

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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APR 4 11 36 AM '96

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Bureau of Employment Programs
Legal Services Division 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; §23-2-17; §23-3-1; §23-4A-6; §23-4B-C; §23-4C-4; §29-5-1 et seq.
RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW _____

AMENDMENT TO AN EXISTING RULE: YES _____, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: *The proposed procedural rule repeals and
replaces 85 CSR 7, "Hearings"

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 7

TITLE OF RULE BEING ADOPTED: "Rules for Selected Hearings"

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS May 6, 1996

Andrew N. Richardson

Andrew N. Richardson, Commissioner

Bureau of Employment Programs
112 California Avenue
Charleston, West Virginia 25305-0112

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner



April 4, 1996

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, WV 25305

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

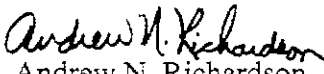
Dear Secretary Hechler:

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,


Andrew N. Richardson
Commissioner

Oral Comment:

Chief Administrative Law Judge Robert Smith suggested the rule be clarified so that it would not affect any matter residing in the jurisdiction of the Office of Judges.

Response to Comment:

The rule was changed in subsection 1.1 to include the words:

"This procedural rule does not affect any matter residing in the jurisdiction of the Office of Judges."

FILED

APR 4 11 36 AM '96

TITLE 85
PROCEDURAL RULE
BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION
SERIES 7
RULES FOR SELECTED HEARINGS

OFFICE OF 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, West Virginia Code, §29A-5-1 et seq. While not all of the hearings conducted by the commissioner are held pursuant to that act, see West Virginia 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.

1.2. Authority. -- West Virginia Code, §21A-2-6(1), -6(2) & -6(14); §21A-2-19; §21A-3-7(b) & -7(c), §23-1-1, §23-2-9; §23-2-17; §23-3-1; §23-4A-6; §23-4B-6; §23-4C-4; and §29A-5-1 et seq. Pursuant to West Virginia 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 West Virginia 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. -

1.4. Effective date. -

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 West Virginia Code, §21A-2-1, and West Virginia Code, §21A-2-12 & -13.

2.4. "Division" means the workers' compensation division within the bureau of employment programs as provided for by West Virginia Code, §21A-1-4, and West Virginia Code, §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. Administrative hearings; notice; and place.

3.1. All administrative hearings conducted pursuant to this rule will be held in accordance with the provisions of West Virginia 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.

3.2. 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

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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.

3.3. 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.

3.4. In any instance where any form of notice, including one arising under subsection 3.2 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.

3.5. The subsection 3.2 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.

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

§85-7-4. Parties and conduct of hearings.

4.1. 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 reported testimony and evidence at a hearing shall be transcribed, and a copy thereof furnished to the party at its expense. 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.

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

4.3. 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.

4.4. 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 West Virginia 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 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.

4.5. 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.

4.6. 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.

4.7. 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.

4.8. 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.

4.9. 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.

§85-7-5. Correction of the record.

Upon motion in writing served by any party or by the division as notice may be served pursuant to subsection 3.2 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.

§85-7-6. Subpoenas.

6.1. 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.

6.2. 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.

6.3. 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.

6.4. 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.

6.5. In case of disobedience or neglect of any subpoena or

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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, 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.

6.6. 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.

§85-7-7. 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.

§85-7-8. Hearing officers.

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

8.2. 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.

8.3. 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.

§85-7-9. Concluding the hearing.

9.1. 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.

9.2. 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 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 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 retains its' right to review any and all proposed findings of facts against the record and to disagree therewith provided that the division states the basis for the disagreement in its' final order. The division shall render either a final order or an interlocutory order as the decision may require in which the division 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 rejects or modifies the report and recommendation of the hearing officer, the division shall furnish its' own findings of fact and conclusions of law.

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

9.4. All appeals from the final order or decision of the division shall be taken pursuant to West Virginia Code, §29A-5-4.

§85-7-10. 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 affect without the invalid provisions or application and to this end the provisions of this rule are declared to be severable.