

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

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2004 FEB 18 P 3:50

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Form #1

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 ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 5

TITLE OF RULE BEING PROPOSED: Permanent Total Disability

DATE OF PUBLIC HEARING: April 14, 2004 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209

Charleston Civic Center

Charleston, West Virginia

*The comment period expires at the conclusion of the public hearing.

COMMENTS LIMITED TO: ORAL ☐ , WRITTEN ☐ , BOTH ☒

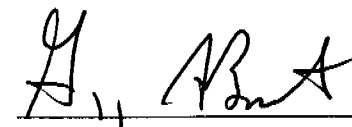
COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

T. J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Ave., S.E.
Charleston, WV 25304
Fax # (304) 926-5372



Authorized Signature



Gregory A. Burton, Executive Director

4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone: (304) 926-1710

February 17, 2004

The Honorable Joe Manchin III
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 Manchin:

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. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 5 entitled, "Permanent Total Disability," 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

**SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 5
PERMANENT TOTAL DISABILITY**

This exempt legislative rule implements the provisions of W. Va. Code § 23-4-6(j)(1) regarding the proper completion and support for an application for permanent total disability benefits.

This exempt legislative rule provides for the continuous monitoring of permanent total disability awards in accordance with the provisions of W. Va. Code § 23-4-16(d).

This exempt legislative rule also provides for a program to update the disability status of claimants receiving permanent total disability awards as of July 1, 2003. This program is for those awards of permanent total disability that have occurred on or after April 8, 1993.

As a part of the monitoring and updating processes, the rule requires the Commission to contact the subject recipients of permanent total disability awards and determine their current activity status.

Depending on the information received as a result of the monitoring process, the Commission may re-open the permanent total disability claim for the purpose of modifying the award.

The rule complies with the new provisions of W. Va. Code §§ 23-4-6(j)(1) and 23-4-16(d), as contained within Senate Bill 2013, effective July 1, 2003.

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>	500,000	(17,000,000)	0	(11,000,000)	(17,000,000)
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER:					
Benefit payments	0	(17,000,000)	0	(11,000,000)	(17,000,000)
Evaluations and attorney fees	500,000	0	0	250,000	500,000

2. Explanation of above estimates:

Implementation of the proposed rule may require additional personnel to initially review and update all of those receiving permanent total disability (PTD) benefits as of July 1, 2003 that are subject to review as well as performing additional tasks required in providing the ongoing review of PTD recipients documentation resulting from monthly mailing data requests to PTD claimants beginning in June, 2004. It cannot be reasonably determined what amount of additional personnel expenses will be incurred as a result of the proposed rule. A slight reduction in a few PTD benefits may result from claimants whose benefits are suspended due to their failure to timely respond to data requests from the Commission. It is estimated that 16% of all claims reviewed will be set aside resulting in the elimination of an annualized \$17,000,000 in PTD benefit payments.

Rule Title: Title85 Series5: Permanent Total Disability

3. Objectives of this rule:

This rule establishes the policies and procedures of the Workers' Compensation Commission related to filing, reviewing and monitoring permanent total disability claims.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that this rule will increase the administrative expenses of reviewing and maintaining permanent total disability claims while potentially reducing the amount of permanent total disability benefits paid as a result of preventing or discontinuing improper payments made on these same claims.

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

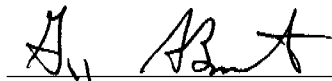
It is expected that employers will benefit by the additional monitoring and review of permanent total disability claims by reducing the amount of improper payments being made on these claims.

C. Economic Impact on Citizens/Public at Large.

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

Date: 02 - 18, 2004

Signature of Agency Head or Authorized Representative



Gregory A. Burton

Executive Director, Workers' Compensation Commission

85 CSR 5

FILED

TITLE 85
WORKERS' COMPENSATION COMMISSION
EXEMPT LEGISLATIVE RULE

2004 FEB 18 P 3: 50

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. --

1.4. Effective Date. --

§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.

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.

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, 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.

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

3.1. A PTD Application will not be processed by the Commission unless and until a Commission approved application is filed with the Commission that has been properly and fully completed, and is accompanied by all supporting information requested by the Commission, in its sole discretion. The PTD Application shall be on a form provided by the Commission 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;
- 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;
- 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 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.

3.3. The Commission 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 determines that the requirements of West Virginia Code Section 23-4-6(n)(1) have been met.

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, including, but not limited to, those Releases and Authorizations required for the Commission to obtain state and federal tax records, financial records, affidavits, income records, social security records, employment records, military service records, and education records.

3.6. All information required in Sections 3.1-3.5 must be received by the Commission 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 unless a properly completed and supported application for permanent total disability benefits has been received by the Commission. Prior to the referral of any issue to the interdisciplinary examining board, the commission 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 at the time of the referral.

3.8. Claimants' whose applications 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, shall not be referred to the interdisciplinary examining board.

3.9 A permanent total disability application shall not be made in the form of the re-opening of an existing claim; instead, it shall be a separate and independent claim for which application can be made at anytime on forms approved by the Commission, as amended from time to time by the Commission.

§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 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 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 may employ one (1) or more of the following methods:

a. Require the PTD Recipient to provide documents as more fully set forth in Section 4 above and other information to the Commission, 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 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 request. Benefits will be reinstated prospectively if and when the PTD Recipient complies with the Commission's request, but the benefits lost during the suspension shall not be paid.

5.2. If the Commission 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 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, in its sole discretion, may process the reopening through the Interdisciplinary Examining Board or through any other medical review process.

5.4 Upon reopening, the Commission 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.

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 as the employer may elect.

5.6. In the event the claimant retains his or her award following the reevaluation, the PTD Recipient's reasonable attorneys' fees incurred in defending the award shall be paid by the Commission from the workers' compensation fund. Additionally, if he or she prevails, 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 The criteria that shall be employed in determining the reasonable attorneys' fees to be awarded shall be as provided for in 85 C.S.R. 4.

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

§85-5-6. Chargeability

The Commission may assign a permanent total disability application a new claim identification number. The employer chargeable for the permanent total disability indemnity award shall be the employer at the time the last injury was sustained that materially contributed to the permanent total disability award, as determined in the sole discretion of the Commission. Future medical benefits shall be chargeable to the employer that employed the claimant at the time of each respective compensable injury.

§85-5-7. Severability.

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.