WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #5

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2004 JAN 29 P 3:00

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

CITE AUTHORITY: W. Va. Code §§ 23-1-1a(j); 23-2-1d

RULE TYPE: PROCEDURAL ____ INTERPRETIVE ____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W. Va. Code § 23-1-1a(j)(3)

AMENDMENT TO AN EXISTING RULE: YES X NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: Primary Contractor Liability

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ____

TITLE OF RULE BEING PROPOSED: ____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS March 1, 2004

Authorized Signature

WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #1

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NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: Code §§ 23-1-1a(j)(3) & 23-2-1d

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: Primary Contractor Liability

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

DATE OF PUBLIC HEARING: December 17, 2003 TIME: 11:00 a.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia
**This public hearing is an extension and continuance of the previous comment period for this proposed rule.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T.J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
~~4700 MacCorkle Avenue, S.E.~~
Charleston, WV 25304
Fax # (304) 926-5372

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Randall [signature]

Authorized Signature

WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #2

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FILED

2003 OCT -6 P 4:20

SECRETARY OF STATE, VIRGINIA

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code §§ 23-1-1a & 23-2-1d

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: Primary Contractor Liability

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON November 6, 2003 AT 5:00 p.m ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

T.J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304
Fax # 304-926-5372

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

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

4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone: (304) 926-1710

October 6, 2003

The Honorable Joe Manchin III
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 10
"Primary Contractor Liability"

Dear Secretary Manchin:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission have approved the enclosed 85 C.S.R. 10 entitled, "Primary Contractor Liability," for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 85, Series 10: Primary Contractor Liability

Type of Rule: ____Legislative Exempt ___Interpretive _X_Procedural

Agency Workers' Compensation Commission

Address 4700 MacCorkle Avenue, S.E.

Charleston, WV 25304

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	Undetermined	Undetermined	Undetermined	Undetermined	Undetermined
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	Undetermined	Undetermined	Undetermined	Undetermined	Undetermined
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER Recoveries	Undetermined	Undetermined	Undetermined	Undetermined	Undetermined

2. Explanation of above estimates:

There should be no significant change in the estimated costs associated with recovering payments due and owing to the Workers' Compensation Commission (the Commission). The Commission currently uses various collection efforts to recover delinquent and defaulted amounts outstanding. Under the proposed rule, specific costs associated with collection efforts related to a primary contractor's liability resulting from a subcontractor who is not in good standing or who is in default are recoverable. Any increase in specific costs should be offset by recovery of those costs. In addition, the amounts owed the Commission for premium taxes, premium deposits, penalties, interest and administrative charges by the subcontractor are also recoverable from the primary contractor. The amount of additional recoveries resulting from implementation of the proposed rule cannot be reasonably determined or estimated.

3. Objectives of this rule:

This rule implements the provisions of W.Va. Code section 23-2-1d as amended in the 2003 extraordinary session. The rule updates a previous rule to reflect the Commission's new status and attempts to clarify questions raised regarding the prior rule which included liabilities related to the extraction of natural resources.

This rule provides for the administration of a fair and equitable system for recovery of unpaid subcontractor obligations that is consistent with the specific provisions and purposes of the applicable W.Va. Code. These obligations include amounts due to the Commission for premium taxes, premium deposits, penalties, interest, administration charges and attorney fees and costs of actions incurred by the Commission.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

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

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

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

C. Economic Impact on Citizens/Public at Large.

This rule is intended to increases the Commission's ability to collect the premiums related to a company's workers' compensation obligations. This will reduce the financial burden placed on other businesses and the citizens of West Virginia, who ultimately pay for the obligations associated with unpaid premiums.

Date: October 6, 2003

Signature of Agency Head or Authorized Representative

G. A. Burton

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 10
Primary Contractor Liability

This rule is a revision to a rule of the former Workers' Compensation Division of the Bureau of Employment Programs. The rule was last revised effective January 19, 1996.

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission was created, effective October 1, 2003, as a stand-alone agency of State government. Under that Bill, the Commission is required to revise each of its rules prior to July 1, 2006. W. Va. Code § 23-1-1d.

In addition, the provisions of W. Va. Code § 23-2-1d, as revised by Senate Bill 2013, requires the Workers' Compensation Commission to revise the current rule so that it clearly applies to the extraction of natural resources.

Senate Bill 2013 states the Legislature's intent that no primary contractor, subcontractor or sub-subcontractor escape or avoid liability for workers' compensation obligations.

The rule was revised to comply with the Legislative directive.

~~TITLE 85~~
~~BUREAU OF EMPLOYMENT PROGRAMS~~

TITLE 85

WORKERS' COMPENSATION ~~DIVISION~~COMMISSION

SERIES 10
PRIMARY CONTRACTOR LIABILITY

§85-10-1. General.

1.1. Scope. -- This rule implements the provisions of W. Va. Code, §23-2-1d, regarding the liability of a primary contractor for payments due to the workers' compensation ~~division~~commission by a subcontractor under certain circumstances. The provisions of this rule shall apply generally to all work done by contract; the person, firm, corporation or other legal ~~This rule~~entity, which lets a contract for such work shall be responsible primarily and directly for all premiums and related obligations upon the work. This rule, as amended, is applicable only to contracts that are entered into or extended on or after the effective date of this rule.

1.2. Authority. -- W. Va. Code, ~~§21A-2-6(2); §21A-3-7(b) & -7(c); §23-1-1; and §23-2-18.~~§23-1-1a; and §23-2-1d. Pursuant to W. Va. Code, ~~§21A-3-7(c),~~§23-1-1a(j)(3), rules adopted by the ~~compensation programs performance council and the commissioner~~board of managers and the commission 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. ~~Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment~~

~~programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.~~

1.3. Filing Date. -- ~~December 20, 1995.~~

1.4. Effective Date. -- ~~January 19, 1996.~~

§85-10-2. Purpose of Rule.

2.1. The purpose of this rule is to implement the provisions of W. Va. Code, §23-2-1d, which was first adopted by the legislature during the 1993 session. The section was amended and reenacted by the legislature during the 1995 session. The section was further amended and reenacted by the legislature during the 2003 extraordinary session and became effective on ~~February 10, 1995.~~July 1, 2003.

~~2.1.1. The rule which implemented the 1993 legislation became effective on January 1, 1995. This rule forgives compliance with the provisions of the earlier version of this rule effective January 1, 1995. The 1995 legislative changes necessitated revisions to that rule which are incorporated herein.~~

2.2. This rule imposes liability upon primary contractors, including owners and lessees under certain circumstances, for payments due and owing to the workers' compensation ~~division.~~commission. These payments include premium taxes, premium deposits, late reporting and payment penalties, interest, and certain other penalties. This rule provides the procedures for certain employers to follow to avoid the imposition of this liability as well as the procedures by which the workers' compensation ~~division~~commission will impose this liability. The rule also offers guidance on the substantive application of the section.

2.3. This rule does not apply to any subcontractor who obtains and maintains without termination or default appropriate workers' compensation coverage from another state or jurisdiction for its employees who are regularly employed by the employer in the other state or jurisdiction and who will be involved in this state temporarily, that is, under a ~~temporarily~~contract or project that will be completed within ninety days of its commencement by its worker or workers, in the performance of the work under the contract. The rule is only applicable to a subcontractor any of whose employees ought to be covered by workers' compensation coverage by the West Virginia workers' compensation ~~division.~~commission. West Virginia coverage is required for employees who are initially employed in West Virginia by an out-of-state employer merely temporarily to be involved in the performance of the work under the contract, regardless of the place of hire or the personal domicile of the temporary employee.

2.4 This rule is implemented in accordance with the stated intent of the Legislature that no contractor, whether a primary contractor, subcontractor or sub-subcontractor, escape or avoid liability for any workers' compensation premium, assessment or tax.

2.5. Applicability.

2.5.a. W.Va. Code §23-2-1d provides that primary contractors may become liable for the workers' compensation obligations of their subcontractors. In addition, W.Va. Code §23-2-1d provides a methodology whereby the primary contractor may avoid this liability.

2.5.b. This rule only applies to the liability imposed on the primary contractor and the avoidance of liability by the primary contractor under the provisions of W.Va. Code 23-2-1d.

2.5.c. This rule does not apply to any other theory of liability under which a primary contractor or any other legal entity or individual may become liable for the workers' compensation obligations of its subcontractors or others.

§85-10-3. Definitions.

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

3.1. ~~"Commissioner" means the commissioner of the bureau of employment programs~~"Executive Director" means the executive director of the West Virginia workers' compensation commission pursuant to W. Va. ~~Codes, §§21A-2-1, and 23-1-1, and any deputies designated pursuant to W. Va. Code, §21A-2-12 & 13.~~Code 23-1-1b.

3.2. "Contract" means an agreement of sufficient duration, oral or written, under which some service is to be performed. "Contract" shall include a deed for ownership or a lease of rights for any coal, oil, gas, other minerals or timber under which some service is to be performed. A contract for the extraction or transportation of natural resources is a provision of services. A contract for the provision of goods is not a contract affected by this rule. For example, the service to be performed may be the construction of a house, the grading and laying of a roadway, the construction of an office building or store, the destruction of a building, the repair of buildings or equipment, or other activity. The contracting for the mere sale and purchase of goods~~, such as coal,~~ is not an affected contract. However, if the contract provides for or requires for fulfillment the extraction of the coal, oil, gas, other minerals or timber, by the contractor ~~where the coal is not being sold~~, then the contract ~~could~~would be affected by this rule. ~~Conversely,~~Therefore, if the contracting party sells the coal, for example, any contracts it may enter with another employer to extract the coal or perform some other service such as equipment or premises maintenance or repair ~~would not~~ shall be a contract affected by this rule or by W. Va. Code, §23-2-1d. In all instances, the exact terms of and the actual implementation of the contract must be examined.

~~3.2.1.~~3.2.a. Contracts affected by this rule are those which are entered into or extended on or after the effective date of this rule, as amended from time to time. It does not apply to any other contracts entered into or extended prior to that date.

~~3.2.2.~~3.2.b. Contracts affected by this rule are those for work or services for a period longer than thirty (30) days or contracts for consecutive periods of work that total more than thirty (30) days.

3.3. ~~"Division"~~"Commission" means the workers' compensation ~~division within the bureau of employment programs~~commission as provided for by W. Va. Code, ~~§21A-1-4, and W. Va. Code, §23-1-1 et seq.~~§23-1-1.

3.4. "Good standing" with the ~~division~~commission means that the contractor or subcontractor has not defaulted on its obligations to make payments to the ~~division.~~commission. Being in delinquent status, as provided for in W. Va. Code, §23-2-5(b), is not equivalent to being in default and does not deprive the subcontractor of good standing. Delinquent status does not give rise to the liability provided for by this rule. The term default is defined in W. Va. Code, §§23-2-5(d), -5(e), -6, & -8. The term default also includes those situations under W. Va. Code, §23-2-5(f)(2)-(4), where an employer returns to default status upon breaching a reinstatement agreement. If a subcontractor fails to meet the requirements of those sections, then it is in default and is not in good standing with the ~~division.~~commission.

3.5. "Payments" that are obligations of the subcontractor for the purposes of this rule include the payment of premium taxes, the payment of premium deposits, late reporting and payment penalties, interest, ~~and penalty premium taxes. It does not include the payment of benefits to an injured worker or to the health care providers of an injured worker by a~~ administration charges and attorney fees and costs of actions.
~~self insured employer.~~

3.6. "Primary contractor" means generally a person, partnership, corporation, or other legal entity, which is in the business of contracting or which regularly contracts with other parties for the performance by it of some service, including the extraction of natural resources. For example, the other party may be a home owner, a land owner, neighborhood association, the owner or tenant of a building, a municipality seeking the construction of a roadway, or any other entity seeking to have work done for it. A person, partnership, corporation, or other legal entity which is in the business of selling goods ~~(such as coal, timber, aluminum or machinery)~~ and not in the business of contracting for services is not a "primary contractor" for purposes of liability under this rule and W. Va. Code, ~~§23-2-1d.~~
§23-2-1d. However, the owner or lessee of coal, oil, gas, other minerals or timber acting under deed or lease otherwise covered by this rule shall be a primary contractor acting under a primary contract whenever that owner or lessee is in the business of selling or extracting that asset or good and enters into a contract with another party for the purpose of extracting such coal, oil, gas, other minerals or timber. Furthermore, an owner is no less a primary contractor, and is defined as such, if he contracts with another party for the development of the property he owns whenever that owner is in the business of developing property.

Rather, the totality of the circumstances surrounding the contract must be examined. For instance, a person might obtain his or her first contract in a line of work with the intention of starting a business in that field. Such an initial contract would likely cause that person to be considered a primary contractor if a portion of the obligation under the contract is subcontracted to another.

3.7. "Subcontractor" means a person, partnership, corporation, or other legal entity who contracts with a primary contractor, owner or lessee, to directly perform all or part of the services to be rendered under the contract between the primary ~~contractor and a~~contractor, owner or lessee and a second or third party. Examples of contracts that are not subcontracts for the purpose of this rule include contracts solely to clean, repair~~,~~ or maintain the owner's, lessee's or primary contractor's own facility, home or machinery, such as janitorial services, ~~copier services, or vehicle maintenance.~~domestic services, copier services or vehicle maintenance and so on in like instances. The subcontractor's contract must be directly with the primary contractor; that is, in a relationship where a primary contractor subcontracts with a subcontractor who in turn sub-subcontracts with a~~sub-~~ sub-subcontractor, then the relationship of primary contractor to subcontractor does not exist between the primary contractor and sub-subcontractor. In most circumstances, however, the subcontractor will be found to be a primary contractor with regard to the sub-subcontractor as in the example above. In order to determine whether the subcontractor is to be found to be a primary contractor, then the definition of primary contractor will have to be applied.

3.8. "Employee" means, and "subcontractor" does not mean, any independent contractor who does not maintain a separate business and who does not hold himself or herself out to and render services to the public, trade or industry, provided he or she is not himself or herself an employer subject to this law or has not complied with the provisions of this law, including the workers' compensation act, and shall for the purpose of this rule and act be an employee of any employer for whom he or she is performing services in the course of the trade, business, profession or occupation of such employer.

§85-10-4. Primary Contractor's Liability; Generally.

4.1. The liability of the primary contractor, under the provisions of W.Va. Code §23-2-1d, for the payments due to the workers' compensation ~~division~~commission by its subcontractors can arise in only two ways.

~~4.1.1.~~4.1.a. If the subcontractor is not in good standing with the ~~division~~commission on the first date on which it begins performance of its work under the contract, then the primary contractor will become liable for any payments due by the subcontractor to the ~~division~~commission after the subcontractor begins the performance of its work. The primary contractor will not be liable for the payments due to the ~~division by the subcontractor~~commission by the subcontractor, which became due prior to the start of the subcontractor's work.

~~4.1.2.~~4.1.b. The second way in which the primary contractor can become liable to the ~~division~~commission for the subcontractor's payments is if the subcontractor loses its good standing with the ~~division~~commission after the subcontractor begins the performance of its work and throughout the life of the contract. That is, a subcontractor can be in good standing with the ~~division~~ commission at the start of its performance under the contract, but later lose that good standing when it fails to make a report or a payment. In this situation, the primary contractor can become liable for the debts of the subcontractor to the ~~division~~commission unless the primary contractor takes certain actions. In this situation, the primary contractor becomes liable only for certain of the payments that become due after the default. The primary contractor is not liable for any payments that were due prior to that default except as provided for in subdivision ~~4.1.1.~~4.1.a. The determination of which payments the primary contractor becomes liable for is set forth in subsection 5.3.

§85-10-5. Avoiding Primary Contractor Liability.

5.1. In order to avoid liability under subdivision ~~4.1.1,~~4.1.a, the primary contractor must obtain a valid, current certificate of good standing for the subcontractor. The certificate of good standing can be obtained either from the ~~division~~commission or from the subcontractor. If the certificate of good standing was issued for some earlier quarter than the calendar quarter immediately preceding the current quarter, then the certificate cannot be relied upon. The certificate of good standing is valid only if it is issued for the immediately preceding quarter; provided, however, since current premium tax payments are only due within thirty (30) days after a quarter ends, if a certificate of good standing is issued during the first month of any quarter, then it will be considered valid if issued, in whole or in part, for the next preceding quarter. In addition, if the proffered certificate of good standing is fraudulent on its face, then the primary contractor can become liable under subdivision ~~4.1.1.~~4.1.a.

5.2. In order to avoid liability under subdivision ~~4.1.2,~~4.1.b, the primary contractor must first give notice to the ~~division~~commission that the primary contractor wishes to be notified by the ~~division~~commission if the subcontractor defaults. The primary contractor must provide the

~~division~~commission with the subcontractor's and the primary contractor's correct name, address, and federal employers' identification number (FEIN) or its equivalent as well as the ~~risk~~policy numbers that are assigned by the ~~division~~commission to the primary contractor and to the subcontractor. The primary contractor is encouraged to use the attached form for this purpose. While other forms of notice, including computer print-outs, will be accepted, such notices must contain, at a minimum, the information and signature requested in the form. The primary contractor may use additional sheets attached to the form to indicate other subcontractors who are working at the same job site. If the primary contractor's notice is accurate and complete, then, before liability can be imposed by the commission under the ~~division, the division~~provisions of W.Va. Code §23-2-1d, the commission must notify the primary contractor of the subcontractor's default in order to provide an opportunity for the primary contractor to take corrective action. The liability then begins as specified in subdivision ~~5.3.2.~~5.3.b. Notice of default by the ~~division~~commission to the primary contractor is complete upon placing the notice in the first class United States mail, postage prepaid, and addressed to the primary contractor at the address furnished to the ~~division~~commission by the primary contractor.

5.3. Determination of the beginning date of the primary contractor's liability under subdivision ~~4.1.2~~4.1.b shall be accomplished as follows.

~~5.3.1.~~5.3.a. Before any employer attains default status, these actions must either occur or fail to occur as indicated. In the usual course for a usual employer account, payment is due by the last day of the month following the quarter for which payment is being made. For instance, for the first fiscal calendar quarter (July through September), the payment is due on or before October 31st. If payment is not made by that date, the ~~division~~commission is obligated to issue a delinquency notice to the employer informing it, among other things, that it is now delinquent and that payment must be made on or before the last day of the third month following the quarter for which payment is due. In the above example, payment would be due on or before December 31st. Failure to make payment by that date places the employer in default if the delinquency notice by the ~~division~~commission was timely made. The delinquency notice must be issued within sixty (60) days of the end of the quarter for which payment is due. In the above example, the delinquency notice must be issued on or before November~~29th not November~~ 30th. These requirements are contained in W. Va. Code,
§23-2-5(b).

~~5.3.2.~~5.3.b. For purposes of primary contractor liability, in the example set forth in subdivision ~~5.3.1,~~5.3.a, the notice of default by the ~~division~~commission to the primary contractor cannot be issued until sometime in January. This is the beginning of the second quarter after the quarter for which payment is due. The subcontractor does not become default~~ed~~ until December 31st and, thus, no notice of default could be issued before that date. According to W. Va. Code, §23-2-1d(b)(2), unless the primary contractor takes corrective action, the primary contractor's liability would then begin with the first day of the third quarter following the end of the quarter for which payment is due; that is, for the quarter beginning on April 1st. The primary contractor's liability for its contractor's payments begins with payments due in that third quarter. Payments that were due for the July through September quarter, payments that were due for the October through December quarter, and payments that were due for the January through March quarter are not the liability of the primary contractor under subdivision ~~4.1.2.~~4.1.b.

~~5.3.3.~~5.3.c. It sometimes occurs, for a variety of reasons, that the ~~sixtieth day~~ delinquency notice to the employer that is described in subdivision ~~5.3.1~~5.3.a is not timely made within sixty (60) days. Should that happen ~~with regard to~~ regarding a subcontractor affected by W. Va. Code,

§23-4-1d, then the time period described in subdivision ~~5.3.2~~5.3.b may be affected. W. Va. Code, §23-2-5(b), is understood to require at least a thirty (30) day notice to the employer before it ~~can be placed into~~shall be in default status. If in the example set forth in subdivisions ~~5.3.1 and 5.3.2, the "sixtieth day"~~5.3.a and 5.3.b, the delinquency notice was not issued until December 14th (i.e., the seventy-fifth day), then the payment in order to avoid default would not be due until January 13th (thirty days from the issuance of the late ~~"sixtieth day"~~ delinquency notice). Default would begin on January 14th. Even later issuance of the ~~"sixtieth day"~~ delinquency notice would move the ~~liability~~default date back accordingly. In the event a notice of default is issued less than thirty (30) days before the end of the quarter, liability will not be imposed upon the primary contractor until the first day after the end of the next quarter. Accordingly, in the example set forth in subdivisions ~~5.3.1 and 5.3.2,~~5.3.a and 5.3.b, if the notice is issued between March 2nd and March 31st, the primary contractor's liability would not begin until July 1st.

5.3.d. If an employer is required to file its payroll report and pay its premium taxes on a basis other than quarterly, then the time periods for curing delinquencies and the primary contractor's notification of the subcontractor's default shall be accordingly adjusted.

5.4. The corrective action that a primary contractor can take to avoid subdivision ~~4.1.2~~4.1.b liability is either to arrange payment of the amounts due to the ~~division~~commission prior to the start of the primary contractor's liability or to terminate the subcontract prior to that date. Payments may be made by the subcontractor, the primary contractor, or other third party. ~~The division will not consider entering into a repayment agreement with the primary contractor or other third party which extends payment over time as a form of payment which satisfies this subsection.~~ A reinstatement agreement covering all of a subcontractor's periods of delinquency and default may be considered based upon the best interests of the fund.

5.4.a. The commission may enter into a reinstatement agreement with the primary contractor and subcontractor as co-signators. The primary contractor becomes liable for payment to the fund of the premium taxes as if the premium taxes were incurred by the primary contractor.

5.5. In the event that the primary contractor elects to terminate its subcontract, W. Va. Code, §23-2-1d, provides that a subcontractor's failure to make required payments is good and sufficient cause to terminate the contract regardless of any contrary provision in the contract.

5.6. Exclusively for the purposes of W. Va. Code, §23-2-1d, and of this rule, a certificate of good standing issued by the ~~division~~commission furnishes an irrebuttable presumption that the subcontractor is in good standing with the ~~division~~commission for the period in question. The presumption does not apply to any other section of chapter 23 of the Code. Even if it is later determined that the certificate was issued in error, for any reason, the certificate prevents the imposition of the subdivision ~~4.1.1~~4.1.a liability. For example, if clerical error resulted in the ~~division~~commission issuing a certificate of good standing for a subcontractor whose record with the ~~division~~commission clearly shows it to be in default, the certificate still operates to protect the primary contractor from liability. The erroneously issued certificate does not affect the subcontractor's own liability to the ~~division.~~commission. Similarly, if the ~~division's~~commission's records indicated that a subcontractor was in good standing and a certificate is then issued, then a later determination, which shows that the subcontractor was not in fact in good standing, does not invalidate the certificate with regard to the primary contractor. This is the case even if the subcontractor acted fraudulently or criminally to conceal its actual record, unless the primary contractor acted in concert to aid the fraud.

5.7. Under this rule no liability will arise if all of the subcontractor's employees are appropriately and lawfully covered by another state's or jurisdiction's workers' compensation laws. Hence, if an Ohio employer provides workers' compensation coverage through the Ohio state fund to its employees who may be sent into West Virginia on a temporary or transient basis to work on a given contract, then neither this rule nor W. Va. Code, §23-2-1d, are applicable. If any one of those employees is to be covered or must be covered by West Virginia's workers' compensation program, then the gross wages for that employee must be reported and premium taxes paid. In that case, all of the provisions of this rule would be applicable to such a subcontractor to the extent of the reportable gross wages.

§85-10-6. Extent of Liability.

6.1. The liability which the primary contractor incurs, under the provisions of W.Va. Code §23-2-1d, is the obligation to pay to the ~~division~~commission the true and correct amount of premium taxes, premium deposit, late reporting and payment penalties, and any interest thereon, as well as administrative charges and attorney fees and costs of any actions, that the subcontractor owes to the ~~division. In addition, if a subcontractor does not pay any premium penalty tax, W. Va. Code. §23-2-~~commission.

~~5(f), that may be due the division, then the primary contractor may become liable for that penalty premium tax and interest thereon as well. The liability never includes the value of benefits paid to the injured employees or to their health care providers.~~

6.2. In determining the amount of payments due to the ~~division, the division~~commission, the commission is not limited to the amounts of gross wages reported by the subcontractor. Rather, the ~~division~~commission may audit the wage records of the employer or other pertinent records and determine for itself the amounts owed to it. From this audit, the true and correct amount of premium taxes, premium deposit, ~~interest,~~interest and late reporting and payment penalties~~, and penalty premium taxes, if any,~~ will be determined in calculating the primary contractor's liability.

6.3. ~~The~~Under the provisions of W.Va. Code §23-2-1d, the primary contractor is liable only for the payments due from the subcontractor for those employees who are performing work under its contract. Payments for gross wages for employees who are engaged in other work for the subcontractor unrelated to the contract in issue will not become the liability of the primary contractor.

6.4. If the same employees of a subcontractor split their time among a number of jobs some of which are not related to the contract in issue, then the liability imposed by this rule extends only to payments due for the gross wages earned as a result of working under the contract in issue. It shall be the primary contractor's burden to prove that employee(s) of a subcontractor split time among jobs which were not related to its contract with the subcontractor.

6.5. If the subcontractor's default occurs because of a breach of a prior reinstatement agreement, then under the terms of the agreement the full amount of the liability becomes due. However, in this event, the primary contractor will not be liable for any portion of the reinstatement -agreement's liability which arose prior to the term or extension of the contract including any interest due on the principal of the agreement which was earned during the term or extension of the contract after the effective date of this rule.

6.6. In the event that the primary contractor makes payment to the ~~division~~commission in the place of the subcontractor, then the primary contractor has a legal right to seek reimbursement or indemnification from the subcontractor for the amounts paid ~~to the division from the subcontractor.~~on its behalf to the commission. In addition, the primary contractor may recover its costs of action and attorney fees in seeking such reimbursement or indemnification. Such legal right is not subject to resolution by the ~~division.~~commission. Recovery must be made from the subcontractor or through the state's judicial system.

~~In the event that a penalty is imposed upon the primary contractor under the provisions of subsection 7.3 of this rule, such penalty payments are not collectable from the subcontractor by the primary contractor. The penalties are not paid in order to avoid or cure the subcontractor's default and are thus not recoverable from it.~~

§85-10-7. ~~Additional Penalties; Limitations.~~

~~7.1. Under certain circumstances, the division will impose a penalty premium tax rate upon either the primary contractor or the subcontractor, or both. Under no circumstances shall the penalty imposed upon the primary contractor operate to make the primary contractor the de facto or the de jure employer of the subcontractor's employees. It is not the purpose of this rule or of W. Va. Code,~~

~~§23-2-1d, to create or lessen any legal remedies that an injured employee of a subcontractor has or may have against the primary contractor or against the subcontractor employer. Neither this rule nor W. Va. Code, §23-2-1d, have any affect upon any relationship that the primary contractor has or may have with the employees of the subcontractor.~~

~~7.2. Imposition of the penalty premium tax rate upon the subcontractor shall be done solely as provided for in W. Va. Code, §23-2-5(f)(1).~~

~~7.3. The penalty premium tax rate may be imposed upon the primary contractor either under the terms of this subsection of this rule or under the standard provisions of W. Va. Code, §23-2-5(f)(1), for its independent default of its own obligations. The penalty premium tax rate, if imposed, shall be set at the level of one hundred ten percent of the amount of premium tax that would otherwise be due from the primary contractor based upon its own wage reports to the division. The penalty premium tax rate shall be imposed upon the primary contractor only if the primary contractor demonstrates a pattern of disregard for the duties imposed upon it by W. Va. Code, §23-2-1d. A pattern of disregard shall consist of the following:~~

~~7.3.1. If the primary contractor incurs liability under subsection 4.1.1 three or more times within any five (5) year period, then a pattern will be presumed; however, this presumption is rebuttable under the process set forth in section 9 of these rules.~~

~~7.3.2. If the primary contractor incurs liability under subsection 4.1.2 three or more times within any five (5) year period, then a pattern will be presumed; however, this presumption is rebuttable under the process set forth in section 9 of these rules.~~

~~7.4. It must be noted that, if a subcontractor was subject to a penalty premium tax rate at the time the contract was entered into and then defaults for any reason, then the primary contractor will be liable for the payments calculated by use of the subcontractor's penalty premium tax rate. In addition, if subsection 7.3 is invoked, then the primary contractor would be subject to paying the subcontractor's premium taxes at the penalty tax rate and would also have to pay its own premium taxes at the penalty tax rate.~~

~~§85-10-8.~~ Collections Efforts.

In the event that the primary contractor does not readily make any payment due under this rule, the ~~division~~commission is authorized to take collections actions for payments by the primary contractor under the provisions of W. Va. Code, §23-2-5a. Reference to that section and the rules promulgated under it should be made by the primary contractor.

~~§85-10-9.~~§85-10-8. Appeal Process.

Any primary contractor affected by this rule or W. Va. Code, §23-2-1d, who wishes to contest any ~~determination~~decision made by the ~~division~~commission may do so under the provisions of W. Va. Code, §23-2-17. The rule implementing that section requires the filing of a formal request for reconsideration, and following reconsideration decision, a petition within thirty days of the primary contractor's receipt of notice of the disputed decision or action or reconsidered decision or, in the absence of such receipt, within sixty days of the date of the ~~division's~~commission's making such disputed decision or taking such disputed ~~action.~~action or making such reconsideration decision. (See 85 C.S.R.7, "Rules for Selected Hearings".)

~~§85-10-10.~~§85-10-9. 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 effect without the invalid provisions or application and to this end the provisions of this rule are declared to be severable.

NOTIFICATION REQUEST

DEFAULT OF SUBCONTRACTOR

The undersigned primary contractor hereby notifies the workers' compensation ~~division~~commission that it has entered into a subcontract(s) and that it desires to receive notice from the workers' compensation ~~division~~commission if the subcontractor(s) defaults on any payments due to the workers' compensation ~~division.~~commission.

(Please provide the following information:)

PRIMARY CONTRACTOR'S NAME: ______________________________

ADDRESS TO WHICH NOTICES ARE TO BE SENT: ______________________________

PRIMARY CONTRACTOR'S ~~RISK~~POLICY NUMBER: ______________________________

PRIMARY CONTRACTOR'S FEIN[1] NUMBER: ______________________________

SUBCONTRACTOR'S COMPLETE ~~NAME:~~ ______________________________ FORMAL NAME (AND INCLUDE ANY TRADE NAME OR TRUE NAME OR A.K.A.)

: ______________________________

SUBCONTRACTOR'S ADDRESS: ______________________________

____

SUBCONTRACTOR'S ~~RISK~~POLICY NUMBER: ______________________________

SUBCONTRACTOR'S FEIN [1] NUMBER: ______________________________

GIVE A BRIEF DESCRIPTION OF CONTRACT INCLUDING WORKSITE(S):

____

____

EXPECTED LENGTH OF THE CONTRACT (BEGINNING DATE & ENDING DATE:

____

(Additional sheets may be attached for additional subcontractors.)

DATE: ______________ SIGNATURE: ______________________________

PRINTED NAME: ______________________________

POSITION WITH PRIMARY CONTRACTOR: ______________________________

[1] If employer does not have an FEIN, please provide social security number.

PUBLIC COMMENT: RULE 10

JACKSON KELLY
ATTORNEYS AT LAW PLLC
1600 LAIDLEY TOWER • P.O. BOX 553 • CHARLESTON, WEST VIRGINIA 25322 • TELEPHONE: 304-340-1000 • TELECOPIER: 304-340-1130
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Writer's E-Mail Address: tehuffman@jacksonkelly.com

November 6, 2003

VIA FACSIMILE AND U. S. MAIL

T. J. Obrokta, Esquire
General Counsel
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

Re: Proposed Rule 10: Primary Contractor Liability

Dear Mr. Obrokta:

I offer the following comments with regard to the above-captioned proposed Rule.

[illegible]

1. Section 3.2 as proposed currently reads as follows: "Contract" shall include a deed for ownership or a lease of rights for any coal, oil, gas, other minerals or timber." The word "shall" should be changed to "may".

2. Section 3.6 contains a new paragraph which begins "However, the owner or lessee of coal, oil, gas . . ." This paragraph should be amended to read as follows: "However, the owner or lessee of coal, oil, gas, other minerals or timber acting under a deed or lease may be a primary contractor acting under a primary contract whenever that owner or lessee is in the business of selling or extracting that asset or good and enters into a contract with another party for the purpose of extracting such coal, oil, gas, other minerals or timber. Furthermore, an owner is no less a primary contractor, and is defined as such, if he contracts with another party for the development of the property he owns, whenever that owner is in the business of developing property.

Please accept these comments as filed and provide them to the Board of Managers for their review at the appropriate time.

"covered by this rule" other lease

Very truly yours,

TIMOTHY E. HUFFMAN

THE/cm

C0770013.1

THOMAS P. MARONEY
GENERAL COUNSEL

ROBERT M. WILLIAMS, ATTORNEY
J. ROBERT WEAVER, ATTORNEY
EDWIN H. PANCAKE, ATTORNEY
PATRICK K. MARONEY, ATTORNEY

OFFICE ADDRESS
608 VIRGINIA STREET, EAST
CHARLESTON, WV 25301

THOMAS P. MARONEY, L.C.

OFFICE OF
GENERAL COUNSEL
AND
WORKERS' COMPENSATION SERVICES
WEST VIRGINIA AFL-CIO
BENEFIT SERVICES
DISTRICT 17 UMWA

WILBUR YAHNKE
DIRECTOR COMPENSATION SERVICES

MAILING ADDRESS
POST OFFICE BOX 3709
CHARLESTON, WV 25337

TELEPHONE (304) 346-9629
TELECOPIER (304) 346-3325

TELECOPIER TRANSMITTAL SHEET

DATE: November 6, 2003

TO: T.J. Obrokta
General Counsel
West Virginia Workers' Compensation Commission

FAX NO.: 304/926-5372

FROM: Thomas P. Maroney, Esquire
Thomas P. Maroney, L.C.

RE: Proposed Rule Title 85, Series 10
Primary Contractor Liability

TOTAL NUMBER OF PAGES, INCLUDING THIS SHEET: 3

IF YOU DO NOT RECEIVE ALL THE PAGES AND/OR WE ARE DISCONNECTED DURING TRANSMISSION, PLEASE CALL CINDY AT 304/346-9629.

THOMAS P. MARONEY
GENERAL COUNSEL

ROBERT M. WILLIAMS, ATTORNEY
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November 6, 2003

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

Re: Proposed Rule Title 85, Series 10
Primary Contractor Liability

Dear Mr. Obrokta:

This letter is in response to the above-proposed rule filed on October 6, 2003, in the Office of the Secretary of State. While the filing document indicates only written comments are to be accepted, due to the extreme importance of this rule I am requesting on behalf of the West Virginia AFL-CIO that a full public hearing be scheduled.

Over a period of many years numerous primary and subcontractors in the coal, coal hauling, and timbering industries defaulted in premiums resulting in over 750 million dollars in lost revenue to the West Virginia Workers' Compensation Fund. The revised provisions of Chapter 23 now charge the new Board of Managers with the fiduciary responsibility to the Commission for insuring that funds are timely collected, including those of delinquent and defaulting employers.

The revisions of Chapter 23-1-1d in changing the production of coal, natural resources and timbering to a service rather than a sale of goods is a major step in eliminating the avoidance of workers' compensation premiums by contract methods. However, the proposed rules still provide a method by which subcontractors and sub-subcontractors may avoid payment of workers' compensation premiums causing the deficit to grow at a continuing alarming rate. For these reasons the following changes are suggested:

1. The words "can, must, or may" should all be changed throughout the entire rule to read "shall."

2. The rule should be changed to shorten the length of time that a company or subcontractor can continue with its nonpayment of workers' compensation premiums thereby reducing any financial short fall in the fund. §23-2-5(a)(1) specifically allows the Board of Managers may require employers to report gross wages and pay premiums monthly or at other intervals as opposed to only requiring companies to pay premiums quarterly on or before the last day of the month following the end of a quarter.

3. 85-10-2.3 the 90-day period should be reduced to 10 days.

4. 85-10-3 following the word "extraction" in the seventh sentence the words "or transportation" should be inserted. In the eighth sentence after the word "extract" the words "or transportation" should be inserted, and after the words "such as" the word "transportation" should be inserted and the word "would" should be changed to "shall." In the final sentence after the word "instances," the phrase "all contracts and subcontracts shall be provided to the Commission" should be added.

ok

5. 85-10-3.2.b "30 days" should be changed to "10 days"

6. 85-10-5.6 should be totally removed from this proposed rule.

7. 85-10-6.4 should be totally removed or reworded placing the burden on the subcontractor to prove that employees are not spending time on the contract in issue.

I would be happy to sit down with any members of your staff to further review these comments.

Sincerely yours,

Thomas P. Maroney

TPM/cls

November 4, 2003

Thomas Obrokta, General Counsel
WV Workers' Compensation Commission
4700 McCorkle Avenue SE
Charleston, WV 25304

Re: Series 10
Primary Contractor

Liability Rule

Dear Mr. Obrokta,

Thank you for sending me the proposed rules modifications for Series 10 (Primary Contractor Liability Rule).

We have reviewed the proposal and do not find that the new proposal would bring any greater burden to contractors in the home building industry. We support the modifications .. which bring the rule in compliance with the newly adopted workers' compensation reforms.

For your information, I am enclosing copy of a letter which was written by one of our members (Mr. Bill Thompson) to Director Burton. Mr. Burton was a recent visitor at our Home Builders Convention at Stonewall Resort. The letter asks again a couple of questions that Mr. Thompson asked Mr. Burton. I believe Mr. Burton's response at the time was "I'm not sure .. I'll get back to you you on that". I am wondering if you might have any response/solution to these questions.

Again, thank you for seeking our input on the Series 10 Rule. We are anxious to be of whatever assistance that we can work with leaders in getting Workers' Compensation "back on track".

Sincerely,

Beth Thomasson
Executive Officer

Enclosure

October 27, 2003

Thomas "T.J" Obrokta, Jr.
General Counsel
Bureau of Employment Programs
Workers' Compensation Division
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

Re: ACT Foundation's Comments on WC Draft Rules (Series 32-Permitting, Series 15- Rehab and Series 10-Primary Contractor Liability)

Dear Mr. Obrokta:

I am writing again on behalf of Steve White and the Affiliated Construction Trades Foundation. ACT again appreciates this opportunity to provide these comments to the draft WC rules, but reserves the right to file additional comments if and when the Board of Managers proposes these or similar regulations in three above-referenced areas.

If you need clarification of any of the issues and/or questions raised by ACT, please do not hesitate to contact myself or Mr. White at our office. I thank you for your attention to this matter.

Sincerely,

Lesly H. Messina
Research Director

In addition, ACT objects to the removal of the following language from the original definition 3.13 of §85-15-3 "*giving due consideration to the nature and extent of the injured worker's injury; the injured worker's qualifications, interests, motivation level, preinjury earnings, and future earning capacity; and the current and future condition of the labor market. Nothing in this definition prohibits providing an injured worker with vocational rehabilitation services which enable the injured worker to obtain a job with a higher economic status than her or she would have been able to attain without such vocational rehabilitation, provided the rehabilitation plan demonstrates that the injured worker is not able to return to his or her prior employment and such vocational rehabilitation services are necessary to increase the likelihood of reemployment*".

It is ACT's contention that the above-referenced language should be put back into the definition of "*suitable gainful employment*". By eliminating this language and adding the language "*regardless of his or her previous level of earnings*" is extremely unfair to injured workers who will be expected to take the first low paying job that comes along even if they are highly motivated to improve their educational and economic status through re-education.

§85-15-7 Payment of Indemnity Benefits

7.5. Temporary partial rehabilitation benefits are only payable during the implementation and successful progress toward completion of a rehabilitation plan. Upon termination of the plan, as provided for under this rule, or upon expiration of the plan, payment of all temporary partial and/or total rehabilitation benefits must be stopped regardless of the injured worker's level of wages.

Again ACT objects to the punitive language in this section. An injured worker should be able to have his or her income supplemented by temporary partial benefits at minimum until the closure of the rehabilitation case, and at best indefinitely. A compromise would be to add the language "*are payable for five years from the time that the rehabilitation program commences, provided that the terms of the rehabilitation plan are met by the claimant, and only in circumstances where the claimant's post injury wages are less than his or her pre-injury wages*" after "*Temporary partial rehabilitation benefits*" and before the word "*upon*".

Delete "*are only payable during the implementation and successful progress toward completion of a rehabilitation plan*".

Series 10- Primary Contractor Liability

§85-10-1 General.

1.1. Scope- This rule implements the provisions of W.Va. Code §23-2-1d, regarding the liability of a primary contractor for payments due to the worker's compensation commission by a subcontractor under certain circumstances. The provisions of this rule shall apply generally to all work done by contract; the person, firm, corporation or other legal entity, which lets a contract for such work shall be responsible primarily and directly for all premiums and related obligation upon the work. This rule as amended, is applicable only to contracts that are entered into or extended on or after the effective date of this rule.

Why is there no retroactivity in the scope of this rule? There will be millions of dollars in lost revenue if this stands.

Add after the word "*applicable*", "*to contracts entered into ten years before the effective date of this rule and any contracts entered into on the effective date or subsequent dates thereafter*".

Delete "*only to contracts that are entered into or extended on or after the effective date of this rule*".

§85-10-3 Definitions

3.4. "Good Standing" with the commission means that the contractor or subcontractor has not defaulted on its obligations to make payment sto the commission. Being in delingquent status, as provided for in W.Wa Code §23-2-5(b), is not equivalent to being in default and does not deprive the subcontractor of good standing. Delinquent status does not give rise to the liability provided for by this rule. The term default is defined in W.Va. Code § 23-2-5(d), 5(e), 6 & 8. The term default also includes those situations under W.Va. Code §23-2-5(f)(2)(4) where an employer returns to default status upon breaching a reinstatement agreement. If a subcontractor fails to meet the requirements of those sections, then it is in default and is not in good standing with the commission.

It is ACT's contention that there should be specific language stating exactly how long an employer can be in breach of its reinstatement agreement before they go back on the default list. How many chances do they get?

Bowles Rice McDavid Graff & Love PLLC

RECEIVED NOV 07 2003

Sarah E. Smith
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600 Quarrier Street, Charleston, West Virginia ❖ Post Office Box 1386, Charleston, West Virginia 25325-1386 ❖ (304) 347-1100 ❖ www.bowlesrice.com

November 6, 2003

Thomas J. Obrokta, Esquire
Workers' Compensation Division
Post Office Box 3151
Charleston, West Virginia 25332

Re: § 85 CSR 10
Primary Contractor Liability

Dear Mr. Obrokta:

Thank you for the opportunity to comment on the proposed rules for Primary Contractor Liability.

We recommend the following:

1) In § 85 CSR 10-3.2, the fourth line should be changed to read: "A contract for the extraction of natural resources is a provision of services."

2) To permit an opportunity for appropriate negotiations in individual cases, § 85 CSR 10-3.5 should be changed to read: "Payments that are obligations of the subcontractor for purposes of this rule <u>may</u> include the payment of premium taxes, the payment of premium deposits, late reporting and payment penalties, interest, administrative charges, and <u>reasonable</u> attorney fees and costs of actions." [Additions have been redlined].

3) In § 85 CSR 10-3.8, we believe an "and" may be missing before "shall for the purpose of this rule" in lines 4-5. If not, some other revision is needed to clarify this definition.

4) In § 85 CSR 10-5.3.c., the formatting in lines 3 and 4 should be amended as follows: "Should that happen regarding a subcontractor affected by West Virginia Code § 23-4-1d, then the time period described in subdivision 5.3.b may be affected."

Thank you for considering our suggestions.

Very truly yours,

Sarah E. Smith

Sarah E. Smith

SES/pfl

BEFORE THE WEST VIRGINIA WORKERS' COMPENSATION COMMISSION
BOARD OF MANAGERS

IN RE: RULE 85 CSR 10

TRANSCRIPT OF PROCEEDINGS had at the public hearing in the above referenced matter, held on December 17, 2003, at 11:00 a.m., before the West Virginia Workers' Compensation Commission Board of Managers, at the Charleston Civic Center, Charleston, West Virginia, pursuant to notice duly given to all interested parties.

REBECCA L. BAKER
CERTIFIED COURT REPORTER
P. O. BOX 7822
CROSS LANES, WV 25356 - (304) 759-2471

ATTENDING REPORTER: JENNIFER L. JIMISON, CCR

A P P E A R A N C E S:

MEMBERS OF THE BOARD OF MANAGERS:

STEVE WHITE, Chairman
CRAIG SLAUGHTER
RICHARD HUMPHREYS
GENE F. BAILEY
JOHN JOHNSON
EVERETTE SULLIVAN
BOB PHALEN
DOUG MERRITT (via telephone)

(Call to order, 11:05 a.m.)

CHAIRMAN WHITE: My name is Steve White and I'm Chairman of the Board of Managers. For the court reporter's benefit, I'd like to go around and everybody on the Board indicate your name so that we can get the names correct.

MR. SLAUGHTER: Craig Slaughter.

MR. HUMPHREYS: Richard Humphreys.

MR. BAILEY: Gene F. Bailey.

MR. JOHNSON: John Johnson

MR. SULLIVAN: I'm Everette Sullivan.

MR. PHALEN: I'm Bob Phalen, P-h-a-l-e-n.

CHAIRMAN WHITE: And Doug Merritt is on the phone.

MR. MERRITT: Doug Merritt.

CHAIRMAN WHITE: This is a public hearing on five rules that are being considered. And we're going to do them each individually one at a time.

Pursuant to the provisions of West Virginia Code 23-1-1A(j)30, the Board of Managers is responsible for approving the rules for the Workers' Compensation Commission.

The Board has determined that a public hearing be held with regard to this Rule 10 to solicit public comment. Please check the sign-in sheets to determine whether anyone has requested to address the Board concerning this rule.

We have -- provided me the sign-in sheet for Rule 10. Tammy Pritt?

MS. PRITT: I'm not speaking.

CHAIRMAN WHITE: Okay.

MS. PRITT: I just signed in because I'm here.

CHAIRMAN WHITE: Okay. Ed Pancake?

MR. PANCAKE: Thank you, Mr. Chairman, members of the Board. My name is Ed Pancake. I'm a lawyer with Pat Maroney's office who is general counsel to the AFL-CIO. Pat could not be here today due to being out of town for a deposition, but he did ask me to pass along some comments with regard to Rule 10.

Now, on Rule 10, we had previously submitted written comments. Some of the requests were adopted; however, we think that the primary contractor liability provisions still need to be tightened up in a couple of different respects.

Primarily with the days of work involved in the State. These are found in 2.3 of the Rule where we would recommend the 90 days be reduced to 10 days.

In 3.2 there was some language added that a contract for the extraction of natural resources is a provision of services. We believe that ought to also include extraction and transportation of natural resources. We think that that would bring in some of the subcontractors who provide the transportation of these products.

In 3.2B, we would ask that 30 days be reduced to 10 days. And Rule 5.6 we would ask that that be removed altogether. That is a broad clause which allows for the irrebuttable presumption of good standing.

Thank you, Mr. Chairman.

CHAIRMAN WHITE: Thank you, Ed.

Are there any other individuals wishing to comment on Rule 10?

(No response.)

CHAIRMAN WHITE: I hereby declare that the public comment period for Rule 10 is closed.

(Whereupon, the public hearing was adjourned.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

I, Jennifer L. Jimison, a Subcontractor for Rebecca L. Baker, Official Court Reporter, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption thereof.

Jennifer L. Jimison
Certified Court Reporter

OFFICIAL SEAL
Notary Public, State of West Virginia
JENNIFER L. JIMISON
P.O. Box 724
Barboursville, WV 25504
My commission expires May 10, 2009

WEST VIRGINIA WORKERS' COMPENSATION COMMISSION'S RESPONSES TO PUBLIC COMMENTS RECEIVED ON RULES 10, 14, AND 32

On November 6, 2003, the public comment period for Series 10, 14, 32 of Title 85 of the Code of State Rules ("Rules") expired. The Rules previously had been filed by the West Virginia Workers' Compensation Commission ("Commission") after receiving approval by the Workers' Compensation Board of Managers. The following are the Commission's responses to the public comments received:

RULE 10: PRIMARY CONTRACTOR LIABILITY

I. Timothy E. Huffman

1. Change "shall" to "may" in the second sentence of Section 3.2.

   Recommendation: Insert "under which some service is to be performed" at the end of the second sentence. This achieves the desired clarification.

2. Change "shall" to "may" in the 10^{th} line of Section 3.6.

   Recommendation: Insert ",otherwise covered by this rule," after the word "lease" on line 10. This achieves the desired clarification.

3. Insert "and enters into a contract with another party for the purpose of extracting such coal, oil, gas, other minerals or timber." after the word "good" on line 11 of Section 3.6.

   Recommendation: Accept. This is a reasonable clarification.

4. Insert "with another party" between the words "contracts" and "for" on line 12 of Section 3.6

   Recommendation: Accept. This is a reasonable clarification.

II. Thomas P. Maroney

1. Change all uses of "can, must, or may" to "shall."

   Recommendation: No change recommended. This is an overly broad recommendation that changes the legal meaning of various provisions of the Rule in such a manner as to make the Rule inconsistent with Chapter 23 of the West Virginia Code. Also, the suggestion has various undesirable consequences, such as requiring the Commission to enter into repayment agreements. Section 5.4.a.

2. Without identifying specific provisions of the Rule that should be revised, it is suggested that the Rule be changed to "shorten the length of time that a company or subcontractor can continue with its nonpayment of workers' compensation premiums... ."

   Recommendation: The Commission agrees that the Rule should reflect SB 2013's requirement that the Board of Managers promulgate a rule allowing for the reporting of gross wages and the paying of premiums at intervals other than quarterly. However, this should apply to all subscribers and not just contractors and subcontractors. Accordingly, Rule 10 is not the appropriate place for the proposed provision. Nevertheless, to allow this Rule to reflect the anticipated rule on shorter filing intervals, the Commission recommends the following be added:

"5.3.d. If an employer is required to file its payroll report and pay its premium taxes on a basis other than quarterly, then the time periods for curing delinquencies and the primary contractor's notification of the subcontractor's default shall be accordingly adjusted."

3. The 90-day time period in 85-10-2.3 should be changed to 10 days.

   Recommendation: No change recommended. This provision is inconsistent with provisions of Rule 9, which is the appropriate place to discuss the extra territorial coverage aspects of Workers Compensation. It is anticipated that Rule 9 will be revised over the next 8 months and the comment should be restated at that time.

4. Insert the word "transportation" at various places in Section 3.2. Also, change the word "would" to "shall" in the 12th line of Section 3.2. Finally, add the phrase "all contracts and subcontracts shall be provided to the Commission."

   Recommendation: Partially accept. The insertion of the word "transportation" should be rejected as the current language mirror's the new statutory language and making the requested change may change the Legislative intent. The Commission recommends accepting the suggestion that the word "would" be changed to "shall" in the 12th line of Section 3.2. Finally, the Commission recommends rejecting the final comment. It is unreasonable to burden the Commission with the administrative duty of collecting and maintaining every contractor/subcontractor contract entered into in the State of West Virginia.

5. Change "30 days" to "10 days" in Section 3.2.b.

   Recommendation: No change recommended. This comment proposes language that would be in direct violation of West Virginia Code Section 23-2-1d.

6. Remove Section 5.6.

   Recommendation: No change recommended. This comment proposes language that would be in direct violation of West Virginia Code Section 23-2-1d.

7. Remove or reword Section 6.4, which deals with subcontractor employees who work under more than 1 prime contract.

   Recommendation: Accept in concept. Add the following as a second sentence in Section 6.4: "It shall be the primary contractor's burden to prove that employee(s) of a subcontractor split time among jobs which were not related to its contract with the subcontractor."

III. Steve White/Affiliated Construction Trades

1. Make various changes that would cause the Rule change to be retroactive and apply to contracts entered into or extended on or after the effective date of the Rule.

   Recommendation: No change recommended. The rule applicable to West Virginia Code Section 23-2-1d (Rule 10) has been in effect since January 19, 1996. The amendments are intended to clarify the Rule and strengthen the Rule with regard to legislative changes. The amendments do not forgive compliance with the former provisions of this Rule. Finally, laws are not considered retroactive unless inferred from or expressly stated in the statute.

2. Add language specifying how long an employer can be in breach of its reinstatement agreement before going back on the default list.

Recommendation: No change recommended. Defaults and reinstatement agreements are covered by the provisions of West Virginia Code Section 23-2-5(f)(2). The entry into a repayment agreement and its terms is discretionary with the Commission under this statute. When employers fail in their obligations under a repayment agreement, the agreement becomes null and void under its terms. While the Commission may enter into another repayment agreement with the employer, the terms of such a subsequent agreement are more stringent than the original.

IV. Sarah E. Smith

1. The fourth sentence of Section 3.2 should read "A contract for the extraction of natural resources is a provision of services."
Recommendation: Accept. This is technical clean-up.

2. Insert "may" between "rule" and "include" on the 1st line of Section 3.6 and insert the word "reasonable" between "and" and "attorney" on the 4th line of Section 3.6.

   Recommendation: No change recommended. Inserting the word "may" injects flexibility to waive payment of premium taxes, premium deposits, late reporting and payment penalties. This area is heavily regulated by the Code and should not be addressed in Rule. Also, if "reasonable" is added, then the reasonableness of attorneys' fees incurred in the collection of premiums will become another issue open for litigation.

3. Insert "and" between "act," and "shall" on the 4th line of Section 3.8.

   Recommendation: Accept. This is technical clean-up.

4. Reword the 2nd sentence of Section 5.3.c. to read as follows: "Should that happen regarding a subcontractor… ."

   Recommendation: Accept. This is a stylistic change that is acceptable. Also, the Commission recommends that the statutory reference in this sentence be changed from "23-4-1d" to "23-2-1d." This is an error in the current Rule.

WORKERS' COMPENSATION COMMISSION BOARD OF MANAGERS

RISK MANAGEMENT COMMITTEE

NOVEMBER 26, 2003

Minutes of the meeting of the Risk Management Committee held on Wednesday, November 26, 2003, at 1:00 p.m. in the Charleston Civic Center, Rooms 207-209, Charleston, West Virginia.

Committee members present:
Douglas W. Merritt, Chairman
Paul E. Thompson
David Satterfield (by phone)

Board member present:
John L. Johnson

Commission staff present:
Bob Bess
Greg Burton
Phil Lynch
T. J. Obrokta
Randall B. Suter
Lisa Teel

1. Call To Order

Chairman Merritt called the meeting to order at 1:00 p.m.

2. Safety and Loss Report – Bob Bess

Bob Bess: You have before you our reports for September and October since we didn't give a report in September. What would be your pleasure, Mr. Chairman, do you want me to just go over October's or do you want me to go over both of them?

Chairman Merritt: Why don't you just kind of summarize both of them please.

Mr. Bess: The safety audits for September – we did about 200 audits – that compared with fiscal year 2003 at 304. That's for the month of September, though, and the 304 was for the entire year of 2003. On return-to-work applications, we received 29. We approved 28 and had 21 pending at the end of the month. That compares favorably with 2003. For safety videos, we had 97 checked out in August and 203 for the year 2004. You see a drastic increase in the fiscal year.

4. Primary Contractor Liability Rule – T. J. Obrokta

Mr. Obrokta: Mr. Chairman and members of the Committee, you have before you two documents. The first document summarizes the public comments we received regarding Rule 10. The second document is Rule 10 itself for your reference.

Just very briefly, I think it's important to explain how we have gotten to the point we are now on Rule 10. Soon after the legislation was passed in July, we got to work on the first round of rules that were required by the legislation. We solicited the input of various stakeholder groups. That number is a little over forty now, but initially we had over twenty folks who helped us work on an initial round of rules.

One of those rules we identified as being critical to the implementation of the bill was Rule 10. It already existed in one form, but it had to be modified significantly to comply with the new legislation. In particular, over a – historically, contractors have been liable for the unpaid workers' compensation premiums of their sub-contractors. However, that rule arguably did not apply to the natural resources extraction industries; i.e., it may not have applied in the coal, timbering and natural gas businesses. So the Legislature, in Senate Bill 2013, made it clear that this concept of contractors being liable for the unpaid premiums of their sub-contractors – that concept would apply going forward to those engaged in the industries I've just identified.

So, we took the existing Rule 10 and modified it to reflect this significant legislative change. We initially sent out a draft. We got an agreement from everybody that I kind of write the first draft. I did that and sent it out to the stakeholders in late August. We received a couple of rounds of input, got the rule to where we thought it was appropriate, and at your very first meeting as a Board of Managers on October 2nd or 3rd, you approved our filing of this Rule with the Secretary of State's Office. That began the formal thirty day public comment period.

That public comment period ended or on about November 6th. We received very few public comments. I think that is a reflection of the process that Director Burton has instructed us to put together which I've have just gone through with you. We had buy in up front from almost everybody, so once it came time to file with the Secretary of State's Office, the thirty days came and went. We had very few public comments – very few substantive comments, in particular.

Anyway, we do have a few comments. Once I received the comments the first week of November, I put together the document in front of you called "West Virginia Workers' Compensation Commission's Responses to the Public Comments Received on Rules 10, 13 and 32." I sent this document to the four individuals who commented on Rule 10. You will see the four individuals who commented were Mr. Huffman from Jackson and Kelly, Mr. Maroney, Mr. Steve White from the ACT Foundation and Sally Smith from Bowles Rice. These are the first three pages of this document.

I put together our responses to each of those individual's comments. I faxed them out shortly after November 6th. I don't remember the exact date, but they have had our responses for well over two weeks. No one who commented has contacted me and said, we disagree, T. J., with your responses to our suggestions. So, to the extent – I'm not aware of anyone who disagrees with my responses to their public comments. I don't see anybody here who may talk on that today. Nevertheless, just to point out, we do have a public hearing on this rule as well on December 17th, so if any of these individuals do disagree with my responses, I would assume they would have come today or they will come on the 17th of December.

With all that background said – I apologize for going through it but I think it is important – I will touch briefly and get into as much detail as you would like on the specific responses from these four individuals.

Mr. Huffman made four recommendations on Rule 10. I've discussed with Mr. Huffman our responses to these four. We've accepted two – numbers 3 and 4 – and on 1 and 2, we agreed in concept. We came up with some better language, we thought, than what he suggested and he has agreed. So, you'll see the four comments from Mr. Huffman and our responses where we accept, in theory or in the actual language, all four. These simply go to definition of terms in the rule. I don't think in any way they change the substance of the rule. They simply clarify some definitions. Again, I don't think they're necessary, but he thinks they're helpful to clarify. That's fine with me. Again, I don't think there are any substantive changes there.

Mr. Maroney, you'll see made seven recommendations. I'll get into each one in detail if you would like but, for the first recommendation, he just says he wants a blanket – every "can, must" and "may" – every usage of the word "can, must" or "may," he wants changed to "shall." That simply is, in my opinion, really an overly broad suggestion. If you go to the rule, it has all kinds of unintended consequences. So, I suggest that we reject that suggestion and, again, Mr. Maroney has not called me to say that he feels otherwise.

We recommend adopting Mr. Maroney's second point. He wants to make it clear in the rule that, at some point – as you know, employers currently pay their premiums on a quarterly basis. Therefore, in this rule that's set up, it talks about contractors or sub-contractors paying on a quarterly basis. The new legislation says we can come up with a separate rule that requires employers to pay on different intervals, such as monthly. So, if and when we pass that rule and bring it to you, those changes would apply to this rule as well. So I have come up with some language to reflect that and, to my knowledge, it is acceptable to Mr. Maroney.

Mr. Maroney's points 3, 5 and 6 are a direct violation of the Code or existing rules for the Workers' Compensation Commission and I would suggest that they not be adopted. I pointed that out to Mr. Maroney and, again, I'm not aware of his disagreement.

We partially adopted one suggestion on 4 which is more of a clarification. And, finally, on his suggestion with regard to number 7, we have adopted that as well. We think that is an improved clarification.

So, we have accepted some of Mr. Maroney's, we've rejected some, and we have partially accepted some. Our explanations have been given to him and I'm not aware of any disagreement.

Mr. Steve White from the ACT Foundation has made two suggestions. We disagree with them both. I've chatted with him about these. I don't want to speak for him. I don't see him here today. But, again, he has had our responses and he has not disagreed.

Finally, Ms. Smith from Bowles Rice makes four suggestions. Suggestions 1, 3 and 4 are just technical clean-up – absolutely no substantive change in the rule. It doesn't change the meaning at all, so we have agreed to that technical clean-up. Her second suggestion would make a substantive change. It would empower the Executive Director to waive certain interest and penalties under certain circumstances. It would give him that right. However, he is expressly prohibited from doing that in the statute. So, we cannot adopt the rule that gives him powers that are contrary to the statute, so we suggest we deny number 2 from Ms. Smith.

That's it in a nutshell – an overview. Again, I'm not aware of any disagreement from what I proposed.

What I would ask respectfully from this Committee is that it report back to the full Board of Managers on the 17th with the recommendation that Rule 10 be passed for final adoption with the changes as suggested in the document before you.

Chairman Merritt: Are there any questions for Mr. Obrokta? So, your recommendation is for this Committee to recommend to the full Board of Managers that we accept the changes made and adopt Rule 10?

Mr. Obrokta: Yes, sir. Adopt the changes that are set forth in the document entitled "West Virginia Workers' Compensation Commission's Response to Public Comments Received on Rules 10, 14 and 32." I would ask that you authorize us to make those changes and then you pass on the rule in full on December 17th.

Chairman Merritt: Okay. I have just one question. The other document that you gave us, is that the -- are the changes in that document?

Mr. Obrokta: No, sir. That's as it is currently pending, or as it was -- that's in the format you approved for filing with the Secretary of State's Office. It would be this document then. We would make the changes as set forth in the second document.

Chairman Merritt: Now, will you circulate those changes like in a draft final document?

Mr. Obrokta: Depending on the sense that I leave with here today, I will make those changes and have a final version ready for you before the 17th if I get the sense that would make sense. If it's this Committee's recommendation that these changes be adopted, then, yes, sir, I will prepare the appropriate version and have it to you before the meeting of the 17th so you can review it one last time.

Chairman Merritt: I'm going to ask one of the two other Committee members if they would like to entertain a motion for this Committee to take the proposed new Rule 10 with the changes that Mr. Obrokta has recommended to the full Board of Managers meeting on the 17th.

David Satterfield: So moved.

Chairman Merritt: Mr. Satterfield moved. Do we have a second?

Paul E. Thompson: No.

Chairman Merritt: I'd like to second it. It's been moved and seconded that we take this to the full Board with the changes for approval. All in favor, say "Aye." Mr. Satterfield and Chairman Merritt voted "Aye." Opposed? Mr. Thompson voted against the motion. The "Ayes" have it.

Mr. Obrokta: I will therefore prepare a new version reflecting those changes that will be presented to the Board on the 17th. I will get you a copy well beforehand.

BOARD OF MANAGERS

December 18, 2003 - 10:00 a.m.
Charleston Civic Center Rms. 207-209

AGENDA

1. Call to Order..Steve White
2. Approval of Minutes..Steve White
3. Commission Report..Greg Burton
4. Office of Judges Report ....Timothy Leach
5. Claims Committee Report...Everette Sullivan
6. Audit Committee Report..Bob Phalen
7. Finance & Administration Report.................................Chris Jarrett
8. Risk Management Report..Doug Merritt
9. General Counsel's Report..T.J. Obrokta
    a. Primary Contractor Liability 85CSR10
    b. Board of Managers Procedural Rule 85CSR14
    c. License Non-Renewal and Revocation Rule 85CSR32
    d. Treatment Refusal and Mileage Rule 85CSR1
    e. Health Care Vendor Hearings Rule 85CSR28
    f. Request to File Rules
10. Old Business..Steve White
11. New Business...Steve White
12. Comments from the Public...Steve White
13. Next Meeting..Steve White
14. Executive Session...Steve White
15. Adjourn..Steve White

WORKERS' COMPENSATION COMMISSION BOARD OF MANAGERS

DECEMBER 18, 2003

Minutes of the meeting of the Board of Managers held on Thursday, December 18, 2003, at 10:00 a.m. in the Charleston Civic Center, Rooms 207-209, Charleston, West Virginia.

Board members present:

Steve White, Chairman
Gene F. Bailey
Richard W. Humphreys
Chris E. Jarrett
John L. Johnson
Matt Jones (representing Craig Slaughter)
Brooks McCabe
Douglas W. Merritt
Bob Phalen
David Satterfield (by phone)
Everette E. Sullivan

Commission staff present:

Gregory A. Burton
Melinda Ashworth Kiss
Timothy G. Leach
T. J. Obrokta
Randall B. Suter
Lisa Teel

1. Call To Order

Chairman White called the meeting to order at 10:10 a.m.

2. Approval Of Minutes

Mr. Sullivan moved to approve the minutes of the meeting held on October 28, 2003. The motion was seconded by Mr. Merritt and passed unanimously.

3. Commission Report – Gregory A. Burton

Gregory A. Burton: Thank you, Mr. Chairman. You have in your hand-out the November statement. This was gone over at the last F&A Committee meeting, but we wanted to take a minute to go over it with the full Board. This is a new format. I want to make sure everyone is comfortable with it and you're getting the information that you want to receive.

9. General Counsel's Report – T. J. Obrokta

T. J. Obrokta: Mr. Chairman, members of the Committee, T. J. Obrokta, General Counsel, Workers' Compensation Commission. You have on the agenda before you here today eight rules that we will be discussing that are at various stages in the rule development process. Before I discuss the specific rules, let me just say you've been handed a packet that has the eight rules that we're going to discuss today in the order in which we will discuss them. I'll go through them one-by-one.

If I could make a preliminary comment or two, we're pretty excited about today. This Commission – more importantly, this Board of Managers has been in existence for only two-and-a-half months, and yet today you stand poised to vote on up to five rules that will go a long way to implementing Senate Bill 2013. We think that pace has been expeditious but a deliberate pace, and certainly congratulate the Board of Managers on the process. I will finally say that given the very limited comments we had yesterday at the public hearing, it's very clear that the process we've established, as authorized by Mr. Burton, has given everyone a seat at the table in the development of these rules. I believe everyone who came up and commented yesterday indicated that they had made comments during the process and that we had accepted a lot of them. So, people are given a seat at the table, we take their comments seriously, and have tried to adopt as many as we possibly could. With that, I'll go right to the rules.

The first rule in your packet is Rule 10. This is a rule up for final vote today. Just a very general – very brief background because you've seen most of these rules several times before. Historically, primary contractors have been liable for the unpaid premiums of their sub-contractors. Senate Bill 2013 expanded that concept to include what it called the Natural Resources Extraction Business. That is to say, we're going to take this concept and we're going to apply it in the coal, timber and natural gas businesses. Primary contractors will be liable for the unpaid premiums of their subs.

We took the then existing Rule 10 and modified it to accommodate this legislative change. That is what's before you here today. This rule has been through several drafts with the stakeholders – everyone from the Coal Association to the United Mine Workers, the Chamber, and the AFL-CIO. I think we're very comfortable with the way it is now.

The changes I would like to highlight and make the Board aware of today are the changes that were suggested yesterday at the public hearing. The comments, I believe, came from Mr. Maroney's office. They're four small comments – small in terms of the least number of words – that I will briefly discuss with you.

On page 2 of Rule 10, paragraph 2.3, you will see some underlined language on the fourth line. It says within ninety days. This issue addresses when an out-of-state company comes into West Virginia and when they are required to get coverage from our Workers' Comp Commission and when their coverage from the other State will apply. This ninety days is provided for in Rule 9 of our rules. Rule 9 covers all types of coverage issues, classification issues – it covers really all of the "employer" issues. I believe the suggestion from the comment was to take that ninety days to thirty. The reason I would disagree with that suggestion is because that ninety days is provided for in Rule 9. Rule 9 takes a global approach to this whole issue, and I think we should reserve the right to address this issue when Rule 9 is before the Board, which I would expect to be in the next few months. So, I'm not suggesting that I disagree with the comment. I'm simply suggesting that this is an issue that if we changed it now, it would be inconsistent with Rule 9, and I just think it's an issue better addressed once the Board is looking at Rule 9 in total. So, I would suggest not adopting that recommendation.

Paragraph 3.2 on the bottom of this page – the fourth line. Mr. Maroney wanted to insert the word "transportation" to make it clear that this rule covered those who also transported natural resources. I think the rule covered them anyway, but to accommodate his request, I inserted the word "transportation" there on the fourth line.

Page 3 – you'll see the first full paragraph, 3.2.b. You'll see a reference there to thirty days. The concept of primary contractors only being liable for the unpaid sub's premiums – that only applies per *Code* if the contractor/sub-contractor contract is longer than thirty days. That's in *Code*. That's why we have thirty days here. If you adopted the public comment suggestion that that thirty days go, I believe, to ten days, that would be in violation of the *Code*. So, I'm not suggesting that I disagree with the concept – I may even agree with the concept – but I don't think you can do it here in this rule. I think that would require a legislative change.

Finally, on page 6 of the document, you will see paragraph 5.6. The essence of this paragraph is as follows. Under the *Code*, a primary contractor can protect itself from being liable for the unpaid premiums of its subs if that primary contractor comes to us before the contract and gets a certificate from us saying the sub's in good standing with us. There's a whole process set forth in the *Code* that enables the primary contractor to insulate itself from this liability. Paragraph 5.6 is in here to adopt those provisions of the *Code*. It was suggested that this come out in the public comment period. I would disagree with that suggestion because, again, I think this is just implementing what's in the *Code* and to be changed, it would have to be changed in the *Code*.

Those are the four comments we received yesterday, according to my notes, on Rule 10. I think it's fair to say that, given the scope of the rule and its complexity, we were pleased to be down to these very few issues.

I would respectfully request from this Board that it entertain a motion to adopt the recommendations we propose be adopted from the public comments and have those amended into the rule. Then I would request a second motion to approve the rule – the final filing with the Secretary of State's office.

Chairman White: Thank you, Mr. Obrokta. Do we have a motion to amend the rule as suggested?

Mr. Merritt: I would like to make that motion – as Mr. Obrokta indicated, actually two motions – one to make the amendments/changes and then to ....

Chairman White: The first motion would be to make the amendments that have been suggested by the Division reflecting public comments. We have a motion. Do we have a second?

Mr. Sullivan: Second. I have a question. Mr. Obrokta, on the ninety days to thirty days request, you said that would be in Rule 9?

Mr. Obrokta: Yes, sir.

Mr. Sullivan: What would be the position of the Commission on bringing it back to thirty days if we did change it in Rule 9?

Mr. Obrokta: Without consulting with Mr. Burton or the rest of the Commission, I would say it is my personal belief that conceptually, it makes sense to reduce the ninety days. My personal belief is it would make sense to sit down and try to lower that figure.

Mr. Sullivan: Back to thirty days or ten days or...?

Mr. Obrokta: I would want to give it further thought before I would commit to a number but, again, conceptually, I agree with the idea.

Mr. Phalen: I just want to follow up on that. I appreciate your response, T.J., however, once we got to Rule 9, we have Rule 10 and Rule 10 has ninety days. Then if we were to change Rule 9 to thirty days, would there not be a conflict there?

Mr. Obrokta: At that point, we could certainly just do an amendment to this section. We could amend that one word. We could come back and do that very easily.

Mr. Phalen: Okay. Thank you.

Chairman White: Good question. Any further discussion? Hearing none, all those in favor, please signify by saying "Aye." Opposed?

The motion was passed unanimously.

Chairman White: It is clear that the amendment has passed. The rule before you is the revised Primary Contractor Liability Rule 10. Do I hear a motion?

Mr. Merritt: So moved.

Mr. Sullivan: Second. Mr. Obrokta, you said that even though we pass this rule that we can come back and amend it if we amend Rule 9?

Mr. Obrokta: Yes, sir. We can put language in Rule 9 that says this supercedes the ninety days in this rule. We can easily address that.

Mr. Sullivan: Thank you.

Chairman White: Further discussion? Hearing none, all those in favor of passing the revised rule, signify by saying "Aye." Opposed?

The motion was passed unanimously.

Chairman White: It is clear that revised Rule 10, the Primary Contractor Liability Rule, has passed. The next rule on the agenda is Rule 14. Mr. Obrokta.

Mr. Obrokta: Rule 14 is the procedural rule that sets forth how this Board of Managers will operate. This rule was subject to public hearing yesterday. There was one comment received on the rule that I have tried to accommodate. I believe the comment was either from Mr. White or Mr. Maroney's office.

If you will look on page 7 of the document, you will see the second full paragraph, number 10.8. There was an interest expressed yesterday during the public hearing discussion that members of the public be able to come to this Board and request a public hearing on a rule.

After discussions with some of the Board members afterwards, I have tried to come up with language that accommodates that request. Essentially, what it reads is, any member of the public may request a public hearing – may request one – at any point until after the rule has been filed with the Secretary of State's office and then fifteen days have expired. After the expiration of those fifteen days – it's been out there in the public for fifteen days – then that right to request a public hearing would expire.

But, again, during the entire drafting process, during the entire deliberation process when you're considering filing with the Secretary of State's office, and after we file with the Secretary of State's office for the next fifteen days, all that time is open for members of the public to come to you or come to us as a Commission if you're not having a meeting, and request a public hearing. I think that's a reasonable balance. We don't want to unnecessarily delay the process but, again, we want to accommodate the request. That was the only comment made at yesterday's public hearing.

The Commission would request two similar motions that were made for Rule 10.

Mr. Sullivan: Mr. Chairman, I move the amendments be approved.

Mr. Phalen: Second

Chairman White: Discussion? All those in favor, signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: It is clear the amendment has passed. The rule has been amended to reflect the comments made in the public comment period. Do we have a motion to adopt the amended rule?

Mr. Jarrett: So moved.

Mr. Bailey: Second.

Chairman White: We have a motion and a second. Discussion? All those in favor, please signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: We have declared that revised Rule 14 as before this Committee has passed. The next item on the agenda is Rule 32.

Mr. Obrokta: Mr. Chairman, members of the Board, Rule 32 is a critical rule that we see as a great new tool given to us by the Legislature to enforce premium collections. Specifically, it has been the law on the books for quite a while that if an employer goes into default, the next time that employer goes to get a new business license or any other license that's necessary to do business – the next time they go to renew that, that request will be rejected because they're in default with Workers' Comp.

The Legislature greatly strengthened that provision. What the Legislature said in Senate Bill 2013 is, you no longer have to wait until it's renewal time. You can go out now and when they go into default, you can go out and you can revoke a business license or any other type of license that's necessary to do business in the State of West Virginia – a very proactive step. We took Rule 32 and modified it to reflect this legislative change.

Again, this rule's been all through the drafting stages with the stakeholders. It's been through the Sub-Committees. It was the subject of yesterday's public hearing. I believe we received two comments yesterday and I'm trying to adopt them both.

If you will turn to page 2 of the document, you will see paragraph 2.9. If I could just take a step back and explain what this is trying to get at, it may be helpful. Rule 32 says you can go out and revoke business licenses or what-have-you if they go into default. There's a separate concept in the legislation – another new concept – called an Employer Violator System. What that says is, if you're a ten percent or more shareholder in a company that goes into default, you're going to be put on a violator list and, you, as an individual, if you go try to form another company – go around the hill and start another operation – you will be denied. You will be blocked. That Employer Violator System deals with the individual owners of the companies.

The trick is to make sure Rule 32, which, again, involves the revoking of business licenses, must work in tandem with the Employer Violator System so that when you revoke the license, then you get the ownership information on the folks who own that company who are in default, and you put those individuals on the Employer Violator System. So, the next time they go out and try to start a new company, they won't be allowed to do so. So, these two concepts have to work in tandem. We fully agree with that concept.

Steve White with the ACT Foundation wanted to make it clearer in Rule 32 that it has to work with the Employer Violator System. I agree with that. The language I've come up with is in 2.9, the last sentence has been added. It reads as follows: The Commission shall gather individual and other ownership information concerning the employing units in default for examination under the Commission's Employer Violator System.

That's the language I've tried to come up with to make the point that these two endeavors must work in tandem together. I spoke with Mr. White before the meeting – I don't want to put words in his mouth, but I think he thinks we're almost there. I'm not sure he's completely signed on, but that's the best I think we can do to try to accommodate the request.

The other request yesterday at the public hearing made, I believe, by Mr. Maroney's office – if you turn to page 4 of the document, what this paragraph is addressing – paragraph 7.2. Let me take a step back and kind of give you the factual scenario of how this would evolve. An employer goes delinquent – they don't pay their premiums. Then they go into default because they still haven't paid their premiums. Several months have gone by now. So, then they go into default. At that point, we're going to revoke the business license. The rule provides for an administrative review before we pull the license because governments do make mistakes and we don't want to pull someone's business license until we're sure. Mr. Maroney suggested that you need to make them put up a bond at that point before you reconsider to at least secure the debt. We agreed with that and put that in. But I said the Commission "may" require the bond, etc., and he thought "may" should be "shall." So I made it "shall." 7.2. Okay.

That covers the comments that I have from my notes on the hearing yesterday. So, with that, I would ask that the Board adopt the various modifications to Rule 32 that have evolved through the public hearing process. Then, I would ask for a second motion approving Rule 32 for final filing.

Mr. Sullivan: So moved, Mr. Chairman.

Mr. Satterfield: Second.

Chairman White: We have before us a motion to adopt the amendments that have been explained by Mr. Obrokta to Rule 32. Discussion?

John L. Johnson: Yes, I have a question, T. J. In regard to 7.2, changing the "may" to "shall" gives the Division absolutely no leeway going forward. If an employer happens to be in default, it's quite possible that they're defaulting for good reasons – economic reasons – and, consequently, cannot afford at that time to put up assets for reconsideration which means that then you have no choice but to go out of business which may not work in the best interest of Workers' Comp and may not work in the best interest of the State as a whole. So, for that reason, I object to changing that from "may" to "shall."

As a matter of fact, I'm pretty sure if we change that – in the past, we would have been in hot water with a lot of different companies and entities that we are even currently dealing with. So, I would oppose changing that to "shall."

Mr. Obrokta: Mr. Johnson, I share some of your apprehension on this change, but the way I reconciled it in my own mind is that we are so far down the process at this point – they've been in delinquency, they've been in default and they still haven't paid. So, I'm very sensitive to your issue and I think you raise a very good point, but they're so far down the line at this point, I could see the point that we want to be firm with them, and I would ultimately suggest that this Board do that.

The other point I would suggest is, all they have to do – of course, well, they can pay up – they can also just enter into a repayment agreement. That's sufficient, or they can get a cash or surety bond or a bank letter of credit. So, they have several methods available to them that will hopefully safeguard against the issue you're raising.

Chairman White: Any further discussion?

Mr. Phalen: T. J., in regard to the employing unit under 2.9 – and I appreciate you adding the additional language – one question that I have. It says, the Commission shall gather individual or other ownership information – does this go towards if, say we have three owners with an employer or a board of directors. Let's just put it that way. Does this prohibit (a) the CEO or the president of the company or the employer from obtaining another license or whatever? Would his license be revoked or (b) a secretary/treasurer of an employer or that he or she may be able, to use your words, go around the hill and open up another operation? Does that go to that extent?

Mr. Obrokta: It does not go to that extent. But, when we do the Employer Violator System and they work together, we will accomplish the concepts you're describing. But, again, Rule 32 is not designed to do that. It's just a rule limited to the revoking of business licenses. But, again, to put this language in there, I'm trying to make the point that it's got to talk with the Employer Violator System and, working together, they should accomplish what you've outlined.

Mr. Phalen: Okay. Just to make sure I understand it, in conjunction with the Employer Violator System, this change that you've made should take care of that particular problem.

Mr. Obrokta: That's correct.

Chairman White: Any further discussion? The question before us is the adoption of the amendment to Rule 32 which reflects the comments made in the public comment period. We have a motion and a second. All those in favor, please signify by saying "Aye."

Ayes: Humphreys, Jarrett, McCabe, Phalen, Satterfield, Sullivan, White

Chairman White: Opposed?

Nays: Bailey, Johnson, Merritt

Chairman White: The "Ayes" have it. The motion is passed.

We have an amended Rule 32 before us. Do I have a motion for the adoption of amended Rule 32?

Mr. Phalen: So moved, Mr. Chairman.

Mr. Satterfield: Second.

Chairman White: We have a motion and a second to adopt revised Rule 32. Discussion? Hearing no discussion, we have before us the revised Rule 32. All those in favor, please signify by saying "Aye."

Ayes: Humphreys, Jarrett, McCabe, Phalen, Satterfield, Sullivan, White

Chairman White: Opposed?

Nays: Bailey, Johnson, Merritt

Chairman White: The "Ayes" have it. I declare the motion is passed. The revised rule has been adopted.

Mr. Obrokta: The next rule is Rule 28. Senate Bill 2013 did several things in an effort to get a hold of and to get under control the various medical expenses being incurred by the Commission. A couple things Senate Bill 2013 did – first of all, it gave the Executive Director power to suspend for up to three years or terminate any medical provider who's abusing the system. The old law used to require, however, that the Executive Director go through a very onerous administrative process before he could get to that point.

The second thing Senate Bill 2013 did was say, he doesn't have to go through that onerous administrative process any more. He can immediately suspend or terminate a medical provider after he's consulted with a medical expert of his own. He can immediately suspend or terminate, and then there will be an administrative process to see whether he was right or not, essentially.

Those rules have been modified and put into Rule 28. The only public comment – there were no comments yesterday on this rule. This rule, again, has gone through the stakeholder process. The only comment I received – and it's well taken. If you'll turn to page 8 of the document – the statute states that the Executive Director can suspend or terminate if the provider is basically engaging in medically-unsupportable treatment. Paragraph 9.6 is a series of definitions of what that means. What we wrote was, "treatment which is controversial, obsolete, investigational or experimental will be subject to strict scrutiny by the Commission." It was suggested that we add the words, "and must be pre-authorized by the Commission." I think it's a good point, although I do think it's taken care of in other rules. But, again, I would propose amending Rule 28 by adding that phrase – "and must be pre-authorized by the Commission." That's the only public comment and change that I'm aware of.

So, I would request a vote to adopt that minor change, and I would request a vote to file the rule with the Secretary of State's office.

Mr. Bailey: I move that we adopt the change.

Mr. Humphreys: Second.

Chairman White: I have a motion that we adopt the amendment and a second. Discussion?

Mr. Humphreys: T. J., at 9.6, it may not be of any consequence, but I guess I'm a little uneasy about the idea that the Commission might pre-authorize controversial or obsolete treatment.

Mr. Obrokta: I would be concerned if we pre-authorized obsolete treatment as well and, if we do that, I hope someone brings it to your attention. I agree that language might not quite – I'm sensitive to your point. I would simply – I guess I would suggest that our Medical Director, Jim Becker, and his staff will be the ones responsible for ensuring that we don't run afoul of the concern you're expressing. I have full faith that they will do that.

As soon as we take out obsolete, which we can do if you'd like, there's going to be a treating physician who's going to say this is not obsolete, so there's going to be a debate as to what's obsolete. That's why we're saying it's subject to strict scrutiny and that we pre-authorize before we ever do it.

Chairman White: Any further discussion? The question before us is passage of the Rule 28, as amended, pursuant to the recommendations of the Division. All of those in favor, please signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: I declare the motion has passed. The rule has been adopted. It has been pointed out to me that the amendment has not been passed. We'll do it again. All those in favor, please signify by saying "Aye." Opposed?

The motion on the amendment to the rule passed unanimously.

Chairman White: We have before us the revised rule. Do I have a motion for its passage?

Mr. Humphreys: I so move.

Mr. Bailey: Second.

Chairman White: We have a motion and a second. Discussion? Hearing none, all those in favor, please signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: I declare the motion has passed. The revised rule has passed – for the second time.

Mr. Obrokta: The next rule on the agenda is the final rule we'll discuss today that you've already seen. This is Rule 1. It's twenty-nine pages long, but we only made a few isolated changes to it.

They are as follows. First and foremost, Senate Bill 2013 states that a claimant can have his benefits suspended if he refuses to seek necessary medical treatment. We put the language into the rule which adopts that. I have not received – I don't recall receiving a single comment from anybody as to the language we put in here. I'm not aware of anyone who objects to how we've set it out. No comments were made on this Rule yesterday at the public hearing.

The second substantive change in Rule 1 is on page 15 of your document. Just to go back over an issue, this is an idea that we presented to the Board awhile back and let me just briefly remind you. Claimants are entitled to mileage reimbursement at 36¢ a mile every time they go to a doctor, chiropractor, etc. We made a proposal, as outlined in the document before you, to eliminate that mileage reimbursement. We would still maintain reimbursing claimants if they were mandated by the Commission to go to a doctor or mandated by an employer to go to the doctor. So, we would still have reimbursement under those circumstances. But the routine daily trips to secure treatment, we were proposing eliminating the mileage reimbursement. We viewed as somewhere north of a $6 million savings and there are three FTEs (full-time employees) that do this work. That was the reason behind the suggestion at the time.

I believe there have been some discussions on maybe a better way to address this issue. Those are my comments and I would leave it to the Board to instruct me on – if there are any questions or if anyone has a suggested better way to do this.

Mr. Phalen: As I spoke before, I was adamantly opposed to the reduction of the 36¢ per mile when an injured worker had to seek medical attention, understanding full well if the employer or the Commission gives that injured worker direction, then that 36¢ per mile would still be paid. That's my understanding, right, T. J.?

Mr. Obrokta: That's correct. As proposed.

Mr. Phalen: And the elimination of the mileage is if the injured worker has a doctor's appointment to be treated for the injury that he has sustained and he goes on his own where the doctor sets up that appointment. That's correct, right?

Mr. Obrokta: Yes, sir.

Mr. Phalen: And, again, I stand today still in opposition of the elimination of that 36¢ per mile, understanding full well that has been the practice of the Division for a number of years and understanding full well as to what the Division has said in regard to the estimated savings that may be derived from the elimination of that 36¢ per mile. Again, that is estimated savings. I have not seen anything concrete as to what that savings would constitute, other than what you folks have told us in the past, and that's somewhere around $5 million, I believe.

Again, I'm still adamantly opposed to the reduction or the elimination of the 36¢ per mile. These people did not ask to be injured. They do not ask the doctor to set up their appointment, in most situations.

Don't anybody misunderstand. I recognize that there's abuse in anything, and some people can take full advantage of anything. But, I can point out several situations where the people do have to go to the doctors on a regular basis and they're not sent by the employer or they're not sent by the Division.

You know, again, these folks did not injure themselves intentionally or whatever the case may be. When they are injured, naturally their monies are eliminated as to their wages and things as to what they're actually used to making. It's reduced. Thank God we do have workers' compensation to provide for on-the-job injuries. However, that's part of the injury, and I can't for the life of me understand, you know, if someone's injured and they have to go to the attending physician for medical treatment as to why they're going to be penalized further out of their pocket to pay for their mileage expense, their gas expense, and things when they've already sustained loss in regard to the injury itself.

So, again, I would still stand opposed to the reduction of the 36¢ per mile on the injured worker. However, I do have an open mind in regard as to how this is done on another level. Through Medicare, I believe it is, that rate is around 13¢ or 15¢ per mile, and I would have an open mind in regard to trying to reach some type of settlement in regard to this particular situation. And even at 15¢ per mile, that's still a 21¢ per mile reduction on an injured worker. However, it's still 15¢ better than zero. So, again, I'm opposed to the elimination of mileage on injured workers.

Mr. Jarrett: There has been, as I understand it, some in-depth discussion between the Commission as well as all the stakeholders regarding this issue. It's been a very divisive issue. In an effort for conciliation and a compromise, I'd like to propose the following as an amendment for this section, 15.1. We would strike it in its entirety and insert the following:

> Claimants are entitled to reasonable travel, meals and lodging expenses actually incurred in connection with medical examinations or treatment. In making a determination of the reasonableness of such expenses, the Commission shall utilize the travel regulations for State employees as a guide, unless specific provisions to the contrary are otherwise contained herein. Claimants may be reimbursed for mileage in connection with medical examination or treatment at a rate of 15¢ per mile.

> This rate shall not apply to mileage reimbursement requests involving treatment provided when the Commission requires the claimant to undergo the medical examination and has selected the physician, or when an employer is required to reimburse reasonable travel and other expenses, as provided for in the *West Virginia Code* §23-4-a. The rate provided for in the travel regulations for State employees shall apply to these latter reimbursement requests.
>
> I offer this as an amendment up for consideration before this Board.
>
> Mr. Sullivan: I would second that amendment, Mr. Chairman.

Chairman White: We have an amendment that's been proposed to Rule 1 and we have a second. Do we have discussion?

Mr. Phalen: Yes, Mr. Chairman. For clarification, Chris, it only applies – the 15¢ only applies to the claimant going to a doctor other than him being directed by the Commission or by the employer, is that correct?

Mr. Jarrett: That's correct.

Mr. Phalen: And the regular amount that's provided by the State *Code*, if the Commission or the employer directs a claimant to a doctor, would still apply in that situation?

Mr. Jarrett: That kick in. That's correct.

Chairman White: Thank you, Mr. Jarrett and Mr. Phalen. Further discussion?

Mr. Bailey: I have a concern or a thought that that 15¢ should be across-the-board. It should be in all the categories whether the employer requests the exam or whether it's an IME. I know that's not what the motion says here at this point in time. I'm even concerned that paying at all – well, I'm not concerned with us paying 15¢ or whatever. I have supported that to some degree. But, I understand that Mr. Obrokta has said here that it takes three full-time employees just to process those invoices. I don't know what we can do about that. I don't know how many invoices that entails – many thousands, I assume, if it takes three full-time employees two hundred and twenty days a year or however many days they work to process those. I, at this point in time, have a problem with the motion if it does not cover all of those categories or all areas.

Chairman White: Mr. Obrokta, in the public hearing process, were there any comments directed to including these other categories into the reduction in the mileage reimbursement?

Mr. Obrokta: Mr. Chairman, normally, we receive very little, if any, written comment on this issue. I got one letter from one attorney suggesting it was unfair. But, I do believe that through the give-and-take of the public discourse, there has been discussion that the concept offered by Mr. Bailey was one alternative people were discussing, as was, of course, the amendment described by Mr. Jarrett. Both have been ideas I have heard floated by one side or the other.

Mr. Jarrett: It's subject to check, but I think, as an employer, if I send my employee to use his personal transportation to go to a doctor at my request, I think I'm required by Federal law to subject him to the Federal levels of transportation. Someone can check that for me. I mean, if I have an employee and I tell him to use his car to go over and pick up a box of paper clips, I've got to pay him mileage, by Federal law. So, I don't know that we can even do that, Gene. That's subject to check.

Mr. Bailey: I mean all I'm asking is that you pay everybody 15¢ a mile. But, you're saying that according to Federal ...

Mr. Jarrett: I would ask for clarification on that if anybody knows that particular piece of the law but, to my knowledge, we pay whatever the guidelines are. An employer is told, here's what you've got to pay if an employee uses his personal car on company business. And, if I direct an employee to go for a second opinion or to a doctor, I typically reimburse him at that 36¢ – unless someone tells me different. That's my understanding.

So, you couldn't change that piece of it. The only piece you could be talking about, in my judgment, would be the part – maybe – and I don't know the law on that one either – when the Commission directs someone to go.

Mr. Humphreys: T. J., awhile back, you gave us an example of a claimant employed by a chiropractor who was charging mileage to go to work. Would this amendment mean that this claimant would be able to charge 15¢ instead of 36¢?

Mr. Obrokta: Yes. Obviously, we're not going to let that person charge anything because they're abusing the system and we'll take the appropriate steps. But, conceptionally, yes.

Mr. Merritt: I personally oppose paying claimants going for the routine doctor visits. I think if you look around at the other surrounding States, they do not pay claimants going for routine office visits. I could live with a change of maybe for these routine visits if there's a mileage of, say, anything over twenty-five miles, then we could consider reimbursing the claimant. That's my suggestion.

Mr. Sullivan: I think we're losing sight of the fact that these are injured workers that we're talking about. These are employees of the employer and it wasn't – as Mr. Phalen has stated, it wasn't their doing that they got injured and they have to go to the doctor, and I don't see why that we'd want to penalize them further. I would support the amendment as it was suggested by Mr. Jarrett.

Mr. McCabe: I would just suggest that perhaps the Board does support the amendment as presented, given the different perspectives that are really fairly broad as I am listening to this. I would suggest that we take this amendment and the Board accept it and pass it and ask that Mr. Obrokta perhaps, at some point in the future, take another look at this. But at least we are taking a step today that we can implement something and create some savings. My fear is that if we don't do that, we may create some unnecessary divisiveness. I sense that there perhaps is not a clear, broad-based consensus on this as we sit here. Maybe what we do is do the best we can today, pass the amendment as presented by Mr. Jarrett and, as we work through some of these other rules, ask Mr. Obrokta to maybe convene a working group to take another look at it further down the path a bit.

Chairman White: Thank you, Mr. McCabe. Are there further discussions? Hearing none, all those in favor of passing the amendment as proposed, signify by saying "Aye."

Ayes: Humphreys, Jarrett, McCabe, Phalen, Satterfield, Sullivan, White

Chairman White: Opposed?

Nays: Bailey, Johnson, Merritt

Chairman White: It is clear that the motion has passed. The rule before the Committee, as revised by Mr. Jarrett's motion.... Now, as a point of clarification, T. J., were there other amendments that had to be addressed or that you have suggested?

Mr. Obrokta: No, sir.

Chairman White: Is there a motion to adopt the Rule that has been amended, pursuant to the amendment just passed? Do we have a motion?

Mr. Jarrett: So moved.

Mr. Sullivan: Second.

Chairman White: We have a motion and a second to adopt the revised Rule 1. Discussion? Hearing none, all those in favor, please signify by saying "Aye."

Ayes: Humphreys, Jarrett, McCabe, Phalen, Satterfield, Sullivan, White

Chairman White: Opposed?

Nays: Bailey, Johnson, Merritt

Chairman White: I declare the motion has passed. Rule 1, as revised, has been adopted by this Committee.

The next item on the agenda is Old Business.

Mr. Obrokta: There should be another item on the agenda regarding rules.

Chairman White: Oh, pardon me. Request to file rules. It's your floor.

Mr. Obrokta: We are now bringing before you three new rules. I am going to request that at least two of those be filed with the Secretary of State's office for the initial public comment period. The same work has gone into these rules that went into the other rules. These rules have gone through the stakeholder process. We've tried to adopt as many suggestions as possible. I am not here to tell you that these rules are perfect yet, but I do think they are far enough along that we can file them. I do think each of these three rules will be very important, and my suggestion would be that each have their own public hearing because they are very substantive rules. I agree that the continued dialogue with all the stakeholders is still necessary on these rules, but I think we're far enough along that they can be filed with the Secretary of State's office.

The first rule in your packet should be Rule 15. This is the Vocational and Rehabilitation Provider Rule. Senate Bill 2013 did a few things on rehab. First of all, it increased from $10,000 to $20,000 – double – the amount we'll pay for rehab plans.

This rule adopts that doubling. Senate Bill 2013 allowed employers to contract with preferred providers for those rehab services. This rule accomplishes that. Finally, Senate Bill 2013 put a two-year limit on rehab indemnity benefits. This rule adopts that as well.

The evolution of this rule is as follows. I did a first draft, as usual, sent it out to everybody and got a whole host of comments. It was important to me and I tried to accommodate as many comments as possible and, then, unlike the other rules, I sent it back out for a second round of comments. I then met with the head of the Rehab Association. I will represent to the Board that I think – not all – but the overwhelming majority of issues have now been worked out with them. I would pledge also to continue to work with them if there are any outstanding issues.

A couple of other changes in the rule or a couple of things the rule accomplishes – there was a $10,000, now a $20,000 cap on rehab plans. The rule never said, well, what goes against that $20,000? It was very hard to police. So I went to the State of Washington, I believe, and they have a rule on rehab. I got a lot of ideas from them. So, the rule sets forth actually what should be charged against the $20,000 so that limit can have some meaning. That's in the rule.

This is a major rewrite – there's no doubt about it – on Rule 15. But, again, we have involved the stakeholders and two drafts have gone out to them and a sit-down meeting. I'm not here to tell you that they agree with everything, but I am here to say that we have narrowed the gap so that I think the filing with the Secretary of State's office, and then a public hearing on this rule, is an appropriate step at this time.

So, with that, I would request permission to file this with the Secretary of State's Office.

Mr. Jarrett: So moved.

Mr. Phalen: Second.

Chairman White: We have a motion and a second. Discussion? All those in favor, please signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: The motion has passed. It will be filed with the Secretary of State's office.

Mr. Obrokta: We will also work with the Chair and the other members of the Board to set up a public hearing on this rule.

Chairman White: A public hearing is hereby requested on this rule.

Mr. Phalen: For clarification. T. J., I thought you stated in the beginning that you would suggest a public hearing on all three?

Mr. Obrokta: That's correct.

The second rule before you, I e-mailed this to everyone on the Board or mailed it to them a couple of weeks ago. Excuse me. Permit me one second.

Chairman White: Just for clarification, Mr. Obrokta, it's my understanding that we will be – when we set the rules for public hearing, that will – if, in fact, a public hearing is beyond the thirty-day time period, the public comment period will be expanded to include the public hearing.

Mr. Obrokta: As a matter of fact, we'll set a forty-five day public comment period just to accommodate that issue. If you need to, we can extend it.

Senate Bill 2013 required us to come up what I generically will call a Medical Management of Claims Rule. This is a very comprehensive rule. If I could just read to you out of Senate Bill 2013 – just very briefly. We have to bring to you what the statute calls a Medical Management of Claims Rule and Awards of Disabilities Rule. This requires three things. Three things must be in this rule. First, we have to establish standardized guidelines and parameters for the appropriate medical treatment of claimants. Second, we have to establish expected periods of time to reach maximum medical improvement. Third, under the statute, we have to come up with ranges of permanent partial disability awards for common injuries and diseases. The statute gives us the flexibility to come up with our own to meet any of these three, or we can reference in our rule a nationally-standardized set of guidelines or what-have-you. So, that's the statutory background for why I'm bringing this rule to you today.

What we've done is, you have a 102 page rule in front of you. The first three pages, which are not included in the 102, are basically a table of contents which breaks down what this rule is trying to do. You'll see roman numeral I, then there's an introduction – those are introductory provisions. Roman numeral II addresses providers – who can be providers of workers' comp. Roman numeral III gets into provision of services – the role of the treating physician – how do they bill us, things of this nature. Roman numeral IV are those specific guidelines I just mentioned to you regarding treatment – treatment guidelines. Roman numeral V – we have some special rules for drugs and medications. Roman numeral VI gets into the expected period of time off. When you are injured, what do we expect? How long do we expect you to be off? The Board members may know awhile back, the Commission adopted the Pressley-Reed guidelines on this issue and this provision of this rule references Pressley-Reed. That's how we handled that. Roman numeral VII gives the ranges for permanent partial disability awards for common injuries and diseases.

The evolution of this rule is as follows. There was – some of this had been in rules, but very little of it. The Commission had treatment guidelines on the Internet. We had other documents that governed medical care scattered through different rules. It was not well organized. What we did – we took this chance that the Legislature gave us to bring everything in that we could think of that has to do with how we manage medical claims – we spend $220-some million a year on medical claims – and brought everything into one rule – let's sit down and work it out and see how this should all operate.

Jim Becker, our Director of the Office of Medical Services – who's from Marshall, I will mention – he's worked with the WVU lawyers so we have diversity there – worked closely with them. They've had a lot of input. This rule, obviously, the State Medical, the State Hospital – all of those folks who are on our stakeholders list, they got the first draft that you received a couple weeks ago. We've gotten very limited comments on the rule. I think people are still trying to digest it. I do think, however, we are at a point, and we are required by Senate Bill 2013, to get this filed with the Secretary of State's office.

I recognize this is a very voluminous document – that no one can sit down and go through all this at one sitting. This is really the reason I preface my remarks on these rules. I think we need at least a forty-five day public comment period on this. We need a hearing. We need continued involvement with the stakeholders.

I'm not here to tell you this is all agreed to. There will be parts in here that are controversial, I'm sure. But, nevertheless, we are trying to satisfy our legislative mandate to bring this rule to you, and it does need to be filed with the Secretary of State's office before December 31st. So, I present it to you, as a second step in a process I recognize will be a longer process.

I'll be happy to answer any specific questions. Dr. Becker is here to talk about it as well.

But I would respectfully request that we be given permission to file this with the Secretary of State's office and initiate the public comment period and, again, get the stakeholders involved in a public hearing and also as many sit-arounds as we need to, and hammer out any differences. So, with that, I'll request that we file this with the Secretary of State's office.

Chairman White: Thank you, Mr. Obrokta. We have a request to file the rule with the Secretary of State's office. Do I have a motion to that effect?

Mr. Bailey: So moved.

Mr. Jarrett: Second.

Chairman White: All those in favor, please signify by saying "Aye." Opposed?

The motion was passed unanimously.

Chairman White: The rule will be filed with the Secretary of State's office.

Mr. Obrokta: The last rule here before you today – under Senate Bill 2013, we are required to come up with .... Let me back up. This rule deals with permanent total disability awards. Under Senate Bill 2013, we have to come up – by the end of this year – we being the Commission – have to present to you, the Board, by the end of this year the contents of a new permanent total disability application. We also have to come up with a plan – under the *Code*, we're required to go back and anyone who was awarded a permanent total disability since 1993, we are required to take another look at those recipients and see if they do still meet the definition of permanently and totally disabled.

The last document in your folder is our attempt to do this. It is our plan to again address a new application and a plan to evaluate all claimants who have received PTDs since 1993. As we put this together, we realized there may be some ancillary issues – we realized this over the last few days – there may be some ancillary issues that could be impacted by the requirements of Senate Bill 2013 – issues such as chargeability and things of this nature.

I would request that you accept this rule as our plan, but I would also request that we hold off until the January meeting before filing with the Secretary of State's office so we can have just one more month to think through these ancillary issues that may be impacted by this that may or may not have been contemplated by the legislation. Again, the plan certainly meets everything that's required by the legislation, but I think we need to do it right and make sure we address these by-products or these other ancillary issues. So, I would request that you accept this as our plan, but allow us to possibly present an amended plan at the January meeting.

Chairman White: Then you are not asking us to file the rule at this time?

Mr. Obrokta: Not at this point. I would wait to request that in January.

Chairman White: Then, there is no action requested of the Committee?

Mr. Obrokta: I am simply asking you – we are mandated by *Code* to give you this – just to give it to you – by the end of the year. We're doing that. We're clearly satisfying that duty. But, I'm not going to ask you to file it with the Secretary of State's office until the January meeting because there are some other issues that have come up in our deliberative process.

Chairman White: So, you're not asking us to take any action at this time?

Mr. Obrokta: No, sir. Just read it and comment, if you would.

Mr. Phalen: A point of clarification. Are you asking us to accept this plan or just accept that you have given it to us prior to the end of the year?

Mr. Obrokta: Exactly that – the latter. With that, Mr. Chairman, that's all I have.

Chairman White: Thank you very much.

10. Old Business

Chairman White: Do we have old business?

11. New Business

Chairman White: New business?