WEST VIRGINIA ADMINISTRATIVE RULES
WORKERS' COMPENSATION COMMISSIONER
Chapter 23-4C
Series III
(1983)

EMPLOYERS' EXCESS LIABILITY FUND

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Title 85
Legislative rules

FILED

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

~~WEST VIRGINIA ADMINISTRATIVE REGULATIONS~~
WORKERS' COMPENSATION COMMISSIONER

~~Chapter 23-4C~~
Series ~~III~~ 3
~~(1983)~~C

Subject: These rules provide for the general administration of the Employers' Excess Liability Fund.

Section 1. General

1.01. Scope. These are legislative rules relating 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.

1.02. Authority. These legislative rules are promulgated pursuant to the authority of West Virginia Code, Chapter 23, Article 1, Section 15 and Article 4C, Section 3.

1.03. Filing Date. These rules were proposed on the 30th day of September, 1984, and filed on the 30th day of September, 1984, in the Secretary of State's Office.

1.04. Effective Date. These rules are to become effective on July 1, 1984, as legislative rules.

Section 2. DEFINITIONS

As used in these rules unless the context in which used requires a different meaning:

2.01. Commissioner shall mean the Workers' Compensation Commissioner appointed pursuant to the West Virginia Code 23-1-1.

2.02. Conscious, subjective and deliberate intention shall mean that type of deliberate intention defined by West Virginia Code 23-4-2(c)(2)(i) which shall be excluded from coverage of any Excess Liability policy issued by the Commissioner.

2.03. Fund shall mean the Employer's Excess Liability Fund created by West Virginia Code 23-4C-1 et seq.

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

2.05. 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.

2.06. 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.

2.07. Petitioner shall mean the employer who submits the petition.

2.08. 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.

2.09. Remuneration shall mean all wages paid to employees, whether payable in money or other valuable consideration, and shall include bonuses, commissions, profit sharing, and the reasonable money value of board, rent, housing, lodging, and other goods and services.

Section 3. PREMIUMS AND COVERAGE

3.01. Subscription. An Employer shall apply 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 Commissioner.

3.02. 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.

3.03. Rating. Rates shall apply per $100 of total remuneration of employees working in West Virginia. Base rates shall be established for each of the classes utilized by 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 $130,000 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 $25 shall apply to each quarterly premium.

3.04. 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.

3.05. 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.

3.06. Surcharge for claims. A surcharge of 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 36 months and will be refunded to the employer if the claim or suit is finally resolved with no payment from the Fund.

3.07. Reclassification. The Commissioner 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.

3.08. Deductible. The Commissioner may require 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.

3.09. 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.

Section 4. COVERAGE OF INSURING AGREEMENT

4.01. 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 agrees with the insured:

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 of

the following facts are proven:

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. 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. 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. that notwithstanding the existence of the facts set forth in (1), (2) and (3) above, the insured nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally, and

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

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

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 may make any settlement of the suit or claim as it deems expedient and that the Fund is not obligated to defend any claim or suit after its limit of liability has been exhausted.

Section 5. LIMIT OF LIABILITY

5.01. 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 or more occurrences within four consecutive quarters shall be double the Fund's per occurrence limit.

5.02. 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.

Section 6. POLICY EXCLUSIONS

6.01. Exclusions. This policy does not apply to:

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

(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 of that employee has not been reported to the Fund for any period of time during which this policy has been in effect,

(G) Any liability of the insured for an occupational disease contracted by an employee, or

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

Section 7. CONDITIONS

7.01. 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.

7.02. 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 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 years from the date of termination. When termination occurs during a quarter, a charge of $15 plus 20% of the previous quarter's premium, pro-rated for the uncovered portion of the latest quarter shall be assessed.

7.03. Continuous policy; cancellation for nonpayment. This policy shall remain in effect from quarter to quarter, so long as the required premiums and deposits are paid. The Fund shall have the right to terminate this policy for nonpayment of premium or deposit, upon ten-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 years from the date of termination of coverage. Upon thirty-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, coverage shall continue from quarter to quarter.

7.04. Payroll reporting. Each quarter, the insured shall report to the Fund the names of all employees employed in the State of West Virginia, together with the total remuneration 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 paid for the period of coverage. The insured shall keep proper records and books of account with respect to the remuneration of its employees, and those records and books shall be available for audit by the Fund.

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

7.06. Cooperation. The insured shall cooperate with the Fund 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.

7.07. Voluntary payments and settlements. The Fund shall not be liable for any payment made to any employee, without the written consent of the Fund. 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.

7.08. Subrogation. In the event of any payment under this policy, the Fund 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 rights of subrogation. The insured shall do nothing to prejudice those rights.

7.09. Other insurance. The coverage afforded by this policy applies only after all other insurance coverage applicable to any claim or suit has been exhausted.

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

7.11. 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: Employers' Excess Liability Fund, P.O. Box 3971, Charleston, West Virginia 25339.

Section 8. PETITION FOR SETTLEMENT

8.01. 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 Section 7.11 of these rules.

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

8.03. Signature and verification.

(A) All petitions must be signed by the petitioner and duly verifed 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.

8.04. 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.

Section 9. CONTENTS OF PETITION

9.01. 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 Section 9.02 of these rules.

9.02. 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.

9.03. 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.

9.04. 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.

Section 10. REVIEW OF PETITION

10.1. Completeness. Within 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.

Section 11. CRITERIA FOR APPROVAL

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

11.02. 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.

11.03. Compensability. No petition shall be approved unless the Commissioner shall determine that the provisions of Section 5 and 6 of these rules have been met.

11.04. 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.

11.05. 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 pertinant 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.

Section 12. MODIFICATION AND/OR APPROVAL OF A PETITION

12.01. 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.

12.02. 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.

12.03. 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.

12.04. 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.

12.05. Final decisions. The Commissioner's decision is final and not reviewable by any court unless the provisions of Section 12.04 of these rules is applicable.

12.06. 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 23-4-16 or otherwise.

Section 13. CONFIDENTIALITY OF RECORDS

13.01. 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.

EMPLOYERS' EXCESS LIABILITY FUND

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PUBLIC HEARING

WORKERS' COMPENSATION FUND
EMPLOYERS' EXCESS LIABILITY FUND

A public hearing was held on Monday, November 7, 1983 in Rooms A & B Conference Center, Capitol Complex, Kanawha County, Charleston, West Virginia concerning Regulations to implement the Employers' Excess Liability Fund (Mandolidis Legislation).

The record remained open from 1:00 P.M. until 4:30 P.M.

No one appeared for testimony.

STATE OF WEST VIRGINIA
WORKERS' COMPENSATION FUND, to wit:

I, Grace Day, Reporter for the Workers' Compensation Fund, do hereby certify that the foregoing is a correct record of the proceedings.

Given under my hand this the 14th day of November, 1983.

Grace Day

Grace Day, Reporter

WORKERS' COMPENSATION FUND

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301

JOHN D. ROCKEFELLER IV
Governor

GRETCHEN O. LEWIS
Commissioner

November 14, 1983

The Honorable A. James Manchin
Secretary of State
Capitol Complex
Charleston, West Virginia 25305

Dear Mr. Secretary,

I, Gretchen O. Lewis, the duly appointed Workers' Compensation Commissioner, hereby certify that the attached rules implementing the Employers' Excess Liability Fund initially submitted as proposed legislative rules for filing in the State Register have been open to public comment for at least 30 days. A public hearing was held on November 7, 1983, in accordance with the previously filed Notice of Public Hearing.

At the close of the comment period, no oral or written comments had been received. My staff and I have reviewed these proposed rules and have decided not to amend them in any fashion. Thus, today, I am submitting a formal Notice of Approval of these proposed rules in accordance with the provisions of W. Va. Code 29A-3-9, for filing in the State Register.

The Notice of approval and fifteen (15) copies of these rules are to be filed this same day with the Legislative Rule-Making Review Committee.

Very truly yours,

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE Nov. 14, 1983
Administrative Law Division

Gretchen O. Lewis by
Gretchen O. Lewis
Workers' Compensation Commissioner

WEST VIRGINIA ADMINISTRATIVE RULES
WORKERS' COMPENSATION COMMISSIONER
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SECRETARY OF STATE
THIS DATE 11/14/83
Administrative Law Division

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3.06. Surcharge for claims. A surcharge of 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 36 months and will be refunded to the employer if the claim or suit is finally resolved with no payment from the Fund.

3.07. Reclassification. The Commissioner 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.

3.08. Deductible. The Commissioner may require 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.

3.09. 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.

Section 4. COVERAGE OF INSURING AGREEMENT

4.01. 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 agrees with the insured:

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 of

the following facts are proven:

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. 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. 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. that notwithstanding the existence of the facts set forth in (1), (2) and (3) above, the insured nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally, and

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

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

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 may make any settlement of the suit or claim as it deems expedient and that the Fund is not obligated to defend any claim or suit after its limit of liability has been exhausted.

Section 5. LIMIT OF LIABILITY

5.01. 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 or more occurrences within four consecutive quarters shall be double the Fund's per occurrence limit.

5.02. 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.

Section 6. POLICY EXCLUSIONS

6.01. Exclusions. This policy does not apply to:

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

(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 of that employee has not been reported to the Fund for any period of time during which this policy has been in effect,

(G) Any liability of the insured for an occupational disease contracted by an employee, or

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

Section 7. CONDITIONS

7.01. 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.

7.02. 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 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 years from the date of termination. When termination occurs during a quarter, a charge of $15 plus 20% of the previous quarter's premium, pro-rated for the uncovered portion of the latest quarter shall be assessed.

7.03. Continuous policy; cancellation for nonpayment. This policy shall remain in effect from quarter to quarter, so long as the required premiums and deposits are paid. The Fund shall have the right to terminate this policy for nonpayment of premium or deposit, upon ten-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 years from the date of termination of coverage. Upon thirty-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, coverage shall continue from quarter to quarter.

7.04. Payroll reporting. Each quarter, the insured shall report to the Fund the names of all employees employed in the State of West Virginia, together with the total remuneration 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 paid for the period of coverage. The insured shall keep proper records and books of account with respect to the remuneration of its employees, and those records and books shall be available for audit by the Fund.

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

7.06. Cooperation. The insured shall cooperate with the Fund 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.

7.07. Voluntary payments and settlements. The Fund shall not be liable for any payment made to any employee, without the written consent of the Fund. 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.

7.08. Subrogation. In the event of any payment under this policy, the Fund 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 rights of subrogation. The insured shall do nothing to prejudice those rights.

7.09. Other insurance. The coverage afforded by this policy applies only after all other insurance coverage applicable to any claim or suit has been exhausted.

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

7.11. 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: Employers' Excess Liability Fund, P.O. Box 3971, Charleston, West Virginia 25339.

Section 8. PETITION FOR SETTLEMENT

8.01. 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 Section 7.11 of these rules.

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

8.03. Signature and verification.

(A) All petitions must be signed by the petitioner and duly verifed 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.

8.04. 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.

Section 9. CONTENTS OF PETITION

9.01. 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 Section 9.02 of these rules.

9.02. 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.

9.03. 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.

9.04. 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.

Section 10. REVIEW OF PETITION

10.1. Completeness. Within 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.

Section 11. CRITERIA FOR APPROVAL

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

11.02. 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.

11.03. Compensability. No petition shall be approved unless the Commissioner shall determine that the provisions of Section 5 and 6 of these rules have been met.

11.04. 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.

11.05. 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 pertinant 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.

Section 12. MODIFICATION AND/OR APPROVAL OF A PETITION

12.01. 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.

12.02. 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.

12.03. 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.

12.04. 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.

12.05. Final decisions. The Commissioner's decision is final and not reviewable by any court unless the provisions of Section 12.04 of these rules is applicable.

12.06. 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 23-4-16 or otherwise.

Section 13. CONFIDENTIALITY OF RECORDS

13.01. 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.

EMPLOYERS' EXCESS LIABILITY FUND

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