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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: Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

CITE AUTHORITY WV Code §§23-2C-3(f)(1) through (3); 23-2C-5(c)(2); 23-2C-22; 23-2D-5; 23-2D-6; 33-2-10(b) and 33-2-20(a)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code §§23-2C-5(c)(2) and 33-2-10(b)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Workers' Compensation Debt Reduction Fund Assessments and Regulatory Surcharges

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: _____

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS May 12, 2007

James Robert Alsop
Cabinet Secretary
West Virginia Department of Revenue

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 6
WORKERS' COMPENSATION
DEBT REDUCTION FUND ASSESSMENTS AND
REGULATORY SURCHARGES

§85-6-1. General.

1.1. Scope. -- This exempt legislative rule provides for the establishment and collection of statutory percentage 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 and for statutory percentage surcharges to be remitted to the insurance commissioner for the regulatory costs associated with regulating West Virginia's workers' compensation market.

1.2. Authority. -- W. Va. Code §§23-2C-3(f)(1) through (3); 23-2C-5(c)(2); 23-2C-22; 23-2D-5; 23-2D-6; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules proposed by the Insurance Commissioner and approved by the Industrial Council 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. -- April 12, 2007.

1.4. Effective Date. -- May 12, 2007.

§85-6-2. Purpose of Rule.

This rule provides for the implementation of the following:

2.1. Pursuant to W. Va. Code §23-2C-3(f)(3), a premiums surcharge on private carrier workers' compensation policy holders for deposit into the "West Virginia Workers' Compensation Debt Reduction Fund";

2.2. Pursuant to W. Va. Code §23-2C-3(f)(3) an assessment on the self-insured employer community for deposit into the "West Virginia Workers' Compensation Debt Reduction Fund";

2.3. Pursuant to W. Va. Code §23-2C-3(f)(1), a percentage surcharge on private carrier workers' compensation policy holders to pay for the costs attributable to the regulation of the workers' compensation insurance market; and

2.4. Pursuant to W. Va. Code §23-2C-3(f)(2), a percentage surcharge on self-insured employers to be remitted to the Insurance Commissioner to pay for the costs attributable to the

regulation of the self-insured employer market.

§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. "Industrial Council" means the Industrial Council created pursuant to W. Va. Code §23-2C-5.

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

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

3.4. "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.

3.5. "Payroll" means the term as defined in the most current approved filing of the Insurance Commissioners' designated rating organization for workers' compensation.

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

3.7. "Private carrier regulatory surcharge" is the surcharge described in subsection 2.3. of this rule.

3.8. "Self-insured employer regulatory surcharge" is the surcharge described in subsection 2.4. of this rule.

3.9. "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.

3.10. "Total Premium Due" means the premium payable at each payment interval to a private carrier by an employer for its West Virginia workers' compensation coverage under Chapter 23 of the West Virginia Code, including, but not limited to, the base rate premium as adjusted by any experience modification factor: Provided, That the Insurance Commissioner shall have discretion to determine which premiums constitute premiums for West Virginia workers' compensation coverage and which premiums constitute other insurance coverage subject to premium taxes and surcharges under Chapter 33 of the West Virginia Code: *Provided further*, That under no circumstances shall any premiums be subject to both the surcharges under Chapter 23 and this Rule and taxes and surcharges under Chapter 33 of the West Virginia Code.

3.11. "WCDRF premiums surcharge" is the surcharge described in subsection 2.1. of this rule.

3.12. "WCDRF self-insured employer surcharge" is the surcharge described in subsection 2.2. of this rule.

§85-6-4. Surcharges on Private Carrier Premiums.

4.1. The insurance commissioner shall assess private carriers the following statutory percentage surcharges:

a. The private carrier regulatory surcharge; and

b. The WCDRF premiums surcharge.

The private carrier shall collect such surcharges and shall remit such surcharges to the insurance commissioner. The percentage amounts for such surcharges shall be set by the insurance commissioner annually on or before May 1, and shall be effective on July 1. The Insurance Commissioner may change the percentage amounts 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 at least thirty (30) days notice to private carriers prior to changing percentage amounts. Any change to the percentage amounts shall only be implemented by private carriers in policies issued or renewed on or after the effective date of the change.

4.2. If the annual statutory amount collected for the Insurance Commissioner under either of the surcharges as described in this section exceeds or is less than the annual statutory funding requirements, the excess or shortage shall be applied in the determination of the percentage amounts for the next year, so that the running average collected for the Insurance Commissioner is consistent with the aggregate monetary amount required to be collected under the statute.

4.3. The surcharges described in this section shall also be applicable to all uninsured employers [W. Va. Code §23-2C-8] to the extent that the insurance commissioner is able to collect the same and all employers assigned to the adverse risk fund [W. Va.. Code §23-2C-10].

4.4. The obligation of the private carrier is to collect and remit the surcharges described in this section, as set by the insurance commissioner, from the total premium due and received by the private carrier. The private carrier has no obligation to the insurance commissioner or to the Workers' Compensation Debt Reduction Fund to make up for surcharge amounts not collected as a result of the insured's failure to pay their premium.

4.5. Failure by an insured to pay the percentage surcharge amounts as invoiced by their private carrier on the premium invoice shall be grounds for cancellation of the workers' compensation policy for failure to pay premium.

§85-6-5. Surcharges on the Self-insured Employer Community.

5.1. The insurance commissioner shall assess self-insured employers the following statutory percentage surcharges:

a. The self-insured employer regulatory surcharge; and

b. The WCDRF self-insured employer surcharge.

Such percentage surcharges shall apply to the payroll of each self-insured employer. Each self-insured employer shall remit such surcharges to the insurance commissioner on a quarterly basis. The percentage amounts for such surcharges set by the insurance commissioner shall be effective July 1 of that year. The Insurance Commissioner may change the percentage amounts 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 at least thirty (30) days notice to self-insured employers prior to changing the percentage amounts.

5.2. If the annual statutory amount collected for the Insurance Commissioner under the surcharges as described in this section exceeds or is less than the annual statutory funding requirements, the excess or shortage shall be applied in the determination of the percentage amounts for the next year, so that the running average collected for the Insurance Commissioner is consistent with the aggregate monetary amount required to be collected under the statute.

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

6.1. The surcharges imposed by section four of this Rule shall be reflected on each premium invoice issued by a private carrier, regardless of the payment interval. The surcharge percentage amounts shall be applied against the total premium due and both the percentage amounts and the total monetary amounts of the surcharges shall be clearly stated as line items on the premium invoice. The surcharges shall be remitted by the private carrier within ninety (90) days of the receipt of premium payments.

6.2. Each self-insured employer, group self-insurer, or insurance carrier shall provide any information and submit any reports the Insurance Commissioner may require to effectuate the provisions of this Rule.

§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.

INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND PUBLIC COMMENTS RECEIVED ON W. VA. CODE ST. R. § 85-6-1 ET SEQ.

Introduction

Below is the written response of the Insurance Commissioner to the stakeholder and public comments received in regard to the proposed amendment of Title 85 Rule, W. Va. Code St. R. § 85-6-1 et seq. ("Workers' Compensation Debt Reduction Fund Assessments and Regulatory Surcharges"), which was filed with the West Virginia Secretary of State for public comment on 1/16/07. This response is itemized by topic, and addresses all of the comments received at the 2/15/07 Industrial Council meeting as well as other selected substantive written comments received from stakeholders.

Time Frame for Remission of Surcharge by Self-Insured Employers

- An attorney expressed concern that there was no time frame in the rule for self-insured employers to remit surcharges to the Insurance Commissioner. This has been addressed in subsection 5.1. of the rule, which states that self-insured employers shall remit their surcharges to the Insurance Commissioner on a quarterly basis.

Comments Regarding Differentiation between Premium Workers' Compensation Coverage and "Other Insurance Coverage"

An attorney and an insurance industry representative expressed concern over the fact subsection 3.10. of the rule (subsection 3.8. in the former draft filed with the Secretary of State) provides the Insurance Commissioner discretion to determine which premium is for "workers' compensation coverage" for purposes of the surcharges described in this Rule and which premium is "other insurance coverage" subject to premium taxes and surcharges under Chapter 33 of the WV Code. Specifically, concern was expressed that the Rule should actually state the specific coverages that will be considered as "workers' compensation coverage" and "other insurance coverage." While the Insurance Commissioner understands the desire for clarity in the Rule regarding the definintion of "workers' compensation insurance", the Commissioner believes that the better approach is to address this issue through informational letters to carriers and the rate approval process. There are a number of different types of coverage types that are subject to interpretation in this regard, and it would be difficult and ill-advised to attempt to create an exhaustive list in this rule of which coverage types are "workers' compensation" and which are "other insurance." The Insurance Commissioner assures the insurance industry that the manner in which they should classify these different coverage types will be clearly communicated to them by the Commissioner.

Additionally, an attorney commented that absent the legislature's stated intent, workers' compensation premiums should not be excluded from the Chapter 33 premium tax requirements. W. Va. Code § 23-2C-3(f) specifically states that the surcharges provided for in this subjection are in lieu of Chapter 33 premium taxes, and that workers' compensation carriers are exempt from Chapter 33 premium taxes. Therefore, the

Legislature did expressly exempt workers' compensation premiums from Chapter 33 premium taxes.

Setting of Percentage Amount and Notice Regarding Changes

An attorney commented that the Rule should set forth the current specific percentage amounts for the surcharges or, alternatively, that there be a specific time frame for notice to be provided to private carriers and self-insured employers prior to a change in the percentage amounts. The Insurance Commissioner believes that it would be overly burdensome to change this Rule every time the Commissioner deems a change necessary to the regulatory or debt reduction surcharge percentage amounts. However, the Insurance Commissioner agrees that it would be appropriate to require a specific time frame for notice to private carriers and self-insured employers before changing the percentage amounts. Therefore, subsections 4.1. and 5.1. of the Rule were amended to require thirty (30) days notice to private carriers and self-insured employers before changing the surcharge percentage amounts.

Additionally, an attorney commented that the language in subsection 4.4. of the rule, which clarifies that private carriers are only responsible for collecting surcharge amounts only from premium actually paid and are not responsible for making up for any differences in surcharge amounts owed if their policy holders failing to pay premiums, should be stricken. The attorney noted that the responsibility to pay the surcharges should be the burden of the private carriers and not the policy holders, suggesting that policy holders already pay some portion of the Insurance Commissioner's regulatory costs through general revenue taxes.

In response to this comment, the Commissioner first notes that the Offices of the Insurance Commissioner ("OIC") is completely funded by special revenue and not at all funded by general revenue. Specifically, the OIC's budget is funded through special revenue premium taxes collected under Chapter 33 of the West Virginia Code, and, with the passage of Senate Bill 1004, the workers' compensation regulatory surcharge pursuant to W. Va. Code § 23-2C-3(f). Moreover, W. Va. Code § 23-2C-3(f) specifically provides that the regulatory and debt reduction surcharges are to be collected "from . . . policy holders," indicating that the legislature clearly did not intend these charges to be borne by the private carriers. Consequently, the Insurance Commissioner disagrees that Rule 6 should make the private carrier directly responsible for paying the surcharge rather than collecting it from premium received.

Statement of Surcharge on Premium Invoice

An attorney commented that subsection 6.1., which requires that surcharges and the percentage amounts in this Rule be stated on each premium invoice as a clearly ascertainable line item, should be amended to clarify that both the percentage amounts and monetary amount of the surcharges should be stated on the invoice. The Insurance Commissioner agrees and has amended 6.1. accordingly.

Statutory Authority to Impose Surcharge for Debt Reduction Fund

An attorney expressed concern that the Insurance Commissioner may not have statutory authority to impose the surcharges in this Rule. Specifically, the attorney noted that, pursuant to W. Va. Code § 23-2C-3(g), the surcharge for the Debt Reduction Fund set forth in W. Va. Code § 23-2C-3(f)(3) "sunsets" when the "Governor certifies to the Legislature . . . that the unfunded liability of the old fund has been paid or has been provided for in its entirety . . . ." The attorney further noted that in his December 8, 2005 Proclamation, the Governor confirmed that there was sufficient funding to meet the remaining obligations of the Old Fund, and that this finding was necessary, pursuant to W. Va. Code § 23-2C-11, before the workers' compensation could be terminated and the Mutual (now BrickStreet) could be created. The specific concern expressed is that by making the above noted finding in the December 8, 2005 Proclamation, the Governor eliminated the authority for the imposition of the Debt Reduction Fund.

The Insurance Commissioner disagrees with this interpretation. Specifically, the Governor's finding in the December 8, 2005 Proclamation was that there had been sufficient funding identified, *inclusive of the revenue sources identified in Senate Bill 1004 [including the Debt Reduction Surcharge in this Rule]*, to meet the remaining obligations of the Old Fund. The provision in 23-2C-3(g) states that when the Governor certifies to the Legislature that the Old Fund has been paid or provided for in its entirety, the Debt Reduction Fund surcharge sunsets. These are two different findings, the latter of which the Governor has not made and will not make until the Old Fund has been fully paid off. Currently, the various revenue sources provided for in Senate Bill 1004, which include, in addition to the surcharge, a natural resources severance tax and proceeds from West Virginia Lottery, among other sources, are necessary to pay off the remaining Old Fund liabilities. At such time when the Old Fund has been fully funded, then the Governor may issue a finding to the Legislature that these funding sources are no longer required. It is then that the Debt Reduction surcharge will sunset.

Detailed Statement Regarding Regulatory Funding Requirements

An attorney suggested that the Insurance Commissioner should place within this Rule the details regarding the regulatory costs for West Virginia's workers' compensation system incurred by the OIC in order to create transparency as to what the regulatory surcharge is funding. The Insurance Commissioner stresses the fact that the OIC's budget is a matter of public record and appropriated through the Legislature. Consequently, the Insurance Commissioner does not believe it is necessary to place the OIC's workers' compensation regulatory budget in this Rule.

Ability to Change the Debt Reduction Fund Aggregate Amounts

An attorney suggested that the Insurance Commissioner has the ability to change the aggregate amounts to be collected from private carrier premiums and self-insured employer pursuant to the Debt Reduction Fund surcharge and that this should be reflected in the Rule. The Insurance Commissioner disagrees with this interpretation of the law, as

the Legislature specified in W. Va. Code § 23-2C-3(f)(3) that the Debt Reduction Surcharge aggregate amounts are $45 million annually from private carrier premiums and $9 million annually from self-insured employers. Absent a change in the Code, the Insurance Commissioner does not have any discretion to change these statutorily set amounts.

Date of Applicability of Changes in Surcharge Percentage Amounts

A representative of the insurance industry expressed concern with the lack of clarity in the Rule regarding the applicability of changes in the surcharge percentage amounts to workers' compensation insurance policies. Specifically, it was suggested that when percentage amounts are changed, it should be clarified that the changes are only applicable to policies issued or renewed on or after the effective date of the change. For example, if on May 1, 2009, the Insurance Commissioner changes the percentage rate for the regulatory surcharge effective July 1, 2007, it is argued that the change should only apply to policies issued or renewed on or after July 1, 2007, and the new rate should apply for the full term of all such policies. This argument is based primarily on the difficulty from a systems perspective that changing the surcharge amount in mid-term of the policy could cause, as well as the hindrance a mid-term change could cause on business-friendly premium installment plans.

The Insurance Commissioner is in agreement with the need for clarification in the rule regarding the applicability of changes in the surcharge amounts to workers' compensation policies. Consequently, section 4.1. of the Rule was amended to clarify that any change to the surcharge percentage amounts is applicable only to policies issued or renewed on or after the effective date of the change.

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February 14, 2007

Ryan Sims, Associate Counsel
West Virginia Insurance Commission
Offices of the WV Insurance Commission
PO Box 50540
Charleston, WV 25305 0540

Via United States Postal Service and facsimile to 304.558.1362

Re: SERIES 6 WORKERS' COMPENSATION
DEBT REDUCTION FUND ASSESSMENTS AND
REGULATORY SURCHARGE

Dear Mr. Sims,

This is to request that you consider, pursuant to the Notice published January 19, 2007, in the State Register, the following comments regarding the proposed rule:

The Regulatory Surcharge

The proposed rule provides for a "regulatory" surcharge, the purpose of which is to provide funding for the Commissioner's workers compensation regulatory duties. The statute provides:

> Each fiscal year, the insurance commissioner shall calculate a percentage surcharge to be collected by each private carrier from its policy holders. The surcharge percentage shall be calculated by dividing the previous fiscal year's total premiums collected plus deductible payments by all employers into the portion of the insurance commissioner's budget amount attributable to regulation of the private carrier market. This resulting percentage shall be applied to each policy holder's premium payment and deductible payments as a surcharge and remitted to the insurance commissioner. Said surcharge shall be remitted within ten (10) days of receipt of premium payments, whenever said payments are made by its insureds;

The statute clearly mandates this process. However, the regulation is unduly vague regarding the impact of this surcharge on premiums, particularly in the first year or two of the assessment. As we all know, Brickstreet assumed, without payment of consideration, the assets of the former workers' compensation commission. Thus, for the first year or two, the assessment will include substantial start up costs associated with the commissioners' administration of both the

surcharge from their policy holders equal to ten percent, or such higher or lower rate as annually determined, by the first day of May of each year, by the insurance commissioner to produce forty-five million dollars annually, of each policy holder's periodic premium amount for workers' compensation insurance. Additionally, by the first day of May each year, the self-insured employer community shall be assessed a cumulative total of nine million dollars. The methodology for the assessment shall be fair and equitable and determined by exempt legislative rule issued by the workers' compensation board of managers. The amount collected shall be remitted to the insurance commissioner for deposit in the workers' compensation debt reduction fund created in section five, article two-d of this chapter.

(g) The new premiums surcharge imposed by subdivision (2), subsection (f) of this section shall sunset and not be collectible with respect to workers' compensation insurance premiums paid when the policy is renewed on or after the first day of the month following the month in which the Governor certifies to the Legislature that the revenue bonds issued pursuant to article two-d, chapter twenty-three of this code have been retired and that the unfunded liability of the old fund has been paid or has been provided for in its entirety, whichever occurs last.

First, while on its face a set number, the relative allocations may be adjusted to a higher or lower figure. However, the regulation is silent on this point. The public is entitled to know whether the current financial situation allows for increase or reduction from the allocation as set forth in the statute. The regulation should provide guidance to the concerned parties regarding the expectation of the commissioner whether the surcharge will go up or down from the amounts set forth in the code.

A further consideration is W. Va. Code 23-2C-3a:

(c) Notwithstanding any provision of subsection (g), section three of this article to the contrary, in the event the Governor certifies to the Legislature that revenue bonds issued pursuant to article two-d of this chapter have been retired and **that the unfunded liability of the Old Fund has been paid or has been provided for in its entirety, whichever occurs last, then:**

uninsured and "adverse risk" pool, which requires only two rejects from insurers for qualification.
Employees, employers and the public in general has not been given as part of this regulation any kind of budget estimate for what it will cost the commissioner to replace the assets taken by Brickstreet. As proposed, the rule provides for a direct pass through to the employers of all budget costs associated with regulation. The difficulty is that there is no description of the estimated costs to be incurred for this process. Without such an estimate, the regulation is just a recitation of the provision already in the code. Certainly the public is entitled to know the value of what was taken by Brickstreet in order to begin to plan for the additional charge. There are employers whose rates have gone up, not down, and the imposition of this surcharge on top of already increased rates will only cause undo hardship.

The regulation should set forth a reasonable prediction of the costs the commission expects to incur as a result of the start of the commissioner's new workers compensation funds. Such information should include the value of the assets taken by Brickstreet, the anticipated size of the uninsured and adverse risk funds and the anticipated administrative start up costs and routine operational expenses for each.

In addition, the rule provides no estimate of the number of employers who may opt to carry no insurance or seek coverage from the state. The November 30, 2005 PRAG report clearly anticipated that "small" employers would seek coverage from the state. Surely at the time there were estimates of the number of such small employers. The rule likewise should provide guidance to the public on this important issue.

In short, the regulation is deficient because it fails to provide the public with any information about the expected costs of administration. It is only fair to ask what this hidden cost of the Brickstreet transaction is going to be to the public and employers.

The Funding of the Deficit

The PRAG report of November 30, 2005, provided for specfic funding amounts for the workers compensation deficit. Those amounts were 9 million dollars annually from the self insurance community and 45 million dollars from the private carrier funded community. The regulation, on the other hand, makes no calculation based on these amounts. The statute provides:

> 23-2C-4(f)(3) Upon termination of the commission, the company and all other private carriers shall collect a premiums

(1) The premiums surcharge imposed by subdivision (2), subsection (f), section three of this article shall not sunset and shall continue to be remitted in accordance with the provisions of said subsection; and

(2) The premiums surcharge imposed by subdivision (3), subsection (f), section three of this article shall sunset and not be collectible with respect to workers' compensation insurance premiums paid when the policy is renewed on or after the first day of the month following the month in which the Governor makes the certification.

The code also provides direction regarding the effect of the governor's proclamation:

23-2C-11. Transfer of assets from new fund to the mutual insurance company established as a successor to the commission; transfer of commission employees

(a) If the governor determines that:

(1) **The old fund assets are sufficient to satisfy the old fund liabilities or that a revenue source has been secured to satisfy the old fund liabilities as they occur from time to time;**

(2) The executive director has established a mutual insurance company pursuant to this code;

(3) The comprehensive financial plan has been accepted by the insurance commissioner; and

(4) The commissioner of insurance has determined that the mutual insurance company established by the executive director qualifies:

(A) For a certificate of authority to transact workers' compensation insurance in this state; and

(B) For the authority to issue nonassessable policies of insurance pursuant to this code, **the governor shall issue a proclamation stating that the events described in subdivisions (1) through (4), inclusive, of this subsection have occurred, along with the exact amount of funds to be transferred from the workers' compensation fund to the old fund. The Governor shall establish the effective date of the termination of the commission in the proclamation.**

In short, the Commissioner, in light of the proclamation of the governor, has no statutory authority to assess any premium surcharges pursuant to both sunset provisions of the law. By issuing the proclamation, the Governor has as a matter of law triggered the application of the 23-2C-3(f)(3) sunset provision. Reading the various surcharge and sunset provisions in their entirety, the Commissioner has no legal authority to assess the forty five million dollars debt reduction payment from private carrier employers or the nine million dollar self insurance surcharge.

A further objection to both assessments is that they treat all employers on an equal basis. They make no adjustment for employers' contributions to the original deficit, their relative ability to pay the assessments or the fairness of assessing these fees in the manner proscribed.

Fundamental fairness would require such a fact finding process be employed by the commissioner and such a fact finding process should be reflected in the proposed regulations.

Please accept these comments on the proposed regulation in accordance with your usual procedures.

Very Truly Yours,

John H. Skaggs

Office of General Counsel

February 14, 2007

Members of the Industrial Council
c/o Ryan Sims, Associate Counsel
West Virginia Insurance Commission
P.O. Box 50540
Charleston, WV 25305-0540

Re: Comments on Proposed 85CSR6, "Workers' Compensation Debt reduction Fund Assessments and Regulatory Surcharge"

Members of the Industrial Council:

Thank you for BrickStreet's opportunity to offer comments regarding the proposed rule.

The rule allows the Office of the Insurance Commissioner to change the amounts of the surcharges on July 1 of each year. However, the rule is unclear about when a rate is applicable to premium received by the carrier. We offer the following suggestions.

The surcharge rate should be implemented against every policyholder whose policy term become effective during the period the surcharge is in effect. For example, the term of an insurance policy is November 1 through October 31. All premium payment for the policy is due on November 1. The rate set by the Insurance Commissioner on July 1 should be applicable to the entire policy term (even if on the next July 1, the rate is changed).

There is a similar scenario regarding employers who are afforded the opportunity to make installment payments of premium. Given the same example as above, the policy term is November 1 through October 31. A policyholder makes four installment payments of premium. The last premium installment is due August 1 of the policy term. The applicable surcharge rate should be the same rate as applied to the other installments.

There are a number of reasons behind these suggestions:

1. From a systems perspective, it is very difficult for a carrier to change the rate of surcharge during the term of a policy;

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2. If the rate is applicable when premium is received by the carrier, then the system could be manipulated so that the amount due is changed (e.g. my premium payment is due on July 15, but I'll pay on June 30 to beat the increased rate);

3. There are times when it makes good business sense for the carrier and policyholder to agree to installment payments plans. Implementation of the surcharge rate when premium is received, rather than during the effective date of the policy term, would discourage installment plans; and

4. The use of the Anniversary Rating Date for the implementation of a new rate is a common practice in the insurance industry (See NCCI Basic Manual – Rule 3.A.2).

At 3.8, the Insurance Commissioner is provided the discretion to determine which premiums constitute premiums for workers' compensation coverage and which premiums constitute other coverage subject to premium taxes and surcharges under Chapter 33 of the W. Va. Code. It seems reasonable that the Commissioner make this determination in the body of the rule. BrickStreet does not oppose the inclusion of what is currently termed WV Broad Form Employers' Liability (formerly EELF) coverage under Chapter 33 for purposes of premium tax payment.

There appears to be a typo in 6.1 which references section "five" of the rule. It appears that this is section "four."

Again, thank you for the opportunity to participate in this process.

Very truly yours,

Randall B. Suter

Joy Zirkle

From: Ryan Sims
Sent: Monday, March 26, 2007 10:08 AM
To: Joy Zirkle
Subject: FW: Workers' Compensation Rule 6 initial draft: comments

Attachments: WordPerfect 6.1

Rule
arges.draft.co

Jennifer Meeks' comments to Rule 6.

Ryan M. Sims
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-----Original Message-----
From: Jennifer Meeks [mailto:jennifermeeks@wvdhhr.org]
Sent: Monday, January 29, 2007 3:12 PM
To: Ryan Sims
Subject: Workers' Compensation Rule 6 initial draft: comments

Please consider the attached comments to the draft of Rule 6.

Jennifer J. Meeks
State Capitol Complex
Building 3, Room 201
Charleston, WV 25305
(304)558-6989

Draft Comments to
Rule 6
Debt Reduction Fund Assessments
and Regulatory Surcharge

Section 2:
Including self-insured employers as responsible for payment of the assessments and surcharge is quite reasonable, and should be retained despite anticipated argument by the self-insured employer community. If one looks far enough back in time, even self-insured employers are undoubtedly somewhat responsible for the workers' compensation deficit that led to abandoning the historic state monopoly system. Further, part of the insurance commissioner's responsibility is to regulate self-insured employers' workers' compensation compliance. Consequently, it is manifestly fair and reasonable for self-insured employers to share the burdens imposed by these assessments and surcharges.

Section 3:
Section 3.5: "Payment interval" is defined only in relation to private carriers' insurance policies, and does not address self-insured employers. Unless self-insured employers are expected to pay assessments and surcharges once a year, there should be some definition included to specify when assessments and surcharges will be applied and due.

Section 3.8 provides that premiums subject to the Rule 6 surcharge will never be subject to taxes and surcharges under Chapter 33. It would be helpful to have some explanation of what taxes and surcharges will not be applied to premiums paying Rule 6 surcharges, in order to provide meaningful comment. Unless the Legislature specified in the statute that premiums subject to workers' compensation surcharges were not to be subjected to taxes and surcharges under Chapter 33, such exemption was likely not intended. Exempting parties from taxes and surcharges, without Legislative consideration and intention, will most likely create another deficit elsewhere in the State's funding.

Section 4:
Section 4.1, and section 2, do not set a particular surcharge percentage or rate, but instead states that the surcharge rates will be set annually. The interest of the business community in finality and predictability would be better served by setting the rate within the rules, and then changing it if necessary. While this may cause some inconvenience to the insurance commission for the first few years, that burden would be outweighed by the advantages of having a definite surcharge for which policyholders may budget.

Further, section 4.1 states that the Insurance Commissioner shall provide "sufficient notice" to private carriers, but "sufficient notice" is not defined. This also needs to be clarified, by specifying within the Rule the method and timing of the required notice. Of course, if the suggestion above to incorporate a surcharge rate into the Rule is taken, there would be no need of a separate notice, as notice is given by the Rule itself.

Section 4.4 states that the private carrier has no obligation to the State to "make up any difference

in the amount projected to be collected as a result of the surcharge percentage . . . and the amount actually collected." This sentence should be removed. According to Section 1.1, the surcharges are not only for debt reduction, but also "for the regulatory costs associated with regulating West Virginia's workers' compensation market." Costs of regulating the insurance market should be borne directly by the private carriers and self-insured employers, rather than passed through to the policy holders. Policy holders presumably already pay some portion of the regulatory costs, through other general revenue taxes, and are certainly to bear direct costs through this Rule. Some part of the costs here are not associated with the policyholders, but instead with the necessity of regulating the insurance carriers. Moreover, private carriers are explicitly engaged in the business of assessing and bearing risks associated with the insureds' interests and behaviors. The risk of the private carriers not actually collecting from policyholders should be part of the private carriers' risks of doing business. It is not in the State's interest to carry the entire risk, in lieu of the private carriers.

Section 5:
Section 5.1 repeats the problems with vague, nonspecific language found in section 4. It applies surcharges to self-insured employers "in a time frame consistent" with the statute, while requireing "sufficient" notice prior to changing surcharge rates. The surcharge rates and due dates should be set within this Rule. That will take care of the issue of notice when changes are required, as the changes will occur through rulemaking procedures.

Section 6:
Section 6.1 allows private carriers to reflect the surcharges on "each premium invoice" "regardless of the payment interval" and the surcharge rates are to be "a clearly ascertainable line item on the premium invoice." This should be clarified, as the surcharge dollar amount will be different from the surcharge rate. While the surcharge rate should certainly be clearly included on the invoice, for general reference, the line item should be the dollar amount charged for that payment interval which is directly attributable to the surcharge rate. None of the private carriers' administrative costs should be included in the rate or the dollar amount. It should reflect exclusively the surcharge rate and resulting dollar amount, for that payment interval alone.

Section 6.1 also states that the private carriers will remit the surcharge amounts "in a time frame consistent with" the statute. The requirement should be specified in this Rule. Interests of notice and finality, as well as ability to track compliance, will all be served by stating a definite time period in which payments are due within this Rule.

PUBLIC HEARING

FEBRUARY 15, 2007

WEST VIRGINIA INSURANCE COMMISSION
WORKERS' COMPENSATION INDUSTRIAL COUNCIL

WORKERS' COMPENSATION DEBT REDUCTION FUND ASSESSMENT AND REGULATORY SURCHARGE TITLE 85, SERIES 6

Transcript of the Public Hearing held on Thursday, February 15, 2007, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
Charles Bayless, Chairman
Dan Marshall
Walter Pellish (via telephone)
Jane L. Cline, Commissioner

Insurance Commission Staff Members Present:
Bill Kenny
Mary Jane Pickens
Ryan Sims

Chairman Charles Bayless: We received a couple of comments and I know there are going to be quite a few questions. I'll start with a question and then we can go from there. Back when we did Series 19. Series 19 was the Workers' Compensation Uninsured Employees' Fund. There were two funds in there. There was a Guaranty Fund for claims after July 1, 2004. There was a Security Fund for claims prior to cover that. Is there any overlap between the Series 6 Debt Reduction? I mean the private people don't have the Series 19 separate assessment for that security and guaranty. Is there any danger – I'll ask one of the staff – of an overlap there?

Ryan Sims: The short answer to your question, Chairman Bayless, would be no there isn't because the surcharges in Rule 6 are to address two separate items. That's the cost of the Insurance Commissioner in regulating the workers' compensation market – statutory upgraded surcharge to those self-insureds and workers' compensation

insurance companies for the cost it actually takes to regulate. In other words employment staff; that type of thing. The debt reduction surcharge is another statutorily created surcharge and that's specifically for the purpose of paying off the unfunded liability of the Old Fund. It creates one stream of several streams of revenue that are used to pay off the remaining unfunded liability – the Old Fund. The Rule 19 Guaranty Pool and Security Pool – as you noted the Guaranty Pool is for liabilities after July 1, 2004, and the Security Risk Pool is for liabilities prior to July 1, 2004. Those are two payoffs, specifically liabilities, if there is a case where a self-insured employer for whatever reason is unable to pay those liabilities primarily in the case of a bankruptcy or where a self-insured employer for some reason is in very bad financial shape on the verge of bankruptcy.

Chairman Bayless: That's what I was wondering about, like a Weirton Steel. There is no possibility would get into both funds and collect twice. Somehow the Security Pool, the pre July 1, 2004, ended that reduction fund.

Mr. Sims: I don't see that as being possible. Like I said the Rule 6 surcharges serve two purposes. One is to fund our cost to regulate the market and the other is to payoff the Old Fund. If a self-insured were to go under now I think, again, that would go to Rule 19 funds. I think they are completely separate.

Chairman Bayless: Mr. Marshall or Mr. Pellish, any questions?

Walter Pellish: I have no questions.

Chairman Bayless: I was just wondering back on page five, section 4.2, for instance. It says, "If the annual statutory amount collected for the Insurance Commissioner under either of the surcharges as described in this section. . ." Now this is for people that are not self-insured. ". . .exceeds or is less than the annual statutory funding requirements, the excess or shortage shall be applied in the determination of the rates for the next year. . ." Wonder if we should put something like "applicable rates" under this section to make sure there is no cross fertilization from self-insured to not and the staff can look at that. I don't think that was the intent. I'm just trying to tie the language down.

We've got a couple of comments and we can start with them. Mr. Skaggs, I've got yours and I'm sorry I have to admit I'm confused. I do not say that in any way to judge the merits of it. I just got it and I haven't got it sorted out in my mind yet. Would you care to say anything further?

John Skaggs (The Calwell Practice, PLLC): I think there are really two issues I would direct you to. First is to both of those. I would ask for as much transparency as you could give us on these issues of both replacing the assets or give them to BrickStreet for free. Because I think if you are going to ask employers to pay to replace that building full of material then they should know what they're paying for, and that would include proprietary computer programs and everything else. There is no provision in the rule for that. Although I understand that this is really almost. . .this is the first shot and it would be followed up by a regulation making procedure. And that I think goes to the second issue also because the PRAG report and the statute at first glance have a very specific number in there for both the self-insured and the general employer community for $45 million and the $9 million. But in reality of course you had the authority to deviate from that up and down. And, again, in order to know where this is going to end up I think the employer community, and especially the small employer community, are again entitled to as much transparency as possible in the course of assessing that surcharge. Clearly when you look at it altogether the Commissioner has the authority to make that basically whatever you choose. Even though it starts out with a fixed number you are allowed to deviate as circumstances may warrant. So, again, I think there should be absolute transparency there if the employer community has some idea of the foundation for it. And also there are small employers who have seen significant increases in their premiums. Reports have indicated some small employers have had three or four times increase. And at least at first glance what you are telling them with this regulation is your premium is going to go up another ten percent. It's going to be a significant amount of money to some small employers. I'll leave it there. I think you understand what I'm getting at.

The more fundamental issue that I raised involved the interplay of the sunset provision and the statutory authority for the Governor to issue his proclamation creating BrickStreet. And in a nutshell what I'm saying is if you look at the provision of the statute that allowed the Governor to issue his proclamation and create BrickStreet based on the finding of a revenue stream that would so satisfy the deficit reduction plan and then you look at the sunset language, it appears to me that you cannot apply the deficit reduction surcharge because the Governor as a matter of law had by his proclamation found that the Old Fund is provided for. That's as straightforward as I can make it. I think they are in essence trying to have it both ways. But they jumped the gun and issued the proclamation too soon on BrickStreet. That's too bad. If you look at the surcharge statute, the sunset provision and the provisions regarding the issue of the proclamation, it seems to me that there is no statutory authority to assess any deficit reduction surcharge. I would be happy to answer any questions.

Chairman Bayless: Does any member of the staff. . .I mean the staff obviously needs to look at this and look at these arguments. Does anybody have any questions that they would like to ask Mr. Skaggs?

Mr. Sims: I would be glad to comment.

Chairman Bayless: That's fine.

Mr. Sims: On his first point regarding a transparency, I think the issue with placing that type of information in a rule. . .I guess first starting with the regulatory surcharge. The cost of regulating West Virginia's workers' compensation insurance market is going to change from year to year depending on the size of the employment market. I think asking us to place our regulatory budget – you know I would be glad to let the Commissioner or Mary Jane talk more about this – but asking us to place our regulatory budget at least from my view in the rule specifically each year would be a pretty cumbersome task if that's what Mr. Skaggs is referring to. That's not to say that our regulatory budget wouldn't be made available, but to place it in a rule seems like a cumbersome task that would be extremely difficult to me. So that's as to the transparency.

In regard to the Debt Reduction Fund, I don't think there could be more transparency. And this ties into the second point regarding deviation in the amounts. Our interpretation is that §23-2C-3(f)(3) sets a specific amount to be charged to the insured community and the self-insured community. That is $45 million dollars to the insured community annually and $9 million dollars to the self-insured community annually. We simply do not see any leeway in the statute to change those amounts in §23-2C-3(f)(3). We believe the Legislature set that as one of several streams of revenue to pay off the outstanding Old Fund liabilities; the other streams including proceeds from Lottery, a severance tax and a number of other areas. And, again, that is our interpretation. I guess I would have to say the Insurance Commissioner simply disagrees with Mr. Skaggs that there is any leeway to deviate from that $9 million dollars to self-insureds and $45 million dollars to the insured community. And I guess we believe that the Legislature would have to change that language for us to deviate from those amounts.

Addressing Mr. Skaggs' third point regarding not having authority for these surcharges. Really I have never heard that argument before. Again, we just don't see that as being a valid argument whatsoever. It seems that there might be some

confusion on Mr. Skaggs' part regarding the proclamation made by the Governor and he notes the actual language in the proclamation. What the Governor proclaimed in that December 2005 proclamation was that he had to find that Old Fund assets are sufficient to satisfy the Old Fund liabilities or that a revenue source has been secured to satisfy. And the revenue sources are as I discussed – one of these is the Debt Reduction Fund, but there's also Lottery proceeds; there's a severance tax. So the Governor found that those revenue sources were available to payoff this unfunded liability. And that is that proclamation was issued by the Governor in December of 2005 right before transition to a private market and the establishment of BrickStreet.

On the other hand, the certification I think that Mr. Skaggs is getting confused with – the proclamation is found in §23-2C-3(a). And basically what that says if the Governor certifies that the unfunded liability Old Fund has been paid or has been provided for in its entirety, that doesn't mean that's fully funded now. We received enough income from those revenue streams to payoff the unfunded liability. Then at that time the Debt Reduction Fund, the $45 million dollars to the insured community and $9 million dollars to self-insureds, certainly does sunset. But that is a separate certification that the Governor will make years down the road when we have fully funded the Old Fund liability.

Chairman Bayless: I would ask that you take the arguments into consideration.

Mr. Sims: Certainly.

Chairman Bayless: I think I understand what you're saying. I got this too late to really study it. But certainly if somebody claims that there is no authority we need to look at that before we do anything.

Mr. Sims: Absolutely. We carefully look at all the comments we receive during the public comment period and we will continue to do so.

Commissioner Jane Cline: I will just add to what Ryan said with respect to the budget process. Our budget is public. It is presented to the Legislature and the Legislature makes the appropriations as to our spending authority for the various accounts. That is part of the Executive Budget Bill and will be part of the Budget Bill that the Legislature ultimately adopts.

Chairman Bayless: I would assume that the rate setting process would be rather transparent and you will have to say why you're assessing a rate of "X."

Commissioner Cline: Certainly we would have to do. . .

Chairman Bayless: I can see Mr. Skaggs. . .you know if. . .I know this was not the case, but if they had given $100 million dollars to BrickStreet and then we had to turn around and assess the insured community – both self and non-self the $100 million dollars – people would not like that. I know it wasn't $100 million dollars. Does anybody else have any comments on Rule 6? We've got some written comments. Does anybody else have any comments? Mr. Marshall?

Mr. Marshall: No.

Chairman Bayless: Mr. Pellish do you have any questions?

Mr. Pellish: No sir.

Chairman Bayless: I think we are done with that one. And this is the initial or am I mistaken, or what is this?

Mary Jane Pickens: On Rule 6, it was initially presented at the last meeting. This is the Public Hearing so we'll come back with responses to the comments and a final proposal at the next meeting.

Chairman Bayless: That's what I thought. Okay. If you have any further comments or comments on things you've heard today, please get them in to the Commission and at the next hearing we will have a vote.

Industrial Council Meeting

PUBLIC HEARING

Title 85, Series 6

Workers' Compensation Debt Reduction Fund Assessments and Regulatory Surcharge

Offices of the West Virginia Insurance Commissioner, Room 400

February 15, 2007

Name	Address	Telephone Number	Group Affiliation	Do you desire to address the Council?	Agenda item to which you desire to speak
RANDALL SUTTON			BRICKSTREET	NO	
MICK RICHARDS.		2552536.	PRAXIS.	YES.	COMMENT MAY