

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #5

~~Do Not Mark In this Box~~

2008 JUL 18 PM 3: 32

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

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

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

CITE AUTHORITY West Virginia Code §§ 23-2C-5(c)(2), 23-2C-22, 33-2-10(b) and 33-2-21(a)

RULE TYPE: PROCEDURAL \_\_\_\_\_ INTERPRETIVE \_\_\_\_\_

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

West Virginia Code § 23-2C-5(c)(2)

AMENDMENT TO AN EXISTING RULE: YES X NO \_\_\_\_\_

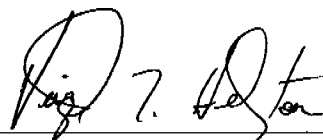
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 2

TITLE OF RULE BEING AMENDED: Workers' Compensation Claims Index

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: \_\_\_\_\_

TITLE OF RULE BEING ADOPTED: \_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS August 17, 2008



Virgil T. Helton  
Cabinet Secretary  
West Virginia Department of Revenue

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

**SERIES 2**  
**WORKERS' COMPENSATION CLAIMS INDEX**

FILED

2008 JUL 18 PM 3: 32

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**§85-2-1. General.**

1.1. Scope. -- This rule governs the administration of the West Virginia Workers' Compensation Claims Index established pursuant to W. Va. Code §23-2C-5(c)(8).

1.2. Authority. -- W. Va. Code §§23-2C-22; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules proposed by the 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. -- July 18, 2008.

1.4. Effective Date. -- August 17, 2008.

**§85-2-2. Purpose.**

The purpose of this rule is to establish guidelines to govern the administration of the Workers' Compensation Claims Index pursuant to W. Va. Code §23-2C-5(c)(8).

**§85-2-3. 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.

3.1. "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.

3.2. "EDI" is the Electronic Data Interchange Project of the International Association of Industrial Accident Boards and Commissions ("IAIABC"), Release 3 standards.

3.3. "Industrial Council" means the Industrial Council created pursuant to W. Va. Code §23-2C-5.

3.4. "Private carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West

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

3.5. "Self-insured employer" means an employer who is eligible and has been granted self-insured status pursuant to the provisions of W. Va. Code §23-2-9 and the rules promulgated thereunder, and any third-party administrator designated by the self-insured employer to adjust West Virginia workers' compensation claims.

3.6. "Special Funds," mean all workers' compensation related funds created in W. Va. Code §23-2C-1 et seq., and administered by the Commissioner, which are responsible for paying certain West Virginia workers' compensation benefits, and any third-party administrator designated by the Commissioner to adjust West Virginia workers' compensation claims on behalf of such funds.

3.7. "WV OIC EDI IG" is the West Virginia Offices of the Insurance Commissioner's EDI Implementation Guide.

3.8. "Workers' Compensation Claims Index" or "claims index" is a method for indexing claims of injured workers filing for West Virginia workers' compensation benefits that will make information concerning West Virginia's injured workers available to insurers or self-insured employers, as required by the Industrial Council pursuant to W. Va. Code §23-2C-5(c)(8).

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

#### **§85-2-4. Claims Index.**

4.1. Consistent with the provisions of W. Va. Code §23-2C-5(c)(8), a West Virginia Workers' Compensation Claims Index shall be maintained in the form of an electronic database and administered by staff of the Commissioner, utilizing selected data reported by private carriers, special funds and self-insured employers to the Commissioner through EDI. The purpose of the claims index is to make basic information regarding claims filed by injured workers available to private carriers, self-insured employers and the Commissioner.

4.2. The claims index shall contain basic information on all West Virginia workers' compensation claims reported consistent with this rule, including the following minimum requirements, based upon the best information available to the private carrier, self-insured employer or Commissioner:

- a. Claim number;
- b. Accident date/Date of injury or last exposure;
- c. Claimant's full name;

- d. Claimant's social security number;
- e. Name, address and phone number of a contact person for the private carrier, self-insured employer or third-party administrator, as applicable;
- f. Body part that is the subject of the claim;
- g. The percentage of permanent partial disability award granted in the claim; and
- h. Any other fields of information as the Commissioner deems necessary.

4.3. The required fields for the claims index shall be established by the Commissioner with advice and consent of the Industrial Council consistent with an objective of providing sufficient basic information regarding West Virginia workers' compensation claims to private carriers, self-insured employers and the Commissioner without creating unduly burdensome reporting requirements.

#### **§85-2-5. Access to Claims Index.**

5.1. Upon application to the Commissioner on forms prescribed by the Commissioner, a private carrier, self-insured employer or any designated agent thereof, including, but not limited to, an attorney for the private carrier or self-insured employer, may be granted access to the claims index. Such access shall be permitted in a method and manner prescribed by the Commissioner.

5.2. Any information in the claims index may be used only for the purposes of administering and defending the workers' compensation claim upon which the request was based in a manner consistent with chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

5.3. A claimant, an attorney representing a claimant or a healthcare provider duly authorized by the claimant may request a list of the claimant's prior claims available from the claims index. Such request shall be permitted in a method, manner and form created by the Commissioner.

#### **§85-2-6. Duty to Timely Report Claims Data.**

6.1. All private carriers, special funds and self-insured employers shall report claims data to the Commissioner consistent with the provisions of the WV OIC EDI IG.

6.2. Failure of an insurer or self-insured employer to timely report data to the Commissioner as required in subsection 6.1. of this section may subject the private carrier or self-insured employer to a fine not to exceed \$500 per occurrence of untimely reporting.

# **PUBLIC HEARING**

**MAY 29, 2008**

## **OFFICES OF THE WEST VIRGINIA INSURANCE COMMISSIONER WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

### **"WORKERS' COMPENSATION CLAIMS INDEX" TITLE 85, SERIES 2**

Transcript of the Public Hearing held on Thursday, May 29, 2008, at 3:00 p.m.,  
Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400,  
Charleston, West Virginia.

#### Industrial Council Members Present:

Charles Bayless, Chairman  
Bill Dean  
Senator Don Caruth  
Delegate Nancy Guthrie  
Kent Hartsog  
Dan Marshall (via telephone)  
Senator Brooks McCabe  
Walter Pellish (via telephone)

Chairman Bayless: We have Title 85, Series 2, "Workers' Compensation Claims Index." Are there any comments from the staff on this rule that you would like to make?

Mary Jane Pickens (General Counsel OIC): I don't think so. House Bill 4636 passed and this is the rule that we needed to amend to reflect the now current law.

Chairman Bayless: Any comments from members of the Council? Are there any public comments on Series 2 on the proposed rule? We hear no comments. [No public comments.]





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May 28, 2008

Mary Jane Pickens  
Office of the Insurance Commissioner  
P O Box 50540  
Charleston, WV 25301-0540

Via email at [mj.pickens@wvinsurance.gov](mailto:mj.pickens@wvinsurance.gov)

Re: **Issues and Comments - On Initial Draft of Amendments:**  
**85 C.S.R. § 1**  
**85 C.S.R. § 2**

Dear Ms. Pickens:

Please accept this correspondence as our public comments regarding the Offices of Insurance Commissioner's Proposed Rules 85 C. S. R. §§ 1 and 2. We are submitting these comments on behalf of our clients who are affected by these proposed rules.

**Series 1 Claims Management and Administration**

**85 C.S.R. § 1-2. Definitions.**

- **Issue** – § 2.14. "Retire" means an individual has permanently ceased working due to age or years of service and has no intent to return to work.
- **Comment** – We suggest the language referring to "has no intent to return to work" be removed or rephrased since it is very subjective. This could provide a "loop hole" for the claimant once he or she learns no temporary total disability benefits will be paid because he "retired" but wants to argue with the responsible party or employer that he may want to work at a later date but is merely retiring from his pre-injury employment. This leaves the responsible party or employer in a position to be unable to defend the denial of benefits or impossible to contradict the claimant's statement of his/her intent.

**85 C.S.R. §1-5 - This section relates to "special rules of temporary total disability claims."**

- **Issue** – §1-5-2 has been amended to reflect that when an individual retires "as long as the individual remains retired", the individual 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 is retired.
- **Comment**- As with the definition of retire discussed above, the inclusion of the language as long as the individual remains retired is subjective to the claimant. Please consider that the use of this phrase in the amendments to this rule regarding the eligibility to receive benefits, in some instances, would encourage or suggest to a retired claimant to state that they do not have an intent to remain retired in order to receive benefits. The responsible party or employer would be unable to rebut such a statement since it would be impossible to contradict the individual's statement of his/her intent.

**85 C.S.R. § 1-10. Time Standards**

- **Issue** - §10.1 After each time frame the word "working" has been removed.
- **Comment** - Although this may be the Industry Standard the employer or carrier should be allowed a minimum of five (5) additional days similar to the allowance in the changes to 85 C.S.R. § 6 and 85 C.S.R. § 8. By using calendar days rather than business days there will be times that the pending ruling or action could fall during the Holidays and this could hinder the employer or carrier's ability to render the appropriate decision due to the limited time for investigation. Also, in certain instances the time frame change could require payments to be issued prior to the determination of "stay" by the Office of Judges

**85 C.S.R. § 1- 10.5**

- **Issue** - §10.5.c. The added language, "Permanent partial disability awards "may" be paid either by lump sum or in installments"
- **Comment** – The language should clarify that this is at the responsible party or employers' discretion or upon receipt of documentation of hardship.

### **85 C.S.R. § 1-16. Complaints**

- **Issue** – Upon receipt of any inquiry from the Insurance Commissioner regarding a complaint filed with the Commissioner, all private carriers and self-insured employers shall, within fifteen (15) days of the date appearing on the inquiry, furnish the Commissioner with a complete written response. A “complete written response” addresses all issues raised by the complainant or the Commissioner and includes copies of any documentation requested. This subsection is not intended to permit delay in responding to inquiries by the Commissioner or the Commissioner’s staff in conjunction with a scheduled examination.
- **Comment** –
  - There should be language which includes the exception of response by the Commissioner or the Commissioner’s staff, private carriers and self-insured employers on issues currently in litigation.
  - We believe the private carrier and self-insured employers have the right to be provided copies of **all** responses to the complainant by the Insurance Commissioner or the Commissioner’s staff.

### **Series 2 Workers’ Compensation Claims Index**

#### **85 C.S.R. § 2-4. Claims Index.**

- **Issue** – § 4.2.f. Body part that is the subject of the claim. And Section 4.2.g. the percentage of permanent partial disability award granted in the claim.
- **Comment** - Request permanent partial disability award percentage contain break down for the specific accepted body parts in the claim. The lack of this information is not only detrimental to employer/carrier, but claimant as well.
  - Example:

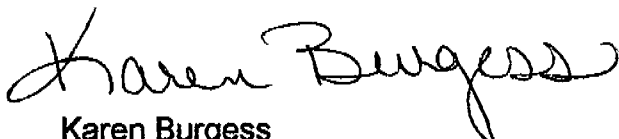
Index shows low back claim, 17% PPD (break down of impairment is 10% lumbar, 5% cervical, 2% shoulder).

    - An injured worker suffers a new injury to the same shoulder and he is evaluated for permanent partial disability. The recommendation is 3% for the shoulder, with the information listed in the current language the injured worker would be granted a 3% award for the shoulder which would actually be over compensating since he was previously granted a 2% in the prior claim.

- Another scenario would be if the claimant was evaluated for a newer low back injury and the physician recommends a 12% for the low back the claimant would not be granted any award since the index states he was already granted 17% award for a low back in a prior claim.
- To avoid this inaccuracy the proper procedure is to request the complete record for any related body part that has a percentage of impairment from the responsible party as soon as a new injury has occurred. However if the break down of the awarded body parts is not listed there would be inaccurate awards short changing the claimant and causing over payments by the responsible party that may not be possible to recover.
- Rule 18 had a time standard for supplying requested records but this was not included in the drafted version of Rule 1.
- Since there is reluctance to provide the records by responsible parties and they are refusing to release the records with out a separate signed release by the claimant. We suggest that the rule refer to WV Code 23-4-7 to reinforce the acceptance of the claimant's signed Report of Occupational Injury that states that by signing the application he/she authorizes the release of medical records pertaining to the occupational injury or illness for which he/she is claiming benefits and any prior injury to or disease to the portion of his/her body for which he/she is alleging a medical impairment.
- Furthermore now that the carrier and employer have less time to issue decisions and payments because the "working" day has been removed from Rule 1 it is very important to be able to timely gather the necessary records to make the accurate claim decision and to avoid unnecessary litigation.

Thank you for your consideration of these comments. If you have any questions, please feel free to contact me at 304-346-2683 ext. 23302.

Respectfully,



Karen Burgess  
WV Operations Manager  
[kburgess@avizentrisk.com](mailto:kburgess@avizentrisk.com)



Legal Department

May 29, 2007

Members of the Industrial Council  
c/o Ryan Sims, Associate Counsel  
West Virginia Insurance Commission  
P.O. Box 50540  
Charleston, WV 25305-0540

Re: Comments on Proposed 85 CSR 2, "Workers'  
Compensation Claims Index"

Members of the Industrial Council:

BrickStreet Insurance appreciates the opportunity to participate in this public process and offer comments regarding the proposed rule.

**Proposed Rule Sections Followed by Comments**

3.4. "Private carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code and any third-party administrator designated by the private carrier to adjust West Virginia workers' compensation claims.

3.5. "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,~~ is eligible and has been granted self-insured status pursuant to the provisions of W. Va. Code §23-2-9 and the rules promulgated thereunder, and any third-party administrator designated by the self-insured employer to adjust West Virginia workers' compensation claims.

**§§3.4 & 3.5 Comment:** While these provisions include TPAs, 3.4 only includes TPAs of private carriers and 3.5 includes TPAs of self-insurers. TPAs working for the Office of the Insurance Commissioner do not appear to be responsible to comply with the indexing provisions. Since 1913, the State of West Virginia was the insurer for workers' compensation claims. The State continues to provide insurance benefits to injured workers in the State through the Old Fund. The OIC's TPAs should be required to update Old Fund information so that other insurers in the West Virginia workers'



compensation system are provided a complete picture of a claimant's previous injuries and awards.

6.2. Failure of an insurer or self-insured employer to timely report data to ~~ED~~ the Commissioner as required in subsection 6.1. of this section may subject the private carrier or self-insured employer to a fine not to exceed \$500 per occurrence of untimely reporting: ~~Provided, That this penalty may not duplicate penalties provided for in other applicable rules relating to reporting to ED.~~

**§6.2 Comment:** Why was this provision concerning the duplication other fines removed from the rule? Is it the OIC's position that multiple fines may be levied for the same conduct? Or, does this mean that the OIC will not duplicate fines for the same conduct and it is not necessary to express this in a rule?

Again, thank you for the opportunity to offer comment of this rule. If I can provide any other assistance, please do not hesitate to contact me.

Very truly yours,

Randall B. Suter



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May 30, 2008

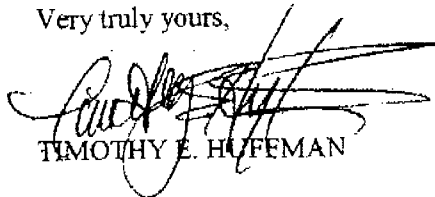
Mary Jane V. Pickens, Esquire  
West Virginia Insurance Commission, Legal Division  
Post Office Box 50540  
Charleston, West Virginia 25305-0540

Re: *Comments to Proposed Rule Amendments*

Dear Ms. Pickens:

Please find enclosed herewith comments which I wish to file on behalf of the Workers' Compensation Committee of the West Virginia Chamber of Commerce to the proposed amendments presently being considered to Rule 1, Rule 2, Rule 6 and Rule 18.

Very truly yours,



TIMOTHY E. HUFFMAN

TEH/nkl

cc: Ms. Brenda Nichols Harper

**COMMENTS TO:**  
**SERIES 1**  
**CLAIMS MANAGEMENT AND ADMINISTRATION RULE**

- **Section 2.14**

This definition is too restrictive and does not include medical, disability or voluntary retirements.

- **Section 2.4.c**

The amended rule defines filing to include a document that is e-mailed and deems the date of filing to be the date upon which the e-mail was sent to the e-mail address for the recipient. A filing should only be completed upon proof of receipt, however filed. Additionally, specific standards should be developed regarding the use of e-mail transmissions under these and other rules.

- **Section 5.1**

This Section needs further amendment to be consistent with *W. Va. Code* § 23-4-5. Specifically, that Code Section requires that temporary total disability benefits are not paid unless the period of disability lasts longer than three days from the date the employee leaves work as a result of the injury. This Section, as written, does not specifically require three days of consecutive disability from scheduled work before temporary total disability benefits are payable.

- **Section 5.3**

This Section should be further amended to apply specifically to seasonal reductions in work force and seasonal layoffs.

- **Section 6.2**

The proposed rule would delete Section 6.2 as written. Section 6.2 should not be deleted or amended.

- **Section 7.2**

This Section needs further amendment to provide for the statutory requirement of a 30-day protest period for decisions of the Occupational Pneumoconiosis Board.

- **Section 9.3**

See comments under Section 12.2.

- **Section 10.1**

The proposed amendments to this Section shorten the time period for ruling on claims from 15 working days to 15 days. This Rule should continue to permit 15 working days for the responsible party to rule on a claim.

- **Section 10.4.a**

This Section should be deleted entirely. Notwithstanding the fact that, the statute continues to require 120-day evaluations, neither self-insured employers nor insurance carriers wait 120 days before referring a claimant out for an evaluation.

- **Section 10.5.b**

The word "working" should not be deleted from this section.

- **Section 10.5.c**

This Section should be amended to provide that the payment of permanent partial disability awards in either monthly installments or in a lump sum amount, should be at the discretion of the responsible party.

- **Section 10.5.d**

This Section should not be amended from 30 working days to 30 days.

- **Section 10.6**

This Section should be further amended by striking "total" from line 2, so that it is applicable only to applications for the reopening for temporary or permanent disability benefits and does not include permanent total disability benefits.

- **Section 12.2**

This Section as amended limits the collection of overpayments contrary to the provisions of *W. Va. Code* § 23-4-1C(h) and 23-4-1D(d). The statute permits the collection of overpayments from future claims that the claimant may file. The limitation proposed in the amendment leads to the unintended financial enrichment of claimants. Additionally, a system should be developed to track and manage intercarrier reimbursements for such overpayments.

- **Section 13.1**

This Section should not be amended as proposed. The amendments will allow a claimant to file an OP cancer claim as an occupational disease claim and thus avoid having to satisfy statutory exposure requirements as a prerequisite to establishing a valid OP claim.

- **Section 16**

This new Section should be further amended to require that a responsible party receives a copy of any response made by the Office of the Insurance Commissioner to a complaint.

- **Section 18.1**

The proposed amendments would delete this Section entirely. Section 18.1 as exists in the current Rule should remain intact.

**COMMENTS TO:**  
**SERIES 2**  
**WORKERS' COMPENSATION CLAIMS INDEX**

- **Section 4.2**

This Section should be further amended to provide that the data collected in this Rule must be sortable by the claimant's full name and must include all of the claims filed by each claimant.

A system to manage and report intercarrier reimbursements for overpayments should be created under this rule.

**COMMENTS FOR:**  
**A SERIES 6**  
**WORKERS' COMPENSATION DEBT REDUCTION FUND ASSESSMENTS AND**  
**REGULATORY SURCHARGES**

- **Section 4.1**

This Section should be further amended to provide that a detailed accounting of all sums collected and expended by the Commissioner are to be reported to the Industrial Council on a semiannual basis within sixty (60) days of January 31<sup>st</sup> and June 30<sup>th</sup> of each year.

- **Section 5.1.b**

This Section should be further amended to provide that the Insurance Commissioner may only change the percentage as needed to meet the funding requirements of *W. Va. Code* § 23-2C-3(f) on an annual basis.

**COMMENTS TO SERIES 18 SELF INSURANCE, SELF ADMINISTRATION AND  
THIRD-PARTY ADMINISTRATORS**

**Section 3.1**

What other "recognized accounting body" is contemplated by this proposed change in the definition of audited statements?

**Section 3.8**

This definition is in conflict with the provisions of *W. Va. Code* § 23-2-9(f). That Section specifically defines the period of inactivity as four or more consecutive quarters without payroll.

**Section 3.11**

The use of the term "payroll" should be consistent throughout this rule and should utilize the definition of "payroll" incorporated from Rule 6. The use of the term "gross wages" in this rule should be replaced with the term "payroll".

**Section 5.1**

This last line of that Section should be amended to read "The required parental guarantee must be received and accepted by the Commissioner before the applicant's self insured status may become effective."

**Section 5.2**

The current provisions of this rule provide that failure to disclose certain information may result in termination of a self insured account as determined at the "sole discretion" of the Commission and is contrary to the provisions of Section 15 regarding the involuntary revocation of self insured status, which requires approval by the Industrial Council.

The rule provisions should be amended to require only the signature of an individual with authority to act on behalf of the entity seeking self insurance.

**Section 5.5**

Self insurance should become effective on the first day of the month following approval by the Industrial Council or on a later date as determined by the self insured employer.

**Section 5.5.a**

The Commission should be required to make a recommendation to the Industrial Council within sixty (60) days of receipt of the completed application and additional requested information.

**Section 6.1**

This section should be deleted from this rule as the subject matter is covered by Rule 32.

**Section 6.2**

This section should be deleted from this rule as the subject matter is covered by Rule 32.

**Section 7**

This section should be deleted as unnecessary.

**Section 8**

All the provisions of this section should be covered under Rule 19 and should not be part of this particular rule.

**Section 8.3**

Because future self insured liability is secured through the Guaranty Pool, it is unnecessary to continue requiring employers to post minimum security of any level.

**Section 8.3.b**

This section should be amended to require that a self insured's failure to obtain additional bond or security may result in a revocation.

**Section 9**

The proposed language with regard to employer's modification of business constitutes an unreasonable expansion of this section. There should be no reporting requirement by the employer unless the modification impacts on the employer's claim liability. An employer should be required to provide such financial information only if the modification of the employer's business results in a substantial change in the financial ability of the company that provides the surety or parental guarantee.

**Section 9.4**

This section should be amended to provide that a processing fee may be assessed rather than shall be assessed.

**Section 10.1.a**

The word "forever" should be deleted as it is unnecessary.

**Section 10.1.b**

This section should be amended to provide that termination of a self insured account should occur on the first day of the month or on a date agreed upon between the Commission and the self insured employer.

**Section 10.1.c**

This section should be amended to provide that if surety is posted by the employer upon termination of the account, no further contribution to the Guaranty Pool will be required.

**Section 10.2**

This section should be amended to provide simply that without prior approval, the OIC is not bound by the terms of any such agreement.

This section should be amended to permit approved risk portfolio transfers of a self insured employer's past liability.

**Section 11.1**

This section should be amended to delete the following language "as those afforded to injured workers whose claims are paid and administered by the Workers' Compensation Commission private workers' compensation insurance carriers. These same benefits include the proper and timely payment of medical bills and compensation".

**Section 12**

"Payroll" as defined herein should be substituted for "gross wages and earnings".

**Section 12.2**

This section should be amended to replace "gross wages and earnings" with "payroll" as defined earlier in this rule.

**Section 12.4**

This section should be numbered 12.3.

**Section 13.1**

“Payroll” as defined herein, should be substituted for “gross wages”.

**Section 13.2**

“Payroll” as defined herein, should be substituted for “gross wages”.

**Section 13.4.b**

The word “shall” should be replaced with “may”.

**Section 13.5**

“Payroll” as defined herein, should be substituted for “gross wages”.

**Section 13.9**

The words “and conduct” should be deleted from the end of this section.

**Section 13.9.a**

This section should be amended to provide a penalty of \$500.00 per review and not per occurrence.

**Section 14.2**

This section should be amended to provide that the Commissioner shall perform a financial review on an annual basis and may perform a comprehensive claims review on a less frequent basis.

**Section 14.2.b**

This section should be amended to provide that the Commissioner may recommend revocation of the employer’s self insured status consistent with the involuntary revocation provisions of this rule.

**Section 14.2.c**

This section should be amended to read “The Commissioner shall notify the employer of the results of any review.”

**Section 14.3.a.5**

This section should be amended to read "The auditor's opinion on the financial statements for the most recent fiscal year must not express a going concern qualification."

**Section 14.4**

The amendments to this section are unnecessary.

**Section 14.5**

These amendments are unnecessary and currently covered under the provisions of Rule 19. Additionally, catastrophic surety is not required by statute.

**Section 14.8**

The proposed language to be added to this section should be amended to read "The Commissioner shall report to the Industrial Council any acts of noncompliance by the self insured employer which the Commissioner deems to be major violations."

# MARONEY, WILLIAMS, WEAVER & PANCAKE, PLLC

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May 28, 2008

**VIA FACSIMILE ONLY 304-558-1362**

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WV Office of the Insurance Commissioner  
Post Office Box 50541  
Charleston, West Virginia 25305

Re: Comments to Proposed Rules 1, 2, 8 and 18

Dear Mr. Sims:

This letter contains responses to the above-proposed rules filed with the Secretary of State. On behalf of the West Virginia AFL-CIO and its affiliated members, including the United Mine Workers of America, the following changes are suggested:

## **RULE 85 CSR 1, CLAIMS MANAGEMENT AND ADMINISTRATION**

### **85-1-2 Definitions**

Pg. 2 2.10 Delete the word "deposited" and replace it with the word "received."

### **85-1-3 Injured Workers' Report of Injury and Application for Compensation**

Pg. 3 3.1 Delete sentence beginning with "Failure to immediately..." and the remaining two sentences of Section 3.1

Pg. 4 3.2 Line 6, delete sentence beginning with "There shall be no retroactive adjustments..."

### **85-1-4 Employers' Report of Injuries**

Line 3, Keep in the two deleted sentences beginning with "Failure to comply..."

Ryan Sims, Esquire  
Associate Counsel  
Re: Comments to Proposed Rules 1, 2, 8 and 18  
May 28, 2008, Page Two

85-1-5 Special Rules for Temporary Total Disability Claims

Pg. 5 5.2 Line 4, insert the words "temporary total disability" immediately prior to the word "indemnity."

Pg. 5 5.3 Delete Section 5.3 in it's entirety.

85-1-9 Special Rules for Non-Awarded Partial Benefits

Pg. 6 9.2 Delete this Section in it's entirety.

85-1-10 Time Standards

Pg. 7 10.2 Line 2, reinsert the word "fifteen (15)" and delete the word "ninety (90)."

Line 9, reinsert the word "fifteen (15)" and delete the word "ninety (90)."

Pg. 7 10.3 Line 1, insert the word "prescriptions" after the word "Treatment."

Line 2, insert the word "prescriptions" after the word "treatment."

Pg. 8 10.6 Lines 2 and 3, reinsert the word "ten (10)" and delete the word "thirty (30)."

Line 9, reinsert the word "ten (10)" and delete the word "thirty (30)."

85-1-12 Overpayments

Pg. 10 12.1 Lincs 7 and 8, delete the words "dependents benefits, fatal (104 week) benefits."

The following new Section needs to be added:

"85-1-14A Procedure for Abuse by Employer and Responsible Party

Misrepresentation of any statement and information by Employer or Responsible Party shall be considered fraudulent and subject to a \$1,000.00 fine for each occurrence for failure by Employer and/or Responsible Party to timely file information, provide information and act

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on information shall result in a \$1,000.00 fine for each occurrence, and after five occurrences fines shall be increased to \$2,500.00.”

“Coercing and discouraging a worker not to report an injury is an offense that will result in a fine of \$2,500.00 and result in a ruling in an automatic ruling for the claimant.”

85-1-15 Travel Expenses-Medical Examination and Treatment

Pg. 12 15.1 Line 6, delete the number (15) and insert the number (54.5) and insert “(\$54.50) and delete (\$0.15).”

85-1-16 Complaints

Pg. 13 Add “failure to respond within 15 days will result in a \$1,500.00 fine for each occurrence.”

85-1-17 Expert Witness Appearances

Pg. 13 17.1 Line 1, insert the words “authorized independent medical examiner” after the words “treating physician.”

**RULE 85 CSR 2, WORKERS' COMPENSATION CLAIMS INDEX**

85-2-4 Claims Index

Pg. 3 4.2 Add the following:

“h. All wage information”

“i. Any other fields of information as the Commissioner deems necessary.”

Ryan Sims, Esquire  
Associate Counsel  
Re: Comments to Proposed Rules 1, 2, 8 and 18  
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**RULE 85 CSR 8, WORKERS' COMPENSATION  
POLICIES, COVERAGE ISSUES AND RELATED TOPICS**

85-8-3 Definitions

Pg. 3 3.8 Add the following:

"e. Any business involving first responders including, but not limited to, policeman, fireman, EMTs, and other emergency personnel."

85-8-6 Employees Covered; Independent Contractors; Coverage Elections; Assignment

Pg. 7 6.2a.3 Line 7, delete the entire sentence beginning with the word "Provided."

6.2.a.5 Line 1, delete the first thirteen sentences of this Section through the words "legal right to use the same."

**RULE 85 CSR 18, SELF INSURANCE, SELF  
ADMINISTRATION, AND THIRD PARTY ADMINISTRATORS**

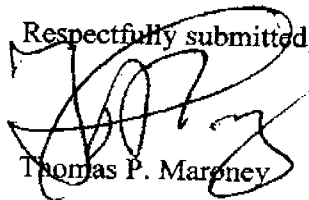
85-18-3 Definitions

Pg. 2 3.4 Line 1, delete the words "without good cause."

Line 15, delete the remainder of this Section beginning with the words "For purposes of."

In closing, I would be happy to meet with the members of the Industrial Council, Commissioner Cline or any members of her staff to discuss our thoughts on these issues.

Respectfully submitted,



Thomas P. Maroney

TPM/clw



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**REPLY TO: CHARLESTON**

**SENDER'S E-MAIL: [jbrannon@pffwv.com](mailto:jbrannon@pffwv.com)  
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Date: May 29, 2008

Re: Comments regarding Proposed Rules:  
85 C.S.R. § 1  
85 C.S.R. § 2  
85 C.S.R. § 6  
85 C.S.R. § 8  
85 C.S.R. § 18

Public Comment period expires 5/29/2008

Public Hearing to be held on 5/29/2008 at 3:00 p.m. at OIC Office in  
Charleston, West Virginia

Please accept this correspondence as our public comments regarding the Offices of Insurance Commissioner's Proposed Rules 85 C.S.R. §§ 1, 2, 6, 8, and 18, which has been submitted for public comment.

**85 C.S.R. § 1 et seq.: "Claims Management and Administration"**

General Comment: We applaud the OIC's determination to modify Rules 1 and 18 to provide one consistent claims management and administration standard for all "responsible parties" as a beneficial change that now standardizes all claims management and claims administration requirements.

**85 C.S.R. § 1-2**

This section has been amended to provide a definition for "retire" which means "an individual has permanently ceased working due to age or years of service and has no intent to return to work."

**Comment:**

The phrase "has no intent to return to work" is subjective to the individual seeking benefits. Please consider that the use of this phrase in the amendments to this rule regarding the eligibility to receive benefits, in some instances, would incentivize a "retired" claimant to state that they do have an "intent to return to work" in order to receive benefits. The "responsible party" or employer would be unable to refute such a statement as it would be impossible to contradict the individual's statement of his/her intent.

#### **85 C.S.R. § 1-3**

The changes in this section provide specifically that the fact that an injury was reported more than 2 days after the injury cannot, by itself, be a reason to deny the claim. Retained in the draft is the language that enforcement of an employer's personnel policy requiring immediate reporting of a work-place injury is not a discriminatory practice.

**No Comment.**

#### **85 C.S.R. § 1-4**

The section was amended to delete the \$250 dollar fine for failure by an employer to report injuries to the "responsible party" within 5 days. However, the reporting requirement itself was retained and still requires the employer to notify the "responsible party" within five (5) days of receipt of notice of the employees desire to file a claim.

**Comment:**

It is recommended that the OIC define "receipt of notice of the employees desire to file a claim". Some workers' who sustain a work related injury may report the injury to the employer but never file an application for benefits. Some "responsible parties" have interpreted this section to require the employer to report the injury to them within five (5) days of the occurrence of an injury and then, based on the employer's report, have taken the position that the employer's report under this section is sufficient to issue a ruling on the claim. This interpretation is contrary to West Virginia Code § 23-4-1a and 23-4-15(a) which requires the injured worker to complete and file an application for benefits with the responsible party. Any interpretation that does not require an application for benefits to be filed prejudices the employer's rights under the applicable statute of limitations. Further, without a completed application for benefits, as required by the statute, the "responsible party" does not have the injured workers' allegation regarding the injury, does not have medical evidence indicating that an injured worker sustained an injury, and does not have a valid release to obtain medical records related to the alleged claim.

#### **85 C.S.R. §1-5**

This section relates to "special rules of temporary total disability claims." § 1-5-2 has been amended to reflect that when an individual retires "as long as the individual remains retired", the individual 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 is retired.

**Comment:**

As with the definition of retire discussed above, the inclusion of the language "as long as the individual remains retired" is subjective to the claimant. Please consider that the use of this phrase in the amendments to this rule regarding the eligibility to receive benefits, in some instances, would incentivize a "retired" claimant to state that they do not have an intent to "remain retired" in order to receive benefits. The "responsible party" or employer would be unable to refute such a statement as it would be impossible to contradict the individual's statement of his/her intent.

Further, §1-5.3 was amended regarding the closure of temporary total disability benefits when the claimant would not have been working for the employer. Previously, this section said a reasonably ascertainable period of time during which the injured worker would not have been compensated from his or her employer and now says a reasonable ascertainable period of time during which the claimant would not have been "performing work for any employer."

**Comment:**

The previous language in this section had been interpreted to relate to seasonal employees or temporary employees who did not work year-round or full-time for an employer. Under the previous language and employer of seasonal or temporary employees was not charged for temporary total disability benefits and the worker was not entitled to temporary total disability benefits during periods in which they would not have been compensated by the employer, i.e., during the off-season or after the termination of the temporary employment. The proposed amendment to this section now permits the worker to receive, and the employer to be charged, temporary total disability benefits even when the employee would not have been working for the employer. Further, even if the employee would not have been working for another employer during the off-season or after the conclusion of the temporary employment, this section incentivizes the worker to state that but for the injury he/she would/could have been working for another employer. If this is the intent of the amendment to this section, then the section should be deleted as it is superfluous. However, the previous language provided a significant benefit to employers of seasonal or temporary employees, who would naturally only be operating a portion of the year, to minimize the impact of claims on their premiums and to properly charge their policies with benefits during periods only when they would be working. These employers are most likely smaller employers who can not easily absorb additional workers' compensation premiums based on the amount of benefits which could be authorized under this section. It must be remembered that temporary total disability benefits are granted to compensate an injured worker for wages lost due to the injury. Clearly, the previous language in this section was consistent with the purpose of these benefits as the employee received benefits during

periods he/she would have been working for the employer, and not for periods when the worker would not have been receiving wages from the employer.

#### **85 C.S.R. §1-7**

§1-7: This section is completely new and relates to "Notice and Litigation." Language has been included which again re-states that there are only two (2) parties to a claim, the claimant or the claimant's dependents and the employer, with the exception of funds created by article two-c of Chapter 23, the Insurance Commissioner is also a party.

#### **Comment:**

While it is clear that the Insurance Commissioner is a party in all "Old Fund" claims created in article two-c of Chapter 23, it does not appear that the Insurance Commissioner is a party to "Uninsured Fund Claims" created in West Virginia Code § 23-2C-8. While the Insurance Commissioner, or its designee, is the claims administrator, the statute does not provide that he Insurance Commissioner is a party to the actual claim. If it is the intent of the Insurance Commissioner not to be a party to these Uninsured Fund Claims then this language should be amended to specify that the Insurance Commissioner is a party only in "Old Fund" claims.

§ 1-7.2: This section requires that upon the making of any decision, the responsible party is required to send written notice of the decision to all parties which sets forth the basis of the decision and "informing the claimant or claimant's dependents of the right to protest the decision by filing a protest with the Office of Judges within sixty days of the receipt of the decision."

#### **Comment:**

The language in this section purports to require notice of only the claimant's right to protest a decision and thus preclude the employer's right to protest a decision. This section should be amended to require notice "informing **the parties** of the right to protest the decision by filing a protest with the Office of Judges within sixty days of receipt of the decision."

The language which purports to provide only the claimant or the claimant's dependent's a right to protest a decision, and preclude the employer from filing a protest, is contrary to the plain language of West Virginia Code § 23-5-1(b)(1) as amended, and is inconsistent with numerous other sections of Chapter 23 which specifically provide the employer the right to protest decisions of the claims administrator.

Initially, West Virginia Code § 23-5-1(b)(1), as amended states "An employer may protest decisions incorporating findings made by the Occupational Pneumoconiosis Board, decision made by the Insurance Commissioner acting as administrator of claims involving funds created in article two-c of this chapter, or decisions entered pursuant to subdivision (1), subsection (c), section seven-a, article four of this chapter." There is no language contained

in this statute which eliminates or abolishes the employer's right to protest a decision by the claims administrator. In State ex rel McKenzie v. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002), the West Virginia Supreme Court of Appeals stated that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syllabus Point 1, Consumer Advocate Div'n v. Public Service Comm'n, 182 W.Va. 152, 386 S.E.2d 650 (1989)." Syl. pt. 11, State ex rel McKenzie v. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002). Further, the West Virginia Supreme Court of Appeals has stated that "[a]ny rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute." Syl. pt. 4, Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ., 206 W.Va. 691, 527 S.E.2d 802 (1999)". Syl. Pt. 4, Repass v. Workers' Compensation Division, 212 W.Va. 86, 569 S.E.2d 162 (2002).

Further, an "interpretation" of this language which serves to administratively abolish the employer's right to protest decisions by the claims administrator does not reflect the "Legislatures" intent and is inconsistent with the remainder of Chapter 23. It must be remembered that "[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." Syl. Pt. 5, Fruehauf Corp. v. Huntington Moving & Storage Co., 159 W.Va. 14, 217 S.E.2d 907 (1975)." Syl. pt. 7, Verizon v. West Virginia Bureau of Employment Programs, 214 W.Va. 95, 586 S.E. 2d 170 (2003).

When Chapter 23 is reviewed *in toto*, it is clear that the Legislature did not abolish the employer's right to protest a decision by a claims administrator. Had the Legislature intended to abolish the employer's right to protest such decisions, the Legislature could have done so clearly with language to effectuate that purpose. At Syllabus Point 5, the Verizon Court stated that "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, Newhart v. Pennybacker, 120 W.Va. 774, 200 S.E. 350 (1938)." Id. at Syl. Pt. 5. Additionally, in Syllabus Point 4 of Kessel v. Monongalia County General Hospital, 220 W.Va. 602, 648 S.E.2d 366 (2007) the West Virginia Supreme Court of Appeals stated that "[a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, State v. Snyder, 64 W.Va. 659, 63 S.E. 385 (1908)." Id. Bearing this in mind, it can not be asserted that the Legislature "intended" to abolish the employer's right to protest when the Legislature is presumed to have been familiar with the remaining sections of Chapter 23, such as West Virginia Code §§ 23-5-2, 23-5-4, 23-5-5, 23-4-1b, 23-4-1c(a)(3), 23-4-1c(h), 23-4-1d, 23-4-

6(j)(6), 23-4-7a(g), and 23-4-16a, all of which reference the rights of either both parties to protest a decision or the employer specifically.

Further, as the employer and the claimant are the only parties to a workers' compensation claim, it is fundamentally unfair, and potentially a violation of the employer's constitutional equal protection rights (Article III, § 10 of the West Virginia Constitution) and the certain remedy provision of the West Virginia Constitution (Article III, § 17 of the West Virginia Constitution) to allow the claimant to protest any order entered by the claims administrator while denying, or attempting to severally limit, the employer's right to do the same.

§1-7.3: This section re-states the language from House Bill 4636 relating to the private carrier who is providing coverage to the employer, has full authority to act on behalf of the employer in the claim, including but not limited to, the ability to make claims decisions, appoint counsel for defense of the claim and make determinations regarding litigation strategy. Further, this section states that an insured employer generally may not independently protest the decision by its carrier and then lists the two (2) circumstances in which, according to the OIC, an employer may still protest a decision by its carrier. These two (2) exceptions are decisions incorporating findings made by the OP Board and decisions entered pursuant to West Virginia Code § 23-4-7a(c)(1). However, the proposed rule goes on to state that even in these circumstances the carrier has the sole authority to act on the employer's behalf in the litigation of the claim.

**No Comment:**

### **85 C.S.R. §1-10**

This section deals with time standards related to actions and claims. The major change, obviously, is that these standards are now applicable to both private carriers and self insured employers.

Regarding injury and occupational disease claims under §1-10.1, this section has been amended to state that the responsible party is required to rule on a properly executed and filed application within fifteen (15) days from the date of the receipt of all required information. However, the section also provides that whenever a claim has not been adequately or properly developed for consideration, the responsible party may require the production of additional evidence and the fifteen (15) days to rule on the claim is tolled during that evidence gathering process.

Regarding occupational pneumoconiosis claims, in §1-10.2, the amendment requires that a non-medical ruling be issued within ninety (90) days and that this ninety (90) day period can be extended for up to an additional thirty (30) days to develop further evidence.

§1-10.3 relates to medical treatment, appliances, devices and supplies and requires that a request for authorization for the same be acted upon within fifteen (15) days from the date of the receipt of the request.

§1-10.4 relates to medical evaluations and requires that a referral for a one-hundred twenty (120) day exam be made within twenty (20) days of the end of the one-hundred twenty (120) day period. However, an amendment was added to allow that the expected period of temporary total disability exceeds one-hundred twenty (120) days, the referral can be made within twenty (20) days of the expected day of the end of the temporary total disability.

§1-10.5 has been amended to require that the responsible party act upon a permanent partial disability evaluation report within thirty (30) days of the receipt of that report. Furthermore, a section was added to permit the permanent partial disability awards to be paid either in a lump sum or in installments and requires that temporary total disability awards commence within thirty days of the decision granting the award.

§1-10.6 relates to applications for re-opening and requires that an application for re-opening for "temporary or permanent total disability benefits" be ruled on within thirty (30) days from the date of the receipt by the responsible party. However, this section also provides an additional thirty (30) days to rule if additional evidence is required. It should be noted that this section mentions temporary and permanent total disability benefits and the language regarding permanent total disability is contrary to West Virginia Code §23-4-6 requirements for ruling on a permanent total disability applications. It appears that the OIC meant to include re-opening requests for temporary total disability and permanent partial disability, not permanent total disability.

Further, §1-10.7 requires that a responsible party comply with orders of the Office of Judges Board of Review or the West Virginia Supreme Court of Appeals within thirty (30) days of the date of receipt, unless required to act sooner or unless the order issued is subject to a lawfully ordered stay.

**No Comment.**

#### **85 C.S.R. §1-12**

This section relates to overpayments and the definition of an overpayment includes any money received from or paid on an injured workers behalf by the responsible party which is subsequently determined that the injured worker was not entitled. Further, overpayments may include TTD, PPD, PTD, NAP TTR, TPR, dependent's benefits, fatal benefits, travel or medical benefits. The section also permits a responsible party to withhold the overpayment from future disability benefits payable to the worker or the dependents in the same claim or other claims which are pending with the same responsible party to whom the overpayment is due.

**Comment:**

This section should be amended to allow for the responsible party to collect the overpayment from a prior or subsequent responsible party. Additional changes may have to

be made in Rule 2 to provide a mechanism to place prior and subsequent responsible parties on notice that a claimant has an overpayment in a claim and to whom the withheld overpayment should be forwarded.

**85 C.S.R. §1-17**

This section relates to expert witness appearance fees and requires a responsible party to reimburse a treating physician or authorized consulting physician who appears at a hearing to give testimony at a rate of \$100.00 per quarter hour. Additionally, all other expert witness appearance fees are also paid at the rate of \$100.00 per quarter hour; however, if the expert demands an amount in excess of that, it is the responsibility of the party who has retained the services of the expert or submitted a report or record to pay the additional monies.

**Comment:**

The net effect of this is to put in a requirement that allows expert witnesses to charge in excess of the rate set by the Office of the Insurance Commissioner and the Office of Judges and essentially costs the carrier, or the claimant, additional money for the deposition as the deponent is now allowed to charge the additional sum to the parties who submitted the report. This was not the case previously and may prove to have a negative impact on employers, carriers and even claimants depending on the evaluating physician that they use.

**85 C.S.R. §2-1, et seq. "Workers' Compensation Claims Index"**

**Comment:**

As noted in the Comment to 85 C.S.R. § 1-12 above, it is recommended that this Rule be amended to include a field in the Claims Index for overpayments made by a responsible party in a claim. Further, each responsible party should be required to confirm by review of the Claims Index that no overpayments have been made to a claimant before paying benefits. Similar to the requirement to confirm no outstanding child or spousal support debts. This would serve as notice to the responsible party preparing to make an indemnity benefit payment in a claim to withhold any prior or subsequent overpayment in a claim for another responsible party.

**85 C.S.R. §6-1 et seq. "Debt Reduction Fund Assessment and Regulatory Surcharges"**

**No Comment.**

**85 C.S.R. §8-1 "Workers' Compensation Policies, Coverage Issues and Related Topics"**

**No Comment.**

**85 C.S.R. §18-1, et seq. "Self Insurance, Self Administration and Third Party Administrators"**

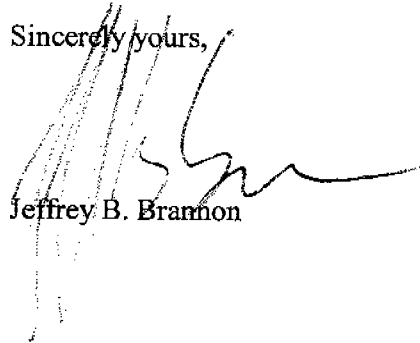
§ 18-14.4. was amended to prohibit self-insured employers from operating in an “illegal, improper or unjust manner” with regard to claims handling. This is similar to language found in chapter 33 pertaining to carriers. According to the OIC, the concept is to create a “catchall” provision for self-insured employers similar to that which applies to insurance companies.

**Comment:**

The language contained in this amendment, “illegal, improper or unjust” is vague and ambiguous, does not provide a consistent standard which will be applied, and presents an opportunity for misinterpretation of claims handling decisions. There is a potential for severe penalties based on the subjective interpretation of a claims handling reviewer. This section should be deleted.

Thank you for your consideration of these comments. If you have any additional questions, please feel free to contact me.

Sincerely yours,



Jeffrey B. Bramon



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May 29, 2008

Jane L. Cline, Commissioner  
West Virginia Division of Insurance  
1124 Smith Street  
P. O. Box 50545  
Charleston, West Virginia 25305

**Re: Comments on Workers Compensation Rules;  
Title 85, Series 1, 2 and 6**

Dear Commissioner Cline:

These comments are submitted on behalf of the American Insurance Association (AIA), a national trade association representing property and casualty insurers. AIA members write a major share of property and casualty insurance, including workers' compensation insurance throughout the United States.

**SERIES 1 – CLAIMS MANAGEMENT AND ADMINISTRATION**

**Special Rules for Non-Awarded Partial Benefits**

Our understanding is that the “non-awarded partial benefits” addressed in §85-1-8 would be provided voluntarily by a private carrier when an employee has reached maximum medical improvement (MMI), has not returned to work, and is awaiting an assessment of permanent partial disability (PPD). However, subsection 8.1 of §85-1-8 provides that “Non-awarded partial disability benefits will only be payable if the weight of the evidence indicates that a permanent impairment exists.” If these are, in fact, voluntarily paid benefits, who would be responsible for weighing the evidence? We recommend defining the term “non-awarded partial benefits” in order to clarify this area.

**SERIES 2 – WORKERS' COMPENSATION CLAIMS INDEX**

**Access to Claims Index**

Subsection 5.1 of §85-2-5 permits private carriers or their designated agents to apply for, and be granted access to, the claims index. We recommend clarifying that granting access to a private carrier or one of its designated agents entitles any employee or designated agent to access the claims index without having to make a separate application.

**SERIES 6 – WORKERS' COMPENSATION DEBT REDUCTION FUND ASSESSMENTS AND REGULATORY SURCHARGES**

**Definition of “Total assessable workers' compensation premium due”**

The second sentence of subsection 3.10 of §85-6-3 currently reads:

“Total assessable workers' compensation premium due” shall also include all discounts based on deductible provisions in policies.”

Jane L. Cline, Commissioner  
May 29, 2008  
Page 2

We recommend the following, in order to increase clarity:

“Total assessable workers’ compensation premium due” shall also be computed prior to all discounts based on deductible provisions in policies.”

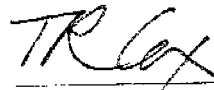
#### **Federal Black Lung Coverage**

Subsection 3.10 of §85-6-3 would require assessable premium for Federal Black Lung coverage. Unlike the other federal coverages (e.g., USL&H, FECA and FELA), black lung coverage is only a portion of the rate for a class code. All of the other federal class codes have their own rate, and so one can easily determine which coverage is federal by the class code. However, a rate for a coal mining class code combines both federal and state coverage, and the portion of the rate that is attributed to federal coverage will change each year. Breaking out the premium attributed to black lung in the assessment would require private carriers to incur substantial programming costs, and the information would have to be updated with each rate filing. Accordingly, we recommend that the relatively minor portion of the rate attributed to black lung be excluded from the surcharge's assessable base.

#### **Notice of Rate Changes**

Subsection 4.1 of §85-6-4 would establish that the commissioner shall provide private carriers at least sixty (60) days notice prior to changing the private carrier regulatory surcharge percentage amount. We recommend increasing this notice period to 90 days.

Respectfully submitted  
on behalf of American Insurance Association

By:   
T. Randolph Cox, Retained Counsel

# **INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND PUBLIC COMMENTS RECEIVED ON W. VA. CODE ST. R. § 85-2-1 ET SEQ.**

## **Introduction**

Below is the written response of the Insurance Commissioner to the stakeholder and public comments received in regard to the proposed amendment of Title 85 Rule, W. Va. Code St. R. § 85-2-1 et seq. (“Workers’ Compensation Claims Index” hereinafter referenced as “Rule”), which was filed with the West Virginia Secretary of State for public comment on 04/29/08. This response is itemized by topic, and addresses all of the substantive comments received at the 5/29/08 Industrial Council meeting as well as written comments received from stakeholders.

## **Special Funds Claims Information**

It was suggested that language be added to the Rule to clarify that the various special funds (Old Fund, Uninsured Fund, etc.) be required to report claims data to EDI so that the claims index included claims from these funds. While the Commissioner’s third-party administrator for the various special funds does report information to EDI, for purposes of clarity, the Commissioner has added language to the Rule clarifying that such information be reported to EDI from the special funds.

## **Additional Claims Index Fields Requested**

It was suggested that several fields be added to the claims index. Specifically, one commenter suggested that “all wage information” be added as a specific field. Several others suggested that a field be added regarding overpayments. Finally, another suggested that more detail and breakdown regarding percentage awards for permanent partial disability be added.

Regarding all of these suggestions, the Commissioner believes that adding these more detailed fields goes beyond the scope of the purpose of the claims index created by the Legislature. Specifically, the intent of the Legislature in creating the index was to provide carriers and self-insureds a brief overview of a claimant’s claims history for purposes of adjusting workers’ compensation claims. The claims index information should provide a starting point for adjusters, not a comprehensive profile of each claim a claimant has had. Therefore, the Commissioner does not see necessity for adding these requested fields at this time. It should be pointed out, however, that the Industrial Council and OIC have discretion to add fields at a future time if it becomes apparent that the absence or particular fields are causing an undue burden to carriers and employers in obtaining information.

## **Overpayments**

It was suggested that the claims index include a field for overpayments made in claims and that further, the OIC create a process whereby overpayments made in claims

can be recovered in future claims even if the future claims involve separate carriers and self-insured employers.

In response, the Commissioner states that the West Virginia Code does not permit the recoupment of overpayments made in one claim in a future claim being handled by a completely different entity. Specifically, W. Va. Code §23-4-1c(h) permits carriers or self-insured employers to recover overpayments by crediting indemnity amounts owed to claimants in the same or other claims against previous overpayments made. It does not provide for or contemplate a system whereby separate carriers or self-insured employers can or are expected to recover overpayments for other entities. Further, the Commissioner researched and spoke with the insurance industry on how other states handle overpayments, and it was revealed that most states only permit overpayments to be recouped by the same carrier or self-insured employer in the same claims. Therefore, the Commissioner does not believe it would be appropriate to create a system for inter-carrier and self-insured employer recoupment of overpayments.

### **Sharing of Claims Information**

It was suggested that the Rule provide for a system whereby various entities handling workers' compensation claims are compelled to share claims file information with each other, and that claimants are deemed to have released all their claims information for purposes of this information sharing by way of signing an application for benefits.

The Commissioner does not believe that these suggestions are recommended, for several reasons. First, to create this type of claims sharing network and system would go well beyond the more limited scope of the claims index, as espoused above. Second, much of the information contained in a claims file, and particularly medical information, is protected as confidential under State and federal laws. Therefore, many entities desire to use their own methods and forms for releasing such information which provides a legal comfort level regarding the sharing of this information. The Commissioner therefore believes that the sharing of more detailed claims information between entities should not be mandated by rule, but rather should be handled between entities as they deem appropriate based upon their business practices.

### **Search Fields**

It was suggested that access to the claims index include the ability to search the index by the claimant's name in addition to the current field of social security number. The Commissioner disagrees with this suggestion. Permitting a carrier or self-insured employer to search a claimant's information by more general and accessible fields such as the claimants name would cause significant concerns regarding the protection of potentially confidential information found in the claims index. Only permitting search by social security provides some degree of assurance that the entity searching for information is entitled to the same, because if the entity has the social security number,

that at least strongly indicates they are the employer or carrier properly entitled to the claims history for the claimant.

**Access by Employer or Their Attorney**

It was suggested that 5.1. of the Rule be amended to state that when an employer, carrier or TPA is granted access to the claims index, that this provides the same access to the employee/claimant and his or her counsel if applicable. The Commissioner sees this change as unnecessary, as section 5.2. of the Rule specifically permits access to claims index information by the claimant or their attorney.