

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

Form #5

Do Not Mark In This Box

FILED

2005 OCT 28 P 2: 53

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), 23-2C-21(c)

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 _____ NO X

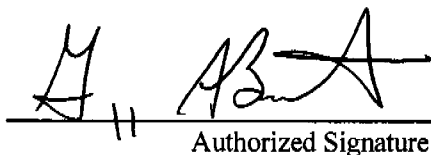
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: * This rule repeals and replaces 85CSR4, "Payment of
Attorney's Fees by the Workers' Compensation
Commissioner"

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 4

TITLE OF RULE BEING PROPOSED: Attorney's Fees

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


Authorized Signature

85.80

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

Form #1

Do Not Mark In This Box

FILED

2005 JUL 14 P 1:54

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code §§23-1-1a(j)(3), 23-2C-21(c)

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: * This proposed rule repeals and replaces 85 CSR 4, "Payment of Attorney's Fees by the Workers' Compensation Commissioner."

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 4

TITLE OF RULE BEING PROPOSED: Attorney's Fees

DATE OF PUBLIC HEARING: August 16, 2005 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia

COMMENTS LIMITED TO: ORAL ☐, WRITTEN ☐, BOTH ☒
COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

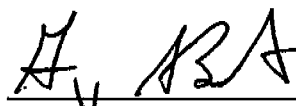
The Department requests that persons wishing to make
comments at the hearing make an effort to submit written
comments in order to facilitate the review of these comments.

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

T.J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

Fax # (304) 926-5372



Authorized Signature



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

July 13, 2005

The Honorable Betty Ireland
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 4
"Attorney's Fees"

Dear Secretary Ireland:

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. The Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 4 for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 4: Attorney's Fees

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>	Unknown	Unknown	Decrease	N/A	N/A
PERSONAL SERVICES	0	0	0	N/A	N/A
CURRENT EXPENSE	0	0	0	N/A	N/A
REPAIRS & ALTERNATIONS	0	0	0	N/A	N/A
EQUIPMENT	0	0	0	N/A	N/A
OTHER: Benefit related payments	Unknown	Unknown	Unknown	N/A	N/A

2. Explanation of above estimates:

Proposed changes since the last filing for this rule address the responsibilities for the Workers' Compensation Commission (commission) to pay attorney's fees related to certain claims denial rulings that are determined to be unreasonable. The above estimates are based on the assumption that the rule changes become effective in the current fiscal year (FY'06). A change in the amount of attorney's fees paid by the commission could occur for FY'06 as a result of the proposed changes. However, there is no historical data available to estimate the number of unreasonable claims denials that may be asserted in protests, the effect on the amounts of attorney's fees paid, or the limitations on the attorney's fees paid by the commission as a result of the reversal of unreasonable claims denial rulings. Subject to the governor issuing the proclamation set forth in chapter twenty-three, article 2C of the Code of West Virginia that terminates the Workers' Compensation Commission, after December 31, 2005, the responsibility for the majority of these resulting protest decisions will remain with the Office of Judges as an operating unit of the Insurance Commission.

3. Objectives of this rule:

This rule establishes and defines the policy for the payment of attorney's fees related to the reversal of unreasonable claims denial rulings by private carriers, including the successor to the commission, and self-insured employers.

Rule Title: Title 85 Series 4: Attorney's Fees

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that there will be no direct economic impact from the rule changes.

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

It is expected that there will be no impact from the rule changes.

C. Economic Impact on Citizens/Public at Large.

The rule changes will not have a direct economic impact on the citizens of West Virginia.

Date: _____

7/13/05

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 4
Attorney's Fees**

Pursuant to Senate Bill 1004, First Special Session, 2005, and the provisions of W. Va. Code §23-2C-21(c), the Office of Judges may award attorney fees to a claimant after a determination that certain claim denials made by the successor to the Commission, other private carriers or self-insured employers are unreasonable. The limited circumstances involve the unreasonable denial of the compensability of a claim, the unreasonable denial of an initial award of temporary total disability or the unreasonable denial of an authorization of medical benefits.

This rule implements the provisions of W.Va. Code §23-2C-21(c).

**TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION**

**SERIES 4
ATTORNEY'S FEES.**

FILED

2005 OCT 28 P 2:53

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§85-4-1. General.

1.1. Scope. This exempt legislative rule relates to compliance with orders of the Office of Judges directing private carriers to attorney fees and costs with regard to certain types of denials of benefits issued by a private carrier.

1.2. Authority. W. Va. Code §§23-1-1; 23-1-1a(j)(3) and 23-2C-21(c). Pursuant to W. Va. Code §23-1-1a(j)(3), rules adopted by the board of managers and the commission are not subject to legislative approval as would otherwise be required under W. Va. Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date.

1.4. Effective Date.

1.5. Repeal of former rule. This rule repeals and replaces 85 C.S.R. 4, "Payment of Attorney's Fees by the Workers' Compensation Commissioner" filed and effective on May 23, 1985.

§85-4-2. Definitions.

As used in this rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

2.1. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.

2.2. "Board" means the workers' compensation board of managers created pursuant to the provisions of W. Va. Code §23-1-1a.

2.3. "Commission" means the workers' compensation commission created pursuant to the provisions of W. Va. Code §23-1-1.

2.4. "Code", "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

2.5. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W. Va. Code §23-1-1b.

2.6. "Insurance Commissioner" means the insurance commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code.

2.7. "Office of Judges" refers to the Office of Judges, as set forth in W. Va. Code §23-5-8.

2.8. "Private Carrier" means any insurer, including the successor to the Commission, authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code, but shall not include self-insured employers.

2.9. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

§85-4-3. Denial rulings; types.

3.1. The Office of Judges may determine that certain denial rulings by a private carrier or self-insured employer are unreasonable and, upon reversal of the denial, award attorney's fees to the claimant to be paid by the private carrier or self-insured employer. ~~In order to preserve the right to seek attorney fees, the claimant or the claimant's legal representative, whichever is applicable, is required to state in their initial protest to the denial ruling that the ruling is unreasonable.~~

3.2. Denial rulings; limited types.

a. The Office of Judges may only award attorney's fees to a claimant when the unreasonable denial ruling:

1. Denies the compensability of a claim;
2. Denies an initial award of temporary total disability; or
3. Denies an authorization for medical benefits.

3.3. The Office of Judges shall not award attorney's fees to a claimant resulting from any other type of denial ruling by a private carrier or self-insured employer.

§85-4-4. Payment of awards.

4.1. An award of reasonable attorneys' fees and costs actually incurred in reversing an unreasonable denial decision shall be paid by a private carrier or self-insured employer.

4.2. Reasonable attorneys' fees incurred in reversing an unreasonable denial of compensability or an initial award of temporary total disability shall be the attorney's fees allowed pursuant to W. Va. Code §23-5-16. Attorney's fees shall be payable only upon the conclusion of all litigation and appeals if the denial decision has been reversed and if the Office of Judges has determined that the denial decision is unreasonable.

a. Attorneys shall not be entitled to receive attorney fees under both the provisions of W. Va. Code §23-5-16 and this rule. Any amounts received in excess of the statutory amount shall be reimbursed to the claimant for incurred attorney's fees.

4.3. Reasonable attorneys' fees incurred in reversing an unreasonable denial of an authorization of medical benefits will be calculated at a rate of \$110 per each hour worked through a final decision by the Office of Judges, up to a maximum of \$1,500. The attorney will be paid \$110 per hour worked for any appellate work at the Board of Review and West Virginia

85CSR4
Draft 10-9-05

Supreme Court of Appeals, up to a maximum additional \$1,500. Attorney's fees shall be payable only upon the conclusion of all litigation and appeals if the denial decision has been reversed and if the Office of Judges has determined that the denial decision is unreasonable. The hours worked shall begin to accrue upon the injured workers' receipt of the denial of medical authorization.

4.4. Costs actually incurred in the process of obtaining a reversal of the unreasonable denial is limited to the following items incurred after the date of the denial decision:

- a. Court filing costs;
- b. Service of process costs;
- c. Transcription costs;
- d. Costs of preparation of medical reports; and
- e. Costs of testimony of expert witnesses.

4.5. In no event shall the costs of the preparation of a medical reports or the testimony of expert witnesses exceed the normal and customary fee schedule of the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable.

4.6. The attorney's fees and actual costs shall be paid upon petition presented to the private carrier or self-insured employer. The fee petition shall provide the contract of representation, an itemization of all legal services provided and the amount of time (expressed in tenths of an hour) expended in providing them, and an itemized listing of the actual costs incurred in the litigation of the matter.

4.7. In no event shall attorney's fees and costs be awarded for disputes regarding the amount contained within the fee petition presented to the private carrier or self-insured employer.

§85-4-5. Appeals of Office of Judges' decisions.

Determinations made by the Office of Judges to award or not award attorney's fees to the claimant shall be appealable in accordance with the provisions of W. Va. Code §23-5-10 ~~of the West Virginia Code~~.

§85-4-6. Severability.

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

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

IN THE MATTER OF:	) HEARING DATE:
	) AUGUST 16, 2005
PUBLIC HEARING:	)
85CSR4 - ATTORNEY'S FEES	)

Transcript of proceedings had in the above-styled matter, were held as therein appears at the Charleston Civic Center, Rooms 207-209, 100 Civic Center Drive, Charleston, West Virginia, on the 16th day of August, 2005, 1:15 p.m., pursuant to notice, as transcribed from audio cassette recordings provided by the Workers' Compensation Commission.

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

APPEARANCES**BOARD MEMBERS****ROB ALSOP, BOARD CHAIR****GENE F. BAILEY****CHRIS JARRETT****DOUGLAS MERRITT
(via telephone)****BOB PHALEN****CRAIG SLAUGHTER****VIC SPROUSE****EVERETTE E. SULLIVAN****PAUL E. THOMPSON****RICHARD HUMPHREYS****PAUL HARDESTY****STAFF MEMBERS****DR. JAMES BECKER****GREGORY BURTON****ALAN DRESCHER****TIMOTHY LEACH****BECKY NEAL****T. J. OBROKTA, JR.****RANDALL SUTER**

I N D E X

PUBLIC HEARING, RULE 4 4

Reporter's Certificate.....7

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P R O C E E D I N G S

1:00 p.m.

CHAIRMAN ALSOP: I call to order this meeting of the Workers' Compensation Board of Managers. Margaret, if you would at this time call the roll.

(WHEREUPON, roll was called.)

CHAIRMAN ALSOP: The next item on our agenda is a series of public hearings. I will open the public hearing for 85CSR4 relating to attorney's fees.

Looking at the agenda sheet, it appears that no one has signed up to speak on this rule, but if anybody would like to do so, they may come forward now.

BOARD MEMBER PHALEN: I just have a question, Mr. Chairman, in regards to, I believe it's 4.3 on the attorney fees. Previously there was discussion regarding the unreasonable denial. In the event that a claimant was successful through the appellate process, that claimant could still be denied attorney fees.

1 I just have a question as to whether
2 or not that has been addressed or if it remains
3 the same.

4 MR. LEACH: Guest speaker, Mr. Phalen.
5 Tim Leach, Administrative Law Judge, Office of
6 Judges.

7 The answer to your question is that
8 the Code section provides that the attorney fee is
9 approved only if the initial decision was
10 unreasonable. So a person could win on appeal and
11 still have the first decision be considered
12 reasonable based upon the evidence or the record
13 that was available to the decision maker at the
14 time they made the decision.

15 It's not based upon hindsight. It's
16 not Monday morning quarterbacking where we or the
17 supreme court looks back and says, knowing what we
18 know today, they made the wrong decision
19 yesterday. It's whether they made an unreasonable
20 decision yesterday based upon the record that they
21 had at that time.

22 So the answer to your question is

1 it's unchanged because we believe that's how the
2 statute is intended to be read.

3 BOARD MEMBER PHALEN: Thank you, Judge
4 Leach.

5 CHAIRMAN ALSOP: Any further comment or
6 question?

7 (No response.)

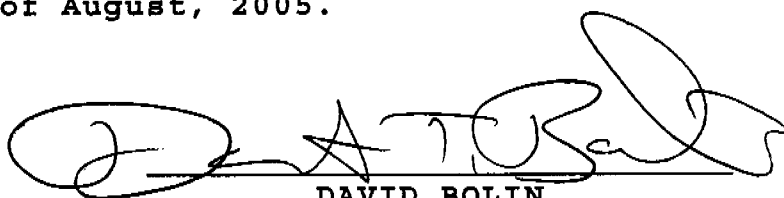
8 CHAIRMAN ALSOP: If not, we'll close the
9 public hearing for Rule 4 relating to attorney's
10 fees.

11 (WHEREUPON, the hearing
12 was adjourned.)

REPORTER'S CERTIFICATE

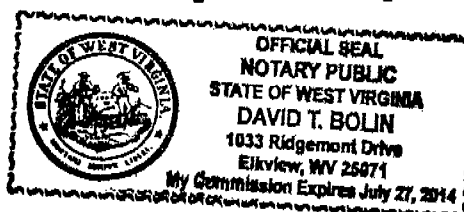
I, DAVID T. BOLIN, a Court Reporter and Notary Public in and for the State of West Virginia, hereby certify that the foregoing is a true and correct transcript of all proceedings had and evidence adduced, together with all the objections made and rulings thereon, and exceptions thereto, as stated in the caption hereto, as transcribed from an audio cassette recording supplied by the Workers' Compensation Commission and transcribed into the English language.

Given under my hand and official seal
this 22nd day of August, 2005.



DAVID BOLIN
Court Reporter and
Notary Public

My commission expires July 27, 2014.



WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS

PUBLIC HEARING

AUGUST 16, 2005 – 1:00 P.M.

85CSR4 "ATTORNEY'S FEES"

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)
Bill Gerwig	Gerwig Law Office	No
Karen Byrnes	Frank Oaks	
Teressa Shibadaux	Acordia Employee Service	
Connie Saunders	Saunders Staffing	Yes
Roger Triche	Stepke & Johnson	No

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July 14, 2005

Via Facsimile

T.J. Obrokta, Legal Counsel
Workers' Compensation Commission
P.O. Box 431
Charleston, WV 25322

*Re: Comment
Title 85 Series 4-4
Attorney Fees*

Dear Mr. Obrokta:

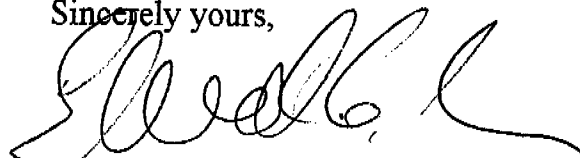
I am in receipt of prosed Rules 85 Series 4 relating to attorney fees.

My comment relates to the hourly rate and the "ceilings" as expressed 85-4-4.3. As you recall we had this discussion of the issue of attorney fees as it relates to permanent total disability claims.

There is a lack of explanation as to how the hourly rate and the maximum payable are determined. What is the basis for the determination of an hourly rate of \$110.00? No attorney I know works at that hourly rate in the private sector. If a survey has been made which forms the basis of the hourly rate I believe that such survey should be disclosed.

I appreciate the opportunity to comment.

Sincerely yours,



Edward G. Atkins

EGA/tmf

Response to Comments

August 16, 2005

Robert Phalen (question from Board of Managers).

Comment: Mr. Phalen raised the question of whether a claimant who prevails in his/her appeal would be eligible to have their attorney's fees paid under the rule.

Response: In order to qualify for attorney's fees under this rule and the statute, the carrier must unreasonably deny certain types of benefits to the claimant. In order to determine whether the initial denial is unreasonable, the Office of Judges is required to look at the evidence that the claims adjuster had in front of him/her when the denial was made. It would be fundamentally unfair to base this determination on evidence later introduced during the appeal process. No change.

July 14, 2005

Atkins.

Comment: Mr. Atkins requests the basis for the determination of the \$110 per hour attorney's fee rate.

Response: The \$110 per hour figure is the same as that used in 85CSR5, "Permanent Total Disability." No change made.

3.1.

Comment: Office of Judges. Request that the last sentence of this section be deleted as it would result in unnecessary protests.

Response: Agreed.