WEST VIRGINIA
SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

CITE AUTHORITY W.Va. Code §§ 23-2C-5(c)(2), 23-2C-17(b), 23-2C-18(g), 23-2C-22, 33-2-10(b), and 33-2-21(a)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W.Va. Code § 23-2C-5(c)(2)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 8

TITLE OF RULE BEING AMENDED: Workers' Compensation Policies, Coverages Issues and Related Topics

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

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS August 17, 2008

Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES
OF THE WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 8
WORKERS' COMPENSATION POLICIES, COVERAGE ISSUES AND RELATED TOPICS

§85-8-1. General.

1.1. Scope. -- This exempt legislative rule provides for: (1) Specific criteria, standards and other clarification as to which entities are required to carry West Virginia workers' compensation coverage and which individuals are considered employees entitled to benefits under chapter thirty-three of the West Virginia Code; (2) the minimum contents of a policy issued for workers' compensation insurance pursuant to West Virginia Code §23-1-1 et seq.; (3) rate making provisions applicable to workers' compensation insurance in West Virginia; (4) notice requirements regarding termination of coverage and renewal offers; and (5) coverage related topics.

1.2. Authority. -- W. Va. Code §§23-2C-17(b); 23-2C-18(g); 23-2C-22; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules proposed by the Insurance Commissioner and approved by the Industrial Council 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.

1.3. Filing Date. -- July 18, 2008.

1.4. Effective Date. -- August 17, 2008.

§85-8-2. Purpose of Rule.

This rule provides specific criteria, standards and other clarification as to which entities need to carry West Virginia workers' compensation coverage and which individuals are considered employees entitled to benefits under chapter twenty-three of the West Virginia Code, establishes the requirements of a basic policy to be used by private carriers of workers' compensation insurance, establishes ratemaking provisions applicable to workers' compensation insurance in West Virginia and addresses other workers' compensation coverage related topics.

§85-8-3. 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 and the context expressly indicates that another meaning is intended.

3.1. "Casual employer," as the term is used in W. Va. Code §23-2-1(b)(4) and this rule, means an employer who employs not more than three (3) for a period that is temporary, intermittent and sporadic in nature and does not exceed ten (10) calendar days in any calendar quarter.

3.2. "Classification" means categorization of employees for the purpose of assessing risk, rate making, and developing premium charges.

3.3. "Domestic services" means services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. A private home is a fixed place of abode of an individual or family. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home and the services performed therein are not domestic services.

a. In general, services of a household nature in or about a private home include services performed by cooks, butlers, housekeepers, governesses, maids, valets, babysitters, care-takers, care givers, medical providers, handymen, gardeners, and chauffeurs of automobile for family use.

b. The term "domestic services" does not include services of a household nature performed by an employee in or about the private home of a person when that employee is employed by someone other than a member of the household. For example, employees of maid services, temporary employment agencies, or other businesses do not provide domestic services under the provisions of this rule.

3.4. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

3.5. "Employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, and includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person for the purpose of carrying on any form of industry, service or business in this state.

a. "Industry, service or business," as the term is used in W. Va. Code §23-2-1(a) and this rule, means an occupation or an employment engaged in for the purposes of obtaining a livelihood or for profit or gain. This term includes any not-for-profit entity or volunteer organization to the extent that such entity or organization employs individuals.

b. "Carrying on any form of industry, service or business in this state," as the term is used in W. Va. Code §23-2-1(a) and this rule, means that the employer:

1. Has obtained or is required to obtain authorization to do business in West Virginia; or

2. Operates a business or plant or maintains an office in West Virginia; or

3. Hires employees in West Virginia; or

4. Hires West Virginia residents to work at a West Virginia facility or office; or

5. Utilizes labor on a regular basis at a West Virginia facility for the employer:

c. An employer who meets one or more of the above stated criteria and otherwise meets the definition of "employer" may still be exempt from having to maintain workers' compensation coverage under the provisions of W. Va. Code §23-2-1(b) or of subsection 4.3. of this rule.

3.6. "Employment" or "regularly employing" means engaging the services of a person or persons in return for wages or other compensation.

3.7. "Extraterritorial employee" means an employee who is not a resident of the State of West Virginia and who is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than the State of West Virginia.

3.8. "Hazardous industry" is an industry involving any of the following types of work or business:

a. Construction, including, but not limited to, excavation or electrical work and the erection, maintenance, removal, remodeling, alteration or demolition of any structure.

b. Carriage by land, water or aerial service and loading or unloading in connection therewith, including, but not limited to, all common or contract carriers by motor vehicle.

c. Any business involving the extraction of natural resources, including, not limited to, mining, surface mining, quarrying, logging or oil and gas extraction.

d. Any business or enterprise wherein molten metal, or explosive or injurious gases, materials, chemicals, creosote and other preservatives for the treatment of wood, dusts or vapors, or inflammable vapors, dusts or fluids, corrosive acids, or atomic radiation are manufactured, handled, used, generated, stored or conveyed.

3.9. "Insurance Commissioner" or "Commissioner" means the Insurance Commissioner of West Virginia as provided for in section one, article two, chapter thirty-three of the West Virginia Code.

3.10. "Old Fund" means the fund created pursuant to W. Va. Code §23-2C-2(l).

3.11. "Old Fund default" means being on the Insurance Commissioner's default list as defined in W. Va. Code St. R. §85-11-1 *et seq.* as a result of owing money to the Old Fund.

3.12. "Payroll" means the term as defined in the most current approved filing of the Insurance Commissioner's designated rating organization for workers' compensation.

3.13. "Policy default" means a policy holder that had its policy cancelled as a result of a failure to comply with the terms of the policy.

3.14. "Policy holder" means an employer that has been issued a West Virginia workers' compensation insurance policy by a private carrier and currently has coverage under said policy.

3.15. "Private carrier" means any insurer authorized by the Insurance Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.16. "Self-insured employer" means an employer who is eligible and has been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.17. "Temporary" or "Temporarily," as the term is used in W. Va. Code §§23-2-1(b)(3); 23-2-1a(a)(1) and 23-2-1c(c), and in this rule, means for a period not exceeding thirty (30) calendar days within any three hundred and sixty-five (365) day period.

3.18. "Transitory," as the term is used in W. Va. Code §23-2-1a(a)(1) and this rule, means for a period not exceeding thirty (30) calendar days within any three hundred and sixty-five (365) day period.

3.19. "Temporary, intermittent and sporadic," as the term is used in W. Va. Code §§23-2-1(b)(4) and in this rule, means for a period not exceeding ten (10) working days in any ninety (90) day period.

3.20. "Uninsured Employers' Fund" means the fund created pursuant W. Va. Code §23-2C-2(o).

3.21. "Uninsured Employers' Fund default" means being on the Insurance Commissioner's default list, defined in W. Va. Code St. R. §85-11-1 *et seq.*, as a result of owing money to the Uninsured Employers' Fund.

3.22. "West Virginia workers' compensation coverage" means workers' compensation coverage which provides the employees of the insured employer workers' compensation benefits consistent with chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

§85-8-4. Employers Required to Maintain Workers' Compensation Insurance; Exemptions; Application for Letter of Exemption.

4.1. Duty to maintain insurance. Every employer is required to obtain West Virginia workers' compensation coverage for the protection of its employees.

4.2. Every employer has a continuous and ongoing duty to maintain current information with its current private carrier about the employer's business activities, including all information that could affect the employer's payroll or premium.

4.3. Exemptions. An employer who is otherwise required to maintain mandatory West Virginia workers' compensation coverage is exempt from the requirement in the following circumstances:

a. An employer of domestic services as defined in subsection 3.3 of this rule is not required to carry West Virginia workers' compensation coverage for any individuals hired to perform such domestic services;

b. An employer of five (5) or fewer full-time employees in agricultural services is not required to carry West Virginia workers' compensation coverage for those employees;

c. An employer who is a casual employer;

d. An employer who is a church;

e. An employer who is engaged in organized professional sports activities, including an employer of trainers and jockeys engaged in thoroughbred horse racing: *Provided*, That the employer must carry coverage for its employees who are not participating in the organized professional sports activities. For example, an employer of jockeys and trainers engaged in thoroughbred horseracing may exempt such jockeys and trainers, but if the same employer also employs a driver to transport horses and equipment, the driver must be provided coverage;

f. A volunteer rescue squad or volunteer police auxiliary unit organized under the auspices of a county commission, municipality or other government entity or political subdivision, or a volunteer organization created or sponsored by a government entity, political subdivisions or an area or regional emergency medical service board of directors in furtherance of the purposes of the emergency medical services act of article four-c [§§16-4C-1 et seq.], chapter sixteen of this code: *Provided*, That if any such employers have paid employees, they must provide West Virginia workers' compensation for such paid employees; or

g. An employer of employees who are provided coverage for benefits under the federal Long shore and Harbor Workers' Compensation Act, 33 U. S. C. §901, et seq., is exempt from having to carry West Virginia workers' compensation coverage for such employees, but must provide West Virginia workers' compensation coverage for employees who are not provided coverage for benefits under the federal Long shore and Harbor Workers' Compensation Act.

4.4. Application for letter of exemption. An employer may apply to the Insurance

Commissioner on forms supplied by the Insurance Commissioner for a letter of exemption from coverage. The Insurance Commissioner will review the application and all evidence submitted by the employer and, based on the provisions of chapter twenty-three of the West Virginia Code and this rule, may make such determination as the Insurance Commissioner deems proper. The Insurance Commissioner shall charge a processing fee for each application in the amount of twenty-five dollars ($25).

§85-8-5. Auditing; Inspections; and Payroll Reporting.

Each private carrier may include reasonable auditing, inspection and payroll reporting provisions in its policy, subject to the approval of the Insurance Commissioner.

§85-8-6. Employees Covered; Independent Contractors; Coverage Elections; Assignment.

6.1. General. A West Virginia workers' compensation policy must cover all of the employees of the insured employer who are required to be provided West Virginia workers' compensation coverage under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

6.2. Independent contractors. All individuals performing services for compensation paid by an employer are presumed to be employees and required to be covered by a West Virginia workers' compensation insurance policy unless and until it is shown that the worker is an independent contractor. The burden of proving that an individual is an independent contractor is at all times, on the party asserting independent contractor status. For purposes of West Virginia workers' compensation coverage only, the following criteria are dispositive of whether an individual is an independent contractor:

a. For workers who are working in a hazardous industry, the following criteria must be met to be an independent contractor:

1. The individual holds himself or herself out to be in business for himself or herself. Examples of facts supporting this include, but are not limited to:

A. The individual possesses a license, permit or other certification required by federal, state and/or local authorities of businesses or individuals engaging in the type of work that is being performed by the individual;

B. The individual has entered into, or regularly enters into, verbal or written contracts with the persons and/or entities for whom the work is being performed, which have terms and conditions consistent with the other criteria stated in this subsection;

C. The individual has the right, pursuant to written contractual provisions entered into with the persons and/or entities for whom the work is being performed, to regularly solicit business from different persons or entities to perform for compensation the type of work that is being performed by the individual;

2. The individual has control over the time when the work is being performed, and the individual's work schedule is not dictated by the person or entity for whom the work is performed. This criterion does not prohibit the person or entity for whom the work is performed from reaching agreement with the individual as to completion schedule, range of work hours, and maximum number of work hours to be provided by the individual, and, in the case of entertainment, the time such entertainment is to be presented;

3. The individual has control and discretion over the means and manner of performance of the work being performed and in achieving the result of the work. In other words, the individual is not being supervised by the person or entity for whom the work is performed on an ongoing basis, but rather, the individual is given a description and expectation of the work to be performed at the outset of the retention of the individuals' services and then is expected to perform the services contracted for without any ongoing supervision. The mere fact that a person or entity for whom the work is being performed checks on the status of the work from time to time, or otherwise monitors the work being performed for the purposes of legal compliance with federal or state laws related to safety does not constitute supervision on an ongoing basis;

4. Unless expressly required by law, the individual is not required to work exclusively for the person or entity for whom the work is performed; and

5. If the use of equipment is required to perform the work, the individual provides most significant equipment required to perform the job. Some examples would be:

A. An independently contracted truck or delivery driver must use his or her own truck or delivery vehicle;

B. An independently contracted taxi cab driver must use his or her own vehicle;

C. An independently contracted timbering worker must use his or her own timbering equipment.

In the above examples, "his or her own" means that the equipment is not provided by, loaned, or leased to the individual worker by the person or entity for whom the work is being performed, but rather, the individual performing the work owns, or legally obtains the equipment from a separate source (i.e., not the person or entity for whom the work is being performed), and has the legal right to use the same.

b. For all other workers (i.e., workers not involved in a hazardous industry), the following criteria must be met:

1. The individual possesses a license, permit or other certification required by federal, state and/or local authorities of businesses or individuals engaging in the type of work that is being performed by the individual;

2. There is a written contract between the individual and the person or entity for whom the individual is performing services clearly establishing that the individual is an independent contractor and not an employee, and that the individual will not be provided workers' compensation coverage by the person or entity for whom the work is being performed; and

3. The individual maintains primary control over the time, means and manner of the work performed. For example, the person or entity for whom the services are being performed may specify that the contractee wants a particular project or type of work to be done and a certain time frame for the work to be completed, but the person or entity for whom the services are being performed cannot exert control over the day-to-day schedule of the individual or continuously supervise the individual as a boss would in an employment situation.

6.3. Elections not to provide coverage. Elections not to provide coverage to certain individuals, such as partners of a partnership, sole proprietors, members and certain investors in limited liability companies or certain corporate officers, are governed by the provisions of W. Va. Code §§23-2-1(g) and 31B-12-1207.

a. An employer may elect not to provide coverage for certain corporate officers and all members of a corporation's board of directors. A corporate officer or member of a corporate board of directors elected out of coverage by an employer is not entitled to the benefits of the Act.

1. The employers' election out of coverage of officers of a corporation is limited to four (4) principal officers for the employer: (1) president; (2) vice-president; (3) secretary; and (4) treasurer. The four (4) principal officers must be elected or appointed by the corporation's board of directors as prescribed by the corporate bylaws. The employer may elect these four (4) officers out of coverage even though their activities include work that is ordinarily performed by an officer and work that is ordinarily performed by a worker, an administrator or other employee who is not an officer. An officer who performs both types of activities (officer/worker, administrator, or other employee who is not an officer) is deemed to be working in a "dual capacity."

2. No other officer or assistant officer engaged in dual capacity may be elected out of coverage.

3. Dual capacity is determined by the duties of the officer/employee. For an officer other than the four (4) principal officers stated in paragraph 1. of this subdivision to be eligible to be elected out of coverage, that officer cannot have duties and perform work that also would ordinarily be done by a worker, administrator or other employee who is not an officer. It is the employer's burden to show that duties performed by officers or assistant officers other than the four (4) principal officers are not dual capacity activities and that the work could only be performed by an officer of a corporation. Examples of such showings are a vice president within a corporation (not the one vice president allowed to be elected out of coverage as one of the four (4) principle officers) who only attends board meetings and an assistant secretary whose only job is to affix the corporate seal to corporate papers.

4. Members of corporate boards of directors may be elected out of coverage by an employer, regardless of whether the member of the board of directors works in a dual capacity. It is the employer's burden to show that the individual elected out of coverage is, in fact, a member of the board of directors and is, in fact, vested with the authority to manage the affairs of the corporation as a member of the employer's board of directors. Members of corporate boards of directors who do not receive "gross wages" from the employer for their activities are not "employees" within the meaning of chapter twenty-three of the West Virginia Code and are not entitled to the benefits of chapter twenty-three of the West Virginia Code.

b. Certain members of a limited liability company may be elected out of coverage by an employer. "Limited liability companies" include those entities created pursuant to the "Uniform Limited Liability Company Act" of chapter thirty-one b of the West Virginia Code. These entities consist of all forms of limited liability companies, including, but not limited to, manager-managed limited liability companies, member-managed limited liability companies, foreign limited liability companies and professional limited liability companies.

1. Limited liability companies may elect not to include as an employee for purposes of workers' compensation coverage a total of not more than four (4) persons. Each of the persons elected out of coverage by the employer is required to be acting in the capacity of a manager, officer or member of the limited liability company.

2. All covered members of limited liability companies which are treated as partnerships for federal income tax purposes are subject to the calculation of premiums on the members as provided for partners in a partnership in W. Va. Code §23-2-1b.

6.4. Manner of notification. In the event of an election under W. Va. Code §23-2-1(g) and subsection 6.3 of this section, the employer shall provide to the private carrier written notice naming the positions not to be covered and the names and social security numbers of the individuals occupying those positions. The employer shall not include such individuals' gross wages for premium purposes in future payroll reports. The partner(s), member/manager(s), proprietor(s) or corporate or executive officer(s) named in the notification is not deemed an employee within the meaning of chapter twenty-three of the West Virginia Code after such notice has been served.

a. Elections not to be covered made under subsection 6.3 of this section are effective for the next policy period after the written notification in this subsection is received by the private carrier and each policy period thereafter with the same private carrier without subsequent written notification.

b. Elections not to be covered are valid only for the individuals named in the written notice provided for in this subsection. An election is not valid for any individual who may later hold the same position, office or title until an amendment to the election is made in accordance with this rule.

c. Amendments to a written notification of an election may be made only for the purpose of:

1. Changing the named person for any office or position previously reported on the election; or

2. Making an election for persons who were not previously employed as a sole proprietor, partner, officer, or member of the board of directors on the date the election was made; or

3. Making an election upon changing private carriers: *Provided*, That an employer must disclose the written notification, in its entirety, to the new private carrier prior to the effective date of the insurance policy; or

4. Adding a person who has previously elected not to be covered under the provisions of subsection 6.3 of this section if the private carrier receives written notification sixty (60) days prior to the coverage period in which coverage is sought. If written notification is not received by the private carrier sixty (60) days prior to the coverage period in which coverage is sought, then coverage shall not be extended to such person requesting coverage beginning that coverage period, but shall instead be extended to the following coverage period. The written notification shall clearly identify the coverage period in which coverage is sought to begin.

6.5. Owners and officers; Coverage denials when the employer is in default.

a. Employers that are required, but fail to maintain West Virginia workers' compensation coverage shall not be afforded coverage for the employers' partners, members, proprietor or corporate or executive officers, nor shall coverage or benefits be afforded through the Uninsured Employers' Fund or any other fund of the Insurance Commissioner to any individual for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or certain members of a limited liability company.

b. Employers who are in Old Fund, Uninsured Employers' Fund or policy default shall not be afforded workers' compensation coverage for the employers' partners, members, proprietor or corporate or executive officers, nor shall coverage or benefits be afforded through the Uninsured Fund or any other fund of the Insurance Commissioner to any individuals for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or members of a limited liability company.

1. Coverage for the individuals specified in this subsection shall not be afforded if the employer is in Old Fund, Uninsured Employers' Fund or policy default on the date of injury, and this exclusion will continue for the life of that injury. For example, if, at some time after the date of injury, the employer cures its default status, an individual specified in this subsection that incurs an injury on a date while the employer was in default status nevertheless will not be covered for the injury that occurred during the period of default, and benefits will never be payable for that injury.

2. Benefits paid during periods of Old Fund, Uninsured Fund or policy default for individuals denied coverage under this subsection shall be considered overpayments.

6.6. Duty to report all payroll.

a. Each employer has a duty to report the entire payroll of all employees to its private carrier.

b. The private carrier may make its own initial decision regarding the determination of all issues relevant to the classification of employees, rates and payroll: *Provided*, That any employer that disagrees with the decision made by its private carrier and is not able to reasonably resolve the dispute may file a protest with the Insurance Commissioner's designated rating organization for workers' compensation, or, in the event that the dispute involves issues of State law which the rating organization refuses to resolve, with the Insurance Commissioner. All private carriers issuing final decisions to insured employers on matters discussed in this subdivision shall provide clear instructions to the insured employer regarding the procedure for filing a protest to the private carriers' decision.

c. Nothing in this subsection shall be construed to permit an employer to deviate from the procedures set forth in subsection 6.4. of this section regarding elections not to provide coverage to certain individuals.

6.7. Limited partner. A "limited partner" as defined and provided by the Uniform Limited Partnership Act (W. Va. Code §47-9-1 et seq.) is not an employee of an employer which is a limited partnership subject to the mandatory or elective provisions of chapter twenty-three of the West Virginia Code, unless that person is employed in the service of the limited partnership for the purpose of carrying on the industry, business, service or work in which it is engaged.

6.8. Investors. A person who is solely an investor and who does not participate in the direction, administration, or control of a business or venture and its activities or investments is not an employee of an employer subject to the mandatory or elective provisions of chapter twenty-three of the West Virginia Code, unless that person is employed in the service of the business or venture for the purpose of carrying on the industry, business, service or work in which it is engaged.

§85-8-7. Extraterritorial Coverage and Related Issues.

7.1. Extraterritorial employees working in West Virginia on a temporary basis. Extraterritorial employees performing work in the State of West Virginia on a temporary basis (i.e., for a period not exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period) are not required to be covered with West Virginia workers' compensation coverage. If an extraterritorial employee is injured while working in this state on a temporary basis, the extraterritorial employee's exclusive workers' compensation remedy is under the laws of the state to which the extraterritorial employee is subject.

7.2. Extraterritorial employees working in West Virginia on a non-temporary basis.

Extraterritorial employees who perform work in the State of West Virginia on a non-temporary basis (i.e., for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period) and are not otherwise exempt from West Virginia's workers' compensation laws must be covered with West Virginia workers' compensation coverage unless they enter into an agreement with their employer described under subsection 7.4. of this section. An employer of extraterritorial employees has a duty to immediately advise its West Virginia private carrier when it reasonably believes it will be employing extraterritorial employees in the State of West Virginia on a non-temporary basis, so that premium can be adjusted accordingly.

7.3. Employment by a West Virginia employer outside of the State of West Virginia. Pursuant to West Virginia Code §23-2-1(b)(3) and subdivision c., subsection 4.3. of this rule, an employer that is otherwise subject to the provisions of chapter twenty-three of the West Virginia Code does not have to provide West Virginia workers' compensation coverage for employees who perform work for the employer in a state other than the State of West Virginia on a non-temporary basis (i.e., for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period): *Provided*, That the employer must provide West Virginia workers' compensation coverage for any employee working in the State of West Virginia and who is not otherwise exempt from West Virginia's workers' compensation laws on a non-temporary basis (i.e., for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period) unless the employee has entered into an extraterritorial agreement described in subsection 7.4. of this section.

7.4. Agreements to be covered in a state other than West Virginia. An employer and an employee who are both subject to the workers' compensation laws of a state other than West Virginia may enter into a written agreement in which the employer and employee both agree to be bound by the laws of the other state: *Provided*, That any employee entering into such an agreement must physically work for the employer entering into such agreement outside of the State of West Virginia for a period of not less than thirty (30) calendar days in any three hundred and sixty-five (365) day period, and the employer must comply with the workers' compensation laws of the other state(s). Failure to meet these circumstances shall cause any agreement contemplated under this section to be void from its beginning: *Provided, further*, That an agreement entered into by an employer carrying West Virginia workers' compensation coverage shall immediately be provided to the employer's West Virginia carrier so that premium can be adjusted accordingly. If an employee who has entered into an extraterritorial agreement as described in this subsection is injured, the extraterritorial employee's exclusive workers' compensation remedy is under the laws of the state to which the employee has agreed to be bound.

7.5. Agreements to be covered in West Virginia. With the consent of its West Virginia private carrier, an employee and employer may agree to be bound by the workers' compensation laws of West Virginia, regardless of where and for what amount of time the work is being performed: *Provided*, That this subsection shall not be construed in any manner to affect the workers' compensation insurance requirements of a state other than West Virginia.

§85-8-8. The Workers' Compensation Insurance Policy.

8.1. Each policy for West Virginia workers' compensation insurance shall comply with chapters twenty-three and thirty-three of the West Virginia Code.

8.2. Each West Virginia workers' compensation insurance policy shall provide coverage and benefit payments consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated there under for any bodily injury with a date of injury within the policy period and for all benefits types thereafter awarded, including all dependent benefits and related death benefits provided for under chapter twenty-three of the West Virginia Code. Each workers' compensation policy shall also provide coverage for any occupational disease or occupational pneumoconiosis award with a date of last exposure within the policy period, including all dependent benefits and related death benefits provided for under chapter twenty-three of the West Virginia Code.

8.3. Dependent and Death Benefits

a. All dependent benefits payable to a claimant pursuant to W. Va. Code §23-4-10(a)-(d), for claims in which the decedent dies on or after January 1, 2006 shall, for purposes of responsibility and chargeability, be derivative of the decedent's underlying compensable injury or exposure which caused his or her death. This means that the carrier, self-insured employer or other fund responsible for paying the dependent benefits is the private carrier, self-insured employer or other fund providing workers' compensation coverage on the date of injury or last exposure giving rise to such dependent benefits. For all other purposes, including benefit rate and duration, the dependent benefits shall be a new right, separate and apart from the original date of injury or last exposure, to be paid in a manner otherwise consistent with statutory, regulatory and case law applicable to the same: *Provided*, That should the decedent's death result from a work place injury or exposure for which there was no underlying attributable workers' compensation claim during the decedent's lifetime, the carrier, self-insured employer or other fund assigned to the compensable injury or exposure which is proven to have caused the decedent's death is responsible for the payment of the dependents' benefits.

b. All "104 weeks awards" payable to a dependent, pursuant to W. Va. Code §23-4-10(e), for claims in which the claimant dies on or after January 1, 2006 shall, for purposes of responsibility and chargeability, be derivative of the deceased claimant's previously granted permanent total disability award. This means that the carrier, self-insured employer or other fund responsible for paying the 104 weeks award is the private carrier, self-insured employer or other fund providing workers' compensation coverage for the permanent total disability award giving rise to the 104 weeks award. For all other purposes, including benefit rate and duration, the 104 weeks awards shall be a new right, separate and apart from the original date of injury or last exposure, to be paid in a manner otherwise consistent with statutory, regulatory and case law applicable to the same.

c. Nothing in subdivisions a. and b. of this subsection shall alter the terms of any contract or agreement entered into prior to January 1, 2006, whereby any entity agreed to pay specified workers' compensation benefits.

d. A private carrier, self-insured employer or other responsible fund that pays a

104 weeks award to a dependent pursuant to W. Va. Code §23-4-10(e) has a right to full reimbursement from another private carrier, self-insured employer or other responsible fund that pays dependent benefits pursuant to W. Va. Code §23-4-10(a)-(d), no later than when the issue of compensability of the dependents' claim is finally determined.

8.4. Upon issuance of a policy, each private carrier is deemed to have reserved its right to select, retain, and compensate legal counsel to defend any claims decisions made by the private carrier which are protested under article five, chapter twenty-three of the West Virginia Code and to settle said claims in accordance with all applicable statutes and rules.

8.5. Each private carrier shall assess its policy holders any applicable deficit reduction surcharge, Insurance Commissioner regulatory surcharge, Uninsured Employers' Fund assessment, and/or Private Carrier Guaranty Fund assessment and remit the same as directed by the Insurance Commissioner. The obligation of the private carrier is limited solely to the collection and remittance of the proper percentage amount of the surcharges and assessments, as established by the Insurance Commissioner. The private carrier has no obligation to the Insurance Commissioner or to the Debt Reduction Fund to make up for surcharge amounts that are not collected as a result of the insured employer's failure to pay their premium.

§85-8-9. Notification of Issuance, Renewal or Termination of Coverage.

9.1. Except as provided in subsection 9.2. of this section, upon cancellation of a West Virginia workers' compensation policy, every private carrier is required to notify the Insurance Commissioner's designated rating organization of the cancellation at least ten (10) calendar days in advance of the effective date of termination of the coverage. The notification shall be on forms and/or other procedures developed by the Insurance Commissioner.

9.2. If an insured employer expressly requests in writing to the carrier that its West Virginia workers' compensation policy be cancelled, the private carrier shall notify the Insurance Commissioner's designated rating organization of said cancellation within ten (10) calendar days after receipt of the written request or any specified requested date of cancellation, whichever is later. Such a request by an insured employer shall not be deemed valid until received by the private carrier in writing.

9.3. Upon issuance or renewal of a West Virginia workers' compensation policy, every private carrier is required to notify the Insurance Commissioner's designated rating organization of said issuance or renewal within thirty (30) calendar days after the effective date of coverage, including the effective date of coverage and the date of expiration of the new policy. Notification shall be on forms and/or other procedures developed by the Insurance Commissioner.

9.4. If a carrier timely reports the information required by subsection 9.3. of this section, it shall be deemed sufficient to meet the requirements of W. Va. Code § 23-2C-15(f)(2) as this code provision relates to refusals to renew.

9.5. Failure of a private carrier to timely report information to the Insurance

Commissioner as required by subsections 9.1., 9.2. and 9.3. of this section may subject the private carrier to a fine not to exceed $500 per occurrence of untimely reporting.

9.6. A private carrier may cancel a workers' compensation policy for failure of the policy holder to timely remit adequate consideration upon the issuance of advance written notification to the policy holder of no less than ten (10) calendar days. The refusal of a policy holder to: (a) permit a premium audit by a private carrier; or (b) to pay any applicable surcharge or assessment that the carrier is required to collect pursuant to Chapter twenty-three of the West Virginia Code, is considered "failure of the policy holder to timely remit adequate consideration" for purposes of this section. The effective date of cancellation shall be no earlier than ten (10) calendar days after issuance of advance written notice.

9.7. Except for the failure of the policy holder to timely remit adequate consideration, a private carrier may cancel a workers' compensation policy for reasons consistent with the terms of the policy, upon the issuance of advance written notification to the policy holder of no less than thirty (30) calendar days. The effective date of cancellation shall be no earlier than thirty (30) calendar days after issuance of advance written notice.

9.8. A private carrier may decline to renew a workers' compensation policy upon the issuance of advance written notification to the policy holder, or, if the policy holder purchased the policy through an insurer through an agent, the agent, of not less than sixty (60) calendar days prior to the expiration date of the current policy.

9.9. Any offer of renewal shall be sent to the policy holder, or, if the policy holder purchased the policy through an insurer through an agent, the agent, at least sixty (60) calendar days prior to the expiration date of the current policy.

9.10. All notifications and offers referenced in subsections 9.5. through 9.9. of this section must be forwarded to the insured or agent by mail. A cancellation, non-renewal or other termination of coverage must state with specificity the reason for and the specific effective date of the termination of coverage: *Provided*, that if the notification or offer is being sent to an agent, the carrier and agent may agree, pursuant to the provisions of W. Va. Code §39A-1-8, to send the notification or offer electronically. All private carriers must maintain proof or certificate of mailing for all notices sent.

§85-8-10. Rating Organizations.

10.1. Consistent with the provisions of W. Va. Code §23-2C-18a(b), the Insurance Commissioner may designate a workers' compensation rating organization that has been licensed in accordance with W. Va. Code §33-20-6 to assist the commissioner with carrying out his or her regulatory duties in regard to the workers' compensation insurance market.

10.2. Every workers' compensation private carrier shall: (1) record and report to the designated rating organization its workers' compensation experience as set forth in the uniform statistical plan submitted by the designated rating organization and approved by the Insurance Commissioner; and (2) adhere to the uniform classification plan and uniform experience rating

plan developed by the designated rating organization and approved by the commissioner.

10.3. Upon the Insurance Commissioner's designation of a workers' compensation rating organization to be utilized by all insurers, the loss cost, rule, or form filings made by the designated rating organization shall be utilized by every member of the rating organization without modification and as of the effective date of the relevant rating organization filing unless the member specifically makes a request in writing to the Insurance Commissioner to deviate from the same and receives approval to do so, or unless the member makes an exception basis filing pursuant to W. Va. Code §33-6-8 or §33-20-4.

§85-8-11. Rate Making.

11.1. Beginning on the fiscal year commencing the first day of July, 2008, all private carriers shall determine their base rates from the actuarially determined loss costs filed by and approved for the designated rating organization. All private carriers shall additionally adhere to the rating rules filed by and approved for the designated rating organization unless the private carrier makes an approved filing permitting deviation from the same.

11.2. The base rates charged by the private carriers may also include: (1) a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments, surcharges and fees, catastrophe reinsurance expenses, expenses associated with rating organizations, loss adjustment expenses not included in the loss costs, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the private carrier's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to the provisions of W. Va. Code §33-20-4. Any filing made to establish or amend a loss cost multiplier or multipliers which accounts for expenses is effective until such time as the private carrier makes another filing to adjust the same.

11.3. Private carriers may offer premium credits and debits through schedule rating plans which are consistent with industry practices. The ultimate premium net said credits and debits may not violate W. Va. Code §23-2C-18(c). All rating plans shall be subject to the filing requirements of chapter thirty-three of the West Virginia Code that are applicable to other commercial insurance lines. Any credit or debit applied to the insured shall reasonably reflect: (1) appropriate judgment of the private carrier as to the risk and/or exposure characteristics of the insured; (2) the private carrier's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations.

11.4. Deductible plans. Deductible workers' compensation plans are permitted subject to the approval of the Insurance Commissioner, including the underwriting standards used for issuing such plans. Under a deductible plan, an insured employer that fails to make a required deductible payment shall be deemed to be in default of the policy premium and subject to cancellation for its failure to timely remit adequate premium, but the default shall not affect the payment of all benefits in otherwise compensable claims made under a policy inclusive of a

deductible plan. Under all deductible plans, the private carrier remains responsible for payment of claims benefits and administration and defense of claims.

11.5. In addition to the premium charges determined, private carriers shall charge (1) all Deficit Reduction Fund surcharges as provided for in chapter twenty-three of the West Virginia Code and W. Va. Code St. R. §85-6-1 et seq.; (2) all regulatory surcharges required to fund the Insurance Commissioner's regulation of the workers' compensation industry as provided for in chapter twenty-three of the West Virginia Code and W. Va. Code St. R. §85-6-1 et seq.; and (3) all assessments made by the Insurance Commissioner for the funding of the Uninsured Employers' Fund or the Private Carrier Guaranty Fund as defined in W. Va. Code §23-2C-1 et seq. All collected surcharges shall be remitted as directed by the Insurance Commissioner.

PUBLIC HEARING

MAY 29, 2008

OFFICES OF THE WEST VIRGINIA INSURANCE COMMISSIONER
WORKERS' COMPENSATION INDUSTRIAL COUNCIL

"WORKERS COMPENSATION POLICIES, COVERAGE ISSUES AND RELATED TOPICS"
TITLE 85, SERIES 8

Transcript of the Public Hearing held on Thursday, May 29, 2008, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
Charles Bayless, Chairman
Bill Dean
Senator Don Caruth
Delegate Nancy Guthrie
Kent Hartsog
Dan Marshall (via telephone)
Senator Brooks McCabe
Walter Pellish (via telephone)

Chairman Bayless: We have Title 85, Series 8, "Workers' Compensation Policies, Coverage Issues and Related Topics." Mary Jane, anything from the staff?

Mary Jane Pickens (General Counsel OIC): No. This is the same. Rules 2, 6 and 8 are all simply rules that we had to reopen for the purpose of making them match the new law.

Chairman Bayless: Any comments from members of the Council? Are there any public comments on Series 8 on the proposed rule? [No public comments.]

PUBLIC HEARING
TITLE 85, SERIES 8
"WORKERS' COMPENSATION POLICIES, COVERAGE ISSUES AND RELATED TOPICS"
Industrial Council Meeting
Offices of the West Virginia Insurance Commissioner
1124 Smith Street, Room 400, Charleston, WV 25301
May 29, 2008

Name	Address	Telephone Number	Group Affiliation	Do you desire to address the Council?	Agenda item to which you desire to speak

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May 28, 2008

VIA FACSIMILE ONLY 304-558-1362

Ryan Sims, Esquire
Associate Counsel
WV Office of the Insurance Commissioner
Post Office Box 50541
Charleston, West Virginia 25305

Re: Comments to Proposed Rules 1, 2, 8 and 18

Dear Mr. Sims:

This letter contains responses to the above-proposed rules filed with the Secretary of State. On behalf of the West Virginia AFL-CIO and its affiliated members, including the United Mine Workers of America, the following changes are suggested:

RULE 85 CSR 1, CLAIMS MANAGEMENT AND ADMINISTRATION

85-1-2 Definitions

Pg. 2 2.10 Delete the word "deposited" and replace it with the word "received."

85-1-3 Injured Workers' Report of Injury and Application for Compensation

Pg. 3 3.1 Delete sentence beginning with "Failure to immediately..." and the remaining two sentences of Section 3.1

Pg. 4 3.2 Line 6, delete sentence beginning with "There shall be no retroactive adjustments..."

85-1-4 Employers' Report of Injuries

Line 3, Keep in the two deleted sentences beginning with "Failure to comply..."

85-1-5 Special Rules for Temporary Total Disability Claims

Pg. 5 5.2 Line 4, insert the words "temporary total disability" immediately prior to the word "indemnity."

Pg. 5 5.3 Delete Section 5.3 in it's entirety.

85-1-9 Special Rules for Non-Awarded Partial Benefits

Pg. 6 9.2 Delete this Section in it's entirety.

85-1-10 Time Standards

Pg. 7 10.2 Line 2, reinsert the word "fifteen (15)" and delete the word "ninety (90)."

Line 9, reinsert the word "fifteen (15)" and delete the word "ninety (90)."

Pg. 7 10.3 Line 1, insert the word "prescriptions" after the word "Treatment."

Line 2, insert the word "prescriptions" after the word "treatment."

Pg. 8 10.6 Lines 2 and 3, reinsert the word "ten (10)" and delete the word "thirty (30)."

Line 9, reinsert the word "ten (10)" and delete the word "thirty (30)."

85-1-12 Overpayments

Pg. 10 12.1 Lines 7 and 8, delete the words "dependents benefits, fatal (104 week) benefits."

The following new Section needs to be added:

"85-1-14A Procedure for Abuse by Employer and Responsible Party

Misrepresentation of any statement and information by Employer or Responsible Party shall be considered fraudulent and subject to a $1,000.00 fine for each occurrence for failure by Employer and/or Responsible Party to timely file information, provide information and act

on information shall result in a $1,000.00 fine for each occurrence, and after five occurrences fines shall be increased to $2,500.00."

"Coercing and discouraging a worker not to report an injury is an offense that will result in a fine of $2,500.00 and result in a ruling in an automatic ruling for the claimant."

85-1-15 Travel Expenses-Medical Examination and Treatment

Pg. 12 15.1 Line 6, delete the number (15) and insert the number (54.5) and insert "($54.50) and delete ($0.15)."

85-1-16 Complaints

Pg. 13 Add "failure to respond within 15 days will result in a $1,500.00 fine for each occurrence."

85-1-17 Expert Witness Appearances

Pg. 13 17.1 Line 1, insert the words "authorized independent medical examiner" after the words "treating physician."

RULE 85 CSR 2, WORKERS' COMPENSATION CLAIMS INDEX

85-2-4 Claims Index

Pg. 3 4.2 Add the following:

"h. All wage information"

"i. Any other fields of information as the Commissioner deems necessary."

RULE 85 CSR 8, WORKERS' COMPENSATION POLICIES, COVERAGE ISSUES AND RELATED TOPICS

85-8-3 Definitions

Pg. 3 3.8 Add the following:

"e. Any business involving first responders including, but not limited to, policeman, fireman, EMTs, and other emergency personnel."

85-8-6 Employees Covered; Independent Contractors; Coverage Elections; Assignment

Pg. 7 6.2a.3 Line 7, delete the entire sentence beginning with the word "Provided."

6.2.a.5 Line 1, delete the first thirteen sentences of this Section through the words "legal right to use the same."

RULE 85 CSR 18, SELF INSURANCE, SELF ADMINISTRATION, AND THIRD PARTY ADMINISTRATORS

85-18-3 Definitions

Pg. 2 3.4 Line 1, delete the words "without good cause."

Line 15, delete the remainder of this Section beginning with the words "For purposes of."

In closing, I would be happy to meet with the members of the Industrial Council, Commissioner Cline or any members of her staff to discuss our thoughts on these issues.

Respectfully submitted,

Thomas P. Maroney

TPM/clw

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REPLY TO: CHARLESTON

SENDER'S E-MAIL: jbrannon@pffwv.com
www.pffwv.com

Date: May 29, 2008

Re: Comments regarding Proposed Rules:
85 C.S.R. § 1
85 C.S.R. § 2
85 C.S.R. § 6
85 C.S.R. § 8
85 C.S.R. § 18
Public Comment period expires 5/29/2008
Public Hearing to be held on 5/29/2008 at 3:00 p.m. at OIC Office in Charleston, West Virginia

Please accept this correspondence as our public comments regarding the Offices of Insurance Commissioner's Proposed Rules 85 C.S.R. §§ 1, 2, 6, 8, and 18, which has been submitted for public comment.

85 C.S.R. § 1 et seq.: "Claims Management and Administration"

General Comment: We applaud the OIC's determination to modify Rules 1 and 18 to provide one consistent claims management and administration standard for all "responsible parties" as a beneficial change that now standardizes all claims management and claims administration requirements.

85 C.S.R.§ 1-2

This section has been amended to provide a definition for "retire" which means "an individual has permanently ceased working due to age or years of service and has no intent to return to work."

Comment:

The phrase "has no intent to return to work" is subjective to the individual seeking benefits. Please consider that the use of this phrase in the amendments to this rule regarding the eligibility to receive benefits, in some instances, would incentivize a "retired" claimant to state that they do have an "intent to return to work" in order to receive benefits. The "responsible party" or employer would be unable to refute such a statement as it would be impossible to contradict the individual's statement of his/her intent.

85 C.S.R. § 1-3

The changes in this section provide specifically that the fact that an injury was reported more than 2 days after the injury cannot, by itself, be a reason to deny the claim. Retained in the draft is the language that enforcement of an employer's personnel policy requiring immediate reporting of a work-place injury is not a discriminatory practice.

No Comment.

85 C.S.R. § 1-4

The section was amended to delete the $250 dollar fine for failure by an employer to report injuries to the "responsible party" within 5 days. However, the reporting requirement itself was retained and still requires the employer to notify the "responsible party" within five (5) days of receipt of notice of the employees desire to file a claim.

Comment:

It is recommended that the OIC define "receipt of notice of the employees desire to file a claim". Some workers' who sustain a work related injury may report the injury to the employer but never file an application for benefits. Some "responsible parties" have interpreted this section to require the employer to report the injury to them within five (5) days of the occurrence of an injury and then, based on the employer's report, have taken the position that the employer's report under this section is sufficient to issue a ruling on the claim. This interpretation is contrary to West Virginia Code § 23-4-1a and 23-4-15(a) which requires the injured worker to complete and file an application for benefits with the responsible party. Any interpretation that does not require an application for benefits to be filed prejudices the employer's rights under the applicable statute of limitations. Further, without a completed application for benefits, as required by the statute, the "responsible party" does not have the injured workers' allegation regarding the injury, does not have medical evidence indicating that an injured worker sustained an injury, and does not have a valid release to obtain medical records related to the alleged claim.

85 C.S.R. §1-5

This section relates to "special rules of temporary total disability claims." § 1-5-2 has been amended to reflect that when an individual retires "as long as the individual remains retired", the individual is disqualified from receiving temporary total disability indemnity

benefits as a result of an injury received from the place of employment from which he or she is retired.

Comment:

As with the definition of retire discussed above, the inclusion of the language "as long as the individual remains retired" is subjective to the claimant. Please consider that the use of this phrase in the amendments to this rule regarding the eligibility to receive benefits, in some instances, would incentivize a "retired" claimant to state that they do not have an intent to "remain retired" in order to receive benefits. The "responsible party" or employer would be unable to refute such a statement as it would be impossible to contradict the individual's statement of his/her intent.

Further, **§1-5.3** was amended regarding the closure of temporary total disability benefits when the claimant would not have been working for the employer. Previously, this section said a reasonably ascertainable period of time during which the injured worker would not have been compensated from his or her employer and now says a reasonable ascertainable period of time during which the claimant would not have been "performing work for any employer."

Comment:

The previous language in this section had been interpreted to relate to seasonal employees or temporary employees who did not work year-round of full-time for an employer. Under the previous language and employer of seasonal or temporary employees was not charged for temporary total disability benefits and the worker was not entitled to temporary total disability benefits during periods in which they would not have been compensated by the employer, i.e., during the off-season or after the termination of the temporary employment. The proposed amendment to this section now permits the worker to receive, and the employer to be charged, temporary total disability benefits even when the employee would not have been working for the employer. Further, even if the employee would not have been working for another employer during the off-season or after the conclusion of the temporary employment, this section incentivizes the worker to state that but for the injury he/she would/could have been working for another employer. If this is the intent of the amendment to this section, then the section should be deleted as it is superfluous. However, the previous language provided a significant benefits to employers of seasonal or temporary employees, who would naturally only be operating a portion of the year, to minimize the impact of claims on their premiums and to properly charge their policies with benefits during periods only when they would be working. This employer's are most likely smaller employer's who can not easily absorb additional workers' compensation premiums based on the amount of benefits which could be authorized under this section. It must be remembered that temporary total disability benefits are granted to compensate an injured worker for wages lost due to the injury. Clearly, the previous language in this section was consistent with the purpose of these benefits as the employee received benefits during

periods he/she would have been working for the employer, and not for periods when the worker would not have been receiving wages from the employer.

85 C.S.R. §1-7

§1-7: This section is completely new and relates to "Notice and Litigation." Language has been included which again re-states that there are only two (2) parties to a claim, the claimant or the claimant's dependents and the employer, with the exception of funds created by article two-c of Chapter 23, the Insurance Commissioner is also a party.

Comment:

While it is clear that the Insurance Commissioner is a party in all "Old Fund" claims created in article two-c of Chapter 23, it does not appear that the Insurance Commissioner is a party to "Uninsured Fund Claims" created in West Virginia Code § 23-2C-8. While the Insurance Commissioner, or its designee, is the claims administrator, the statute does not provide that he Insurance Commissioner is a party to the actual claim. If it is the intent of the Insurance Commissioner not to be a party to these Uninsured Fund Claims then this language should be amended to specify that the Insurance Commissioner is a party only in "Old Fund" claims.

§ 1-7.2: This section requires that upon the making of any decision, the responsible party is required to send written notice of the decision to all parties which sets forth the basis of the decision and "informing the claimant or claimant's dependents of the right to protest the decision by filing a protest with the Office of Judges within sixty days of the receipt of the decision."

Comment:

The language in this section purports to require notice of only the claimant's right to protest a decision and thus preclude the employer's right to protest a decision. This section should be amended to require notice "informing **the parties** of the right to protest the decision by filing a protest with the Office of Judges within sixty days of receipt of the decision."

The language which purports to provide only the claimant or the claimant's dependent's a right to protest a decision, and preclude the employer from filing a protest, is contrary to the plain language of West Virginia Code § 23-5-1(b)(1) as amended, and is inconsistent with numerous other sections of Chapter 23 which specifically provide the employer the right to protest decisions of the claims administrator.

Initially, West Virginia Code § 23-5-1(b)(1), as amended states "An employer may protest decisions incorporating findings made by the Occupational Pneumoconiosis Board, decision made by the Insurance Commissioner acting as administrator of claims involving funds created in article two-c of this chapter, or decisions entered pursuant to subdivision (1), subsection (c), section seven-a, article four of this chapter." There is no language contained

in this statute which eliminates or abolishes the employer's right to protest a decision by the claims administrator. In State ex rel McKenzie v. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002), the West Virginia Supreme Court of Appeals stated that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syllabus Point 1, *Consumer Advocate Div'n v. Public Service Comm'n*, 182 W.Va. 152, 386 S.E.2d 650 (1989)." Syl. pt. 11, State ex rel McKenzie v. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002). Further, the West Virginia Supreme Court of Appeals has stated that "[a]ny rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute." Syl. pt. 4, *Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W.Va. 691, 527 S.E.2d 802 (1999)". Syl. Pt. 4, Repass v. Workers' Compensation Division, 212 W.Va. 86, 569 S.E.2d 162 (2002).

Further, an "interpretation" of this language which serves to administratively abolish the employer's right to protest decisions by the claims administrator does not reflect the "Legislatures" intent and is inconsistent with the remainder of Chapter 23. It must be remembered that "[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975)." Syl. pt. 7, Verizon v. West Virginia Bureau of Employment Programs, 214 W.Va. 95, 586 S.E. 2d 170 (2003).

When Chapter 23 is reviewed *in toto*, it is clear that the Legislature did not abolish the employer's right to protest a decision by a claims administrator. Had the Legislature intended to abolish the employer's right to protest such decisions, the Legislature could have done so clearly with language to effectuate that purpose. At Syllabus Point 5, the Verizon Court stated that "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938)." Id. at Syl. Pt. 5. Additionally, in Syllabus Point 4 of Kessel v. Monongalia County General Hospital, 220 W.Va. 602, 648 S.E.2d 366 (2007) the West Virginia Supreme Court of Appeals stated that "[a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)." Id. Bearing this in mind, it can not be asserted that the Legislature "intended" to abolish the employer's right to protest when the Legislature is presumed to have been familiar with the remaining sections of Chapter 23, such as West Virginia Code §§ 23-5-2, 23-5-4, 23-5-5, 23-4-1b, 23-4-1c(a)(3), 23-4-1c(h), 23-4-1d, 23-4-

6(j)(6), 23-4-7a(g), and 23-4-16a, all of which reference the rights of either both parties to protest a decision or the employer specifically.

Further, as the employer and the claimant are the only parties to a workers' compensation claim, it is fundamentally unfair, and potentially a violation of the employer's constitutional equal protection rights (Article III, § 10 of the West Virginia Constitution) and the certain remedy provision of the West Virginia Constitution (Article III, § 17 of the West Virginia Constitution) to allow the claimant to protest any order entered by the claims administrator while denying, or attempting to severally limit, the employer's right to do the same.

§1-7.3: This section re-states the language from House Bill 4636 relating to the private carrier who is providing coverage to the employer, has full authority to act on behalf of the employer in the claim, including but no limited to, the ability to make claims decisions, appoint counsel for defense of the claim and make determinations regarding litigation strategy. Further, this section states that an insured employer generally may not independently protest the decision by its carrier and then lists the two (2) circumstances in which, according to the OIC, an employer may still protest a decision by its carrier. These two (2) exceptions are decisions incorporating findings made by the OP Board and decisions entered pursuant to West Virginia Code § 23-4-7a(c)(1). However, the proposed rule goes on to state that even in these circumstances the carrier has the sole authority to act on the employer's behalf in the litigation of the claim.

No Comment:

85 C.S.R. §1-10

This section deals with time standards related to actions and claims. The major change, obviously, is that these standards are now applicable to both private carriers and self insured employers.

Regarding injury and occupational disease claims under §1-10.1, this section has been amended to state that the responsible party is required to rule on a properly executed and filed application within fifteen (15) days from the date of the receipt of all required information. However, the section also provides that whenever a claim has not been adequately or properly developed for consideration, the responsible party may require the production of additional evidence and the fifteen (15) days to rule on the claim is tolled during that evidence gathering process.

Regarding occupational pneumoconiosis claims, in §1-10.2, the amendment requires that a non-medical ruling be issued within ninety (90) days and that this ninety (90) day period can be extended for up to an additional thirty (30) days to develop further evidence.

§1-10.3 relates to medical treatment, appliances, devices and supplies and requires that a request for authorization for the same be acted upon within fifteen (15) days from the date of the receipt of the request.

§1-10.4 relates to medical evaluations and requires that a referral for a one-hundred twenty (120) day exam be made within twenty (20) days of the end of the one-hundred twenty (120) day period. However, an amendment was added to allow that the expected period of temporary total disability exceeds one-hundred twenty (120) days, the referral can be made within twenty (20) days of the expected day of the end of the temporary total disability.

§1-10.5 has been amended to require that the responsible party act upon a permanent partial disability evaluation report within thirty (30) days of the receipt of that report. Furthermore, a section was added to permit the permanent partial disability awards to be paid either in a lump sum or in installments and requires that temporary total disability awards commence within thirty days of the decision granting the award.

§1-10.6 relates to applications for re-opening and requires that an application for re-opening for "temporary or permanent total disability benefits" be ruled on within thirty (30) days from the date of the receipt by the responsible party. However, this section also provides an additional thirty (30) days to rule if additional evidence is required. It should be noted that this section mentions temporary and permanent total disability benefits and the language regarding permanent total disability is contrary to West Virginia Code §23-4-6 requirements for ruling on a permanent total disability applications. It appears that the OIC meant to include re-opening requests for temporary total disability and permanent partial disability, not permanent total disability.

Further, §1-10.7 requires that a responsible party comply with orders of the Office of Judges Board of Review or the West Virginia Supreme Court of Appeals within thirty (30) days of the date of receipt, unless required to act sooner or unless the order issued is subject to a lawfully ordered stay.

No Comment.

85 C.S.R. §1-12

This section relates to overpayments and the definition of an overpayment includes any money received from or paid on an injured workers behalf by the responsible party which is subsequently determined that the injured worker was not entitled. Further, overpayments may include TTD, PPD, PTD, NAP TTR, TPR, dependent's benefits, fatal benefits, travel or medical benefits. The section also permits a responsible party to withhold the overpayment from future disability benefits payable to the worker or the dependents in the same claim or other claims which are pending with the same responsible party to whom the overpayment is due.

Comment:

This section should be amended to allow for the responsible party to collect the overpayment from a prior or subsequent responsible party. Additional changes may have to

be made in Rule 2 to provide a mechanism to place prior and subsequent responsible parties on notice that a claimant has an overpayment in a claim and to whom the withheld overpayment should be forwarded.

85 C.S.R. §1-17

This section relates to expert witness appearance fees and requires a responsible party to reimburse a treating physician or authorized consulting physician who appears at a hearing to give testimony at a rate of $100.00 per quarter hour. Additionally, all other expert witness appearance fees are also paid at the rate of $100.00 per quarter hour; however, if the expert demands an amount in excess of that, it is the responsibility of the party who has retained the services of the expert or submitted a report or record to pay the additional monies.

Comment:

The net effect of this is to put in a requirement that allows expert witnesses to charge in excess of the rate set by the Office of the Insurance Commissioner and the Office of Judges and essentially costs the carrier, or the claimant, additional money for the deposition as the deponent is now allowed to charge the additional sum to the parties who submitted the report. This was not the case previously and may prove to have a negative impact on employers, carriers and even claimants depending on the evaluating physician that they use.

85 C.S.R. §2-1, *et seq*. "Workers' Compensation Claims Index"

Comment:

As noted in the Comment to 85 C.S.R. § 1-12 above, it is recommended that this Rule be amended to include a field in the Claims Index for overpayments made by a responsible party in a claim. Further, each responsible party should be required to confirm by review of the Claims Index that no overpayments have been made to a claimant before paying benefits. Similar to the requirement to confirm no outstanding child or spousal support debts. This would serve as notice to the responsible party preparing to make an indemnity benefit payment in a claim to withhold any prior or subsequent overpayment in a claim for another responsible party.

85 C.S.R. §6-1 et seq. "Debt Reduction Fund Assessment and Regulatory Surcharges"

No Comment.

85 C.S.R. §8-1 "Workers' Compensation Policies, Coverage Issues and Related Topics"

No Comment.

85 C.S.R. §18-1, et seq. "Self Insurance, Self Administration and Third Party Administrators"

§ 18-14.4. was amended to prohibit self-insured employers from operating in an "illegal, improper or unjust manner" with regard to claims handling. This is similar to language found in chapter 33 pertaining to carriers. According to the OIC, the concept is to create a "catchall" provision for self-insured employers similar to that which applies to insurance companies.

Comment:

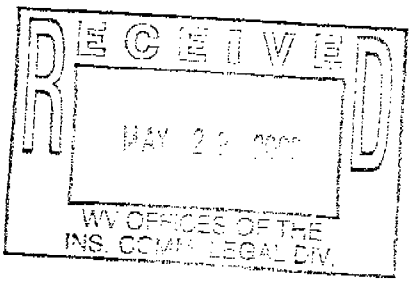
The language contained in this amendment, "illegal, improper or unjust" is vague and ambiguous, does not provide a consistent standard which will be applied, and presents an opportunity for misinterpretation of claims handling decisions. There is a potential for severe penalties based on the subjective interpretation of a claims handling reviewer. This section should be deleted.

Thank you for your consideration of these comments. If you have any additional questions, please feel free to contact me.

Sincerely yours,

Jeffrey B. Brannon

West Virginia Insurance Federation



May 29, 2008

BY HAND-DELIVERY

Ryan Sims
Associate Counsel
Legal Division
Office of the West Virginia Insurance Commissioner
1124 Smith Street
Charleston, West Virginia 25301

RE: Comments to Proposed Administrative Rules
Title 85, Series 8

Dear Mr. Sims:

These comments to the proposed amendments to 85 CSR 8 relating to "Workers' Compensation Policies, Coverage Issues, and Related Topics" are submitted on behalf of the West Virginia Insurance Federation ("WVIF"), the state trade association for property and casualty insurance companies doing business in West Virginia. Many of the WVIF's members write workers' compensation coverage in other states and are considering writing workers' compensation insurance when the market opens to private insurers in July 2008. These insurers are monitoring closely the development of West Virginia's regulations relating to workers' compensation issues.

Based on its evaluation of the proposed rule, the WVIF has the following concerns, all of which relate to Section 9, "Notification of Issuance, Renewal or Termination of Coverage":

1. Proposed Rule 9.1.

Proposed Rule 9.1 changes the deadline by which an insurer must report to the Insurance Commissioner's designated rate organization, NCCI, of any cancellation or nonrenewal. One company raised this issue because in other states, it does not report to NCCI until the policy is actually cancelled. Indeed, most policies do not actually cancel because insurers receive the premium prior to cancellation. Proposed Rule 9.1 effectively changes this notice requirement from notice of an actual cancellation to notice a prospective or potential cancellation. Under this scenario, insurers would be required to notify NCCI of an expected cancellation and then notify NCCI a second time of the reinstatement. The WVIF believes it would be more efficient to report cancellations after an insurer actually cancels the policy.

2. Proposed Rule 9.7.

The WVIF is concerned that the sixty (60) day notice required for nonrenewal notices is too long. One company stated that this long timeframe will require it to re-program its computer systems for one line of business in one state, leading to additional operational expenses. That company suggested a notice period of thirty-five (35) days prior to the policy's expiration date.

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3. Proposed Rules 9.8 and 9.9.

Proposed Rule 9.9 (current Rule 9.5) requires insurers to provide advance written notice of cancellation or nonrenewal to the insured by mail and that insurers maintain proof or certificate of mailing of such notice. Taken together, Proposed Rules 9.8 and 9.9 appear to expand this requirement to include offers of renewal. Specifically, Proposed Rule 9.8 states:

> 9.8. Any offer of renewal shall be sent to the policyholder at least sixty (60) calendar says prior to the expiration date of the current policy. (Emphasis added.)

Additionally, Proposed Rule 9.9 (current Rule 9.5), which historically has required advance written notification of "cancellation or nonrenewal", refers to "all notifications and offers referenced in subsections 9.4 through 9.8 of this section." (Emphasis added.)

As such, the WVIF is concerned that Proposed Rules 9.8 and 9.9 impose a new, additional requirement that insurance companies send offers of renewal by mail and retain proof or certificate of mailing of such offer. Thus, because Proposed Rule 9.8 refers to offers of renewal and requires that they be "sent", Proposed Rule 9.9 appears to apply not only to cancellations and nonrenewals, but also to offers of renewal to be sent by mail and proof of mailing maintained. Importantly, policy renewals for the majority of commercial policies, including workers' compensation policies, are not mailed directly to the policyholder by the insurer. Instead, insurers mail the policies to the agent who may personally deliver the policy to the insured or send the policy by mail within the required time period. Because the offer of renewal may be hand-delivered, rather than mailed, it would be impossible to maintain a record of mailing the renewal offer to the insured.

The WVIF believes the effect of the proposed rule -- to prohibit the current methods of delivery of commercial policies, which include personal delivery and discussion with the agent -- is an unintended consequence of the proposed revisions to this rule. To address this issue, the WVIF proposes the following alternative language to Proposed Rules 9.8 and 9.9 to read as follows:

> 9.8. Any offer of renewal shall be sent or delivered to the policy holder at least sixty (60) calendar days prior to the expiration date of the current policy.

9.9 All notifications and offers referenced in subsections 9.4. through 9.7 ~~9.8~~ of this section must be forwarded to the insured by mail, and, if a cancellation, non-renewal or other termination of coverage, must state with specificity the reason for the cancellation, non-renewal or other termination of coverage and the specific effective date of cancellation, non-renewal or other termination of coverage. All private carriers must maintain proof or certificate of mailing for all notices sent.

We hope you find these comments helpful, and we appreciate your consideration. As always, if you have any questions or need additional information of any kind, please do not hesitate to contact me.

Very truly yours,

Jill C. Bentz
President

cc: The Honorable Jane L. Cline
Mary Jane Pickens, Esquire

INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND PUBLIC COMMENTS RECEIVED ON W. VA. CODE ST. R. § 85-8-1 ET SEQ.

Introduction

Below is the written response of the Insurance Commissioner to the stakeholder and public comments received in regard to the proposed amendment of Title 85 Rule, W. Va. Code St. R. § 85-8-1 et seq. ("Workers' Compensation Policies, Coverage Issues and Related Topics," hereinafter referenced as "Rule"), which was filed with the West Virginia Secretary of State for public comment on 04/29/08. This response is itemized by topic, and addresses all of the substantive comments received at the 5/29/08 Industrial Council meeting as well as written comments received from stakeholders.

At the outset, it should be noted that this version is limited in scope of amendment to address changes made in the law in House Bill 4636 (enacted on March 8, 2008) to W. Va. Code §23-2C-15(e) and (f) (as amended). Specifically, these changes affect section 9 of the Rule regarding notice requirements for carriers in reporting cancellations and non-renewals. The other topics addressed in this Rule were open for public comment during the comprehensive amendment to the Rule which was made effective November 30, 2007. It is not the Commissioner's intention in the current limited amendment to revisit any of these other topics which were fully vetted in 2007 prior to finalization of that version.

Time Frame for Reporting Cancellation and Non-Renewals

It was suggested that in section 9.1., which was amended to require cancellations and non-renewals of workers' compensation policies to be reported to the Commissioner at least ten (10) days prior to the effective date be amended, because this reporting requirement would often lead to premature reporting in situations where premium is received right before the effective date of cancellation or non-renewal and therefore the policy is not cancelled or non-renewed.

As to non-renewals, the Commissioner agrees. Non-renewals by a private carrier are basically recorded by the Commissioner's proof of coverage system at the time when a carrier reports the issuance or renewal of a new policy, in the system notes the expiration date of the policy and treats it as non-renewed until a renewal for the next policy term is reported. Therefore, section 9.1. was amended to not require non-renewals to be reported.

As for cancellations (mid-term termination of a policy), in HB 4636, the Legislature specifically mandated, in amending W. Va. Code §23-2C-15(f), that all cancellations be reported ten days prior to effective date. Therefore, the Commissioner made this change in subsection 9.1. to reflect this change in the law, and has no discretion to establish any different time frame. However, the Commissioner's systems will be designed to remediate situations where a carrier reports a cancellation initially but then reverses the decision to cancel. Specifically, no action will be taken against the employer

until a waiting period occurs, during which time if the policy is reinstated by the carrier, the Commissioner's system will reflect the same and the employer/policy holder will be placed back in good standing.

Time Frame for Providing Policy Holder Notice on Non-Renewals

It was suggested that requiring in subsection 9.8. sixty (60) days advance notice to the policy holder when a carrier decides not to renew an employer's policy is unduly burdensome, and the notice period should be changed to thirty-five (35) days. In HB 4636, the Legislature specifically mandated, in amending W. Va. Code §23-2C-15(e), that all non-renewals be sent out at least sixty (60) days in advance of the termination date. Therefore, the Commissioner made this change in subsection 9.8. to reflect this change in the law, and has no discretion to establish any different time frame.

Offers to Renew (Quotes)

It was suggested that the requiring in subsection 9.9. that carriers send out quotes for renewal sixty (60) days advance notice to the policy holder was overly burdensome to carriers. It was also suggested that this would cause systematic issues because normally carrier send quotes in commercial lines such as workers' compensation to the agent, not the actual policy holder.

In response to the requirement of the sixty (60) day notice, the Commissioner believes that the intent of the Legislature in HB 4636 in amending W. Va. Code §23-2C-15(e) was to require that the carrier send out notice to the policy holder at least sixty days in advance of the carriers intentions regarding the renewal of the policy, whether that intention is to non-renew or renew at the same or a different premium rate. This provides the policy holder sufficient time to shop around for new coverage if they were non-renewed or do not like the new quote.

Regarding the concern about having to send the quote to the policy holder rather than the agent, this point is well taken. Therefore, section 9.9. was amended to permit the quote to be sent to the agent rather than the policy holder.