WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In This Box

FILED

2004 OCT 19 P 3: 14

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code§§23-1-1a(j)(3), 23-4C-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 3

TITLE OF RULE BEING AMENDED: "Administration of the Employers' Excess Liability Fund"

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

DATE OF PUBLIC HEARING: November 19, 2004 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia
**Comments will close at the end of the public hearing on this rule.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T. J. Obrokta
Executive Offices
Workers' Compensation Commission
~~4700 MacCorkle Avenue, S.E.~~
Charleston, WV 25304
Fax # (304) 926-5372

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

[signature]

Authorized Signature

$5.60

Insuring a Working West Virginia
Workers' Compensation Commission
Gregory A. Burton, Executive Director

Office of General Counsel
4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone Number (304) 926-3423
Fax Number (304) 926-5441

October 19, 2004

The Honorable Joe Manchin III
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 3
"Administration of the Employers' Excess Liability Fund"

Dear Secretary Manchin:

Please consider this letter to be my written approval for the filing of the above-noted proposed Rule.

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission have approved the enclosed 85 C.S.R. 3 entitled, "Administration of the Employers' Excess Liability Fund," for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 3: Administration of the Employers' Excess Liability Fund

Type of Rule: X Legislative Exempt ___Interpretive __Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Ave. S.E.

Charleston, WV 25304

1. Effect of Proposed Rule

	Annual		Fiscal Year		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$0	$0	$0	$0	$0
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER:					
Benefit payments	0	0	0	0	0
Benefit related payments	0	0	0	0	0

2. Explanation of above estimates:

Implementation of this rule provides additional guidance for the administration of the West Virginia Employers' Excess Liability Fund (the Fund). The additional guidance includes subscription requirements, classification and premium rates, extent of coverage, limits of liability, policy exclusions and the claims petition and approval process. Implementation of the rule refines and clarifies the existing rule regarding certain aspects of the administration of the Fund. The proposed changes should not have any significant financial impact on the administration of the Fund.

3. Objectives of this rule:

This rule refines the policy and procedures for the administration of the West Virginia Employers' Excess Liability Fund, and should result in equitable premium rates for subscribers and promote more effective claims petition and approval processing.

Rule Title: Title 85 Series 3: Administration of the Employers' Excess Liability Fund

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that this rule will improve the overall administration of the West Virginia Employers' Excess Liability Fund and should promote a more efficient and cost-effective employers excess liability insurance program.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

The rule will provide the opportunity for employers to apply, as an alternative to other coverage available, for coverage in the West Virginia Employers' Excess Liability Fund insurance program.

C. Economic Impact on Citizens/Public at Large.

This proposed rule would not have a direct economic impact on the citizens of West Virginia.

Date: October 19, 2004

Signature of Agency Head or Authorized Representative

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 3

The proposed rule entitled, "Administration of the Employer's Excess Liability Fund," amends the current 85 C.S.R. 3 with the same title.

Senate Bill 2013, effective July 1, 2003, substantially changed the provisions of the Workers' Compensation Act [W. Va. Code §§23-1-1 et seq.]. The changes include: the creation of a new state agency, the West Virginia Workers' Compensation Commission; creation of a new governing board, the Board of Managers; and provisions that the agency be separated from the Bureau of Employment Programs. The requirements of the Senate Bill include the duty to revisit and revise the rules of the former Workers' Compensation Division of the Bureau of Employment Programs.

This proposal provides for terminology consistent with the current law. In addition, the proposal clarifies the definition of "gross wages."

A change is made to the rule to clarify that the provision of Employers' Excess Liability coverage is discretionary with the Commission.

A change is made to the methodology of establishing premium rates for Employers' Excess Liability coverage so that the Board of Managers determines rates and classifications in a similar manner to the method used to establish workers' compensation premium rates. The proposal allows the Board of Managers to set rates on a periodic basis. In addition, the rule provides for interim rate adjustments based upon claims made against the Fund.

The rule provides for a different method of reporting by the employer of the identities of the employees for which coverage is sought and excludes coverage where the employer fails to properly report the employees. The proposal also requires the employer to timely report claims and suits for which the Fund may be liable.

The rule clarifies that the Commission selects defense counsel in claims made against this Fund.

The rule provides for the establishment of rates for both primary and secondary coverage.

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OFFICE WEST VIRGINIA SECRETARY OF STATE

TITLE 85
EXEMPT LEGISLATIVE RULE

WORKERS' COMPENSATION COMMISSIONER

~~SERIES 3~~
~~THESE RULES PROVIDE FOR THE GENERAL~~SERIES 3
ADMINISTRATION OF THE EMPLOYERS' EXCESS LIABILITY FUND

§85-3-1. General.

1.1. Scope. —~~These are L~~This exempt legislative ~~R~~rule ~~s~~ relat~~inges~~es to the Employers' Excess Liability Fund to provide definitions and prescribe procedures and criteria for subscriptions, payroll reporting, premium payment, termination of subscriptions, reinstatement, reclassification of groups, classes or subscribers, changes in premiums based upon claims and awards, petitions for settlement including the contents and approval thereof.

1.2. Authority. —W. Va. Code §§ 23-1-1~~5~~a(j)(3) and 23-4C-3.

1.3. Filing Date. ~~—September 30, 1983.~~

1.4. Effective Date. ~~—July 1, 1984.~~

§85-3-2. Definitions.

As used in the~~se R~~is rule ~~s~~ unless the context in which used requires a different meaning:

2.1. ~~"Commissioner" shall mean~~"Board" means the Workers~~'~~' Compensation ~~Commissioner appoin~~Board of Managers created pursuant to the provisions of W.Va. Code §23-1-1a.

"Commission" shall mean the West Virginia ~~Code Section one, Article one, Chapter twenty-three.~~

2.2. ~~2.2~~Workers' Compensation Commission created under the provisions of W. Va. Code § 23-1-1.

2.3. "Conscious, Subjective and Deliberate Intention" shall mean that type of deliberate intention defined by W~~est Virginia Code Subdivisions (i), (2), Subsection (c), Section two, Article four, Chapter twenty-three~~. Va. Code §23-4-2(d)(2)(i) which shall be excluded from coverage of any ~~E~~excess ~~L~~liability policy issued by the commission.

2.4. "Executive Director" means the executive director of the Workers' Compensation Commission ~~er.~~

~~2.3. "Fund" shall mean the Employers' Excess Liability Fund created by West Virginia Code Section one, Article~~ four-c, Chapter twenty-three as provided pursuant to the provisions of W.Va. Code §23-1-1b.

2.5. "Fund" shall mean the Employers' Excess Liability Fund created by W. Va. Code §23-4C-1 et seq.

2.4~~6~~. "Injury" shall include death when the injury or accident for which compensation is claimed results in the death of one or more employees.

2.~~5~~7. "Party or Parties" shall mean the petitioner or a proposed recipient of proceeds from the Fund (beneficiary) either as a result of a court ordered payment or a settlement approved by the ~~C~~commissioner~~.~~

2.~~6~~8. "Petition" shall mean the petition for settlement including all exhibits and attachments submitted by an employer/subscriber to the ~~C~~commissioner~~,~~ to settle a disputed claim.

2.~~7~~9. "Petitioner" shall mean the employer who submits the petition.

2.~~8~~10. "Policy" shall mean the completed application form issued and accepted in writing by the ~~C~~commission ~~or~~ for Excess Liability Insurance and shall include all conditions, exclusions and other provisions of these ~~Rules.~~

~~2.9. "Remuneration" shall mean~~rules.

2.11. "Gross wages" means all wages paid to employees, whether payable in money or other valuable consideration, and shall include salaries, bonuses, commissions, profit sharing, and the reasonable money value of board, rent, housing, lodging and other goods and services.
The commission retains the right to determine whether an item, not otherwise described in this provision, is reportable as "gross wages."

"Gross wages" include: W-2 items, vacation pay, including accrued vacation at time of dismissal, holiday pay, sick pay (excluding 3rd party sick pay), partnership and S Corporation distributions of ordinary income from trade or business activities (do not report losses), draws taken for items other than business expenses, retroactive wages, bonuses, including stock options and stock bonuses, commissions, including draws against commissions, wages paid to summer interns, overtime wages, profit sharing, incentive programs, per diem payments to employees not directly related to travel, allocation to employees for such things as tools, equipment, machinery, etc. regardless if such allocation is labeled as per diem, hourly expense or other titles, stipend or other non-travel related payments to board members who are being covered under the employer's workers' compensation account, other compensation and perquisites paid to employees, owners and officers that have value, but are not per diem travel related, and value of gifts given to employees, owners, officers and board members.

"Gross wages" do not include: per diem expenses related to travel, the value of any special discount or markdown allowed a worker on goods or services purchased from or supplied by the employer if the purchase is optional with the worker and does not constitute regular or systematic remuneration for services, facilities or privileges such as cafeterias, restaurants, medical services or so-called 'courtesy discounts' on purchases furnished or offered by an employer merely as a convenience to workers or as a means of promoting their health, goodwill or efficiency, partnership and S Corporation distributions other than ordinary income from trade or business activities, payments, not required under any contract of hire, made to an individual with respect to a period of training or service in the armed forces of the United States, severance pay, savings plan proceeds, third party sick pay, and disability pay.

2.12. "Quarter" means the four calendar quarters: January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through December 31 of each calendar year.

2.13. "This rule" means the instant exempt legislative rule designated as 85 C.S.R. 3, "Administration of the Employers' Excess Liability Fund."

§85-3-3. Subscription and Premiums~~and coverage~~.

3.1. Subscription. —An employer shall apply for subscription to the Fund on forms approved by the ~~C~~commissioner~~er~~. Coverage shall not commence until a signed application, along with the required deposit, are received by the Fund and approved by the ~~C~~commission.

a. The commission, in the exercise of its fiduciary responsibility to the Fund and in its sole discretion, may reject an application for subscription to the Fund.

3.2. Coverage. —The policy form shall be approved by the ~~C~~commissioner~~er~~. The details of coverage shall be summarized on a declarations page, attached to the policy form.

3.3. ~~Rating. — Rates shall apply per one hundred dollars ($100.00) of total remuneration of employees working in West Virginia. Base rates shall be established for each of the classes utilized by~~Deposit. The initial deposit shall be equal to an annual premium, based on the payroll reported by the employer to the Workers' Compensation ~~Fund. Base rates shall be modified by the modification factor calculated for Workers' Compensation rates. (Modification factors for self-insureds shall be computed analogously to those for regular subscribers, utilizing a one hundred thirty thousand dollars ($130,000.00) per claim limitation.) Total remuneration shall be adjusted at least annually, becoming effective for the quarter beginning on October 1. For employers selecting limits of coverage higher than the minimum offered limits, a surcharge shall be added. A minimum premium of twenty-five dollars ($25.00) shall apply to each quarterly~~Commission. If the commission determines that this amount of payroll is not a reasonable estimate of annual payroll, the commission may make a suitable adjustment. Thereafter the deposit shall be maintained at a level of payroll corresponding to the employer's annual premium.

3.4. ~~Deposit. — The initial deposit shall be equal to an annual premium, based on the payroll reported by the employer to the Workers' Compensation Fund. If the Fund shall determine that this amount of payroll is not a reasonable estimate of annual payroll, the Fund may make a suitable adjustment. Thereafter the deposit shall be maintained at a level of payroll corresponding to the employer's annual premium.~~

~~3.5.~~ Premium payment. —Premiums shall be payable quarterly, on the last day of the month following the end of each calendar quarter. The premium statement shall also reflect any change in the amount of required deposit.

3.~~6. Surcharge for claims. — A surcharge of fifty percent (50%) of the otherwise applicable premium (not including the minimum premium) shall be charged to the employer for each claim or suit filed with the Fund: **Provided, however,** That the surcharge shall be applicable for a period of thirty-six (36) months and will be refunded to the employer if the claim or suit is finally resolved with no payment from the Fund.~~

~~3.7. Reclassification. —~~5. Deductible. The Commission ~~or shall review the classification structure periodically and may make any adjustments necessary to make rates more accurate and equitable. The Fund may change the assigned classification of an employer if it is determined that another classification (or classifications) is (are) more appropriate for the individual employer.~~

~~3.8. Deductible. — The Commissioner~~ may require the subscriber to employers' excess liability coverage to be responsible for a minimum deductible. The minimum deductible amount may be based upon payroll, premium or any other measure related to the size or hazard of the employer.

~~3.9. Refund of deposit. — A refund of the employer's deposit need not be made until the employer has reported its payroll for the latest calendar quarter and the Fund has had a reasonable opportunity to audit the employer's books and accounts.~~

§85-3-4. Premiums and Rates.

4.1. Exposure base. Premium taxes shall be based on the total gross wages paid or payable to employees covered by the Act.

4.2. Determinations. The board of managers shall have the authority to make the following determination or determinations regarding employers' excess liability coverage at any time and from time to time in accordance with the procedures set out in subsection 4.3 of this rule.

a. Classify into classes the employers who desire to subscribe for employers' excess liability coverage.

b. Restructure classes and create or eliminate classes. The board of managers may establish additional classifications on the basis of the number of employees, size of payroll, type of operations, claims experience or any combination of the aforementioned, or on any other basis which the board of managers deems appropriate.

c. Prepare a premium tax rate schedule based on an actuarially sound model, which shall specify the base rate for each classification.

d. Adjust the premium tax rate schedule in whole or in part.

e. Determine the expected loss ratios.

f. Determine the method for limiting losses.

g. Determine such other matters as the board of managers deems appropriate in the exercise of its ratemaking authority.

4.3. Procedures for determinations. Determinations made by the board of managers under the provisions of subsection 4.2, shall be made in the following manner.

a. The board of managers shall make any determination or determinations at a public meeting or meetings held in accordance with the provisions of 85 C.S.R.14, "Procedural Rules for the Workers' Compensation Board of Managers."

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

c. Such determinations shall be filed with the office of the secretary of state at least thirty (30) days prior to the first day of the quarter in which the determination or determinations become effective.

4.4. Notification. The commission shall notify every employer whose employers' excess liability coverage is affected under the provisions of section four (§85-3-4) of this rule. The commission shall provide notice to each affected employer at least thirty (30) days prior to the period for which the rate change is applicable.

a. Interim rate adjustments. The commission may make interim rate adjustments as necessary to reflect the experience of the employer for each claim or suit filed with the Fund or classification of the employer subscribing to employers' excess liability coverage.

§85-3-5. Coverage of insuring agreement.

45.1. Coverage. —In consideration of the payment of premiums and subject to the limits of liability, exclusions, conditions and other requirements of the policy and th~~ese Rules, the Fund~~is rule, the Commission agrees with the insured:

~~(a)~~ a. To pay on behalf of the insured, an amount up to the Fund's limit of liability, that is payable by the insured on account of an injury or death
to one of its employees, where all five (5) of the following facts are proven:

~~(1)~~1. That a specific unsafe working condition existed in the insured's workplace which presented a high degree of risk and a strong probability of serious injury or death;

~~(2)~~2. That the insured had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

~~(3)~~3. That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the insured, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

~~(4)~~4. That notwithstanding the existence of the facts set forth in ~~Subdivisions 4.1(a)(1), (2) and (3) of these Regulations,~~5.1.a.1, -2 and -3 of this rule, the insured nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

~~(5)~~5. That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

~~(b)~~b. That coverage shall apply only to accidents that occur where both (1) the employee~~becomes disabled or~~ is injured while the policy is in effect, and (2) the policy was in effect when the employee was exposed to the above specific unsafe working condition.

~~(c)~~c. To defend any suit or claim made against the named insured, to the extent the suit or claim alleges liability covered by this policy: Provided, however, That the ~~Fund~~Commission may make any settlement of the suit or claim as it deems expedient and that the ~~Fund~~Commission is not obligated to defend any claim or suit after its limit of liability has been ~~exhausted.~~
exhausted and provided that the Commission shall have sole authority to select defense counsel.

~~§85-3-5.~~§85-3-6. Limit of liability.

~~5.1.~~6.1. Maximum limits. — The Fund's maximum liability for any one "Occurrence" is the amount stated in the declarations. A single "Occurrence" includes all injuries to one or more employees that arise out of the same specific unsafe working condition, referred to in the insuring agreement. The Fund's maximum liability for two (2) or more occurrences within four (4) consecutive quarters shall be double the Fund's per occurrence limit.

~~5.2.~~6.2. Excess coverage. — The Fund's liability shall not extend to cover nor be required to contribute to any claim by an employee of the insured to the extent that such claim is recoverable through the Workers' Compensation Fund or a qualified self-insurer. Subject to the maximum limits of liability of each policy, no proceeds shall be paid from the Fund unless such proceeds shall represent compensation in excess of the amount recovered or recoverable from the Workers' Compensation Fund or a qualified self-insurer.

~~§85-3-6.~~§85-3-7. Policy exclusions.

~~6.1.~~7.1. Exclusions. — This policy does not apply to:

~~(a)~~a. Any liability of the insured, arising out of any specific unsafe working condition, referred to in the insuring agreement, where a valid citation was issued before the injured employee was exposed to the specific unsafe working condition;

~~(b)~~b. Any liability of the insured for an injury to an employee where either (1) the injury to the employee does not give rise to a compensable claim, which has been rule compensable under the West Virginia Workers' Compensation Law, or (2) the injury occurred at a time at which the insured was deprived of its common law defenses for failure to comply with the West Virginia Workers' Compensation Law, or both;

c. ~~(c)~~ Any liability of the insured for an accident that is not reported to the ~~Fund~~commission within twenty-four (24) months of the date of the accident;

d. Any liability of the insured where the insured has failed to timely report to the Commission the name and social security number of the injured employee in accordance with this rule.

e. Any liability of the insured for an injury to an employee where the insured does not provide notice to the commission within thirty (30) days of any claim or suit that may be covered by this policy;

~~(d)~~f. Any liability of the insured for punitive or exemplary damages or for any fines or penalties assessed against the insured for violation of any state or federal statute, rule or regulation; or any obligation to represent or defend the insured at any administrative hearing or proceeding;

~~(e)~~g. Any liability of the insured, arising out of a conscious, subjective and deliberate intention to produce the specific result of any injury to an employee;

~~(f)~~h. Any liability of the insured for an injury to an employee, where the total required ~~remuneration~~gross wages of that employee has not been reported to the ~~Fund~~commission for any period of time during which this policy has been in effect;

~~(g)~~i. Any liability of the insured for ~~an~~occupational pneumoconiosis, carpel tunnel syndrome, noise induced hearing loss or any occupational disease contracted by an employee; or

~~(h)~~j. Any liability of the insured for compensation recovered or recoverable from the Workers' Compensation Fund ~~on~~or a qualified self-insurer.

~~§85-3-7.~~§85-3-8. Conditions.

~~7.1.~~8.1. Premium. — The insured shall pay when due all premiums as provided for by the rules and procedures of the Fund. Premiums shall be payable on all of the insured's employees employed within the State of West Virginia.

~~7.2.~~8.2. Cancellation by insured. — The insured may terminate a policy at any time; the termination to be effective either on the day the notice of termination is received by the ~~Fund~~commission or as specified in the notice. ~~If the insured terminates a policy, the Fund need not offer to insure the insured for a period of two (2) years from the date of termination. When~~

~~termination occurs during a quarter, a charge of fifteen dollars ($15.00) plus twenty percent (20%) of the previous quarter's premium, prorated for the uncovered portion of the latest quarter shall be assessed.~~

~~7.3.~~8.3. Continuous policy; ~~cancellation for nonpayment. —~~cancellation. This policy shall remain in effect from quarter to quarter, so long as the required premiums and deposits are ~~paid. The Fund~~paid and the policy is not cancelled. The commission shall have the right to terminate this policy for nonpayment of premium or deposit, upon ten (10) day written notice to the insured stating that additional premium or deposit is due. ~~If the Fund cancels a policy for nonpayment, the Fund need not offer to insure the insured for a period of two (2) years from the date of termination of coverage. Upon thirty (30) day written notice by the Commissioner, coverage may be terminated if continued coverage of any employer would jeopardize the~~

~~overall solvency of the Fund, otherwise,~~ The Commission may terminate coverage upon thirty (30) days written notice to the insured.
~~coverage shall continue from quarter to quarter.~~

8.4. Employee reporting. On the last day of the month prior to the beginning of each calendar quarter and in all cases prior to the onset of coverage, the insured shall report to the Commission the names and social security numbers of all employees employed in the State of West Virginia. Further, within twenty-four (24) hours hiring a new employee, the insured shall report the name and social security number of that employee to the Employers' Excess Liability Fund for the purposes of inclusion in the insured's coverage.

~~7.4.~~8.5. Payroll reporting. — Each quarter, the insured shall report to the ~~Fund~~commission the names of all employees employed in the State of West Virginia, together with the total ~~remuneration~~gross wages paid to each of those employees for that quarter. If the coverage period is less than a full calendar quarter, the insured shall determine the total ~~remuneration~~gross wages paid for the period of coverage. The insured shall keep proper records and books of account with respect to the ~~remuneration~~gross wages of its employees, and those records and books shall be available for audit by the ~~Fund.~~commission.

~~7.5. Notice. — The insured shall notify the Fund, as soon as practicable, of any claim or suit that may be covered under this policy.~~

~~7.6.~~8.6. Cooperation. — The insured shall cooperate with the ~~Fund~~commission in the defense of any claim or suit brought under this policy. Such cooperation shall include, without limitation, the attendance at hearings or trials and any assistance in securing or giving relevant evidence.

~~7.7.~~8.7. Voluntary payments and settlements. — The Fund shall not be liable for any payment made to any employee, without the written consent of the ~~Fund.~~commission. The Fund shall not be liable for any settlements of a claim or suit agreed to by an insured and its employee, without the written consent of the ~~Fund.~~commission.

~~7.8.~~8.8. Subrogation. — In the event of any payment under this policy, the ~~Fund~~commission shall be subrogated to the rights of recovery of the insured. The insured shall execute and deliver any documents and do whatever else is necessary to secure the ~~Fund's~~commission's rights of subrogation. The insured shall do nothing to prejudice those rights.

~~7.9.~~8.9. Other insurance. The insured is required choose primary or secondary coverage.

a. If the insured chooses primary coverage, the Fund will provide coverage for any applicable claim or suit prior to coverage by other insurance coverage.

~~— The coverage afforded by this policy applies~~ b. If the insured chooses secondary coverage, the Fund will provide coverage for any applicable claim or suit only after all other insurance coverage applicable to any claim or suit has been exhausted.

1. In order to qualify for secondary coverage, the insured is required to provide evidence of primary coverage to the commission.

2. In the event that an insured is permitted to pay the secondary coverage rate and a claim or suit is filed against the insured and thereafter it is discovered that primary coverage from another insurer was not in effect, then the insured shall be excluded from coverage in the same manner as provided in section seven (§85-3-7) of this rule.

c. Rates for primary and secondary coverages shall be developed in accordance with the determinations of the Board of Managers in accordance with the provisions of subsection four (§85-3-4) of this rule.

~~7.10.~~8.10. Modifications; waiver. — This policy may not be modified except by written agreement of the parties. No rights of the ~~Fund~~commission under this policy may be waived, except by a written waiver signed by an authorized representative of the ~~Fund.~~commission.

~~7.11. Notice. —~~8.11. Notice. Notice to the insured may be sent registered mail to the address listed on the declarations page. Notice to the Fund must be sent registered mail ~~to:~~to the Executive Director of the Workers' Compensation Commission, Employers' Excess Liability ~~Fund, P. O. Box 3971, Charleston,~~Fund at the West Virginia ~~25339.~~Workers' Compensation headquarters in Charleston, West Virginia.

~~§85-3-8.~~§85-3-9. Petition for settlement.

~~8.1.~~9.1. Form of petition. — A petition for settlement shall be submitted to the commission on forms prescribed by the ~~Commissioner.~~commission. Such forms may be obtained from the ~~Commissioner's Office or by writing to the address listed in Subsection 7.11 of these Rules.~~commission's office.

~~8.2. Number of copies. — The original and three (3) copies of a petition shall be submitted to the Commissioner if there are only two (2) parties to the proposed settlement. If there are more than two (2) parties, an additional copy shall be submitted for each such additional party.~~

~~8.3.~~9.2. Signature and verification.

~~(a)~~a. All petitions must be signed by the petitioner and duly verified by a Notary Public. A petition submitted by a corporation shall be signed by an officer, that of a partnership, by a partner and any other petition must be signed by an owner, a trustee or chief executive of the entity submitting the petition.

~~(b)~~b. Any recitation of facts or allegations by individuals other than the petitioner to be included in the petition, must be in the form of a notarized and verified statement.

~~(c)~~c. Any verification required by ~~these Rules~~this rule shall certify that the facts and allegations contained in the petition are true and accurate, and to the extent that they are therein stated to be on information, the facts and allegations are believed to be true.

~~8.4.~~9.3. Pages, exhibits and documentation. — If additional pages are needed to supplement the petition with relevant information, those pages shall be attached to the petition and clearly identified as attachments. If exhibits of any type are to be included, they shall be attached to the petition, referenced in the petition and designated alphabetically as Exhibit "A", etc.

~~§85-3-9.~~§85-3-10. Contents of petition.

~~9.1.~~10.1. Names and addresses. — The petition shall include the name, title, address and telephone number of:

~~(a)~~a. The petitioner;

~~(b)~~b. The person who prepared the petition if other than the petitioner;

~~(c)~~c. The employee or employees who suffered injury;

~~(d)~~d. The person or persons to receive the proceeds of any recovery from the Fund if the settlement is approved;

~~(e)~~e. The known guardian or guardian ad litem of any persons eligible to recover proceeds from the Fund if such persons are under a legal disability due to age, mental incapacity or other reason; and

~~(f)~~f. Attorneys representing the parties identified in ~~Subsection 9.2 of these Rules.~~subsection 10.2 of this rule.

~~9.2.~~10.2. Pending legal and administrative actions.

~~(a)~~a. If a pending civil or criminal action, of any type involves the same accident or injury which is the subject matter of the petition, the petition shall include a statement indicating the court (federal, state or local) in which the suit is pending, the docket or civil action number, the parties to such action, and its present status.

~~(b)~~b. If a pending administrative investigation, complaint or other proceeding involves the same accident or injury which is the subject matter of the petition, the petition shall include a statement identifying the administrative agency (federal, state or local) involved, the case or investigation number, the parties to such proceeding and its present status.

~~9.3.~~10.3. The injury or accident. — The petition shall also contain at a minimum:

~~(a)~~a. The time, date and location at which the injury or accident occurred;

~~(b)~~b. A description of the nature and extent of the injury of each person injured;

~~(c)~~c. A description of the accident, without regard to fault of any party;

~~(d)~~d. The name and address of any person who is neither a party to the petition nor a proposed recipient of proceeds from the Fund, but who was injured in the same injury or accident as any proposed recipient; and

~~(e)~~e. A statement indicating whether additional petitions will be submitted involving the same accident or injury and the anticipated filing date of such petitions.

~~9.4.~~10.4. Damages and compensability. — No petition shall be accepted or approved unless it contains:

~~(a)~~a. A statement indicating whether the petitioner was current in its premium payments to the Workers' Compensation Employers' Excess Liability Fund on the date the accident or injury occurred;

~~(b)~~b. A description of the damages for which compensation from the Fund is proposed;

~~(c)~~c. A statement setting forth the amount proposed as a settlement; and

~~(d)~~d. The proposed method and duration of dispersal of proceeds from the Fund as a lump sum or periodic award.

~~§85-3-10.~~§85-3-11. Review of petition.

~~10.1.~~11.1. Completeness. — Within ten (10) days of receipt of a petition, the ~~Commissioner~~commission shall determine whether it is complete. If it is found to be substantially complete, it shall be reviewed by the ~~Fund.~~commission. Any petition that is deemed incomplete shall be returned to the petitioner immediately.

~~10.2.~~11.2. Review by the parties. ~~— The Commissioner~~The commission shall cause copies of the petition to be mailed to all other parties identified in the petition.

~~10.3.~~11.3. Review by the ~~Fund. — The Commissioner~~commission. The commission shall have persons employed by the ~~Fund~~commission review the petition, evaluate its merits and make a recommendation to the ~~Commissioner.~~commission.

~~§85-3-11.~~§85-3-12. Criteria for approval.

~~11.1.~~12.1. Facts. — No petition shall be approved until the ~~Commissioner~~commission investigates the facts and allegations contained in the petition.

~~11.2.~~12.2. Parties. ~~— The Commissioner~~The commission shall determine whether the proper beneficiaries are parties to the agreement and whether minors and others subject to a legal disability are properly represented before approving a petition.

~~11.3.~~12.3. Compensability. — No petition shall be approved unless the ~~Commissioner~~commission shall determine that the provisions ~~of Sections 5 and 6 of these Rules have been met.~~concerning limits of liability (§85-3-6) and policy exclusions (§85-3-7) of this rule are not exceeded or applicable.

~~11.4.~~12.4. Agreement of the parties. — All parties to the settlement must consent to be bound by its terms before it may become binding. Such consent of the parties shall be made in writing.

~~11.5.~~12.5. Adequacy of amounts of award. ~~— The Commissioner~~The commission shall review the suggested amount and proposed allocation of proceeds from the Fund. In determining whether to approve a settlement, the ~~Commissioner~~commission may consider:

~~(a)~~a. The total amount recovered or recoverable from the Workers' Compensation Fund by any party;

~~(b)~~b. The present day value of damages which may be proposed for:

~~(1)~~1. Loss or impairment of earning capacity,

~~(2)~~2. Physical pain, suffering and inconvenience,

~~(3)~~3. Mental suffering and anguish, and

~~(4)~~4. Loss of services.

~~(c)~~c. Facts pertinent to a beneficiary including:

~~(1)~~1. Projected life span,

~~(2)~~2. Ability and potential to earn a living,

~~(3)~~3. Events such as marriage or education which may affect a beneficiary's financial future.

~~(d)~~d. The costs to the Fund of defending a claim in court or litigating instead of settling a claim;

~~(e)~~e. The potential impact upon the Fund of a judgment against the petitioner;

~~(f)~~f. The merits of the petitioner's case and the merits of the cases of other parties, and

~~(g)~~g. The effect that approving a settlement will have upon the overall solvency and financial condition of the Fund.

~~§85-3-12.~~§85-3-13. Modification and/or approval of a petition.

~~12.1.~~13.1. Modification. ~~The Commissioner~~The commission shall have the authority to modify, change or alter:

~~(a)~~a. The amount of proceeds to be paid from the Fund to any one or a group of proposed beneficiaries; and

~~(b)~~b. The method and duration of the proposed payment of proceeds from the Fund.

~~12.2.~~13.2. Approval of beneficiaries; legal guardians. ~~The Commissioner~~The commission shall have the authority to substitute beneficiaries and require legal guardians to represent the interests of any beneficiary subject to a legal disability.

~~12.3.~~13.3. Approval. — ~~The Commissioner~~The commission shall have the power but shall not be required to approve any petition for a settlement submitted pursuant to ~~these Rules.~~this rule. Upon approval or disapproval, all parties shall be notified.

~~12.4.~~13.4. Limited review by a court. — No petition approved by the ~~Commissioner~~commission pursuant to ~~these Rules~~this rule shall be reviewable by any Court unless one or more of the beneficiaries thereunder is subject to a legal disability which would normally necessitate review by an appropriate Circuit Court. A petition, which must be approved by a Circuit Court Judge of this State, shall not become effective until so approved.

~~12.5.~~13.5. Final decisions. — ~~The Commissioner's~~The commission's decision is final and not reviewable by any Court unless the provisions of Subsection ~~12.4 of these Rules~~13.4 of this rule are applicable.

~~12.6.~~13.6. Liability after settlement. — Every party to an approved settlement shall sign a written release which absolves the Fund and the commission of any additional liability regardless of whether the party thereto is later adjudged eligible for additional compensation from the Workers' Compensation Fund pursuant to West Virginia Code Section sixteen, Article four, Chapter twenty-three or otherwise.

~~§85-3-13. Confidentiality of records.~~

~~13.1. General. — All records of the Commissioner or the Fund which are kept not as a memorial of official transactions but as evidence of internal operations and information necessary to the proper administration of the Fund including investigating and processing claims and settlements are private except as to parties in interest and their duly authorized representatives. The Commissioner or his duly authorized representative may require any person to produce satisfactory evidence of his authority before such person will be permitted to file any papers or examine claim records of the Commissioner. The Commissioner may require satisfactory evidence of one's interest in the records of the Fund, and such interest must be a legitimate interest before such records will be produced for inspection.~~

§85-3-14. Severability.

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