

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN III
ADMINISTRATIVE LAW DIVISION**

Form #5

Do Not Mark In This Box

FILED

2001 DEC 11 P 12:08

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

W. Va. Workers' Compensation Division
AGENCY: Bureau of Employment Programs TITLE NUMBER: 85
CITE AUTHORITY: 21A-2-6(1), -6(2) & -6(14); 21A-2-19; 21A-3-7(b) & -7(c); 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.

RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

§§21A-2-6(1), -(2) & (14); 21A-2-19; 21A-3-7(b) & -(c); &23-1-1

AMENDMENT TO EXISTING RULE: YES X NO I

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: 85 C.S.R. 7 "Rules for Selected Hearings"

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS January 10, 2002


Authorized Signature

Robert J. Smith, Commissioner,
Bureau of Employment Programs

Bob Wise
Governor

Robert J. Smith
Commissioner



West Virginia Bureau of Employment Programs

• Job Service • Labor Market Information
• Unemployment Compensation • Workers Compensation
an equal opportunity/affirmative action employer

December 11, 2001

The Honorable Joe Manchin III
Secretary of State
Building 1, Suite 157K
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Re: Final Filing
Procedural Rule
Title 85, Series 7
"Rules for Selected Hearings"

Dear Mr. Secretary:

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

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 of the Governor, the Commissioner of the Bureau of Employment Programs is empowered to promulgate rules without the consent or approval of a department secretary.

Thank you very much for your assistance in this matter.

Very truly yours,

Robert J. Smith
Commissioner

RJS/RBS/nwd

Enclosure

Legal Services Division

One Players Club Drive, Third Floor, Charleston, West Virginia 25311-1638 • www.state.wv.us/bep
Telephone 304.558.6100 • Facsimile 304.558.6101

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

2001 SEP 23 P 1:42

WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

W. Va. Workers' Compensation Division
AGENCY: Bureau of Employment Programs TITLE NUMBER: 85
RULE TYPE: Procedural CITE AUTHORITY: 21A-2-6(1), -6(2) & -6(14); 21A-2-19; 21A-3-7(b) & -7(c); 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.
AMENDMENT TO AN EXISTING RULE: YES X NO
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 7
TITLE OF RULE BEING AMENDED: Title 85 "Rules for Selected Hearings"
IF NO, SERIES NUMBER OF RULE BEING PROPOSED:
TITLE OF RULE BEING PROPOSED:

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON October 30, 2001 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Randall B. Suter, Senior Counsel

Workers' Compensation Division

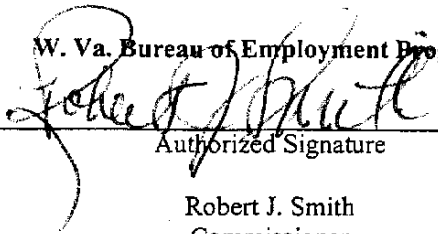
Executive Office

Box 3824, 4700 MacCorkle Avenue, S.E.

Charleston, WV 25338

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

W. Va. Bureau of Employment Programs


Authorized Signature

Robert J. Smith
Commissioner

ATTACH A BRIEF SUMMARY OF YOUR PROPOSAL

Bob Wise
Governor
Robert J. Smith
Commissioner



West Virginia Bureau of Employment Programs

• Job Service • Labor Market Information
• Unemployment Compensation • Workers Compensation
an equal opportunity/affirmative action employer

September 28, 2001

The Honorable Joe Manchin, III
Secretary of State
Capitol Building, Room W-157
Charleston, West Virginia 25305

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

Dear Secretary Manchin:

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

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 of the Governor, the Commissioner of the Bureau of Employment Programs is empowered to promulgate rules without the consent or approval of a department secretary.

Thank you very much for your assistance in this matter.

Very truly yours,

Robert J. Smith
Commissioner

RJS/RBS/nwd

Enclosures

Legal Services Division

One Players Club Drive, Third Floor, Charleston, West Virginia 25311-1638 • www.state.wv.us/bep
Telephone 304.558.6100 • Facsimile 304.558.6101

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Series 7 Rules For Selected Hearings

Type of Rule: Legislative Exempt Interpretive X Procedural

Agency Bureau of Employment Programs

Address 112 California Avenue

Charleston, WV 25305

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

Primary costs associated with hearings are related to personal services such as salary, benefits, and personnel administration. Transferring responsibilities for employer article two hearings to the Office of Judges from outside lawyers on contract will result in a change in total costs that cannot be reasonably estimated. A net decrease of the costs associated with lawyers on contract will be offset, to some degree, by an increase in the costs of personal services resulting from Office of Judges personnel necessary to perform the reviews and analysis of these requests. Annual costs cannot be determined currently because there is no available analysis of historical records on which to base an estimate.

3. Objectives of this rule:

The purpose of this rule is to establish a hearing and review process, within the Office of Judges, to consider article two petitions for hearings resulting from employers' requests regarding primarily workers' compensation classification and merger/succession issues.

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 the impact of this rule will lead to a more efficient hearing process for employers related to article two hearings, which could result in savings for the Bureau.

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

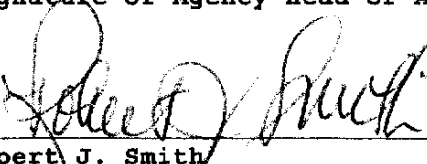
It is expected that the impact of this rule will improve the timeliness of the hearing and review process for employers who dispute article two decisions or actions, file requests for reconsideration and petition for article two hearings.

C. Economic Impact on Citizens/Public at Large.

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

Date: September 28, 2001

Signature of Agency Head or Authorized Representative



Robert J. Smith
Commissioner, Bureau of Employment Programs

**SUMMARY OF PROPOSED PROCEDURAL RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 7
RULES FOR SELECTED HEARINGS**

The proposed changes to "Rules for Selected Hearings" involve the process by which employers contest premium tax decisions by the Workers' Compensation Division. For example, decisions made by the Division involving matters such as classifications, mergers and successions, ratemaking and payroll determinations, which are contested under the provisions of *W. Va. Code §23-2-17*, are subject to the procedural requirements of this rule.

The changes primarily affect two areas.

One, prior to filing a petition for hearing under *W. Va. Code §23-2-17*, an employer is required to file a request for reconsideration of the decision with the Workers' Compensation Division. The proposal is designed to facilitate communication between the employer and the Division and encourage the parties to resolve matters prior to engaging in the litigation process.

Two, the provisions clarify that the Commissioner of the Bureau of Employment Programs may delegate the authority for conducting proceedings under the rule to the Bureau's Chief Administrative Law Judge. The Chief Administrative Law Judge is authorized to assign attorneys from the Office of Judges to individual matters. This change is to facilitate a more efficient hearing process.

Other minor change involve clarity and fairness issues. The rule does not apply to the processing of claims in litigation under the provisions of *W. Va. Code §23-5-1 et seq.*

TITLE 85
PROCEDURAL RULE
WORKERS' COMPENSATION DIVISION

SERIES 7
RULES FOR SELECTED HEARINGS

FILED
2001 DEC 11 P 12:08
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 ~~by the West Virginia workers' compensation division~~ 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 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(c), 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(c), 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.

1.3. Filing Date. -- ~~April 4, 1996.~~

1.4. Effective Date. -- ~~May 6, 1996.~~

1.5. ~~Repeal and Replacement.~~ This rule repeals and replaces ~~85C.S.R.7, entitled "Hearings", which was~~

~~filed on January 28, 1987, and became effective on April 1, 1987.~~

§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.

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. "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 West Virginia 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 decision or action or, in the absence of such a receipt, within sixty days of the date of the division'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 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 with the relevant information necessary to perform its review. After reviewing the request, the division shall enter its final decision.

3.6.1. The division 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 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 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 stays the tolling of the time limitations for filing a petition for hearing under the

provisions of West Virginia 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 final decision in the matter, the expiration of the one hundred-twenty (120) day period for the division 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 West Virginia Code §23-2-17. Should the employer fail to file a timely and complete request for reconsideration, then the division'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 West Virginia 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 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 hearing examiner designated by the commissioner.

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

34.1. 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 and which are applicable to that case will be adhered to during administrative hearings in lieu of any contrary provision in this rule.

34.2. Unless waived by all the parties to the hearing and by the division, 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 officer or assistant or employee of the division, or by~~ 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.

34.3. 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.

34.4. In any instance where any form of notice, including one arising under subsection 34.2 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.

34.5. The subsection 34.2 notice shall contain the date, time, and place of the hearing and a short and plain statement of the matters asserted. If the division 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.

34.6. The hearing shall be held in the county selected by the division.

§85-7-45. Parties and Conduct of Hearings.

45.1. At the hearing, an opportunity shall be afforded all parties to present evidence and argument with respect to the matters and issues involved. ~~Any person interested in the proceeding, but not a party thereto, shall be permitted to testify as to the issues in controversy after first being placed under oath or affirmation. Any such interested person, who is not a party, shall not, however, be permitted to submit argument or to cross examine other witnesses.~~ 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 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. ~~Upon request from any party to the hearing, all~~ All reported testimony and evidence at a hearing shall be transcribed, and a copy thereof furnished to the party ~~at~~ upon its expense request. The division 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.

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

45.3. 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.

45.4. All hearings shall be conducted in an impartial manner ~~and shall be open to members of the public. Information of a confidential nature as provided by W. Va.~~

~~Code, §23-1-4, may be excluded from members of the public upon motion to the hearing officer.~~ The commissioner, the executive director, inspectors, and every hearing officer appointed by the division 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.

45.5. 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.

45.6. All evidence, including papers, records, agency staff memoranda and documents in the possession of the division, 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.

45.7. Every party ~~as well as the division~~ shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

45.8. 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.

45.9. 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 decisions or actions are valid. The party contesting the division's decisions or actions has the burden of overcoming this presumption by satisfactory proof.

§85-7-56. Correction of the Record.

Upon motion in writing served by any party ~~or by the division~~ as notice may be served pursuant to subsection 34.2 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.

§85-7-67. Subpoenas.

67.1. ~~The commissioner, the executive director, inspectors, or a 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. ~~Service of subpoenas duces tecum issued at the instance of the division shall be the responsibility of the division.~~ 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.

67.2. 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.

67.3. 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 shall be paid by the division if the subpoena or subpoena duces tecum was issued, without the request of an interested party, at the instance of the division.~~ 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.

67.4. 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.

67.5. 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 division commissioner, or any division 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.

67.6. 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.

§85-7-78. 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.

§85-7-89. Hearing Officers.

89.1. Every hearing officer appointed by the division 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.

89.2. The hearing officer is authorized to receive and rule upon any procedural matter arising before, during, or after a hearing. ~~All final rulings on substantive matters shall be made by the division's duly designated representative.~~

89.3. ~~The hearing officer shall continue a hearing upon motion of the division.~~ Requests for continuances by a party shall not be granted as a matter of course, but only upon a showing of good cause ~~which cause shall be strictly construed against the requests.~~

§85-7-910. Concluding the Hearing.

910.1. 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.

910.2. 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 ~~division's~~ 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 ~~division~~ 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 ~~division~~ commissioner retains ~~its~~ the right to review any and all proposed findings of facts against the record and to disagree therewith provided that the ~~division~~ commissioner states the basis for the disagreement in ~~its~~ the final order. The ~~division~~ commissioner shall render either a final order or an interlocutory order as the decision may require in which the ~~division~~ 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 ~~division~~ commissioner rejects or modifies the report and recommendation of the hearing

officer, the division commissioner shall furnish ~~its~~ his or her own findings of fact and conclusions of law.

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

910.4. All appeals from the final order or decision of the division 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.

§85-7-1012. 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.

West Virginia Self-Insurers Association

Post Office Box 1573
Charleston, West Virginia 25326
Tax ID# 55-0654337



October 30, 2001

bowenh@steptoe-johnson

(304) 353-8128

VIA FACSIMILE & US MAIL

Randall B. Suter, Senior Counsel
Workers' Compensation Division
Executive Office
4700 MacCorkle Ave., S.E.
P.O. Box 3824
Charleston WV 25338
(Fax No.: 926-5372)

Dear Mr. Suter:

On behalf of the West Virginia Self-Insurers Association, attached are comments to the proposed amendments to Title 85, SERIES 7, titled "Rules for Selected Hearings".

Very truly yours,

A handwritten signature in black ink, appearing to read "Henry C. Bowen". The signature is fluid and cursive, with a large initial "H" and a stylized "B".

Henry C. Bowen
Executive Secretary

HCB/npk

958740/99001

West Virginia Self-Insurers Association

Post Office Box 1573
Charleston, West Virginia 25326
Tax ID# 55-0654337



BEFORE THE WORKERS' COMPENSATION
PERFORMANCE COUNCIL

Re: West Virginia Self-Insurers Association's Comments to the
Workers' Compensation Division's proposed amendments to
SERIES 7, "Rules for Selected Hearings"

INTRODUCTION

The West Virginia Self-Insurers Association ("WVSIA") has reviewed the Workers' Compensation Division's proposed changes to SERIES 7, "Rules for Selected Hearings" (commonly referred to as "Rule 7"). WVSIA favors the involvement of the Worker's Compensation Office of Judges in the Article 2 hearing process. However, WVSIA objects to the procedures recommended to the Performance Council which are ostensibly designed to facilitate communication between the employer and the Division and which are intended for resolution of matters prior to the litigation process. WVSIA submits that the Workers' Compensation Division's processing of many of the Article 2 disputes has been inconsistent and in some instances untimely. WVSIA recognizes that all parties should seek dispute resolution without formal litigation whenever possible. However, WVSIA recommends that the Performance Council consider adopting alternatives to the proposal requiring a formal motion for reconsideration to be filed by the protesting employer. In many instances, the Division's decision has been made and will not be changed. The parties need to move forward to establish an evidentiary record. WVSIA respectfully suggests that the mandatory meeting processes required in the civil litigation system are preferable to the Division's proposal that in every

case, the employer "file a complete and timely request for reconsideration as a condition precedent" to the filing of a petition for an Article 2 hearing. A process similar to the mandatory requirement in the civil rules of procedure, would enable the Article 2 hearing process to be administered in a manner which allows the enumerated laudable goals to be achieved without requiring both formal protest, followed by formal reconsideration, followed by informal dialogue, followed by another formal protest. Such a bureaucratic procedure is unnecessary and delays the orderly hearing process.

Finally, as set forth more fully below, WVSIA objects to the proposal that the rule be modified to contain a legal presumption that the Division is always correct. Such a "presumption" is legally unwarranted.

The Performance Council should be reminded that it accepted a Division recommendation in SERIES 11, that all financial disputes arising from Article 2 decisions which are disputed by employers have to be first paid in full,¹ as a condition precedent to having an Article 2 hearing under SERIES 7. Whatever interests the Workers' Compensation Division has in seeking changes in SERIES 7 must be balanced by the Performance Council against the underlying philosophy that the Workers' Compensation Division is, after all, a state agency required to provide customer services to both employers and their employees. There is no authority in the Workers' Compensation Act which allows a "presumption" that the Division is always correct and the Division must be required to fully support the basis for its decisions, just as it demands similar requirements from employers disputing them. Moreover, nothing in the Workers' Compensation Act provides any presumption that the Division is always correct in its "claims decisions." To the contrary, the

1

The Workers' Compensation Division does allow an employer to demonstrate financial hardship or inability to pay in lieu of full payment. The Division has not indicated any interest in proposing changes to SERIES 11.

legislature has enacted a statutory scheme where any party aggrieved by a claim decision may protest it; and receive a "de novo litigation" before the Office of Judges.² WVSIA urges the Performance Council to reject the recommendations, as presented in the Division's proposals.

COMMENTS TO SPECIFIC PROPOSALS

1. § 85-7-1. GENERAL. WVSIA has no comment regarding the scope or authority for SERIES 7.

2. § 85-7-2. DEFINITIONS. WVSIA has no comment to this section.

3. § 85-7-3. WVSIA objects to the definition of Article 2 "Decision or Action," as set forth in subsection 3.1. A decision by the Workers' Compensation Division applying West Virginia Code § 23-2-15, is quite clearly an Article 2 decision; that statutory section contains a specific procedure for the filing of objections to the Division's decisions and cannot be changed by the SERIES 7 rule. While the Division's recommendation to exclude this Code section from the definition of Article 2 "decisions or actions" may be intended to avoid the "reconsideration process", it is confusing as presented and should be moved to subsection 3.3, if the proposed Section 3 is retained.

4. § 85-7-3.2 through 3.9. WVSIA objects to these proposed subsections which impose on a party objecting under § 23-2-17, the requirement that it file timely a request for reconsideration, stating forth with particularity, why the reconsideration is being presented and requiring the Division to dispose of the requested reconsideration within 120 days, before affording the protesting party an opportunity to protest the decision again in order to have an administrative hearing under Section 4 of the SERIES 7 rule.

²

The dispute in litigation is adjudicated without any underlying "rule" that the Division was "presumptively correct" in its claim decision.

Informal discussion with representatives from the Office of Judges and the Legal Services Division, suggests that this procedure is proposed to assure that communications between employers and the Division take place and to encourage the parties to resolve the disputed matters prior to engaging in the litigation process. Such a formal process is unnecessary to obtain this goal. In many instances, Article 2 decisions are rendered by the Division after discussions with the employer. Normally, these discussions may, but may not include a lawyer from the Legal Services Division. If these discussions do not lead to a resolution, but instead result in an unfavorable ruling, it is unnecessary to require a formal reconsideration before the Division. Often, after a protest is filed, resolution of the protests have been achieved, primarily because the employer and the Division have been able to resolve the matters without the need for a formal administrative hearing. WVSIA urges that this process not be impacted by further bureaucratic delay. WVSIA appreciates that the Office of Judges must have a system that will allow it to be free from large volumes of Article 2 protests (filed either on a protective basis by employers or their third party claims administrators) to allow the employers or their designated representatives to review the Division's determinations and to verify their accuracy. As noted in our general introduction, WVSIA recommends that the Performance Council adopt an alternative approach requiring a mandatory conference utilizing the following or similar suggested language:

"3.3 Requirement. After filing of an Article 2 protest, the parties must proceed to schedule a mandatory meeting within 30 days from the acknowledgment of the protest by the Workers' Compensation Office of Judges. The parties will be required to meet and make all relevant disclosures and establish whether discovery of additional matters is desirable or necessary. Within 30 days from the said mandatory conference, the parties shall file with the Office of Judges (1) a statement of issues as they then appear; (2) a proposed plan and schedule of discovery; (3) any limitations proposed to be placed on discovery; (4) any proposed orders with respect to discovery; and (5) a statement showing that the parties have made reasonable efforts to

reach agreement. Each party is under a duty to participate in good faith in the framing of a discovery plan to achieve orderly and efficient disposition of the dispute. The hearing officer shall inform the parties within 10 days of receipt of the "mandatory meeting" report, whether he or she is in agreement with the proposed litigation plan.

Following the filing of the mandatory conference report, the Office of Judges shall enter an order identifying the issues and scheduling a hearing date.

5. § 85-7-4. ADMINISTRATIVE HEARINGS; NOTICE; PLACE. WVSIA offers no comment to the proposed changes to this section.

6. § 85-7-5. WVSIA has no comment on the proposed changes to new subsections 5.1, 5.2 and 5.3. With regard to the proposed subsection 5.4, WVSIA points out that the Office of Judges procedural rules contain proposed changes to include closing hearings to the public. WVSIA asserts that Article 2 hearings should be conducted in a consistent manner with all other hearings before the Office of Judges. If hearings are not open to members of the public before the Office of Judges, then there is no basis for having open hearings for Article 2 disputes.

7. WVSIA has no comment on proposed subsection 5.5 - 5.9.

8. WVSIA objects to the proposed subsection 5.10 titled "Burden of Proof". This section imposes a "presumption" that the Division's decisions or actions are always correct. In the Division's introductory comments to the proposed rules, the Division states that the primary basis for its recommendations were to facilitate communication between employers and Division, to encourage parties to resolve matters prior to the litigation process; and, to clarify that the Commissioner, Bureau of Employment Programs, may delegate authority for conducting hearings to the Chief Administrative Law Judge. Finally, other recommendations to the Performance Council were identified as "minor" changes involving clarity and fairness. WVSIA submits that the

proposed subsection 5.10 is neither minor nor fair. It is not related to any of the changes outlined by the Division in its introductory comments. To the contrary, this is a "burden of proof" and "evidence" issue. WVSIA urges the Performance Council to reject the subsection 5.10 proposal and to strike it from the rule.

9. §§ 85-7-6 through 85-7-12. WVSIA has no comments on these proposed sections.

Response to Comments
85 C.S.R. 7
“Rules for Selected Hearings”

The proposed revisions to 85 C.S.R. 7, “Rules for Selected Hearings,” were filed with the office of the Secretary of State on September 28, 2001. The comment period on the proposed revisions to this rule expired on October 30, 2001, at 5:00 p.m.

The Division received one set of comments dated October 30, 2001, from Henry Bowen in his capacity as the Executive Director of the West Virginia Self-Insurers Association.

The WVSIA comments are, in essence, as follows:

- (1) An objection to the provisions of section 3.1., which defines “Article Two Decisions” and exempts from the definition decisions made under the provisions of W. Va. Code 23-2-15;*

Response. The Division agrees that the rule should be clarified in accordance with this comment. Language concerning the W.Va. Code 23-2-15 petition process has been deleted from 3.1. Additional language regarding the W. Va. Code 23-2-15 process has been inserted at 3.3. to clarify that the such petitions are not subject to the reconsideration process. The reason that these petitions are not subject to the reconsideration process is that this Code section provides for a review process in matters involving certain requests for relief. The review results in a Division order that may be protested under the provisions of W. Va. Code 23-2-17.

- (2) An objection to the provisions of 3.2. through 3.9 which require employers to file a request for reconsideration as a condition precedent to filing a petition for hearing under the provisions of W. Va. Code 23-2-17;*

Response. The Division disagrees with the objections. The purpose of the sections is to require the employer and Division representatives to meet and determine whether the matter can be resolved prior to hearing. The informal resolution of the matter need not include the Office of Judges.

The WVSIA suggested language requires the petition to be filed with, tracked by, and acted upon by the Office of Judges prior to any attempted resolution

of the dispute. There have been past occasions where protests involving hundreds of employers have been filed by third party administrators. The Division's proposed process does not require the involvement of limited OOJ resources. Office of Judges' resources that may be devoted to this process should not needlessly detract from its overall statutory mission of workers' compensation claims adjudication.

(3) WVSIA notes that the hearing process for claimants is closed to the public and questions why employer hearing are open to the public;

Response. The Division agrees with the comment. Employer information, with very few enumerated exceptions, and claimant information are both treated as confidential information by the Division. The proposed rule has been modified by deleting certain language from both 5.1. & 5.4.

(4) WVSIA objects to the proposed provision of section 5.10. which provide "a presumption that the division's decisions or actions are valid" and require the contesting party to overcome the presumption by satisfactory proof.

Response. The Division disagrees with the objection. The provision was inserted to clarify for the hearing examiner and the parties that the petitioning party has the burden of convincing the hearing examiner by satisfactory evidence that their position is correct. Case law supports the proposition that decisions by administrative bodies are presumptively valid.