

Cecil H. Underwood  
Governor

William F. Vieweg  
Commissioner



## West Virginia Bureau of Employment Programs

- Job Service/Job Training Programs • Labor Market Information
  - Unemployment Compensation • Workers' Compensation
- an equal opportunity/affirmative action employer*

September 15, 1997

The Honorable Ken Hechler  
Secretary of State  
Administrative Law Division  
State Capitol Complex  
Charleston, WV 25305

Dear Secretary Hechler:

RE: "Hearing and Review Process Regarding the Performance of Self-Insured Employers," 85 CSR 5

On February 3, 1997, the Compensation Programs Performance Council filed a proposed amendment to the above noted rule. Following a public hearing and consideration of the comments filed regarding the rule, the Council has concluded that the rule should not be amended. In addition, the Council has concluded that the existing rule is no longer needed following the promulgation of the rule titled "Risk Management," 85 CSR 9.

Thus, at its August 19, 1997, the Compensation Programs Performance Council voted unanimously to withdraw the proposed amendment to this rule and to repeal the existing rule, 85 CSR 5.

Please consider this letter to be the formal notification of these actions and take the appropriate steps to adjust your office's records.

Sincerely,

A handwritten signature in dark ink, appearing to read "William F. Vieweg".

William F. Vieweg  
Commissioner

cc: Council Mailing List

WFV/JHK

Legal Services Division

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SEP 15 3 11 PM '97

FILED

**TITLE 85  
LEGISLATIVE RULES  
WORKERS' COMPENSATION COMMISSIONER**

**SERIES 5  
HEARING AND REVIEW PROCESS REGARDING  
THE  
PERFORMANCE OF SELF-INSURED  
EMPLOYERS**

**§85-5-1. General.**

1.1. Scope. -- These are 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.

1.2. Authority. -- W. Va. Code §23-1-15 and §23-2-9. 309 S.E.2d 58 (1983).

1.3. Filing Date. -- May 23, 1985

1.4. Effective Date. -- May 23, 1985

1.5. 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 Section nine, Article two, Chapter twenty-three.

(b) "Fund" shall mean the West Virginia Workers' Compensation Fund created by West Virginia Code Section one, Article three, Chapter twenty-three.

(c) "Commissioner" shall mean the Workers' Compensation Commissioner appointed pursuant to West Virginia Code Section one, Article one, Chapter twenty-three.

**§85-5-2. Complaint procedure.**

2.1. Filing of complaint; proper cause for failure to honor pay orders.

(a) An injured employee of a self-insured em-

ployer, 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.

2.2. 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 (30) 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.

2.3. 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.

#### **§85-5-3. Hearing; notice; review.**

3.1. Hearing. -- Hearings shall be conducted pursuant to the provisions of West Virginia Code Section one, Article five, Chapter twenty-three.

3.2. 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.

3.3. 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 sections one, three and four, article five, chapter twenty-three shall be applicable.

#### **§85-5-4. Penalties.**

4.1. 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 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 may assess against the employer a financial penalty, payable to the claimant in the claim which gave rise to the com-

plaint, in an amount not to exceed five thousand dollars (\$5,000).

4.2. Revocation of self-insurance privilege. -- In addition to the financial penalty provided in subsection 4.1, 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.

4.3. Continuing liability and jurisdiction. -- An employer that has the privilege of self-insurance revoked pursuant to subsection 4.2, 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.