

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Bureau of Workers' Compensation TITLE NUMBER: 85
RULE TYPE: Procedural; CITE AUTHORITY W. Va. Code §§ 23-1-1; 23-1-8;
23-1-9; 23-1-10; 23-1-11; 23-1-12; 23-1-13; 23-1-15; 23-4-8a; 23-4-8b; 23-4-8c;
AMENDMENT TO AN EXISTING RULE: YES X NO 23-4-15b; 23-5-1; & 23-5-3a.

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 7

TITLE OF RULE BEING AMENDED: Hearings

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

DATE OF PUBLIC HEARING: May 1, 1990 TIME: 9:30 a.m.

LOCATION OF PUBLIC HEARING: Bureau of Workers' Compensation
Third Floor Conference Room
601 Morris Street
Charleston, WV 25301

COMMENTS LIMITED TO: ORAL , WRITTEN X, BOTH

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Bureau of Workers' Comp.

ATTN.: John H. Kozak

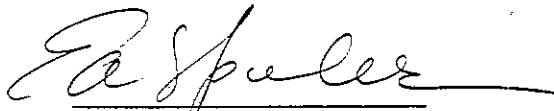
Post Office Box 3824

Charleston, WV 25338

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL


Commissioner



WORKERS' COMPENSATION FUND

601 MORRIS STREET

CHARLESTON, WEST VIRGINIA 25301

GASTON CAPERTON
GOVERNOR

TELEPHONE: (304) 348-0475

EMILY A. SPIELER
COMMISSIONER

JOHN H. KOZAK
EXECUTIVE SECRETARY

March 27, 1990

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, W. Va. 25305

Dear Secretary Hechler:

RE: Filing of Proposed Procedural Rule, Title 85, Series
7; "Hearings".

Pursuant to West Virginia Code, §5F-2-2(a)(12), please
consider this letter to be my written approval of the above
noted proposed procedural rule.

With much appreciation for your assistance in this matter,
I remain

Very truly yours,

A handwritten signature in cursive script, appearing to read "Taunja".

Taunja Willis Miller
Secretary

TWM/jhk

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OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

TITLE 85
WEST VIRGINIA PROCEDURAL RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BUREAU OF WORKERS' COMPENSATION

SERIES 7
HEARINGS

SUMMARY OF PROPOSED RULE

This proposed procedural rule amends the prior series 7 Hearings rule. The new rule is specifically designed to resolve critical problems in the litigation of protests pursuant to West Virginia Code, §23-5-1 et. seq., and the prior series 7 rule. In particular, parties failed to comply with, and the commissioner failed to enforce, that section of the prior rule, specifically section 2.11(b), which set time limits for the submission of protests. No consistent attempt was previously made to require parties to comply with the time limits. This created a severe administrative problem which resulted in the denial of timely and expeditious resolution of claims, as required by West Virginia Code, §23-5-3(a), and case law developed thereunder.

The rule addresses time periods for the submittal of pending claims by creating specific time periods for each pending claim based upon how long it has been on the docket. The rule also addresses evidentiary depositions and delegates to the Director of the Legal Division responsibility for docketing and managing the claims on protest. The rule also addresses a number of issues common to administrative hearings such as continuances, subpoenas, costs of transcripts, procedures for classes of claims with common elements, and numerous other matters.

The amended rule will govern all protests in litigation as of the effective date of the rule, as well as any protests which are acknowledged after the effective date of the rule. It is intended to resolve the backlog of claims in litigation in order to make speedy and expeditious resolution of claims possible, as is required by law, and in order to allow for any future changes in the litigation process without concern for the resolution of a large backlog of old claims.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Hearings, Title 85, Series

Type of Rule: Legislative Interpretive X Procedural

Agency: Bureau of Workers' Compensation
Address: 601 Morris Street
Charleston, W. Va. 25301

	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
1. Effect of Proposed Rule					
Estimated Total Cost	\$0	\$0	\$0	\$0	\$0
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

The Bureau of Workers' Compensation has provided a hearings mechanism for many years. The proposed rule will not add to the cost of that system. It is expected that after the rule has been in place for a number of years that claims in protest will be heard and decided in a much more expeditious fashion. This will result in savings to the bureau as it will not be necessary to maintain so many case files and to continuously reschedule the same cases for hearings. However, this savings is probably three years in the future and cannot be quantified at this time.

3. Objectives of these rules:

To provide for more expeditious hearings for the some 60,000 pending protests in litigation. The rule provides for time limits for the development of cases and for the submittal of those cases for decision. The rule also provides for the delegation of responsibility to the Director of the Legal Division for the management of the case load. The rule also remedies a number of other flaws in the current system and provides for the tools to adequately develop cases for decision.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None in the immediate future. Savings will result in the longer term.

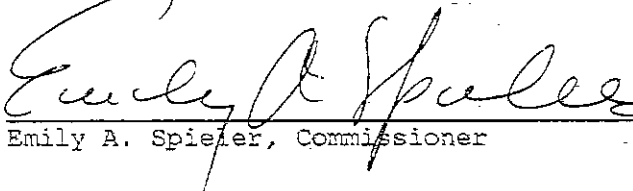
B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens.

By providing for more expeditious handling of claims in protest, employers and injured employees will both benefit by having their cases promptly decided. Claims that should be paid but are not will more rapidly be discovered and payment instituted. Similarly, those cases where payments are being erroneously made will also be discovered and such payments stopped. Employers will be protected from the claims losses that should not be attributable to them. This will result in a lowering of claims experience and a lower premium rating.

C. Economic Impact on Citizens/Public at Large.

Not applicable.

Date: March 26, 1990

A handwritten signature in cursive script, reading "Emily A. Spieker", is written over a horizontal line.

Emily A. Spieker, Commissioner

TITLE 85
WEST VIRGINIA PROCEDURAL RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BUREAU OF WORKERS' COMPENSATION

SERIES 7
HEARINGS

§85-7-1. General.

1.1. Scope. -- These ~~This~~ procedural rules rule shall govern the initiation and conduct of hearings in contested workers' compensation claims before the commissioner.

1.2. Authority. -- W. Va. Code, §§23-1-1, 23-1-8, 23-1-9, 23-1-10, 23-1-11, 23-1-12, 23-1-13, 23-1-15, 23-4-8a, 23-4-8b, 23-4-8c, 23-4-15b, 23-5-1, and 23-5-3a.

1.3. Filing Date. -- January-28--1987

1.4. Effective Date. -- April-1--1987

~~1.5. -- Repeal of a Former Rule. -- Legislative Rule 7-23-1-7 Series 17-Sections 16 and 17.~~

1.5. Purpose. -- On January 28, 1987, a procedural rule governing the initiation and conduct of hearings in contested workers' compensation claims was filed and became effective on April 1, 1987. WV 85 CSR 7 "Hearings". That rule was adopted after considerable comment by attorneys representing all parties in claims. However, the rule was not enforced. As a result, the procedure prior to the promulgation of this rule which governed claims was unclear and created considerable confusion both within and outside the division of workers' compensation. Moreover, during discussions regarding enforcement of WV 85 CSR 7, questions were raised as to whether that rule was promulgated in full compliance with the requirements of West Virginia Code, §29A-2-1 et seq.

This new procedural rule amends the prior rule and therefore cures any procedural irregularities in the promulgation of the prior rule. The new rule therefore repeals and replaces the prior rule. This new procedural rule is specifically designed to resolve critical problems in the litigation of protests pursuant to West Virginia Code, §23-5-1 et. seq., and the prior series 7 rule. In particular, parties failed to comply with, and the commissioner failed to enforce,

that section of the prior rule, specifically section 2.11(b), which set time limits for the submission of protests. As a result, as of the date of the filing of this new rule, over 60,000 issues or unsubmitted claims remained in litigation. Over one-third of these pending matters remained in litigation over the maximum time of two years allowed under the prior procedural rule for the litigation of protests. No consistent attempt was previously made to require parties to comply with the time limits. This created a severe administrative problem which resulted in the denial of timely and expeditious resolution of claims, as required by W. Va. Code, §23-5-3(a), and case law developed thereunder.

Any attempt to force the immediate submission of claims might deny the parties adequate notice for the development of evidence. Parties universally indicated that they came to rely upon the failure of the commissioner to enforce the preexisting rule. As a result, in many cases no attempt was made to comply with the time limits. The provisions concerning the disposition of contested claims arising under this rule accord full rights to the parties to complete the submission of evidence while ensuring that the goal of speedy and expeditious litigation of workers' compensation cases will be served.

At the same time, the commissioner failed to rule within the time limits on submitted claims required by applicable statutory and case law. In view of the need to provide prompt and proper rulings on submitted claims within the time limits set by law, the time period allowing for the parties to complete the development of evidence likewise allows the commissioner to develop internal systems to guarantee that time limits for the rendering of decisions on claims will be met.

This amended rule governs all protests in litigation as of the effective date of the rule, as well as any protests which are acknowledged after the effective date of the rule. It is intended to resolve the backlog of claims in litigation in order to make speedy and expeditious resolution of claims possible, as is required by law, and in order to allow for any future changes in the litigation process without concern for the resolution of a large backlog of old claims.

1.6. Effect on Former Rule: This rule repeals and replaces WV 85 CSR 7 filed January 28, 1987, and effective April 1, 1987, governing hearings.

§85-7-2. Hearing Process.

2.1. Purpose. -- The purpose of the hearing process shall be to receive and consider, as expeditiously as possible in a speedy and expeditious manner, 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 entry of any order, 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 of 1931, as amended.

2.2. Right to hearing. -- Upon the timely filing of an objection, and subject to the limitations of this section, Any party to a claim shall have a right to a hearing concerning any issue of fact or law upon which the commissioner has made a determination and entered a protestable ruling; and upon the timely filing of an objection.

2.3. Initiation of Hearing Process.

{a}2.3.1 Notice by commissioner of decision. -- Upon a protestable ruling or determination by the commissioner with regard to any award or order 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 parties and their counsel of record. Such notice shall state the time allowed within which to file an objection.

{b}2.3.2. Objection. -- Any objection to the commissioner's decision shall be filed with the commissioner director of the legal division ("director") in writing. Said objection shall be upon a form developed by the commissioner and shall set out with specificity the nature of the objection and the issues to which the objecting party seeks to raise objection and shall state whether an initial hearing is desired pursuant to subsection 2.6 this rule, and, in issues before the occupational pneumoconiosis board, shall state with specificity the reasons an initial hearing is desired. A copy of said written objection shall be served upon opposing counsel and upon the opposing party, as required by paragraph 2.3.5 of this rule.

{c}2.3.3. Time period for filing an objection. -- Any objection under {a} paragraphs 2.3.1 and {b}2.3.2 of this section shall be filed with the commissioner director within the time-allowed-after thirty days from receipt of the notice set forth in {a} paragraph 2.3.1 of this section, except as provided in West Virginia Code, §23-5-1e. If an objection is not so filed, the commissioner's decision shall be final, provided that the commissioner shall have the authority to amend, revise or reconsider a ruling or determination in order to correct mistakes as defined in applicable case law.

{d}2.3.4. Action by commissioner director. -- The director shall determine if an objection is timely filed, and

shall notify all parties and their counsel of record of the determination. Any party may file an appeal to such determination.

(e)2.3.5. Manner and receipt of notice, pleadings and other documents. Any notice required by these rules shall be deemed adequate if served upon a party and their counsel of record -- Any notice, pleading or other document, including documentary evidence or transcripts from depositions, required by this rule or filed under this rule shall be filed with the director of the legal division or his or her designated representative ("director") and a copy shall be served upon the counsel of record of the opposing party, or in the event that said party is unrepresented, upon the opposing party him or herself, by mailing such notice, pleading or other document by regular United States Mail, postage prepaid, addressed to the party to be so notified at their last known address. Receipt of notice shall be presumed seven (7) calendar days after the date of the notice, or if the date of notice is not applicable, receipt of any pleading or other document shall be presumed seven (7) calendar days after the date of mailing.

2.3.6. Reconsideration. -- When any party believes that the commissioner's initial protestable decision or a protestable occupational pneumoconiosis board finding is based upon administrative, clerical or other plain error which is readily discernible from the claim file, the party may file a motion for reconsideration of the commissioner's or occupational pneumoconiosis board's finding with the director. Said motion shall set out with particularity the nature of administrative, clerical or other plain error which would warrant reversal or modification of the commissioner's decision. Said motion shall be filed within thirty (30) days of the date of receipt of the commissioner's decision and a copy shall be served upon the opposing party or his or her counsel, as provided in paragraph 2.3.5. Any other party shall file any response to said motion within twenty (20) days of service of the motion. The director shall consider motions for reconsideration and any response thereto and shall recommend a ruling to the commissioner upon such motion within thirty (30) days of receipt of said response. In motions for reconsideration involving occupational pneumoconiosis board findings, the director may refer the issue to the board for written comment. The recommendation by the director shall be made upon the record only, except that the director may consider any additional opinions of the occupational pneumoconiosis board. The commissioner shall then issue an order, after considering the recommendations of the director, affirming the prior decision or reversing or modifying the prior decision. The order issued upon the motion for reconsideration shall be a protestable order and objection thereto may be filed according to paragraph 2.3.2.

2.4. Referral to director and trial examiner. -- Following receipt of a timely objection or motion for reconsideration, 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. The commissioner shall refer such file to the director for purposes of referral 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 request, to all parties and their counsel of record.

2.5. Duties of trial examiner and director.

2.5.1. Trial Examiner. -- The trial examiner is the presiding official in a workers' compensation fund hearing. The trial examiner shall:

(a) a. Rule on all evidentiary matters, and motions for continuance, or other interlocutory matters properly raised at hearing;

(b) b. 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;

(c) c. Exclude unduly repetitious or evidence irrelevant to the scope of the hearing as set out in the objection to the commissioner's decision filed pursuant to paragraph 2.3.2. Such exclusion need not be based upon the motion of any party;

d. Inform parties of the closure date for the admission of new evidence pursuant to paragraph 2.11.2. When additional testimony must be introduced, and the normal scheduling process would delay the hearings beyond the closure date, the trial examiner shall notify the director of the need for emergency docketing so that the evidence may be presented prior to the closure date;

e. Render recommendations to the commissioner either orally on the record or in written form regarding all matters involving a determination of the credibility of witnesses and said recommendations shall be made a part of the record;

f. Ensure, whenever possible, the speedy and expeditious resolution of any objection.

g. Perform such other duties as may be set forth in these rules for a trial examiner.

2.5.2. Legal Director. -- The duties of the director of the legal division or his or her designated representative, who may be an administrative law judge and shall be an attorney and who shall be referred to as director for the purposes of this rule, shall include the following:

a. Oversee the work of the trial examiners and provide to the trial examiners such technical support as will assist them in the speedy and expeditious resolution of issues in litigation;

b. Oversee the docketing and scheduling of matters for hearing;

c. Rule upon, or supervise the ruling upon, any interlocutory matters raised by parties in writing between hearings;

d. Recommend rulings upon all motions for reconsideration filed by any party pursuant to paragraph 2.3.6;

e. Ensure, whenever possible, the full compliance of all parties with the time limitations set out in subsection 2.11;

f. Establish consistency in the procedural handling of all matters undergoing hearings pursuant to this rule;

g. Maintain the records developed subsequent to the filing of an objection or motion for reconsideration;

h. Perform such other duties as may be set forth in these rules or may from time to time be delegated by the commissioner.

2.6. Date, Time and Place of Hearing Scheduling and Scope of Hearings.

{a} 2.6.1. Injury Docket.

a. Initial hearing (injury docket).

A. Following receipt of a timely objection, including a request for an initial hearing, the commissioner or director shall determine the date, time and place a hearing will be held, in accordance with West Virginia Code, §23-5-1. The time of such hearing shall be within thirty (30) days of receipt of the objection, assuming an initial hearing is

requested; provided, that said hearing may be postponed upon agreement of the parties or for good cause. Objections to a commissioner's decision in which the objecting party is not represented by counsel shall be set for an initial hearing without regard to whether a request for such initial hearing was explicitly made.

(b)B. Notice of the date, time and place of the hearing shall be provided the parties and their counsel of record at least ten (10) days in advance of the hearing date, unless the ten day notice period has been waived by both parties.

(c)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 director, 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 convenience of witnesses, but the ends of justice will control.

b. Scheduling of subsequent hearings (injury docket).

A. There shall be no limit on the number of hearings allowed on any issue, subject to the time limitations contained in paragraph 2.11.2. The director shall establish a method of scheduling said hearings that shall allow for the speedy and expeditious resolution of matters in litigation in compliance with the limitations contained in paragraph 2.11.2. Parties shall be kept informed regarding the general practices of the director with regard to the scheduling of subsequent hearings.

B. Parties shall be encouraged to obtain and submit evidence without the necessity of hearings through the direct filing of medical and other expert documentary evidence and through the use of evidentiary depositions and stipulations, as provided for in subsections 2.9, 2.10, and 2.14.

C. Subsequent to the first hearing as provided in subparagraph 2.6.1.a, no further hearings will be set unless requested by a party. If no request is made for further hearings within the time limitations set out in paragraph 2.11.2, the claim will be submitted for final decision at the expiration of the applicable time limits. Any party may request a hearing for the purpose of submission of testimony. In order to allow for the application of part 2.6.1.b.D, each such request shall specify the type of issue

for which a hearing is requested. Such requests shall be made in writing and shall state the reason a hearing is requested. There shall be no requirement that any party wait for receipt of a transcript of a prior hearing before requesting a date for proceeding with the taking of testimony at a subsequent hearing. All hearing requests for specific dates and places must be filed with the director thirty (30) days prior to the date requested. The director shall issue a notice of hearing indicating the date and place upon which any hearing is to be held. Such notice shall be sent to all counsel of record and to the parties, whether or not they are represented by counsel. Additional notices need not be issued.

D. When there is a conflict or the director is for any reason unable to comply with all requests for hearings, the following matters shall be given priority in docketing:

(a) Matters involving the granting, modification, denial or reopening of temporary total disability benefits, including any issue involving the compensability of a lost-time injury, or the conversion of no-lost time to lost-time benefits, and matters involving the denial of authorization of medical treatment;

(b) Matters which must be heard forthwith in order to comply with the time limits set out in paragraph 2.11.2 of this rule;

(c) Matters involving the award or denial of permanent total disability benefits, excluding the issue of the proper party to be charged with the award;

(d) Matters involving the compensability of any injury or occupational disease, except for matters involving lost-time disability, and matters involving non-medical orders in occupational pneumoconiosis claims issued pursuant to West Virginia Code, §23-4-15b;

(e) Matters involving the impairment rating of any permanent partial disability award;

(f) Matters involving the proper party to be charged with the cost of any award when such matters do not involve a decision as to whether benefits should or should not be paid to the claimant.

2.6.2. Occupational pneumoconiosis (OP) docket.

a. Initial hearing (OP docket).

A. The first hearing set pursuant to West Virginia Code, §23-5-1, regarding an objection to the findings of the occupational pneumoconiosis board, shall be deemed waived unless the protesting party specifically requests such a hearing in the objection filed pursuant to paragraph 2.3.2 of this rule and sets out with specificity the reasons an initial hearing is requested. Protests to orders in which the protesting party is unrepresented by counsel shall be set for an initial hearing automatically, unless the protesting party has waived the right to the initial hearing.

B. If an initial hearing is requested or is scheduled because the protesting party is unrepresented by counsel, the director shall set the hearing in accordance with subparagraph 2.6.1.a, except that said hearings shall be scheduled before the occupational pneumoconiosis board in Charleston.

b. Subsequent hearing (OP docket).

A. Parties shall develop their evidence in accordance with time limits set out in paragraph 2.11.2 of this rule. Only one hearing shall be scheduled before the occupational pneumoconiosis board, subsequent to the initial hearing, if any. Said hearing shall be scheduled after both the protesting and responding parties have developed, exchanged and filed all evidence relevant to the matter in litigation. Said hearing shall be scheduled after both the protesting and responding parties have notified the director that they are ready to proceed with a hearing.

B. Any party seeking any hearing in addition to that provided for in part 2.6.2.b.A before the occupational pneumoconiosis board shall file a written motion to the director setting forth good cause for the holding of any additional hearing(s). A desire to hold informal off-the-record discussions with occupational pneumoconiosis board members regarding the claim shall not constitute good cause for the scheduling of initial or additional hearings before the occupational pneumoconiosis board.

C. Evidence shall be filed in accordance with subsection 2.9. Except as provided in part 2.6.2.b.D, testimony of witnesses other than occupational pneumoconiosis board members shall be obtained either through use of evidentiary depositions or at hearing scheduled on the injury docket and transcripts of said testimony shall be filed with the director.

D. Any party may file a motion with the director to schedule testimony of witnesses before the Occupational Pneumoconiosis Board; provided, that testimony of

witnesses before the occupational pneumoconiosis board shall be restricted to the testimony of members of said board, qualified physicians and roentgenologists pursuant to West Virginia Code, §23-4-8c. Said motions shall be granted only upon a showing of good cause that it is essential that the occupational pneumoconiosis board personally hear said testimony. Any party may likewise file a motion with the director requesting that the occupational pneumoconiosis board review any testimony of other witnesses before any hearing held before said board.

2.6.3. Scope of Hearings. -- The scope of evidence to be admitted in any hearing, proceeding or evidentiary deposition shall be limited to that evidence relevant to the issues enumerated in the objection filed by the protesting party pursuant to paragraph 2.3.2, except that the protesting party to a non-medical occupational pneumoconiosis order may inquire into the medical history of the claimant at a hearing on said protest if the claimant is unrepresented by counsel or the commissioner has failed to promulgate interrogatories for use in occupational pneumoconiosis claims pursuant to paragraph 2.8.5. Absent a showing of good cause, the need to inquire into the medical history of the claimant in this latter case shall not constitute good cause for extension of the time limitations contained in paragraph 2.11.2. Failure of a claimant to attend a non-medical hearing in an occupational pneumoconiosis claim for the taking of his or her testimony, after being duly noticed to appear at such hearing, shall be grounds to postpone any examination by the occupational pneumoconiosis board.

2.7. Hearing procedures; Generally.

{a} 2.7.1. Rules of evidence. -- The hearing process shall not be conducted in accordance with strict common law or statutory rules of evidence, or by formal rules of procedure, except as provided by these rules. Except as provided in these rules, The the trial examiner or director shall receive the testimony and other evidence of the parties and witness, subject to objection by any party.

{b} 2.7.2. Procedure.

{1} a. Presentation of evidence.

{A} A. Order of presentation of evidence.
-- The normal order of presentation of evidence shall be as follows. 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 or upon agreement of counsel of the Trial Examiner may permit a variance in the normal order of presentation. When a party has 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 to offer, they shall announce they are ready to submit the claim. The trial examiner or director shall then order the claim submitted for decision. The normal order of presentation of evidence may be varied by agreement of the parties who may agree either to alter the order or to present evidence concurrently. The trial examiner or director shall for good cause also permit or order a variance in the normal order of presentation of evidence, when the interests of speedy resolution or of justice would be served by such a variance. The normal order of presentation of evidence shall be varied for matters in which the objection was filed on or before two years before the effective date of this rule, as provided in paragraph 2.11.2.

{B} B. Testimony. -- All testimony shall be taken under oath or affirmation.

{C} C. Cross-examination. -- All parties shall be given reasonable latitude in cross examining witnesses ; provided, that unduly repetitive or irrelevant evidence and evidence irrelevant to the objection filed pursuant to subsection 2.3 shall be excluded.

{D} D. Marking exhibits. -- All exhibits offered into evidence shall be labeled and marked as either "Claimant's Exhibits", "Employer's Exhibits", or "Joint Exhibits", and shall have a number or letter assigned in sequence, starting with "1" or "A". All exhibits offered into evidence, or copies thereof, shall be appended to the record of proceedings, and if any exhibit is not susceptible to attachment or copying, either a photograph, facsimile, or description of such exhibit may be substituted.

{2} b. Objections. -- The trial examiner shall rule upon all objections to the evidence or testimony presented at the hearing. The trial examiner shall take into consideration the apparent reliability of evidence, and the basis of knowledge of a witness in ruling on objections. 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. The trial examiner may require oral argument and citation of authority by the parties in support of or opposed to objections.

{3} c. Transcription of evidence. -- All testimony, argument and rulings of the trial examiner shall be taken down by stenographic or voice recording, and shall be transcribed, and become part of the record of proceedings.

{4} d. Public access. -- It is the policy of the commissioner that hearings will be open to the general public, subject to the following exceptions:

{A} A. Any person whose conduct is unruly or disruptive may be removed from a hearing.

{B} B. Only those persons for whom adequate seating is available shall be permitted to attend a hearing, and there shall be no duty imposed to provide notice to the public of the date, time or place for hearings, or to provide more than the usual amount of seating provided at hearings. Seating shall be on a "first come, first served" basis.

{C} C. Upon written motion of a party in advance of hearing or upon motion made at a hearing, supported by a showing of good cause, the ~~commissioner~~ director or trial examiner may order a hearing closed to the public. When the interests of justice dictate, the public may be excluded from a hearing.

{D} D. The trial examiner may order witnesses sequestered.

{5} e. Representation and appearance of parties.

{A} A. By individuals. -- Any claimant or employer, who is a natural person, may appear at and represent their himself or herself in any hearing. The trial examiner shall explain to any party appearing without counsel the right to be represented by counsel, and shall inquire as to their desire to obtain counsel. In appropriate cases the hearing may be continued to permit a party to obtain counsel; however, absent a showing of good cause, a hearing shall only be continued one time for a party to obtain counsel. When a party elects to proceed without counsel, the absence of counsel shall be considered in the application of these rules.

{B} B. By corporations. -- A corporate employer may be represented at a hearing only by counsel.

{C} C. By counsel. -- Any claimant or employer may be represented at a hearing by an attorney duly licensed or authorized to practice law in the State of West Virginia.

{D} D. Lay representative. -- A party may not be represented at a hearing by a spokesperson, lay representative or anyone else not licensed or authorized to practice law in the State of West Virginia.

(e) 2.7.3. Presence of parties. -- All parties to a claim are entitled to be present and to present evidence at a hearing; however, 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 if:

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

(2) b. After being advised by the trial examiner that disruptive conduct will cause his or her removal from the hearing, the party persists in conduct which is such as to justify exclusion from the hearing.

(d) 2.7.4. Commissioner's Director's action. -- The commissioner director shall review the transcript of the hearing, the testimony, the evidence and exhibits, and shall take such action with regard to the issues as shall be appropriate. The commissioner director may order further hearing in a claim when it appears that the record has not been sufficiently developed to permit a just resolution of any issue. Any further hearing so ordered by the commissioner director shall be limited to only those matters so referred by the commissioner for further hearing and shall constitute good cause for extension of time limitations set out in paragraphs 2.11.2 and 2.11.3.

2.7.5. Hearings before Occupational Pneumoconiosis Board -- The provisions of subsection 2.7 shall be subject to other provisions of this rule governing hearings before the occupational pneumoconiosis board.

2.8. Discovery.

(a) 2.8.1. Exchange of evidence prior to hearing. -- Any party desiring to submit the report of an expert or any other document shall do so by delivering such report or document to the commissioner director by mail with copies to opposing counsel or unrepresented parties as seen as can reasonably be accomplished within 30 days following receipt of such report or document. Items not susceptible of 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) 2.8.2. Witnesses. -- All parties shall notify each other, and the commissioner director, of the names and addresses of the all witnesses whose testimony they intend to introduce. Names of witnesses shall be provided as soon as reasonably possible, insofar as such are known or can be

reasonably-ascertained-or-anticipated- but in no event later than ten (10) days prior to the date of hearing at which said witness' testimony is to be introduced.

(e) 2.8.3. Failure to comply. -- Shall a party fail to comply with the disclosure requirements of these rules, the commissioner, the director or the trial examiner may take one or more of the following actions:

(1) a. Order the party to supply the material required by this section;

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

(3) c. Prohibit a party from introducing evidence or testimony if the commissioner, director or the trial examiner finds that the failure to disclose was intentional or without good cause.

(d) 2.8.4. Interrogatories to parties by agreement.

(1) a. Written interrogatories may be utilized only upon agreement of the parties except as provided in section 2.8.5. Permission of the commissioner director 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 director.

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

(3) c. 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 party upon whom the interrogatories have been served shall serve a copy of the answers within thirty (30) days after service of the interrogatories. The commissioner director may allow a shorter or longer time for service of such answer or objection for good cause shown.

d. Responses to interrogatories may be filed as evidence or may be used as the foundation for stipulations between the parties.

2.8.5. Mandatory interrogatories.

a. The commissioner or the director may develop interrogatories for use in occupational pneumoconiosis claims. Such interrogatories shall be used solely for the discovery of

evidence from the claimant regarding prior medical history or exposure history relevant to the occupational pneumoconiosis at issue. Said interrogatories shall be served upon the claimant's counsel and verified responses shall be filed with the opposing party and with the director within thirty (30) days of receipt thereof. Claimants not represented by counsel shall not be required to file responses to interrogatories. Once developed and utilized, in the event that a claimant fails to respond within the foregoing time limit to such interrogatories, any other party shall be entitled to take the testimony of the claimant by evidentiary deposition or at hearing regarding the issues covered by the interrogatories and any examination before the occupational pneumoconiosis board shall be postponed until such testimony can be obtained.

b. Responses to the aforesaid interrogatories shall be filed as evidence in the claim, in lieu of testimony. The claimant shall not be permitted to testify regarding the issues addressed by said interrogatories, unless the party seeking to examine or cross examine the claimant regarding said issues can show clear good cause for the admission of such testimony. Mere desire to corroborate or verify the matters stated in the responses to the interrogatories shall not constitute good cause for the admission of said testimony.

2.9. Production of witnesses and evidence.

{a} 2.9.1. Right to witnesses. -- Each party is entitled to compel the attendance of any witness whose testimony may be relevant and material at a hearing or an evidentiary deposition, except a party is not entitled to the presence of a witness other than a party who is deemed unavailable within the meaning of this subsection. A witness shall be deemed unavailable in, but not limited to, the following situations.

{1} a. The witness is not subject to compulsory process in West Virginia by reason of non-residence within, or prolonged absence from, the State of West Virginia, unless that witness is the claimant or the employer.

{2} b. The witness refuses to testify despite an order to do so.

{3} c. The witness claims by sworn affidavit a lack of memory of the subject matter.

{4} d. The witness is unable to be present or to testify at the hearing because of then existing existent physical or mental illness or infirmity.

{5} 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 in Section--2.9(b){2} subparagraph 2.9.2.b.

{b} 2.9.2. Procedures for production of witnesses and evidence.

{1} a. Subpoena. -- The presence of a witness or production of evidence may be obtained by the issuance of a subpoena or subpoena duces tecum by the commissioner. A request for a subpoena must be made in writing to the director as soon as reasonably possible prior to a hearing, and in no event later than 20 days prior to the hearing date. A subpoena for a physician shall also include a subpoena duces tecum for the treatment records and notes pertaining to the claimant.

{2} b. Service. -- It shall be the responsibility of the party requesting the issuance of a subpoena to serve the subpoena on a witness by personal service or by certified mail.

{3} c. Witness fees.

{A} A. General. -- The party requesting issuance of a subpoena for a witness shall pay the attendance fees and mileage provided for witnesses in civil cases in circuit court. Such fees may be paid in advance upon a timely request by the witness. When the subpoena was issued on behalf of the commissioner, such advance shall not be required.

{B} B. Expert Witness Fees. -- The party who introduces the report of an expert witness shall be responsible for payment of the appearance fee of such witness, except that the commissioner shall be responsible for payment of a witness fee when the claim has not been rejected and the witness is:

{i} (a). An authorized treating physician₇; or

{ii} (b). A physician engaged by the commissioner₇; or

{iii} (c). An authorized consulting physician acting upon referral from an authorized treating physician.

{e} 2.9.3. Exclusion of evidence. -- Upon the failure or refusal of a properly subpoenaed witness to appear, produce requested evidence or testify in response to a subpoena, the trial examiner or the ~~commissioner~~ director may exclude any statement, record or report rendered by that witness from the record of litigation. A motion to exclude such evidence shall be made in writing or, if at hearing or deposition, on the record, by the party seeking exclusion of the evidence. If no such motion is filed, the evidence shall be admitted and remain part of the record in the claim.

{d} 2.9.4. Alternatives to testimony and other evidence.

{1} a. The trial examiner or director and the commissioner may receive and consider, subject to objection and the right of cross-examination by an opposing party:

{A} A. Sworn statements or affidavits;

{B} B. Prior testimony under oath;

{C} C. Stipulations of fact or expected testimony; and

{D} D. Depositions and interrogatories

{2} b. The trial examiner or director and the commissioner may receive and consider in lieu of evidence which is unavailable:

{A} A. Testimony describing the evidence;

{B} B. An authenticated copy, photograph or reproduction of the unavailable evidence; or

{C} C. A stipulation of fact or expected testimony concerning such unavailable evidence.

{e} 2.9.5. Examinations and evaluations.

{1} a. Right to Examination and Evaluation.

A. All parties are entitled to a reasonable number of relevant medical examinations or vocational evaluations. A reasonable number of examinations or evaluations shall be no more than two (2) per specialty or discipline involved; provided, however, that upon written request a party may be granted the right to further examinations or evaluations upon a showing of necessity; provided further, that in occupational pneumoconiosis claims blood gas studies shall only be performed at the request of the

employer after a written request pursuant to part 2.9.5.a.B, and such request shall only be granted if the claimant has had such studies performed and the number of studies performed at the request of the employer shall not exceed the number of studies performed by the claimant's physician or at the request of the claimant's physician.

B. A written request must for further examinations or evaluations shall be served upon all other parties and filed with the commissioner director. The request shall set forth with specificity the reasons why such additional examination or evaluation is necessary. All other parties shall have fifteen (15) days after the date of service of said request to file a written response. No hearing shall be held upon said request, and the commissioner's ruling thereon shall be interlocutory. The director shall rule upon said request within sixty (60) days from the date the request is filed.

C. Except as provided in this section, employers shall not be required to file a written request for authorization to the commissioner in order to refer the claimant to the first two examinations or evaluations per specialty or discipline which may be obtained as a matter of right pursuant to subparagraph 2.9.5.a; provided, that if the employer does not seek written authorization, said examinations or evaluations shall be scheduled at a reasonable time and within a 100 mile radius of the claimant's residence. The claimant shall appear for any examination or evaluation scheduled pursuant to this paragraph unless he or she provides notification stating reasons for failure to so appear to the opposing party or parties and to the director. Whenever possible, such notification shall be in writing and shall be provided prior to the date of the examination.

D. Reports or results of any examination or evaluation obtained pursuant to this paragraph shall be filed with the director and with all opposing parties within thirty (30) days of receipt by the party arranging said examination or evaluation. Results of testing performed at the occupational pneumoconiosis board facility shall be automatically forwarded to the director for inclusion in the claim file.

E. All costs associated with obtaining said examination or evaluation shall be borne by the party arranging said examination or evaluation. Said costs shall include, but not be limited to, medical fees for examination, tests and reports, claimant's lost wages and costs associated with travel to and from said examination.

{2} b. Prompt exchange of reports. -- Reports of examination and evaluation which--a--party--intends--to introduce--into--evidence shall be promptly exchanged among the parties, and submitted to the ~~commissioner~~ director without waiting for a hearing.

{3} c. Admission of reports. -- Upon receipt by the ~~commissioner~~ director, all reports will become a part of the record, subject to objection and the right of cross-examination.

{4} d. Requests for cross-examination. -- A request for cross-examination shall be made promptly in writing to the ~~commissioner~~ director within thirty (30) days of receipt of said reports.

{5} e. Production of expert witness for cross-examination. -- When cross-examination of a reporting expert is properly requested, it shall be the responsibility of the party offering the report to procure the appearance of the witness for cross-examination. The direct and cross-examination of any expert witness shall be completed in one day and may be completed by evidentiary deposition as provided in subsection 2.14.

{6} f. Submission without hearing. -- Following the submission of reports, in the absence of a need for hearing the parties shall promptly submit the claim by mail with notice to all opposing parties.

2.9.6. In view of the difficulty in arranging for testimony by expert witnesses at hearings, parties are encouraged to obtain the testimony of experts by evidentiary deposition or by written interrogatories. The party seeking the testimony shall ensure that the transcripts of the deposition or the responses to the interrogatories are filed with the director before the expiration of the applicable time limits set out in paragraph 2.11.2 of this rule. In the event that an expert witness refuses to cooperate to provide testimony at hearing or by deposition or interrogatory, the trial examiner or the director may, based upon the totality of the circumstances, either continue the matter for a limited and specified period of time beyond the applicable time limits, if necessary, to allow for the admission of the testimony or may exclude the evidence pursuant to paragraph 2.9.3.

2.10. Stipulations.

{a} 2.10.1. General. -- Parties shall be encouraged by trial examiners and the director to enter into stipulations for the purpose of expediting procedures in a claim. A written stipulation, or an oral stipulation on the record, may be

accepted as a substitute for evidence. A stipulation may relate to a question of fact, the contents of a document, or the expected testimony of a witness. Parties may also stipulate to admission of relevant testimony which was obtained in another protest or claim.

(b) 2.10.2. Requirements. -- Before accepting a stipulation the ~~commissioner~~ trial examiner or director must be satisfied that:

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

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

(3) c. The stipulation is written or stated in clean and unambiguous terms;

(4) d. 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

(5) e. All parties to the stipulation shall indicate in writing, or orally on the record, that they understand and agree to the stipulation.

(c) 2.10.3. Withdrawal. -- Withdrawal from a stipulation shall be in writing and filed with the ~~commissioner~~ director with notice to all opposing parties. Notice of withdrawal of a stipulation must be filed prior to the date a matter is submitted for final decision.

(d) 2.10.4. Effect of stipulation. -- Unless properly withdrawn, 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.

2.11. Scheduling of Hearings; Limitations for submission; Extensions.

(a) 2.11.1. First hearing. -- The first hearing shall be scheduled in accordance with West Virginia Code, §23-5-1, and section subsection 2.6 of these rules this rule,

unless the party filing objection to the commissioner's decision, pursuant to paragraph 2.3.2, has not requested that an initial hearing be held. Whenever possible the introduction of evidence shall be completed at the first hearing and the claim shall be submitted for decision. Although a continuance of the first hearing may be granted, the parties may use the first hearing as a vehicle of discovery to aid in case preparation; also, the commissioner, The trial examiner or director may order that the initial hearing proceed for the purpose of addressing evidentiary matters, simplification of issues, consolidation of related claims, and such other matters as may aid in the disposition of the case.

(b) 2.11.2. Limitations. -- When the first hearing scheduled in a claim is continued or has been waived, there shall be no limit upon the number of hearings held subsequent thereto, provided however, that the objecting party or parties shall have completed the presentation of evidence no later than one (1) year from the date of acknowledgement of the objection. Subsequent to the completion of the presentation of evidence by the objecting party or parties, the defending party or parties shall have completed the presentation of rebuttal evidence no later than one (1) year thereafter. -- Upon written application of one or both of the parties, setting forth good cause therein, the commissioner may extend the period for presentation of evidence. time limitations set out in this rule shall govern the submission of an issue for final decision.

a. Time Limitations Governing Protests. -- Except as provided in paragraphs 2.11.2.c, 2.11.2.d, 2.11.2.e, 2.11.2.f, the following time limitations shall apply to the litigation of claims. The objecting party or parties shall have completed the presentation of evidence no later than one (1) year from the date of acknowledgement of the objection. Subsequent to the completion of the presentation of evidence by the objecting party or parties, the defending party or parties shall have completed the presentation of rebuttal evidence no later than one (1) year thereafter. Upon written application of one or both of the parties, setting forth good cause therein, the commissioner or director may extend the period for presentation of evidence.

b. No evidence previously admitted will be excluded based upon the operation of any limitation contained in this rule.

c. Protests in Litigation Over Two Years

A. For all protests which have been in litigation at the time of the effective date of this rule for more than two (2) years from the acknowledgement of protest, in contravention of the time limitations contained in subparagraph

2.11.2.a, the parties shall be given an initial additional six months from the effective date of this rule to present evidence. This extension of time shall be effective only for those protests whose time for submission of evidence has been exceeded at the time of the effective date of this rule.

B. This initial extension for the submission of evidence provided for herein shall run concurrently for both parties. Under this provision for a window for the presentation of evidence, the presentation of evidence need not be presented first by the protesting party.

C. After the close of the initial six month period, either party may have a maximum of three additional months for the submission of any rebuttal evidence. No new issue or new type of expert evidence may be submitted during this period, which is reserved exclusively for the introduction of rebuttal evidence.

D. At the conclusion of the nine month period, each such claim shall be submitted to the director for entry of a final commissioner's order. Any claim may be submitted prior to the exhaustion of the nine month period.

d. Protests in litigation less than two years but more than one year.

A. For protests which have been in litigation, as of the effective date of this rule, less than two (2) years but more than one (1) year from the acknowledgement of protest, the parties shall be given two years from the acknowledgement of protest for the submission of all evidence, as is set out in subparagraph 2.11.2.a of this rule, or the parties shall be allowed the time period set out in subparagraph 2.11.2.c of this rule, whichever is greater, for the introduction of evidence. This extension of time shall be effective only for those protests whose time for submission of evidence has exceeded one year but is less than two years at the time of the effective date of this rule.

B. The remaining time for the submission of evidence provided for herein shall run concurrently for both parties and evidence on any issue or from any type of expert may be introduced by either party; except that, the final three months for the submission of evidence shall be used for the purposes of rebuttal evidence only and no new issue or new type of expert evidence may be introduced. Under this provision for a window for the presentation of evidence, evidence need not be presented first by the protesting party.

C. At the conclusion of the additional time period provided for in part A of this subparagraph, each

such protest shall be submitted to the director for a final commissioner's decision. Any claim may be submitted prior to the exhaustion of the additional time period.

e. Protests in litigation less than one year.
-- For protests that have been in litigation, as of the effective date of this rule, for less than one year from the acknowledgement of protest, the time limitations set out in subparagraph 2.11.2.a of this rule shall be strictly enforced. The remaining time for the submission of evidence provided for herein shall run concurrently for both parties and evidence on any issue or from any type of expert may be introduced by either party; except that, the final three months for the submission of evidence shall be used for the purposes of rebuttal evidence only and no new issue or new type of expert evidence may be introduced. Under this provision for a window for the presentation of evidence, evidence need not be presented first by the protesting party.

f. Protests filed on or after April 1, 1990. --
The following time limits shall apply to protests acknowledged on or after April 1, 1990.

A. For compensability issues involving the payment of temporary total disability benefits including issues involving reopening or modification of temporary total disability benefits, the objecting party or parties shall have completed the presentation of evidence no later than six months from the date of acknowledgement of the objection. The defending party may submit evidence concurrently or may have an additional two months for the presentation of rebuttal evidence.

B. For non-medical occupational pneumoconiosis orders, the objecting party or parties shall have completed the presentation of evidence no later than six months from the date of acknowledgement of the objection. The defending party may submit evidence concurrently or may have an additional two months for the presentation of rebuttal evidence.

C. In all other matters, the provisions of subparagraph 2.11.2.a shall apply.

g. The trial examiner, the director, or the commissioner shall ensure that the foregoing time limitations shall not be exceeded. A protest shall be deemed submitted at the time the parties jointly notify the trial examiner or the director that they are prepared to submit it; or, at the time the party entitled to submit rebuttal evidence waives the right to do so and provides notification that said party is prepared to submit the matter; or, at the time that the applicable time

limit has expired unless a motion for extension of time has been made, either orally at hearing to the trial examiner or in writing and filed with the director and served upon all parties and their counsel as provided for by subparagraph 2.11.4.a.

2.11.3. Submission of evidence; Right of cross-examination. -- Submission of evidence shall always be subject to the right of the opposing party to cross-examine any expert or lay witness. Medical reports and other documentary evidence must be filed with the director and provided to the opposing party at least sixty (60) days prior to the expiration of the applicable time limit governing submission of the claim to give the opposing party the opportunity to cross-examine. Evidence submitted late which results in the inability of opposing counsel to cross-examine shall be subject to a motion to strike such evidence from consideration. Such evidence shall not, however, later be the basis for any petition to reopen based upon evidence not previously considered.

2.11.4. Extensions for Good Cause.

a. After conclusion of the applicable time limit, additional evidence will not be accepted and the claim will be deemed submitted for final determination unless a written motion is submitted to the hearing examiner or to the director stating with particularity the reasons that party seeks an extension of time. Extensions shall only be granted for good cause and good cause must be specifically stated. Motions for extension of time must be submitted prior to the expiration of the time limit unless good cause for delay can be shown.

b. Good cause for extension of time will be strictly construed. The following shall not constitute good cause for extension of the time limits set out in this rule:

A. A desire to obtain additional medical evaluations if two medical evaluations have been previously introduced by the party making the motion;

B. A desire to obtain additional medical evaluations when there have been less than two evaluations previously introduced by the party making the motion, unless there is a clear and substantial showing that such evaluations could not have been obtained within the time limits imposed by this rule;

C. A desire to obtain additional evidence unless there is a clear and substantial showing that such evidence could not have been obtained within the time limits imposed by this rule; or

D. A desire to obtain additional expert testimony unless there is a clear and substantial showing that this testimony is essential to the development of the protest and could not have been obtained at hearing or by deposition within the time limits imposed by this rule.

c. The following shall constitute good cause for extension of the time limits set out in paragraph 2.11.2 of this rule: administrative failure on the part of the commissioner or director to docket a matter in a timely manner after a timely request for hearing was made or other demonstrated administrative action or inaction which prevented a party from presenting necessary evidence.

d. Rulings on motion for extension of time by trial examiner. -- If a motion for extension of time limitations for the introduction of evidence is made to the trial examiner at hearing, the trial examiner shall evaluate the motion, determine whether good cause has been shown for the extension of time, and shall rule upon said motion forthwith. The trial examiner shall then set a specific time limit for the submission of such additional evidence, whether it be documentary or testamentary in nature. Said extension shall not exceed sixty (60) days unless the party requesting the extension makes a specific showing regarding the need for an extension greater than sixty (60) days.

e. Rulings on motion for extension of time by director. -- Any written motion for extension of time limitations for the introduction of evidence shall be made to the director, who shall evaluate the motion, determine whether good cause has been shown for the extension of time, and shall rule upon said motion within fifteen (15) days of receipt of said motion. The director shall set a specific time limit for the submission of any additional evidence, whether it be documentary or testamentary in nature. Said extension shall not exceed sixty (60) days unless the party requesting the extension makes a specific showing regarding the need for an extension greater than sixty (60) days.

f. In no event will an extension of time for presentation of evidence be granted which fails to set a specific time limitation on said extension.

2.12. Continuances.

(a) 2.12.1. General. -- Continuances, other than those upon the commissioner's own motion, shall be granted only upon agreement of the parties, or at the request of either party only for good cause shown. Whenever possible, continuances shall be requested in advance of any hearing and the opposing party shall be notified of the request. Failure

to notify the opposing party of any request for continuance in advance of hearing may result in the admission of evidence at the hearing. No continuances shall be granted in matters involving objection to the occupational pneumoconiosis non-medical ruling when such continuance is sought solely for the purpose of reviewing medical evidence, unless said evidence is relevant to the non-medical issues in the claim.

{b} 2.12.2. Criteria; strictly construed. -- The criteria for good cause shall be strictly construed to prevent unnecessary delay in the resolution of claims. Criteria cannot be established covering the elements of every possible ground for continuance constituting good cause; however, each such motion shall be considered with regard to the circumstances and facts of each case, and by application of general criteria, as follows:

{1} a. The party must act in good faith, and not merely for the purpose of delay;

{2} b. The party must have acted with due diligence respecting the reason for which continuance is sought;

{3} c. There must be established the probability that something material, relevant, and necessary, not able to be obtained otherwise, will be obtained by the continuance; and

{4} d. It must appear that a party will be deprived of due process if the motion is not granted.

~~{e}--Where the parties have completed presentation of evidence relating to an objection to the findings of the Occupational Pneumoconiosis Board, and the claimant indicates a desire to develop evidence of entitlement to a permanent total disability award payable from the second injury reserve, the claim shall be continued and scheduled for hearing upon an injury docket, subject to the provisions of Section 2.11, except that the time limitations for presentation of evidence therein shall commence running from the date such continuance is granted as opposed to the date of acknowledgement of objection.~~

2.13. Motions; objections; and communications.

{a} 2.13.1. General. -- A copy of all correspondence, motions, objections, or other writings to the commissioner or to the director regarding any issue in litigation shall be provided to all opposing parties, as provided in paragraph 2.3.5.

(b) 2.13.2. In advance of hearing. -- Except as otherwise provided in this rule, All motions shall be made in writing in advance of the hearing, insofar as grounds for such are then known, or can be reasonably ascertained or anticipated. The motion shall clearly set forth all grounds, facts, and authorities in support of the motion and shall be filed with the director. Any response by an opposing party shall be filed in writing with the commissioner director within fifteen (15) days of receipt service of the motion, and shall set forth all matters in opposition to the motion.

(e) 2.13.3. During Hearing. -- A motion may be made 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 shall not be grounds for a delay in ruling upon any motion, nor grounds for reconsideration of any ruling made, absent a written motion for reconsideration and an affirmative showing of good cause for such nonappearance by the moving party.

(d) 2.13.4. Action Upon Motions.

(1) a. Deferred ruling. -- The commissioner director 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) b. Continuances for ruling of a motion. -- The commissioner director before hearing, or the trial examiner at hearing, may continue a case set for hearing in order to investigate and rule upon a motion. Rulings on all motions shall be made within 30 days of receipt of response to such motion.

(3) c. Character of rulings. -- All rulings upon motions by the commissioner director or trial examiner shall be interlocutory.

2.14. Evidentiary Depositions.

(a) -- General. -- Although the hearing process is for the purpose of the development of evidence and should be used to the maximum extent possible, depositions may be obtained and used for evidentiary purposes. -- Evidentiary objections may be made on the record during any deposition or at the time the deposition is offered into evidence. -- Depositions shall be conducted in accordance with Section 2-7, except that a trial examiner need not be present.

(b)-- By the commissioner or by request of a party. The commissioner may take the deposition of any witness.-- A party or parties may be permitted to take the deposition of a witness, within or without the State of West Virginia, upon written request to the commissioner.-- A request for deposition shall contain:

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

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

(3)-- A brief statement of the reasons for taking the deposition in lieu of testimony at a hearing.

The taking of a deposition shall be upon reasonable notice to the deponent and all parties and their counsel of record.-- Notice shall be in writing, and shall contain the date, time and place of the deposition, as well as the name and address of each person to be deposed.-- An objection to a request for the taking of a deposition must be filed in writing with the commissioner within fifteen (15) days of receipt of the request for deposition served by the requesting party.-- The cost of court reporter services shall be borne by the commissioner.-- The cost of witness fees and expenses shall be borne by the respective proponents of the witness, as provided in Section 2-9(b)-(3).

(c)-- 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.-- 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.

(d)-- Telephone Depositions.-- By agreement of the parties, depositions may be taken by telephone conference call in like manner as if taken in person, in accordance with these rules.-- Costs incurred in the taking of telephone depositions shall be borne as appropriate under sub-sections (b) or (c) above.

2.14.1. General. -- Depositions may be obtained and used for evidentiary purposes only. Depositions shall be conducted in accordance with the provisions of subsection 2.7, except that a trial examiner need not be present.

2.14.2. Depositions by a party.

a. Depositions may be obtained from any lay or expert witness by agreement between the parties and shall be encouraged for the purpose of expediting the litigation of claims except as provided elsewhere in this rule. No authorization shall be required for evidentiary depositions conducted pursuant to an agreement between the parties. The party seeking said deposition shall file a notice of the deposition with the director, who shall cause it to be made a part of the record.

b. The members of the occupational pneumoconiosis board shall not be subject to deposition. The testimony of the members of said board shall be taken exclusively at the hearings of said board.

c. In the event that agreement from the opposing party cannot be obtained, the party seeking the deposition may request authorization for the taking of said deposition by filing a motion with the director which shall be considered pursuant to subsection 2.13. A motion for deposition shall set out with specificity the following information:

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 statement of the matters on which the person is to be examined;

C. A statement as to whether the testimony or evidence is necessary to the development of the matter and whether said testimony or evidence can be otherwise obtained within the time limits set out in paragraph 2.11.2 of this rule.

2.14.3. Depositions by the commissioner. -- The commissioner may take the deposition of any witness.

2.14.4. Notice. -- The taking of a deposition shall be upon reasonable notice to the deponent and all parties and their counsel of record, and in no event shall depositions be taken with less than twenty (20) days notice unless agreed to by the opposing party. Whether taken by agreement of the parties, with authorization by the director, or by the

commissioner, notice shall be made in writing and shall contain the date, time and place of the deposition, as well as the name and address of each person to be deposed. Parties may, upon making appropriate arrangement with the director, utilize hearing rooms of the Workers' Compensation Fund for the taking of evidentiary depositions.

2.14.5. Objections. -- Objections to the relevance or materiality of evidence shall be made on the record during any deposition. Evidentiary objections may also be made, provided that the proceedings under this rule do not require strict application of the rules of evidence. Objections to testimony will be considered when the record of the claim is reviewed after submission for a final decision. To obtain review of the objections prior to submission, the party seeking such review may file a motion which shall be considered pursuant to subsection 2.13 of this rule.

2.14.6. Telephone Depositions. -- Telephone depositions may be taken by telephone conference call in like manner as if taken in person, in accordance with these rules. Telephone depositions may be taken by agreement of the parties or upon motion to the director which sets out the reason a telephone deposition is sought. Costs incurred in the taking of telephone depositions shall be borne as provided under paragraphs 2.14.8 and 2.14.9, below.

2.14.7. Subpoenas. -- Subpoenas for evidentiary depositions may be obtained in the same manner as for hearings, pursuant to paragraph 2.9.2 of this rule.

2.14.8. Witness Fees. -- The commissioner shall pay the reasonable cost of any witness fees for evidentiary depositions where such depositions are used in lieu of testimony at hearing, in accordance with subparagraph 2.9.2.c of this rule, provided that the commissioner may establish a maximum fee schedule for the payment of expert witness based upon either a maximum hourly rate or upon a maximum total payment per deposition.

2.14.9. Costs. -- The commissioner shall pay reasonable court reporting costs associated with the taking of evidentiary depositions where such depositions are used in lieu of testimony at hearing, provided that the commissioner shall establish a maximum schedule of fees to be paid for said costs. Said fee schedule shall be based upon the court reporting costs associated with the recording and transcription of testimony at hearing. The commissioner may require parties to utilize court reporting services for depositions which are utilized by the commissioner for hearings, if such requirement would not unduly delay the taking of testimony and would contain costs associated with the taking of such depositions.

2.14.10. The party taking any deposition shall be responsible for the filing of the transcript with the director within twenty (20) days of receipt thereof.

2.14.11. Use. -- Use of any deposition so taken shall be subject to objection as in circuit court, provided however that the rules of evidence shall not be strictly applied to the admission of testimony. The transcript shall be made a part of the record, subject to any written objection to its admission. The director or 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 to impose an undue burden or hardship upon the opposing party.

2.15. Non-appearance of party.

{a} 2.15.1. General. -- Absent proper service of subpoena, no party is required to appear at a hearing, except that it shall be the responsibility of an objecting party to prosecute their objection. The non-appearance of a party shall not prevent an appearing party from presenting evidence at a hearing.

{b} 2.15.2. Action when a party does not appear

{1} a. Objecting party. -- If an objecting party does not appear at a hearing to prosecute objection, then upon the motion of an opposing party, or upon the direction of the trial examiner, the objection may be dismissed for failure to prosecute, or the claim may be submitted for decision upon the existing record; provided, before such action shall become final, the nonappearing party shall be given written notice that they have fifteen (15) days within which to show good cause to the commissioner in writing why such action should not become final.

{2} b. Non-objecting party.

{A} A. A subpoena requiring the presence of a non-objecting party at a hearing for cross-examination shall provide that such party's failure to appear, absent a showing of good cause, will result in one of more of the following actions:

{1} (a). Suspension of termination of the payment of benefits;

{2} (b). Submission of the claim for final determination upon the existing record;

{3} (c). A determination that an overpayment of benefits has occurred which may be recovered as permitted by law; or

{4} (d). When personal service of a subpoena has been obtained, institution of attachment proceedings as for contempt in circuit court.

{B} B. Upon failure of a non-objecting subpoenaed party to appear, the director shall give written notice to such party that they have fifteen (15) days within which to show good cause to the director in writing why one or more of the aforementioned sanctions should not be imposed.

2.16. Dismissal of Party.

When the commissioner determines that a party is not a proper party to the claim, such party shall be dismissed.

2.17. Litigation of second injury life award claims.

2.17.1. Procedure for filing for permanent total disability awards; time limitations. -- After the effective date of this rule, when a claimant seeks to convert a permanent partial disability award to a permanent total disability award, including a second injury life award, the claimant shall file a written petition for a permanent total disability award to the Claims Benefits Division of the Workers' Compensation Fund or such other division as the commissioner may later designate. The petition shall be treated as a reopening for purposes of the application of any time limits. The petition shall be reviewed by the Permanent Total Disability Evaluation Unit, or any other administrative unit which is later established for the review of such applications. After the completion of said review, including the obtaining, when appropriate, of any independent medical, vocational or rehabilitation evaluations on behalf of the commissioner, the commissioner will issue a protestable decision granting or denying the petition for permanent total disability benefits and, if granted, setting out the party chargeable for said award, or if the commissioner determines that the award should be charged to the second injury reserve of the surplus fund, the decision shall so find. The parties may object to or request reconsideration of said decision, as provided in subsection 2.3, and thereafter shall have the full two years for completion of litigation of said claim, as provided for in subsection 2.11.2.

2.17.2. Defense of Surplus Fund.

a. When the commissioner has administratively determined that the claimant is not due an award from the second injury reserve of the surplus fund, and if the claimant

or the employer protest said order, the commissioner shall determine whether the second injury reserve of the surplus fund should be represented in the hearing on the protest.

b. The commissioner shall seek legal representation from the office of the attorney general or appropriate other source to represent the commissioner or the surplus fund in any protest regarding permanent total disability benefits wherein the commissioner determines that insufficient evidence has been submitted to charge the second injury reserve of the surplus fund for a second injury life award.

2.17.3. Docketing of hearings involving second injury life awards -- When a petition for a permanent total disability award arises out of a permanent partial disability based upon the findings of the Occupational Pneumoconiosis Board, the claimant shall follow the procedure set out in subsection 3.1. Any protest to a second injury life award, including any claim in which the first order was a permanent partial disability resulting from occupational pneumoconiosis, shall be scheduled on the injury claim docket, and not before the occupational pneumoconiosis board, unless the claimant asserts that the entire total disability is attributable to occupational pneumoconiosis. Any permanent total disability award which is not a second injury award or which is based solely upon occupational pneumoconiosis shall be scheduled for hearing before the occupational pneumoconiosis board.

2.18. Litigation of group or class claims.

Claims arising out of substantially the same factual situation shall be considered group claims for procedural purposes. When an objection is filed to the commissioner's decision in any claim which may be considered a part of a group of claims involving substantially similar facts, said objection shall include notice of the group or class nature of the claim. In the absence of such notice, any party to the claim may notify the director of the existence of such group claims. When such notice is received, the director shall hold a conference on said matter(s) for the purpose of designating the claims to be included in the group or class, narrowing the factual and legal issues, establishing a schedule for the submission of evidence and developing stipulations. Evidence admitted in one claim shall be deemed admitted, if relevant, in all claims which are members of the group of claims so designated.

2.19. Evidence for reopening of claims.

All evidence which has been admitted into the claim record on or before submission of the claim for final determination shall be considered in the final determination after the matter is submitted for decision. Said evidence may not be used as the basis for a reopening of the claim at a later date, as said evidence does not constitute a fact or facts not previously considered by the commissioner in a former finding.

2-17-§85-7-3. Severability.

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

TITLE 85
 WEST VIRGINIA PROCEDURAL RULES
 DEPARTMENT OF HEALTH AND HUMAN RESOURCES
 BUREAU OF WORKERS' COMPENSATION

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AREA CODE 304

April 26, 1990

CRRR P 508 909 622

Ms. Emily A. Spieler, Commissioner
Workers' Compensation Fund
601 Morris Street
Charleston, WV 25301

Re: Title 85, West Virginia
Procedural Rules
Department of Health
and Human Services,
Bureau of Worker's Compensation,
Series 7, Hearings

Dear Commissioner Spieler:

I have received your letter of April 5, 1990, inviting me to submit comments with regard to the Proposed Revision of Procedural Rules, Series 7, Hearings, which were filed with the Secretary of State's office on March 28, 1990, and which have a comment period to May 1, 1990.

In your letter of April 5, 1990, you stated that the proposed rules were procedural in nature. As to their procedural nature, I have no objections to the proposals. However, there are certain parts of the proposed rules that are not procedural in nature but are substantive in nature, controlling and affecting the rights of the parties in matters before the Commissioner. Therefore, I do not feel that the substantive part of the rules can be dispensed with without public hearings and proper comment periods or testimony periods with regards to those portions that are substantive in nature.

Further, without statutory changes by the legislature, it appears that certain sections of the proposed rules are beyond the Scope of the Act and the scope of your authority as a Commissioner. Since I feel that certain portions of the proposed rules filed with the Secretary of State on March 28, 1990, are outside the Scope of the Act, I herewith file the following objections:

Ms. Emily A. Spieler, Commissioner
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As reflected by the attached "Exhibit A", I address these comments to proposed Rules 2.2, 2.11, and 2.17 on the basis that they are outside the Scope of the Act, the scope of the Commissioner's authority, and that they substantially affect the rights of the parties.

Code 23-5-1 provides generally for a protest to be filed to a ruling of the Commissioner. Code 23-5-1 also generally provides for hearings to be held. There is no provision within the Act, itself, to provide authority for procedural rules restricting the right to hearings and placing time limitations upon those rights to hearings, other than reasonableness of time periods in the scheduling of the hearings.

To place a strict time limitation upon the processing of claims would serve to deny the parties the right to properly develop their cases and present evidence. Code 23-5-3(a) provides that no benefits are to be denied to the claimant because of legal technicalities. Proposed Rules 2.2 and 2.11 have the effect of denying rights on the basis of legal technicalities. It is impossible to process claims within the time frame suggested and mandated by these rules. The ultimate effect would be to deny the rights of the parties in these claims.

Again, I would like to suggest that internal rules or policies within the Fund be adopted by the Commissioner for the docketing of hearings and the control of the docketing of hearings, so as to provide parties with an opportunity to be able to have their cases heard in a timely manner. Though progress has been made in this regard, many problems still exist, causing delays and time conflicts. The parties would best be served by the Fund internally structuring the docketing of claims so that once a party requests a hearing the docketing of the claim could be carried out as expeditiously as possible to allow the prosecution of the claim in a timely manner. Definitely more timely than it has been carried out in the past. Another shortcoming of the proposed rules is the unavailability of medical witnesses. It is difficult at times to have a medical witness available and the proposed rules do not address the extension of time or the granting of continuances in this situation. Nevertheless, the restriction of processing a claim within the one-year limitation is impossible, impractical, and outside the Scope of the Act. Therefore, I would suggest that proposed rules 2.2 and 2.11 be deleted from the Series 7 proposed rules.

In regard to proposed Rule 2.17 dealing with second injury life award claims, it is my position that this process is definitely outside the jurisdiction of the Commissioner and exceeds the Scope of the Act.

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Code 23-5-1 provides for the claimant to file a protest to the Commissioner's ruling with regards to an award in a claim. The Supreme Court has held in Bowman v. WCC, 140 S.E.2d 708, 709 (1966), that a claim must be considered in its entirety and cannot be regarded as divisible in the sense of being barred by the provisions of Code, 1931, 23-4-16, as amended, in relation to a disability of one character, but at the same time, alive and litigable in relation to another disability arising from the same injury. Additionally, the Supreme Court has held in Cline v. WCC, 156 W.Va. 647, 196 S.E.2d 296 (1973), that the Court will not permit denial of benefits to a claimant where the evidence clearly demonstrates entitlement. There is no provision in the Act for the support of Proposed Rule 2.17. Therefore, the proposed Rule 2.17 is outside the Scope of the Act with regards to not permitting the claimant to develop his case in the primary case to its fullest extent and submitting his evidence to the Commissioner in a proper sense during a period of litigation under Code 23-5-1. Also, there is not a provision in the Act for the Commissioner to become a party litigant, as proposed by Rule 2.17.2, Defense of Surplus Fund. It was not intended by the Legislature to provide the Commissioner authority to become a party litigant in a claim. Therefore, Rule 2.17.2 is clearly outside the Scope of the Act. Rule 2.17 should be deleted from the proposed rules.

As counsel for several thousand claimants, I respectfully object to the adoption of Rules 2.2, 2.11, and 2.17 in their entirety, for the above reasons. I move that they be deleted from the proposed rules in their drafted version on the basis that they are outside the Scope of the Act and that the Commissioner has no jurisdiction to place such restrictive rules upon the processing of the claims and the submission of evidence.

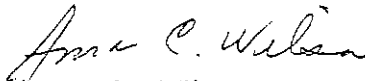
As claimants' counsel, I would be very much in favor of hearing rules that would expedite the processing of the claims by proper docketing of the cases in a timely manner, as the Commissioner is attempting to do and has attempted to do since August 1989, by internal policy. It is my position that the Commissioner has the authority by statute to make the internal policies which have been made regarding the docketing of cases. I further believe that the Commissioner does not have the statutory authority to make rules, as proposed by Rules 2.2, 2.11, and 2.17, and it is my position that such attempt is outside the Scope of the Act.

Since my comments are directed to certain portions of the rules as being outside the Scope of the Act, I am also filing a copy of these comments with the Secretary of State, requesting that he make them

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available to the legislative rule making committees in the event these rules are presented in their final form to the Secretary of State for filing. Therefore, by a certified return-receipt copy, I am forwarding you a copy and a second copy to the Secretary of State for filing.

Very truly yours,


Amos C. Wilson

ACW:sjp/1

✓cc: Secretary of State

Enclosures

2.2 Right to hearing - Upon the timely filing of an objection, and subject to the limitations of this section, any party to a claim shall have a right to a hearing concerning any issue of fact or law upon which the Commissioner has made a determination and entered a protestable ruling.

2.11 Hearings; Limitations for Submission; Extension

2.11.1 First Hearing

2.11.2 Limitations

- 2.11.2a Time limitations governing protests
- 2.11.2b No evidence previously admitted will be excluded based on the operation of these rules
- 2.11.2c Protests in litigation over 2 years
- 2.11.2d Protests in litigation less than 2 years but greater than 1 year
- 2.11.2e Protests in litigation less than 1 year
- 2.11.2f Protests filed on or after June 1, 1990
- 2.11.2g The trial examiner shall ensure that the limitations are not exceeded

2.11.3 Submission of evidence; right of cross-examination

2.11.4 Extensions for good cause

- 2.11.4a At end of time, additional evidence will not be accepted
- 2.11.4b Good cause strictly construed: subparts explain what is NOT good cause
- 2.11.4c Explanation of what IS good cause
- 2.11.4d Rulings on motion for extension of time by trial examiner
- 2.11.4e Rulings on motion for extension of time by Director
- 2.11.4f All time extensions must set a specific period.

2.17 Litigation of second injury life award claims

2.17.1 Procedure for filing for PTD awards; time limitations

2.17.2 Defense of Surplus Fund

- 2.17.2a Commissioner shall determine if 2nd injury fund shall be represented
- 2.17.2b Commissioner shall seek attys from atty general to defend 2nd injury fund

2.17.3 Docketing of hearings involving second injury life awards