WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #8

FILED
1988 NOV 22 AM 9:40
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE

AGENCY: Division of Workers' Compensation TITLE NUMBER: 85

DATE EMERGENCY RULE WAS ORIGINALLY FILED: June 15, 1989

IS THIS THE FIRST EMERGENCY AMENDMENT TO THE ORIGINALLY FILED EMERGENCY RULE:

Yes

IS THIS THE SECOND EMERGENCY AMENDMENT TO THE ORIGINALLY FILED EMERGENCY RULE:

—

DATE OF FIRST EMERGENCY AMENDMENT: _____

SERIES NUMBER OF RULE: 9* TITLE OF RULE Self-Insurers Electing to opt into or out of Surplus Fund

THE ATTACHED IS AN EMERGENCY AMENDMENT TO AN EXISTING EMERGENCY RULE. THIS EMERGENCY AMENDMENT BECOMES EFFECTIVE UPON FILING.

Emily A. Spieler
Commissioner

*The original filing of this rule designated it as Series 8. However, this was an error since another rule had that series number and it was not intended that this rule replace the initial series 8 rule. Hence, this rule has been designated as Series 9.

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JOHN H. KOZAK
EXECUTIVE SECRETARY

Novemeber 22, 1989

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, W. Va. 25305

Dear Secretary Hechler:

RE: Filing of Emergency Legislative Rule, Title 85, Series 9; "Self-Insurers Electing To Opt Into Or Out Of Surplus Fund," Division Of Workers' Compensation."

Pursuant to West Virginia Code, §5F-2-2(a)(12), please consider this letter to be my written approval for the filing of the above noted emergency legislative rule.

With much appreciation for your assistance in this matter, I remain

Very truly yours,

Taunja Willis Miller
Secretary

TWM/jhk

EMERGENCY RULE
TITLE 85
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
DIVISION OF WORKERS' COMPENSATION

SERIES 9
Self-Insurers Electing To Opt Into Or Out Of Surplus Fund

§85-9-1. General.

1.1. Scope - This emergency legislative rule provides for the movement by employers electing to opt out of the Workers' Compensation Fund's surplus fund or to opt into that surplus fund. The rule is adopted on an emergency basis in order to prevent a substantial harm to the public interest. Heretofore, the Workers' Compensation Fund has not had a rule regulating the options of self-insuring employers regarding movement into and out of surplus fund coverage. The Fund has had a rule regulating movement into and out of the general fund, but it has not been applied to the surplus fund. This lack of a rule makes impossible the carrying out of the commissioner's duty to accurately set rates for the surplus fund at the lowest possible rates of premiums consistent with the maintenance of a solvent surplus fund. This is because the unpredictable movement of employers into and out of the surplus fund renders rate calculation equally unpredictable. Given the compensation fund's current extreme financial difficulty, it is essential that accurate rates be fixed in order to achieve solvency for the surplus fund and to comply with the statutory directive imposed upon the commissioner.

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

1.3. Filing Date - November 22, 1989.

1.4. Effective Date - November 22, 1989.

1.5. Notice - This emergency rule is issued with the expectation that a permanent rule will be promulgated and that that permanent rule will affect the entire area of self-insurance under the Act. During the development of that permanent rule, the commissioner expects to revaluate all of the policy issues affecting self-insurance and to implement such changes and additions to policy as that revaluation may indicate are necessary. Hence, this emergency rule shall not be relied upon as stating what the policy shall or will be following the promulgation of the permanent rule by the commissioner and its approval by the Legislature.

§85-9-2. Definitions.

2.1. As used in this emergency legislative rule, the following terms, words, and phrases have the meanings stated below unless in any instance where such term, word, or phrase is

employed the context clearly indicates that another meaning in intended.

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

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

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

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

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

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

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

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

2.10. The phrase "this rule" means the instant emergency legislative rule designated in the caption hereof as W.Va. C.S.R., §85-9-1 et seq.

§85-9-3. Prior Rule Not Affected.

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

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

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

§85-9-4. Election With Regard To The Surplus Fund.

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

4.2. An employer so filing will then be reviewed for approval to change its status to self-insured with respect to all or part of the surplus fund without undue delay upon the terms stated below. An employer may withdraw the letter of intent at any time even after approval by the commissioner, except as follows. The employer must elect either to be a self-insurer or to withdraw the letter of intent by December 31, 1989. Once withdrawn, the letter of intent is void and may not be resurrected. The effective date of the employer's change to self-insured status will be determined by the employer and the commissioner in each individual case as warranted by the facts and circumstances in each such case. Such factors as the availability of adequate security, determination of the amount of funds needed by an employer to buy out its liability, the availability to the employer of such funds, and others shall be considered.

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

4.4. An employer making the election under subsection 4.3 of this rule who meets the conditions specified below will be granted permission to become a self-insured employer only as of the first day of July following the commissioner's approval of

its application for such permission; however, such application must be received no later than December 31 of the year preceding the pertinent first day of July. As an example, any application received after June 30, 1989, will not be eligible for approval and implementation until July 1, 1990, provided the application is received on or before December 31, 1989; similarly, an application received between January 1, 1990, and December 31, 1990, will be eligible for implementation on July 1, 1991. An employer applying for self-insured status for its regular subscription as well as for all or part of the surplus fund must comply with W. Va. C.S.R., §85-1-4.2(d), as to the timing of the entire application.

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

§85-9-5. Standards For Approval of Applications.

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

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

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

5.4. On an annual basis or sooner as an individual case may require, the commissioner shall review the sufficiency and the Fund's actuary shall review the amount of the bond or security

provided by each self-insuring employer for its coverage with respect to all or part of the surplus fund.

5.5. In the event that the employer's obligations under the Act can reasonably be expected to decrease, then the employer may petition the commissioner for permission to reduce the amount of its bond or security; however, such reduction shall not be made until after the commissioner approves the reduction. Upon a showing of credible evidence that the employer's obligations under the Act can reasonably be expected to decrease, the commissioner shall grant the petition to reduce the amount of bond or security. The amount of such reduction shall be actuarially determined by the Fund's actuary and shall be made in consideration of the factors outlined in subsection 5.3 above. The commissioner shall rule upon each such petition within ninety (90) days of its receipt by the commissioner.

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

5.7. As a condition of approval, the employer shall agree either to assume liability on all awards made after the effective date of the approval of the application for self-insured status in respect to claims for an injury or death which may have occurred prior to that date or the employer shall pay into the surplus fund prior to the effective date of the approval of the employer's request for self-insured status the amount of money equal to the total present value of all of the claims for which the Fund would have been responsible if the employer had not become self-insured. The amount required by the commissioner shall be the sum actuarially determined by the Fund's actuary. The actuary shall utilize generally accepted actuarial principles and such additional factors as the actuary concludes are necessary to take into consideration.

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

5.8.a. The employer shall retain responsibility for the payment of all claims with dates of injury before the effective date of the employer's return to non-self-insurer status with regard to the surplus fund even if a final award has not been made for a particular claim prior to that effective date; that is, in effect the employer will remain self-insured for those claims; except that, in a situation where in a particular case a

date of injury occurs while the employer is a subscriber to the pertinent portion of the surplus fund and then the employer becomes self-insured for that pertinent portion of the surplus fund and then subsequently returns to the status of subscriber to that pertinent portion of the surplus fund and then the date of award occurs for that injury subsequent to that employer's return to subscriber status for that portion of the surplus fund, in that instance responsibility for payments for that award will be determined as if the employer had not had the intervening period of self-insured status; it is expressly noted that this exception is only applicable during the existence of this rule and that during the promulgation of the permanent rule this issue will be reviewed; or

5.8.b. The employer shall pay into the surplus fund prior to the effective date of the approval of the employer's return to regular subscriber status the amount of money equal to the total present value of all the claims for which it would be responsible under subsection 5.8.a. Such amount shall be determined through the use of generally accepted actuarial principles and such other factors as are deemed pertinent by the Fund's actuary.

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

5.10. By filing an application for self-insured status with regard to the surplus fund, the employer is deemed to acknowledge that it remains subject to all other pertinent rules and regulations.

§85-9-6. Payment Of Compensation Benefits.

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

obligations in a prompt and timely fashion shall be given considerable weight by the commissioner in determining whether to permit the employer to remain a self-insurer.

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

§85-9-7. Continuance Of Self-Insured Status; Termination; Right to Protest and Hearing.

7.1. The employer's status as a self-insured employer with respect to all or part of the surplus fund shall continue on a year-to-year basis so long as the employer continues to meet all of the requirements for such status as well as the other requirements imposed by the Act, by this rule, and by other rules and regulations promulgated by the commissioner. The commissioner retains the discretion to permit an employer to correct any deficiency in lieu of revoking that employer's self-insured status.

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

7.3. Any employer which wishes to protest any decision made by the commissioner under this rule (including those decisions made by the commissioner upon the advice of the Fund's actuary) may do so by filing a petition which sets forth with particularity the decision complained of, the facts pertaining to the employer's position, and the reasons in support thereof. The employer shall then be entitled to a hearing upon that petition as provided for by general law or by procedural rule promulgated by the commissioner. An employer may file a petition requesting that the commissioner stay the immediate enforcement of a protested order against the employer. The commissioner may grant that request for a stay and, in an appropriate case, may condition the stay upon the employer filing a sufficient bond to cover any obligations of the employer that appear to be a risk so as to result in final payment by the Fund. In addition, in any particular case where the commissioner finds good cause to believe that an employer may have violated the Act or any rule pertaining to self-insurance status, then the commissioner may institute a show cause proceeding against that employer by filing a petition setting forth the nature of the offense and a summary of the facts in support thereof. A hearing shall then be held as provided for by general law or by procedural rule promulgated by the commissioner. Upon convening a show cause hearing, the

initial burden of going forward with the evidence shall be upon the Fund to present the basis for the good cause finding. Thereafter, the burden of going forward with the evidence switches to the employer.

7.4. Any employer whose status as a self-insurer for all or part of the surplus fund is terminated shall (unless a stay is obtained pending the exhaustion of administrative appeals including possible judicial appeals) make payment to the surplus fund in the same fashion as if it had elected to surrender its self-insurer status as provided for by subsection 5.8.b of this rule except that such payment shall be due immediately upon the termination of the self-insured status and failure to make payment within thirty (30) calendar days of the effective date of the termination shall cause the employer to be in default for purposes of section 8 of this rule. In lieu of the aforesaid payment, the employer may elect to post additional, sufficient bond or security within the thirty (30) day period to cover the amount due to the Fund. The sufficiency of such bond or security must be satisfactory to the commissioner and meet the requirements of subsection 5.3 of this rule. In the event that the commissioner determines that good cause exists to believe that payment by the employer is unlikely or that posting of additional, sufficient bond or security is unlikely, the commissioner may demand that the employer make the required payment immediately and take collection actions.

§85-9-8. Collection Actions Against Self-Insured Employer.

Notwithstanding any other provision of this rule, either as an addition to or in place of any remedy provided by the Act, other rules promulgated by the commissioner, or by this rule, the commissioner may institute one or more collection actions against a self-insured employer. Such collection actions shall pertain to a finding that the employer has failed to make any payment due to the Fund in a prompt or timely fashion. As an example of such payments, the amounts of money determined to constitute a buy out of liability by an employer being forced back into subscriber status with respect to all or part of the surplus fund pursuant to section shall constitute a payment due to the Fund. All such collection actions will be controlled by the Act as provided for in section 5a of article 2, chapter 23, West Virginia Code, and by any pertinent rule promulgated by the commissioner.

§85-9-9. Severability.

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

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EXECUTIVE SECRETARY

M E M O R A N D U M

TO: The Honorable
Ken Hechler
Secretary of State

FROM: Emily A. Spieler
Commissioner

DATE: November 20, 1989

RE: Emergency Amendment to Emergency Rule;
Title 85, Series 9; "Self-Insurers Electing
To Into Or Out Of Surplus Fund."

On June 15, 1989, the Division of Workers' Compensation filed an emergency rule titled as above but which was designated Series 8. This was an erroneous designation since there already was a series 8 rule for the division and it was not the intention of the division to replace that original rule. Hence, this rule has been redesignated as series 9.

On August 14, 1989, a public hearing was held on the emergency rule for the purpose of taking written comment on it. The proposed permanent legislative rule had not been filed at that time. Only one set of comments was received. A copy of the hearing transcript and of the written comment is attached hereto.

As a result of the comments, amendments have been made to the emergency rule as filed. Enclosed herewith, please find a copy of the amended rule with strike throughs indicating language that has been deleted and underlines indicating language that has been added. Also a final copy of the emergency rule, as amended, is also enclosed for filing at this time.

The set of written comments to this emergency rule was submitted by the West Virginia Self-insurers Association. The comments contain twelve (12) points which will be addressed below in the same order as presented by the Association.

(1) This comment addresses the effective date of the employer's option to become self-insured during the window provided by subsection 4.2. This point was addressed in the amendment to subsection 4.2. The closing dated for the window has been extended to December 31, 1989. Also, the rule makes clear that the effective date of the employer's election is not tied to the closing date. The employer and the division can agree upon the closing date by taking into consideration the factors enumerated. This is somewhat different that the position desired by the association, but actually provides for more flexibility on the part of the employer and the division.

(2) The association urges an amendment to subsection 5.3 on the grounds that the current language confines the Commissioner's discretion too narrowly by requiring the amount of security or bond be determined by the division's actuary based upon generally accepted actuarial principles. The comment suggests that the employer community may be deprived of their due process rights under the current language. The division disagrees with the association. As to due process requirements, the employer can submit any evidence it wishes to to the division's actuary for his or her consideration. If the employer is not satisfied with the amount finally ordered, the employer can protest the decision and will be allowed a hearing on its contentions. Subsection 7.3 of the rule has been amended to make this right explicit. As to the rule being too confining, the division is of the opinion that the amount of the security or bond must be sufficient and adequate to guarantee that all payments due to injured employees and their dependents will be made. The setting of an amount under this standard is an actuarial decision. History has shown that even the largest, most financially sound employers can suffer reversals and be placed in bankruptcy under a chapter 11 reorganization. See for instance the case of Wheeling-Pittsburgh Steel Company. If adequate security is not in place beforehand, the division and through it all of West Virginia's employer community will be left holding the responsibility for paying for claims from such an employer's employees but without a surety to look to for reimbursement. The division is unable to see any circumstances that would be appropriate for consideration that cannot be taken into account by the actuary. If such do exist in a given case, then they can be considered during a protest hearing.

(3) This comment is directed towards subsection 5.5 of the rule which concerns the reduction of a previously set and in place security or bond amount. The subsection is intended to deal with those situations where changes in circumstances of the employer result in a lesser amount of security being needed to guarantee the payments required by the law. The division has adopted the language urged by the association in part. The difference goes to the points made in comment (2) above. The association would have the Commissioner make the reduction decision upon the Commissioner's own unfettered discretion, whereas the division believes that the division's actuary's opinion should be taken into consideration.

The new language ties this decision to the same standards as are set forth in subsection 5.3.

(4) The association complains that subsection 5.7 and 5.8.a chill the rights of an employer from opting out of surplus fund coverage or of opting back in. The effect of subsection is to place responsibility upon the employer for injuries that occurred while the employer was a subscriber to the surplus fund but in which the award of benefits was not made until after the employer became self-insured. Subsection 5.8.a deals with situations where the employer is self-insured but wishes to return to coverage under the surplus fund. The subsection places responsibility upon the employer for all awards for injuries that occurred during the employer's period of self-insurance. The association would prefer that subsection 5.7 be amended to have the determining factor be when the injury occurred. The division notes that current rule subsection 4.2(b), 85 C.S.R. 1., has the same effect as does subsection 5.7 of the emergency rule. The division has amended subsection 5.7 to provide another option to the withdrawing employer. The employer can pay into the workers' compensation fund an amount of money determined by the division's actuary so as to buy out its responsibility for the costs of future awards. A similar mechanism is available to employers reentering the surplus fund under subsection 5.8.b. The division notes that self-insured status under the law is a privilege and not a right. An employer's exercise of that privilege should not drain the fund's resources. By electing to pay into the fund a buy out amount, the employer will be given credit for the money paid to the fund as premiums when the actuary sets the buy out amount.

(5) The association addresses the same criticism to subsection 5.8.b that it did to subsection 5.7 and further states that by requiring the payment of "total present value", the rule adopts a requirement that cannot be determined. The association submitted language that would satisfy it but also would place the decision of the amount upon the Commissioner's unfettered discretion. The division has amended the subsection by striking the language suggested by the association, but replacing it with a requirement that the amount of the present value be determined by the actuary according to actuarial principles and evidence submitted.

(6) The association questions the need for subsection 6.1, but also offers amendments to the subsection without explaining their purpose. The reason for this subsection is to point out the obligations that the employer is assuming by becoming a self-insurer. The rule notes that the employer's record in meeting these obligations will be taken into account by the division in deciding whether to permit an employer to continue as a self-insurer. The changes suggested by the association would defeat that purpose and are rejected.

(7) The association complains that subsection 6.2 requires the filing of duplicative and unnecessary information. The division has

amended the subsection to more clearly point out that the division wishes to collect information on the invoices presented to the self-insured employer for the surplus fund as it does for invoices presented to the self-insurer for the regular fund. It merely makes the requirement apply in both places so that claimants who are, for example, second injury cases will have the amount of benefits for health care services, travel, etc., reported and retained as part of the division's record keeping functions. This information is used by many researchers as the requests for it that the division receives indicates.

(8) The introduction to this comment as well as the comment itself questions the need for section 7 of this rule. The current rules do not address situations where it might be necessary to take up the question of whether an employer should be permitted to remain self-insured other than in areas related to payments to claimants and health care providers. There are other criteria which must be met by a self-insurer and the employer's failure to meet them justifies the division looking at the issue of extending the employer's self-insurance status. The comment also suggests modifying subsection 7.1 by adding the word "significant" to the section to insure that the employer's self-insured status will be terminated only for significant reasons. The division has opted to deal with this problem by adding a sentence to specifically note that the division can permit the employer to correct deficiencies rather than automatically terminating the employer's status. In addition, new subsection 7.3 makes clear than an employer can protest a termination order and that the order can be stayed pending the protest.

(9) This comment addresses concerns of the association with regard to former subsection 7.2. That subsection has been deleted and the subsections renumbered.

(10) This comment does not criticize subsection 7.3 but notes its appropriateness. This subsection has been renumbered as subsection 7.2. No other changes have been made.

(11) This comment addresses former subsection 7.5 now renumbered as 7.4. The comment states that the subsection is too punitive and is subject to abuse. It suggests that the ability of the division to terminate an employer's status as a self-insurer be delayed until after the exhaustion of administrative appeals. The subsection has been rewritten to make clear that the employer can obtain a stay of the effect of a termination order by filing an appeal and meeting the usual requirements for a stay which traditionally include posting a bond. The comment also suggests that much of the corrective authority stated in the subsection is unneeded because the employer will have posted a bond. The comment fails to consider that termination might be undertaken by the division because the employer has failed to post an adequate bond or security. It is readily foreseeable that posted security or bond might become less valuable due to any number of circumstances. The

subsection is written to control these situations as well as others. If the employer can post acceptable security or bond, that is provided for by the subsection. The language also permits the division to consider emergency situations where it is apparent that an employer's circumstances have deteriorated to the point where immediate action is required. This is a different question than subsection 5.3 addresses contrary to the comment's attempt to link the two subsections.

(12) The comment suggests that section 8 is unneeded for the purposes of this rule. The comment also suggests some changes to the language of the subsection. The division believes that the subsection is needed since, as stated previously, there are a variety of reasons that could result in terminating an employer's self-insured status beyond those relating to payments to a claimant or a health care provider. This rule allows the division to handle those situations. The subsection has been amended to require the findings specified by the association. In addition, the scope of the subsection has been more closely tailored to the needs of the division by noting that there will be situations of payments other than to a claimant or health care provider that will be the responsibility of the employer. The subsection directly places those situations under the collection authority given the law in section 5a of article 2, chapter 23 of the Code of West Virginia of 1931, as amended.

EMERGENCY RULE
TITLE 85
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
DIVISION OF WORKERS' COMPENSATION

SERIES 9
Self-Insurers Electing To Opt Into Or Out Of Surplus Fund