# WORKERS' COMPENSATION FUND

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Governor

EMILY A. SPIELER
Commissioner

TO: Secretary of State

FROM: Emily A. Spieler
Workers' Compensation Commissioner

DATE: June 15, 1989

RE: Emergency Causing Need for Rule

On this date, the Workers' Compensation Fund has filed an emergency rule titled "Self-Insurers Electing To Opt Into Or Out Of Surplus Fund," and which has been designated as Series 8, Title 85. This memorandum is offered to demonstrate the emergency circumstances which necessitate the emergency filing of the rule.

The rule is adopted on an emergency basis in order to prevent a substantial harm to the public interest. Heretofore, the Workers' Compensation Fund has not had a rule regulating the options of self-insuring employers regarding movement into and out of surplus fund coverage. The Fund has had a rule regulating movement into and out of the general fund, but it has not been applied to the surplus fund. This lack of a rule makes impossible the carrying out of the Commissioner's duty to accurately set rates for the surplus fund at the lowest possible rates of premiums consistent with the maintenance of a solvent fund. This is because the unpredictable movement of employers into and out of the surplus fund renders rate calculation equally

unpredictable. Given the Workers' Compensation Fund's current extreme financial difficulty, it is essential that accurate rates be fixed in order to achieve solvency for the surplus fund and to comply with the statutory directive imposed upon the Commissioner.

The rule also provides for the setting of the amounts of bond or security which must be posted by an employer in order for it to become self-insured. The amount will be determined upon an actuarial basis by the Fund's actuary. This action will stop the depletion of the Fund's assets which has been occurring when self-insurers are no longer in a position to pay benefits owed to claimants and there is no other source of payment other than the Fund. Stopping this drain on the Fund will also work toward achieving solvency for the surplus fund and toward lessening the magnitude of the rates needed in the future.

SUMMARY OF EMERGENCY RULE. Title 85, Series 8

Under the provisions of West Virginia Code, §23-2-9, an employer may elect, under certain circumstances to self-insure itself for workers' compensation coverage. While the statute sets forth certain fundamental principles to guide the Workers' Compensation Commissioner in deciding whether to permit a given employer to elect self-insured status, neither the statute nor current regulations describe the election process for employers with regard to the surplus fund. It is the purpose of this rule to fill in this gap in the law and to prevent the continuance of a situation which has been and will continue to cause a substantial harm to the public interest.

Under West Virginia Code, §23-3-1, the Workers' Compensation Fund has a designated separate fund referred to as the surplus fund. Within the surplus fund are separate funds for catastrophe coverage, second injury coverage, and coverage for "all losses not otherwise specifically provided for in" the law. Id. Heretofore, the regulations pertaining to self-insurance have concerned an employer's regular coverage under the law but have not provided adequate guidance for the surplus fund.

The emergency rule notes that it does not supplant any provision in the current rule titled "Administration Of the Workers' Compensation Fund," W. Va. C.S.R., §85-1-1 et seq. (1986), but is to be read as an adjunct to that rule. The rule then allows a grace period for employers which had committed themselves to becoming self-insured as to the surplus fund, but which had not yet communicated that intention to the Commissioner, to still opt out of coverage in Fiscal Year 1990, provided that the employer notifies the Commissioner by June 30, 1989. If a letter of intent to self-insure is received on or before June 30, the employer will have until October 31, 1989 to finalize its option to self-insure for all or part of the surplus fund. Thereafter, movement out of surplus fund coverage will be limited in the same fashion as is such movement for regular subscription coverage. That is, an employer will have to give the Fund notice of its intent to self-insure by December 31 and, following approval by the Commissioner, will be permitted to opt out after July 1 of the subsequent fiscal year. However, the employer will not have to finally choose whether to actually opt out until October 1 of that year.

The rule then provides for certain requirements before an employer's election will be approved. Initially, the requirements for the election for regular coverage are incorporated into the rule, but in addition guidance concerning the type and amount of bond or security is also discussed. Of primary importance is that the amount of the bond or security will be set by the Fund's actuary so that a presently existing problem concerning the lack of sufficient financial backing for many self-insurers who self-insure can be addressed. The rule provides for the allocation of responsibility for risks between the Fund and the employer and provides for the financial terms if an employer wishes to later cancel its self-insured status.

The rule notes that the employer must continue to abide by the statute and regulations, especially regarding the timely payment of benefits to claimants, in order for the employer to maintain its self-insured status. Finally, the rule provides for an administrative hearings process for employers which wish to contest any decision made by the Commissioner under the rule.

In its preamble, the rule notes that a permanent rule will be filed in the near future. However, it is expected that the permanent rule will have a greater scope than the emergency rule. The rule notes that many of the positions stated in the emergency rule are being evaluated during the promulgation of the permanent rule and that changes in those positions are expected.

EMERGENCY RULE

WEST VIRGINIA LEGISLATIVE RULE

WORKERS' COMPENSATION COMMISSIONER

TITLE 85

SERIES 8

TITLE: Self-Insurers Electing To Opt Into Or Out Of Surplus Fund

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§85-8-1. General

1.1 Scope - This emergency legislative rule provides for the movement by employers electing to opt out of the Workers' Compensation Fund's surplus fund or to opt into that surplus fund. The rule is adopted on an emergency basis in order to prevent a substantial harm to the public interest. Heretofore, the Workers' Compensation Fund has not had a rule regulating the options of self-insuring employers regarding movement into and

out of surplus fund coverage. The Fund has had a rule regulating movement into and out of the general fund, but it has not been applied to the surplus fund. This lack of a rule makes impossible the carrying out of the Commissioner's duty to accurately set rates for the surplus fund at the lowest possible rates of premiums consistent with the maintenance of a solvent surplus fund. This is because the unpredictable movement of employers into and out of the surplus fund renders rate calculation equally unpredictable. Given the Compensation Fund's current extreme financial difficulty, it is essential that accurate rates be fixed in order to achieve solvency for the surplus fund and to comply with the statutory directive imposed upon the Commissioner.

1.2 Authority - West Virginia Code, §23-2-9, and §23-3-1.

1.3 Filing Date - June 15, 1989.

1.4 Effective Date - June 15, 1989.

1.5 Notice - This emergency rule is issued with the expectation that a permanent rule will be promulgated and that that permanent rule will affect the entire area of self-insurance under the Act. During the development of that permanent rule, the Commissioner expects to revaluate all of the policy issues affecting self-insurance and to implement such changes and

additions to policy as that revaluation may indicate are necessary. Hence, this emergency rule shall not be relied upon as stating what the policy shall or will be following the promulgation of the permanent rule by the Commissioner and its approval by the Legislature.

§85-8-2. Definitions

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

2.2 The term "Act" means the workers' compensation laws of the State of West Virginia which are codified at chapter 23 of the Code of West Virginia of 1931, as amended.

2.3 The terms "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

2.4 The term "Commissioner" means the West Virginia Workers' Compensation Commissioner as provided for by West Virginia Code, §23-1-1.

2.5 The term "Compensation Fund" means the fund created by West Virginia Code, §23-3-1, which includes the surplus fund.

2.6 The term "Employer" has the meaning ascribed to that term by West Virginia Code, §23-2-1.

2.7 The term "Regular Subscription" means an employer's relationship to the main portion of the compensation fund but not including the surplus fund.

2.8 The terms "Self-Insurer" and "Self-Insured Employer" mean employers who have elected one or both of the options contained in West Virginia Code, §23-2-9, and who pay individually and directly, or from a benefit fund or system of compensation, the compensation and other benefits provided to injured employees or their dependents under the Act.

2.9 The term "Surplus Fund" means that portion of the compensation fund created by West Virginia Code, §23-3-1, which is to be set aside to create and maintain coverage for the catastrophe hazard, the second injury hazard, and all losses not otherwise specifically provided for by the Act.

2.10 The phrase "this rule" means the instant emergency legislative rule designated in the caption hereof as W.Va. C.S.R., §85-8-1 et seq.

§85-8-3. Prior Rule Not Affected

3.1 By legislative rule effective July 1, 1986, the Commissioner specified that employers which elect to self-insure under the provisions of West Virginia Code, §23-2-9, with regard to their regular subscription under the Act are to file an application in order to do so. See W.Va. C.S.R., §85-1-4. The application must also indicate whether or not the employer further elects to become a self-insured employer in regard to all or part of the surplus fund. See W.Va. C.S.R., §85-1-4.5.

3.2 Nothing in this rule is intended to affect the substantive right of an employer to elect to become a self-insurer under W.Va. C.S.R., §85-1-4.5.

3.3 However, any employer hereafter electing to become a self-insured employer with respect to all or part of the surplus fund must comply with this rule as to the conditions for becoming a self-insurer and with the provisions of any permanent rule which supersedes or supplements this rule. Such an employer also includes one who is initially electing to become self-insured with respect to its regular subscription and who is electing to become self-insured to all or part of the surplus fund as well.

§85-8-4. Election With Regard To The Surplus Fund

4.1 Until June 30, 1989, any employer who has previously elected to be a self-insured employer with regard to its regular subscription under the Act but who has also not elected to be a self-insured employer with respect to all or part of the surplus fund may elect to do so by filing a written letter of intent with the Commissioner which must be received by the Commissioner on or before June 30, 1989.

4.2 An employer so filing will then be reviewed for approval to change its status to self-insured with respect to all or part of the surplus fund without undue delay upon the terms stated below. An employer may withdraw the letter of intent at any time even after approval by the Commissioner, except as follows. The employer must elect either to be a self-insurer or to withdraw the letter of intent by October 31, 1989. Once withdrawn, the letter of intent is void and may not be resurrected.

4.3 Any self-insured employer who has not previously elected to be a self-insured employer with regard to all or part of the surplus fund and which wishes to so elect after June 30, 1989, shall file a written request to so change its status. The written request shall be in the form specified by the

Commissioner and shall contain the information provided for below.

4.4 An employer making the election under subsection 4.3 of this rule who meets the conditions specified below will be granted permission to become a self-insured employer only as of the first day of July following the Commissioner's approval of its application for such permission; however, such application must be received no later than December 31 of the year preceding the pertinent first day of July. As an example, any application received after June 30, 1989, will not be eligible for approval and implementation until July 1, 1990, provided the application is received on or before December 31, 1989; similarly, an application received between January 1, 1990, and December 31, 1990, will be eligible for implementation on July 1, 1991. An employer applying for self-insured status for its regular subscription as well as for all or part of the surplus fund must comply with W. Va. C.S.R., §85-1-4.2(d), as to the timing of the entire application.

4.5 An employer which has made the election under subsection 4.3 of this rule and which has been approved by the Commissioner to become a self-insured employer with respect to all or part of the surplus fund, shall exercise the election on or before October 1, 1990, or by the first day of October for each year thereafter.

§85-8-5. Standards For Approval of Applications

5.1 No application for self-insured status with regard to all or part of the surplus fund will be approved unless the employer complies with all of the provisions of the Act, of the other various rules promulgated by the Commissioner, and of this rule unless it is expressly stated otherwise in a specific subsection.

5.2 The applying employer must either meet or continue to meet all of the requirements for self-insured status as to its regular subscription under the Act. An employer which previously became a self-insured employer for purposes of its regular subscription but not as to the surplus fund shall not be permitted to become self-insured with respect to the surplus fund if it is not in good standing with regard to all of its obligations under the Act.

5.3 Prior to becoming self-insured for all or any part of the surplus fund, the employer shall post a bond or give security. The bond or security shall be in the form, type, and amount as required by the Commissioner. The amount required by the Commissioner shall be the sum actuarially determined by the Fund's actuary. The actuary shall utilize generally accepted actuarial principles including, but not limited to, the applicant's own experience and net worth, and such additional

factors as the actuary concludes are necessary to take into consideration.

5.4 On an annual basis or sooner as an individual case may require, the Commissioner shall review the sufficiency and the Fund's actuary shall review the amount of the bond or security provided by each self-insuring employer for its coverage with respect to all or part of the surplus fund.

5.5 In the event that the employer's obligations under the Act can reasonably be expected to decrease, then the employer may petition the Commissioner for permission to reduce the amount of its bond or security; however, such reduction shall not be made until after the Commissioner approves the reduction. The Commissioner shall obtain the Fund's actuary's opinion on the petition and shall rule upon each such petition within ninety (90) days of its receipt by the Commissioner.

5.6 The employer shall acknowledge its obligation to continue to make all other payments required under the Act, to file all reports due under the Act or required by rule, and to make timely payment of all benefits properly due to employees.

5.7 As a condition of approval, the employer shall agree to assume liability on all awards made after the effective date of the approval of the application for self-insured status in

respect to claims for an injury or death which may have occurred prior to that date.

5.8 As a condition of approval, the employer shall agree that, if its application is approved, then the employer may subsequently surrender its self-insured status with regard to all or part of the surplus fund only by electing one of the two following alternatives for disposal of claims or awards for injuries or deaths occurring during the period of its self-insured status:

5.8.1 The employer shall retain responsibility for the payment of all claims with dates of injury before the effective date of the employer's return to non-self-insurer status with regard to the surplus fund even if a final award has not been made for a particular claim prior to that effective date; that is, in effect the employer will remain self-insured for those claims; except that, in a situation where in a particular case a date of injury occurs while the employer is a subscriber to the pertinent portion of the surplus fund and then the employer becomes self-insured for that pertinent portion of the surplus fund and then subsequently returns to the status of subscriber to that pertinent portion of the surplus fund and then the date of award occurs for that injury subsequent to that employer's return to subscriber status for that portion of the surplus fund, in that instance responsibility for payments for that award will be

determined as if the employer had not had the intervening period of self-insured status; it is expressly noted that this exception is only applicable during the existence of this rule and that during the promulgation of the permanent rule this issue will be reviewed; or

5.8.2 The employer shall pay into the surplus fund prior to the effective date of the approval of the employer's return to regular subscriber status the amount of money equal to the total present value of all of the claims for which it would be responsible under subsection 5.8.1 above as determined solely by the actuary retained by the Commissioner.

5.9 By filing an application for self-insured status with regard to all or part of the surplus fund, the employer is deemed to acknowledge that if the application is approved it will be responsible for all charges assignable to its account that would otherwise be the responsibility of the surplus fund. For example, any award to an employee for a second injury shall be the responsibility of the employer who shall compensate the employee or employees in the same manner as if the disability of the employee had resulted from a single injury while in the employ of the employer.

5.10 By filing an application for self-insured status with regard to the surplus fund, the employer is deemed to acknowledge

that it remains subject to all other pertinent rules and regulations.

§85-8-6. Payment Of Compensation Benefits

6.1 A self-insured employer with respect to all or part of the surplus fund shall be responsible for the direct payment of all benefits due and owing under the Act to the employee or the employee's dependents. Benefits payable by the employer shall be paid in the time periods specified in the Act or in the various rules promulgated by the Commissioner or, in the absence thereof, in a prompt and timely fashion. The ability of an employer to process, review, and ultimately pay for services rendered to an employee, benefits due an employee's dependents, and invoices therefor shall be determined upon the same basis as for self-insured employers with respect to their regular subscription. The employer's experience in meeting its obligations in a prompt and timely fashion shall be given considerable weight by the Commissioner in determining whether to permit the employer to remain a self-insurer.

6.2 The employer shall file reports with the Commissioner in the form required by the Commissioner concerning the number and type of claims made and the amount of benefits paid, all on an individual and aggregate basis.

## §85-8-7 Continuance Of Self-Insured Status; Termination

7.1 The employer's status as a self-insured employer with respect to all or part of the surplus fund shall continue on a year-to-year basis so long as the employer continues to meet all of the requirements for such status as well as the other requirements imposed by the Act, by this rule, and by other rules and regulations promulgated by the Commissioner.

7.2 In the event that the employer fails to meet any of its duties, responsibilities, liabilities, or obligations under the Act or any of the rules promulgated by the Commissioner, including this rule, then the employer will be deemed to be delinquent within the meaning of West Virginia Code, §23-2-5.

7.3 The legislative rule titled "Hearing And Review Process Regarding The Performance of Self-Insured Employers" and designated as W.Va. C.S.R., §85-5-1 et seq. (1985), shall be applicable to self-insured employers under this rule to the same extent as that rule applies to employers which have elected to be self-insurers with respect to their regular subscriptions.

7.4 Any employer which wishes to protest any decision made by the Commissioner under this rule may do so by filing a petition which sets forth with particularity the decision complained of, the facts pertaining to the employer's position,

and the reasons in support thereof. The employer shall then be entitled to a hearing upon that petition as provided for by general law or by procedural rule promulgated by the Commissioner. In addition, in any particular case where the Commissioner finds good cause to believe that an employer may have violated the Act or any rule pertaining to self-insurance status, then the Commissioner may institute a show cause proceeding against that employer by filing a petition setting forth the nature of the offense and a summary of the facts in support thereof. A hearing shall then be held as provided for by general law or by procedural rule promulgated by the Commissioner. Upon convening a show cause hearing, the initial burden of going forward with the evidence shall be upon the Fund to present the basis for the good cause finding. Thereafter, the burden of going forward with the evidence switches to the employer.

7.5 Any employer whose status as a self-insurer for all or part of the surlus fund is terminated shall make payment to the surplus fund in the same fashion as if it had elected to surrender its self-insurer status as provided for by subsection 5.8.2 of this rule except that such payment shall be due immediately upon the termination of the self-insured status and failure to make payment within thirty (30) calendar days of the effective date of the termination shall cause the employer to be in default for purposes of section 8 of this rule. In lieu of

the aforesaid payment, the employer may elect to post additional, sufficient bond or security within the thirty (30) day period to cover the amount due to the Fund. The sufficiency of such bond or security must be satisfactory to the Commissioner and meet the requirements of subsection 5.3 of this rule. In the event that the Commissioner determines that good cause exists to believe that payment by the employer is unlikely or that posting of additional, sufficient bond or security is unlikely, the Commissioner may demand that the employer make the required payment immediately and take collection actions.

§85-8-8. Collection Actions Against Self-Insured Employers

Notwithstanding any other provision of this rule, either as an addition to or in place of any remedy provided by the Act, other rules promulgated by the Commissioner, or by this rule, the Commissioner may institute one or more collection actions against a delinquent or defaulted self-insured employer. Such delinquency or default shall pertain to the failure to pay in a prompt or timely fashion or the failure to make any payment which is due under the Act or this rule by an employer who has obtained self-insured status with respect to the surplus fund. All such collection actions will be controlled by the Act as provided for in sections 5 and 5a of article 2, chapter 23, West Virginia Code, and by any pertinent rule promulgated by the Commissioner.

§85-8-9. 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.

EMERGENCY RULE

WEST VIRGINIA LEGISLATIVE RULE

WORKERS' COMPENSATION COMMISSIONER

TITLE 85

SERIES 8

TITLE: Self-Insurers Electing To Opt Into Or Out Of Surplus Fund

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