WORKERS' COMPENSATION FUND

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301

JOHN D. ROCKEFELLER IV
Governor

TIMOTHY E. HUFFMAN
Commissioner

October 25, 1984

FILED
1984 OCT 25 AM 10:07
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Mr. A. James Manchin
Secretary of State
State Capitol
Suite 157-K
Executive Office
Charleston, WV 25305

Re: Agency Approved Proposed
Legislative Rules of the
Workers' Compensation
Commissioner, Series IV, V,
and VI
Filed October 25, 1984

Dear Mr. Manchin:

Enclosed herewith for filing in the State Register are two copies of Agency Approved Proposed Legislative Rules promulgated by the Workers' Compensation Commissioner, and supporting documentation.

The filing includes three series of rules, designated Series IV, Series V, and Series VI, each of which is referred to below. These rules are promulgated for the purpose of supplanting those Emergency Legislative Rules bearing the same designations which were filed in your office on June 6, 1984, and are presently in effect.

A public hearing was held at 1:00 p.m. on October 4, 1984, to receive oral and written comment upon the proposed rules. Notice of the hearing was filed in the State Register, notice was served by a Class I Legal Advertisement published in 34 newspapers throughout the state, and copies of the proposed rules were distributed in the Fund's Field Offices and at Workers' Compensation hearings. A copy of the transcript of the hearing and a copy of the written comment received are enclosed herewith. The comment received was duly considered and some of the recommended revisions were adopted. Revisions are for clarification of provisions and establishment of procedures based upon experience and reasonable future expectations.

Revisions of the emergency rules are denoted as follows: (1) deleted language is stricken through, (2) additions are underlined, and (3) additions to titles are double underlined.

Re: Agency Approved Proposed Legislative Rules of the Workers' Compensation Commissioner, Series IV, V, and VI
Filed October 25, 1984

A Fiscal Note including a narrative discussion of the fiscal implications regarding each series of rules and an estimate of projected additional administrative cost is enclosed herewith.

A copy of the notice of agency approval of the proposed legislative rules and submission of the rules to the Legislative Rule-Making Review Committee is enclosed herewith.

The following is a statement of the circumstances which require the promulgation of these rules and a brief summary of the content of the rules.

All three series of rules pertain to subject matter that is integrally related to the administration of the Workers' Compensation Fund and its influence upon the health and welfare of injured workers and their dependents. Also, all three series of rules are promulgated for the express purpose of compliance with directives of the Supreme Court of Appeals of West Virginia.

In the case of UMWA, et al v. Lewis, W.Va. , 309 S.E.2d 58 (1983), the Supreme Court of Appeals of West Virginia ordered the Workers' Compensation Commissioner to ".....establish a procedure by which a claimant can institute an action to suspend or terminate an employer's status as a self-insurer, or to have a substantial fine, payable to the claimant, levied against the employer when a self-insurer is not meeting obligations to claimants....." These rules are designed to accomplish compliance with the order of the Court.

In the case of Meadows, et al v. Lewis, W.Va. , 307 S.E.2d 625 (1983), the Supreme Court of Appeals of West Virginia interpreted pertinent provisions of the West Virginia Code as providing that the Commissioner is required, in certain circumstances, to pay attorney fees and expenses to claimants in addition to the benefits they receive. Such fees and expenses have not previously been paid from the Workers' Compensation Fund. The purpose of these rules is to provide systematic administrative management of the action mandated by the Court.

In the case of Meadows, et al v. Lewis, W.Va. , 307 S.E.2d 625 (1983), the Supreme Court of Appeals of West Virginia directed that the Workers' Compensation Commissioner promulgate administrative rules and regulations specifying internal procedural time limits through which adjudications and awards are made. The essential purpose therefor is to promote and protect the health and welfare of injured workers and their dependents by prompt, efficient delivery of benefits to which they are entitled.

Re: Agency Approved Proposed
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The representative of the agency who may be contacted for further information regarding these proposed rules is William Mitchell, Senior Counsel, telephone number 348-2580.

Thank you for your cooperation in this matter.

Very truly yours,

Timothy E. Huffman
Commissioner

TEH:WM:cm

Enclosures

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Series IV--Attorney Fees
Series V---Self-Insurers
Series VI--Procedural Time Limits

October 25, 1984

Type of Rule: X Legislative _____ Interpretive _____ Procedural

Agency Workers' Compensation Fund Address 601 Morris Street

Charleston, WV 25301

1. Effect of Proposed Rule	ANNUAL Increase	Decrease	FISCAL YEAR Current	Next	Thereafter
Estimated Total Cost	$6,601,452	$	$17,163,443	$18,021,615	$18,879,787
Personal Services	3,143,568		7,897,637	8,292,519	8,687,401
Current Expense	1,914,039		6,195,895	6,505,690	6,815,485
Repairs and Alterations	---		---	---	---
Equipment	442,525		602,175	632,284	662,393
Other S.S., Ret., & Ins.	1,101,320		2,467,736	2,591,123	2,714,510

2. Explanation of above estimates.

Estimate based upon the administrative cost related to creation and staffing of 227 additional positions in the Workers' Compensation Fund.

3. Objectives of these rules:

Series IV---To provide for systematic administrative management of the payment of attorney fees and expenses from the Workers' Compensation Fund, as directed by the Supreme Court of Appeals.

Series V----To establish a procedure by which a claimant can institute an action against a self-insured employer, as directed by the Supreme Court of Appeals.

Series VI---To establish internal procedural time limits pertaining to adjudications and awards, as directed by the Supreme Court of Appeals.

4. Explanation of Overall Economic Impact of Proposed Rule.

Questions A, B and C are addressed with specific reference to each of the three series of rules individually:

Series IV

The promulgation and implementation of these rules would produce no economic impact upon the state or its residents inasmuch as the rules merely provide for the administrative management of the payment of attorney fees and expenses which are awarded by the Court.

Of course, the payment of attorney fees and expenses from the Workers' Compensation Fund as directed by the Court will constitute expenditures that must be funded by all employers in the state who subscribe and pay premiums to the Workers' Compensation Fund. However, there is no basis upon which such expenditures could be estimated at this time because we have no way of anticipating when the Court will direct the payment of fees and expenses. To date, fees and expenses have been paid in three claims in the total amount of $12,700.00.

Series V

The promulgation and implementation of these rules will produce only a very minor economic impact upon the state or its residents. Of course, the directive of the Supreme Court of Appeals requires that hearings be held upon receipt of complaints from claimants against their employers. Therefore, a modest amount of administrative expense will be incurred in docketing and conducting hearings and resolving issues. Existing personnel and facilities will be utilized for that purpose.

The major expenditures that will result from the process ordered by the Court and addressed by these rules will be in the form of fines paid by employers directly to complaining employees.

Series VI

The promulgation and implementation of these rules, as directed by the Supreme Court of Appeals, will produce an economic impact on the state and its residents in the form of a dramatic increase in the administrative cost of operating the Workers' Compensation Fund, an estimate of which is set forth above.

SELF-INSUREDS

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SUGGESTED AMENDMENT TO WORKERS' COMPENSATION RULES - SELF INSURERS

4.02 An employer may reapply for self-insured status after five (5) successive years as a premium paying subscriber during which no proven violation of the ~~Commission~~ Workers' Compensation statutes or rules has occurred. Reinstatement as a self-insurer shall follow those requirements for self-insured status in effect at the time of reapplication.

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
WORKERS' COMPENSATION COMMISSIONER

Chapter 23-2
Series V
(1984)

SELF-INSUREDS

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WEST VIRGINIA ADMINISTRATIVE REGULATIONS
WORKERS' COMPENSATION COMMISSIONER

Chapter 23-2
Series V
(1984)

Subject: These rules provide for the general administration of a hearing and review process regarding the performance of self-insured employers.

Section 1. GENERAL

1.01. Scope. These are ~~emergency legislative rules~~ Agency Approved Proposed Legislative Rules establishing a hearing and review process for consideration of complaints filed by claimants about the performance of employers who are permitted to self-insure their workers' compensation liability.

1.02. Authority. These ~~emergency legislative rules~~ Agency Approved Proposed Legislative Rules are promulgated pursuant to the authority of West Virginia Code, Chapter 23, Article 1, Section 15, and Article 2, Section 9, as judicially interpreted by the Supreme Court of Appeals of West Virginia in the case of UMWA, et al v. Lewis, W.Va. , 309 S.E.2d 58 (1983).

1.03. Filing Date. These rules were filed on the ~~6th~~ 25th day of ~~June,~~ October, 1984, in the Secretary of State's office.

1.04. ~~Effective Date~~. Submission Date. These rules ~~are to become effective on the 6th day of June, 1984, as emergency legislative rules.~~ were submitted on the 25th day of October, 1984, to the Legislative Rule-Making Review Committee as required by law.

1.05. Definitions. As used in these rules:

A. Self-Insured Employers shall mean those employers who have elected and been granted permission to self-insure their workers' compensation liability pursuant to the provisions of West Virginia Code, Chapter 23, Article 2, Section 9.

B. Fund shall mean the West Virginia Workers' Compensation Fund created by West Virginia Code, Chapter 23, Article 3, Section 1.

C. Commissioner shall mean the Workers' Compensation Commissioner appointed pursuant to West Virginia Code, Chapter 23, Article 1, Section 1.

Section 2. COMPLAINT PROCEDURE

2.01. Filing of Complaint; Proper Cause for Failure to Honor Pay Orders. ~~A claimant employed by a self-insured employer, or a dependent of a fatally injured employee of a self-insured employer, having reason to believe that the employer has refused or failed to properly discharge its responsibility in paying compensation and expenses directly to its employees as required by law may file in the office of the Commissioner a written complaint regarding the alleged refusal or failure of the employer. The written complaint should contain specific information including dates, amounts, names and other pertinent facts upon which the complaint is based.~~

A. An injured employee of a self-insured employer, or a dependent of a fatally injured employee of a self-insured employer, where

such person's claim has been ruled compensable, who has reason to believe that the employer has refused or failed without proper cause to discharge its responsibility in paying compensation and expenses in that claim directly to that injured employee or that dependent of a fatally injured employee as required by law may file in the office of the Commissioner a written complaint regarding the alleged refusal or failure of the employer. Such a written complaint must be made with specificity and include dates, amounts, names and other pertinent facts upon which the complaint is based.

B. Proper cause for failure to promptly honor a pay order to a claimant shall include, but not be limited to, those instances where a self-insured employer fails to receive notice of a properly promulgated pay order, or those instances in which a pay order has been promulgated in substantive error, is on its face obviously in error as to the amount due, or orders the payment of temporary total disability benefits past the date on which the claimant returned to work.

2.02. Investigation of Complaint. Upon receipt of a written complaint the Commissioner shall forward a copy to the employer and give the employer an opportunity to respond to the complaint in writing. The employer shall respond within thirty days of receipt of the complaint. The matter shall then be investigated by review of the claim records, communication with the employer and complainant or their representatives, and by audit of the employer's

operations and records, or otherwise, as may be deemed appropriate by the Commissioner.

2.03. Initial Determination. After investigation the Commissioner shall give notice in writing to the parties of the initial determination. If investigation of the matter and communications with the interested parties produce a satisfactory resolution of the matter in dispute, or if it shall appear that the employer has substantially complied with all requirements of law, the complaint shall be dismissed. Otherwise, a hearing shall be scheduled.

Section 3. HEARING; NOTICE; REVIEW

3.01. Hearing. Hearings shall be conducted pursuant to the provisions of West Virginia Code, Chapter 23, Article 5, Section 1.

3.02. Notice of Decision. After hearing the Commissioner shall give written notice of the action taken upon the complaint in the form of an appealable order.

3.03. Appeal. If the employer or the complainant shall feel aggrieved by any action of the Commissioner the right to appeal provided by West Virginia Code, Chapter 23, Article 5, Sections 1, 3, and 4 shall be applicable.

Section 4. PENALTIES

4.01. Financial Penalty. If after hearing the Commissioner finds that the employer has refused or failed without proper cause to discharge its responsibility in paying compensation and expenses in a compensable claim as

required by law ~~directly to its employees~~ to the claimant or dependent or has otherwise failed to comply with the requirements of law in its performance as a self-insured employer the Commissioner ~~shall~~ may assess against the employer a financial penalty, payable to the claimant in the claim which gave rise to the complaint, in an amount not to exceed five thousand dollars.

4.02. Revocation of Self-Insurance Privilege. In addition to the financial penalty provided in Section 4.01, above, where the Commissioner determines that the self-insured employer has refused or failed without proper cause to discharge its responsibility in paying compensation and expenses as required by law with such frequency as to produce a substantial impairment of the rights of its employees and their dependents, based upon proven infractions found and penalized by the Commissioner pursuant to these rules, the Commissioner may revoke the privilege of the employer to self-insure its risk and require the employer to become a premium-paying subscriber to the Fund.

An employer's privilege to self-insure a subsidiary or division or other operating entity of a parent company may be revoked when the evidence of record clearly reflects that the subsidiary or division or other operating entity is operated at a different location from the parent company and that the improper conduct requiring revocation was neither directed nor authorized by the parent company.

4.03. Continuing Liability and Jurisdiction. An employer that has the privilege of self-insurance revoked pursuant to Section 4.02, above, shall continue to be liable for the payment of claims incurred during the period of

self-insurance and the Commissioner shall continue to have jurisdiction over such claims and payments. The Commissioner may require reports from the employer and may conduct audits of the employer's records to identify the continuing liability of the employer.

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HEARING FOR SERIES iv - v - vi

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1984 OCT 25 AM 10: 11

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WORKERS' COMPENSATION FUND

Transcript of a Public Hearing held at 1:00 p.m. on Thursday, October 4, 1984, in Conference Room A, Building No. 7, Capitol Complex, Washington Street and California Avenue, Charleston, West Virginia, pursuant to prior public notice duly given pursuant to Chapter 29A of the West Virginia Code, as amended, concerning Legislative Rules proposed by the Workers' Compensation Commissioner of the State of West Virginia.

APPEARANCES:

WILLIAM MITCHELL, Assistant to the Workers' Compensation Commissioner

JAMES BARRETT, Attorney at Law
P. O. Box 402, Huntington, WV 25708

E. GARTH ATKINS, Attorney at Law
608 Virginia St., Charleston, WV 25301

ANDY CASTO, Manager, Workers' Compensation Insurance, American Electric Power Service Corporation, P. O. Box 700, Lancaster, Ohio 43130

And other interested parties.

I N D E X

MR. MITCHELL: Good afternoon, Ladies and Gentlemen. We appreciate your coming, and we want you to know that we're very much interested in hearing what you have to say today.

As you know, this Public Hearing is being conducted for the purpose of receiving public comment upon Legislative Rules that have been proposed by the Workers' Compensation Commissioner.

I'm an assistant to Commissioner Huffman, who has asked that I represent him here today.

The way we'd like to proceed is that I'd like to make just a brief comment about the development of the Rules, what has transpired with regard to them to the present and what we anticipate will transpire in the next few months. Then I would like to allow all the rest of the time, that we'll spend here today, to you so that you can offer any comment that you care to, any suggestion, any recommendation, concerning these Rules and the effect that they will have upon the entire Workers' Compensation program and the citizens of this State. These Rules were first filed as emergency Rules on June 6th. They'll be in effect for a maximum period of six months, after which time we anticipate making a request for an extension of that time, simply for the purpose of having something in effect until such time as the Legislature can act upon the proposed Rules. The proposed Rules were filed on August 9th with the State Register and with the Legislative Rule-Making Review Committee.

We have received some public comment in writing up to this time, and, of course, we're here today for the purpose of receiving your public comment. All of that comment will then be considered by the Commissioner who will revise the Rules, as deemed appropriate, and he will then approve the revised form of the Rules and file them again with the Legislative Rule-Making Review Committee. The staff of the Committee has indicated to us that if the approved version of the Rules is filed within the next couple of weeks or so, they intend to schedule a Public Hearing during the Interim Legislative session on their November schedule so that if you desire to participate in that public proceeding of the Legislative Rule-Making Committee concerning these Rules, you may want to contact the committee staff for information regarding their scheduling. After the Legislative Committee has completed its deliberations, it'll make a recommendation to the Legislature, and we hope that the Legislature will act upon these Rules at some time during the 1985 session.

Now, then, as you probably know - if anyone doesn't have copies of the rules, there are copies here - these Rules are in three Series, each of which concerns specific independent subject matter. So what we'd like to do is to take them up one Series at a time, in numerical order, so we'll begin with the Series designated 'IV', which concerns attorney fees and expenses.

Who would like to speak first regarding the attorney fees? Yes, sir?

MR. BARRETT: I'd like to...if you'd just explain Section 2.01 in contrast, if you would, with Section 3.01. If you'd just tell me what it means - what it intends to do?

MR. MITCHELL: It intends to provide the circumstances under which fees will be paid from the Fund, which, in essence, is upon order of the Court.

MR. BARRETT: I don't understand the petition of the attorney, then, to the Commissioner?

MR. MITCHELL: That relates to the Court's mandate concerning the methodology for determining what the amount of the fee award would be, and the petition would contain that necessary information identifying the work performed, etc. and, therefore, the value of the services.

MR. BARRETT: As I understand it, a Court order will be the only way an attorney will be paid; is that correct?

MR. MITCHELL: Yes, sir.

MR. BARRETT: From the Fund?

MR. MITCHELL: Yes, sir.

MR. BARRETT: And I do understand that a petition must be filed after the Court orders?

MR. MITCHELL: Yes, sir. That's consistent with the content of the Court's order in the case of Meadows, et. al. vs. the Commissioner. They directed, in that order, that the fees be paid in

accordance with Disciplinary Rule 2-106, and the statutory limit on fees in Chapter 23 of the Code. And in order for the Commissioner to make a determination as to what the amount should be, the Commissioner needs to know the specifics of the word 'performed'.

MR. BARRETT: The next question is, on what type of legal services are we talking about the Fund paying the fees?

MR. MITCHELL: I'm not sure I understand the question, but...

MR. BARRETT: As I understand, Meadows was a mandamus proceeding, and I'm wondering...from the normal filing of the protest by a claimant or filing a protest by an employer?

MR. MITCHELL: Only if the Court orders, and, then, whether it be mandamus or appeal, the Commissioner will pay.

MR. BARRETT: Is it my understanding that you're sort of leaving this open to the Court, again, as to what you're going to have to pay?

MR. MITCHELL: There might be any future developments that we couldn't anticipate now, of course.

MR. BARRETT: Is that what this is left open for? I'm familiar with the Meadows case - and I'm wondering...I saw some dictum sometime back that talked about...I'm assuming that a claimant files a protest to the Commissioner's award and he, subsequently, receives an increase in that award; do these Rules apply as to the attorney fees?

MR. MITCHELL: No, sir.

MR. BARRETT: This would not...has nothing then to do with a protestable award?

MR. MITCHELL: In the absence of an order of the Court, that's true. Of course, the Court said, in Meadows, and I assume they may say in other cases, that, for instance, in Manning's claim, fees were to be paid immediately with regard to one proceeding, and they said that you'll probably have to pay fees according to the appeal once that's concluded, but we don't have an order to pay for that at this point. Of course, those proceedings aren't completed.

MR. BARRETT: These Rules are written in light of the fact that you've made the order, then, to pay the attorney fees in normal protestable orders?

MR. MITCHELL: Certainly. Upon order of the Court.

MR. BARRETT: Then you have not ruled that out in the Commissioner's office - that you may be required to pay the attorney fees?

MR. MITCHELL: No, sir. We will comply with any order of the Court.

MR. BARRETT: One more question. Assuming the attorney fees are ordered to be paid by the Court in a protestable order, would they be charged...are you charging those to the Fund or, if you are self-insured, would you be paying the attorney fee as a self-insured?

MR. MITCHELL: The self-insured would pay in the same manner that they would pay benefits.

MR. BARRETT: Thank you.

MR. MITCHELL: We may get some more comment about that. Yes, sir, Mr. Atkins?

MR. ATKINS: Mr. Mitchell, I normally represent claimants in cases, and I've been listening to the various questions and answers - the question I have is, to what Court do you make application for these fees?

MR. MITCHELL: The Commissioner would respond to the order of any Court having appropriate jurisdiction.

MR. ATKINS: And what Court would that be?

MR. MITCHELL: I would think it would be the Supreme Court, or it might be a Circuit Court.

MR. ATKINS: Is there any...?

MR. MITCHELL: I don't think there's a question of making application. The petition that's referred to (that Mr. Barrett inquired about) is to be presented to the Commissioner with respect to identifying the work and the value, etc.

MR. ATKINS: I understand that; it's the question of the particular steps involved in presenting the petition to the Commissioner first, as I understand; is that correct?

MR. MITCHELL: I would think there would be no reason for a petition being filed until the Court order had been issued.

MR. ATKINS: I understand that, but how do you get the Court to assume jurisdiction in the first place?

MR. MITCHELL: You'd have to see the Court about that.

MR. ATKINS: So you just file some kind of paper with the Court to say that you want a fee award, is that basically what the Regulation seems to encompass?

MR. MITCHELL: The Regulations don't address that. The method that has been used, to date - for those cases in which the Commissioner has been required to file fees - is that it has been done by motion in connection with litigation that was already before the Supreme Court of Appeals.

MR. ATKINS: But in protestable orders, there's no Court that takes any jurisdiction unless you go all the way to the Supreme Court, which means that if, at some stage of the proceedings, litigation is terminated short of the Supreme Court, what Court do you go to to request the order that's referred to in the Regulations?

MR. MITCHELL: I can't answer that. I know of no such proceeding.

MR. ATKINS: Thank you.

MR. MITCHELL: Any other comment regarding the attorney fees, and expenses?

Then let's proceed to Series V of the Rules, which concerns the performance of self-insured Employers and the system for hearing of complaints that was mandated by the Supreme Court. Who would like to speak with regard to this Series of Rules?

MR. CASTO: For the record, I am Manager of Workers' Compensation Insurances for American Electric Power Service Corporation, Fuel Supply Division, Lancaster, Ohio. In that capacity, I represent nine coal-related companies, primarily self-insured in Ohio, West Virginia, Illinois, and Utah. The proceedings this afternoon are a little different than anticipated, since it has been nine years since the Commissioner has had hearings on Rules. The comments I've prepared are in total, as opposed to being to the three specific areas, but, since we're halfway there, I thought I would go ahead and proceed at this point.

I have herewith, and I'd like to tender today, a written commentary to the Rules and Regulations and would like to make a few brief comments on the highpoints that we see and have problems with. The rule-making process of the Commissioner has direct impact on the self-insured operations of the Fuel Supply Division, which are five coal mining companies throughout West Virginia. We are concerned about the wording of some of the Regulations. We are obviously most concerned about the self-insured complaint section, and we would ask that you review it carefully. I realize that it's impossible to create a mechanism that will avoid frivolous complaints entirely. We would ask that the Commissioner establish a procedure by which complaints can be reviewed, evaluated for the validity and processed without the need for litigation. There are many instances where a self-insured complaint can be resolved by a

telephone call, by an explanation. These Regulations lend themselves to harassment by individuals who have no standing in the claim, just because they want to file a complaint against the company. Nothing in these Regulations indicate that the person filing the claim need be a claimant in the claim involved, or representing a claimant in the claim involved, or a party in any claim. We believe that needs to be rectified. We believe that there are circumstances where a self-insurer needs to return a pay order because it is clearly improper, wholly in error, and the Rules should provide for that kind of activity. To go one step further, we would ask the Commissioner to establish a core group of employees who are familiar with self-insurance and familiar with the workings of the Fund, who would be available to deal with questionable pay orders within the time period, which would allow for the return, correction, and timely payment of pay orders, so as to avoid overpayments, misunderstandings and unnecessary litigation, all three of which have cost factors that cannot be recovered and hurt us all. To facilitate that, we would ask that you establish a hot-line, which can be used by the self-insured employers to call in to gain access to these people who will be able to say, this is the reason this pay order was written, or, in the instance that comes to mind, the pay order was written for $35,000.00, and it was supposed to be for $3,500.00 - a computer error. It was for two months benefits. It's very obvious it's got to be wrong.

Current Regulations would require the self-insured employer to pay the claimant $35,000.00 and then come back and file a protest and get its money back from the Fund. That's not doing anyone any good. There needs to be the ability to deal day-to-day with errors that are going to occur. I don't think any of us are willing to give up our human nature and state that we're going to be perfect all the time. I make mistakes. The Fund makes mistakes. There has to be a mechanism and a manner in which those can be corrected.

The second area we would like to deal with is that of attorney fees, which is the preceding commentary. We believe that the statute is clear...or the case law is clear on the attorney fees. They are applied in only very special cases, and we hope that the Regulations will further explain exactly how the Commissioner is going to pay for his failure to comply with the statute? That's what the special cases are, and the Commissioner is the person who makes the failing and should make the payment.

The third area, I think, of importance are the time limitations the Commissioner has placed upon himself in dealing with non-statutory adjudications and rulings. There are some time limitations that we can do nothing about because they're in the statute. There are many other limitations in these Regulations that are self-imposed, and, I believe, unrealistic. The Commissioner has been operating under these emergency Regulations for some time now, and I would implore you to go

back and study what you've been doing over the past few months to determine whether or not you have, in fact, been living up to the Regulations you set for yourself. If you cannot live with the Regulations, as you have written them, if you can't comply with them, it is foolhardy to pass permanent Regulations that require you to do something you can't possibly do. The end result will be more routine granting of authorizations, the payment of benefits, the payment of bills without any audit process whatever. And, granted, it's very limited now, but with no audit process at all, we'll end up with constant litigation, far worse than it is today, and no end in sight. We believe that a careful auditing review of the non-statutory time limitations on a real comparison to what is being done, will create a standard which we can all live to, which we will all understand, which will treat the claimants fairly, treat the employers fairly, and treat the Commissioner fairly. It's just unbelievable that the Commissioner would crawl out on a limb, and saw it off behind himself. And that's exactly what this will do. Every day the gentlemen across the street criticize the Workers' Compensation Fund. They would lead you to believe that West Virginia has the worst compensation system in the nation. That is not fact; West Virginia has a very competent Workers' Compensation system. But it keeps doing things that cause people to be critical of it.

The final area I would like to bring up is not exactly in the Rules, but I would like to ask that it be included in the Rules. Almost every other jurisdiction in this nation has, as a part of its Workers' Compensation procedure and practice, an allowance of the claim. The claimant, the employer and the State all know what we're dealing with. The Commissioner, or the governing body, or whoever is involved, says to the injured worker: "Your claim is allowed for this; if you disagree with that, notify me." The doctor understands what's allowed, the employer understands what's allowed, and ten years later, the State understands what it allowed. I believe that, if we are to move into the 20th Century in this State and be able to deal with claims on a careful managed basis, auditing benefits and dealing in the computer era, we're going to have to have an allowance of claim that everyone knows. It completely avoids the conflicts that come up years later when witnesses memories are foggy, and doctors' memories are foggy, and no one can remember exactly what happened to the guy. He fell on his head and now his toes hurt and no one knows how his toe got hurt but it's compensable. If the State would take the one little step in the second sentence of its compensability ruling and say: 'We have allowed your claim for...' - whatever it happens to be that he's claiming - everyone knows where they stand from day one. There can be no confusion. If then you have problems, there's a procedure to correct it. The claimant, the doctor, the employer, can work together to notify the State as to what's

wrong and get it corrected so that anyone picking up that file will know whether or not the request for medical authorization is proper or improper. We won't have the confusion of a doctor getting a letter authorizing surgery today and two days later getting a letter from a different claims examiner saying surgery is not authorized because it's not a part of the claim. The doctor is sitting here with two letters - and I have such a file so I know it can happen - the bottom line in this whole thing, I believe the main thing forgotten by the edicts of the Court, by the rush to avoid further criticism, is the fact that the West Virginia Workers' Compensation Fund is an insurance company. It's primary duty is to protect the assets of the insured. To be sure to see that benefits are paid to injured workers in a timely manner at an appropriate rate but only to those individuals who are truly deserving and meet the criteria for a compensable claim. Thank you.

MR. MITCHELL: Your comments about what is allowed in a claim has what relationship to either of these three Series of Rules?

MR. CASTO: The Commissioner is in the process of making rules. It's something that needs to be dealt with in terms of rule-making. While you're making rules, I'm asking that you... as I said, it doesn't specifically apply to the Rules that are here, but every nine years when you make Rules, you know, you've got to put out what you've got. Thank you.

MR. MITCHELL: I'd just like to make two brief explanatory responses to Mr. Casto's comments. First, with respect to the self-insured complaint procedure - it was the intent to deal with the very kind of problem that Mr. Casto referred to, the simple oversight kind of thing, when Section No. 2.02 was written. It talks about investigation, and, if, through communication with the parties, it can be discovered that there is no objectionable conduct, then the complaint will be dismissed. It is a summary proceeding, so to speak, so that time, effort and money will not be spent by all the parties where it's inappropriate. That's the purpose of that. With respect to the very short time limits, I'll have to confess that I, as well as many other employees of the Fund, share your concern. But, I think I should offer just a brief comment about what the rationale was for determining what those periods should be for each of those functions. You mentioned that there are already several statutory time limits. Some of them are virtually impossible to satisfy. For instance, just for one example, there's the 30-day time limit that the Commissioner has to rule upon a submitted claim after litigation. That's been in the Code for quite a number of years, and it's virtually impossible to satisfy. Nevertheless, the Fund does the very best it can utilizing that as a goal, as the ideal. When we determined these time limits, and, of course, the first purpose was to satisfy the mandate of the Court saying; 'you've got to

establish time limits.' But the way we tried to decide what those time limits should be was to establish a goal which was ideal, and to shoot for it, as best we can, including that highly-advertised process that is going on now, which is to hire some 200 and some additional employees in the Fund. The staff of the Fund has now been increased to approximately 550 employees, and, of course, as the number grows higher, many of the jobs being low paid, there is a great deal of turnover, but nevertheless, that is continuing. One of the most active offices in the Fund today is the Personnel Office where we are recruiting employees as fast as we can. We recognize that given your comments relating to what we are able to do today - it is our intent to do much better tomorrow by acquiring additional employees, additional office space, additional equipment, etc. So that is the rationale for those very short time limits, although, as far as the possibility of satisfying them tomorrow, I could not disagree with you.

Any further comments on Series V concerning self-insured employers?

Then let's go to Series VI on the internal procedural time limits regarding adjudications and awards.

MR. ATKINS: I have a question under attorney fees, if we could go back. Are these Regulations mandatory or permissive, as far as fees and fee petitions are concerned? In other words, do these Rules purport to be mandatory on all people that practice in Workers' Compensation claims?

MR. MITCHELL: With respect to those instances in which the Court orders the Commissioner to pay from the Fund, yes, it is intended to be mandatory.

MR. ATKINS: The question that I have then is, if you choose not to file such a petition, then the claimant's representative is just bound by the statute, is that correct, with respect to the chargeable fee?

MR. MITCHELL: I should think so, except that I couldn't speak for the Court. If the Court orders, and you choose not to avail yourself of the benefits of the Court's order, I wouldn't presume to speak for the Court.

MR. ATKINS: Thank you.

MR. MITCHELL: Does anyone have any comment on Series VI?

There being no further comments, this meeting is adjourned.

(HEARING ADJOURNED AT 1:30 p.m.)

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 11th day of October 1984.

Grace Day

Grace Day, Reporter

HEARINGS FOR SERIES IV-V-VI

BEFORE THE COMMISSIONER OF THE WORKERS' COMPENSATION FUND

In Re: Proposed Legislative Rules
Workers' Compensation Commissioner
Series IV, V and VI

COMMENTS ON BEHALF OF

CEDAR COAL COMPANY

CENTRAL APPALACHIAN COAL COMPANY

SOUTHERN APPALACHIAN COAL COMPANY

SOUTHERN OHIO COAL COMPANY

WINDSOR POWER HOUSE COAL COMPANY

Lloyd A. Casto

Manager, Workers' Compensation and Insurances
American Electric Power Service Corporation
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COMMENTS OF CEDAR COAL COMPANY, CENTRAL APPALACHIAN COAL COMPANY, SOUTHERN APPALACHIAN COAL COMPANY, SOUTHERN OHIO COAL COMPANY, AND WINDSOR POWER HOUSE COAL COMPANY ON PROPOSED LEGISLATIVE RULES OF THE WORKERS' COMPENSATION COMMISSIONER: SERIES IV, V AND VII

October 4, 1984
Charleston, West Virginia

Pursuant to the notice filed in the office of the Secretary of State on August 9, 1984, Cedar Coal Company, Central Appalachian Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company, jointly file these comments on the proposed legislative rules of the Workers' Compensation Commissioner, Series IV, V and VI. As self-insured employers in West Virginia, our interests extend not only to the proposed legislative rules regarding self-insured employers, but also to the effect that the propcsed legislative rules regarding attorney fees and internal time limits may have on us and on all West Virginia employers.

As indicated in the letter from the Workers' Compensation Commissioner which accompanied the filing of these proposed legislative rules, all three series of rules were promulgated to comply with the directives of the Supreme Court of Appeals of West Virginia as set forth in Meadows, et al. v. Lewis, ___ W.Va. ___, 307 S.E.2d 625 (1983), and U.M.W.A. et al. v. Lewis, ___ W.Va. ___, 309 S.E.2d 58 (1983). These proposed rules are essentially the same as those rules which were filed on an emergency basis on June 6, 1984. Thus, the experience gained by the operation of the Workers' Compensation Fund under the

emergency rules is of particular significance in the ultimate determination of appropriate final legislative rules by the Commissioner.

A. Comments on Specific Sections, Series IV, Payment of Attorney Fees

1. 1.01 Scope - We do not object to the scope language in this section as it follows the requirements set forth in Meadows, et al. v. Lewis, supra. However, because the language is vague as to the source of payment of attorneys fees and expenses, we believe that the phrase "from the Workers' Compensation Fund" should be inserted after the phrase ". . . directing the Commissioner to pay . . .". Thus, there will be no confusion as to the source for payment of attorneys fees and expenses, and the wording of this section will be compatible with that found in §§ 2.01, and 3.01.

We are concerned that this potential for an award of attorneys fees and expenses to a party which must pursue its rights in court is strictly limited to claimants. Employers may similarly be aggrieved by a willful disregard of legal duties by the Commissioner and would be Constitutionally equally entitled to seek this remedy. Therefore, we believe that the phrase "or employers" should be added directly following the phrase " . . . to attorneys who represent claimants . . . ". Neither a claimant nor an employer should be forced to bear the legal expense incurred in requiring the government to do its job.

2. 1.05. B. Fee Petition or Petition - For the reasons stated in comment 1 above, we believe that the phrase

"from the Workers' Compensation Fund" should be inserted after the phrase " . . . for an award of attorney fees and expenses . . .", to specify the Workers' Compensation Fund as the source for the payment of an award. Further, for the reasons stated in comment 1 above, we believe that the phrase "or an employer's" should be added directly after the phrase " . . . submitted to the Commissioner by a claimant's . . .".

3. 1.05. C. Petitioner - For the reasons stated in comment 1 above, we believe that the phrase "or an employer's attorney" should be added directly after the phrase " . . . shall mean a claimant's attorney . . .".

4. 2.01. Court Order - We support the language of this section which clearly implies that any award of attorney fees and expenses shall be paid from the Workers' Compensation Fund. We note, however, that there is the potential for confusion as to whether an employer can ever be held responsible for the payment of such fees and expenses. Therefore, we believe that the word "solely" should be inserted following the phrase " . . . fees and expenses shall be paid . . .". For the sake of proper identification, we also believe that the phrase "Workers' Compensation" should be inserted preceding the word "Fund". It is noted that the Court in Meadows, et al. v. Lewis, supra, indicated at Syllabus Point 7 that " . . . the government ought to bear the reasonable expense incurred by the citizen . . .". To insure that this cost is not unfairly passed on to an individual employer, we believe that the following sentence should be added to this section after the phrase " . . . and

guidelines established by these rules.": "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." By making such changes, the mechanism of this rule will be clear.

5. 3.01. Petition by Attorney. For the reasons stated in comments on section 1.01 above, we believe that the phrase "or an employer's attorney" should be inserted directly following the phrase " . . . and submitted by a claimant's attorney . . . ".

6. 4.01. C. Agrement and Payments. This section is vague concerning what is meant by the "subject course of litigation". We believe that the phrase "upon which the claim for attorney fees and expenses is based." should be added immediately following the phrase " . . . involved in the subject course of litigation . . .". In addition, since the fee-limiting language of this section is statutorily applicable only to claimants' attorneys, we believe that the word "claimant's" should be inserted preceding the word "attorney".

7. 5.01. Necessity of Services - For the reasons stated above, we believe that the phrase "or the employer's right to the performance of a legally prescribed non-discretionary duty" should be added directly following the phrase ". . . necessary to establish the claimant's entitlement to benefits . . . ".

8. 6.02. Pre-Litigation Services - For the reasons

stated above, we believe that the phrase "or the employer's entitlement to a legally prescribed non-discretionary duty" should be inserted following the phrase " . . . to establish the claimant's entitlement is compensable . . .".

9. 6.03. Post-Litigation Services - Similarly, we believe that the phrase "or the employer's entitlement to a legally prescribed non-discretionary duty," should be inserted following the phrase " . . . nature of the claimant's entitlement is compensable . . .".

10. 6.05. Litigation of Award of Attorney Fees And Expenses - For the reasons cited above, we believe that the sentence "Time expended by the petitioner in successfully obtaining a court order for the payment of attorney fees and expenses to the employer is also compensable" should be added to this section.

11. 8.02. Maximum Fees. - Since the Statute refers only to attorneys of claimants and dependents and is tied to benefits received, we believe that phrase "for attorneys for claimants and dependents" should be inserted following the word "fees."

12. 10.01. Payment Based Upon Final Order - For the reasons previously stated, we believe that the phrase "from the Workers' Compensation Fund" should be inserted directly following the phrase " . . . the Commissioner shall issue payment . . .".

B. Comments on Specific Sections, Series V, Self-Insureds.

Section 2. COMPLAINT PROCEDURE.

This proposed rule is intended to set the standing requirements for the filing of a complaint against a self-insured employer. It also attempts to spell out what information must be included in a written complaint. We support a rule which clearly delineates who can file a written complaint containing specific information. However, we do not believe that the language contained in the proposed rule adequately sets out the requirements for standing to file a complaint as envisioned by the Supreme Court of Appeals in UMWA, et al. v. Lewis, supra (in which the Court indicated that because an individual claimant is most directly affected by the failure of a self-insured employer to meet its legal obligations, he or she is the most effective policeman of the system). The vagueness of the proposed rule's wording would apparently permit an employee without a compensable claim to make such a complaint. Further, the proposed wording would apparently permit an employee who is not the claimant in a given claim to intercede in that claim despite the fact that he is not a party-in-interest. Certainly, the Court did not envision permitting such action by persons not parties in a given claim. Such a procedure would be ripe to misuse and abuse.

We also believe that the choice of words regarding the acts or omissions of a self-insured employer upon which a written complaint may be filed is too broad in that it fails to take into account instances where a self-insured employer fails to receive notice of an obligation in the form of a payorder, and instances

where it is obvious that an error has been made by an employee of the Workers' Compensation Fund. An example of such an error would be the receipt by a self-insured employer of a payorder for a temporary total disability payment in the amount of $32,130.00 for ten weeks of disability. It is obvious in such an instance that a "0" has been erroneously added to the amount on the payorder. The result would be an unwarranted overpayment to the claimant. Another example would be the receipt of a payorder for chiropractic treatments which have not been authorized by the Workers' Compensation Fund.

We believe that a protest mechanism or similar device must be included in the rules which will afford a self-insured employer a speedy means by which to challenge questionable payorders, and a mechanism which will prevent the unjustified overpayment of benefits to a claimant while, at the same time, insuring that a claimant receives those benefits to which he is entitled. The decision in UMWA, et al. v. Lewis, supra, clearly demonstrates that the Court was concerned that a claimant receive only "required" payments. We believe that this proposed rule should be rewritten to incorporate not only the standing concerns addressed above, but also to identify those instances where a self-insured employer does not receive notice by means of a payorder, or receives a payorder which is obviously in error.

We further believe that the Commissioner should establish a "hotline" at the Fund by which employers could contact designated Fund staff to have erroneous payorders corrected immediately and administratively to avoid senseless and costly litigation.

We tender the following substitute language for section 2.01:

2.01. Grounds for Complaint and Objections to Pay-Orders. A. An injured employee of a self-insured employer, or a dependent of a fatally injured employee of a self-insured employer, where such injury has been ruled compensable, who has reason to believe that the employer has refused or failed without proper cause to discharge its responsibility in paying compensation and expenses in that claim directly to that injured employee or that dependent of a fatally injured employee as required by law may file in the office of the Commissioner a written complaint regarding the alleged refusal or failure of the employer. Such a written complaint must be made with specificity and include dates, amounts, names and other pertinent facts upon which the complaint is based.

B. Proper cause for failure to promptly honor a payorder to a claimant from the Commissioner shall include, but not be limited to, those instances where a self-insured employer fails to receive notice of a properly promulgated payorder, or those instances in which a payorder has been promulgated in substantive error, is on its face obviously in error as to the amount due, or orders the payment of temporary total disability benefits past the date on which the claimant returned to work.

C. Upon receipt of a questionable payorder to a claimant, a self-insured employer shall pay that amount to which a claimant is legally entitled, and may file a written objection with the Commissioner within five days of receipt of the payorder. This objection shall be ruled upon by the Commissioner within 10 (ten) working days from the date of receipt of the objection in the Fund. The Commissioner shall give notice of the action taken upon the objection to the claimant and the employer in the form of a protestable order, pursuant to the provisions of West Virginia Code, Chapter 23, Article 5, Section 1. After final hearings an appealable order shall be entered and transmitted to the parties pursuant to these regulations and to the provisions of West Virginia

Code, Chapter 23, Article 5, Sections 1, 3, and 4.

> D. The Commissioner shall refund to self-insured employers within a reasonable time, not to exceed 30 days, any overpayment made by the self-insured employer to a claimant pursuant to an erroneous payorder.

In light of the confusion which has resulted from the Court's decision in Butcher v. State Workers' Compensation Commissioner, ___ W.Va. ___, 315 S.E.2d (1983), concerning overpayments, and the Court's subsequent failure to clearly define its stand on the overpayment question, every endeavor must be made to prevent an overpayment in the first instance.

2. 4.01. Financial Penalty - For the reasons stated above, we believe that the phrase "without proper cause" should be inserted after the phrase " . . . that the employer has refused or failed . . ."; and that the phrase "in a compensable claim as required by law" should be inserted after the phrase " . . . to discharge its responsibility in paying compensation and expenses . . .". We also believe the phrase "directly to its employees" should be modified to read "to the claimant or dependent," to avoid any suggestion that complaints may be brought by non-parties or as class complaints.

The proposed wording of this subsection further places upon the Commissioner a mandatory requirement to impose financial penalties against a self-insured employer regardless of the nature of the infraction. Because we feel that the Commissioner's discretion to act must be preserved in the application of these rules, we believe that the word "shall"

should be changed to "may" and thus insure that the Commissioner's sound judgment can be exercised: " . . . the Commissioner may assess against the employer a financial penalty . . .".

Although this subsection's wording reflects the Court's desire to impose financial penalties for a self-insured employer's malfeasance, there is nothing to guide the Commissioner in imposing a financial penalty short of a ceiling of five thousand dollars. In the interest of predictability and stability, we believe that the following sentence should be added to this subsection immediately following the phrase " . . . in an amount not to exceed five thousand dollars." : "Such financial penalty shall be in addition to the amount of proper compensation or expenses in controversy, and shall in no instance exceed an amount equal to that amount of proper compensation or expenses in controversy nor five thousand dollars, whichever is less."

3. 4.02. Revocation of Self-Insurance Privilege - We note that this subsection fails to provide an objective basis upon which self-insurance privileges may be suspended or terminated. Therefore, we urge that the phrase "where the Commissioner determines that the self-insured employer has refused or failed without proper cause to discharge its responsibility in paying compensation and expenses as required by law with such frequency as to indicate a general business practice, based upon proven infractions filed and found by the Commissioner under these rules," be inserted directly after the

phrase "In addition to the financial penalty provided in Section 4.01, above, . . .". We believe that such an addition will serve as reviewable and fair standard to be used by the Commissioner and make sure that one infraction will not constitute grounds for revocation.

We also believe that an employer should be permitted to reapply for self-insured status after five years following revocation.

4. Timeliness of Complaints.

We are keenly aware of the thin ice upon which any financial penalty provision in Workers' Compensation regulations rests. We specifically and fundamentally believe that the Court had no statutory authority upon which to require or impose such penalties. We therefore, believe that some limitations are essential to avoid the harmful abuse which may stem from the misuse of procedural devices. Therefore, we propose that the following be included as Section 5 in the proposed rules:

Section 5. TIMELINESS OF COMPLAINTS

5.01. Time in which to File a Complaint. A complaint alleging a self-insured employer's refusal or failure without proper cause to discharge its responsibility in paying compensation and expenses to a claimant or dependent shall be filed no later than thirty (30) days following such refusal to act or failure to act, or no later than thirty (30) days after the claimant knows or should have known of such refusal or failure to act, whichever is later. In no event shall a complaint be filed later than three (3) months after an alleged refusal or failure to act.

C. Comments on Specific Sections, Series VI, Adjudications and Awards.

1. 1.01. Scope - We support the Commissioner's attempts to implement internal time limits in the administrative processing of claims. While many of the time deadlines in these proposed rules are laudatory, we believe that many may also be unrealistic in light of the reality of operations in an administrative agency. We urge the Commissioner to assess the operation of the Fund under the emergency rules implemented on June 6, 1984, and to determine whether the discretionary proposed time limits are realistically achievable. Consistent failure by the Fund to meet its own internal time limits could result in the imposition of attorneys fees pursuant to the proposed rules of Series IV, payable from the Workers' Compensation Fund. Such a result would adversely impact upon all West Virginia employers in the form of higher Workers' Compensation premiums. Therefore, we urge the Commissioner to seriously reassess the time limits prescribed in Series VI. We believe that the following two sentences should be added to the end of this section: "In all instances where a time limit herein prescribed is in conflict with a time limit set forth in the Workers' Compensation Act, the latter statutory time limit shall govern. Compliance with non-statutory time limits may be extended for good cause."

2. 4.01. Awards of Temporary Total Disability Benefits - To better identify those who may receive disability benefits, we believe that the phrase " . . . sufficient evidence that

claimants are entitled to awards . . ." should be changed to " . . . sufficient evidence that a claimant with a compensable injury is entitled to awards . . .".

3. 4.02. Cessation of Temporary Total Disability - To better reflect what evidence is necessary to require cessation of temporary total disability benefits, we believe that the phrase "or have returned to work" should be added immediately after the phrase " . . . have ceased to be temporarily and totally disabled . . .".

4. 4.04. Medical Evaluations. B. - We believe that this rule should reflect medical referrals not only on behalf of claimants, but also on behalf of employers. Therefore, we believe that the phrase "or employers" should be added directly after the phrase " . . . in response to requests by or on behalf of claimants . . .".

D. Conclusion

Cedar Coal Company, Central Appalachian Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company appreciate the opportunity to comment on these proposed rules and respectfully urge the Commissioner to adopt appropriate revisions in issuing any final regulations.