WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

CITE AUTHORITY: W. Va. Code §§23-1-1a(j)(3); 23-2C-17(b); 23-2C-18(g); 23-2C-8(a)(4)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW
W. Va. Code §23-1-1a(j)(3)

AMENDMENT TO AN EXISTING RULE: YES ____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 8

TITLE OF RULE BEING PROPOSED: Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS January 20, 2006

Authorized Signature

WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code§§23-1-1a(j)(3);-2C-17(b)&18(g

AMENDMENT TO AN EXISTING RULE: YES___NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 8

TITLE OF RULE BEING PROPOSED: Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics

DATE OF PUBLIC HEARING: November 18, 2005 TIME: 1:00 p. m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T.J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

Fax # (304) 926-5372

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

R. Philip Slen for GREG BURTON

Authorized Signature

WCC Insuring a Working West Virginia
Workers' Compensation Commission
Gregory A. Burton, Executive Director

Office of General Counsel
4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone Number (304) 926-3423
Fax Number (304) 926-5441

October 14, 2005

The Honorable Betty Ireland
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 8
"Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics"

Dear Secretary Ireland:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. The Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 8 for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

R. Phillip Shen Eq

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 8: Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Ave. S.E.

Charleston, WV 25304

1. Effect of Proposed Rule

	Annual		Fiscal Year		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	N/A	N/A	N/A	N/A	N/A
PERSONAL SERVICES	N/A	N/A	N/A	N/A	N/A
CURRENT EXPENSE	N/A	N/A	N/A	N/A	N/A
REPAIRS & ALTERNATIONS	N/A	N/A	N/A	N/A	N/A
EQUIPMENT	N/A	N/A	N/A	N/A	N/A
OTHER: Benefit related payments	N/A	N/A	N/A	N/A	N/A

2. Explanation of above estimates:

The proposed rule establishes certain requirements of private carriers providing workers' compensation insurance related to basic policy issues, ratemaking, premium collection, assessment methodologies, rates, payments and other workers' compensation topics. The above estimates are based on the assumption that the rule changes become effective after December 31, 2005. Any expenses incurred prior to 1/1/06 by the Workers' Compensation Commission (Commission) in anticipation of implementing this rule, such as setup costs or operational processes required to be in place by 1/1/06, should be paid out of the mutualization transition fund as defined in the state code at §23-2C-2(i). The Commission transferred $35,000,000 to the mutualization transition fund, in accordance with §23-2C-6(a), in anticipation of covering disbursements authorized by the executive director of the Commission for expenditures reasonably related to the legal, operational, consultative and human resource related expenses associated with the establishment of the Mutual Insurance Company. Subject to the governor issuing the proclamation set forth in chapter twenty-three, article 2C of the Code of West Virginia that terminates the Workers' Compensation Commission, after December 31, 2005, the responsibility for the administration of this rule will become the responsibility of the Insurance Commissioner.

3. Objectives of this rule:

The proposed rule provides for the requirements of a basic policy to be used by private carriers of workers' compensation insurance, establishes the criteria for ratemaking and premium collection by private carriers, establishes the assessment methodologies, rates, payments and provides rules regarding other workers' compensation topics.

Rule Title: Title 85 Series 8: Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that the there will be no direct economic impact from this rule.

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

It is expected that there will be no impact from the rule.

C. Economic Impact on Citizens/Public at Large.

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

Date: October 14, 2005

Signature of Agency Head or Authorized Representative

R.P.D. for Slen for

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 8
Workers' Compensation Policies, Coverage Issues,
Policy Defaults and Related Topics

Pursuant to Senate Bill 1004, First Special Session, 2005, the Workers' Compensation Commission may terminate. Thereafter, Workers' Compensation insurance in West Virginia will be provided through the successor to the Commission and other private insurance carriers.

As part of Senate Bill 1004, the Legislature required that the Board of Managers promulgate a rule that would provide the minimum requirements for a workers' compensation policy to be used be private carriers. In addition, the Board of Managers is required to promulgate a rule to govern workers' compensation ratemaking.

This proposed rule provides for the above as well as general provisions related to coverage, policy defaults and other workers' compensation matters.

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

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

§85-8-1. General.

1.1. Scope. -- This exempt legislative rule provides for (1) the minimum contents of a policy issued for workers' compensation insurance pursuant to West Virginia Code Section 23-1-1 *et seq.*; (2) rate making and premium collection associated with a workers' compensation insurance policy; (3) the consequences of entering policy default and resulting claim payments made from the uninsured employer fund; and (4) other coverage related topics.

1.2. Authority. -- W.Va. Code §§23-1-1a(j)(3); 23-2C-17(b); 23-2C-18(g); 23-2C-8(a)(4). Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission are not subject to legislative approval as would otherwise be required under West Virginia Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. --

§85-8-2. Purpose of Rule.

This rule provides for the requirements of a basic policy to be used by private carriers of workers' compensation insurance, establishes the criteria for ratemaking and premium collection by private carriers, establishes the assessment methodologies, rates, payments and penalties necessary to operate the uninsured employers' fund and provides rules regarding other workers' compensation 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. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.

3.2. "Base rates" means the loss cost calculated for each classification.

3.3. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W.Va. Code §23-1-1a.

3.4. "Classification" shall mean a categorization of employers for the purpose of assessing risk, rate making, and developing premium charges.

3.5. "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

3.6. "Commission" means the Workers' Compensation Commission created pursuant to the provisions of W.Va. Code §23-1-1.

3.7. "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, 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.

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

3.9. "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.

3.10. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W.Va. Code §23-1-1b.

3.11. "Gross wages" means all wages paid to employees, whether payable in money or other valuable consideration, and shall include salaries, bonuses, commissions, profit sharing, and the reasonable money value of board, rent, housing, lodging and other goods and services. The commission retains the right to determine whether an item, not otherwise described in this provision, is reportable as "gross wages."

"Gross wages" include: W-2 items, vacation pay, including accrued vacation at time of dismissal, holiday pay, sick pay (excluding 3rd party sick pay), partnership and S Corporation distributions of ordinary income from trade or business activities (do not report losses), draws

taken for items other than business expenses, retroactive wages, bonuses, including stock options and stock bonuses, commissions, including draws against commissions, wages paid to summer interns, overtime wages, profit sharing, incentive programs, per diem payments to employees not directly related to travel, allocation to employees for such things as tools, equipment, machinery, etc. regardless if such allocation is labeled as per diem, hourly expense or other titles, stipend or other non-travel related payments to board members who are being covered under the employer's workers' compensation account, other compensation and perquisites paid to employees, owners and officers that have value, but are not per diem travel related, and value of gifts given to employees, owners, officers and board members.

"Gross wages" do not include: per diem expenses related to travel, the value of any special discount or markdown allowed a worker on goods or services purchased from or supplied by the employer if the purchase is optional with the worker and does not constitute regular or systematic remuneration for services, facilities or privileges such as cafeterias, restaurants, medical services or so-called 'courtesy discounts' on purchases furnished or offered by an employer merely as a convenience to workers or as a means of promoting their health, goodwill or efficiency, partnership and S Corporation distributions other than ordinary income from trade or business activities, payments, not required under any contract of hire, made to an individual with respect to a period of training or service in the armed forces of the United States, severance pay, savings plan proceeds, third party sick pay, and disability pay.

3.12. "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.

3.13. "Old Fund" means the fund created pursuant to article two-c of chapter twenty-three of the West Virginia Code.

3.14. "Payroll" means the entire gross wages of all employees not excluded under provisions of the Act or this rule, or such other wage related exposure base as may be determined pursuant to Chapter 23 of the West Virginia Code.

3.15. "Policy Default" means a policy holder that has failed to comply with the terms of its workers' compensation insurance policy and is consequently without workers' compensation coverage and shall include, but not be limited to, a policy holder's failure to pay the regulatory surcharge and deficit reduction surcharge required by article two-c of chapter twenty-three of the West Virginia Code.

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

3.17. "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

3.18. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.19. "This rule" means this legislative rule designated as 85 C.S.R. 8, "Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics."

§85-8-4. Employers.

4.1. Duty to register. Every employer subject to the Workers' Compensation Act (W. Va. Code §23-1-1 et seq.) is required to obtain a workers' compensation policy 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.

4.3 Exemption determination. An employer shall make application 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 make such determination as it deems proper. The insurance commissioner shall charge each applicant for a letter of exemption from coverage a processing fee in the amount of twenty-five dollars ($25).

§85-8-5. Auditing; Inspections; and gross wage reporting.

5.1 Each private carrier may include reasonable auditing, inspection and wage reporting provisions in its policy.

5.2 A private carrier may cancel a policy after providing fifteen (15) days advance written notice to a policy holder of its failure to comply with auditing, inspection, or reporting requirements of its policy. A private carrier shall provide the Insurance Commissioner with all applicable notices of said cancellation. The effective date of the termination shall be upon expiration of said fifteen (15) days.

§85-8-6. Employees Covered; Employers Required to Subscribe; Coverage Elections; Assignment.

6.1. General. An employer's subscription for workers' compensation coverage must cover all of its employees who are mandated coverage and benefits by law.

6.2. Independent contractors. Services performed by a worker for wages are employment subject to this rule unless and until it is shown to the satisfaction of the private carrier that the worker is an independent contractor. In determining whether an independent contractor relationship or an employment relationship exists between the parties, the private carrier will examine information that provides evidence of the degree of control and the degree of independence exhibited by the parties.

Facts that provide evidence of the degree of control fall into three categories: behavioral control, financial control, and the type of relationship between the parties. As the degree of control rises, the more the facts indicate that an employee/employer relationship exists. The private carrier is provided with discretion to weigh out the degree of control. Neither all categories of the degree of control, nor each element of every category, is required to determine that an employment relationship exists.

a. Behavioral control is whether the business has a right to direct and control how the worker does the task for which the worker is hired. Evidence of behavioral control includes whether the worker is subject to the business' instructions about when, where, and how to work.

The key consideration is whether the business has retained the right to control the details of a workers' performance or instead has given up that right.

b. Financial control is whether the business has a right to control the business aspects of a worker's job.

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 Workers' Compensation Act as provided in chapter 23 of the West Virginia Code.

1. The employers' election out of coverage of officers of a corporation is limited to four officers (a president, a vice-president, a secretary, and a treasurer). The four 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 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 an employee who is not an officer. An officer who performs both types of activities (officer/worker, administrator, or other worker) is deemed to be working in a "dual capacity."

2. "Other officers" and "assistant officers" may only be elected out of coverage if they are engaged in activities exclusive to their function as a corporate officer. No other officer or assistant officer may be elected out of coverage if they are engaged in a dual capacity of having duties and responsibilities for work ordinarily performed by an officer and also having duties and responsibilities for work ordinarily performed by a worker, administrator or employee who is not an officer.

3. Dual capacity is determined by the duties of the officer/employee. For an officer, other than the four principal officers 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 employee who is not an officer. It is the employer's duty to show that work performed by "other officers or assistant 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) that only attends board meetings and the 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 duty 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 the Workers' Compensation Act and are not entitled to the benefits of the Act.

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 31B of the Code of West Virginia. 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 that 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 ~~7~~6.3 of this rule, 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 persons occupying those positions, and shall not include such "employee's" gross wages for premium purposes in future payroll reports. Such partner, member/manager, proprietor or corporate or executive officer shall not be deemed an employee within the meaning of the Act after such notice has been served.

a. Elections not to be covered made under subsection ~~7~~6.3 of this rule are effective for the next policy period and each policy period thereafter with the same private carrier without subsequent election.

b. Elections not to be covered are valid only for the persons named in the written notice to the commission. Such an election is not valid for any person 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 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; or

4. Adding a person who has previously elected not to be covered under the provisions of subsection ~~7~~6.3 of this rule 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 (fiscal year July 1 through June 30) in which coverage is sought, then coverage shall not be extended to such person requesting coverage beginning that 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 delinquent or in default.

a. Employers who fail to subscribe for workers' compensation coverage shall not be afforded coverage for its partners, the 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 "employee" 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 default or in policy default of their workers' compensation obligations shall not be afforded workers' compensation coverage for its partners, the 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 "employee" 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 "employees" specified in this provision shall not be afforded if the employer is in default or in 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, the "employee" nevertheless will not be covered for the injury that occurred during the period of default or delinquency and benefits will never be payable for that injury.

2. Benefits paid during periods of default or policy default for "employees" denied coverage under this provision shall be considered overpayments.

3. When coverage for an injury is denied to an "employee" as a result of the employer's default or policy default, the injured "employee" may only contest the determination through the provisions of 85 C.S.R. 7, "Rules for Selected Hearings," and the provisions of W. Va. Code §23-2-17. Until the conclusion of the W. Va. Code §23-2-17 process and the determination of whether the "employee" is afforded coverage, action in the claim will be held in abeyance.

6.6. Employment activities within and outside state borders; reporting.

a. The entire gross wages of employees, whose contracts of hire have been consummated within the borders of West Virginia, whose employment involves activities both within and without the borders of West Virginia, and where the supervising office of the employer is located in West Virginia, shall be included in the payroll report.

b. The gross wages of employees of other than West Virginia employers, who have entered into a contract of employment outside of West Virginia to perform transitory services in interstate commerce only, both within and outside the boundaries of West Virginia, shall not be included in the payroll report.

c. The office of the insurance commissioner respects the extra-territorial right of the workers' compensation insurance coverage of an out-of-state employer for his regular employees, whose contracts of hire have been consummated in some state other than West Virginia, while

performing work in the state of West Virginia for a temporary period not to exceed ninety working (90) days in any three hundred sixty-five day period.

1. Employees whose contracts of hire are consummated at a job site in West Virginia or employees who have been hired to work specifically in West Virginia must be protected for workers' compensation insurance in accordance with the provisions of W. Va. Code §23-1-1 et seq.

d. Where there is a conflict with respect to the application of the workers' compensation law, the provisions of W. Va. Code §23-2-1c, apply. The employer requesting coverage under such provisions shall supply the names and social security numbers of each employee sought to be covered under such provisions to the office of the insurance commissioner.

e. Workers' compensation coverage for temporary or transitory employment activities outside the State of West Virginia extends only to the time limit as defined and determined by the requirements of coverage of such other state or other jurisdiction.

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 the Act, 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 the Act, 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. The workers' compensation insurance policy.

7.1. Each policy for workers' compensation insurance shall comply with chapter thirty-three of the West Virginia Code unless a waiver of a specific provision of Chapter 33 of the Code is secured by a private carrier from the West Virginia insurance commissioner.

7.2. Each workers' compensation insurance policy shall provide coverage 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 23 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 23 of the West Virginia Code. 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.

7.3 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, to settle said claims in accordance with all applicable statutes, rules, and regulations, and to elect not to defend a protest.

7.4 The termination of a policy for failure to pay the initial premium shall be deemed effective as of the first date of the policy.

7.5 Each private carrier shall assess its policyholders any applicable deficit reduction surcharge or insurance commissioner regulatory surcharge and remit as directed by the insurance commissioner. The obligation of the private carrier is limited solely to the collection and remittance of the surcharges, 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 any difference in the amount projected to be collected as a result of the surcharge percentage set by the insurance commissioner and the amount actually collected.

§85-8-8. Ratemaking.

8.1. Fiscal Year 2007.

a. For the fiscal year beginning the first day of July, 2006, the West Virginia Employers' Mutual Insurance Company shall determine premium rates based on the actuarially determined base rates for the fiscal year. The base rates shall be calculated by the Mutual and submitted for approval by the insurance commissioner.

b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.

c. In addition to said loss cost base rates, the premium rates charged by the Mutual may also include (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost 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 Mutual'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.

d. The Mutual 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 the West Virginia Code Section 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the Mutual as to the risk and/or exposure characteristics of the insured; (2) the Mutual's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.

e. The Mutual 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. Under a deductible plan, an insured that fails to make a claim payment within the deductible 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.

f. In addition to the premium charges determined, the Mutual shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.

8.2. Fiscal Year 2008.

a. For the fiscal year beginning the first day of July, 2007, the West Virginia Employers' Mutual Insurance Company shall determine premium rates based on the actuarially determined base rates for the fiscal year. The base rates shall be calculated by the Mutual and submitted for approval by the insurance commissioner.

b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.

c. In addition to said loss cost base rates, the premium rates charged by the Mutual may also include (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost 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 Mutual'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.

d. The Mutual may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the Mutual as to the risk and/or exposure characteristics of the insured; (2) the Mutual's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.

e. The Mutual 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. Under a deductible plan, an insured that fails to make a claim payment within the deductible 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.

f. In addition to the premium charges determined, the Mutual shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.

8.3. Fiscal Year 2009.

a. For the fiscal year beginning the first day of July, 2008, all private carriers shall determine their premium rates based on the actuarially determined base rates. The base rate shall be either 1) the base rate filed by a licensed rating organization and approved by the insurance commissioner; or 2) the base rate promulgated by the insurance commissioner; *Provided* that the private carrier may file for approval of a deviation of the base rate by classification in an amount not to exceed five percent (5%) of the approved or promulgated base rate.

b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.

c. In addition to said loss cost base rates, the premium 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 and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost 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.

d. Private carriers may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). 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. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.

e. 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. Under a deductible plan, an insured that fails to make a claim payment within the deductible 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.

f. In addition to the premium charges determined, private carriers shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.

8.4. Fiscal Year 2010.

a. For the fiscal year beginning the first day of July, 2009, all private carriers shall determine their premium rates based on the actuarially determined base rates. The base rate shall be either 1) the base rate filed by a licensed rating organization and approved by the insurance commissioner; or 2) the base rate promulgated by the insurance commissioner; *Provided* that the private carrier may file for approval of a deviation of the base rate by classification in an amount not to exceed ten percent (10%) of the approved or promulgated base rate.

b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.

c. In addition to said loss cost base rates, the premium 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 and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost 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.

d. Private carriers may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). 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. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.

e. 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. Under a deductible plan, an

insured that fails to make a claim payment within the deductible 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.

f. In addition to the premium charges determined, private carriers shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.

§85-8-9 Rating Organizations

9.1. All private carriers may become a member of an advisory organization and/or a rating organization as provided for in Chapter thirty-three of the West Virginia Code to perform said duties set forth in Chapter thirty-three of the West Virginia Code; *Provided* that said advisory organization and/or rating organization has otherwise complied with Chapter thirty-three of the West Virginia Code.

9.2. The Insurance Commissioner may designate a workers' compensation rating organization that has been licensed in accordance with West Virginia Code §33-20-6 to assist the commissioner in gathering, compiling, and reporting relevant statistical information and data. Each workers' compensation insurer shall 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. The designated worker's compensation rating organization may develop (i) a uniform policy form (ii) statistical plans, (iii) experience rating plans, (iv) classification systems and other rating plans for use by its members and subscribers in the provision of workers' compensation insurance and the reporting of the experience of this line of insurance. The rating organization may also develop manual rules for the recording and reporting of experience data of members pursuant to its uniform plans and systems. Such uniform plans, systems, and rules shall be filed with the insurance commissioner by the rating organization pursuant to the same process that applies to other commercial lines prior to their use by members of the rating organization.

9.3. Each workers' compensation insurer must be a member or subscriber of the designated workers' compensation rating organization. Every workers' compensation insurer shall adhere to policy forms, rules, uniform classification system and uniform experience and retrospective and other rating plans that have been filed with the commissioner by such designated rating organization and approved by the commissioner.

§85-8-10. 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.

BEFORE THE
WEST VIRGINIA WORKERS' COMPENSATION
BOARD OF MANAGERS

****

IN THE MATTER OF:	)	**ROBERT ALSOP,**
	)	**CHAIRMAN**
PUBLIC HEARING	)	**RULE 8 - Public Hearing**
NOVMBER 18, 2005)	)	

****

Transcript of proceedings had in the above-styled meeting were held as therein appears before the **WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS,** held at the Charleston Civic Center, Suite 207, 200 Civic Center Drive, Charleston, West Virginia, at 1:06 p.m., on the 18th day of November, 2005.

****

BILLANTI & ASSOCIATES
COURT REPORTERS
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ELKVIEW, WV 25071
304-965-7444

APPEARANCES:

MEMBERS OF THE WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS

HONORABLE JOE MANCHIN, III, CHAIRMAN

Robert Alsop (Designee)

PAUL THOMPSON, Member

GENE BAILEY, Member

BOB PHALEN, Member

EVERETTE SULLIVAN, Member

CHRIS JARRETT, Member

DOUGLAS MERRITT, Member

RICHARD HUMPHREYS, Member

PAUL HARDESTY, Member

CRAIG SLAUGHTER, Member

MARGARET RICE, Recording Secretary

(P R O C E E D I N G S)

(1:06 P.M)

CHAIRMAN ALSOP: The next item on our agenda is the public hearing for Rule 8, relating to policies, rates, coverage issues, policy defaults and related topics.

We will open the public hearing. To my understanding, no one has signed up to speak with respect to Rule 8, but if there is anybody who didn't sign up who would like to come up and speak with respect to this issue, they may do so now.

(No response.)

CHAIRMAN ALSOP: I will close the public hearing with respect to rule 8.

(WHEREUPON, the hearing was adjourned at 1:08 p.m.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to wit:

I, the undersigned, David T. Bolin, Courter Reporter and Notary Public, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of the proceedings had before the **West Virginia Workers' Compensation Board of Managers** as set forth in the caption hereof, and that this is the original transcript thereof for the files of the Board.

Given under my hand this 22nd day of November, 2005.

Court Reporter

MY COMMISSION EXPIRES JULY 27, 2014.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
DAVID T. BOLIN
1033 Ridgemont Drive
Elkview, WV 25071
My Commission Expires July 27, 2014

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
PUBLIC HEARING
NOVEMBER 18, 2005 – 1:00 P.M.
85CSR8 – POLICIES, RATES, COVERAGE ISSUES, POLICY DEFAULTS AND RELATED TOPICS

ATTENDANCE SHEET

The Board is required to keep a list of individuals attending its meetings and of those who wish to address the Board.

NAME	COMPANY	Do you wish To speak? (Yes/No)

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

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

§85-8-1. General.

1.1. Scope. -- This exempt legislative rule provides for (1) the minimum contents of a policy issued for workers' compensation insurance pursuant to West Virginia Code Section 23-1-1 *et seq.*; (2) rate making and premium collection associated with a workers' compensation insurance policy; (3) the consequences of entering policy default and resulting claim payments made from the uninsured employer fund; and (4) other coverage related topics.

1.2. Authority. -- W.Va. Code §§23-1-1a(j)(3); 23-2C-17(b); 23-2C-18(g); 23-2C-8(a)(4). Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission are not subject to legislative approval as would otherwise be required under West Virginia Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. --

§85-8-2. Purpose of Rule.

This rule provides for the requirements of a basic policy to be used by private carriers of workers' compensation insurance, establishes the criteria for ratemaking and premium collection by private carriers, establishes the assessment methodologies, rates, payments and penalties necessary to operate the uninsured employers' fund and provides rules regarding other workers' compensation 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. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.

3.2. "Base rates" means the loss cost calculated for each classification.

3.3. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W.Va. Code §23-1-1a.

3.4. "Classification" shall mean a categorization of employers for the purpose of assessing risk, rate making, and developing premium charges.

3.5. "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

3.6. "Commission" means the Workers' Compensation Commission created pursuant to the provisions of W.Va. Code §23-1-1.

3.7. "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, 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.

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

3.9. "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.

3.10. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W.Va. Code §23-1-1b.

3.11. "Gross wages" means all wages paid to employees, whether payable in money or other valuable consideration, and shall include salaries, bonuses, commissions, profit sharing, and the reasonable money value of board, rent, housing, lodging and other goods and services. The commission retains the right to determine whether an item, not otherwise described in this provision, is reportable as "gross wages."

"Gross wages" include: W-2 items, vacation pay, including accrued vacation at time of dismissal, holiday pay, sick pay (excluding 3rd party sick pay), partnership and S Corporation distributions of ordinary income from trade or business activities (do not report losses), draws

taken for items other than business expenses, retroactive wages, bonuses, including stock options and stock bonuses, commissions, including draws against commissions, wages paid to summer interns, overtime wages, profit sharing, incentive programs, per diem payments to employees not directly related to travel, allocation to employees for such things as tools, equipment, machinery, etc. regardless if such allocation is labeled as per diem, hourly expense or other titles, stipend or other non-travel related payments to board members who are being covered under the employer's workers' compensation account, other compensation and perquisites paid to employees, owners and officers that have value, but are not per diem travel related, and value of gifts given to employees, owners, officers and board members.

"Gross wages" do not include: per diem expenses related to travel, the value of any special discount or markdown allowed a worker on goods or services purchased from or supplied by the employer if the purchase is optional with the worker and does not constitute regular or systematic remuneration for services, facilities or privileges such as cafeterias, restaurants, medical services or so-called 'courtesy discounts' on purchases furnished or offered by an employer merely as a convenience to workers or as a means of promoting their health, goodwill or efficiency, partnership and S Corporation distributions other than ordinary income from trade or business activities, payments, not required under any contract of hire, made to an individual with respect to a period of training or service in the armed forces of the United States, severance pay, savings plan proceeds, third party sick pay, and disability pay.

3.12. "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.

3.13. "Old Fund" means the fund created pursuant to article two-c of chapter twenty-three of the West Virginia Code.

3.14. "Payroll" means the entire gross wages of all employees not excluded under provisions of the Act or this rule, or such other wage related exposure base as may be determined pursuant to Chapter 23 of the West Virginia Code.

3.15. "Policy Default" means a policy holder that has failed to comply with the terms of its workers' compensation insurance policy and is consequently without workers' compensation coverage and shall include, but not be limited to, a policy holder's failure to pay the regulatory surcharge and deficit reduction surcharge required by article two-c of chapter twenty-three of the West Virginia Code.

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

3.17. "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

3.18. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.19. "This rule" means this legislative rule designated as 85 C.S.R. 8, "Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics."

§85-8-4. Employers.

4.1. Duty to register. Every employer subject to the Workers' Compensation Act (W. Va. Code §23-1-1 et seq.) is required to obtain a workers' compensation policy 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.

4.3 Exemption determination. An employer shall make application 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 make such determination as it deems proper. The insurance commissioner shall charge each applicant for a letter of exemption from coverage a processing fee in the amount of twenty-five dollars ($25).

§85-8-5. Auditing; Inspections; and gross wage reporting.

5.1 Each private carrier may include reasonable auditing, inspection and wage reporting provisions in its policy.

5.2 A private carrier may cancel a policy after providing fifteen (15) days advance written notice to a policy holder of its failure to comply with auditing, inspection, or reporting requirements of its policy. A private carrier shall provide the Insurance Commissioner with all applicable notices of said cancellation. The effective date of the termination shall be upon expiration of said fifteen (15) days.

§85-8-6. Employees Covered; Employers Required to Subscribe; Coverage Elections; Assignment.

6.1. General. An employer's subscription for workers' compensation coverage must cover all of its employees who are mandated coverage and benefits by law.

6.2. Independent contractors. Services performed by a worker for wages are employment subject to this rule unless and until it is shown to the satisfaction of the private carrier that the worker is an independent contractor. In determining whether an independent contractor relationship or an employment relationship exists between the parties, the private carrier will examine information that provides evidence of the degree of control and the degree of independence exhibited by the parties.

Facts that provide evidence of the degree of control fall into three categories: behavioral control, financial control, and the type of relationship between the parties. As the degree of control rises, the more the facts indicate that an employee/employer relationship exists. The private carrier is provided with discretion to weigh out the degree of control. Neither all categories of the degree of control, nor each element of every category, is required to determine that an employment relationship exists.

a. Behavioral control is whether the business has a right to direct and control how the worker does the task for which the worker is hired. Evidence of behavioral control includes whether the worker is subject to the business' instructions about when, where, and how to work.

The key consideration is whether the business has retained the right to control the details of a workers' performance or instead has given up that right.

b. Financial control is whether the business has a right to control the business aspects of a worker's job.

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 Workers' Compensation Act as provided in chapter 23 of the West Virginia Code.

1. The employers' election out of coverage of officers of a corporation is limited to four officers (a president, a vice-president, a secretary, and a treasurer). The four 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 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 an employee who is not an officer. An officer who performs both types of activities (officer/worker, administrator, or other worker) is deemed to be working in a "dual capacity."

2. "Other officers" and "assistant officers" may only be elected out of coverage if they are engaged in activities exclusive to their function as a corporate officer. No other officer or assistant officer may be elected out of coverage if they are engaged in a dual capacity of having duties and responsibilities for work ordinarily performed by an officer and also having duties and responsibilities for work ordinarily performed by a worker, administrator or employee who is not an officer.

3. Dual capacity is determined by the duties of the officer/employee. For an officer, other than the four principal officers 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 employee who is not an officer. It is the employer's duty to show that work performed by "other officers or assistant 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) that only attends board meetings and the 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 duty 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 the Workers' Compensation Act and are not entitled to the benefits of the Act.

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 31B of the Code of West Virginia. 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 that 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 ~~7~~6.3 of this rule, 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 persons occupying those positions, and shall not include such "employee's" gross wages for premium purposes in future payroll reports. Such partner, member/manager, proprietor or corporate or executive officer shall not be deemed an employee within the meaning of the Act after such notice has been served.

a. Elections not to be covered made under subsection ~~7~~6.3 of this rule are effective for the next policy period and each policy period thereafter with the same private carrier without subsequent election.

b. Elections not to be covered are valid only for the persons named in the written notice to the commission. Such an election is not valid for any person 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 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; or

4. Adding a person who has previously elected not to be covered under the provisions of subsection ~~7~~6.3 of this rule 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 (fiscal year July 1 through June 30) in which coverage is sought, then coverage shall not be extended to such person requesting coverage beginning that 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 delinquent or in default.

a. Employers who fail to subscribe for workers' compensation coverage shall not be afforded coverage for its partners, the 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 "employee" 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 default or in policy default of their workers' compensation obligations shall not be afforded workers' compensation coverage for its partners, the 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 "employee" 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 "employees" specified in this provision shall not be afforded if the employer is in default or in 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, the "employee" nevertheless will not be covered for the injury that occurred during the period of default or delinquency and benefits will never be payable for that injury.

2. Benefits paid during periods of default or policy default for "employees" denied coverage under this provision shall be considered overpayments.

3. When coverage for an injury is denied to an "employee" as a result of the employer's default or policy default, the injured "employee" may only contest the determination through the provisions of 85 C.S.R. 7, "Rules for Selected Hearings," and the provisions of W. Va. Code §23-2-17. Until the conclusion of the W. Va. Code §23-2-17 process and the determination of whether the "employee" is afforded coverage, action in the claim will be held in abeyance.

6.6. Employment activities within and outside state borders; reporting.

a. The entire gross wages of employees, whose contracts of hire have been consummated within the borders of West Virginia, whose employment involves activities both within and without the borders of West Virginia, and where the supervising office of the employer is located in West Virginia, shall be included in the payroll report.

b. The gross wages of employees of other than West Virginia employers, who have entered into a contract of employment outside of West Virginia to perform transitory services in interstate commerce only, both within and outside the boundaries of West Virginia, shall not be included in the payroll report.

c. The office of the insurance commissioner respects the extra-territorial right of the workers' compensation insurance coverage of an out-of-state employer for his regular employees, whose contracts of hire have been consummated in some state other than West Virginia, while

performing work in the state of West Virginia for a temporary period not to exceed ninety working (90) days in any three hundred sixty-five day period.

1. Employees whose contracts of hire are consummated at a job site in West Virginia or employees who have been hired to work specifically in West Virginia must be protected for workers' compensation insurance in accordance with the provisions of W. Va. Code §23-1-1 et seq.

d. Where there is a conflict with respect to the application of the workers' compensation law, the provisions of W. Va. Code §23-2-1c, apply. The employer requesting coverage under such provisions shall supply the names and social security numbers of each employee sought to be covered under such provisions to the office of the insurance commissioner.

e. Workers' compensation coverage for temporary or transitory employment activities outside the State of West Virginia extends only to the time limit as defined and determined by the requirements of coverage of such other state or other jurisdiction.

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 the Act, 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 the Act, 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. The workers' compensation insurance policy.

7.1. Each policy for workers' compensation insurance shall comply with chapter thirty-three of the West Virginia Code unless a waiver of a specific provision of Chapter 33 of the Code is secured by a private carrier from the West Virginia insurance commissioner.

7.2. Each workers' compensation insurance policy shall provide coverage 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 23 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 23 of the West Virginia Code. 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.

7.3 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, to settle said claims in accordance with all applicable statutes, rules, and regulations, and to elect not to defend a protest.

7.4 The termination of a policy for failure to pay the initial premium shall be deemed effective as of the first date of the policy.

7.5 Each private carrier shall assess its policyholders any applicable deficit reduction surcharge or insurance commissioner regulatory surcharge and remit as directed by the insurance commissioner. The obligation of the private carrier is limited solely to the collection and remittance of the surcharges, 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 any difference in the amount projected to be collected as a result of the surcharge percentage set by the insurance commissioner and the amount actually collected.

§85-8-8. Ratemaking.

8.1. Fiscal Year 2007.

a. For the fiscal year beginning the first day of July, 2006, the West Virginia Employers' Mutual Insurance Company shall determine premium rates based on the actuarially determined base rates for the fiscal year. The base rates shall be calculated by the Mutual and submitted for approval by the insurance commissioner.

b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.

c. In addition to said loss cost base rates, the premium rates charged by the Mutual may also include (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost 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 Mutual'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.

d. The Mutual 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 the West Virginia Code Section 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the Mutual as to the risk and/or exposure characteristics of the insured; (2) the Mutual's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.

e. The Mutual 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. Under a deductible plan, an insured that fails to make a claim payment within the deductible 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.

f. In addition to the premium charges determined, the Mutual shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.

8.2. Fiscal Year 2008.

a. For the fiscal year beginning the first day of July, 2007, the West Virginia Employers' Mutual Insurance Company shall determine premium rates based on the actuarially determined base rates for the fiscal year. The base rates shall be calculated by the Mutual and submitted for approval by the insurance commissioner.

b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.

c. In addition to said loss cost base rates, the premium rates charged by the Mutual may also include (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost 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 Mutual'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.

d. The Mutual may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the Mutual as to the risk and/or exposure characteristics of the insured; (2) the Mutual's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.

e. The Mutual 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. Under a deductible plan, an insured that fails to make a claim payment within the deductible 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.

f. In addition to the premium charges determined, the Mutual shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.

8.3. Fiscal Year 2009.

a. For the fiscal year beginning the first day of July, 2008, all private carriers shall determine their premium rates based on the actuarially determined base rates. The base rate shall be either 1) the base rate filed by a licensed rating organization and approved by the insurance commissioner; or 2) the base rate promulgated by the insurance commissioner; *Provided* that the private carrier may file for approval of a deviation of the base rate by classification in an amount not to exceed five percent (5%) of the approved or promulgated base rate.

b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.

c. In addition to said loss cost base rates, the premium 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 and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost 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.

d. Private carriers may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). 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. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.

e. 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. Under a deductible plan, an insured that fails to make a claim payment within the deductible 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.

f. In addition to the premium charges determined, private carriers shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.

8.4. Fiscal Year 2010.

a. For the fiscal year beginning the first day of July, 2009, all private carriers shall determine their premium rates based on the actuarially determined base rates. The base rate shall be either 1) the base rate filed by a licensed rating organization and approved by the insurance commissioner; or 2) the base rate promulgated by the insurance commissioner; *Provided* that the private carrier may file for approval of a deviation of the base rate by classification in an amount not to exceed ten percent (10%) of the approved or promulgated base rate.

b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.

c. In addition to said loss cost base rates, the premium 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 and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost 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.

d. Private carriers may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). 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. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.

e. 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. Under a deductible plan, an

insured that fails to make a claim payment within the deductible 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.

f. In addition to the premium charges determined, private carriers shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.

§85-8-9 Rating Organizations

9.1. All private carriers may become a member of an advisory organization and/or a rating organization as provided for in Chapter thirty-three of the West Virginia Code to perform said duties set forth in Chapter thirty-three of the West Virginia Code; *Provided* that said advisory organization and/or rating organization has otherwise complied with Chapter thirty-three of the West Virginia Code.

9.2. The Insurance Commissioner may designate a workers' compensation rating organization that has been licensed in accordance with West Virginia Code §33-20-6 to assist the commissioner in gathering, compiling, and reporting relevant statistical information and data. Each workers' compensation insurer shall 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. The designated worker's compensation rating organization may develop (i) a uniform policy form (ii) statistical plans, (iii) experience rating plans, (iv) classification systems and other rating plans for use by its members and subscribers in the provision of workers' compensation insurance and the reporting of the experience of this line of insurance. The rating organization may also develop manual rules for the recording and reporting of experience data of members pursuant to its uniform plans and systems. Such uniform plans, systems, and rules shall be filed with the insurance commissioner by the rating organization pursuant to the same process that applies to other commercial lines prior to their use by members of the rating organization.

9.3. Each workers' compensation insurer must be a member or subscriber of the designated workers' compensation rating organization. Every workers' compensation insurer shall adhere to policy forms, rules, uniform classification system and uniform experience and retrospective and other rating plans that have been filed with the commissioner by such designated rating organization and approved by the commissioner.

§85-8-10. 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.

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November 11, 2005

Thomas J. Obrokta
WV Workers Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

RE: Comments to Title 85, Series 8
Workers Compensation Policies, Coverage Issues, Policy Defaults and Related Topics

TJ

Dear Mr. Obrokta

I am submitting these comments as retained counsel for the American Insurance Association (AIA).

AIA appreciates the opportunity to provide comments on the Commission's proposal governing workers' compensation ratemaking. AIA is a national property and casualty trade association comprised of over 400 insurers which write a major share of property and liability insurance throughout the United States. AIA members provide a major share, as well, of workers' compensation insurance in all states permitting a private market for such insurance. West Virginia's transition to a private market for workers' compensation insurance recognizes inherent benefits to a private market, in ensuring injured workers receive an adequate level of benefits for lost wages and all reasonable and necessary medical treatment, at a cost employers can afford. It is critically important to ensure that West Virginia's transition to a private market is well-grounded on sound rules permitting appropriate allocation of risk and in allowing a healthy insurance environment to blossom. This means that rules governing ratemaking are clear; and insurers are able to charge rates adequate to cover anticipated losses and provide for a reasonable return on capital. It is this context that we offer the following comments.

I. Major Issues

A. Rates and Rating Organization

We would like to reiterate our recommendation – shared earlier this year with the Department of Insurance – that West Virginia looks to Delaware's workers' compensation rating law as a model. Delaware's system -- which mirrors the system in other Mid-Atlantic states such as Maryland, Pennsylvania and Virginia – permits carriers to use full rates upon filing with the Insurance Department; does not require prior approval over final rates; deems the advisory

organization's filed loss costs approved if not disapproved within 30 days; and limits collective activity to the advisory organization's promulgation of advisory loss costs, which are filed with the Department.

AIA believes establishment of a single, mandatory advisory organization is vital to a healthy ratemaking environment. Accordingly, we recommend that Section 85-8-9 be amended to allow for a single, mandatory advisory organization. AIA also recommends subjecting the new mutual company to a common classification system, premium algorithm, and experience rating plan during the entire period in which it is the sole writer. We also recommend requiring that loss costs be determined by the appointed advisory organization by 2008. In addition, Section 85-8-8(e) would permit the new mutual company and, eventually, private carriers to adopt experience rating plans at their discretion. AIA believes experience rating should be mandatory, following a single, commonly administered plan. Although AIA does not have policy favoring a specific advisory organization, in West Virginia's circumstance, we would note the deep national experience and efficiencies of the National Council of Compensation Insurance (NCCI) which is the licensed advisory/rating organization in over 30 states.

Finally, the statutory language that only permits graduated deviations from common approved base rates during the first three fiscal years after the opening of the market could be undermined by the broad language allowing "tiered rating" and "schedule rating" plans. For this period, as well as for the period during which the new mutual company is the sole writer, AIA recommends prohibiting tiered rating and restricting schedule rating to a range that will not interfere with this policy objective (e.g., +/- 25%).

We trust our comments are helpful. Please contact me if you wish to discuss this matter further.

B. Deductible Issues

All non-monopolistic workers' compensation states, other than Florida, currently have rules permitting the use of a Large Risk Alternative Rating Option (LRARO) for retrospectively rated or large deductible insureds. These states permit insurers and large insureds to jointly negotiate and tailor the components of their loss responsive rating programs. AIA recommends that West Virginia adopt this approach, with a $250,000 eligibility threshold (all-state's standard premium). Furthermore, a policyholder's failure to reimburse a carrier for a deductible payment should create a right to cancel the policy with ten days' notice. However, this should not affect the coverage status of the claim. Finally, under Section 85-8-8(e), failure to make claim payment within the deductible would render a claim uninsured. This result is problematic from a public

policy standpoint and does not occur in any other state. This section should be amended to permit policy cancellation, with due notice, in the event of failure to make the payment.

III. Other Issues

- On page 8, under 7.2, last sentence, the intent is unclear: "Additionally, with regard to claims which can be allocated under West Virginia Code, each policy shall be deemed to provide coverage for all payment obligations". While this might be a normal requirement (i.e., two carriers fighting over the same claim) and the standard policy meets the provision, we urge this provision not be construed to permit double recovery and bar other insurance provisions.

- On page 9, under 7.4, cancellations for non-payments would be effective on the first date of the policy. Where a policy is written with payment plans and the insured defaults mid-term on the payment, it would be unduly punitive to revert to policy inception. Accordingly, we recommend requiring ten days notice for non-payment, regardless of when it occurs during the policy term.

- On page 4, under 6.2, second paragraph, there appears to be a typo in the sentence that starts, "The p is provided...." We assume this should read: "The private carrier is provided..."

- On page 12, under 8.4.a, the reference to the year "2000" is presumably intended to read "2010."

Once again, we appreciate your consideration of our comments, and we look forward to continuing to work with the Commission. Please let me know if you have any questions about these comments.

Very truly yours,

T. Randolph Cox

TRC/lb; 386600

West Virginia Rate-Making Proposal
St. Paul Travelers Comments

Major Issues

1. **We recommend that the rate-making regulations only allow for a single mandatory rating organization. We recommend that NCCI be the mandatory rating and statistical organization.**

   a. 85-8-9 Rating Organization This section is appears to open the door to not having a mandatory rating organization. Ambiguity stems from the use of "may" in sections 1 & 2 and the use of "must" in section 3. We feel it is important that there be one mandatory rating organization.

2. **Experience rating should be mandatory, following a single, commonly administered plan. It should, ideally, be the NCCI plan, administered by NCCI.**

   a. 85-8-8 (e) Language allows Mutual to adopt experience rating plan as it deems appropriate. Same language is later applied to private carriers after 2008. This should be mandated by appointed rating organization.

3. **Conversion to a common classification system, premium algorithm and experience rating plan should be effected fully during the period in which the WV Mutual has control of the entire market. We would like to see the regulations require that, by Fiscal Year 2008, the loss costs be determined by the appointed rating organization.**

4. **Failure of an insured to reimburse a carrier for a deductible payment should create a right to cancel the policy with 10 day's notice but should not affect the coverage status of the claim.**

   a.85 -8-8 (e) Language states that failure to make claim payment within deductible makes claim uninsured. This poses a public policy issue not created in any other state. It should only trigger right to cancel policy with due notice.

5. **The statutory language that only allows graduated deviations from common approved base rates the first 3 fiscal years that the market is opened could be undermined by the broad language allowing "tiered rating" and "schedule rating" plans. Tiered rating is somewhat unusual in workers comp. In states with unlimited schedule rating, carriers have been known to file plans with parameters as broad as +/- 75%. Over time, as the market stabilizes, this may be appropriate. But for the initial WV Mutual period and the 3 years following, we would recommend not allowing tiered rating and restricting schedule rating to +/- 25%.**

6. **We would like to see a Large Risk Alternative Rating Option for retrospectively rated or large deductible insureds included in the regulations. Eligibility should be $250,000 all-state's standard premium. All non-monopolistic workers' compensation states, other than Florida, currently have LRARO rules. They allow insurers and large insureds to jointly negotiate and tailor the components of their loss responsive rating programs.**

Minor Issues

1. 3. On page 4, under 6.2, second paragraph, there appears to be a typo in the sentence that starts, "The p is provided...." We assume this should read: "The private carrier is provided..."

2. On page 8, under 7.2, last sentence, we're not sure what the intent is. "Additionally, with regard to claims which can be allocated under West Virginia Code, each policy shall be deemed to provide coverage for all payment obligations". Perhaps this is a normal requirement (two carriers fighting over the same claim) and the standard policy meets the provision, but we hope this doesn't permit double recovery and bar other insurance provisions.

3. On page 9, under 7.4, cancellations for non-payments are effective on the first date of the policy. There are situations where a policy is written with payment plans, and the insured defaults mid-term on the payment. It does seem to us rather harsh to go back to policy inception. Perhaps this should be revised to require 10 days notice for non-payment regardless of when it occurs during the policy term.

4. On page 12, under 8.4.a, there is a typo in the year. I believe it should read 2010, not 2000.

From: "Timothy Murphy" <Timothy.Murphy@wvinsurance.gov>
To: "Thomas Obrokta" <tobrokta@wvwcc.org>, "Randy Suter" <rsuter@wvwcc.org>
Date: 11/14/2005 8:44:24 AM
Subject: FW: From Randy Cox / AIA comments to regs.

TJ, another set of comments to 85 csr 8 that I'm not sure got to you

Timothy R. Murphy
Associate Counsel
West Virginia Insurance Commission
Legal Division
P.O. Box 50540
Charleston WV 25305-0540
phone 304-558-0401 ext 210
fax 304-558-1362

-----Original Message-----
From: Jane Cline
Sent: Sunday, November 13, 2005 12:57 PM
To: Timothy Murphy
Cc: 'ryan'
Subject: FW: From Randy Cox / AIA comments to regs.

-----Original Message-----
From: Linda M. Blackshire [mailto:lblackshire@spilmanlaw.com]
Sent: Fri Nov 11 16:20:46 2005
To: Jane Cline
Subject: From Randy Cox / AIA comments to regs.

Commissioner Cline:

The following are AIA's comments to the rating regs -

The American Insurance Association (AIA) appreciates the opportunity to provide comments on the Commission's proposal governing workers' compensation ratemaking. AIA is a national property and casualty trade association comprised of over 400 insurers which write a major share of property and liability insurance throughout the United States. AIA members provide a major share, as well, of workers' compensation insurance in all states permitting a private market for such insurance. West Virginia's transition to a private market for workers' compensation insurance recognizes inherent benefits to a private market, in ensuring injured workers receive an adequate level of benefits for lost wages and all reasonable and necessary medical treatment, at a cost employers can afford. It is critically important to ensure that West Virginia's transition to a private market is well-grounded on sound rules permitting appropriate allocation of risk and in allowing a healthy insurance environment to blossom. This means that rules governing ratemaking are clear; and insurers are able to charge rates adequate to cover anticipated losses and provide for a reasonable return on capital.

It is this context that we offer the following comments.

I. Major Issues

A. Rates and Rating Organization

We would like to reiterate our recommendation - shared earlier this year with the Department of Insurance - that West Virginia looks to Delaware's workers' compensation rating law as a model. Delaware's system -- which mirrors the system in other Mid-Atlantic states such as Maryland, Pennsylvania and Virginia - permits carriers to use full rates upon filing with the Insurance Department; does not require prior approval over final rates; deems the advisory organization's filed loss costs approved if not disapproved within 30 days; and limits collective activity to the advisory organization's promulgation of advisory loss costs, which are filed with the Department..

AIA believes establishment of a single, mandatory advisory organization is vital to a healthy ratemaking environment. Accordingly, we recommend that Section 85-8-9 be amended to allow for a single, mandatory advisory organization. AIA also recommends subjecting the new mutual company to a common classification system, premium algorithm, and experience rating plan during the entire period in which it is the sole writer. We also recommend requiring that loss costs be determined by the appointed advisory organization by 2008. In addition, Section 85-8-8(e) would permit the new mutual company and, eventually, private carriers to adopt experience rating plans at their discretion. AIA believes experience rating should be mandatory, following a single, commonly administered plan. Although AIA does not have policy favoring a specific advisory organization, in West Virginia's circumstance, we would note the deep national experience and efficiencies of the National Council of Compensation Insurance (NCCI) which is the licensed advisory/rating organization in over 30 states.

Finally, the statutory language that only permits graduated deviations from common approved base rates during the first three fiscal years after the opening of the market could be undermined by the broad language allowing "tiered rating" and "schedule rating" plans. For this period, as well as for the period during which the new mutual company is the sole writer, AIA recommends prohibiting tiered rating and restricting schedule rating to a range that will not interfere with this policy objective (e.g., +/- 25%).

We trust our comments are helpful. Please contact me if you wish to discuss this matter further.

B. Deductible Issues

All non-monopolistic workers' compensation states, other than Florida, currently have rules permitting the use of a Large Risk Alternative Rating Option (LRARO) for retrospectively rated or large deductible insureds. These states permit insurers and large insureds to jointly negotiate and tailor the components of their loss responsive rating programs. AIA recommends that West Virginia adopt this approach, with a

$250,000 eligibility threshold (all-state's standard premium). Furthermore, a policyholder's failure to reimburse a carrier for a deductible payment should create a right to cancel the policy with ten days' notice. However, this should not affect the coverage status of the claim. Finally, under Section 85-8-8(e), failure to make claim payment within the deductible would render a claim uninsured. This result is problematic from a public policy standpoint and does not occur in any other state. This section should be amended to permit policy cancellation, with due notice, in the event of failure to make the payment.

III. Other Issues

* On page 8, under 7.2, last sentence, the intent is unclear: "Additionally, with regard to claims which can be allocated under West Virginia Code, each policy shall be deemed to provide coverage for all payment obligations". While this might be a normal requirement (i.e., two carriers fighting over the same claim) and the standard policy meets the provision, we urge this provision not be construed to permit double recovery and bar other insurance provisions.

* On page 9, under 7.4, cancellations for non-payments would be effective on the first date of the policy. Where a policy is written with payment plans and the insured defaults mid-term on the payment, it would be unduly punitive to revert to policy inception. Accordingly, we recommend requiring ten days notice for non-payment, regardless of when it occurs during the policy term.

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Once again, we appreciate your consideration of our comments, and we look forward to continuing to work with the Commission. Please let me know if you have any questions about these comments.

Thank you
/Randy

CC: "Mary Jane Pickens" <MJ.Pickens@wvinsurance.gov>, <tcox@spilmanlaw.com>

From: "Michael Idleman" <MIdleman@msigusa.com>
To: "Thomas Obrokta" <tobrokta@wvwcc.org>
Date: 10/13/2005 7:45:20 AM
Subject: Re: Ratemaking Rule

T. J.,

I suggest that this rule is a good place to confirm that all workers' compensation claims must be adjudicated in WV, as stated in sections 23-2C-2(n) and 23-2C-17(c) of the law. It is clear to me that the WV legislature requires this, but some carriers do not believe this is the case.

Please let me know if you have any questions. Thanks.

Mike

Comments: 85CSR8, "Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics

AIA/St. Paul Travelers/T. Randolph Cox Comment:
Requests that WV follow the Delaware model that:

1. Permits carriers to use full rates upon filing with the OIC;
2. Does not require prior approval over final rates;
3. Deems the advisory organization's filed loss costs approved if not disapproved within 30 days; and
4. Limits collective activity to the advisory organization's promulgation of loss costs, which are filed with the OIC.

Response: These items are left to the Industrial Council and the Office of the Insurance Commissioner to consider the circumstances involved and to determine whether the adoption of all or part of the suggestions make sense over the long term.

AIA/St. Paul Travelers/T. Randolph Cox Comment:

1. Requests an amendment to Section 9 to allow for a single, mandatory advisory organization because of AIA's believe that this structure is vital to a healthy ratemaking environment.
2. The new Mutual company should be subject to a common classification system, premium algorithm, and experience plan during the time it is the sole writer.
3. Recommendation that would require that loss costs be determined by the appointed advisory organization by 2008.
4. Recommends that experience rating is mandatory, following a single, commonly administered plan---Recommend that Section 8(e) be changed which allows carriers to adopt experience rating plans at their discretion.

Response: These items are left to the Industrial Council and the Office of the Insurance Commissioner to consider the circumstances involved and to determine whether the adoption of all or part of the suggestions make sense over the long term.

AIA/St. Paul Travelers/T. Randolph Cox Comment:

1. The statutory language that only permits graduated deviations from common approved base rates during the first three fiscal years after the market opens could be undermined by allowing "tiered rating" and "scheduled rating." Recommendation that these systems be restricted so that the range will not interfere with the statute.

Response: These items are left to the Industrial Council and the Office of the Insurance Commissioner to consider the circumstances involved and to determine whether the adoption of all or part of the suggestions make sense over the long term.

AIA/St. Paul Travelers/T. Randolph Cox Comment:
Deductible Issues:

1. Requests that a Large Risk Alternative Rating Option for retrospectively rated or large deductible insureds are included. AIA requests an eligibility level of $250,000 all-state's standard premium.

Response: These items are left to the Industrial Council and the Office of the Insurance Commissioner to consider the circumstances involved and to determine whether the adoption of all or part of the suggestions make sense over the long term.

2. Failure to reimburse a carrier for a deductible payment should provide a right to cancel with 10 days notice, not render the claim uninsured.

Response: No change made.

AIA/St. Paul Travelers/T. Randolph Cox Comment:

Minor Issues:

1. 6.2. Typo –Add "private carrier."

Response: Change made.

2. 7.2. Last sentence. Unsure as to the intent of language saying, "each policy shall be deemed to provide coverage for all payment obligations." Comment—"We hope this doesn't allow double recovery or bar other insurance provisions."
3. 7.4. Cancellation for non-payment on policy inception seems harsh. Suggests 10 day notice.
4. 8.4.a. Typo—Year should be 2010, not 2000.

Response: No change made in response to suggestions. Did not find referenced typo.

Michael Idleman, GARMI:

Comment: suggests change to require claim adjudication in West Virginia.

Response: No change made.