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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 WV Code §§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

WV Code §§23-2C-5(c)(2) and 33-2-10(b)

AMENDMENT TO AN EXISTING RULE: YES ______ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ______

TITLE OF RULE BEING AMENDED: ______

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 2

TITLE OF RULE BEING ADOPTED: Workers' Compensation Claims Index

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THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS ______

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

Section

85-2-1. General.

85-2-2. Purpose.

85-2-3. Definitions.

85-2-4. Claims Index.

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

SERIES 2
WORKERS' COMPENSATION CLAIMS INDEX

§85-2-1. General.

1.1. Scope. -- These rules shall govern 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. -- December 21, 2007.

1.4. Effective Date. -- January 20, 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").

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.

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, and any third-party administrator designated by the self-insured employer to adjust West Virginia workers' compensation claims.

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

3.7. "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 the injured workers of one insurer or self-insured employer available to other insurers or self-insured employers, as required to be established by the Industrial Council pursuant to W. Va. Code §23-2C-5(c)(8).

3.8. "West Virginia workers' compensation" means workers' compensation coverage which provides injured employees workers' compensation benefits 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 and self insured employers to EDI. The purpose of the claims index will be to make available basic information regarding claims filed by injured workers 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. Such information shall include the following minimum requirements, based upon the best available information 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; and

f. Body part that is the subject of the claim.

g. 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 or self-insured employer may be granted access to the claims index. Upon receiving a report that a claimant has made a claim for West Virginia workers' compensation benefits, any private carrier or self-insured employer may access a list of the claimant's prior claims available from 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 only be used for the purposes of administering and defending the workers' compensation claim upon which the request was based in a manner otherwise 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 shall be permitted to 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 to EDI.

6.1. All private carriers and self-insured employers shall report data to EDI consistent with the provisions of the WV OIC EDI IG. All required data shall be reported to EDI within five (5) business days of the receipt of relevant information.

6.2. Failure of an insurer or self-insured employer to timely report data to EDI 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 EDI.

§85-2-7. Severability.

If any provision of these rules or the application thereof to any person, party, or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.

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 regarding the proposed limited amendment of W. Va. Code St. R. § 85-2-1 et seq. ("Rule 2," or "the Rule" - "Workers' Compensation Claims Index"), which was filed with the West Virginia Secretary of State for public comment on 8/14/07. This response is itemized by topic and order of sequence the Rule, and addresses all of the comments received at the 9/13/07 Industrial Council meeting as well as other selected written comments received from stakeholders.

Requirement of Timely Reporting of Information and Fine for Failure to Timely Report

An attorney practicing in the area of workers' compensation law recommended that the Rule be amended to specify a time frame for private carriers and self-insured employers to report claims information. The initial version of the Rule, in subsections 6.1. and 7.1., already placed a five (5) day reporting requirement upon carriers and self-insured employers to report information. The final version has been amended to replace sections 6 and 7 (regarding FROI and subsequent information) to place a single requirement on carriers and self-insured employers to report to EDI (from which the Insurance Commissioner will extract information for the claims index). However, the five (5) day reporting requirement for all information is still contained in subsection 6.1. of the final version. Therefore, there is a time frame requirement for the reporting of claims information by private carriers and self-insured employers.

Further, an attorney practicing in the area of workers' compensation law and an organization representing labor both commented that there should be a fine provision placed in the Rule if carriers and/or self-insured employers fail to timely report data. This comment is well-taken. Therefore, in subsection 6.2. of the final version, a provision has been placed in the Rule which subjects carriers and/or self-insured employers to a fine of not more than $500 per occurrence of untimely reporting.

Information Contained in Claims Index

An attorney practicing in the area of workers' compensation law recommended that the Rule be amended to specify some additional criteria to be included within the information listed in the claims index, such as area of body, treating physician and types of benefits granted. While the Commissioner agrees that some of these criteria could be helpful as being included in the claims index, it is not necessary to expressly include every category of information in the Rule. Specifically, subdivision 4.2.f. of the Rule states as one of the criteria: "[a]ny other fields of information as the Commissioner deems necessary." This provision gives the Commissioner the flexibility to add and/or remove fields as is deemed appropriate. Consequently, the Commissioner does not see it as necessary to expressly state any additional criteria. The body part involved in the injury is currently a data element in the index, and the Insurance Commissioner agrees to add this reporting element to the rule.

Access to Claims Index Information to Claimant and Claimant's Representative

An attorney practicing in the area of workers' compensation law recommended that the Rule be amended to permit access to claims information from the claims index to a claimant or the claimant's representative. The Rule already permits a claimant or claimant's attorney to obtain index information. Specifically, see subsection 5.3. of the final version.

Insurers Sharing Information

A private carrier commented that the Rule should be amended to provide specifically that private carriers be required to share claims files of past workers' compensation claims with each other. The Commissioner disagrees with this suggestion. While reporting of claims activity through EDI is common in many states, it is uncommon for a "claims index" to be maintained by the state to provide information to carriers for the adjustment of claims. In fact, AIA, an insurance trade organization, has commented to Insurance Commissioner staff during conversations that the claims index is not expected or needed by private carriers, who are used to adjusting workers' compensation claims without a claims index.

To be sure that not requiring carriers to share such information with each other is not inconsistent with industry standards, the Commissioner solicited feedback from industry on this issue. The Commissioner learned that it is ***not*** a common practice for carriers to share past claims files with each-other in other states, and that the industry would prefer that there be no specific legal requirement that carriers share claims information with each-other. Consequently, the Commissioner is not going to place such a requirement in the Rule. Carriers, of course are permitted to share information if they like, as long as all applicable privacy laws are followed.

Release of Information

A private carrier suggested that a provision be placed in the Rule that states that by signing the application for benefits, claimants agree to permit carriers to release claim file information to other carriers. The Insurance Commissioner does not agree with this suggestion.

While workers' compensation carriers are exempt from HIPPAA, and the Commissioner can see the benefit of carriers having this type of "automatic" release in the application, the Commissioner nonetheless has concerns about placing this provision in the Rule. Specifically, it is not clear what legal effect a "blanket release" in a law or rule has, as opposed to a specific, express release that is read by the signor, and there are significant public policy concerns with placing such a "release" in rule or law as opposed to having it expressly set forth in the document itself. While the claimant may be "charged" by law of knowing about such a release, he/she may not actually know that he/she is granting the release by signing the benefits application. Therefore, the Commissioner does not believe creating a release in rule is appropriate.

From: Jennifer Meeks [jennifermeeks@wvdhhr.org]
Sent: Wednesday, September 12, 2007 9:42 AM
To: Ryan Sims; TERRY YAHR
Subject: Comments to Rule 2 (Workers' Compensation Claims Index)

My comments, as an attorney practicing in this area of law, are as follows:

The claims index information should also include a brief reference to the injury, specifically the area(s) of the body impacted (such as "back injury" or "occupational disease"). Preferably, it should reference the primary treating physician for the injury. The index should also include some summary of significant benefits granted, such as number of weeks of TTD (or if TTD is ongoing) and the percentage of PPD awarded to date.

The data should be required to be updated on a specified time basis, such as "no less frequently than every six (6) months."

The index should also be made available to employers and employers' representatives on request. Some may argue that this may be done if the requestor has an appropriate release signed by the claimant. However, the FROI form includes the release, for each claim filed, and is sufficient to allow release of the information by the Insurance Commission and any private carrier/self-insured employer.

There should also be a reference to private carriers/self-insured employers being required to share basic information with claimant's and employers' attorneys for litigation purposes. This latter will be absolutely essential should the Insurance Commissioner decline to include body part(s), treating physician, and benefits information in the index.

Thank you for your consideration of these comments.

medium. Also, please note that it is possible to spoof or fake the return address found in the "From" section of an Internet email. There is no guarantee that the sender listed in the "From" section actually sent the email. It is advised that you understand and observe this lack of security when emailing.

Jennifer J. Meeks
State Capitol Complex
Building 3, Room 201
Charleston, WV 25305
(304)558-6989

Office of General Counsel

September 10, 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 offers the following comments regarding the proposed rule.

It is necessary that insurers exchange information regarding a claimant's workers' compensation claims. This exchange is necessary for a number of reasons, including, but not limited to: (1) determining the amount of permanent partial disability received as the result of a particular injury for the determination of whether the threshold for permanent total disability has been met and for other matters; (2) determining the amount and type of drugs prescribed in the current claim and comparing that to prescriptions written in previous and subsequent claims; (3) determining whether there are duplicate medical payments being made in more than one claim; and (4) determining whether a claim constitutes a new claim or the exacerbation of a previous injury.

In order to facilitate the exchange of information, we propose that the following section be added to the rule:

§85-2-6. Sharing Claims Information.

6.1. After the insurer has received a list of claims from the claims index, the insurer may request copies of claimant's workers' compensation claim files from previous or subsequent insurers, including Old Fund claims and other claims administered under the auspices of the office of the insurance commissioner.

a. In return, the previous or subsequent insurers may request copies of the requesting insurer's claim files concerning the claimant.

6.2. The claimant's signature on the insurer's workers' compensation application for benefits is deemed to be the claimant's written consent and release of

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liability for the exchange of the claimant's workers' compensation claim file(s) between previous and subsequent insurers and the insurer with whom the subject claim is filed.

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

Randall B. Suter

PUBLIC HEARING

SEPTEMBER 13, 2007

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, September 13, 2007, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
- Bill Dean, Chairman (via telephone)
- Delegate Nancy Guthrie
- Kent Hartsog
- Dan Marshall
- Walter Pellish (via telephone)
- Delegate Carrie Webster (via telephone)

Ryan Sims (Associate Counsel, Offices of the WV Insurance Commissioner): Good afternoon members of the Industrial Council. We are bringing before you today Rule 2 for a Public Hearing which pertains to the "Workers' Compensation Claims Index." It is essentially for the most part a procedural rule giving guidelines for how the claims index operates and giving guidance to those involved with it such as carriers, self-insured employers, etc.

We brought this before you on August 9, 2007, to be initially filed and has been filed with the Secretary of State. There has been 30 days of public comment and it concludes today with the Public Hearing where the public has an opportunity to provide you any comment they wish. Based on the comments we have received so far – we received two comments – we don't deem it to be a very controversial rule. The comments are basically on tweaking the things to clarify who has access to the information. And we will certainly take the written comments we have received into consideration before bringing the final rule before you in October. With that, I will open the podium up to anyone wishing to comment.

Chairman Dean: Does anybody have any comments?

Steve White (Affiliated Construction Trades Foundation): Thank you. Just really maybe more questions than comments. I don't see any penalty for not complying, particularly with the duty to make the first report of injury. So I just wonder what would compel anybody to comply. And number two; will you be tracking the compliance rate? Will you be tracking how many people do meet the deadline and how many don't and within how many days? I have a concern particularly on the self-insured side, but for the insurance companies too. A lot of times companies like to pretend that claims don't happen and ask the individual, you know, to not report it. See if it will just go away. And that creates problems for the claimants down the road. So that's my two questions. Is there any penalty, number one? Number two, will you be tracking what the compliance rate is and get that information back to us?

Mr. Marshall: I would ask if either Mary Jane or Ryan to respond to that.

Mary Jane Pickens (General Counsel OIC): I think those are both good comments and we will certainly take those into consideration. I think we share – and Ryan can jump in here – the thrust of the rule is to make sure that we do have an effective and helpful claims index that serves the intended purposes. And if you don't hold people to these standards, then you haven't met that goal. We will certainly consider the compliance issues that go along with it. If there is an omission or something that needs to be in there to strengthen that, we'll consider changes that are appropriate to achieve that goal.

Mr. Marshall: So you will take a look at those issues before the final draft is before us for approval?

Ms. Pickens: Certainly.

Henry Bowen (Executive Secretary of the West Virginia Self-Insurers' Association): Mr. Marshall, may I comment? I think Mr. White's comments are not well taken. There is absolutely no data to support any allegation that self-insurers do not timely report their first reports of injuries. Secondly and most importantly, Rule 18 contains the requirements of self-insurance reporting. Rule 1 contains employer reporting obligations. There are penalties in Rule 1 for failure to report. And Mr. White is continuing the invective that somehow is spreading in this community that self-insurers aren't doing it right and there is no data to support that. And I would ask the Industrial Council to remember that we go through annual audit review of the Self-Insurance Unit, and this Commission's Self-Insurance Unit has statistics that show a very high audit compliance with claim administration since the 2004 authorization that allows self-insurers to self-administer. And I would simply suggest that once again you are being asked to look at a rule on claims indexing and put additional penalties in there because of unsupported allegations. There are plenty of penalties in the other rules. Thank you.

Ms. Pickens: And as I said, we welcome all comments. This is an opportunity for comments. We will consider all comments and do what we think is appropriate – we bring it back. We'll look at everything. If it is appropriate to make a change we will. A lot of times we get comments and we decline to do those because it doesn't appear appropriate. I didn't mean to suggest that that was an automatic "yes, we'll do that type of thing." What I meant is yes, we will look at that and consider those comments and bring back to the Industrial Council something that we feel is appropriate.

Mr. Marshall: And I believe that's exactly what should happen.

Chairman Dean: Are there any other comments?

Walter Pellish: Would somebody please clarify who it was that just spoke?

Mr. Marshall: Henry. . .

Mr. Bowen: I'm sorry. Henry Bowen from the Self-Insurers' Association.

Chairman Dean: Any other comments?

Delegate Nancy Guthrie: This is something that I should have noticed at the last two meetings and I apologize because you all know that I am new to the Council. But one of the things that concerned me. . .it goes back to the heart of the same discussion that we had at the last meeting. Under the authority, would there be any possibility for you all to consider the Legislature still having authorization and oversight so that we're not just granting you an unlimited access to pass a rule or to operate under a rule? For two reasons, number one – we may not be lucky in the future to have an Insurance Commissioner of the caliber that we've got in Commissioner Cline. And number two, none of you are subject to criticism from the voting public and the Legislature is. And it might be considered if we don't subject this particular portion or this particular rule to the legislative process with legislative oversight, that we're once again abrogating our authority or our legislative authority or ceding our authority to the Insurance Commission and hoping for the best. And I think that there are an awful lot of things that could happen under the auspices of us saying, "Go ahead. You all make the decisions." But I would like to be able to have some legislative oversight if we get into a jam somewhere down the road.

Ms. Pickens: If I could respond to that. The Legislature, the Joint Judiciary Committee, is looking at different agencies. The Legislature has specifically exempted out of the legislative rulemaking process, which is what has happened with the former Workers' Compensation Commission carried over in Senate Bill 1004, the Industrial Council. It is my understanding that at the October interims we will have our opportunity to present our rulemaking process and explain what a very open. . .what an open process it is. We really invite a lot of input and a lot of comment. And of course the Legislature has non-voting members, but nevertheless they're here and I'm pleased to see that we're having some folks show up on a regular basis. The thing that I think we all really, really need to keep in mind is that if these were legislative rules you would not have an effective transition. It simply would not happen because it takes so long for that process to work. We have to be nimble enough to react to the needs of the marketplace and that's going to continue for a period of several years. You couldn't effectively establish a private insurance market if you had to go through a year or more of the rulemaking. It just could not be done. That's just a really important point to make – for a period of a few years until the marketplace is established. But again the Legislature is studying this and we are going to have an opportunity to explain our process.

Delegate Guthrie: So the Legislature then would have the final say on whether or not this particular portion. . .

Ms. Pickens: No. This is an exempt legislative rule. It goes through the process that you are seeing working right now – the Public Hearing; at the next meeting a presentation of the final rule; the Industrial Council would vote to either final file it or not and then it would be made effective.

Delegate Guthrie: As you said – and you said it more eloquently than I'll ever be able to say it – this is a very important change in the way we've done business in West Virginia. And the market will now be opening up. Because of that I would still like to see legislative oversight or at least the ability to come back in and say to you all, "We need to have legislative. . ." Especially with something as important as workers' compensation – especially with something that important. I'm just asking you when you are preparing for the Joint Committee that you take that under consideration, if you would. I think it's important.

Mr. Pellish: I would echo. . .at every meeting that all comments are welcomed. And I think we clearly get input from all sources on anything we do. [At this point the telephone was cutting out.] I don't see any need to consider anything that could cause a delay in the process or a delay in fixing some of the problems that are out there. I am very comfortable with what we're doing.

Chairman Dean: Any other comments?

Delegate Mike Caputo (Majority Whip, WV House of Delegates): I have a comment. This is Delegate Mike Caputo, Majority Whip in the House. This is the first meeting I've attended and I plan on attending more of them. I would like to mirror what Delegate Guthrie has talked about in regard to legislative approval. I think this is something that the Council really needs to look at. We as elected officials are responsible for the outcome of any claim in workers' comp because we are the accessible ones in our districts when people get injured on the job. And ma'am I heard you say about the needs of the marketplace. My concern right now is the needs of the injured worker. And I think that legislative oversight would only improve what you have built here and assure the public that we are doing the right thing. So I would ask that that be considered. And I'm anxious to. . .our Joint Committee meeting on your comments on that. And we, as a Legislature, I truly believe need to look at this. You know I get more and more complaints in the field than I ever have – and I've been in the Legislature 11 years now – and I am getting record numbers of complaints in regard particularly to self-insureds. And in Mr. Bowen's comments on self-insured – in his little sparring match with Mr. White – I can only say that if the self-insureds are doing what they should be doing and are very confident that they are, then penalties no matter how large won't be a problem. So I think we do need to look at the penalty stages in regard to that. But that's just some comments. I appreciate the hard work that every one of you do, and I'm certainly not here to be critical of that. I want to say "thank you" for your service. Those are just some observations that I felt was necessary for me to make today. Thank you, Mr. Chairman.

Chairman Dean: Thank you, sir. Are there any other comments? Mr. Marshall, is there anybody else up to talk?

Mr. Marshall: No. I think we can proceed to close the Public Hearing and move along to General Public Comment, Mr. Chairman.

Chairman Dean: We'll move on to General Public Comment.

Industrial (ıncil Meeting
PUBLIC HEARING
Title 85, Series 2
"Workers' Compensation Clams Index"
Offices of the West Virginia Insurance Commissioner
September 13, 2007

Name	Address	Telephone Number	Group Affiliation	Do you desire to address the Council?	Agenda item to which you desire to speak