

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

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2009 JUN 26 PM 2:35

Form #1

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Offices of the Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY WV Code §§23-2C-5(c)(2);

23-2C-22; 33-2-10(b); and 33-2-20(a)

AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 9

TITLE OF RULE BEING AMENDED: Workers' Compensation Uninsured Employers' Fund

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

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: Thursday, July 30, 2009 TIME: 3:00 PM

LOCATION OF PUBLIC HEARING: Offices of the WV Insurance Commissioner

1124 Smith Street - 4th Floor - Room 400

Charleston, WV 25301

COMMENTS LIMITED TO: ORAL ☐ WRITTEN ☐ BOTH ☒

DATE WRITTEN COMMENT PERIOD ENDS: Thursday, July 30, 2009 TIME: 3:00 PM

WRITTEN COMMENTS MAY BE MAILED TO:

Ryan Sims, Associate Counsel

Offices of the Insurance Commissioner

P.O. Box 50540

Charleston, WV 25305-0540

Ryan.Sims@wvinsurance.gov

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL


Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

Insurance Commissioner (Workers'
Compensation Rules)
Exempt Legislative Rule
Title 85, Series 9

WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

TITLE 85, SERIES 9

BRIEF SUMMARY OF RULE

This amended rule sets forth certain processes, procedures pertaining to the workers' compensation uninsured employers' fund ("UEF"). The original version of W. Va. Code St. R. §85-9-1 et seq. ("Rule 9", "Workers' Compensation Uninsured Employers' Fund") was adopted by the Industrial Council with an effective date of December 17, 2006.

The current amendment is for the purpose of addressing changes to West Virginia Code §§23-2A-1 and 23-2C-17 in Senate Bill 537 (passed April 11, 2009; effective July 10, 2009), pertaining to subrogation and the decision appeals process.

Regarding subrogation, the Legislature amended 23-2A-1 to clarify that the Commission may pursue subrogation against third-party lawsuits brought by the claimant for all amounts paid to date or paid in the future. (Previously, the W. Va. Code was ambiguous on this issue, and Rule 9 only permitted subrogation on amounts paid to date). Also, the Code was unclear as to whether the claimant had to first bring a suit against the third-party or if the UEF could bring suit separately, but the amendments to 23-2A-1 clarified that the claimant must first bring suit. Changes were made to section 5 of the rule to reflect these changes in the law.

Regarding the appeals process, previously, the Legislature amended 23-2C-8 to give the Workers' Compensation Office of Judges ("OOJ") jurisdiction to hear all decisions regarding the UEF. (Previously, the OOJ had no jurisdiction to hear protests regarding the WV Offices of the Insurance Commissioner's initial decision to accept or not accept a claim into the UEF). Changes were made to section 4 of the rule to reflect these changes in the law.

Insurance Commissioner (Workers'
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WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

TITLE 85, SERIES 9

STATEMENT OF CIRCUMSTANCES

Pursuant to Senate Bill 1004, First Special Session, 2005, workers' compensation in West Virginia was changed from a state run, monopolistic system to a private market system. This bill also transferred all regulatory authority for workers' compensation insurance to the Insurance Commissioner.

To establish procedures and processes applicable to the administration of the Workers' Compensation Uninsured Employers' Fund, the Industrial Council promulgated W. Va. Code St. R. §85-9-1 et seq. ("Rule 9", "Claims Management and Administration"), with an effective date of December 17, 2006. As a result of a change in the law in Senate Bill 537 (passed April 8, 2009, effective July 10, 2009), there is a need for an amendment in the Rule to address subrogation and the decision appeals process. This amendment is discussed more specifically in the "Brief Summary" for this rule.

This amended rule is being promulgated for the purpose of implementing the above referenced changes necessary to Title 85, Series 9 of the West Virginia Code of State Rules.

APPENDIX B
FISCAL NOTE FOR PROPOSED RULES

Rule Title: Workers' Compensation Uninsured Employers' Fund (Title 85, Series 9)
Type of Rule: X Exempt Legislative Interpretive Procedural
Agency: Insurance Commission
Address: Post Office Box 50540
1124 Smith Street, Greenbrooke Building
Charleston, West Virginia 25305-0540
Phone Number: (304) 558-0401 Email: Ryan.Sims@wvinsurance.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure
will have on costs and revenues of state government.

The rule will have no additional fiscal impact upon state government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of
Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	N/A	N/A	N/A
Personal Services	N/A	N/A	N/A
Current Expenses	N/A	N/A	N/A
Repairs & Alterations	N/A	N/A	N/A
Assets	N/A	N/A	N/A
Equipment	N/A	N/A	N/A
Other	N/A	N/A	N/A
2. Estimated Total Revenues	N/A	N/A	N/A

Rule Title: Workers' Compensation Uninsured Employers' Fund (Title 85, Series 9)

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

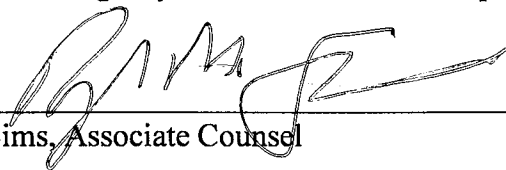
N/A

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: 6-26-09

Signature of Agency Head or Authorized Representative



Ryan Sims, Associate Counsel

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 9
WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

Section

85-9-1. General.

~~85-9-2. Purpose.~~

85-9-~~32~~. Definitions.

85-9-~~43~~. Application for Benefits from the ~~Fund~~ UEF.

85-9-~~54~~. ~~Irrevocable Assignment of Subrogation Rights.~~

85-9-~~65~~. Employer Liability.

85-9-~~76~~. Methods for Determining and Collecting Employer Liabilities Owed to the ~~Fund~~ UEF.

85-9-~~87~~. Methods for Determining Assessments for the ~~Fund~~ UEF.

~~85-9-9. Severability.~~

FILED

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

2009 JUN 26 PM 2: 36

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 9
WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

§85-9-1. General.

1.1. Scope. -- These rules shall govern the administration of the Workers' Compensation Uninsured Employers' Fund pursuant to W. Va. Code §§~~23-2C-2(e); 23-2C-7(a); and 23-2C-8.~~

1.2. Authority. -- W. Va. Code §§23-2C-5(c)(2); 23-2C-22; 33-2-10(b); and 33-2-20(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), rules proposed by the Insurance Commissioner and adopted by the Industrial Council and the Insurance Commissioner as related to workers' compensation under chapter twenty-three of the West Virginia Code are not subject to legislative approval as would otherwise be required under W. Va. Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed W. Va. Code §§29A-3-9 through 29A-3-16, inclusive.

1.3. Filing Date. -- ~~November 17, 2006.~~

1.4. Effective Date. -- ~~December 17, 2006.~~

~~§85-9-2. Purpose.~~

~~The purpose of this rule is to establish a procedure and process to govern the administration of the Workers' Compensation Uninsured Employers' Fund pursuant to W. Va. Code §§23-2C-2(e); 23-2C-7(a); and 23-2C-8.~~

~~§85-9-32. Definitions.~~

As used in this ~~exempt legislative rule~~, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

~~32.1. "Commissioner" means the Insurance Commissioner of West Virginia as provided in W. Va. Code §23-2-1, or any designated third-party administrator of the Insurance Commissioner or the Commissioner's designated third-party administrator.~~

~~32.2. "Industrial Council" means the Industrial Council created pursuant to W. Va. Code §23-2C-5.~~

~~32.3. "Private carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.~~

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32.4. "~~Fund~~ UEF" is the Workers' Compensation Uninsured Employers' Fund, as defined and established in W. Va. Code §§23-2C-2(o); 23-2C-7(a); and 23-2C-8.

32.5 "Workers' compensation coverage," as the term is used in this rule, means mandatory workers' compensation coverage pursuant to W. Va. Code §23-2C-1 *et seq.*

§85-9-43. Application for Benefits from the ~~Fund~~ UEF.

43.1. If an individual believes that he or she may be entitled to benefits under the ~~Fund~~ UEF, then he or she shall complete an application for benefits from the ~~Fund~~ UEF on a form created by the Commissioner. The Commissioner reserves the right to change the ~~Fund~~ UEF application form from time to time as deemed necessary. Completion of the application for benefits is an absolute prerequisite for any entitlement to benefits from the ~~Fund~~ UEF.

43.2. Upon receipt of an application for benefits, the Commissioner shall send a letter to the employer named in the application which notifies the employer that one of its employees has made a claim against the ~~Fund~~ UEF.

43.3. ~~Within five (5) business days of receiving an application for benefits, the~~ The Commissioner shall determine whether: (1) the claimant's employer named in the application was required to carry workers' compensation coverage on the date of the injury or last exposure; and (2) if the claimant's employer named in the application was required to carry workers' compensation coverage on the date of the injury or last exposure, whether ~~the employer named in the application was carrying applicable workers' compensation coverage~~ existed on the date of injury or date of last exposure. ~~If the Commissioner needs additional time to make this determination, the Commissioner shall be granted up to an additional thirty (30) calendar days to make the determination. The Commissioner shall also send a letter to the claimant, copied to the employer, informing them that the determination cannot be made within five (5) business days, the reason(s) why it cannot be made and that the decision will be made within the next thirty (30) calendar days.~~

3.3.a. If the Commissioner determines that: (1) ~~the employer named in the application was carrying applicable workers' compensation coverage~~ existed on the date of injury or date of last exposure; or (2) the employer named in the application was not required to carry workers' compensation coverage on the date of injury or last exposure, then the Commissioner shall send the claimant a letter, copied to the employer, informing the claimant of this determination, and that coverage for the claim through the Fund is therefore denied is not eligible to receive benefits from the UEF. Additionally, in the case that the Commissioner determines that ~~the employer named in the application was carrying applicable workers' compensation coverage~~ existed on the date of injury or date of last exposure, the letter described in this subdivision shall also be copied to the insurance carrier which provided such coverage.

3.3.b. If the Commissioner determines that: (1) the employer named in the application

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was required to carry workers' compensation coverage on the date of injury or date of last exposure; and (2) the employer named in the application was not carrying no applicable workers' compensation coverage existed on the date of injury or date of last exposure, then the Commissioner shall send the claimant a letter, copied to the employer, informing the claimant of this determination, and that the claim will be accepted into the Fund: ~~Provided, That the letter accepting the claim is not a compensability ruling, but rather is only an initial determination that the claim is chargeable to the Fund, if in fact the claimant is ultimately found by the claims adjuster to be otherwise entitled to benefits under the law. The Commissioner shall then administer the claim or forward the claim to its designated third party administrator for further administration of the claim consistent with the provisions of chapter twenty three of the West Virginia Code and the rules promulgated thereunder~~ is eligible to receive benefits from the UEF. If the claim is deemed eligible to receive benefits from the UEF, the Commissioner shall begin to administer the claim consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

~~4.3.4~~ If, after rendering a determination as described in subdivisions a and b, subsection ~~4.3~~ 3.3 of this section, the Commissioner receives evidence to indicate that the determination was erroneous, the Commissioner reserves the right to enter a corrective determination remedying the previous erroneous determination.

~~4.5~~ Any decision rendered by the Commissioner under subdivision a or b of subsection ~~4.3~~ or subsection ~~4.4~~ of this section may be contested by an aggrieved party by filing a protest and request for hearing within thirty (30) calendar days of receiving the determination and in a manner otherwise consistent with the protest instructions contained in the decision. The Insurance Commissioner will then schedule a hearing on the matter before a hearing examiner to take place within fifteen (15) days of the receipt of the protest: ~~Provided, That the only issues that may be argued by any party contesting any such determination are: (1) whether the employer named in the application was required to carry workers' compensation coverage on the date of injury or date of last exposure; and (2) whether the employer named in the application was in fact carrying workers' compensation coverage on the date of injury or date of last exposure. Hearings under this subdivision shall otherwise proceed pursuant to the provisions of W. Va. Code St. R. § 85-7-4 through 85-7-13. All appeals from the final order or decision of the commissioner following the hearing shall be taken pursuant to W. Va. Code, § 29A-5-4.~~

3.5. Decisions made by the Commissioner as described in this section are protestable to the Workers' Compensation Office of Judges pursuant to the provisions of W. Va. Code §23-5-1 et seq.

~~§85-9-54. Irrevocable Assignment of Subrogation Rights.~~

~~54.1. Pursuant to W. Va. Code §23-2C-8(b)(1)(C), as a condition of receiving benefits from the Fund, a claimant under the Fund irrevocably assigns his or her rights to recover money from a collateral source for the occurrence or exposure which resulted in the claimants' injury, including, but not limited to: (a) any benefits from other existing insurance policies, such as a~~

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~~later discovered workers' compensation policy providing coverage, or a disability insurance policy; and (b) any funds resulting from a settlement or jury verdict stemming from a cause of action under statutory or common law against a third party who has liability for the occurrence or exposure which resulted in the claimant's occupational injury or disease §23-2A-1, the Commissioner, on behalf of the UEF, has a right to statutory subrogation against any claim made by a UEF claimant, his or her dependents or personal representatives, against a third-party for the injury or exposure from which the claim arose: Provided, That this irrevocable assignment of rights of recovery statutory subrogation is only to the extent of the actual monetary benefits received by paid or to be paid to the claimant from the fund UEF. Provided further, That nothing in this subsection shall be construed to prevent a claimant from pursuing a claim on his or her own against a collateral source for the occurrence or exposure. The subrogation language contained in the application for benefits from the Fund, which is signed by the claimant, is deemed to constitute the irrevocable assignment from the claimant to the Commissioner of a right to be subrogated to the rights of the claimant as contemplated by this subsection and W. Va. Code §23-2C-8(b)(1)(C).~~

~~54.2. Pursuant to the irrevocable assignment of subrogation rights as contemplated in subsection 5.1 of this section and W. Va. Code §23-2C-8(b)(1)(C), the Commissioner shall have discretion to pursue subrogation directly from any collateral source with liability, by contacting the collateral source and demanding the funds for which the source is liable, and bringing a civil action in the name of the claimant against the liable source if necessary; or seeking subrogation from the claimant of any funds the claimant has successfully recovered from any collateral source; or any combination thereof: *Provided*, That the Commissioner shall only be permitted to seek collateral source funding as described in this section up to the amount of benefits paid from the Fund, including all medical and indemnity benefits. Pursuant to W. Va. Code §23-2A-1(d), it is the duty of the claimant, his or her representatives or dependents, or any attorney representing the claimant or his or her dependents or representatives, to provide the Commissioner reasonable notice of a claim being made against a third-party, as well as reasonable notice prior to the disbursement of any recovery. Failure to provide such notice shall waive an attorney's right to be paid reasonable attorney fees out of the subrogation amount and shall further give rise to a cause of action by the Commissioner on behalf of the UEF against the claimant, his or her representatives or dependents or the attorney who failed to provide such reasonable notice.~~

§85-9-65. Employer Liability.

~~65.1. Pursuant to W. Va. Code §23-2C-8, an employer of claimant(s) a claimant who receive receives benefits from the Fund are UEF is liable to the Fund UEF for all expenditures from the Fund UEF on behalf of their its injured employee(s) employee, including, but not limited to:~~

~~5.1.a. All benefits, including all medical and indemnity payments, made from the Fund UEF ;~~

~~5.1.b. All claims administration costs related to the administration of claim(s) against the Fund UEF;~~

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5.1.c. All attorney fees related to defense of claim(s) made against the Fund UEF; and

5.1.d. Interest on the above expenditures, as calculated under W. Va. Code §~~23-2C-8(b)(8)~~ 23-2-13.

~~65.2.~~ An employer shall remain on the ~~Commission~~ Workers' Compensation Default List or Private Carrier Default List, whichever is applicable, as defined in 85CSR11, until it pays all of its liability to the Fund UEF, enters into a full and final settlement with the Commissioner for its liability to the Fund UEF or enters into a repayment agreement with the Commissioner for its liability to the Fund UEF and remains in good standing. As such, the The employer will be subject to all of the sanctions associated with being on the Default List, including, but not limited to:

~~a. Not being permitted to obtain or renew mandatory workers' compensation coverage;~~

~~b~~ 5.2.a. Having a posting placed on the employer's front door informing its employees that the employer is uninsured and therefore may be sued by its employees for work related injuries;

~~e~~ 5.2.b. A penalty of up to \$10,000, pursuant to W. Va. Code §~~23-2C-8(b)(10)~~; and

~~d~~ 5.2.c. Being subject to an action in the Circuit Court of Kanawha County to enjoin the employer from continuing business operations.

~~65.3.~~ If an employer incurs liability to the Fund UEF after being removed from the ~~Commission Default List or Private Carrier Default List, whichever is applicable~~, and the employer fails to remit payment for such liability to the Fund UEF on a timely basis, as described in subsection ~~7-1~~ 6.1 of this rule, the employer will be placed on the Default List until the liability is fully paid or otherwise resolved pursuant to section ~~7~~ 6 of this rule.

§~~85-9-76~~. Methods for Determining and Collecting Employer Liabilities Owed to the Fund UEF.

The Commissioner shall have discretion, ~~on a case-by-case basis, based on what is considered to be in the best interests of the Fund~~, to utilize one or more of the following methods to determine and collect amounts owed to the Fund UEF:

~~76.1.~~ As benefit payments are made from the Fund UEF, issue pay orders to ~~a liable employers~~ employer ordering them to reimburse the Fund UEF, within a specific and reasonable amount of time, as selected by the Commissioner, for the amounts described in subsection ~~6-1~~ 5.1 of this rule;

~~76.2.~~ Enter into repayment agreements with an employers to reimburse the Fund UEF for the

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amounts described in subsection ~~6.1~~ 5.1 of this rule, and then enter pay orders to the employers as described in subsection ~~7.1~~ 6.1 of this section;

~~76.3.~~ Using generally accepted accounting and actuarial principles, reduce the estimated amount of a claim or claim(s) against the ~~Fund~~ UEF, including all the amounts described in subsection 6.1 of this rule, to a present value reserve for the claim, and then deem the responsible employer to be liable for this amount. The Commissioner may then pursue this amount as a judgment against the employer, including filing a civil action in Circuit Court against the employer, seeking a judgment lien against the employer, and all other accepted methods of collection as set forth in article two, chapter twenty-three of the West Virginia Code and 85CSR11.

~~76.4.~~ The Commissioner shall have discretion, if it is found to be in the best interests of the ~~Fund~~, to enter into a full and final settlement with an employer for its liability to the ~~Fund~~.
~~Further, if it is found to be in the best interests of the Fund, the Commissioner shall have discretion to~~ UEF or waive amounts owed to the ~~Fund~~ UEF as part of a repayment agreement or a full and final settlement with the employer.

§85-9-87. Methods for Determining Assessments for the Fund UEF.

87.1. If at any time the Commissioner determines, based on generally accepted accounting and actuarial principles, despite the collection of, or projected collection of, amounts owed to the ~~Fund~~ UEF, that: (1) the ~~Fund~~ UEF has incurred a deficit balance; or (2) it appears imminent that it will incur a deficit balance, then, in order to maintain the solvency of the ~~Fund~~ UEF, the Commissioner may, pursuant to W. Va. Code §23-2C-8(a)(3), impose assessments against either private carriers, self-insured employers, or both, in the following manner:

7.1.a. Monthly or quarterly assessments against workers' compensation private carriers that reflect the relative hazard of the employments covered by the private carriers, results in an equitable distribution of costs among the private carriers and is based upon expected annual premiums to be received: Provided, this assessment may be collected by each private carrier from its policy holders in the form of a policy surcharge, and private carriers will have no liability for the amounts of this assessment which are not paid by employers defaulting on their premium payments;

7.1.b. Monthly or quarterly assessments against self-insured employers that result in an equitable distribution of costs among the self-insured employers and is based upon expected annual expenditures for claims.

87.2. Prior to imposing the assessments described in this section, the Commissioner shall provide at least sixty (60) days notice to the entities being assessed. Notice shall be provided in writing to all entities being assessed and through other means deemed appropriate by the Commissioner.

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~~§85-9-9. Severability.~~

~~If any provision of these rules or the application thereof to any person, party, or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.~~