



WORKERS' COMPENSATION FUND

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

MARY MARTHA MERRITT
Commissioner

August 15, 1986

NOTICE OF COMMENT PERIOD ON PROPOSED RULE

AGENCY: Workers' Compensation Fund

RULE TYPE: Procedural

RULE TITLE: Hearings

A COMMENT PERIOD ON THE ABOVE PROPOSED RULE HAS BEEN SCHEDULED AND
WILL END ON September 30, 1986 AT 5:00 p.m. WRITTEN COMMENTS ARE
TO BE MAILED TO THE FOLLOWING ADDRESS: Workers' Compensation Fund
601 Morris Street
Charleston, WV 25301

THE ISSUES TO BE CONSIDERED SHALL BE LIMITED TO THE PROPOSED RULE.

Mary Martha Merritt
Mary Martha Merritt
Commissioner

FILED
1986 AUG 15 PM 1:42
DEPT. OF LABOR
SECRETARY OF STATE



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ARCH A. MOORE, JR.
Governor

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301

MARY MARTHA MERRITT
Commissioner

August 15, 1986

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Hearings

Type of Rule: Procedural

Agency: Workers' Compensation Fund Address: 601 Morris Street
Charleston, WV 25301

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$ None	\$ None	\$	\$	\$

2. Explanation of above estimates: It is not anticipated that implementation of the revised procedures will produce an appreciable fiscal impact upon the administrative cost of operating the Workers' Compensation Fund or upon persons with interests in litigated claims.
3. Objectives of these rules: To streamline the hearing procedures in such a way as to promote more efficient handling of claims in litigation, and to reduce the average period of time claims are in litigation.
4. Explanation of Overall Economic Impact of Proposed Rule.
 - A. Economic Impact on State Government.

See 2, above.

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

There may be some modest initial cost to law firms related to adapting office procedures to the revised hearing procedures; however, the long-range effect is expected to be a reduction in time lags, man hours, and related costs.

C. Economic Impact on Citizens/Public at Large.

See 2, above.

Mary Martha Merritt

Mary Martha Merritt
Commissioner

WEST VIRGINIA PROCEDURAL RULES
WORKERS' COMPENSATION COMMISSIONER
Chapter 23-1
Series VII

Title: Hearings

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WORKERS' COMPENSATION COMMISSIONER
Chapter 23-1
Series VII

FILED
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OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

Title: Hearings

Section 1. General

1.1 Scope - These Procedural Rules shall govern the initiation and conduct of hearings in contested cases involving Workers' Compensation claims.

1.2 Authority - 23-1-1, 23-1-8, 23-1-9, 23-1-10, 23-1-11, 23-1-12, 23-1-13, 23-1-15, 23-4-8c, 23-4-15b, 23-5-1.

1.3 Filing Date - August 15, 1986.

1.4 Effective Date -

1.5 Repeal of a former rule. Legislative Rule, 23-1, Series I, Section 16, Section 17.

SECTION 2. Hearing Process

2.1 Purpose

The purpose of the hearing process shall be to obtain and develop, as speedily and expeditiously as possible, evidence and information relevant to determination of the substantial rights of the parties, and to provide the first level of review of the Commissioner's decisions and determinations with regard to the granting or denial of any award, or the granting or denial of any modification or change with respect to former findings, orders or awards made pursuant to Chapter 23 of the West Virginia Code as amended.

2.2 Right to Hearing

Any party to a claim shall have a right to a hearing concerning any contested issue of fact or law upon which the Commissioner has made a determination and entered a protestable ruling, and upon the proper and timely filing of an objection or protest thereto.

2.3 Initiation of Hearing Process

(a) Notice by Commissioner of Decision. Upon a ruling or determination by the Commissioner with regard to any award or modification or change with respect to former findings, orders or awards by the Commissioner, the Commissioner shall give written notice of the decision to all the proper parties to the claim, stating therein the time allowed within which to file an objection or protest to such decision.

(b) Objection or Protest. Any objection or protest to the Commissioner's decision shall be filed with the Commissioner in writing, and such writing shall clearly set forth all grounds or reasons for objection or protest.

(c) Time period for filing protest or objection. Any protest or objection under parts (a) and (b) of this section shall be filed with the Commissioner within the time allowed after receipt of the notice set forth in part (a) of this section, except as provided in W.Va. Code, 23-5-1e. No protest or objection shall be permitted after the passage of the time allowed from receipt of said notice, except upon the showing of good cause or excusable neglect by a written affidavit to the Commissioner stating in detail such good cause or excusable neglect, supported by sufficient evidence. If a protest is not filed, as provided in this section, within the specified time period, the Commissioner's prior decision shall be final and any attempt to alter that decision shall be made by the filing of a petition for reopening, or a petition for modification, supported by appropriate evidence.

(d) Action by Commissioner. The Commissioner shall determine if a protest is properly and timely filed. The Commissioner shall notify all parties of the determination regarding any protest filed.

(e) Manner and receipt of notice. Any notice requested by these rules of the Commissioner to the parties to a claim, or by the parties to each other, shall be deemed adequate if served upon a party by means of personal service, or by mailing such notice by regular United States Mail, postage postpaid, addressed to the party to be so notified at their last known address. It shall be the specific and sole responsibility of the parties in any given claim to assure that the Commissioner is informed of their current addresses. Any and all changes of address must be forwarded to the Commissioner by the parties in writing, together with a listing of all claim numbers to which such change is applicable. The last address of a party on file with the Commissioner in a claim shall be the "last known address" of such party for the purpose of any notice required by these rules. Notice, herein, shall not require service upon anyone except a named party, except that when the

party is represented by counsel, service upon such counsel shall also constitute notice to and service upon the party. Certification of service shall be made upon the notice served, by the party making such service, and shall include the time, date, place and method of such service. If service is made by mailing, receipt shall be presumed seven (7) calendar days after the date of mailing, not including the date of mailing. Absent evidence to the contrary, mailing shall be presumed to have occurred on the day next following the date of the notice.

2.4 Referral to Trial Examiner

Following receipt of a properly and timely filed protest or objection, the Commissioner shall prepare a file, which shall include copies of all documents, forms, statements, evidence and information considered in rendering the Commissioner's prior decision, together with all documents, medical reports and other evidence submitted by the parties, subject to the objection of any party, to be offered and considered in the matter, and shall refer such file to a Trial Examiner, who shall be an attorney licensed to practice law in West Virginia, for conduct of the hearing. Copies of such file shall be provided, upon written request, to the claimant and the employer, or their respective counsel.

2.5 Duties of Trial Examiner

The Trial Examiner, as the representative of the Commissioner, is the presiding officer in a Workers' Compensation Fund hearing. The Trial Examiner shall:

(a) Ensure that the dignity and decorum of the proceedings are maintained; and that delay and interference with the efficiency of the hearing process are prevented;

(b) Rule on all evidentiary matters and motions for continuance properly raised at hearing;

(c) Act to obtain evidence in addition to that presented by the parties, if such is proper and necessary to a full and fair determination of the issues in litigation;

(d) Perform such other duties as may be set forth in these rules for a Trial Examiner.

2.6 Time and Place of Hearing

(a) Following receipt of a properly and timely filed objection or protest, the Commissioner shall determine the time and place a hearing will be held, in accordance with W.Va. Code, 23-5-1. The time of such hearing shall be within thirty (30) days

of receipt of the objection or protest; provided that said hearing may be postponed for good cause only by ruling of the Commissioner, or the Trial Examiner, as the Commissioner's representative, upon motion by a party or upon the Commissioner's own motion.

(b) Notice of the time and place of the hearing shall be provided the claimant, employer, and their respective counsel at least ten (10) days in advance of the hearing date.

(c) The place of hearing shall be the county seat of the county in which the injury occurred, or any other place agreed upon by the interested parties; however, if the ends of justice so dictate in the opinion of the Commissioner, the hearing may be held at any other place, within or without the state, with or without the agreement of the parties. In determining a place for hearing, regard will be given to the convenience of witnesses, but the ends of justice will control.

2.7 Hearing Procedures; Generally

(a) Scope of hearing. Only those issues properly set forth in a party's protest, filed under 2.3(b), and acknowledged by the Commissioner as proper issues to be considered in litigation under 2.3(d), shall be considered to be issues upon which the parties may present evidence at hearing.

(b) Rules of evidence. The hearing process shall not be strictly bound by common law or statutory rules of evidence, or by formal rules of procedure, except as provided by these rules. The Trial Examiner shall receive into evidence the testimony and other evidence of the parties and witnesses, subject to objection by any party.

(c) Objections; time for ruling. The Trial Examiner shall entertain and rule upon all objections of any party to the evidence or testimony presented at the hearing. Although not bound by formal rules of evidence, the Trial Examiner shall take into consideration the apparent reliability of such evidence, and the basis of knowledge of a witness in ruling on any such objections. The Trial Examiner may in his discretion reserve a ruling on any objection posed, until all other evidence to be considered in the hearing has been received or heard.

(d) Procedure

(1) Presentation of evidence

(A) Testimony. All testimony shall be taken under oath or affirmation. The Trial Examiner shall administer the oath.

(B) Cross-examination. All parties shall be given reasonable latitude in cross-examining witnesses.

(C) Limited to matters in litigation. Although a reasonable latitude is to be given the parties in the presentation of their cases, the presentation, nonetheless, shall be limited to those issues of fact or law properly protested and in litigation.

(D) Other evidence. All other evidence offered must have been supplied to all parties, and the Commissioner, in accordance with these rules before such may be received into evidence.

(E) Marking of exhibits. All exhibits offered into evidence in the hearing shall be labeled and marked as either "Claimant's Exhibit" or "Employer's Exhibit", and shall have a number or letter assigned in sequential manner, starting with "1" or "A". All exhibits offered into evidence, or copies thereof, shall be appended to the record of proceedings, and if any such exhibit is not susceptible of attachment or copying, either a photograph, facsimile, or description of such exhibit may be substituted.

(2) Objections. Any objection to evidence not previously made to the Commissioner, and already ruled upon, shall be made to the Trial Examiner, as soon as such objection arises. All objections shall be noted in the transcript of the hearing together with the rulings thereon. Exceptions to the Trial Examiners' rulings shall be automatic, and need not be made each time. The Trial Examiner may require argument and citation of authority by the parties in support of or opposed to objections, before ruling thereon.

(3) Transcription of evidence. All testimony, evidence, arguments of counsel or the parties, and all rulings of the Trial Examiner shall be taken down by stenographic or voice recordings, and shall be thereafter converted into a written transcript, which shall become part of the record of proceedings.

(4) Public access. It is the policy of the Commissioner that the hearing will be open to the general public, subject to the following exceptions:

(A) Any persons conducting themselves in an unruly, or disruptive manner may be removed from the hearing.

(B) Only those persons for whom adequate seating is available shall be permitted to attend the hearing, and there shall be no duty imposed by this section to provide notice to

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the public of the time or place for hearings, or to provide more than the usual amount of seating provided at the hearings. Seating shall be on a "first come, first served basis."

(C) Upon written motion of a party in advance of the hearing, supported by a showing of good cause, the Commissioner may order a hearing closed to the public.

(D) In other circumstances, in which the Commissioner or Trial Examiner in his discretion finds that the interests of justice dictate the exclusion of the public from a hearing, the Commissioner or Trial Examiner may exclude the public from a hearing on his own motion.

(5) Representation and appearance of parties.

(A) By individuals. Any claimant or employer, who is a natural person, may appear at and represent himself in any hearing or other like proceeding of the Commissioner. The Trial Examiner shall explain the right to be represented by counsel to any party appearing without counsel, and shall inquire as to their desire to obtain counsel. In appropriate cases the hearing may be continued to permit counsel to be obtained; however, absent a showing of good cause, a hearing shall only be continued one time for the party or parties to obtain counsel.

(B) By corporations. A corporate employer may appear at hearings or other like proceedings of the Commissioner only by counsel.

(C) By counsel. Any claimant or employer may appear at a hearing or other like proceeding of the Commissioner by an attorney duly licensed or authorized to practice law in the State of West Virginia; evidence of such may be required and must be produced by the attorney upon demand for such.

(D) Lay representative. A party may not be represented by a spokesperson, lay representative or anyone else not licensed to practice law.

(E) Commissioner's counsel. In those cases in which the Commissioner may find it appropriate, the Commissioner may designate an employee of the Fund, who shall be an attorney licensed to practice law in the State of West Virginia, to protect the interests of the Fund, and to promote a just resolution of issues in the best interest of the parties and the general public.

(F) Order of presentation of evidence. The protesting party shall have the burden of going forth with evidence. In the event all parties have protested, the claimant

shall go forth, except that for good cause the Trial Examiner may permit a variance in the normal order of presentation. When a party shall have presented all of their evidence including rebuttal of any matters raised by the cross-examination of the opposing party, they shall rest their case. The opposing party shall then go forth. When all parties have no further evidence or rebuttal of a proper nature to offer, they shall announce that they are ready to submit the claim. The Trial Examiner shall then order the claim submitted for decision. A party who announces that they are not ready to submit must be prepared to show good cause for continuance. Absent such showing of good cause for not submitting the claim, the Trial Examiner shall order the claim submitted over the objection of the party.

(e) Presence of parties. All parties to a claim are entitled to be present, and to present evidence, at a hearing; however, the further progress of the taking of evidence and a final determination of the issues in litigation, shall not be prevented, and a party shall be considered to have waived the right to be present, when a party:

(A) After being notified of the time and place of a hearing does not appear, absent a showing of good cause; or

(B) After being warned by the Trial Examiner that disruptive conduct will cause removal from the hearing, persists in conduct which is such as to justify exclusion from the hearing.

(f) Commissioner's action. The Commissioner shall review the transcript of the hearing, the testimony, the evidence and exhibits, and shall take such action with regard to the issues litigated as shall be appropriate under the circumstances of each case. The Commissioner may order further hearings in a claim when it appears that the record has not been sufficiently developed to permit a just resolution of any issue or issues. Any further hearing so ordered by the Commissioner shall be limited to only those matters referred by the Commissioner for further hearing.

2.8 Discovery

(a) Exchange of evidence. After the filing of a protest, there shall be an exchange of all evidence between the parties in litigation. This exchange shall include all material and information relevant to the claim, whether or not such is intended to be offered into evidence by the possessing party, except that information subject to the attorney/client or work/product privileges. The exchange shall be accomplished by delivering, each to the other, and both or all to the Commissioner, copies of material information in the possession of the parties, including all medical and vocational reports and records, employment or

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exposure history, witness statements, photographs, and safety and accident reports. Items not susceptible to reproduction or copying shall be brought to the attention of all other parties, and reasonable inspection of such shall be permitted prior to hearing.

(b) Witnesses. Upon timely request by any party, all parties shall notify each other, and the Commissioner, of the names and addresses of the witnesses whose testimony they intend to introduce, insofar as such is known or can be reasonably ascertained or anticipated at the time of the request.

(c) Continuing duty to disclose. The duty of disclosure does not end with the initial exchange of evidence. If, before or during the hearing, a party discovers additional relevant and material evidence, that party shall promptly notify the other party, and the Commissioner, and shall supply the material or information in the same manner as provided hereinbefore in (a) and (b) of this section.

(d) Failure to comply. If at any time during the hearing process it is brought to the attention of the Commissioner that a party has failed to comply with the disclosure requirements of these rules, the Commissioner, or the Trial Examiner as the Commissioner's representative, may take one or more of the following actions:

(1) Order the party to supply the material required by this section, and commence contempt proceedings under W. Va. Code, 23-1-9 upon the failure or refusal of a party to comply with the order;

(2) Grant a continuance if good cause is shown;

(3) Prohibit the party from introducing evidence or testimony not exchanged or disclosed if the Commissioner or the Trial Examiner finds that the non-disclosure was intentional or without good cause;

(4) Enter such other order, respecting the use of such evidence or testimony, as may be deemed appropriate in the circumstances.

(e) Claims of privilege. If, in connection with any exchange or disclosure under (a) or (c) above, a party declines to exchange certain information based upon the work/product or attorney/client privilege, the transmittal letter of exchange shall so state and shall generically describe such withheld documents. Any party may challenge such non-disclosure at any hearing, or in writing to the Commissioner. The Trial Examiner or

the Commissioner may require disclosure after the parties have each had an opportunity to be heard on the matter. Action may then be taken in accordance with the provisions of (d) above.

(f) Interrogatories to Parties

(1) After acknowledgement of protest in a case, and during a period of continuance for discovery and preparation, any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Permission of the Commissioner shall not be prerequisite to the serving of interrogatories; however, copies of all interrogatories served and all answers thereto shall be filed with the Commissioner.

(2) Each party shall be limited to a maximum of fifty (50) written interrogatories, including any and all initial or follow-up interrogatories.

(3) Each interrogatory shall consist of a single question, and shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, if any, within thirty (30) days after service of the interrogatories. Except that for good cause shown the Commissioner may allow a shorter or longer time for service of such answer or objection.

(4) The party submitting the interrogatories may move for an order of the Commissioner directing a non-responding party to answer an interrogatory. If such party shall then fail to comply with the order of the Commissioner, an action to compel obedience to the Commissioner's order may be instituted by the Commissioner in the manner set forth in 2.9 (d)(2).

(5) Interrogatories may relate to any matters which are relevant and material to any issue of fact or law properly in litigation in a Workers' Compensation case, and the answers may be used to the extent such evidence would be permissible under these rules.

2.9 Production of Witnesses and Evidence

(a) In general. All parties to the hearing shall have equal opportunity to obtain witnesses and evidence through the use of compulsory process.

(b) Right to witnesses

(1) On the merits. Each party is entitled to compel the attendance of any witness whose testimony on a matter in issue on the merits would be relevant, material and necessary. Relevant and material testimony is necessary when it is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact.

(2) Unavailable witnesses. Notwithstanding section (b)(1) of this rule, a party is not entitled to the presence of a witness who is unavailable.

A witness shall be deemed unavailable in, but not limited to, the following situations:

(A) The witness is not subject to process and enforcement proceedings in contempt in West Virginia by reason of non-residence within or prolonged absence from the State of West Virginia unless that witness is the claimant, the employer or an employee of the employer at the time of the hearing.

(B) The witness persists in refusing to testify despite an order to do so.

(C) The witness claims by sworn affidavit or similar document a lack of memory of the subject matter.

(D) The witness is unable to be present or to testify at the hearing because of then existing physical or mental illness or infirmity.

(E) The witness is absent from the hearing and the requesting party is not at fault, could not have prevented the unavailability, and demonstrates that all reasonable measures to secure the presence of the witness have been taken, including the timely request for and service of a subpoena, as set forth herein in 2.9 (C)(2). Any attempt to secure the attendance and testimony of a witness shall not be deemed reasonable until and unless action is taken to compel obedience to any subpoena issued and properly served upon a witness, upon proper motion of the requesting party, or upon the Commissioner's motion. However, if the testimony of a witness, who is unavailable, is of such central importance to an issue that it is essential to a fair hearing, and if there is no adequate substitute for such testimony, the Trial Examiner or the Commissioner shall grant one final continuance of the hearing for a reasonable period of time, not to exceed three (3) months, to permit one final attempt by the requesting party to secure the witness' presence and/or testimony. Except that,

regardless of the essential nature of a witness, no such continuance shall be granted to attempt to secure the presence and/or testimony of a witness if the refusal, claim or lack of memory, inability, or absence is due to the procurement or wrongdoing of the requesting party for the purpose of preventing the witness from attending or testifying.

(c) Procedures for production of witnesses and evidence.

(1) Subpoena. The presence of a witness or production of evidence, subject to process and enforcement in West Virginia, may be obtained by the issuance of a subpoena or subpoena duces tecum by the Commissioner. A subpoena shall be issued upon written request by any party. Such request must be made at least twenty (20) days prior to a scheduled hearing or deposition. Nothing in this section shall prevent issuance of a subpoena or subpoena duces tecum upon the Commissioner's motion for any evidence to be produced or for any witness whose testimony the Commissioner desires to procure at the hearing. A subpoena for a doctor shall also include a subpoena duces tecum for his notes, treatment papers and records of treatment involving the claim in litigation.

(2) Service. It shall be the responsibility of the party actually requesting the issuance of a subpoena to see that it is properly served. Upon issuance of a subpoena, it shall be transmitted to the actual requesting party for service. Service upon witnesses desired and subpoenaed by the Commissioner, as the Commissioner's witnesses, shall be the responsibility of the Commissioner. Service by certified mail shall be an acceptable means of service for a subpoena.

(3) Witness fees. Witness fees shall be paid in accordance with W.Va. Code, 59-1-16, by the requesting party, including the advance payment of one day's attendance fee, plus mileage and tolls, provided such was properly requested in writing by the witness a reasonable time in advance of the hearing. When the subpoena was issued on behalf of the Commissioner such advance shall not be required. Irregardless of the actual requesting party, the Commissioner shall only be deemed to be the requesting party for purposes of payment of reasonable fees when the claim has not been rejected, and the subpoenaed witness is:

- (A) An authorized treating physician, or
- (B) A PPD evaluator of the Commissioner, or
- (C) An authorized consulting physician acting upon referral from an authorized treating physician.

Regarding any other physician, the party who first introduces a physician's report shall be deemed to be the requesting party for purposes of payment of fees for appearance, attendance and service of the subpoena, even when the appearance was actually requested by another party for cross-examination purposes.

(d) Neglect, failure or refusal to appear.

(a) Action of Trial Examiner. Upon the neglect, failure, or refusal of a witness to appear, produce requested evidence or testify in response to a subpoena, the Trial Examiner shall inquire fully upon the record into the facts and circumstances surrounding such neglect, failure or refusal. Such inquiry shall include, but shall not be limited to, whether or not the witness or evidence was subpoenaed, service and the manner of service, and any reasons known to the parties present for such neglect, failure or refusal.

(2) Action compelling obedience. Upon motion of one of the parties to a claim in litigation, or upon the Commissioner's own Motion, the Commissioner may continue the claim in litigation and commence an action for civil contempt to compel obedience to an order or subpoena issued by the Commissioner, or any of the Commissioner's authorized representatives or investigators, and properly served upon the person whose obedience is to be compelled, absent a timely showing of good cause to the Commissioner for such neglect, failure, or refusal. The action shall be by way of a petition for a rule to show cause, filed in the circuit court of the county in which the person resides, whose obedience is sought to be compelled.

(e) Right to evidence

(1) In general. Each party is entitled to the production of evidence which is relevant, material and necessary. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the issue in litigation more probable or less probable than it would be without the evidence. Relevant evidence is necessary when it is not cumulative, and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact.

(2) Unavailable evidence. Notwithstanding section (e)(1), above, a party is not entitled to the production of evidence which is unavailable. Evidence will be deemed unavailable when it has been destroyed, lost, or is otherwise not subject to compulsory process. Except where such evidence is of

such central importance to an issue that it is essential to a fair hearing, and if there is no adequate substitute for such evidence, the Trial Examiner or the Commissioner shall grant one final continuance of the hearing for a reasonable period of time, not to exceed three (3) months, in order to permit one final attempt to produce the evidence. However, if the unavailability of the evidence is the fault of, or could have been prevented by, the requesting party, or the requesting party fails to demonstrate that they have taken all reasonable measures to secure the production of the evidence, including the timely request for and service of a subpoena duces tecum for such evidence, as set forth herein in 2.9 (C)(2), such final continuance shall not be granted. Regardless of the essential nature of the evidence, a continuance shall not be granted to attempt to obtain such evidence if the destruction, loss, or other reason for non-production is due to the procurement or wrongdoing of the requesting party for the purpose of preventing the production of the evidence. Any attempt to secure the production of an item of evidence shall not be deemed reasonable until, and unless, action is taken to compel obedience to any properly issued and served subpoena for such evidence.

(f) Alternatives to testimony

(1) Unless the other party objects in a timely manner, a Trial Examiner and the Commissioner may receive and consider, regardless of the availability of the witness:

(A) Sworn statements or affidavits;

(B) Prior testimony under oath;

(C) Stipulations of fact or expected testimony;
and

(D) Depositions and interrogatories properly taken in accordance with 2.13 and 2.8 (F).

(2) The Trial examiner and the Commissioner may receive and consider, over the objection of the other party, when the witness is not reasonably available:

(A) Prior testimony under oath when cross-examination was also afforded under oath; and

(B) Depositions of that witness, when properly taken in accordance with 2.13.

(g) Alternatives to evidence

(1) Unless the other party objects, a Trial Examiner and the Commissioner may receive and consider, regardless of the availability of the evidence:

(A) Testimony describing the evidence;

(B) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;

(C) An alternative to testimony, when permitted under subsection (f)(2) above, in which the evidence is described; or

(D) A stipulation of fact or stipulation of expected testimony as to the contents of a document.

(2) The Trial Examiner and the Commissioner may receive and consider, over the objection of the other party, when the evidence is not reasonably available:

(A) Testimony describing the evidence;

(B) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or

(C) An alternative to testimony, when permitted under subsection (f)(2) above, in which the evidence is described.

(h) Limitation on use of alternatives to testimony and evidence

No alternative shall be permitted over objection of an opposing party until the proponent of such alternative shall have complied with the discovery procedures and the procedure for production of witnesses and evidence, set forth in these rules, and shall have demonstrated that all reasonable attempts have been made to procure the direct testimony or evidence contained within the offered alternative, excepting a deposition which was taken upon prior approval of the Commissioner. The proponent must further show that the unavailability of the evidence or testimony was not by their own procurement or wrongdoing, and that they could not reasonably have prevented the unavailability of such evidence or testimony.

(i) Medical examination, evaluation, and evidence

(1) Right to Medical Examination. When a workers' Compensation claim is in litigation, both the employer and the

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claimant are entitled to a reasonable number of medical examinations, when medical examination and evidence would be relevant to the issues being litigated. Medical issues are generally not relevant to occupational pneumoconiosis nonmedical protests.

(2) Determination of Reasonable Number of Medical Examinations. A reasonable number of medical examinations shall be no more than two (2) examinations per medical specialty or discipline. Provided, however, that upon written petition a party may be granted the right to have one (1) or more additional medical examinations. Any such petition must be served upon all other parties and filed with the Commissioner not later than ninety (90) days before the expiration of the period of time hereinafter provided in 2.11 (e) for completion of medical examinations. The petition shall set forth the reasons why such additional medical examination is warranted, and any evidence in support of the petition shall be attached thereto. All other parties shall have fifteen (15) days after the date of service of said petition to file an answer or objection thereto. No evidentiary hearing shall be held upon said petition, and the Commissioner's ruling thereon shall be interlocutory in nature.

(3) Prompt exchange of medical reports. W.Va. Code, 23-4-8 shall be construed to require the prompt exchange among the parties, and direct submission to the Commissioner of any and all medical reports that each might have, without waiting for an evidentiary hearing. If the parties do not have and do not intend to obtain any medical reports, they shall promptly notify the Commissioner and all opposing parties.

(4) Admission of reports to record. Upon receipt by the Commissioner, all medical reports will become a part of the record in the case, subject to the right of an opposing party to object to their admissibility and to cross-examine the reporting medical experts.

(5) Objections and requests for cross-examination. Any objection posed to any report submitted, and any request for cross-examination of the reporting medical expert shall be made promptly in writing to the Commissioner to avoid needless delays and evidentiary hearings.

(6) Responsibility for production of medical expert for cross-examination. When cross-examination of a reporting medical expert is properly requested, it shall be the responsibility of the party offering the evidence of such medical expert to procure the appearance of such medical expert at hearing so as to permit the requested cross-examination. The direct and cross-examination of any such medical expert shall all be

completed in one day. Failure to procure the said medical expert for cross-examination as requested shall result, upon proper motion therefor, in exclusion from consideration of the written report of such medical expert, except as may otherwise be provided by these rules.

(7) Submission of case without hearing, when no need for hearing indicated. Absent a timely objection or request for cross-examination of reporting medical experts, or affirmative indication by the parties of a need for an evidentiary hearing for other valid reasons, the case will be submitted for final determination without further evidentiary hearing as soon as all parties have submitted all of their medical reports.

(8) Examination and cross-examination of medical experts by deposition. Examination and cross-examination of reporting medical experts may be by deposition, in the manner set forth in 2.13, and the case may be submitted upon completion of the depositions in those cases where the only matters to be addressed at evidentiary hearings would be the examination and cross-examination of reporting medical experts.

2.10 Stipulations

(a) In general. The parties may enter into a written stipulation, or an oral stipulation entered upon the record, to be used in appropriate cases as a substitute for testimony. A stipulation may be one of fact, the contents of a document, or the expected testimony of a witness.

(b) Authority to reject. The Commissioner may decline to accept a stipulation.

(c) Requirements. Before accepting a stipulation into evidence, the Commissioner must be satisfied that;

(1) The stipulation does not amount to a negotiated settlement between the parties;

(2) The stipulation is relevant to an issue properly in litigation;

(3) The stipulation is written or stated in clear and unambiguous terms;

(4) A factual basis exists for the stipulation, which shall be thoroughly set forth upon the record or in the preamble section of a written stipulation, and which the Commissioner may verify by investigation; and

(5) All parties to the case understand and agree to the stipulation; for this purpose, a written stipulation shall have an addendum that each and every party to the claim has read the stipulation; that upon their oath the information contained therein is believed to be true; and that they consent to the stipulation and its use. Each and every party, and their counsel shall sign the addendum.

(d) Withdrawal. A party may withdraw from an agreement to stipulate, or from a stipulation, at any time before a stipulation is accepted by the Commissioner; the stipulation may not then be accepted. Such withdrawal must be in writing, and shall be filed with the Commissioner. All other parties to the stipulation shall be furnished written notice of such withdrawal by the withdrawing party. After a stipulation has been received by the Commissioner, a party may withdraw from it only if permitted to do so in the discretion of the Commissioner. Withdrawal normally will not be permitted, absent a showing that the information contained within the stipulation is not true, and why such information was agreed to if not the truth, or that the party did not voluntarily consent to the stipulation.

If a stipulation is withdrawn, the other party may be entitled to a continuance to obtain proof of the matters which were to have been stipulated.

(e) Effect of stipulation. Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding, upon the parties, and may not be contradicted by the parties. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or a document's contents, unless the stipulation is one of fact, nor does a stipulation add anything to the evidentiary nature of the testimony or document.

(f) Procedure. When offered, a written stipulation shall be filed with the Commissioner. Upon determination by the Trial Examiner or Commissioner that the stipulation meets all requirements, the stipulation will be included in the record of the claim in litigation.

2.11 Continuances

(a) General. No continuance shall be granted except upon an affirmative showing of good cause. Continuances may be granted upon the motion of a party, or upon the Commissioner's or Trial Examiner's motion. After one continuance has been granted, no

other continuance, respecting a matter for which a case has been once continued, will be granted except upon a showing of extraordinary cause.

(b) Criteria; strictly construed. The criteria for good cause shall be strictly construed to prevent unnecessary delay in the resolution of claims. Criteria cannot be set to establish the individual elements of each and every possible ground for continuance which might constitute good cause; however, each such motion shall be considered with regard to the individual circumstances and facts of each case, and by application of general criteria, as follows:

(1) The party must act in good faith, and not merely for the purpose of delay;

(2) The party must have acted with due diligence respecting the reason for which continuance is sought;

(3) There must be established the probability that something material, relevant, and necessary, not able to be obtained otherwise, will be obtained by the continuance;

(4) It must appear that a party will be deprived of due process if the continuance is not permitted.

(c) First Hearing Continuance for Discovery and Preparation. The first hearing scheduled in any claim shall be continued for good cause upon the motion and representation of any party, made at or before the first hearing scheduled, that additional time is needed for discovery and preparation for final presentation of the case on the merits. When such continuance is granted, all parties shall use the same period of continuance for discovery and preparation. There shall not be one such continuance for each party, but rather one for all parties. No motion for continuance for discovery and preparation filed after the first hearing scheduled shall be granted. Except that the right to a continuance for discovery and preparation purposes may be reserved by any of the parties at the first hearing under the following circumstances:

(1) The reserving party requested in writing, prior to the first hearing, that such first hearing proceed as a vehicle of discovery to aid in case preparation, pursuant to 2.11(d), and,

(2) The reserving party has, prior to the first hearing, indicated that cross-examination of an opposing party, or an employee of such party, is necessary to a determination by the reserving party of whether a discovery and preparation continuance will be needed, and,

(3) The reserving party has taken all reasonable steps to procure the appearance and testimony of the opposing party at the first hearing, under 2.9(b) and (c), and,

(4) The opposing party has failed to appear and testify in response to the subpoena through no fault and without the procurement of the reserving party.

When such reservation of the right to exercise the discovery and preparation continuance is sought, the right shall be reserved until the opposing party shall appear and testify at hearing as directed, or shall be compelled to appear by attachment proceedings as for contempt.

(d) First Hearing as Pre-Hearing Conference and Vehicle of Discovery. Even though a first hearing continuance for discovery and preparation may be sought and granted, the parties may use, and are encouraged to use, the first hearing as a vehicle of discovery to aid in case preparation. If a party requests in writing that the first hearing proceed for discovery purposes, the hearing will so proceed and the continuance for discovery and preparation shall be granted at the close of the hearing.

When a party requests a first hearing continuance for discovery and preparation, the Commissioner may order that the hearing proceed as a pre-hearing conference for the purpose of addressing evidentiary matters, simplification of issues and addressing such other matters as may aid in the disposition of the case. If the Commissioner shall exercise such prerogative, the parties shall appear at the first hearing, prepared to address the above matters.

(e) Schedule for Discovery and Preparation. When the first hearing scheduled in any claim is continued for discovery and preparation, the following schedule shall apply to all parties: Provided, however, that, if no party plans to obtain medical reports as a part of their discovery and preparation, the time periods set forth in the following schedule shall be reduced by six (6) months.

(1) All medical reports shall be obtained, exchanged and submitted to the Commissioner not later than six (6) months from the date on which the continuance was granted.

(2) Not later than nine (9) months after the date on which the continuance was granted, all discovery and preparation shall be completed by all parties and the parties shall notify the Commissioner in writing of any objections to any medical reports, requests for cross-examination of any reporting medical experts, plans to take depositions and need for an evidentiary hearing.

(3) If the parties plan to use depositions in the case, all depositions shall be completed and filed with the Commissioner not later than twelve (12) months after the date on which the continuance was granted.

(4) When a case has been continued for discovery and preparation, docketing for further hearing on the next available docket or docket agreed upon by the parties will occur, depending upon the actions of the parties, as follows:

(A) Upon request of a party at any time before the expiration of the above maximum time periods, when all parties have indicated, or are deemed to have indicated, that they have completed their preparations and are ready to proceed. A party shall be deemed to have indicated that they are ready to proceed when such party shall fail to respond in writing within fifteen (15) days, regarding readiness to proceed, to a notice from the Commissioner that it has been requested that the case be set for hearing.

(B) If the parties do not plan to take depositions, the case will be docketed for further hearing after the passage of the nine (9) months discovery and preparation period only if the parties have informed the Commissioner of a need for an evidentiary hearing, or requested their right of cross-examination of any reporting medical expert; otherwise the case will be ordered submitted for final decision at the expiration of the nine (9) months period, without further hearing.

(C) If the parties did indicate a plan to take depositions, the case will be docketed for further hearing after the passage of the full twelve (12) months period only if the parties informed the Commissioner of a need for an evidentiary hearing, or requested their right of cross-examination of a reporting medical expert, other than one whose examination was conducted by deposition; otherwise the case will be submitted for final decision at the end of the twelve (12) months period, without further hearing.

(5) After a continuance for discovery and preparation, when the case is again set for hearing the parties shall have concluded all case preparation, including all consultations with their respective clients by any counsel for the parties, and no further continuance for such discovery, preparation or consultation shall be permitted. Except that, upon written motion of a party, the period for discovery and preparation may be expanded as determined by the Commissioner upon an affirmative showing by the moving party that they have been prevented from completing their discovery and preparation by the lack of cooperation or obstructive tactics of the opposing party or other

good cause, that the moving party did not procure such behavior, and that the moving party has acted with due diligence in the discovery and preparation of the case.

(6) Since medical evidence is not relevant to the question to be resolved at the non-medical hearing phase of an occupational pneumoconiosis claim, the discovery and preparation continuance at or before the first hearing in the non-medical phase shall be limited to three (3) months.

(7) In a hearing before the Occupational Pneumoconiosis Board the first hearing continuance for discovery and preparation shall follow the same schedule set forth above except that the case shall be again set for hearing before the Occupational Pneumoconiosis Board at the expiration of the nine (9) months or twelve (12) months period, whichever is appropriate under the circumstances of the case, unless the parties sooner announce that they are prepared to proceed and request earlier docketing of the case, or unless the parties indicate that they wish the case submitted for final decision without further hearing.

(8) Once the discovery and preparation period has passed and an occupational pneumoconiosis case is again set for hearing before the Occupational Pneumoconiosis Board no further continuance shall be permitted either party for additional medical testing; except that, should the Board find that one or more of the medical reports submitted by the parties is a product of invalid testing or is of such a degree of variance with other reports as to warrant retesting in the opinion of the Board, each of the parties shall be permitted upon proper motion to obtain one (1) additional medical report based upon repeat testing by a physician and/or medical facility of their choosing. Upon the granting of a motion for such retesting by the parties, the parties shall be granted a continuance of three (3) months within which to secure such retesting.

(9) There shall be no continuance, general or otherwise, for separate second injury development and preparation. Such preparation shall be conducted at the same time as other discovery and preparation in all cases. However, second injury questions may be later raised by a petition to reopen based upon facts and circumstances not previously considered. Provided, however, that when a claimant moves for a life award in an occupational pneumoconiosis case, before the Board, based upon combined effects of prior and present injuries and other factors, supported by the introduction of evidence in the form of medical reports tending to establish a prima facie showing of total permanent disability under the second injury statute resultant therefrom, and upon a proper motion therefor, the case may be transferred to the injury docket for further evidence and testimony in support of the motion

for a life award, and for evidence in support of an employer's motion that the case be charged as a second injury. The occupational pneumoconiosis case shall be fully developed before transfer to an injury docket.

(10) Absent a request by the parties, together with a showing of need for such, once a case has been transferred to the injury docket for second injury purposes, it shall not be returned to the Occupational Pneumoconiosis Board docket for final submission but shall be submitted directly from the injury docket.

2.12 Motions; Objections; and Communications

(a) General. Ex-parte motions, objections, writings and other communications with the Commissioner or representatives of the Commissioner, which seek to procure action by the Commissioner, are prohibited in any case in litigation.

(b) In Advance of Hearing. All motions shall be made in advance of the hearing, insofar as grounds for such are then known, or can be reasonably ascertained or anticipated. A timely motion for continuance or other appropriate relief made in advance of the hearing shall be made in writing to the Commissioner, and a copy shall be served upon all other parties by the moving party. The motion shall clearly set forth all grounds, facts, and authorities in support of the motion. The opposing party shall have fifteen (15) days to respond in writing to any such motion, and shall set forth in the response all matters in opposition to such motion.

(c) During Hearing. A motion for continuance or other appropriate relief on grounds unknown prior to hearing, or arising during the hearing, and which could not reasonably have been ascertained or anticipated prior to the hearing, shall be made before the Trial Examiner on the record, orally or in writing. The motion shall clearly set forth all grounds, facts and authorities in support of the motion. The opposing party, if present, shall have the right to set forth matters in opposition to such motion on the record. The absence of a party in opposition shall not be a grounds for delay in ruling upon any motion, nor a ground for reconsideration of any ruling made, absent a written petition for reconsideration and an affirmative showing of good cause for such non-appearance by the moving party.

(d) Action Upon Motions

(1) Deferred ruling. The Commissioner or Trial Examiner may, as deemed appropriate, defer ruling upon a motion until such time as all evidence to be presented by the parties has been received and the case submitted for final decision.

(2) Continuance for Ruling on a Motion. The Commissioner before hearing, or the Trial Examiner at hearing, may, as deemed appropriate, continue a case set for hearing in order to investigate and rule upon a motion. However, no case shall be continued to rule upon a motion for continuance.

(3) Who May Rule. The Trial Examiner shall rule on motions made at hearing, as indicated by 2.5(b), all other rulings upon motions shall be by the Commissioner.

(4) Character of Rulings. All rulings by the Commissioner or Trial Examiner upon motions shall be interlocutory in nature.

(e) Motions for Continuance Not Timely Filed. Any motion for continuance prior to hearing must be timely filed, so as to permit ruling upon such in accord with subsection (b) above. Any motion for continuance not capable of such timely filing, and ruling thereupon prior to hearing, must be made on the record at hearing. Filing of a request for continuance shall not be an excuse for non-appearance at such hearing. The continuance shall not be effected unless and until properly ruled upon, and notification is sent to the parties.

2.13 Depositions

(a) General. Depositions for use in a Workers' Compensation case shall be taken, and may be used, for evidentiary purposes in the same manner prescribed by law for like depositions in the circuit court, except as may be otherwise provided herein.

Evidentiary objections shall be made on the record during any deposition or such objections shall be deemed waived. Evidentiary objections may be ruled upon by the deposing officer, if present, otherwise they shall be referred to the Commissioner for later ruling. Depositions shall be conducted in accordance with 2.7.

(b) By the Commissioner. The Commissioner may take the deposition of a witness, when it is deemed appropriate in the Commissioner's discretion, within or without the State of West Virginia. The taking of such deposition by the Commissioner shall be upon reasonable notice to the deponent and all parties, or their respective counsel. Notice shall be in writing, and shall contain the time and place of the deposition, as well as the name and address of each person to be examined. Proof of notice shall be by affidavit of any employee of the Fund rendering such notice on behalf of the Commissioner, and shall contain the name of the noticed party and the time, place and manner of notice.

Notice shall be given by personal service, or by prepaid mail to the last known address of the party to be notified.

Upon ordering a deposition on the Commissioner's motion, the Commissioner shall appoint a deposing officer, who shall preside over the taking of the deposition. The Commissioner shall in such instance also provide the court reporter and pay all witness fees.

(c) By request of party

(1) Submission of request. At any time after a protest to a claim has been filed and accepted, a party may request that the Commissioner either permit or deny the taking of a deposition. The request shall be in writing, and shall be served upon all parties by the requesting party.

(2) Contents of request. A request for a deposition shall include:

(A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(B) A brief statement of the matters on which the person is to be examined;

(C) A brief statement of the reasons for taking the deposition in lieu of testimony at a hearing; and

(D) The proposed date, time and location of the taking of the deposition.

(3) Objections. The opposing party, if he objects to the taking of the deposition, must file such objection in writing with the Commissioner within fifteen (15) days of receipt of the request for deposition served by the requesting party.

(4) Action on request. The Commissioner may permit or refuse the taking of such deposition and shall notify all parties in writing of the action taken on any request filed.

(5) Costs. The costs of the court reporter shall be borne by the Commissioner, or the Commissioner may provide a court reporter from the Fund. The costs of witness fees and expenses shall be borne by the respective proponents of the witnesses, as provided in 2.9(c)(3).

(d) Deposition without request to Commissioner

(1) Taking deposition. Parties may agree to take a deposition, upon proper and reasonable notice, as provided by law for like depositions in the circuit court, without the prior approval of the Commissioner. In such cases, the parties shall bear all associated costs, as they may agree.

(2) Use. Use of any deposition so taken shall be subject to objection as in circuit court, and the Commissioner may deny the admission of such deposition into evidence, if it appears that the deposition was taken at such place and under such circumstances as imposed an undue burden or hardship upon the opposite party.

(e) Telephone Depositions. By agreement of the parties, depositions may be taken by conference call over the telephone in like manner as if taken in person in accordance with these rules. In such cases, the parties may waive any objection to the jurisdiction of the court reporter to administer an oath or affirmation. Costs for telephone depositions shall be borne as may be appropriate under (b), (c) or (d) above.

2.14 Non-appearance of a party

(a) General. Absent proper service of a subpoena, commanding the appearance of a party at a hearing, no party is required by the law or these rules to appear at a hearing, except that it shall be the responsibility of a protesting party to prosecute their protest. The non-appearance of any party shall not prevent any appearing party from presenting evidence at any scheduled hearing.

(b) Action when a party does not appear

(1) Protesting party. If a protesting party does not appear to prosecute their protest at a scheduled hearing, absent the granting of a proper continuance, upon the motion of any opposing party or direction of the Trial Examiner, the protest of such non-appearing party may either be dismissed for failure to prosecute or submitted for decision on the existing record; provided that, before such action shall become final, the non-appearing party shall be given written notice that they have fifteen (15) days within which to affirmatively show good cause to the Commissioner in writing why such action should not become final, and why another hearing should be scheduled for prosecution of their protest.

(2) Non-protesting party

(A) After personal service with a subpoena. If a non-protesting party has been personally served with a subpoena and yet does not appear at a scheduled hearing, attachment proceedings as for contempt shall be commenced against such non-appearing party in the appropriate circuit court to compel obedience to the subpoena upon the granting of a motion for such by the party at whose request the subpoena was issued, or upon the Commissioner's own motion. Provided however that, before any such action is commenced, the non-appearing party shall first be given written notice that they have fifteen (15) days within which to affirmatively show good cause to the Commissioner in writing for their non-appearance.

(B) Without personal service with a subpoena when non-protesting party is a claimant. If personal service with a subpoena was not possible due to non-residence within West Virginia, or was attempted upon a non-protesting claimant, but was not completed because the party could not be located after diligent and reasonable effort, and upon a finding, based upon facts presented at the hearing upon the record or by affidavit, that the non-protesting party's appearance and testimony at a hearing is necessary for the protesting party to prosecute their protest, the claim shall be rescheduled for hearing and the non-protesting party shall be given written notice that their appearance and testimony is necessary at such hearing. The notice may be effected by postpaid mailing to the last known address of such party, as provided in 2.3(e). The notice shall further advise the non-protesting party claimant that:

(1) Should the said party fail to appear and submit to cross-examination at the hearing indicated in the notice, they shall make an affirmative showing of good cause to the Commissioner in writing for their failure to so appear and testify within fifteen (15) days after the scheduled hearing date, and

(2) Absent such showing of good cause, and a finding by the Commissioner that good cause has been shown, the Commissioner will suspend all further and/or future payment of benefits and expenses to the non-protesting party claimant until such time as the said party shall appear at a scheduled hearing and submit to cross-examination as directed.

Upon failure of the non-protesting party to so appear and testify after the notice, set forth above, and upon failure of the party to show good cause for such failure, and upon motion of the opposing party, or upon the Commissioner's own motion, the Commissioner may suspend all benefits and expenses until such time as the non-protesting party shall appear and testify.

2.15 Dismissal of party other than claimant

A party who is determined by the Commissioner not to be a proper party to the claim shall be dismissed by the Commissioner, upon the motion of such party, upon the motion of any other party, or upon the Commissioner's own motion.

2.16 Severability

If any provision of these rules or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.