

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND**

ADMINISTRATIVE LAW DIVISION

Form #5

Do Not Mark In This Box

FILED

2005 JUN 29 P 4: 28

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), 23-4-6(j)(1), 23-4-16(d)

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 X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 5

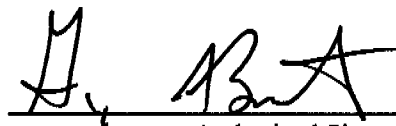
TITLE OF RULE BEING AMENDED: Permanent Total Disability

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS August 1, 2005


Authorized Signature

#7.20

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

Form #1

Do Not Mark In This Box

FILED

2005 APR 13 P 2:57

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: §23-1-1a(j)(3), 23-4-6(j)(1), 23-4-16(d)

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 5

TITLE OF RULE BEING AMENDED: Permanent Total Disability

IF NO, SERIES NUMBER OF RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

DATE OF PUBLIC HEARING: May 17, 2005 TIME: 1:00 p.m.

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

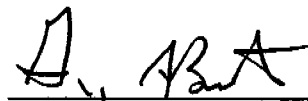
COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH X
COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

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
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304
Fax # (304) 926-5372



Authorized Signature

April 6, 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 5
"Permanent Total Disability"

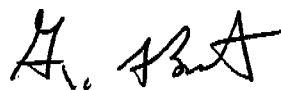
Dear Secretary Ireland:

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. 5 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 5: Permanent Total Disability

Type of Rule: X Legislative Exempt Interpretive Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Avenue, S.E.

Charleston, WV 25301

1. Effect of Proposed Rule

	Annual		Fiscal Year		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$0	Unknown	Decrease	Decrease	N/A
PERSONAL SERVICES	0	0	0	0	N/A
CURRENT EXPENSE	0	0	0	0	N/A
REPAIRS & ALTERNATIONS	0	0	0	0	N/A
EQUIPMENT	0	0	0	0	N/A
OTHER:					
Claims expense	0	Unknown	Decrease	Decrease	N/A

2. Explanation of above estimates:

Proposed changes since the last filing for this rule address administration of the requirements related to permanent total disability (PTD) application, the status review of certain Old Fund PTD claims and the monitoring of PTD benefits upon termination of the Workers' Compensation Commission (commission). The above estimates are based on the assumption that the rule changes become effective in the current fiscal year (FY'05). 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, reviewing Old Fund PTD application requirements, monitoring of Old Fund PTD recipients and reviewing and updating the status of those receiving Old Fund PTD benefits will become the responsibility of the insurance commissioner and/or the administrator of the Old Fund liabilities beginning January 1, 2006. Administration of PTD application requirements and monitoring of PTD claims under this rule in connection with PTD claims other than those contained in the Old Fund may be required and performed by self-insured employers or private carriers. Transferring responsibilities for Old Fund PTD claims under this rule to the insurance commissioner and/or the administrator of the Old Fund liabilities will result in a change in total costs for the commission for FY'06 that cannot be reasonably estimated or pro-rated.

Rule Title: Title 85 Series : Permanent Total Disability

3. Objectives of this rule:

This rule addresses the responsibilities related to the policies and procedures for filing, reviewing and monitoring permanent total disability claims both before and after the termination of the Workers' Compensation Commission.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that there will be no economic impact on State Government from the proposed rule changes.

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

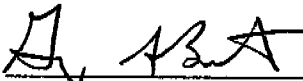
It is expected that there will be no impact from the rule changes

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: April 5, 2005

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 5
Permanent Total Disability**

Pursuant to Senate Bill 1004, First Special Session, 2005, the Workers' Compensation Commission may terminate. Thereafter, Workers' Compensation insurance in West Virginia will be provided through the successor to the Commission and other private insurance carriers.

This rule is amended to address the termination of the Commission and to transition certain activities to Office of the Insurance Commissioner or the administrator of the Old Fund. The rule amendments also recognize that, in a private insurance setting, certain duties in connection with liabilities other than those contained in the Old Fund may be required and performed by insurers.

Draft
6-21-05
85 CSR 5

FILED

2005 JUN 29 P 4: 28

TITLE 85
WORKERS' COMPENSATION COMMISSION
EXEMPT LEGISLATIVE RULE

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 5
PERMANENT TOTAL DISABILITY

§85-5-1. General.

1.1. Scope. – This rule implements the provisions of West Virginia Code Section 23-4-6(j)(1) regarding the proper completion and support for an application for permanent total disability benefits and the provisions of West Virginia Section 23-4-16(d) regarding the continuous monitoring of permanent total disability awards.

1.2. Authority – W.Va. Code Section 23-4-6(j)(1); Section 23-4-16(d). Pursuant to W. Va. Code, §23-1-1a(j)(3), rules adopted by the Workers Compensation Board of Managers 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. -- ~~November 24, 2004.~~

1.4. Effective Date. – ~~January 1, 2005.~~

§85-5-2. Definitions.

The following terms and words have the meanings stated, unless the context clearly indicates otherwise.

2.1. "Executive Director" means the executive director of the West Virginia Workers' Compensation Commission pursuant to W.Va. Code §23-1-1b.

2.2. "Commission" means the West Virginia Workers' Compensation Commission as provided for by W. Va. Code §23-1-1, and where appropriate, reference to the Commission shall include the self-insured employer."

2.3. "Act" means the workers' compensation laws of the State of West Virginia that are codified at chapter twenty-three of the Code of West Virginia.

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

2.5. "This rule" means the present exempt legislative rule that is designated in the caption here as title 85, series 5.

Proposed SOS
6-21-05

2.6. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of West Virginia Code Section 23-1-1a, et seq.

2.7. "PTD Application" shall mean an application for permanent total disability benefits provided for in West Virginia Code Section 23-4-6(d), et seq.

2.8. "PTD Recipient" shall mean any individual receiving permanent total disability benefits from the Commission or its predecessor agencies, self-insured employers or private carriers, whichever may be applicable, regardless of date of injury, date of last exposure, or date of award.

2.9. "PTD Award" shall mean an award of permanent total disability benefits, regardless of date of injury, date of last exposure, or date of award.

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

2.11. "Insurer" shall mean 1) as self-insured employer; or 2) a private carrier.

2.12. "Private carrier" means any insurer authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

2.13. "Reviewing body" means the interdisciplinary examining board or, upon termination of the Commission, the reviewing body who has jurisdiction over the claim as set forth in the provisions of W. Va. Code §23-4-6(j).

§85-5-3. Completion and Support of PTD Application.

3.1. A PTD Application will not be processed by the Commission, self-insured employer or private carrier, whichever is applicable, unless and until a Commission or insurance commissioner approved application is filed with the Commission, self-insured employer or private carrier that has been properly and fully completed, and is accompanied by all supporting information requested by the Commission, self-insured employer, or private carrier in its sole discretion. The PTD Application shall be on a form provided by the Commission or insurance commissioner which shall solicit the following information:

- a. Applicant's name;
- b. Applicant's social security number;
- c. Applicant's injuries and dates of injuries;
- d. Applicant's date of birth;
- e. Applicant's address;

Proposed SOS
6-21-05

- f. Applicant's phone number;
- g. Applicant's current employment status (employed, unemployed, self-employed, off due to injury);
- h. Details regarding any efforts by the Applicant to apply for and/or receive social security benefits, of any type;
- i. Details regarding any efforts by the Applicant to apply for and/or receive a retirement benefit of any type, include, but not limited to, receipt of a defined benefit or disability pension plan. The Applicant shall advise as to whether he or she contributed to the retirement plan and whether the plan benefit is being paid under the terms and conditions of a collective bargaining agreement;
- j. All workers' compensation claims indicating their claim number, the date of injury, the injured body part, and the impairment rating, if any, awarded in the claim, and the name of the employer and the employer's insurer in the claim;
- k. All disability claims filed with any other state or federal agencies;
- l. Copies of all medical reports indicating that the claimant has a permanent impairment;
- m. Information regarding any non-work related injuries or diseases suffered by the Applicant;
- n. Medical history;
- o. Prescription drug history;
- p. Employment history, including dates on employment for each employer;
- q. Military history; and
- r. Education history.

3.2. The PTD Application shall contain a Fraud Warning and shall reference applicable criminal and civil penalties as set forth in Chapter 23 and Chapter 61 of the West Virginia Code and, upon termination of the Commission, shall also reference applicable penalties under Chapter 33 of the West Virginia Code.

3.3. The Commission, self-insured employer or private carrier may utilize an Application for determining whether a claim should be opened for consideration as more fully set forth in West Virginia Code Section 23-4-6(n)(1) which solicits the information set forth in 3.1 that is pertinent to such determination and may thereafter utilize an Application Addendum or Supplemental Application to solicit more detailed information if the Commission, self-insured

Proposed SOS
6-21-05

employer or private carrier determines that the requirements of West Virginia Code Section 23-4-6(n)(1) have been met. A claim will not be re-opened for PTD consideration unless the Application has been filed within five (5) years of the date of closure of the claim, or within five (5) years of the date of the initial PPD award, whichever is applicable, as required by West Virginia Code Section 23-4-16. Further, any request for reopening shall be subject to the limitation on the number of requests (two) as contained within the provisions of W. Va. Code §23-4-16(a)(1).

3.4. The Applicant shall submit detailed and complete information regarding any benefits being paid to the Applicant through a retirement plan, wage replacement plan, salary continuation plan or other benefit plan provided by any current or former employer. The Applicant shall supply any evidence illustrating that he or she contributed to the plan and/or that the benefits being paid under the terms and conditions of a collective bargaining agreement.

3.5. The Applicant shall execute and update any and all Releases or Authorizations required by the Commission, self-insured employer or private carrier, including, but not limited to, those Releases and Authorizations required for the Commission, self-insured employer, or private carrier to obtain state and federal tax records, financial records, affidavits, income records, social security records, employment records, military service records, medical records, and education records and records held by other insurers, including self-insured employers.

3.6. All material information required in Sections 3.1-3.5 must be received by the Commission, self-insured employer, or private carrier before the PTD Application will be deemed complete and adequately supported.

3.7. No issue of permanent total disability may be referred to the ~~interdisciplinary examining board~~ reviewing body unless a properly completed and supported application for permanent total disability benefits has been received by the Commission, self-insured employer, or private carrier. Prior to the referral of any issue to the ~~interdisciplinary examining board~~ reviewing body, the commission, self-insured employer or private carrier shall conduct examinations of a claimant that it finds necessary and obtain all pertinent records concerning a claimant's medical history and reports of examinations and forward them to the ~~board~~ reviewing body at the time of the referral.

3.8. Claimants' whose applications for permanent total disability benefits do not satisfy the re-opening requirements of West Virginia Code Section 23-4-6(n)(1), as determined in the sole discretion of the Commission, self-insured employer, or private carrier, shall not be referred to the ~~interdisciplinary examining board~~ reviewing body and said decision shall be issued as a protestable order.

3.9. For all applications received on or after June 1, 2005, a claim determined to be eligible for evaluation for a permanent total disability award shall be ruled on by the ~~Interdisciplinary Board~~ reviewing body within one (1) year from the date such eligibility was determined. Nevertheless, for good cause, this period may be extended by the Commission, self-insured employer, or private carrier at the request of the employer or injured worker

Proposed SOS
6-21-05

§85-5-4. Program to Update Disability Status of Those Receiving PTD Benefits as of July 1, 2003.

4.1. Upon the effective date of this Rule, the Commission will begin a program requiring each person receiving permanent total disability benefits as of July 1, 2003, who had been granted a permanent total disability award on or after April 8, 1993, to 1) submit his or her tax returns for the preceding three (3) years; and 2) an affidavit demonstrating level of income, recreational activities, and work activities. Any permanent total disability award granted prior to April 8, 1993 but reopened for a benefit level adjustment shall be eligible for this review.

4.2. Each month, the Commission shall contact, by certified mail, approximately five hundred (500) PTD Recipients in an effort to secure the information set forth in Section 4.1. The mailing shall include an appropriate Internal Revenue Service authorization which can be completed in full and returned to the Commission, a form affidavit, and a self-addressed, postage pre-paid return envelope so that the documents can be returned to the Commission at no charge to the PTD Recipient.

4.3. The mailing shall instruct the recipient that he or she has forty-five (45) days from receipt to return the requested information or otherwise fully and adequately respond to the Commission's inquiry. Failure to so respond shall result in a second notice being sent to the PTD Recipient in the manner set forth in Section 4.2. The PTD Recipient will be given another forty-five (45) days to respond to this second notice and the PTD Recipient will be advised that failure to fully and adequately respond will result in a suspension of permanent total disability benefits.

4.4. Failure of a PTD Recipient to fully and adequately respond to the second notice as described in Section 4.3 above shall result in the suspension of permanent total disability benefits. The suspension shall remain in effect until the PTD Recipient has fully complied with the Commission's request. Benefits may be reinstated prospectively if and when the PTD Recipient fully complies with the Commission's request, but the benefits lost during the suspension shall not be paid.

4.5. The Commission will identify those injured workers who appear to be working, receiving income, not reporting any medical care, or are believed to otherwise not meet the current eligibility criteria for a permanent total disability award and make these individuals a priority review. Otherwise, the PTD review shall generally begin with those most recently awarded a permanent total disability award and will work in reverse chronological order thereafter.

§85-5-5. Monitoring of PTD Recipients.

5.1. The Commission, self-insured employer, or private carrier shall continuously monitor permanent total disability awards and may reopen a claim for reevaluation of the continuing nature of the disability and possible modification of the award. In evaluating whether to reopen a claim, the Commission, self-insured employer, or private carrier may employ one (1) or more of the following methods:

Proposed SOS
6-21-05

a. Require the PTD Recipient to provide documents as more fully set forth in Section 4 above and other information to the Commission, self-insured employer, or private carrier, including, but not limited to, tax returns, financial records, affidavits demonstrating level of income, recreational activities, work activities, and any other information set forth in Section 3.1.a.-r. of this Rule;

b. Require the PTD Recipient to appear under oath before the Commission, self-insured employer, or private carrier or its duly authorized representative and answer questions;

c. Any claimant who willfully fails to provide the information called for in Section 5.1.a. or willfully fails to appear as required by Section 5.1.b. shall have his or her permanent total disability benefits suspended. The suspension shall remain in effect until the PTD Recipient has fully complied with the Commission's, self-insured employer's, or private carrier's request. Benefits will be reinstated prospectively if and when the PTD Recipient complies with the Commission's, self-insured employer's, or private carrier's request, but the benefits lost during the suspension shall not be paid.

5.2. If the Commission, self-insured employer, or private carrier concludes, in its sole discretion, that there exists good cause to believe that the PTD Recipient no longer meets the eligibility requirements of West Virginia Code Section 23-4-6(n), the claim may be reopened after providing the PTD Recipient 30 days written notice.

5.3. Upon reopening, the Commission, self-insured employer, or private carrier may modify the PTD award or reevaluate the continuing nature of the PTD Recipient's disability. The eligibility requirements for evaluating a PTD Recipient's permanent total disability status shall be the requirements, including any vocational standards, stated in Chapter 23 at the time of a claim's reopening, regardless of date of injury or date of award. If appropriate, the Commission, self-insured employer, or private carrier, in its sole discretion, may process the reopening through the ~~Interdisciplinary Examining Board~~ reviewing body or through any other medical review process.

5.4 Upon reopening, the Commission, self-insured employer, or private carrier may take evidence, have the claimant evaluated, make findings of fact and conclusions of law and issue a Final Order that 1) shall vacate, modify or affirm the award; 2) require the offset of any benefits being paid to the PTD Recipient due the PTD Recipient's receipt of benefits from a retirement plan, wage replacement plan, salary continuation plan or other benefit plan provided by any current or former employer as more fully provided for in West Virginia Code Section 23-4-1d(f), as that provision may be amended from time to time; 3) may award any rehabilitation benefits as more fully provided for in West Virginia Code Section 23-4-9, as that section may be amended from time to time; or 4) may otherwise modify the PTD Award as determined appropriate in the sole discretion of the Commission, self-insured employer, or private carrier.

a. The Commission, self-insured employer, or private carrier shall issue a proposed order setting forth its findings, which shall become effective in 120 days from the date

Proposed SOS
6-21-05

of the order unless the injured worker submits evidence within 90 days of the proposed order establishing that the proposed action is not supported by the weight of the evidence submitted.

5.5. The PTD Recipient's former employer shall not be a party to the reevaluation, but shall be notified of the reevaluation and may submit any information to the Commission, self-insured employer, or private carrier as the employer may elect.

5.6. In the event the claimant retains his or her award following the reevaluation, the PTD Recipient shall be reimbursed his or her costs in obtaining one evaluation on each issue during the course of the reevaluation with the reimbursement being made from the workers' compensation fund.

5.7. Upon being identified as a candidate for reevaluation, an injured worker shall be entitled to legal counsel and the injured worker's attorneys' fees incurred in defending the award shall be paid by the Commission, self-insured employer, or private carrier. The attorney will be paid \$110 per each hour worked through a final decision by the Office of Judges, up to a maximum of \$3,500. The attorney will be paid \$110 per hour worked for any appellate work at the Board of Review and West Virginia Supreme Court of Appeals, up to a maximum additional \$1,500. The fee shall be payable only upon the issuance of a decision by the West Virginia Supreme Court of Appeals, or a lower jurisdiction if an appeal is not taken. The hours worked shall begin to accrue upon the injured workers' receipt of a Commission, self-insured employer, or private carrier notice identifying him or her for review. The maximum attorney fee allowable under this section may be waived in extraordinary cases in the sole discretion of the Commission, self-insured employer, or private carrier.

5.8 The reopening and reevaluation process shall not apply to PTD Awards granted pursuant to West Virginia Code Section 23-4-6(m).

5.9 The Commission's, self-insured employer's, or private carrier's Final Order, issued pursuant to Section 5.4 shall be a protestable Order. The Commission's, self-insured employer's, or private carrier's reopening and other actions set forth in Section 5.1-5.3 shall not be protestable.

§85-5-6. Termination of the Commission.

Upon termination of the commission, the application requirements set forth in Section 3 of this exempt legislative rule and all duties set forth in Sections 4 and 5 of this exempt legislative rule as they are to be performed in connection with Old Fund liabilities as set forth in W. Va. Code §23-2C-2(m) shall be required and performed by the insurance commissioner and/or the insurance commissioner's administrator of the Old Fund or the administrator of other various funds regulated by the insurance commissioner. The application requirements set forth in Section 3 of this exempt legislative rule and all duties set forth in Section 5 of this exempt legislative rule as they are to be performed in connection with liabilities other than those contained in the Old Fund may be required and performed by insurers as defined above.

§85-5-67. Severability.

Proposed SOS
6-21-05

If any provision of this rule or the application thereof to any entity or circumstance is held invalid, such invalidity does 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.

COPY

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

IN THE MATTER OF:	)	HONORABLE JOE MANCHIN, III,
	)	CHAIRMAN
PUBLIC HEARING	)	RULE 5 - PTD
(May 17, 2005)	)	

Transcript of proceedings had in the above-styled
meeting were held as therein appears before the **WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF MANAGERS**, held at the
Charleston Civic Center, Suite 209, 200 Civic Center Drive, Charleston,
West Virginia, at 1:05 p.m., on the 17th day of May, 2005.

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

APPEARANCES:**MEMBERS OF THE WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF MANAGERS****HONORABLE JOE MANCHIN, III, CHAIRMAN****Robert Alsop (Designee)****PAUL THOMPSON, Member****GENE BAILEY, Member****BOB PHALEN, Member****EVERETTE SULLIVAN, Member****CHRIS JARRETT, Member****DOUGLAS MERRITT, Member****RICHARD HUMPHREYS, Member****PAUL HARDESTY, Member****CRAIG SLAUGHTER, Member****MARGARET RICE, Recording Secretary****Reporter's Certificate.....4**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

(P R O C E E D I N G S)

(1:05 P.M)

CHAIRMAN ALSOP: This is a meeting of the West Virginia Workers' Compensation Board of Managers. We have a public hearing for several rules. The first rule is 85CSR5, regarding permanent total disability.

No one has signed up to speak to Rule 5 regarding permanent total disability, but I will ask out of an abundance of caution, are there any members of the public who would like to speak to this rule? (No Response.)

If not, then, we will close the public hearing for Rule 5, permanent total disability.

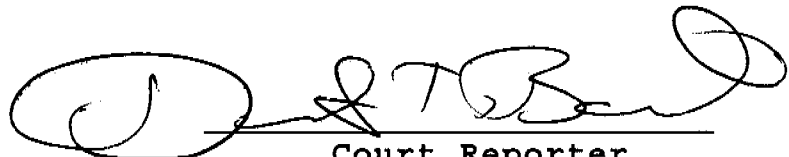
(WHEREUPON, the hearing was adjourned at 1:06 p.m.)

REPORTER'S CERTIFICATE

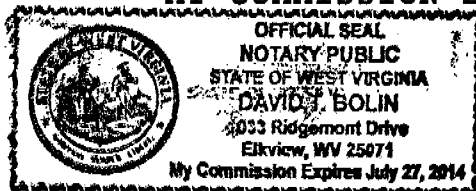
STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, the undersigned, David T. Bolin,
Court Reporter and Notary Public, do hereby
certify that the foregoing is, to the best of my
skill and ability, a true and accurate transcript
of the proceedings had before the West Virginia
Workers' Compensation Board of Managers as set
forth in the caption hereof, and that this is the
original transcript thereof for the files of the
Board.

Given under my hand this
23rd day of May, 2005.


Court Reporter

MY COMMISSION EXPIRES JULY 27, 2014.



WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS

PUBLIC HEARING

MAY 17, 2005 – 1:00 P.M.

85CSR5 "PERMANENT TOTAL DISABILITY"

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)
Adrian Alatu	Conventia	N
Stacie Ouellet	FG	N
Tressa McCallister	Can I	N
Tammy Shambler	Can I	N
Bill Wagoner	MWLP, LLC	N

Name	Company	Mailing address if you wish to receive notices of meetings (if previously provided, leave blank)	Do you wish to speak? (yes/no)
MARK D. CLARK	FRANK GATES	Address City, state, zip	No
Michael Keen	Adena	Address City, state, zip	No
Susan Osborne	AMVEST	Address City, state, zip	No
LARRY DUGGESS	PEABODY ENERGY	Address City, state, zip	No
Danby Schoolcraft	Chme	Address City, state, zip	No
TREAS McCallister	CMT	Address City, state, zip	No

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS

ATTENDANCE SHEET

BOARD OF MANAGERS MEETING – MAY 17, 2005 – 1:00 P.M.

The Board is required to keep a list of individuals attending its meetings and of those who wish to address the Board.

Name	Company	Mailing address if you wish to receive notices of meetings (if previously provided, leave blank)	Do you wish to speak? (yes/no)
<i>Jose Snyder</i>	<i>Miller & Snyder</i>	Address City, state, zip	<i>no</i>
<i>T. Snyder</i>	<i>JS</i>	Address City, state, zip	<i>✓</i>
		Address City, state, zip	
		Address City, state, zip	
		Address City, state, zip	
		Address City, state, zip	
		Address City, state, zip	

From: Thomas Obrokta
To: Suter, Randy
Date: 5/3/05 12:13PM
Subject: Fwd: Rules 5, 7 19, and 32

please comment

>>> "Ryan Sims" <Ryan.Sims@wvinsurance.gov> 04/21/05 11:06AM >>>
TJ -

Below are my suggested changes and comments regarding the other rules you sent out for comment on 03/31/05. Again, most of these are of the "semantic" nature, pertaining to adding the "transition language" being placed after places in which the WCC is mentioned. (This was discussed further in my last email on series 21). However, there are a few substantive suggestions as well, with which I have included comments, where appropriate. Perhaps the most significant substantive change is in series 7, regarding the Article 2 hearings. I think there is some language at the end of this rule which inappropriately limits the scope of Article Two hearings before the Insurance Commissioner under the new privatized system.

Series 5

- * 85-5-2.8 - Only sentence, after "Commission or its predecessor agencies" add "self-insured employer or private carrier".
- * 85-5-3.2 - Only sentence, after "Chapter 23" add "Chapter 33". (This is because under the new system, applicants would also be subject to the provisions of Chapter 33 as well).
- * 85-5-3.7 - Second sentence, after "Commission" add "self-insured employer or private carrier".

Series 7

- * 85-7-12, general comment - The rule appropriately includes "transition" language in section 12, making it clear that the IC assumes the administration of the Article 2 hearings upon termination of the WCC. However, there is some concern regarding this transition language. Specifically, it states that, upon termination of the WCC, the IC administers series 7 "for the sole purpose of processing then existing Article Two matters, or any subsequently filed Article Two matters, which involve the collection of the Old Fund assets as defined in West Virginia Code § 23-2C-2)(1)." The concern is that there are some decisions which the IC could be required to make under Article Two that do not necessarily pertain to "the collection of Old Fund assets", and that this limitation in the rule could cause some confusion as to the IC's ability to make such Article Two decisions. For example, if the IC made a decision under the new privatized system that a particular employer was not exempt from procuring WC coverage from a private carrier, pursuant to 23-2-1, this would be a decision that would be subject to an Article Two hearing. However, under the rule, the employer could not obtain such a hearing, because it would not involve "the

collection of Old Fund assets." Another example would be decisions as to applications by employers to obtain self-insured employer status; again, such decisions by the IC would be Article Two decisions, but under this rule, the employer could not obtain a hearing.

Therefore, I would suggest that the transition language in section 12 be revised, perhaps by the language limiting Article Two hearings to "Old Fund" subject matter being stricken altogether.

Series 19

* General comment - The rule appropriately includes the "transition" language in section 11, making it clear that the IC assumes the regulatory enforcement of this rule upon termination of the WCC. However, there are a number of duties also imposed upon the Board of Managers in the rule, such as considering petitions for grace periods under 6.1.c.1.A, and determining a methodology to assess additional amounts to self-insured employers for the guaranty pool under section subsection 9.4. It should probably be clarified in the "transition" language of section 11 which entity (either the IC or the Industrial Council, or both), assumes these various duties of the BOM under this rule.

Series 32

* 85-32-2.9 - Second sentence, after "Commission" add "or, upon termination of the Commission, the Insurance Commissioner." Also, in second sentence, after "Commission's" add "or Insurance Commissioner's".

* 85-32-2.14 - Only sentence, after Commission, add "Insurance Commissioner."

* 85-32-2.15 - Only sentence, after "included as" add "being". Also, after "Commission" add "or Insurance Commissioner."

* 85-32-7.3a. - Second sentence, after "If the Commission" add "or Insurance Commissioner. Also, in last sentence, after "Commission" add "Insurance Commissioner."

* 85-32-7.5a.2. - Only sentence, after "Commission" add "or Insurance Commissioner."

Note regarding the above comments: The above comments are ones similar to the comments made on Rule 21, regarding placing the "transition" language after each place where the WCC is mentioned in the rule. In series' 5, 21 and 32, it appears that attempts were made to place "transition" language throughout

the rule, in each place where it is necessary, rather than to just have a comprehensive "transition section" which states that upon termination of the WC, the enforcement of the rule transfers to the IC (as was done in series' 7 and 19). It is probably fine to create the transfer of the rule to the IC in either manner; however, in the rules where it was decided to place the language throughout the rule, the transition language should be inserted everywhere where the WCC is mentioned, so there is no confusion regarding the duties which transfer to the IC.

* 85-32-8 - The BOM is given the duty of reviewing and granting or denying petitions from agencies or other persons to be exempt from the provisions of this rule. As with series 19, when a duty is conferred upon the BOM, the rule should make it clear which entity (either the IC, the Industrial Council, or both), assumes these duties upon termination of the WCC.

* General comment - This actually ties back into my comment on series 7, above. It is clear in section 7 of this rule that the employer is entitled to an Article Two hearing if they want to contest their status as being in default under series 32. This is another example of an "Article 2" issue which would deal with the new system, and not the old fund. Therefore, the scope of the Article Two hearings in series 7 should not be limited to matters involving old fund assets.

The Insurance Commission has an interest in these rules which are transferring from the WCC to the IC to be in a functional form at such time as the governor issues the proclamation terminating the WCC, and we certainly want to work with the BOM and the WCC to this end. Please feel free to contact me at your convenience so that we may discuss the above comments, as well as my previous comments on series 21.

Ryan M. Sims

Associate Counsel

West Virginia Insurance Commission

Legal Division

P.O. Box 50540

Charleston, WV 25305-0540

(304) 558-0401 ext. 139

Response to Comments

Series 5

Insurance Commissioner's Office

* 85-5-2.8 - Only sentence, after "Commission or its predecessor agencies" add "self-insured employer or private carrier".

Response: Agreed.

Internal Comment

Comment: As part of the application, the claimant should identify the name of the employer and the insurer under which the award was granted.

Response: The section was modified as shown in the following marked revision:

- j. All workers' compensation claims indicating their claim number, the date of injury, the injured body part, ~~and~~ the impairment rating, if any, awarded in the claim, and the name of the employer and the employer's insurer in the claim;

Insurance Commissioner's Office

* 85-5-3.2 - Only sentence, after "Chapter 23" add "Chapter 33". (This is because under the new system, applicants would also be subject to the provisions of Chapter 33 as well).

Response: Agreed, with the notation that applicants will not be subject to chapter 33 until termination of the commission.

Internal Comment

Comment: Section 3.3. should be modified so that it is clear that either of the two statutes of limitations may apply by the addition of the words, "whichever applicable."

Response: The section was modified as follows:

A claim will not be re-opened for PTD consideration unless the Application has been filed within five (5) years of the date of closure of the claim, or within five (5) years of the date of the initial PPD award, whichever is applicable, as required by West Virginia Code Section 23-4-16.

Internal Comment

Comment: Section 3.3 should be modified so that it is clear that a PTD reopening application is subject to the reopening limitations (two) as contained in W. Va. Code §23-4-16(a)(1).

Response: The following language was added to 3.3.

Further, any request for reopening shall be subject to the limitation on the number of requests (two) as contained within the provisions of W. Va. Code §23-4-16(a)(1).

Internal Comment

Comment: Section 3.5. should provide for a release of records held by other insurers including self-insurers.

Response: The section was modified by adding the following language to the section providing for the execution of a release of records by the claimant applicant for a PTD: "and records held by other insurers, including self-insured employers."

Insurance Commissioner's Office

* 85-5-3.7 - Second sentence, after "Commission" add "self-insured employer or private carrier".

Response: Agreed. During the review of this section, it was determined that references were made to the Interdisciplinary Examining Board (IEB) that is set to terminate upon termination of the Commission. The term "reviewing body," as provided in accordance with W. Va. Code §23-4-6(j), was substituted for the IEB at 3.7, 3.8, 3.9 & 5.3. In addition, the term "reviewing body" was defined at 2.13.

6-8-05 Insurance Commissioner comment

Rule 5 should be re-visited in regard to the same concerns expressed in Rule 12, above. Specifically, the IC should be inserted as another entity, along with self-insured and private carriers, which has the ability to award PTD's under the standards in rule 5, as it will be considering (through its designated TPA) PTD claims under the various funds it is charged with regulating, such as the old fund uninsured employer fund and adverse risk fund. An alternative might be to amend the "transition section" of 85-5-6 as follows:

Upon termination of the commission, the application requirements set forth in Section 3 of this exempt legislative rule and all duties set forth in Sections 4 and 5 of this exempt legislative rule as they are to be performed in connection with Old Fund liabilities as set forth in W.Va. Code §23-2C-2(m), or claims under the other various funds regulated by the insurance commissioner, shall be required and performed by the insurance commissioner and/or the insurance commissioner's designated administrator of the Old Fund or other various funds regulated by the insurance commissioner. The application requirements set forth in Section 3 of this exempt legislative rule and all duties set forth in Section 5 of this exempt legislative rule as they are to be performed in connection with liabilities other than those contained in the Old Fund or other various funds regulated by the insurance commissioner may be required and performed by insurers as defined above.

Response: Agreed. Change to wording of section 6 made.