WEST VIRGINIA
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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 WV Code §§23-2C-17(b); 23-2C-18(g); 23-2C-22; 33-2-10(b); and 33-2-20(a)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code §§23-2C-5(c)(2) and 33-2-10(b)

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, Coverage Issues, ~~Policy Defaults~~ 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 November 30, 2007

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

Section

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 need 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; and (4) other 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 33-2-20(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. -- October 31, 2007.

1.4. Effective Date. -- November 30, 2007.

§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 whose number of employees does not exceed three (3) and the period of employment is temporary, intermittent and sporadic in nature and does not exceed ten (10) calendar days in any calendar quarter.

3.2. "Classification" means a 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.

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

The term domestic services shall 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, which 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 or persons 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:

Provided, That an employer that 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 the provisions 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" 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 commission 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," as the term is used in W. Va. Code §§23-2-1(b)(3) and 23-2-1a(a)(1), 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. "Temporarily," as the term is used in W. Va. Code §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.

3.19. "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.

3.20. "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.

3.21. "This rule" means this exempt legislative rule designated as W. Va. Code St. R. §85-8-1 et seq., "Workers' Compensation Policies, Coverage Issues and Related Topics."

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

3.23. "Uninsured Employers' Fund default" means being on the insurance commissioner's commission default list as defined in W. Va. Code St. R. §85-11-1 et seq. as a result of owing money to the Uninsured Employers' Fund.

3.24. "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 shall have 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 to maintain such coverage 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 the five (5) or fewer full-time employees in agricultural services;

c. An employer who is a casual employer is not required to carry West Virginia workers' compensation coverage;

d. An employer who is a church is not required to carry West Virginia workers' compensation coverage;

e. An employer who is engaged in organized professional sports activities, including an employer of trainers and jockeys engaged in thoroughbred horse racing, is not required to carry workers' compensation coverage for the employees participating in the organized professional sports activities: *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. Employers who are 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 do not need to carry West Virginia workers' compensation coverage: *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 Longshore 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 Longshore 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 for exemption from coverage and all evidence submitted by the employer applying for the letter of exemption 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 shall at all times be on the party asserting independent contractor status. For purposes of West Virginia workers' compensation coverage only, when determining whether an independent contractor relationship or an employment relationship exists between the parties, the following criteria are dispositive, and are all required before an individual may be determined to be 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 any 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: *Provided*, That 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 by the individual 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: *Provided*, That the mere facts 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 the 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 any 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 must be 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 must maintain 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 to not provide coverage. Elections to not 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. Certain corporate officers and all members of a corporation's board of directors may be elected out of coverage by an employer. A corporate officer or member of a corporate board of directors elected out of coverage by an employer shall not be 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 is allowed to elect these four (4) officers out of coverage even though their activities consist of 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 other than the four (4) principal officers stated in paragraph 1. of this subdivision may be elected out of coverage if they are engaged in a dual capacity.

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 shall be 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, and shall not include such individuals' gross wages for premium purposes in future payroll reports. Such partner(s), member/manager(s), proprietor(s) or corporate or executive officer(s) as named in the notification shall not be 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. Such 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 such 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 such 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 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 such 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 as described in this subdivision and is not able to reasonably resolve the dispute with the private carrier is permitted to 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, the insurance commissioner. All private carriers issuing final decisions to insured employers on matters as 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 as 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 as 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 shall be entitled to 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); the failure of these circumstances being met shall cause any agreement contemplated under this section to be void from its beginning: *Provided further,* That when such an agreement is entered into by an employer carrying West Virginia workers' compensation coverage, the agreement 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 policyholders 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 Coverage, Change and Cancellation.

9.1. Upon cancellation or non-renewal of a West Virginia workers' compensation policy, every private carrier is required to notify the insurance commissioner's designated rating organization of said cancellation or non-renewal within three (3) business days of the effective date of cancellation. Such notification shall be on forms and/or other procedures developed by the insurance commissioner.

9.2. 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 ten (10) calendar days of the effective date of coverage. Such notification shall be on forms and/or other procedures developed by the insurance commissioner.

9.3. A private carrier may cancel a workers' compensation policy for failure of the policyholder to timely remit adequate consideration upon the issuance of advance written notification to the policyholder of no less than fifteen (15) calendar days. The refusal of a policyholder 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, shall be considered "failure of the policyholder to timely remit adequate consideration" for purposes of this subsection. The effective date of cancellation shall be no earlier than the expiration of the fifteen (15) days of advance written notice.

9.4. Beginning July 1, 2008, private carriers may cancel or decline to renew a workers' compensation policy for reasons other than failure of the policyholder to timely remit adequate consideration, consistent with the terms of the policy, upon the issuance of advance written notification to the policyholder of no less than sixty (60) calendar days. The effective date of

cancellation shall be no earlier than the expiration of the sixty (60) days of advance written notice.

9.5. Advance written notification of cancellation or non-renewal to the insured by private carriers must be forwarded to the insured by mail, and must state with specificity the reason for the cancellation or non-renewal and the specific effective date of cancellation or non-renewal. All private carriers must maintain proof or certificate of mailing for all cancellation 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 the commissioner's regulatory duties in regard to the workers' compensation insurance market.

10.2. Every workers' compensation private carrier shall: (1) record and report its workers' compensation experience to the designated rating organization 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. Ratemaking.

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 shall be deemed 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 shall not violate W. Va. Code §23-2C-18(c). All such 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 insurance commissioner's approval of 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 such 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 shall remain 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.

§85-8.12. Severability.

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

PUBLIC HEARING

MAY 31, 2007

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

WORKERS' COMPENSATION POLICIES, COVERAGE ISSUES, POLICY DEFAULTS AND RELATED TOPICS
TITLE 85, SERIES 8

Transcript of the Public Hearing held on Thursday, May 31, 2007, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
Bill Dean, Chairman
Dan Marshall
Walter Pellish (via telephone)
Senator Don Caruth
Senator Brooks McCabe

Ryan Sims: At this time anyone interested in providing verbal comment to the Industrial Council on this proposed rule is entitled to do so. You should have in your packet the written comments. We received a few yesterday and a few today. Again, this is an opportunity for anyone in the public to speak.

Lesly H. Messina (Affiliated Construction Trades Foundation): My name is Lesly Messina and I am the Research Director at the ACT Foundation and I'm here today to speak to sections of Rule 8 and Rule 11 that we feel that's due some changes at this time.

The first one is Rule 8. Our main focus of interest is the language that allows 90 working days for a company to be in the State of West Virginia as long as they have their own employees to work without coverage before they are required to obtain it. We think that that should be changed in the sections that we've referenced that are in the rule now from "90 working days to 30 calendar days." And there are several reasons that we think that that is a necessary change and would make the rule much better.

The first one is that in our experience we've seen that it is very difficult for the Insurance Commission and workers' comp to police companies when they are coming in from out of state and working for periods of time. As it stands it's very hard for them to track who is coming in and who is coming out of the State, and we have seen over time some abuse has taken place with the 90-day provision. We think it gives companies an opportunity to come into the State and bid and work on shorter term projects. Sometimes they will go beyond the 90 days and just kind of blow it off and decide you know that they can skirt the law and not pick up the coverage, which means loss revenue for the State.

A good example of this taking place is a company that we encountered this year, and I think it's a very good example of the problem that it creates. It's RVL Contractors. They were working on a project at WVU. They started in December of 2006 (sic). They wrapped it up in August of 2007 (sic). [It should read: They started in December of 2005. They wrapped it up in August of 2006.] By the time we got them checked on and investigated, BrickStreet had to scramble. They found out that in fact they would have owed in excess $65,000.00 in audited premium. As of February of 2007 BrickStreet had not been able to collect that money and were unable to locate the owner because they were an out of state company. That's a good example. That may not seem. . .that to me seems like a lot of money that they're not paying. On the face of things it may not seem like a tremendous amount but if you add that up over time – different companies come into the State and deciding that they can try to skirt the system – we think that the 90-day provision gives them a lot of leeway that they wouldn't necessarily have with a 30-day provision. We think that that is a very good example. And incidentally that company also left the State owing the Department of Labor in excess of $16,000.00. So you can kind of see a patterned practice of behavior with certain companies where they will take advantage of that if they can.

We also think that making the rule "90 working days" as opposed to "90 calendar days" should be changed because you know essentially giving them "working days" gives them another five weeks to be in the State without picking up a policy. I think that. . . well ACT thinks that in doing so you're further creating a situation where these companies are difficult to police. They are falling off the radar screen with the Insurance Commission. Having enforcement have to continually go back and check on these companies to see if they are still doing work, it just creates a difficult kind of situation for them to enforce. So on the face of things it wouldn't seem like it would be that big of an issue, but five weeks is a lot of extra time for someone to be in the State.

Kentucky has. . .as most of you probably already know, Kentucky has a more stringent rule. It's first day coverage. This is more patterned after Ohio with their 90-day provision. We think that 30 days is reasonable. It's a middle ground. It's not as stringent as Kentucky's provision but it would certainly create a situation where the Insurance Commission's enforcement team would have a more systematic way of enforcing out of state of companies when they come into to do work.

A final point that we think is very important is as it stands the 90-day provision gives. . .or it creates a disincentive for out of state companies, especially contractors in our line of work to avoid hiring locally. We've had general contractors flat out say because of the 90 days they have no interest in hiring out of local hiring halls and West Virginians do not get an opportunity to do this work. We had an example. Marquee Cinemas was being built in Raleigh County. They decided. . .the GC decided they didn't want to hire locally and the job took six months and they never got coverage, even though they would have needed to after the 90 days.

So, we think that narrowing the window to 30 calendar days is going to give companies that are coming in for short periods of time to do work; to do the work they need to do without having to pick up a policy. But it also gives them a little flexibility. But we just think that the 90 days is just too much time. It's going to continue to allow for these kinds of abuses to take place, and frankly those dollars add up. And not only are West Virginia workers not getting an opportunity to bid and work on these projects, but the State is losing money because it is very difficult for them to track. So in Rule 8 we really think that that's a substantive change that should be made.

Chairman Bill Dean: Ryan, do have a comment on this?

Ryan Sims: This issue. . .I think Ms. Messina touched on this. The 90 days has been in Rule 8 for. . .I think it was formerly in a different similar rule, but recently in Rule 8 right before transition. But it's been in Title 85 rules for a significant amount of time. It is something that we are certainly considering as a valid point – reducing this amount of time. We received comments from a few different stakeholders. Ultimately it's something that we're going to consider over the course of the next 30 days before we bring the final version of this rule to you, obviously consider reducing the amount of time. It's really not a decision I'm going to make. My job is to present it to leadership and see what their decision, and it's certainly something that we are deliberating at this point on that. Again, all the written comments we've received – we received some other obviously substantive comments on this rule – and we intend, as we always do, to file a

written response to every substantive comment we receive on this rule either stating why we didn't make any changes or we do make changes and what our position is.

Dan Marshall: Ryan, will we get your comments sometime. . .a reasonable time before the meeting at which we're going to consider final adoption of this rule?

Mr. Sims: Certainly. We try our best to get those out as close to possible as a week ahead of time, but certainly several days before the meeting.

Mr. Marshall: That's particularly appreciated.

Walter Pellish: I agree.

Chairman Dean: Mr. Pellish, do you have any comments for Ms. Messina or Ryan?

Mr. Pellish: I just said I agree with what was just requested in terms of getting the stuff in our hands on a timely basis. And also I thought the comments made were valid and should be taken into consideration.

Chairman Dean: Very good.

Mr. Marshall: I'll echo what Mr. Pellish said. I too agree with the position as stated by Ms. Messina. It seems to make sense that these contractors from out of state have a level playing field with our contractors here in West Virginia. And to the extent that we could prevent the free ride and the abuse, we ought to do it. It's hard to see a reason not to do it.

Chairman Dean: Senator Caruth, do you have comment?

Senator Don Caruth: Yes. I think for discussion I have a different view that needs to be addressed. Number one, historically the 90 days has served several functions. It not only applies to companies which are coming into West Virginia doing business, but also applies to West Virginia insured companies whose people who are out of state for a period which is transitory. And thus under that circumstance a West Virginia company doesn't have to duplicate coverage they purchased here in some other state. I think the issue is a little more complicated than it might seem at first glance. Although I understand the example that was given there about a company which may come in here and not have insurance coverage for some reason has to

subscribe in West Virginia. In general those companies which would come into West Virginia and do work for a brief period of time would have coverage in some other state and the injured worker would be covered here. It does create an expense both for West Virginia companies going out of state and for other companies coming in state to shorten that period of time. That's food for thought and I think it's something that shouldn't be overlooked. There has been a purpose historically for an expanded period of time.

Mr. Sims: I think that's a valid point. And really if you look throughout the country you will see that different states' laws differ on this issue like Ms. Messina mentioned. Kentucky requires you to have coverage from day one and it gets to the point of absurd in Kentucky the way that law is enforced right now. For example, we've had a couple of trucking companies based in West Virginia have a trucker take a haul through Kentucky and get in a wreck that day when he was just driving through the state. They had BrickStreet coverage or they had Workers' Comp fund coverage probably at the time. The injured trucker filed with them, but then went ahead and filed in Kentucky's Uninsured Fund and Kentucky doggedly went after the West Virginia trucking company saying you should have Kentucky coverage from day one. It causes a particular problem when one state is monopolistic and one is not. One thing that I think should be pointed out is this will be an easier problem to address come July 1, 2008, when the market opens up. Because at that point most firms that offer workers' compensation coverage or offers something to the affect of a multi state or an all states' endorsement would end. And so as long as the company is licensed in the various states they can offer multi state coverage. But again it is a valid point. And Ohio for example does let any foreign company come in for 90 days whereas Kentucky doesn't. We also know that Pennsylvania doesn't let you come in for any amount of time. So it does vary from state to state. There are other states that have the 90-day provision so it kind of varies across the country. We think in our law it does require employers to come in for a temporary amount of time without having to have West Virginia benefits for their employees. I think that's made clear in §23-2-1 subsection (d). It says specifically it gives out of state employers the ability to come in for a temporary amount of time, but the Code did not define "temporary." So that is essentially what we're trying to do here – what is a good definition of "temporary?"

Senator Caruth: If I may follow up on that as a comment. Those employees who come in the State for a shorter period of time and have to purchase coverage, they don't get a reduction of their coverage they're already paying in another state for them. So I think the discussion is a good discussion, but I think both sides of that discussion have to be. . .it adds to the costs – not only potentially but realistically – adds to the cost for

other companies that would come in here to do small projects for whatever reason, but could potentially add cost to West Virginia companies that go out of state to pay their workers' comp premium here. As you said in Kentucky, you have to pay first day coverage there; don't get a credit for it here. And then that accident situation you just described, you may have a conflict of law situation where the plaintiff may file in both states and you've got litigation. So there are a number of questions which make the issue a little more complicated than the short amount of time I think would allow for discussion.

Mr. Sims: I will say, I think consistent with that, the Commissioner's goal and consistent with our statute is to find a middle ground where you're not being too restrictive on encouraging out of state companies coming in to the State. But also you don't want to have a law that makes it very difficult for West Virginia companies to compete.

Senator Caruth: Which is certainly your objective.

Chairman Dean: I've got a question for you. Say a company comes in from Ohio – and I've asked this question before – but how do we know if he is here 60 days? How do we know he's got workers' comp coverage in his home state? Do we check that? How often?

Mr. Sims: No we don't. The way the laws are set up you are subject based on each state's law whether you have to have to carry comp. For example, there is one state in the union now that doesn't even require workers' compensation insurance, and that's Texas. So theoretically. . .fortunately I don't think we have too many Texas contractors coming in, but theoretically the Texas contractor. . .maybe I'm wrong on that.

Chairman Dean: You're wrong.

Mr. Sims: But theoretically a state has to comply with their home state's laws. If that state requires them to have coverage, then they have to have it. If it doesn't, then they don't. But there is nothing. . .the law basically says that an out of state employer bringing out of state employees in for a temporary period does not have to have West Virginia coverage. That's the way we interpret it. It really doesn't speak to the other state. It's up to that state to enforce their laws.

Chairman Dean: Here again is my question and I asked this a few months ago. I have a member working for an out of state contractor in the State of West Virginia. The contractor had no West Virginia workers' comp. My member got hurt. He also cancelled his comp in Ohio, so now my member is without any way of paying his bills because he turned it in as workers' comp. He's not covered. Don't have workers' comp in West Virginia. The guy cancelled in Ohio. His health insurance won't take care of it because it's a worker's related injury. So that guy was without really doctor's care for quite some time. And I think you answered my question the last time. For six weeks. . .you know we thought after six weeks we could probably get that cleared up to where it would go. . .something, somewhere would cover him we thought.

Mr. Sims: Well, I think there would be really two remedies for that individual. I think he might have a remedy first of all in Ohio. I'm not real familiar with their laws as to how their system works, but if it was anything like West Virginia's system, he would be able to file in Ohio and file with their workers' comp fund regardless of whether his employer had coverage or not. And he would also of course have a remedy if he met the jurisdictional requirements as to our Uninsured Fund. So he would have two options in that situation. I don't think in most states the law is designed. . .well it does vary from state to state. But states like ours that have the Uninsured Fund, that's a stop gap there in case there is a noncompliant employer.

Chairman Dean: But I still think we discussed last time. . .he was like four to six weeks without anybody paying his bills and he really couldn't get treatment.

Mr. Sims: You're talking as far as the claims getting administered?

Chairman Dean: Yes. And there was nobody to take care of him when neither state had workers' comp. . .or the contractor paid in neither state.

Mr. Sims: Well, I mean, we have timeframes in our Rule 9 for filing with the Uninsured Fund and if the claim wasn't ruled on. . .I mean I think we have five days to rule on an Uninsured Fund claim and we should have ruled on it timely if we didn't then that might have been on us.

Chairman Dean: No. I think the timing went to this state. We figured out he didn't have workers' comp. We went to that state and find out he didn't have workers' comp and by the time we filed and got everything done I think he was four to six weeks without coverage. You know what I'm saying.

Mr. Sims: We certainly want to avoid that situation. Like I said, we have a five day time period to rule on an Uninsured Fund claim. We can extend that for 30 days if there are specific factual issues, but we certainly have an objective of getting an injured worker care as soon as possible.

Chairman Dean: Sure. But there are cases where people do slip through the cracks.

Mr. Sims: Right.

Chairman Dean: Any other comments? Senator McCabe? Mr. Pellish?

Mr. Pellish: Yes.

Chairman Dean: Do you have any further comments?

Mr. Pellish: Only that. . .that was a good, healthy discussion.

Chairman Dean: Thank you. Does the public have any other comments on this?

Mark Grigoraci (Robinson & McElwee PLLC): I don't have any particular comments to make. I just simply want to make a statement. I am Mark Grigoraci with the law firm of Robinson & McElwee, and I've just tendered to Mr. Sims' comments on proposed Rule 8. The comments are by the West Virginia Association of Realtors, and on behalf of the realtors I request that you give them careful consideration as you prepare the final amendments. . .the final version of Rule 8. Thank you.

Mr. Marshall: Excuse me. . .

Chairman Dean: Mr. Marshall has a question.

Mr. Marshall: Ryan, will you see that we get copies of those comments?

Mr. Sims: Absolutely.

Mr. Marshall: Thank you.

Mr. Sims: The ones he just handed to me. I'll have them scanned.

Chairman Dean: Okay. Any other comments from the public on this?

Industrial Council Meeting
PUBLIC HEARING
Title 85, Series 8, Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics
Offices of the West Virginia Insurance Commissioner
1124 Smith Street, Room 400, Charleston, WV
May 31, 2007

Name	Address	Telephone Number	Group Affiliation	Do you desire to address the Council?	Agenda item to which you desire to speak
MARK D. CLARK	—	—	FRANK GATES	No	
David Leaver			Manathon	No	
Ed Watson			Watson Rules	No	
Randy Suter			Brick Street	No	
Tammy Shamblin	—	—	Compmgt	No	
Harold Clifton	—	—	WVDHHR	No	
Josh Mussina	Charleston	343-7570	ACT Foundation	Yes	Rule 8
Terry Yahr	OIC-Legal	558-1966 ext 3115	OIC-Legal	No	
Richard Cryncovic	OIC—Legal	"	"	No	
Mark Gryn	Robinson McElwee				

AFFILIATED CONSTRUCTION TRADES FOUNDATION
A Division of the West Virginia State Building and Construction Trades Council, AFL-CIO

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Director
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Charleston, WV 25301
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Email: stevewhite@actwv.org
Website: www.actwv.org

May 29, 2007

Ryan Sims, Associate Counsel
Office of the West Virginia Insurance Commissioner
Post Office Box 50540
Charleston, West Virginia 25305-0540

Re: Public Comments on Proposed Rule Title 85, Series 8

Dear Mr. Sims:

On behalf of the Affiliated Construction Trades Foundation, I would like to present the following comments and suggestions regarding the above-referenced proposed rule;

Title 85, Rule 8-

- Section(s) 3.16., 3.17, 7.1, 7.2, 7.3, 7.4, . Change "ninety (90) working days" to "thirty (30) calendar days"

It is the ACT Foundation's position that allowing an employer ninety (90) working days opens the door to abuse by companies of what will surely become a "Workers' Compensation exemption" loophole. Ninety (90) days is simply too long in our estimation. Here are the reasons why;

- It is too difficult for the Insurance Commission to enforce and/or police coverage requirements if a company has three months to be in the state without coverage. It gives companies an opportunity to bid and work on bigger and longer range projects for which they will frequently try to avoid paying Workers' Compensation premiums.

- Making the rule ninety (90) "working" days as opposed to "calendar" days will further extend this time frame and give companies even more time to get in and out of West Virginia without paying proper premiums. A company that can be in the state for three months can easily "fall off the radar screen" of the Insurance Commission's enforcement team. If a company is forced to get coverage after thirty (30) days, there will be more systematic enforcement process that will follow. It will not become a situation of "out of sight out of mind".

- Kentucky currently has a stringent "first day" rule for out of state companies regardless of what kind of WC coverage held in another state. ACT suggests that a thirty (30) day rule is not as stringent and is an adequate middle ground.

- A ninety (90) day exemption creates a disincentive for construction contractors to hire locally for jobs. If a contractor has a ninety (90) day window before WC is required but he/she must obtain WC coverage from day one if they hire a WV worker- they will be inclined to bring in their own workers and bypass hiring any West Virginians at all.

It is ACT's position that narrowing this window to thirty (30) calendar days allows a company sufficient flexibility to come into West Virginia for short periods of time to work (with its own employees) but not enough time to use this provision as a way to avoid paying premiums on shorter-term construction projects.

Thank you for your consideration of these suggestions. Should you have any questions, please feel free to contact me at my office.

Sincerely,

Lesly H. Messina
Research Director

Brickstreet INSURANCE
Office of General Counsel

May 31, 2007

Members of the Industrial Council
c/o Ryan Sims, Associate Counsel
West Virginia Insurance Commission
P.O. Box 50540
Charleston, WV 25305-0540

Re: Comments on Proposed 85CSR8, "Workers' Compensation Policies, Coverage Issues and Related Topics"

Members of the Industrial Council:

Thank you for the opportunity to offer comments regarding the proposed rule. Participation in the rulemaking process by BrickStreet is an extremely important and highly valued activity.

Comment: §3.5.b. An entity that regularly employs another person or persons for the purpose of "carrying on any form of industry, service or business" in this state is required to have West Virginia workers' compensation coverage. In the definition of "carrying on any form of industry, service or business" there are a number of criteria listed in the rule that could be modified for clarity. In numbers 3 and 5, the phrase "In a particular claim" should be removed. The definition attempts to generally define when an employer is carrying on business in West Virginia, but wanders into providing coverage in unspecified claim scenarios. The following suggestions on rewording the provisions are offered.

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. ~~In a particular claim, hired~~Hires the ~~claimant~~ employee in West Virginia; or

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

5. ~~In a particular claim, utilized~~ Utilizes labor on a regular basis at a West Virginia facility for the employer ~~prior to the injury at issue~~:

4700 MacCorkle Avenue, S.E.
P.O. Box 4907 Charleston, West Virginia 25364
304.926.3470 Ext. 5348-phone ■ 304.926.5372-fax ■ 866.45.BRICK
www.brickstreet.com

Comment: 6.3.b. The deletion of the following paragraph is inconsistent with the current law. Please see W. Va. Code §§ 31B-12-1207, a provision of the Uniform Limited Liability Company Act. The paragraph should be reinserted.

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

Comment: §7.4. Subsection 7.4 allows an employer and its employees to enter into an agreement to be bound by the laws of another state. This provision provides a number of concerns.

--An employee cannot enter into a contract waiving the benefits of the West Virginia Workers' Compensation Act. Any such agreement is void to the extent that it waives the benefits of the Act. W. Va. Code §23-2-7. In its wisdom, the Legislature created a narrowly drawn exception to this general rule as contained in W. Va. Code §23-2-1c.

--W. Va. Code §23-2-1c allows the employer and its employees to enter into an agreement regarding the state of coverage. However, this agreement is only applicable when, "there is a **possibility of conflict with respect to the application of workers' compensation laws** because the contract of employment is entered into and **all or some portion of the work is to be performed in a state or state other than this state**." W. Va. Code §23-2-1c(a). (Emphasis added.)

--A determination must be made to ascertain whether there is a conflict of laws between the states. Does the state where the employee and employer claim coverage require that the employee be covered by its policy when the employer and its employees are in West Virginia for an extended period? If not, then the company is required to have West Virginia coverage if it regularly employs another person or persons to carry on its business in this state.

--A determination must be made whether "all or some portion of the work is to be performed in a state other than West Virginia." If a person is specifically hired to work on a job in West Virginia, then regardless of the site of hire, the employer is required to provide West Virginia coverage.

--A determination must also be made regarding a new requirement set forth in the proposed rule. "...any extraterritorial 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 no less than ninety (90) working days in any three hundred and sixty-five (365) day period..."

--All of the above determinations must be made to decide whether an employer is required to afford the benefits of the West Virginia Workers' Compensation Act to its employees. However, no process is set out in the rule to make these determinations. If these determinations are left to employers, then many employees who are entitled to the protections of the West Virginia Workers' Compensation Act will be without coverage. Their claims will fall to the Uninsured Fund.

--The statute sets out a process so that these determinations may be made. The provisions of W. Va. Code §23-2-1c(a) provides for the regulator to review and accept or reject the agreement. While the statutory language needs updated, the concept is valid and remains the law. The regulator is the gatekeeper to ensure that employees working in the state of West Virginia are provided proper coverage under our law and that the Uninsured Fund is properly protected.

Recommendation: The rule proposal should set out the determinations, as listed above, to be made by the regulator. The rule should also set out a process to guarantee proper regulatory scrutiny in accordance with the provisions of W. Va. Code §23-2-1c. The exemption application process as contained in §4 of the proposal could be utilized for this purpose.

Comment: §8.2. This provision states (last sentence):
"Additionally, with regard to claims which can be allocated under the West Virginia Code, each policy shall be deemed to provide coverage for all payment obligations."

As of January 1, 2006, there are no further claim allocations. The provision should be deleted.

Comment: §9.1. In accordance with the provisions of W. Va. Code §23-2C-15(f), private carriers are required to notify the Office of the Insurance Commissioner (OIC) **or** his or her designee of a termination of coverage. The process as it currently exists is for the carrier to notify the Commissioner's rating organization who provides the data to the OIC to populate their systems. Sometimes, depending on the input from the rating organization, the information may be amended. Reporting the same data to both the OIC and the OIC's rating organization is duplicative and contrary to the statute. In addition, the term "issuance" seems misplaced. According to W. Va. Code §23-2-15(f), the carrier has ten (10) days to inform the OIC of renewal or issuance.

9.1. Upon cancellation or non-renewal of a West Virginia workers' compensation policy, every private carrier is required to notify ~~both~~ the insurance commissioner's ~~and its~~ designated rating organization of said ~~issuance,~~ cancellation or non-renewal within three (3) business days of the effective date of cancellation. Such notification shall be on forms and/or other procedures developed by the insurance commissioner.

Comment: §9.2. Similar changes are made for the same reasons as above.

9.2. Upon issuance or renewal of a West Virginia workers' compensation policy, every private carrier is required to notify ~~both~~ the insurance commissioner's ~~and its~~ designated rating organization of said issuance within ten (10) calendar days of the effective date of coverage. Such notification shall be on forms and/or other procedures developed by the insurance commissioner.

Comment: §9.3. Unlike the rule proposal, the statute does not use the term "premium payments," but instead uses "failure of consideration to be paid by the policyholder." As proposed, a policyholder could provide incorrect information regarding their payroll, pay a nominal amount for coverage, and deny access to the records by the carrier's premium auditors at the conclusion of the term. The carrier would have to provide the policyholder with 60 days notice when it is likely that full consideration was not paid for the previous term and is not being paid for the current coverage term. Private carriers need the ability to act expeditiously in such matters.

9.3. A private carrier may cancel a workers' compensation policy for failure of the policyholder to timely remit proper consideration ~~premium payments~~ upon the issuance of advance written notification to the policyholder of no less than fifteen (15) calendar days. Failure to "timely remit proper consideration" includes the failure by the policyholder to permit a premium audit by a private carrier. The effective date of cancellation shall be no earlier than the expiration of the fifteen (15) days of advance written notice.

Comment: 9.4. The term, "failure to remit proper consideration," was added in place of "non-payment of premiums" to be consistent with the comment at 9.3. The recent provisions of Senate Bill 595 changed the date to January 1, 2009. See W. Va. Code §23-2C-15(e).

9.4. Beginning ~~July 1, 2008~~January 1, 2009, private carriers may cancel or decline to renew a workers' compensation policy for reasons other than ~~non-payment of premiums~~failure to timely remit proper consideration, consistent with the terms of the policy, upon the issuance of advance written notification to the policyholder of no less than sixty (60) calendar days. The effective date of cancellation shall be no earlier than the expiration of the sixty (60) days of advance written notice.

Comment: §9.5. This provision requires that a private carrier must inform a policyholder of cancellation or non-renewal by certified mail, return receipt requested. The certified mail requirement is expensive and unnecessary. BrickStreet opposes this requirement.

Comment: §11.2. The last sentence of this provision appears to accommodate only one loss cost multiplier. The statute allows more than one loss cost multiplier. See W. Va. Code §23-2C-18(b). The suggested change is embodied in the provision.

~~e~~ 11.2. ~~In addition to said loss cost base rates, the premium~~ 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 ~~advisory organizations and/or~~ rating organizations, loss adjustment expenses not included in the loss costs ~~base rates~~, 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 ~~approval by the insurance commissioner~~ the file and use 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 shall be deemed effective until such time as the private carrier makes another filing to adjust the same.

Comment: §11.4. Additional language is suggested to clarify that when a policyholder does not meet its deductible payments, then the policy is subject to cancellation for failure to remit proper consideration.

e 11.4. ~~Private carriers may adopt tiered rating, scheduled rating plans, experience rating plans, deductible plans, retrospectively rated plans and other similar rating plans as it deems appropriate. All such rating plans shall be subject to the filing requirements of Chapter 33 of the Code that are applicable to commercial insurance lines.~~ Deductible plans. Deductible workers' compensation plans are permitted subject to the approval of the insurance commissioner, including the insurance commissioner's approval of the underwriting standards used for issuing such plans. Under a deductible plan, an insured employer that fails to make a ~~claim payment within the deductible~~ required deductible payment shall be deemed ~~uninsured for said claim and shall be subject to all penalties and consequences of being uninsured as set forth in Chapter twenty-three of the West Virginia Code~~ to be in default of the

policy premium and subject to cancellation for its failure to timely remit proper consideration, but such 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 shall remain responsible for payment of claims benefits and administration and defense of claims.

Again, thank you for the opportunity to participate in this process.

Very truly yours,

Randall B. Suter

Randall B. Suter

cc: Jane Cline, Insurance Commissioner
Mary Jane Pickens, General Counsel, OIC

May 31, 2007

VIA HAND DELIVERY
The Honorable Jane L. Cline
Commissioner
Office of the Insurance Commissioner
1124 Smith Street
P.O. Box 50540
Charleston, WV 25305

Re: Comments on Proposed Amendments to Title 85, Series 8 of the Code of State Rules.

Dear Commissioner Cline:

These comments are submitted by the West Virginia Association of REALTORS® ("the Association") on behalf of its members. The Association is the Voice for Real Estate™ in West Virginia. Among other things, the Association represents its membership in regulatory and legislative matters. Our membership includes numerous real estate brokers and agents throughout this state, virtually all of whom have an interest in and are affected by certain proposed amendments to, and provisions of, Title 85, Series 8 of the Code of State Rules ("Rule 8"). We appreciate the opportunity to present the following comments for your consideration.

Section 6

The Association appreciates the efforts of the Insurance Commissioner to provide guidance on the determination whether an individual is an independent contractor or an employee for workers' compensation purposes. However, we respectfully request that further guidance be provided for determining whether the relationship between a real estate agent and the real estate broker for whom the agent performs services is an independent contractor relationship or an employment relationship. Specifically, we

request that a separate standard be established for determining whether a real estate agent is an independent contractor or an employee of the broker.

The Internal Revenue Service ("I.R.S") distinguishes real estate agents from other individuals who are independent contractors. Pursuant to Internal Revenue Code § 3508, a "qualified real estate agent" is not an employee for federal income and unemployment tax purposes, if they meet the following three part test:

(1) The individual must be a licensed real estate agent;

(2) Substantially all of the remuneration the individual receives must be directly related to sales of real estate or other related sales activities, rather than to the number of hours worked; and,

(3) There must be a written contract between the real estate agent and the broker for whom he or she performs services that expressly provides that the agent will not be treated as an employee with respect to such services "for Federal tax purposes."

The West Virginia State Tax Department has adopted the I.R.S. standard for both personal and corporate income tax purposes. See W. Va. Code §§ 11-21-9(a) and 11-24-3(a). As such, the Association's request is not unreasonable and is not without precedent. We respectfully request that the Insurance Commissioner follow the example of the Tax Department by utilizing the I.R.S. standard for determining whether a real estate agent is an independent contractor for workers' compensation purposes.

To be sure, number three of the I.R.S. standard requires slight modification for workers' compensation purposes. This can be easily accomplished by requiring that the written contract expressly provide that the real estate agent will not be treated as an employee for workers' compensation purposes.

The Association understands that West Virginia Supreme Court case law instructs that in determining whether an individual is an independent contractor or employee, the

Workers' Compensation Act must be liberally construed in favor of the individual and any doubt should be resolved in favor of the individual's status as an employee. Syl. Pt. 4, *C & H Taxi Co. v. Richardson*, 461 S.E.2d 442 (W. Va. 1995) (citation omitted). However, the 2003 amendments to the Workers' Compensation Act provides that, except where the evidence is found to be equal in weight, no principle of liberal construction may "be used in the application of the law to the facts of a case arising out of . . ." the Workers' Compensation Act. W. Va. Code §§ 23-4-1(g)(a) and (b). This statutory provision casts doubt on the validity of the holding of *C & H Taxi Co., supra.*

Assuming that the holding of *C & H Taxi Co., supra* still is valid, the standard urged by the Association does not appear to be logically different from the standard proposed by the Insurance Commissioner. If the standard proposed by the Insurance Commissioner is not considered inconsistent with *C & H Taxi Co. surpa*, neither should the standard recommended by the Association.

Furthermore, the general presumption that an individual performing services for compensation is an employee would apply to real estate agents. A real estate agent therefore would be an employee of the broker for whom he or she performs services unless and until it is shown that they meet the I.R.S. criteria.

In addition, one of the purposes of the proposed amendments to Rule 8 is to provide specific criteria, standards and clarification as to which individuals are considered employees entitled to workers' compensation benefits. W. Va. Code St. R. § 85-8-2.1 A separate standard for real estate agents would further this purpose.

For your convenience, an example how the standard recommended by the Association could be implemented in the Rule 8 is attached.

Subsection 4.4

The Association recommends that the twenty-five dollar ($25) fee required for each application for a letter of exemption from coverage be eliminated. Doing so will minimize the financial impact on its numerous member who must annually file for a letter of exemption. We also recommend that the application form be revised to permit individuals, such as real estate agents, to apply for a letter of exemption.

Again, the Association appreciates the opportunity to provide comments on the proposed changes to the Rule 8. We thank you for your consideration of these comments.

Cordially,

Raymond I. Joseph
Executive Vice President and CEO
West Virginia Association of REALTORS®
2110 Kanawha Blvd., E.
Charleston, WV 25311
(304) 342-7600

Attachment to Comments by the West Virginia Association of REALTORS®
on the Proposed Amendments to Title 85, Series 8 of the Code of State Rules

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 showing that an individual is an independent contractor shall at all times be on the party asserting independent contractor status. Except as provided in subsection 6.3 of this section, ~~In~~ in determining whether an independent contractor relationship or an employment relationship exists between the parties, the following criteria are dispositive, and are all required before an individual may be determined to be an independent contractor:

a. 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:

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

2. 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; and

3. The individual regularly solicits business from different persons or entities to perform for compensation the type of work that is being performed by the individual;

b. 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: *Provided*, That 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;

c. The individual has control and discretion over the means and manner of performance of the work being performed by the individual 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: *Provided*, That 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 does not constitute supervision on an ongoing basis;

d. The individual is not required at any time to work exclusively for the person or entity for whom the work is performed; and

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

1. An independently contracted truck driver must use his or her own truck and trailer;

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

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

6.3. Independent contractor standard for real estate agents. The general presumption of employment status set forth in subsection 6.2 of this section applies to the relationship between real estate agents and the real estate brokers for whom they perform services. The burden of showing that a real estate agent is an independent contractor shall at all times be on the party asserting independent contractor status. A real estate agent is an independent contractor of the broker for whom he or she performs services, if all of the following criteria are met:

a. The agent is a licensed real estate agent;

b. Substantially all of the remuneration the agent receives must be directly related to sales of real estate or other related sales activities, rather than to the number of hours worked; and

c. There must be a written contract between the real estate agent and the broker for whom he or she performs services that expressly provides that the agent will not be treated as an employee with respect to such services for workers' compensation purposes.

~~6.3~~ 6.4. Elections to not provide coverage. Elections to not 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. Certain corporate officers and all members of a corporation's board of directors may be elected out of coverage by an employer. A corporate officer or member of a corporate board of directors elected out of coverage by an employer shall not be 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 is allowed to elect these four (4) officers out of coverage even though their activities consist of 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 other than the four (4) principal officers stated in paragraph 1 of this subdivision may be elected out of coverage if they are engaged in a dual capacity

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.

~~6.4~~ 6.5. Manner of notification. In the event of an election under W. Va. Code §23-2-1(g) and subsection ~~6.3~~ 6.4 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, and shall not include such individuals' gross wages for premium purposes in future payroll reports. Such partner(s), member/manager(s), proprietor(s) or corporate or executive officer(s) as named in the notification shall not be 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~~ 6.4 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. Such 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 such 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~~ 6.4 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~~ 6.6. 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 such 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 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 such employers' partners, members, proprietor or ~~its~~ 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~~ 6.7. Duty to report all payroll.

a. All employers have a duty to report the entire payroll of all employees to their private carrier.

b. The private carrier has an absolute right to 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 as described in this subdivision and is not able to reasonably resolve the dispute with the private carrier is permitted to file a protest with the insurance commissioner's designated rating organization for workers' compensation. All private carriers issuing final decisions to insured employers on matters as 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~~ 6.5 of this section regarding elections not to provide coverage to certain individuals.

~~6.6~~ 6.8. 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.

~~6.6~~ 6.9. 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.

JACKSONKELLY
ATTORNEYS AT LAW PLLC

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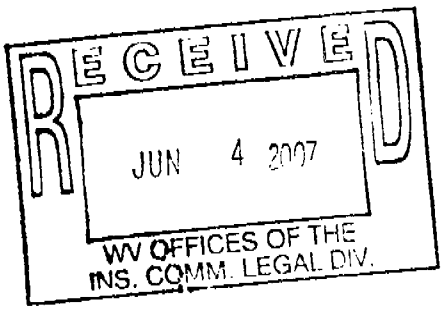
May 31, 2007



Brian Simms, Esquire
Associate Counsel
Office of the West Virginia Insurance Commission
Post Office Box 50540
Charleston, West Virginia 25305-0540

Re: Comments to Proposed Rule 85-8

Dear Mr. Simms:

Please accept the following as comments I am filing on behalf of the Workers' Compensation Committee of the West Virginia Chamber of Commerce, to the proposed amendments to Rule 85-8:

1. Section 3.16 should be amended to provide more specific direction on how the "(90) working day(s)" period is calculated and whether such days must be continuous.

2. Section 6.3.a.1 should be amended to permit the employer to designate (4) principal officers without restriction to the president, vice-president, secretary and treasurer as the only principal officers who may be designated under this section.

3. Sections 6.5.a and b should be amended with respect to members of limited liability corporations, to be equity members rather than all members.

4. Section 7.1 regarding "extraterritorial coverage" should be amended to require first day coverage of any employee working in West Virginia unless the OIC approves coverage from an acceptable carrier outside the state.

5. Section 9.1 should be amended to permit the required notification to be given to either the OIC or the OIC's designee.

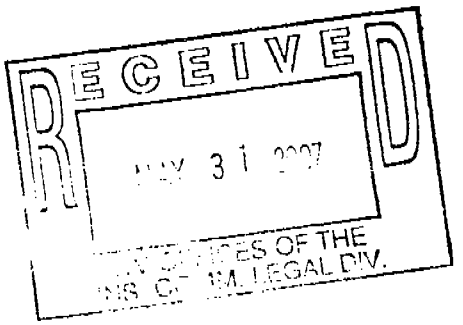
Very truly yours,

TIMOTHY E. HUFFMAN

TEH:tsn

Insurance Federation

May 31, 2007



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 to determine whether to make a commitment to writing workers' compensation insurance.

Based on its evaluation of the proposed amendment, the WVIF has the following concerns:

1. **Proposed Rule 9.1.** This proposed section requires "every private carrier . . . to notify both the insurance commissioner and its designated rating organization of said issuance, cancellation or non-renewal within three (3) business days of the effective date of cancellation." The WVIF's first concern is that the three business day requirement is very short, and insurers are concerned that such notification may not be provided within that time frame even if mailed on the first day possible. This proposed rule seems to unintentionally require all such notices by facsimile. The WVIF believes that such notification reasonably could be provided within ten (10) business days.

P.O. Box 11887 • Charleston, West Virginia 25339 •Telephone: 304.357.9929 • Facsimile: 304.357.0919
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This proposed section also does not address how insurers will comply with this notification requirement to the Commissioner and the rating organization in the event of nonpayment of the premium. The WVIF invites additional guidance on this narrow issue.

2. **Proposed Rule 9.2.** This proposed rule would require "every private carrier . . . to notify both the insurance commissioner and its designated rating organization of said issuance within ten (10) calendar days of the effective date of coverage." This standard will be difficult to meet, particularly for companies and agents who utilize paper applications, which must be mailed to the company by the agents or brokers. If adopted, this proposed rule likely will force agents and brokers to send applications via express mail to comply with this proposed requirement and, importantly, at an additional cost to them. The WVIF believes this is an unintended consequence of this proposed rule and that ten business days or fourteen calendar days of the effective date of coverage is more reasonable than the proposed timeframe.

3. **Proposed Rule 9.4.** The WVIF has two primary concerns with Proposed Rule 9.4, which states that "[b]eginning July 1, 2008, private carriers may cancel or decline to renew a workers' compensation policy . . . upon the issuance of advance written notification to the policyholder of no less than sixty (60) calendar days."

First, the WVIF believes that the sixty day period is unreasonably long. The fifteen (15) day period applicable to the cancellation for non-payment of the premium is a reasonable length of time for a cancellation. This is particularly true if a policyholder refuses to comply with an audit at the end of a policy term. In that situation, sixty days is far too long. If the Commissioner opts to lengthen this time period for nonrenewal situations, then thirty days is a more reasonable timeframe.

Additionally, the proposed language appears to conflict with W. Va. Code § 23-2C-15(f), which provides in pertinent part that:

> Effective the first day of January, two thousand nine, the company may decline to offer coverage to any applicant. Effective the first day of January, two thousand nine, the company and private carriers may cancel a policy or decline to renew a policy upon the issuance of sixty days' written advance notice to the policy holder. (Underlining added.)

Clearly, there is a conflict as to the date on which private carriers may cancel or decline to renew a workers' compensation policy for reasons other than non-payment of premiums.

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The WVIF believes that the rule is the more reasonable position because private insurers can start writing business on July 1, 2008, and it would follow that the same dates would be the first permissible date on which carriers can cancel a policy. The WVIF, however, is concerned about this clear conflict.

4. **Proposed Rule 9.5.** The requirement in Proposed Rule 9.5 that private insurers must provide notice of cancellation or non-renewal "by certified mail, return receipt requested" is a very costly requirement. Most states require only a Certificate of Mailing as proof of mailing, rather than a Certified Mail Return Receipt. Indeed, one member company noted that only two of the many states in which it conducts business requires that such notices be sent by certified mail. Requiring insurers to maintain proof or Certificates of Mailing should be sufficient to satisfy any concerns or disputes concerning proof of mailing.

Thank you for your consideration of these comments. If you have any questions or need additional information of any kind, please let me know.

Very truly yours,

Jill C. Bentz
President

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

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May 31, 2007

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 Rule 85 CSR 8

Dear Mr. Sims:

These comments are in regard to 85 CSR 8.3 which addresses dependent and death benefit claims. The language in the proposed rule indicates that for all claimants who are deceased on or after January 1, 2006, that any dependent or death benefit claims filed will be deemed derivative of the deceased claimant's original date of injury or date of last exposure and not deemed to be a new or separate claim. This rule as currently proposed allows the argument to be made that if the dependent or death benefit claim is derivative of the claimant's original injury or last exposure, then the benefits payable should cease on the date that the deceased claimant would have reached age 65 or 70. This proposed rule also allows the argument to be made that the dependent or death benefits may be paid at a lesser rate than what is mandated by statute.

West Virginia Code §23-4-10 states that a dependent widow or widower shall be paid dependent benefits until death or remarriage. It also states that all dependents shall be paid in the same amount that was paid or would have been paid to the deceased employee for total disability had he or she lived.

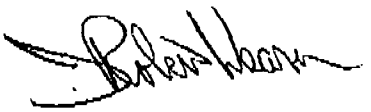
The Supreme Court held in *Rouse v. WCC and Pocahontas Fuel Co.*, 176 W.Va. 262, 342 S.E.2d 229 (1986) that a dependent's claim for death benefits pursuant to *West Virginia Code* §23-4-10 is separate and distinct from the injured employee's claim for disability benefits. The decision also points out that a widow's right to benefits does not come into existence until her husband's death and until that time of death the widow and/or surviving dependents have no right to file a claim. The Court further held that widows' benefits pursuant to *West Virginia Code* §23-4-10 are a new award because a widow's claim does not come into existence until her husband's death.

It has been suggested that this proposed rule change only affects chargeability issues in a dependent or death benefit claim. However, this rule as written does not indicate that it only affects chargeability issues. As proposed, Rule 8.3 conflicts with existing West Virginia case law and statutory law.

This proposed rule needs amended so it is clear that all dependent widows or widowers shall be paid dependent benefits until death or remarriage. Further, the rule should state that all dependents, including widows and widowers, shall be paid dependent benefits for as long as their dependency continues in the same amount that was paid or would have been paid to the deceased employee for total disability had he or she lived.

Your time and attention to this matter are greatly appreciated.

Sincerely yours,



J. Robert Weaver

JRW/clw

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 W. Va. Code St. R. § 85-8-1 et seq. ("Rule 8," or "the Rule" - "Workers' Compensation Policies, Coverage Issues and Related Topics"), which was filed with the West Virginia Secretary of State for public comment on 5/1/07. This response is itemized by topic and order of sequence the Rule, and addresses all of the comments received at the 5/31/07 Industrial Council meeting as well as other selected substantive written comments received from stakeholders.

Changes to Request for Letter of Exemption Provisions

A trade organization representing real estate brokers recommended that section 4.4. of the Rule pertaining to the ability of an employer to request a letter of exemption from workers' compensation coverage should be amended to eliminate the $25 processing fee for submitting an application for a letter of exemption and also to permit individuals rather than just employers.

Regarding eliminating the $25 fee, the Insurance Commissioner placed the processing fee in the Rule to assist with the significant resources expended in processing the applications for letters of exemptions. Moreover, the Commissioner believes this reasonable processing fee is not excessive or overly burdensome to parties requesting exemptions.

Regarding the suggestion that section 4.4. of the Rule be amended to permit individuals as well as employers to apply for letters of exemption, the current draft of the Rule already permits individuals to apply. Specifically, the section permits "employers" to apply for exemptions. In turn, section 3.5. of the Rule includes "individual" as one type of entity which may be an employer. Consequently, individual persons may make application for a letter of exemption.

Language Requiring Calculation of Premium for Members of Legal Partnerships

An insurer commented that the language in section 6.3.b. of the Rule regarding calculation of premium for members of partnerships should not be deleted because it is consistent with the law in W. Va. Code § 32B-12-1207 (the Uniform Limited Liability Company Act). This provision was inadvertently deleted from the Rule and has been re-inserted in the final version.

Designation of Principal Officers who can be Exempted from Coverage

A business interest organization commented that section 6.3.a.1. of the Rule, which clarifies that a business is permitted to exempt the four (4) principal officers of a company from workers' compensation coverage should not specify the positions of the four (4) principal officers who can be exempted. Currently, this section specifies that the four (4) principal officers are: (1) president; (2) vice president; (3) secretary; and (4) treasurer. The Insurance Commissioner disagrees with this comment because to make the requested amendment would be inconsistent with the Code. Specifically, W. Va. Code § 23-2-1(g)(2) designates that the four principal officers of a corporation are the president, vice president, secretary and treasurer.

Request for Special Provisions Regarding Real Estate Agents

A trade organization representing real estate brokers recommended that section 6.2. of the Rule, setting forth provisions for determining independent contractor status, be revised to provide different standards for real estate agents which are consistent with the found in the I.R.S. Code. The Insurance Commissioner understands the concern regarding real estate agents, who are generally deemed to be independent contractors. As a result, the Insurance Commissioner has made amendments in subsections 3.8. and 6.2. of the Rule to differentiate between "hazardous" and "non-hazardous" industries, and providing a different set of criteria to be met for "non-hazardous" industries. The new criteria for "non-hazardous" industries as found in subdivision 6.2.b. of the Rule should now be applicable to real estate agents and should permit them to be independent contractors in most instances.

Exemption from Coverage of Limited Liability Company Members

A business interest organization commented that section 6.5.b. of the Rule should clarify that only equity members of Limited Liability Companies ("LLC's") should be permitted to be exempted from coverage. The insurance disagrees with this comment because to make the requested amendment would be inconsistent with the Code. Specifically, W. Va. Code § 23-2-1(g)(3) permits an LLC to exempt up to four (4) members of an LLC, and does not quantify that the members must be equity members.

Definition of "Temporary" for Purposes of Workers' Compensation Coverage and Extraterritorial/Cross Border Issues

Several entities, including representatives of employers and labor, made comment regarding the amount of time defined in the Rule as "temporary," "temporarily" and "transitory" for purposes of workers' compensation as related to extraterritorial and cross-border issues. Specifically, a definition of these terms as used in various code sections in Article 2 of Chapter 23, is required. Formerly, the Rule used a period of ninety (90) days in any three-hundred and sixty-five (365) day period.

The comments were that this period should either be eliminated or at least be reduced to a lesser time period of thirty (30) days. Additionally, it was suggested that the definition should use the term "calendar" days instead of "working days". The rationale behind these comments is that West Virginia businesses can be placed at a disadvantage in competing with out of state businesses if the out of state businesses are permitted to enter West Virginia for a period of up to ninety (90) days in a year without having to maintain West Virginia workers' compensation coverage. Moreover, it is argued that permitting such a long period for employers to enter West Virginia without procuring in state coverage can make enforcement of the state's workers compensation laws very difficult.

After reviewing this issue, the Insurance Commissioner is in agreement that reducing the definitions of these terms from "ninety (90) working days" to "thirty (30) calendar days" is appropriate. This amendment is consistent with striking a balance between providing some flexibility regarding out of state businesses entering the State, while also assuring that West Virginia businesses are not at a marked disadvantage, and additionally assuring the ability to properly police out of state employers for proper compliance with West Virginia's workers' compensation laws.

Extraterritorial Agreements

An insurer commented that the provisions in section 7.4. of the amended rule regarding extraterritorial agreements raise several issues. The primary argument is that extraterritorial agreements setting forth which state's workers' compensation laws apply are controlled by W. Va. Code § 23-2C-1c(a), and that section 7.4. of the Rule does not properly reflect the "pre-requisite determinations" that must be made prior to entering into a valid extraterritorial agreement with an employee.[1] Further, it is argued that the

[1] Specifically, W. Va. Code § 23-2C-1c(a) states:

> Whenever, with respect to an employee of an employer who is a subscriber in good standing to the workers' compensation fund or an employer who has elected to pay compensation directly, as provided in section nine [§ 23-2-9] of this article, there is a possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is performed or is to be performed in a state or states other than this state, the employer and the employee may agree to be bound by the laws of this state or by the laws of any other state in which all or some portion of the work of the employee is to be performed: Provided, That the executive director may review and accept or reject the agreement. The review shall be conducted in keeping with the executive director's fiduciary obligations to the workers' compensation fund which may include, among other things, the nexus of the employer and the employee to the state: Provided, however, That nothing in this section shall be construed as to require an agreement in those instances where subdivision (3), subsection (b), section one [§ 23-2-1] of this article or subdivision (1), subsection (a), section one-a [§ 23-2-1a] of this article are applicable. All agreements shall be in writing and filed with the executive director within ten days after execution of the agreement but shall not become effective until approved by the executive director and shall, thereafter, remain in effect until terminated or modified by agreement of the parties similarly filed or by order of the executive director. If the parties agree to be bound by the laws of this state, an employee injured within the terms and provisions of this chapter is entitled to

Offices of the Insurance Commissioner ("OIC") should act as a clearing house to review and approve any agreement to assure the requirements of § 23-2C-1c(a) are met.

The Insurance Commissioner disagrees with this comment. Specifically, the Commissioner believes that the language in W. Va. Code § 23-2-1c(a) is no longer applicable in the privatized workers' compensation market as created by S.B. 1004. Rather, W. Va. Code § 23-2-1(b) is applicable, and permits an employer to enter into extraterritorial agreements with their employees to be covered in a State other than West Virginia without the various requirements of W. Va. Code § 23-2-1c(a) being met.

W. Va. Code § 23-2-1(b) states:

> **(b)** If the parties agree to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and his or her dependents under the laws of that state shall be the exclusive remedy against the employer on account of injury, disease or death in the course of and as a result of the employment without regard to the situs of the injury or exposure to occupational pneumoconiosis or other occupational disease.

The Commissioner is of the opinion that this code section permits an employer who has complied with the laws of another state to enter into an agreement with its employees for the employees to be covered by the foreign state's workers' compensation laws rather than WV. However, the Commissioner does believe that in order to avoid abuse of this code provision, as a pre-requisite to such an agreement being valid, there must be a "non-temporary" nexus of time of at least thirty (30) calendar days worked in the foreign state(s) by all employees covered under any such agreement. Additionally, the employer entering into such an agreement must comply with the provisions of the applicable foreign state – in most cases, this means carrying workers' compensation in the foreign state by the covered employees. Finally, to assure the private carrier has proper notice regarding any agreements in affect so that proper underwriting adjustments can be made, the employer should be required to provide any agreements entered into with employees to their private carrier. As such, the Commissioner has drafted section 7.4. of the Rule to reflect the interpretation of W. Va. Code § 23-2-1(b) as delineated above.

The carrier also pointed out that permitting an employee to enter into an agreement to be covered by a foreign state's workers' compensation laws conflicts with W. Va. Code § 23-2-7, which generally provides that an employee cannot contract to waive the benefits of West Virginia's workers' compensation provisions. While the Commissioner does recognize that W. Va. Code § 23-2-7 generally prohibits a waiver of WV workers' compensation benefits, general rules of statutory construction provide that

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> benefits under this chapter regardless of the situs of the injury or exposure to occupational pneumoconiosis or other occupational disease, and the rights of the employee and his or her dependents under the laws of this state shall be the exclusive remedy against the employer on account of injury, disease or death in the course of and as a result of the employment.

more specific provisions in the Code preempt more general provisions on the same subject matter. Therefore, the Commissioner believes that the legislature specifically carved out an exception to the general rule in W. Va. Code § 23-2-7 that workers' compensation benefits cannot be waived by providing a specific method in W. Va. Code § 23-2-1(b) whereby an employee can agree to be covered by a foreign state's workers' compensation laws.

Clarification on Dependent/Death Benefit Claims

An attorney representing workers' compensation claimants commented that section 8.3. of the amended rule which provides clarification as to the treatment of death benefit claims should be amended to clarify that it only applies to the chargeability of death benefit claims but not to the duration, benefit amount or in any other aspect. The concern is that this section could be construed to mean that workers' compensation death benefit claims are derivative of the underlying occupational injury or disease claim for purposes of benefit duration and amount, contrary to a previous informational letter issued by the Insurance Commissioner and a West Virginia Supreme Court case clarifying that death benefit claims are new claims for purposes of benefit duration and amount.

The Insurance Commissioner agrees that providing clarification as suggested in section 8.3 is appropriate. Consequently, this amendment has been made.

Notification Regarding Issuance, Renewal or Termination of Coverage

Consistent with the provisions of W. Va. Code § 23-2C-15(f), as amended in Senate Bill 595 (effective March 10, 2007), private carriers are required to notify the Insurance Commissioner or the Commissioner's designee of the issuance or renewal of insurance coverage, within ten (10) calendar days of the effective date of coverage and the termination of coverage due to lapse, refusal to renew or cancellation, within three (3) business days of the effective date of the termination. These requirements are reflected in section 9.1. and 9.2. of the Rule.

A carrier, an insurance industry trade organization and a business interest organization commented that the language in the Rule indicated that carrier had to report this information both to the Insurance Commissioner *and* the Commissioner's designated rating organization, and that duplicative reporting requirements are overly burdensome and unnecessary. The Insurance Commissioner agrees that the language in these sections indicates unnecessary duplicative reporting requirements. As a result, this language was amended to require carriers only to report the information to the Insurance Commissioner's designated rating organization.

Additionally, comment was made that the period of three (3) business days to report termination of coverage is too short, particularly if notice is sent by mail. While the Commissioner understands the concern with this short time frame, the statutory language, as noted above, is clear regarding the three (3) day time frame. Therefore, the

Commissioner does not have any ability to extend this time frame by Rule, as it would then be in direct conflict with the Code. Moreover, as the Rule has been amended to only require notice to the designated rating organization (currently NCCI), and as this type of reporting is done electronically, there should be no issues with delay caused by reporting by mail. Consequently, the three (3) day time frame should be sufficient time to report the information.

Notification to Insured Employers Regarding Cancellation of Coverage

A carrier and an insurance industry trade organization commented on the provisions of sections 9.4. and 9.5. of the Rule pertaining to the cancellation of workers' compensation policies. First, comment was made that the sixty (60) day notice requirement for reasons other than failure to pay consideration is unreasonably long. While the Insurance Commissioner understands the concern of Industry in requiring a sixty (60) day notice period for cancellation is a lengthy period, the legislature mandated this notice requirement pursuant to W. Va. Code § 23-2C-15(e), and changing it would be in conflict with the Code. Therefore, the Commissioner does not have the ability to alter this time frame.

Also, it is argued that the shorter notice requirement of fifteen (15) days is too narrow in its applicability. Specifically, the concern is that the language in the current draft only permits cancellation in fifteen (15) days for failure to pay premium. It is argued that since the language in W. Va. Code § 23-2C-15(e) permits cancellation with only fifteen (15) days notice for "failure of consideration to be paid by the policyholder," the Rule language should be amended to properly reflect the statutory language. Additionally, it is asserted that this language should also clarify that the fifteen (15) day time frame can also be used if a policy holder refuses to comply timely with a requested premium audit by a carrier, since such audits may be required to determine the amount of premium owed. The Commissioner is in agreement with these suggested changes to section 9.5., and believe such amendments would be consistent with the intent of the relevant Code provisions. Consequently, changes were made to this section to appropriately broaden the scope of when the fifteen (15) day cancellation notice can be utilized by private carriers.

Finally, it is suggested that the requirement in section 9.5. of the Rule that cancellation notices to policy holder be sent to carriers by certified mail, return receipt requested, is overly burdensome and inefficient. It is suggested as an alternative that carriers only be required to send the cancellation only by regular mail, but to maintain internal documentation and/or proof that the mail was sent. The Insurance Commissioner is in agreement with this comment, particularly in light of the fact that cancellation need not be mailed by certified mail in other lines of insurance in West Virginia. Therefore, appropriate changes were made to section 9.5.

Cancellation for Failure to Meet Deductible Plans

A carrier commented that section 11.4. of the Rule, which addresses deductible plans, should clarify that the failure of a policy holder to meet deductible requirements under such plans be subject to the fifteen (15) day cancellation requirement for failure to remit proper consideration to the carrier. The Insurance Commissioner agrees with this comment. Paying deductible amounts owed are within the purview of "consideration" owed to a private carrier. Therefore, section 11.4 of the Rule was amended to clarify the same.