WEST VIRGINIA
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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 W.Va. Code §§ 23-2C-3(f)(1-3), 23-2C-5(c)(2), 23-2C-22, 23-2D-5, 23-2D-6, 33-2-10(b), and 33-2-21(a).

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

West Virginia Code § 23-2C-5(c)(2)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: 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 August 17, 2008

Virgil T. Helton
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 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. -- July 18, 2008.

1.4. Effective Date. -- August 17, 2008.

§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 Commissioner's 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 an employer who is eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.10. "Total Assessable Workers' Compensation 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 twenty-three of the West Virginia Code, including, but not limited to, the base rate premium as adjusted by any experience modification factor. "Total assessable workers' compensation premium due" shall also be computed prior to the application of all discounts based on deductible provisions in policies. The Insurance Commissioner has 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 thirty-three of the West

Virginia Code: *Provided*, That under no circumstances may any premiums be subject to both the surcharges under chapter twenty-three of the West Virginia Code and this rule and taxes and surcharges under thirty-three of the West Virginia Code. Premiums payable for insurance coverage necessitated by federal law, including, but not limited to, Federal Black Lung and USL&H coverage, and for any type of employer's liability coverage, including, but not limited to, coverage for liability arising under W. Va. Code § 23-4-2(d)(2) are not included in the "total assessable workers' compensation premium:" *Provided, further,* That, with the exception of premiums for coverage necessitated by federal law, premiums for standard limits of employer's liability coverage included in a workers' compensation policy are included in "total assessable workers' compensation premium due."

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.

Beginning on July 1, 2008, the private carrier regulatory surcharge shall be 5.5% and the WCDRF premiums surcharge shall be 9%. The Insurance Commissioner may annually change the percentage of the private carrier regulatory surcharge as the Commissioner deems necessary beginning on July 1, 2013: *Provided*, That the Commissioner shall provide private carriers at least ninety (90) days notice prior to changing the private carrier regulatory surcharge percentage. The private carrier shall collect and remit the surcharges to the Insurance Commissioner. Any change to the percentage may be implemented by private carriers only in policies issued or renewed on or after the effective date of the change.

4.2. The surcharges described in this section are also 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 to all employers assigned to the adverse risk fund [W. Va. Code §23-2C-10].

4.3. 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 assessable workers' compensation 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.

4.4. Failure by an insured to pay the percentage surcharge as invoiced by their private carrier on the premium invoice is 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.

The percentage surcharges apply to the payroll of each self-insured employer. Each self-insured employer shall remit the surcharges to the Insurance Commissioner on a quarterly basis. The surcharge percentage set by the Insurance Commissioner shall be effective July 1 of that year. The Insurance Commissioner may change the percentage annually, 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 ninety (90) 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 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 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 shall be applied against the total assessable workers' compensation premium due.

6.2. The surcharges shall be remitted by the private carrier no later than the twenty-fifth day of the month succeeding the end of the calendar quarter in which they are collected, except if the surcharges are collected in the fourth quarter, the surcharges shall be remitted no later than the first day of March the succeeding year.

6.3. 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.

PUBLIC HEARING

MAY 29, 2008

OFFICES OF THE WEST VIRGINIA INSURANCE COMMISSIONER
WORKERS' COMPENSATION INDUSTRIAL COUNCIL

"WORKERS COMPENSATION DEBT REDUCTION FUND ASSESSMENTS AND REGULATORY SURCHARGES"
TITLE 85, SERIES 6

Transcript of the Public Hearing held on Thursday, May 29, 2008, 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
Bill Dean
Senator Don Caruth
Delegate Nancy Guthrie
Kent Hartsog
Dan Marshall (via telephone)
Senator Brooks McCabe
Walter Pellish (via telephone)

Chairman Bayless: We have Title 85, Series 6, which is "Workers' Compensation Debt Reduction Fund Assessments and Regulatory Surcharges." Mary Jane, anything from the staff on this rule?

Mary Jane Pickens (General Counsel OIC): No. This is the same. Rules 2, 6 and 8 are all simply rules that we had to reopen for the purpose of making them match the new law.

Chairman Bayless: Any comments from members of the Council? Are there any public comments on Series 6 on the proposed rule? All right, hearing none we'll move on. [No public comments.]

PUBLIC HEARING
TITLE 85, SERIES 6
"WORKERS' COMPENSATION DEBT REDUCTION FUND ASSESSMENTS AND REGULATORY SURCHARGES"
Industrial Council Meeting
Offices of the West Virginia Insurance Commissioner
1124 Smith Street, Room 400, Charleston, WV 25301
May 29, 2008

Name	Address	Telephone Number	Group Affiliation	Do you desire to address the Council?	Agenda item to which you desire to speak

Brickstreet INSURANCE
Legal Department

May 29, 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 85 CSR 6, "Debt Reduction Fund Assessments and Regulatory Surcharges"

Members of the Industrial Council:

BrickStreet Insurance appreciates the opportunity to participate in this public process and offer comments regarding the proposed rule.

Proposed Rule Section Followed by Comment

6.2. The surcharges shall be remitted by the private carrier within ninety (90) days of the receipt of premium payments no later than the twenty-fifth day of the month succeeding the end of the calendar quarter on which they are collected, except if the surcharges are collected in the fourth quarter, the surcharges shall be remitted no later than the first day of March the succeeding year.

6.2. Comment:
The current language creates some confusion. Under the OIC proposal, amounts collected early in the quarter will be due at various times. For example, amounts collected at days 1 through 25 of the quarter will be due 90 days later (or on days 1 through 25 after the end of the quarter). Amounts collected after the 25th day of the quarter will all be due on the 25th day after the end of the quarter. This doesn't make a lot of sense. The OIC should delete the "within ninety (90) days of the receipt of premium payments" language and keep the language that says that the private carrier shall remit surcharges "no later than the twenty-fifth day of the month succeeding the end of the calendar quarter in which they are collected..."

Again, thank you for the opportunity to offer comment of this rule. If I can provide any other assistance, please do not hesitate to contact me.

Very truly yours,

Randall B. Suter

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May 30, 2008

Mary Jane V. Pickens, Esquire
West Virginia Insurance Commission, Legal Division
Post Office Box 50540
Charleston, West Virginia 25305-0540

Re: *Comments to Proposed Rule Amendments*

Dear Ms. Pickens:

Please find enclosed herewith comments which I wish to file on behalf of the Workers' Compensation Committee of the West Virginia Chamber of Commerce to the proposed amendments presently being considered to Rule 1, Rule 2, Rule 6 and Rule 18.

Very truly yours,

TIMOTHY E. HUFFMAN

TEH/nkl

cc: Ms. Brenda Nichols Harper

COMMENTS TO:
SERIES 1
CLAIMS MANAGEMENT AND ADMINISTRATION RULE

- **Section 2.14**

This definition is too restrictive and does not include medical, disability or voluntary retirements.

- **Section 2.4.c**

The amended rule defines filing to include a document that is e-mailed and deems the date of filing to be the date upon which the e-mail was sent to the e-mail address for the recipient. A filing should only be completed upon proof of receipt, however filed. Additionally, specific standards should be developed regarding the use of e-mail transmissions under these and other rules.

- **Section 5.1**

This Section needs further amendment to be consistent with *W. Va. Code* § 23-4-5. Specifically, that Code Section requires that temporary total disability benefits are not paid unless the period of disability lasts longer than three days from the date the employee leaves work as a result of the injury. This Section, as written, does not specifically require three days of consecutive disability from scheduled work before temporary total disability benefits are payable.

- **Section 5.3**

This Section should be further amended to apply specifically to seasonal reductions in work force and seasonal layoffs.

- **Section 6.2**

The proposed rule would delete Section 6.2 as written. Section 6.2 should not be deleted or amended.

- **Section 7.2**

This Section needs further amendment to provide for the statutory requirement of a 30-day protest period for decisions of the Occupational Pneumonoconiosis Board.

- **Section 9.3**

See comments under Section 12.2.

- **Section 10.1**

The proposed amendments to this Section shorten the time period for ruling on claims from 15 working days to 15 days. This Rule should continue to permit 15 working days for the responsible party to rule on a claim.

- **Section 10.4.a**

This Section should be deleted entirely. Notwithstanding the fact that, the statute continues to require 120-day evaluations, neither self-insured employers nor insurance carriers wait 120 days before referring a claimant out for an evaluation.

- **Section 10.5.b**

The word "working" should not be deleted from this section.

- **Section 10.5.c**

This Section should be amended to provide that the payment of permanent partial disability awards in either monthly installments or in a lump sum amount, should be at the discretion of the responsible party.

- **Section 10.5.d**

This Section should not be amended from 30 working days to 30 days.

- **Section 10.6**

This Section should be further amended by striking "total" from line 2, so that it is applicable only to applications for the reopening for temporary or permanent disability benefits and does not include permanent total disability benefits.

- **Section 12.2**

This Section as amended limits the collection of overpayments contrary to the provisions of *W. Va. Code* § 23-4-1C(h) and 23-4-1D(d). The statute permits the collection of overpayments from future claims that the claimant may file. The limitation proposed in the amendment leads to the unintended financial enrichment of claimants. Additionally, a system should be developed to track and manage intercarrier reimbursements for such overpayments.

- **Section 13.1**

This Section should not be amended as proposed. The amendments will allow a claimant to file an OP cancer claim as an occupational disease claim and thus avoid having to satisfy statutory exposure requirements as a prerequisite to establishing a valid OP claim.

- **Section 16**

This new Section should be further amended to require that a responsible party receives a copy of any response made by the Office of the Insurance Commissioner to a complaint.

- **Section 18.1**

The proposed amendments would delete this Section entirely. Section 18.1 as exists in the current Rule should remain intact.

COMMENTS TO:
SERIES 2
WORKERS' COMPENSATION CLAIMS INDEX

- **Section 4.2**

This Section should be further amended to provide that the data collected in this Rule must be sortable by the claimant's full name and must include all of the claims filed by each claimant.

A system to manage and report intercarrier reimbursements for overpayments should be created under this rule.

COMMENTS FOR:
A SERIES 6
WORKERS' COMPENSATION DEBT REDUCTION FUND ASSESSMENTS AND REGULATORY SURCHARGES

- **Section 4.1**

This Section should be further amended to provide that a detailed accounting of all sums collected and expended by the Commissioner are to be reported to the Industrial Council on a semiannual basis within sixty (60) days of January 31st and June 30th of each year.

- **Section 5.1.b**

This Section should be further amended to provide that the Insurance Commissioner may only change the percentage as needed to meet the funding requirements of *W. Va. Code* § 23-2C-3(f) on an annual basis.

COMMENTS TO SERIES 18 SELF INSURANCE, SELF ADMINISTRATION AND THIRD-PARTY ADMINISTRATORS

Section 3.1

What other "recognized accounting body" is contemplated by this proposed change in the definition of audited statements?

Section 3.8

This definition is in conflict with the provisions of *W. Va. Code* § 23-2-9(f). That Section specifically defines the period of inactivity as four or more consecutive quarters without payroll.

Section 3.11

The use of the term "payroll" should be consistent throughout this rule and should utilize the definition of "payroll" incorporated from Rule 6. The use of the term "gross wages" in this rule should be replaced with the term "payroll".

Section 5.1

This last line of that Section should be amended to read "The required parental guarantee must be received and accepted by the Commissioner before the applicant's self insured status may become effective."

Section 5.2

The current provisions of this rule provide that failure to disclose certain information may result in termination of a self insured account as determined at the "sole discretion" of the Commission and is contrary to the provisions of Section 15 regarding the involuntary revocation of self insured status, which requires approval by the Industrial Council.

The rule provisions should be amended to require only the signature of an individual with authority to act on behalf of the entity seeking self insurance.

Section 5.5

Self insurance should become effective on the first day of the month following approval by the Industrial Council or on a later date as determined by the self insured employer.

Section 5.5.a

The Commission should be required to make a recommendation to the Industrial Council within sixty (60) days of receipt of the completed application and additional requested information.

Section 6.1

This section should be deleted from this rule as the subject matter is covered by Rule 32.

Section 6.2

This section should be deleted from this rule as the subject matter is covered by Rule 32.

Section 7

This section should be deleted as unnecessary.

Section 8

All the provisions of this section should be covered under Rule 19 and should not be part of this particular rule.

Section 8.3

Because future self insured liability is secured through the Guaranty Pool, it is unnecessary to continue requiring employers to post minimum security of any level.

Section 8.3.b

This section should be amended to require that a self insured's failure to obtain additional bond or security may result in a revocation.

Section 9

The proposed language with regard to employer's modification of business constitutes an unreasonable expansion of this section. There should be no reporting requirement by the employer unless the modification impacts on the employer's claim liability. An employer should be required to provide such financial information only if the modification of the employer's business results in a substantial change in the financial ability of the company that provides the surety or parental guarantee.

Section 9.4

This section should be amended to provide that a processing fee may be assessed rather than shall be assessed.

Section 10.1.a

The word "forever" should be deleted as it is unnecessary.

Section 10.1.b

This section should be amended to provide that termination of a self insured account should occur on the first day of the month or on a date agreed upon between the Commission and the self insured employer.

Section 10.1.c

This section should be amended to provide that if surety is posted by the employer upon termination of the account, no further contribution to the Guaranty Pool will be required.

Section 10.2

This section should be amended to provide simply that without prior approval, the OIC is not bound by the terms of any such agreement.

This section should be amended to permit approved risk portfolio transfers of a self insured employer's past liability.

Section 11.1

This section should be amended to delete the following language "as those afforded to injured workers whose claims are paid and administered by the Workers' Compensation Commission private workers' compensation insurance carriers. These same benefits include the proper and timely payment of medical bills and compensation".

Section 12

"Payroll" as defined herein should be substituted for "gross wages and earnings".

Section 12.2

This section should be amended to replace "gross wages and earnings" with "payroll" as defined earlier in this rule.

Section 12.4

This section should be numbered 12.3.

Section 13.1

"Payroll" as defined herein, should be substituted for "gross wages".

Section 13.2

"Payroll" as defined herein, should be substituted for "gross wages".

Section 13.4.b

The word "shall" should be replaced with "may".

Section 13.5

"Payroll" as defined herein, should be substituted for "gross wages".

Section 13.9

The words "and conduct" should be deleted from the end of this section.

Section 13.9.a

This section should be amended to provide a penalty of $500.00 per review and not per occurrence.

Section 14.2

This section should be amended to provide that the Commissioner shall perform a financial review on an annual basis and may perform a comprehensive claims review on a less frequent basis.

Section 14.2.b

This section should be amended to provide that the Commissioner may recommend revocation of the employer's self insured status consistent with the involuntary revocation provisions of this rule.

Section 14.2.c

This section should be amended to read "The Commissioner shall notify the employer of the results of any review."

Section 14.3.a.5

This section should be amended to read "The auditor's opinion on the financial statements for the most recent fiscal year must not express a going concern qualification."

Section 14.4

The amendments to this section are unnecessary.

Section 14.5

These amendments are unnecessary and currently covered under the provisions of Rule 19. Additionally, catastrophic surety is not required by statute.

Section 14.8

The proposed language to be added to this section should be amended to read "The Commissioner shall report to the Industrial Council any acts of noncompliance by the self insured employer which the Commissioner deems to be major violations."

PULLIN, FOWLER FLANAGAN, BROWN & POE PLLC
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REPLY TO: CHARLESTON

SENDER'S E-MAIL: jbrannon@pffwv.com
www.pffwv.com

Date: May 29, 2008

Re: Comments regarding Proposed Rules:
85 C.S.R. § 1
85 C.S.R. § 2
85 C.S.R. § 6
85 C.S.R. § 8
85 C.S.R. § 18
Public Comment period expires 5/29/2008
Public Hearing to be held on 5/29/2008 at 3:00 p.m. at OIC Office in Charleston, West Virginia

Please accept this correspondence as our public comments regarding the Offices of Insurance Commissioner's Proposed Rules 85 C.S.R. §§ 1, 2, 6, 8, and 18, which has been submitted for public comment.

85 C.S.R. § 1 et seq.: "Claims Management and Administration"

General Comment: We applaud the OIC's determination to modify Rules 1 and 18 to provide one consistent claims management and administration standard for all "responsible parties" as a beneficial change that now standardizes all claims management and claims administration requirements.

85 C.S.R.§ 1-2

This section has been amended to provide a definition for "retire" which means "an individual has permanently ceased working due to age or years of service and has no intent to return to work."

Comment:

The phrase "has no intent to return to work" is subjective to the individual seeking benefits. Please consider that the use of this phrase in the amendments to this rule regarding the eligibility to receive benefits, in some instances, would incentivize a "retired" claimant to state that they do have an "intent to return to work" in order to receive benefits. The "responsible party" or employer would be unable to refute such a statement as it would be impossible to contradict the individual's statement of his/her intent.

85 C.S.R. § 1-3

The changes in this section provide specifically that the fact that an injury was reported more than 2 days after the injury cannot, by itself, be a reason to deny the claim. Retained in the draft is the language that enforcement of an employer's personnel policy requiring immediate reporting of a work-place injury is not a discriminatory practice.

No Comment.

85 C.S.R. § 1-4

The section was amended to delete the $250 dollar fine for failure by an employer to report injuries to the "responsible party" within 5 days. However, the reporting requirement itself was retained and still requires the employer to notify the "responsible party" within five (5) days of receipt of notice of the employees desire to file a claim.

Comment:

It is recommended that the OIC define "receipt of notice of the employees desire to file a claim". Some workers' who sustain a work related injury may report the injury to the employer but never file an application for benefits. Some "responsible parties" have interpreted this section to require the employer to report the injury to them within five (5) days of the occurrence of an injury and then, based on the employer's report, have taken the position that the employer's report under this section is sufficient to issue a ruling on the claim. This interpretation is contrary to West Virginia Code § 23-4-1a and 23-4-15(a) which requires the injured worker to complete and file an application for benefits with the responsible party. Any interpretation that does not require an application for benefits to be filed prejudices the employer's rights under the applicable statute of limitations. Further, without a completed application for benefits, as required by the statute, the "responsible party" does not have the injured workers' allegation regarding the injury, does not have medical evidence indicating that an injured worker sustained an injury, and does not have a valid release to obtain medical records related to the alleged claim.

85 C.S.R. §1-5

This section relates to "special rules of temporary total disability claims." § 1-5-2 has been amended to reflect that when an individual retires "as long as the individual remains retired", the individual is disqualified from receiving temporary total disability indemnity

benefits as a result of an injury received from the place of employment from which he or she is retired.

Comment:

As with the definition of retire discussed above, the inclusion of the language "as long as the individual remains retired" is subjective to the claimant. Please consider that the use of this phrase in the amendments to this rule regarding the eligibility to receive benefits, in some instances, would incentivize a "retired" claimant to state that they do not have an intent to "remain retired" in order to receive benefits. The "responsible party" or employer would be unable to refute such a statement as it would be impossible to contradict the individual's statement of his/her intent.

Further, **§1-5.3** was amended regarding the closure of temporary total disability benefits when the claimant would not have been working for the employer. Previously, this section said a reasonably ascertainable period of time during which the injured worker would not have been compensated from his or her employer and now says a reasonable ascertainable period of time during which the claimant would not have been "performing work for any employer."

Comment:

The previous language in this section had been interpreted to relate to seasonal employees or temporary employees who did not work year-round of full-time for an employer. Under the previous language and employer of seasonal or temporary employees was not charged for temporary total disability benefits and the worker was not entitled to temporary total disability benefits during periods in which they would not have been compensated by the employer, i.e., during the off-season or after the termination of the temporary employment. The proposed amendment to this section now permits the worker to receive, and the employer to be charged, temporary total disability benefits even when the employee would not have been working for the employer. Further, even if the employee would not have been working for another employer during the off-season or after the conclusion of the temporary employment, this section incentivizes the worker to state that but for the injury he/she would/could have been working for another employer. If this is the intent of the amendment to this section, then the section should be deleted as it is superfluous. However, the previous language provided a significant benefits to employers of seasonal or temporary employees, who would naturally only be operating a portion of the year, to minimize the impact of claims on their premiums and to properly charge their policies with benefits during periods only when they would be working. This employer's are most likely smaller employer's who can not easily absorb additional workers' compensation premiums based on the amount of benefits which could be authorized under this section. It must be remembered that temporary total disability benefits are granted to compensate an injured worker for wages lost due to the injury. Clearly, the previous language in this section was consistent with the purpose of these benefits as the employee received benefits during

periods he/she would have been working for the employer, and not for periods when the worker would not have been receiving wages from the employer.

85 C.S.R. §1-7

§1-7: This section is completely new and relates to "Notice and Litigation." Language has been included which again re-states that there are only two (2) parties to a claim, the claimant or the claimant's dependents and the employer, with the exception of funds created by article two-c of Chapter 23, the Insurance Commissioner is also a party.

Comment:

While it is clear that the Insurance Commissioner is a party in all "Old Fund" claims created in article two-c of Chapter 23, it does not appear that the Insurance Commissioner is a party to "Uninsured Fund Claims" created in West Virginia Code § 23-2C-8. While the Insurance Commissioner, or its designee, is the claims administrator, the statute does not provide that he Insurance Commissioner is a party to the actual claim. If it is the intent of the Insurance Commissioner not to be a party to these Uninsured Fund Claims then this language should be amended to specify that the Insurance Commissioner is a party only in "Old Fund" claims.

§ 1-7.2: This section requires that upon the making of any decision, the responsible party is required to send written notice of the decision to all parties which sets forth the basis of the decision and "informing the claimant or claimant's dependents of the right to protest the decision by filing a protest with the Office of Judges within sixty days of the receipt of the decision."

Comment:

The language in this section purports to require notice of only the claimant's right to protest a decision and thus preclude the employer's right to protest a decision. This section should be amended to require notice "informing **the parties** of the right to protest the decision by filing a protest with the Office of Judges within sixty days of receipt of the decision."

The language which purports to provide only the claimant or the claimant's dependent's a right to protest a decision, and preclude the employer from filing a protest, is contrary to the plain language of West Virginia Code § 23-5-1(b)(1) as amended, and is inconsistent with numerous other sections of Chapter 23 which specifically provide the employer the right to protest decisions of the claims administrator.

Initially, West Virginia Code § 23-5-1(b)(1), as amended states "An employer may protest decisions incorporating findings made by the Occupational Pneumoconiosis Board, decision made by the Insurance Commissioner acting as administrator of claims involving funds created in article two-c of this chapter, or decisions entered pursuant to subdivision (1), subsection (c), section seven-a, article four of this chapter." There is no language contained

in this statute which eliminates or abolishes the employer's right to protest a decision by the claims administrator. In State ex rel McKenzie v. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002), the West Virginia Supreme Court of Appeals stated that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syllabus Point 1, *Consumer Advocate Div'n v. Public Service Comm'n*, 182 W.Va. 152, 386 S.E.2d 650 (1989)." Syl. pt. 11, State ex rel McKenzie v. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002). Further, the West Virginia Supreme Court of Appeals has stated that "[a]ny rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute." Syl. pt. 4, *Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W.Va. 691, 527 S.E.2d 802 (1999)". Syl. Pt. 4, Repass v. Workers' Compensation Division, 212 W.Va. 86, 569 S.E.2d 162 (2002).

Further, an "interpretation" of this language which serves to administratively abolish the employer's right to protest decisions by the claims administrator does not reflect the "Legislatures" intent and is inconsistent with the remainder of Chapter 23. It must be remembered that "[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975)." Syl. pt. 7, Verizon v. West Virginia Bureau of Employment Programs, 214 W.Va. 95, 586 S.E. 2d 170 (2003).

When Chapter 23 is reviewed *in toto*, it is clear that the Legislature did not abolish the employer's right to protest a decision by a claims administrator. Had the Legislature intended to abolish the employer's right to protest such decisions, the Legislature could have done so clearly with language to effectuate that purpose. At Syllabus Point 5, the Verizon Court stated that "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938)." Id. at Syl. Pt. 5. Additionally, in Syllabus Point 4 of Kessel v. Monongalia County General Hospital, 220 W.Va. 602, 648 S.E.2d 366 (2007) the West Virginia Supreme Court of Appeals stated that "[a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)." Id. Bearing this in mind, it can not be asserted that the Legislature "intended" to abolish the employer's right to protest when the Legislature is presumed to have been familiar with the remaining sections of Chapter 23, such as West Virginia Code §§ 23-5-2, 23-5-4, 23-5-5, 23-4-1b, 23-4-1c(a)(3), 23-4-1c(h), 23-4-1d, 23-4-

6(j)(6), 23-4-7a(g), and 23-4-16a, all of which reference the rights of either both parties to protest a decision or the employer specifically.

Further, as the employer and the claimant are the only parties to a workers' compensation claim, it is fundamentally unfair, and potentially a violation of the employer's constitutional equal protection rights (Article III, § 10 of the West Virginia Constitution) and the certain remedy provision of the West Virginia Constitution (Article III, § 17 of the West Virginia Constitution) to allow the claimant to protest any order entered by the claims administrator while denying, or attempting to severally limit, the employer's right to do the same.

§1-7.3: This section re-states the language from House Bill 4636 relating to the private carrier who is providing coverage to the employer, has full authority to act on behalf of the employer in the claim, including but no limited to, the ability to make claims decisions, appoint counsel for defense of the claim and make determinations regarding litigation strategy. Further, this section states that an insured employer generally may not independently protest the decision by its carrier and then lists the two (2) circumstances in which, according to the OIC, an employer may still protest a decision by its carrier. These two (2) exceptions are decisions incorporating findings made by the OP Board and decisions entered pursuant to West Virginia Code § 23-4-7a(c)(1). However, the proposed rule goes on to state that even in these circumstances the carrier has the sole authority to act on the employer's behalf in the litigation of the claim.

No Comment:

85 C.S.R. §1-10

This section deals with time standards related to actions and claims. The major change, obviously, is that these standards are now applicable to both private carriers and self insured employers.

Regarding injury and occupational disease claims under §1-10.1, this section has been amended to state that the responsible party is required to rule on a properly executed and filed application within fifteen (15) days from the date of the receipt of all required information. However, the section also provides that whenever a claim has not been adequately or properly developed for consideration, the responsible party may require the production of additional evidence and the fifteen (15) days to rule on the claim is tolled during that evidence gathering process.

Regarding occupational pneumoconiosis claims, in §1-10.2, the amendment requires that a non-medical ruling be issued within ninety (90) days and that this ninety (90) day period can be extended for up to an additional thirty (30) days to develop further evidence.

§1-10.3 relates to medical treatment, appliances, devices and supplies and requires that a request for authorization for the same be acted upon within fifteen (15) days from the date of the receipt of the request.

§1-10.4 relates to medical evaluations and requires that a referral for a one-hundred twenty (120) day exam be made within twenty (20) days of the end of the one-hundred twenty (120) day period. However, an amendment was added to allow that the expected period of temporary total disability exceeds one-hundred twenty (120) days, the referral can be made within twenty (20) days of the expected day of the end of the temporary total disability.

§1-10.5 has been amended to require that the responsible party act upon a permanent partial disability evaluation report within thirty (30) days of the receipt of that report. Furthermore, a section was added to permit the permanent partial disability awards to be paid either in a lump sum or in installments and requires that temporary total disability awards commence within thirty days of the decision granting the award.

§1-10.6 relates to applications for re-opening and requires that an application for re-opening for "temporary or permanent total disability benefits" be ruled on within thirty (30) days from the date of the receipt by the responsible party. However, this section also provides an additional thirty (30) days to rule if additional evidence is required. It should be noted that this section mentions temporary and permanent total disability benefits and the language regarding permanent total disability is contrary to West Virginia Code §23-4-6 requirements for ruling on a permanent total disability applications. It appears that the OIC meant to include re-opening requests for temporary total disability and permanent partial disability, not permanent total disability.

Further, §1-10.7 requires that a responsible party comply with orders of the Office of Judges Board of Review or the West Virginia Supreme Court of Appeals within thirty (30) days of the date of receipt, unless required to act sooner or unless the order issued is subject to a lawfully ordered stay.

No Comment.

85 C.S.R. §1-12

This section relates to overpayments and the definition of an overpayment includes any money received from or paid on an injured workers behalf by the responsible party which is subsequently determined that the injured worker was not entitled. Further, overpayments may include TTD, PPD, PTD, NAP TTR, TPR, dependent's benefits, fatal benefits, travel or medical benefits. The section also permits a responsible party to withhold the overpayment from future disability benefits payable to the worker or the dependents in the same claim or other claims which are pending with the same responsible party to whom the overpayment is due.

Comment:

This section should be amended to allow for the responsible party to collect the overpayment from a prior or subsequent responsible party. Additional changes may have to

be made in Rule 2 to provide a mechanism to place prior and subsequent responsible parties on notice that a claimant has an overpayment in a claim and to whom the withheld overpayment should be forwarded.

85 C.S.R. §1-17

This section relates to expert witness appearance fees and requires a responsible party to reimburse a treating physician or authorized consulting physician who appears at a hearing to give testimony at a rate of $100.00 per quarter hour. Additionally, all other expert witness appearance fees are also paid at the rate of $100.00 per quarter hour; however, if the expert demands an amount in excess of that, it is the responsibility of the party who has retained the services of the expert or submitted a report or record to pay the additional monies.

Comment:

The net effect of this is to put in a requirement that allows expert witnesses to charge in excess of the rate set by the Office of the Insurance Commissioner and the Office of Judges and essentially costs the carrier, or the claimant, additional money for the deposition as the deponent is now allowed to charge the additional sum to the parties who submitted the report. This was not the case previously and may prove to have a negative impact on employers, carriers and even claimants depending on the evaluating physician that they use.

85 C.S.R. §2-1, *et seq.* "Workers' Compensation Claims Index"

Comment:

As noted in the Comment to 85 C.S.R. § 1-12 above, it is recommended that this Rule be amended to include a field in the Claims Index for overpayments made by a responsible party in a claim. Further, each responsible party should be required to confirm by review of the Claims Index that no overpayments have been made to a claimant before paying benefits. Similar to the requirement to confirm no outstanding child or spousal support debts. This would serve as notice to the responsible party preparing to make an indemnity benefit payment in a claim to withhold any prior or subsequent overpayment in a claim for another responsible party.

85 C.S.R. §6-1 et seq. "Debt Reduction Fund Assessment and Regulatory Surcharges"

No Comment.

85 C.S.R. §8-1 "Workers' Compensation Policies, Coverage Issues and Related Topics"

No Comment.

85 C.S.R. §18-1, et seq. "Self Insurance, Self Administration and Third Party Administrators"

§ 18-14.4. was amended to prohibit self-insured employers from operating in an "illegal, improper or unjust manner" with regard to claims handling. This is similar to language found in chapter 33 pertaining to carriers. According to the OIC, the concept is to create a "catchall" provision for self-insured employers similar to that which applies to insurance companies.

Comment:

The language contained in this amendment, "illegal, improper or unjust" is vague and ambiguous, does not provide a consistent standard which will be applied, and presents an opportunity for misinterpretation of claims handling decisions. There is a potential for severe penalties based on the subjective interpretation of a claims handling reviewer. This section should be deleted.

Thank you for your consideration of these comments. If you have any additional questions, please feel free to contact me.

Sincerely yours,

Jeffrey B. Brannon

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May 29, 2008

Jane L. Cline, Commissioner
West Virginia Division of Insurance
1124 Smith Street
P. O. Box 50545
Charleston, West Virginia 25305

Re: Comments on Workers Compensation Rules; Title 85, Series 1, 2 and 6

Dear Commissioner Cline:

These comments are submitted on behalf of the American Insurance Association (AIA), a national trade association representing property and casualty insurers. AIA members write a major share of property and casualty insurance, including workers' compensation insurance throughout the United States.

SERIES 1 – CLAIMS MANAGEMENT AND ADMINISTRATION

Special Rules for Non-Awarded Partial Benefits

Our understanding is that the "non-awarded partial benefits" addressed in §85-1-8 would be provided voluntarily by a private carrier when an employee has reached maximum medical improvement (MMI), has not returned to work, and is awaiting an assessment of permanent partial disability (PPD). However, subsection 8.1 of §85-1-8 provides that "Non-awarded partial disability benefits will only be payable if the weight of the evidence indicates that a permanent impairment exists." If these are, in fact, voluntarily paid benefits, who would be responsible for weighing the evidence? We recommend defining the term "non-awarded partial benefits" in order to clarify this area.

SERIES 2 – WORKERS' COMPENSATION CLAIMS INDEX

Access to Claims Index

Subsection 5.1 of §85-2-5 permits private carriers or their designated agents to apply for, and be granted access to, the claims index. We recommend clarifying that granting access to a private carrier or one of its designated agents entitles any employee or designated agent to access the claims index without having to make a separate application.

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

Definition of "Total assessable workers' compensation premium due"

The second sentence of subsection 3.10 of §85-6-3 currently reads:

"Total assessable workers' compensation premium due" shall also include all discounts based on deductible provisions in policies."

We recommend the following, in order to increase clarity:

"Total assessable workers' compensation premium due" shall also be computed prior to all discounts based on deductible provisions in policies."

Federal Black Lung Coverage

Subsection 3.10 of §85-6-3 would require assessable premium for Federal Black Lung coverage. Unlike the other federal coverages (e.g., USL&H, FECA and FELA), black lung coverage is only a portion of the rate for a class code. All of the other federal class codes have their own rate, and so one can easily determine which coverage is federal by the class code. However, a rate for a coal mining class code combines both federal and state coverage, and the portion of the rate that is attributed to federal coverage will change each year. Breaking out the premium attributed to black lung in the assessment would require private carriers to incur substantial programming costs, and the information would have to be updated with each rate filing. Accordingly, we recommend that the relatively minor portion of the rate attributed to black lung be excluded from the surcharge's assessable base.

Notice of Rate Changes

Subsection 4.1 of §85-6-4 would establish that the commissioner shall provide private carriers at least sixty (60) days notice prior to changing the private carrier regulatory surcharge percentage amount. We recommend increasing this notice period to 90 days.

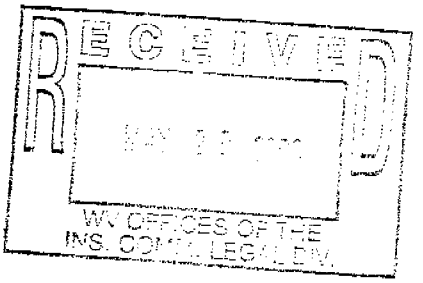
Respectfully submitted
on behalf of American Insurance Association

By: _____
T. Randolph Cox, Retained Counsel

TRC/lb;1038482

West Virginia Insurance Federation

May 29, 2008



BY HAND-DELIVERY

Ryan Sims
Associate Counsel
Legal Division
Office of the West Virginia Insurance Commissioner
1124 Smith Street
Charleston, West Virginia 25301

RE: Comments to Proposed Administrative Rules
Title 85, Series 6

Dear Mr. Sims:

These comments to the proposed amendments to 85 CSR 6 relating to "Workers' Compensation Debt Reduction Fund Assessments and Regulatory Surcharges" are submitted on behalf of the West Virginia Insurance Federation ("WVIF"), the state trade association for property and casualty insurance companies doing business in West Virginia. Many of the WVIF's members write workers' compensation coverage in other states and are considering writing workers' compensation insurance when the market opens to private insurers in July 2008. These insurers are monitoring closely the development of West Virginia's regulations relating to workers' compensation issues.

Based on its evaluation of the proposed rule, the WVIF believes it is necessary to clarify how debt reduction and regulatory surcharges are applied. The WVIF believes that an amendment to the proposed language contained in Section 3.10 will address this concern. Specifically, the WVIF respectfully requests that this section by revised as it relates to "total assessable workers' compensation premium due" to read as follows:

> "Total assessable workers' compensation premium due" shall include estimated annual workers' compensation premiums prior to the effect of any deductible programs, including TRIPRA and DTEC premiums, but excluding premium for increased limits, waiver of subrogation, and any federal programs.

Phone: 304.357.9929 • Facsimile: 304.357.0919 • PO Box 11887 • Charleston, WV 25339

Thank you for your consideration of these comments. If you have any questions or need additional information of any kind, please let me know.

Very truly yours,

Jill C. Bentz
President

cc: The Honorable Jane L. Cline
Mary Jane Pickens, Esquire

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. ("Debt Reduction Fund Assessments and Regulatory Surcharges", hereinafter referenced as "Rule"), which was filed with the West Virginia Secretary of State for public comment on 04/29/08. This response is itemized by topic, and addresses all of the substantive comments received at the 5/29/08 Industrial Council meeting as well as written comments received from stakeholders.

Reports to Industrial Council on Surcharges

It was suggested that the Rule be amended to require the OIC produce to the Industrial Council ("INDC") a bi-annual report on remittances and expenditures for the workers' compensation surcharges. The OIC responds that there is no such requirement for these reports to the INDC in the law. More importantly, all financial information regarding these surcharges is public information and as such accessible to anyone requesting the same. Finally, the INDC is free to request reports from the OIC; however, a rule is not the proper place to espouse a request for report.

Changes in Surcharge Percentages and Advance Notice Time Frame

It was suggested that sections 4 and 5 of the current draft be amended to specify that the OIC may only increase the surcharge percentage amounts annually, and that the advance notice requirement of any changes be amended to ninety (90) days. These comments are well taken. As such, sections 4 and 5 of the current draft will be amended to reflect the same.

Change to Language Defining Assessable Premium for Surcharges

Several carriers suggested changes to the language in subsection 3.10. of the current rule regarding defining "total assessable workers' compensation premium" due. The primary concerns were with properly including and excluding the appropriate parts of premium, including deductible discounts and federal coverages. The OIC has carefully reviewed this subsection and believes that as it reads, it strikes an appropriate balance between providing sufficient clarity on the topic while not delving into too much detail. The OIC will continue to carefully monitor the application of this crucial definition and make changes in the future if appropriate.

It was also suggested that this section be amended to exclude from assessable amounts the discounts employers receive for deductible provisions in policies. While the OIC can understand why an employer would not want to be assessed for discounts in their policy received for deductible provisions, in HB 4636, passed in 2008, the West

Virginia Legislature specifically mandated that these amounts be assessable. Therefore, the OIC has no discretion to remove this provision in the Rule.