

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #1

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2005 APR 13 P 2:57

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: §23-1-1a(j)(3), 23-2-17

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 7

TITLE OF RULE BEING AMENDED: Rules for Selected Hearings

IF NO, SERIES NUMBER OF RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

DATE OF PUBLIC HEARING: May 17, 2005 TIME: 1:00 p.m.

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

COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH X
COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

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

T.J. Obrokta
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304
Fax # (304) 926-5372

T.J. Obrokta
Authorized Signature

4.80

April 6, 2005

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

Re: Proposed Rule
Title 85, Series 7
"Rules for Selected Hearings"

Dear Secretary Ireland:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. The Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 7 for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,



Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 85, Series 7: Rules For Selected Hearings

Type of Rule: X Legislative Exempt Interpretive Procedural

Agency Workers' Compensation Commission

Address 4700 MacCorkle Ave. S.E.
Charleston, WV 25304

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

Proposed changes since the last filing for this rule address vesting of authority for selected hearings upon termination of the Workers' Compensation Commission (commission). The above estimates are based on the assumption that the rule changes become effective in the current fiscal year (FY'05). Subject to the governor issuing the proclamation set forth in chapter twenty-three, article 2C of the Code of West Virginia that terminates the Workers' Compensation Commission, Article Two hearings involving collection of Old Fund assets shall be administered by the insurance commissioner and collection of New Fund assets will not be subject to this rule. Transferring responsibilities for Old Fund employer Article Two hearings to the insurance commissioner will result in a change in total costs for FY'06 that cannot be reasonably estimated or pro-rated. These costs cannot be determined currently because there is no available analysis of historical records of these costs on which to base an estimate.

3. Objectives of this rule:

The purpose of this rule is to establish a hearing and review process to consider article two petitions for hearings resulting from employers' requests regarding primarily workers' compensation classification and merger/succession issues in Old Fund matters.

Rule Title: Series 7 Rules For Selected Hearings

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that there will be no economic impact on State Government from the proposed rule changes.

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

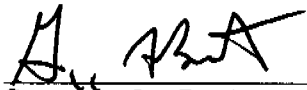
It is expected that there will be no impact from the rule changes.

C. Economic Impact on Citizens/Public at Large.

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

Date: April 11, 2005

Signature of Agency Head or Authorized Representative



Gregory A. Burton
Executive Director, Workers' Compensation Commission

**SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 7
Rules for Selected Hearings**

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

This rule is amended to address the termination of the Commission and to transition certain activities to Office of the Insurance Commissioner for the purpose of processing existing Article Two matters involving the collection of Old Fund assets. The rule amendments also recognize that, in a private insurance setting, the rule will have no force and effect over the collection of New Fund assets or other matters involving private carriers.

FILED

TITLE 85
PROCEDURAL RULE
WORKERS' COMPENSATION ~~DIVISION~~ COMMISSION

2005 APR 13 P 2:58

SERIES 7
RULES FOR SELECTED HEARINGS

OFFICE WEST VIRGINIA
SECRETARY OF STATE**§85-7-1. General.**

1.1. Scope. -- This procedural rule is intended to set forth the procedures for administrative hearings which are conducted pursuant to the West Virginia Administrative Procedures Act, W. Va. Code, §29A-5-1 et seq. While not all of the hearings conducted by the ~~commissioner~~ commission are held pursuant to that act, ~~see W. Va. Code, §§23-1-13 and 29A-5-5,~~ those hearings that are subject to the act will be conducted in accordance with this rule. This procedural rule does not affect any matter residing in the jurisdiction of the Office of Judges under the provisions of W. Va. Code §23-5-1 et seq.

1.2. Authority. — ~~W. Va. Code, §§21A-2-6(1), 6(2) & 6(14); 21A-2-19; 21A-3-7(b) & 7(e), 23-1-1, 23-2-9; 23-2-15; 23-2-17; 23-3-1; 23-4A-6; 23-4B-6; 23-4C-4; and 29A-5-1 et seq. Pursuant to W. Va. Code, §21A-3-7(e), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under W. Va. Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary. W. Va. Code §23-2-17. Pursuant to W. Va. Code Section §23-1-1a(j)(3), rules adopted by the Workers Compensation Board of Managers are not subject to legislative approval as would otherwise be required under W. Va. Code Section §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.~~

1.3. Filing Date. -- ~~December 11, 2001~~

———1.4. Effective Date. -- ~~January 10, 2002.~~

§85-7-2. Definitions.

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

2.1. "Act" means the workers' compensation laws of the State of West Virginia which are codified at chapter twenty-three of the Code of West Virginia.

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

~~2.3. "Commissioner" means the commissioner of the bureau of employment programs pursuant to W. Va. Code, §§21A-2-1 and 21A-2-12 & 13. "Executive Director" means the executive director of the West Virginia Workers' Compensation Commission pursuant to section one-b, article one, chapter twenty-three of the West Virginia Code.~~

2.4. "Commission" means the West Virginia Workers' Compensation Commission as provided for by section one, article one, chapter twenty-three of the West Virginia Code.

~~2.4. "Division" means the workers' compensation division within the bureau of employment programs as provided for by W. Va. Code, §§21A-1-4 and 23-1-1 et seq.~~

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

2.56. "This rule" means the present procedural rule which is designated in the caption hereof as title 85, series 7.

§85-7-3. Article Two Decisions.

3.1. "Article two decision or action," means a decision or action taken under the provisions of article two, chapter twenty-three of the West Virginia Code.

3.2. Language. On and after the effective date of this rule, each written article two decision or action shall include language to inform the employer that it is afforded the right to file a request for reconsideration of the decision or action.

3.3. Requirement. Each employer who desires to dispute an article two decision or action is required to file a complete and timely request for reconsideration as a condition precedent to filing a petition for an article two hearing under the provisions of W. Va. Code §23-2-17. No request for reconsideration is required to be filed in petitions for relief filed under the provisions of W. Va. Code §23-2-15.

3.4. Time limits. A request for reconsideration shall be filed with the division within thirty (30) days of the employer's receipt of notice of the disputed ~~division's~~ commission's decision or action or, in the absence of such a receipt, within sixty days of the date of the ~~division's~~ commission's making such disputed decision or taking such disputed action. Such time limitations are a condition of the right to litigate the decision or action and are jurisdictional.

3.5. Contents of the request for reconsideration. In its request for reconsideration, the employer shall clearly identify the decision or action disputed. The employer shall also clearly identify the bases upon which the employer disputes the decision or action.

3.6. Review. Upon the filing of an employer's request for reconsideration, the ~~division~~ commission shall review the bases for the request. Such a review may include a meeting with the employer, a review of the employer's records, or any other process calculated to provide the ~~division~~ commission with the relevant information necessary to perform its review. After reviewing the request,

the ~~division~~ commission shall enter its final decision.

3.6.1. The ~~division~~ commission is required to enter a final decision or enter into an extension agreement with the employer within one hundred-twenty (120) days from the date the employer's request for reconsideration is filed.

3.6.2. The ~~division~~ commission and the employer may enter into a written extension agreement to provide no more than an additional sixty (60) days for the division to enter a final decision.

3.6.3. The ~~division's~~ commission's -failure to enter a final decision within the initial time period or extended time period, where applicable, triggers an employer's right to file a petition for hearing under the provisions of W. Va. Code §23-2-17.

3.7. Effect of filing. The filing of a timely and complete request for reconsideration of a written decision or action of the ~~division~~ commission stays the tolling of the time limitations for filing a petition for hearing under the provisions of W. Va. Code §23-2-17 until the final decision is issued.

3.8. Example. The employer receives an article two decision or is notified of an article two action. The employer desires to dispute the decision or action. The employer must file a request for reconsideration of the decision or action and await the ~~division's~~ commission's final decision in the matter, the expiration of the one hundred-twenty (120) day period for the ~~division~~ commission to issue a final decision, or the expiration of such additional written time extension agreement as limited by this rule. The final decision may be contested under the process provided in W. Va. Code §23-2-17. Should the employer fail to file a timely and complete request for reconsideration, then the ~~division's~~ commission's decision or action becomes final.

3.9. Conversion. On and after the effective date of this rule, a petition for hearing filed under the provisions of W. Va. Code §23-2-17 shall be converted to a request for reconsideration when there has not been a previous filing of a request for reconsideration of the disputed decision or action. The ~~division~~ commission shall notify the employer of this conversion.

3.10. Petitions for hearing. All article two petitions for hearing shall be filed with ~~the Office of Judges or such other~~ a hearing examiner designated by the executive director and, upon termination of the commission, the insurance commissioner.

§85-7-4. Administrative Hearings; Notice; and Place.

4.1. All administrative hearings conducted pursuant to this rule will be held in accordance with the provisions of W. Va. Code, §29A-5-1 et seq., and with the provisions of this rule. In any particular case, any special conditions which are set forth in the Act or in other rules promulgated by the commissioner and the ~~compensation programs performance council~~ Board of Managers and which are applicable to that case will be adhered to during administrative hearings in lieu of any contrary provision in this rule.

4.2. Unless waived by all the parties to the hearing, all hearings shall be preceded by at least ten (10) days written notice. The notice shall be given either by personal delivery thereof to the person or to the entity to be notified or by depositing such notice in the certified United States mail, postage prepaid, return receipt requested, in an envelope addressed to such person or other entity at the last known address of such person or other entity. Proof of the giving of notice in either such manner may be made by the affidavit of any person over eighteen years of age, naming the person or other entity to which or to whom such notice was given and specifying the time, place and manner of the giving thereof. If certified mail is used, then a copy of the return receipt shall be attached to the proof of notice.

4.3. Notice of the hearing and service of any document or order shall be upon the parties of record except that any party who is represented by an attorney shall be deemed to have designated that attorney as the proper recipient of all such notices, documents, or orders and service upon that attorney will be the equivalent for all purposes as service upon the party. Notice shall be complete if the written notice is personally tendered to the intended recipient and is either accepted or refused by that recipient. Similarly, notice shall be complete if the written notice is sent by certified mail, return receipt requested, to the recipient and the return receipt shows that it was either accepted by a person at the last known address or was refused by a person at the last known address.

4.4. In any instance where any form of notice, including one arising under subsection 4.2 of this rule or one contained in any order or document, the time period will begin to elapse with the first day following the date of the notice, order, or document. This rule is applicable whether the notice is delivered personally or served by mail.

4.5. The subsection 4.2 notice shall contain the date, time, and place of the hearing and a short and plain statement of the matters asserted. If the ~~division~~commission is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application by a party a more definitive and detailed statement shall be furnished.

4.6. The hearing shall be held in the county selected by the ~~division~~commission.

§85-7-5. Parties and Conduct of Hearings.

5.1. At the hearing, an opportunity shall be afforded all parties to present evidence and argument with respect to the matters and issues involved. Argument may be restricted to a presentation in written form. All of the testimony and evidence at the hearing shall be reported by stenographic notes and characters or by mechanical means. All rulings on the admissibility of testimony and evidence shall also be reported. The ~~division~~commission shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in

consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. All reported testimony and evidence at a hearing shall be transcribed, and a copy thereof furnished to the party upon its request. The ~~division~~commission shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence and such transcription shall be accomplished with all dispatch.

5.2. Evidentiary depositions may be taken and read as in civil actions in the circuit court of this state.

5.3. Except to the extent required by statute or by this rule, all hearings under this rule will be conducted in accordance with the "Rules of Civil Procedure for Trial Courts of Record," "Trial Court Rules for Trial Courts of Record," and "Local Rules for Kanawha County Civil Courts" as those rules would apply to a trial court sitting without a jury.

5.4. All hearings shall be conducted in an impartial manner. The commissioner, the executive director, inspectors, and every hearing officer appointed by the commissioner shall have the power to administer oaths and affirmations, certify official acts, take depositions, rule upon offers of proof and receive relevant evidence, regulate the course of the hearing, hold conferences for the settlement or simplification of the issues (subject to the limitations stated elsewhere in this rule) by consent of the parties, dispose of procedural requests, motions, or similar matters, and take such other actions as are authorized by this rule.

5.5. During a hearing, irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The "Rules of Evidence" as applied in civil cases by a court sitting without a jury shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The hearing officer shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record, but exceptions to rulings by the hearing officer shall not be made. Any party to any hearing may vouch the record as to any excluded testimony or other evidence provided that the hearing officer may elect to require that the excluded testimony be submitted in written form following the hearing.

5.6. All evidence, including papers, records, agency staff memoranda and documents in the possession of the ~~division~~commission, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies of excerpts or by incorporation by reference. In all cases, copies of orders, proceedings, or records in the offices of the division shall be equal to the original in evidence.

5.7. Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

5.8. All witnesses who testify during a hearing shall first be subject to oath or affirmation and any testimony submitted by deposition shall show on the face thereof that the witness was so qualified.

5.9. The hearing officer may take notice of judicially cognizable facts. All parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

5.10. Burden of proof. There is a presumption that the ~~division's~~commission's decisions or actions are valid. The party contesting the ~~division's~~commission's decisions or actions has the burden of overcoming this presumption by satisfactory proof.

§85-7-6. Correction of the Record.

Upon motion in writing served by any party as notice may be served pursuant to subsection 4.2 of this rule and therein assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the hearing officer shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing or shall direct that the transcript be corrected and revised in the respects designated by the hearing officer, so as to make it conform to the whole truth.

§85-7-7. Subpoenas.

7.1. The hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents, and testimony. All subpoenas and subpoenas duces tecum shall be issued in the name of the hearing officer or other authorized official, but any party requesting their issuance must see that they are properly served. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay service fees and fees for the attendance and travel of witnesses.

7.2. Every subpoena or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail. But a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail. If service is by mail, then the five (5) day notice period shall not begin to run until the date the subpoena or subpoena duces tecum is received by the person or entity subject thereto as shown by the date on the return receipt.

7.3. Any person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this state. All such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued.

7.4. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held, or the circuit court in which the subpoena duces tecum was served, or the judge of either such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such court, under the West Virginia Rules of Civil Procedure for Trial Courts of Record, could grant, and for any of the same reasons, with respect to a subpoena duces tecum issued from either such court.

7.5. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the commissioner, or any ~~division~~ commission employee designated by the commissioner, or hearing officer appointed by the commissioner, shall compel obedience by attachment proceedings for contempt of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein.

7.6. The issuance of a subpoena duces tecum will be refused only in an instance when there is good reason to believe that the subpoena power is being abused. All subpoenas and subpoenas duces tecum will state on their face the name of the party who requested it.

§85-7-8. Discovery.

Discovery shall be engaged in only with the consent of the hearing officer or, if a hearing officer has not yet been assigned, with the consent of the commissioner or the executive director. All discovery requests will be submitted to the appropriate official at the same time as the discovery request is served

upon the other party. If the official determines that the requested information is relevant and material to the issues to be heard and not unduly burdensome, the official will permit the discovery and set a reasonable time frame for the disclosure of the information. Determination of a reasonable time frame will be premised upon the nature and scope of the information requested and the date on which the hearing is scheduled. The official shall attempt to avoid continuing a previously scheduled hearing.

§85-7-9. Hearing Officers.

9.1. Every hearing officer appointed by the commissioner to conduct a hearing under this rule shall be an attorney licensed to practice law in this state.

9.1.1. The commissioner may delegate the authority necessary for the conduct of proceedings under this rule to the chief administrative law judge of the office of judges. The chief administrative law judge is authorized to assign attorneys from the office of judges as hearing officers.

9.1.2. The commissioner retains the right to appoint other attorneys as hearing officers for purposes of conducting specific hearings under this rule.

9.2. The hearing officer is authorized to receive and rule upon any procedural matter arising before, during, or after a hearing.

9.3. Requests for continuances by a party shall not be granted as a matter of course, but only upon a showing of good cause.

§85-7-10. Concluding the Hearing.

10.1. At the conclusion of the hearing, the parties shall be permitted to file proposed findings of fact, conclusions of law, and such legal briefs or memoranda as they wish. The parties shall be permitted seven (7) days to file such items which filings shall be concurrent. The parties shall be permitted three (3) days to respond to the filing of any other party. No further argument shall be permitted.

10.2. Thereafter, the hearing officer will prepare a report and recommendation which shall contain proposed findings of fact and conclusions of law as suggested by the hearing officer for the commissioner's approval. The parties to the hearing shall then be permitted seven (7) days in which to file objections or comments upon the report and recommendation and three (3) more days to respond to each others' objections and comments. Thereafter, the commissioner shall decide whether to accept the report and recommendation, to reject it, to modify it, or to remand the matter to the hearing officer for further proceedings or upon other instructions. The commissioner retains the right to review any and all proposed findings of facts against the record and to disagree therewith provided that the commissioner states the basis for the disagreement in the final order. The commissioner shall render either a final order or an interlocutory order as the decision may require in which the commissioner accepts in whole or in part the proposed findings of fact and conclusions of law submitted by the hearing officer and, to the extent that the commissioner rejects or modifies the report and recommendation of the hearing officer, the commissioner shall furnish his or her own findings of fact and conclusions of law.

10.3. A copy of the final order or decision of the commissioner shall be served upon each party and the party's attorney of record, if any, either in person or by certified mail.

10.4. All appeals from the final order or decision of the commissioner shall be taken pursuant to W.Va. Code, §29A-5-4.

§85-7-11. Pending petitions.

Petitions for hearing filed under the provisions of W. Va. Code §23-2-17, prior to the effective date of this rule, for which no hearing has been held shall be transferred to hearing officers designated by the commissioner under this rule.

§85-7-12. Termination of the Commission

Upon termination of the Commission, this procedural rule shall be administered by the insurance commissioner for the sole purpose of processing then existing Article Two matters, or any subsequently filed Article Two matters, which involve collection of Old Fund assets as defined in West Virginia Code §23-2C-2(1). This rule shall have no force and effect over the collection of New Fund assets or any other matters involving private carriers and their insureds.

§85-7-123. Severability.

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