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1985 MAY 23 PM 3:23

WORKERS' COMPENSATION FUND

OFFICE OF
SECRETARY

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE
ARCH A. MOORE, JR.
Governor

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301

MARY MARTHA MERRITT
Commissioner

May 23, 1985

NOTICE OF FINAL FILING - LEGISLATIVE RULE

LEGISLATIVE RULE: Payment of Attorney Fees by the Workers'
Compensation Commissioner, Series IV.

The attached legislative rule is hereby final filed with the Secretary
of State by Workers' Compensation Fund
as authorized by Senate Bill 399 Section 64-2-23(1)(15)(b).

Mary Martha Merritt
Commissioner



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OFFICE OF THE SECRETARY OF STATE

STATE OF WEST VIRGINIA
SECRETARY OF STATE

Charleston 25305

May 23, 1985

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Secretary of State

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Special Assistant

(Plus all the volunteer
help we can get)

PROPOSED RULES

STATE REGISTER FILING

=====

AGENCY Workers' Compensation Fund

CONTACT PERSON William Mitchell PHONE 348-2580

TYPE OF RULE Legislative

TITLE OF RULE Payment of Attorney Fees by the Workers' Compensation
Commissioner.

CHAPTER 23 ARTICLE 5 SERIES IV

AUTHORITY 23-1-15

CHECK APPLICABLE ITEMS BELOW TO SHOW KIND OF ACTION BEING TAKEN

- NEW RULE
- AMENDMENTS TO EXISTING RULE
- REPEAL OF EXISTING RULE
- NOTICE OF HEARING
- NOTICE OF AGENCY APPROVAL (legislative rules only)
- NOTICE OF AGENCY ADOPTION (interpretive & procedural rules only)

NOTE: ALL FILINGS REQUIRE ONLY ONE COPY, EXCEPT FINAL FILING OF RULES WHICH REQUIRES AN ORIGINAL AND A COPY.

- FINAL FILING
- FIRST EMERGENCY FILING
- SECOND EMERGENCY FILING

SENATE BILL NO. 418

(By Mr. R. Williams

Introduced March 6, 1985

referred to the Committee on the Judiciary

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10 A BILL to amend article two, chapter sixty-four of the code
11 of West Virginia, one thousand nine hundred thirty-one,
12 as amended, by adding thereto a new section, designated
13 section twenty-three (one)(fifteen), relating to
14 authorizing the workers' compensation commissioner to
15 promulgate legislative rules relating to payment of
16 attorney's fees.

17 Be it enacted by the Legislature of West Virginia:

18 That article two, chapter sixty-four of the code of West
19 Virginia, one thousand nine hundred thirty-one, as amended,
20 be amended by adding thereto a new section, designated
21 section twenty-three (one)(fifteen), to read as follows:

22 ARTICLE 2. EXECUTIVE AGENCY AUTHORIZATION TO PROMULGATE
23 LEGISLATIVE RULES.

24 §64-2-23(1)(15). Workers' compensation commissioner.

25 The legislative rules filed in the state register on the
26 twenty-fifth day of October, one thousand nine hundred

1 eighty-four, modified by the workers' compensation
2 commissioner to meet the objections of the legislative
3 rule-making review committee and refiled in the state
4 registered on the fifth day of December, one thousand nine
5 hundred eighty-four, relating to the workers' compensation
6 commissioner (payment of attorney's fees) are authorized.

7

8 NOTE: The purpose of this bill is to authorize the
9 workers' compensation commissioner to promulgate legislative
10 rules relating to payment of attorney's fees.

11 This section is new; therefore, strike-throughs and
12 underscoring have been omitted.

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H. B. 1600

(By Delegate Casey)
(Introduced March 6, 1985; referred to the
Committee on the Judiciary)

A BILL to amend article two, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section twenty-three (one)(fifteen), relating to authorizing the workers' compensation commissioner to promulgate legislative rules relating to payment of attorney's fees.

Be it enacted by the Legislature of West Virginia:

That article two, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section twenty-three (one)(fifteen), to read as follows:

ARTICLE 2. EXECUTIVE AGENCY AUTHORIZATION TO PROMULGATE LEGISLATIVE RULES.

§64-2-23(1)(15). Workers' compensation commissioner.

The legislative rules filed in the state register on the twenty-fifth day of October, one thousand nine hundred

1600

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WORKERS' COMPENSATION FUND

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

May 23, 1985

MARY MARTHA MERRITT
Commissioner

Promulgation History Abstract

Rule Title: Payment of Attorney Fees by the Workers' Compensation Commissioner.

Rule Type: Legislative.

Filed Notice for Public Hearing: September 6, 1984.

Public Hearing Held: October 4, 1984.

Filed Agency Approved Rule: October 25, 1984.

Filed Agency Approved Rule with LRMRC: October 25, 1984.

Action by LRMRC: Approved with modification, December 4, 1984.

Legislative Action: Authorized in Senate Bill 399, W.Va. Code, 64-2-23(1)(15)(b). Passed April 13, 1985; in effect from passage.

Final Rule Filed with Secretary of State: May 23, 1985.

Effective Date: May 23, 1985.

A handwritten signature in cursive script that reads "Mary Martha Merritt".

Mary Martha Merritt
Commissioner

Entered

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WEST VIRGINIA LEGISLATIVE RULES
WORKERS' COMPENSATION COMMISSIONER
Chapter 23-5
Series IV

STATE OF WEST VIRGINIA
SECRETARY OF STATE

Title: Payment of Attorney Fees by the Workers' Compensation
Commissioner.

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WORKERS' COMPENSATION FUND

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301

JOHN D. ROCKEFELLER IV
Governor

TIMOTHY E. HUFFMAN
Commissioner

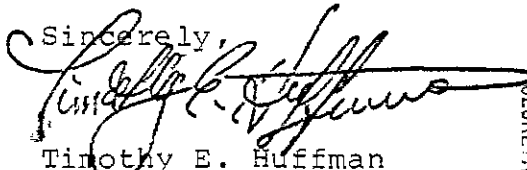
November 9, 1984

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

Dear Mr. Secretary:

I, Timothy E. Huffman, the duly appointed Workers' Compensation Commissioner hereby certify that the attached rules implementing the Employers' Excess Liability Fund are authorized legislative rules filed pursuant to the provisions of West Virginia Code, Chapter 23, Article 1, Section 15 and Chapter 23, Article 4C, Section 3. These rules were authorized by the West Virginia Legislature with the passage of Senate Bill No. 425.

I hereby submit two (2) copies of West Virginia Administrative Regulations, Chapter 23, Article 4C, Section 3, Series III (1983) for filing in the State Register. I further certify that the enclosed rules are true and accurate as finally authorized by the West Virginia Legislature, and are being promulgated in accordance with Chapter 29A, Article 3, Section 13 of the West Virginia Code, and shall become effective thirty days after filing in the State Register. These rules do not replace or amend any existing rules.

Sincerely,

Timothy E. Huffman
Commissioner

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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Enclosures

Title 85

~~WEST VIRGINIA~~ LEGISLATIVE RULES
WORKERS' COMPENSATION COMMISSIONER

~~Chapter 23-56~~
Series ~~IVe 4~~

Title: Payment of Attorney Fees by the Workers' Compensation
Commissioner.

Section 1. GENERAL

1.1. Scope. These are Legislative Rules relating to compliance with court orders directing the Commissioner to pay from the Workers' Compensation Fund attorney fees and expenses to attorneys who represent claimants in connection with workers' compensation claims.

1.2. Authority. These Legislative Rules are promulgated pursuant to the authority of West Virginia Code, Chapter 23, Article 1, Section 15, and Article 4, Section 6, and Article 5, Section 5, as judicially interpreted by the Supreme Court of Appeals of West Virginia in the case of Meadows v. Lewis, W. Va. , 307 S.E.2d 625 (1983).

1.3. Filing Date. These rules were filed on the 23rd day of May, 1985, in the Secretary of State's office.

1.4. Effective Date. These rules became effective on the 23rd day of May, 1985.

1.5. Definitions. As used in these rules:

- A. Commissioner shall mean the Workers' Compensation Commissioner appointed pursuant to West Virginia Code, Chapter 23, Article 1, Section 1.
- B. Fee Petition or Petition shall mean the petition or application for an award of attorney fees and expenses from the Workers' Compensation Fund submitted to the Commissioner by a claimant's attorney, including all attachments and supporting documentation.
- C. Petitioner shall mean a claimant's attorney who submits a fee petition to the Commissioner.
- D. Dependent or Surviving Dependent shall mean a dependent as defined in West Virginia Code, Chapter 23, Article 4, Subsection 10 (d).

Section 2. COMPENSABLE REPRESENTATION

2.1. Court Order. Attorney fees and expenses shall be paid from the Workers' Compensation Fund when, and only when, the Commissioner is directed by court order to do so. Payment shall be made in accordance with such order and the limits and guidelines established by these rules.

Section 3. FEE PETITION

3.1. Petition by Attorney. The Commissioner shall consider payment of reasonable attorney fees and expenses from the Workers' Compensation Fund upon receipt of a fee petition prepared and submitted by a claimant's attorney in accordance with a court order, which petition must satisfy all the requirements of these rules.

Section 4. CONTRACT FOR LEGAL SERVICES

4.1. Agreement and Payment. The petitioner must provide the following in support of the fee petition:

- A. A copy of the contract for legal services entered into by the attorney and client, and any other fee or payment agreement entered into, relating to the claim in which payment is sought.
- B. A written disclosure of all prior payments for services and reimbursement of expenses made by the client to the attorney, relating to the claim in which payment is sought.
- C. A statement that the attorney will neither charge nor receive any further payment for services or reimbursement of expenses from the client relating to the issue or issues involved in the subject course of litigation upon which the claim for attorney fees and expenses is based.

4.2. Client Notification. The attorney shall be responsible for providing the client a copy of the fee petition and explaining it to the client.

Section 5. DUTIES OF ATTORNEYS AND OTHER EMPLOYEES

5.1. Necessity of Services. The services performed by the attorney and other persons must be reasonably necessary to establish the claimant's entitlement to benefits.

5.2. Status of Employees. The fee petition must provide a thorough record of the necessary work performed, which record must have been compiled contemporaneously with the performance of the work, indicating the professional status of each person performing such work, with the appropriate billing rate for each person, the dates on which each duty was performed, and the time devoted by each person to each duty.

5.3. Duties of Paralegal Assistants. The duties performed by a paralegal assistant are compensable, but at an hourly rate attributable to that employee.

5.4. Duties of Secretaries and Clerks. The duties performed by secretaries and clerks are not separately compensable, but are considered an element of the firm's overhead costs.

Section 6. TIME EXPENDED

6.1. Billing for Necessary Services. The amount of time reported must be reasonably related to the service provided in order to be compensable. Time must be reported in increments of one-tenth of an hour.

6.2. Pre-Litigation Services. Time spent prior to a determination that litigation is necessary to establish the claimant's entitlement is compensable, provided that the work was reasonably related to the issue that was litigated.

6.3. Post-Litigation Services. A reasonable amount of time spent by an attorney after litigation to explain, by letter or appointment, the results of the litigation and the nature of the claimant's entitlement is compensable.

6.4. Preparation of Fee Petition. Time spent preparing the fee petition is compensable, in an amount not to exceed twenty-five dollars (\$25.00).

6.5. Litigation of Award of Attorney Fees and Expenses. Time expended by the petitioner either in successfully defending an award of attorney fees and expenses upon an employer's protest and/or appeal, or successfully obtaining an increased award upon the petitioner's protest and/or appeal, is compensable.

6.6. Educational Activities. Time spent attending CLE seminars, workers' compensation seminars, hearings on proposed regulations, hearings in other workers' compensation claims, and other general educational activities is not compensable.

Section 7. REIMBURSEMENT OF EXPENSES

7.1. Incidental Expenses. Necessary incidental expenses that are directly allocable to the claim such as long distance calls, copying, photographs, etc. are compensable. Telephone calls cannot be reported in aggregate, but must be reported individually with a brief identification of the party called and the purpose of the call.

7.2. Travel Expense. Travel expenses are compensable if the description thereof includes detailed information about the items of expense, dates, times, and the activity conducted relating to the issue or issues in litigation. Items of expense and amounts payable shall be limited to those prescribed by the Travel Regulations promulgated by the Department of Finance and Administration.

7.3. Inter-State Travel. The cost of long distance travel should be avoided and/or limited to the extent possible. Alternative methods of case development should be utilized whenever possible. For instance, the engagement of co-counsel and the utilization of depositions, courtesy hearings docketed by workers' compensation agencies in other states, interrogatories, etc. are encouraged in the interest of preserving the Fund for maximum disbursement in the form of benefits paid to claimants. The cost of inter-state travel will be reimbursed only if it is thoroughly justified as necessary and reasonable.

Section 8. FEE LIMITS

8.1. Hourly Attorney Fee Rates. The criteria of Disciplinary Rule 2-106 of the Code of Professional Responsibility shall be considered in determining reasonable hourly rates. Out-of-court work shall be compensated at not less than \$50.00 per hour and not more than \$75.00 per hour. In-court work shall be compensated at not less than \$70.00 per hour and not more than \$100.00 per hour. Compensation at such hourly rates shall be subject to the limits set forth in Sections 8.2, 8.3, and 8.4 below.

8.2. Maximum Fees. The statutory limit upon fees prescribed by West Virginia Code, Chapter 23, Article 5, Section 5, shall apply in all cases, notwithstanding the number of hours expended, the allowable hourly rates, or other considerations.

8.3. Two Hundred Eight Week Limit. The statutory limit of twenty percent of the benefits paid during a period of two hundred eight weeks shall be deemed to mean "per award" as opposed to "per claim". For example, in a single claim an attorney could conceivably receive up to twenty percent of up to two hundred eight weeks benefits paid pursuant to a post-litigation award of temporary disability benefits, and could thereafter receive up to twenty percent of up to two hundred eight weeks benefits paid pursuant to a post-litigation award of permanent disability benefits. *

8.4. Computation of Twenty Percent Limit. The basis for computation of the statutory twenty percent limit shall be as follows:

- A. In those cases which involve the issue of the claimant's entitlement to temporary disability benefits, and/or the claimant's entitlement to permanent disability benefits, or a surviving dependent's entitlement to dependents' benefits, the basis for computation shall be the dollar amount of the disability benefits or dependents' benefits received by the claimant or dependent as a direct result of the protest or appeal and subsequent litigation. The basis shall not include the dollar amount of the benefits granted by an order of the Commissioner which was protested, since entitlement to such portion of the total benefits ultimately awarded was established without the intervention of legal representation.

- B. In those cases which involve only the issue of the claimant's entitlement to medical expense benefits and/or vocational rehabilitation benefits, the basis for computation shall be an amount to be determined by the Commissioner, considering the criteria of these rules, but shall in no event be more than the dollar value of two hundred eight weeks of total disability benefits calculated at the benefit rate or rates applicable to the claim involved.

Section 9. ACTION UPON PETITION; NOTICE; REVIEW

9.1. Interim Notice. If upon review of the fee petition it shall appear that additional or more specific information is needed the petitioner shall be notified thereof and provided an opportunity to submit such information for consideration.

9.2. Notice of Decision. The Commissioner shall give notice of the action taken upon the petition to the petitioner and the parties to the claim in the form of a protestable order, pursuant to the provisions of West Virginia Code, Chapter 23, Article 5, Section 1.

9.3. Review. If the petitioner, the employer, or the claimant or dependent shall feel aggrieved by the action of the Commissioner in granting or denying an award of attorney fees and expenses, the right to review provided by West Virginia Code, Chapter 23, Article 5, Sections 1, 3, and 4 shall be applicable.

Section 10. PAYMENT OF FEES

10.1. Payment Based Upon Final Order. After the applicable period for protest or appeal of an order of the Commissioner or appellate authority granting an award of attorney fees and expenses has expired and such order has become final, the Commissioner shall issue payment from the Workers' Compensation Fund pursuant to said final order, payment to be made as prescribed below. Attorney fees and expenses shall not be charged against an employer's account, either directly or by means of a pay order in the case of a self-insured employer.

10.2. Payee. Payment shall be made jointly to the petitioner and client.

10.3. Payment of Co-Counsel. The Commissioner shall not issue payment to co-counsel.

10.4. Basis of Award; Lump Sum Payments; Installment Payments. If the award of attorney fees and expenses is based upon benefits that have been paid or accrued, payment shall be in a lump sum. If, however, all of the benefits constituting the basis of the award have not accrued at the time payment is to be made, payment shall be issued for that portion of an award based upon accrued benefits and the balance of the payment shall be made in future installments to be issued concurrently with the issuance of future benefit payments.

Workers' Compensation Fund
Leg. Rule, 23-5
Series IV, Sec. 10

10.5. Reimbursement of Client. The petitioner shall be responsible for reimbursement of the client in the amount of any payments previously received by the petitioner from the client for services and expenses which are thereafter compensated by an award of attorney fees and expenses paid by the Commissioner.