WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #6

Do Not Mark In this Box

FILED
1990 MAR 30 AM 9:25
OFFICE OF THE SECRETARY OF STATE

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

AGENCY: Bureau of Workers' Compensation TITLE NUMBER: 85

AMENDMENT TO AN EXISTING RULE: YES ___, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ___

TITLE OF RULE BEING AMENDED: ___

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 9

TITLE OF RULE BEING PROPOSED: Self-Insured Employers

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

AUTHORIZATION IS CITED IN (house or senate bill number) Senate Bill No. 243

SECTION §§64-5-6(h), PASSED ON March 10, 1990.

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE: April 30, 1990

Emily A. Spieler
Commissioner

4.20

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

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 elect to subscribe to the Workers' Compensation Fund and 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 all or part of the surplus fund as well as those employers who previously received approval of such an election. The rule also applies to employers who wish to terminate either such election and to either 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; §23-3-1; §23-5-6; and §23-4A-6.

1.3. Filing Date. -

1.4. Effective Date. -

1.5. Repeal of Former Rules. - ~~Upon approval by the Legislature and upon the final filing with the Office of the Secretary of State, this rule will replace the previously filed Emergency Rule titled "Self-Insurers Electing To Opt Into Or Out Of Surplus Fund," West Virginia Code of State Rules, §85-9-1 et seq. (1989). In addition, t~~This rule repeals and replaces Section 4 of the legislative rule titled "Administration Of The Workers' Compensation Fund," West Virginia Code of State Rules, §85-1-1 et seq. (April 15, 1986). The provisions of section 8 of that latter rule are not affected by this rule and remain in force and effect. Finally, the provisions of the legislative rule titled "Hearing and Review Process Regarding The Performance of Self-Insured Employers," West Virginia Code of State Rules, §85-5-1 et seq. (May 23, 1985), are not affected by this rule.

1.6. Pursuant to West Virginia Code, §5F-2-2(b)(12), the Secretary of the Department of Health and Human Services 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 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 "decision" means a written statement issued by the commissioner containing the commissioner's findings of facts and conclusions as to any issue presented to the commissioner under these rules. Any purported "decision" which is not in writing shall have no legal effect under this rule.

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

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

2.9. 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.

2.10. 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.

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

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

3.1. Employers who at the time of the effective date of this 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 this rule.

3.2. Similarly, employers who at the time of the effective date of this rule are subscribers to all of the compensation fund shall not become self-insured due to the mere promulgation of this rule.

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

4.1. Certain employers may elect to become self-insured with respect to all of the compensation fund or to the compensation fund but not including all or part of the surplus fund. In order for the employer's election to become effective, the employer must satisfy all of the requirements of the Act and of this rule. Failure to satisfy those requirements will prevent the employer from becoming a self-insured employer. A parent or other related company may self-insure the risks of an employer in lieu of the employer itself being self-insured if its parent or other related company can meet all of the applicable requirements of the Act and of this rule for itself and for the subject employer.

4.2. An employer wishing to elect to become a self-insured employer must first demonstrate that it is a member of one of the following categories.

a. The employer is of sufficient financial responsibility to ensure the payment of compensation to injured employees and the dependents of fatally injured employees, whether in the form of pecuniary compensation or medical attention, funeral expenses or otherwise as provided for by the Act and the various rules adopted by the commissioner, of the value at least equal to the compensation provided in the Act; or

b. The employer is of such financial responsibility as required by subsection 4.2.a and maintains its own benefit funds, or system of compensation to which its employees are not required or permitted to contribute; and

c. The employer furnishes bond or other security to insure that the payments described in subsection 4.2.a are made.

4.3. The employer shall demonstrate to the satisfaction of the commissioner that it meets the requirements of subsection 4.2 by supplying to the commissioner sufficient financial and other information about the employer from which the commissioner is then able to make findings of fact in support of the employer's contention and to conclude that the employer is a member of the categories described in subsection 4.2. The commissioner shall supply an application form to the employer which shall specify the information needed by the commissioner to make the ~~aforesaid~~ required findings and conclusions. The

employer must supply all of the information requested plus such additional information as the employer may wish to have the commissioner consider on behalf of its application. If, as a result of his or her review of the completed application, the commissioner is of the opinion that further information is needed to properly make the required findings and conclusions, then the commissioner may require that the employer provide such further information to the commissioner. The commissioner may conduct an audit of all books, records, papers, and documents in the possession of the employer or under its control in order to verify the information provided by the employer or as will aid the commissioner in making the required findings and conclusions.

4.4. At a minimum, the application form shall require the employer to file financial statements including a sworn and notarized itemized statement of the assets and liabilities of the employer for the three years prior to the date of application. The employer shall also file copies of its federal tax returns for the three years immediately preceding the date of application if the employer has been in existence that long. If the employer does not file a separate tax return, then the employer shall file copies of the returns which include the employer. The employer shall also file a sworn and notarized statement indicating the type or kind of business or operation that the employer is engaged in or will become engaged in at the time of the effective date of its application.

4.5. At the time of filing of its application, the employer shall, with such application, make a written statement as to whether the employer elects to remain a subscriber to all or part of the surplus fund. If the employer elects to become self-insured for all or part of the surplus fund, then the employer shall specify the parts of the surplus fund to which it wishes to remain a subscriber and the parts of the surplus fund as to which it wishes to self-insure.

4.6. Any employer whose record upon the books of the commissioner for the ten years preceding the date of the employer's application shows, as determined by the Fund's actuary, 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, shall not be granted the right, individually and directly or from ~~such~~ its own benefit funds, department or association, to compensate its injured employees and the dependents of its fatally injured employees until it has paid into the compensation fund the amount of such excess of liability over premiums paid, including its proper proportion of the liability incurred on account of explosions, catastrophes or second injuries occurring within the state and charged against such fund. An employer's "proper proportion" of the ~~aforesaid~~ liability" shall be determined by comparing the amount of premiums paid by the employer to the specific portion

of the surplus fund in issue (eg., the second injury fund) and the total amount of dollars paid out of that fund on account of that employer's employees. The difference, if any, of premiums paid from dollars paid out shall be the employer's responsibility.

4.7. Any employer electing to become a self-insured employer, as to all or part of the compensation fund, shall give security or a bond in the form, of the type, and in the amount required by the commissioner. The amount of the security or bond shall be that amount determined by the commissioner's actuary to be adequate and sufficient to compel or secure to the employer's employees, or their dependents, payment of the compensation and expenses required by the Act, which compensation and expenses shall in no event be less than the compensation paid or furnished out of the state workers' compensation fund in similar cases to injured employees or the dependents of fatally injured employees whose employers contribute to such fund. If the employer wishes to post marketable securities in order to meet its obligation for security or bond, the self-insured employer must meet the following requirements:

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

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

c. The maturity date of the instrument ~~shall~~ can not be more than ten years from the date the securities are posted with the Fund; and

d. The payment of both principal and interest ~~shall~~ be 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.

4.8. The security or bond given by the employer shall be of the occurrence type so that the security or bond shall be liable in the place of the employer should the employer be unable to meet its obligations for all injuries or deaths as may occur during the time period for which the security or bond is given ~~for~~ and shall remain ~~so~~ liable at the time the award, if any, is subsequently made and for the entire time period in which all benefits will be paid under such award including death benefits to surviving dependents. Nothing to the contrary contained in any writing associated with or part of the security or bond shall defeat this obligation. Every surety, guarantor, warrantor, or other such person or entity who purports to stand in the place of the self-insured employer for the payment of

such benefits shall be deemed to have given such security or bond in compliance with this subsection 4.8 and no statement or disclaimer in the security or bond shall negate this requirement. This subsection 4.8 shall be applicable to all security or bond given by an employer after the effective date of this rule including additional security or bond if an employer who is already a self-insurer (but not with regard to all or part of the surplus fund) becomes self-insured for all or the remaining part of the surplus fund. All security and bonds given prior to the effective date of this rule shall be construed in keeping with the law in effect prior to the effective date of this rule for purposes of this subsection.

4.9. The applying employer shall post security or a bond in an amount sufficient to meet all of its obligations, as specified in subsection 4.2.a of this rule, to its employees and their dependents during the first year of its achieving the status of self-insured with respect to the compensation fund or to the pertinent portion of the surplus fund 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 an additional or supplemental bond or ~~additional~~ security to meet ~~that~~ these obligations. Such additional or supplemental security or bond shall meet the requirements of subsections 4.7 and 4.8 of this rule. Failure on the part of the employer to so increase its bond or security shall result in the forfeiture by the employer of its rights to remain self-insured for any and all purposes under the Act and its self-insured status will be terminated. A determination of a requirement to post an additional or supplemental bond or ~~additional~~ security shall be made in accordance with the other provisions of this section 4 of this rule.

4.10. At the time of filing its application, the employer shall pay to the commissioner a sufficient sum of money (at the time of the adoption of this rule, $2500.00) to pay for the commissioner's actuary and staff to conduct a review of the employer's account with the commissioner in order to make the determination under subsection 4.6 of this rule, to determine the proper amount of the security or bond to be given by the employer, and to ~~make the determination under~~ determine the amount of the employer's liability to the commissioner for the future costs of benefits to its injured employees as required by subsection 4.12 of this rule. The employer may request that any or all of such determinations be made prior to the time of the filing of its application, but such employer shall first pay the sum described above. In either event, the sum shall not be refundable to the employer. The commissioner shall increase or decrease the sum of money required by this subsection as the commissioner's expenses and costs change.

4.11. The amount of the security or bond required by the commissioner in order for the employer to become a self-insurer for all or part of the compensation fund or all or part of the surplus fund shall be the sum actuarially determined by the commissioner'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. Until and unless the employer gives the required security prior to July 1 of the application year, the employer shall not attain self-insured status.

4.12. As part of its application for self-insured status, the employer ~~shall be deemed to have agreed~~ agrees to pay to the commissioner a sufficient sum of money to cover the actuarially determined amount of its liability for the future costs of awards that are made by the commissioner following the effective date of its attaining self-insured status in respect to an injury or death which may have occurred prior to that effective date. Prior to the effective date of the employer attaining self-insured status, this amount shall either be paid in full or the employer shall enter into an agreement with the commissioner to make such payment over a period of time not to exceed three (3) years. The agreement shall provide for the payment of interest on the principal which shall be calculated as provided for in West Virginia Code, §23-2-13, except that the rate of interest after being so determined shall not change during the life of the agreement; however, interest shall be compounded as specified in the Act.

4.13. Subsection 4.12 of this rule is not ~~be~~ applicable to those employers who are self-insurers ~~at~~ on the effective date of this rule. However, for those employers the requirement of former section 4.2(b), 85 W.Va. C.S.R. 1 (1986), or the requirements of subsections 5.7 and 5.8 of the emergency predecessors to this rule, 85 W.Va. C.S.R. 8 [sic] and 85 W.Va. C.S.R. 9, shall continue and those employers shall remain liable for all awards made after the effective date of their self-insured status in respect to claims for an injury or death which may have occurred prior to that date. But, if such employers seek to expand their self-insurance status to other parts of the compensation fund (including other parts of the surplus fund), then such employer shall be subject to this subsection 4.13 in regards to the liability arising from the newly self-insured portion of the compensation fund.

4.14. Upon filing an application for self-insured status, an employer ~~shall be deemed to have acknowledged~~ acknowledges its obligation to continue to make all other payments and all reports required by the Act or by the rules adopted by the commissioner which are applicable to self-insured employers. One such obligation requires each self-insured employer on or before the last day of the first month of each quarter, for the

preceding quarter, to file with the commissioner a sworn statement of the total earnings of all of its employees subject to the Act for such preceding quarter, and to pay into the compensation fund a sum sufficient to pay its proper proportion of the expenses of the administration of the Act and a sum sufficient to pay its proper portion of the expenses for claims for those employers who are delinquent in the payment of premiums, and a sum sufficient to pay its fair portion of the expenses of the disabled workers' relief fund, as may be determined by the commissioner.

4.15. If an employer applies for self-insured status with regard to the compensation fund but not including the surplus fund, then upon the approval of such application the employer shall attain the status of self-insurer for the compensation fund but not including the surplus fund as to which it shall remain a subscriber. In such a situation, the employer shall pay into the surplus fund upon the same basis and in the same percentages as funds are set aside for the maintenance of the surplus fund out of payments made by premium-paying subscribers, such payments to be made at the same time as is provided for with respect to payment of its proportion of expense of administration.

4.16. If an employer applies for self-insured status with regard to the compensation fund including all or part of the surplus fund, then subsection 4.15 of this rule shall be applicable to those portions of the surplus fund to which the employer remains a subscriber.

4.17. An employer wishing to elect to become a self-insured employer with respect to all or part of the compensation fund (including an employer who is already a self-insured employer for part of the compensation fund) shall be granted permission to become a self-insurer only as of the first day of July following the commissioner's approval of its application. In addition, the application asking for such permission must be received no later than December 31 of the year preceding said first day of July before the commissioner may grant his or her approval of the application. For example, in order to become a self-insured employer with respect to all or part of the compensation fund or in order to become a self-insurer to all or part of the surplus fund on July 1, 1991, the application must be received by the commissioner on or before December 31, 1990. This requirement applies to all employers who are initially electing to become a self-insurer and to employers who are already self-insured with respect to to part of the compensation fund, but who now wish to become self-insured with respect to all or part of the surplus fund; except that, an employer new to the State shall be permitted to file an application for self-insured status at any time during its first two years of operations.

4.18. By filing an application for self-insured status, the employer ~~is deemed to have agreed~~ agrees to the provisions of this rule for maintaining its status as a self-insurer, for electing to relinquish its self-insured status, in whole or in part, and for the termination of its doing business in the state or otherwise closing its account with the commissioner.

4.19. Any employer subject to the Act who has elected to carry its own risk and who has complied with the requirements of the Act and of this rule shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after such election and during the period that it is allowed by the commissioner to carry its own risk.

§85-9-5. Conditions For Maintaining Self-Insured Status.

5.1. Employers permitted by the commissioner to become self-insurers must comply with the Act, the various rules promulgated by the commissioner, and the orders of the commissioner. If at any time, an employer fails to comply or becomes in default with regard to the obligations of a self-insured employer or the requirements of the Act, of this rule of any other pertinent rule, or any order of the commissioner, such failure or default, ~~shall be~~ is a sufficient basis for the commissioner's exercise of discretion to issue a decision which suspends or terminates the employer's status as a self-insurer. See, for example, the legislative rule titled "Hearing and Review Process Regarding The Performance Of Self-Insured Employers," 85 W.Va. C.S.R. 5 (May 23, 1985).

5.2. 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 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 issue a decision which permits an employer to correct within ninety (90) days any deficiency in lieu of revoking that employer's self-insured status. Unless such a correction decision is issued, the commissioner shall issue a decision which terminates the employer's self-insured status if it fails to satisfy the aforesaid requirements.

5.3. A self-insured employer with respect to all or part of the compensation fund shall be responsible for the direct payment of all pecuniary compensation due and owing under the Act to the employee or the employee's dependents and shall also be responsible for reimbursing the commissioner for all medical attention, funeral expenses, or other expenses paid by the commissioner on behalf of employees and their dependents. Pecuniary compensation payable by the employer and

reimbursements from the employer shall be paid in the time periods specified in the Act, or in the various rules promulgated by the commissioner, or in accordance with the orders of the commissioner, or, in the absence of any of the above, in a prompt and timely fashion. The employer's experience in so meeting its obligations shall be given consideration by the commissioner in determining whether to permit the employer to remain a self-insurer.

5.4. On at least an annual basis, but sooner if required by the commissioner, the employer shall file such reports as the commissioner may require in the form required by the commissioner concerning the number and type of claims made, the amount of benefits paid, and the timeliness of payments, all on an individual and aggregate basis.

5.5. On an annual basis or sooner as an individual case may require, the commissioner shall review the sufficiency and the commissioner's actuary shall review the amount of the bonds or securities provided by each self-insuring employer for its coverages with respect to all or part of the compensation fund. In the event that the commissioner then concludes that the securities or bonds are not adequate or sufficient for the purposes intended, the commissioner shall order the employer to increase or add to its securities or bonds by the amount needed to reach the adequate and sufficient level. The commissioner shall provide a reasonable amount of time for the employer to obtain such increased or added security or bond; ~~as is deemed just in each individual case;~~ however, such period shall not exceed ninety (90) days from the date of the commissioner's order. Such increased or added security or bond shall be subject to all of the conditions of section 4 of this rule pertaining to security and bonds. Failure by the employer to furnish increased or additional bond in the required time shall result in the employer's immediate termination as a self-insurer. Upon such a termination, the employer shall be subject to the various provisions of section 6 of this rule concerning termination of self-insured status.

5.6. 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 for purposes of future injuries or deaths among the employer's employees. The determination of the amount of such reduction shall be within the discretion of the commissioner and shall be made in consideration of the factors outlined in section 4 of this rule. The commissioner shall obtain his or her actuary's opinion on the petition and

shall rule upon each such petition within ninety (90) days of its receipt by the commissioner.

5.7. Self-insured employers may pay compensation benefits prior to receipt of the commissioner's pay order if, and only if:

a. The commissioner receives notice in writing from the employer within seven (7) days from the date of issuance of the first payment of benefits; ~~and~~

b. Such notice is accompanied by a properly completed form or forms as designated by the commissioner unless such form or forms was submitted prior to the date of submission of the notice; and

c. Such notice is accompanied by a properly completed physician's report or a statement that a blank copy of the physician's report form has been sent by mail to the employee's treating physician with a request to file such form with the commissioner within seven (7) days from the date of issuance of the first payment unless such a report was submitted prior to the date of submission of the notice.

~~5.9.~~ 5.8. Every employer granted self-insured status must continue to meet all of the requirements for becoming self-insured under the Act, of this rule, and of any other pertinent rule promulgated by the commissioner in order to maintain its status as a self-insured employer. If, for example, the employer at any time ceases to meet the qualifications of subsection 4.2 of this rule, then the commissioner may exercise his or her discretion to revoke the employer's self-insured status or, alternately, allow the employer sufficient time (not to exceed ninety (90) days) to rectify its failure. In order to ascertain if the employer does continue to meet all of the requirements for becoming self-insured, the commissioner may conduct an audit of all books, records, papers, and documents in the possession of the employer or under its control in order to verify the information provided by the employer or ~~as will~~ to aid the commissioner in making the required findings and conclusions.

5.9. In the event that security or bond previously given by the employer ~~is unable to continue meeting~~ no longer meets the obligations imposed by section 4 of this rule, the self-insured employer shall substitute adequate and sufficient security or bond, under the terms imposed by section 4 of this rule, for all time periods originally intended to be covered by the ~~failed~~ inadequate or insufficient security or bond. ~~Such failed~~ An inadequate or failed security or bond ~~shall include,~~ includes, but is not ~~be~~ 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. Whenever a

substitution of security or bond is required, the employer shall be permitted a reasonable amount of time (not to exceed ninety (90) days) in which to obtain and file appropriate substitute security or bonds. Failure to meet this obligation shall cause the employer's self-insured status to terminate.

§85-9-6. Terminating Self-Insured Status.

6.1. In the event that a self-insured employer wishes to continue doing business in the state but wishes to terminate, in whole or in part, its self-insured status with regard to all or part of the compensation fund, the employer may do so only after obtaining the agreement of the commissioner. The agreement with the commissioner shall be on such terms as are required by this rule and upon such additional terms as the commissioner finds to be reasonable under the circumstances in order to maintain the solvency of the compensation fund and in carrying out the commissioner's fiduciary duties to the compensation fund. The provisions of this section 6 are applicable to any employer wishing to terminate all or part of its self-insured status regardless of whether the employer became a self-insured employer before or after the effective date of this rule.

6.2. As part of the agreement with the commissioner, the employer shall be required to pay to the commissioner a sufficient sum of money to cover the actuarially determined amount of its liability for the future costs of awards made during its period of self-insured status and of awards that are made by the commissioner following the effective date of the termination of its self-insured status ~~in~~ with respect to an injury or death which may have occurred prior to that effective date. This amount shall either be paid in full prior to the effective date of the employer's termination of its self-insured status or by the employer entering into an agreement with the commissioner over a period of time not to exceed three (3) years to make such payment ~~over a period of time not to exceed three (3) years~~. The agreement shall provide for the payment of interest on the principal which shall be calculated as provided for in West Virginia Code, §23-2-13, except that the rate of interest after being so determined shall not change during the life of the agreement; however, interest shall be compounded as specified in the Act.

6.3. Upon making the payment or successfully completing the agreement required by subsection 6.2 of this rule, the employer shall be relieved of all future responsibility for the awards covered by the buy-out provided for by subsection 6.2. However, until the final payment pursuant to an agreement, the commissioner shall assume all such responsibility for so long as the employer abides by the agreement. In the event that the employer fails to abide by the agreement, the employer's obligation to make the required payments to the employee or the employee's dependents and to reimburse the commissioner shall

resume. Further, the commissioner shall elect whether to apportion the employer's liability based upon the amount actually paid to the commissioner as opposed to the amount remaining to be paid under the agreement or, as an alternative, the commissioner may find that the employer is in default of a payment for purposes of West Virginia Code, §23-2-5a.

6.4. If an employer's status as a self-insurer is terminated by the commissioner due to the failure of the employer to abide by and fulfill its obligations, such employer shall (unless a stay is obtained pending the exhaustion of administrative appeals including possible judicial appeals) make payment to the compensation fund in the same fashion as if it had elected to surrender its self-insurer status as provided for by subsection 6.2 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 West Virginia Code, §23-2-5a. 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 commissioner. The sufficiency of such bond or security must be satisfactory to the commissioner and meet the requirements of section 4 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 as authorized by West Virginia Code, §23-2-5a, and the rules adopted by the commissioner thereunder.

6.5. In the event that a self-insured employer sells its assets or acquires additional assets of another business, then the appropriate provisions of section 8 of the legislative rule titled "Administration Of The Workers' Compensation Fund," 85 W.Va. C.S.R. 1 (1986), shall apply to the employers involved in the transaction.

6.6. Subscribing employers who were previously self-insured employers and who at the effective date of this rule were continuing to pay compensation and expenses for certain of its employees due to its previous status as a self-insurer may elect to buy-out their responsibility for those payments by making the payment specified by subsection 6.2 of this rule including entering into a agreement in which event the terms of subsection 6.3 shall also be applicable.

§85-9-7. Buy-outs Required By The Commissioner.

~~As regards any self-insured employer, whether the employer attained that status before or after the effective date of this rule, the commissioner may at any time and in any case that~~

~~shall require the payment of compensation or benefits by such employer in periodical payments, and the nature of the case makes it possible to compute the present value of all future payments, the~~ 7.1. The commissioner may, in his or her discretion, ~~at any time~~ compute and permit or require to be paid into the compensation fund by a self-insured employer an amount of money equal to the present value of all unpaid compensation for which liability by the employer exists, in trust. The commissioner may take this action:

a. With regard to any self-insured employer regardless of when the employer attained that status;

b. At any time; and

c. In any case that requires the payment of compensation or benefits by the employer in periodic amounts and where the nature of the case makes it possible to compute the present value of all future payments.

7.2. In an appropriate case, the commissioner may permit an employer to enter into an agreement to make the required payment over a period of time not to exceed three (3) years. The agreement shall provide for the payment of interest on the principal which shall be calculated as provided for in West Virginia Code, §23-2-13, except that the rate of interest after being so determined shall not change during the life of the agreement; however, interest shall be compounded as specified in the Act. During the life of such an agreement, the commissioner shall pay any pertinent claims from the compensation fund. Upon the employer making such payment or upon the employer successfully achieving the completion of an agreement, the employer shall be discharged from any further liability upon such award, and payment of the same shall be assumed by the commissioner.

7.3. Failure by the employer to complete an agreement under which the commissioner has been making payments, in lieu of the employer, shall cause the employer to be in default of a payment due the commissioner for purposes of the West Virginia Code, §23-2-5a, and shall further cause the employer to forfeit its self-insured application and status, if any, and shall further cause the employer's security or bond to be responsible for any obligations of the employer which results from the failure within the ambit of the security or bond.

§85-9-8. Protests By Employers; Administrative Hearings.

8.1. An employer may protest any order or decision of the commissioner made under the provisions of West Virginia Code, §23-2-9, or of this rule. In order to preserve its right to protest, the employer must file a written petition stating the order or decision protested and the exact nature of the issue in

controversy. Such written petition must be received by the commissioner within thirty (30) days of the date of the order or decision protested. This period may not be extended or waived.

8.2. Within fifteen (15) days of the commissioner's receipt of the written protest, the commissioner shall issue a notice of an administrative hearing upon the protest. The hearing shall be held within thirty (30) days after the receipt by the commissioner of the written protest unless such hearing ~~be~~ is postponed by agreement of the parties or by the commissioner for good cause. Filing of the written protest ~~shall~~ does not stay the order or decision protested unless the commissioner so orders. The commissioner may grant a stay provided that security or a bond is provided by the employer in a sufficient and adequate amount to protect the interests of the compensation fund in keeping with the fiduciary obligations of the commissioner.

8.3. All administrative hearings conducted pursuant to this rule will be held in accordance with the provisions of this section ~~8 of this rule.~~ In any particular case, any special conditions which are set forth in the Act or in other rules promulgated by the commissioner and which are applicable to that case will be adhered to during administrative hearings in lieu of any contrary provision in this rule.

8.4. 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. The notice shall be given either by personal delivery thereof to the person or to the entity to be notified or by depositing such notice in the certified United States mail, postage prepaid, return receipt requested, in an envelope addressed to such person or other entity at the last known address of such person or other entity. Proof of the giving of notice ~~in either such manner~~ may be made by the affidavit of any officer or assistant or 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 such notice was given and specifying the time, place and manner of the giving thereof. If certified mail is used, then a copy of the return receipt shall be attached to the proof of notice.

8.5. Notice of the hearing and service of any document or order shall be upon the parties of record except that any party who is represented by an attorney shall be deemed to have designated that attorney as the proper recipient of all such notices, documents, or orders and service upon that attorney will be the equivalent for all purposes as service upon the party. Notice shall be complete if the written notice is personally tendered to the intended recipient and is either accepted or refused by that recipient. Similarly, notice shall be 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.

8.6. ~~In any instance where~~ The time period for any form of notice, including one arising under subsection 8.4 of this rule or one contained in any order or document, ~~the time period~~ will begin to elapse with 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.

8.7. The subsection 8.4 notice shall contain the date, time, and place of the hearing and a short and plain statement of the matters asserted. If the commissioner is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application by a party, a more definitive and detailed statement shall be furnished.

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

8.9. At the hearing, an opportunity shall be afforded all parties 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 such interested person, who is not a party, shall not, however, be permitted to submit argument or to cross-examine other witnesses. Argument may be restricted 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 shall 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 shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence and such transcription shall be accomplished with all dispatch.

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

8.11. Except to the extent required by statute or by this rule, all hearings under this rule ~~will~~ shall be conducted in accordance with the then current versions 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.

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

8.13. During a hearing, irrelevant, immaterial, or unduly repetitious evidence shall be excluded. 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, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The hearing officer shall be 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 provided that the hearing officer may elect to require that the excluded testimony be submitted in written form following the hearing.

8.14. 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 no other factual information or evidence shall be considered 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 ~~shall be~~ are equal to the original in evidence.

8.15. Every party as well as the commissioner ~~shall~~ have the right of cross-examination of witnesses who testify, and ~~shall~~ have the right to submit rebuttal evidence.

8.16. 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.

8.17. The hearing officer may take notice of judicially cognizable facts. All parties shall be notified 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.

8.18. Upon motion in writing served by any party or by the Fund as notice may be served pursuant to subsection 3.2 of this rule and therein assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the hearing officer shall settle all differences arising as to whether such 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.

8.19. The commissioner, the executive secretary, inspectors, 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 Fund shall be 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.

8.20. Every subpoena or subpoena duces tecum shall be served at least five (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. But a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service 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.

8.21. Any person who serves any such subpoena or subpoena duces tecum ~~shall be~~ 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 ~~shall be~~ are the same as for witnesses before the circuit courts of this State. All such fees shall be paid by the Fund if the subpoena or subpoena duces tecum was issued, without the request of an interested party, at the instance of the Fund. All such 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 such subpoena or subpoena duces tecum be issued.

8.22. 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 such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such 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 such court.

8.23. 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 such circuit court or a refusal to testify therein.

8.24. The issuance of a subpoena duces tecum ~~will~~ 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 ~~will~~ shall state on their face the name of the party who requested it.

8.25. Discovery shall be engaged 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.

8.26. 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.

8.27. 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.

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

8.29. 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 such 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.

8.30. Thereafter, the hearing officer will prepare a report and recommendation which shall contain proposed findings of fact and conclusions of law as suggested by the hearing officer for the commissioner's approval. 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 others' objections and comments. The hearing ~~shall be deemed to be~~ is ended upon the commissioner's receipt of the objections and comments from all of the parties. Within thirty (30) days of the receipt of the parties objections and comments, the commissioner shall decide whether to accept the 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 facts against the record and to disagree therewith 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 the commissioner 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 the commissioner 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.

8.31. 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 the commissioner is of the opinion that the facts have not been adequately developed.

8.32. 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.

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

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

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

§85-9-10. Severability

If any provision of this rule or the application thereof to any entity or circumstance ~~shall be~~ is 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.

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

SERIES 9
SELF-INSURED EMPLOYERS