# WEST VIRGINIA
# SECRETARY OF STATE
**KEN HECHLER**
# ADMINISTRATIVE LAW DIVISION

Form #6

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.**

AGENCY: Bureau of Employment Programs Workers' Compensation Division TITLE NUMBER: 85

AMENDMENT TO AN EXISTING RULE: YES X, NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 9

TITLE OF RULE BEING AMENDED: Self-Insured Employers

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) HB 100

SECTION 64-5-6(i), PASSED ON May 26, 1993.

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE: July 2, 1993

Andrew N. Richardson

8-20

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# STATE OF WEST VIRGINIA

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May 28, 1993

John Kozak
Workers' Comp Commission
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**HB 100** authorizing, **Title 85, Series 9, Self-Insured Employers**, passed the Legislature on **May 26, 1993.** It is now awaiting the Governor's signature.

You have sixty (60) days after the Governor signs HB 100, to final file the legislative rule with the Secretary of State's office. To final file your legislative rule, fill in the blanks on the enclosed form #6, the "Final Filing" form and file the form with our office. Authorization for your legislative rule is cited in **HB 100** section **64-5-6(i).** The agency may set the effective date of the legislative rule up to ninety (90) days from the date the legislative rule is final filed with the Secretary of State's office. Please have an authorized signature on the bottom line.

***IMPORTANT: IF YOUR AGENCY HAS COMPLETED THE LEGISLATIVE RULE ON A COMPUTER SYSTEM THAT USES A 3 1/2" OR 5 1/4" DISK, **PLEASE SUBMIT A CLEAN COPY, WITH ALL UNDERLINING AND STRIKE-THROUGHS TAKEN OUT,** TO OUR OFFICE WHEN FINAL FILING THE RULE. STATE ON THE DISK THE FORMAT THE RULE IS IN AND THE TITLE IT IS FILED UNDER. THIS WILL MAKE IT QUICKER FOR US TO ENTER YOUR RULES ON THE LEGISLATIVE DATA BASE. REMEMBER THE TEXT OF THE COMPUTER FILED RULE **MUST** BE IDENTICAL - WORD FOR WORD, COMMA FOR COMMA, **WITH ALL UNDERLINING AND STRIKE-THROUGHS TAKEN OUT,** AS THE HARD COPY AUTHORIZED BY THE LEGISLATURE.

After the final rule is entered into the legislative data base, the rule will be sent to the agency for review and proofing. Following confirmation or corrections, as the case may be, the Secretary of State shall submit to the agency a final version of the rule for their records.

If you have any questions or need any assistance, please do not hesitate to call our office.

Thank You
Administrative Law Division

TITLE 85
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
DEPARTMENT OF COMMERCE, LABOR, AND ENVIRONMENTAL RESOURCES
BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION

SERIES 9
SELF-INSURED EMPLOYERS

§ 85-9-1. General.

1.1. Scope. - This legislative rule applies to employers who either must subscribe to or who wish to elect to provide their own system of compensation. This rule applies to employers who previously received approval of their election and who are currently operating their own systems of compensation as well as employers who have not previously received such approval. Similarly, this rule applies to employers who wish to elect to provide their own system of compensation with regard to the catastrophe reserve of the surplus fund as well as those employers who previously elected and received approval to provide their own system of compensation with regard to all or part of the surplus fund. The rule also applies to employers who wish to terminate any self-insurance election and return as a regular subscriber to part or all of the Fund, or who wish to cease doing business.

1.2. Authority. - West Virginia Code, § 23-1-13; § 23-2-9; and § 23-9-17.

1.3. Filing date. -

1.4. Effective Date. -

1.5. Repeal of Former Rules. - This rule repeals and replaces Series 9 of Title 85, April 30, 1990, the legislative rule titled "Self-Insured Employers".

1.6. Pursuant to 85CSR9 West Virginia Code, § 5F-2-2(b)(12), the Secretary of the Department of Commerce, Labor and Environmental Resources has granted written consent to the promulgation of this rule.

§ 85-9-2. Definitions.

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

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

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

2.4. The phrase "this Rule" means the instant legislative rule designated as W.Va. 85 C.S.R. 9, § 85-9-1 et seq.

2.5. The term "commissioner" means the West Virginia Workers' Compensation Commissioner as provided for by West Virginia Code, § 21A-2-1 et seq. and § 23-2-2.

2.6. The term "division" means the Workers' Compensation Division of the Bureau of Employment Programs provided for by West Virginia Code, § 21A-1-4, and § 23-1-1 et. seq.

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

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

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

2.10. The term "regular subscription" means that an employer is a subscriber to all parts of the compensation fund including the surplus fund.

2.11. The terms "self-insurer" and "self-insured employer" mean employers who have elected one or both of the options contained in West Virginia Code, § 23-2-9, and who pay individually and directly, or from their own benefit fund or system of compensation, the compensation and other benefits provided to injured employees or their dependents under the Act.

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

2.13. The term "dependent" has the meaning ascribed to that term by West Virginia Code, § 23-4-10(d).

2.14. The term "decision" means a written statement issued by the commissioner containing the commissioner's findings of facts and conclusions of law as to any issue presented to the commissioner under this rule. Any purported "decision" which is not in writing has no legal effect under this rule.

§ 85-9-3. Current Status of Employers Not Affected.

3.1. Employers who at the time of the effective date of the Rule are self-insured employers as regards to all or part of the compensation fund shall not lose that status due to the mere promulgation of the Rule.

3.2. Employers who at the time of the effective date of the Rule are subscribers to all of the compensation fund shall not become self-insured due to the mere promulgation of the Rule.

§ 85-9-4. Obtaining Self-Insurance Status.

4.1. An employer may elect to become self-insured with respect to the compensation fund and the catastrophe reserve of the surplus fund or to the compensation fund but not the catastrophe reserve of the surplus fund, if the commissioner determines it meets the financial responsibility requirements and procedural requirements set forth in W.V. Code 23-2-9 and in the Rule.

An employer owned by or related to another business may have its compensation risks self-insured by the parent or related business in lieu of the employer itself being self-insured, if the relationship between the employer and parent or related business is adequately documented, as determined by the commissioner, and if the parent or related business can satisfy the requirements of the Act and the Rule for both itself and for the subject employer.

Any employer granted the privilege of self-insurance, as to all or part of the compensation fund, shall give security or bond in the form, of the type, and in the amount required by the commissioner, pursuant to the Act and the Rule. Additionally, any employer granted the privilege of self-insurance, as to all or part of the compensation fund, shall abide by the requirements for maintaining, modifying,
or terminating the self-insured status, as set forth in the Act and the Rule.

§85-9-5. Application For Self-Insurance.

5.1. An employer may apply for self-insurance by filing with the commissioner an application for self-insurance on a form prescribed by the commissioner. If a parent or related business is to insure the employer's compensation risk, the relationship between the employer and the parent or related business must be documented on the application.

5.2. A disclosure of the employer's management and financial structures, notice of the type of surety the employer intends to

obtain to secure the self-insurance risk, and the employer's audited financial statements for the three (3) fiscal years preceding the date of application must be attached to the application. If a parent or related business is to insure the employer's compensation risk, the parent's or related business' disclosure of management and financial structures, and its audited financial statements for the three years preceding the date of application must also be attached to the application.

5.2.1. The employer's application and the required financial statements must be signed and sworn to by the president or vice-president and secretary or assistant secretary of the employer, parent or other related business if the employer, parent, or related business is a corporation or limited corporation; or, by all of the partners if the employer, parent or related business is a partnership; or, by all of the general partners if the employer, parent or related business is a limited partnership; or, by the owner if the employer, parent or related business is neither a corporation, limited corporation, partnership, nor limited partnership.

5.2.2. If an employer, parent or related business does not have audited financial statements for the three years preceding the date of application, the employer, parent, or related business must submit a financial statement prepared by an outside accounting firm which addresses the three year period immediately preceding the date of application or the period for which the employer, parent or related business has existed, whichever is a shorter period.

5.3. The employer may provide the commissioner with any additional information deemed relevant to its financial stability. After reviewing the application and financial statements, the commissioner may request additional information from the employer,parent, or related business relevant to the employer, parent, or related business' financial stability, and the applicant must provide the requested information.

5.4. The employer applying for self-insurance shall pay to the compensation fund an application fee of $2500.00 at the time the application is filed, to be deposited in the general revenue account of the Workers' Compensation Fund. The fee is assessed to offset the cost incurred by the Fund when the commissioner requests his or her staff and/or actuary to review the employer's account with the commissioner, and the financial statements and other information submitted by the employer in conjunction with the application. The commissioner will utilize the reviews in making a decision on the application, pursuant to section 8 of the Rule, and in setting appropriate security and bond requirements, pursuant to section 9 of the Rule.

The application fee is subject to modification by the commissioner.

5.5. An employer who is a subscriber to all or part of the West Virginia Workers' Compensation Fund may apply in any given year to self-insure all or part of its workers' compensation risk, as set forth in section 7 of the Rule, if an application for overall self-insurance or partial self-insurance is filed with the compensation fund by December 31 of the given year. If the application and the security are approved by the commissioner, the self-insurance will be effective on July 1, following the year of the application filing, but only if the security is effective on that date. An employer new to the state of West Virginia, who has never subscribed to the compensation fund, may apply for self-insurance at the time it registers with the Workers' Compensation Fund and is not subject to the time frame set forth in this section.

5.5.1. When an application for self-insurance is filed by December 31 of a given year, the commissioner will review the claim and inform the employer-applicant if there is a need for additional financial information by February 1 of the following year, pursuant to subsection 5.3 of the Rule. The employer-applicant must provide the commissioner with the additional information by March 1, following the year of the application filing. The commissioner's staff will complete an evaluation of the financial statements and the employer-applicant's surety choice by April 1, following the year of the application filing. The commissioner will have a preliminary audit of the employer-applicants account with commissioner performed and issue to the employer-applicant a notice of the required remittance by May 1, following the year of the application filing. The commissioner will have the "buy-out" amounts, defined under section 6 of the Rule, calculated by June 1, following the year of the application filing. Additionally, the commissioner will render a decision approving or disapproving the application and defining the security requirements by June 1, following the year of the application filing. The employer-applicant will then have until July 1 of the year following the application filing to obtain adequate security, as defined by the commissioner under section 9 of the Rule.

5.5.2. An employer-applicant may request an extension on the March 1 deadline for filing additional information by making a written request for an extension to the commissioner prior to the expiration of the deadline. The commissioner may grant a 60 day extension if the employer-applicant has established good cause for the extension. If the extension is granted, the commissioner will render a decision approving or disapproving self-insurance and defining the security requirements by June 1, following the year of the application filing. The employer-applicant will then have until July 1 of the year following the application filing to obtain adequate security, as defined by the commissioner pursuant to section 9 of the Rule.

If the employer-applicant is unable to obtain adequate security, as defined by the commissioner, by July 1 of the year following the application filing, the employer-applicant may file a written request with the commissioner for an extension of the deadline, but the request must be filed prior to the expiration of the original deadline. The commissioner may grant a 60 day extension if the employer-applicant has established good cause for the extension. If an extension is granted, the employer-applicant must obtain adequate security, as defined by the commissioner under section 9 of the Rule, by September 1 of the year following the date of the application filing and the self-insurance status will be effective on the first day of the quarter following that September 1, if the security is effective by or on the first day of the quarter following that September 1.

5.6. Employers applying for self-insurance must continue to make timely payments for quarterly premiums as a regular subscriber to the compensation fund until the self-insurance status is approved by the commissioner and the status is effective.

§85-9-6. Reconciliation And Settlement Of Employer Applicant Account.

6.1. The commissioner shall not grant self-insured status under the Act to any employer whose record upon the books of the commissioner shows a liability against the compensation fund, incurred on account of injury to or death of any of its employees, in excess of premiums paid by such employer as a subscriber to the compensation fund, until it has paid into the compensation fund the amount of such excess liability, including excess liability incurred on account of explosions, catastrophes or second injuries occurring within the state and charged against the surplus fund. The employer must pay to the compensation fund the entire amount of the excess liability prior to the effective date of self-insurance, unless the commissioner and the employer enter into a repayment agreement.

The commissioner has the authority to determine whether entering into a particular repayment agreement will meet his or her fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment. The repayment term shall not exceed three years. Additionally, the agreement shall provide for the payment of interest on the principal which shall be calculated on the effective date of the agreement, pursuant to WV Code 23-2-13. The interest rate shall remain the same for the life of the agreement.

6.2. An employer is responsible for the future costs of awards and medical benefits granted after the effective date

of self-insurance to its employees for injuries or deaths that occurred in any period during which it subscribed to the compensation fund. At the time of an employer's application for self-insured status, the commissioner may determine the amount of money that is sufficient to cover the applicant's liability for the future costs of the awards and medical expenses. The commissioner may utilize an actuary for calculating the amount.

An employer's self-insured status will not be effective until the employer posts security or bond in an amount sufficient to cover the future liability, or pays the actual amount. The commissioner must approve the employer's election.

6.2.1. The commissioner must approve of the form, type, and amount of the security or bond before the employer will be permitted to post security or bond to cover the cost of future liability.

6.2.1.a. If the security or bond is approved by the commissioner, the compensation fund will transfer all of the employer's open and closed claims from the regular subscriber account to the self-insured account. The employer shall agree to reimburse the compensation fund for any payments made in these claims on behalf of the employer after the effective date of self-insurance except where an award was granted prior to the effective date of self-insurance.

6.2.1.b. If a self-insured employer's employee is granted a permanent total disability award pursuant to WV Code 23-3-1, and the "second injury" was incurred by the employee during a period of time in which the employer was a subscriber to the compensation fund or the Second Injury Reserve of the surplus fund, then only the cost of the permanent partial disability award associated with the "second injury" will be charged to the self-insured account and all other costs associated with that permanent partial disability award which are incurred after the date of the second injury life award will be charged to the compensation fund.

6.2.2. If the employer elects or is required by the commissioner to pay the amount estimated to cover the cost of future liability, this amount shall be paid prior to the effective date of self-insurance. The employer must pay to the compensation fund the entire amount of the excess liability prior to the effective date of self-insurance, unless the commissioner and the employer enter into a repayment agreement.

The commissioner has the authority to determine whether entering into a particular repayment agreement will meet his or her fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment.

The repayment term shall not exceed three years. Additionally, the agreement shall provide for the payment of interest on the principal which shall be calculated on the effective date of the agreement, pursuant to WV Code 23-2-13. The interest rate shall remain the same for the life of the agreement.

6.3. If an employer-applicant can establish that as of the effective date of self-insurance, its record upon the books of the commissioner shows that the premiums it paid to the compensation fund exceed the liabilities incurred by the compensation fund on account of injury to or death of any of its employees, then the commissioner shall consider the amount of excess premiums in assessing the employer-applicant's demonstrated loss experience for the purpose of determining whether security in excess of the one million dollar minimum shall be required, pursuant to section 9 of the Rule. This subsection does not entitle the employer-applicant to an actual monetary credit or refund.

6.4 The commissioner will attempt to obtain the actuarial figures on a buy-out of liability in a timely fashion. The employer will not be penalized by a delay in a decision on the self-insurance application because the commissioner is unable to obtain the actuarial figures in a timely fashion.

6.5 The commissioner will not interpret in a capricious or arbitrary manner the provisions requiring the employer to buy-out liability.

§85-9-7. Elections by Employers Applying For Self-Insurance.

7.1. The employer applying to self-insure its workers' compensation risk must at the time of application elect in writing to subscribe to the catastrophe reserve of the surplus fund or to self-insure the catastrophe risk pursuant to WV Code 23-2-9(c), and elect in writing to make direct payment of health care provider and medical invoices or to have the compensation fund make payment of the invoices.

7.1.1. If a self-insured employer elects to subscribe to the catastrophe reserve of the surplus fund, it shall pay premiums into the surplus fund on the same basis and in the same percentages as subscribers to the general fund pay for coverage under the catastrophe reserve of the surplus fund. The employer shall pay the premium on or before the last day of the first month of each quarter.

7.1.2. If a self-insured employer elects to self-insure the catastrophe risk, then it must furnish a catastrophe security or bond, approved by the commissioner, in addition to the security or bond furnished as a general self-insurance requirement. The catastrophe security or bond

shall be in an amount the commissioner considers adequate and sufficient to compel or secure payment of all compensation and expenses to the employer's employees and the employees' dependents for catastrophe-related injuries or deaths.

7.1.3. The employer must satisfy the following requirements in order to make direct payment of health care provider and medical invoices:

1) The employer must designate in writing to the commissioner a person responsible for payment of the bills and must provide the commissioner with the address and telephone number of the responsible person.

2) The employer must retain a claimant file, a copy of each invoice, and a record of any action taken with respect to the invoice. This information must be accessible to the commissioner or his or her staff during normal working hours. If the employer stops doing business in West Virginia, or elects or is required to cease making direct payment of health care provider and medical invoices, then the employer must deliver this information to the commissioner.

3) The health care provider must use the invoices prescribed by the commissioner in billing the employer. The employer must pay all invoices within 30 days of receipt or notify the provider and the commissioner of the reason for the delay.

4) The employer may request the commissioner' assistance in resolving an invoice dispute. The request must be made in writing and include a complete medical and medical invoice history of the relevant claim.

5) The employer shall forward medical invoices in claims with allocated employer charges to the division for processing. The commissioner will then issue a payorder and/or check,as is appropriate.

6) The employer shall forward medical invoices related to Occupational Pneumoconiosis Board evaluations to the division for processing. The commissioner will then issue a payorder and/or check, as is appropriate.

7) Employers must collect all overpayments and duplicate payments directly from the health care provider.

8) The employer must provide all medical invoices that it believes are to be paid from one of the division's internal accounts to the division for processing. The employer must file a written explanation of the charge with the invoice.

9) At the end of each calendar year, the employer must provide an IRS Form 1099 to health care providers to whom payment was made during the calendar year.

10) Prior to July 31 of each year, the employer must provide the commissioner with an annual report of total medical payments made during the previous fiscal year. The report must be in a format acceptable to the commissioner.

7.1.3.a. If the employer fails to meet any statutory or regulatory requirements pertaining to the payment of health care provider or medical invoices, the commissioner may revoke the privilege of making direct payments. The commissioner will issue to the employer an intent to revoke and the employer has afforded an opportunity for hearing before the privilege is revoked. The employer will have 30 days after receiving the revocation notice to request a hearing and/or provide the commissioner with evidence of a just cause for failure to meet the requirements.

If the employer is issued a revocation notice more than two times, even if the infractions have been corrected and just-cause shown, the commissioner will review the employer's entire record and make a determination as to whether the employer shall be allowed to continue the privilege of making direct payments or be required to return to the compensation fund as a regular subscriber.

7.2. The employer may request a change in its election as to the catastrophe reserve or direct payment of medical and health care provider invoices. The request must be in writing and filed with the commissioner on or by June 1 of any given year, to be effective on July 1 of that year.

The commissioner will issue a decision approving or disapproving the change in election. If the change in status is approved, the new status will be effective on the first day of the first quarter following the request for a change in status.

§85-9-8. Commissioner's Review Of The Application For Self-Insurance.

8.1. In reviewing an employer's application for self-insurance, the commissioner must assess the employer's ability to demonstrate that its financial strength is sufficient to meet its obligations under the Act.

8.2. In assessing the employer-applicant's financial standing, the commissioner shall review and evaluate the financial statements filed with the application, the employer-applicant's workers' compensation loss experience, and other information obtained during the application process. The evaluation may be performed for the commissioner by his or her staff, and/ or actuary. The evaluation may include, but shall not be limited to, reference to a version of the current financial ratios found in the Dun & Bradstreet Industry Norms and Key Business Ratios.

§ 85-9-9. Security And Bond.

9.1. The minimum amount of security or bond required to become a self-insurer for all or part of the compensation fund is one million dollars ($1,000,000). The commissioner may direct that this amount be increased or decreased in the future.

9.2. The employer-applicant shall post security or bond in an amount sufficient to meet all of its obligations to its employees and their dependents, as defined by the Act and the Rule, during the first year of self-insurance and for the reasonably foreseeable period thereafter. At anytime that good cause exists to believe that the bond or security is no longer sufficient to meet the employer's reasonably foreseeable obligations, the commissioner shall require the employer to post additional or supplemental security or bond to meet these obligations. (See Section 11 of the Rule , Maintaining Self-Insured Status).

9.3. There are several acceptable types of security and bond including, but not limited to, occurrence type security or bond, marketable securities, and letters of credit. The commissioner has the discretion to find that a particular type of security or bond is acceptable.

9.3.1. If the self-insured employer obtains an occurrence-type security or bond, then the security or bond is liable in the place of the employer should the employer be unable to meet its obligations for any or all injuries or deaths that may occur during the time period for which the security or bond is effective, and the security or bond remains liable at the time any awards for the injuries or deaths are subsequently made and

for the entire time period in which benefits will be paid under the awards, including death benefits to surviving dependents.

Nothing to the contrary contained in any writing associated with or included as a part of the security or bond shall defeat this obligation. Every surety, guarantor, warrantor, or other person or entity who purports to stand in the place of the self-insured employer for the payment of benefits shall be considered to have given the security or bond in compliance with this subsection, and no statement or disclaimer in the security or bond shall negate this requirement.

9.3.2. If the self-insured employer wishes to post marketable securities to meet its obligation for security or bond, the securities must satisfy the following requirements:

1. The securities must be fixed term debt instruments with a fixed and determinable principal amount;

2. The issuer of the securities must be a governmental entity or governmental agency or corporation of this state, or any other state, or the United States;

3. The maturity date of the instrument can not be more than ten years from the date the securities are posted with the division; and,

4. The payment of both principal and interest are denominated and payable in United States dollars with the interest payable at fixed periodic payment dates and at a fixed rate of the principal amount of the indebtedness.

9.3.3. If the self-insured employer wishes to post a letter of credit to meet its obligation for security or bond, the letter of credit must satisfy the following requirements:

1. The letter of credit must be issued by a bank operating in the United States;

2. The letter of credit must utilize language approved by the commissioner and in accordance with subsection 6.1 of of this rule;

3. Before it will be considered surety for self-insured risks, the letter of credit must contain an "evergreen" clause as specified by the commissioner, which holds the issuer responsible for the employer-applicant's liability resulting from all injuries

incurred by or deaths of the employer's employees prior to the expiration of the letter of credit. In the event that the employer-applicant is unable to obtain an evergreen clause, then the employer-applicant must obtain permission from the commissioner to use a letter of credit with a nonrenewal draw clause.

9.4. Employers applying for self-insurance must meet the security requirements defined by the commissioner. The amount of security or bond required from a self-insured employer shall be that amount determined by the commissioner or his or her staff or actuary to be adequate and sufficient to compel or secure payment of compensation and expenses to the employer's employees, or their dependents, as required by the Act, and shall not be less than one (1) million dollars. The amount of security required of a self-insured employer shall be based upon, but not be limited to, such criteria as the employer's financial strength including excess liability insurance and the employer's demonstrated loss experience. A demonstrated loss experience includes general workers' compensation loss experience, second injury reserve loss experience and catastrophe reserve loss experience.

The commissioner shall utilize a financial ratio summarization, based upon a comparison of the employer-applicant's solvency, efficiency and profitability ratios to a specific industry's ratios, as defined, for example, in the current Dunn & Bradstreet Industry Norms and Key Business Ratios referenced in section 8 of the Rule, in evaluating an employer's financial strength and in making a determination as to an appropriate amount of security, not to be less than one (1) million dollars. The commissioner shall utilize the employer-applicant's workers' compensation industry classification for the purpose of making a comparison of ratios.

9.5. Upon notice from the commissioner, each self-insured employer shall file an application annually to continue the self-insurance privilege, as set forth in section 11 of the Rule. At the time the application for continuation of the privilege is filed, or sooner as an individual case may require, the commissioner or his or her staff or actuary shall review the self-insured employer's current financial status and security requirements. The commissioner will notify the employer of the results of an annual review, if a review is performed.

If the commissioner determines that the security requires adjustment in light of the employer's current financial status, the commissioner may adjust the security requirements. The commissioner, or his or her staff and/or actuary, shall utilize the procedure set forth in section 9.3 of the Rule to make the security requirement determination.

9.5.1. If the commissioner determines that a self-insured employer's securities or bonds are inadequate or insufficient, the commissioner shall enter an order directing the employer to increase its securities or bonds by the amount needed to reach the adequate and sufficient level for all time periods originally intended to be covered by the inadequate or insufficient security or bond. An inadequate or failed security or bond includes, but is not limited to instances where the entity behind the security or bond is no longer a viable entity or, for whatever reason, can no longer meet its obligations.

The commissioner shall provide a reasonable amount of time for the employer to obtain the increased or added security or bond; however, the period shall not exceed ninety (90) days from the date of the commissioner's order. The increased security or bond must meet the requirements set forth in subsection 9.2 of the Rule.

9.5.2. A self-insured employer's failure to obtain additional bond or security, as required by the commissioner, may result in a revocation of the privilege of self-insurance and termination of the employer's self-insured status. Termination of the self-insured status is effective upon notice of the commissioner.

9.5.3. If the commissioner has not already determined that a decreased adjustment is merited, the self-insured employer may file a written petition with the commissioner for a downward adjustment of its security requirements for purposes of future injuries or deaths incurred by its employees. The security can not be adjusted to an amount less than one (1) million dollars. The petition must include the employer's audited financial statements for the three years preceding the date of the petition. The commissioner may request additional information from the employer, as he or she considers necessary. The commissioner shall render a written decision on the petition within ninety (90) days of receipt of the petition, and if it is granted, the commissioner shall set forth the terms for the new security requirements in the written decision.

9.6. After the effective date of the Rule, this section of the rule is applicable to all security or bond given by an employer to meet any security requirement under the Act or the Rule. All securities and bonds given prior to the effective date of the Rule shall be construed to be in keeping with the law in effect prior to the effective date of the Rule.

## § 85-9-10. Second Injury Reserve Of The Surplus Fund.

10.1. All self-insured employers must subscribe to the second injury reserve of the surplus fund, with the exception of the self-insured employers who elected prior to the first day of

January, one thousand nine hundred eighty-nine, not to subscribe to the second injury reserve and who have continued not to subscribe to the reserve from that date, without interruption, and with the exception of the self-insured employers who elected prior to the first day of January, one thousand nine hundred eighty-nine, to subscribe to the second injury reserve of the surplus fund, but elected not to subscribe to the reserve for the calendar year of one thousand nine hundred eighty-nine and who have continued such election from that date, without interruption.

10.2. To determine the self-insured employer's second injury reserve premium or contribution, the commissioner shall establish industrial groups or classes to reflect common risks related to the payment of second injury life awards from the second injury reserve of the surplus fund and he or she may modify the groups or classes from time to time, as necessary to meet the fiduciary needs of the second injury reserve of the surplus fund, pursuant to WV Code 23-2-9. Additionally, by the first day of July in any given year, the commissioner shall actuarially establish the projected funding cost for losses to be incurred by the second injury reserve of the surplus fund during the prospective year for each industrial group or class.

10.2.1. The commissioner shall assign base premium rates to each industrial class to reflect the second injury life award experience rating of the class. He or she may modify the assigned rate yearly on the first day of July, or at any time the modification may be necessary, provided that he or she files a schedule of the readjusted rates with the office of the Secretary of State for publication in the State Register, pursuant to W.Va. Code § 29A-2-1 et seq., at least thirty days prior to the first day of the quarter to which the adjustment of rates is applicable, as set forth in W.Va. Code § 23-2-4.

10.2.2 The individual self-insured employer's base rate shall be modified by the commissioner to reflect the ratio of the individual employer's record of second injury life awards to the average cost of second injury life awards for all employers in the particular industrial group or class. To calculate the ratio, the commissioner shall utilize a period not to exceed three years preceding the year in which the rate is to be effective.

10.2.3. The commissioner shall notify every self-insured employer subscribing to the second injury reserve of the surplus fund of any rate modification and the effective date of the modification. The commissioner shall furnish each self-insured employer subscribing to the second injury reserve of the surplus fund, yearly or more often if requested by the employer, a statement giving the name of each of the employer's employees who were granted a second injury life award or related benefits during the period covered by the statement.

10.3. The commissioner may require any employer who is permitted to self-insure the second injury life award risk pursuant to W.Va. Code § 23-2-9(b)(4), to furnish a additional security as defined by section 9 of the Rule. The second injury security or bond must be approved by the commissioner and must satisfy the requirements set forth in section 9 of the Rule. Provided, pursuant to W.Va. Code § 23-2-9(b)(4)(C), any second injury security or bond given by any employer prior to the effective date of the Rule, given pursuant to rules promulgated by the commissioner prior to the promulgation of the Rule, and given with the approval of the commissioner shall continue to be valid until the commissioner notifies the employer to the contrary.

§85-9-11. Maintaining Self-Insured Status.

11.1. Upon notice of the commissioner, each self-insurer shall file annually an application to continue the self-insurance privilege. The renewal application shall be on a form prescribed by the commissioner and shall be accompanied by a current financial statement.

The employer's status as a self-insured employer with respect to all or part of the compensation fund shall continue on a year-to-year basis so long as the employer continues to maintain the requisite financial standing, as set forth in section 8 of the Rule, and continues to satisfy the other requirements imposed by the Act, the Rule and any other pertinent rule, and any order of the commissioner. If necessary in order to ascertain whether the employer has met and can continue to meet all of the self-insurance requirements and obligations, the commissioner may conduct an audit of all books, records, papers, and documents in the possession or control of the employer.

11.2. A self-insured employer with respect to all or part of the compensation fund is responsible for the direct payment of all pecuniary compensation due and owing under the Act to employees or employees' dependents; is responsible for the direct payment of health care provider and medical invoices pursuant to section 7 of the Rule, if the employer elected to make such direct payment; and is responsible for reimbursing the commissioner for all medical, funeral, or other expenses paid by the commissioner on behalf of its employees and their dependents.

The employer shall pay pecuniary compensation payable by the employer and reimbursements due from the employer within the time periods specified by the Act, the various rules promulgated by the commissioner, and the orders of the commissioner; or, in the absence of any of the above, employer shall pay the compensation and reimbursements in a prompt and timely fashion. Further, the commissioner's payorders for temporary total disability benefits must be paid within ten (10) days of receipt, payorders for

permanent partial disability benefits must be paid within fifteen (15) days of receipt, and payorders for medical bills must be paid within thirty (30) days of receipt. The employer's experience in meeting these obligations shall be considered by the commissioner in determining whether to permit the employer to remain a self-insurer.

11.3. The commissioner may suspend or terminate an employer's self-insurance status if the employer fails at any time to comply with the requirements of the Act, the Rule or any other pertinent rule, or any order of the commissioner; or, otherwise defaults on a self-insurance obligation. The commissioner shall provide the employer with written notice of the suspension or termination.

The commissioner may exercise his or her discretion to permit an employer to correct a failure to comply or a default within ninety (90) days of receiving notice of the deficiency, in lieu of revoking that employer's self-insured status.

§ 85-9-12. Self-Insured Employer's Modification of Business.

12.1. In the event a self-insured employer reorganizes its business, assumes additional liability, acquires new assets or operations, buys an additional business, merges with another business, or otherwise changes its operation in any manner which impacts on its workers' compensation liability, the self-insured employer must notify the commissioner of the modification of business, immediately. The notice of notification must include specific information as to the nature of the modification and the names of other employers and/or businesses affected by the modification.

12.2. If the self-insured employer has acquired a new operation or business or has merged with another business, then it must file an application for self-insurance on behalf of its new or additional business and must request that the new or additional business be merged into its existing self-insured account. The application is not subject to the timeframe set forth in subsection 5.5 of the Rule. The commissioner has the discretion to require that the application to self-insure the new operation or business be processed in accordance with the Act and the Commissioner's Rules and Regulations governing self-insurance, including, but not limited to section 4, Obtaining Self-Insurance Status; section 8, Commissioner's Review of the Application for Self Insurance; and, section 9, Security and Bond.

12.3. Under sections 12.1 and 12.2 of this rule, the commissioner or his or her actuary or staff will review the employer's security and bond requirements and make an appropriate

adjustment to the requirements, as set forth in section 9 of the Rule.

§85-9-13. Voluntary Termination of Self-Insured Status.

13.1. If a self-insured employer decides to continue doing business in the state of West Virginia, but terminate its self-insured status and become a subscriber to the Fund, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of all such liability, in which case the future costs of the liability shall be paid from the compensation fund.

13.1.1. When the employer decides to terminate its self-insured status, the employer may request the commissioner to estimate the amount of money that is sufficient to cover the future costs of the liability defined in section 9.1 of this Rule. The commissioner may utilize an actuary for calculating the estimate. The employer must pay a $2500.00 fee for the service.

13.1.2 The commissioner shall not permit the employer to terminate the self-insured status and subscribe to the Fund until it pays the actual estimate, or maintains security or bond in an amount sufficient to cover the estimated future cost of the liability. The commissioner must approve the employer's election for the payment of the estimated future cost of liability.

13.1.2.a. If the employer elects or is required by the commissioner to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination of self-insurance unless the employer and the commissioner enter into a repayment agreement. The commissioner has the authority to determine whether entering into a particular repayment agreement will meet his or her fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment. The repayment term shall not exceed three years.

Additionally, the agreement shall provide for the payment of interest on the principal which shall be calculated on the effective date of the agreement, pursuant to WV Code 23-2-13. The interest rate remain the same for the life of the agreement.

13.1.2.b. If the employer elects to cover the future costs of the liability with a security or bond, it must obtain the commissioner's approval of the election and the commissioner's approval of the form, type, and amount of the security or bond.

13.2. A self-insured employer must provide the commissioner with written notice of termination if it ceases doing business in the state of West Virginia and intends to terminate its self-insurance status, stop reporting wages, stop paying administrative costs and, stop paying premiums to the Surplus Fund. If a self-insured employer so terminates its business, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability shall be paid from the compensation fund. When the employer decides to terminate its self-insured status, it may request the commissioner to estimate the amount of money that is sufficient to cover the future costs of the liability defined in this section. The commissioner may utilize an actuary for calculating the estimate. The employer must pay a $2,500.00 fee for the service.

Upon terminating self-insurance, the employer may elect to continue making payment of benefits, pay the full amount of the future liability, or enter into a repayment agreement with the commissioner for the amount of the future liability. If the employer retains full liability or enters into a repayment agreement, the employer must maintain the security for self-insurance, as defined by the Rule.

13.2.1. If the employer elects or is required by the commissioner to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination unless the employer and the commissioner enter into a repayment agreement. The commissioner has the authority to determine whether entering into a particular repayment agreement will meet his or her fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment. The repayment term shall not exceed three years.

Additionally, the agreement shall provide for the payment of interest on the principal which the commissioner shall calculate on the effective date of the agreement, pursuant to WV Code

23-2-13. The interest rate remains the same for the life of the agreement.

13.3. If a self-insured employer terminates its self-insured status because it ceases doing business in the state of West Virginia as the result of a sale or transfer of all or part of its business, the self-insured employer must notify the compensation fund of the sale or transfer within thirty (30) days after the date of closing. The self-insured employer so terminating its self-insured status remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability will be paid from the compensation fund. When the employer decides to terminate its self-insured status, the employer shall request the commissioner to estimate the amount of money that is sufficient to cover the future costs of the liability defined in this section. The commissioner may utilize an actuary for calculating the estimate. The employer must pay a $2,500.00 fee for the service.

The employer shall pay the actual estimate, or post security or bond in an amount sufficient to cover the estimated future cost of the liability. The commissioner must approve the employer's election for the payment of the estimated future cost of liability.

13.3.1. If the employer elects or is required by the commissioner to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination of self-insurance unless the employer and the commissioner enter into a repayment agreement. The commissioner has the authority to determine whether entering into a particular repayment agreement will meet his or her fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment. The repayment term shall not exceed three years.

Additionally, the agreement shall provide for the payment of interest on the principal which the commissioner shall calculate on the effective date of the agreement, pursuant to WV Code 23-2-13. The interest rate remains the same for the life of the agreement.

13.3.2 Upon terminating self-insurance, the employer may elect to continue making payment of benefits, pay the full

amount of the future liability, or enter into a repayment agreement with the commissioner for the amount of the future liability. If the employer retains full liability or enters into a repayment agreement, the employer must maintain the security for self-insurance, as defined by the Rule.

13.4. If a contract of sale or transfer includes an agreement as to the parties' assumption of charges and contingent liabilities incurred by the self-insured seller prior to the effective date of the sale or transfer, and if a complete copy of the contract is filed with the commissioner, he or she will give effect to the agreement, so long as, in his or her opinion, it meets the fiduciary requirements of the Fund. The commissioner will issue a written decision on whether he or she will give effect to the agreement.

13.4.1. If a completed copy of the contract of sale is filed with the commissioner and he or she gives effect to the agreement, and if the agreement provides that the Buyer or person acquiring the business assumes the liability defined in subsection 13.3 of this rule, the Buyer or person acquiring the business must pay the actual estimate of all the self-insured seller's accrued and contingent liability, as calculated pursuant to that section. Alternatively, the Buyer or person acquiring the self-insured employer's business may, with the commissioner's approval, post security or bond in an amount actuarially determined to be sufficient to cover the assumed liabilities. The security or bond must cover the Seller's entire period of self-insurance. In the event of a security or bond being posted by the buyer to cover the seller's liabilities, or if the buyer pays the actual estimate of the seller's liability, then the commissioner will release the employer's like security or bond previously posted by the employer-seller.

13.4.2. If a complete copy of the contract of sale is not filed with the commissioner and/or if the commissioner does not give effect to the agreement, the Division will hold the self-insured seller liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to the effective date of the sale or transfer, unless the employer pays into the fund an amount sufficient to cover the estimated cost of all such liability, as set forth in subsection 13.2 of the Rule.

13.5. The commissioner will attempt to obtain the actuarial figures on a buy-out of liability in a timely fashion. The employer will not be prevented from terminating its self-insured status or from subscribing to the Fund because of an untimely delay in obtaining the buy-out figures.

13.6. The commissioner will not interpret in a capricious or arbitrary manner the provisions requiring the employer to buy-out liability.

§ 85-9-14. Present Value Payment of Unpaid Compensation.

14.1. At any time, the commissioner, in his or her discretion, may permit or require any self-insured employer to pay into the Fund an amount of money equal to the present value of all unpaid compensation awarded in a claim and for which the employer is liable, in trust.

14.2. The self-insured employer and the commissioner may enter an agreement to allow the employer to make the present value payment of unpaid compensation over a period of time, if the commissioner determines that entering into an agreement is in keeping with his or her fiduciary responsibility to the Fund. The payment term shall not exceed three years.

Additionally, the agreement shall provide for the payment of interest on the principal which shall be calculated on the effective date of the agreement, pursuant to WV Code 23-2-13. The interest rate shall remain the same for the life of the agreement.

14.3. Upon making the present value payment of unpaid compensation with one lump sum or with the last installment of the payment agreement, the self-insured employer discharged from any further liability for the unpaid compensation and all future costs associated with the unpaid compensation shall be paid from the Fund.

§ 85-9-15. Subscribing Employers Buy-Out Of Liability Previously Incurred As A Self-Insured Employer.

15.1. Employers who were previously self-insured employers and who on the effective date of the Rule were continuing to pay compensation and expenses for certain of their employees due to their previous status as self-insured employers may elect to buy-out their responsibility for those payments related to the prior self-insured status, pursuant to the provisions set forth in subsection 13.2 of the Rule.

§ 85-9-16. Administrative Reports And Fees.

16.1. Upon filing an application for self-insured status, an employer acknowledges its obligation to continue to make all payments and all reports required by the Act or by the rules adopted by the commissioner.

16.2. On or before the last day of the first month of each quarter, for the preceding quarter, each self-insured employer shall file with the commissioner a sworn statement of the total earnings of all of its employees subject to the Act for the preceding quarter.

16.3. On or before the last day of the first month of each quarter, for the preceding quarter, each self-insured employer shall pay into the compensation fund a sum sufficient to cover its proper portion of the expenses related to the administration of the Act.

16.3.1. The sum sufficient to pay a self-insured employer's proper portion of the expenses related to the administration of the Act is determined by applying a percentage to the base rate that has been assigned to the self-insured employer's industrial class.

16.3.2. If a self-insured employer does not subscribe to the second injury reserve of the surplus fund, pursuant to W.Va. Code § 23-2-9(b)(4), the sum sufficient to pay its proper portion of the expenses related to the administration of the second injury reserve of the surplus fund is determined by applying a percentage to the second injury reserve base rate that has been assigned to the self-insured employer's second injury reserve industrial class, as set forth in W.Va. Code §23-2-9(b)(2).

§85-9-17. Administrative Protests And Hearings.

17.1. An employer may protest any order or decision of the commissioner made under the provisions of W.Va. Code § 23-2-9, W.Va. Code §23-2-17, or the Rule.

17.2. In order to preserve its right to protest, the employer must file a written petition with the commissioner, stating the order or decision protested and the exact nature of the issue in controversy. In the written petition, the employer must designate a person or entity to receive official notices related to the protest and the employer must provide the address of the person or entity. The written petition must be received by the commissioner within thirty (30) days after the employer receives notice of the objectionable order or decision or within sixty (60) days of the date of the objectionable order or decision, regardless of notice. This period may not be extended or waived.

17.3. Within thirty (30) days after receiving the written protest, the commissioner shall issue a notice acknowledging the protest and providing an opportunity for hearing. Filing of the written protest does not stay the order or decision protested, unless the commissioner orders a stay. The commissioner may grant a stay provided that the employer posts security or bond in an amount adequate to protect the interests of the Fund and to meet the commissioner's fiduciary obligations to the Fund.

17.3.1. Unless waived by all the parties to the hearing and by the commissioner, all hearings shall be preceded

by at least ten (10) days written notice from the commissioner. The notice shall be given either by personal delivery to the designated person or entity designated by the employer in the written petition or by depositing the notice in the certified United States mail, postage prepaid, return receipt requested, in an envelope addressed to the designated person or entity. Proof of the giving of notice may be made by the affidavit of any employee of the commissioner, or by affidavit of any person over eighteen years of age, naming the person or other entity to which or to whom the notice was given and specifying the time, place and manner of delivery. If certified mail is used, then a copy of the return receipt shall be attached to the proof of notice.

17.3.2. The commissioner shall serve notice of the hearing and of any document or order upon the parties of record, subject to section 17.4 of this rule, except that any party who is represented by an attorney is considered to have designated that attorney as the proper recipient of all notices, documents, or orders and service upon that attorney is the equivalent for all purposes as service upon the party. Notice is complete if the written notice is personally tendered to the intended recipient and is either accepted or refused by that recipient. Similarly, notice is complete if the written notice is sent by certified mail, return receipt requested, to the recipient and the return receipt shows that it was either accepted by a person at the last known address or was refused by a person at the last known address.

17.3.3. The time period for any form of notice, including one arising under section 17.4 of this rule or one contained in any order or document, will begin to elapse the first day following the date of the notice, order, or document. This rule is applicable whether the notice is delivered personally or served by mail.

17.3.4. The notice required by section 17.3 of this rule shall contain the date, time, and place of the hearing and a short and plain statement of the issues in controversy at the time the notice is served. Thereafter, upon application by a party, the Commissioner shall furnish a more definitive and detailed statement explaining the subject of the hearing.

17.4. All administrative hearings conducted pursuant to the Rule shall be held in accordance with the provisions of this section. If any special conditions set forth in the Act or in other rules promulgated by the commissioner are applicable to a particular case, conditions will be adhered to during the course of the administrative hearings held in the case, in lieu of any contrary provision set forth in this section of the Rule.

All hearings shall be conducted in an impartial manner and shall be open to members of the public. The commissioner, the executive secretary, and every hearing officer appointed by the

commissioner have the power to administer oaths and affirmations, certify official acts, take depositions, rule upon offers of proof and receive relevant evidence, regulate the course of the hearing, hold conferences for the settlement or simplification of the issues by consent of the parties, dispose of procedural requests, motions, or similar matters, and take such other actions as are authorized by this rule.

17.4.1. The hearing shall be held in the county selected by the commissioner.

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

The hearing officer is authorized to receive and rule upon any procedural matter arising before, during, or after a hearing. All final rulings on substantive matters shall be made by the commissioner.

17.4.3. The hearing officer shall continue a hearing upon motion of the commissioner. The hearing officer shall not grant requests for continuances by a party as a matter of course, but only upon a showing of good cause, which cause shall be strictly construed against the requests.

17.4.4. The parties shall engage in discovery in only with the consent of the hearing officer or, if a hearing officer has not yet been assigned, with the consent of the commissioner or the executive secretary. All discovery requests will be submitted to the appropriate official at the same time as the discovery request is served upon the other party. Discovery requests filed less than ten (10) days prior to a hearing shall not be approved unless the party to whom the discovery request is directed waives this requirement. If the official determines that the requested information is relevant and material to the issues to be heard and not unduly burdensome, the official will permit the discovery and set a reasonable time frame for the disclosure of the information. Determination of a reasonable time frame will be premised upon the nature and scope of the information requested and the date on which the hearing is scheduled. The official shall attempt to avoid continuing a previously scheduled hearing.

17.4.5. At the hearing, the hearing officer shall afford all parties an opportunity to present evidence and argument with respect to the matters and issues involved. Any person interested in the proceeding, but not a party thereto, shall be permitted to testify as to the issues in controversy after first being placed under oath or affirmation. Any interested person shall not, however, be permitted to submit argument or to cross-examine other witnesses. The hearing officer may restrict argument to a presentation in written form.

All of the testimony and evidence at the hearing shall be reported by stenographic notes and characters or by mechanical means. All rulings on the admissibility of testimony and evidence is also be reported. The commissioner shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. Upon request from any party to the hearing, all reported testimony and evidence at a hearing shall be transcribed, and a copy thereof furnished to the party at its expense. The commissioner has the responsibility for making arrangements for the transcription of the reported testimony and evidence, and the transcription shall be accomplished with all dispatch.

17.4.5.a. The hearing officer shall exclude irrelevant, immaterial, or unduly repetitious evidence during the course of a hearing. The then current "Rules of Evidence", as applied in civil cases by a court sitting without a jury, shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, the hearing officer may admit evidence not admissible thereunder, except where precluded by statute, if such evidence is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The hearing officer is bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record, but exceptions to rulings by the hearing officer shall not be made. Any party to any hearing may vouch the record as to any excluded testimony or other evidence, and the hearing officer may elect to require that the excluded testimony be submitted in written form following the hearing.

17.4.5.b. All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and the commissioner shall consider no other factual information or evidence in the determination of the case. Documentary evidence may be received in the form of copies of excerpts or by incorporation by reference. In all cases, copies of orders, proceedings, or records in the office of the commissioner are equal to the original in evidence.

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

17.4.5.d. All witnesses who testify during a hearing shall first be subject to oath or affirmation and any testimony submitted by deposition shall show on the face thereof that the witness was so qualified.

17.4.5.e. Every party as well as the commissioner has the right of cross-examination of witnesses who testify, and has the right to submit rebuttal evidence.

17.4.6. The commissioner, the executive secretary, or a hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents, and testimony. All subpoenas and subpoenas duces tecum shall be issued in the name of the commissioner, but any party requesting their issuance must see that they are properly served. Service of subpoenas duces tecum issued at the instance of the Division is the responsibility of the commissioner. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay service fees and fees for the attendance and travel of witnesses.

17.4.6.a. Every subpoena or subpoena duces tecum shall be served at least (5) days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail. If service is by mail, then the five (5) day notice period shall not begin to run until the date the subpoena or subpoena duces tecum is received by the person or entity subject thereto as shown by the date on the return receipt.

17.4.6.b. Any person who serves any subpoena or subpoena duces tecum is entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses are the same as for witnesses before the circuit courts of this State. All fees shall be paid by the Division if the subpoena or subpoena duces tecum was issued, without the request of an interested party, at the instance of the Division. All fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that the subpoena or subpoena duces tecum be issued.

17.4.6.c. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held, or the circuit court in which the subpoena duces tecum was served, or the judge of either court in vacation, may grant any relief with respect to the subpoena duces tecum which either court, under the West Virginia Rules of Civil Procedure for Trial Courts of Record, could grant, and for any of the same reasons with respect to a subpoena duces tecum issued from either court.

In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be

lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the commissioner, shall compel obedience by attachment proceedings for contempt of a subpoena or subpoena duces tecum issued from circuit court or a refusal to testify therein.

17.4.6.d. The issuance of a subpoena or a subpoena duces tecum shall be refused only in an instance when there is good reason to believe that the subpoena power is being abused. All subpoenas and subpoenas duces tecum shall state on their face the name of the party who requested them.

17.4.7. Except to the extent required by statute or by the Rule, all hearings under this rule shall be conducted in accordance with the then current version of the "Rules of Civil Procedure for Trial Courts of Record", "Trial Court Rules for Trial Courts of Record", and "Local Rules for Kanawha County Civil Courts" as those rules would apply to a trial court sitting without a jury.

17.4.8. The hearing officer may take notice of judicially cognizable facts. The hearing officer shall notify all parties either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

17.4.9. At the conclusion of the submission of evidence, the parties shall be permitted to file proposed findings of fact, conclusions of law, and such legal briefs or memoranda as they wish. The parties shall be permitted seven (7) days to file the items which filings shall be concurrent. The parties shall be permitted three (3) days to respond to the filing of any other party. No further argument shall be permitted.

17.4.10. Upon motion in writing served by any party or by the commissioner as notice may be served pursuant to subsection 3.2 of this rule, assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any hearing held pursuant to this section of the Rule, the hearing officer shall settle all differences arising as to whether the transcript truly discloses what occurred at the hearing or shall direct that the transcript be corrected and revised in the respects designated by the hearing officer, so as to make it conform to the whole truth.

17.4.11. The hearing officer will prepare for the commissioner a report and recommendation which shall contain proposed findings of fact and conclusions of law. The parties to the hearing shall then be permitted seven (7) days in which to file objections or comments upon the report and recommendation

and three (3) more days to respond to each other's objections and comments. The hearing is ended upon the commissioner's receipt of the objections and comments from all of the parties.

17.4.12. At any time within thirty (30) days after the receipt of the parties' objections and comments, the commissioner may order a supplemental hearing upon due notice to the parties if he or she is of the opinion that the facts have not been adequately developed.

17.5. Within thirty (30) days of the receipt of the parties objections and comments, the commissioner shall decide whether to accept the hearing officer's report and recommendation, to reject it, to modify it, or to remand the matter to the hearing officer for further proceedings or upon other instructions. The commissioner retains his or her right to review any and all proposed findings of fact against the record and to disagree with the findings provided that the commissioner states the basis for the disagreement in his or her final order.

The commissioner shall render either a final order or an interlocutory order as his or her decision may require, in which he or she accepts in whole or in part the proposed findings of fact and conclusions of law submitted by the hearing officer and, to the extent that he or she rejects or modifies the report and recommendation of the hearing officer, the commissioner shall furnish his or her own findings of fact and conclusions of law. A copy of the final order or decision of the commissioner shall be served upon each party and the party's attorney of record, if any, either in person or by certified mail.

17.6. All appeals from the final order or decision of the commissioner shall be taken as provided by West Virginia Code, § 23-2-17, and West Virginia Code § 23-5-1 et seq.

## § 85-9-18. Written Decisions; Public Access.

18.1. All decisions made pursuant to the provisions of the Rule shall be in writing and shall be a matter of public record. Any purported decision not in writing void and of no legal effect and any person or other entity relying upon such a purported decision does so at his, her or its own risk.

## § 85-9-19. Severability.

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

TITLE 85
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF COMMERCE, LABOR, AND ENVIRONMENTAL RESOURCES
WORKER' COMPENSATION DIVISION

SERIES 9
SELF-INSURED EMPLOYERS

SENATE BILL NO. 203

(By Senator Manchin)

[Introduced March 1, 1993; referred to the Committee on the Judiciary.

A BILL to amend and reenact section six, article five, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to authorizing the workers' compensation fund to promulgate legislative rules relating to self-insured employers.

**Be it enacted by the Legislature of West Virginia:**

That section six, article five, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, to read as follows:

**ARTICLE 5. AUTHORIZATION FOR DEPARTMENT OF HEALTH AND HUMAN RESOURCES TO PROMULGATE LEGISLATIVE RULES.**

**§64-5-6. ~~Office of workers' compensation commissioner~~ Workers' compensation.**

(a) The legislative rules filed in the state register on the fourteenth day of November, one thousand nine hundred

eighty-three, relating to the workers' compensation commissioner (employers' excess liability fund), are authorized.

(b) The legislative rules filed in the state register on the twenty-fifth day of October, one thousand nine hundred eighty-four, relating to the workers' compensation commissioner (time limits for the administrative proceedings of adjudications and awards), are authorized.

(c) The legislative rules filed in the state register on the twenty-fifth day of October, one thousand nine hundred eighty-four, modified by the workers' compensation commissioner to meet the objections of the legislative rule-making review committee and refiled in the state register on the ninth day of January, one thousand nine hundred eighty-five, relating to the workers' compensation commissioner (self-insured employers), are authorized.

(d) The legislative rules filed in the state register on the twenty-fifth day of October, one thousand nine hundred eighty-four, modified by the workers' compensation commissioner to meet the objections of the legislative rule-making review committee and refiled in the state register on the fifth day of December, one thousand nine hundred eighty-four, relating to the workers' compensation commissioner (payment of attorney's fees), are authorized.

(e) The legislative rules filed in the state register on the sixth day of August, one thousand nine hundred eighty-five,

relating to the workers' compensation commissioner (standards for medical examination in occupational pneumoconiosis claims), are authorized with the amendments set forth below:

On page 1, the second and third unnumbered paragraphs on page one are amended to read as follows:

"When two or more ventilatory function tests performed in reasonably close proximity in time produce differing but acceptable results, the Commissioner, at the request of the O. P. Board, may direct the parties to furnish additional evidence and/or order additional testing at the laboratory utilized by the O. P. Board or other laboratories, all for the purpose of determining whether any of the results are unreliable or incorrect or are clearly attributable to some identifiable disease or illness other than occupational pneumoconiosis."

When blood gas studies are performed and abnormal values are obtained and thereafter new blood gas studies are performed and normal or significantly higher values are further obtained, the Commissioner, at the request of the O. P. Board, may direct the parties to furnish additional evidence and/or order additional studies at the laboratory utilized by the O. P. Board or other laboratories, all for the purpose of determining whether any of the values are unreliable or incorrect or are clearly attributable to some identifiable disease or illness other than occupational pneumoconiosis."

And,

On page 7, paragraph (11) is amended to read as follows:

"(11) It is recognized that arterial blood gas studies done in laboratories throughout this state are obtained at different altitudes. Only by 'standardizing' for altitude can an equitable assessment be made of impairment when values of arterial oxygen are being measured at remarkably different altitudes. Therefore, the results reported from laboratories should include the name of the laboratory and the date and time of the testing, altitude of the laboratory and barometric pressure at the laboratory on the day the samples were collected. The O. P. Board will evaluate the arterial blood gas values by converting those values to the average altitude of Charleston, West Virginia. For this purpose, it shall be sufficient to add 1 mmHg to each arterial oxygen tension for each 300 feet or fraction thereof that the testing laboratory is located above the average altitude of Charleston, because the relationship of barometric pressure (altitude) and alveolar oxygen is approximately linear up to 4,000 feet as long as the subject breathes room air.

As an example, Bluefield is located approximately 2,600 feet above sea level. Charleston is approximately 600 feet above sea level. Thus, arterial oxygen values obtained in Bluefield should have 6.67 mmHg added to them before applying the table to them to obtain 'percent impairment.' The calculations are as follows:

'Bluefield (2,600') minus Charleston (600') equals 2,000'

differential 2,000' divided by 300' altitude equals 6.67

6.67 multiplied by 1 mmHg per 300' altitude equals 6.67 mmHg.'"

(f) The legislative rules filed in the state register on the ninth day of August, one thousand nine hundred eighty-five, modified by the workers' compensation commissioner to meet the objections of the legislative rule-making review committee and refiled in the state register on the fifteenth day of January, one thousand nine hundred eighty-six, relating to the workers' compensation commissioner (administration of the coal-workers' pneumoconiosis fund), are authorized.

(g) The legislative rules filed in the state register on the thirtieth day of November, one thousand nine hundred eighty-nine, modified by the division of workers' compensation to meet the objections of the legislative rule-making review committee and refiled in the state register on the tenth day of January, one thousand nine hundred ninety, relating to the division of workers' compensation (enforcement of reporting and payment requirements), are authorized.

(h) The legislative rules filed in the state register on the sixteenth day of January, one thousand nine hundred ninety, modified by the division of workers' compensation to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-third day of January, one thousand nine hundred ninety, relating to the division of workers' compensation (self-insured employers), are authorized.

(i) The legislative rules filed in the state register on the eighteenth day of September, one thousand nine hundred ninety-two, modified by the workers' compensation fund to meet the objections of the legislative rule-making review committee and refiled in the state register on the twenty-first day of January, one thousand nine hundred ninety-three, relating to the workers' compensation fund (self-insured employers), are authorized.

NOTE: The purpose of this bill is to authorize the Workers' Compensation Fund to promulgate legislative rules relating to self-insured employers.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.