WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #5

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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), 23-2C-3(f)(3)

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: 6

TITLE OF RULE BEING PROPOSED: Workers' Compensation Debt Reduction Fund Assessments

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

Authorized Signature

$6.60

WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #1

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2005 MAY 18 P 4:13

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: W. Va. Code §§23-1-1a(j)(3); 23-2C-3(f)(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: 6

TITLE OF RULE BEING PROPOSED: Workers' Compensation Debt Reduction Fund Assessments

DATE OF PUBLIC HEARING: June 23, 2005 TIME: 1:00 p.m.

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

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T.J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Avenue, S. E.
Charleston, WV 25304

Fax # (304) 926-5372

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

Authorized Signature

WCC Insuring a Working West Virginia
Workers' Compensation Commission
Gregory A. Burton, Executive Director

Office of General Counsel
4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone Number (304) 926-3423
Fax Number (304) 926-5441

May 18, 2005

The Honorable Betty Ireland
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 6
"Workers' Compensation Debt Reduction Fund Assessments"

Dear Secretary Ireland:

Please consider this letter to be my written approval for the filing of the above-noted proposed Rule.

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. The Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 6 for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 85, Series 6: Debt Reduction Fund Assessments

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency Workers' Compensation Commission

Address 4700 MacCorkle Avenue, S.E.

Charleston, WV 25304

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1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	0	0	0	0	N/A
PERSONAL SERVICES	0	0	0	0	N/A
CURRENT EXPENSE	0	0	0	0	N/A
REPAIRS & ALTERNATIONS	0	0	0	0	N/A
EQUIPMENT	0	0	0	0	N/A
OTHER	0	0	0	0	N/A

2. Explanation of above estimates:

The above estimates are based on the assumption that the rule becomes effective in the current fiscal year (FY'05). There would be no change in the estimated costs for the Workers' Compensation Commission (commission) as the initial surcharges and assessments are not implemented until after the termination of the commission at 12/31/05. After 12/31/05, amounts billed for the surcharges and assessments will be owed to and administered by the West Virginia Insurance Commission. After 12/31/05, any costs associated with evaluating, maintaining and administering the surcharges and assessments levied against employers will be incurred by the Insurance Commission.

3. Objectives of this rule:

This rule provides for the levying of a surcharge on private carrier policy holders and an assessment against every self-insured employer for deposit into the "West Virginia Workers' Compensation Debt Reduction Fund" and, to the extent necessary, ultimately into the "West Virginia Workers' Compensation Debt Reduction Revenue Bond Debt Service Fund".

Rule Title: Title 85, Series 6: Debt Reduction Fund Assessments

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that the there will be no direct economic impact from this rule.

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

It is expected that there will be no impact from this rule. The collections from private carriers and self insured employers are limited to the amount set forth and provided by the Legislature in W.Va. Code §23-2C-3(f)(3).

C. Economic Impact on Citizens/Public at Large.

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

Date: 5/18/05

Signature of Agency Head or Authorized Representative

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 6
Workers' Compensation Debt Reduction Fund Assessments

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

As part of the termination of the Commission, the Legislature created various revenue streams to assist in funding "Old fund" liabilities. This rule provides for the revenue stream contemplated under the provisions of W. Va. Code §23-2C-3(f)(3) for deposit in the Workers' Compensation Debt Reduction Fund created in W. Va. Code §23-2D-5.

The rule provides for the establishment and collection of surcharges to be remitted to the insurance commissioner for deposit in the "West Virginia Workers' Compensation Debt Reduction Fund."

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 6
WORKERS' COMPENSATION
DEBT REDUCTION FUND ASSESSMENTS

§85-6-1. General.

1.1. Scope. --This exempt legislative rule provides for the establishment and collection of surcharges to be remitted to the insurance commissioner for deposit in the workers' compensation debt reduction fund as created in W. Va. Code §23-2D-5.

1.2. Authority. -- W.Va. Code §§23-1-1a, 23-2C-3(f)(3); 23-2D-5; 23-2D-6. Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission are not subject to legislative approval as would otherwise be required under West Virginia 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. --

§85-6-2. Purpose of Rule.

This rule provides for the implementation of a policy surcharge on private carrier policy holders and assessments on self-insured employers for deposit into the "West Virginia Workers' Compensation Debt Reduction Fund" and, to the extent necessary, ultimately into the "West Virginia Workers' Compensation Debt Reduction Revenue Bond Debt Service Fund."

§85-6-3. Definitions.

As used in this rule, the following terms, words, and phrases have the meanings stated unless in any instance where such term, word, or phrase is employed and the context expressly indicates that another meaning is intended.

3.1. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.

3.2. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W.Va. Code §23-1-1a.

3.3. "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

3.4. "Commission" means the Workers' Compensation Commission created pursuant to the provisions of W.Va. Code §23-1-1.

3.5. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W.Va. Code §23-1-1b.

3.6.. "Gross wages" include: W-2 items, vacation pay, including accrued vacation at time of dismissal, holiday pay, sick pay (excluding 3rd party sick pay), partnership and S Corporation distributions of ordinary income from trade or business activities (do not report losses), draws taken for items other than business expenses, retroactive wages, bonuses, commissions, including draws against commissions, wages paid to summer interns, overtime wages, profit sharing, incentive programs, per diem payments to employees not directly related to travel, allocation to employees for such things as tools, equipment, machinery, etc. regardless if such allocation is labeled as per diem, hourly expense or other titles, stipend or other non-travel related payments to board members who are being covered under the employer's workers' compensation account, other compensation and perquisites paid to employees, owners and officers that have value, but are not per diem travel related, and value of gifts given to employees, owners, officers and board members.

"Gross wages" do not include: per diem expenses related to travel, the value of any special discount or markdown allowed a worker on goods or services purchased from or supplied by the employer if the purchase is optional with the worker and does not constitute regular or systematic remuneration for services, facilities or privileges such as cafeterias, restaurants, medical services or so-called 'courtesy discounts' on purchases furnished or offered by an employer merely as a convenience to workers or as a means of promoting their health, goodwill or efficiency, partnership and S Corporation distributions other than ordinary income from trade or business activities, payments, not required under any contract of hire, made to an individual with respect to a period of training or service in the armed forces of the United States, severance pay, savings plan proceeds, third party sick pay, and disability pay.

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

3.8. "Payment interval" means each periodic payment of the employer's workers' compensation coverage obligation to the private carrier as established by the workers' compensation policy.

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

3.10. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.11. "This rule" means this legislative rule designated as 85 C.S.R. 6, "Debt Reduction Fund Assessments."

3.16 "Total Premium Due" means the total amount ~~of~~ payable at each payment interval to a private carrier by an employer for its workers' compensation coverage, including, but not limited to, the base rate premium as adjusted by any experience modification factor, and shall include any amount due pursuant to an insurance commissioner regulatory budget assessment and any policy debits applied to a private carrier policy, but shall exclude any policy credit allowed by a private carrier.

§85-6-4. Initial Surcharge and Assessments Made Pursuant to W. Va. Code §23-2C-3(f)(3).

4.1. From the termination of the Commission through June 30, 2006, a surcharge shall be levied against every employer of 10.5% to the total premium due from each policy holder. The successor to the Commission shall collect said surcharge, and shall remit said surcharge to the insurance commissioner. The Insurance Commissioner may change the percentage surcharge at any time, as needed to meet the annual funding requirements as set forth in W. Va. Code §23-2C-3(f). The Insurance Commissioner shall provide sufficient notice to employers and the successor to the Commission prior to changing the percentage amount.

a. If the annual statutory amount collected for the Insurance Commissioner exceeds or is less than the annual statutory funding requirements, the excess or shortage shall be applied in the determination of the percentage surcharge for the next year, so that the running average collected for the Insurance Commissioner is consistent with the amount required to be collected under the statute.

4.2 From the termination of the Commission through June 30, 2006, a monthly gross wages payroll assessment shall be levied against each self-insured employer at the rate of (0.0035) times each month's payroll . Each self-insured employer shall, as otherwise provided in this Rule, remit the assessment to the insurance commissioner within calendar ten (10) days of the end of each month. The Insurance Commissioner may change the percentage surcharge at any time, as needed to meet the annual funding requirements as set forth in W. Va. Code §23-2C-3(f). The Insurance Commissioner shall provide sufficient notice to employers and the successor to the Commission prior to changing the percentage amount.

a. If the annual statutory amount collected for the Insurance Commissioner exceeds or is less than the annual statutory funding requirements, the excess or shortage shall be applied in the determination of the percentage surcharge for the next year, so that the running average collected for the Insurance Commissioner is consistent with the amount required to be collected under the statute.

§85-6-5. Subsequent Surcharge and Assessment Rates Set by the Insurance Commissioner Pursuant to W. Va. Code §23-2C-3(f)(3).

5.1 Beginning on July 1, 2006, the insurance commissioner shall assess, as otherwise provided for in this Rule, a surcharge percentage to the total premium due from each policy holder. The private carrier shall collect said surcharge and shall remit said surcharge to the insurance commissioner. The surcharge percentage shall be set by the insurance commissioner

annually on or before May 1. The rate set by the insurance commissioner shall be effective July 1 of that year. The Insurance Commissioner may change the percentage surcharge at any time, as needed to meet the annual funding requirements as set forth in W. Va. Code §23-2C-3(f). The Insurance Commissioner shall provide sufficient notice to employers and the successor to the Commission prior to changing the percentage amount.

a. If the annual statutory amount collected for the Insurance Commissioner exceeds or is less than the annual statutory funding requirements, the excess or shortage shall be applied in the determination of the percentage surcharge for the next year, so that the running average collected for the Insurance Commissioner is consistent with the amount required to be collected under the statute.

~~a~~b. The policy surcharge applicable to each policyholder shall also be applicable to all uninsured employers [W. Va. Code §23-2C-8] and all employers assigned to the adverse risk fund [W. Va.. Code §23-2C-10].

5.2. The obligation of the private carrier is to collect and remit the surcharge percentage, as set by the insurance commissioner, from the total premiums received by the private carrier. The private carrier has no obligation to the insurance commissioner or to the Debt Reduction Fund to make up any difference in the amount projected to be collected as a result of the surcharge percentage set by the insurance commissioner and the amount actually collected.

5.3. Beginning on July 1, 2006, a monthly payroll assessment shall be levied against each self-insured employer at a rate established annually by the insurance commissioner on or before May 1. Each self-insured employer shall, as otherwise provided for in this Rule, remit the assessment to the insurance commissioner within ten (10) calendar days of the end of each month. The rate set by the insurance commissioner shall be effective July 1 of that year. The Insurance Commissioner may change the percentage surcharge at any time, as needed to meet the annual funding requirements as set forth in W. Va. Code §23-2C-3(f). The Insurance Commissioner shall provide sufficient notice to employers and the successor to the Commission prior to changing the percentage amount.

a. If the annual statutory amount collected for the Insurance Commissioner exceeds or is less than the annual statutory funding requirements, the excess or shortage shall be applied in the determination of the percentage surcharge for the next year, so that the running average collected for the Insurance Commissioner is consistent with the amount required to be collected under the statute.

§85-6-6. Surcharge and Assessment Methodology for Collections Made Pursuant to W. Va. Code §23-2C-3(f)(3).

6.1 The policy surcharge imposed by this section shall be reflected on each premium invoice issued by a private carrier, regardless of the payment interval. The premium surcharge rate shall be applied against the total premium due and shall be a clearly ascertainable line item on the premium invoice. The policy surcharge shall be remitted by the private carrier to the insurance commissioner within ten (10) days of receipt.

6.2 Each self-insured employer, group self-insurer, or insurance carrier shall provide any information and submit any reports the ~~Revenue Cabinet or the funding commission~~ Insurance Commissioner may require to effectuate the provisions of this section. In addition, the funding commission may enter reciprocal agreements with other governmental agencies for the exchange of information necessary to effectuate the provisions of this section.

§85-6-7. Severability.

If any provision of these rules or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of these rules which can be given effect without the invalid provisions or application and to this end the provisions of these rules are declared to be severable.

ORIGINAL

WEST VIRGINIA WORKERS' COMPENSATION
BOARD OF MANAGERS

IN THE MATTER OF:	)	
	)	
PUBLIC HEARING,	)	RULE 6, DEBT REDUCTION
WORKERS COMPENSATION	)	
BOARD OF MANAGERS	)	
JUNE 23, 2005	)	

****

Transcript of proceedings had in the above-styled matter, were held as therein appears at the Charleston Civic Center, Rooms 207-209, 100 Civic Center Drive, Charleston, West Virginia, on the 23rd day of June, 2005, 1:05 p.m., pursuant to notice, before David T. Bolin, Court Reporter and Notary Public in and for the State of West Virginia.

****

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

APPEARANCES

BOARD MEMBERS

ROB ALSOP, BOARD CHAIR

GENE F. BAILEY

CHRIS JARRETT

DOUGLAS MERRITT

PAUL THOMPSON

RICHARD HUMPHREYS

PAUL HARDESTY

BOB PHALEN

EVERETTE SULLIVAN

CRAIG SLAUGHTER

P R O C E E D I N G S

1:05 p.m.

CHAIRMAN ALSOP: Next item on our agenda is the public hearings. I would like to go to the public hearing on Rule 6 regarding Debt Reduction.

No one has signed up to speak with respect to this rule, but I will ask if there's anyone who didn't have a chance to sign up that would like to speak to or have any comment on Rule 6?

(No response.)

If not, we'll close the public hearing on Rule 6.

(WHEREUPON, the hearing was adjourned.)

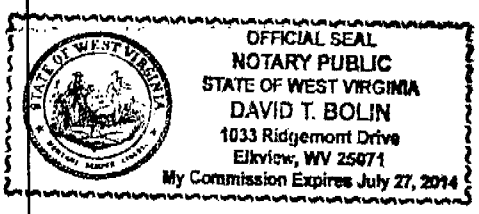
REPORTER'S CERTIFICATE

I, DAVID T. BOLIN, a Court Reporter and Notary Public in and for the State of West Virginia, hereby certify that the foregoing is a true and correct transcript of all proceedings had and evidence adduced, together with all the objections made and rulings thereon, and exceptions thereto, as stated in the caption hereto, as reported by me by means of the stenomask and stenographic characters and transcribed into the English language.

Given under my hand and official seal this 30th day of June, 2005.

DAVID BOLIN
Court Reporter and
Notary Public

My commission expires July 27, 2014.



WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
PUBLIC HEARING
JUNE 23, 2005 – 1:00 P.M.
RULE 6 – DEBT REDUCTION

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)

From: "Ryan Sims" <Ryan.Sims@wvinsurance.gov>
To: <rsuter@wvwcc.org>, <tobrokta@wvwcc.org>
Date: 5/16/05 3:30PM
Subject: Initial comments on rules 6, 15, 18, additional comment on rule 12.

Gentlemen - Below are the IC's initial comments on rules 6, 15 and 18. The IC is still in the process of reviewing these rules, as well as 11 and 12, and reserves the right to submit further comments regarding the same. We appreciate your cooperation during this arduous process.

Series 6

Comment regarding providing the IC flexibility to change the percentage amounts for the surcharge and assessment

Pursuant to W.Va. Code 23-2C-3(f)(3), the surcharges/assessments made against the private carrier premiums and the self-insured employers need to be sufficient to produce $45 million and $9 million, respectively. In light of the requirement under the law that the law requires the IC to produce specific amounts of income on an annual basis from these surcharges/assessments, the rule should include language permitting the IC flexibility to change the percentage amounts as necessary (including during the annual period). Therefore, the following amendments should be made to the rule:

* Amend 85-6-4.1 as follows:

From the termination of the Commission through June 30, 2006, a surcharge shall be levied against every employer of 10.5% to the total premium due from each policy holder. The successor to the Commission shall collect said surcharge, and shall remit said surcharge to the insurance commissioner. The insurance commissioner may change the percentage surcharge at any time, as needed to meet the annual funding requirements as set forth in W.Va. Code § 23-2C-3(f). The insurance commissioner shall provide sufficient notice to employers and the successor to the Commission prior to changing the percentage amount.

* Amend 85-6-4.2 as follows:

From the termination of the Commission through June 30, 2006, a gross wages payroll assessment shall be levied against each self-insured employer at the rate of 0.0035%. Each self-insured employer shall, as otherwise provided in this Rule, remit the assessment to the insurance commissioner. The insurance commissioner may change the percentage of the assessment at any time, as needed to meet the annual funding requirements as set forth in W.Va. Code § 23-2C-3(f). The insurance commissioner shall provide sufficient notice to self-insured employers prior to changing the percentage amount.

* Amend 85-6-5.1 as follows:

Beginning on July 1, 2006, the insurance commissioner shall assess, as otherwise provided for in this Rule, a surcharge percentage to the total premium due from each policy holder. The private carrier shall collect said surcharge and shall remit said surcharge to the insurance commissioner. The surcharge percentage shall be set by the insurance commissioner annually on or before May 1. The rate set by the insurance commissioner shall be effective July 1 of that year. The insurance commissioner may change the percentage surcharge at any time, as needed to meet the annual funding requirements as set forth in W.Va. Code § 23-2C-3(f). The insurance commissioner shall provide sufficient notice to employers and private carriers prior to changing the percentage amount.

* Amend 85-6-5.3 as follows:

Beginning on July 1, 2006, a payroll assessment shall be levied against each self-insured employer at a rate established annually by the insurance commissioner on or before May 1. Each self-insured employer shall, as otherwise provided for in this Rule, remit the assessment to the insurance commissioner. The rate set by the insurance commissioner shall be effective July 1 of that year. The insurance commissioner may change the percentage of the assessment at any time, as needed to meet the annual funding requirements as set forth in W.Va. Code § 23-2C-3(f). The insurance commissioner shall provide sufficient notice to self-insured employers prior to changing the percentage amount.

Comment regarding terms "Revenue Cabinet" and "funding commission" as used in 85-6-6.2

The terms "funding commission" and "Revenue Cabinet" are referred to in 85-6-6.2 in regard to self-insured employers or insurance carriers providing information and reports and agreements with other agencies for the exchange of information. These terms do not appear anywhere in SB 1004, and it is not clear how these entities are involved in the collection process in regard to this rule. Some clarification as to the purpose of this section would be appreciated. This subsection would be appropriate if "funding commission" and "Revenue Cabinet" were replaced with "insurance commissioner."

Series 15

Comment regarding the term "insurance commissioner" as used in the transition language contained within the rule.

This rule appears to appropriately insert "transition" language where applicable, which generally required inserting "insurance commissioner, self-insured employer or private carrier" where the WCC was referenced. It is assumed that the IC was included in this transition language because of the claimants

which the IC will ultimately be responsible for under the various funds under SB 1004, such as the old fund, uninsured fund and adverse risk fund. While it is appropriate to include the IC in this "transition language" along with private carriers and self-insured employers, it should be clarified in the rule that the IC may (and most likely will) designate a TPA to administer the vocational and physical rehabilitation requirements as set forth in this rule (as well as all the other duties which are required to administer a claim). Therefore, 85-15-3.29 should be amended as follows:

3.29. "Insurance commissioner" means the insurance commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code, or any designated third-party administrator of the insurance commissioner.

Comment regarding payment for physical and vocational rehab. services under 85-15-10

85-15-10.1 discusses the fee schedule for physical and voc. rehab services pursuant to W.Va. Code 23-4-3. The rules states that the WCC or the IC will pay for these services in accordance with the fee schedule in effect at the time of service, which fee schedule is adoptee by the WCC or IC. Then, subdivision a. states that self-insured employers and private carriers may deviate from the fee schedule in paying providers. This is in conflict with W.Va. Code 23-4-3(a), which states that "[t]he workers' compensation commission, and effective upon termination of the commission, the insurance commissioner, shall establish and alter from time to time, as it determines appropriate, a schedule of the maximum reasonable amounts to be paid to . . . providers of rehabilitation services . . . to injured employees under this chapter." This section can only be interpreted to mean that, upon termination of the WCC, the IC will maintain the schedule of maximum amounts to be paid to providers of rehab. services, and that self-insured employers, private carriers or the IC (or its designated administrator) cannot pay the rehab provider more than this amount. There does not appear to be any portion of SB 1004 which states that private carriers are permitted to deviate from this maximum schedule (of course, they could negotiate to pay less than the schedule amount, as the schedule is just a "ceiling"). Therefore, 85-15-10 should be amended to read as follows:

10.1. The Commission or, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, will pay for physical and vocational rehabilitation services in accordance with the fee schedule of maximum reasonable amounts in effect at the time the service is rendered, adopted by the Commission or Insurance Commissioner, whichever is applicable, pursuant to W. Va. Code §23-4-3 and otherwise as set forth in this rule. To the extent there are inconsistencies between the schedule and this rule, this rule shall govern. Only those physical rehabilitation services that are reasonable and necessary, in the sole discretion of the Commission, within the scope of the applicable rehabilitation plan, and otherwise meet the standards as outlined in Sections 3.7 and 2.2.2 of this Rule and 85 C.S.R. 28, Section 9, can be reimbursed pursuant to these rules.

a. Upon termination of the Commission, self-insured employers and private carriers may contract for physical and vocational rehabilitation services with providers for fees other than contained in the fee schedule.

Comment regarding the insertion of a transition "catchall" provision in this rule.

As this rule is a lengthy and detailed rule, it would probably be appropriate to insert a "transition section" into the rule similar to what has been done with the other rules. Therefore, a section should be added at the end of the rule as follows:

§ 85-15-13 Transfer to the Insurance Commissioner; provisions in conflict with SB 1004 inapplicable

Upon termination of the Commission, responsibility for the regulatory enforcement of this exempt legislative rule shall transfer to the Insurance Commissioner to be administered in a manner otherwise consistent with chapter twenty-three of the West Virginia Code. All provisions of this rule which have been rendered moot by, or are otherwise in conflict with Senate Bill 1004 are not applicable.

Series 18

Comment/changes to 85-18-7 regarding catastrophic risk coverage

In light of the changes in SB 1004 regarding catastrophic risk coverage for self-insured employers (WV Code 23-2-9(g)), section 7 of the rule should be changed. Specifically, upon termination of the WCC, self-insured employers can no longer subscribe to catastrophic coverage in the WC fund. Additionally, all catastrophic risks must be "reinsured" by self-insured employers. We interpret this to mean that self-insured employers must carry, at the very least, some type of "umbrella" coverage insurance on all catastrophic risks. Therefore, 85-18-7 should be amended as follows:

§85-18-7. Catastrophe Reserve Election.

7.1. The employer applying to self-insure its workers' compensation risk must at the time of application elect in writing to subscribe to catastrophic risk coverage or to self-insure the catastrophe risk pursuant to W. Va. Code §23-2-9(g).

a. If a self-insured employer elects not to self-insure its catastrophic injury risk, it shall pay premium taxes on the same basis and in the same percentages as subscribers to the general fund pay for catastrophic coverage.

b. If a self-insured employer elects to self-insure the catastrophe risk, then it must furnish a catastrophe security or bond, in an amount determined by the commission, with the approval of the board of managers, in addition to the security or bond furnished as a self-insurance requirement. The

catastrophe security or bond shall be in an amount the commission considers adequate and sufficient to compel or secure payment of all compensation and expenses to the employer's employees and the employees' dependents for catastrophe-related injuries or deaths.

7.2. A self-insured employer may elect to insure its catastrophic risk through a policy of excess insurance obtained through a private insurance carrier approved by the commission.

a. The self-insured employer shall provide a copy of the policy to the commission for approval.

b. The commission may give approval of the election if the insurer meets the financial strength requirements as applied to self-insured employers and entities that provide surety to self-insured employers.

c. If approved to insure catastrophic risk through a private insurance carrier, the self-insured employer shall notify the commission within fifteen (15) days of the occurrence of any change in the terms of the policy, including cancellation, by filing a copy of the policy with the change and providing a written explanation of the type of change.

d. A self-insured employer approved to carry its catastrophic risk through a private insurance carrier shall not be charged premium taxes to insure against the catastrophic risk assumed by the private insurance carrier.

7.3. The employer may request a change in its election as to catastrophic coverage. The request must be in writing and filed with the commission on or before June 1 of any given year, to be effective on July 1 of that year. The commission will issue a decision approving or disapproving the change in election.

7.4. Upon termination of the commission, those self-insured employers which previously subscribed to catastrophic risk coverage through the workers' compensation fund shall either elect to insure their catastrophic risks through a policy of excess insurance obtained through a private insurance carrier, as described in section 7.2 above, or elect to self-insure their catastrophic risk as described in section 7.1 above. Those self-insured employers which self-insure their catastrophic risks shall obtain a policy of excess insurance which covers the excess of an amount which the Insurance Commissioner determines the self-insured employer will sufficiently be able to provide payment for in the event of a catastrophic occurrence.

Comment/change 85-18-15.10 regarding negotiating final settlements

85-18-15.10 provides that self-insured employers may negotiate a final settlement with a claimant, and

that such settlements are subject to approval of the OOJ in accordance with W.Va. Code 23-5-7. This section is problematic in regard to the settlements being subject to OOJ approval, because upon termination of the WCC, the OOJ will not approve settlements between self-insured employers and claimants (see W.Va. Code 23-5-7). Rather, the self-insured employer will have the ability to negotiate the settlement without OOJ approval. The proposed new version of Series 12, which was sent out with the most recent set of rules, reflects this change in the law. Therefore, 85-18-15.10 should be amended as follows:

15.10. Settlements. The self-insured employer and the claimant may negotiate a final settlement of any and all issues in a claim, subject to the provisions of W.Va. Code §23-5-7 and W.Va. C.S.R. 85-12-1, et. seq.

Comment/change to 85-18-23 regarding transition to IC, workers' compensation fund references

There are various references in this rule, such as in 85-18-5, to the workers' compensation fund, or an employer subscribing to or making premium payments to the workers' compensation fund. As this fund will not longer exist upon termination of the commission, it would be proper to place some language in the rule which clarifies that these sections are inapplicable, and that the references in this rule to the WC fund or subscribing to or paying premiums into the same are replaced by "obtaining insurance from," or "the payment of premiums to" "the successor to the commission or another private workers' compensation carrier." This will help to avoid any possible confusion in regard to the transition into the new privatized system. Additionally, as this rule is detailed and lengthy, and has probably not been reviewed substantively for appropriate changes under SB 1004, a general "catchall" provision should be included which makes inapplicable all provisions of the rule that have been rendered moot or are otherwise in conflict with SB 1004. Therefore, 85-18-23 should be amended as follows:

§85-18-23. Transfer to the Insurance Commissioner; workers' compensation fund references and other provisions in conflict with SB 1004 inapplicable

Upon termination of the Commission, responsibility for the regulatory enforcement of this exempt legislative rule shall transfer to the Insurance Commissioner to be administered in a manner otherwise consistent with chapter twenty-three of the West Virginia Code. References to the Commission and the Board of Managers are thereafter replaced by the term "Insurance Commissioner" or "Industrial Council," whichever may be applicable. Additionally, upon termination of the Commission, references within this rule to the workers' compensation fund, including payment in to, or responsibilities of, the fund, will have no applicability, except to the extent that such references are applicable to claims or employer liability in regard to "old fund liabilities" as defined in West Virginia Code § 23-2C-2. To the extent applicable, references to subscribing to, or the payment of premiums into, the workers' compensation fund are thereafter replaced with "obtaining insurance from," or "the payment of premiums to" "the successor to the commission or another private workers' compensation carrier." All other provisions of this rule which have been rendered moot by, or are otherwise in conflict with Senate Bill 1004 are not applicable.

Ryan M. Sims

Associate Counsel

West Virginia Insurance Commission

Legal Division

P.O. Box 50540

Charleston, WV 25305-0540

(304) 558-0401 ext. 139

Response to Comments

5-16-05 Office of the Insurance Commissioner

Pursuant to W.Va. Code 23-2C-3(f)(3), the surcharges/assessments made against the private carrier premiums and the self-insured employers need to be sufficient to produce $45 million and $9 million, respectively. In light of the requirement under the law that the law requires the IC to produce specific amounts of income on an annual basis from these surcharges/assessments, the rule should include language permitting the IC flexibility to change the percentage amounts as necessary (including during the annual period).

Response:

Agreed. Appropriate changes were made to §§4.1, 4.2, 5.1 and 5.3 to allow the Insurance Commissioner to adjust the surcharge as needed for collection of sufficient revenues.

In addition, the change also provides that the surcharge may be adjusted year to year so that the running average collected by the Insurance Commissioner is consistent with the collection of the correct statutory amounts.

5-16-06 Office of the Insurance Commissioner

The terms "funding commission" and "Revenue Cabinet" are referred to in 85-6-6.2 in regard to self-insured employers or insurance carriers providing information and reports and agreements with other agencies for the exchange of information. These terms do not appear anywhere in SB 1004, and it is not clear how these entities are involved in the collection process in regard to this rule. Some clarification as to the purpose of this section would be appreciated. This subsection would be appropriate if "funding commission" and "Revenue Cabinet" were replaced with "insurance commissioner."

Response:

Agreed.