WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY WV Code §§23-2C-22; 33-2-10(b); and 33-2-21(a)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Claims Management and Administration

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: Thursday, July 5, 2007 TIME: 3:00 PM

LOCATION OF PUBLIC HEARING: Ofc. of Insurance Commissioner
1124 Smith St
4th Floor, Main Conference Room
Charleston, WV

COMMENTS LIMITED TO: ORAL _____, WRITTEN _____, BOTH X

NOTE: Comment Period for written comments will end on July 5, 2007 at 3:00 PM.

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Ryan Sims, Associate Council

Offices of the WV Insurance Commissioner

P.O. Box 50540

Charleston, WV 25305-0540

The Department request that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

James Robert Alsop
Cabinet Secretary
West Virginia Department of Revenue

Insurance Commissioner (Workers' Compensation Rules)
Exempt Legislative Rule
Title 85, Series 1

WORKERS COMPENSATION CLAIMS MANAGEMENT AND ADMINISTRATION

TITLE 85, SERIES 1

BRIEF SUMMARY OF RULE

This amended rule sets forth certain standards, clarification, guidelines and procedures applicable to workers' compensation claims management and administration. The original draft of W. Va. Code St. R. § 85-1-1 et seq. ("Rule 1", "Claims Management and Administration") was promulgated by the former West Virginia Workers' Compensation Board of Managers with a most recent effective date of June 1, 2005.

As with all Title 85 Rule amendments following the passage of SB 1004 in 2005, general technical and stylistic cleanup was implemented to reflect the termination of the former WV Workers' Compensation Commission, privatization of West Virginia's workers' compensation insurance market, and the transfer of regulatory authority for workers' compensation to the Insurance Commissioner. Additionally, several substantive changes were made to the Rule. Specifically, provisions were added providing standards, clarification, guidelines and/or procedures for the procurement of and payment for expert witness testimony in workers' compensation claims and, pursuant to W. Va. Code § 23-5-1(f) (as amended in Senate Bill 595, effective March 10, 2007) the ability of a private carrier to make a motion before the Office of Judges or Board of Review to stay certain indemnity benefits resulting from an Office of Judges Order. Additionally, the Rule was amended to increase mileage reimbursement to which a claimant is entitled for medical travel related to a workers' compensation claim, pursuant to W. Va. Code § 23-4-8, from 15 cents per mile to a rate consistent with what the State of West Virginia pays for authorized travel (currently 44.5 cents per mile).

Insurance Commissioner (Workers' Compensation Rules)
Exempt Legislative Rule
Title 85, Series 1

WORKERS COMPENSATION CLAIMS MANAGEMENT AND ADMINISTRATION

TITLE 85, SERIES 1

STATEMENT OF CIRCUMSTANCES

Pursuant to Senate Bill 1004, First Special Session, 2005, workers' compensation in West Virginia was changed from a state run, monopolistic system to a private market system. This bill also transferred all regulatory authority for workers' compensation insurance to the Insurance Commissioner.

To provide standards, clarification, guidelines and procedures applicable to workers' compensation claims management and administration, the former West Virginia Workers' Compensation Commission Board of Managers promulgated W. Va. Code St. R. § 85-1-1 et seq. ("Rule 1", "Claims Management and Administration") with a most recent effective date of June 1, 2005. It has become apparent to the Insurance Commissioner that there is a need for certain stylistic, technical and substantive amendments to this Rule to properly reflect West Virginia's new privatized workers' compensation system and to otherwise reflect West Virginia's statutory law regarding workers' compensation. This particular amendment addresses several topics with some degree of urgency in the Rule. The Insurance Commissioner plans to supplement this draft with a more comprehensive amendment to the Rule later in 2007, after opportunity has been had to meet with various stakeholders and receive input as to what additional changes should be made to the Rule. The substantive amendments in the instant draft are more specifically referenced in the "Brief Summary" for this Rule.

This amended rule is being promulgated to implement the above referenced changes necessary to Title 85, Series 1 of the West Virginia Code of State Rules.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: (Title 85, Series 1) Workers' Compensation Claims Management and Administration

Type of Rule: __X__ Exempt Legislative _____Interpretive ___Procedural

Agency: West Virginia Offices of the Insurance Commissioner

Address: Post Office Box 50540

1124 Smith Street, Greenbrooke Building

Charleston, West Virginia 25305-0540

Phone Number: (304) 558-6279 ext. 1139 Email: Ryan.Sims@wvinsurance.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This proposed new rule amendment addresses certain topics regarding workers' compensation claims management and administration. There are two amendments in this Rule which could have a fiscal impact upon state government costs and revenues.

First, the mileage reimbursement amount to which claimants are entitled for travel related to medical care, pursuant to W. Va. Code § 23-4-8, is being increased from 15 cents per mile to the same rate as paid by the State of WV for authorized travel (currently 44.5 cents per mile). This will significantly increase the amount of money paid for medically related travel mileage reimbursement to claimants in the Old Fund. The exact amount of increase in expenditure is not known; however, since the overall liabilities for the Old Fund are limited and decreasing in nature (as it only involved pre 7.1.05. claims), the impact of this change should decrease in subsequent years.

Second, pursuant to changes made to W. Va. Code § 23-5-1(f) in Senate Bill 595 (passed during the 2007 regular session, effective March 10, 2007), the Rule establishes guidelines and procedures for a private carrier or self-insured employer to make a motion before the Office of Judges or Board of Review to stay certain indemnity benefits resulting from an Order of the Office of Judges. The ability to make such motions and the time required to review and rule upon such motions will require additional resources from the Office of Judges and Board of Review. The Office of Judges is currently sufficiently staffed to take on this additional work load; however, the Office of Judges does believe that were it not for the motion for stay process, they may be able to reduce their staff by one or two classified employees, through attrition or otherwise. The Board of Review is not sure whether they are currently sufficiently staffed to take on this additional workload, and believe they may need to hire one additional staff attorney to assist with the additional work load associated with the motion for stay process. However, the Board of Review believes it may have to hire an additional staff attorney regardless, depending upon the outcome of other pending personnel related issues. It should also be pointed out that this motion for stay process is a mandatory process pursuant to W. Va. Code § 23-5-1(f), as amended, described above.

Rule Title: (Title 85, Series 1) Workers' Compensation Claims Management and Administration

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	Unknown	Unknown	Unknown
Personal Services	Unknown	Unknown	Unknown
Current Expenses	Unknown	Unknown	Unknown
Repairs & Alterations	N/A	N/A	N/A
Assets	Unknown	Unknown	Unknown
Equipment	Unknown	Unknown	Unknown
Other	Unknown	Unknown	Unknown
2. Estimated Total Revenues	Unknown	Unknown	Unknown

3. Explanation of above estimates (including long-range effect):
Please include any increase or decrease in fees in your estimated total revenues.

There are potential increased costs to the State in this Rule, as described above; however, it is not possible at this time to estimate these costs.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

None.

Rule Title: (Title 85, Series 1) Workers' Compensation Claims Management and Administration

Date: _____

Signature of Agency Head or Authorized Representative

_____

Jane L. Cline, Insurance Commissioner

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION ~~COMMISSION~~ RULES OF THE WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 1
CLAIMS MANAGEMENT AND ADMINISTRATION

Title

85-1-1. General.

85-1-2. Definitions.

85-1-3. Injured Worker's Report of Injury and Application for Compensation.

85-1-4. Employer's Report of Injuries.

~~85-1-5. Special Rules for Owner and Officer Claims.~~

~~85-1-6~~ 85-1-5. Special Rules for Temporary Total Disability Claims.

~~85-1-7~~ 85-1-6. Special Rules for Permanent Partial Disability Claims.

~~85-1-8~~ 85-1-7. [RESERVED]

~~85-1-9~~ 85-1-8. Special Rules for Non-Awarded Partial Benefits.

~~85-1-10~~ 85-1-9. Time Standards.

~~85-1-11~~ 85-1-10. Child Support and Spousal Support Orders.

~~85-1-12~~ 85-1-11. Overpayments.

~~85-1-13~~ 85-1-12. Occupational Pneumoconiosis and Occupational Disease Claims.

~~85-1-14~~ 85-1-13. Special Rules on Closure of Claims.

~~85-1-15~~ 85-1-14. Procedures for Suspension for Claimant Abuse.

~~85-1-16~~ 85-1-15. Travel Expenses-Medical Examination and Treatment.

~~85-1-17~~ 85-1-16. ~~Litigated Claims~~ Expert Witness Appearances.

Title (Cont'd)

85-1-17.	Implementation and Stay of Orders from the Office of Judges.
85-1-18.	Miscellaneous Administrative Matters.
85-1-19.	Preferred Drug List.
85-1-20.	Severability.

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION ~~COMMISSION~~ RULES OF THE WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 1
CLAIMS MANAGEMENT AND ADMINISTRATION

§85-1-1. General.

1.1. Scope. -- This exempt legislative rule establishes the requirements and procedures to be followed by the West Virginia ~~Workers' Compensation Commission, parties to claims pending before the Commission~~ Insurance Commissioner, private carriers, third-party administrators, claimants, health care providers, vocational professionals, and others involved in the administration of claims. This rule also applies to self-insured employers to the extent that provisions of this rule expressly reference self-insured employers or to the extent that this rule addresses subject matter applicable to private carriers and not addressed by W. Va. Code St. R. §85-18-1 et seq.

1.2. Authority. -- W. Va. Code §§23-2C-22; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §§~~23-1-a(j)(3)~~ 23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules ~~adopted~~ proposed by the ~~Workers' Compensation Board of Managers~~ Insurance Commissioner and approved by the Industrial Council are not subject to legislative approval as would otherwise be required under W. Va. Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- ~~April 14, 2005~~.

1.4. Effective Date. -- ~~June 1, 2005~~.

~~1.5. Repeal of former rule. -- WV 85 CSR 1, "Administration Of The Workers' Compensation Fund," filed April 5, 2004, and effective May 5, 2004 is hereby repealed and replaced by the provisions of this exempt legislative rule. WV 85 CSR 6, "Time Limits for the Administrative Processing of Adjudications and Awards," filed May 23, 1985 and effective May 23, 1985 is hereby repealed and replaced by the provisions of this exempt legislative rule.~~

§85-1-2. Definitions.

As used in this exempt legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

~~2.1. "Executive Director" means the executive director of the West Virginia Workers'~~

~~Compensation Commission pursuant to W. Va. Code §23-1-1b.~~

~~2.9~~ 2.1. "Acted upon" ~~shall mean~~ means, but shall not be limited to, any one of the following: 1) ~~receipt and processing by Commission personnel~~ received and processed; 2) ~~contacting~~ contacted an injured worker, employer, or medical provider in any fashion requesting more information; 3) ~~review~~ reviewed and ~~examination~~ examined by ~~the Commission's~~ medical personnel; 4) ~~conducting~~ conducted a potential overpayment analysis; 5) ~~cross checking~~ cross-checked with other state agencies for relevant information; and 6) and other similar administrative steps which must be taken before a request can be ruled upon.

~~2.2. "Commission" means the West Virginia Workers' Compensation Commission as provided for by W. Va. Code §23-1-1.~~

2.2. "Board of Review" is the workers' compensation board of review pursuant to W. Va. Code §23-5-1 et seq.

~~2.6~~ 2.3. "Filing" ~~shall mean~~ means actual receipt by the ~~Commission~~ recipient.

2.4. "Injured worker" means an employee entitled to West Virginia workers' compensation benefits as the result of a work-related injury, as provided under W. Va. Code §23-4-1.

2.5. "Injured worker's employer" or "employer" means an employer within the meaning of W. Va. Code §23-2-1, et seq.

~~2.3~~ 2.6. "Injury" and derivative words have the meaning ascribed to the term "injury" by W. Va. Code §23-4-1.

2.7. "Insurance Commissioner" means the insurance commissioner of West Virginia as provided in W. Va. Code §33-2-1, or any designated third-party administrator of the Insurance Commissioner.

2.8. "Office of Judges" means the workers' compensation office of administrative law judges pursuant to W. Va. Code §23-5-1 et seq.

~~2.7~~ 2.9. "Paid" ~~shall mean~~ means the time the check is deposited in the mail or presented in person to the claimant, claimant's attorney or anyone acting in his behalf.

2.10. "Private carrier" ~~shall mean~~ means an insurer authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapter twenty-three of

the West Virginia Code and any third-party administrator designated by the private carrier to adjust West Virginia workers' compensation claims.

~~2.8~~ 2.11. "Receipt ~~by the Commission" shall mean~~ means the day the document is scanned or otherwise entered into the ~~Commission's~~ Insurance Commission's or private carrier's computer system.

2.12. "Self-insured employer" means an employer who has applied for permission to elect and thereafter has elected to maintain its own benefit fund or system of compensation to ensure the payment of benefits to its injured employees and their dependents in amounts at least equal in value to the workers' compensation benefits provided by law and ordered to be paid under the provisions of chapter twenty-three of the West Virginia Code, and any third-party administrator designated by the self-insured employer to adjust West Virginia workers' compensation claims.

2.13. "West Virginia workers' compensation coverage" means workers' compensation coverage which provides the employees of the insured employer workers' compensation benefits consistent with chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

§85-1-3. Injured Worker's Report of Injury and Application for Compensation.

3.1. General.

Immediately after a work-place injury, an injured worker 1) should seek necessary medical care; 2) shall immediately on the occurrence of the injury or as soon as practicable give or cause to be given to the employer or any of the employer's agents a written notice of the occurrence of the injury; and 3) should file a workers' compensation claim or request that one be filed on his or her behalf. Failure to immediately give notice to the employer of the injury shall weigh against a finding of compensability in the weighing of the evidence mandated by W. Va. Code §23-4-1g and will dilute the credibility and reliability of the injured workers' claim. Notice provided to the employer within two (2) working days of the injury shall be deemed immediate notice. Enforcement of an employer's personnel policy requiring that an injured worker report an injury immediately shall not be deemed a discriminatory practice under chapter ~~23~~ twenty-three of the West Virginia Code.

3.2. Benefit rate calculation; wage information.

It is the joint responsibility of the injured worker and the employer to ensure that the correct wage information is provided to the ~~Commission~~ Insurance Commissioner or private

carrier so that the correct benefit rate can be paid the injured worker. If inaccurate wage information is received by the ~~Commission~~ Insurance Commissioner or private carrier, the ~~Commission~~ Insurance Commissioner or private carrier will, upon receipt of accurate wage information, adjust prospectively the benefit rate. There shall be no retroactive adjustments to previous underpayments beyond two (2) years. The submission of inaccurate wage information ~~submitted~~ by the employer or the receipt of benefits based on inaccurate wage information by the injured worker may serve as evidence of abuse or fraud under the applicable provisions of the West Virginia Code.

§85-1-4. Employer's Report of Injuries.

4.1. General.

The injured worker's employer shall report to the ~~Commission~~ Insurance Commissioner or private carrier every injury sustained by any person in its employ within five (5) days of the employer's receipt of the employee's notice of a desire to file a claim for injury or within five (5) days after the employer has been notified by the ~~Commission~~ Insurance Commissioner or private carrier that a claim for benefits has been filed, whichever is sooner. Failure to comply with this reporting requirement may result in the employer being fined by the ~~Commission, and upon termination of the Commission, the~~ Insurance Commissioner up to $250 per occurrence. Any employer that has five (5) or more occurrences within a rolling three hundred sixty-five (365) day period shall be fined up to $500 per occurrence as determined in the sole discretion of the ~~Commission and upon termination of the Commission, the~~ Insurance Commissioner.

4.2. Benefit rate calculation; wage information.

It is the joint responsibility of the injured worker and the employer to ensure that the correct wage information is provided to the ~~Commission~~ Insurance Commissioner or private carrier so that the correct benefit rate can be paid the injured worker. If inaccurate wage information is received by the ~~Commission~~ Insurance Commissioner or private carrier, the ~~Commission~~ Insurance Commissioner or private carrier will, upon receipt of accurate wage information, ~~adjusted~~ adjust prospectively the benefit rate. There shall be no retroactive adjustments to previous underpayments beyond two (2) years. The submission of inaccurate wage information submitted by the employer or the receipt of benefits based on inaccurate wage information by the injured worker may serve as evidence of abuse or fraud under the applicable provisions of the West Virginia Code.

~~4.3. The Commission may require employers to file forms and reports electronically or telephonically through written policy.~~

~~**§85-1-5. Special Rules for Owner and Officer Claims.**~~

~~5.1. Owners and officers; Coverage denials when the employer is delinquent or in default.~~

~~5.1.a. Until termination of the Commission, employers who fail to subscribe for workers' compensation coverage shall not be afforded coverage for its partners, the proprietor or its corporate or executive officers, nor shall coverage be afforded to any "employee" for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or certain members of a limited liability company.~~

~~5.1.b. Employers who are delinquent or in default of their workers' compensation obligations shall not be afforded workers' compensation coverage for its partners, the proprietor or its corporate or executive officers, nor shall coverage be afforded to any "employee" for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or members of a limited liability company.~~

~~1. Coverage for the "employees" specified in this provision shall not be afforded if the employer is delinquent or in default on the date of injury, and this exclusion will continue for the life of that injury. For example, if, at some time after the date of injury, the employer cures its default or delinquency status, the "employee" nevertheless will not be covered for the injury that occurred during the period of default or delinquency and benefits will never be payable for that injury.~~

~~2. In those cases where the employer is in good standing at the time of the injury and the "employee's" injury is therefore covered, but the employer then becomes delinquent or in default, then coverage shall terminate for the "employees" specified in this policy for the time period of the delinquency or default. No indemnity or medical benefits shall be paid for lost wages or medical treatment provided during this period of default or delinquency. If the employer fails to cure the delinquency or default within thirty (30) days notice thereof, then the claim shall be closed, coverage for the injury shall be barred for the life of that injury, and benefits paid to date shall be deemed an overpayment collectable from any future benefit awarded to the "employee."~~

~~3. In those cases where the employer appears to be in good standing at the time of the injury and the employer appears to have workers' compensation coverage, but the employer then becomes delinquent or goes into default retroactively (for example, as a result of underreporting payroll for a time period) so as to include the date of injury, then coverage shall~~

~~not be afforded for the "employee" and this exclusion will continue for the life of that injury.~~

~~A. Provided: If the total delinquency or default is less than two hundred dollars ($200.00) of premium tax, then the commission will afford the employer an opportunity to cure its retroactive delinquency status by the issuance of a thirty (30)day notice to cure to the employer. If the employer cures its default or delinquency in accordance with this provision, the "employee" will be covered for the injury that occurred during the period of default or delinquency and benefits will be payable for that injury.~~

~~4. Benefits paid during periods of delinquency or default for "employees" denied coverage under this provision shall be considered overpayments.~~

~~5. When coverage for an injury is denied to an "employee" as a result of the employer's delinquency or default, the injured "employee" may only contest the commission's order through the provisions of WV §85 CSR 7, "Rules for Selected Hearings," and the provisions of W. Va. Code §23-2-17. Until the conclusion of the W. Va. Code §23-2-17 process and the determination of whether the "employee" is afforded coverage, action in the claim will be held in abeyance.~~

~~6. The provisions of this section shall govern owner and officer claims that would have been payable from the Old Fund created in West Virginia Code §23-2C-2(l) if the employer otherwise had been in good standing.~~

~~7. Upon termination of the Commission, owners and officers of employers that are in policy default under chapter twenty-three of the West Virginia Code shall not be eligible for benefits from the Uninsured Employer Fund created in W. Va. Code §§23-2C-2(o) and 23-2C-8.~~

~~§85-1-6~~ 85-1-5. Special Rules for Temporary Total Disability Claims.

~~6.1~~ 5.1. To qualify for temporary total disability benefits, the injured worker must have missed more than three (3) days due to the compensable injury before benefits become payable. To receive temporary total disability benefits for the first three (3) days, the injured worker must have missed more than seven (7) days due to the compensable injury.

~~6.2~~ 5.2. If an individual retires, he or she is disqualified from receiving temporary total disability indemnity benefits as a result of an injury received from the place of employment from which he or she retired, unless the application for benefits was received prior to his or her retirement. Individuals who have retired also shall be barred from reopening for indemnity benefits an earlier claim filed in connection with an injury received at the place of employment

from which he or she retired. This section shall not preclude payments of benefits otherwise due an injured worker if the retiree has returned to employment and suffers a compensable injury and shall not preclude payment of benefits if the compensable injury causes the individual to retire.

~~6.3~~ 5.3. If a period of disability includes a reasonably ascertainable period of time during which the injured worker would not have been compensated from his or her employer, then temporary total disability indemnity benefits shall not be paid during that period. This Section shall not apply to periods of time caused by a reduction in force, lay-off, or time-off provided in connection with an employee benefit.

~~§85-1-7~~ 85-1-6. Special Rules for Permanent Partial Disability Claims.

~~7.1~~ 6.1. Notice.

Upon the making of or refusing to make an award of benefits, the ~~Commission~~ Insurance Commissioner or private carrier shall send to each interested party a written notice setting forth its decision and the terms thereof and informing the parties of their right to protest its decision by filing objection with the Office of Judges thereto in writing at any time within thirty (30) days after receipt of notice.

~~7.2~~ 6.2. Computation of awards.

When an injured worker is found to be entitled to a permanent partial disability award, the award shall be computed in accordance with the law in effect when the award is payable.

~~7.3~~ 6.3. Payment of permanent partial disability award.

Permanent partial disability awards shall be paid in monthly installments equal to the impairment awarded. For instance, a 10% permanent partial disability award would be paid over a ten (10) month period with the first payment being made the month following the award.

~~§85-1-8~~ 85-1-7. Special Rules for Permanent Total Disability Claims.

[RESERVED]

~~§85-1-9~~ 85-1-8. Special Rules for Non-Awarded Partial Benefits.

~~9.1~~ 8.1. Non-awarded partial disability benefits will only be payable if the weight of the evidence indicates that a permanent impairment exists.

~~9.2~~ 8.2. Non-awarded partial disability benefits shall not be payable in a claim that has been re-opened for temporary total disability benefits if a permanent partial disability award was previously made in the claim.

~~9.3~~ 8.3. Non-awarded partial disability benefits paid prior to entry of the permanent disability award are to be deducted from the permanent partial disability award when it is granted. If the non-awarded partial disability benefits exceed the amount of the award, the injured worker will not be entitled to any further benefits from the award. The excess is considered to be an overpayment and shall be collected from any future disability award in the same or any future claim, including, but not limited to, an award for temporary total disability benefits, permanent partial disability benefits, permanent total disability benefits, non-awarded partial disability benefits.

~~9.4~~ 8.4. The ~~Commission~~ Insurance Commissioner or private carrier may cease paying non-awarded partial disability benefits if the ~~Commission~~ Insurance Commissioner or private carrier concludes that the amount of non-awarded partial disability benefits already paid will likely exceed the expected partial disability award and may, as soon as practicable thereafter, enter a permanent partial disability award based on the most current information available and the guidelines set forth in ~~85 CSR 20~~ W. Va. Code St. R. §85-20-1 et seq., if applicable.

~~9.5~~ 8.5. If the injured worker begins to receive rehabilitation benefits, non-awarded partial disability benefits shall not be paid until the rehabilitation process is completed.

~~9.6~~ 8.6. Non-awarded partial disability benefits shall be immediately suspended if the injured worker fails, without good cause, to present for an examination or rating. If suspended with good cause, benefits can be reinstated, without back pay, once the injured worker presents for the examination or rating.

~~9.7~~ 8.7. Non-awarded partial disability benefits are paid at the same rate as the permanent partial disability rate.

~~§85-1-10~~ 85-1-9. Time Standards.

~~10.1~~ 9.1. Injury and occupational disease claims. -- Those claims based upon injuries and occupational diseases other than occupational pneumoconiosis that are filed with the ~~Commission~~ Insurance Commissioner or private carrier upon properly executed, prescribed forms shall be ruled on within fifteen (15) working days from the date of receipt of all required information by the ~~Commission~~ Insurance Commissioner or private carrier. The ~~Commission~~ Insurance Commissioner or private carrier shall consider all information and proof properly submitted in connection with each claim. Whenever it is of the opinion that a claim has not been

adequately or properly developed for consideration, it may require the parties to produce additional evidence. The fifteen (15) working days to rule on the claim shall be tolled during this evidence gathering process.

~~10.2~~ 9.2. Occupational Pneumoconiosis claims. -- Non-medical rulings shall be entered in occupational pneumoconiosis claims within fifteen (15) working days from the date of receipt by the ~~Commission~~ Insurance Commissioner or private carrier of properly executed, prescribed forms from all parties involved. The ~~Commission~~ Insurance Commissioner or private carrier shall consider all information and proof properly submitted in connection with each claim. Whenever the ~~Commission~~ Insurance Commissioner or private carrier is of the opinion that a claim has not been adequately or properly developed for consideration, it may require the parties to produce additional evidence. The fifteen (15) working days shall be tolled during this evidence gathering process.

~~10.3~~ 9.3. Medical Treatment. -- Requests for authorization of medical treatment shall be acted upon within fifteen (15) working days from the date of receipt by the ~~Commission~~ Insurance Commissioner or private carrier.

~~10.4~~ 9.4. Appliances, Devices, and Supplies. -- Requests for authorization of purchase of prosthetic or other appliances, devices or medical supplies shall be acted upon within fifteen (15) working days from the date of receipt by the ~~Commission~~ Insurance Commissioner or private carrier.

~~10.5~~ 9.5. Medical evaluations.

a. Referral of claimants to physicians for examinations and evaluations as required by W. Va. Code §23-4-7a(d), shall be made within twenty (20) working days of the end of the one hundred twenty (120) day period of temporary total disability.

b. Examinations and evaluations to be performed by the Occupational Pneumoconiosis Board shall be scheduled and notice of the scheduling shall be transmitted to the parties within sixty (60) days from the date of non-medical rulings directing referral to the Board.

~~10.6~~ 9.6. Permanent disability rulings.

a. Permanent disability evaluation reports received from physicians to whom claimants have been referred by the ~~Commission~~ Insurance Commissioner or private carrier in claims based upon injuries and occupational diseases other than occupational pneumoconiosis shall be acted upon within thirty (30) days.

b. Findings of the Occupational Pneumoconiosis Board shall be transmitted to the parties within thirty (30) working days from the date of examination by the Board.

~~10.7~~ 9.7. Petitions for reopening.

a. Petitions for reopening of claims for temporary total disability benefits and/or medical benefits shall be ruled upon within ten (10) working days from the date of receipt ~~in~~ by the ~~Commission~~ Insurance Commissioner or private carrier. The ~~Commission~~ Insurance Commissioner or private carrier shall consider all information and proof properly submitted in connection with each claim. Whenever it is of the opinion that a claim has not been adequately or properly developed for consideration, it may require the parties to produce additional evidence. The ten (10) working days to rule on the claim shall be tolled during this evidence gathering process.

b. Petitions for reopening of claims upon a permanent disability basis shall be ruled upon within thirty (30) days from the date of receipt in the Fund.

~~10.8~~ 9.8. Applications for modification of awards. -- Applications for modification of awards filed by employers shall be ruled upon within twenty (20) working days from the date of receipt in the Fund.

~~§85-1-11~~ 85-1-10. Child Support and Spousal Support Orders.

~~11.1~~ 10.1. W. Va. Code §23-4-18 allows child and/or spousal support payments to be withheld from an injured worker's compensation and sent to the bureau for Child Support Enforcement. The term "compensation" refers to temporary total disability benefits, temporary partial rehabilitation benefits, non-awarded partial benefits, permanent partial disability benefits and permanent total disability benefits only.

~~11.2~~ 10.2. The amounts to be withheld from an injured worker's compensation will be those which are set out in the withholding notice issued pursuant to the West Virginia Domestic Relations Act.

~~11.3~~ 10.3. When an award of compensation is for permanent partial or non-awarded partial benefits, the ~~Commission~~ Insurance Commissioner or private carrier can withhold 100% of those benefits to collect payment of child and/or spousal support benefits.

~~11.4~~ 10.4. When compensation is for temporary total, temporary partial, rehabilitation temporary total, permanent total, or dependent benefits, the ~~Commission~~ Insurance Commissioner or private carrier may only withhold the amount or amounts specified on the

withholding notice, subject to the limitations set out in Table 1a.

~~§85-1-12~~ 85-1-11. Overpayments.

~~12.1~~ 11.1. Overpayments include the receipt of any monies from the ~~Commission~~ Insurance Commissioner or private carrier to which it is subsequently determined the injured worker was not entitled to receive or have paid on his or her behalf and include, but shall not be limited to, the payment of temporary total disability benefits, permanent partial disability benefits, permanent total disability benefits, non-awarded partial disability benefits, temporary total rehabilitation benefits, temporary partial rehabilitation benefits, dependents benefits, fatal (104 week) benefits, travel reimbursement, and medical benefits.

~~12.2~~ 11.2. Overpayments to injured workers may be collected by the ~~Commission~~ Insurance Commissioner or private carrier by withholding future disability benefits payable to the injured worker or the worker's dependents in the same or other claims. The overpayment specifically can be withheld from temporary total disability benefits, permanent partial disability benefits, permanent total disability benefits, non-awarded partial disability benefits, temporary total rehabilitation benefits, temporary partial rehabilitation benefits, dependents benefits, fatal (104 week) benefits, travel reimbursement, and any other monies awarded or paid by the ~~Commission~~ Insurance Commissioner or private carrier.

~~12.3~~ 11.3. Collection of overpayments from temporary total disability benefits, permanent total disability benefits, temporary total rehabilitation benefits, temporary partial rehabilitation benefits, dependents benefits, and fatal (104 week) benefits shall be limited to thirty percent (30%) of the periodic benefit amount (i.e. weekly, bi-weekly, monthly, etc.); Provided that if the overpayment was based upon fraud, abuse, or mistake, caused in whole or in part, by the injured worker or his or her agent, then the amount of the overpayment may be recovered in full by withholding 100% of the periodic benefit amount until the overpayment is recaptured.

~~12.4~~ 11.4. Collection of overpayments from travel reimbursement, permanent partial disability benefits and non-awarded partial disability benefits shall not be limited and may be withheld in full until the overpayment is satisfied.

~~§85-1-13~~ 85-1-12. Occupational Pneumoconiosis and Occupational Disease Claims.

~~13.1~~ 12.1. Occupational disease claims that involve disability or death resulting from occupational pneumoconiosis must be filed, processed, and litigated in accordance with statutory provisions prescribing the administration of occupational pneumoconiosis claims. Claims involving cancers caused by inhalation of minute particles of dust over a period of time in the

course of and resulting from employment are occupational pneumoconiosis claims and must be filed, processed and litigated as such. Statutes of limitation for occupational pneumoconiosis-cancer claims will begin to run on the date when the occupational cancer was made known to the claimant by a physician or on the date when the claimant should reasonably have known of the cancer, whichever shall last occur.

~~13.2~~ 12.2. Carpal tunnel and all other nerve entrapment syndromes of the upper extremity shall be filed as occupational disease claims unless the syndrome is a secondary diagnosis to an otherwise compensable injury.

~~13.3~~ 12.3. An occupational disease claim filed based on the opinion of a psychologist shall be denied. Psychologists are not treating physicians and are not permitted to certify occupational disease disability.

§~~85-1-14~~ 85-1-13. Special Rules on Closure of Claims.

~~14.1~~ 13.1. Medical benefits in all no lost time claims and claims for temporary total disability benefits shall cease and the claim administratively closed six (6) months after the last date of service in the claim. A protestable order shall be issued by the ~~Commission~~ Insurance Commissioner or private carrier upon said administrative closure. Nothing in this provision shall be deemed to abridge an injured worker's right to attempt to reopen the claim at a later date under applicable law.

§~~85-1-15~~ 85-1-14. Procedures for Suspension for Claimant Abuse.

~~15.1~~ 14.1. When evidence is obtained justifying a finding that an injured worker has engaged or is engaging in abuse, including, but not limited to, engaging in physical activities inconsistent with his or her compensable workers' compensation injury, or when evidence is obtained establishing a failure to undergo examinations or needed treatment, then the injured worker's temporary total disability benefits will be suspended by the ~~Commission~~ Insurance Commissioner or private carrier.

~~15.2~~ 14.2. Abuse may also include working at an unreported job while drawing temporary total disability benefits, making false or misleading statements to the ~~Commission~~ Insurance Commissioner or private carrier or a health care provider for the purpose of securing any benefit, and altering, falsifying, destroying, or concealing workers' compensation related records.

~~15.3~~ 14.3. Any claimant found to be engaging in abuse or who fails to undergo examinations or needed treatment shall receive a notice of benefit suspension. This notice will

not be protestable. The injured worker will have thirty (30) days to submit evidence justifying the reinstatement of benefits. If justification is not established, then the injured worker will receive notice that the claim has been closed for temporary total disability payments and said notice shall be protestable. If justification is established, benefits will be reinstated with back benefits awarded.

~~15.4~~ 14.4. In claims pending prior to approval of a managed health care plan, failure to select a treating physician from an approved managed health care plan within sixty (60) days of notification to do so will result in a suspension of medical and indemnity benefits until said selection is made, unless the injured worker is eligible to opt out of the managed care plan network.

§~~85-1-16~~ 85-1-15. Travel Expenses-Medical Examination and Treatment.

~~16.1~~ 15.1. General.

Claimants are entitled to reasonable travel, meals and lodging expenses actually incurred in connection with authorized medical examinations or treatment. In making a determination of the reasonableness of such expenses, the ~~Commission~~ Insurance Commissioner or private carrier shall utilize the travel regulations for West Virginia State employees as a guide, unless specific provisions to the contrary are otherwise contained herein. Claimants may be reimbursed for mileage in connection with medical examination or treatment at a rate ~~of 15 cents ($0.15) per mile~~ equal to the same rate provided for in the travel regulations for State of West Virginia employees. ~~This rate shall not apply to mileage reimbursement requests involving treatment provided when the Commission or private carrier requires the claimant to undergo the medical examination and has selected the physician, or when an employer is required to reimburse reasonable travel and other expenses, as provided for in the W. Va. Code §23-4-8. The rate provided for in the travel regulations for State employees shall apply to these latter reimbursement requests.~~

~~16.2~~ 15.2. Physical limitations.

Where a medical vendor certifies that a claimant, because of the state of his health, requires special travel arrangements in order to report for an authorized examination, the claimant shall be reimbursed for the cost of such arrangements.

~~16.3~~ 15.3. Claimant's residence.

It shall be the policy of the ~~Commission~~ Insurance Commissioner and private carriers to arrange for examination as near as practicable to the claimant's residence. If the claimant

changes his residence after his or her date of injury to a location outside of West Virginia or to a location substantially further from the state than the residence on the date of injury, the following limitations shall be observed:

a. Where the change of residence is necessitated by reason of health or financial hardship, as determined in the sole discretion of the ~~Commission~~ Insurance Commissioner or private carrier upon a proper showing of such reasons, the ~~Commission~~ Insurance Commissioner or private carrier shall, in writing, endorse the change of residence and direct payment of meal and lodging expenses as follows:

1. Where the distance between the residence and the situs of the examination is less than four hundred (400) miles, meal and lodging expenses shall be payable as provided in subsections ~~16.1~~ 15.1. and ~~16.2~~ 15.2. of ~~these Rules~~ this section;

2. Where the distance between the residence and the situs of the examination is greater than four hundred (400) miles, expenses actually incurred en route shall be payable, to a maximum amount of the round trip air fare, economy class, between the closest airports offering scheduled commercial passenger service, as of the date said examination was scheduled;

3. Where the claimant objects to any order or finding, and the employer does not object thereto, and the claimant is subsequently directed to report for examination upon request of the employer, the claimant will be entitled to reimbursement of expenses from point of entry into West Virginia;

b. Where the claimant's change of residence is not necessitated by reason of health or financial hardship, expenses shall be payable only from point of entry into West Virginia.

~~§85-1-17~~ 85-1-16. ~~Litigated Claims~~ Expert Witness Appearances.

~~17.1~~ 16.1. An authorized treating physician, or an authorized consulting physician acting upon referral from an authorized treating physician, appearing at a hearing to give testimony regarding an examination of an injured worker will be paid a fee by the Insurance Commissioner, private carrier or self-insured employer commensurate with the service rendered for such appearance and testimony, not to exceed $100 per quarter hour.

~~17.2~~ 16.2. ~~A treating physician or other medical vendor appearing at a hearing or deposition will be paid a fee commensurate with the service rendered for such appearance and testimony as otherwise provided for in the applicable fee schedule.~~ All other expert witness

appearance fees, including, but not limited to, any physician other than those physicians mentioned in subsection 17.1. of this section, medical vendors, rehabilitation providers, physical therapists or vocational specialists, shall be paid for by the party wishing to examine or cross-examine the expert witness at an amount agreed to by the parties based upon usual and customary rate for the profession involved, not to exceed $100 per quarter hour. If the expert witness demands an amount in excess of $100 per quarter hour to appear, then it will be the sole responsibility of the party who has retained the services of the expert or submitted a report or records of the expert as evidence in the case to pay for the difference.

§85-1-17. Implementation and Stay of Orders from the Office of Judges.

17.1. Subject to the provisions of subsections 18.2. through 18.6. of this Rule, the Insurance Commissioner, private carriers, and self-insured employers shall comply with any Order entered by the Office of Judges within thirty (30) calendar days of the entry of the Order. This provision is intended to apply to self-insured employers in lieu of W. Va. Code St. R. § 85-18-15.5.j., thereby repealing that subdivision in favor of this subsection regarding self-insured employers.

17.2. The Insurance Commissioner, private carrier or self-insured employer may move for stay of any order entered by the Office of Judges for the payment of indemnity benefits, or which will necessarily require or result in the payment of such benefits, including, but not limited to, an order which finds a claim to be compensable, by filing a motion with either the Administrative Law Judge who entered the order or with the Board of Review.

17.3. A motion as described in subsection 17.2. of this section filed with the Office of Judges must be filed within fifteen (15) calendar days of the date of entry of such order. A motion as described in subsection 17.2. of this section filed with the Board of Review must be filed contemporaneously with the petition for appeal. Any such motion that is not timely filed in accordance with this subsection shall be dismissed with prejudice. In either case, the claimant may file a response to the motion within five (5) calendar days of the date on which the motion was filed, and the Office of Judges or Board of Review, whichever is applicable, shall enter an order granting or denying the motion within the ten (10) calendar days from receipt of the motion.

17.4. Any motion as described in subsection 17.2. of this section must include the following minimum content: (1) A statement of the reasons why the stay is being sought; and (2) a statement of the grounds for the underlying appeal. Failure to include the minimum content as described in this section shall be grounds for the motion to be summarily denied.

17.5. Any order granting a motion as described in subsection 17.2. of this section shall

expressly limit the stay to temporary total or permanent partial indemnity benefits paid in the claim as a result of the underlying Office of Judges order. No order granting a motion as described in subsection 17.2. of this section may stay any medical benefit or any permanent total disability benefit.

17.6. Any order granting a motion as described in subsection 17.2. of this section by the Office of Judges shall expressly limit the time duration of the stay to the expiration of the jurisdictional time limit for the filing of an appeal of the underlying order, or to the entry of a decision by the Board of Review of the underlying appeal if an appeal is filed. Any order granting a motion as described in subsection 17.2. of this section by the Board of Review shall expressly limit the time duration of the stay to the entry of a decision by the Board of Review of the underlying appeal: *Provided*, that if the Board of Review enters a decision remanding a case to the Office of Judges for further proceedings, any stay granted by the Office of Judges or Board of Review shall remain in effect until the Office of Judges enters a new order on the issue which was remanded, at which time the stay will be lifted.

§85-1-18. Miscellaneous Administrative Matters.

18.1. Incidents that do not result in material medical treatment, or that are not reasonably expected to result in medical treatment need not be reported to the ~~Commission~~ Insurance Commissioner or private carrier by the worker or the employer.

18.2. If mail sent by the ~~Commission~~ Insurance Commissioner or private carrier to an injured worker, an employer, a vendor or any other party to a claim is returned due to an incorrect address, a reasonable effort will be made to determine the correct address. If after reasonable effort and due diligence a correct address cannot be located, the ~~Commission~~ Insurance Commissioner or private carrier shall cease mailing correspondence to the party until such time as a correct address is provided.

§85-1-19. Preferred Drug List.

~~19.1. Purpose.~~ In accordance with the provisions of the Workers' Compensation Act [23-4-3(a)(3)] that require pharmacists filling a prescription for medication for a workers' compensation claimant to dispense a generic brand of the prescribed medication if the generic brand exists ~~and in accordance with HCAP's responsibility to establish guidelines for reasonably required health care treatment for occupational injuries and diseases, HCAP shall~~ the Insurance Commissioner and any private carrier may establish a Preferred Drug List (PDL) for the purposes of:

a. Improving the quality of care of claimants by utilizing a PDL of generics and

brand medications in the absence of generics;

b. Affecting cost savings in the provision of health care services by determining what is reasonably required; and

c. Optimizing pharmaceutical care and cost effectiveness.

~~19.2. Determinations. Considering the purposes the PDL, HCAP shall determine:~~

~~a. Therapeutic classifications;~~

~~b. Generic medications associated with each therapeutic class; and~~

~~c. Certain brand name medications associated with each therapeutic class for which a generic medication is not available.~~

~~19.3. Medications prescribed that are not listed on the PDL are subject to the approval of the Commission. In determining whether to approve or not approve the prescription, the Commission shall consider whether any generic or brand name medication for the same therapeutic class is listed on the PDL. If a generic or brand name medication is listed for that therapeutic class, the Commission shall not authorize the prescription.~~

~~a. Medications prescribed for off-label use shall require pre-approval by the commission, self-insured employer, or private carrier.~~

~~b. "Off-label use" means that the medication is prescribed for a condition, which is inconsistent with the manufacturer's label or instructions.~~

~~19.4. Procedure. Determinations made by HCAP shall be made in the following manner.~~

~~a. HCAP shall make any determination or determinations at a public meeting or meetings held in accordance with the provisions of this rule.~~

~~b. The determinations shall be filed with the office of the secretary of state for publication in the state register pursuant to the provisions of W. Va. Code §29A-2-1 et seq.~~

~~19.5. Review. HCAP shall review the listings and classes of the PDL at least every six (6) months as calculated from the effective date of this rule. The PDL may be reviewed and updated more often in the discretion of HCAP in accordance with the purposes and procedures contained within this section.~~

~~19.6. The current PDL, as adopted by HCAP, remains in force and effect in all existing and future claims until such time as HCAP adopts or revises the PDL.~~

~~19.7. Upon termination of the Commission, each private carrier may establish a PDL for the purposes set forth in Section 19.1.~~

§85-1-20. Severability.

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

TABLE 1a

Family	**Arrears**	**Percentage**
Not supporting another family	Less than 12 weeks old	Maximum of 50%
Not supporting another family	Greater than 12 weeks old	Maximum of 55%
Supporting another family, even just a spouse	Less than 12 weeks old	Maximum of 40%
Supporting another family, even just a spouse	Greater than 12 weeks old	Maximum of 45%