

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

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FILED

MAR 29 4 37 PM '95

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: Workers' Compensation Office of Judges TITLE NUMBER: 93

CITE AUTHORITY: West Virginia Code Sections 23-5-8, 23-5-9, 29A-1-2, 29A-3-3

RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW _____

AMENDMENT TO AN EXISTING RULE: YES____, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

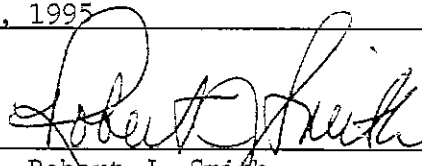
TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: Two

TITLE OF RULE BEING ADOPTED: Ninety-Three

Rules on Time Standards for the Workers' Compensation Office of Judges

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS June 1, 1995


Robert J. Smith
Chief Administrative Law Judge

57.30

RULES ON TIME STANDARDS FOR THE
WORKERS' COMPENSATION OFFICE OF JUDGES

FILED

MAR 29 4 37 PM '95

§ 93-2-1 General

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

1.1 Scope - These procedural rules shall govern the time periods within which contested claims before the Workers' Compensation Office of Judges shall be decided.

1.2 Authority - West Virginia Code §§ 23-5-8, 23-5-9, 29A-3-3.

1.3 Filing Date -

1.4 Effective Date - June 1, 1995.

1.5 Purpose - The purpose of this rule is to establish time standards for the processing of protests before the Workers' Compensation Office of Judges in order that parties to such litigation may receive decisions without unreasonable delay.

§ 93-2-2 Definitions

2.1 Acknowledgment of Protest - A written acknowledgment by the Office of Judges that a timely and proper objection to a Commissioner's decision has been filed with the Office of Judges.

2.2 Final Decision - Written decision by an Administrative Law Judge which adjudicates a protest or protests and which is appealable to the Appeal Board as provided by W.Va. Code 23-5-11 or any order which concludes litigation in any protest.

2.3 Final Hearing - An Order to Submit issued by the Office of Judges or a hearing before an Administrative Law Judge at which all parties agree that a protest should be submitted for final decision.

2.4 Protest - An objection to an order of the Workers' Compensation Commissioner received by the Office of Judges and made pursuant to W.Va. Code § 23-5-1(b) by which an employer, claimant or dependent has expressed a desire to litigate the issue before the Workers' Compensation Office of Judges.

2.5 Submission - Date of receipt of a motion or date of receipt of response to a motion by opposing party.

2.6 Time Frame Order - An order scheduling the presentation of evidence by all parties to the litigation of a claim. A time frame order may be amended or extended by the Office of Judges at the request of one or more of the parties for good cause shown.

§ 93-2-3 Implementation of Rule

3.1 Applicability - These rules shall apply to protests filed on or after June 1, 1995. The percentage of final decisions that must be at or under the applicable time standards as provided in § 93-2-6 of these rules is 50% by January 1, 1996, 60% by January 1, 1997 and 75% by January 1, 1998.

3.2 Reporting - On December 31, 1995 and on September 1 of each year thereafter, the Chief Administrative Law Judge shall file a report with the Governor, the Joint Legislative Committee on Government and Finance or such other committee as shall be designated by the President of the Senate and the Speaker of the House, and with the Compensation Programs Performance Council indicating the degree of compliance with these rules. Such report shall include, with respect to any area of noncompliance with these rules, the reasons for noncompliance together with a plan to secure compliance with these rules.

§ 93-2-4. Motions - All motions shall be acted upon by the Office of Judges within forty-five (45) days of the date of submission of said motion or on the date of the final decision, whichever is earlier. Any party may file a response to any motion but such response must be filed within 15 days from the date of receipt of said motion.

§ 93-2-5. Hearings - Hearings will be scheduled by the Office of Judges within 60 days from the receipt of the request for hearing.

§ 93-2-6 Time Standards

6.1 Compensability - a final decision shall be issued in protests involving compensability issues within 6 months of the date of receipt of the protest by the Office of Judges.

6.2 Medical Treatment Authorization - a final decision shall be issued in protests involving medical treatment authorization issues within 4 months of the date of receipt of the protest by the Office of Judges.

6.3 Rehabilitation - a final decision shall be issued in protests involving rehabilitation issues within 10 months of the date of receipt of the protests by the Office of Judges.

6.4 Temporary Total Disability - a final decision shall be issued in protests involving temporary total disability issues within 6 months of the date of receipt of the protest by the Office of Judges.

6.5 Dependents Benefits (104 Weeks) - a final decision shall be issued in protests involving dependents benefits issues within 4 months of the date of receipt of the protest by the Office of Judges.

6.6 Dependents Benefits (Fatal Claims) - a final decision shall be issued in protests involving such fatal claims within 18 months of the date of receipt of the protest by the Office of Judges. It is recognized that such cases often involve voluminous medical records and that such records often are difficult to obtain. Moreover, such cases often involve expert opinions that are dependent on the analysis of such medical records. Accordingly, in these more complex cases, motions to extend time frames will not be unreasonably denied.

6.7 Permanent Partial Disability - a final decision shall be issued in protests involving permanent partial disability, including protests to permanent partial disability awards in occupational pneumoconiosis cases, within 15 months of the date of the receipt of the protest by the Office of Judges.

6.8 Occupational Pneumoconiosis Non-Medical - a final decision shall be issued in protests involving OP non-medical issues within 9 months of the date of receipt of the protest by the Office of Judges.

6.9 Permanent Total Disability.

6.9.1 Impairment Threshold - a final decision shall be issued in protests involving whether the claimant has a sufficient degree of medical impairment to be considered for a permanent total disability award within 8 months of the date of the receipt of the protest by the Office of Judges.

6.9.2 Permanent Total Disability Entitlement - A final decision shall be issued in protests involving whether a claimant should be granted or denied an award of permanent total disability within 8 months of the date of receipt of the protest by the Office of Judges.

6.9.3 Onset Date - a final decision shall be issued in protests involving the onset date in permanent total disability cases within 4 months of the date of receipt of the protest by the Office of Judges.

6.9.4 Second injury chargeability - a final decision shall be issued in protests involving whether or not a permanent total disability award is a second injury award within 4 months of the receipt of the protest by the Office of Judges.

6.10 Reopening - a final decision shall be issued in protests involving reopening issues within 5 months of the date of receipt of the protest by the Office of Judges.

§93-2-7. Severability - If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not effect the provisions or the applications of this rule which can be given affect without the invalid provisions or applications and to this end the provision of this rule are declared to be severable.

Commentary

The time frames set forth herein recognize that there are different types of issues in Workers' Compensation litigation. Because of the nature of the issues and the complexity of the issues, it is appropriate to process certain issues more rapidly than others. For example, for obvious reasons, treatment issues should be resolved as rapidly as possible. Reopening issues, because they typically do not involve the necessity of additional evidentiary development, may be concluded expeditiously. On the other hand permanent disability issues usually involve evidence from medical and other professional discipline and more time is needed to properly develop those cases.

The rules attempt to balance the need for prompt resolution of disputes and the ability of the parties to appropriately develop the evidence needed for a reasoned decision. In addition the rules take into account the administrative time necessary to process and decide the protests. The vast majority of protests can be acknowledged and time framed within 30 days from receipt of the protest. After evidentiary development is completed, the Office of Judges must determine that the case is ready for decision and abstract the issues. The case is then ready for the decision making and the decision writing process. These activities ordinarily require 60 to 90 days after completion of the evidence by all parties.

The establishment of these time frames assumes the Office of Judges is fully staffed and has the proper resources. That includes an adequate number of administrative law judges with sufficient paraprofessional and other support staff.

Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328-2233

Gaston Caperton, Governor
Robert J. Smith
Chief Administrative Law Judge



March 29, 1995

The Honorable Ken Hechler
Secretary of State
Building 1, Suite 157K
1900 Kanawha Boulevard, E.
Charleston, WV 25305-0770

Re: Procedural Rules
Workers' Compensation
Office of Judges

FILED
MAR 29 4 37 PM '95
OFFICE OF THE SECRETARY OF STATE

Dear Secretary Hechler:

We have heretofore filed with your Office a Proposed Rule in regard to Time Standards for the Workers' Compensation Office of Judges. The comment period expired September 30, 1994. We received several written comments and we conducted six (6) public hearings around the State in regard to the Rule. We now seek to finalize that Rule. Accordingly, we enclose the following:

- (1) Copies of the Notice of Agency Adoption.
- (2) Copy of approval of filing by the Compensation Programs Performance Council, the body which statutorily must approve Rules proposed by the Workers' Compensation Office of Judges.
- (3) One copy of the adopted Rule.
- (4) Copies of written comments and responses thereto together with transcripts of the public hearings.

Based on the comments and the public hearings some changes were made to the Rule. However, the main purpose of the Rule has been in no way compromised or changed. The effective date of the Rule will be June 1, 1995.

Charleston office located at 601 Morris Street. Regional offices located in Beckley and Fairmont.
Address all correspondence to the Charleston post office box.

An Equal Opportunity/Affirmative Action Employer

The Honorable Ken Hechler
Secretary of State
Page Two
March 29, 1995

Re: Procedural Rules
Workers' Compensation
Office of Judges

Thank you for your cooperation. If there is any additional information needed, please contact me.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert J. Smith", written over a circular stamp or seal.

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Enclosures

b.329

RULES ON TIME STANDARDS FOR THE WORKERS'
COMPENSATION OFFICE OF JUDGES

§ 1 General

1.1 Scope - These procedural rules shall govern the time periods within which contested claims before the Workers' Compensation Office of Judges shall be decided.

1.2 Authority - West Virginia Code §§ 23-5-1g, 23-5-1h, 29A-3-3.

1.3 Filing Date -

1.4 Effective Date -

1.5 Purpose - The purpose of this rule is to establish time standards for the processing of protests before the Workers' Compensation Office of Judges in order that parties to such litigation may receive decisions without unreasonable delay.

§ 2 Definitions -

A) Acknowledgment of Protest - A written acknowledgment by the Office of Judges that a timely and proper objection to a Commissioner's decision has been filed with the Office of Judges.

B) Final Decision - Written decision by an Administrative Law Judge which adjudicates a protest or protests and which is appealable to the Appeal Board as provided by W.Va. Code 23-5-1i.

C) Final Hearing - Order to Submit issued by the Office of Judges.

D) Protest - An objection to an order of the Workers' Compensation Commissioner made pursuant to W.Va. Code §23-5-1(b) by which an employer, claimant or dependent has expressed a desire to litigate the issue before the Workers' Compensation Office of Judges.

E) Submission - Date of receipt of motion or date of receipt of response to motion by opposing party.

F) Time Frame Order - An order scheduling the presentation of evidence by all parties to the litigation of a claim. A time frame order may be amended or extended by the Office of Judges at the request of one or more of the parties for good cause shown.

§ 3 Implementation of Rule - These rules shall apply to protests filed on or after January 1, 1995. The percentage of final decisions that must be at or under the applicable time standards as provided by these rules is fifty percent by July 1, 1995, sixty percent by July 1, 1996 and seventy percent by January 1, 1997.

§ 4 Motions - All motions shall be acted upon by the Office

of Judges within forty-five (45) days of the date of submission of said motion or on the date of the final decision, whichever is earlier.

§ 5 Hearings - Hearings will be scheduled by the Office of Judges within 60 days from the receipt of the request for hearing.

§ 6 Time Standards -

a) Compensability - a final decision shall be issued in protests involving compensability issues within 6 months of the date of receipt of the protest by the Office of Judges.

b) Medical Treatment Authorization - a final decision shall be issued in protests involving medical treatment authorization issues within 4 months of the date of receipt of the protest by the Office of Judges.

c) Rehabilitation - a final decision shall be issued in protests involving rehabilitation issues within 10 months of the date of receipt of the protest by the Office of Judges.

d) Temporary Total Disability - a final decision shall be issued in protests involving temporary total disability issues within 6 months of the date of receipt of the protest by the Office of Judges.

e) Dependents Benefits (104 Weeks) - a final decision shall be issued in protests involving dependents benefits issues within 4 months of the date of receipt of the protest by the Office of Judges.

f) Permanent Partial Disability - a final decision shall be issued in protests involving permanent partial disability issues within 18 months of the date of receipt of the protest by the Office of Judges.

g) Permanent Total Disability - a final decision shall be issued in protests involving permanent total disability issues within 18 months of the date of receipt of the protest by the Office of Judges.

h) Reopening - a final decision shall be issued in protests involving reopening issues within 5 months of the date of receipt of the protest by the Office of Judges.

Commentary

The time frames set forth herein recognize that there are different types of issues in Workers' Compensation litigation. Because of the nature of the issues and the complexity of the issues, it is appropriate to process certain issues more rapidly than others. For example, for

obvious reasons, treatment issues should be resolved as rapidly as possible. Reopening issues, because they typically do not involve the necessity of additional evidentiary development, may be concluded expeditiously. On the other hand permanent disability issues usually involve evidence from medical and other professional discipline and more time is needed to properly develop those cases.

The rules take into account the need for prompt resolution of disputes and the ability of the parties to appropriately develop the evidence needed for a reasoned decision. In addition the rules take into account the administrative time necessary to process and decide the protests. The vast majority of protests can be acknowledged and time framed within 30 days from receipt of the protest. After evidentiary development is completed, the Office of Judges must determine that the case is ready for decision and abstract the issues. The case is then ready for the decision making and the decision writing process. These activities ordinarily require 60 to 90 days after completion of the evidence by all parties.

The establishment of these time frames assumes a fully staffed and properly resourced office. That includes a minimum of 25 administrative law judges with sufficient para-professional and other support staff.

§ 7 Severability - If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not effect the provisions or the applications of this rule which can be given effect without the invalid provisions or applications and to this end the provision of this rule are declared to be severable.

Bureau of Employment Programs
Legal Services Division
Post Office Box 3922
Charleston, West Virginia 25339-3922

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner



March 24, 1995

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, W. Va. 25305

Dear Secretary Hechler:

RE: Certification of Minutes

It has been requested that I certify to your office the authenticity and correctness of a portion of the minutes for March 22, 1995, meeting of the Compensation Programs Performance Council created pursuant to West Virginia Code, §21A-3-1 et seq. During meetings of the Council, I serve as the secretary for purposes of keeping the minutes and then transcribing them. During the March 22nd meeting of the Council, I performed this same task.

Enclosed herewith, you will find a portion of the minutes of the Council meeting which demonstrates that the full Council took up the issue of the approval of a proposed rule of the Workers' Compensation Office of Judges titled: "Rules on Time Standards for the Workers' Compensation Office of Judges." As noted in the excerpt, the motion for approval was properly made, seconded, and voted upon by the Council. The motion for approval was adopted by a nine in favor and zero opposed (9 - 0) vote.

I certify that the excerpt of the minutes of the March 22, 1995, meeting enclosed herewith are authentic and correctly state the actions of the Council.

Very truly yours,


John H. Kozak
Director

Bureau of Employment Programs
Legal Services Division
Post Office Box 3922
Charleston, West Virginia 25339-3922

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner



COMPENSATION PROGRAMS PERFORMANCE COUNCIL

MINUTES of the meeting of the Council held at 10:30 a.m. on Wednesday, March 22, 1995, in the large conference room, sixth floor, 112 California Avenue, Charleston, West Virginia.

Council members present at the meeting:

Mr. Thad D. Epps, Vice-Chairperson
Mr. David Harris
Mr. Richard Humphreys
Mr. Thomas A. Rotenberry
Mr. Daniel B. Scherder
Mr. Everett Sullivan
Mr. Paul Thompson
Mr. Fred Tucker
Commissioner Andrew N. Richardson, Chairperson.

See the register of attendance for other persons who were present. Staff members in attendance included Mr. John E. Burdette, Mr. Edward H. Staats, Mr. Jerry L. Parker, Mr. Robert J. Smith, Mr. Alan M. Drescher, and Mr. John H. Kozak.

The meeting was called to order by the Chairperson, Andrew N. Richardson. The proposed agenda was approved.

....

COMMITTEE REPORTS

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Mr. Tucker then noted that the claims committee had reviewed the proposed "Rules on Time Standards for the Workers' Compensation Office of Judges" and recommends that the Council approve their adoption. Accordingly, Mr. Tucker **MOVED** that the Council approve the rules for final filing. Mr. Harris seconded the motion. Following discussion, the Commissioner put the question and the motion was approved by a vote of 9 - 0.

....

ANNOUNCEMENTS AND ADJOURNMENT

Mr. Rotenberry **MOVED** and Mr. Humphreys seconded that the Council meeting be adjourned. Motion adopted by acclamation.

Offices located at 601 Morris Street

An Equal Opportunity/Affirmative Action Employer

RECEIVED

BRECKINRIDGE, DAVIS, SPROLES & STOLLINGS AUG 19 1994

STEPHEN A. DAVIS
GREGORY W. SPROLES
HARLEY E. STOLLINGS

E. SCOTT STANTON
ASSOCIATE

ATTORNEYS AT LAW
509 CHURCH STREET
SUMMERSVILLE, WEST VIRGINIA 26651

WORKERS COMPENSATION
OFFICE OF JUDGES
TELEPHONE (304) 872-2271
TELEFAX (304) 872-5713

JOHN B. BRECKINRIDGE
1919-1981

August 16, 1994

RECEIVED

AUG 17 1994

Robert J. Smith, Chief
Administrative Law Judge
Workers' Compensation Office of Judges
P. O. Box 2233
Charleston, WV 25328

WORKERS COMPENSATION
OFFICE OF JUDGES

RE: Comments to the Workers' Compensation
Office of Judges Procedural Rules

Dear Mr. Smith:

I have and thank you for providing me with the copy of the Proposed Rules on Time Standards for the Workers' Compensation Office of Judges. I would like to make several comments regarding these rules.

I practice extensively in the area of workers' compensation and represent both claimants and employers. My comments are made from the prospective of an attorney who has represented both parties in workers' compensation claims.

My first comment deals with all of the time standards which require that final decisions be issued from the date of the receipt of the protest by the Office of Judges. This could create a potentially prejudicial situation when the opposing party does not actually receive a copy of the protests. Many times claimants or employers are not represented early on in litigation and once they receive a protest there may be substantial delay in getting this protest to their respective counsel. I would suggest that the decisions relating to protests be issued within a certain time period after an Automatic Time Frame Order is entered regarding this issue. I would further suggest that a rule be implemented whereby Automatic Time Orders be entered within a relatively short period of time after receipt of the protest by the Office of Judges.

With regard to the Time Frame Orders, it is my opinion that they should require the protesting party to proceed first with its evidence with the responding party being given a like consecutive period of time within which to develop evidence. This seems only fair since the responding party may not choose to incur the expense of obtaining experts or testimony if the protesting party has not submitted evidence in support of its protest. I frankly do not see any reason for time periods at the end of the evidentiary development for cross-examination of the other party's witnesses. This

ORIGINAL

A.L.J.

BRECKINRIDGE, DAVIS, SPROLES & STOLLINGS

Judge Robert J. Smith
August 16, 1994
Page 2

would be and should be accomplished during the applicable periods for the parties to submit evidence.

I believe the six (6) month time period for a decision to be issued with regard to compensability is much too short. I would suggest a nine (9) month time period after the entry of a Time Frame Order with the protesting party being given three (3) to four (4) months for the development of evidence and the responding party a like three (3) or four (4) month period.

Regarding the medical treatment and authorization issues, I do not feel that four (4) months would be an inappropriate period of time if this time period runs from the date of the issuance of an Automatic Time Frame Order.

I believe the time period for resolving permanent partial disability issues should be twelve (12) months, as should permanent total disability issues.

I am unclear regarding the issue of reopening and whether the same relates to temporary total disability only or whether this also includes permanent partial disability. This issue should be made more clear to avoid any future confusion.

I have several problems with the commentary to these rules. First of all, reopening issues typically do involve the necessity of additional evidentiary development. This is necessary in the form of the claimant's testimony and the cross-examination of the examining doctor. As you are abundantly aware, if there has been no aggravation or progression of the claimant's condition, the claim should not be reopened. I find many times that the physicians who complete Claim Reopening Applications are unable to substantiate an aggravation or progression of the claimant's condition. Without being given the opportunity to cross-examine these physicians, after obtaining the claimant's medical records, the employer is not given the opportunity to prove that there has been no actual aggravation or progression of the claimant's condition. As I am sure you are aware, there is often a substantial delay in obtaining a claimant's medical records, both on behalf of the claimant and the employer. Without these medical records, the employer is at a severe disadvantage because he does not know the claimant's condition prior to the subject injury and whether there may or may not have been an aggravation or progression. I would suggest that any time an issue is in litigation, the claimant be required to automatically and immediately provide counsel for the employer authorization for release of the claim-

BRECKINRIDGE, DAVIS, SPROLES & STOLLINGS

Judge Robert J. Smith
August 16, 1994
Page 3

ant's medical records. This would expedite the handling of all of these claims.

I agree that a vast majority of the protests can be acknowledged and a Time Frame Order be entered within thirty (30) days from receipt of the protests. I would make one suggestion regarding the acknowledgment of a protest, which is that in the acknowledgment of the protests you state what the issue was that is being protested. Without this information, it is very inconvenient to look back through the file to determine what the protest was when you are given only the date of the protest.

I frankly do not see why the Office of Judges requires sixty (60) to ninety (90) days after the completion of evidence to make a decision. With the time frames that you are proposing, the Office of Judges is given more time to decide the issue than the parties are given to develop the evidence. If the parties are not given a sufficient time to develop evidence, then claims worthy of payment will be denied and many claims which are not justified or appropriate will be granted. The parties should be given at least twice as much time to develop evidence as the Office of Judges has to render a decision. As I am sure you are aware, scheduling of depositions must be made by consulting two (2) attorneys' calendars and the doctor. In a majority of cases, this can not be accomplished within many of the time frames which you set forth.

These comments are only intended to be a thumbnail sketch of the problems which I see with the procedural rules. In short, the parties must be given sufficient time to develop evidence and the practicalities of presenting this evidence must be considered before any rigid time frames are established. Quite frankly I feel that it is inappropriate and a denial of due process to establish time frames for the development of evidence which are shorter than the time within which the Judge must make a decision. I do not intend to minimize the seriousness or difficulty that the Administrative Law Judge has in making a decision, however, without having evidence fully developed, no judge can make an informed and correct decision.

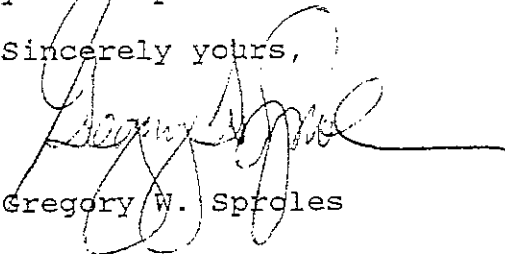
I hope that these comments are helpful. If I can be of any further assistance in any manner, please do not hesitate to contact me.

BRECKINRIDGE, DAVIS, SPROLES & STOLLINGS

Judge Robert J. Smith
August 16, 1994
Page 4

Thank you in advance for your cooperation.

Sincerely yours,



Gregory W. Sproles

GWS: dd

Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328-2233

Gaston Caperton, Governor
Robert J. Smith
Chief Administrative Law Judge



March 24, 1995

Mr. Gregory W. Sproles
Attorney at Law
509 Church Street
Summersville, WV 26651

Re: Response to Comment on Procedural Rules

Dear Mr. Sproles:

Thank you for your comments on the Proposed Time Standard Rules for the Workers' Compensation Office of Judges.

First you indicate concern because the opposing party does not receive a copy of the protests when they are filed. It is not the responsibility of the Office of Judges to furnish parties with copies of the protests. To the contrary, the statute requires the parties to serve a copy of the protest on the opposing side. Under the procedures that we will follow once the Rules are implemented, an automatic time frame order will be entered concurrent with the acknowledgment of the protest.

You indicate that the protesting party should always proceed first in development of evidence. That is a matter that is addressed in the Series I Procedural Rules of the Office of Judges and is not intended to be addressed in these Rules.

You indicate that some time standards are too short and some time standards are too long. The time standard periods were arrived at taking into account the needs of claimants and employers as well as our experience on the ability of counsel to reasonably obtain the evidence necessary to support the protest on any given issue. It is recognized that time frames in some cases will need to be extended where complications develop in the litigation process. We have provided for a procedure to extend time frames and where necessary they will be extended.

You indicate uncertainty as to whether the reopening time standard refers to both temporary total disability reopening and permanent partial disability reopening. It is intended to apply to both.

Charleston office located at 601 Morris Street. Regional offices located in Beckley and Fairmont.
Address all correspondence to the Charleston post office box.

An Equal Opportunity/Affirmative Action Employer

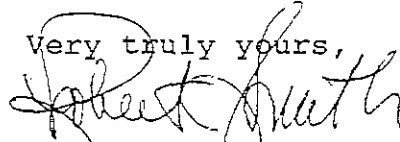
Mr. Gregory W. Sproles
Page Two
March 24, 1995

Re: Response to Comment on Procedural Rules

You indicate difficulty with parts of the commentary to the Rules. Please understand that the commentary does not constitute a substantive Rule. It is simply an explanation as to how the Rules were arrived at. Much of your concern in regard to the commentary appears to relate to the period of time that the parties have for evidentiary development. Let me reiterate that where it is necessary, an extension of the time in which to develop evidence may be granted.

Once again let me thank you for your comment to the Rules.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert J. Smith", written over the typed name.

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

c.324

WVSIA

West Virginia Self-Insurers Association

Post Office Box 1573 • Charleston, West Virginia • 25326

September 28, 1994

The Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office
of Judges
Post Office Box 2233
Charleston, WV 25328

Re: Rules on Time Standards

Dear Judge Smith:

Enclosed, on behalf of the West Virginia Self-Insurers Association, are comments to Rules on Time Standards for the Workers' Compensation Office of Judges.

Very truly yours,



Henry C. Bowen

HCB/blf
WVS/22351

**PROPOSED COMMENTS TO THE
RULES ON TIME STANDARDS FOR THE WORKERS'
COMPENSATION OFFICE OF JUDGES**

§ 1 General

1.1 Scope - These procedural rules shall govern the time periods within which contested claims before the Workers' Compensation Office of Judges shall be decided.

1.2 Authority - West Virginia Code §§ 23-5-1g, 23-5-1h, 29A-3-3.

1.3 Filing Date -

1.4 Effective Date -

1.5 Purpose - The purpose of this rule is to establish time standards for the processing of protests before the Workers' Compensation Office of Judges in order that parties to such litigation may receive decisions without unreasonable delay.

§ 2 Definitions -

A) Acknowledgment of Protest - A written acknowledgment by the Office of Judges that a timely and proper objection to a Commissioner's decision has been filed with the Office of Judges.

B) Final Decision - Written decision by an Administrative Law Judge which adjudicates a protest or protests and which is appealable to the Appeal Board as provided by W.Va. Code 23-5-1i.

C) Final Hearing - Order to Submit issued by the Office of Judges.

D) Protest - An objection to an order of the Workers' Compensation Commissioner made pursuant to W.Va. Code §23-5-1(b) by which an employer, claimant or dependent has expressed a desire to litigate the issue before the Workers' Compensation Office of Judges.

E) Submission - Date of receipt of motion or date of receipt of response to motion by opposing party.

F) Time Frame Order - An order scheduling the presentation of evidence by all parties to the litigation of a claim. A time frame order may be amended or extended by the Office of Judges at the request of one or more of the parties for good cause shown.

§ 3 Implementation of Rule - These rules shall apply to protests filed on or after January 1, 1995. The percentage of final decisions that must be at or under the applicable time standards as provided by these rules is fifty percent by July 1, 1995, sixty percent by July 1, 1996 and seventy percent by January 1, 1997.

§ 4 Motions - All motions shall be acted upon by the Office of Judges within forty-five (45) days of the date of submission of said motion or on the date of the final decision, whichever is earlier.

COMMENT: The 45-day deadline for rulings on motions is reasonable.

§ 5 Hearings - Hearings will be scheduled by the Office of Judges within 60 days from the receipt of the request for hearing.

COMMENT: The West Virginia Self Insurers Association ("the Association") would suggest that the deadline for scheduling of hearings be reduced to 30 or 45 days. Expedition scheduling of hearings is necessary in many claims, including most claims in which claimants are unrepresented. In some claims, the evidentiary development process begins with the claimant's testimony. Delay in scheduling of hearings often delays the evidentiary development process. As a consequence, the parties are left with no alternative, but to request extensions of the applicable evidentiary time frames.

§ 6 Time Standards -

COMMENT: With respect to all of the time standards in this section, the Association would recommend that "the receipt of the protest by the Office of Judges" not constitute the triggering event for decisional deadlines. Although a protesting party would be aware of the onset of the applicable time frame, the responding party would be unaware of the triggering of such time frame, unless the responding party were provided with a copy of the letter protesting the order. In practice, many claimants and attorneys fail to provide their adversaries with copies of protest letters. Accordingly, the Association would propose that issuance of acknowledgement letters by the Office of Judges trigger final decision deadlines.

a) Compensability - a final decision shall be issued in protests involving compensability issues within 6 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Hearings are often necessary in claims involving compensability issues. Unless hearings are scheduled more promptly, six months for evidentiary development, submission of the claim and resolution of the claim would appear to be unreasonable. A deadline of eight months would appear to be more reasonable.

b) Medical Treatment Authorization - a final decision shall be issued in protests involving medical treatment authorization issues within 4 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Since medical treatment issues rarely involve extensive evidentiary development, a final decision deadline of four months is acceptable.

c) Rehabilitation - a final decision shall be issued in protests involving rehabilitation issues within 10 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Although rehabilitation issues occasionally require development of vocational evidence, including vocational referrals, most claims involving rehabilitation issues require little

evidentiary development. Therefore, a deadline of eight months for final decisions would appear to be sufficient.

d) Temporary Total Disability - a final decision shall be issued in protests involving temporary total disability issues within 6 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Temporary total disability issues, including closure issues, often require medical testimony. In light of the busy schedules of the physicians in our area, depositions or hearings are often scheduled three or four months in advance. Therefore, the Association would recommend a deadline of eight months for final decisions.

e) Dependents Benefits (104 Weeks) - a final decision shall be issued in protests involving dependents benefits issues within 4 months of the date of receipt of the protest by the Office of Judges.

COMMENT: A deadline of four months for final decisions in dependents' benefits claims is inadequate. Some dependents' benefits claims require development of medical evidence, including the taking of medical testimony. Accordingly, the Association would recommend a decisional deadline of eight months.

f) Permanent Partial Disability - a final decision shall be issued in protests involving permanent partial disability issues within 18 months of the date of receipt of the protest by the Office of Judges.

COMMENT: The 18-month deadline for resolution of permanent partial disability issues is reasonable. Permanent partial disability issues often require multiple referrals. Such referrals are scheduled up to six months in advance. Therefore, an 18-month deadline for final decisions in permanent partial disability claims is reasonable.

g) Permanent Total Disability - a final decision shall be issued in protest involving permanent total disability issues within 18 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Claims involving permanent total disability issues often require medical, vocational and psychiatric referrals. Consequently, a final decision deadline of 18 months is appropriate.

h) Reopening - a final decision shall be issued in protests involving reopening issues within 5 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Reopening issues often require medical testimony. In order to establish a prima facie cause for reopening of a claim, a claimant must establish that there has been an aggravation

or progression in his condition or that there are facts that have not been previously considered by the Commissioner, which would entitle the claimant to additional benefits. W. Va. Code § 23-5-16. Whether there has been an aggravation or progression in the claimant's condition is, in many claims, a medical issue. Since medical evidence is developed in many claims involving reopening issues, a final decision deadline of eight months would appear to be warranted.

Commentary

The time frames set forth herein recognize that there are different types of issues in Workers' Compensation litigation. Because of the nature of the issues and the complexity of the issues, it is appropriate to process certain issues more rapidly than others. For example, for obvious reasons, treatment issues should be resolved as rapidly as possible. Reopening issues, because they typically do not involve the necessity of additional evidentiary development, may be concluded expeditiously. On the other hand permanent disability issues usually involve evidence from medical and other professional discipline and more time is needed to properly develop those cases.

The rules take into account the need for prompt resolution of disputes and the ability of the parties to appropriately develop the evidence needed for a reasoned decision. In addition, the rules take into account the administrative time necessary to process and decide the protests. The vast majority of protests can be acknowledged and time framed within 30 days from receipt of the protest. After evidentiary development is completed, the Office of Judges must determine that the case is ready for decision and abstract the issues. The case is then ready for the decision

making and the decision writing process. these activities ordinarily require 60 to 90 days after completion of the evidence by all parties.

The establishment of these time frames assumes a fully staffed and properly resourced office. That includes a minimum of 25 administrative law judges with sufficient para-professional and other support staff.

COMMENT: The Association agrees that treatment issues should be disposed of expeditiously and that permanent partial and permanent total disability issues often require considerable evidentiary development. However, the Association disputes the contention that temporary total disability issues typically do not require evidentiary development. Whether a claimant has reached his or her maximum degree of medical improvement is, by definition, a medical determination. Therefore, parties often take testimony from medical experts for the purpose of establishing whether a particular claimant is temporarily and totally disabled.

Recognizing the backlog confronting the Office of Judges and that well-reasoned decisions require considerable time and effort, the Association would suggest that the decision-making process be accelerated. Rather than 60 to 90 days, the Association would urge the Office of Judges to attempt to decide issues within 30 to 60 days of submission. Although 90 days would not be an unreasonable time frame for deciding permanent partial disability and permanent total disability issues, it would be excessive where the deadline for final decisions is six months or less. By requiring up to 90 days for reaching a decision, the parties would be afforded

insufficient time to develop evidence in claims in which the decisional deadline is six months or less.

§ 7 Severability - If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not effect the provisions or the applications of this rule which can be given effect without the invalid provisions or applications and to this end the provisions of this rule are declared to be severable.

Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328-2233

Gaston Caperton, Governor
Robert J. Smith
Chief Administrative Law Judge



March 24, 1995

Mr. Henry C. Bowen
Attorney at Law
West Virginia Self-Insurers Association
P. O. Box 1573
Charleston, WV 25326

Re: Response to Comment on Procedural Rules

Dear Mr. Bowen:

Thank you for your comments in regard to the Proposed Time Standard Rules for the Workers' Compensation Office of Judges.

You suggested that the deadline for the scheduling of hearings be reduced from 60 days to 30 or 45 days. It is true that the expeditious scheduling of hearings is necessary and appropriate. The 60 day deadline is the maximum period. It is our hope that we will be able to schedule hearings more quickly than that. However, based upon the volume of requests in our staffing capabilities we felt it was more realistic to initially set the deadline as 60 days.

You suggest that the receipt of a protest not trigger a time frame inasmuch as the responding party would be unaware of such unless they had received a copy of the protest. Under our former procedures you would be correct. However, under the procedures we intend to follow commencing on June 1, the time frame order and the acknowledgment of the protest will be a single document and thus both parties will receive an acknowledgement and a time frame order at the same time.

You suggest that the time standard for compensability hearings be eight months. Your request is premised upon the probable necessity of hearings in such cases. Not every case will require extensive hearings. We believe most cases can be completed in a reasonable fashion within the 6 month time frame. It is recognized that some cases will require additional time and provision is made for extending time frames. Those will be granted where appropriate. Accordingly, it is not believed that extending the time standard on compensability hearings is necessary at this time.

Charleston office located at 601 Morris Street. Regional offices located in Beckley and Fairmont.
Address all correspondence to the Charleston post office box.

An Equal Opportunity/Affirmative Action Employer

Mr. Henry C. Bowen
West Virginia Self-Insurers Association
Page Two
March 24, 1995

Re: Response to Comment on Procedural Rules

You suggest that the time frame on rehabilitation issues be shortened to 8 months. We do not believe that most rehabilitation issues will take 10 months. However, to date there has not been a large enough number of cases for the Office of Judges to be able to ascertain with certainty that such cases can be reasonably completed within 8 months. For that reason we set the time frame at 10 months. All time standards are maximum and if our experience reflects that we can do them quicker then the time frame orders will be adjusted to accommodate that.

You suggest that the time standard for temporary total disability cases be extended from 6 months to 8 months. We believe that most temporary total disability issues can be resolved within 6 months. Some cases will in all likelihood require greater lengths of time. However, provision has been made to extend time frames where such extensions are necessary. Accordingly, we believe it not to be appropriate to create a deadline of 8 months for such cases. You suggest a longer time frame for dependent benefit cases. In your comment you indicated that dependent benefit cases often require the presentation of medical evidence. The proposed rule referred only to the "104-week" cases. No provision was made for fatal claims. Your comment about medical evidence caused me to recognize the omission of that kind of case. Accordingly, as a result of your comment we have now included in the rule a time standard for fatal cases.

In reopening cases you suggest a longer time frame. The Office of Judges believes that most cases involving reopening issues can be completed within 5 months. Where the case is complex enough to warrant an extension of a time frame order, such can be accomplished. Accordingly, the Office of Judges believes that a 5 month time frame is appropriate.

Thank you for your comments. We believe that with the cooperation of the parties the Office of Judges can meet the time standards set forth in the rule.

Very truly yours,



Robert J. Smith
Chief Administrative Law Judge

RJS:cm

g.324

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CHARLESTON, WEST VIRGINIA 25301

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LEXINGTON, KENTUCKY 40592
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TELEFAX (606) 255-1168

HENRY C. BOWEN
DIRECT DIAL NO. (304) 347-9354

September 26, 1994

The Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office
of Judges
Post Office Box 2233
Charleston, WV 25328

Re: Rules on Time Standards

Dear Judge Smith:

Enclosed, on behalf of Robinson & McElwee, are comments to Rules on Time Standards for the Workers' Compensation Office of Judges.

Very truly yours,



Henry C. Bowen

HCB/blf
RAM/00157

**PROPOSED COMMENTS TO THE
RULES ON TIME STANDARDS FOR THE WORKERS'
COMPENSATION OFFICE OF JUDGES**

§ 1 General

1.1 Scope - These procedural rules shall govern the time periods within which contested claims before the Workers' Compensation Office of Judges shall be decided.

1.2 Authority - West Virginia Code §§ 23-5-1g, 23-5-1h, 29A-3-3.

1.3 Filing Date -

1.4 Effective Date -

1.5 Purpose - The purpose of this rule is to establish time standards for the processing of protests before the Workers' Compensation Office of Judges in order that parties to such litigation may receive decisions without unreasonable delay.

§ 2 Definitions -

A) Acknowledgment of Protest - A written acknowledgment by the Office of Judges that a timely and proper objection to a Commissioner's decision has been filed with the Office of Judges.

B) Final Decision - Written decision by an Administrative Law Judge which adjudicates a protest or protests and which is appealable to the Appeal Board as provided by W.Va. Code 23-5-1i.

C) Final Hearing - Order to Submit issued by the Office of Judges.

D) Protest - An objection to an order of the Workers' Compensation Commissioner made pursuant to W.Va. Code §23-5-1(b) by which an employer, claimant or dependent has expressed a desire to litigate the issue before the Workers' Compensation Office of Judges.

E) Submission - Date of receipt of motion or date of receipt of response to motion by opposing party.

F) Time Frame Order - An order scheduling the presentation of evidence by all parties to the litigation of a claim. A time frame order may be amended or extended by the Office of Judges at the request of one or more of the parties for good cause shown.

§ 3 Implementation of Rule - These rules shall apply to protests filed on or after January 1, 1995. The percentage of final decisions that must be at or under the applicable time standards as provided by these rules is fifty percent by July 1, 1995, sixty percent by July 1, 1996 and seventy percent by January 1, 1997.

§ 4 Motions - All motions shall be acted upon by the Office of Judges within forty-five (45) days of the date of submission of said motion or on the date of the final decision, whichever is earlier.

COMMENT: The 45-day deadline for rulings on motions is reasonable.

§ 5 Hearings - Hearings will be scheduled by the Office of Judges within 60 days from the receipt of the request for hearing.

COMMENT: We would suggest that the deadline for scheduling of hearings be reduced to 30 or 45 days. Expeditionary scheduling of hearings is necessary in many claims, including most claims in which claimants are unrepresented. In some claims, the evidentiary development process begins with the claimant's testimony. Delay in scheduling of hearings often delays the evidentiary development process. As a consequence, the parties are left with no alternative, but to request extensions of the applicable evidentiary time frames.

§ 6 Time Standards -

COMMENT: With respect to all of the time standards in this section, we would recommend that "the receipt of the protest by the Office of Judges" not constitute the triggering event for decisional deadlines. Although a protesting party would be aware of the onset of the applicable time frame, the responding party would be unaware of the triggering of such time frame, unless the responding party were provided with a copy of the letter protesting the order. In practice, many claimants and attorneys fail to provide their adversaries with copies of protest letters. Accordingly, we would propose that issuance of acknowledgement letters by the Office of Judges trigger final decision deadlines.

a) Compensability - a final decision shall be issued in protests involving compensability issues within 6 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Hearings are often necessary in claims involving compensability issues. Unless hearings are scheduled more promptly, six months for evidentiary development, submission of the claim and resolution of the claim would appear to be unreasonable. A deadline of eight months would appear to be more reasonable.

b) Medical Treatment Authorization - a final decision shall be issued in protests involving medical treatment authorization issues within 4 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Since medical treatment issues rarely involve extensive evidentiary development, a final decision deadline of four months is acceptable.

c) Rehabilitation - a final decision shall be issued in protests involving rehabilitation issues within 10 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Although rehabilitation issues occasionally require development of vocational evidence, including vocational referrals, most claims involving rehabilitation issues require little

evidentiary development. Therefore, a deadline of eight months for final decisions would appear to be sufficient.

d) Temporary Total Disability - a final decision shall be issued in protests involving temporary total disability issues within 6 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Temporary total disability issues, including closure issues, often require medical testimony. In light of the busy schedules of the physicians in our area, depositions or hearings are often scheduled three or four months in advance. Therefore, we would recommend a deadline of eight months for final decisions.

e) Dependents Benefits (104 Weeks) - a final decision shall be issued in protests involving dependents benefits issues within 4 months of the date of receipt of the protest by the Office of Judges.

COMMENT: A deadline of four months for final decisions in dependents' benefits claims is inadequate. Some dependents' benefits claims require development of medical evidence, including the taking of medical testimony. Accordingly, we would recommend a decisional deadline of eight months.

f) Permanent Partial Disability - a final decision shall be issued in protests involving permanent partial disability issues within 18 months of the date of receipt of the protest by the Office of Judges.

COMMENT: The 18-month deadline for resolution of permanent partial disability issues is reasonable. Permanent partial disability issues often require multiple referrals. Such referrals are scheduled up to six months in advance. Therefore, an 18-month deadline for final decisions in permanent partial disability claims is reasonable.

g) Permanent Total Disability - a final decision shall be issued in protest involving permanent total disability issues within 18 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Claims involving permanent total disability issues often require medical, vocational and psychiatric referrals. Consequently, a final decision deadline of 18 months is appropriate.

h) Reopening - a final decision shall be issued in protests involving reopening issues within 5 months of the date of receipt of the protest by the Office of Judges.

COMMENT: Reopening issues often require medical testimony. In order to establish a prima facie cause for reopening of a claim, a claimant must establish that there has been an aggravation

or progression in his condition or that there are facts that have not been previously considered by the Commissioner, which would entitle the claimant to additional benefits. W.Va. Code § 23-5-16. Whether there has been an aggravation or progression in the claimant's condition is, in many claims, a medical issue. Since medical evidence is developed in many claims involving reopening issues, a final decision deadline of eight months would appear to be warranted.

Commentary

The time frames set forth herein recognize that there are different types of issues in Workers' Compensation litigation. Because of the nature of the issues and the complexity of the issues, it is appropriate to process certain issues more rapidly than others. For example, for obvious reasons, treatment issues should be resolved as rapidly as possible. Reopening issues, because they typically do not involve the necessity of additional evidentiary development, may be concluded expeditiously. On the other hand permanent disability issues usually involve evidence from medical and other professional discipline and more time is needed to properly develop those cases.

The rules take into account the need for prompt resolution of disputes and the ability of the parties to appropriately develop the evidence needed for a reasoned decision. In addition, the rules take into account the administrative time necessary to process and decide the protests. The vast majority of protests can be acknowledged and time framed within 30 days from receipt of the protest. After evidentiary development is completed, the Office of Judges must determine that the case is ready for decision and abstract the issues. The case is then ready for the decision

making and the decision writing process. these activities ordinarily require 60 to 90 days after completion of the evidence by all parties.

The establishment of these time frames assumes a fully staffed and properly resourced office. That includes a minimum of 25 administrative law judges with sufficient para-professional and other support staff.

COMMENT: We agree that treatment issues should be disposed of expeditiously and that permanent partial and permanent total disability issues often require considerable evidentiary development. However, we dispute the contention that temporary total disability issues typically do not require evidentiary development. Whether a claimant has reached his or her maximum degree of medical improvement is, by definition, a medical determination. Therefore, parties often take testimony from medical experts for the purpose of establishing whether a particular claimant is temporarily and totally disabled.

Recognizing the backlog confronting the Office of Judges and that well-reasoned decisions require considerable time and effort, we would suggest that the decision-making process be accelerated. Rather than 60 to 90 days, we would urge the Office of Judges to attempt to decide issues within 30 to 60 days of submission. Although 90 days would not be an unreasonable time frame for deciding permanent partial disability and permanent total disability issues, it would be excessive where the deadline for final decisions is six months or less. By requiring up to 90 days

for reaching a decision, the parties would be afforded insufficient time to develop evidence in claims in which the decisional deadline is six months or less.

§ 7 Severability - If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not effect the provisions or the applications of this rule which can be given effect without the invalid provisions or applications and to this end the provisions of this rule are declared to be severable.

Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328-2233

Gaston Caperton, Governor
Robert J. Smith
Chief Administrative Law Judge



March 24, 1995

Mr. Henry C. Bowen
Attorney at Law
Robinson & McElwee
P. O. Box 1791
Charleston, WV 25326

Re: Response to Comment on Procedural Rules

Dear Mr. Bowen:

Thank you for your comments in regard to the Proposed Time Standard Rules for the Workers' Compensation Office of Judges.

You suggested that the deadline for the scheduling of hearings be reduced from 60 days to 30 or 45 days. It is true that the expeditious scheduling of hearings is necessary and appropriate. The 60 day deadline is the maximum period. It is our hope that we will be able to schedule hearings more quickly than that. However, based upon the volume of requests in our staffing capabilities we felt it was more realistic to initially set the deadline as 60 days.

You suggest that the receipt of a protest not trigger a time frame inasmuch as the responding party would be unaware of such unless they had received a copy of the protest. Under our former procedures you would be correct. However, under the procedures we intend to follow commencing on June 1, the time frame order and the acknowledgment of the protest will be a single document and thus both parties will receive an acknowledgement and a time frame order at the same time.

You suggest that the time standard for compensability hearings be eight months. Your request is premised upon the probable necessity of hearings in such cases. Not every case will require extensive hearings. We believe most cases can be completed in a reasonable fashion within the 6 month time frame. It is recognized that some cases will require additional time and provision is made for extending time frames. Those will be granted where appropriate. Accordingly, it is not believed that extending the time standard on compensability hearings is necessary at this time.

Charleston office located at 601 Morris Street. Regional offices located in Beckley and Fairmont.
Address all correspondence to the Charleston post office box.

An Equal Opportunity/Affirmative Action Employer

Mr. Henry C. Bowen
Robinson & McElwee
Page Two
March 24, 1995

Re: Response to Comment on Procedural Rules

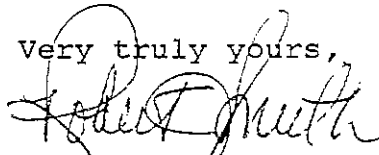
You suggest that the time frame on rehabilitation issues be shortened to 8 months. We do not believe that most rehabilitation issues will take 10 months. However, to date there has not been a large enough number of cases for the Office of Judges to be able to ascertain with certainty that such cases can be reasonably completed within 8 months. For that reason we set the time frame at 10 months. All time standards are maximum and if our experience reflects that we can do them quicker then the time frame orders will be adjusted to accommodate that.

You suggest that the time standard for temporary total disability cases be extended from 6 months to 8 months. We believe that most temporary total disability issues can be resolved within 6 months. Some cases will in all likelihood require greater lengths of time. However, provision has been made to extend time frames where such extensions are necessary. Accordingly, we believe it not to be appropriate to create a deadline of 8 months for such cases. You suggest a longer time frame for dependent benefit cases. In your comment you indicated that dependent benefit cases often require the presentation of medical evidence. The proposed rule referred only to the "104-week" cases. No provision was made for fatal claims. Your comment about medical evidence caused me to recognize the omission of that kind of case. Accordingly, as a result of your comment we have now included in the rule a time standard for fatal cases.

In reopening cases you suggest a longer time frame. The Office of Judges believes that most cases involving reopening issues can be completed within 5 months. Where the case is complex enough to warrant an extension of a time frame order, such can be accomplished. Accordingly, the Office of Judges believes that a 5 month time frame is appropriate.

Thank you for your comments. We believe that with the cooperation of the parties the Office of Judges can meet the time standards set forth in the rule.

Very truly yours,



Robert J. Smith
Chief Administrative Law Judge

RJS:cm

f.324

Pepper & Nason



William W. Pepper & Andrew S. Nason
Attorneys at Law
8 Hale Street Charleston, West Virginia 25301
(304) 346-0361

August 19, 1994

Robert J. Smith, Chief Judge
Office of Administrative Law Judges
Workers' Compensation Fund
P.O. Box 2233
Charleston, West Virginia 25328

Re: Workers' Compensation Office of Judge
Proposed Procedural Rules

Dear Chief Judge Smith:

Thank you for your letter of August 3, 1994, and enclosed proposed rules on time standards for the Workers' Compensation Office of Judges. I am happy to see that these procedural rules are being discussed and worked on.

Normally, I would not comment on proposed rules but do have some questions and suggestions.

One of my questions concerns Paragraph E on Page 2 entitled "Submission". I am not certain what this section refers to and what is being submitted. I cannot understand if it a motion, protest or what issue is to be submitted.

Although this office represents both claimants and employers on workers' compensation cases, the majority of our clients are claimants. Under Section 6 "Time Standards" regarding Compensability, I would suggest that if the protest to compensability is by the claimant that a final decision be made by the Office of Judges within three months from the date of receipt of the protest by the Office of Judges unless the claimant is to waive or agree to an extension of that time period. If the employer is protesting compensability, since the claimant may be receiving both disability and medical benefits if proper, it would appear that allowing a longer time period to decide the issue such as six (6) months would be appropriate. I would suggest a shorter time period for a final decision where the claimant has protested compensability based on a finding that the claim is not compensable by the Commissioner should be shortened because not only is the claimant being denied possibly due disability benefits but also medical treatment.

Letter to Robert J. Smith, Chief Judge
August 19, 1994
Page 2

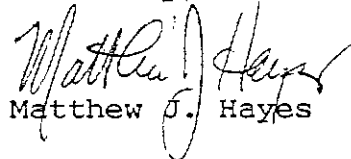
I have found that many individuals as much as they need disability benefits are as in need of, if not more so, of medical treatment. I would like to propose that the period for medical treatment authorization, if it involves denied medical treatment which has been protested by the claimant, be shortened to three months from the date of receipt of the protest by the Office of Judges unless that period is waived or an extension is agreed to by the claimant.

By the same token, under Section d involving Temporary Total Disability benefits, I would propose that a final decision on these protests be issued within three months from the date of receipt of the protest by the Office of Judges if the temporary total disability benefits have been discontinued and protested by the claimant. Accordingly, the claimant in this case could waive having a decision within the three months or agree to an extension.

Similarly, since reopening issues often involve both disability benefits and medical treatment, I believe setting a deadline to issue a final decision on protests involving reopening issues be made within three months from the date of receipt of the protest by the Office of Judges if the protest is a denial of reopening and is made by the claimant.

Your consideration of this is greatly appreciated. Once again, thank you for involving us in the process.

Sincerely,


Matthew J. Hayes

MJH:rls

Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328-2233

Gaston Caperton, Governor
Robert J. Smith
Chief Administrative Law Judge



March 24, 1995

Mr. Matthew J. Hayes
Attorney at Law
8 Hale Street
Charleston, WV 25301

Re: Response to Comment on Procedural Rules

Dear Mr. Hayes:

Thank you for your comment on the Proposed Time Standard Rules for the Workers' Compensation Office of Judges.

You express some concern about the clarity of the definition of "Submission". That definition relates to the amount of time in which a motion must be decided. Submission refers to the point at which a motion is ready to be considered for decision.

You express concern about the length of the time standard in regard to claimant protest to compensability decisions. Please understand that the time standards are maximum time standards. A decision can be made in less time than the time standard, particularly if the parties are cooperative. The Time Standards were arrived at taking into account the needs of claimants and employers as well as the ability of the parties to develop the evidence necessary to support the protest. You also suggest that medical treatment issues be decided in a shorter time frame. Once again, the time frame for medical treatment issues has been developed taking into account the needs of the parties as well as the ability of the parties to adduce evidence and the ability of the Office of Judges to render decisions.

Your comments in regard to the time standard for temporary total disability and reopening issues is appreciated. My response to those matters is the same as my response above to compensability and treatment issues.

I very much appreciate your comments to these Rules.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert J. Smith", written over a circular stamp.

Robert J. Smith
Chief Administrative Law Judge

RJS:cm
c.324

Charleston office located at 601 Morris Street. Regional offices located in Beckley and Fairmont.
Address all correspondence to the Charleston post office box.

An Equal Opportunity/Affirmative Action Employer

WILLIAM B. RICHARDSON
WILLIAM B. RICHARDSON, JR.
ROBERT D. CAMPBELL, ASSOCIATE

RICHARDSON & RICHARDSON
LAWYERS
RICHARDSON BUILDING
325 SEVENTH STREET
P. O. Box 266
PARKERSBURG, W. VA. 26102

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AUG 19 1994
WORKERS' COMPENSATION
OFFICE OF JUDGES
(304) 428-8241

August 12, 1994

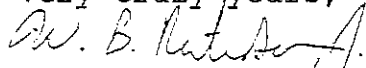
Robert J. Smith
Chief Administrative Law Judge
P.O. Box 2233
Charleston, WV 24328-2233

RE: Proposed Procedural Rules

Dear Judge Smith:

I have read your proposed procedural rules. In my opinion, less time should be spent writing rules and more time devoted to rendering decisions in accordance with the existing rules. Time Frame Orders in a Workers' Comp. Case are a joke. You must know this. For instance, I have cases where both the claimant and employer have written submitting the matter for decision. Approximately three months later a notice is sent out advising the parties that they have fifteen days to respond as to why the matter should not be submitted for decision. Simply stated, the system is a mess and I do not envy your position. Frankly, I have even considered not taking any more Workers' Compensation cases because of my dissatisfaction with the entire process.

Very truly yours,



William B. Richardson, Jr.
Richardson and Richardson

vaj

RECEIVED

AUG 17 1994

WORKERS' COMPENSATION
OFFICE OF JUDGES

ORIGINAL
Filed

Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328-2233

Gaston Caperton, Governor
Robert J. Smith
Chief Administrative Law Judge



March 24, 1995

Mr. William B. Richardson, Jr.
Attorney at Law
Richardson and Richardson
P. O. Box 266
Parkersburg, WV 26102

Re: Response to Comment on Procedural Rules

Dear Mr. Richardson:

Thank you for your comment on the Proposed Time Standards Rule for the Workers' Compensation Office of Judges. The tenor of your comments questions the ability of the Office of Judges to appropriately implement the Time Standards. Over the past several months the Office has acquired the material resources and the personnel that we believe are necessary to make the Rules work properly. I share your concern about appropriate implementation and can only assure that you that we will do the very best that we possibly can.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert J. Smith", written over a circular stamp or seal.

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

b.324

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343-5529-CHARLESTON

AREA CODE (304)
742-3772-CRAIGSVILLE
FAX NO: 344-0751

August 10, 1994

Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, WV 25328

RECEIVED

AUG 10 1994

WORKERS' COMPENSATION FUND
CLAIMS SERVICE DIVISION

RE: Workers' Compensation Office of Judges
Procedural Rules

Dear Chief Judge Smith:

I have received your proposed Procedural Rules for operation of the Office of Judges which proposes time standards concerning the processing of claims pending before your office for decision. On initial review, I have a number of concerns and objections. Your definition of "Final Hearing" set forth in Section 2 (Definitions) gives absolutely no indication of when an Order to Submit is to be entered and actually does not reflect the holding of a "final hearing" in a claim. However, the lack of a date by which a Submit Order is to be entered and, therefore, a final hearing is considered to have been held, may be in some fashion corrected by the provisions contained in Section 6 as to when a Final Decision is to be entered. If not, then I believe that the "Final Hearing" definition improperly slows the period of time within which a decision can be entered. Under your proposed Rules, should the present delay continue with regard to entering Submit Orders it will take longer to enter the Submit Order than the parties are given to present evidence in accordance with Section 6. I would request that you amend the definition of Final Hearing to include the actual holding of a hearing at which time the parties to a claim, or those parties who appear for a hearing upon receipt of proper notice, advise the Administrative Law Judge that they are prepared to submit the matter for decision.

With regard to the definition of "Submission", I would assume that the word "submission" applies to all issues and therefore it should indicate that submission is not only the date of receipt of a motion or date of receipt of a response to a motion by an opposing party, but the date by which the participating parties in a case have notified the Office of Judges that they are prepared to submit a claim for entry of a final order on the issue pending before the Office of Judges.

Honorable Robert J. Smith, Chief ALJ
August 10, 1994
Page 2

With regard to the definition for "Time Frame Order" (Section 2(F)), unless the Office of Judges enters a Time Frame Order immediately following receipt of a protest, which certainly is not the case presently, a Time Frame Order will oftentimes be received after the date established by your Rules for decision of an issue. Thus, unless consecutive periods of time within the time period established by the Rules for entry of a decision are to be provided, Time Frame Orders should be unnecessary.

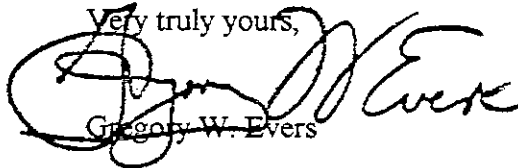
With regard to "Time Standards" (Section 6), the times noted for decision of the issues of compensability, medical treatment authorization, rehabilitation, temporary total disability, dependents' benefits, permanent partial disability, permanent total disability and reopening would imply that time periods are to operate concurrently for all parties involved in a protest. If a Time Frame Order would indicate a different period of time, for instance, the splitting of these time periods in half for each party, the time periods provided would obviously be insufficient for obtaining independent evidence, for holding hearings, for the Commissioner's witnesses as well as the claimants' and employers' witnesses and any other matter relevant to the issue pending before the Office of Judges for decision.

With regard to the time standard for the issue of a decision compensability, six months would be appropriate with the proviso that a hearing requested upon filing of a protest or in response to the filing of a protest with a request that a witness be made available for testimony that a hold be placed on the time periods until the Office of Judges complies with the request and schedules the hearing and issues an appropriate subpoena for the appearance of such witness. The same would apply to the issues of medical treatment authorization, rehabilitation, temporary total disability, dependents' benefits, permanent partial disability, permanent total disability and reopening.

The present difficulty, if continued, in receiving timely acknowledgments to protests and timely Time Frame Orders, as well as timely hearings, will make these time periods impossible to keep and still protect the rights of the parties' litigant to present their evidence and cross-examine experts offered by the opposing party.

I hope that these comments are considered and that appropriate changes with regard to your proposed procedural rules are made to clarify the matters noted in my letter.

GWE/kdh

Very truly yours,

Gregory W. Evers

Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328-2233

Gaston Caperton, Governor
Robert J. Smith
Chief Administrative Law Judge



March 24, 1995

Mr. Gregory W. Evers
Attorney at Law
One Valley Square, Suite 1305
Charleston, WV 25301

Re: Response to Comment on Procedural Rules

Dear Mr. Evers:

Thank you for your comment in regard to the Proposed Rule on Time Standards for the Workers' Compensation Office of Judges. Your comments and the comments of others have been helpful.

You address several issues in your comment. First, you indicate that the definition of "Final Hearing" needs to be amended to include an actual hearing. I agree and the final rule has been amended to incorporate that comment. Second, you indicate that Time Frame Orders should be entered immediately following the receipt of protest. That is not a subject that was intended to be covered in the Rule. However, please understand it is our intent to issue a time frame order at the same time the protest is acknowledged. You indicate that the time frames are too short unless that assume concurrent development. Most of the time frames do assume concurrent development. Permanent partial disability evidentiary development will remain consecutive. Your comment in regard to the definition of "Submission" misperceives the intent of that word. That word does not relate to submitting issues for final decision. Rather, it refers to the point at which a motion will be considered ready for decision. You indicate a general concern about the ability of the Office of Judges to actually do the work necessary to make the Procedural Rule operate properly. I share your concern. It is our belief that we now have the resources necessary to implement the Rule appropriately.

Once again thank you for your comment on the Rule.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert J. Smith", written over a circular stamp.

Robert J. Smith
Chief Administrative Law Judge

RJS:cm
a.324

Charleston office located at 601 Morris Street. Regional offices located in Beckley and Fairmont.
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September 30, 1994

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HAND DELIVERED

Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328-2233

Dear Judge Smith:

Enclosed are comments regarding the proposed "Rules on Time Standards For The Workers' Compensation Office of Judges". Thank you very much for the opportunity to comment on these proposed rules.

Sincerely,



ROBERT J. BUSSE

RJB/ss
Enclosure

ORIGINAL
E.C.J.

RECEIVED

SEP 30 1994

WORKERS' COMPENSATION
OFFICE OF JUDGES

COMMENTS REGARDING
"RULES ON TIME STANDARDS
FOR THE WORKERS' COMPENSATION OFFICE OF JUDGES"

General Comments

The overriding purpose of any procedural rules should be to simplify and expedite the claims litigation process while preserving the procedural due process rights of the parties to develop and introduce evidence in support of their respective positions. Although the proposed rules contain many commendable ideas with respect to the elimination of unnecessary delay in the litigation of claims before the Office of Judges, certain provisions of these proposed rules should be amended. For example, while § 2F of one of the proposed rules, provides that "a time frame order may be amended or extended by the Office of Judges at the request of one or more of the parties for good cause shown", the remainder of the proposed rules, especially those proposed rules pertaining to the actual time limitations, are written in a "non-discretionary" manner. It is essential that the varying and unique nature of each claim be recognized in formulating administrative time standards for the litigation of claims. Although the general time limits set forth in these proposed rules may be sufficient in some, or perhaps even most, claims, situations often arise which prevent the parties from completing evidentiary development in a timely manner. Further, the proposed rules seem to presume that a litigated claim involves the issue of compensability or medical treatment authorization or rehabilitation or temporary total disability or permanent partial disability or permanent total disability. In actuality, claims more often than

not involve many of these issues simultaneously. While, in the abstract, it may seem to be desirable to resolve the compensability issue or a medical authorization issue in a very short period of time, it is not always possible to do so because the compensability issue, the authorization issue, the temporary total disability issue, and the permanent partial or permanent total disability issue are often intertwined and involve the same evidence. With these general comments in mind, the specific proposed rules will hereinafter be addressed.

§ 2 - Definitions

§ 2C. This proposed definition defines a "final hearing", as an "Order to Submit issued by the Office of Judges". It does not seem logical to define a "final hearing" as an "order" issued by the Office of Judges, since the issuance of such order usually has absolutely nothing to do with the occurrence or even scheduling of an actual "final hearing". It is presumed that this proposed definition defines "final hearing" as an "Order to Submit" for the purpose of conforming with the current procedure followed by the Office of Judges regarding the submission of claims.

§ 2E. This proposed definition defines "Submission" as the "Date of receipt of motion or date of receipt of response to motion by opposing party". It is unclear as to what the term "submission" refers. Specifically it is not clear whether this refers solely to a "motion to submit" or merely a motion on a evidentiary matter. If this proposed definition is intended to apply to both motions to

submit and all other motions, the definition is acceptable insofar as the submission date itself is defined as "date of receipt" by the Office of Judges. If, however, the definition is intended to refer only to a specific type of motion, such as a motion to submit, that intention should be clearly delineated in the definition.

§ 2F. This proposed definition defines a "Time Frame Order" as "An order scheduling the presentation of evidence by all parties to the litigation of a claim". There is no indication in this proposed rule with regard to whether such time frame orders will be protestable in nature. Under current practice, a party may file a protest to a time frame order if such party is dissatisfied with any part of the time frame order and the filing of such protest will automatically nullify the terms of the order and cause such claim to be scheduled for hearing, at which time the time frame issue can be addressed. This current practice has worked quite well. It is unclear from this proposed rule as to whether the "time frame order" mentioned will likewise be protestable. If so, it is suggested that this proposed rule contain a provision specifically noting the protestable nature of the time frame order.

As noted in the "General Comments", this proposed rule also contains a statement that a "time frame order may be amended or extended by the Office of Judges at the request of one or more of the parties for good cause shown". This provision is absolutely essential, since rules of general application regarding time limits for submission of evidence cannot be applied to all cases involving

a similar issue since, for example, the compensability issue in one claim can be quite a bit more complicated than the compensability issue in another claim. This sentence in the proposed rule allowing for the amendment or extension of time frame orders should be retained in the final rules.

§ 3 - Implementation of Rule

This proposed rule requires that the time limitations set forth generally in the proposed rules shall apply to protests filed on or after January 1, 1995. This provision in the proposed rules is acceptable. The remainder of the proposed rule provides that the "percentage of final decisions that must be at or under the applicable time standards as provided by these rules is fifty percent by July 1, 1995, sixty percent by July 1, 1996 and seventy percent by January 1, 1997". It is respectfully submitted that this sentence is unclear and, quite frankly, confusing. It is not clear what is meant by providing that the percentage of "final" decisions will be governed by this rule. Specifically, is this proposed rule an attempt to state that fifty percent of all claims in litigation on the compensability issue on July 1, 1995, will be resolved within six months, sixty percent of all such claims in litigation on July 1, 1996, will be resolved within six months, and seventy percent of all such claims in litigation on January 1, 1997, will be resolved within six months? If so, how will it be determined which claims fall within the percentage guidelines and which claims do not? Is this provision an attempt to impose time limitations upon the parties with respect to evidentiary

development and the submission of claims, or is it an attempt to impose limits upon the Office of Judges with respect to issuing final orders after a claim has been submitted? It is suggested that this rule should be substantially revised and clarified.

§ 5 - Hearings

§ 5 of the proposed rules provides that "Hearings will be scheduled by the Office of Judges within sixty days from receipt of the request for hearing". Does the requested hearing have to be held within sixty (60) days of receipt of the request, or does the scheduling of the hearing merely have to occur within such sixty (60) day period? As previously pointed out, are the initial time frame orders envisioned by these proposed rules still "protestable" which, if protested, will automatically cause the claim to be scheduled for hearing? Alternatively, does this proposed rule mean that no claim will ever be set for hearing unless the Office of Judges receives a "request for hearing"?

§ 6 - Time Standards

This section sets forth various time frames which "shall" be applicable to cases involving eight different issues, namely compensability (six months), medical treatment authorization (four months), rehabilitation (ten months), temporary total disability (six months), dependents benefits (104 weeks) (four months), permanent partial disability (eighteen months), permanent total disability (eighteen months) and reopening (five months). This proposed rule provides that these time periods constitute the

entire amount of time which will elapse between the commencement of the running of the appropriate time period upon the "date of receipt of the protest by the office of judges" until the "final decision" is rendered. This proposed rule is unacceptable. The event which triggers the commencement of the running of the applicable time period should not be the receipt of the protest by the Office of Judges, especially when the non-protesting party often has no idea that a protest has even been filed until the Office of Judges acknowledges receipt of such protest. It is submitted that the event which should commence the running of the applicable time period should be the date of the letter acknowledging a protest by a party, not the date of the receipt of the protest by the Office of Judges. Moreover, the "Commentary" following this proposed rule provides that the acknowledgement of and time framing of a protest usually occurs "within thirty days from receipt of the protest". It is also noted in this "Commentary":

After evidentiary development is completed, the Office of Judges must determine that the case is ready for decision and abstract the issues. The case is then ready for the decision making and the decision writing process. These activities ordinarily require 60 to 90 days after completion of the evidence by all parties.

If these proposed time standards are accepted at face value, it is entirely conceivable that the parties will have absolutely no time for submission of evidence on certain issues, such as the medical treatment authorization issue. By way of example, the "time standards" in § 6b of the proposed rule provide

that a "final decision shall be issued in protests involving medical treatment authorization issues within 4 months of the date of receipt of the protest by the Office of Judges". Under the proposed rules, the Office of Judges can receive a protest on June 1 to an order on the medical treatment authorization issue, yet acknowledgement of such protest can take up to 30 days, or until July 1. The non-protesting party may not even be aware of the existence of the protest until receipt of the acknowledgement letter. The proposed rule requires the issuance of a "final decision" on or before October 1, four (4) months after receipt of the protest. However, the "Commentary" acknowledges that preparation and issuance of a final order can take the Office of Judges "60 to 90 days after completion of the evidence" by the parties. Consequently, § 6b does not allow the parties four months in which to complete evidence. In fact, in the example, it does not allow the non-protesting party any time to submit evidence, since an "order to submit" must be issued on July 1, the same date on which the protest is acknowledged, if it indeed will take the Office of Judges 90 days (or until October 1), to prepare and issue a "final decision" under this rule.

It is suggested that all of the proposed rules in § 6 be amended to provide that the event which commences the running of the applicable time limitation period be the acknowledgement of the protest by the Office of Judges, in order to make sure that all parties to the claim are aware of the issuance of the filing of the protest. Further, it is suggested that § 6 be amended to provide

that an "order to submit" shall be issued at the expiration of the appropriate time period, and not that a "final decision" shall be issued, since the preparation and issuance of a final decision can admittedly require up to three months. As the proposed rule is written, this three-month period must occur during the time periods set forth in § 6 and, by definition, it must occur after the order to submit. Consequently, the time frames set forth in § 6 are entirely unrealistic, unless the commencement date for the running of the time period is redefined as the date of the protest acknowledgement and the termination date of the time period is redefined as the date of the "order to submit".

As noted, the proposed rules appear to provide for little flexibility regarding the time frames and simply do not recognize that many, if not most, claims involve not a single issue, but some combination of the various types of issues listed in Proposed Rule § 6b. Often, the interrelationship of these issues requires that they be litigated together. It would certainly not be an efficient use of administrative resources if the final rules require multiple "final orders" to be issued in a claim on multiple issues within a relatively short period of time. Further, the four-month time limitation regarding medical treatment authorizations in § 6b and the six-month time limitation regarding the compensability issue in § 6a fail to account for the fact that the medical authorization issue itself is often dependent upon the compensability of the underlying claim. For example, it is usually apparent in a hearing loss claim whether a claimant requires hearing aids. However, the

issue of whether the claimant's need for hearing aids is the result of a compensable hearing loss cannot, by definition, be determined until after the compensability issue itself has been resolved. Hence, it is impossible to resolve the issue of whether hearing aids should be authorized in an occupational hearing loss claim until after the underlying compensability of the claim itself has been resolved. This, of course, is not possible under the time limits contained in § 6a and b.

The proposed rules also fail to make any reference to whether the time limitations will be imposed on the parties in a "consecutive" or "concurrent" manner. It is submitted that the rules must permit the consecutive development and presentation of evidence, with the protesting party bearing the initial burden of going forward with the evidence and thereafter providing the non-protesting party with a sufficient period of time to present rebuttal evidence. Any rule requiring the concurrent development and presentation of evidence rather than the consecutive development and presentation of evidence forces the non-protesting party to develop and present evidence before he has an opportunity to see the protesting party's evidence, thus placing the non-protesting party in an unfair position since he does not even know what type of evidence (orthopedic, psychiatric, etc.), the protesting party will present before he must begin developing rebuttal evidence. In the event that both parties file protests to an order, the claimant should be required to develop and submit evidence initially, as currently required by 93 CSR 1.2.5(a).

Again, the proposed rule should contain some statement recognizing the need for the discretionary expansion or contraction of the time limits by the Office of Judges, as the needs of the individual claim require. Additionally, recent experience has shown that the development of evidence is complicated and "lengthened" significantly where the claimant is unrepresented by counsel. Obviously, counsel for the employer is completely unable to take the deposition of the claimant, since no one will be present at such deposition to advise the claimant of his right to an attorney. It is certainly not the responsibility of the employer's attorney to advise the claimant of his right to counsel. The only way an unrepresented claimant's testimony can be obtained is at a hearing and, as the proposed rules recognize, significant delay (up to 60 days) can occur between the request for hearing and the hearing itself. Finally, the unrepresented claimant can (and often does) merely appear at the hearing and request a continuance in order to give him an opportunity to "consult with an attorney" before testifying, thus delaying the claim even further. Since, in such instances, the employer is usually the protesting party, its legitimate attempts at developing evidence can be completely frustrated solely by the claimant's failure either to agree to proceed without benefit of counsel or to take the steps necessary to secure counsel in a timely fashion. This is becoming more of a problem for employer's representatives and its occurrence and concomitant problems in complying with the evidentiary guidelines should be explicitly recognized in the rules by providing the

Office of Judges with increased flexibility in setting and enforcing time limitations.

Conclusion

Although the goals sought through these proposed rules are admirable, such rules must be modified significantly to recognize the unpredictable variability among claims in the litigation process. Further, the events which constitute the "beginning" and "ending" dates in § 6 must be modified to recognize that the applicable time limits commence on the date of the acknowledgement of a protest and cease on the date of an "order to submit". Finally, the proposed rules should recognize the need for the consecutive development of evidence and the authority to vary the evidentiary guidelines as required, depending upon the nature and complexity of the claim.

Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328-2233

Gaston Caperton, Governor
Robert J. Smith
Chief Administrative Law Judge



March 24, 1995

Mr. Robert J. Busse
Jackson & Kelly
Attorneys at Law
P. O. Box 553
Charleston, WV 25322

Re: Response to Comment on Procedural Rules

Dear Mr. Busse:

Thank you for your comments on the Proposed Time Standard Rules for the Workers' Compensation Office of Judges.

In your general comments you indicate the necessity of recognizing the "varying and unique nature" of cases. Our office recognizes that cases involve varying degrees of complexity and difficulty. It is for that reason that we have provided for an extension on time frame orders so that the parties may appropriately develop a case for decision. At the same time it must be recognized that timely decisions must be made.

You suggest that the definition of "final hearing" might be improved by reference to an actual hearing. The final rule which will go to the Secretary of State does in fact incorporate that suggestion. You also express concern about the clarity of "submission". That term refers to when a motion is ready to be decided. The word is intended to refer to all types of motions. Time frame orders are not protestable under the proposed rule. However, if a party needs additional time in which to develop a case, a request for such may be made and if appropriate it will be granted. Similarly, if a party desires to shorten a time frame, a request to do that may also be made. Thus, while the time frame order is not protestable it is subject to being amended upon good cause shown.

The Time Standards will become effective on June 1, 1995. The portion of the rule which describes the percentage of cases which must be decided relates only to protests filed after June 1, 1995. The intent is to impose limits on the Office of Judges and

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Mr. Robert J. Busse
Jackson & Kelly
Page Two
March 24, 1995

Re: Response to Comment on Procedural Rules

not limits on the parties. However, to the extent that the Office of Judges is limited it may be that the parties are limited in the time that may be allowed in the evidentiary development. However, let me once again state that where additional is needed the request may be made and if appropriate it will be granted.

The intent of Section 5 of the rules in regard to hearings is that a hearing will be scheduled within 60 days. It is our hope and indeed our overall goal that hearings will be scheduled much more quickly than that. Our experience has shown that parties need between 45 and 60 days notice on a hearing in order to accommodate their schedules and thus avoid a large number of continuance requests. Our policy has been and will continue to be that we will not set hearings unless they are requested. It is pointless for our office to schedule a hearing if no party has indicated a need for a hearing.

Your comment on the time standards themselves contain what I perceive to be certain premises that are not accurate. The apparent overriding concern which you express is that parties will have insufficient time within which to develop evidence in a particular protest. Time frame orders for evidentiary development will be utilized in all protests. The length of the time frame will vary depending upon the type of protest. For example, protests involving permanent partial disability have historically taken longer to develop, because of the necessity of medical evidence, than protests involving compensability or occupational pneumoconiosis non-medical orders. In regard to any particular type of protest a time frame for evidentiary development may be extended if the need to do so is present. The proposed rule makes specific allowance for that.

You indicate that the time frames are unrealistic unless the commencement date for the running of the evidentiary development is the date of the protest acknowledgement. While the rule itself does not provide precisely that, our processes will do that. Under the new processes, the acknowledgment and time frame order will be one document. Thus, the time frame will commence to run at the same time the protest is acknowledged. Parties will have an appropriate amount of time to litigate the case and the Office of Judges will be able on a reasonable basis to conclude the litigation within the time standards set forth in the rule.

Mr. Robert J. Busse
Jackson & Kelly
Page Three
March 24, 1995

Re: Response to Comment on Procedural Rules

You also expressed concern about concurrent as opposed to consecutive evidentiary development. In certain kinds of cases we have already utilized concurrent time frames. We will continue to utilize concurrent time frames in those cases. We will utilize consecutive time frames on permanent partial disability cases. However, the rule does not require that we do so. We do not at this time propose to change the procedure that we have been following in regard to permanent partial disability protests. However, should changes occur in the manner of litigation then we would certainly have the authority under these rules to concurrently time frame any case before the Office of Judges. This office is aware of the problems created by concurrent development in permanent partial disability cases. It could cause responding parties to expend needless resources if the protesting party did not develop any evidence in the case if concurrent time frames were used. We do not intend to do that at this time.

You expressed some concern about other matters which I believe are best described as enforcement issues. That is, what will our office do to enforce the rules. As I have stated repeatedly in meetings throughout the State for several months, it is our intent to reasonably enforce these rules. We expect most cases to be completed within the time standards that we have set forth. Some cases will not because they are too complex or because of other problems that develop during the litigation. However, the majority of cases do not fit in that category and can be decided within the time standards that we have set forth in the rule. With the cooperation of the parties I believe that we can reasonably and fairly enforce the rule.

Very truly yours,



Robert J. Smith
Chief Administrative Law Judge

WEST VIRGINIA WORKERS' COMPENSATION FUND
OFFICE OF JUDGES

IN RE:

RULES ON TIME STANDARDS FOR THE WORKERS'
COMPENSATION OFFICE OF JUDGES

* * *

P U B L I C H E A R I N G

Robert J. Smith, Chief Administrative Law Judge

Alan M. Drescher, Deputy Chief Administrative Law
Judge

Wednesday, September 14, 1994

10:04 a.m.

* * *

John Manchin Room
West Virginia State Office Building
107-109 Adams Street
Fairmont, West Virginia

Whereupon, this matter came on for
hearing and the proceedings were as follows:

Wheeling, WV

Pittsburgh, PA
Morgantown, WV
Martins Ferry, OH



STRESKI REPORT

VIDEO SERVICE

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3 West Virginia University
4 Human Resources

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6 Deanna J. Watts
7 West Virginia University
8 Human Resources

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10 Susan Yurko
11 Furbee, Amos, Webb & Critchfield
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15 James J. Arbogast, District 31, UMWA

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17 Pete Dinardi, District 31, UMWA,
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P R O C E E D I N G S

* * *

JUDGE DRESCHER: Good

morning. We'll go ahead and get started now. For those of that you don't know me, my name is Alan Drescher, and I'm the Deputy Chief Administrative Law Judge for the Workers' Compensation Office of Judges.

I'd like to welcome you all to this hearing to receive public comment concerning the proposed rules on time standards for the Workers' Compensation Office of Judges.

We want to take just a few minutes to give you some brief background about our office. The Office of Judges was created by statute in 1991.

Prior to its creation, the Workers' Compensation commissioner would make a ruling with regard to a Workers' Compensation claim. And then, if it was protested, it was referred to the Legal Division of the Workers' Compensation Fund, which then made another ruling.

And our office was created to

1 establish an independent entity to do that second
2 review of the Workers' Compensation commissioner's
3 initial ruling.

4 So our office is a separate legal
5 entity from the Workers' Compensation Fund. We
6 are housed in the same building in Charleston,
7 which tends to create some confusion in the minds
8 of some people; however, I just wanted to make
9 sure that you're all aware that we are a separate
10 entity.

11 Some of the problems we're now
12 experiencing are, really, in many ways, related to
13 the problems that existed before our office was
14 created, including a substantial case backlog,
15 chronic understaffing and an antiquated
16 record-keeping system, all of which we're trying
17 to address, and have been trying to address for
18 some time now.

19 However, the purpose of these rules is
20 to address the issue of the timeliness of the
21 issuance of decisions to protests. And we
22 appreciate your attendance here this morning and
23 look forward to receiving your comments.

24 I would ask, for the assistance of our

1 court reporter here, if you would identify
2 yourself prior to speaking so, when we get our
3 transcript, we'll now who said what.

Know

4 At this time I'd like to introduce Bob
5 Smith, the Chief Administrative Law Judge, who
6 wants to make a few brief comments before we get
7 started.

8 JUDGE SMITH: I thank
9 everybody who is here for taking the time out of
10 their busy schedules to come comment on the rules
11 that we're in the process of promulgating.

12 We're doing a series of public
13 hearings around the state. In addition to the
14 public hearings where we receive comment, we also
15 will be receiving written comment from anybody who
16 desires to make such.

17 Accordingly, simply because you've
18 come today and make public comment about the
19 rules, there's no reason in the world that you
20 can't, if you desire to do so, make written
21 comment as well.

22 I'd like to give a little bit of a
23 thumbnail sketch of the genesis of the rules and
24 how we got there. It's always been our intent in

1 the Office of Judges to do something of this
2 nature.

3 Prior to the recent times, we have not
4 had the staff that's necessary in order to
5 promulgate any sort of reasonable time standards
6 for getting decisions out.

7 That's always been a problem in the
8 organization, as well as its predecessors. It's
9 particularly been a problem with us. We have
10 gotten to the point where we will soon have our
11 full complement of employees, including about 25
12 administrative law judges, as well as the
13 appropriate numbers of support staff that are
14 necessary to make certain that we can get the work
15 done.

16 Since we have those numbers of people
17 there, we've determined that it's appropriate to
18 go out and to do this promulgation. There were a
19 couple things that we had in mind as we
20 promulgated the rules.

21 One of the overriding-- well, the
22 overriding thing is to get decisions done timely,
23 not just the back end of the process; that is,
24 after the case is submitted, but the entire

1 process, to make sure that we can get cases
2 through the system as rapidly as possible, but
3 still consistent with a reasonable development of
4 the evidence.

5 We've divided the cases or the types
6 of cases, if you would, as you can see from
7 reading the rules, into what appear to be, from
8 historical analysis, one group of cases which
9 appear to be very fast-tracked, and another group
10 of cases which are not.

11 Generally, generally, the purpose for
12 that is to make certain that we devote both
13 appropriate judicial resources to those cases
14 which need and provide an appropriate
15 developmental time for the parties for those cases
16 that need that kind of development.

17 Secondly, it is our hope that we can
18 push cases, certain kinds of cases at least,
19 through the system very, very quickly. Those
20 kinds of cases historically do not need the depth
21 of development that permanent total cases, for
22 example, need.

23 And they don't need the same sort of
24 resource application from our office that those

1 cases need. So those are going to go through much
2 quicker. I'll identify those in a minute.

3 This is the second of the hearings
4 that we've had. The first hearing, we learned
5 that there may be some confusion about what we
6 mean by time standards, and how that relates to
7 what has been occurring in the office.

8 In Section 6, the time standards that
9 we've promulgated, and let's just take
10 compensability as an example, we indicated in the
11 proposed rule that a final decision will be issued
12 within six months from the date of the receipt of
13 protest.

14 The way we got to six months in both,
15 in this, in that kind of case, as well as in the
16 other kinds of cases, is to take into account
17 three distinct developmental phases.

18 First would be what we call the front
19 end of the process; that is, how long does it take
20 us to acknowledge the case and time-frame the
21 case.

22 Second distinct part is the actual
23 evidentiary development of a case. And the third
24 and last part is the amount of time necessary for

1 us to push the case through our process after the
2 evidentiary development has been concluded.

3 Generally but not-- it won't
4 necessarily coincide fully, but generally, what we
5 have done is to say that a case-- a protest will
6 be acknowledged and time framed within 30 days,
7 and that we will deal with it, after evidentiary
8 development is concluded, within 60 to 90 days.
9 That leaves the balance of the time for
10 development, what you now recognize to be time
11 frame orders.

12 And that will continue to be done.
13 The time frame orders for all cases will now be
14 automatic; they will be generated-- when this rule
15 goes into effect-- they will be generated at the
16 time the acknowledgment is issued.

17 We will issue at the same time an
18 indication in some form, some written form, as to
19 what the time frame order will be. And that's
20 when your evidentiary development will start.

21 That's how we got there. And the
22 process also contemplates some rather substantial
23 changes from the way we've done things. And I'll
24 take treatment as an example of that.

1 Treatment issues are important to
2 everybody. They're important because people need
3 to have appropriate treatment when it's needed,
4 not a year, or two, or three later. They need to
5 have it then.

6 Secondly, treatment, appropriate
7 treatment at the time it's needed, tends to get
8 people back to work quicker, so that you have a
9 speedier return to work on the part of an
10 individual where that is appropriate.

11 Our experience indicates, for example,
12 that treatment issues are rarely litigated by
13 employers. And our dealing with these is going to
14 take that factor into account.

15 What we will do will be have a very,
16 very short time frame, and a decision that is--
17 we've already drafted, for example, two decisions;
18 one grant, one denied, based upon what we get in
19 the form of evidence.

20 And these are form decisions which
21 will contain sufficient facts and findings to, of
22 course, support the decision. But the cases,
23 treatment cases, are largely able, I believe, to
24 be handled in that kind of a process.

1 What that means is they're going to be
2 handled by themselves. They will not be
3 consolidated with other cases. And, indeed, what
4 you will find is very little consolidation in the
5 future.

6 You can't run these separate time
7 tracks and then consolidate. We will have
8 consolidation where it's appropriate, but it's
9 going to be a lesser used vehicle than what we
10 have done.

11 I've done a little more, probably, in
12 the way of explanation than I really intended to.
13 What we'd like to do is just to use the sign-in
14 sheet as the mechanism and either hear your
15 comments, or if you have questions before you
16 comment about the way the rules are, then I'll be
17 glad to-- either Alan, or I, or both of us will be
18 glad to deal with those. So...

19 JUDGE DRESCHER: We found out
20 yesterday that the first person I called on was
21 the only person who was there who really came for
22 the purpose listening as opposed to commenting.
23 So I'm just going to ask for volunteers. Is there
24 anybody who would like to go first? We promise we

1 -- won't bite.

2 MR. ARBOGAST: I'm Jim
3 Arbogast. I'm Secretary-Treasurer of District 31
4 UMWA here in Fairmont. And the funding is there,
5 Bob; am I correct?

6 JUDGE SMITH: The funding is
7 there for our-- well, let me talk about that for a
8 second. The funding is there for the staff we
9 need to do the job.

10 There are some issues surrounding what
11 Alan called record-keeping system. There are some
12 funding issues around that. And those are as yet
13 unresolved.

14 In addition to that, and I guess I
15 need to be really candid about this, Alan
16 mentioned a backlog. Well, there is a backlog.
17 There's a substantial backlog.

18 We proposed back in early June to the
19 governor's office that a supplemental
20 appropriation be approved for the purpose of
21 solely dealing with that backlog.

22 We've estimated that the cost of that,
23 of taking care of that backlog over 18 months or
24 so, whatever it might be-- I don't want to be tied

1 to that 18 months, but it will be at least that
2 long-- will be somewhere between a million and a
3 half and \$2,000,000. And that will cover more
4 than 1 fiscal year.

5 We don't have any final decision from
6 the governor's office on that. But it's essential
7 that that be approved in order for us to be able
8 to meet the commitments that we're undertaking
9 here in these time standards.

10 We don't have the final decision, but
11 I don't have any indication that the proposal will
12 be not approved. To the contrary, my
13 understanding is that it's likely to be approved.
14 But it hasn't yet been. So with that caveat, Jim,
15 that is correct, the funding is there.

16 MR. ARBOGAST: That's fine.

17 Thank you, Bob.

18 MR. DINARDI: Pete Dinardi,
19 attorney for District 31, UMWA. My understanding
20 is that these rule changes will be made without
21 any kind of legislative review?

22 JUDGE SMITH: That's correct.
23 These are procedural rules and do not require
24 legislative review. We do not perceive them to be

1 substantive legal matters; that is, involving
2 claims-- the merits of claims.

3 So those kinds of rules need to be
4 legislatively approved unless they go through the
5 performance council, in which case they don't. We
6 don't perceive it appropriate, frankly, for our
7 office to do legislative rule making. We think we
8 should make our changes in what we see by case
9 decision. These are procedural rules.

10 MR. ROBERT COHEN: Bob Cohen
11 from Cohen, Abate & Cohen. One question, two
12 comments. The question is the definition of final
13 hearing.

14 JUDGE SMITH: Yes, sir.

15 MR. ROBERT COHEN: It says,
16 "Order to Submit issued by the Office of Judges."

17 JUDGE SMITH: That's correct.
18 It's a formal-- it would be an order that we
19 issue. You've probably seen some now, Bob. There
20 is an order in our office that's called order to
21 submit that we utilize with some degree of
22 frequency.

23 That will be the vehicle that
24 commences the time clock, so to speak, at least

1 from our view, from a regulation standpoint, that
2 commences the time clock that the statute mentions
3 that we have in which to decide-- to make a final
4 decision, which is 30 days. That's the purpose of
5 that. It's a formal order that we will issue.

6 MR. ROBERT COHEN: So that's
7 referring to an order rather than the hearing,
8 itself?

9 JUDGE SMITH: That's correct.
10 As a matter of fact, what we know is that, in the
11 vast majority of the cases, the parties indicate
12 that they are-- that they have concluded their
13 development, either in the form of a letter, or a
14 joint letter or something like that.

15 Over and above that, we'll tend to use
16 the time frame orders as a-- as time goes on, as a
17 vehicle to conclude the hearing. It will be
18 self-concluding.

19 MR. ROBERT COHEN: Uh-huh.
20 The two comments are these. One is that I think
21 it's very good that the Office of Judges is
22 promulgating standards for the completion of
23 cases.

24 You know, we're all familiar with how

1 long these cases take to be resolved. Hopefully
2 we'll be able to do it within these time frames.
3 The second comment is addressed to the
4 compensability time frame.

5 If we're talking about whether a
6 claimant hurt his back on a job, for example, I
7 think six months is fine. I think there are going
8 to be cases however, particularly occupational
9 disease type cases, where the question is chemical
10 exposure, something like that, six months isn't
11 going to be close to enough time for that. It may
12 be necessary to bring in industrial hygienists--

13 JUDGE SMITH: Right.

14 MR. ROBERT COHEN: -- doctors.
15 And I don't know if maybe there should be a
16 separate provision for those types of cases within
17 the-- within these rules.

18 JUDGE SMITH: Okay. Without
19 addressing the comment at this moment, because
20 that's not what I'm here for, we're here to
21 receive your comments, but the rules provide for
22 a-- provide that-- well, we recognize that we
23 cannot possibly do all compensability cases within
24 that six-month period.

1 Indeed, what we have indicated in our
2 rule is, over time, we'll probably do 60 percent
3 of them that way. Compensability may be a higher
4 percentage, I don't know.

5 But we recognize that there are cases
6 in the compensability area, there are cases in the
7 medical treatment area, there are cases in the
8 rehab that will need to be handle differently.

9 And this is not an attempt to
10 determine how all cases will be handled. People
11 can get time frames extended. We don't intend to
12 stop that. Just a request, and we'll do it if
13 it's appropriate.

14 But what our drive is is to try to
15 identify or to try to deal with 80 percent of the
16 cases. And the challenge for us will be dealing
17 with those 20 percent that don't fit the
18 mechanism.

19 And I think that you've raised a kind
20 of case, and I think it's going to be a challenge
21 for our office, as well as for the parties, to be
22 able to handle those. So I appreciate that
23 comment.

24 MR. ROBERT COHEN: Oh, one

1 other. There could be cases that overlap,
2 different areas. Could have, for example, a
3 rehabilitation issue, which also it becomes a TTD
4 issue because of the person's eligibility for TTD
5 while on rehab. How would those cases be
6 considered under these time frames?

7 JUDGE SMITH: I think that
8 none of us have a great deal of experience yet as
9 to how rehab issues are going to be dealt with.
10 That's an area of the statute that, as you know,
11 that was amended drastically by the legislature in
12 the 1990 amendments.

13 And recently the Fund has issued, or
14 the performance council, I should say, has
15 promulgated regulations dealing with rehab.
16 That's an undeveloped area. We're uncertain how
17 that's going to work.

18 And we've put-- we were confident
19 enough that it's going to be a separate issue that
20 we included it separately in the rules. But how
21 it's going to work, we don't know.

22 And it may be that-- I am-- my belief
23 is that it's got to be separate from PTD because
24 you're going to have some rehab issues in there

1 that are going to need quicker resolution than the
2 PTD cases are.

3 And you're going to have, maybe, in
4 that, surely surface in what appears to be the way
5 the commissioner is dealing with denials of
6 permanent total, oftentimes those cases are
7 referred for rehabilitation.

8 There can be a protest to the denial,
9 and then it goes over to the rehab at the same
10 time as it's still going through rehabilitation
11 process, maybe.

12 And you'll have protests arising out
13 of that as well, on both side. So it's not our
14 intent to tie those two together. I think it
15 would be inappropriate to do so because of the
16 lengthy time frame that we've proposed for PTD.

17 It's my view that rehab is a
18 statutorily mandated process, and not unlike
19 treatment, it needs to get dealt with quickly, but
20 we just don't know how quickly we can deal with
21 it. It's going to have different kinds of
22 professionals than some cases do, and we're not
23 certain.

24 These time frames, incidentally, are

1 maximum. They're not just there, and that's what
2 we're going to do. They're maximum. If we can do
3 them quicker, we will.

4 MR. ROBERT COHEN: I think
5 you're going to see, in the rehab area, I hope
6 you'll see, some litigation in that under the new
7 regulations because--

8 JUDGE SMITH: I'm sure you
9 will.

10 MR. ROBERT COHEN: -- the way
11 that the Fund has traditionally handled rehab is
12 basically to try to get the person back to the old
13 job, and the person isn't going to go back to the
14 old job. They drop it.

15 And I think it's clear in the new
16 regulations that that's not proper. But to get
17 the Fund to change what it does-- my experience in
18 the last several months is that the Fund has not
19 changed its basic attitudes about that, at least
20 the people that I've dealt with around here. And
21 it's going to take some hard pushing to get them
22 to change that, and probably some litigation.

23 JUDGE SMITH: Like many
24 cultural issues, those things take time to

1 change. And indeed, I think that there's change
2 not just for the government in that, in the
3 rehabilitation area, but also for claimants and
4 employers as well. As I read the statute, there's
5 mandated cooperation by everybody. That always
6 hasn't been the case either.

7 JUDGE DRESCHER: I think the
8 other aspect of your question~~er~~ has really to go *question*
9 to what do you do when you have several claims or
10 protests in the same claim, and basically gets
11 back to what Bob mentioned earlier, and that is
12 that we'll probably keep those separate. They'll
13 be running on separate time frames.

14 That's going to be a lot more of a
15 paper work, I guess, problem perhaps with the
16 attorneys for keep track of all those.

17 MR. ROBERT COHEN: Then what
18 becomes the appealable order?

19 JUDGE SMITH: I'm sorry?

20 MR. ROBERT COHEN: When is the
21 appealable order issued, or will there be a series
22 of appealable orders?

23 JUDGE SMITH: A series, a
24 series.

1 MR. ROBERT COHEN: That could
2 be difficult to deal with on appeal--

3 JUDGE SMITH: Could be.

4 MR. ROBERT COHEN: -- because
5 there will be different things to be brought
6 together.

7 JUDGE SMITH: I understand
8 that, and I recognize that-- we recognize that
9 this may result in some substantial changes, but I
10 don't know how-- we have provided for
11 consolidation; it can take place.

12 And what happens when you consolidate
13 is you go to the longest time frame, but I don't
14 want to necessarily do that with treatment cases,
15 for example, or reopenings.

16 You just get reopening piled on top of
17 reopening, piled on top of reopening, piled on top
18 of reopening. And it just is-- it's a morass
19 that's horrid.

20 And it's-- one of our objectives is to
21 stop that. And we'll probably have to monitor all
22 of this ourselves and be willing to be flexible as
23 we see the necessity to change.

24 And that's one of the reasons when--

1 my view of rule making is not 50 pages of detail
2 because you get locked up, and you have to go out
3 and change it by rule-making every time you figure
4 out you need to do something differently.

5 What we've tried to do is to paint
6 some very broad strokes here, but be firm enough
7 on what our commitment is that there's some
8 accountability in what we do.

9 MS. YURKO: Susan Yurko,
10 Furbee, Amos. I have a couple of questions.
11 First of all, in Section 5 dealing with the
12 hearings, it indicates they'll be scheduled only
13 upon receipt of a request. Is this telling us now
14 there'll no longer be automatic hearings
15 scheduled?

16 JUDGE SMITH: That's the way
17 we do it now, yes.

18 MS. YURKO: There are times
19 when there been hearings that I haven't requested,
20 and the other side hasn't, and they're still set.

21 JUDGE SMITH: That may occur,
22 but the whole drive of the office is to get away
23 from automatic hearings where people don't ask for
24 them.

1 We see no need to have a hearing if
2 somebody doesn't want it. If neither side has
3 indicated a need for a hearing, it doesn't make
4 any sense for me to schedule it, for us to
5 schedule it.

6 JUDGE DRESCHER: I think
7 sometimes, too, people have their form protest
8 letters they use, and sometimes they have language
9 in there where they request a hearing in their
10 protest letter. They don't really mean it, but
11 it's in there, and it gets set.

12 JUDGE SMITH: Check your form
13 protest, for example. I'll bet that a lot of them
14 say, And I request a hearing on this protest.
15 Then that's your request for hearing, and you get
16 it.

17 MS. YURKO: If I might make an
18 observation, I'm amazed that you guys would pick
19 up something like that, which I know for a fact is
20 not in my form, when you don't even pick up that
21 I'm the attorney of record, give it to someone
22 else who's not the attorney of record.

23 JUDGE SMITH: Are you talking
24 about in your office?

1 MS. YURKO: In our office,
2 which is--

3 JUDGE SMITH: We've talked
4 about that.

5 MS. YURKO: I know. This has
6 nothing to do with the hearing. That's just an
7 observation. I'm amazed that they would pick that
8 up when they can't even get my name right. But
9 that's neither here nor there.

10 JUDGE SMITH: That's correct,
11 it isn't.

12 MS. YURKO: I know.

13 (Laughter.)

14 MS. YURKO: The other question
15 that I had goes more to what Bob was saying with
16 respect to these separate protests now. Are you
17 indicating or will we still be allowed to combine
18 business for hearings, combine our protest, like
19 if we want testimony for various things, we can
20 do-- use one hearing to accomplish business on
21 these various protests, or do we have to have a
22 separate hearing for each protest?

23 JUDGE SMITH: I'm uncertain--
24 I think that the question you've asked is about as

1 big a question as you might be able to ask, Ms.
2 Yurko. And-- yes, we did, didn't we-- and the
3 issue, to the extent that you ask for a hearing in
4 multiple protests and stay within the time frames,
5 I don't have any objection to your doing so.

6 To the extent that you ask for a
7 hearing in a case that's going to take you outside
8 the time frames, clearly that may well present a
9 problem. I think that we do want to exercise as
10 much economy as we can in regard to both employer
11 and claimant resources, and in regard to hours.

12 But the driving part of this, in these
13 rules, is to get decisions done timely. And it is
14 not-- they are not devised simply for the
15 convenience of the parties.

16 We have made a policy decision that--
17 I think the statute makes this policy decision--
18 that cases have to be processed expeditiously.
19 And while we want to be able to offer an
20 appropriate time for the parties to develop their
21 cases, at the same time we can't continue to be--
22 we can't continue to allow the parties to dictate
23 the pace.

24 We now-- we've not had the resources

1 to do the things that we wanted to do. We believe
2 we're going to have those. And I don't mean to be
3 suggesting that we're going to ignore the requests
4 of the parties, but-- ignore their needs-- but
5 certainly the primary need that the statute spells
6 out is to decide-- is to get these cases decided
7 quickly.

8 MS. YURKO: One of the
9 observations, then, that I'm going to make, to
10 some extent, that that philosophy or these rules
11 don't have any kind of meat in there to help some
12 of us who are involved in dual litigation as well
13 as this because the judicial system doesn't
14 concern itself with your deadlines, which creates
15 problems.

16 The other thing is that some of the
17 issues that would help us, such as responding to
18 interrogatories or other discovery kinds of
19 things, there doesn't appear to be any kind of
20 meat to force people to respond to those things,
21 which would enable us to process our cases faster,
22 to develop the evidence that we need.

23 And the rules don't address, and I
24 don't think they're intended to, but I have

1 concerns about the enforcement of these time
2 standards as they apply to some of us who are held
3 hostage by other means and have no ability to
4 address that within the system.

5 JUDGE SMITH: The-- as I
6 indicated earlier, the rules are designed to deal
7 with 80 percent of the situations. I think what
8 you're describing are those exceptional cases that
9 are not the standard run of the mill cases.

10 And I believe I've indicated that the
11 challenge for us will be to be able to deal with
12 those cases in such a fashion that we can, to the
13 extent possible, accommodate parties.

14 Those are exceptional cases that I
15 believe you're describing, and I think the rules
16 provide adequate mechanisms for dealing with
17 those.

18 In regard to interrogatories and in
19 regard to discovery in general, I think that this
20 is one of those-- it is not the intent of these
21 rules to deal with those kinds of practice and
22 procedure issues.

23 We have practice and procedure rules
24 which state, which are there and are not amended

1 in any way by these rules. There are some things
2 that we need to do with the rules of practice and
3 procedure.

4 The Workers' Comp., Bar Committee has
5 made some recommendations which we've indicated we
6 intend to adopt. And we'll probably-- not
7 probably-- we will be making some amendments to
8 those.

9 We felt these were more important to
10 get done than those changes at this time. So we
11 wanted to get these done. It is my hope, however,
12 let me-- that when we do these rules changes, that
13 we never get to the point-- this question arose
14 yesterday-- where we're litigating process matters
15 and not merits, the merits of the case.

16 The statute requires-- or doesn't
17 require, I guess-- but it provides that cases
18 should not be decided based on technicalities.
19 And I think that there is a danger, when we get
20 involved in these kinds of discovery issues that
21 you've indicated, that we can get overly burdened
22 with those kinds of things.

23 So, and that's going to be one of
24 those things that just kind of moves depending on

1 what the necessities of the overall system are at
2 any given point in time.

3 It will probably change over time with
4 the person who's running that particular aspect of
5 an operation or the person who's in charge of the
6 entire operation. So that's one of those things
7 that just-- it's kind of a moving target, what you
8 emphasize.

9 My emphasis will be to encourage
10 people to voluntarily deal with discovery, but
11 it's not my desire to bog the resources of the
12 Office of Judges down in dealing with enforcement
13 issues, unless we have to. If we have to, we'll
14 get in there.

15 I don't think we will. I think the
16 counsel that we deal with out there are, and have
17 been, and will continue to be cooperative in
18 their-- in their handling of cases as well as
19 their recognition of what we need.

20 JUDGE DRESCHER: Any other
21 comment? Mr. Doherty?

22 MR. DOHERTY: I have a
23 question on whether the rules here are going to be
24 directed to or made available to treating

1 physicians.

2 I mean they may not know or have any
3 idea what our time frames are for taking their
4 depositions, getting their reports back and what
5 have you. And some are notoriously difficult to
6 get to hearings for cross-examination.

7 It might be interesting or helpful to
8 them, particularly those that deal on a regular
9 basis with Workers' Compensation, to know that,
10 you know, there's going to be a crackdown on
11 getting these cases completed in a set amount of
12 time.

13 JUDGE SMITH: I'd be more than
14 willing to, and have indicated in the past to the
15 medical community willingness to cooperate with
16 the medical community so that they have an
17 understanding about what the needs are here.

18 I think that's a good suggestion, and
19 I think it's something that we probably ought to
20 try to do. And at the same time it certainly
21 isn't any reason that the parties themselves can't
22 do that as well.

23 One thing I wanted to mention about
24 these rules and about how-- there are going to be

1 enormous changes in our own office in conjunction
2 with these rules.

3 We're developing paralegal writing
4 teams as a consequence of these rules, or as part
5 and parcel of these rules. We're developing--
6 we're changing our own internal processes.

7 We've had some recent enhancements to
8 the software that will, in fact, enable us to do
9 some of the things that we needed to do in order
10 to make this work.

11 So there are a whole host of changes
12 in our office that are going to mean changes for
13 the practitioners. And we recognize that, and to
14 that end, we have already arranged for two
15 seminars to be conducted through the West Virginia
16 University Office of Continuing Education.

17 They will be in December, the early
18 part of December. One is December 6th, and one is
19 December 8th. I believe the first one is in
20 Morgantown. The second one will be in Charleston.

21 And they will be designed specifically
22 toward the nuts and bolts and how-to's of
23 processing a case in our office. The seminar
24 participants will be solely people in our office,

1 or that is, the leaders of the seminar.

2 We will, hopefully, have graphics
3 available on our work flows. We will try to be
4 telling practitioners and anybody else who wants
5 to come-- this is probably something that's very
6 important for the paralegals who work in these
7 offices because I suspect that it's not unlike our
8 office.

9 Paralegals do an awful lot in our
10 office, and I'm confident they do in others. So
11 we certainly invite both lawyers and paralegals to
12 come to this.

13 It's going to be a nuts and bolts
14 seminar, how do you do it, what buttons do you
15 have to push to get something done? And it will
16 explain how we see and view these changes and try
17 to bring everybody along with us as we walk
18 through these changes.

19 They're going to be very, very
20 significant. If we do what we say we're going to
21 do-- the history has been that that doesn't occur.
22 We intend to make this happen. We intend to make
23 it happen, and I understand the proof is in the
24 pudding, and we'll see.

1 And I don't mean we intend to make
2 that happen in a Draconian sort of way, or in a
3 way that punishes the parties. That's not our
4 intent, but it is our intent to make these things
5 occur in a fashion that we can get decisions done
6 and cases resolved more quickly.

7 But we recognize that they're large
8 changes, and these seminars are for the express
9 purpose of trying to develop a cooperative
10 relationship with everybody and to show what we
11 are, and how you can work with us, and how we can
12 work with you.

13 JUDGE DRESCHER: Anything
14 else?

15 All right. In that case, I guess
16 we'll conclude this hearing. Thank ~~y'all~~ very
17 much.

18 * * *

19 (Whereupon, this hearing
20 was concluded at 10:50 a.m.)

21 * * *

1 THE STATE OF :
2 WEST VIRGINIA :
3 COUNTY OF OHIO : SS: C E R T I F I C A T E

4 I, Katherine L. Warren, Court Reporter
5 and Notary Public within and for the State of West
6 Virginia, duly commissioned and qualified, do
7 hereby certify that the proceedings had in the
8 cause aforesaid were by me reduced to stenotype at
the time and place stated herein; afterwards
reduced to Computer Aided Transcription under my
direction and control; that the foregoing is a
true and correct transcription of the proceedings.

9
10 I do further certify that the
11 proceedings were taken at the time and place in
the foregoing caption specified, and completed
without adjournment.

12
13 I do further certify that I am not a
14 relative, counsel or attorney of any party, or
otherwise interested in the event of this action.

15
16 IN WITNESS THEREOF, I have
17 hereunto set my hand and affixed my seal of
office at Wheeling, West Virginia, on the day
of 1994.

18
19 Katherine L. Warren, Court
20 Reporter and Notary Public
21 within and for the
State of West Virginia

22 My commission expires April 27, 2004
23
24

OFFICE OF JUDGES
PUBLIC HEARING

Fairmont

September 14, 1994

Name:

Address:

1. James B. White N.V.U. Human Resources
2. James J. White N.V.U. Human Resources
3. Susan York Furbee, Amos, Webster PO Box 1189 Fint WV 26555-1189
4. James J. Arlberg District 31, UMW
5. Pete Dinardi 198 Spruce Mgr. UMW Dist
6. Robert F. Cole Jr. Cole, Arlt & Cole, P.O. Box 846, Fair
7. DAN DOMERTY 178 CHANCERY ROWS MTN 26505
8. Richard Cohen Cohen, Abate & Cohen Fint
9. _____
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[illegible]

OFFICE OF JUDGES
PUBLIC HEARING

Fairmont

September 14, 1994

Name:

Address:

1. James B. White N.V.U. Human Resources
2. Sharon J. Warden N.V.U. Human Resources
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6. Robert F. Cole Jr. Cole, Abate & Cole, P.C. Box 846, Fairmont
7. DAN DOMERTY 178 CHANICERY ROW MTN 26505
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1 WEST VIRGINIA WORKERS' COMPENSATION FUND

2 OFFICE OF JUDGES

3
4 IN RE:

5 RULES ON TIME STANDARDS FOR THE WORKERS'

6 COMPENSATION OFFICE OF JUDGES

7
8 * * *

9 P U B L I C H E A R I N G

10 Before:

11 Robert Smith, Chief Administrative Law Judge

12 Alan Drescher, Deputy Administrative Law Judge

13 Thursday, September 15, 1994

14 10:00 a.m.

15 * * *

16
17 Independence Hall

18 Sixteenth and Market Streets

19 Wheeling, West Virginia 26003

20
21
22 Whereupon, this matter came on for
23 hearing and the proceedings were as follows:24

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9 Jane Glauser
10 Seibert, Kasserman
11 1217 Chapline Street
12 Wheeling, West Virginia 26003
13
14 Sue Howard
15 1310 Jacob Street
16 Wheeling, West Virginia 26003
17
18 Paul Boos
19 78 Fourteenth Street
20 Wheeling, West Virginia 26003
21
22
23
24

* * *

P R O C E E D I N G S

* * *

JUDGE DRESCHER: Good morning.

I want to welcome everyone to the hearing of the Office of Judges to receive public comment concerning proposed rules on time standards for the Workers' Compensation Office of Judges.

Just by way of a brief background, the Office of Judges was created by statute in 1991. Prior to this statutory change, whenever the Workers' Compensation commissioner made a ruling on a claim, and it was protested by either side, it was then reviewed by the legal division of the Workers' Compensation Fund.

In order to get away from one part of the Fund reviewing the work of another part of the Fund, the Office of Judges was created as a separate legal entity in order to review the decisions made by the Workers' Compensation Fund on the initial rulings on the claims.

So our office is a separate, is a separate office from the Fund, although we're still located in the same building. And I think

1 there still exists some confusion on the parts of
2 some people as to that. But we are a separate
3 entity.

4 Some of the problems that our office
5 has faced since its coming into existence include
6 the case backlog that we inherited from the Fund,
7 a chronic understaffing of our new office, and the
8 antiquated record-keeping system that we still
9 have to this day. We're trying to address all
10 those problems.

11 And one of the things that is, I
12 guess, an outcropping from addressing these
13 problems are these proposed rules on time
14 standards, which are designed primarily to address
15 the timeliness of the issuance of decisions by our
16 office.

17 I think that's fairly self-explanatory
18 as you go through those. But at this time I'm
19 going to introduce the chief administrative law
20 judge, Bob Smith, who wants to make a few brief
21 comments. And then we'd like to hear your
22 thoughts about these proposed rules.

23 JUDGE SMITH: Thank you for
24 taking time out of your schedules to come today to

1 either make comment, or ask questions, or simply
2 to listen, whatever it might be.

3 This is the third hearing that we've
4 conducted in regard to our rules. We've had two
5 previous hearings, one in Martinsburg on Tuesday,
6 and one in Fairmont yesterday. We will have three
7 more hearings the last week in September, one in
8 Huntington, one in Charleston, and one in Beckley.

9 The purpose is to receive comment from
10 whoever wishes to address the issues that are
11 raised by the proposed promulgation of the rules
12 on time standards for our office.

13 In addition to the public comment that
14 can be made at these hearings, we invite and
15 solicit anyone who chooses to make written comment
16 by the end of the month.

17 Once we have received all the
18 comments, we will examine them, take into account
19 what has been stated therein, and either modify or
20 not the proposed rules that we have published to
21 this date.

22 A couple of things have arisen in the
23 first two hearings that I wanted to perhaps
24 clarify. The time standards, themselves, set

1 forth a number of different kinds of cases and the
2 time within which those cases must be decided by
3 our office.

4 The times set forth in regard to those
5 various issues is the total time to decide the
6 case, which would include everything that occurs
7 in that particular kind of case from the time a
8 protest is filed through the final decision.

9 This is not, let me repeat, not, a
10 time frame for the development of evidence. When
11 we contemplated the establishment of these times,
12 we divided the processing of a claim into three,
13 what we perceive to be-- you may not-- what we
14 perceive to be three distinct areas.

15 The first part of it would be the
16 acknowledgment and setting of the time frame.
17 That's work within our office. The second part of
18 this overall time period would be the time the
19 parties have to develop whatever evidence they
20 wish to present in the claim.

21 And the last part of the last section
22 which we looked at to determine how long we would
23 have to take would be what it would take for us to
24 review and get the case abstracted, assigned to a

1 judge, and then decided by the judge, and the
2 decision printed.

3 So there are-- this is not the
4 establishment of a time frame. Time frames are
5 contemplated within and will be, obviously,
6 shorter than the time frames set forth in the--
7 than the time periods set forth in the rule,
8 itself.

9 We recognize-- let me back out of
10 that. We are attempting to promulgate a rule that
11 will deal with 80 percent of the cases; that is,
12 the cases that are routine and which constitute
13 the vast majority of the work that we receive.

14 We recognize that there will be cases
15 that take a longer time to develop and for us to
16 decide than these time periods we've stated.
17 Indeed, the rule, itself, contemplates not every
18 case will be decided within that time frame.

19 We recognize that parties will need,
20 in cases, extensions to their time frame orders,
21 and we will do that. We also recognize, and I
22 have indicated previously in both seminars and
23 talks around the state, that this, in all
24 likelihood, represents a substantial change from

1 the way folks do their business with us.

2 It certainly represents a substantial
3 change with the way we do business with other
4 people. One of the things that we will be doing
5 to help everyone get acquainted with this new
6 process will be to conduct two seminars in
7 December.

8 One will be in Morgantown; one will be
9 in Charleston. The topics that are addressed will
10 be the same in each. The Morgantown seminar--
11 these seminars are being conducted in conjunction
12 with the West Virginia University Office of
13 Continuing Legal Education. And we will-- I think
14 it's seven hours of CLE credit will be able to be
15 obtained for the attendance at the seminar.

16 The seminar will be a nuts and bolts
17 seminar. It will not be one of these where you go
18 and listen to developments of cases. It is our
19 intent at the seminar to explain in detail exactly
20 how cases flow through our office.

21 We'll have handouts, we'll have
22 graphics, and we will explain in as much detail as
23 we possibly can how cases work their way through
24 our office.

1 We will have present the people who
2 actually do the work, and not simply the folks who
3 think they know how it works. We'll have the
4 people who actually do it.

5 In addition to that, we will try to
6 deal with how it is that you can process your
7 cases, not just showing you how we do it, but try
8 to help you set up how you're going to handle your
9 cases; how you can contact us, who you can contact
10 to make things occur and generally try to provide
11 a mechanism that enables you to deal with us and
12 enables to us deal with you.

13 Particularly, I think it's important
14 for those 20 percent of the cases that aren't
15 going to fit the mold, those 20 percent of the
16 cases that are very labor-intensive for us and for
17 you, as well.

18 And they probably cause us all more
19 heartache and more difficulty than they should now
20 because we simply don't have in place a mechanism
21 to deal with those. It is our intent to do so.

22 So anyway, we believe that the
23 seminars can be very useful, and we really urge
24 you to consider registering for one. There will

1 be information, I assume, forthcoming from Jessica
2 Justice's office fairly soon about it, and we will
3 also be publicizing it ourselves, as well.

4 In any event, that's my preparatory
5 remarks. We have-- in the past two seminars, we
6 followed kind of a go-by-the-seat-of-our-pants
7 format. We certainly want everybody to have the
8 opportunity to make whatever comments they wish to
9 make.

10 We also want people to have an
11 opportunity to ask questions about what these mean
12 to us and how we see them. So we can proceed in
13 that fashion, or we can just receive your
14 comments, whichever it is you'd like to do.

15 When you ask questions, it's not my
16 intent to be defensive about these rules. In
17 explanation, what I will try to do is to be
18 explanatory, to illustrate why we've done
19 something. These are not finished. These are--
20 remain to be changed if they need to be. So we
21 surely do invite your questions and your comments.

22 JUDGE DRESCHER: Thank you,
23 Judge Smith. I don't know, at the first public
24 hearing we had in Martinsburg, the first person I

1 called on explained that he was just there to
2 listen, didn't really have a comment.

3 So I would just as soon ask for a
4 volunteer. You're all welcome. We'll be here as
5 long as we need to be to receive your comments.
6 One other thing, I would ask that you identify
7 yourself just for the record so the court reporter
8 will know who's speaking.

9 MR. MAZEZKA: My name is Marty
10 Mazezka, 2426 Pennsylvania Avenue, Weirton, West
11 Virginia. I'm an attorney in practice in the area
12 of Workers' Compensation. I have a request for
13 clarification regarding your comment so that I
14 fully understand the time standards.

15 Did you state that the time frame and
16 the litigation, for instance on the compensability
17 issue, and it says a decision will be issued
18 within six months, is the litigation of that issue
19 also within that six-month period?

20 JUDGE SMITH: Yes, sir.
21 Obviously there may be some cases which are more
22 complex. That question arose yesterday, as a
23 matter of fact, in regard to chemical exposure
24 issues, which can be very difficult to do.

1 Obviously those need longer time to
2 develop, or if they do, then we won't get it
3 decided within six months. It's just that simple.
4 Once the time frame gets extended, then the time
5 period is gone. We can't do it if we extend the
6 time frame.

7 And let me just address specifically,
8 Marty, in regard to compensability. What we
9 allotted ourselves was 30 days to acknowledge the
10 time frame. One of the things that we'll be
11 doing, and one of the things that's different for
12 us, and one of the reasons-- let me back up just a
13 minute.

14 We always have intended to do
15 something like this. The format, we didn't know
16 what it would be. This is the format that's
17 developed.

18 We never had staffing to do these
19 sorts of things. I mean it was just useless for
20 us to suggest that we could do this without the
21 staffing to do it, and without the software
22 mechanisms in our automated case management
23 system.

24 We've had some enhancement to that,

1 and we're now within five of six people from being
2 fully staffed. We've hired two more judges we're
3 going to hire five more within the next couple
4 weeks.

5 So we'll have enough. We'll have
6 about 25 judges overall and a full complement of
7 support staff to make everything work, we think,
8 appropriately.

9 One of the changes that we'll be doing
10 is that the time frame orders will be automatic.
11 We won't ask you if you want a hearing. You'll
12 have to ask us for a hearing.

13 When we get-- when we acknowledge a
14 protest, we'll send out, off our software system,
15 automatically, a time frame order or something
16 that will indicate what that is. So you'll know
17 within 30 days what your time frames are in a
18 case.

19 And then we figured, on
20 compensability, for example, what we've been doing
21 is 3 months concurrent time for development.
22 That's what we'll continue to do. And then we
23 have 60 days for us to process at the end, decide.

24 MR. MAZEKA: Given that, I

1 think one of the concerns that I may have is
2 probably the way I would handle that-- I don't
3 know what other attorneys would-- but I think it's
4 going to be pretty automatic that I am going to be
5 requesting a hearing when each automatic time
6 frame order was issued.

7 Given that, and assuming that most
8 attorneys will be doing the same thing, is the
9 staffing available to set timely hearings, you
10 know, given that circumstance?

11 JUDGE SMITH: We believe so.
12 One of the issues that we've dealt with here is
13 that we will set hearings within 60 days. One of
14 the things we are also putting into place in our
15 own office is the ability to schedule hearings
16 outside of just a request for a hearing. If you
17 need a quick hearing, we'll try to have the
18 ability to do that.

19 One of the further enhancements which
20 is at this time underway-- how long is it going to
21 take to put it in place is not quite known-- we'll
22 have an automated scheduler, which will really
23 facilitate scheduling an awful lot for us.

24 And when a request comes in, we'll

1 simply put it into the computer, and once a week
2 or twice a month, whatever time period we select,
3 we'll go into the computer.

4 And the computer will schedule the
5 hearings for all the venues across the state,
6 doing conflict resolution between counsel and
7 witnesses, if necessary, although most
8 professional witnesses are not coming to hearings,
9 but by deposition, and at the same time trying to
10 schedule counsel together to maximize their own
11 schedules.

12 But that's something that probably
13 won't occur-- we won't have that ready, certainly
14 not before the first of the year for us. But we
15 can still manage to do the hearings, I think.

16 MR. MAZEZKA: Now, in regard
17 to the requests for extensions, I think you
18 probably recognize that there's a different way
19 the southern part of the state practices and the
20 northern part of the state practices.

21 JUDGE SMITH: Right.

22 MR. MAZEZKA: And I don't
23 think, in my practice, I run into any problems
24 with requests for extensions. Are these rules--

1 is one of the purposes of these to tighten or to
2 clamp down on extensions that are granted the way
3 they're currently granted?

4 JUDGE SMITH: I don't want to
5 use the words "clamp down" because I think that's
6 a negative sort of phrase. What I would say is to
7 get under control the granting or denial of
8 requests for extensions.

9 Right now, we don't have the ability
10 to-- or I should say we haven't had, I think we do
11 now with the new systems-- we haven't really had
12 the ability to go out and look and see whether it
13 should or shouldn't be granted.

14 MR. MAZEZKA: Well, is that
15 seen as a problem, the way extensions are granted,
16 or is that--

17 JUDGE SMITH: In some cases it
18 is. I think that it's less of a problem in the
19 northern part of the state than it is in the
20 southern part of the state.

21 We know that there are folks who
22 simply have more than they can do. And that's why
23 they request extensions. They just can't get it
24 done.

1 We don't think that's an appropriate
2 reason to be asking for an extension. We think
3 that it is appropriate if you're having trouble
4 with development or if the case is more difficult.

5 I don't want to use the phrase "clamp
6 down," but I suspect that we will have standards
7 internal which we'll share with the practitioner.

8 We don't intend to promulgate them
9 because they're going to change from time to time,
10 which we'll share with the practitioners about how
11 we'll grant or deny requests for extensions.

12 And that's also-- you can look over
13 and see, if you look at the implementation, the
14 Section 3, we don't anticipate doing 100 percent
15 of the cases in those time frames.

16 MR. MAZEZKA: Right.

17 JUDGE SMITH: That's where we
18 say we'll be at 60 percent by July. That's some
19 reflection in our eyes about the number of
20 requests for extensions we probably are going to
21 be dealing with.

22 MR. MAZEZKA: The way I look--
23 I'm looking at these rules, I'm assuming strict
24 adherence to the time frame orders?

1 JUDGE SMITH: That's correct,
2 you can assume that.

3 MR. MAZEZKA: If that-- if
4 there is strict adherence to time frame orders are
5 enforced, I think I see a problem, particularly in
6 regard to permanent partial disability issues,
7 especially in light of the rules promulgated or
8 proposed by the commissioner in regards to the AMA
9 guides because I think those rules, if the
10 commissioner is going require strict application
11 of the AMA Guides, I think that's going to
12 increase litigation by requiring the
13 cross-examination of commissioner's physicians,
14 and employers' and claimants' physicians to see
15 which physicians followed the AMA Guides and which
16 didn't.

17 Given that, I think that would create
18 a problem, along with the strict adherence of the
19 time frame deadlines, and of course those rules
20 haven't been adopted yet.

21 JUDGE SMITH: They have.

22 MR. MAZEZKA: They have been
23 adopted?

24 JUDGE SMITH: They have been

1 adopted. They've been modified rather
2 substantially though. I did something unusual,
3 our office did something unusual in regard to
4 those rules.

5 We commented on those rules, and we
6 thought they were inappropriate because they did
7 exactly what you were suggesting. And that is,
8 they would have made it necessary for everybody to
9 go out and cross-examine on the technical pieces
10 of a report rather than on the substance of a
11 report.

12 The comment that we and other folks
13 made, as well, convinced the Performance Council
14 that they should not look at that Series 16
15 promulgation as an exclusionary effort, but
16 rather, that the-- that the guides-- the Fourth
17 Edition is what they wanted used-- but you don't
18 exclude reports now if you don't dot all the I's
19 and cross all the T's, rather, it goes to the
20 weight of the report.

21 And I think that's just going to take
22 some time to flesh out. I think what we all need
23 to do, at least what we want to do is decide cases
24 based upon the substance of what's in a report and

1 not upon the technical adherence to rules.

2 The statute does, after all, provide
3 that claims will not be determined, dealt with, on
4 a technical basis, and we intend to follow that
5 statutory mandate.

6 So again, though, I think you're
7 right; there are going to be some adjustment
8 periods. That rule has not been implemented yet.
9 The implementation of the Fourth Edition
10 guidelines has been put off until February 2.

11 And in the meantime the Performance
12 Council, as I, understand it, intends to develop
13 disability, a disability rule as well. It's
14 recognized that an impairment is simply a piece of
15 the process, and that you have to have some way to
16 get to-- and I understand where you are.

17 And I think it's just that one of the
18 challenges that we're going to have to do-- one of
19 the things that we tried not to do in these rules
20 was to lock ourselves in so that we didn't have
21 the ability to respond to people and to situations
22 that we couldn't-- I mean that we couldn't
23 anticipate.

24 Some people like to draft 50 pages of

1 rule in great detail. Then when things change,
2 you've got to go change the rule. My preference
3 is different. I prefer to be a little broader and
4 try to adapt what we do as we go down the road.

5 But that's a problem. We recognize
6 it, and I think it's something we'll have to deal
7 with it in terms of extensions. Did I deal-- in
8 an explanatory way. I don't want to be defensive
9 about what the Fund is doing, or what we're doing.
10 That's not the intent.

11 MR. MAZEKKA: I think you did.
12 One of my concerns that I suppose is alleviated in
13 apparently that the proposed rules weren't adopted
14 as written exactly.

15 JUDGE SMITH: They were not.
16 I think the only real exclusionary piece left in
17 there is, if you don't have a back form, if an
18 orthopedist doesn't have the back form, it's out.

19 They might have to use that. But
20 that's-- I don't think that's real difficult. But
21 now it's all the weight of evidence. And that's
22 what it should be, in my opinion.

23 MS. HOWARD: Sue Howard.
24 Judge Smith, are you going to have any mechanism

1 in place under your proposed guidelines that would
2 permit a party to shorten the amount of time?

3 I have had several cases, particularly
4 with compensability issues, that we've been able
5 to complete the presentation of our evidence
6 within a month simply by having the information
7 ready and getting it kicked out and onto a docket.

8 But all that we've been able to
9 accomplish by doing that is extending the amount
10 of time that the responding party has to come in
11 and present rebuttal evidence, so that we don't
12 really gain anything from that.

13 And I wondered if you could comment on
14 that.

15 JUDGE SMITH: Yes, the answer
16 to your question is yes. But let me explain how
17 that I think that will occur. We have not really
18 addressed that issue in the past, primarily
19 because we didn't have the staff to go out and
20 deal with shortened time frames.

21 We were so overwhelmed with the other
22 stuff, that we felt that was more important that
23 we didn't do that. Maybe that was a good
24 decision; maybe it was a bad decision. It was the

1 decision that we made.

2 We will use two mechanisms that I can
3 think of off the top of my head to deal with your
4 concern. One is a joint submission document. We
5 have that in existence now. We haven't dealt with
6 it well, and I'm not sure everybody is aware of it
7 out there yet.

8 It may be that, when we finally
9 promulgate, we'll attach a series of forms to the
10 promulgation that parties can use in the process.
11 At the very least, we'll use those in our seminar.
12 So that's one thing that would help.

13 Second, and in the real short time
14 frames it's not as helpful, but we intend to use
15 the show-cause order in the way that it should
16 always have been used.

17 And that is where, for example, there
18 isn't anybody on the other side. And you have--
19 particularly appropriate in permanent partial
20 disability cases where you have lengthier times.
21 Shorter time frames, it's not as useful.

22 If you have a six-month time frame,
23 and there's nobody appearing on the other side,
24 there's no point in your just sitting there for

1 six months waiting for the time frame to run.

2 We intend to dispose of the cases by
3 letting the parties tell us if there's nobody,
4 and, if there hasn't been anybody appear, we're
5 going to submit them.

6 The statute was made in 1990 to
7 provide that the commissioner have the right to
8 appear in those cases. It was further amended in
9 1993 to enhance that right.

10 And insofar as we're concerned, it's
11 not up to us to do that; it's up to us to process
12 the case, and we intend to do that. If there's
13 nobody appearing on the other side, we're not
14 going to sit there and continue to sit there and
15 let it not-- let it just wait. So two ways. The
16 best one for the short time frames is to do a
17 joint submission.

18 MS. HOWARD: I guess my
19 question wasn't well phrased. Is there a
20 mechanism to compel the other party within your
21 guidelines here?

22 Not that anyone in this room would do
23 it, but many counsel who represent employers and
24 have claimants with denied claims are content to

1 sit back and take the full five months.

2 JUDGE SMITH: And do nothing.

3 MS. HOWARD: And do nothing.

4 And I would like to know if there's going to be
5 some mechanism that claimants can use to compel
6 employers to expedite that process, not by virtue
7 of shortening their time frame, still give them
8 three months.

9 What I'm saying is, if I get my
10 evidence in in one month, I would like the
11 beginning of their time to start to run at that
12 point. And today, it doesn't.

13 JUDGE SMITH: No, and--

14 MS. HOWARD: And I don't see
15 that it does under these rules.

16 JUDGE SMITH: We have not
17 contemplated that in the rule. I did
18 misunderstand your question. And you and Judge
19 Drescher have made it plain to me what you're
20 asking. We have not contemplated that in our
21 processes, not deliberately in any event.

22 What-- if you're talking a long time
23 frame, like there may be one way to do that. If
24 you're talking about a short time frame like

1 compensability where it's concurrent three months,
2 I don't really think you're going to be able to do
3 it if they're just sitting on it, because it would
4 take us as long to react to it as it would be--
5 and get their reaction; all they would really have
6 to say is, look, we haven't really decided what
7 we're going to do yet. And I think we have a due
8 process obligation there.

9 But if you're talking about limiting a
10 PPD, for example, a motion to alter time frames
11 there may be something you could do. I don't know
12 how we'd deal with that yet.

13 MS. HOWARD: If I could make a
14 suggestion.

15 JUDGE SMITH: That's what
16 we're here for.

17 MS. HOWARD: Rather than have
18 specific time frames the way that they're phrased
19 today, if I were to submit a protest, and a time
20 order would come back that would give me from
21 September 15th to December 15th, and then the
22 employer would have from December 16th to February
23 the 15th. Okay.

24 If I can get my evidence in in one

1 month, by October the 15th, phrase the time frames
2 such that the burden would be on the party who is
3 pursuing the protest to enter notice on the record
4 that I've closed the presentation of my case.
5 From that point in time, the responding party has
6 three months.

7 Don't limit us to specific dates in
8 the time frame, but gear the time frames so that
9 the party-- the opposing party would be protected
10 in terms of amount of time they would have, but
11 they wouldn't be able to relax because they know
12 that they've been given a specific date. Just
13 give them a specific amount of time to respond,
14 not a specific date. I think it would work better
15 that way.

16 And I just-- you know, in particular
17 with compensability issues, it's not only a matter
18 of getting benefits, but I see people so many
19 times who aren't getting medical treatment, whose
20 conditions are deteriorating. If there's anything
21 that can be done at all to help that situation, I
22 would urge you to take a look at it.

23 JUDGE SMITH: I don't know
24 what we-- I don't have a response right now.

1 That's something that we will certainly look at.
2 That's why we're here is to get those kinds of
3 comments, to see if there's some way that we can
4 reasonably alter what we do to meet that kind of
5 need. I'm not going to say we can, but I have an
6 understanding of what it is you're attempting to
7 accomplish now. We'll look at it.

8 MS. HOWARD: Do you have any
9 idea what kind of time frame orders you're going
10 to be issuing within your regulatory time frame?
11 Are you going to be splitting the amount of time?

12 JUDGE SMITH: We'll be--
13 compensability will be a three-month concurrent.
14 That's what we envision right now. That's what
15 we've had.

16 The medical treatment authorization is
17 going to be like a 45-day time frame. We're not
18 going to have a time frame on reopenings. We're
19 going to give you 30 days to make argument about
20 whether the petition should be granted or denied.

21 We'll run into a buzz saw when it
22 comes to TTD on that. I'm not sure how we're
23 going to deal with TTD on that issue yet. That's
24 one that might require some evidence.

1 So when I say we're not contemplating
2 a time frame on reopenings, let me try to back out
3 of that just a bit. There are at least three
4 kinds of reopenings, one of the which is permanent
5 partial, one of which is treatment, one of which
6 is temporary total benefit.

7 Permanent partial reopening, all
8 you're seeking in the reopening is to get a
9 referral for an examination to determine. We
10 perceive that the petition, itself, should enable
11 us to say whether or not that should be granted.

12 The court set forth standard, and the
13 evidentiary standard is not great in getting that
14 done. At least the court has indicated that. So
15 we didn't-- we think that the petition, itself,
16 ought to be enough for us to determine.

17 If it's not, we'll tell them and let
18 the parties go get a new petition if that's what
19 they wish to do, rather than having serial
20 reopenings, none of which, four or five of which,
21 haven't yet been ruled on. That just get
22 hopelessly confusing in litigation.

23 Treatment, the same way. If it's
24 there, get it taken care of. TTD is a bit of a

1 more difficult problem, and I'm not just sure how
2 we'll deal with that yet.

3 But our intent is to cut short the
4 time frame on the reopenings. Our intent to get
5 these cases done. There's another intent as well.

6 If treatment, the necessity of
7 treatment, is obvious, not just for the claimant,
8 but it gets people back to work quicker if they
9 get the treatment they need so that it's a
10 win-win, it seems to me, for the parties.

11 But if we can deal with these things
12 more routinely, then we can take our own
13 resources, the most difficult resources we have to
14 obtain, and that's the judge time, and devote them
15 to the more difficult issues and the issues that
16 require or should require more examination by a
17 judge, not have them dealing with the more routine
18 things.

19 It's our intent to have medical
20 treatment and TTD, probably other issues as well,
21 looked at by paralegals. But we have to train
22 them as to what to take to a judge and not assign
23 themselves.

24 MS. HOWARD: Would it be

1 possible for, in tandem with that on the
2 administrative commissioner's level, if you were
3 to issue this expedited decision regarding
4 reopening, and it involved a TTD issue, that you
5 might be able to order the commissioner to enter a
6 protestable order awarding TTD benefits to permit
7 the employer to come back and litigate the issue
8 as opposed to solely making it an appealable
9 issue, which would come from the Office of Judges,
10 and then the only recourse would be a bump up into
11 the appeal board?

12 I mean I could see where that might be
13 a workable framework for employers to protect
14 their rights, as well as addressing the need of
15 the claimant to obtain necessary medical and
16 temporary total disability benefits.

17 JUDGE SMITH: I'd sure like to
18 hear from folks on that issue. That's one
19 mechanism. Another mechanism would be if you
20 award TTD, to do it for a very short time frame.
21 And if you do these cases quickly, you can do
22 that.

23 And that means, if you want more,
24 you're going have to-- once you, or through some

1 vehicle. It's going to be back with the
2 commissioner in any event, and you have to define
3 some way. But the exact mechanism, we really
4 haven't figured out in fine detail. That's why we
5 still have work to do to.

6 JUDGE DRESCHER: One of the
7 things that's a big change, in my opinion, as
8 contemplated by these rules will be the fact that
9 we probably-- well, we don't intend to consolidate
10 cases in the sense that we're doing it now where
11 you have multiple protests under the same claim.

12 Now, most people tend to say we'll
13 just throw everything together on the same time
14 frame, and we'll just decide them all when we get
15 to the end of the one that takes the longest time.

16 And under these rules, what we intend
17 to do is, if there's a compensability issue, we
18 want to rule on it. We don't wait six months, and
19 wait until there's a PPD issue, and then wait
20 twelve more months to do all that. We want to go
21 ahead and rule on the compensability and get that
22 out of the claim.

23 Now, that's going to involve more
24 paper work for you all. You have to keep track of

1 separate time frames within the same claim because
2 each issue will have a different time frame.

3 And it won't necessarily get combined.
4 Now, they can be combined if there's a reason to
5 do that, but just as Judge Smith was saying on
6 reopenings, what we'd like to do is get them in,
7 rule on them and get them out, as opposed to comes
8 in, then nothing happens.

9 So then there's another application,
10 and there's another application, and we get claims
11 that have four, five, six issues strictly dealing
12 with reopenings because they're denied each time
13 at the commissioner level.

14 By the time we get to the end of the
15 PPD issue, we've got six issues we have to look
16 at; whereas, if we could rule on it quicker up
17 front, maybe we could avoid some of that. So I
18 think that's going to be a big change.

19 MS. HOWARD: Could you assign
20 it back to the same judge?

21 JUDGE SMITH: I don't know
22 what you mean.

23 MS. HOWARD: If you have a
24 case that has multiple issues, and you have a

1 judge that writes a decision on the first issue,
2 becomes familiar with the file, that person might
3 not have to do the same amount of research into
4 that file.

5 And I've even had one case that I had
6 a decision on the closing of a claim and the PPD
7 issue that came out separately. The issue
8 closing-- and we had submitted evidence of
9 permanent partial disability.

10 And the closing of the claim decision
11 used our permanent partial disability report to
12 fix the maximum medical improvement. The second
13 decision, which dealt with the PPD issue, stated
14 that we didn't submit any evidence in support of
15 our protest.

16 I know it's there because it's listed
17 in the first decision. I could see where it would
18 be more efficient to have a mechanism in place
19 that you could assign a case to one judge.

20 JUDGE SMITH: That is-- I
21 think that, this system, that makes a lot more
22 sense than heretofore has. Our drive heretofore
23 has been to get things out, which means that we
24 simply don't have the time and energy to go out

1 and do those kinds of things that you're talking
2 about.

3 I think it's time that we relook at
4 this. When we contemplated this whole matter
5 three or four years ago, we really wanted to have
6 an initial assignment to a judge and follow-up,
7 and it has since proved impractical.

8 Maybe it's time for to us look at that
9 again and see, at least in the decision part of
10 it, since we're going to have different time
11 frames. That suggestion makes a lot of sense.
12 And that's certainly something we'll look at.

13 MR. MAZEZKA: Marty Mazezka.
14 I think there's a new denial on reopening that's
15 evolving, too, and that's the commissioner denies
16 the reopening of motions for permanent total
17 disability.

18 Practically speaking, I don't know
19 whether that needs to be treated any different as
20 far as the time frame deadlines. But I expect
21 that's something that might be more hotly
22 contested than your normal reopening for treatment
23 issue because the commissioner-- I've received a
24 couple when I filed motions for permanent total

1 disabilities. The commissioner's treated it as a
2 reopening and has denied the reopening and never
3 got to the merits of the issue.

4 JUDGE SMITH: The-- I believe
5 you're absolutely correct; that we're going to
6 have to take a look at that. And that's one of
7 the problems that I have with rules. We may come
8 up with some new kinds of cases, and we're going
9 to have to figure out some way to deal with it.
10 There's a new-- there's a set of rules which are--
11 is there, still?

12 * * *

13 (Whereupon, a discussion was
14 held off the record)

15 * * *

16 JUDGE SMITH: I don't know.
17 There's-- Performance Council promulgated a rule
18 in regard to the procedures for permanent total
19 disability.

20 Now, I don't know if the comment
21 period has closed on that or not. I don't recall
22 off the top of my head. But that's-- that
23 procedure set forth in there in the reopening and
24 not, that may be correct.

1 There's another kind of issue that's
2 going to come out of the way that the Fund is
3 dealing with permanent totals. What I'm seeing in
4 a lot of denials is a referral for rehabilitation.

5 And that's going to create a whole new
6 subset of issues, and we have a rehabilitation
7 time frame on here, but I'm not sure it's
8 appropriate because I'm not sure what kinds of
9 issues we're going to be faced with there.

10 I think we're going to be faced with,
11 not simply rehabilitation plan issues, but we're
12 going to be faced with TTD issues and other kinds
13 of issues as well.

14 I'm not sure yet, because we just
15 haven't seen them, what is going to be necessary.
16 And I hope, between now and the time we promulgate
17 these, we'll have a better feel for it.

18 One thing that we do need to emphasize
19 is that the time frames that we set here are
20 maximum. They-- we can deal with them in
21 shorter. We can set a shorter time frame. I
22 don't think we're locked into any particular
23 frame.

24 That was one of the purposes, not to

1 be locked in. For example, if we see that we have
2 a rehab issue, but we think that the-- that it's
3 more of an legal issue, we can put a time frame
4 out that's short.

5 And we haven't locked ourselves in is
6 what I guess I'm trying to say. That was one of
7 the things we tried not to do except in regard to
8 deciding the cases.

9 We did want to have some
10 accountability for us on that issue: It's fair,
11 if we cannot do it, that we have to explain why we
12 can't do it.

13 And then somebody can make a decision
14 about whether they want this process, or whether
15 they want something different, or they want to put
16 more resources in, whatever it is.

17 MS. HOWARD: I'm sorry to
18 monopolize things, but your savings clause-- I
19 don't quite know what to term it?

20 JUDGE SMITH: I don't know
21 either.

22 MS. HOWARD: But at the end of
23 Section 6 on the establishment of time frames
24 assumes a fully staffed and properly resourced

1 office.

2 JUDGE SMITH: Where are you
3 talking about?

4 MS. HOWARD: On Page 5.

5 JUDGE SMITH: The
6 establishment, you want to know what that means?

7 MS. HOWARD: I know what that
8 means. I'm just concerned that, if that is placed
9 in regulations as stated, that it's going to void
10 that whole section if the Office of Judges doesn't
11 stay fully staff because it goes to the
12 establishment of time frames.

13 If you might comment on that, I just--
14 I think-- I applaud your efforts in the time
15 frames in terms of getting the decisions out more
16 timely, but I don't know that that clause is going
17 to--

18 JUDGE SMITH: It was not the
19 intent of that paragraph to serve as an escape for
20 what we are proposing. Indeed, we hadn't even
21 decided at the time that we promulgated this to
22 include or not include the commentary. Sometimes
23 commentary is included in rules; sometimes it is
24 not.

1 I take your comment to be a concern
2 that, if we do decide-- tell me if I am
3 incorrectly stating what your concern is-- that if
4 we do decide to leave the commentary in, that,
5 left as it is, that paragraph could be construed
6 as an out if staffing were at a lower level; is
7 that what I understand you to say?

8 MS. HOWARD: (Ms. Howard moves
9 head in an affirmative response.) And I don't
10 know how else it would be construed.

11 JUDGE SMITH: It is not our
12 intent to have that done, and if we leave the
13 commentary in-- there's already been one
14 suggestion that we delete that, not for the same
15 reason that you have as a claimant lawyer. It was
16 from an employer lawyer, not for the same reason.
17 But it was not our intent to have the result.

18 In fact, I hadn't even contemplated--
19 it was our intent to say to folks, look, we can do
20 this, but we have to have these resources. But if
21 we don't have them-- here, it's not our intent to
22 back out of those time frames. I can make that
23 clear.

24 MS. HOWARD: I guess I

1 understand that. Is this the way that you need to
2 say that to people?

3 JUDGE SMITH: I understand.

4 * * *

5 (Whereupon, a discussion was
6 held off the record)

7 * * *

8 JUDGE SMITH: Judge Drescher's
9 indicated that this may be an appropriate time to
10 comment on the backlog. We have a substantial
11 backlog as all of the practioners in this room and
12 elsewhere know.

13 In the first part of June, we made a
14 proposal to the governor's office for a
15 supplemental appropriation to deal solely with the
16 backlog.

17 We have proposed a plan that would
18 result in, if fully implemented, the issuance of
19 an additional 500 or so decisions per month over
20 and above whatever our office's capability is.
21 This is in addition to our own office capability.

22 With about 18 judges, we're running at
23 750. With some of the things we're going to do
24 here, we'll have a lot more capability because the

1 treatment issues will not go through judges;
2 they'll go through paralegals. So that adds to
3 your ability to get cases decided by judges.

4 The plan is to ask-- what we have
5 asked for is a supplemental appropriation which
6 will enable us to hire additional temporary
7 resources, paralegals, secretaries and others as
8 necessary, in addition to hiring, on a contractor
9 basis, lawyers who are not Workers' Comp.,
10 practitioners to review and decide cases, not
11 permanent total. We'll take those ourselves, but
12 certainly the kinds of cases that we can get done
13 and get out.

14 We-- no decision has been made by the
15 governor's office on that supplemental
16 appropriation. That doesn't have to go to the
17 legislature. We're special revenue, so the
18 governor has statutory authority to do that if he
19 wishes to do it.

20 While I don't want to indicate that
21 there is any kind of commitment made, we have not
22 received any indications that our request has been
23 reviewed unfavorably.

24 But I'm not going to lock the

1 governor's office into anything. He might
2 embarrass me by saying no. I don't anticipate a
3 negative response, but again, that's the
4 governor's choice, and he has not made it yet.

5 So I will say one more thing in regard
6 to the backlog. If we don't have the resources,
7 these additional resources, temporary resources,
8 that we've requested to deal with the backlog,
9 there's no hope for us to meet these time
10 standards.

11 We can't do it. You just can't do it,
12 because we'll be so mired down in dealing with
13 what's there that we'll never get to what's coming
14 in.

15 It's our intent to separate it out--
16 not separate it physically, but to
17 administratively deal with it separately so that
18 we can continue to get the-- that we can start off
19 on a fresh foot with the protests that are coming
20 in after whatever the effective date is on the
21 rule, itself. This is not a backward looking
22 promulgation. It's a forward looking
23 promulgation.

24 MS. GLAUSER: Jane Glauser,

1 P.O. Box 311 in Wheeling, doing majority claimants
2 work and some employers work. I want to echo some
3 of what Sue and Marty had to say because they have
4 basically the same kind of practice I do, and I
5 agree with a lot of what they've brought up.

6 And you've already answered some of
7 the questions I had. I did want to know if you're
8 going to publish what these guidelines are for the
9 different types of cases, for example?

10 JUDGE SMITH: You mean time
11 frames?

12 MS. GLAUSER: Yes.

13 JUDGE SMITH: We have already
14 done that, and if you don't have it, we'd be happy
15 to make sure you get it. The answer to your
16 question is yes.

17 MS. GLAUSER: And in the case
18 of an unrepresented client, because I know we all
19 get those. They have the first hearing, and they
20 want all of a sudden to have an attorney.

21 And they don't understand until they
22 get to that first hearing, and they become
23 concerned that, oh, yes, maybe I better get an
24 attorney because I really don't understand what's

1 going on.

2 So if you have these issues of
3 reopening or whatever else that's involved in the
4 case, and you're going to make a decision within
5 45 days, and there's not going to be any hearing
6 scheduled, I can foresee an unfavorable decision
7 with no record.

8 And that's when they will come to us
9 and say I got a bad decision; I need an appeal to
10 the appeal board. And we're not going to have
11 very much of a record to perhaps work on as far as
12 the appeal.

13 And I just wondered if you had any
14 process for handling pro se claimants any
15 differently with some of these initial time frame
16 orders?

17 JUDGE SMITH: No. You're not
18 the first person to suggest it though. It's
19 something that we're going have to think about,
20 and I'm not sure how to deal with it, quite
21 honestly.

22 We not only have unrepresented
23 claimants, we have unrepresented employers as
24 well. Your mom and pop grocery store rarely gets

1 a lawyer.

2 And I don't see them in any different
3 circumstances, quite honestly, as I do an
4 unrepresented claimant. There may be difficulties
5 along those lines.

6 There was a suggestion in
7 Martinsburg-- I'm not sure-- about that. We'll
8 have to take that up and look at it. Without
9 saying what the answer will be, because I really
10 don't know, I will tell you what the difficulty
11 is.

12 The difficulty is that, in dealing
13 with mass litigation, we get 30-- well, we
14 envision it was 24, now we're up to 30-- 30,000
15 protests a year. It's really hard for us to know
16 whether somebody is going to be represented or
17 not.

18 There's a lawyer, oftentimes, there,
19 but just hasn't made an appearance yet. And it's
20 near impossible for us to make those kinds of
21 distinctions with that kind of volume.

22 And if we see that-- my view is that,
23 if we see we're really prejudicing people, maybe
24 we need to go look at it again. But I don't know

1 what the effect will be. It may be just what you
2 say. We'll just have to look at it and see, Jane.

3 MS. GLAUSER: I've just had a
4 lot of cases where that's occurred. And when
5 somebody comes in, and either their prior attorney
6 says no, we don't want to appeal, or they've been
7 handling it themselves, or all of a sudden they've
8 got to go to the appeal or produce a brief. And
9 in that space of time, they don't have a complete
10 file, and there's a lot of repercussions.

11 JUDGE SMITH: One of the
12 things I've noticed about the appeal board, that
13 this appeal board has been very willing to remand
14 those back.

15 And that doesn't offend me a bit.
16 You're right. There's still a risk while you're
17 there. A different appeal board may see it
18 differently. I don't know the answer right now.

19 MS. GLAUSER: Some of the
20 problems I've been having, too, with cases, is
21 that you all make a great decision that I like and
22 order temporary total or--

23 JUDGE SMITH: I'm glad to hear
24 somebody say we did something they liked. You've

1 made my day.

2 MS. GLAUSER: -- and it's
3 really good. And then it sits there, and you
4 write to the commissioner, and you say hey, do
5 this, and you tell your client maybe in six to
6 eight weeks, we'll have time for the commissioner
7 to process it, but it still sits there, and sits
8 there.

9 And like Sue, I would like to see some
10 implementation process or some direction to the
11 commissioner that this decision must be
12 implemented within a certain amount of time.

13 And I don't care if it's 30, or 60, or
14 90 days, or whatever might be appropriate for the
15 particular case. But so often, there is such a
16 time lag, and you tell your client well, you know,
17 six to eight weeks is a reasonable time for this
18 to be implemented by the commissioner, but nothing
19 happens.

20 And I think, if you could just tag in
21 there some direction to the commissioner. And
22 it's up to them whether they, I guess, obey that.
23 But it would be helpful, especially on temporary
24 total disability or medical treatment issues, for

1 that to be accomplished.

2 And with the good cause and the
3 extensions of the time frame orders, will that be
4 something that you publish as far as delineating
5 what constitutes good cause?

6 JUDGE SMITH: Absolutely.

7 MS. GLAUSER: Sometimes, in a
8 case, you need the medical treatment addressed,
9 and a doctor won't say what the permanent
10 disability is until he has this MRI, or until he
11 has a course of physical therapy. And it kind of
12 is a domino effect in some of the other protests.

13 JUDGE SMITH: Yeah, we have
14 some folks in the office now looking at standards
15 for both extensions of time frame and
16 continuances. And that-- when we finish that,
17 we'll publish it so that everybody is aware of
18 what the game-- what the rules are.

19 It's not appropriate for us to sit
20 back with our-- oh, you didn't do it right this
21 time. Obviously not appropriate for us to do
22 that.

23 MS. GLAUSER: In these cases
24 with the reopening decisions in 45 days or the

1 medical treatment, I think you were going have
2 like a 45, I think that's great because I think,
3 if they can address the reopening issue, they'll
4 get rid of half the litigation that's before the
5 Office of Judges that's frustrating for everybody.

6 And I was just wondering, if you did
7 have a case where there was a very poor reopening
8 application, and you thought it needed bolstered
9 by claimant's testimony or by doctor's testimony
10 for some reason, would filing like a notice of
11 deposition with the Office of Judges and a request
12 for extension early on in the case be sufficient
13 to get around that time frame order?

14 JUDGE SMITH: I think we
15 haven't yet thought about that. And I think we
16 probably need some way to do that, and I'm not
17 sure what that mechanism will be. I'm not sure it
18 has to be in the rules.

19 But we certainly-- it seems to me that
20 we need to have some mechanism, because we're on
21 such a short time frame, to let that occur. And
22 I'm not sure what it would be.

23 MS. GLAUSER: I have had one
24 where I thought the reopening application was

1 decent, and I didn't need to do. And it would be
2 denied, and then I'd say well, I should have done
3 the doctor's deposition. And I was just wondering
4 if you did have any process for that?

5 JUDGE SMITH: Not in place,
6 but that's obviously a part of-- whenever you have
7 a time frame, whenever you have-- well, in
8 reopenings, we're really not contemplating
9 evidentiary development, but you can ask for it
10 when you get your acknowledgment, whatever
11 document you get from us, whatever you call it,
12 and we'll have to just address it.

13 MS. HOWARD: Might be faster
14 to submit a new reopening application in terms of
15 a management from your office.

16 JUDGE SMITH: But then you've
17 got to start with the commissioner again, and it's
18 not our intent to make that occur, although, if
19 you believe it's a fatally flawed application,
20 that's the right thing to do.

21 Doctors sometimes don't do them right.
22 Even though the basis is really there, they just
23 haven't done it right. And with a little help,
24 they can.

1 So if you-- we encourage you all to do
2 those things as well. I mean we-- it's not a part
3 of these rules, but we're doing some things in
4 Beckley, and we're going to commence things in
5 Charleston that we hope we'll bring up here at
6 some point in time as well, pilot projects in
7 regard to motions, motion dockets and settlement
8 dockets. If it works right where we're doing
9 them, we'll bring them statewide.

10 MS. GLAUSER: Well, in your
11 suggestion about filing a second reopening
12 application, then you file it with the
13 commissioner, and then they take 30 to 60 days to
14 do it.

15 JUDGE SMITH: I know.

16 MS. GLAUSER: And the problem
17 with the commissioner's office right now is that
18 you can put together a real good reopening
19 application, and they deny it. Or you can have a
20 real bad reopening application, and they deny it.

21 And I would say 95 percent of special
22 and temporary total are denied, and the problem is
23 it just keeps repeating itself. And, of course,
24 when the claimant gets a denial or a closing of

1 the claim, they call compensation; they're
2 unrepresented. And compensation says well, don't
3 protest that, just file a new reopening
4 application.

5 So they file a new reopening
6 application, and that gets denied, and they call
7 Comp., back, and Comp., says well, don't protest
8 that, file a new reopening, and the process-- I
9 mean it's just continuous.

10 And especially with unrepresented
11 claimants, these people don't know that, if you
12 don't protest that first denial, it's never going
13 to be reviewed. And I know that's not criticism
14 your office.

15 JUDGE SMITH: You need to
16 address that to a different public hearing.

17 MS. GLAUSER: I know that, but
18 that's the problem I have about filing a separate
19 reopening application.

20 JUDGE SMITH: I understand.
21 The process isn't completed yet, or perfect, by
22 any means. The work that the Fund is doing on its
23 own assessment and the changes that they're
24 contemplating for their internal workings should,

1 if appropriately done and completed, greatly help
2 those kinds of issues. And I encourage the folks
3 in the Fund to do that. It will help everybody.
4 Help us. We won't have as many protests.

5 MS. GLAUSER: Has your office
6 also thought about doing more in the nature of
7 remands to the commissioner for further
8 development of evidence, maybe a reopening
9 application denial?

10 JUDGE SMITH: I'm not sure
11 that that's the way to go. We have discussed that
12 internally from time to time. But until the Fund
13 has its own house better-- in better order, and
14 they're in a really transition state right now, we
15 simply think that it's better to go ahead and
16 decide and go on.

17 JUDGE DRESCHER: I think we
18 have the same concerns that were expressed earlier
19 about having the commissioners or the Fund act on
20 our orders. If we remand it, we're afraid they
21 won't do it.

22 MR. BOOS: Thank you, Paul
23 Boos, 78-14th Street, Wheeling. A comment on the
24 six-month standards in the case of compensability

1 and TTD.

2 I don't disagree with those time
3 frames, but I can foresee circumstances, and I
4 hope they will be the exception rather than the
5 rule, where we will have difficulty meeting the
6 six-month deadline.

7 And I'm speaking of not a uncommon
8 instance where, if I understand the standards you
9 are proposing, one would have the automatic time
10 frame within a month after the protest; one
11 promptly requests a hearing, which will be
12 scheduled within two months, I hope actually heard
13 within the following month.

14 That gets us to four months. One
15 takes the testimony of the claimant at that first
16 hearing or by deposition at around the same time,
17 it is not uncommon-- and one requests copies of
18 medical records which would conceivably be
19 relevant both in the issue of compensability and
20 in the issue of the right to TTD.

21 It is not uncommon for it to take 30
22 to 60 days to receive those medical records from
23 physicians, bringing us right up to the edge of
24 the deadline. In those cases where a second

1 hearing is necessary, one would, of course, need
2 to request an extension.

3 I think that perhaps the key to making
4 this system work, or making it work in more cases
5 than not, will be your prompt response to the
6 request for a hearing. If the hearing actually
7 occurs within 60 days of the request, which is not
8 what you're saying in the rules--

9 JUDGE SMITH: That's right.

10 MR. BOOS: -- it gives us a
11 little more breathing space. But in any event, I
12 think that your prompt response to that request is
13 key to this working.

14 JUDGE SMITH: I appreciate the
15 comment you're making. I think you're dead on
16 target. And I really think that the real
17 challenge for us as an office, and, indeed, I
18 believe, for the practitioners as well, is to deal
19 with the cases that are going to fall outside of
20 these parameters, the 20 percent-- that's what I
21 call the 20 percent of the cases that need more
22 attention, more labor-intensive attention than
23 others.

24 And it's going to be a challenge for

1 us, and I hope we're up to it. I believe we are.
2 We're going to try to put into place mechanisms
3 which will make that occur.

4 The 60 days, and you did accurately
5 understand precisely what we were saying on the
6 definition on hearings, we really believe we can
7 do it quicker than that. We did not, at the time
8 we were writing these, have that capability, but
9 we think we will.

10 And that's why I'm not as-- I know
11 you're concerned because you see what's in
12 writing, and I'd be concerned, too, in your
13 position. I think it's entirely appropriate to
14 express that concern.

15 I hope that we'll be able to do it
16 much quicker than what we're saying here. This is
17 our outside time. But your concern is noted, and
18 indeed if we-- if a reason for the extension is
19 our own time failure, that should be granted,
20 point blank.

21 In fact, that ought to be a piece of
22 any request for extention that we have, any
23 promulgation, that it's caused by our own
24 inability to respond, then it should be granted.

1 MR. BOOS: At the present
2 time, if I request a hearing within the time
3 frame, I include in my request a request for
4 extension if I can't meet that.

5 JUDGE SMITH: Right.

6 MS. HOWARD: Are the
7 Occupational Pneumoconiosis Board hearings going
8 to be excluded?

9 JUDGE SMITH: You're the first
10 one that's asked that question.

11 (Laughter.)

12 JUDGE SMITH: Let me explain
13 where we are on that. I'm going to give you-- the
14 ultimate answer is I don't know. But I don't
15 think that's an appropriate answer to give you
16 because there's a lot more to it than that.

17 More than a year ago, I requested or
18 created what I'm calling a work group of counsel,
19 both claimant and employer, to address the real
20 serious problems that are associated with
21 occupational pneumoconiosis.

22 Those serious problems are that we
23 have-- we're receiving upwards of 350 new
24 protests, the board-- not protests, new claims

1 involving board decisions, OP Board decisions,
2 every month.

3 Because of the way the litigation
4 process has developed over the years, the parties
5 are only submitting about 150 a month. We decide
6 those quickly at the judges' level because they're
7 easier decisions to do. So I'm not going to own
8 any backlog on that.

9 But the litigation process has to be
10 re-examined. Obviously if you're deciding 200
11 fewer every month than you're getting, you have a
12 real serious problem.

13 And we've been aware in our office of
14 this difficulty for quite some time. This work
15 group has met on a number of occasions. And I
16 believe it's fair to say that it now shares my
17 concern of the problem.

18 And it's now commencing to really
19 address the issues. There are a number of
20 different issues involving OP that we have to deal
21 with. The so-called off-the-record discussions is
22 a real major issue to me, because what occurs is
23 that you come in, you're claimant counsel, and you
24 have your first series of tests.

1 You go to the board and sit down and
2 say, I'd like to have the off-the-record
3 discussion with the board.

4 Doctor Walker, is this going to help
5 me?

6 No.

7 What I do need?

8 Well, maybe this.

9 So you've taken up a hearing slot. We
10 have 4800 hearing slots a year in the OP Board.
11 To take up 4 slots for each case, you can't
12 possibly do numbers. Just do the math in your
13 head, and you'll see it doesn't work.

14 So one of the problems we have is
15 off-the-records. And I asked some folks in a
16 discussion, if we were going to promulgate rules
17 dealing with OP, would somebody please define for
18 me an off-the-record discussion.

19 And I couldn't find anybody who was
20 willing to say I think we ought to put that
21 definition in rules. When you start thinking
22 about it, it's just-- there's no such animal as
23 that.

24 What you're really getting is an

1 advisory opinion from the statutory expert
2 witness. In any event, that's one of the issues.
3 Other issues are time frames, and we'll probably
4 end up in some sort of time frame on OP cases.
5 Just what it is, I don't know.

6 The bottom line is we're not far
7 enough along in the process just yet for me to
8 feel real comfortable about putting it in. I'm
9 not sure what to do with it. I'd love to hear
10 your observations since the issue has now been
11 raised. Thank you for raising it.

12 MR. MAZEZKA: Marty Mazezka.
13 Getting to Paul's point, I think this stricter
14 adherence to time frame deadlines and the time
15 frame deadlines that are within this, it's going
16 to create more hearings and more testimony at
17 hearings, which I think is going mean that there's
18 going to be more judges on the road, and more of
19 the judges' time are going to be spent at
20 hearings. Do you have any contingencies to deal
21 with that potential problem so that the judges
22 might have more time to issue decisions?

23 JUDGE SMITH: Let me question
24 your assumption because it's not something I've,

1 frankly, taken into account or even thought would
2 occur.

3 MR. MAZEZKA: And I don't know
4 whether my assumption is correct.

5 JUDGE SMITH: The assumption
6 being that we'll need more hearings because of the
7 rules, themselves?

8 MR. MAZEZKA: Well, I think
9 at least in the short time because I think what is
10 going to happen is there's going to be a lot of
11 cases will have to be litigated within these
12 deadlines.

13 So I think that's going to mean you're
14 going to have more hearings and more testimony.
15 Now, maybe over a period of time, that's something
16 that's going to even out. But...

17 JUDGE SMITH: My own opinion
18 is that that won't occur. Again, we do not have a
19 contingency plan to deal with that directly, but
20 the rules, themselves, contemplate additional
21 judge time because, implicit in this, is that
22 we're taking a whole host of cases out of the
23 hands of judges from a decision standpoint. I
24 mean a bunch.

1 There are over 5,000 protests a year,
2 or about 5,000 protests per year to treatment
3 issues. Reopenings are slightly less than that,
4 but it's still a very high number.

5 And those will be out of judges' hands
6 except for the ones that are more complex, and a
7 paralegal sees that he or she can't deal with
8 them. So that, in and of itself, gives us more
9 judge time.

10 So I don't-- but the direct answer to
11 your question is that I guess I'm not yet ready to
12 buy into the assumption because I think that most
13 of the cases will-- I think one of the things
14 we're going to do is force a lot of cases out of
15 the system that don't belong there.

16 What occurs is, for example, and we
17 know that you have-- and I understand it-- you get
18 a PPD decision order from the commissioner. You
19 don't have the foggiest notion what the basis of
20 it is so you protest it.

21 And then you get the medical report
22 later, and you say, well, that's not so bad.
23 Well, those things don't come out of litigation,
24 and they sit around.

1 And what we're going to do is to say
2 to people you're going have to make some choices
3 here about what you do. There's an awful lot of
4 stuff that's in litigation that there's no
5 evidence on and never has been.

6 JUDGE DRESCHER: And none is
7 contemplated.

8 JUDGE SMITH: And none is
9 contemplated. They're just protested because
10 there's not enough time to contact the client to
11 see whether you want to do it or not. And it just
12 sits. But we sill have to deal with it.

13 So I think a lot of that stuff will
14 just go by the board. I don't know, Marty. I
15 hope that what you're anticipating doesn't occur
16 because it will create a problem.

17 JUDGE DRESCHER: As far as
18 this area specifically, we are contemplating
19 another judge in the Fairmont office.

20 JUDGE SMITH: There will be.
21 It's not a contemplation. There will be another
22 judge in Fairmont.

23 JUDGE DRESCHER: Any further
24 comment?

1 If not, I guess we'll conclude this
2 hearing, then. Thank you very much.

3 JUDGE SMITH: Thank you very
4 much.

5 * * *

6 (Whereupon, this hearing
7 was concluded at 11:30 a.m.)

8 * * *

1 THE STATE OF :
2 WEST VIRGINIA :
3 COUNTY OF OHIO : SS: C E R T I F I C A T E

4 I, Katherine L. Warren, Court Reporter
5 and Notary Public within and for the State of West
6 Virginia, duly commissioned and qualified, do
7 hereby certify that the proceedings had in the
8 cause aforesaid were by me reduced to stenotype at
9 the time and place stated herein; afterwards
10 reduced to Computer Aided Transcription under my
11 direction and control; that the foregoing is a
12 true and correct transcription of the proceedings.

13 I do further certify that the
14 proceedings were taken at the time and place in
15 the foregoing caption specified, and completed
16 without adjournment.

17 I do further certify that I am not a
18 relative, counsel or attorney of any party, or
19 otherwise interested in the event of this action.

20 IN WITNESS THEREOF, I have
21 hereunto set my hand and affixed my seal of
22 office at Wheeling, West Virginia, on the day
23 of 1994.

24 Katherine L. Warren, Court
Reporter and Notary Public
within and for the
State of West Virginia

My commission expires April 27, 2004

OFFICE OF JUDGES
PUBLIC HEARING

Wheeling

September 15, 1994

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OFFICE OF JUDGES
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BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION
OFFICE OF JUDGES

IN THE MATTER OF:

RULES ON TIME STANDARDS FOR
THE WORKERS' COMPENSATION
OFFICE OF JUDGES

Martinsburg, West Virginia

September 13, 1994

Transcript of the public hearing held in the
Commissioner's Room, Berkeley County Court House,
Martinsburg, West Virginia, commencing at approximately
10:00 a.m., when were present on behalf of the Bureau of
Employment Programs, Workers' Compensation Division, Office
of Judges:

STABNER COURT REPORTING COMPANY
(703) 635-9425 (703) 667-3704

APPEARANCES ON BEHALF OF
THE WORKERS' COMPENSATION DIVISION

ROBERT J. SMITH, ESQ.
Chief Administrative Law Judge
Workers Compensation Division
Office of Judges

ALAN DRESCHER, ESQ.
Deputy Administrative Law Judge
Workers' Compensation Division
Office of Judges

TAMMY G. VANCE
Director of Operations
Workers' Compensation Division
Office of Judges

STABNER COURT REPORTING COMPANY
(703) 635-9425 (703) 667-3704

P R O C E E D I N G S

1 MR. DRESCHER: Good morning. My name is Alan
2 Drescher. I am the Deputy Chief Administrative Law Judge for
3 the Workers' Compensation Office of Judges.

4 I want to welcome you to the hearing of the West
5 Virginia Workers's Compensation Office of Judges to receive
6 any comment concerning the proposed rules on time standards
7 for the Workers' Compensation Office of Judges.

8 Just by way of background, our office was created
9 by statute in 1991.

10 Prior to that time, the Workers' Compensation Fund
11 made an initial determination as to any issues regarding a
12 Workers' Compensation claim, and if there was a protest to any
13 of those decisions it was referred to the legal division,
14 which was also in the Workers' Compensation Fund, which then
15 made a second ruling.

16 The Office of Judges was created to establish an
17 independent review of that initial decision of that Workers'
18 Compensation Commissioner.

19 Since 1991, that is the role we have played in the
20 litigation process. We are a separate legal entity from the
21 Workers' Compensation Fund, although we are located in the

1 same building and we have some employees that came over from
2 the former legal division that are now Administrative Law
3 Judges.

4 I guess there are many reasons behind the
5 development of these time standards, some of which were to
6 address the problems which we, I guess, inherited, if you
7 will, from the fund at the time of our creation, including a
8 case backlog, under staffing, and an antiquated record keeping
9 system. We are trying to deal with all those things.

10 One piece to the puzzle as far as we are concerned
11 is the adoption or the promulgation of these rules which we
12 developed in the hope that we will be able to be more timely,
13 and effectively and efficiently deal with the protests to
14 Workers' Compensation claims.

15 At this time, I would like to introduce the Chief
16 Administrative Law Judge, Robert Smith, who is going to make
17 a few brief comments. Then we would like to receive your
18 comments.

19 MR. SMITH: Thank you, Judge Drescher.

20 I just have a few brief comments before we get to
21 what we came here for and that was to hear from you in regard
22 to what it is we are proposing to do.

1 The promulgation of time standards for the
2 processing of cases is something new to Workers' Compensation.
3 It is something that we have always intended to do either
4 formally or informally. This is a formal mechanism of doing
5 it.

6 But we never intended to undertake the project, and
7 until we had reached a point where we had the staffing that
8 was adequate and necessary in order to accomplish the time
9 frame, that we were about to achieve that objective.

10 We will, very shortly, have on board 25 or 26
11 administrative law judges full-time. Together with the staff,
12 that is necessary in order to be able to get the cases to the
13 judges in a manner that they can decide them.

14 And it's only after we reached that point of
15 staffing that we felt it appropriate to attempt to promulgate
16 these rules.

17 We still have yet to deal with the record keeping
18 system that Judge Drescher mentioned. That is an ongoing
19 effort on our part and we will continue to deal with that.

20 As Judge Drescher mentioned, we inherited a rather
21 large backlog of cases. And, because of the chronic
22 under-staffing that we have suffered, we have not been able

1 to, in my opinion, adequately deal with that backlog. We have
2 proposed to the Governor's office a plan to deal with the
3 backlog of cases that we have.

4 It is a plan that requires a supplemental
5 appropriation. The plan would cause an additional 500
6 decisions per month to be issued over and above that which we
7 will be able to generate with 26 Administrative Law Judges.

8 I mentioned that because my understanding is that
9 the plan will be favorably or the proposal will be dealt with
10 favorably. I mentioned that because if we don't deal with
11 that backlog there isn't any hope at all that we can meet the
12 time standards that we are going to promulgate.

13 So it's with that caveat that I turn to you all and
14 say to you, what kind of response do you have to what it is
15 we have done?

16 This is not a final product. We never intended it
17 to be a final product. We have done a great deal to genuinely
18 solicit comment from all segments of the customer base that
19 we deal with, the business community, labor community,
20 attorneys, and claimants themselves.

21 We hope that we can hear from you and be as critical
22 as you feel necessary.

1 As I indicated, this is not a finished product.

2 We want to take into account what it is, what
3 concerns you have about what we are proposing and what we
4 would like to do.

5 With that in my mind, let me see if we are ready to
6 go ahead.

7 MR. DRESCHER: I think the best thing to do is just
8 go ahead and, if you don't mind, we will take you in the order
9 you signed in.

10 We will let Mr. Kalbach go first; did you want to
11 make some public statement?

12 MR. KALBACH: I came to listen but I'll be glad to
13 make some comments as I see them.

14 MR. DRESCHER: Can I ask you to identify yourself
15 for the record?

16 MR. KALBACH: I am Joe Kalbach. I am Assistant
17 Treasurer, National Fruit Product Company, Winchester,
18 Virginia.

19 We are an employer in the State of West Virginia in
20 our agriculture orchard operations. We have operations in
21 four other states, so we compare our Workers' Compensation
22 problems with one location to the other.

1 One of our problem area is West Virginia. It is
2 very expensive to operate in West Virginia as far as Workers'
3 Compensation.

4 The pickers can go to Florida three months later and
5 say they fell off a ladder in West Virginia and they get paid
6 by the local chiropractor, which are the addresses they use
7 for their claims.

8 That doesn't have anything to do with your rules
9 here--I understand that. I appreciate your background that
10 you gave me here. I was unaware of a lot of that.

11 With that backlog, you obviously have some problems,
12 but it doesn't look very ambitious when I compare it to other
13 states as far as time frame. You get much quicker results
14 elsewhere. Colorado, Michigan, Virginia and North Carolina,
15 to be specific.

16 The rule being only as good as being adequately
17 staffed means that the rules and time frames really have no
18 meaning.

19 So, that's how I look at it. And I know that your
20 problem is to be properly funded; but not promulgated, if you
21 can't be adequately staffed, then you can't do it.

22 MR. SMITH: I quite agree with you, sir, and that

1 is why we have done it. We believe we will be adequately
2 staffed to do this.

3 The difficulty I was referring to was the previous
4 backlog that was created by the inadequate staffing. We
5 propose to plan to deal with that.

6 Let me make sure that we have the context of what
7 it is these rules are about.

8 These rules are about the litigation process and
9 what occurs afterwards. And I would say to you that these
10 rules are intended, I'm not defending them, please don't
11 misunderstand, I'm trying to do this by way of what the intent
12 of the rules is; the intent of the rules is to outline maximum
13 times and not to say these are the shortest time that
14 decisions, in which decisions will occur. It is our hope and
15 desire to have decisions occur much quicker.

16 Indeed, one of the purposes of these rules is to
17 identify the kinds of cases that don't need to have the
18 intensive development from both a claimant and an employer
19 standpoint and, thus, the cost that is there, as historically
20 has been the case.

21 What we hope to be able to do is identify the kinds
22 of cases that don't need that intensive development and deal

1 with those in a much more expeditious kind of way.

2 And included in those cases would be certainly
3 treatment issues which everybody wants to get resolved
4 quickly, as well as reopening issues. Obviously, on a fast
5 track should be compensability issues as well as temporary
6 total disability issues, for obvious reasons.

7 Any further remarks, sir?

8 MR. KALBACH: Thank you very much.

9 MR. SMITH: I appreciate what you have said and
10 having looked at some of the other states recognize that what
11 we are proposing is, by some standards, not a very quick way
12 of dealing with cases. And we hope this is not the end of it.

13 MR. KALBACH: I'm glad to see you are moving forward.

14 MR. SMITH: Thank you, sir.

15 MR. DRESCHER: Claudia?

16 MRS. BENTLEY: May I ask a question? Do you mind,
17 Bill?

18 MR. POWERS: No.

19 MRS. BENTLEY: A follow-up to that, just for my own
20 information before commenting, could you sort of give some
21 background on the status of your plan to address the backlog
22 and request for a supplemental appropriation and so forth, and

1 where that is in the scheme of things?

2 MR. SMITH: In the first of June of this year, we
3 presented to the Governor's office a plan, a fairly detailed
4 plan, that outlined what we believed was necessary in order
5 to, the resources necessary, both people and equipment
6 resources, necessary in order to be able to produce an
7 additional 500 decisions over and above what the office itself
8 might be able to generate, 500 per month.

9 We have since then furnished additional information
10 to the Governor's office and all supplemental appropriations
11 requests have to go through the Governor's office and be
12 approved by the Governor. That is where it rests.

13 MRS. BENTLEY: And it remains there as of this time?

14 MR. SMITH: As of this date, it is there. And when
15 the Governor's office deals with it one way or the other, I
16 have received no indication that it will not be favorably
17 reviewed, quite the contrary.

18 But, again, it hasn't been dealt with so I'm not
19 going to sit here and tell you it's going to be dealt with
20 favorably. It is simply in that office and is to be, it
21 obviously has to have the approval of the Governor or it can't
22 be done.

1 MR. POWERS: How big is that backlog?

2 MR. SMITH: The backlog of cases that we see is
3 approximately, that is ready to be dealt with, about 10,000
4 cases. And obvious math says 20 months. We hope to be able
5 to do it quicker than that but our goal right now is to do 500
6 a month.

7 And the office itself, when we get to the full
8 staffing levels, should be able to generate decisions at the
9 rate of about, just take 26 times 45, that's the average, each
10 judge is averaging about 45 decisions a month.

11 So whatever that number is, is what we would be able
12 to do and we hope we will be able to deal with it quicker.
13 Does that address your question, Claudia?

14 MRS. BENTLEY: Yes, thank you.

15 MR. DRESCHER: Mr. Power, did you care to comment?

16 MR. POWER: Yes, for the record, my name is Bill
17 Power and I'm an attorney with Martin & Seibert in
18 Martinsburg.

19 Bear with me; I have a some questions and comments.

20 Just to follow up, to what extent do you perceive
21 that the requirement that you make findings of facts and
22 conclusions of law are delaying the process of getting

1 decisions out more quickly?

2 I know that's a statutory requirement for you now
3 and it was my understanding that that requirement really was
4 implemented to try to speed the process up with the
5 understanding that if the parties had a better idea why a
6 decision was made, on what basis the decision was made, less
7 appeals would be filed and so forth.

8 I assume that it's actually had the opposite affect.

9 MR. SMITH: Well, first of all, let me address the
10 assumption that the statutory requirement of findings of fact
11 and conclusions of law was intended to speed the process up;
12 it was not.

13 MR. POWER: Okay.

14 MR. SMITH: It was intended as a method to
15 professionalize the work product for decisions in the prior
16 system. The decision itself was simply a recitation of the
17 procedural process with the result, and had no findings
18 whatsoever incorporated in it, so that none of the parties
19 were aware of how in the world the decision-maker, whoever it
20 was, got to the result that he or she did.

21 The findings of fact and the conclusions of law do
22 give that, if we continue to address the issue of making those

1 findings and more particularly the discussion part of the
2 decision itself, easier, more expeditious for the judges.

3 And I think that it is probably fair to say that the
4 decision-making process, as a consequence of findings of fact,
5 is longer.

6 You can generate, obviously, more decisions when you
7 simply state your result than you can if you explain it.

8 We would at this point in time be very, very much
9 opposed to eliminating that requirement. We believe it has
10 had a good impact both for the parties and for the subsequent
11 reviews of the record.

12 The Appeal Board, for example, where appeals go, now
13 can look at the decision and have some idea why the decision
14 was reached, what the findings were that went into the
15 decision. Before, it couldn't do that.

16 And, more particularly, the Supreme Court is able
17 now to do that. And, indeed, one of the people who imputed
18 that process, I don't want to say individuals, but there is
19 an entity, the Supreme Court was extremely interested, and has
20 been extremely supportive of findings of fact and conclusions
21 of law and there is some discussion being part of that
22 process. Because for the very first time they have some idea

1 about what to do with a case; A, when it gets there, and, B,
2 once it gets there it's a lot easier for them to deal with.

3 Anecdotaly, in our initial phases, we invited Judge
4 McHugh to come and speak to our Judges as a training
5 mechanism, and he gave us a list of things that he thought was
6 nice to have in a decision. We have tried to incorporate
7 that.

8 In addition to that, it wasn't too long, maybe six
9 months afterwards, when we received a call from the court and
10 the court requested that we forward to them some, just a
11 sampling of our decisions because they wanted to look at them
12 and plan their own workload. And we received no negative
13 feedback.

14 MR. POWER: I perceive it that it has helped with
15 respect to the appeals process.

16 MR. SMITH: But it does slow down the process, Bill.
17 I wouldn't try and sit here and say that it doesn't take
18 longer because it does.

19 And I think one of the things we are trying to do
20 is to develop more formatted language. Most of the Judges have
21 formatted languages, as you know from seeing the decisions,
22 now. And what we are in the process of doing is collecting

1 all of that and trying to make it a little more standard.

2 I think we can do some things that will help it.
3 For example, in the rules themselves, you will notice that on
4 medical treatment authorizations issues, we have a four month
5 time frame. The reason for that, part of the reason for that,
6 is how we are going to deal with them.

7 But we have already developed a decision model for
8 all treatment cases and it is an up or down decision. There
9 are two decisions. And we anticipate 90 percent of the cases,
10 those kinds of cases, will be dealt with by that model.

11 And to the extent that we can standardize the
12 decision process and the decision format in greater detail,
13 I think we will help deal with that issue.

14 MR. POWER: I mean, there are so many cases you can
15 cite on treatment issue. I think we all know what they are.

16 MR. SMITH: And the same applies to permanent
17 partial, permanent total.

18 One thing you can say accurately about worker's
19 compensation is that it has had a treatment from the Supreme
20 Court. And there are some new issues out there, quite a few
21 as a matter of fact.

22 But I think that standard decisions, standard form

1. decisions, most standardized decisions, is something that we
2. are pushing toward.

3. But dealing with these treatment issues in that kind
4. of fashion and we will deal with reopenings the same way. So
5. while it won't be like the old decision, it will not take as
6. much judge time.

7. Indeed, I don't even anticipate Judges writing the
8. treatment decisions. We anticipate those being dealt with by
9. a paralegal. And reopenings as well.

10. So that will free the Judges up to do more of the
11. kinds of decisions that require, we believe, a greater and
12. higher level professional expertise.

13. MR. POWER: These rules on time standards, and these
14. are not meant to substitute for all the procedural rules that
15. you have, in other words, they don't mention cross
16. examination, subpoenas, things of that nature; is that
17. correct?

18. MR. SMITH: That is correct. These are not meant
19. to deal with those procedural things, the rules of practice
20. and procedure at all.

21. There are a number of things that we have done over
22. the last year and a half that would seem, I should say, in

1 that the Workers' Compensation Bar Committee has recommended
2 that we need to go out and change those rules of practice and
3 procedure, and we will be doing that.

4 MR. POWER: The proposed rules define submission as
5 the date of receipt of a motion or date of receipt of response
6 to a motion. I don't see anywhere in here defining when the
7 response to a motion is due, how many days, what time period.

8 MR. SMITH: That comment has been made before and
9 I think it's a good one.

10 MR. POWER: Okay, and that's all you're going to
11 say, isn't it? Are you looking at 30 days?

12 MR. SMITH: I haven't even thought about it, but,
13 remember, when you look at it that it is our objective to do
14 them as quickly as we can. I think, frankly, that 30 days
15 would be, from my prospective, the outside, the outside, maybe
16 less.

17 MR. POWER: These proposed rules mention time frame
18 orders and they also set forth the various periods for
19 submission of these issues, 6 months, 18 months and so forth.
20 Are you still going to issue time frame orders if these time
21 periods are going to be set anyway?

22 MR. SMITH: Yes.

1 MR. POWER: May objections still be filed to the
2 time frame?

3 MR. SMITH: Yes, we will be doing something a little
4 different than we have been. Heretofore, we have advised
5 parties if they want a hearing instead of a time frame order,
6 we are going to abandon that process and go to automatic time
7 frames in every case. You can object to the time frame order.

8 As you know there are at least 25 percent of the
9 cases that we have, the protests that we have, there isn't an
10 opposing party. If you are a claimant representative, there
11 is no employer that ever appears in a case and takes part.

12 The statute provides that the Commissioner appear
13 in cases like that if the Commissioner chooses to do so. I
14 think it's discretionary. The Commissioner has not chosen to
15 do so.

16 So those cases remain undefended and what we will
17 do is try to use the show-cause process as a way, this is the
18 proper way to use show-causes where there's nobody there, to
19 go ahead and complete those cases because we are going to
20 automatically give a time frame to the employer. We have, as
21 a matter of due process, that requirement.

22 But if nobody appears and in cases not being

1 litigated aggressively by an employer, what we intend to do
2 is to close it out as quickly as we can.

3 If you have any suggestions on how to do that and
4 put it in here, I would be glad to have it.

5 MR. POWER: I know the hearing process to this point
6 has been used to get around those automatic time frame orders,
7 so a claim can get submitted and get to a hearing and wipe out
8 whatever period of time the responding party had, because they
9 don't show up at the hearing, and then submit it at the
10 hearing.

11 How did you arrive at these proposed time frames?
12 Just being experienced-based?

13 MR. SMITH: I think that's the best way we got
14 there. The driving factor in trying to get to the time frames
15 was multiple.

16 First of all, we wanted to differentiate between
17 those kinds of cases that needed a lot of professional
18 development, that needed lawyer time, as well as cases that
19 needed Judge time.

20 I think there's a real distinction between those
21 kinds of cases which are generally the permanent total
22 disability cases and the permanent partial disability cases,

1 and other cases. So that was one thing we had in mind.

2 We wanted to devise a process that, as much as we
3 could, took issues out of litigation. I don't mean literally
4 out, but took them out of the adversarial litigation process.
5 Because the kinds of things that were locked into litigating
6 were the kinds of things the parties need to have an answer
7 quicker than the full-blown litigation process can reasonably
8 give to them. So that was a piece of it.

9 In regard to treatment issues, we had two things in
10 mind. One was that people need to have treatment if they are
11 entitled to it, and, two, if treatment is delayed, that means
12 people don't get back to work. And if people don't get back
13 to work, the process is encumbered, you have more money
14 expended both in terms of actual compensation resources, but
15 also in terms of the resources that the parties
16 representatives have to devote to that kind of case. So, in
17 treatment, that is what we were trying to do.

18 We wanted to do the same thing with compensability,
19 frankly, because that is a threshold question.

20 We really wanted to do it more quickly than we did
21 but there are an awful lot of compensability issues that are
22 still medically driven. We just thought it was more difficult

1 to do that. We got it down, but that doesn't mean it will
2 take six months every time.

3 MR. POWER: Oh, no, I agree that some more
4 difficulties can arise.

5 MR. SMITH: And, reopening, we are trying to make
6 a legal issue. What we intend to do is to say, on a
7 reopening, here's the petition, we are going to review the
8 petition, give us your argument.

9 Now, we have to be able to set in place a system,
10 some sort of way to let parties say to us, well, this isn't
11 really that kind of case, we need to have some evidentiary
12 development.

13 But the rules are designed to deal with 80 percent
14 of the cases and not the 20 percent that are the most
15 difficult to deal with. They are designed to deal with the
16 bulk.

17 MR. POWER: Will there still be a provision for
18 obtaining an extension from a time frame?

19 MR. SMITH: Absolutely, and the rule specifically
20 contemplates that. That is also the reason that we said we
21 could not make 100 percent of the cases in the time frames.
22 We can't do it if we have extensions.

1 MR. POWER: I was going to ask you about that.
2 Under the section labeled "Time Standards," for instance,
3 "Compensability, a final decision shall be issued," et cetera,
4 et cetera, "Within six months of the date of receipt of the
5 protest."

6 MR. SMITH: Yes, sir.

7 MR. POWER: Will the time frame orders then run from
8 the receipt or the date of receipt of the protest?

9 MR. SMITH: The time frame orders will be issued
10 automatically with the acknowledgement.

11 MR. POWER: Okay. In other words, the starting date
12 under the time frame will coincide with the date of receipt
13 of the protest?

14 MR. SMITH: Probably acknowledge letter, which will
15 be about a week later.

16 MR. POWER: There could be different dates with
17 respect to when you want the decision made and when the time
18 frame order runs. Maybe I'm reading this too technically.

19 MR. SMITH: No, I think you are doing the right
20 thing.

21 Incidentally, one thing we do intend to do and we
22 have already planned through the WVU Office of Continuing

1 Legal Education is to conduct two seminars in December which
2 will be nitty gritty how-to, nut and bolts stuff. And it will
3 deal with exactly these questions. We don't have all the
4 answers to these questions ourselves because these rules are
5 not final.

6 But we are going to have a seminar in Morgantown
7 and one in Charleston to deal with just that issue. And what
8 we will do in that seminar is to graphically display to the
9 parties what our process is by slides or other mechanisms to
10 show you step-by-step what our process is and to give the
11 practitioners hints on how, what buttons to push in that
12 process to make things occur.

13 MR. POWER: I'll give you an example of what I'm
14 trying to get at under the existing system.

15 A protest will be filed, an automatic time frame
16 order will be issued at some point after that protest. And
17 on several occasions I will receive an automatic time frame
18 order under which my expiration date is a month after I
19 received the order, even though the protest hasn't been filed
20 several months earlier.

21 In other words, the automatic time frame order may
22 give me, whichever party I'm representing, three months to

1 develop the evidence. But by the time I get the automatic
2 time frame order giving me that three month period there is
3 only a month left in that period.

4 MR. SMITH: That shouldn't be continuing to occur.
5 I will not say it isn't but that's what we attempted to do,
6 was to get the people who were doing the automatics to go out
7 a month, to allow for processing time.

8 MR. POWER: That was my concern with the language
9 under the proposed rule in that you are calling for a decision
10 from a certain period of time from the acknowledgement under
11 the protest, but is the time frame order going to allow for
12 that processing?

13 MR. SMITH: The answer is yes, but not in the way
14 that I just said.

15 One of the things we had to do in order to get where
16 we are was to get the software fixed in such a fashion that
17 we could do these kinds of things.

18 We have now completed the first phase of the fixes
19 and what will occur is that the acknowledgement, which is
20 generated by the software, whenever you put in the information
21 that's needed on the initiating claim, the acknowledgement is
22 automatically generated after you enter the information by a

1 few keys strokes and it doesn't go through word processing,
2 the printers automatically print the acknowledgements.

3 The time frame orders will be the same way. Am I
4 correct, Ms. Vance?

5 MS. VANCE: That's correct.

6 MR. SMITH: Time frame orders will be generated off
7 a machine. It will not go through word processing, so that
8 should make them quicker. We have not had that capability.

9 MR. POWER: Here was my suggestion with respect to
10 the language in your time standards.

11 MR. SMITH: Let me have it, please.

12 MR. POWER: I thought maybe this may fall outside
13 your goal but perhaps you should read that a case will be
14 submitted within these certain periods of times and not
15 necessarily that a final decision will be made.

16 MR. SMITH: I understand the significance of that.

17 MR. POWER: On dependent benefits, personally, I
18 feel that four months is not long enough.

19 MR. SMITH: Let me tell you what we are talking
20 about there just so we are not confusing ourselves. We are
21 not talking about, we are talking about 104 week cases.

22 MR. POWER: Where a claim is received in permanent

1 disability award and dies from cause other than the
2 compensable injury?

3 MR. SMITH: Right.

4 MR. POWER: Okay, but that can get into litigation
5 as to whether in fact the person died from the compensable
6 injury or not.

7 MR. SMITH: If they are getting a permanent total,
8 I don't think it matters. It's an entitlement. The only
9 question is whether there are dependents or not.

10 MR. POWER: So this is only with respect that there
11 are dependents?

12 MR. SMITH: Bingo.

13 MR. POWER: I think that would need to be clarified
14 because that is not apparent from the language.

15 MR. SMITH: And you are suggesting that we have
16 another section, if you will, because I don't think we put it
17 in here specifically that deal with fatal claims.

18 MR. POWER: That's essentially a permanent total.

19 MR. SMITH: They are somewhat different.

20 MR. POWER: They are different but as far as the
21 timing of litigating they are fairly similar.

22 MR. SMITH: I quite agree.

1 MR. POWER: And then finally, reopening; can you
2 comment on that? There is a five month period for reopening.
3 Now is that reopening on any type of benefit, temporary total,
4 permanent partial?

5 MR. SMITH: Yes. Now, let me explain the process
6 that is envisioned by that time frame, so that you can more
7 intelligently address it.

8 There are three kinds of reopenings. At least three
9 kinds. There is reopening for temporary total, there is
10 reopening for treatment, there is reopening for permanent
11 partial.

12 The reopening for treatment issue is something that
13 we ought to be able to deal with based on the petition itself,
14 it seems to me.

15 And, similarly, the reopening for permanent partial,
16 you can deal with, I think, on the petition itself. Because
17 the only issue there is whether you are going to get an
18 examination. You are not making any benefit termination
19 whatsoever.

20 So, on those two kinds of issues, the process would
21 be that we get the protest, we indicate to the parties that
22 they have 30 days or some time frame within which to make

1 argument as to why it should or shouldn't be dealt with.

2 You are not anticipating evidence, but we have got
3 to give the parties an opportunity if they really believe it
4 is appropriate to develop. We don't anticipate that most of
5 those cases are going to require development. And then the
6 end of that is simply the amount of time necessary to get the
7 decision through the process.

8 Temporary total poses more complicating factual
9 issues than those two and, frankly, those are still in my head
10 and I would appreciate any comments on how we would deal with
11 temporary total on a reopen.

12 MR. POWER: I'll think about that. And those are
13 all the comments I have. Thank you.

14 MR. SMITH: When I respond, I am not trying to do
15 it in a defensive sort of way, so, please, make what comments
16 you have, good or bad.

17 We are here to get everything and we are not here
18 to defend what we have done, but to explain how we got there.

19 I like the question about you got to your time
20 frames because I think it's not apparent how we got there.

21 MR. DRESCHER: Mrs. Bentley?

22 MRS. BENTLEY: Claudia Bentley with Bowles, Rice

1 McDavid, Graff & Love, Martinsburg office.

2 I will just make my comments, if that's okay, in the
3 order they are here.

4 With respect to the definition of submission on page
5 2, I had a question when I read this in the proposal, and then
6 my question is heightened when I heard your response to a
7 point raised by Bill Powers.

8 I am wondering how the order to show cause mechanism
9 factors in. I understand in part this is raised because of
10 a discussion we had at a hearing in Martinsburg earlier. I
11 understand how an order to show cause is meant to work when
12 there is a party not appearing, not participating in the
13 process.

14 I have always been frustrated by the fact that even
15 when the parties agree, a claim needs to be submitted, and you
16 get this order to show cause in the mail. And I understood
17 from some comments you made earlier that I thought that you
18 wanted to end use of orders to show cause except where a party
19 was not appearing or participating, but I don't see that
20 reflected in the proposed rules anywhere.

21 MR. SMITH: I think it is probably not reflected,
22 but it is still our intent to do that.

1 To me, the order to show cause is a very specific
2 kind of document that needs to be dealt with in specific
3 circumstances, and we did not say that specifically.

4 But I don't think there is anything in here that
5 prevents us from doing it and it is precisely our intent to
6 do that.

7 It is our intent to let the parties litigate more
8 themselves but within the frame work of the time.

9 One of the things that we have contemplated but
10 have not done in this is to attach to it a series of forms
11 that parties can use. We have given those out a lot and it
12 is our intent to use those more. One of the forms we have
13 given out is a joint request to submit.

14 MRS. BENTLEY: Okay. I know in the definition of
15 submission it refers to motions or responses to motions, but
16 my experience now is if Bill Power moves to submit and I say,
17 I don't respond, or that you still get an order to show cause?

18 MR. SMITH: You probably are still getting that but
19 that is not something that will continue when the effective
20 dates come in.

21 But, let me explain something: submission is used
22 in these rules. I really think I may have managed to confuse

1 things. Submission in these rules does not mean what the
2 parties have always perceived it to mean in terms of
3 submitting a case.

4 Go back and look at the circuit court rules that
5 all the circuit courts have.

6 In Kanawha County they call it the rocket docket.
7 If you will look in there, this word is taken from those rules
8 and it's the submission of an issue on a motion; it is not
9 submitting a case. It is just submitting, when you consider
10 that particular motion or other thing to be in front of you.
11 That is all submission is. It does not have and is not
12 intended to have any necessary overt relationship to the
13 phrase "I'm ready to submit my case."

14 MRS. BENTLEY: I assume it was a submission of an
15 issue and I am getting orders to show cause when issues aren't
16 submitted.

17 MR. SMITH: We are probably still doing that.

18 MRS. BENTLEY: Thanks for that clarification.

19 Sometimes you do submit a whole case or all the issues in
20 litigation; other times you just submit one issue, and I
21 recognize that.

22 MR. SMITH: One of the large changes that I think

1 is inherent in these proposals is that we don't intend to
2 consolidate cases much any more. We don't intend to, but the
3 way these things are done there would be very little, not as
4 much consolidation as historically been the case.

5 MRS. BENTLEY: You mean consolidation of issues of
6 one time frame or do you mean consolidation of claims as in
7 a permanent total?

8 MR. SMITH: The former, consolidation of issues in
9 one claim.

10 MRS. BENTLEY: So we will have many, many time
11 frames.

12 MR. SMITH: You may well.

13 MR. DRESCHER: Right now, the practice is when you
14 have multiple issues in a claim, generally speaking, you just
15 throw everything together to the longest lasting time,
16 whichever issue requires the most time, you put everything in
17 together.

18 Under these, if you have, for example,
19 compensability, we don't want to tie that up with your
20 permanent partial disability issue. We want to go ahead and
21 decide compensability.

22 Obviously, if the Judge would find us not

1 compensable that would do away with the need to continue on
2 that track so, there's going to be a little change in the
3 process.

4 MR. SMITH: And it also lets us deal with treatment,
5 which I think is a vitally important issue. We have about
6 5,000 protests to treatment every year, either by employers
7 or by claimants. And that is a huge number. What we want to
8 do is to get those cases decided. It will take two to three
9 years, for God's sake.

10 MRS. BENTLEY: Under the implementation of rule
11 language, the dates and percentages and so forth, I am
12 assuming, perhaps unfairly, that this weaning in is something
13 that was taken from the circuit court time standards, or at
14 least it is similar to that idea of the manner in which the
15 Supreme Court is administrating its time standards as to the
16 circuit court. Is that a fair observation?

17 MR. SMITH: It is a partially fair observation. The
18 concept was taken directly from there and I think the language
19 is probably similar.

20 We also suspect that these rules might go to the
21 Supreme Court and we figured that if they were in the format
22 the Supreme Court used they might look on them a little more

1 favorably.

2 I am not going to try that in the rules, but aside
3 from the form, the circuit court is different from ours and
4 they are different in one very, very major sort of way.
5 Circuit courts can settle out all their cases, every one of
6 them. And that makes it almost impossible for them not to
7 meet the time standards.

8 On the other hand, we can't settle, except a very,
9 very small percentage of the cases that come to us.

10 And so we recognize that virtually every case goes
11 to decisio,n and we also recognize that there is going to be
12 a lot of times when parties, one or the other, is going to
13 need more time.

14 So what this does is to recognize that there will
15 be additional time needed by the parties. And when additional
16 time is requested you can't possibly meet those time changes.
17 Those time standards are designed to deal with the case that
18 goes through the process.

19 MRS. BENTLEY: So that is why you don't get to 100
20 percent?

21 MR. SMITH: Never get to 100 percent, you can't,
22 not the way we have done this.

1 MRS. BENTLEY: My question, I guess, is, I wanted
2 to understand if I was making a fair observation, and beyond
3 that I wanted to get to what is my ultimate concern, always.
4 And that is enforcement of these things. If you are going to
5 have a rule, enforce it.

6 It's just not fair to the litigant, our client, and
7 it's not fair to lawyers to not enforce a rule that you have.

8 And I know that Ted Philylay, the administrator of
9 the court, and he is visiting circuit judges all the time who
10 are not doing what they are meant to do, and he is making
11 adjustments. And who is going to assume that role in the
12 scheme of the Office of Judges, the enforcer?

13 MR. SMITH: I don't know how to answer that.

14 MRS. BENTLEY: That has always been a concern of
15 mine.

16 MR. SMITH: I think it is a fair concern. I think
17 the history of Workers' Compensation, whether it be with the
18 old fund and the litigation process there, or in part with
19 our office, has been the promulgation of rules and no
20 follow-up and no enforcement.

21 It is my intent and the intent of the people that
22 will be dealing with this in our office that we will do these.

1 These are not being promulgating just to satisfy folks'
2 criticism.

3 Because what we are doing here is saying, here they
4 are, folks, if we don't do it, come get us. So we are going
5 to have to enforce them. If we don't enforce them then they
6 can't work.

7 The enforcer is going to be the Chief Judge, whoever
8 that is, whether it is me or somebody else doesn't matter;
9 the enforcer is the Chief Judge. If the Chief Judge doesn't
10 make it occur, it won't occur.

11 One of the things I have consistently said is that
12 we want to enforce the rules, but we also want to have the
13 capability of performing under them ourselves.

14 It is hardly fair for us to make the parties, and
15 I am not talking about lawyers here, I am talking about
16 claimants and employers, it is hardly fair for us to make
17 parties live with rules if we don't live with the same rules.
18 It's not appropriate.

19 So what I have always said is that we are not going
20 to be real strict enforcers of the rules until we have the
21 capabilities of meeting these goals. We time standard all of
22 our employees in the time frame and put an activity standard

1 on our employees, judges, secretaries, paralegals, everybody.
2 And that is the only way we are able to determine how things
3 are accountable and who it is that needs to do what.

4 So it is our intent to enforce these and this is
5 the major cultural change that I think in addition to just
6 getting cases on quickly this will be a major cultural change.

7 It is, in part, the reason we are having these
8 seminars. I have always told counsel that we won't do it
9 until we let you know what it is and what is expected. We
10 think we will be able to do it and we are going to expect
11 counsel to.

12 Now, by the same token, the statute very plainly
13 says that claims should not be dealt with on a technical
14 basis.

15 I think that we have to strike some balance
16 somewhere between that statutory requirement and the overall
17 requirement, that if you are going to have rules then you have
18 to enforce them. And that is one of those things that are
19 going to go back and forth on, depending on the case itself
20 and probably depending on the philosophy of any given office
21 at any given time.

22 MRS. BENTLEY: I guess on that point, you know, the

1 Appeal Board rules with respect to dismissal of an appeal. An
2 appellant brief is not filed, for example, excludes that rule
3 as to pro se appellants?

4 MR. SMITH: That is correct.

5 MRS. BENTLEY: And it seems to me that some language
6 like that in these rules may be a mechanism that would allow
7 you to strike a balance. Because there is no excuse for a
8 claimant or an employer, either one, represented by counsel,
9 borrowing some difficulty with getting something scheduled,
10 something like that. But, I mean, if those claimants and
11 employers are represented, you ought to hold their feet to the
12 fire.

13 MR. SMITH: I think it's a good suggestion we put
14 something in here about pro se folk.

15 But if you recall the Supreme Court I think also
16 said that you cannot dismiss a claim because counsel failed
17 to file a brief, cannot dismiss an Appeal Board brief. I
18 think that is what that case said.

19 MRS. BENTLEY: You are talking about that Linda
20 Nelson Garret case?

21 MR. SMITH: Right, and there is another older
22 Supreme Court decision, Allen, maybe, I'm not sure of the name

1 of it, that deals with dismissing a claimant's claim in a
2 litigation context. I think we have to be mindful of that.

3 I think what the court was saying in the Allen case,
4 however, is more that you have to put people on notice of what
5 is going to occur and not simply that you cannot do it; that
6 if you are going to do it, you have to put them on notice that
7 that is what you are going to do. And that is fair. So we are
8 going to try and do that sort of stuff.

9 Now, I don't mean we are going to start cracking
10 everybody's heads. I think there has to be a phase-in
11 process. We are talking about a cultural change, but there
12 probably will be some pain involved for practitioners, as well
13 as us.

14 MRS. BENTLEY: It's frightening. I mean, we have
15 got thousands of claims in our office and it is frightening.

16 But I think if there is going to be a rule it has
17 to be enforced, whatever that rule is, or it is confusing.

18 MR. SMITH: I hope that people understand that.
19 When we started down the road on this several months ago, in
20 fact, I came here and I said that very thing; that if we do
21 this, folks, you need to be aware that it is going to get
22 enforced. And that's a fact.

1 MRS. BENTLEY: We take you very seriously. We
2 started documenting our files for interrogatories and so
3 forth, so we can file our motions to compel. We take you
4 seriously.

5 MR. SMITH: The one thing I don't want to be in,
6 the one posture I don't want to be in, and that is that we
7 spend more time litigating the process than we do the claim.
8 I don't want to get there. This should not be that kind of
9 dispute resolution process.

10 And while we are at it, one of the things that I
11 have already been talking about is settlement. And I think
12 settlement has to be a part of the dispute resolution process
13 in some way, but I don't believe that I think we have to amend
14 the statute substantially in order to do that properly, from
15 both the claimant and employer standpoint.

16 If I were a claimant I wouldn't settle cases now.

17 Now, having said that, I want you to know that one
18 of the things we are going to be doing is, this really doesn't
19 have a lot to do with the rules itself, but perhaps it does
20 in terms of enforcement, but one of the things we are going
21 to do is to schedule settlement dockets.

22 We are starting a pilot project in the Charleston

1 area first and we will be scheduling settlement dockets.

2 MRS. BENTLEY: I think that's a good idea. I am a
3 believer in that. The Northern District Pilot Project, people
4 came kicking and screaming, thinking they would never settle,
5 and you get a successful settlement under your belt and you
6 begin to feel better about it, and you may look at other
7 claims as having settlement possibilities.

8 MR. SMITH: I still think, in order to be completely
9 successful, the statute has to be amended to provide, not just
10 to provide for finality of settlements, but I think in order
11 to settle a case you also have to, if you are talking about
12 a permanent partial, and that's more than 45 percent of our
13 litigation is permanent partial disability; if you are going
14 to settle those cases, you have got to settle disability and
15 not impairment. And that is what we have been dealing with
16 for years, is impairment, not disability.

17 MRS. BENTLEY: On page 3 of the rules, hearings, it
18 would be helpful to continue to have somewhat standard hearing
19 dates in locations. It would be nice to know the third
20 Thursday or second Tuesday, whatever it is.

21 And when additional hearings are added and
22 additional docket, I know that always happens--it has to

1 happen to get rid of the backlog--but to the extent you can,
2 if you can standardize those dates, a standard date or even
3 a standard supplemental date, so we can protect our calendars
4 and make sure there is appropriate coverage, it might be pie
5 in the sky, but having that standard date is extraordinary
6 helpful.

7 MR. SMITH: Quite the contrary, I don't believe
8 that's pie in the sky at all.

9 One of the enhancements to the software that we are
10 in the process of making is an automated scheduler. It is a
11 module that will handle the scheduling of hearings on an
12 automated basis and will be touch with your office, Claudia
13 and Bill, because what are going to try to do is establish
14 fixed dates where we can do those things.

15 And, in addition to that, Ms. Vance just looked at
16 me with an eye that says, I'm getting ready to say too much,
17 because it's not done yet. And it will also do conflict
18 resolutions automatically. We will be able to match people
19 together.

20 MS. VANCE: Part of the problem has always been,
21 especially in this day now, being able to maintain a permanent
22 hearing location site, because we have to work our schedules

1 in with the rooms that are available to us. So that is why
2 we sometimes jump around and go from different locations to
3 different dates. And we have to secure a permanent hearing
4 location that we can all use.

5 MR. SMITH: And any help you can be in that regard
6 would be greatly appreciated.

7 MRS. BENTLEY: I suspect you could get an awful lot
8 of help if we knew what you needed. I think in the past we
9 have had pretty good success. Our local Bar Association might
10 get locations, so let us know if you help.

11 MR. SMITH: We will. We have not had good success
12 with circuit courtrooms because the circuit judges bounce us.
13 And they should; those are theirs.

14 We can schedule in the circuit courtroom and get
15 bounced and that always upsets everyone.

16 If we could find someplace, not here necessarily in
17 the courthouse, where we can do hearings every week on a fixed
18 basis, we would love it. We have not been able to find such
19 a place, have we, Ms. Vance?

20 MS. VANCE: Correct.

21 MRS. BENTLEY: Really, let us know, the Bar
22 Association---

1 MR. SMITH: Consider yourself on notice. Please
2 think about it.

3 MRS. BENTLEY: Okay, our Bar Association just formed
4 a permanent committee to assist the Kelly offices in making
5 location determinations and outfitting physical buildings and
6 so forth. And that might be a good committee to begin looking
7 at that.

8 MR. SMITH: In that regard, we always look at not
9 to have to pay money to have hearings. There are hearing
10 sites where we pay.

11 MR. POWER: Judge, is that a problem in the areas
12 where you have a field office?

13 MR. SMITH: Yes.

14 MR. POWER: It is?

15 MR. SMITH: Not as much of a problem there. We have
16 an office here in Martinsburg. That office is shared with
17 Unemployment Security, as well. And that poses some
18 scheduling problems. The combining of those offices has not
19 been the panacea for us that might have been for other folk.

20 So, historically, where we had the Worker's
21 Compensation field office we didn't have so much problems, but
22 now with the combining of Unemployment and Workers'

1 Compensation, that has created a difficulty for us. It solves
2 more problems than it probably creates.

3 I am not trying to be critical of it. It just
4 happens to have fallen on us, is the problem.

5 MRS. BENTLEY: We'll take that on as a project. We
6 will see if we can get a list of some possibilities. Under
7 the time standards, I concur with Bill's point about a need
8 to do something with the language, "A final decision," and
9 use the word "Submission." Because if the final decision is
10 due in six months, that doesn't mean the parties have six
11 months to litigate this case unless you all need any time to
12 issue your decision.

13 MR. SMITH: You are quite correct.

14 MRS. BENTLEY: I think that is a critical point.

15 MR. SMITH: Tell me what you are suggesting.

16 MRS. BENTLEY: I would like to see that language
17 that the claim will be submitted for decision within six
18 months or whatever and that the Office of Judges will then
19 issue a final decision within whatever time it is to take.

20 MR. SMITH: The statute says within 30 days.

21 MRS. BENTLEY: I know the statute says 30 days.

22 MR. POWER: We know that, Judge, believe me.

1 MR. SMITH: So do I.

2 MRS. BENTLEY: I think the regulation needs to say
3 30 days but I think you need to distinguish between submission
4 and litigation time and your decision-making analysis and
5 decision writing time.

6 MR. SMITH: We would hate to follow up an
7 unreasonable statute with an unreasonable regulation.

8 MRS. BENTLEY: Well, until it's changed,
9 unfortunately, we are stuck.

10 MR. SMITH: I don't intend to suggest that it be
11 changed. Other people may, but I don't. It is hard to meet
12 the 30 day; the 30 day thing is hard to meet, and what we have
13 tried to do is to work a bit of compromise with all of that
14 kind of language by defining final hearing as an order to
15 submit.

16 And one of the things I didn't mention when Mr.
17 Powers asked how we got to these time frames, and I didn't
18 mention it only because I forgot, what we tried to do was
19 break the process from protest to decision into three distinct
20 areas.

21 One was the front end piece; that is, getting the
22 case acknowledged and time framed.

1 Second was the litigation process itself, what the
2 lawyers do with the case and, third, the administrative time
3 that we needed to deal with the case at the end after the
4 parties were finished to get a decision concluded.

5 And what we did, we took about a week of a dozen
6 peoples time, just went off and sat down and analyzed our
7 processes and what we were going to be, we hoped, what we
8 would have, and tried to figure just how much time we needed
9 to do these things.

10 And there is some optimism on our part.

11 MRS. BENTLEY: So these numbers take into account
12 all of those three segments?

13 MR. SMITH: Takes into account all three of them.

14 MRS. BENTLEY: So, for example, on compensability,
15 as it stands now, a month is gone at the front end, getting
16 our orders and so forth and there is a month gone on the back
17 end for your decision making, and so we are left with four
18 months to do our part; is that how you are looking at it?

19 MR. SMITH: What we are doing now, I think we are
20 doing a three month concurrent time frame.

21 MRS. BENTLEY: I want to talk about that, too. But
22 I think you really do need to distinguish submission and final

1 decision. That is a concern because now you are not going to
2 be giving us time frame that says six months.

3 MR. SMITH: I didn't intend this to be a six month
4 time frame. I intended this to be a three month concurrent
5 time frame. And three months for us to get the rest of it
6 done.

7 MRS. BENTLEY: I think, when you explain it, that
8 would be a good point to make because I think a lot of people
9 who read this will assume that means they are going to get a
10 six month time frame.

11 In my mind, I thought that was not how it could be
12 happening, but I am afraid that is how this may be interpreted
13 by people reading it.

14 MR. SMITH: Thank you for that. There is always
15 ambiguity when you write something.

16 MRS. BENTLEY: On the issue of the automatic time
17 frame orders, I think they are a good idea. It's silly to
18 have a hearing to set a time frame.

19 I have a problem with one getting it late. As Bill
20 said, that is a very real problem. You get the thing and your
21 time is all gone. I don't know if it is a mailing backlog or
22 what the problem is there, but I get things very late and my

1 time is really eaten into by the time I get it in the mail.

2 They are dated late.

3 MR. SMITH: Tell me what you mean.

4 MRS. BENTLEY: On being dated late?

5 MR. SMITH: Are they dated substantially after the
6 date of the document?

7 MRS. LAYMASTER: If it is dated August 28th, she
8 might get it August 29th or August 30th. But our time is due-
9 --.

10 MR. SMITH: Okay. Claudia, I think that is the same
11 issue that Bill raised. And it is a real issue.

12 What we will be doing by the time this is done with
13 the computer enhancement, we will have the time frame order
14 come off the system.

15 MS. VANCE: There is a possibility of that and we
16 are still working on this. Whenever you enter in your time,
17 that is, to acknowledge the protest, you can say three months
18 or six months, and you can calculate that from the day of the
19 acknowledgement letter, and just send it out with the
20 acknowledgement itself. Then, that way, you didn't have to
21 wait on the time frame notice.

22 MRS. BENTLEY: That would be super if we could have

1 that. I have a problem with concurrence, time frames.

2 I raised this point to one of the Administrative Law
3 Judges that I have a great deal of respect for them and the
4 comment back was, Claudia, these things aren't meant to be
5 used as a strategy tool. And I thought, that bothered me
6 because I think it is a fact of life that lawyers do what
7 lawyers feel they need to do to advocate on behalf of their
8 client.

9 If I am the protesting party and I have got a
10 concurrent time frame on some big juicy issue, I am not going
11 to give the other side perhaps my report or my testimony on
12 the first day; I may wait until the last day.

13 I think lawyers may do that for strategy reasons,
14 to effectively deny the other side the right to cross examine,
15 and I think lawyers ought to also do it because of scheduling.
16 Don't do today what you can do tomorrow. If I have got a big
17 brief due today, and my evidence is due next week, I am going
18 to work on my brief today and I am going to mail my evidence
19 next week. That's reality and these concurrent time frames
20 fail completely to take that into account.

21 Now, I have been very lucky. If I get one, I will
22 call the other lawyer and we work it out. I have not had an

1 offensive experience with somebody refusing to tell me what
2 their plan is so I get my cross examination and my evidence
3 in line. But that is a very real possibility. It is not
4 unethical for the lawyer to do it. It may be the best thing
5 the lawyer can do for his or her client.

6 And I think the rules need realistically to deal
7 with that and not say to lawyers, these things aren't meant
8 to be used as a strategy tool. Lawyers use what lawyers can.

9 MR. SMITH: I'm not going to own or disown what any
10 Judge says to you. You will have to decide for yourself
11 whether or not that represents policy of the office.

12 MRS. BENTLEY: And I'm not saying it does, but it
13 was a concern to me because I think you have to be realistic
14 when you look at these things.

15 MR. SMITH: Let me say that these rules and our time
16 frames have not been developed in a vacuum and have not
17 evolved in a vacuum either. When we initially set them, the
18 time frames I'm talking about now, not the rules, but the time
19 frames are inherently a part of these rules, as I have
20 explained to you.

21 And you can now go out probably and see what kind
22 of time frames we are contemplating.

1 But that doesn't mean we won't change them,
2 incidentally. That is why I said very carefully, this is a
3 maximum time, this is not a minimum short time.

4 So we developed the time frames in cooperation and
5 in consultation with the Bar all over the state, and that was
6 three years ago.

7 And after that, we had Lyons, and in the Lyons
8 decision, all of which is dicta, as I understand it, 26 pages
9 of dicta, and the author is not on the court any more.

10 Nevertheless, it is there, and what the decision
11 said is "do concurrent." The Court didn't understand the
12 point we were making.

13 But, by the same token, what we have tried to do is
14 to do a compromise, if you will, to do certain kinds of issues
15 concurrently and some consecutively. We intend to continue
16 to do permanent partial, and permanent total on a consecutive
17 time frame basis. Other issues are concurrent.

18 MRS. BENTLEY: Medical issues on compensability, it
19 is very difficult to deal with those on a concurrent time
20 frame, I think. I am not opposed to the time period. If you
21 want to stick with the three months, why not give the
22 protesting party two or two and half, and give the responding

1 party two weeks, or something, to sit back and think and
2 collect what they need to collect.

3 MR. SMITH: Our experience is that when a claimant
4 protests a denial of treatment, the employer never, almost
5 never, and I'm saying in excess of 95 percent of the time,
6 represented or not, doesn't participate in the litigation.
7 And if you are not going to participate, why give them a time
8 frame? That is one.

9 Second, our other experience is and in a very large
10 percentage of the cases where employers protest the granting
11 of treatment authorizations they don't do anything.

12 MRS. BENTLEY: When it is related to a
13 compensability complaint or something.

14 MR. SMITH: Either that or what occurs is that the
15 reality slips in and the parties recognize that you cannot
16 protest it, go out and get the medical evidence that is
17 necessary to support the protest to pay a lawyer and have that
18 turn out to be less than what it would cost to start with.
19 That does not make any sense, necessarily. But that is the
20 way the system is. And it is just more costly for an
21 employer.

22 I am not endorsing that kind of system. I am simply

1 saying that is what we had. So we know they don't do it, so
2 we are going to delay with it, as it is.

3 On treatment, on other issues, that's different.

4 MRS. BENTLEY: I understand your point and there
5 probably is a place for concurrent time frames. I wanted to
6 make a point that I think it should present a very real
7 problem, and if that were to occur, it would be a most
8 unfortunate resolve, because one side has been effectively
9 denied their opportunity to participate in the litigation.
10 I think that is something that none of us would want.

11 MR. SMITH: Well, it is certainly not our intention
12 to deny people an opportunity to participate in litigation.
13 And I think that lawyers do a very good job of strategizing
14 within the time frames we give. You can use them for whatever
15 reason you want.

16 Our purpose in making time standards is to do what
17 we are supposed to do, and that is to provide a service to
18 claimants and employers that allows them to have these
19 disputes in some sort of mechanism that doesn't, both take
20 forever and, secondly, cost a fortune.

21 MRS. BENTLEY: The last substantive point under time
22 standards that I have is, I am concerned that when you

1 standardize things, when anyone does that, there can be
2 difficulties in the folks who are meant to enforce those time
3 standards, having them be flexible and responsive to parties
4 who may want a change.

5 I can't tell you how many times I have, in
6 conjunction with the lawyer on the other side, wanted to do
7 something with an automatic time frame order and be presented
8 with a memo that said, here are our standard time frames,
9 there is no reason to vary from that.

10 Bob Williams and I say there is a reason to vary
11 from that in this claim. We are the lawyers for the parties
12 and we want to do it when we have been told no. And I think
13 that is not letting the parties tell you how they want to
14 litigate the claim.

15 I am not necessarily being critical of the ALJ
16 because they have got these standards they are supposed to
17 live up to, but I think that inherently there is maybe a
18 conflict there with the Administrative Law Judges trying to
19 abide by the time standards and live up to their productivity
20 standards and comply with internal memos or whatever that
21 dictate time period.

22 There is a conflict between needing to do that which

1 I want to do, I think if I had that job, and letting the
2 parties talk. That is more of an observation. I don't have
3 a solution for it. I don't really think there is one.

4 But I think it's an observation that everybody needs
5 to be mindful of.

6 MR. SMITH: I appreciate that and I think that is
7 one of the historic difficulties in any mass litigation
8 process.

9 You can define a system to deal with 80 percent of
10 what you get but dealing with that other 20 percent is labor
11 intensive. And you have to establish mechanisms to do that,
12 and that's a real challenge for us.

13 Mass litigation is terribly difficult to deal with
14 and it is even harder to deal with individual exceptions to
15 what it is that you have, but you have to do it.

16 And we will continue to have difficulty with that,
17 I don't care how hard we work on it. But it is our intent to
18 deal with it and try to accommodate the parties. There is no
19 reason for us not to, in my opinion, unless it is just obvious
20 that--one of the things we do know, and I am not suggesting
21 this is the situation, it is always dangerous to deal with
22 anecdotal issues.

1 But one of the things that I have noticed about
2 Workers' Compensation practice among counsel, and it is not
3 just Workers' Compensation, it is the general practice, and
4 having been there not that long ago, recognized the necessity
5 of it, and, that is, you don't crowd the other side
6 necessarily, because it may be you the next time.

7 And I understand that and you can't ever--it is a
8 mistake for us to get into the business of mechanistically
9 dealing with anything.

10 But it will continue to be a challenge to us and all
11 I can do is to assure you that we will try to deal with it.

12 And I appreciate your comments.

13 MRS. BENTLEY: The last comment I want to make is,
14 I have a concern, too, as does Mr. Kalbach, with the proviso
15 in here about the establishment of the time frames, assuming
16 a fully staffed office and so forth.

17 I think that is a realistic observation. But my
18 concern is if the rules are in place and you have your 26
19 ALJs, and the number of paralegals, and so forth that you
20 need, and equipment that is running, you are going to lose
21 ALJs; at times you are going to have periods when you are
22 advertising for ALJs and can't get them and all your paralegal

1 walk off the job. And to what extent, if your office has to
2 become lax and I don't mean that in a negative way, but falls
3 below its own expectation because of staffing problems, are
4 we going to get a notice that we, too, can take a vacation?
5

6 I think there needs to be a little give and take
7 there because, for example, in my office, if we have a lawyer
8 leave, there is just another lawyer there that sits up all
9 night and covers their work until we get someone.

10 And I know that your office operates a little bit
11 differently than that because we are in the private sector,
12 but I think that proviso is really pretty generous.

13 MR. SMITH: We are not going to change the time
14 standards. That is simply my effort to say to the people out
15 here that, please, understand folks, that you can do anything,
16 but if you don't have the staff and equipment to do it, then
17 forget it. We all have to be realistic about it.

18 And while we are at it, bear in mind that what we
19 are doing is reaching for the very first time the staffing
20 levels that were contemplated when we were created, which is
21 100 people.

22 At that time we were 24,000 protests a year. This

1 year there will be more than 30,000 protests. We haven't
2 increased the number of people. What we have done is
3 tightened up ways of doing things. And I hope that is like
4 everybody else will have to deal with whatever our constraints
5 are.

6 There will be times when we don't have as many
7 people as we can have. But I don't anticipate that that is
8 any excuse for changing the time standards. Nor do I
9 anticipate that that is any excuse for not performing. You
10 just have to buckle down a little.

11 But, it reaches a point where you don't have the
12 people, you cannot do it.

13 MRS. BENTLEY: I think that is true.

14 MR. SMITH: And there is really a party question.
15 The parties, particularly the employers, but both parties
16 ultimately, both parties, claimants and employers, ultimately
17 pay for this system, either pay for it directly in dollars or
18 they pay for it in bad service.

19 I don't mean to suggest that there is a blank check
20 or should there be one, there should not be. We should be
21 accountable.

22 But, again, that is an effort on my part to simply

1 make everybody understand that this contemplates full
2 staffing, because we are already 25 percent over the workload
3 that we had anticipated.

4 MRS. BENTLEY: Is it your intent for language, this
5 language or similar language, to appear in the---?

6 MR. SMITH: You mean the commentary?

7 MRS. BENTLEY: Yes.

8 MR. SMITH: I haven't decided, frankly. I know the
9 commentary appears in some rules and some rules it doesn't
10 appear.

11 Do you have an opinion about that? I would like to
12 hear it because I am undecided.

13 MRS. BENTLEY: I don't have a problem with
14 commentary appearing. I don't like the two sentences at the
15 end, just before the severability language. Although I think
16 it is a realistic observation, I think it could be, I think
17 it's a bad idea. I think it looks like the Office of Judges
18 needs an out. I don't think you do, and I think it is going
19 to be interpreted that way, almost to mean you are not sure
20 that you can do it. And I don't believe that is the way you
21 feel and that is not the way I feel about it.

22 I think that language suggests a defensiveness or

1 something that just doesn't need to be there.

2 MR. SMITH: Thank you.

3 MR. DRESCHER: Any further comment from anybody?

4 MR. SMITH: Or any questions?

5 MR. KALBACH: Do what you can to keep the costs
6 down. You know, we used to have a plant in this state, but
7 we removed it.

8 MR. SMITH: Well, sir, I think---.

9 MR. KALBACH: We can move these orchards.

10 MR. SMITH: I think the ultimate answer to keeping
11 cost down is keeping protests down and there are two ways that
12 has to occur, it seems to me. And we can't effect either one
13 of them.

14 The number of protests has to be decreased or this
15 office, the office that I'm charged with administering, will
16 founder. If it continues to increase, we will founder. There
17 is just no way; that is a fact.

18 So one way has to be found to reduce the number of
19 protests. The fund is undertaking an in-depth look at itself.
20 And attempting to go to a case management type of decision
21 process, which I think will, if appropriately and successfully
22 done, help to accomplish the objective of keeping costs down.

1 And the other way to keep costs down, and this isn't
2 directed at anybody and I think the fund is working on that,
3 it is not something we can do, is for everybody to work with
4 a greater view towards safety. And that gets to be a cost
5 issue as well. There is a balancing effect.

6 MR. KALBACH: We have added safety engineers to all
7 of our plants now. We put a big effort on that. It is a big
8 pay back for us to prevent accidents. But it is so easy to
9 claim in West Virginia.

10 MR. SMITH: It is part of what I mean by a good
11 solid decision being made at the outset. That is the way that
12 our protests can immediately be reduced. Safety is a
13 long-term cultural kind of issue.

14 But the other things are to get the fund to operate
15 in a proper sort of way and that is the effort they are headed
16 toward, and that way we will get our protests reduced.

17 MR. KALBACH: I see too many chiropractors employed
18 in the State of Florida.

19 MR. SMITH: On West Virginia money.

20 MR. KALBACH: Our money.

21 MR. SMITH: Right, your money is correct.

22 MRS. BENTLEY: Beth raised a couple of points. We

1 are getting the time frame orders after hearings very late.
2 Now, we go ahead, based on what we learn at the hearing, and
3 put them in system. But I don't know that everybody does that
4 and that is a problem, because there's a very significant
5 delay.

6 MR. SMITH: It is a different process and it works
7 differently.

8 MS. VANCE: Yes, that's true, it does work
9 differently. We have put our priority because we are limited
10 in the equipment that we have now because the practitioners
11 and parties do that as a result of a hearing, that is lower
12 on the priority list than the ones we are sending out.

13 MR. SMITH: But, again, one of the things we are
14 trying to do is to utilize our resources appropriately.

15 If it has to go to word processing section, for
16 example, that is labor intensive work.

17 So that is why we want to do the time frame orders
18 automatically. Not only does that get them out quickly, but
19 it takes a huge load of work away from the word processors.

20 And that will enable them to do other kinds of
21 things and make other things more timely that we don't even
22 deal with. They just become automatically more quickly and

1 efficiently done as a result of taking that work away from
2 them.

3 MRS. BENTLEY: I am assuming that from after the
4 first of the year, assuming these go forward, that will
5 continue to be a problem because we won't be setting time
6 frames at hearings?

7 MR. SMITH: We have a lot of work to do by
8 ourselves, you understand.

9 MRS. BENTLEY: Another point is we have a problem
10 both on time frames and on almost all of the automatic time
11 frames that cross examination and rebuttal is not addressed.
12 And that is true as well for the extensions. We are kind of
13 operating on an assumption that I think we all have a general
14 understanding. I have not run into a problem with it but it
15 concerns me. I think those need to be addressed.

16 MR. SMITH: Help me with the rebuttal part.

17 MRS. BENTLEY: Well, we generally just throw
18 rebuttal in as cross. But on a lot of the initial time frames
19 that we got way back when, was in there.

20 I am not hung up on rebuttal. I am hung up on
21 cross. I want to see cross identified, either as part of my
22 evidentiary period or as a tag on the end. I think that is a

1 critical thing to incorporate.

2 MR. SMITH: We are in the process of revising our
3 standard orders, including our time frame orders, so we can
4 take a look at that.

5 MRS. BENTLEY: Okay. And is there a joint request
6 to submit form that is already developed? We don't have one.

7 MR. SMITH: What is your fax number?

8 MRS. BENTLEY: 267-3822.

9 MR. SMITH: We will have you one faxed today.

10 MRS. BENTLEY: Thanks a million. That is it; thank
11 you very much.

12 MR. SMITH: Okay. If there is nothing further then
13 we will conclude this hearing.

14 MR. DRESCHER: Thank you all for participating.

15 (Whereupon, the proceedings were concluded at
16 approximately 11:25 a.m.)

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CERTIFICATE OF REPORTER

I, C.S. STABNER, a court reporter, do hereby certify that I reported, by stenotypy the proceedings had and/or testimony adduced, upon hearing in the above-styled matter.

I further certify that I have transcribed the foregoing proceedings to the best of my ability, as taken from my notes and recordings.

C.S. Stabner
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5. Beth LaMaster Boules Rice " " " "
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ORIGINAL

BEFORE THE WORKERS' COMPENSATION OFFICE OF JUDGES

RE: RULES ON TIME STANDARDS
FOR THE WORKERS' COMPENSATION
OFFICE OF JUDGES

Transcript of proceedings had in the above-
entitled matter before ALAN M. DRESCHER, Deputy
Administrative Law Judge, held in the Raleigh County
Commission Courtroom, 116 1/2 North Heber Street, Beckley,
West Virginia, on the 29th day of September, 1994.

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RECEIVED
OCT 24 1994
WORKERS' COMPENSATION
OFFICE OF JUDGES

APPEARANCES: ALAN M. DRESCHER
Deputy Chief Administrative Law Judge
Bureau of Employment Programs
Workers' Compensation Division
Office of Judges
Post Office Box 2233
601 Morris Street
Charleston, West Virginia 25328

1 JUDGE DRESCHER: Good morning. First, I would
2 like to welcome you all here for the hearing of the West
3 Virginia Workers' Compensation Office of Judges.

4 We're here to receive public comment
5 concerning the proposed rules on time standards for the
6 Workers' Compensation Office of Judges. Just by way of
7 real brief background, as you probably know, the Office of
8 Judges was created by statute and came to existence in July
9 of 1991. Prior to the existence of the Office of Judges
10 anytime a party protested a decision of the Commissioner,
11 the protest was heard by the Legal Division of the
12 Commissioner's office. So you had one part of the
13 Commissioner's office reviewing the work of another part of
14 the Commissioner's office, and I think that was probably
15 the driving force behind it. The development of the Office
16 of Judges was to create a separate entity to do that
17 review, and the Office of Judges is a separate legal entity
18 from the Workers' Compensation Fund.

19 I think the fact that we're still located
20 in the same office building has created some confusion in
21 that regard to some people. However, since the office has
22 come into existence, we have several problems, I think it

1 would be fair to say that we inherited when we came into
2 existence, and that would include a case backlog, a chronic
3 under staffing and antiquated record keeping system, and we
4 tried to address all those issues and have been trying to
5 address them, and I think this effort with regard to time
6 standards is another piece to that puzzle. These rules are
7 designed to address the issue of the timeliness of our
8 decisions.

9 This is the sixth and final public hearing
10 that we've held around the state. We've also held hearings
11 in Martinsburg, Fairmont, Wheeling, Huntington and
12 Charleston. So I guess the first thing I want to say is we
13 appreciate your-alls time coming here today and your
14 willingness to comment on these, good, bad or indifferent.
15 If you have any desire to submit written comments, you're
16 welcome to do so. The deadline is tomorrow at 5 p.m. It's
17 our intent to consider all the comments we get, not only
18 from the public hearings but also the ones we receive in
19 writing and address them all.

20 I think from our prospective these rules
21 that you have before you are a starting point, not an
22 ending point. So I'm not here necessarily to defend these.

1 I'll be glad to try to explain them from our prospective
2 and answer any questions you may have about them, but we're
3 here to receive comment, and that's really what we want.

4 Some of the things that have been brought
5 up in other hearings is, I might just anticipate some
6 questions you may have here, the time standards themselves
7 that are set out in Section 6, those are not and should not
8 be read to correspond with what we now call a time frame or
9 time frame order.

10 The way we developed these was really to
11 break down the processing into three distinct phases, the
12 first phase being an acknowledgement of the protest and
13 issuance of a time frame order. What we're going to do is
14 begin to issue automatic time frame orders on every
15 protest, regardless of whether or not a hearing is
16 requested, and that will either come out with the
17 acknowledgment or very shortly thereafter, so you'll know
18 what your time frame is. And then we'll have the second
19 phase, which is the case development, which is the time
20 frame order that we now have, and then the third phase will
21 be the process we have to make sure the case is ready for
22 decision and then the actual decision, the issuance of the

1 decision. So that caused some confusion among some people,
2 and I just wanted to make sure that that was understood.

3 The other thing, I think it's sort of
4 implicit, although it might not be explicit in here, is
5 that we don't foresee the same sort of combining of issues
6 in the one time frame or consolidation that we currently
7 use on a regular basis.

8 Typically now in a case you have an issue
9 and as other issues come up, they just all tend to get
10 rolled in together and they're all submitted at the end of
11 the time frame for the issue that has the longest or latest
12 date.

13 The problem that causes for us as an
14 example is, if we don't rule on a treatment issue, for
15 example, because we're waiting on a PPD, you know, a year
16 or more may go by and if the person is deserving of
17 treatment, they ought to be able to have that treatment.
18 It's clear that the quicker you get the treatment, the
19 quicker you get back to work, and that's good for both the
20 employer and the employee.

21 The same way on compensability, if we get
22 that ruled on and the claimant's found to be not

1 compensable, then we don't go through all these other
2 things that happen that are protested and have to be
3 decided. So there won't be the same type of consolidation
4 that we're now doing.

5 The other things is, for example, on the
6 treatment issue, as I mentioned, what we tend to get now is
7 an application for treatments received, is denied on
8 reopening. Another one is filed the next month, it's
9 denied, another one's filed the next month, and then by the
10 time it gets to a judge there may be six reopening
11 applications in there, which six issues, he's got to rule
12 on it, and if we can rule on it quickly up front, then the
13 claimant knows, you know, what he's done is not enough,
14 he's got to do something different. On the other hand, if
15 the case is, in fact, reopened then everybody knows that we
16 can go on from there. So it's our hope that that will
17 streamline the process.

18 In conjunction with that, the other thing
19 that we're working on is our ability to use our time, the
20 time of the Office of Judges in a little better manner, and
21 our most precious commodity really is the time of our
22 judges. What we want to do is allow our judges to focus on

1 those cases which really require their attention, the PPD
2 issues, the TTD claims that are more complex and really
3 require a little more time and take out some of the issues
4 that are a little more standard, at least the routine ones
5 are, such as reopenings and treatment, and have those dealt
6 with what we're now referring to as a paralegal writing
7 team.

8 In other words, we'll have paralegals
9 looking at those issues, drafting a decision which
10 basically will be a form decision, and that will be
11 reviewed by a judge and sent out.

12 I guess the challenge to us is helping them
13 to identify those claims which are not the normal one, that
14 may need a judge to review them prior to going out. But we
15 have a substantial number of claims that fit into those
16 categories and we feel that if we can separate those out,
17 it will give our judges more time to concentrate on the
18 more complicated issues, also enables us to get these
19 issues resolved more quickly. So those are some of the
20 kinds of things that we're looking at.

21 But in any event, I'm here to get your
22 comments, and I'll be glad to respond to any questions you

1 may have about the rules.

2 MR. RICHMOND: The first question I have, what do
3 you contemplate on motions? What is that put in here for?
4 I mean, what do you contemplate is going to happen under
5 motions?

6 JUDGE DRESCHER: Currently, as you're probably
7 aware, we're not doing a very good job in responding to
8 motions and oftentimes a judge will get a case in for a
9 decision and find out that a year earlier there was some
10 kind of a motion made with regard to evidence or something
11 else, that just hasn't been ruled on and needs to be ruled
12 on. Oftentimes there's motions that people need ruled on
13 so they'll know what they have to do or don't have to do,
14 and the purpose of putting that in there was to show you
15 that we are going to rule on them and it's going to be done
16 in a fairly timely manner.

17 MR. RICHMOND: Are you going to have a specific
18 section or group of judges that will address those issues
19 or just file it?

20 JUDGE DRESCHER: Well, I don't know that we have
21 reached that level of detail yet in our thinking yet. I
22 mean, that's one of the suggestions is, perhaps, on a

1 rotating basis have a motions judge for a month at a time
2 or something, and that judge will deal with all the motions
3 that come in. That's certainly a possibility, but I guess
4 the answer to your question is, I don't know exactly how to
5 treat that.

6 MR. RICHMOND: It's not just motions for
7 extension of time frames or something like that, it's any
8 kind of motions.

9 JUDGE DRESCHER: No, any kind of motions, right.

10 MR. POE: But the type of critical motions you
11 have in mind -- my name is Tom Poe for the record -- or
12 maybe from the employer's prospective in a disease claim,
13 the employer's counsel is filing a motion to be discharged
14 or reallocated on the charge, particularly in the OP
15 claims, and that's pretty important to employer's counsel
16 to know, I imagine, early on, particularly if it's going to
17 be dismissed, they need to know if the charge is going to
18 be substantially reduced, they need to know how much
19 investment of resources the client would like to make.

20 JUDGE DRESCHER: Right. That's the kind of
21 thing, as well -- yeah, we want to -- if we address those
22 up front, we can save a lot of time in the back end of the

1 case and hopefully help you-all be more efficient in the
2 use of your time, as well.

3 MR. SKEENS: Ron Skeens for the record. How are
4 you going to flag a certain file in order to rule on a
5 motion? You obviously, the motion is going to pertain to
6 something that the other side has done or some evidence, an
7 evidentiary question or something like that, it's going to
8 be just a motion to extend the time frame. You know, those
9 are the only motions that I've ever got a ruling on. I've
10 never got a single ruling on any motion that I have ever
11 made for anything other than time frame extensions, and I
12 get those -- those are fairly complex, by the way. But any
13 other motion, like to expunge evidence or the employer has
14 traditionally -- I've got one particular employer who will
15 send my claimant out for two orthopedic exams and then
16 they'll try to have a chiropractic exam, for instance, and
17 I take the position they can't do that because it's a
18 physical exam. Every time that I've had to block that or
19 try to block that, I've had to ask for a hearing and get
20 before -- actually physically get before a judge and get a
21 ruling on the record. Every one of the judges have taken
22 the same position that I have and granted it, but the point

1 is, it's six months, seven months, eight months, nine
2 months down the road.

3 The second question is besides how are you
4 going to flag it, since for everybody that does this,
5 whether you're on Bill's side, with the employer, or my
6 side with the claimant, but the actual ruling on the
7 motion, we're talking about substantive motion, is going to
8 determine your strategy of what else you're going to do.

9 From Bill's big standpoint it may determine
10 on whether he's going to send the person out or not for
11 additional evaluation, and can we see that the time frame
12 order is going to be held in abeyance until there is a
13 motion or are we going to be stuck with the time frame?

14 JUDGE DRESCHER: A couple things there. As I
15 said, we understand we haven't dealt with motions very well
16 up till now and it's in our intent to try to do that
17 better.

18 The motions when they come in, I think part
19 of the problem is they go down and they get microfiched and
20 put on the record and then they come back and kind of go
21 into never-never land and don't get ruled on, and that's
22 what you're talking about.

1 MR. SKEENS: Right.

2 JUDGE DRESCHER: That's the challenge we have, is
3 to not only to get them in front of the judge but make sure
4 they get ruled on, and our big push, and it's still going
5 to be a big push is to get final decisions out, and I'm
6 sure Judge Poe will tell you that's really what we focused
7 on, but I think now we're to a point where we need to focus
8 on the rest of the system, as well.

9 Part of the problem we've had, and I'll ask
10 Tammy to correct me if I get off base here, is the record
11 keeping system we've had, because our computer software was
12 never developed the way it should have been, requires that
13 we have to be able to locate the file to put that motion
14 with it, and obviously it's hard to rule on a motion if you
15 don't know what's going on in the case, and that's been a
16 difficult and time consuming process. And I know that
17 sounds a little odd to say well you can't find the file,
18 but when you have 30,000 protest coming in a year, it's
19 just unbelievable amount of paper work. But our objective
20 is to get those motions in and get them ruled on promptly
21 because we recognize, as you stated, that it does affect
22 how you're going to handle your case.

1 The extension on the time frames, we'll
2 still recognize that not every case is going to be dealt
3 within the time limits we've listed here. In fact, that's
4 why we've said that these aren't going to apply to 100
5 percent of all the cases when there's a good cause,
6 particularly if it's because of something that our office
7 hasn't responded to in a timely fashion, we're going to
8 grant an extension of the time frame order and you'll be
9 out of this, but you know it's our hope that we can do
10 these things quickly enough and that we're not going to get
11 bogged down in procedural matters that we can do that, but
12 yes, we are going to grant extensions of time frames, just
13 as we do now when there's good reason to do that.

14 MR. SKEENS: Everybody here may not agree with
15 me, but I felt like the experimental project that was done
16 here in Beckley with the actual appearance before a judge
17 at the Office of Judges, office here in Beckley, to rule on
18 those specific motions was a real step in the right
19 direction. I understand now it's been put on hold but
20 nevertheless it seemed to me like that that could resolve a
21 lot of issues really quickly. I mean, you at least get a
22 decision from the bench, so to speak, and you know what

1 direction to go, and if it's a non-represented employer who
2 knows -- say to the Commissioner and to the Attorney
3 General's Office, which they sometimes appear and sometimes
4 don't, and particularly if it's on an issue of
5 compensability or temporary total where you've got a
6 destitute client and it's a real problem, even six months,
7 which may be a relatively short time in a compensability or
8 PPD issue, maybe in the whole scheme of things a fairly
9 prompt decision, there's a lot of things, you know,
10 disastrous things that can take a place in a person's life,
11 who is not getting any income at all for a six-month period
12 of time.

13 JUDGE DRESCHER: Let me just address one thing
14 you mentioned. I agree with what you're saying. The
15 motions docket, the pilot project, really, we've done here
16 in Beckley, it really wasn't put on hold, it was just
17 delayed so we could restructure it internally. From our
18 prospective we had some problems with how it was working
19 and really related again to the files and how we were going
20 to keep track of things. So we are again rescheduling
21 motions for that motions docket, so that is back on track.

22 It is our intent, hopefully, when we see

1 that we get it running properly to expand that to the
2 Charleston and Fairmont offices, as well. So that is
3 something that we intend to continue.

4 In fact, we're also beginning a pilot
5 project in the Charleston office and that's dealing with
6 settlements. We're going to schedule hearings on claims
7 that we feel are right for settlement and see if we can
8 push those a little bit. That's another thing that we
9 haven't handled very well in the past, and that's
10 settlements. The attorneys have agreed to and send them
11 and for some reason we haven't been very good to get them
12 back out, and that's another area that we're addressing.

13 MR. POE: If I may comment along that avenue. I
14 contended for years, ever since Belpre has been in
15 existence and the settlement statute has existed that
16 really the employer has in the hearing loss area no -- in a
17 vast, vast majority of those claims no prospective
18 liability. If those can be settled, I think the employer
19 has some interest in settling them in spite of the ability
20 to reopen. I think that's effectively closed. In the
21 particular instance of hearing loss, I don't know why that
22 isn't a subject area that is focused upon for, you know,

1 indirectly helping the whole case load by disposing of a
2 highly negotiable set of files out of the 30,000 that you
3 discussed.

4 MR. RICHMOND: I think you'll find that the
5 attorneys are settling those cases because of that fact.
6 As Belpre says ... you're not going to have an increase
7 over time, and those are being settled.

8 MR. POE: That's good to hear. I mean, it seems
9 where there's mutual interest in having a settlement, I
10 have contended that there should be even a special mailbox
11 for those claims, they have so many. There's so much carry
12 over, in a matter of months -- claimants with hearing loss
13 claims would have their claim resolved, good, bad or
14 indifferent within a few weeks, where there's counsel on
15 both side.

16 JUDGE DRESCHER: I also note with regard to
17 settlements in general, the Chief Judge has stated publicly
18 that he would like to see the settlement statute revised to
19 allow for full and final settlements, and I think that one
20 piece of that has to be that the disability/impairment
21 issue has to be resolved because I think it's from the
22 claimant's point of view, it's less incentive to settle

1 when you're not talking about his full disability, you're
2 really just talking about his impairment.

3 On the other hand, I think that if we can
4 get that issue resolved and it's really not any different
5 from a personal injury case that you-all work on all the
6 time, if someone's in a car wreck, through some way,
7 attorneys agree that it's worth so much money, and that's
8 what it's worth, and that's the end of the case, and
9 there's no reason that can't be done in a Workers' Comp
10 claim, but I think it's got to be a final settlement, it's
11 got to be a full settlement and, of course, that's not
12 possible under the statute that exists today.

13 MR. RICHMOND: I would like, and my biggest
14 problem -- or I have two problems with these rules, and I'm
15 assuming for purposes of argument that these are
16 dovetailing with other procedural rules that are on the
17 book.

18 JUDGE DRESCHER: That's correct.

19 MR. RICHMOND: But what I'm having the biggest
20 problem is, is crossing over of jurisdiction, and I'll tell
21 you what I mean by that. Recently I had a case with Ray
22 Smith in which the only issue in litigation before the

1 Office of Judges was compensability. The Commissioner had
2 denied compensability, so there had been no ruling or entry
3 of any order granting or denying temporary total or
4 permanent partial.

5 The Office of Judges then decided the case,
6 said it was compensable and then went on to rule that there
7 was no showing of any temporary total disability benefits.
8 Now that denied due process to Ray in that case because Ray
9 only presented evidence on compensability. So he made a
10 ruling based upon a record that wasn't developed on that
11 issue.

12 Conversely, I just had a case come back
13 from the Appeal Board in which the only issue was
14 compensability in a so-called toxic exposure case. The
15 Commissioner denied compensability. The administrative law
16 judge denied compensability, went to the Appeal Board and
17 the Appeal Board reversed on compensability, granted him a
18 total life award beginning on the day of the injury. That
19 denied me due process on whether he has any disability at
20 all, even if he was exposed, okay.

21 Obviously, they don't understand that there
22 are clear jurisdictional lines. The Commissioner only has

1 the right or grant deny initially or originally, just like
2 the circuit court does, benefits of any kind, and neither
3 this Office of Judges or Appeal Board or the supreme court
4 have a right to grant benefits of any kind originally.

5 In addition to that, I get cases -- for
6 instance, I've got a case out of Greenbrier County in which
7 the case was closed by PPD award. A petition to reopen was
8 filed. The factual development of the case is that this
9 person actually had an additional injury with an additional
10 employer, and I realize that there's an overlap here
11 because the Commissioner is ruling on treatment issues
12 continuously.

13 I write the Commissioner and say, "Wait a
14 minute, this person had another injury." I protested the
15 reopening and we're before the Office of Judges. But when
16 the Commissioner -- when a decision is appealed, when one
17 ruling is protested the Commissioner keeps as if, you know,
18 that litigation doesn't exist and keeps issuing orders
19 which actually destroys whatever chance I had of prevailing
20 on that issue, and I don't know what's going to happen, for
21 instance, what if I prevailed on the issue. All these
22 benefits have been paid. I guess my client's account would

1 be credited some way.

2 JUDGE DRESCHER: Should be.

3 MR. RICHMOND: But it looks to me like there
4 needs to be some coordination between the Commissioner's
5 office and the Office of Judges when an issue is in
6 litigation when they're going to continue to issue orders
7 which are contrary to the litigation. I don't know how to
8 resolve that, and I can't even get it submitted on the
9 issue of reopening. I've written and said, "Well, I want
10 to submit it," but nothing has ever happened.

11 Now this motion docket might help me in
12 that regard if I could get immediately and get to somebody
13 and say, "Wait a minute, this woman even filed another
14 claim for additional injury," but I'm not being listened to
15 here and I need to get something to stop this.

16 The other thing is you get a case, for
17 instance, a guy has a low back injury and six months goes
18 by and he receives treatment, there's no reason for the
19 employer to be concerned about it because he's getting his
20 treatment, okay. Then all of a sudden we get an
21 authorization for an MRI on the guy's neck. Nothing in the
22 clinical records about having had complaints of neck pain

1 but all of a sudden this happens. Well, the Commissioner
2 then will either rule that it is part of the claim or not,
3 but when the Commissioner rules that it's not part of the
4 claim, then a month later it comes up and authorizes the
5 treatment. Well, is that not the law of the case when it's
6 not protested? I don't know how many claims I've got right
7 now where the people are trying to get a permanent total
8 disability and all these protests have been going on all
9 the time, and there's one case I just went to the supreme
10 court on, which I doubt it will get in on, but there were
11 five rulings by the Commissioner saying that the neck
12 problem was not related to the back injury, but then the
13 Commissioner went on and authorized treatment later on.

14 Well, the supreme court has said that, you
15 know, if it's not protested within the 30 days it became
16 effective as of that date, and that's the law of that case.
17 It's res judicata on that issue.

18 So some understanding in these types of
19 things ought to be addressed in these rules as to the
20 jurisdiction of this office. I know you can't deal with
21 the Commissioner, but some dialogue needs to be established
22 with the Commissioner so that the Commissioner understands

1 that once this issue is protested the Commissioner ought to
2 leave that alone until this is resolved. Maybe we need a
3 speeded up way to get it resolved so that doesn't deny the
4 claimant proper treatment if he's entitled to it, but it is
5 a jurisdictional problem, and everybody doesn't perceive
6 that jurisdiction, who's entitled to do what and when, and
7 it's a big problem. The supreme court doesn't understand
8 it, I'll tell you that because I can't get in on those
9 issues.

10 I have one case in which it was litigation
11 on an OP claim. It was a non-coal coal mine operator. The
12 guy died after the claimant's lawyer had introduced
13 evidence but before we went back to the OP Board. So I
14 made a motion to dismiss because no additional award had
15 been granted. They did it, then it was appealed to the
16 Appeal Board and they reversed and granted a total life
17 award all the way back to the date he retired, which was
18 1986.

19 My mistake, but I filed a petition to
20 rehear to point it out that I was being denied due process
21 because the statute requires that all medical evidence be
22 reviewed by the OP Board, instead of filing my appeal

1 directly to the supreme court.

2 So they granted my motion to rehear and
3 then denied it. I then did appeal to the supreme court.
4 The supreme court then reversed and said that I was right,
5 we need to go back under the circumstances and hear all the
6 evidence before the Board. In the meantime, an autopsy
7 comes in showing the guy didn't have pneumoconiosis, okay.
8 Well the Commissioner then, when the supreme court remanded
9 it back, says well they didn't reverse the finding of total
10 disability, and in the meantime they granted, because he
11 was totally disabled by that decision of the Appeal Board,
12 and before he's -- then he granted additional 104 weeks of
13 benefits. You know, it was \$200,000-some charged to my
14 client who only has five employees and his rate went out
15 the roof. But there's no way to speed up or do anything to
16 resolve that, but it's a question of everybody
17 understanding where jurisdiction is, and the Appeal Board
18 doesn't understand it, the supreme court in their opinion
19 remanded it back for a hearing, obviously didn't understand
20 and the Commissioner wouldn't understand what's going on
21 either, you know, and wasn't clear enough for what they
22 were intending to do. But if we could address in these

1 where the jurisdictional lines are, the Office of Judges
2 doesn't have a right to rule on temporary total unless
3 that's an issue that's been protested and the Commissioner
4 has already ruled, or similar type things.

5 JUDGE DRESCHER: Obviously, as you stated, it's
6 difficult for the Office of Judges to tell the Commissioner
7 what to do or tell the Appeal Board what to do.

8 MR. RICHMOND: But you do have influence, and if
9 it were stated in the rules, at least I could point to
10 these rules and say because it's not in the statute. When
11 they created the Office of Judges they did not specifically
12 say in the statute the Office of Judges does not have the
13 authority to initially grant benefits, okay.

14 In this section in the code which addresses
15 the Appeal Board says it makes such findings as the
16 Commissioner should have made, okay, but there is due
17 process question raised by that and if we had at least
18 something in rules somewhere that says -- delineates that,
19 then it could be pointed to at least to the Appeal Board
20 and the supreme court saying somebody recognizes that there
21 are clear jurisdictional lines here. You know, and if this
22 is not the appropriate place then somebody ought to

1 consider promulgating some other rules to interpret the
2 statute as to jurisdiction.

3 My second comment about these rules is that
4 I don't believe it goes far enough, and I think that some
5 additional standards by which consideration is going to be
6 given to when the time frames can be extended. What is
7 cause for doing that, because these appear to be fixed to
8 me, and if you read this literally, these are fixed.

9 JUDGE DRESCHER: I understand. I think from
10 Judge Smith's prospective, really, you know we talked about
11 basically we could either write 50 pages with the rules and
12 got pretty detailed or we could write some very broad
13 rules, and his belief is that we're better off doing board
14 general rules of this type that don't need to be changed
15 every time a new situation comes up and creates an
16 exception.

17 With regard to show cause specifically it
18 is our intent to use show causes in appropriate manner and
19 not at the end of every time frame order like we're now
20 doing. I think our intent is to make time frame orders
21 self-ending, and if there has been no extension then that
22 claim is going to be submitted.

1 However, on the other hand, just as we
2 talked to Mr. Skeens about it, we do intend to allow for
3 extensions, and in fact, we have a group working on the
4 definition of good cause, if you will, both in terms of
5 extension of time frames as well as continuances of
6 hearings, and when we get that done, we'll certainly
7 publish that to everybody and make you aware of what the
8 factors are we're looking at so you'll be aware of what it
9 is. But I just think from our prospective that's not the
10 kind of detail we want to get into in rules, although it's
11 something that you need to be aware of that we need to deal
12 with.

13 MR. RICHMOND: If somebody was reading this and
14 you use the word "shall." It says "a final decision shall
15 be issued." You know, if you go to Appeal Board and argue
16 that an extension should have been granted and you look at
17 that, I mean, that's shall, that's mandatory.

18 JUDGE DRESCHER: Yes, but that does not apply to
19 100 percent of the cases, but I understand what you're
20 saying.

21 MR. RICHMOND: But in my regard if we're going to
22 have it, just an overall thing, then I think we need to add

1 that if a party has been requested to produce a witness for
2 cross-examination and it has not been -- that the witness
3 have not been produced then that shall not be considered in
4 the determination of the case, because these are -- you use
5 the word "shall" in it, and I think if you're going to use
6 those words and you're going to use an overall cursory
7 viewpoint as these do, then I think that you need to add
8 that additional to protect parties from being sabotaged
9 simply be refusing to produce the witness and the time
10 frame runs.

11 JUDGE DRESCHER: It's not our intent to allow
12 that to happen, notwithstanding the use of the word shall.

13 MR. RICHMOND: But you have to look at what the
14 Appeal Board is doing, okay, because you're going to
15 establish these rules and somebody's going to be
16 interpreting these rules other than yourselves, and while
17 your intent may be that you're going to do these things,
18 when somebody reviews these and you use the word "shall"
19 that's fixed in my opinion, and I think somebody can really
20 be hurt by the use of that language if that's the way we're
21 going to proceed, so I think you need to add that to it, to
22 protect parties.

1 MR. POE: What is it that you would add to shall
2 to qualify it?

3 MR. RICHMOND: All I think -- you need to add a
4 caveat or additional section here and say that if within
5 the time frame or these time frames as set out here a party
6 has filed a report and the opposite party has requested a
7 right to cross-examine if they're submitted under these
8 mandatory rules and they haven't produced them, then that
9 report will not be considered in the decision.

10 MR. POE: I agree with that point of view.

11 JUDGE DRESCHER: Our intent will be to allow
12 cross-examination, but as you've pointed out sometimes that
13 doesn't happen.

14 MR. RICHMOND: Right.

15 JUDGE DRESCHER: So I understand your concern.
16 Hopefully we can stop that from occurring.

17 MR. POE: Let me comment very briefly, on the
18 whole matter of the time limits, this whole business of
19 medical reports not being supplied to the other side seems
20 to never have -- ever in the history of Workers' Comp ever
21 been resolved. You know, I don't know that the rule needs
22 to be fair as it needs to be certain. There are different

1 attorneys who have different ethical standards about that,
2 and Mr. Skeens here takes a view if he has a report, he'll
3 give it to you. Other people want to fight about that
4 forever.

5 I think we need to air on the side of
6 certainty and make a clear rule regarding disclosure by the
7 parties, and that way a lot of cases that are hung up in
8 the pipeline will be released. I mean, I think it goes to
9 this whole business of timeliness.

10 JUDGE DRESCHER: When we did our meetings back in
11 May, I believe it was, that's one of the issues we
12 discussed. The Workers' Compensation Committee of the West
13 Virginia State Bar took that very issue under advisement,
14 if you will, and I guess had a subcommittee. It was made
15 up of both claimants and employers' attorneys, look at the
16 issue of medical reports, and their recommendation to us
17 was that, in fact, the parties be required to share those
18 reports, and that is the policy that we have announced
19 we're going to follow. Now, they're not in these rules and
20 I think that's probably more appropriate to be put in our
21 rules of practice and procedure. We have not done that
22 yet.

1 MR. POE: Well, I would assume it should be
2 duplicated in both parts of the rules, because it's just an
3 important part of the processing of a claim because the
4 attorneys have to be able to assess what's the state of the
5 evidence in order to know what to do next.

6 JUDGE DRESCHER: Well, it is our policy to
7 require disclosure in that regard, and if that's an issue
8 that any of you have in a case and that's not being done,
9 that's our intention.

10 MR. POE: But my understanding is that both
11 parties to a Workers' Compensation claim are required to
12 make total disclosure.

13 JUDGE DRESCHER: That's correct, of medical
14 evidence --

15 MR. POE: Of medical evidence.

16 JUDGE DRESCHER: -- if requested. The other side
17 of that is if, in fact, the report discloses and the other
18 party chooses to have it introduced that becomes their
19 report and they have to decide whether -- they've already
20 got two reports in, they probably can't get a third report
21 in that way.

22 MR. POE: Well, I really have another fact set in

1 mind and that is there are many times that the employer
2 seeks medical information -- I've said medical reports, I'd
3 like to include medical information as part of medical
4 evidence that doesn't relate specifically to that
5 particular claim, but it's vital to preexisting conditions,
6 that type defenses. I think employer ought to know what he
7 cannot have access to in a clear, in certain way so that
8 they can better prepare in another direction if that's not
9 available. I'm not so interested in the so-called Brogan-
10 Nelson, the two reports and reasonableness, it's just all
11 the medical evidence being available to both of the
12 parties.

13 I mean, instances of a PPD evaluation that
14 goes bad for the requesting party is so rare, that I think
15 three practitioners in this room would see that that
16 happens on just a small percentage basis. It's probably
17 not a big part of their daily headaches of practice of law,
18 but I think not having all the medical evidence is, but I'm
19 speaking as an outsider to that.

20 JUDGE DRESCHER: I think we're getting a little
21 far off from our time standards.

22 MR. POE: My point is if you don't know what the

1 evidence is you don't know how much time you need if you're
2 not given a fast way to get the evidence and have a certain
3 rule that will permit you to have -- a vehicle that will
4 comply with the time frame, I guess, is what I'm saying.

5 JUDGE DRESCHER: I guess from my prospective it
6 would be our hope and it's been our experience that in the
7 vast majority of claims and the vast majority of attorneys
8 practicing in Workers' Comp are able to work out those
9 kinds of things generally speaking. We do not want to get
10 involved in a lot of procedural problems to the extent we
11 can avoid that if things can be resolved. Obviously if
12 they can't we will get involved, but I think the cases in
13 the statute make it clear that we don't want to decide
14 these cases on technicalities and we don't want to get to
15 the point where we're dealing with procedure all the time
16 and not dealing with the substance of the issues, and I
17 understand you're not advocating that either but I guess
18 I'm saying if it becomes a real problem, yeah, we'll get
19 involved with it but hopefully those things can be worked
20 out before it becomes a real problem.

21 MR. POE: I think mainly what the attorneys that
22 I've talked to really thrust for, if they know what the

1 rules are, you can work with them or you can play by them.

2 I'm seeing all kinds of motions, these written
3 motions to expunge a report of a deceased physician, and
4 that kind of business. The attorneys here represent, I
5 think, and I'm not saying because they're present, the
6 higher echelon of confidence in the Workers' Comp field and
7 they're not the ones filing the kind of frivolous, I mean
8 really the kinds of things that could be agreed on with
9 counsel, the type -- we discussed motions here. I think
10 we're talking about time and movement, and it disturbs me
11 that the -- attorneys don't choose to consult with opposing
12 counsel rather than filing motions that aren't important.

13 Important issues are the kinds of
14 reallocation type motions, and the claimant has other
15 motions that are important but that's one that comes
16 presently to mind, but the things that some people consider
17 worthy of a motion like disgorging a report, that becomes a
18 subject matter because they don't know that the rule is
19 that you must disgorge, and I think if that were made known
20 to every practitioner, then it would be a lot of motions
21 not filed, and I just mention that. That's all I have to
22 say.

1 MR. HENRY: My name is Reggie Henry, I have a few
2 questions now. Sequentially I'm not sure how this works
3 once a time frame has been established. Now from what I
4 understand, for example, in regard to compensability, a
5 final decision would be generated six months after the
6 claimant's protest or employer's protest is acknowledged.

7 I guess my first question was, are you
8 going to continue to use show cause orders in order to
9 submit or once the evidentiary deadlines have expired will
10 a final decision automatically be generated unless one of
11 the parties have requested a continuance?

12 Number two, I guess I was unsure -- I think
13 according to the handout it's going to require 60 to 90
14 days for the Office of Judges to complete their activities
15 so that a final decision can be rendered. If that's the
16 case then, for example, on compensable ruling that will
17 leave the claimant approximately 60 days, employer
18 approximately 60 days, and then the Office of Judges 60 to
19 90 days at the end?

20 JUDGE DRESCHER: Well, the way that was derived,
21 and I mentioned earlier, we look at it at in three phases,
22 the first phase being the acknowledgment and issuance of

1 the time frame order. The second phase is the development
2 of the evidence by the parties, what takes place during a
3 time frame order, and under compensability, for example, I
4 think we contemplated would be a three-month concurrent
5 time frame, and then there would be basically 60 days for
6 us to close that file out and write the decision.

7 So I guess to answer your first question is
8 we will be using submit orders. However, if an extension
9 is not requested prior to the expiration of the time frame
10 we will not be doing show cause anymore. We'll just go
11 ahead and issue the submit order at that time.

12 MR. HENRY: What about claims where you have
13 multiple issues, let's say treatment issue, temporary total
14 disability issues, obviously, the date those protest are
15 acknowledged are going to vary. I think typically now for
16 the interest of parties and the Office of Judges many of
17 those issues are consolidated and submitted at the same
18 time. Will this system provide for that kind of scenario
19 or will it be strictly one issue at a time, which I think
20 would be somewhat overwhelming to the Office of Judges?

21 JUDGE DRESCHER: Well, again, under these rules
22 we do not contemplate consolidating different issues that

1 have different time frames. Obviously it could be done but
2 our thought was to deal with these quickly, especially
3 things like treatment that we can get in and get out, and
4 again save ourselves from having to deal with six reopening
5 issues in the same claim because we don't get to them until
6 we get to the end of the claim. So they will be run
7 separately, and it is going to be a little bit of a
8 logistic problem, I believe, both for the attorneys and for
9 the Office of Judges because we're going to have to keep it
10 on track, but that's what we intend to do is issue a
11 separate ruling on the different issues.

12 MR. RICHMOND: Let me ask you this, what do you
13 perceive would happen, for instance, say a PPD issue award
14 is granted and one or both parties protest that, a month
15 later after that becomes an issue in litigation before the
16 Office of Judges then the Commissioner reopens a claim for
17 temporary total, neither party has the opportunity then to
18 get timely evidence on the PPD issue, okay. Say the guy
19 has surgery, then the second time it's reopened, so this
20 claim is potentially in a TTD mode for a year which will
21 exceed any limits you've got set forth here. How is the
22 Office of Judges going to be able to deal with that and how

1 are the parties going to be protected?

2 It seems to me, for instance, that when
3 you've got a PPD issue in litigation and then the claim is
4 reopened, and I don't know if the Commissioner does right
5 now or not, but the PPD should be stopped immediately and
6 set aside as being improbably issued, then the Commissioner
7 has the right within his jurisdictions to deal with the
8 treatment on the TTD issue until it's resolved and then
9 will again send him out for a PPD. But what happens, and I
10 know that this is simply a perceptual problem, but what
11 really happens is when the Commissioner refers them out the
12 second time, says this guy's already got a 5 percent, so
13 that doctor starts in his mind from a 5 percent. I've lost
14 that issue no matter what happens. I mean, I can't go back
15 and convince anybody that he wasn't entitled to that 5
16 percent because everybody starts from there. So I get a
17 double whammy because he not only gets additional TTD
18 benefits but he starts out that that's a fixed thing, not
19 that he goes back to zero and starts over again, but you
20 start from 5 percent and go forward. So the guy gets
21 additional consideration that I can't prevent on PPD when
22 it finally comes back out at TTD. There's no way I can

1 stop that, there's no way I can issue evidence on it
2 because the doctors are not capable of looking back and
3 saying, "Well, yeah, he really only had a 1 percent back
4 there, before this was reopened."

5 JUDGE DRESCHER: Well, I'm not sure how we can
6 address that either but I think -- you're talking about a
7 case that's a little unusual since it -- I think the rules
8 are really intended to address the 80 percent of the claims
9 that are the mainstream type cases. When we know clearly
10 there are unusual cases, that 20 percent is out there and
11 the challenge for us and for you is to figure out how to
12 deal with those in an appropriate manner.

13 MR. RICHMOND: That's not as unusual as you may
14 think, it goes on quite frequently.

15 JUDGE DRESCHER: You may be correct in that. I
16 guess what I'm saying is we recognize that these rules
17 don't cover everything, not intended to cover everything,
18 and we want to be flexible and try to develop a way that
19 allows both sides to do what they need to do in an
20 appropriate fashion, but that doesn't mean we're going to
21 try to write a rule about everything.

22 MR. RICHMOND: I understand that but maybe there

1 needs to be some type of a catch-all where, for instance,
2 when that happens, when it's reopened and the only issue
3 before the judges is a PPD or a PTD, that that could be
4 dealt with and remanded back immediately to the
5 Commissioner to determine whether the PPD ought to be set
6 aside in conjunction with the additional treatment.

7 JUDGE DRESCHER: Okay.

8 MR. HENRY: It's my understanding that
9 occupational pneumoconiosis claims are not subject to these
10 rules; is that correct?

11 JUDGE DRESCHER: That's correct, as they
12 currently are envisioned, yes.

13 MR. HENRY: Are they going to have separate rules
14 for occupational pneumoconiosis and OP fatal claims or are
15 those essentially not going to have specific rules which
16 guide?

17 JUDGE DRESCHER: Well, at this point there are no
18 specific rules on occupational pneumoconiosis. It's been a
19 -- as you know the whole occupational pneumoconiosis
20 process is somewhat of a different animal. The Chief Judge
21 has put together, I think, what he refers to as a working
22 advisory group which is comprised of several attorneys,

1 both claimant oriented and employer oriented, to deal with
2 these things, and I think the bottom line is the OP cases
3 are backing up, as well, but for entirely different
4 reasons, the basic reason being that we can't get as many
5 claims submitted in the month as we have, as come in.

6 The biggest culprit from our point of view
7 is the off-the-record discussion which is essentially
8 advisory opinion from a statutory expert witness, but the
9 problem is you take up a hearing slot to go in front of the
10 Board and say is this evidence going to help you any and
11 they say no, is there something I can do, well maybe you
12 ought to have this test done, okay, I'll try that, I'll
13 come back later. But there's a hearing slot that goes by
14 and we're getting more claims in then we're getting claims
15 submitted.

16 So we're trying to address that. We
17 haven't addressed it in these rules. I think it will be
18 addressed on down the line, but I think the culture of that
19 whole system is such that it's just going to take more
20 time.

21 MR. RICHMOND: Shouldn't you then amend 1.1 to
22 say that this does not apply to occupational pneumoconiosis

1 claims?

2 JUDGE DRESCHER: Maybe we can do that.

3 MR. POE: One line of questioning I would have,
4 is there anything contemplated in the final draft of the
5 rules that would bar the counsel for the parties to a claim
6 to agree to more extended time frames than are suggested
7 here? Some cases are special cases, the claimant's in
8 prison. You know, I don't think it's that unusual example,
9 but there are special cases, an out-of-state claimant, an
10 employer who has a limited --

11 JUDGE DRESCHER: There's nothing that would bar
12 that. I mean, obviously, it's something that a judge is
13 going to have to look at and say, "Well, yeah, this makes
14 sense to do this." What I'm saying is the Office of Judges
15 is going to be in control of that, counsel is not going to
16 drive the system, the office is.

17 MR. POE: I understand that position. I
18 understand that stated position but there is a problem
19 because the attorneys best know what their clients want.

20 JUDGE DRESCHER: But the attorneys don't control
21 the system. That's part of the problem we have right now,
22 attorneys have control of the system and they push the

1 cases they want pushed and others they want to let sit, and
2 that causes us problems. So what I'm saying is, when
3 there's reasons, I don't see any problem with getting
4 cases, time frames extended, but I don't think we're going
5 to leave it entirely to counsel to decide when to do that
6 and when not to do that.

7 MR. HENRY: Are you contemplating any changes
8 within the Office of Judges to expedite the processing of
9 claims from your prospective?

10 JUDGE DRESCHER: Yes, we are. Also I need to
11 mention in a round about way of responding to your
12 question, Reggie, the Governor's office has last week
13 responded to our request for assistance dealing with the
14 backlog and they have authorized hiring of additional
15 staff, both support staff as well as contract attorneys to
16 deal with our backlog.

17 MR. RICHMOND: When is that going to start?

18 JUDGE DRESCHER: That's going to start -- they're
19 putting it on a fast track, so we're hopeful we're going to
20 have people starting in December writing decisions. If
21 you're aware of anybody that might be interested in
22 participating in that, let me know, I'll get in touch with

1 them.

2 The other answer to your question is that
3 we're going to establish a paralegal writing team to deal
4 with the less complex issues like treatment and reopenings,
5 and again that will be reviewed by a judge but at the same
6 time it won't take the same sort of judge resources that we
7 are now devoting to it, so I think that will free up the
8 judges to spend more time on the more complex cases we're
9 going to need to have to concentrate their time.

10 MR. SKEENS: Alan, with respect to that
11 particularly in my situation, of course I can't speak for
12 anybody else here but the last decision that I received on
13 a substantive matter, I'm talking about extension of a time
14 frame or something like that, a substantive decision, was
15 the 18th of August, and I haven't received any decisions,
16 ALJ decision this month, has there been a slow down by the
17 judges?

18 JUDGE DRESCHER: No.

19 MR. SKEENS: Is there something that can explain
20 that?

21 JUDGE DRESCHER: No, I have no idea why that
22 would be the case. There's been no change. I did want to

1 mention with regard to all the changes going on in our
2 office we thought it would be helpful if we put on a
3 seminar, and that's what we're going to do, we're going to
4 do one in Morgantown and one in Charleston. The one in
5 Morgantown, I think is December 6th and the one in
6 Charleston is going to be December 8th, and it's really
7 going to be more of an open-up-the-doors and this is the
8 Office of Judges kind of thing. It's not going to be so
9 much that this is a state of law in Workers' Compensation,
10 it's more this is how the Office of Judges operates, when
11 you send a letter in, this is where it goes, it goes to
12 this person seated right here, and they're going to tell
13 you what they do with it, and it's going to be a nuts and
14 bolts kind of thing, and we really encourage you to attend,
15 and I guess more specifically, we encourage you to send
16 maybe your legal assistant or your paralegal that works
17 with you in this area because we recognize just as we use
18 paralegals extensively that many law offices do also, and
19 in fact, some people would say they do most of the work.

20 So I think it would be very helpful for
21 those kinds of people to really understand how it is we do
22 things and why certain things happen and how, from your

1 prospective, you can get things accomplished more
2 effectively and more efficiently.

3 So we would encourage you to come or send
4 someone from your staff to those seminars because the
5 instructors, if you will, are going to be judges from the
6 Office of Judges as well as other staff.

7 MR. RICHMOND: I take it you're going to send a
8 notice?

9 JUDGE DRESCHER: Yes, it's going to be run
10 through the Office of Continuing Legal Education of WVU,
11 Jessica Justice's office, so there will be plenty of
12 publicity out about that. I just want to give you advance
13 notice. Are there any other comments or questions?

14 (No response.)

15 JUDGE DRESCHER: If not, I again want to thank
16 you for your time and efforts here, and we'll conclude this
17 hearing. Thank you very much.

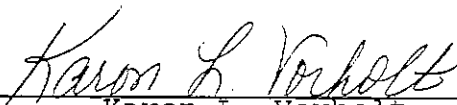
18 (WHEREUPON, the hearing was
19 concluded at 11:22 a.m.)

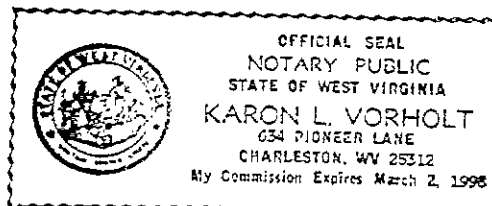
REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, the undersigned, Karon L. Vorholt, Court Reporter and Notary Public within and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings had in the aforementioned matter.

Given under my hand this 16th day of
October, 1994.


Karon L. Vorholt
Court Reporter



OFFICE OF JUDGES
PUBLIC HEARING

Beckley

September 29, 1994

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ORIGINAL

BEFORE THE WORKERS' COMPENSATION OFFICE OF JUDGES

RE: RULES ON TIME STANDARDS
FOR THE WORKERS' COMPENSATION
OFFICE OF JUDGES

Transcript of proceedings had in the above-
entitled matter before ROBERT J. SMITH, Chief
Administrative Law Judge, in the Memorial Student Center,
Room 2W37, Fifth Avenue, between Elm and 17th Street,
Huntington, West Virginia, on the 27th day of September,
1994.

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1 JUDGE DRESCHER: Good morning. I want to welcome
2 you to the hearing of the West Virginia Workers'
3 Compensation Office of Judges. The purpose of the hearing
4 is to receive public comment concerning proposed rules on
5 time standards for our office. Just by way of background
6 -- although I'm looking at individuals here, I assume,
7 probably are all more familiar than I am -- I wanted to
8 just briefly state that the Office of Judges was created by
9 statute in July of 1991, and it is a separate entity from
10 the Workers' Compensation Fund, although the mission that
11 we have is very similar to what was formerly performed by
12 the Legal Division of the Workers' Compensation Fund, and
13 that is to receive evidence and make decisions concerning
14 protest, decisions of the Workers' Compensation
15 Commissioner.

16 Since the office was created, we've had
17 some chronic problems, I think, that have prohibited us
18 from, perhaps, being efficient as you-all and as we would
19 like to be, including a big case backlog, some chronic
20 under staffing and antiquated record keeping systems.

21 Nonetheless, we feel like we're making
22 progress and as one more step in that direction of becoming

1 more efficient are these rules on time standards which we
2 drafted to address the issue of timeliness and the issuance
3 of decisions, and as you know, they're up for public
4 comments. So we appreciate your attendance here this
5 morning and we're very interested in getting your comments.

6 I think since we just have a relatively
7 small number of people here maybe we can do this a little
8 more informally, if you would like, more in a question and
9 answer thing, although, of course, any of you are welcome
10 to make a statement if you wish to do it in that manner. I
11 would ask that you introduce yourself for purposes of the
12 record, identify yourself before you speak. At this time,
13 I'd like to recognize Chief Administrative Law Judge Robert
14 Smith who wants to make a few comments.

15 JUDGE SMITH: Just a few background comments or
16 maybe comments to set the conceptional framework for what
17 it is we're attempting to do.

18 First, let me say that we welcome your
19 written comments as well as your oral comments, you can do
20 either or both. The deadline for the comments is the end
21 of this week.

22 The purpose as stated in the rules

1 themselves, the purpose is to establish time standards for
2 processing cases. We have a duty and an obligation to
3 claimants and employers to process cases timely, and in my
4 opinion we have not met that duty.

5 The promulgation and implementation of
6 these rules is an attempt by our office to set benchmark
7 standards by which parties can judge whether their cases
8 are being processed appropriately and whether or not our
9 office is performing as it ought to. The primary purpose
10 is, however, to ensure the timely processing of cases.

11 In trying to devise some mechanism to push
12 cases through or to ensure that they went through
13 appropriately, we had to make certain that we had
14 sufficient staff to do the work we did, that we needed to
15 get done. We believe that we are approaching that staff
16 level, and we think we will have it by the time these rules
17 are ready to be implemented.

18 Over and above that, it was apparent to us
19 by the experience that we've gained over the last three
20 years that there were substantial differences in the kinds
21 of protest that come through the office and that our time
22 standards needed to recognize the differences and the kinds

1 of issues that we deal with.

2 It's obvious that treatment issues need to
3 be dealt with quickly. We have attempted to do that. It's
4 obvious that reopenings need to be dealt with quickly, and
5 we are trying to do that. It's equally apparent that, at
6 least to us, and I believe from the parties' prospective
7 that more complex issues such as permanent partial
8 disability and permanent total disability simply take
9 longer to work their way through the system, and we have
10 provided for longer time frames for those.

11 In addition to making those kinds of
12 provisions, what the rules don't state expressly for what
13 we are doing internally will be to devote judicial
14 resources according to the kind of case that we have.

15 We anticipate utilizing paralegal resources
16 to do some of the faster-track cases. We do not anticipate
17 using judge resources to do those cases. Obviously, they
18 will be done under the supervision of judges, but it will
19 not be done by judges, as such.

20 Treatment issues are pretty
21 straightforward, and we've devised a process which we will
22 implement and deal with them that way. Reopening is the

1 same way. TTD presents a little harder problem because
2 it's probably going to be more litigious, perhaps, than
3 others, and compensability may be in the same boat, but
4 certainly what we're attempting to do is differentiate both
5 in the practical way the cases need to be handled and at
6 the same time make some allowance for more appropriate
7 allocation of resources within our own office.

8 We recognize that we cannot process all
9 cases within the time standards that we have promulgated in
10 Section 6. We know there will be cases where the parties
11 need extensions on time frames and will be provided for
12 that. So all cases may be processed in accordance with
13 time standards that are set forth, but it is our intent to
14 have the bulk of the cases go through that mechanism.

15 One further thing before I turn it over for
16 questions, two things. One is that we are conducting a
17 seminar or two seminars, one in Charleston, one in
18 Morgantown in December, December 6 in Morgantown, December
19 8 in Charleston. These are nuts and bolts seminars.

20 The leaders of the seminar will be folks at
21 our office and we will be in detail going through what the
22 processes for the different kinds of cases are, and in

1 trying to work with law offices and helping them know what
2 we are and helping us understand what your needs are. It's
3 nuts and bolts. It's not about the law. It's going to be
4 conducted by judges, by staff persons, and we hope at the
5 end of it, we'll have at least a starting point toward a
6 greater ability for all of us to work together to the
7 common end of processing cases in a timely fashion.

8 Lastly, let me make it clear, one of the
9 things that has arisen at the other hearings that we've
10 had, the time frames that are set forth in Section 6 are
11 not time frames as that phrase has been used in our system.

12 We arrived at those time standards by
13 taking into account three things. First is our ability to
14 get the case underway in the office, the front end as we
15 call. Second is the actual litigation time. That's the
16 time frame as you know it now, and we will continue to use
17 time frame orders, and third will be the time at the end of
18 the process that we need in order to do the administrative
19 work after a case is finished and get the decision done.

20 I'll just take one example, in the case of
21 treatment, what you're going to have is 45-day time frame.
22 Now obviously, some cases are going to need a little bit

1 different treatment from that but most cases won't, and the
2 mechanism we've devised to deal with treatment will be such
3 that we can do it in four months but it takes into account
4 about 30 days on the front end, 45 days on the back, and
5 the middle, and the rest of it's on the back end of the
6 process. We went through similar kinds of analyses in the
7 other cases, as well, in the other time frames.

8 With that in mind, I certainly would be
9 willing to answer any questions you might have about what
10 we intended and how we see the rules, as well as to receive
11 any comments you have to make about them.

12 MR. LEACH: Let me ask a couple questions. Tim
13 Leach from Huntington. Chief Judge Smith, you've spoken at
14 some of the Workers' Comp Committee meetings and say that
15 you're intending to get out of the issuing of show cause
16 orders.

17 JUDGE SMITH: That's correct.

18 MR. LEACH: Under this new proposed system are we
19 just going to have a time frame and then an order to submit
20 and no kind of warning or anything in between? How do you
21 respond to the order to submit if you maybe filed a motion
22 for extension and it got overlooked or something like that?

1 JUDGE SMITH: All of the issues, all of the
2 process issues have not been concluded. Our intent is to
3 use automatic time frames in every protest. We have not
4 done that in all protest in the past but we're going to use
5 automatic issuance of time frame orders, and it will go out
6 essentially with the acknowledgement, and it will set a
7 time frame.

8 I think that in order for us to be able to
9 appropriately meet these constraints, that we're going to
10 have to in cases where there is no request for an
11 extension, we will simply submit at the end and won't use
12 the show cause any longer on a routine basis like we have
13 now. Those days will be past. We will make mistakes.
14 Your question is an illustration of just one of the many
15 kinds of mistakes that any organization can make in the
16 processing of cases.

17 I think that most of the cases will go
18 straightforward, straight through, and I think the real
19 challenge to our office and I think the challenge to the
20 practitioners is how do we deal with those cases that get
21 out of the process. We are trying to set up mechanisms to
22 deal with those, and I'm confident that we'll make

1 mistakes, and I hope we'll have in place the ability to fix
2 them.

3 Certainly, I anticipate during the initial
4 processes or the initial months of this, we're going to
5 have that ability. I think we're going to have it not so
6 much because of the staffing levels that we have now, nor
7 so much because of the processes that we're putting in
8 place, but for another reason which I don't think is
9 appropriate now to deal with. It kind of helps explain, at
10 least in initial phases, the answer to your question, it's
11 a process and staffing issue to be able to deal with those.
12 Those are labor intensive, frankly, when you make mistakes
13 like that, if you do.

14 I have indicated on several occasions that
15 it's no secret that we have a substantial backlog and I
16 also indicated that there is no way, in my opinion, that we
17 can meet the time standards if this backlog is not dealt
18 with. I continue to assert that.

19 I'm really pleased to say that the
20 Governor's office has authorized over the next year or at
21 least through the end of 1995, has authorized us the
22 expenditure of an additional \$5 million in order to deal

1 with the backlog.

2 The Governor's office has mandated the
3 cooperation in all areas of government in order to make
4 certain that the equipment, personnel needs that we have to
5 meet in order to make this occur are dealt with
6 appropriately.

7 So I think that while we do those things,
8 we're going to have adequate resources, and I think that's
9 really going to be helpful as we go through the process of
10 finding ways to deal with these things. We have to find
11 ways to deal with it, and in dealing with backlog is not
12 the final answer to all of it but it's going to help
13 because we're going to have adequate resources.

14 Now is there a mechanism in the rules as
15 such, no, but there is, there's a rule that recognizes a
16 need for motions. If, for example, we submit a case and
17 you've asked for a time frame we haven't dealt with, we
18 need to deal with it. We have to find some ways to do that
19 and I'd like to hear from you as to how that gets done.
20 Some of it we're just going to have to figure out but the
21 question anticipates mistakes, and I think that we'll make
22 it, and I hope we'll find a way to deal with them.

1 MR. ROBINSON: Judge Smith, James Robinson from
2 Huntington, with regard to the example that you used with
3 medical treatment time standards.

4 JUDGE SMITH: Yes, sir.

5 MR. ROBINSON: Currently, concurrent development
6 of evidence is routinely met with an objection and are
7 being changed by the various different administrative law
8 judges. Do you anticipate a concurrent 45-day time frame
9 for the development of evidence, and what will be the
10 directives to the judges with regard to opposition to
11 concurrent development in that case?

12 JUDGE SMITH: Well, each kind of case will be
13 dealt with on -- let's talk about kinds of cases first.
14 Each kind of case will be dealt with, we hope, based on
15 what the needs of that case are. For example, in medical
16 treatment cases, that's a concurrent development and it's
17 going to be an automatic. It's not going to be a matter
18 where we're going to entertain routine objections to the
19 concurrent development. Concurrent development will be the
20 way that treatment is dealt with and it will require a
21 substantial showing -- and I can't define what substantial
22 is -- before we change that time frame in that case.

1 I mean, for the most part, I think that the
2 way we've set about the structure treatment issues, there
3 won't be any need, nor will there be time to extend the
4 time frame. We're going to have to react very quickly.

5 MR. ROBINSON: Will the same stand true with
6 regard to compensability of temporary total?

7 JUDGE SMITH: Compensability, we will deal with
8 on a concurrent time frame basis, and we don't intend,
9 incidently, to change -- it's not our intent and I don't
10 believe right now we need to go out and change the time
11 frames for evidentiary development. The time frame for
12 compensability, if I'm correct, is three months concurrent
13 and it will remain that way. It's concurrent. Is that
14 right, Ms. Vance? It's three months concurrent.

15 MR. LEACH: Give yourself six months from the
16 date of protest, they have it all decided.

17 JUDGE SMITH: Exactly. As I indicated, it gives
18 us 30 days on the front end, three months for development
19 and then gives us 60 days on the end to get it decided.
20 The 60 days not to just get it decided, but due to the
21 processing that needs to be done on the end of the case to
22 make certain that it's ready for submission and then go out

1 and decide. So that's a concurrent.

2 TTD, it appears that we're going to be
3 concurrent, although we haven't finally decided that yet.
4 The reopening will be concurrent, permanent partial will be
5 consecutive, as will be permanent total.

6 MR. LEACH: May I ask another question, Tim Leach
7 again. Do you-all anticipate more demands on maybe your
8 paralegal resources caused by shortening these time frames
9 and by setting different standards of time, standards for
10 different issues? By that, I mean, it seems to me as Mr.
11 Robinson has just suggested, you're going to be having a
12 lot of objections filed or maybe motions for extensions
13 that you don't have under the current system.

14 Number two, a lot of your decisions now
15 cover multiple issues that it looks like this new system is
16 going to -- into separate orders because of the different
17 time standards, so that you will have -- as you know, once
18 a protest is filed there may be six more protest of
19 different issues filed before that time frame even runs.
20 Isn't this going to make a greater demand on your staff to
21 be writing more decisions and dealing with more motions
22 than what you have now?

1 JUDGE SMITH: I think that certainly there will
2 be greater demand on our paralegal resources generally. I
3 don't have any real doubt about that.

4 What we have already identified and
5 commenced, the training on a paralegal writing team and it
6 is my anticipation that that paralegal writing team will
7 review the case and prepare the decisions for the bulk of
8 the treatment issues and for the bulk of the reopening
9 issues. Again, there is no final decision made about how
10 that's going to work, and I'm confident there will be other
11 areas that we assign to them, as well.

12 To address the question on motions, I think
13 that we may find in the initial stages a greater increase
14 or an increase, let's put it that way, an increase in the
15 number of requests for extensions on time frames.

16 I don't think it's so much because that
17 we're changing any of the processes as it is because we've
18 never enforced the time frames before, and a lot of people
19 just never asked for extensions because they knew that we
20 didn't enforce them, but since we will be enforcing them, I
21 think that there will be a greater number of request for
22 extensions on time frames made.

1 We have never truly had the resources we
2 needed to be able to go and look at whether or not an
3 extension should or shouldn't be granted, and for the most
4 part, at least for the first time, we granted them almost
5 routinely.

6 We have internally looked at standards for
7 granting or denying time frames and for granting or denying
8 continuous in hearings, and while I don't intend to make
9 those standards a part of the rules, at least that's not my
10 thinking right now, we certainly will publish that so
11 everybody will be aware of it, and then I think that it's
12 probably not appropriate because from time to time, I
13 think, the reasons that extensions or the emphasis that you
14 utilize change, so we will be needing additional resources,
15 and that brings us back to what I said earlier about the
16 commitment of the Governor's office for this next year.

17 We had already started the hiring process.
18 I don't mean actually getting people in but the process
19 means identifying people and getting interviews set up for
20 the paralegal, and we are going to hire minimum -- in the
21 first round of hiring, we will hire an additional 15
22 paralegals and an additional 15 secretaries in the first-

1 round hiring in regard to this backlog, and I anticipate
2 that -- there's no way that you can separate out what's
3 backlogged and what's not when you're deciding cases, so
4 what our goal is, frankly, is to decide about 25,000 cases
5 next year.

6 I think that while consolidation won't be
7 ended, it's not going to be as frequent. I mean, if we can
8 deal with the treatment issues quickly, I think we solve
9 other problems. If we deal with reopening quickly, I think
10 we end the reopening, the serial reopening request that you
11 see now.

12 I'll give you an example, there was a case
13 that counsel had, and it's not an old case, it's '93. I
14 mean, that's new, that's not old by Workers' Comp
15 standards, historical standards. It's got four reopener
16 requests, four, and that makes it difficult to review the
17 record, it makes it more difficult to decide the case. So
18 if we can deal with those quickly, maybe we won't have as
19 many issues. Maybe we'll reduce the number of protest, I
20 don't know, we hope it will, and at the same time the Fund
21 is doing a lot of its own internal work, and maybe the case
22 management system, they are in the process of -- will

1 reduce that.

2 I think the short answer is there is a
3 whole host of unknowns, and what we are trying to do is to
4 prepare for the need for resources that you're saying it
5 may need, and 15 is not where we end, that's the first
6 round of additional hires.

7 MR. GERWIG: Bill Gerwig from Charleston. I
8 guess a concern that I have is tying the time standards to
9 the date of the protest. It doesn't provide for a
10 mechanism on expeditious litigation where a case may be
11 concluded in 30 days rather than 18 months, especially a
12 case where there's no opposition. If that case is then
13 submitted, then it's not going to be given priority because
14 older cases who are running on the 18-month deadline are
15 always going to be bumped ahead of that continuously and
16 the effect will be, I still have to wait 18 months even
17 though I concluded my litigation in 30 days.

18 JUDGE SMITH: No, that's not what we contemplate,
19 Mr. Gerwig. Just because we say there's an 18-month period
20 which to deal with a case doesn't mean that's what has to
21 occur.

22 MR. GERWIG: Well, I understand.

1 JUDGE SMITH: What we anticipate occurring,
2 particularly in those cases where there's nobody on the
3 other side, or you're the claimant's counsel and employer's
4 never made an appearance, is that that's where I believe
5 the use of show cause is appropriate. It certainly is
6 appropriate, I believe, for example, where you're finished
7 and there's nobody on the other side to file a motion to
8 have the show cause order issued so that we can
9 appropriately conclude the litigation, and just because
10 it's not spelled out in here doesn't mean that counsel
11 can't use their own ingenuity.

12 MR. GERWIG: I understand that's available. My
13 concern is me being able to have it enforced because as
14 older claims are being submitted, either they're submitted
15 much longer or much later.

16 JUDGE SMITH: We intend to deal with the time
17 frame cases, with the cases that are after January 1 with
18 time frames. That's our problem.

19 MR. GERWIG: Just to give you an example of a
20 case, I've got an occupational pneumoconiosis case where
21 the OP Board found permanent total disability. The
22 Commissioner granted 5 percent.

1 JUDGE SMITH: I'm aware of that case.

2 MR. GERWIG: I know, I filed a protest and then
3 moved to submit the claim because I'm finished. The
4 evidence is clear to me. It's just a legal argument. I'm
5 afraid of cases like that continually being pushed back
6 while the older claims who are at 17 1/2 months from the
7 protest is being decided in front of it.

8 JUDGE SMITH: Well, without discussing that
9 particular case, the time frame mechanisms do not
10 anticipate that they're going to be placed behind certain
11 cases. We can't succeed if we do that, and we intend to
12 succeed with this.

13 What we're attempting to do is to start
14 fresh with protest that are filed after the effective date
15 of these rules, and while I will not sit here and tell
16 counsel that we will not make mistakes, I am confident that
17 we will, just as they will make mistakes. What I am saying
18 is that it is our intent not to have an absurd result
19 occur.

20 Simply because we set an 18-month time
21 frame doesn't mean that it has to take 18 months. What it
22 does mean is, and we hope that counsel will exercise some

1 ingenuity in these cases, and this is also, I think, the
2 kind of thing that we will be dealing with in the course of
3 our seminar in December, but to make it real clear, these
4 are not going to be put behind. We will have to internally
5 deal with the time frame cases, and I don't intend to get
6 started in a hole on this.

7 MR. GERWIG: I feel a little bit uncomfortable.
8 I much prefer the language you have on Page 5, where you
9 anticipate 60 to 90 days completion of the evidence, and
10 I'd even feel more comfortable if you said 90 to 120 days
11 than having that 18 months. At least that's something I
12 can refer to in a motion as a date that may be approaching
13 in a claim rather than just say it will be submitted, I
14 would like a decision, knowing that 18 months may still
15 expire.

16 JUDGE SMITH: My concept on rules, the rule
17 making itself, is that what is best to do is to have
18 general rules, and there's another way of thinking about
19 rules and that is you that you have very, very specific
20 rules and very, very voluminous rules, as a matter of fact
21 -- and that's a legitimate way of approaching the problem.
22 It's just one I don't adopt.

1 Emily Speiler at one point attempted to
2 promulgate rules about litigation, and I think they were
3 like 50 pages long and extraordinary detailed, and I think
4 that they didn't promulgated in part because once you start
5 that kind of thing everybody is opposed, there's nobody
6 happy.

7 What I would prefer to have and what I
8 think we have are general, very generic general rules but
9 that have enough teeth in them that you can go out and
10 enforce them. Bottom line is, if government is not
11 prepared to go enforce them, it ain't going to happen. You
12 can have all the rules you want, but I think you have here
13 are rules that have enough definition so that if we don't
14 do what we are committing to do, you're going to have the
15 ammunition to go out and take care of it.

16 Again, there will be a lot of different
17 issues and these are designed to deal with 80 percent of
18 the cases, and a challenge to you, to me, to everyone, to
19 all of us, is to find an efficient way to deal with that 20
20 percent that doesn't follow the rule. But in terms of
21 where there's nobody on the other side, that I don't
22 perceive to be a problem. The rule will have processes in

1 place to deal with that.

2 MR. NOONE: Chief Judge, Bob Noone, from Logan.
3 I would like to dwell on that point a little bit because
4 what Bill raised is a big problem in my office. I don't
5 have problems where I'm opposed, I don't have problems
6 where people really fight me on medical issues, hardly
7 anybody does, and when they do, they lose just because the
8 way the evidence is, which you have a treating doctor and a
9 specialist, they got to lose.

10 Sometimes the cases, the no-brainers, for
11 lack of a better word, a case where you're not opposed or
12 in town here, Dr. Panos Ignatiadis says the guy need a TENS
13 unit. He's board certified in two countries. The pain
14 clinic says we've got to get her off medication, TENS unit,
15 and the Commissioner still says no, protest it and then 18
16 months later I might get the TENS unit. Knowing that
17 that's not covered by the rules, if I'm unopposed or
18 whatever in a sense, can we maybe talk more concrete or can
19 you take some suggestions from us?

20 JUDGE SMITH: I'd be happy to have your
21 suggestions. Just because I say we're going to deal with
22 it doesn't mean I don't want to hear what suggestions you

1 have to make. I sure do.

2 MR. GERWIG: If I wasn't clear, my suggestion was
3 that your time standard begin from submission of the claim
4 rather than the protest, which takes into consideration the
5 ability to expedite litigation where I can.

6 JUDGE SMITH: When you mean submission, what do
7 you mean?

8 MR. GERWIG: He means he sends that letter in and
9 says, "I submit --

10 MR. NOONE: I think I understand what you mean,
11 that 90 day runs from when he says, "It's done. I've
12 served this on the other side."

13 MR. GERWIG: Even when there's opposition, I
14 generally complete my evidence before my time frame runs, I
15 protest it and move that it be expedited, and the other
16 side's evidence begins at that point.

17 JUDGE SMITH: Let me suggest that there's a, and
18 I appreciate that, and I'm not saying no to that, I'm
19 saying that presents some very difficult administrative
20 problems for us because we have to go out and touch time
21 frames again and that kind of issue, that is, trying to
22 make time frames, setting an initial time frame for

1 whatever, for the protesting party, and then setting
2 another time frame if the protesting party finishes early.
3 That's real labor intensive, and I suspect that that's
4 something that if you have enough resources you can do -- I
5 have questions in my own mind that it's worth it because I
6 have questions that most cases go like that.

7 MR. GERWIG: You may not need to do that. What
8 generally happens is, is there's such a lag between my
9 protest and the time frame order --

10 JUDGE SMITH: There won't be anymore.

11 MR. GERWIG: -- that I'm finished before the time
12 order arrives.

13 JUDGE SMITH: What we're telling you is that
14 ain't going to happen. What we're telling you is you're
15 going to get a time frame order with the acknowledgement.

16 MR. GERWIG: That's great news.

17 MR. NOONE: Will you accept -- but in the same
18 vein as what Bill is saying, there are cases I submit and I
19 specifically -- or I protest, and I specifically say the
20 claimant waives his time frame order. It's in my protest,
21 don't want to proffer that, here's my evidence. I got my
22 affidavit from the doctor, it's going in, you know, the day

1 of the protest.

2 JUDGE SMITH: We can deal with that. If you say
3 that kind of thing clearly in your letter, I think that's
4 the kind of thing we can deal with, and I think that's a
5 challenge to us, and I think that's a good suggestion, and
6 I think we need to look at a way to make that occur.

7 MR. ROBINSON: What about amending the time frame
8 to state that the protesting party has six months or date
9 that he rests his case, whichever is earlier, and give the
10 responding party six months from that time, then you don't
11 have to go back and amend.

12 JUDGE SMITH: We have that under consideration.
13 That's been one of the comments that's been made earlier in
14 the hearings, and I appreciate hearing it again.

15 I'm not saying no to that, I'm saying that
16 we will consider that and take a look at that and see if
17 that's doable now or if not now, then later. But what I
18 guess I'm saying is that the rules that we have don't
19 prohibit that, don't prohibit us from doing that, and these
20 rules don't say that you can't do it that way. The rules
21 don't spell out that kind of thing, and I think what you're
22 giving to us, Mr. Robinson, is a challenge to find a way to

1 do things differently and we appreciate that challenge.

2 Let me deal with the specifics for a
3 minute, Mr. Noone, and one of the problems is that to try
4 to deal with it in the rules overall is difficult because
5 there are as many different factual situations as I can
6 think of and as you can think of, and I have trouble posing
7 rules to deal with all of those.

8 I think the challenge is the processes that
9 we have internally within the rules, and that's one of the
10 reasons that we have always maintained a good and close
11 relationship with the Workers' Comp Bar Committee. That's
12 where we get feedback. We just have to be willing to
13 listen and have the resources to do those things.

14 What we anticipate occurring in those cases
15 where there's nobody on the other side, even those these
16 rules don't say, they don't prevent it for sure, but what
17 we say, we hope you will do is file a motion to submit if
18 there's nobody on the other side.

19 I mean, if there's nobody out there
20 representing the employer and the Commissioner hasn't made
21 an appearance, it's not our job to take care of it. It's
22 our job to get the case through and decide it, and it's not

1 our job to take care of the employer or the Commissioner.
2 It's our job to decide the case.

3 MR. GERWIG: I guess that's my concern. I'm not
4 concerned with the imaginative portion, what we need to do
5 in trying to get claims resolved. It's getting the
6 results, good or bad.

7 JUDGE SMITH: It's our response.

8 MR. GERWIG: And that's why I'm concerned that it
9 doesn't provide a more narrow time frame for when that your
10 answer comes back or the opinion is delivered, and that's
11 my concern, not what we need to do as litigators in terms
12 of presenting the motion or presenting our argument, but
13 getting a response back.

14 JUDGE SMITH: Well, I think that that's a fair
15 statement, and that's something that we need to consider
16 and to take into account. Let me say one thing about the
17 rules. I'd kind of like to see the process as
18 evolutionary, and I don't think that we're necessarily --
19 where we'll end up at this point in time. So I think that
20 what we're trying to do is put in place mechanisms that can
21 make us get decisions done timely, and that's what we tried
22 to do by the overall.

1 We recognize that there are cases where the
2 overall time frame is maybe not appropriate, but I believe,
3 based on our experience, that this would deal with 80
4 percent of the litigation, certainly 80 percent of the
5 contested litigation, and what I anticipate, frankly, is a
6 far greater number of request for extension than I do for
7 request to shorten, and the point is that both of them take
8 time, and we have to weigh administratively where we spend
9 resources.

10 I don't think anybody wants to give us, nor
11 should we have a limited budget, and I think what we have
12 to try to deal with are large majority of the claims, and I
13 don't think it's appropriate for us to overly respond to
14 the shortening of time frames anymore than it is for us to
15 over respond to the request to extend. Those are both
16 problems that we just have to deal with, and I really think
17 we'll have more request to extend, but we'll see. We don't
18 know what's going to happen. We'll see, and it's a
19 challenge to us to be willing to change them. Yes, sir.

20 MR. LEACH: This is Tim Leach again. Why did you
21 define a final hearing? Doesn't that set you up for a
22 suit, 30 days after --

1 JUDGE SMITH: I think it does, and I think that
2 if we can't meet that, then we either have to -- the
3 statute says 30 days. I think it's entirely fair for the
4 parties to know when that time frame starts to run. I
5 don't think that's an unreasonable request on the party's
6 part.

7 The question becomes whether or not -- how
8 many resources do you want to devote to making that occur
9 and what kind of system do you want to have, and if it sets
10 us up, then it sets us up. Sometimes the only way you can
11 get decisions made and people to say what it is that you
12 want. Do you want longer time or different kinds of
13 decisions or more resources spent on this, or what. What
14 is it you want, because the fact of the matter is, I think
15 it's problematic that we can meet the 30 days. I'm not
16 confident we can. It is our intent to try to do that, but
17 I think sometimes we'll just have to say, "Here's what it
18 is, folks. You tell us what you want to pay for this
19 system," and if people don't want to pay that much, then
20 maybe they'll to have to go out and get the statute
21 changed.

22 I'm not advocating the statute be changed.

1 What I'm advocating is that let's you know what we are, and
2 then if we can't do that, let's either decide why if it can
3 be changed easily, or if not, what are you going to do
4 about it, and that's a policy decision, the legislature to
5 deal with and the parties, frankly.

6 MR. ROBINSON: Judge Smith, this is James
7 Robinson again, and I have actually prepared -- the meeting
8 so far has been sort of a discussion situation. I had
9 actually prepared some comments on these rules, and if
10 appropriate now I would like to go through some of those,
11 one of which -- the starting of which starts with the
12 definition of final hearing.

13 The definition given here appears to define
14 a common understanding of the word hearing and does also,
15 in fact, appear to be inconsistent with Section 5, on Page
16 3, in that hearings will be scheduled by the Office of
17 Judges within 60 days from the receipt of the request for
18 the hearing. That seems to say that if we are requesting
19 the final hearing we can, as litigators, schedule the entry
20 of the order to submit, as well.

21 You mentioned a moment ago about the large
22 majority of claims. I have been doing this for

1 approximately 16 years and it appears that the large
2 majority of claims that I'm involved in, the more common
3 and accepted definition of hearing would be more
4 appropriate. This is where the party's to the suit or to
5 the claim either at a hearing both agree to rest the
6 presentation of their evidence or under the new system
7 that's more common now with the advent of the Office of
8 Judges and more a frequent use of depositions, the parties
9 both write letters indicating they have rested their claim
10 and ready to submit. It would appear that that would be a
11 more workable definition if we're considering the 80
12 percent of claims that are in litigation.

13 Also Section E, the "Submission" and
14 Section 4 appear to be somewhat inconsistent in that
15 Section 4 seems to say that all motions shall be acted upon
16 by the Office of Judges within 45 days of the date of
17 submission of said motion, but then submission is defined
18 as the date of receipt of the motion or the date of receipt
19 of the response to a motion by opposing parties.

20 I have heard on numerous occasions you
21 indicate that you did not intend to let the litigants
22 control the litigation. However, it would appear that a

1 responding party could delay the ruling on a motion or the
2 submission of a case by waiting until the 30th or 31st day
3 before responding because if they respond it would appear
4 that the 45 days starts all over again.

5 The order to submit that you speak about in
6 defining "Final Hearing," what is an order to submit and
7 what is its purpose? It would appear to be something that
8 might be the subject of one of your definitions.

9 Section 5, calling for a hearing within 60
10 days from the receipt of the request for a hearing does
11 appear to be somewhat inconsistent with the statutory
12 hearing of 30 days.

13 The other thing that I'm concerned about is
14 in the "Motions," "All motions shall be acted upon by the
15 Office of Judges within forty-five (45) days," and I have
16 indicated this earlier, it would appear that these rules
17 might indicate what types of motions would be entertained
18 by the Office of Judges.

19 Will there be motions to remand back to the
20 Commissioner for different development of different
21 evidence or reconsideration of something previously done?
22 Will there be motions for summary judgment as indicated by

1 some of the other prior speakers here today, when all we
2 want to say is the Commissioner made a bad decision, we
3 don't have any evidence, decide it all over again and apply
4 the law appropriately.

5 I have a question, and I don't know if this
6 should be the topic of one of the definitions or not but on
7 Page 5 it talks about "After evidentiary development is
8 completed, the Office of Judges must determine that the
9 case is ready for decision and abstract the issues." I'm
10 not clear as to what it means or what is the definition of
11 "abstract the issues." The issues would appear to be that
12 which is under protest in any litigation.

13 The other comment that I have about these
14 rules is that they do not do anything -- appear on their
15 face not to do anything with regard to the thousands of
16 claims that are currently in litigation and would only
17 deal, best case scenario, under implementation of rules
18 with 70 percent of the cases in 1997.

19 That concludes the formal comment that I
20 have but I do have a question with regard to "Submission"
21 and "Motions." The big word "or" sticking out in both of
22 those, what do you envision happening if someone does, in

1 fact, respond to a motion on the 43rd day?

2 JUDGE SMITH: I don't have a vision of that right
3 now, Mr. Robinson. We'll deal with those when we get
4 there. Let me say that there are a lot of issues that are
5 out there and I don't think that either I or anyone else
6 can sit here and tell you what's going to happen with that
7 kind of question without knowing (a) what the facts of the
8 situation are, what the issues are, and to deal with it on
9 an antidotal basis would be inappropriate for me to do
10 so, and it would be inappropriate, I believe, to say what
11 the response to a motion would be without knowing it.

12 I can assure you that the overall intent of
13 these rules, and I believe that the -- I think that the
14 overall intent is to push cases more quickly through the
15 system and that we will construe the requests that we have
16 in the course of these matters with that view in mind. But
17 at the same time, we don't want to decide cases on
18 completely technical bases because I think that's contrary
19 to the statute, as well.

20 I might also add that, to my knowledge,
21 this is the very first attempt on the part of anyone ever
22 involved in Workers' Comp litigation to start saying this

1 is what we're going to do and this is the time frame we're
2 going to do it in. So this isn't the ending point, and I
3 appreciate all the things that you've said.

4 MR. ROBINSON: Does the date of submission in
5 Section 4, the "Motions" section, does that date of
6 submission phrased there, is it intended to mean -- the
7 definition of "Submission" on Page 2, is it intended to say
8 that motions will be acted upon within 45 days of the
9 receipt of the motion by the Office of Judges?

10 JUDGE SMITH: Some of the other comments that
11 we've received here before indicate to me that we need to
12 respond to, and that is that the -- we didn't spell out in
13 here any time frame for a response to a motion and perhaps
14 we need to do that because what is intended is that -- it's
15 just what is says, which is that date of receipt of motion
16 or date of receipt of response, and the reason it's not
17 stated, that it's stated both ways, is that many cases
18 there aren't usually anybody on the other side, but in some
19 cases there are, and they have a right to respond.

20 MR. ROBINSON: I would think so, and I agree with
21 those comments, and I think by way of suggestion it would
22 appear to be more appropriate to actually move the motion

1 down into the "Time Standards" and state clearly that the
2 motions will be ruled upon within 45 days from the date of
3 receipt, like you do the other issues involved, and then,
4 as you indicated, it would probably be appropriate to set
5 forth to the responding parties how much time they're going
6 to be allowed to respond, receive the motion, wait for the
7 response but the decision will be made in 45 days.

8 JUDGE SMITH: We'll certainly take that comment
9 under advisement. Let me make sure I understood one of
10 your suggestions.

11 You indicated that our response to hearings
12 appears to conflict with the statutory mandate that
13 hearings be scheduled within 30 days. Are you talking
14 there, Mr. Robinson, about the statutory provision which
15 requires the scheduling of the hearing within 30 days after
16 the protest has been made?

17 MR. ROBINSON: That's correct. That appears to
18 be the intent of the legislature, that hearings be
19 scheduled within 30 days from receipt of the request for a
20 hearing.

21 JUDGE SMITH: We all know that we don't do that
22 and we haven't done that for years, and if you want us to

1 do that in your cases, Mr. Robinson, if you would tell me,
2 we will be happy to accommodate you.

3 MR. ROBINSON: I'm not talking about the initial
4 hearings because I like --

5 JUDGE SMITH: That's what I think that's goes to,
6 the initial hearing.

7 MR. ROBINSON: I understand. I think, however,
8 my opinion is, that it was the intent of the legislature
9 that hearing be held within 30 days of request, not only
10 the initial hearing but others, although they did not say
11 so, nor is there any legislative history to indicate that,
12 but certainly the Supreme Court and everyone has indicated
13 that they want expeditious handling of these cases. Do you
14 anticipate that the new computer system might accommodate
15 the, at least, scheduling of a hearing within 30 days once
16 it's fully operational?

17 JUDGE SMITH: I'm not confident. My own
18 experience has been that what we need -- that most counsel
19 schedule operate further out than 30 days, except in those
20 cases where they want it now, and in those cases, what
21 we're going to try to do is accommodate people. It is our
22 intent to be as accommodating as possible when you need

1 hearings quickly, but if you're talking routine scheduling,
2 our experience is that if you schedule them, that type, you
3 get more request for continuances as a result of conflicts
4 than you do -- and again, one of the problems is trying to
5 deal with a mass litigation system and at the same time
6 have the ability to deal with those individual cases as
7 well, and those are two competing forces in the process,
8 and it's our challenge to be able to construct a way to
9 deal with that as best we can.

10 MR. ROBINSON: If I was not clear, let me clarify
11 what I'm saying, I'm not talking about the conducting of
12 the hearing.

13 JUDGE SMITH: Scheduling.

14 MR. ROBINSON: I'm talking about scheduling
15 within 30 days from the request of the hearing.

16 JUDGE SMITH: We're getting closer to that.

17 MR. ROBINSON: I get a response back and it says
18 -- I requested a hearing in July, I get a response back
19 before the end of August that says you're going to have a
20 hearing in November, would be sufficient, just so we know
21 when it is?

22 JUDGE SMITH: My thinking is that we're going to

1 come to a lot closer to that than we ever have because
2 assuming the thing works appropriately, the way it's
3 designed to work is that the hearing requests come in and
4 they're entered into the schedule or modular and
5 periodically, and we'll have to determine whether it's
6 every week, every two weeks or every month, we engage to
7 program and schedule, and to the end we should be able to
8 give you an answer to your hearing as close to 30 days but
9 I'm not going to sit here and guarantee 30 days because I'm
10 not sure it's going to happen, but certainly it's going to
11 be quicker. It would be within that 60-day time.

12 MR. ROBINSON: Part of the problem I have is a
13 lot of those request are dropping into a black hole.

14 JUDGE SMITH: We understand, but I don't think
15 they're dropping so much now as they were, but I think it's
16 doing better and this will even make it better.

17 MR. NOONE: I think it's going to be helpful when
18 you to get the rules out or maybe when you do the seminars
19 or workshops, let us know when the black hole is and when
20 it begins because there was a period of time you didn't get
21 a hearing unless you requested one, and then we went
22 through the period of time you got a hearing even if you

1 didn't request one, and you protested it and it was hard to
2 know who was on first. So then someone's constructed
3 protest and said we do want a hearing or we don't want a
4 hearing or we do want a time frame or we don't. The time
5 frames were automatic and then they were unautomatic, and
6 it just became confusing as a player in the game to know
7 when.

8 I got my first time frame orders in and I
9 didn't know we weren't serious, so I created some enemies
10 when I told employers, "Sorry, you did not request an
11 extension within 30 days of the expiration, so my client
12 isn't going to your doctor's appointment that you just
13 bothered to set up," and I became, for lack of a better
14 word, a butt to some of these people, and then I realized
15 we weren't serious about that, and it was just a problem of
16 good rules but I didn't know they weren't in effect.

17 So I guess the general comment is, as you
18 plan for the December seminars, and I know a lot of us will
19 be attending that, particularly if it's going to be a nuts
20 and bolts approach --

21 JUDGE SMITH: We also would like to have your
22 paralegals there or the people in your office who deal with

1 these things. I know that you-all don't every day deal
2 with them, and they're the ones that are going to be
3 handling the cases. We would encourage you to invite them
4 and have them to come to these seminars.

5 Let me respond to just one thing. One of
6 the things we found, we have our own problems and we do,
7 and I'm not here to say we don't, never have been, and
8 we're creatures of habit, very much like everybody is. One
9 of the things that we found is and no matter how often you
10 talk to people, it's hard to get changed, and that is
11 lawyers don't write protest letters, secretaries do, and
12 they've got a form in word processing, and that form is
13 what gets used.

14 One of the great or large practitioners in
15 the state kept insisting that he was not asking for
16 hearings and getting them, and what occurred was that his
17 form letter requested a hearing and he didn't even know it.

18 MR. LEACH: It's in a computer program.

19 JUDGE SMITH: It's in a program and when you
20 change what you're doing, you've got to go into your --
21 somebody's got to go in. We want the people who do the
22 work to come to these seminars.

1 MR. LEACH: We have the same program and we had
2 to quit using the program because you couldn't change the
3 form letter in the program, so we just had to type them out
4 separately.

5 JUDGE SMITH: Well, we have the same kinds of
6 problems, and that's why, really, would hope that you bring
7 your people to these seminars because they're the ones that
8 do it. They're going to say, "Oh, gosh, if the letter says
9 that we're going to have to go change that." You won't
10 think about that unless you're one of the exceptional
11 practitioners in the world, and this practitioner didn't
12 know.

13 MR. ROBINSON: Judge Smith, I have another
14 question. I have on occasion discussed with yourself and
15 some of the various judges, for example, if we are
16 protesting only a part of a Commissioner's order, and
17 specifically I am talking about the dreaded date of
18 disability onset for permanent total. We're perfectly
19 content with everything except the fact that they just
20 started it last week, although the man hadn't worked for
21 ten years. If our protest is issued specific, we protest
22 this order only insofar as it addresses the date of

1 disability onset. What is the Office of Judges going to do
2 with that case?

3 JUDGE SMITH: Well, you made what I perceive to
4 be an excellent suggestion, and what I think we need to do
5 is to go out there and create a new category of protest
6 with a different time frame and it needs to be very much
7 like reopening.

8 The way I see that, is what you're saying
9 to me is, obviously if an employer protests, if it's a
10 grant and the employer protests a grant then you have
11 different factual situation, but if the only thing that's
12 at issue is the date of onset, that doesn't need one whit
13 of evidence, it needs to have -- and ought to be treated
14 just like reopening, where you go out, we simply send a
15 letter out and says give us your position. So that's a
16 good suggestion, and we will address that, and if you need
17 evidence, you can take it out. The things are designed to
18 deal with what the average case is.

19 MR. ROBINSON: Reopening, do we make a prima
20 facie showing or not?

21 JUDGE SMITH: Now, one of the things I sure would
22 like to hear from you-all, even after the rules, even after

1 the comment period has ended but it has to do with how we
2 implement this and not the rules itself, reopening has
3 three pieces to it. One of them is treatment, one of them
4 is PPD, third part is TTD.

5 The first two are easy to deal with from a
6 process standpoint. The TTD is more problematic. It gets
7 much more difficult to envision how in the world we're
8 going to deal with those without evidence because sometimes
9 I think we're going to need evidence. If you have just an
10 opinion about that, tell me, because what we propose to do
11 -- in the rules, what we propose to do, in fact, is not
12 issue a time frame order on reopenings unless we have to do
13 it on the TTD, but rather to issue an acknowledgement and
14 an order of submission with the request that will be
15 submitted on a date certain, something like this, now don't
16 hold me to precise scenario, and give us your statement
17 position on both sides. You have this much time and after
18 that we're going to decide.

19 MR. ROBINSON: Following right along with that,
20 part of the problem that I have encountered in those issues
21 is, I have received decisions from the Office of Judges
22 saying yes you made a prima facie after we submitted all

1 this evidence, temporary total and how long it's going to
2 be and so forth and substantiated medical evidence and I've
3 received decisions back that said yes you made a prima
4 facie showing, the case is remanded to the Commissioner to
5 pay temporary total as substantiated by the medical
6 evidence. It's in the file, it's in the record. I mean,
7 why submit it if it's not going to be acted upon while you
8 got it?

9 JUDGE SMITH: Well, all I'm saying is --

10 MR. ROBINSON: I guess I'm asking, are you only
11 going to decide on reopenings whether or not we made a
12 prima facie showing in the first instance, or not? If
13 you're going to decide some of the substantive issues with
14 regard to yes, you should have had it reopened and you are
15 entitled to temporary total for this period of time, then
16 obviously we need evidence, but if you're just going to
17 decide that we made a prima facie showing in the first
18 instance, either we did or we didn't.

19 JUDGE SMITH: Why do you need evidence if we
20 decide you did? I mean, when you submit that to the
21 Commissioner, if the Commissioner is going to grant a TTD
22 request, he's going to give you a period of temporary

1 benefits if he says yes, right?

2 MR. ROBINSON: And if he says no, it's just that
3 you didn't make a prima facie showing.

4 JUDGE SMITH: What I'm asking you is, how should
5 we deal with it? Do you think we ought to deal with it by
6 just looking at the petition and dealing with the issue
7 that's therein and that is, if based on the petition you're
8 entitled to a period of TTD, grant it or just send it back?
9 My opinion is we ought to grant it.

10 MR. ROBINSON: My opinion is you ought to grant
11 or deny based on the original petition and remand for
12 additional if in the event of granting remand for
13 additional temporary total as substantiated by medical
14 evidence but grant the initial amount that the evidence
15 does prove, and if you're going to deny it, it's a dead
16 fish anyway.

17 MR. NOONE: There are judges doing that now.

18 MR. ROBINSON: There are also judges not doing
19 it. I get decisions that says you make a prima facie
20 showing, go back and prove it all over again and obviously
21 they didn't like our evidence the first time, so.

22 JUDGE SMITH: Judges have their own ways. We.

1 don't micro manage the judges on everything they do, and I
2 don't ever intend to.

3 MR. ROBINSON: I think that is an area though
4 that there ought to be some way -- it's almost a micro
5 management, either the judges are going to have to decide
6 either to make a prima facie or not, and if not on various
7 different issues, you may want to address it in the rules,
8 which one you're not going to.

9 JUDGE SMITH: If we're going to grant TTD based
10 upon the petition, you see a need for evidentiary
11 development, and that's the issue to me. Do you want
12 evidentiary development or not?

13 No, we're prepared to go out and rule that
14 you're entitled to something or you're not, not remand it.
15 Do you want additional -- do you want evidence of not?
16 What I want to do is put an end to that issue, and if we
17 grant it then it's back in the hands of the Commissioner
18 for further benefits where it belongs. I mean, that's the
19 Commissioner role anyway. We don't ever continue to look
20 at TTD or we shouldn't be on an ongoing basis. We ought to
21 decide it and then it goes back here to the Commissioner
22 and the Commissioner then -- or the Fund looks at it again

1 after that period, after TTD.

2 MR. ROBINSON: I think that's appropriate. What
3 are you going to do with the permanent partial?

4 JUDGE SMITH: They go out for referral.

5 MR. ROBINSON: If we show a prima facie, if we
6 think we've made a prima facie cause for reopening
7 supported by a doctor's report that says it's no longer 5
8 percent, it's 7 percent and you determine that we made a
9 prima facie showing, are you then going to grant the
10 additional 2 percent?

11 JUDGE SMITH: Probably not.

12 MR. ROBINSON: Why would that be treated
13 differently?

14 JUDGE SMITH: To me they're conceptionally
15 different issues. I mean, what we're dealing with in the
16 one case is temporary total. To me, temporary total is
17 income replacement and permanent partial should not be such
18 a time pressed issue, and I'm prepared to deal with
19 temporary total because it is time sensitive and let
20 permanent partial be dealt on a longer term basis.

21 MR. ROBINSON: The reopenings for medicals --

22 JUDGE SMITH: You may have a good legal position

1 on that and I'd urge you to make that legal position. I'm
2 not saying we're not going to do that and I appreciate your
3 comment, okay. I'm just saying that's my view right now
4 but that doesn't mean that when we look at this it won't
5 change that view. But again, that becomes a kind of a
6 legal issue. It seems to me that always it's been -- you
7 don't get -- it's rare that you get a PPD right then, the
8 referral.

9 MR. ROBINSON: The reopening for medicals, you
10 indicated you're not going to time frame them, you're going
11 to send out a letter that says what's your position on
12 this, we're going to decide it?

13 JUDGE SMITH: On a medical?

14 MR. ROBINSON: Yes, treatment.

15 JUDGE SMITH: Treatment, that's right.

16 MR. ROBINSON: If we reopen for treatment,
17 there's not going to be a hearing, what's your position,
18 we're going to decide?

19 JUDGE SMITH: The same for PPD and the same --
20 and I don't see why we can't do the same for TTD.

21 MR. ROBINSON: I don't either. That's the reason
22 my suggestion for summary judgment. I think we sent enough

1 in or we need to go back and start all over.

2 JUDGE SMITH: That's what it amounts to, just
3 ain't calling it that.

4 MR. NOONE: From an in-users point of view on the
5 reopening for PPD, we have, you know, take this same
6 example, the 5 percent, your doctor says 7, generally,
7 sometimes when their doctor says 7 percent, it cost a
8 couple hundred dollars but you rarely get a good general
9 practitioner that -- and then the Commissioner sends him to
10 Mukkamala who finds negative 5 percent now, and so we
11 protest that and we've now, we're into three years or more
12 on reopening, and it's not cost effective for my in-user.
13 If my opponent attorney was being paid on a contingency fee
14 he might not think it was cost effective either.

15 MR. ROBINSON: That's not the same category, Bob.
16 Once the Commissioner has made a referral they've already
17 found prima facie. I'm talking about the one where you
18 send in your doctor's report that says 7 percent and they
19 say no, this is not enough, we're ignoring that.

20 JUDGE SMITH: What I hear you're saying -- let me
21 make sure I'm hearing your comment correctly. I hear your
22 comment to be that in our processes, in our time frames

1 what we ought to do, and maybe this is more substantive
2 than procedural, and that's okay, what we ought to be doing
3 is looking at that and not necessarily just restricting
4 ourselves to a decision to refer or not to refer but rather
5 looking at it to see whether or not he's entitled to any
6 additional permanent partial disability?

7 MR. NOONE: Yes.

8 JUDGE SMITH: If you have the report.

9 MR. NOONE: Yes.

10 JUDGE SMITH: Let me suggest to you that that
11 issue may get swallowed up in the new mechanisms that are
12 being thought through and talked about in regard to
13 disability itself.

14 MR. NOONE: I honestly swear, if my mind serves
15 me right, that I have had judges rule for me in that way
16 and on the course of reopening on PPD, I submit two board
17 certified orthopedists report that it's worsened and
18 they've been kind enough to give me the additional two or
19 three percent. Reopen on one and they deny it, once they
20 deny it and I protest it to the Office of Judges, I have
21 supported with additional physician.

22 JUDGE SMITH: That's something I think we need to

1 deal with ourselves internally as well as looking at this.
2 I don't think it affects the rule one whit. I think it
3 only affects what we do on the decision, so I really think
4 it's probably just a different kind of conversation than
5 the rules.

6 MR. ROBINSON: Well, I'm not so sure because we
7 as litigants need to know how you're going to deal with it.
8 Do we need to develop this additional evidence.

9 MR. NOONE: I can save 500 bucks in the process.

10 JUDGE SMITH: Other comments or questions?

11 MR. GERWIG: Did you ever take the position that
12 you're entitled to the additional 2 percent as a matter of
13 law? What's your position on that?

14 JUDGE SMITH: Interesting you say that but that
15 position is there, I guess.

16 MR. NOONE: I have. There's been times I've just
17 tried to enforce the section of the code where a treating
18 physician before the TTD --

19 MR. GERWIG: It doesn't say that and, in fact, it
20 contemplates that --

21 JUDGE SMITH: Well, I prefer not to go --

22 MR. ROBINSON: I have one other suggestion in

1 these rules that you address the issue of presidential
2 value of your prior decisions. If we have a case that's on
3 all fours, where the case has previously been decided a
4 certain way, for example, as the Bogart case, for example,
5 is that of any presidential value or not, and if so, will
6 other administrative law judge decisions have presidential
7 value? I know that you spoke of the Bogart case many times
8 because three of you signed it.

9 JUDGE SMITH: It is presidential in our office.

10 MR. ROBINSON: Are other ALJ decisions
11 presidential when cases are on the exact same factual
12 basis?

13 MR. LEACH: They're not in Social Security and I
14 don't see why they would be.

15 MR. ROBINSON: Because of the fact that they have
16 indicated previously that Bogart was a presidential case.

17 MR. LEACH: That's a policy, though, kind of a
18 decision, I take it. Internal policies are like -- in
19 Social Security, and those are our governing supposedly,
20 but one decision of a judge, you can't walk into another
21 judge's office and throw a decision down and say you've got
22 to rule this way. It's only if it comes out of federal

1 court or the appeals counsel or something can you do
2 anything like that.

3 MR. ROBINSON: Perhaps these rules ought to
4 address the issue when you feel a case will be
5 presidential, how you will indicate such.

6 JUDGE SMITH: Obviously, whenever we're talking
7 about presidential, we're not talking about facts. Every
8 case has different facts. We're talking about policy,
9 we're talking about application of law, and we'll take that
10 comment under advisement.

11 MR. ROBINSON: So we know how to identify this is
12 a presidential case and this is not.

13 MR. NOONE: Just one or two other comments that
14 are aside from time standards a bit. One would be the idea
15 of having hearings where the Fund -- we asked about this
16 before, rather they continue a hearing and doing the letter
17 to opposing counsel agreeing to this or that, I would pay
18 for the call if I could call into the Beckley hearing
19 office and they put me on a speaker phone with opposing
20 counsel that's already there on 20 other cases, or
21 whatever, and if we could do that. Once an enterprising
22 ALJ got another attorney and I together on the phone and

1 hammered out stuff, I guess, to the hearing he couldn't
2 make it the next day and he did it with several other
3 cases, it was great.

4 JUDGE SMITH: We'll look at that and see if we
5 can make that occur. I think we're getting to the point
6 where that's more possible than it used to be. I know in
7 Beckley they've got a phone in the hearing room.

8 MR. NOONE: Yes.

9 JUDGE SMITH: We have control of that, but we
10 don't have control of the hearings sites. It's much more
11 problematic for us because a lot of them don't even have
12 telephone.

13 MR. ROBINSON: It may be a very significant cost
14 savings if the administrative law judge can conduct some
15 hearings by conference call and schedule them by conference
16 call rather than at a particular location. It would save
17 you travel expenses and a lot of money.

18 JUDGE SMITH: You-all are doing telephone
19 depositions, there's no reason we can't do telephone
20 hearings. We just simply have not had the resources to go
21 out and figure out how to do all these and do telephone
22 hearings. You can't do everything. I'm not saying that we

1 won't, I'm saying that's a good idea.

2 MR. ROBINSON: A telephone tape recorder would
3 probably actually even work better than some of the things
4 we've seen show up at hearings.

5 MR. NOONE: The final thing I have to say goes
6 back to resources, should anybody review this transcript
7 besides the Office of Judges under public hearing, I think
8 we need to continually --

9 MR. ROBINSON: Will they be filed with the
10 Secretary of State's Office, the comments?

11 JUDGE SMITH: I don't think the comments are. I
12 think our response to comment is, but I'm not sure. We'll
13 do whatever the law requires us to do, and I know that the
14 law does require us to keep the transcripts for some
15 certain time period but I don't know if it requires us to
16 file. If it does, we will.

17 MR. NOONE: But my final comment was, you are not
18 operating in a vacuum and unless -- aside from the resource
19 issue, unless some changes are made at the Commissioner
20 level or at the Fund level you're going to continually have
21 big backlogs.

22 For me one of the big booms to my business

1 was HCX, people started knocking the door down for crazy
2 issues they shouldn't have a lawyer for. I encourage the
3 doctors who now find it impossible to adequately treat
4 their patients because medication is being denied, certain
5 treatment is being denied, I encourage them to go through
6 the appeal process and let's get to a stage where we have
7 appealable order from the Commissioner that they refuse
8 this. It's going to continue to gum up your works till the
9 Commissioner deals with HCX.

10 We have doctors now, and I'm sure Bill and
11 Tim probably find them, are refusing to treat our clients
12 because their hands are tied in treatment issues. They
13 can't get the medication they need. I have clients that
14 are taking compensable injuries and buying medication on
15 VISA and MasterCard, and now they're being sued because
16 they can't get the bills paid, and I have to do what I do
17 as a litigator and say let's get a protestable order and
18 let's take it to where you can have your day in court,
19 which happens to be you-all. Lately I've demanded so many
20 damn days in court over medication and treatment issues
21 that I'm going to start charging 20 percent of the value,
22 because we have to do it for free essentially. We

1 represent people before -- we do those treatment and
2 medication issues for free. You don't operate in a vacuum
3 and word has to get out to the people because your works
4 are going to continually be gummed up until they deal
5 adequately with treatment issues, and learn the definition
6 of prima facie. You wouldn't have four consecutive
7 reopenings if they learned what a prima facie case, if they
8 read that case that said a treating physician, you know,
9 uncontradicted constitutes prima facie -- it's a real basic
10 thing everybody puts in their briefs. So you're not in a
11 vacuum and if somebody below can learn a couple of those
12 things I think your work would be easier.

13 MR. ROBINSON: I have to follow up with that.
14 The reason I was late for this hearing was I was deposing a
15 doctor upon the necessity of continuing office visits when
16 prescribing medications. The federal government will put
17 them in jail unless they see these people on a regular
18 basis. If they're prescribing medications, the Fund cannot
19 continue to authorize the medicine but say you can't go to
20 the office to get it, and you're going to have to decide
21 that case as soon as I can get the transcript back and send
22 it to you.

1 MR. NOONE: Doctors are refusing -- in fact, a
2 doctor here in town continue to do the silly paperwork to
3 get medication for people they're treating, and they're
4 sending letters to their client saying (1) call your
5 senator, (2) write the governor and (3) get a hold of a
6 lawyer because I can't keep treating you like this.

7 JUDGE SMITH: I recognize those difficulties and
8 I have stated to the Performance Council as well as to
9 other folks that if the number of protest is not decreased,
10 our office will be swallowed up or there will be greater
11 and greater demands for additional resources because that
12 has to occur. To me, the best way to deal with litigation,
13 is not to have it to start with, and that doesn't mean deny
14 it, it means you deal with it appropriately. Any further
15 comments?

16 (No response.)

17 JUDGE SMITH: I thank you all very much for
18 taking your time out of your busy schedules to come over
19 and I appreciate the interest that you've shown. Thank
20 you. We're concluded.

21 (WHEREUPON, the hearing was
22 concluded at 11:24 a.m.)

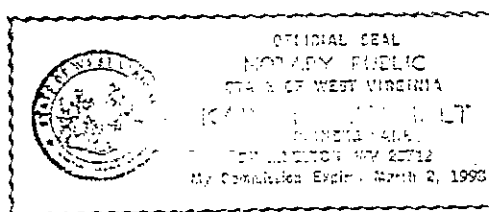
REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, the undersigned, Karon L. Vorholt, Court Reporter and Notary Public within and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings had in the aforementioned matter.

Given under my hand this 16th day of
October, 1994.


Karon L. Vorholt
Court Reporter



OFFICE OF JUDGES
PUBLIC HEARING

Huntington

September 27, 1994

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ORIGINAL

BEFORE THE WORKERS' COMPENSATION OFFICE OF JUDGES

RE: RULES ON TIME STANDARDS
FOR THE WORKERS' COMPENSATION
OFFICE OF JUDGES

Transcript of proceedings had in the above-
entitled matter before ROBERT J. SMITH, Chief
Administrative Law Judge, Room 110, Board of Review, 1321
Plaza East, Charleston, West Virginia, on the 28th day of
September, 1994.

KARON L. VORHOLT
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Office of Judges
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ALAN M. DRESCHER
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1 JUDGE DRESCHER: Good morning. We'll go ahead
2 and call this hearing to order. I would like to welcome
3 all of you to the public hearing of the Office of Judges
4 we're holding for the purpose of receiving comment
5 concerning our proposed rules on time standards.

6 Just by way of background for any of you
7 that may not be aware, the Office of Judges was created by
8 statute in July of 1991. Prior to creation of the Office
9 of Judges, the process in Workers' Compensation claims was
10 that after the Commissioner made an initial decision and
11 was protested by either party, it was then reviewed by the
12 Legal Division of Workers' Compensation Fund, and in order
13 to avoid one division of the Workers' Compensation Fund
14 reviewing the work of another division of the Workers'
15 Compensation Fund, the Office of Judges was created as a
16 separate legal entity in '91 for the purpose of making that
17 review on protest.

18 We are located in the same building, and I
19 think even to this day there is some confusion about our
20 separateness, but we are a separate entity. However, we
21 inherited some problems, I think it's fair to say, from the
22 Fund, including a substantial case backlog, under staffing

1 and antiquated record keeping system, all of which we are
2 attempting to deal with, and as part of our attempts to
3 improve our efficiency, we have promulgated these rules
4 which are designed to address the issue of timeliness of
5 decisions issued by our office.

6 We appreciate your attendance here today,
7 we appreciate every comment you may have. These are not
8 intended to be the all end and end all but are just a
9 starting point and we are genuinely interested in what you
10 have to say and we'll take everything into consideration as
11 we continue on in this process.

12 At this point, I would like to recognize
13 the Chief Administrative Law Judge Robert Smith who wants
14 to make a few brief comments and then we'll get to your
15 comments.

16 JUDGE SMITH: Thank you, Judge Drescher. This is
17 the fifth of six hearings that we've conducted around the
18 state, and what I'd like to do is to paint some conceptual
19 background for what it is that we've done in these time
20 standard rules and to also address some of the questions
21 that have come up in other hearings in regard to
22 clarification matters.

1 The purpose of the rules is stated in the
2 first section and that is to establish time standards for
3 the processing of protest in order that the parties to the
4 litigation may receive decisions without unreasonable
5 delay.

6 In order to do that, we took a very close
7 look at what we are and how we do business, and one of the
8 things that we recognized was that it was important for us
9 to treat different kinds of protest differently, and that
10 had never been done in the Fund, in the old Fund Legal
11 Division, nor had the Office of Judges really dealt with
12 protests differently, that is, to recognize that different
13 kinds of protest need to be dealt with in different ways.

14 It's not just a matter of dealing with them
15 more quickly than they have been in the past, it's a matter
16 of dealing with them administratively differently, so that
17 what we have done here is to not simply say that we're
18 going to do these things more quickly but implicit is that
19 we're going to handle them differently, as well.

20 For example, treatment issues for a variety
21 of reasons need rapid treatment. They have never received
22 it. Reopening issues, likewise, need quick treatment

1 because in addition to the fact that the statute mandates
2 it, the expeditious handling of those issues will tend to
3 stop other protests from being filed, and likewise, those
4 cases have not been dealt with differently, as well. So
5 what we've tried to do is to recognize the different kinds
6 of issues being dealt with differently.

7 In addition to that, while the rules don't
8 overtly state it, whenever you start dealing with cases in
9 a time frame of four months, then it becomes apparent that
10 they're going to have to be dealt with administratively
11 differently than other kinds of cases.

12 For example, treatment issues were the
13 large bulk of them, and I might add that the rules are not
14 designed to deal with all cases, they're designed to deal
15 with what we perceive to be the bulk of the kinds of cases
16 that we deal with.

17 Our real challenge and your challenge, as
18 well, will be to find ways to deal with those cases that
19 don't fit within the usual way cases get handled.

20 But treatment cases will be dealt with
21 expeditiously, and that means, among other things, that
22 they will probably -- not probably, they will be decided

1 differently, that is, they will be reviewed and decided --
2 or the decisions written by paralegals, and other issues
3 will be dealt with the same way, reopening issues. That
4 doesn't mean that paralegals will deal on all issues of --
5 that kind but our challenge is to train folks so that when
6 an issue does need to have the in depth review of the
7 judges -- well, what we're trying to do is to marshall our
8 resources and spend our resources in as efficient of way as
9 possible. We just have concluded that we do not need to
10 have judges dealing with every issue that comes down the
11 pike for us. So what, among other things, we'll be doing
12 is deciding things in that fashion.

13 The frame work for these time standards and
14 one of the things that we ran across in the earlier
15 hearings, these time standards are not equivalent to time
16 frames, as that phrase has come to be used. Rather, the
17 time standards take into account what we perceive to be
18 three discrete stages of development in a case.

19 The first stage of development is the
20 protest and the acknowledgment and time frame. That's what
21 we call the administrative front end of the case. With the
22 advent of these rules, all protest will have an automatic

1 time frame order and the time frame order will go out at
2 the same time or about the same time as the
3 acknowledgement, so that lapse of time between the
4 acknowledgement and the time frame order which has existed
5 in the past will cease to exist. That's the first period
6 of time.

7 We have kind of allowed ourselves
8 generally, not by rule, but in our own minds
9 administratively about 30 days to accomplish that task.

10 The next period of time, the next discrete
11 event, I should say, in determining what the time standard
12 would be was what the people need, what the parties need to
13 reasonably develop the case, and with the exception of
14 reopenings and treatment issues, that has remained pretty
15 much the same, whether it be time standards -- excuse me,
16 the time frame orders for compensability, for example, will
17 remain three months concurrent. The time standard for
18 permanent partial disability and permanent total
19 disability, at this time -- this is not by rule. Remember
20 these are maximum time frames. At this time, we don't
21 intend to make any change in the permanent partial or
22 permanent total disability time frames. It will be six and

1 six, I believe, is what we're effectively doing. A little
2 longer than that, I believe, in permanent total, but it
3 will be consecutive time frames for those.

4 So that we took into account in setting
5 this time standard what we thought the parties reasonably
6 needed in order to complete the development of the case.

7 The last portion of this time frame is what
8 we need administratively in-house once the litigation
9 process is concluded to process and decide the case. It's
10 not simply a matter of giving it to a judge to decide. We
11 need to be able to make sure the case is right and then
12 abstract the issues, that is to have a paralegal or other
13 paraprofessional to review the case and give the judge
14 information that the judge needs so that the judge doesn't
15 have to spend time on that kind of endeavor. We perceive
16 that to be 60 to 90 days on the tail end of the case.
17 That's overall process.

18 So that's how we came up with these time
19 frames, and that would give you some idea about probably
20 what we're going to do.

21 I have indicated previously in both
22 seminars and in meetings that the changes that are

1 occasioned by the implementation of these rules are
2 substantial both for us and for the parties, and I've
3 continued to urge that on everybody that will listen.
4 We're going to have to have some very large changes in our
5 office in order to make it work and I think probably the
6 parties are going to have to have -- take a new look at how
7 they handle things, as well.

8 One of the things that we're going to do to
9 insist in the transition in regard to these rules is to
10 conduct in conjunction with the WVU Continuing Legal
11 Education Program, two seminars, one here in Charleston and
12 one in Morgantown. These have already been scheduled. ----
13 They will be on December 6 and December 8. They will be
14 conducted entirely by Office of Judges personnel. It will
15 be management personnel, judges and staff persons all
16 taking part from our prospective in this seminar. It is
17 intended by us to be a nuts and bolt seminar, that is, what
18 we are, how we do things and at the same time how you can
19 do things so that it responds to what we are, that is what
20 buttons can you push to make us work better, how can you
21 run your business so that it helps us to get our job done,
22 and then how can we, at the same time, learn more about

1 what you are so that we can accommodate ourselves where
2 it's possible to what you do.

3 We encourage your attendance at these two
4 seminars. We also encourage the law firms and counsel to
5 bring their support staff to these seminars. I recognize
6 that in many cases it's the support staff that's doing the
7 work and we believe that it's very important for us, for
8 them to know what we do, as well as it is for the lawyers
9 to know what we do, what we are.

10 So we hope that you will sign up for and
11 attend these seminars. The seminar in Morgantown is the
12 6th, I believe, and the seminar in Charleston is the 8th,
13 and they'll be all day. That concludes my opening remarks.

14 JUDGE DRESCHER: Just a couple procedural things,
15 I guess, I'd like when you speak, if you don't mind,
16 identify yourself for purposes of the record so that we'll
17 know who's speaking.

18 The way we've done this at the other
19 locations, we've not had quite as many people at most
20 places, but anyone who has a prepared statement certainly
21 would be welcome to make that, but we've also had some sort
22 of question and answer type process, and I think probably

1 enables more information to be passed back and forth than
2 just the reading of the prepared statements. So we'll be
3 glad to respond to questions you may have if you have any
4 questions about what was intended by any portion or any
5 section and also any suggestions you have about what we
6 could do to make it clear or make it better.

7 JUDGE SMITH: Before we do that, please
8 understand there are two pieces to the comment process,
9 one are the hearings, and we also are inviting written
10 comments, so you can do either one or both. We would
11 welcome all the comment and advice we can get, so anybody
12 have any questions or comments?

13 MR. HRUTKAY: For comment. Mainly why I came
14 today was while I think at the times you set for deciding
15 cases were reasonable, the problem I had was the times are
16 measured from a point concerning the date of the receipt of
17 the protest by the Office of Judges. Incidentally, I'm Mark
18 Hrutkay, H-r-u-t-k-a-y.

19 Why didn't you pick a time when the case is
20 either motion to submit or formally submitted or something
21 of that nature?

22 JUDGE SMITH: Our objective in setting the time

1 frames was to provide the parties with an overall reference
2 point by which they can judge when we should be able to
3 complete things.

4 It would be possible and we have not
5 eliminated that possibility to write a rule so as to
6 segment time frames at different stages of development.

7 I initially chose not to do that because I
8 think my view of rules is that they should be more general
9 in nature than specific. If you make rules very specific,
10 then as your business changes and as your ability to do
11 things changes, you're hamstrung by specific parts of a
12 rule, and I did not want the Office to be so hamstrung.

13 The overall intent is to process cases as
14 quickly as we can, and the other problem you have in doing
15 that is that when -- every case isn't going to follow like
16 that. I don't care how hard you try, every case isn't
17 going to go that way, and then you start trying to find
18 your way into making exceptions to each time segment, and
19 it became very, very difficult to fashion a ruling like
20 that.

21 My general feeling about rules is that they
22 need to be more general but specific enough to provide

1 accountability. I think that's important. Fifty pages of
2 rules, I think, is something that honors form over
3 substance and we are endlessly involved in trying to deal
4 with the minutia of rules, and I think these are an attempt
5 to provide accountability for our office as well as the
6 flexibility that I think we need in order to get things
7 done properly.

8 MR. HRUTKAY: Thank you, sir.

9 MS. SMITH: Judge Smith, I'm Sally Smith, and I
10 have a question about a comment that we had intended to
11 make that would throw some additional responsibility on the
12 Office of Judges, and so I wanted to give you a chance to
13 comment on that.

14 Given that, with the creation of the Office
15 of Judges, there is what I perceive is an intervening
16 litigation process that didn't exist before. It used to be
17 the Commissioner made the initial order and then litigated
18 it pretty much himself.

19 If you will, I wasn't able to appear as a
20 party, now with the Office of Judges we have more
21 formalized system. We have more professional system, we
22 have requirements of findings of fact and conclusions of

1 law, and a process, and I think we're all more comfortable
2 with.

3 Given that, would you be uncomfortable with
4 the concept that the Appeal Board would become a review
5 body that would have a clearly wrong standard, such as the
6 Supreme Court -- that may be an oversimplification but
7 clearly wrong review standard rather than a de novo
8 standard and that would, of course, place responsibility on
9 the Office of Judges to continue findings of facts and
10 conclusions of law, continue that professionalism and
11 continue to be the initial safety net. That would be my
12 inquiry.

13 JUDGE SMITH: I'm glad you didn't ask a difficult
14 question. I think that the Performance Council which was
15 created by the 1993 legislation is in the process of
16 looking at the Workers' Compensation system overall. I
17 think it's focusing on some -- on more narrow issues from
18 time to time, but I think that the litigation process is
19 one of the things that the council will be looking at, and
20 I think that those kinds of policy issues, I really think
21 that's a very large policy question that you've asked, are
22 things that need to be directed there and that they need

1 then to refer to the legislature for legislative change.

2 I think that what you're suggesting
3 probably would require legislative change, and I personally
4 don't have any objection, whatsoever, to that kind of
5 system. I think that the question that we have to look at
6 and answer is what makes sense in this process, and if
7 that's one of the things that makes sense, then certainly
8 that should be pursued.

9 I think one of the things we need to do is
10 not to duplicate ourselves in the litigation process, and I
11 hope that as time goes on and as we become more
12 professional in what we do without becoming so professional
13 that we make it impossible to reach us, but as we become
14 more professional, I hope that the confidence level will
15 rise in what we do and maybe it will be appropriate to look
16 at those kinds of things.

17 Let me go one step further, Ms. Smith.
18 Certainly, the next year is going to pose some real
19 challenges for the Appeal Board for our office and for the
20 practitioners.

21 I think it's appropriate to let you know
22 that we are undertaking a major effort to eliminate the

1 backlog of cases. We've had meetings in the Governor's
2 office very recently and we are going to be provided with
3 resources that are necessary in order to decide the
4 backlog.

5 The goal of the Governor's office, and it's
6 always been our kind of goal, is to be backlog free by the
7 end of 1995. Those of you who are aware of what that means
8 can recognize that what we're about to undertake to do is
9 probably issue a minimum of 25,000 decisions in the next 12
10 months. In order to undertake that, we will be contracting
11 with outside lawyers similar to what the Fund has done with
12 a very large number of them around the state, we will be
13 essentially have the ability to double our support staff
14 and to do all those things that are necessary in order to
15 accomplish that objective. That's going to place a very
16 large burden on the Appeal Board because we're going to
17 more than double our output in that period of time which
18 means the Appeal Board's work load is going to more than
19 double.

20 I might note that we're entirely pleased to
21 be able to have the challenge as well as the opportunity to
22 do this. I have said that we cannot possibly meet the time

1 standards that we're trying to meet as long as that backlog
2 is there. Our response has been met and we intend to do
3 that. So it's going to be a real problem for the Appeal
4 Board to be able to handle the case load that they're
5 getting ready to have, as well as others. So it may be
6 that's an appropriate time to look at some of those issues.

7 MR. BOWEN: Judge Smith, I'm Henry Bowen, and I
8 intend to file written comments before the expiration of
9 the time frame in which public comments may be received.

10 I did have a question as a follow-up to Ms.
11 Smith's question, with regard to the implementation of the
12 rules. While I certainly have come to believe that the
13 Office of Judges has been subjected to a variety of
14 external pressures, including ongoing litigation filed
15 against it by practitioners in the Circuit Court of Kanawha
16 County and in other forms, the Performance Council is
17 considering rules that will have a profound impact on
18 permanent total disability awards.

19 The Commissioner has more recently publicly
20 stated that there is a drop in the number of petitions of
21 total disability awards, that some 500 claims are pending
22 in front of him in which in those words have surfaced

1 either on direct motion or indication that total disability
2 will be sought.

3 At the very heart of the 1993 reform
4 legislation was -- the legislature attempt to deal with
5 permanent and total disability deficit as being identified
6 as at least one-third, if not greater, of the IBNR or
7 deficit that is now being recognized by the agency as being
8 in excess of some \$5 Billion undiscounted.

9 While I recognize the required commitment
10 to moving ahead with implementation of the rules, I guess I
11 have just a general question concerning it and invite your
12 comment and response to it. Is it not only a question of
13 why but is it absolutely necessary to begin the implement
14 under rule making review a procedural requirement when the
15 agency itself will be faced with absorbing a series of
16 rules applied to claims that will inevitably continue to go
17 quickly into litigation process, and it seems that the
18 first quarter of 1995 looms the impossible huge morass in
19 terms of the division itself trying to deal internally with
20 the effective dates of all of these rules that they predict
21 will be adopted by the Performance Council before the close
22 of this calendar year.

1 If that's the case, is it really practical
2 to have the effective date of these time frames begin at
3 the same time when we have inevitably permanent partial
4 litigation that will need to be disposed of by your office,
5 that is not even recognized probably by actuaries of the
6 agency as being claims in which permanent total disability
7 will even be sought when we all know, as practitioners,
8 that indeed it will not only be sought, will probably be
9 sought under applicable decision of law from the Supreme
10 Court of Appeals. How are we going to reconcile all that?

11 JUDGE SMITH: Again, I appreciate you asking an
12 easy question.

13 MR. BOWEN: In all seriousness you deserve plenty
14 of time to assess this issue. Don't feel compelled to
15 address this issue because I have another question I want
16 to ask.

17 JUDGE SMITH: First of all let me say, I think
18 the question is an excellent question. I think the
19 question raises real practical issues about how change
20 occurs as well as how fast change can occur, and I believe
21 it's fair to state that the Performance Council is looking
22 at some very, very large issues in regard to Workers'

1 Compensation litigation and it's entirely possible -- in
2 fact, I think it's likely that the result will be
3 substantially different ways of doing business in Workers'
4 Compensation.

5 What I think we have to do is to not forge
6 ahead blindly but forge ahead with what we have to do. It
7 may well be that the litigation process in regard to
8 permanent partial disability as well as in regard to
9 permanent total disability will change substantially.
10 Nevertheless, I think that we have an obligation to
11 employers and claimants to process these cases in a timely
12 fashion, and I don't intend that our time standards be a
13 precursor or an inhibiting factor in how the counsel deals
14 with disability or how the litigation process might have to
15 deal with that. If indeed the counsel does handle
16 disability in such a fashion that it compels us to go out
17 and take a second look at what we've done, then we will do
18 that. I do not at this time have any indications that such
19 will occur.

20 Over and above that, I think that we have
21 reached a point in our own development where we have to put
22 in place time standards. I don't know how in the world we

1 can ever, anyone can ever truly assess whether we're doing
2 our job appropriately and properly without such standards
3 being proposed, and while it may well be that what the
4 council does will have a substantial impact on what we do,
5 I think that nevertheless we have to go ahead. I'm not
6 going to try and guess what they're going to do.

7 Over and above that we have in our
8 processes, that's why I asked Ms. Vance to come up, in
9 litigation process right now about 1,200 permanent total
10 disability cases to resolve.

11 I don't know how many there are in front
12 of the Commissioner. We believe that there are still a
13 fairly substantial number of remanded cases that haven't
14 yet been dealt with. The exact number, I wouldn't want to
15 say but it may be as many as 500 remand cases that haven't
16 yet come back. So that's going to increase our litigation
17 load.

18 The remarks I made at the outset about
19 trying to structure a system that enables us to marshall
20 our resources is one of the ways that we think that the
21 litigation process is going to head. I think that we're
22 going to have to try and really push ourselves to deal with

1 permanent partial and permanent total decision, and I don't
2 mean to exclude anything else, but certainly those two
3 issues are there as the kinds of issues that our judges are
4 going to look at, and I think those are the kind of issues
5 that are going to be litigated by the parties down the
6 road.

7 Again, it truly is dependent on part of
8 what the council does but I don't think it's appropriate
9 for us to sit back and wait. We've waited long enough,
10 you've waited long enough. I don't know if I've addressed
11 it, if I didn't, ask it again.

12 MR. BOWEN: I think you did, which is, you'll
13 keep the January 1 date, I think is what you said.

14 JUDGE SMITH: In all likelihood though that's not
15 firm, but in all likelihood we will.

16 MR. BOWEN: The other follow-up question I had
17 was simply on the applicable to all categories of claims
18 that go in litigation or all kinds of claims.

19 JUDGE SMITH: That's a sneaky question and a good
20 one because we didn't include OP in there. That issue has
21 been raised and we are looking at that, and I might also
22 note that there is in existence a work group of attorneys,

1 both claimant and employers, as well as our own staff that
2 are taking a very hard look at OP issues and it may be that
3 we end up, based on comments, including OP in this rule.
4 We have not made that decision yet.

5 One other thing is, we've had some comments
6 from outside that indicated that additional categories of
7 cases ought to be in the rule. For example, it appears
8 that based on the growing number of permanent total
9 disability cases that have been decided by the Fund that
10 we're getting quite a large number of protest that relate
11 only to the onset date, and certainly it's not appropriate
12 for us, I don't believe, to have that kind of case time
13 frame like we would a regular permanent total where the
14 merits are at issue. So we need to look at that as well
15 and others. If you have any other categories you think we
16 ought to have, tell us. We're waiting. So the answer is,
17 round about, we haven't put them all in there.

18 MR. LILLY: Yes, I'm Rob Lilly. I have a
19 question. On the time standards you have for
20 compensability, there's a six-month time frame from the
21 date of your receipt of the date of the notice of protest.
22 I deal a lot with OP non-medical issues where the issue is

1 who are the chargeable employers and some of the evidence
2 we need to obtain is from the Social Security
3 Administration, may take up to five months, and then it
4 takes a while to get notice to other potential chargeable
5 employers, and I don't see how -- there's going to be a lot
6 of times when there's no way those can be done in six
7 months. Are there going to be exceptions when the parties
8 request extensions where those aren't going to be decided
9 in six months?

10 JUDGE SMITH: The rules contemplate that we will
11 have request for extensions on time frame orders. Indeed,
12 I think that we don't say you can file a request, but I
13 think some of the statements in the rules allude to request
14 for extension. So the answer to your question is yes,
15 where it's necessary there will be extensions to time frame
16 orders.

17 We've also increased our resources over
18 prior to the event that I alluded to earlier, that's going
19 to enable us to deal with the backlog. We've increased our
20 resources substantially over the last six months, our
21 personnel resources, and in the past we simply didn't have
22 the people around to really make -- to police, if you will,

1 in an appropriate way, the granting or denying of time
2 frame orders, to the end that they were pretty much all
3 granted. Maybe not all but by-golly most of them were, and
4 I wouldn't be able to sit here and justify why one wasn't
5 but it is our intention to develop standards, guidelines,
6 if you will, not rules, but guidelines for the granting and
7 denying of extensions which we will make available
8 obviously to the parties. We hope to have those ready at
9 the seminar we have in December. We will have those ready
10 by then, and it's just another way of doing business with
11 us and we think it's entirely obviously appropriate that
12 you have those. The answer to your question, we will grant
13 extensions when needed, but the rules will not be designed
14 and are not designed to deal with those exceptions.
15 They're designed to deal with the bulk of cases. The real
16 challenge is, for all of us, to be able to deal with things
17 that don't fit in in the usual course of things.

18 MR. HUFFMAN: Judge, I'm Tim Huffman from Jackson
19 and Kelly. As a follow-up question to the question Rob
20 just asked, I wonder, do you anticipate under these rules
21 increasing the number of hearings that are set and what
22 kind of resources are going to be pushed through that

1 because the case load that I have, I'm pushed to get my
2 stuff done at a faster pace, so I'm going to have to be
3 able to subpoena parties and go to hearings at a faster
4 pace than I've been able to do in the past, and while
5 depositions are great to a certain degree, they don't allow
6 you to get a lot done in a short period of time.

7 JUDGE SMITH: Are you talking about OP Board?

8 MR. HUFFMAN: No, I'm talking about hearings in
9 general.

10 JUDGE SMITH: Just regular hearings. That
11 question was asked before in one of our hearings and the
12 person who asked it had an opinion that our rules were
13 going to increase the number of hearings. We have thought
14 about that and it's not our view that that will occur, and
15 if it does, we'll have to try to meet it. The backlog
16 doesn't deal with hearings, that deals with getting cases
17 out that are already finished, so that's not a problem.

18 My own feeling is that the implementation
19 of the rules will not result in, long-term, more hearings.
20 To the contrary, I believe that it will result in fewer
21 hearings over the long haul because what I think will
22 occur, in part, is that once protest have been made parties

1 are going to take a second look at that protest to see if
2 they really want to do it. That's not something that's
3 ever occurred before and we know that many practitioners
4 simply don't have the time to analyze every order the
5 Commissioner makes in the 30-day period and just
6 automatically protest. Some of them just automatically
7 protest. The consequence of that is, of course, that we
8 have more cases, and if we don't do anything to try to
9 force those cases out of the system, then they stay in
10 there and they muddle up everything.

11 What we hope will occur is that these time
12 frames are going to make people look more closely at the
13 kinds of issues they protest. Whether it happens or not, I
14 don't know, and I think your concern is a real legitimate
15 one, and I don't have an answer. I think that's a wait-
16 and-see, but I think it's a legitimate concern.

17 MR. HUFFMAN: It is for me.

18 JUDGE SMITH: It is for us, as well. I don't
19 care how hard we try to do things, if we make it impossible
20 for practitioners to do the job with the resources that
21 they have, all we've done is increased the cost of the
22 litigation process to the parties, which is not our

1 objective. So we have to find ways of doing things that
2 don't cause that to occur. The last thing we want to do is
3 to run the cost of litigation up. What we hope this will
4 do is to bring it down. In short term, I'm uncertain what
5 the result will be. Long term, I don't think we'll have
6 more hearings, but that's a real legitimate concern, not
7 just for you-all but for us, as well, but I don't know the
8 answer.

9 MS. SMITH: Judge, Sally Smith. On the part of
10 the rules that talks about motions, the way I understand it
11 now, there's been an effort to set special motions dockets
12 for matters that can be dealt with at an add-on basis, such
13 as when someone has to go to a medical exam or whether
14 there needs to be another chargeable employer. The way
15 these are drafted it might contemplate that motions could
16 include a final order in a claim or a dispositive issue
17 being dealt with. How do you intend to deal with the
18 motions issue?

19 JUDGE SMITH: The intent of the provision dealing
20 with motion was not so well thought out as your question.

21 MS. SMITH: We have a lot more time than you.

22 JUDGE SMITH: The intent of that section was to

1 provide a mechanism that required our office to decide
2 motions, period. One of the historic problems in
3 litigation has been that motions get filed that need to get
4 resolved because it determines what course litigation may
5 take, and the intent of this was to provide a frame work in
6 which we get these things decided in some sort of timely
7 fashion. The challenge of it may be what are we going to
8 do with it, which is what your question contemplates, and I
9 don't really have any comment at this point in time. On
10 what this provision was intended to do, we have been and we
11 will continue, I hope, to utilize the motions docket that
12 we've set up as a pilot project in our Beckley regional
13 office and, indeed, we have plans to bring that on board in
14 the other two regions that we have, Charleston and
15 Fairmont. It's still a pilot project and we're still
16 trying to work the kinks out. Boy, did it have some kinks.

17 In addition to that, it's our intent also
18 -- it's kind of like a motion, as well -- we're going to
19 schedule settlement dockets for permanent partial
20 disability cases, and that's something if we have time in
21 our December seminar -- but we don't have it scheduled to
22 talk about, although that could take a specific how we're

1 going to do that, is going to be -- remains to be worked
2 out but that's something we'll also do, as well.

3 One of the things I think that we have to
4 do and one of the intents of the rules was not to overly
5 circumscribe what we did. I think one of our challenges is
6 to be creative about how we do things, and now that we're
7 going to have the kind of staff we need to work, it's our
8 desire to go out and really push on settlements. I believe
9 that settlements need to occur and I believe that if we
10 push on them they can occur better. So we're going to make
11 a real hard push at that and see what happens.

12 Please feel free to comment on things as
13 well. I don't have any objection, whatsoever, to answering
14 questions with you. If you have comments that you want to
15 make now, please feel free to do so.

16 MS. SMITH: It wasn't assumed in my question, let
17 me comment that we like the idea of the motions docket.

18 JUDGE SMITH: Okay. All right.

19 MR. BOWEN: Henry Bowen again, Judge. I just
20 have a comment and question. With respect to the backlog,
21 do you anticipate some type of quality control being
22 implemented to assure that those contract judges dispose of

1 issues in the same way in which your Office of Judges is
2 doing that, and if so, if you know at this point, how are
3 you going to assure that they comply with that?

4 JUDGE SMITH: We have thought about that and we
5 have put into place the genuses of a plan. To use the word
6 assure, I want to qualify that and say that we're not
7 guaranteeing, any more than I guarantee that our judges
8 always deal with every issues. We make mistakes, but I
9 think it's terribly important that the outside counsel that
10 we utilize in helping alleviate the backlog not be an
11 uncontrolled process. I believe that we have come a long
12 way in the quality of the decisions as well as the quality
13 of the decision writing, and I think it's very important
14 for us not to back out of that, to that end.

15 We have already assembled a team from
16 within our office. One of the problems of dealing with
17 this backlog is it's going to take some of our own
18 resources away to deal with it. You simply can't just put
19 it in motion and let it occur. I mean, that would be a
20 chaos, and that's not we intend. So we've got a team of
21 people and what our plan is to have -- to divide the
22 outside counsel into groups, manageable groups and they

1 will deal with a specific judge in our office and that
2 judge will review -- I don't mean to look at the fiche but
3 at least to review the decisions to make certain that they
4 don't have obvious errors in them, that is, that you state
5 as an issue permanent partial and decide a permanent total
6 or that at least -- and also try to ensure that the
7 decisions, the facts you find are consistent with the
8 conclusions and the discussion, and they'll be things that
9 we look at in an organized sort of way, and over and above
10 that, we'll have training sessions for these folks as well,
11 initial training session, as well as follow-up training
12 sessions. So the answer to your question is we are very
13 concerned about the quality of those decisions as well as
14 the quantity and we intend to monitor that as closely as we
15 possibly can consistent with getting those decisions out.
16 Any other questions or comments?

17 (No response.)

18 JUDGE SMITH: I want to make some comments on our
19 own rules and these comments are partly in the rules
20 already but they're comments to this, and I think that it's
21 important that the record reflect these things, at least
22 it's important for me. It may not be important to you.

1 In the framing of any kinds of rules, not
2 only do you have to take into account what your statutory
3 mandate is and what the people you're dealing with have the
4 capability of doing but you also have to take into account
5 the organization's ability to do the task that it has, and
6 I think that it's important to note what our resources are
7 in dealing with the cases that come in. I think that's a
8 -- for folks to believe that the rules are not at least
9 fashioned in part, taking into account those resources, is
10 to not fully appreciate the complexity of trying to make
11 rules. It's not merely a matter of sitting down and
12 deciding what you want to do, it's also matter of taking
13 into account what in the world you can't do.

14 The Office of Judges, as Judge Drescher
15 indicated, was created by statute in 1991. At that time
16 there were 24,000 protest approximately the Office of
17 Judges was receiving. At that time the office was
18 formulated, the staffing pattern -- by staffing pattern,
19 I'm talking about term of art for state government, and
20 that tells you how many employees you are allowed to have
21 in your organization. Staffing pattern contemplates 100
22 people, staffing pattern continues to contemplate 100

1 people. We have roughly broken that down into
2 approximately 25 judges and the remainder is support staff.
3 The number of protest that is received has increased over
4 the last few years and this year we will receive more than
5 30,000 protest.

6 We have as a part of our own internal
7 processes, as a way that we can try to make people, our own
8 employees understand what's expected of them as well as
9 being able to determine what's reasonable for people to do,
10 we have put into place both quality and quantity standards
11 for every piece of our organization. It's divided into
12 four segments, the case management section which handles
13 the entry of all protest into our automative system and
14 also records all the subsequent data that comes in in any
15 case and places it into the computer system. Those folks
16 have quality and quantity standards in place. Secretaries
17 who type decisions, who take phone calls for judges have
18 quality and quantity standards in place by which we
19 measured their performance. The transcriptionist who type
20 the decisions have quality and quantity standards in place
21 by which we measured their work and what they are able to
22 do. Paralegals have quality and quantity standards in

1 place by which we measure their performance and what
2 they're able to do. The judges have quantity and are about
3 to have quality standards. We've had a rough kind of
4 quality standard. We had a group of judges who put
5 together what, I guess, lack of a better word, a quality
6 review document that we will be able to look at and help
7 judges make decisions as well as enable us to determine
8 their quality.

9 Every piece of our organization, we intend
10 to have accountability in place, and these time standards
11 are simply an extension of that overall accountability.
12 This now puts in place something by which people can
13 effectively measure, I believe, whether we, as an office,
14 are achieving our own objective, and I place these numbers
15 and things into this comment so that any reviewer thereon
16 will be cognizant of the facts that are in place that we
17 have to deal with, and those facts are staffing constraints
18 as well as budgetary constraints, and I don't mean to
19 suggest that they're inappropriate, obviously they're not.
20 All state government needs to have accountability, needs to
21 have restraints.

22 In addition, as Mr. Bowen has indicated and

1 applied to his question, litigation process itself is
2 likely to change substantially with 1,200 permanent totals
3 to decide. It's a lot different than having 1,200
4 treatment issues to decide.

5 We recognize that those cases require more
6 resources on our part and it is our intent to continually
7 look at and to review the demands that are made on all of
8 us so that we can appropriately decide and have the
9 mechanisms to deal with the cases that we have, the work
10 that we have and what the resources that we have. That's
11 my comment.

12 JUDGE DRESCHER: Does anyone have anything
13 further?

14 (No response.)

15 JUDGE DRESCHER: If not, we will conclude this
16 hearing then. Thank you all very much.

17 (WHEREUPON, the hearing was
18 concluded 11:02 a.m.)

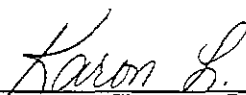
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Given under my hand this 16th day of
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Karon L. Vorholt
Court Reporter

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AGENCY: Workers' Comp. Office of Judges

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DATE: May 22, 1996

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