

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

Form #5

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2005 MAR 24 P 2:58

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: Workers' Compensation Commission TITLE NUMBER: 85

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

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W. Va. Code §§23-1-1a(j)(3)

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: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS May 1, 2005


Authorized Signature

\$8.20

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

Form #2

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD 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 NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 3

TITLE OF RULE BEING AMENDED: "Administration of the Employers' Excess Liability Fund"
This Notice is an extension of the previously established comment period for this proposed rule.

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON January 5, 2005 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

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

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



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,

A handwritten signature in black ink, appearing to read 'G. A. Burton'.

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
<u>ESTIMATED TOTAL COST</u>	\$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.

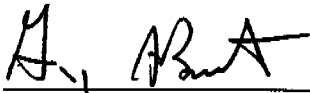
The rule will provide the opportunity for employers to apply, as an alternative to other coverage available, for coverage in the West Virginia Employers' Excess Liability Fund insurance program.

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.

FILED

TITLE 85
EXEMPT LEGISLATIVE RULE

2005 MAR 24 P 2:58

WORKERS' COMPENSATION COMMISSIONER

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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~~ This exempt legislative rule ~~s-relating~~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 §§ 23-1-15a(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 these ~~Rules~~ rule ~~s-unless~~ the context in which used requires a different meaning:

2.1. ~~"Commissioner" shall mean~~ "Board" means the Workers' Compensation ~~Commissioner appointed~~ 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 West Virginia Code Subdivisions (i), (2), Subsection (e), Section two, Article four, Chapter twenty-three, Va. Code §23-4-2(d)(2)(i) which shall be excluded from coverage of any Excess Liability policy issued by the commission.~~

2.4. "Executive Director" means the executive director of the Workers' Compensation Commission ex-

~~2.3. "Fund" shall mean the Employers' Excess Liability Fund created by West Virginia Code Section one, Article four e, 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.

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

2.57. "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 Commissioner.

~~2.8. "Petition" shall mean the petition for settlement including all exhibits and attachments submitted by an employer/subscriber to the Commissioner, to settle a disputed claim.~~

~~2.9. "Petitioner" shall mean the employer who submits the petition.~~

2.8. "Policy" shall mean the completed application form issued and accepted in writing by the Commissioner for Excess Liability Insurance and shall include all conditions, exclusions and other provisions of these rules.

~~2.9. "Remuneration" shall mean~~

2.9. "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."

2.14. "Successor to the commission" means the employers' mutual insurance company created pursuant to the provisions of article two-c, chapter twenty-three of the West Virginia Code.

§85-3-3. Subscription and Premiumsand coverage.

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

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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 er 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.

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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 these Rules, the Fund's 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.

~~(e)~~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 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 and no corrective action was taken by the insured within a reasonable time following the issuance of the citation to correct the cited 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. ~~(e)~~ Any liability of the insured ~~for an accident that arising out of a cause of action which is not reported to the Fund~~commission ~~within twenty four (24) months~~ ten (10) days of the date of service on the accident insured;

d. 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. 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. 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. Any liability of the insured for an occupational pneumoconiosis, carpal tunnel syndrome, noise induced hearing loss or any occupational disease contracted by an employee; or~~

~~(h)g.~~ Any liability of the insured for compensation recovered or recoverable from the Workers' Compensation Fund ~~or a qualified self-insurer or the successor to the commission or other private carrier of industrial insurance; or~~

h. Any liability excluded under the terms of a policy of employers' excess liability coverage issued by the successor to the commission or other private carrier.

~~§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~~ The insured shall report to the Commission the names and social security numbers of all employees employed in the State of West Virginia. Coverage will not be extended to the employer for employees that have not been reported to the commission prior to injury.

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 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.

~~585-3-8. Petition for settlement.~~

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

~~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. Signature and verification.~~

~~(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) 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) Any verification required by these Rules 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. 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.

~~585-3-9. Contents of petition.~~

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

- ~~(a) The petitioner;~~
- ~~(b) The person who prepared the petition if other than the petitioner;~~
- ~~(c) The employee or employees who suffered injury;~~
- ~~(d) The person or persons to receive the proceeds of any recovery from the Fund if the settlement is approved;~~
- ~~(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) Attorneys representing the parties identified in Subsection 9.2 of these Rules.~~

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

~~(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) 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. The injury or accident. — The petition shall also contain at a minimum:~~

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

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

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

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

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

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

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

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

~~§85-3-10. Review of petition.~~

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

~~10.2. Review by the parties. — The Commissioner shall cause copies of the petition to be mailed to all~~

~~other parties identified in the petition.~~

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

~~§85-3-11. Criteria for approval.~~

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

~~11.2. Parties. — The Commissioner 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. Compensability. — No petition shall be approved unless the Commissioner shall determine that the provisions of Sections 5 and 6 of these Rules have been met.~~

~~11.4. 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. Adequacy of amounts of award. — The Commissioner shall review the suggested amount and proposed allocation of proceeds from the Fund. In determining whether to approve a settlement, the Commissioner may consider:~~

- ~~(a) The total amount recovered or recoverable from the Workers' Compensation Fund by any party;~~
- ~~(b) The present day value of damages which may be proposed for:
 - ~~(1) Loss or impairment of earning capacity;~~
 - ~~(2) Physical pain, suffering and inconvenience;~~
 - ~~(3) Mental suffering and anguish;~~
 - ~~(4) Loss of services.~~~~
- ~~(c) Facts pertinent to a beneficiary including:
 - ~~(1) Projected life span;~~
 - ~~(2) Ability and potential to earn a living;~~
 - ~~(3) Events such as marriage or education which may affect a beneficiary's financial future.~~~~
- ~~(d) The costs to the Fund of defending a claim in court or litigating instead of settling a claim;~~
- ~~(e) The potential impact upon the Fund of a judgment against the petitioner;~~

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

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

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

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

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

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

~~12.2. Approval of beneficiaries; legal guardians. — The Commissioner 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. Approval. — The Commissioner shall have the power but shall not be required to approve any petition for a settlement submitted pursuant to these Rules. Upon approval or disapproval, all parties shall be notified.~~

~~12.4. Limited review by a court. — No petition approved by the Commissioner pursuant to these Rules 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. Final decisions. — The Commissioner's decision is final and not reviewable by any Court unless the provisions of Subsection 12.4 of these Rules are applicable.~~

~~12.6. Liability after settlement. — Every party to an approved settlement shall sign a written release which absolves the Fund 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.~~

§85-3-9. Transition.

9.1. The commission will continue to operate under these rules until the termination of the commission.

9.2. Upon novation of the employers' excess liability fund to the successor to the commission:

a. The successor to the commission shall continue to offer employers' excess liability coverage until at least June 30, 2008. Nothing in these rules shall prevent the successor to the commission from offering employers' excess liability coverage beyond June 30, 2008.

b. The application for coverage process and application for coverage information required by the successor to the commission or other private carrier shall be governed by the business practices of the successor to the commission or other private carrier.

c. Policy terms, including, but not limited to, payment, exclusions, and conditions of an employers' excess liability contract of insurance coverage between the successor to the commission and an employer are not governed by the provisions of this rule, except insofar as the coverage terms include the elements of "deliberate intention" as contained within the provisions of W. Va. Code §23-4-2(d)(2)(ii).

d. Nothing in these provisions will require the successor to the commission or other private carrier to provide employers' excess liability coverage to an employer. The issuance of a employers' excess liability policy is entirely within the discretion of the successor to the commission or other private carrier.

e. The successor to the commission or other private carrier may decline coverage, or cancel or refuse to renew with sixty (60) days notice; in addition, the successor to the commission or other private carrier may cancel a policy for failure to pay with (fifteen) 15 days notice.

f. Within thirty (30) days prior to the novation of the employers' excess liability fund to the successor to the commission, the successor to the commission and all private carriers of employers' excess liability insurance shall submit to the insurance commissioner their proposed rates, which may be higher than the base rates established by the board of managers or, upon termination of the commission, the industrial council. The insurance commissioner retains authority to disapprove rates in effect if it is determined that the rates are not in compliance with the following:

1. Rates must not be excessive, inadequate or unfairly discriminatory, nor may an insurer charge any rate which if continued will have or tend to have the effect of destroying competition or creating a monopoly.

2. The insurance commissioner may disapprove rates if there is not a reasonable degree of price competition at the consumer level with respect to the class of business to which they apply. In determining whether a reasonable degree of price competition exists, the insurance commissioner shall consider all relevant tests, including:

A. The number of insurers actively engaged in the class of business and their shares of the market;

B. The existence of differentials in rates in that class of business;

C. Whether long-run profitability for private carriers generally of the class of business is unreasonably high in relation to its risk;

D. Consumers' knowledge in regard to the market in question; and

E. Whether price competition is a result of the market or is artificial. If competition does not exist, rates are excessive if they are likely to produce a long-run profit that is unreasonably high in relation to the risk of the class of business, or if expenses are unreasonably high in relation to the services rendered.

3. Rates are inadequate if they are clearly insufficient, together with the income from investments attributable to them, to sustain projected losses and expenses in the class of business to which they apply.

4. One rate is unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses. Rates are not unfairly discriminatory because different premiums result for policyholders with similar exposure to loss but different expense factors, or similar expense factors but different exposure to loss, so long as the rates reflect the differences with reasonable accuracy. Rates are not unfairly discriminatory if they are averaged broadly among persons insured under a group, franchise or blanket policy.

5. The successor to the commission and all private carriers shall thereafter file their rates on an annual basis subject to the approval of the insurance commissioner.

§85-3-10. 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.

COPY

**BEFORE THE
WEST VIRGINIA WORKERS' COMPENSATION
BOARD OF MANAGERS**

IN THE MATTER OF:)	STEVE WHITE, CHAIRMAN
PUBLIC HEARING)	RULE 3 - ADMINISTRATION
(NOVEMBER 19, 2004))	OF EMPLOYER'S EXCESS
)	LIABILITY FUND

Transcript of proceedings had in the above-styled meeting were held as therein appears before the **WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS**, held at the Charleston Civic Center, Suite 209, 200 Civic Center Drive, Charleston, West Virginia, at 1:42 p.m., on the 19th day of November, 2004.

**BILLANTI & ASSOCIATES
COURT REPORTERS
1033 RIDGEMONT DRIVE
ELKVIEW, WV 25071
304-965-7444**

**APPEARANCES:
MEMBERS OF THE WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF MANAGERS**

STEVE WHITE, Chairman

PAUL THOMPSON, Member

GENE BAILEY, Member

BOB PHALEN, Member

MARGARET RICE, Recording Secretary

(VIA TELEPHONE)

DOUGLAS MERRITT, Member

EVERETTE SULLIVAN, Member

INDEX:

Reporter's Certificate.....5

1 (P R O C E E D I N G S)

2 (1:42 P.M)

3 CHAIRMAN WHITE: The next rule we have
4 before us is Rule 3, Administration of Employer's
5 Excess Liability Fund. I hereby declare that the
6 public hearing with respect to Rule 3 is open.
7 Mr. Bowen?

8 MR. BOWEN: Mr. Chairman, I'm sorry, I
9 will reserve and file written comments.

10 CHAIRMAN WHITE: Thank you, Mr. Bowen.
11 Are there further comments with respect to Rule 3?

12 (No responses were given.)

13 CHAIRMAN WHITE: I hereby declare the
14 public hearing with respect to Rule 3 closed.

15 MEMBER PHALEN: Mr. Chairman, in regards
16 to future written comments coming in, will the
17 board members receive copies of those?

18 CHAIRMAN WHITE: I would request that
19 all board members receive comments that come in
20 that are written unless otherwise requested by the
21 board members. Thank you, Mr. Phalen.

22 (WHEREUPON, the hearing was

1

concluded at 1:43 p.m.)

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REPORTER'S CERTIFICATE

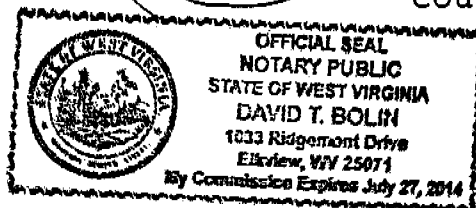
STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, the undersigned, David T. Bolin,
Courter Reporter and Notary Public, do hereby
certify that the foregoing is, to the best of my
skill and ability, a true and accurate transcript
of the proceedings had before the West Virginia
Workers' Compensation Board of Managers as set
forth in the caption hereof, and that this is the
original transcript thereof for the files of the
Committee.

GIVEN UNDER MY HAND THIS 29th
DAY OF NOVEMBER, 2004.

MY COMMISSION EXPIRES JULY, 2014.


Court Reporter



WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
PUBLIC HEARING
NOVEMBER 19, 2004 -- 1:00 P.M.
85SCSR3 - ADMINISTRATION OF THE EMPLOYERS' EXCESS LIABILITY FUND

ATTENDANCE SHEET

The Board is required to keep a list of individuals attending its meetings and of those who wish to address the Board.

NAME	COMPANY	Do you wish To speak? (Yes/No)
T. Anderson	JK	No
Roger Trinker	Stephens & Johnson	No
Adrian Blatter	Conventer	No
M. Keenan	Aerobics	Yes
Hanna B...	Hegler & Johnson	Yes
Darryl Kennedy	Nobody	No

November 19, 2004

T. J. Obrokta, General Counsel
Executive Office
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

Re: Series 3
Administration of the Employers' Excess Liability Fund

Dear Mr. Obrokta:

Please consider these public comments related to the proposed revisions to Series 3 related to the Employers' Excess Liability Fund.

Initially we request that given the purpose for the original creation of the Employers' Excess Liability Fund, which was to provide a safety net to employers related to civil actions claiming damages in excess of workers' compensation benefits, that the new language proposed in subsection 3.1 should be modified as follows:

3.1.a. The commission, may reject an application for subscription to the Fund if there is a reasonable basis to do so in the exercise of its fiduciary responsibility to the Fund, and in its sole discretion, may reject an application for the subscription to the Fund.

We recommend that the deposit required of employers in subsection 3.3 be equal to a quarterly premium, similar to the deposit provisions elsewhere in the Workers' Compensation Act related to premiums, as the change to require that the deposit be equal to an annual premium is overly burdensome and not required for the fiscal solvency of the Fund.

A minor change in subsection 7.1.b. would change the proposed new language to "which has been ruled compensable."

Recent litigation related to this regulation has identified the ambiguity created by having both subsections 7.1.c., which requires notice of claims within twenty-four (24) months of the accident, and 7.5, which permits the insured employer to notify the Fund of any claim or suit as soon as practicable. However, we recommend that instead of keeping the twenty-four (24) month provision in the proposed new rule and deleting the language in subsection 7.5, that just the opposite should occur. Oftentimes claimants with injuries file civil actions which could give rise to coverage through the Fund at or near the two (2) year statute of limitations. Thus, service of process on the employer (and the first notice of the civil action) may occur weeks or even months after the filing of the civil action, well

**Bowles Rice
McDavid Graff & Love_{LLP}**

T. J. Obrokta, General Counsel
November 19, 2004
Page 2

beyond the period in the new rule when the employer must notify the Fund of the case. Thus, to require a twenty-four (24) month notice would preclude coverage when the employer has no notice of the case. Such a change would likely cause courts to agree that the employer's response to the underlying workers' compensation claim is reasonable notice. However, the language of this rule could accommodate this fact pattern by keeping the language of subsection 7.5, which requires reasonable notice as soon as practicable after the employer is notified of the case, and deleting subsection 7.1.c. to eliminate the impracticable time limit and the ambiguity.

We note finally that the Commission should not delay processing existing applications for Fund coverage pending the review of your proposed changes to this rule. That delay precludes coverage required immediately by employers who should not have to file mandamus actions or support the expedited adoption of rules with which they have legitimate concerns in order to operate their businesses with the necessary insurance coverage.

Thank you for considering these comments.

Very truly yours,



Sarah E. Smith

SES/pl
Attachment

Response to Comments

Internal:

Sections regarding "petitions for settlement" as contained in

§§2.8. and 2.9 – Definitions.

§9. Petitions for Settlement.

§10. Contents of Petition.

§11. Review of Petition.

§12. Criteria for Approval.

§13. Modification and/or approval of a petition.

All of these provisions were eliminated because, as a practical matter, this petition process is not workable once a lawsuit is filed. Settlement negotiations do not occur in this fashion.

Internal:

§2.14 was added to define "successor to the commission" as the word is used in the "Transition" section of the rule.

Acordia:

§3.1. Suggests that coverage commence upon receipt of application and deposit without approval by the Commission.

Smith:

3.1.a. Suggestion to change language so that application for coverage may only be rejected if there is a reasonable basis to do so.

Response: Language remains that the Commission may reject the application in its sole discretion.

Smith:

3.3. Suggestion that the deposit only be equal to a quarters' premium.

Response: The deposit remains equal to one year's premium.

Acordia:

§3.6. Suggestion regarding the refund of the last quarter's deposits.

Response: Language was left as is.

Internal:

§5.1.a. Clarified so that all five factors are required prior to coverage for liability.

Smith & Acordia:

7.1.b. Change from "rule" to "ruled"

Response: The exclusions provision was modified and this provision eliminated.

Smith & Acordia:

7.1.c. & 7.5. Recommended changes regarding notification to the Commission concerning claims because of the impracticality of the time limits.

Response: The provisions concerning exclusions were modified to address the expressed concerns so that the insured has 10 days from service of process to notify the Commission that a suit has been filed. Substantial other changes were made to the "exclusions" provisions as a result of stakeholder comment.

Acordia:

8.4. Suggestion that each employer only be required to report names of employees on a quarterly basis.

Internal:

§8.4. The subsection was clarified so that employers cannot add employees to coverage after an injury has occurred, since the employer does not have to insure all of its employees.

Acordia:

§8.9. typo
Corrected

Internal:

§9. As a result of the provisions of SB1004, the successor to the Commission will provide EELF coverage to employers. This provision recognizes this change and provides a mechanism to submit rates to the Insurance Commissioner's office.