WEST VIRGINIA LEGISLATURE

Legislative Rule-Making Review Committee

NOTICE OF ACTIONS TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

January 28, 1986

TO: Ken Hechler, Secretary of State; State Register

TO: Mary Martha Merritt, Commissioner
Workers' Compensation Fund
601 Morris Street
Charleston, WV 25301

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Workers' Compensation - Proposed rules and regulations relating to the administration of the Coal-Workers' Pneumoconiosis Fund

FILED
1986 JAN 31 AM 8:32

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule as originally filed or as modified by the agency — X

2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. —

3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. —

4. Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached. —

Pursuant to Code 29A-3-11(c), this notice has been filed in the state register and with the agency proposing the rule.

cc: Mr. William Mitchell
Senior Counsel

WORKERS' COMPENSATION FUND

1986 JAN 15 PM 4:05

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR
Governor

MARTHA MERRITT
Commissioner

January 15, 1986

Modification of WEST VIRGINIA LEGISLATIVE RULES, WORKERS' COMPENSATION COMMISSIONER, Chapter 23-4B, Series II, Filed August 9, 1985

Section 9.2 is hereby amended by the addition of the underlined portion of the Section, as follows:

9.2. Refunds. Upon withdrawal from coverage by a subscriber, or cancellation by the Fund, the Fund shall not refund any earned premiums for past years of coverage, nor for the current subscription year. Upon withdrawal, or cancellation, the Fund shall perform a closing audit of the subscriber's account and shall prepare a final accounting for the current subscription year, as soon as possible, and within thirty (30) days after the effective date of withdrawal or cancellation, to determine the amount of any unearned premiums and deposits held by the Fund for the current subscription year, and after deducting any amounts found to be owing to the Fund, and properly deductible by the Fund, shall promptly refund to the subscriber any excess unearned premium and deposit for the current subscription year only. Provided, however, that any subscriber desiring to obtain approval of a self insurance plan by the U. S. Department of Labor, and, thereafter, to withdraw from coverage of the Fund and obtain a refund of all premiums, less claims and medical expenditures paid by the Fund on the subscriber's behalf, shall have until April 15, 1986, to submit to the Fund in writing an application for such refund, conditioned upon the aforesaid approval of such self insurance plan and a written release of the Fund for all past, present and future liability under the Federal Act, by an appropriate authorized official of the U. S. Department of Labor. Any subscriber filing such application for refund with the Fund shall proceed with diligence to seek approval from the U. S. Department of Labor for their self insurance plan and the release of the Fund, and shall provide to the Fund a copy of the form or forms filed with the U. S. Department of Labor for the purpose of applying for the privilege of self-insuring their liability, and shall also provide to the Fund copies of other forms or correspondence relating to the granting or denial of such privilege by the U. S. Department of Labor. Upon receipt of the aforesaid release the Fund shall perform a closing audit of the subscriber's account and issue the subscriber a check for a refund of all premiums, less claims and medical expenditures paid by the Fund on behalf of the subscriber, as of the effective date of cancellation in the notice of cancellation of coverage submitted by the Fund to the U. S. Department of Labor.

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: Workers' Compensation

Subject: Proposed rules and regulations relating to the administration of the Coal-Workers' Pneumoconiosis Fund

Fiscal Impact: None

PERTINENT DATES

Filed for public hearing: June 24, 1985
Date of comment period: June 24, 1985, through July 24, 1985
Filed following public hearing: August 9, 1985
Filed LRMRC: August 9, 1985
Filed as emergency: June 24, 1985

ABSTRACT

Section 1 is a general section, setting forth the scope, authority, filing date and effective date. It also defines terms used in the proposed legislative rules and states that the proposed legislative rules repeals the former rules which were filed on December 27, 1982.

Section 2 sets forth the procedure with which an employer must comply in order to subscribe to the Fund.

Section 2.1 allows any person which may be determined an operator liable for the payment of benefits under the federal act to apply to the Fund for coverage. It also specifies the information which must be submitted and the manner in which the application is to be filed.

Section 2.2 requires that, upon request, all prospective applicants be furnished classification and premium information.

Section 2.3 states that all applicants and subscribers are bound by the proposed legislative rules.

Section 2.4 requires the Fund, upon receipt of and examination of a completed application, to deny application for coverage or to approve coverage and determine the amount of deposit and the first quarter's premium. The applicant is to be given written notice of the Fund's action. If

coverage is denied or the applicant believes that the deposit is excessive, he may, within fifteen days, make a written request for review.

Section 2.5 allows the Fund to determine the amount of deposit as long as the deposit is not less than one quarter's premiums. When the amount of a deposit is deemed insufficient, the Fund may, upon written notice, require an additional deposit. An applicant has thirty days from receipt of the notice to remit the additional deposit. The Fund may also reduce a deposit.

Section 2.6 requires the Fund to notify an applicant of acceptance as a subscriber upon compliance with all application, premium and deposit requirements and to file a report with the U. S. Department of Labor.

Section 2.7 allows the Fund to revoke coverage if an applicant or subscriber failed to provide proper information or filed false information. The Fund is entitled to recover all monies paid out, administrative costs and interest.

Section 2.8 requires a subscriber to renew his subscription annually by the thirtieth day of April.

Section 3 relates to coverage.

Section 3.1 specifies those claims for which the Fund will provide coverage.

Section 3.2 allows the Fund to make prospective adjustments to the premium rates charged for past subscription periods should the Federal Act or Regulations be amended in such a way as to impose retroactive liability.

Section 3.3 specifies that coverage by the Fund is not assignable or transferable.

Section 4 deals with classification and premium rates.

Section 4.1 requires the Fund to annually reassess and adjust rates charged subscribers after the first day of July.

Section 4.2 sets up three categories of subscribers to the Fund and sets forth the rates they are to be assessed. The Commissioner may establish additional classifications, including a merit rating classification. Such merit rating classification may not take effect until the subscription year next following the subscription year in which it is announced and must be structured as to maintain the solvency of the Fund.

Section 4.3 relates to determination of prospective rates for new subscribers. The subscribers experience over a period of five years is to be used to make a final premium calculation.

Section 4.4 allows a subscriber to request a report of its experience from the Fund.

Section 4.5 requires operations to be classified as underground or surface. An operator may make a written request to have his operation reclassified or to have portions of the operation excluded from coverage. Such reclassification or exclusion becomes effective at the beginning of the next subscription year.

Section 5 relates to payments of benefits.

Section 5.1 requires the Fund to issue payment within thirty days of the receipt of a decision and order from the U. S. Department of Labor directing payment of benefits, unless such decision and order is controverted by the operator in accordance with the Federal Act and Regulations and the operator has requested that payment be withheld. A subscriber is responsible for notifying the Fund of all claims filed against him and all actions and responses to claims filed against him. The subscriber must submit copies of all documents to the Fund.

Section 5.2 requires medical expenses to be paid for the claimant under the criteria set forth in the Federal Act and Regulations.

Section 6 relates to quarterly reporting.

Section 6.1 requires that on or before the last day of the month next following the end of each quarter of the subscription year, each subscriber must file a quarterly payroll and premium report along with payment of the total premium due. This section also defines wages and specifies the information which must be included in the report. If a subscriber fails to meet the time limits for filing of reports or payment of premiums he may receive an immediate notice of cancellation. Late reports, if accepted in lieu of cancellation, are subject to a one hundred dollar penalty plus interest on any late payments of premium.

Section 7 deals with cancellation and reinstatement.

Section 7.1 lists those reasons for which the Fund has the right to cancel the coverage of any subscriber.

Section 7.2 allows a subscriber to have his coverage

reinstated if he applies for reinstatement after he has been issued a notice of cancellation but prior to the effective date of cancellation. Reinstatement may be made only upon compliance with all requirements for coverage, upon payment of interest on any monies owed to the Fund and upon payment of a penalty of five hundred dollars. After the effective date of cancellation, coverage may be reinstated within one hundred and eighty days, but the penalty increases to one thousand dollars. Any subscriber who voluntarily withdraws from coverage is eligible for reinstatement without penalty if the request is made within one hundred eighty days.

Section 8 relates to audit and inspection.

Section 8.1 requires every subscriber to maintain records of all expenditues for payroll separated by classification. The Fund is authorized to audit and inspect any and all records for the purpose of verification of activities. If the subscriber or applicant fails or refuses to comply, the Fund may (1) assess premiums on the basis of available information, (2) revoke coverage previously approved or (3) deny the application for coverage. If a subscriber fails to maintain separate records for each classification, that part of the payroll which cannot be reasonably determined by the Fund to belong to any other classification shall be allotted to the assigned classification having the highest premium rate.

Section 9 concerns withdrawal.

Section 9.1 allows a subscriber to withdraw from coverage by the Fund at any time. Upon written request for withdrawal, the Fund must send notice of cancellation to the U. S. Department of Labor. A subscriber is liable to the Fund for all premiums, deposits and other payments due the Fund until the effective date of cancellation.

Section 9.2 prohibits the refund of any earned premiums for past years of coverage or for the current subscription year to any subscriber who has withdrawn from the Fund or who has had coverage cancelled by the Fund. Upon withdrawal or cancellation, the Fund is to perform a closing audit and prepare a final accounting for the current subscription year within thirty days of the effective date of withdrawal or cancellation. The Fund is to refund to the subscriber any excess unearned premium and deposit for the current subscription year only.

Section 10 relates to transfers.

Section 10.1 provides that transferred interests between subscribers are not automatically covered upon transfer. The transferee subscriber must apply for coverage of the assets acquired by way of transfer. The transferee subscriber is jointly and severably liable with the transferer subscriber for all past due premiums, deposits, penalties and interest owed the Fund.

Section 10.2 provides that coverage is not automatic for the transfer of assets from a non-subscriber to a subscriber.

Section 10.3 provides that a transferor subscriber who transfers assets to a non-subscriber is liable for payment of premiums, deposits and other payments to the Fund for coverage until withdrawal is effective and may be liable for benefit payments if the transferee fails to insure against liability.

Section 10.4 provides that the provisions of section 10 are to be construed and applied so as to minimize the liability of the Fund for which no revenue is derived.

Section 11 concerns access to records.

Section 11.1 provides that all records of the Fund maintained as a memorial of any official transaction are public records and subject to inspection by all persons who have a legitimate interest in them. All other records which are maintained as evidence of internal operations of the Fund are private except as to the parties in interest and their duly authorized representatives.

Section 12 provides that if at any time the liability of the Fund ceases such that liquidation of the Fund is in order, the Commissioner, after payment of all debts, shall divide and return to each subscriber a proportionate share of the unallocated assets in accordance with the amount of premium paid by and the experience of each subscriber.

AUTHORITY

Statutory authority: W.Va. Code, §23-40-6 which reads in part as follows:

> .... The commissioner may by rule and regulation classify subscribers into groups or classes according to the nature of the hazards incident to the business thereof, and assign premium rates thereto. In addition, the Commissioner may by rule and regulation prescribe procedures for subscription, payroll reporting, premium payment, termination of subscription, reinstatement and other matters pertinent to such subscribers' continuing participation in the coal-workers' pneumonoconiosis fund.

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No. Under the above-cited code provision, the Commissioner has the authority to promulgate rules and regulations of the type proposed.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

a. The Workers Compensation Commissioner received numerous comments regarding this rule when it was promulgated as an emergency rule. The proposed legislative rule has been amended to reflect most of these comments. One comment, which was not reflected in an amendment to the proposed legislative rule and which involves a policy issue, was submitted by Edwin K. Wiles for the West Virginia Coal Association. Mr. Wiles would like the proposed legislative rule to contain a provision requiring the Fund to refund all unearned premiums to those subscribers who wish to withdraw from the fund to become self-insured. This refund policy, though unauthorized by statute or rule, had been inplemented by a prior Commissioner. Under the proposed legislative rule, a refund may only be made for any excess unearned premium and deposit for the current subscription year. Representatives of the Commissioner informed me that since the new rule has gone into effect, the Commissioner has allowed a full refund of unearned premiums to any subscriber which had given any indication of intent to withdraw from

the Fund to become self-insured. There are no plans to amend the proposed legislative rule because it is an insurance-type fund and insurance entities do not refund unearned premiums upon withdrawal of a subscriber. Any decision on this provision would be a policy decision and thus one for the Committee to determine.

b. The review procedure under Section 2.4 seems to relate only to deposits required of new applicants and not to increases or decreases in deposits, premiums or revocation of coverage. If this review process is to include all of the above, which it should, the language in the proposed rule needs some modification.

c. Section 2.5 is vague in that no guidelines or standards are provided relating to how the amount of deposit is determined by the Commissioner.

d. Section 2.6 is vague regarding how the date of acceptance is determined.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No. It should be noted that these rules basically only have relevance to approximately 341 subscribers and virtually have no effect on the general public.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

Tuesday, January 7, 1986 Legislative Rule-Making Review Committee
(Code §29A-3-10)

3:00 - 5:00 p.m.

Dan Tonkovich,
ex officio nonvoting member

Joseph P. Albright,
ex officio nonvoting member

Senate	House
Williams, R., Chairman	Casey, Chairman
Boettner	Knight
Rogers	Schifano
Tomblin	Wiedebusch
Harman	Shaffer
Shaw	Springston

The meeting was called to order by Mr. Williams, Co-Chairman.

The minutes of the January 5, 1986, meeting were approved.

Mr. Williams told the Committee that the first rule on the agenda was the rule proposed by the Board of Registered Professional Nurses relating to the requirement that, beginning in 1992, nurses obtain a baccalaureate degree as a minimum for licensure as a registered professional nurse.

Mr. Knight moved that the proposed rule be referred to the Joint Committee on Government Operations for study during the next interim period and that the Joint Committee on Government Operations report back to this Committee with its recommendations.

Mr. Shaffer moved to amend Mr. Knight's motion to state that the proposed rule is against public policy and that the proposed rule be rejected. Mr. Shaffer demanded a roll call on the motion.

Mr. Williams ruled that Mr. Shaffer's motion was a dispositive motion, moving that the proposed rule be rejected,

and was not an amendment to Mr. Knight's motion. A vote was taken on Mr. Shaffer's motion that the proposed rule be rejected. The motion passed on on a vote of seven yeas and five nays.

Mr. Williams invited members of the Occupational Pneumoconiosis Board to respond to the question as to what effect removal of the altitude adjustment provision would have on the rule proposed by the Workers' Compensation Commissioner relating to Standards for Medical Examination In Occupational Pneumoconiosis Claims. He also asked Board members to suggest alternatives to the altitude adjustment provision.

Dr. James Walker, Chairman of the Occupational Pneumoconiosis Board outlined the various alternatives available to the Board to deal with the effect of changes in altitude on blood gas studies. Dr. Walker told the Committee that if the altitude adjustment provision were to be deleted, that the Board would be in the same position that it was in prior to the West Virginia Supreme Court ruling in the Javins case, and that the smaller coal companies would be penalized.

Dr. Walker responded to questions from the Committee.

William Mitchell, Senior Counsel, Workers' Compensation Fund, answered a question from Mr. Casey regarding the Javins case.

Mr. Williams asked Dr. Walker to introduce the other members of the Board who were present. Dr. Walker intoduced Dr. Willard Pushkin, Dr. William Revercomb and Dr. Dennis Kugel.

Mr. Williams asked if the members of the Committee had further questions for Dr. ,Walker or any other member of the Board. Mr. Williams asked that the motion relating to the

deletion of the altitude adjustment provision from the minutes of the previous meeting be read.

Mr. Shaw moved that the Committee reconsider the action which it took at its December 10, 1985, meeting where, upon motion of Mr. Boettner, the Committee voted to delete the altitude adjustment provision from the proposed rule. Mr. Shaw demanded a roll call on the motion.

Messrs. Casey, Boettner and Knight spoke in opposition to the motion to reconsider.

Messrs. Harman, Rogers and Shaffer spoke in favor of the motion to reconsider.

The motion to reconsider the previous action of the Committee passed on a vote of eight yeas and four nays.

Mr. Williams announced that a roll call vote would be taken on Mr. Boettner's motion to delete the altitude adjustment provision.

Upon reconsideration, the motion by Mr. Boettner that the altitude adjustment provision be deleted was defeated on a vote of four yeas and eight nays.

Mr. Shaw moved that the rule proposed by the Workers' Compensation Commissioner relating to Standards for Medical Examination in Occupational Pneumoconiosis Claims be approved. Mr. Williams announced a roll call vote on the motion. The motion was adopted on a vote of eight yeas and four nays.

Mr. Williams asked Debra Graham, Associate Counsel, to explain the question before the Committee regarding the rule proposed by the Workers' Compensation Commissioner relating to

the administration of the Coal Workers' Pneumoconiosis Fund. She explained that, at the request of the Committee, the Workers' Compensation Commissioner had been asked to determine how many companies would take advantage of a ninety-day window in the proposed rule which would allow a company withdrawing from the Fund to become self-insured and receive a refund of all unearned excess premiums. The Commissioner was also asked to determine what effect such withdrawals would have on the Fund. Mr. Mitchell provided the requested information and then responded to questions from the Committee.

Mr. Shaffer asked unanimous consent for a member of the public, Mr. Fred St. John, of H. & F. Mining, Inc., to address the Committee.

Mr. Mitchell again responded to questions from the Committee.

Mr. Williams asked Mary Martha Merritt, Workers' Compensation Commissioner, if she would be willing to add a ninety-day window provision to the proposed rule. She stated that although she was not in favor of such a provision that she would insert one if the Committee requested it.

Mr. Williams recognized Fred St. John, H & F Mining, Inc., to ask a question.

Mr. Mitchell and Mrs. Merritt responded to questions from the Committee.

Mr. Boettner moved that the Committee request that the Workers' Compensation Commissioner amend the emergency rule currently in effect to allow a ninety-day period for companies to withdraw from the fund for self-insurance purposes and to receive

any unearned excess premiums and also moved that the proposed legislative rule be modified to reflect the ninety-day window.

Mr. Casey moved to amend Mr. Boettner's motion to reduce the ninety-day period to sixty days. The motion failed.

Mr. Boettner's motion was adopted.

Upon motion of Mr. Boettner, properly seconded and adopted, the rule proposed by the Workers' Compensation Commissioner relating to the administration of the Coal Workers' Pneumoconiosis Fund was approved as modified.

Mr. Williams asked if any members of the Committee had any comments or questions regarding the rule proposed by the State Tax Department relating to the operation of a statewide electronic data processing system network, to facilitate administration of the ad valorem property tax on real and personal property. There were none.

The Chairman then advised the Committee that it had adjourned a previous session with a motion pending to adopt the rule proposed by the tax commissioner. The motion was then taken up and acted upon. The motion was adopted. Mr. Tomblin and Mr. Rogers voted nay.

The meeting was adjourned.