

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

Form #5

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FILED

2004 NOV 24 P 2:08

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 _____ NO X

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

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS January 1, 2005



Authorized Signature

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

Form #1

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2004 SEP 21 P 3:27

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 ___ NO X

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 (The proposed rule was filed on 2/18/04 and subject to a public hearing. This notice schedules an additional public hearing for this proposed rule.)

DATE OF PUBLIC HEARING: October 26, 2004 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia
(Written comments will be received through 5:00 p.m. on October 26, 2004.)

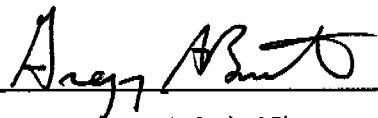
COMMENTS LIMITED TO: ORAL ___ , WRITTEN ___ , BOTH X
COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

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, General Counsel
Executive Offices
Workers' Compensation Commission
4760 MacGorkle Avenue, S.E.
Charleston, West Virginia 25304
Fax # (304) 926-5372


Authorized Signature

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

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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 X

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 12, 2004** (Previously scheduled for 4/14/04) TIME: 1:00 p.m.

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

****Please note the change of the date for this public hearing from 4/14/04 to 4/12/04.
However, written comments will be received through 5:00 p.m. on 4/14/04.**

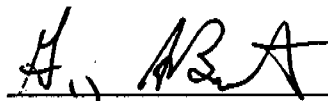
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T. J. Obrokta
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304
Fax # (304) 926-5372



Authorized Signature

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

Form #1

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2004 FEB 18 P 3:50

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 ___ NO X

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 X

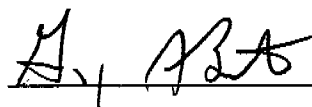
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The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

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

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



Authorized Signature



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

Gregory A. Burton, Executive Director

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: 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: 62 - 18, 2004

Signature of Agency Head or Authorized Representative



Gregory A. Burton

Executive Director, Workers' Compensation Commission

**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. --

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, 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.

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 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.

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, medical records, and education records.

3.6. All material 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 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, shall not be referred to the interdisciplinary examining board and said decision shall be issued as a protestable order.

~~3.9 A3.9. For all applications received on or after June 1, 2005, a claim determined to be eligible for evaluation for 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.~~
award shall be ruled on by the Interdisciplinary Board within one (1) year from the date such eligibility was determined. Nevertheless, for good cause, this period may be extended by the Commission at the request of the employer or injured worker

§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 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.

a. The Commission shall issue a proposed order setting forth its findings, which shall become effective in 120 days from the date 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 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~~ 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 to be awarded shall be as provided for in 85 C.S.R. 4. incurred in defending the award shall be paid by the Commission. 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 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.

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.

**APPEARANCES:
MEMBERS OF THE WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF MANAGERS**

STEVE WHITE, Chairman

DOUGLAS MERRITT, Member

PAUL THOMPSON, Member

EVERETTE SULLIVAN, Member

GENE BAILEY, Member

BOB PHALEN, Member

MARGARET RICE, Recording Secretary

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LESLY MESSINA	32
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1 (P R O C E E D I N G S)

2 (1:06 P.M)

3 CHAIRMAN WHITE: The next rule that we
4 will consider and have a public hearing on is Rule
5 5, Permanent Total Disability. This rule has been
6 passed and sent to the Secretary of State's office
7 for public comment and this is the public comment
8 period.

9 The first gentleman that is
10 indicating he would like to speak to this rule is
11 Mr. Adkins. Mr. Adkins, could you please come up
12 and speak to the rule?

13 MR. ADKINS: Thank you very much, Mr.
14 White. Gentlemen, my name is Edward Adkins. I'm
15 an attorney generally representing claimants in
16 Workers' Compensation cases.

17 I have reviewed the permanent total
18 disability regulations. I made comment to Mr.
19 Obrokta in a three and-a-half page letter to him
20 dated October 6, 2004. I sent a copy to Mr. White
21 and I believe Mr. White has received it and
22 possibly has reviewed it.

1 I have several concerns and the
2 first one that I would wish to bring to up is
3 something which is not in the rule, and that is,
4 any time standards by which the Commission is to
5 determine when a person is eligible or has
6 satisfied the statutory requirements for permanent
7 total disability.

8 We have a lot of time requirements
9 in a lot of other things. There's so much time to
10 do this, time for reference for PTD examinations,
11 times for that and so forth, but there is no time
12 standard that the Commission is required to follow
13 when an application for a total permanent
14 disability award is filed.

15 I have had applications pending for
16 as long as three years, which is way too long.
17 Ordinarily what happens is that I will file an
18 application in the form which I believe complies
19 with statutory and regulatory requirements, I'll
20 get a letter of acknowledgment, it's received and
21 then silence.

22 It is deemed a prima facie case,

1 that is I have made sufficient proof to reopen the
2 claim, then the evaluation process starts and
3 that's a mystery to me, because I'm not sure what,
4 in this particular case, the Interdisciplinary
5 Examining Board, the IEB, wants when it makes a
6 determination of permanent total disability.

7 As you know, there are two
8 particular requirements that a claimant must make,
9 and that is, meeting the threshold and then
10 otherwise establishing the vocational standards
11 for disability.

12 In my experience, it is meeting the
13 threshold which has been the most difficult one
14 for claimants to meet, 40 percent, 50 percent,
15 whichever one happens to be applicable to the
16 particular application on file.

17 Then the claimant is referred out
18 maybe three or four months later, maybe the
19 claimant is sent out for a functional capacities
20 evaluation, maybe a psychological evaluation and
21 sometimes some kind of a vocational evaluation,
22 which strings out for months and months and

1 months.

2 You get a call. Mr. Adkins, what's
3 the status of my case? I don't know, it's
4 pending. I think these people deserve to have
5 some determination made of their claim within a
6 reasonable period of time.

7 At present, the Commission has no
8 statutory or regulatory requirement as to when
9 action is to be taken other than, as I said in my
10 letter, that is it required so as to assure the
11 quick and efficient deliver of indemnity and
12 medical benefits, to have the thing done in an
13 expeditious fashion.

14 I know it requires resources on
15 behalf of the Commission to do this. It's the
16 biggest award that you have, it's the most
17 controversial award that you have and I believe it
18 ought to be adequately evaluated. I can't argue
19 any otherwise, but I think it's got to be done in
20 an expeditious manner.

21 I proposed a rule in this. I said a
22 rule to the following effect: "A claim determined

1 eligible for evaluation for a permanent total
2 disability award must be finally determined by the
3 Interdisciplinary Board within one year from the
4 date such eligibility was determined." In other
5 words, give them a year. I thought that's more
6 than adequate.

7 I've raised this -- I talked to some
8 of my other associates, other claimant's
9 attorneys, why should they have to take a year.
10 Maybe that's too long, but you have got to have
11 some sort of standard by which these cases can be
12 adequately determined.

13 All of a sudden we are going to do
14 this review of all of these existing cases, which
15 is going to be something like 500 a month. How in
16 the world is the system, as I presently understand
17 it to be and how it operates, are you going to be
18 able to push not only existing people applying,
19 but all the people that are being reevaluated
20 through this system?

21 It's going to be just a big glut and
22 it's not been explained to me how this is going to

1 be done on an expeditious basis.

2 I understand the statutory
3 requirement, but there is also a requirement that
4 these cases be efficiently determined. I think
5 this Board should consider some time standard by
6 which a PTD has to be determined.

7 I'm not saying what decision has to
8 be made, but what I'm asking for is that the
9 decision be promptly made and that's the basis for
10 that particular comment.

11 On the application process itself,
12 and I reviewed 85-3 regarding the information
13 required in order to file a permanent total
14 disability application.

15 As I said, I don't see this
16 particular regulation to be objectionable on its
17 face. The Commission needs to have all the
18 information that it needs to determine if a person
19 is eligible.

20 One particular regulation that I saw
21 regarding 3.6 said, "This rule requires that all
22 information required in Sections 3.1 to 3.5 must

1 be received by the Commission before a PTD
2 application would determine complete and
3 adequately support it.

4 Those previous regulations talk
5 about information which the Commission may want to
6 obtain from third parties over which the claimant
7 has no control.

8 Someone calls up a claim's examiner
9 and says, well, we want some information from Dr.
10 X, we want certain information from this insurance
11 company or that insurance company and we can't
12 make a decision until that information is
13 available. Nothing happens. Call back three
14 months later, well, we asked for it, but we
15 haven't got it yet. And it goes on and on and on.

16 I'm not sure how this is going to
17 work on the ground in an actual practice.

18 My concern from a claimant's point
19 of view is that the application process is going
20 to be made so stringent and so restrictive that
21 you can't even get in the door, you can't even
22 present enough evidence for a prima facie case.

1 I think that if you present
2 reasonable evidence that you meet the statutory
3 requirements of a disability, then that should be
4 sufficient and you go through the evaluation
5 process, but I don't want to have to have a trial
6 to see that I have a trial.

7 I don't want a situation in which
8 everything is so stringently reviewed that
9 information keeps going on and on for months and
10 months and months and then finally you get a
11 letter saying, well, your application is
12 inadequate; in other words, you never even got in
13 the door for a review of the substantive part of
14 your case.

15 I don't have any specific remedy or
16 particular thing to offer except that this is a
17 concern that I have and this Board must look at.
18 I know the marching orders, and that is to cut the
19 benefits and one way to cut them is not make any
20 decisions on permanent total disability
21 applications.

22 If you don't make a decision, then

1 there's no benefits going to be awarded and,
2 therefore, the Commission and the fund is going to
3 save money.

4 That's a cynical point of view that
5 you have in this process, but in the last year or
6 three or four, I've unfortunately gone to that
7 particular point of view, that if you reach no
8 decision, then you don't have any money going out,
9 which brings me to the comments that I had on the
10 program to update disability status of those
11 receiving PTD benefits as of July 1, 2003.

12 I didn't sit down and enumerate all
13 of the particular due process objections that I
14 had to this process. I know it's in the law, but
15 it's one thing, it's quite one thing to deny
16 benefits to a claimant that has never received any
17 benefits and quite another to take them away.

18 You are going to be dealing with the
19 lives of families in this process and I think that
20 both the Commission and the staff ought to be
21 aware of that.

22 They are going to get this notice

1 and it's going for people that have been receiving
2 benefits in later life, for as much as 10 years or
3 more and have come to rely upon that check coming
4 in. I don't know -- and then I'm not sure what
5 kind of standards that these people are supposed
6 to meet now.

7 They satisfied the standards of
8 disability when they were originally awarded;
9 obviously they had through some process or the
10 award would not be made.

11 I'm not sure what standards are
12 going to be used for these people. Are we going
13 to have more stringent standards? Are we doing to
14 use the standards in effect for July 1, 2003 for
15 people that have been disabled since 1993?

16 I just think there's substantial due
17 process problems here. I'm not sure this is the
18 place to take up due process problems because this
19 Board, I suppose, has to look through and abide by
20 the statutory requirements and whatever fight that
21 we have to make in court, we will fight in court
22 about.

1 There is one thing, though, that is
2 not clear to me, and that's the procedural process
3 here. It's not clear from the rule as to how this
4 is going to work.

5 Joe Doe gets a letter from the
6 Commission. He's been on, say, PTD since 1997.
7 Your claim is being reviewed. Okay. He has to
8 comply with the Commission requirements under the
9 law to go to the examinations, go through the
10 testing and to get the information upon which the
11 Commissioner makes a decision to determine whether
12 that person is still eligible.

13 All right. Let's say the Commission
14 gets this information and decides that this person
15 does not now meet the requirements for disability.
16 I'm not sure what has happens at this point.

17 Do they send him a letter saying you
18 no longer meet the statutory requirements of the
19 law, therefore, your benefits are terminated as of
20 the first of next month? Is that the way that's
21 going to work?

22 Is there going to be no ability or

1 rebuttal at this level for the claimant? Does he
2 have any opportunity to say, well, this
3 information is wrong, I'm still disabled?

4 I don't think it is sufficient in
5 this process to say, well, you can appeal to the
6 Office of Judges, you can fight your battle there.

7 There has to be some opportunity for
8 the claimants to file some response, at least some
9 proposed -- it has to be a proposed response and
10 to give the claimant some reasonable opportunity
11 to rebut the action of the Commission in proposing
12 to terminate a person's permanent total
13 disability.

14 I think that's the minimum that due
15 process requires. I don't see that here. Maybe
16 that's what the plan is, but I think that
17 something more than just a 10-day letter or a
18 30-day letter is sufficient.

19 You have got to provide a reasonable
20 opportunity for this person to reply to the
21 Commission's action in proposing to terminate
22 benefits. I think that is absolutely a

1 requirement there and I think that's borne out in
2 Mitchell vs. the Commissioner and all of those
3 progeny dealing with notice requirements.

4 My last comment relates to this fee
5 business. Gentleman, I have absolutely have no
6 idea how this is going to work. I don't know
7 where the money is supposed to come from, what
8 charges can be made as far as the claimant is
9 concerned. I don't know whether the attorney can
10 have any fee arrangement with the claimant other
11 than what's set forth in the statute. It's
12 extremely vague.

13 The rule as proposed incorporates
14 Title 85, Series 4. This is a rule that was
15 enacted in 1995 dealing with attorney fees that
16 the Commission has to pay in proceedings, normally
17 mandamus actions and things of that sort, and I
18 think it was incorporated in the response to some
19 supreme court cases and the amount of money that
20 had to be paid.

21 I don't think it is employed much,
22 but in any event, it reversed Disciplinary Rule

1 2.106 of the Code of Professional Responsibility,
2 which no longer exists. That, I understand, was
3 abolished into a different section several years
4 later. It doesn't even exist anymore and somebody
5 is going to have to look at that rule.

6 The other deals with reasonable
7 attorney fees and that is going to be -- that's
8 going to provoke more and more fight than you can
9 possibly imagine if the self-insureds or the
10 Commission has to pay it.

11 The numbers in Title 85, Series 4
12 talk about maybe \$60 or \$70 an hour as what's
13 reasonable. That was 19 years ago. Maybe it was
14 reasonable then. It's certainly not reasonable
15 now. In my judgment, if you are going to
16 establish some sort of fee schedule, then there
17 has to be some evidentiary basis for doing so.

18 I do a lot of Social Security
19 disability award and occasionally you will get an
20 award under what the federal law calls the Equal
21 Access to Justice Act. That's the EAJA fee.
22 Usually you get those if you take a case to a

1 federal district court and you win. They pay you.
2 It's running somewhere between \$150 and \$160 an
3 hour right now, but it's based upon a survey of
4 community charges.

5 I understand there's another
6 committee that's supposed to be looking into fees
7 paid to people and how it affects the process. I
8 don't know what kind of progress they have made on
9 that. I think some of the projections made by
10 claimants in the newspapers are way off base.

11 Good luck on trying to get the
12 employer's attorneys to tell you what they charge
13 their clients. You can pry open that can of
14 worms, but I can tell you, I don't think that
15 attorneys for the employers charge any less than
16 \$150 an hour. You can't get anybody to do
17 anything for less than that on an hourly basis
18 anymore and expect to get something reasonable
19 from it.

20 I've done this work -- the only
21 person around here that I know have done this work
22 longer than I have is Pat Maroney. So I have a

1 pretty good idea of how it operates. I can do
2 things real quickly. I generally don't have to
3 have a lot of time, but I think my time is worth
4 more than \$75 an hour.

5 I just don't know how you are going
6 to address that. I don't think this particular
7 approach is too vague and unworkable. I really
8 don't know and I don't have any suggestions on how
9 to correct it other than you should delete.

10 I think I said -- my suggestion,
11 this whole thing just should be deleted, because
12 it refers to a section which is no longer
13 appropriate to work with.

14 My final comment goes back to the
15 people that are on PTD. I know that the system is
16 very, very cognizant to the amount of money going
17 out. I don't know how well we are doing in terms
18 of keeping solvent.

19 I think a solvent fund is something
20 that claimants need to be -- they need to be
21 assured of this as much as anyone. They need to
22 know there's a place where the money is going to

1 come from, but bear in mind that there's a lot of
2 people out there that are probably somewhere in
3 their mid to late 50s that are going to be sent
4 out for examinations and somebody is going to say,
5 gee, these people don't have a 50 percent wholeman
6 impairment.

7 Again, I just think this is
8 something that ought to be looked at a lot more
9 carefully than I believe is being done. That
10 concludes my comment unless someone has some
11 questions about what I have said.

12 CHAIRMAN WHITE: Mr. Phalen?

13 MEMBER PHALEN: Ed, you mentioned
14 eliminating the part in regards to the fee. What
15 particular section and subsection is that? Can
16 you site that?

17 MR. ADKINS: The one that I was talking
18 about was 85 -- I don't know what the section --
19 5.6. The Commission by this regulation
20 incorporates into it Title 85, Series 4, which is
21 significantly out of date and refers to a
22 disciplinary rule that's no longer in effect.

1 I don't see how it applies. There's
2 no in court or out-of-court work except in special
3 situations and maybe when you file an appeal with
4 the supreme court. The payment rates are over 19
5 years old and do not reflect current hourly rates
6 in the community. It's just an arbitrary number.

7 This is basically something that
8 says the Commission believes this hourly rate is
9 reasonable, period, and they are not based on any
10 survey or determination of charges actually made
11 in the community in the field Workers'
12 Compensation represent and do not reflect
13 contingency issues

14 So this rule should be abolished and
15 perhaps reworked in some fashion, but I don't
16 know. It seems to me you have to have some basis
17 for determining what's reasonable. You just can't
18 say so. Somebody has got to go out and ask
19 people, what do you charge for this, what do you
20 charge for that.

21 You don't get that too much in
22 claimant's work because it's mostly contingent. I

1 don't know what the employers charge, but you have
2 to have something reasonable and the fact that you
3 don't always win, the employer's representatives
4 always get paid whether their clients win or lose.

5 The claimant's representatives do
6 not and so you have to have some adjustment for
7 that particular feature, otherwise people are at a
8 disadvantage.

9 You are working at an hourly rate
10 that is much less than your opponent. Everybody
11 talks about how much claimant's representatives
12 make.

13 I don't have any basis. I don't
14 look into people's billings. I have no idea what
15 they charge, but at least the opinion is that most
16 of the representatives of the employers charge
17 considerably more on the whole than do claimant's
18 representatives. Anything else?

19 CHAIRMAN WHITE: Thank you, Mr. Adkins.

20 MR. ADKINS: Thank you.

21 CHAIRMAN WHITE: Next speaker will
22 be Lesly Messina.

1 MR. BURTON: Could I interject one thing
2 before that?

3 CHAIRMAN BLACK: Yes, sir.

4 MR. BURTON: We typical don't respond at
5 the public hearing, but I wanted to give you
6 something to think about as you go back on his
7 comments related to the IEB and the process that
8 it takes to go through and get a PTD.

9 We agree that that process takes too
10 long. We have been working with the IEB over the
11 past few months and have developed a system that
12 they basically are going to double up the amount
13 of reviews they do.

14 We have a backlog of about 700 to
15 800 PTD's that need to work through the system.
16 Some take anywhere from 2 to 4 years to get done.
17 That is not acceptable.

18 We have developed a new policy that
19 once that backlog is taken care of, that we should
20 be able to get a PTD application through the
21 system within 9 to 12 months and it fits within
22 his math, the one year comment that he made.

1 We agree that it takes too long. We
2 wanted you to know we are working on that. We do
3 have a large backlog and hopefully that will get
4 caught up before July of next year and then once
5 that's done, we will get back on track and get
6 these things worked through the system.

7 CHAIRMAN WHITE: Would the Commission's
8 position be that they would be agreeable to Mr.
9 Adkins' suggestion with respect to one year?

10 MR. BURTON: That would be agreeable to
11 us, the one year after we get this backlog taken
12 care of. Again, we have got about 700 to 800
13 applications that we have got to get through the
14 system. Once that's done -- our goal is to get
15 that done within July of next year, to have that
16 backlog caught up.

17 CHAIRMAN WHITE: Any rule that we would
18 have with respect to a limit, I'm sure would have
19 to have exceptions criteria.

20 MR. BURTON: Right, as TJ mentioned, you
21 could have it effective July 1 of '05. Anything
22 from there, it would be one year after that. We

1 would be agreeable to that.

2 We wanted to let you know that we
 3 are working on it, his concerns, and it has been a
 4 concern of ours for a long period of time and we
 5 are just now getting to it and getting the backlog
 6 caught up.

7 CHAIRMAN WHITE: Thank you.

8 MEMBER PHALEN: Mr. Chairman?

9 CHAIRMAN WHITE: Yes, sir?

10 MEMBER PHALEN: While Greg is up, might
 11 I inquire?

12 CHAIRMAN WHITE: Mr. Burton, you opened
 13 yourself up --

14 MR. BURTON: I understand, Mr. Chairman,
 15 but I felt compelled to respond to his --

16 MEMBER PHALEN: In regards to Mr.
 17 Adkins' comments regarding going back and
 18 reviewing the folks on PTD, I think it goes back
 19 10 years from July 1st of '03. I asked this
 20 question when this rule was originally submitted
 21 before this Board.

22 If, in fact, some of these folks,

1 some of the claimants are determined not to meet
2 the criteria and they are stripped of their
3 benefits, they have no time or they are cut off
4 immediately while the appeal process is ongoing.

5 My question is, does the statute
6 require that or is this the way the rule is
7 written in regards to this situation?

8 CHAIRMAN WHITE: We will let T.J. answer
9 that.

10 MEMBER PHALEN: I didn't get a straight
11 answer on that to begin with, I don't think.

12 MR. OBROKTA: T. J. Obrokta, General
13 Counsel. Under the code, we have an ongoing
14 responsibility, an ongoing jurisdiction over
15 PTD's.

16 Once it would be concluded by the
17 Commission that an individual was no longer
18 eligible for a PTD, then we would have no
19 authority to continuing paying that PTD while it's
20 litigated. So it would be my estimation that once
21 we have concluded they are no longer eligible, we
22 would have no authority to continuing paying once

1 a court tells us --

2 MEMBER PHALEN: That's what the statute
3 requires?

4 MR. OBROKTA: That would be my reading
5 of the code. It doesn't say that expressly. I'm
6 not quoting the code verbatim, but I think that's
7 the reasonable conclusion from a reading of the
8 code.

9 CHAIRMAN WHITE: Mr. Obrokta --

10 MR. OBROKTA: I advised Mr. Burton not
11 to come up here in the first place.

12 CHAIRMAN WHITE: Mr. Adkins had a
13 question in relation with Mr. Phalen's asking
14 about just a due process. A claimant, what due
15 process does he have up to the point that they
16 would have a decision of the Commission that this
17 person is no longer eligible?

18 Does he have a right to dispute that
19 up to that point or is it not until after that he
20 would have the right to dispute the decision?

21 MR. OBROKTA: Firstly, everything the
22 Commission does has to be through an order. We

1 are like a court in that we speak through our
2 orders. If we identify a claimant for review, we
3 would issue an order instructing that claimant of
4 their being identified for the review.

5 In all likelihood, then the injured
6 worker could then protest that selection or any
7 aspect of the review. That doesn't mean the
8 review would be stayed pending the outcome of that
9 litigation. Maybe the rule is not as clear as it
10 needs to be.

11 To the extent, procedurally, Mr.
12 Adkins thinks it can be improved upon, I'd be
13 happy to sit down with him and try to work through
14 those details, because we are really getting into
15 the nuts and bolts of some very technical,
16 detailed processes. I'd be happy to sit down with
17 him and try to get to a point where we both can
18 agree.

19 CHAIRMAN WHITE: Mr. Adkins, I would
20 invite you to take advantage of that opportunity
21 and maybe clarify some of these things.

22 MR. ADKINS: Thank you-all, and I'll be

1 in touch with Mr. Obrokta about that.

2 CHAIRMAN WHITE: Thank you, T.J.

3 MR. OBROKTA: I would just say, I thank
4 Mr. Adkins. His initial point was, "I know it is
5 in the law" and I agree with him. Thank you.

6 MEMBER PHALEN: You mentioned in regards
7 to if the Division determines one of the claimants
8 to be a candidate to be reviewed to take their
9 benefits, they come off of PTD. You say they have
10 the right to protest. They would protest, then,
11 to the Division; right?

12 MR. OBROKTA: To the Office of Judges.

13 MEMBER PHALEN: During that period of
14 time, if they protest to the Office of Judges, are
15 their benefits taken away at that point in time or
16 they are just notified that they have been
17 selected as a candidate for theirs to be reviewed?

18 MR. OBROKTA: At the stage you and I are
19 discussing now, it's just that they are being
20 identified as a candidate for review so there will
21 be no basis to stop the benefits at that point.
22 There would be no basis whatsoever to stop the

1 benefits just because they have been identified
2 for review.

3 MEMBER PHALEN: Let me make sure I
4 understand this. The claimant then could protest
5 that to the Office of Judges. While that protest
6 is ongoing, then they haven't been reviewed so,
7 therefore, their benefits have not been affected?
8 Is that a fair statement?

9 MR. OBROKTA: Let me, if I could, just
10 clarify it. They could protest their selection,
11 but I don't see any legal basis to postpone the
12 review while that selection is being litigated.

13 If the review process, as it plays
14 out, ultimately leads to a benefit change, then we
15 would proceed with that even though the underlying
16 selection is being litigated.

17 They could litigate the selection,
18 it would seem to me, and maybe this needs
19 clarified in the rule, but I do not think that
20 would stay or postpone the review process itself.

21 As a final note, the attorney fee
22 rule is outdated and I'll be happy to work with

1 him on that.

2 MR. ADKINS: May I have one more comment
3 with respect to what Mr. Obrokta said?

4 CHAIRMAN WHITE: Go ahead, Mr. Adkins.

5 MR. ADKINS: I agree with Mr. Obrokta
6 that if Joe Doe is selected for reevaluation
7 there's really no basis for the client to object
8 to the fact that he's going to be reviewed.

9 I never even considered any real
10 basis for objecting to that, because -- I'm in
11 agreement with Mr. Obrokta. I thought -- I have
12 seen permanent total disability evaluations taken
13 away years ago under special circumstances.

14 My concern is, go through the
15 evaluation process, the Commission reviews the
16 data that they have based upon their review,
17 determines Joe Doe does not meet the current
18 criteria for permanent total disability;
19 therefore, his benefits are terminated as of the
20 first of next month. He would get benefits during
21 the evaluation process. I see no basis for not
22 continuing benefits during the evaluation process.

1 My concern relates to the final
2 determination made by the Commission, and that is
3 a determination made that the person is no longer
4 eligible.

5 As I read the rule, short of filing
6 a -- at that point, I understand the benefits are
7 terminated and the only remedy for the claimant
8 would be to appeal to the Office of Judges.

9 My concern is, before that process
10 plays out, the claimant ought to have some
11 opportunity to rebut a proposed order terminating
12 his award. We do this all the time in TTD. We
13 propose to terminate your temporary total
14 disability benefits unless we hear from your
15 doctor within the next 30 days, sincerely yours,
16 Commissioner.

17 I don't know why we can't establish
18 some kind of reasonable time period in which the
19 claimant can respond to the Commission's proposal
20 short of going to the Office of Judges. That to
21 me is minimum due process and that's my concern.

22 CHAIRMAN WHITE: Thank you, Mr. Adkins.

1 Mr. Obrokta?

2 MR. OBROKTA: A 30 day period to
3 introduce or to essentially rebut the Commission's
4 proposed termination of benefits would seem
5 reasonable to me and we could work on some
6 language with Mr. Adkins on that.

7 CHAIRMAN WHITE: Thank you, Mr. Obrokta.
8 Thank you for your comments, Mr. Obrokta. We will
9 take these under advisement.

10 The next person that's indicated a
11 desire to speak is Lesly Messina.

12 MS. MESSINA: Good afternoon, Mr. Chair
13 and Board. I'm here on behalf of the Affiliated
14 Construction Trade Foundation.

15 As most of you are aware, we
16 represent working people in the state, most
17 specially are members of the state building
18 trades, but also we like to consider ourselves as
19 the watchdog in part for working people all across
20 West Virginia.

21 We have appreciated being
22 stakeholders in this past year working with the

1 different rules and working with Mr. Obrokta. I
2 think that's been very fruitful. We have gotten a
3 lot of comments incorporated and we do appreciate
4 that.

5 Today I'd like to speak specifically
6 to the PTD rule, Rule 5, and kind of elaborate on
7 some of the comments that Mr. White, our director,
8 made to you a few weeks ago about the second
9 injury fund.

10 As advocates for working people, we
11 do find it a bit troubling that Section 5.3 is
12 going to reopen old claims under new rules. That
13 being said, we think that in order to sort of
14 level the playing field, it would be a good idea
15 for the Commission to review those claims as they
16 come up to see if the claims were inappropriately
17 placed into the second injury fund at that time.

18 It's our suspicion that a
19 significant amount of, for lack of a better
20 description, dumping into the second injury fund
21 went on before it was eliminated last year.

22 In 1997, they did kind of an

1 analysis of the second injury fund and found that
2 65 percent of the PTD's placed into that fund were
3 coal mining claims.

4 At that time, that was only about 4
5 to 8 percent of the actual work force in the
6 state, so if our theory bears out, then it's going
7 to be another kind of a direct correlation toward
8 showing that a select few large employers were
9 able to shirk their responsibility and not pay for
10 claims that, in fact, they probably should have
11 been paying for.

12 Since these claims are going to be
13 open for review, we really don't think there would
14 be an additional administrative burden placed on
15 the Commission to just go ahead and take a second
16 look at these cases as they come up and to see
17 whether or not there was an abuse taking place.
18 We think that this is a really good way to keep
19 things level.

20 We don't feel that claimants should
21 be taking all the burden. We know that these
22 changes have to take place in order for the fund

1 to stay solvent, but it's very important that the
2 scales be weighted properly, but if a claimant has
3 to take a hit, so to speak, that the employers
4 really need to be scrutinized.

5 We do want to recognize, though,
6 that the Commission and the Board is doing a great
7 job. A recent example would be the decision to
8 look at the uncollectible accounts and to see
9 where that goes. I think that's a really great
10 idea and Mr. White, of course, does and fought
11 really hard for that to happen.

12 We do think that the Commission is
13 going in the right direction, but we would
14 definitely like to see a review of these claims,
15 as they come up administratively, to see whether
16 there was an abuse of that fund. I think Mr.
17 White would like to say something. I didn't put
18 him on the list.

19 CHAIRMAN WHITE: Thank you, Ms. Messina.

20 MS. MESSINA: I appreciate your time.

21 CHAIRMAN WHITE: Mr. White?

22 MR. WHITE: Steve White, Director of the

1 Affiliated Construction Trades Foundation. Just a
2 brief comment on this review that's to take place.
3 We have said it before on the record. I want it
4 to be on record of this hearing that we are for
5 finding fraud and finding money owed to the fund
6 and if there are people who are getting awards
7 that shouldn't get them, by all means review.

8 What I wanted to speak to here, it's
9 a little troubling about the shifting standards.
10 I'm not a lawyer. I don't quite understand what's
11 going forward; that is, there were standards that
12 people were granted a disability award in '93 or
13 '94 that are going to be reviewed now, as I
14 understand it, under standards of 2004, 2003 and I
15 don't see it as an apples and oranges comparison.

16 Things have changed dramatically.
17 We are applying old standards -- or new standards
18 to old claims and fundamentally, it just seems
19 unfair. It seems that if the rules have changed
20 and going forward is one thing, and that's what
21 the legislature said, but going backwards and
22 applying new rules to old situations for people

1 who were injured. We are not talking about people
2 who are cheating.

3 If someone slipped through the
4 system, by all means go get them. That's not what
5 I'm referring to. Someone is out there and
6 somehow got through, I don't know how, but if they
7 did, go get them. But to apply new rules to old
8 situations -- and for instance, we have a very
9 strict threshold definition now. It's my
10 understanding and again I'm not an attorney, not a
11 practitioner here, but I've studied it somewhat
12 and you have to have 50 percent to be considered
13 for an award.

14 Back in '93 and '94, there were a
15 number of other factors like your education, your
16 ability to be retrained, your occupation and how
17 that injury affected your occupation.

18 For instance, a carpenter, one of
19 the people I represent, who might lose three
20 fingers or two fingers and a thumb would not be
21 eligible under today's standards and to apply,
22 even to apply for a disability award, even if they

1 were 60 years old with not a high school
2 education, not able to be retrained and a number
3 of other factors that used to be taken into
4 account, now they are going to bring those people
5 back and re-review them.

6 I think there's something
7 fundamentally wrong, but to put it into another
8 context, let's take what Lesly Messina just
9 commented on about the review for the second
10 injury fund.

11 What she asked for, what we are
12 asking for, first of all, I think makes sense.
13 While you are reviewing, let's make sure that if
14 permanent disability awards were inappropriately
15 put in the second injury fund, that we correct
16 that situation. That could save you millions, if
17 not hundreds of millions of dollars. That's a
18 good thing.

19 What if we apply today's standards
20 to those decisions that were made back in '93 or
21 '94? What if we took the standards of today in
22 the second injury fund and applied it to those?

1 Well, guess what, you will get a lot of money,
2 because there is no second injury fund today.

3 Perhaps if we try that and then
4 employers would scream that's unfair, maybe we
5 would get a feeling for what some of these injured
6 workers, disabled workers might be going through
7 if we apply these standards.

8 Remember, the whole point is, I
9 don't think anybody has said they want to take
10 money away from injured workers, but that's
11 exactly what will take place if you move forward
12 under those standards.

13 If you are after those who don't
14 deserve it, are not eligible, you know, three
15 cheers, go get them, but applying the shifting
16 standards, new standards that are apples and
17 orange standards, perhaps as the original time is,
18 it's just patently unfair.

19 What attorneys tell me is, it's
20 going to go in the courts and we are going to let
21 the courts decide it.

22 So if there's a way to avoid that, I

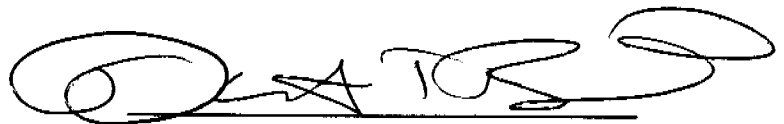
1 don't know, maybe there is no way to avoid it, but
2 it should be looked for because, just like I said,
3 applying the standards of the second injury fund
4 of today would almost appear to be ridiculous to
5 take and just automatically throw it on back to
6 the company. It would end up in court, get turned
7 over, we are not going to do that, so let's find
8 another way. That concludes my comments. Thank
9 you for the opportunity.

10 CHAIRMAN WHITE: Thank you. I declare
11 that the public hearing with respect to Rule 5,
12 Permanent Total Disability is hereby closed.

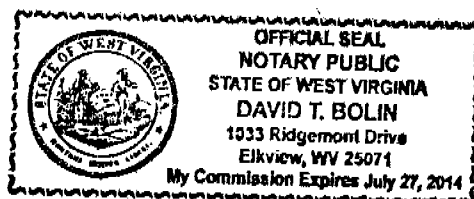
13 (WHEREUPON, the hearing was
14 concluded at 1:40 p.m.)

1
2
3 **REPORTER'S CERTIFICATE**4 STATE OF WEST VIRGINIA,
5
6 COUNTY OF KANAWHA, to wit:7 I, the undersigned, David T. Bolin,
8 Courter Reporter and Notary Public, do hereby
9 certify that the foregoing is, to the best of my
10 skill and ability, a true and accurate transcript
11 of the proceedings had before the **West Virginia**
12 **Workers' Compensation Board of Managers** as set
13 forth in the caption hereof, and that this is the
14 original transcript thereof for the files of the
15 Committee.16 GIVEN UNDER MY HAND THIS 2nd
17 DAY OF NOVEMBER, 2004.

18 MY COMMISSION EXPIRES JULY 27th, 2014.

19
20
21 

22 Court Reporter



WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
PUBLIC HEARING
OCTOBER 26, 2004 - 1:00 P.M.
85CSRS "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)
Edward O. Atkins	Atkins Atkins Atkins	Yes
Lesly Messini	ACT Foundation	yes
Lynni Chapman	UMI	No
Teresa Messalister	CMT	no



Atkins & Atkins

Attorneys at Law

1335 Virginia Street, East • Charleston, West Virginia 25301-3011

(304) 346-0318 • (800) 834-5810 in WV • Fax: (304) 346-1422

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Edward G. Atkins, Esq.

Douglas V. Atkins, Esq.

October 6, 2004

T. J. Obrokta, General Counsel
Workers' Compensation Commission
PO Box 431
Charleston, WV 25322

**RE: Comment - Legislative Rule
Title 85, Series _____
Permanent Total Disability**

Dear Mr. Obrokta:

I was unaware that the Board of Managers had previously considered rules on permanent total disability, and I appreciate the opportunity to comment. These rules involve the largest award that can be made in a Workers' Compensation claim and, of course, should be considered carefully.

These comments are based upon proposed rules presented at the last meeting of the Board of Managers. If there have been any changes since, please advise.

Time Standards for Permanent Total Disability Adjudications

My first comment relates to what is not in the rules, and that is any time standards for award determination.

Once a claimant makes an application for an award of permanent total disability, a determination must be made as to whether the claimant has made a prima facie case for reopening. It appears that 85-6-4.6(b) would apply in that a PTD claim is a claim for a permanent disability. Once the Commission determines that a prima facie case has been made, there are no time standards as to when a final adjudication of the application must be made. It is the undersigned's experience that the evaluation process lingers much too long, and I have had claims pending three years or longer before a final determination is made by the IEB. The PTD evaluation process may be further aggravated by the "Program to Update Disability Status of Those Receiving PTD Benefits as of July 1, 2003." If 500 PTD claims a month are thrown into the present system (see §85-____-5.3), a glut will occur which will drag out claims for years and years.

The issue of the timeliness for the PTD evaluation process is not new. I direct your attention

to Anderson v. Richardson, 191 W.Va. 488, 446 S.E.2d 10 (1994), in which the state agency represented that rules relating to the handling of requests for permanent total disability benefits "...are still in the process of being revised." This was, of course, ten years ago. I consider the issue of time standards for determination of permanent total disability to be a procedural due process issue of substantial importance. The Commission may offer as an explanation lack of resources; however, I submit that it is the Commission's responsibility to acquire the necessary and appropriate resources "...so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers... who are subject to the provisions of this chapter." (W.Va. Code §23-1-1(b) (7/1/03)) The existing process in no way complies with that statutory requirement.

It is this writer's position that it should take no more than one year from the date an application has been accepted for PTD evaluation until final IEB action. Justice delayed is justice denied, and the failure of the proposed regulations to include any type of schedule for adjudication is ripe for challenge as not providing the claimant procedural due process of law.

I would propose the following rule:

"A claim determined eligible for evaluation for a permanent total disability award must be finally determined by the Interdisciplinary Board within one (1) year from the date such eligibility was determined."

The Application Process

Obviously, it is necessary for the Commission to acquire all information relevant to the issue of permanent total disability and the information set forth in the proposed PTD regulation (§85-___-3) does not seem particularly objectionable on its face. My concern is how the application will be viewed in actual practice. If a claimant submits an application in good faith, substantially complying with the requirements of the regulations, that should be sufficient. If the process, however, generates into a nit-picking analysis where an applicant is required to identify exactly what dates he saw a particular doctor 15 years ago, the process will again stall, taking up large amounts of time.

The provisions in Rule §85-___-3.6 are troubling. This rule requires that all information required in Sections 3.1 through 3.5 must be received by the Commissioner before the PTD application will be deemed complete and adequately supported. If this means that the application will not be considered unless information is received from third-parties (i.e., Rule 3.5) then I would object to this rule. How long will it take 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"? Requests to third-parties may or may not be furnished to the Commission pursuant to requested authorization.

While information sought in Rule §85-___-3 may be relevant to the evaluation process, the determination as to whether or not a prima facie case has been made should not be delayed for information not in the control of the claimant. Insofar as the rule proposes a requirement that this information be available before the PTD application is ruled upon, I suggest that Rule

§85-____-3.6 be deleted.

The undersigned objects to Rule §85-____-3.8 insofar as it allows an application for reopening to be determined based upon "the sole discretion of the Commission." This writer can determine that the only place this language can be found is in W.Va. Code §23-4-16(d)(1) dealing with monitoring of permanent total disability awards already made. Even as to this group, significant due process issues are raised by this language. Though this phrase is in the statute, I do not believe that any public body has the "sole discretion" to do anything, and it implies that its action can be arbitrary or capricious and not subject to requirements of law. The absence of the phrase "the sole discretion of the Commission" with respect to an application for permanent total disability as opposed to its existence relating to a review of an award for permanent total disability already made, however, indicates a lack of statutory basis for Rule §85-____-3.8. This rule should be deleted.

While the regulations clearly define the kind of evidence necessary to support a claim for reopening, no regulations are promulgated directed to the sufficiency of the evidence. This writer has observed, from time to time, the practice of the Commission through its claims examiners and its medical staff to issue decisions without the benefit of having the claimant examined. If there is simply a disagreement with findings on medical examinations or etiology of a particular medical disorder or the severity of its impairment, the application should not be rejected simply because of such disagreement. Claims should proceed to evaluation.

Program to Update Disability Status of Those receiving PTD benefits as of July 1, 2003

There is a host of due process problems associated with these regulations promulgated pursuant to the provisions of W.Va. Code §23-4-16(d). I commented earlier with respect to the phrase "sole discretion," and I still believe that this language, although based in statute, violates constitutional due process.

Rule §85-____-5.3, in addition to presenting due process questions, e.g. changes in the standards for permanent total disability, also presents procedural due process questions. This rule is obviously based upon a revised §23-4-16(d)(2). This statutory and regulatory scheme apparently permits the Commission, upon reopening of a claim, to refer the claimant for a one-time medical examination to determine whether the claimant's impairments meet the current statutory standards. If a report concludes that the claimant does not meet such standards, claimant's benefits are terminated. (Rule §85-____-5.4)

The Commission should review Mitchell v. Commissioner, 163 W.Va. 107, 253 S.E.2d 1 (1979) and its progeny regarding procedures for terminating benefits. It cannot be said that under these circumstances a claimant has a remedy by requesting a hearing on a terminated claim. Under the present scheme, a claimant's benefits can be terminated without a hearing and without an opportunity to present evidence. This is a clear violation of procedural due process. The Commission must adopt some procedure whereby a claimant is presented with an opportunity to rebut evidence adverse to his claim before those benefits are terminated.

It is one thing to deny benefits; it is quite another to terminate them. The Commission must not lose sight of the fact that many families' lives will be severely impacted by the termination

October 6, 2004

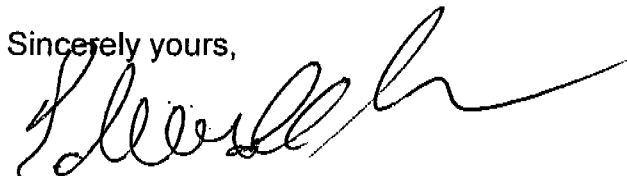
of benefits upon which these families have come to rely for many years. Not only due process, but simple human decency demands that these families be given a voice in their future.

§85-____-5.6 provides that if the claimant retains his or her award "following the reevaluation," reasonable attorney's fees are paid. This provision is taken from W.Va. Code §23-4-16(d)(2). This regulation, as well as its statutory authority, is unclear as to the extent applicable. Are fees paid if benefits are terminated, but thereafter reinstated after further litigation (i.e. at the ALJ level, Board of Review, Supreme Court)? All of these events would fit the phrase "retains his or her award following the reevaluation."

The Commission, by this regulation, incorporates into it Title 85 Series 4 which is significantly out of date (effective 5/3/85). For example, it refers to Disciplinary Rule 2-106 of the Code of Professional Responsibility (§85-4-8.1) which no longer exists. Moreover, Title 85 Series _____ exclusively relates to "compliance with court orders directing the Commissioner to pay... attorney fees..." (§85-4-1.1) There is no "in court" or "out of court work" (Section 85-4-8.1) except in special situations and in the West Virginia Supreme Court. The payment rates set forth in Title 85 Series 4 are over 19 years old and do not reflect current hourly rates. It is submitted that the rates as set forth in Title 85 Series 4 are arbitrary, are not based upon any survey or determination of charges actually made in the community in the field of Workers' Compensation representation and do not reflect contingency issues. It is suggested that Rule 85-_____-5.7 be deleted.

I appreciate the opportunity to comment. If I find on further review I wish to make additional comment, I will forward that to you by separate correspondence.

Sincerely yours,



Edward G. Atkins
EGA/pjm

cc: Steven F. White

THOMAS P. MARONEY, L.C.

**OFFICE OF
GENERAL COUNSEL**

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PATRICK K. MARONEY, ATTORNEY**

**OFFICE ADDRESS
608 VIRGINIA STREET, EAST
CHARLESTON, WV 25301**

October 25, 2004

T.J. Obrokta, General Counsel
Executive Offices
West Virginia Workers' Compensation Commission
4700 MacCorkle Avenue, SE
Charleston, West Virginia 25301

Re: Proposed Title 85 Series 5

This letter contains responses to the above-proposed rule filed in the Office of the Secretary of State. On behalf of the West Virginia AFL-CIO and its affiliated members, including the United Mine Workers of America, the following changes are suggested:

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

- pg. 3 3.4 Delete in its entirety. Not relevant at the application stage. Only becomes relevant if permanent total disability granted.
- pg. 3 3.5 Delete all. Only relevant information would be claimant's W-2 Form, employment, education, and military records.

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

- pg. 4 4.1 Delete last sentence. It is contrary to the law which was in effect at the time the permanent total disability award was granted.
- pg. 4 4.2 – 4.5 Delete in its entirety these sections are arbitrary, capricious and ambiguous. In addition, 4.4 violates the due process entitlement as to property rights.

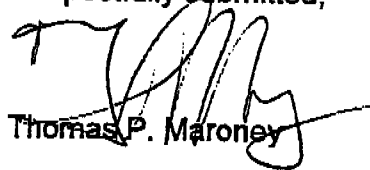
§85-5-5 Monitory of PTD Recipients.

- pg. 4 5.1 – 5.3 Rewrite these entire sections. Each violates the claimant's due process protections as to property and privacy rights. Additionally, the concept of res judicata applies.

T.J. Obrokta, General Counsel
Re: Proposed Title 85 Series 5
October 25, 2004, Page Two

These additional comments should be presented to the Board of Managers, and to a special subcommittee established by the Board. We would request additional public hearings should be held for input by other parties. I would be happy to meet with the Executive Director, you, and other members of the staff to discuss our thoughts on these issues.

Respectfully submitted,



Thomas P. Maroney

TPM/cls

October 26, 2004

T. J. Obrokta, General Counsel
Executive Office
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

Re: Series 5
Permanent Total Disability

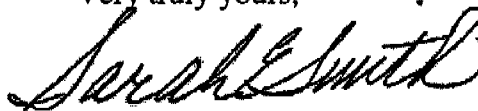
Dear Mr. Obrokta:

Please consider these public comments related to the proposed rule designated as Series 5, 85 C.S.R. 5 of the Workers' Compensation Rules.

We strongly support the language in the rule articulating requirements that permanent total disability applications should be more detailed and properly completed before being reviewed and that existing permanent total disability awards should be evaluated to determine current entitlement. However, we disagree that a regulation can eliminate the statute of limitations which applies in permanent total disability claims by statute.

We have attached a redlined version of the proposed rule with suggested language changes and comments to further explain our recommendations. Thank you for considering these comments.

Very truly yours,



Sarah E. Smith

SES/pfl
Attachment

1321142

10-26-04
BOWLES RICE
SARAH SMITH, ESQ
COMMENTS

85 CSR 5

**TITLE 85
WORKERS' COMPENSATION COMMISSION
EXEMPT LEGISLATIVE RULE**

**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 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.

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 or diseases suffered by the Applicant;
- n. A complete Mmedical history of the Applicant for the entire period of his or her life ;
- o. Prescription drug history;
- p. Employment history, including dates on employment for each employer;
- q. Military history; and
- r. Education history.

[NOTE: We have made the spacing consistent in this section.]

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, medical 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 for permanent total disability benefits do not satisfy the re-opening requirements of West Virginia Code Sections 23-4-6(n)(1) and 23-4-16, 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~~

COMMENT: Neither the Commission nor the Board of Managers can amend the Workers' Compensation Act by regulation to eliminate the statute of limitations. Series 5 as proposed recognizes that the West Virginia Legislature has mandated changes in the standards by which our state grants permanent total disability awards, as the prior standards were out of line with other states and are a major cause for the deficit in the workers' compensation system. The Workers' Compensation Act offers a balance between fairly compensating injured workers who can no longer work and rehabilitating injured workers who deserve an opportunity to remain a valuable part of our work force. Adding subsection 3.9 will have the effect of limiting the impact of the mandated permanent total disability reforms by opening the flood gates to permit MORE permanent total disability applications by eliminating any statute of limitations. Under this proposed provision, an employee can take regular retirement and then file for permanent total disability benefits even though his or her last work-related injury was years earlier and he or she no longer has the right to reopen that claim or any claim for additional temporary total disability or permanent partial disability or even additional medical benefits. This elimination of the statute of limitations violates the West Virginia Constitution and the Workers' Compensation Act, specifically West Virginia Code §§23-4-1a, b, and c; § 23-4-16; § 23-4-22; §23-4-24; and § 23-5-2.

§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 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 current 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 ~~I~~nterdisciplinary ~~E~~xamining ~~B~~oard 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. Future medical benefits which are reasonable, necessary, and directly related to a compensable injury shall be chargeable to the employer that employed the claimant at the time of each respective compensable injury, if not otherwise barred by the applicable statute of limitations.

COMMENT: See comment to subsection 3.9.

§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.o

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TELECOPIER TRANSMITTAL SHEET

DATE: October 25, 2004

TO: T.J. Obrokta
General Counsel
West Virginia Workers' Compensation Commission

FAX NO.: 304/926-5372

FROM: Thomas P. Maroney, Esquire
Thomas P. Maroney, L.C.

RE: Proposed Title 85 Series 5

TOTAL NUMBER OF PAGES, INCLUDING THIS SHEET: 3

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Rule 5 – Permanent Total Disability

Garth Atkins

1. Section 3.6 Insert “material” after “All”

Response: Accept

2. Section 3.8 Insert “and said decision shall be issued as a protestable order.”

Response: Accept

3. New 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 within one (1) year from the date such eligibility was determined. Nevertheless, for good cause, this period may be extended by the Commission at the request of the employer or injured worker.”

Response: Accept

4. New Section 5.4 .1 “The Commission shall issue a proposed order setting forth its findings, which shall become effective in 120 days from the date 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.”

Response: Accept

5. Section 5.7: Insert new attorney fee provision.

Response: Section 5.7 Strike and insert the following: “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 his or her award shall be paid by the Commission. 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 notice identifying him or her for review. The maximum attorney fees allowable under this section may be waived in extraordinary cases in the sole discretion of the Commission.”

Sally Smith

1. Section 2.2: Insert “and, where appropriate, reference to the Commission shall include the self-insured employer.”

Response: Accept.

2. Section 3.1.m: Insert “or diseases” between “injuries” and “suffered”.

Response: Accept.

3. Section 3.1.n: Insert Language requiring the PTD applicant’s medical history for the entire period of his or her life

Response: Reject.

4. Section 3.5 Insert “medical records” after “military service records.”

Response: Accept.

5. Section 3.8: Insert “for permanent total disability benefits” after “applications.”

Response: Accept – technical clean up.

6. Strike Section 3.9 to keep a PTD as the reopening of an old claim.

Response: Accept by striking Section 3.9.

7. Section 5.2: Insert “current” before “eligibility” on line 3.

Response: Accept.

8. Modify Section 6 chargability provisions.

Response: Accept by striking Section 6.