WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

orm #5

FILED

SEP 13 10 04 AM '94

OFFICE OF 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 Division Bureau of Employment Programs TITLE NUMBER: 85

CITE AUTHORITY: §21A-2-6(2); 21A-3-7(b) & -7(c); 23-1-1; 23-2-18

RULE TYPE: PROCEDURAL ____ INTERPRETIVE ____

EXEMPT LEGISLATIVE RULE X
CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

§21A-3-7(c)

AMENDMENT TO AN EXISTING RULE: YES___, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ____

TITLE OF RULE BEING AMENDED: ____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 10

TITLE OF RULE BEING ADOPTED: Primary Contractor Liability

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS January 1, 1995

Authorized Signature
John H. Kozak, Director
Legal Services Division

10.00

Bureau of Employment Programs
Legal Services Division
Post Office Box 3922
Charleston, West Virginia 25339-3922

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner

M E M O R A N D U M

TO: The Honorable Ken Hechler
Secretary of State

FROM: John H. Kozak
Director, Legal Services Division

DATE: September 13, 1994

RE: Filing of Exempt Legislative Rule

Attached hereto, please find a copy of the legislative rule titled "Primary Contractor Liability" and a completed copy of your form #5. This rule is exempt from legislative review, West Virginia Code, §21A-3-7(c).

Also attached hereto you will find copies of all the written comments that were received from the public regarding this rule. A hearing was not held on this rule; hence, there were no oral comments received and there is no attendance sheet. The rule as filed today contains the changes that the Compensation Programs Performance Council made to the original draft in response to the comments. A memorandum responding to the comments is also attached. It reviews the comments that were made and states the Council's responses to them and the reasons for the changes that were made to the original draft.

Also enclosed herewith, please find a computer diskette containing the rule. It is encoded in Display Write 4 Version 2 and is named A:\Series 10.

Thank you for your assistance in this matter.

w/ Attachments

TITLE 85
LEGISLATIVE RULES
BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION

SERIES 10
PRIMARY CONTRACTOR LIABILITY

§85-10-1. General.

1.1. Scope. -- This rule implements the provisions of West Virginia Code, §23-2-1d, regarding the liability of a primary contractor for payments due to the workers' compensation division by a subcontractor under certain circumstances. This rule is applicable only to contracts that are entered into or extended on or after the effective date of this rule.

1.2. Authority. -- West Virginia Code, §21A-2-6(2); §21A-3-7(b) & -7(c); §23-1-1; and §23-2-18. Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia 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. -- September 7, 1994.

1.4. Effective Date. -- January 1, 1995.

§85-10-2. Purpose of rule.

2.1. The purpose of this rule is to implement the provisions of West Virginia Code, §23-2-1d, which was adopted by the legislature during the 1993 session. The section was effective on January 1, 1994; however, for purposes of administration, the liability created by that section will not be enforced until the effective date of these rules. This section imposes liability upon primary contractors, under certain circumstances, for payments due and owing to the workers' compensation division. These payments include premium, premium deposits, interest, and certain penalties. This rule provides the procedures for employers to follow to avoid the imposition of this liability as well as the procedures by which the workers' compensation division will impose this liability.

The rule also offers guidance on the substantive application of the section.

2.2. 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 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. West Virginia coverage is required for employees who are 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.

§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 pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §23-1-1, and any deputies designated pursuant to West Virginia Code, §21A-2-12 & -13.

3.2.1. "Contract" means an agreement, oral or written, under which some service is to be performed. 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 sale and purchase of goods, such as coal, is not an affected contract. However, if the contract provides for the extraction of the coal by the contractor where the coal is not being sold, then the contract could be affected by this rule. Conversely, if the contracting party sells the coal, 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 be a contract affected by this rule or by West Virginia Code, §23-2-1d. In all instances, the exact terms of and the actual implementation of the contract must be examined.

3.2.2. Contracts affected by this rule are those which are entered into or extended on or after the effective date of this rule. It does not apply to any other contracts entered into or extended prior to that date.

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

3.4. "Good standing" with the division means that the subcontractor has not defaulted on its obligations to make payments to the division. Being in delinquent status, as provided for in West Virginia 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 West Virginia Code, §§23-2-5(d), -5(e), -6, & -8. The term default also includes those situations under West Virginia Code, §23-2-5(f)(2)-(4), where an employer returns to default status upon breaching a repayment 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.

3.5. "Payments" that are obligations of the subcontractor for the purposes of this rule include the payment of premiums, the payment of premium deposits, interest, and penalty premiums. It does not include the payment of benefits to an injured worker or to the health care providers of an injured worker by a self insured employer.

3.6. "Primary contractor" means 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. 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, timer, 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 West Virginia Code, §23-2-1d.

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 to directly perform all or part of the services to be rendered under the contract between the primary contractor and a third party. Examples of contracts that are not subcontracts for the purpose of this rule include contracts solely to clean, repair, or maintain the primary contractor's own facility or machinery, such as janitorial services, copier services, or vehicle maintenance. 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-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.

§85-10-4. Primary contractor's liability; generally.

4.1. The liability of the primary contractor for the payments due to the workers' compensation division by its subcontractors can arise in only two ways.

4.1.1. If the subcontractor is not in good standing with the division 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 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 which became due prior to the start of the subcontractor's work.

4.1.2. The second way in which the primary contractor can become liable to the division for the subcontractor's payments is if the subcontractor loses its good standing with the division 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 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 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. 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, 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 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 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.

5.2. In order to avoid liability under subdivision 4.1.2, the primary contractor must first give notice to the division that the primary contractor wishes to be notified by the division if the subcontractor defaults. The primary contractor must provide the division 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 numbers that are assigned by the division 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 will be accepted, such notices must contain, at a minimum, the information 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 division, the division 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. Notice of default by the division 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 by the primary contractor.

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

5.3.1. 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 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 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 West Virginia Code, §23-2-5(b).

5.3.2. For purposes of primary contractor liability, in the example set forth in subdivision 5.3.1, the notice of default by the division 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 defaulted until December 31st and, thus, no notice of default could be issued before that date. According to West Virginia 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 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.

5.3.3. 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 is not timely made. Should that happen with regard to a subcontractor affected by West Virginia Code, §23-4-1d, then the time period described in subdivision 5.3.2 may be affected. West Virginia 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 default status. If in the example set forth in subdivisions 5.3.1 and 5.3.2, the "sixtieth day" 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 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, if the notice is issued between March 2nd and March 31st, the primary contractor's liability would not begin until July 1st.

5.4. The corrective action that a primary contractor can take to avoid subdivision 4.1.2 liability is either to arrange payment of the amounts due to the division 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 repayment agreement covering all of a subcontractor's periods of delinquency and default may be considered based upon the best interests of the fund.

5.5. In the event that the primary contractor elects to terminate its subcontract, West Virginia 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 West Virginia Code, §23-2-1d, and of this rule, a certificate of good standing issued by the division furnishes an irrebuttable presumption that the subcontractor is in good standing with the division 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 liability. For example, if clerical error resulted in the division issuing a certificate of good standing for a subcontractor whose record with the division 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. Similarly, if the division'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.

5.7. Under this rule no liability will arise if all of the subcontractor's employees are appropriately 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 West Virginia 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 wages for that employee must be reported and premiums paid. In that case, all of the provisions of this rule would be applicable to such a subcontractor to the extent of the reportable wages.

§85-10-6. Extent of liability.

6.1. The liability which the primary contractor incurs is the obligation to pay to the division the true and correct amount of premium, premium deposit, and any interest thereon that the subcontractor owes to the division. In addition, if a subcontractor does not pay any premium penalty, West Virginia Code, §23-2-5(f), that may be due the division, then the primary contractor may become liable for that penalty premium 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 is not limited to the amounts of wages reported by the subcontractor. Rather, the division 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, premium deposit, interest, and penalty premium, if any, will be determined in calculating the primary contractor's liability.

6.3. 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 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 wages earned as a result of working under the contract in issue.

6.5. If the subcontractor's default occurs because of a breach of a prior repayment 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 repayment 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 January 1, 1994.

6.6. In the event that the primary contractor makes payment to the division in the place of the subcontractor, then the primary contractor has a legal right to seek reimbursement or indemnification for the amounts paid to the division from the subcontractor. 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. Recovery must be made 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 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 West Virginia 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 West Virginia 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 rate upon the subcontractor shall be done solely as provided for in West Virginia Code, §23-2-5(f)(1).

7.3. The penalty premium rate may be imposed upon the primary contractor either under the terms of this subsection of this rule or under the standard provisions of West Virginia Code, §23-2-5(f)(1), for its independent default of its own obligations. The penalty premium rate, if imposed, shall be set at the level of one hundred ten percent of the amount of premium that would otherwise be due from the primary contractor based upon its own wage reports to the division. The penalty premium 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 West Virginia 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 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 rate. In addition, if subsection 7.3 is invoked, then the primary contractor would be subject to paying the subcontractor's premium at the penalty rate and would also have to pay its own premiums at the penalty 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 is authorized to take collections actions under the provisions of West Virginia Code, §23-2-5a. Reference to that section and the rules promulgated under it should be made by the primary contractor.

§85-10-9. Appeal process.

Any primary contractor affected by this rule or West Virginia Code, §23-2-1d, who wishes to contest any determination made by the division may do so under the provisions of West Virginia Code, §23-2-17. That section requires the filing of a formal petition within thirty days of the primary contractor's receipt of notice of the disputed decision or action or, in the absence of such receipt, within sixty days of the date of the division's making such disputed decision or taking such disputed action.

§85-10-10. 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 that it has entered into a subcontract(s) and that it desires to receive notice from the workers' compensation division if the subcontractor(s) defaults on any payments due to the workers' compensation division.

(Please provide the following information:)

PRIMARY CONTRACTOR'S NAME: ______________________________

ADDRESS TO WHICH NOTICES ARE TO BE SENT: ______________________________

PRIMARY CONTRACTOR'S RISK NUMBER: ______________________________

PRIMARY CONTRACTOR'S FEIN [1] NUMBER: ______________________________

SUBCONTRACTOR'S COMPLETE NAME: ______________________________

SUBCONTRACTOR'S ADDRESS: ______________________________

SUBCONTRACTOR'S RISK 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.

Bureau of Employment Programs
Legal Services Division
Post Office Box 3922
Charleston, West Virginia 25339-3922

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner

M E M O R A N D U M

PRIMARY CONTRACTOR LIABILITY RULES
TITLE 85, SERIES 10

Response to Comments to Proposed Rule

Two sets of comments - one from the Home Builders Association of West Virginia dated April 1, 1994, and the second from the Contractors Association of West Virginia dated April 5, 1994 - were received prior to the beginning of the official comment period. They have been included in this response. The only comments received during the comment period are from the law firm of Bowles, Rice, McDavid, Graff & Love.

The proposed rule as circulated follows the legislative rule issued by the Secretary of State on this issue. See, "Standard Size and Format for Rules and Procedures for Publication of the State Register or Parts of the State Register," 153 CSR 6 (1988), at section 3. The following discussion shall use the commentator's designation and shall also show the corresponding designation as used in the proposed rule.

HOME BUILDERS ASSOCIATION OF WEST VIRGINIA

This comment from Mr. Robert L. Carvell, President, notes the association's acceptance of the prior changes to subsection 3.2.b (shown as subsection 3.2.2 in the proposed rule). The comment goes on to note its support for the rules as amended. However, following lengthy discussions among the council members and with the association, the council decided to delete the exclusion given in the first draft for contracts of thirty (30) days or less. This exclusion is not provided for in the statute and was placed in the rule for administrative convenience. Given the delay in the effective date of the rule until January 1, 1995, it is expected that the affected parties and the division will be able to accommodate the requirements of the rule. The rules as submitted are now applicable to all contracts regardless of their length. The council does not believe that this will be unduly burdensome on the home builders. All that is necessary for a primary contractor to avoid liability under these rules is, first, obtain a certificate of good standing from the proposed subcontractor and, second, send a completed copy of the notification form to the division. Diagrams showing this process are attached to this memorandum. Thereafter, no liability can attach to the primary contractor unless the division first notifies the primary contractor of the subcontractor's default. The primary contractor will then have a calendar quarter in which the subcontractor must cure the delinquency or in which the primary contractor can terminate the subcontract.

CONTRACTORS ASSOCIATION OF WEST VIRGINIA

These comments from Mr. Michael L. Clowser, Executive Director, address several points.

1). With regard to section 2.2, the comment notes the uncertainty surrounding coverage for interstate businesses. This difficulty is not the creation of these rules or of West Virginia Code, §23-2-1d (hereinafter referred to as "section 1d"). Its source lies in other sections of article 2 and there are very few easy answers to the questions that arise from them.

For an employer who is concerned about this issue and wishes to obtain a clear determination, the employer may obtain a declaratory ruling from the West Virginia workers' compensation division under West Virginia Code, §29A-4-1.

2). With regard to section 3.2.a (section 3.2.1), the comment expresses concern regarding the effective date of section 1d and of the rules. The statute indicates that the section is effective on January 1, 1994. However, these rules will not be effective until January 1, 1995. The association requests that the rules indicate that these requirements will apply to only those contracts entered into or extended after the effective date of the rules. Any change to reflect this concern must also be made to section 1.1 Scope which also addresses the effective date.

The council decided to accept this recommendation and the rules and the statute will only be enforced for contracts that are entered into or extended on and after January 1, 1995.

3). With regard to section 5.4, the association notes its disagreement with the section's prohibition against repayment agreements between the primary contractor and the division. The Commissioner is given the authority to enter into repayment agreements by West Virginia Code, §23-2-5(f)(2). This provision specifically states that entering into repayment agreements is discretionary and that the Commissioner is not required to allow such agreements.

In section 5.4, the subcontractor can still cure its default by entering into an agreement. However, the section does prohibit the use of repayment agreements for debts which the primary contractor assumes from the subcontractor under these rules. The draft's prohibition was premised upon what were perceived as the best interests of the fund in keeping with the purposes of the statute and the Commissioner's and the Council's fiduciary obligations to the fund. That is, section 1d provides a method for the quick collection of money owed to the fund and allowing repayment agreements defeats that purpose. In addition, allowing repayment agreements removes some of the urgency that the primary contractor will feel in making sure that its subcontractors are in compliance with their premium requirements. Further, the primary contractor is in a position to use money it owes the subcontractor for payments under their subcontract to pay the debts of the subcontractor to the division. Finally, a promptly acting primary contractor can assure that its liability will be limited by either terminating the subcontract before liability attaches or ensuring that the subcontractor pays its debt before it becomes large or enters into a repayment agreement if the subcontractor's financial condition so requires.

4). With regard to section 6.1, the association expresses confusion over the use of the term "penalty premium." This term is derived from West Virginia Code, §23-2-5(f), and is imposed upon an employer who exhibits chronic problems with the payment of its premiums and premium deposits. It provides for a ten (10%) surtax on the premiums otherwise due from the employer. Section 6.1 is designed to note that, if the subcontractor has been penalized by use of the penalty premium rate, then the primary contractor's liability to the division includes that penalty premium surtax. The statutory reference has been inserted into section 6.1 for the reader's reference.

5). With regard to section 6.6, the association notes its disagreement with the section's prohibition against the primary contractor's collecting its own penalty premium rate from the subcontractor. Section 7.3 of the rules provides for the use of a penalty premium rate against the primary contractor if the primary contractor itself demonstrates sufficient misconduct towards its own obligations. That is, it is the primary contractor's own actions that are being penalized and not that of the subcontractor. Given that the penalty is not being imposed for anything that the subcontractor did, there is no equity in allowing the primary contractor to transfer its penalty to the subcontractor. Subsection 1d(b)(2) provides for the authority to penalize the primary contractor for its own transgressions. A minor change to section 6.6 was made by replacing the reference to section 7 with the more exact reference to section 7.3 of the rules.

6). With regard to section 7.3, the association asks if the reference to "penalty premium rate" there is the same as the penalty premium rate noted in sections 6.1 and 6.6. The statutory authority for the penalty premium rate in all three sections is the same. However, the sections deal with both the subcontractor's and the primary contractor's liability for penalty premium rates.

7). With regard to section 7.4, the association expresses concern regarding the primary contractor's being assessed a penalty premium rate. The association misunderstands the exact meaning of the section, but the result is correct. As noted above, subsection

1d(b)(2) provides for the authority to penalize the primary contractor for its own transgressions. It is this penalty premium that is deemed to be uncollectible from the subcontractor. If the primary contractor is being forced to pay the subcontractor's penalty premium rate, then the primary contractor can recover that payment from the subcontractor.

8). With regard to the form for notice to the division, the association's request for additional space can be met by attaching sheets of paper or additional copies of the notice to the form in sufficient numbers to provide all of the required information.

With regard to a single filing for a subcontractor who works on many projects for the same primary contractor, it is the contract not the number of projects covered by it that determines the number of filings that are required. If the contract provides for a number of different projects, then one filing is sufficient. However, if the primary contractor requires separate contracts with the subcontractor for each project, then separate filings will be required.

BOWLES, RICE, MCDAVID, GRAFF & LOVE

The law firm provided a revision to the proposed rule without further explanation of the reasons for the suggested changes. The following addresses the changes under each section in series.

1). With regard to section 3.2, the law firm suggests changes that clarify the application of the rules by expressly exempting any entity that sells an extracted mineral, such as coal, from primary contractor liability. The suggested language has been inserted into the section. The other portion of the suggested change dealing with equipment and premises service and maintenance is dealt with in section 3.7.

2). With regard to section 3.6, the law firm suggests changes that would limit the scope of section 1d similar to what was proposed in section 3.2. These suggestions have also been accepted.

3). With regard to section 3.7, the law firm suggests similar changes as above clarifying the class of subcontractors affected by section 1d to those that themselves perform services rather than those who might, in turn, sub-subcontract the work to others. These changes have also been accepted. The second suggested change is acceptable as it notes that entities which contract with an entity who might be a primary contractor for another purpose are not covered by section 1d if they are performing services incidental to the operations of the primary contractor itself. The suggested change has been modified so as to limit the exception's scope.

4). With regard to section 5.1, the law firm first suggests changes that would clarify the meaning of the section. The Council adapted the suggested changes in keeping with the intended meaning. The second change suggested by the law firm would limit the application of section 1d by allowing the use of a certificate of coverage which is fraudulent on its face if the primary contractor did not have other information regarding the fraud. By "fraudulent on its face" it is meant that anybody with knowledge of what the certificate should look like can see that there is something wrong with it; for example, a clear "whiting out" of one employer's name and the typing in of another's name.

The section is intended to allow a primary contractor to accept any valid appearing certificate of coverage without the necessity of looking behind the certificate to see if coverage is truly there. The suggested change expands upon that concept by saying that the certificate can look bad on its face, but, unless the primary contractor is otherwise aware of wrongdoing on the part of the subcontractor, then primary contractor liability does not attach. This change was not accepted.

5). With regard to section 5.3.c (section 5.3.1), the law firm suggests changes that would clarify the meaning of the section. As the suggestion is clearer than the original proposal and does not alter its meaning, it was accepted.

6). With regard to subsections 7.3.a and 7.3.b (subsections 7.3.1 and 7.3.2), the law firm suggests changes that would better state the intended meaning. These subsections deal with the circumstances under which a primary contractor's actions are such that a penalty premium rate will be imposed upon it. The suggested changes correctly note that this is a rebuttable presumption and that the primary contractor is entitled to a hearing if it requests one on the issue.

7). With regard to section 10, the law firm suggests changes that would correct the use of two words. This suggested change is accepted.

8). The law firm included four questions at the end of its comments on the application of the rules to specific situations. The following are answers to those questions.

a). "If the fee owner of coal property (who has contracts to sell the coal) contracts with a contract miner, is the contract mining agreement a 'subcontract' within the meaning of the rules?"

A "fee owner" is someone who owns all of the rights to the coal property. In this situation, the "fee owner" would not have a contract with any entity that is senior to it with regard to controlling the coal mining. Hence, the "fee owner" would not be a primary contractor under these rules if it contracts with another for the actual mining of the coal.

b). "If the lessee or sublessor of coal property (who has contracts to sell the coal) contracts with a contract miner, is the contract mining agreement a 'subcontract' within the meaning of the rules?"

This is the situation intended to be addressed by the change to section 3.2 of the rules. With the acceptance of the suggested changes, the answer to this question is that the contract mining agreement would not be a subcontract within the meaning of the rules.

c). "If the fee owner of coal property hires someone to remove debris or equipment from his property or to make repairs on his equipment or facility, is the contractor's agreement a "subcontract" within the meaning of the rules?"

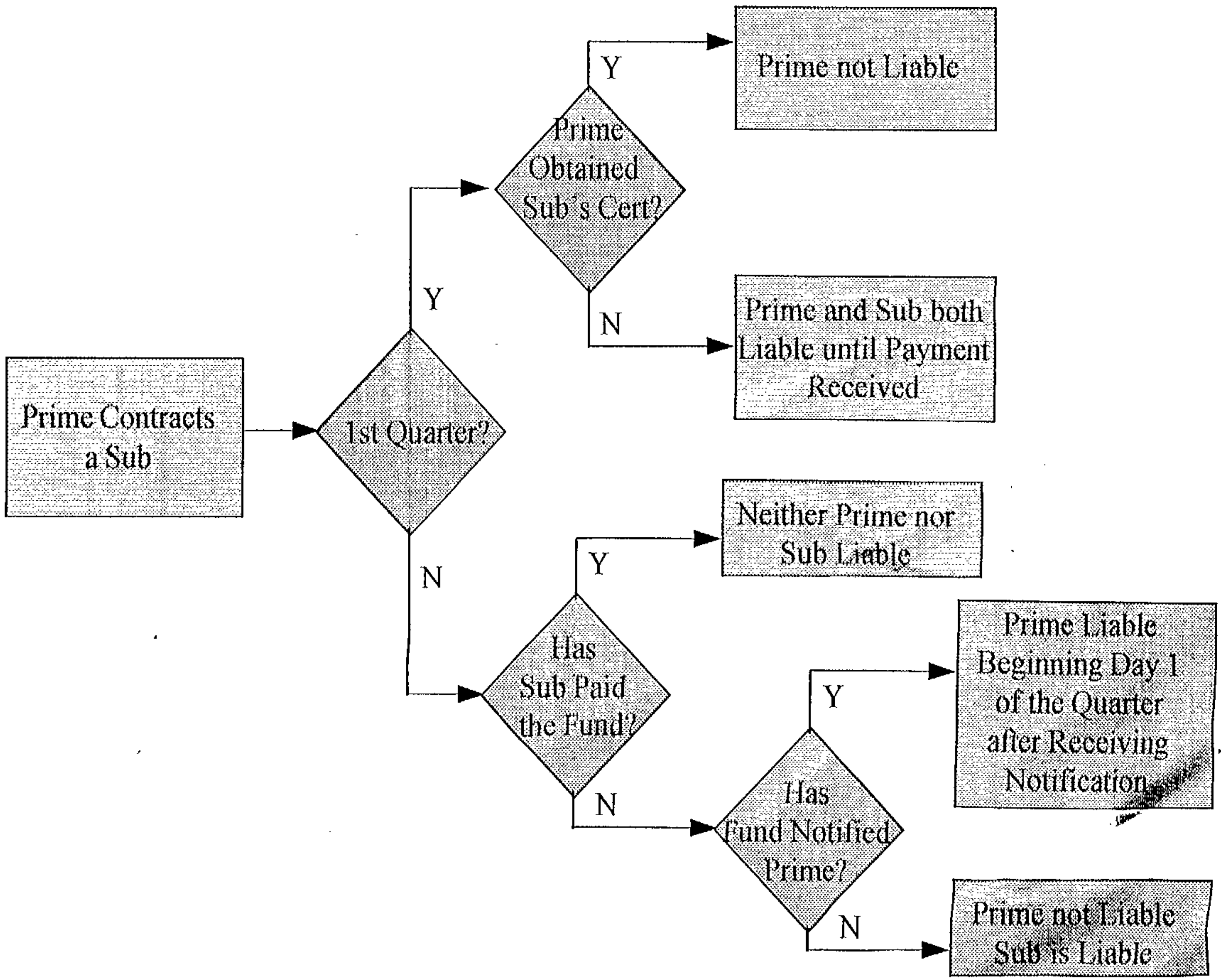
For the reasons stated in a) above, the fee owner would not be a primary contractor in this situation.

d). "If the lessee or sublessor of coal property hires someone to remove debris or equipment from his property or to make repairs on his equipment or facility, is the contractor's agreement a 'subcontract' within the meaning of the rules?"

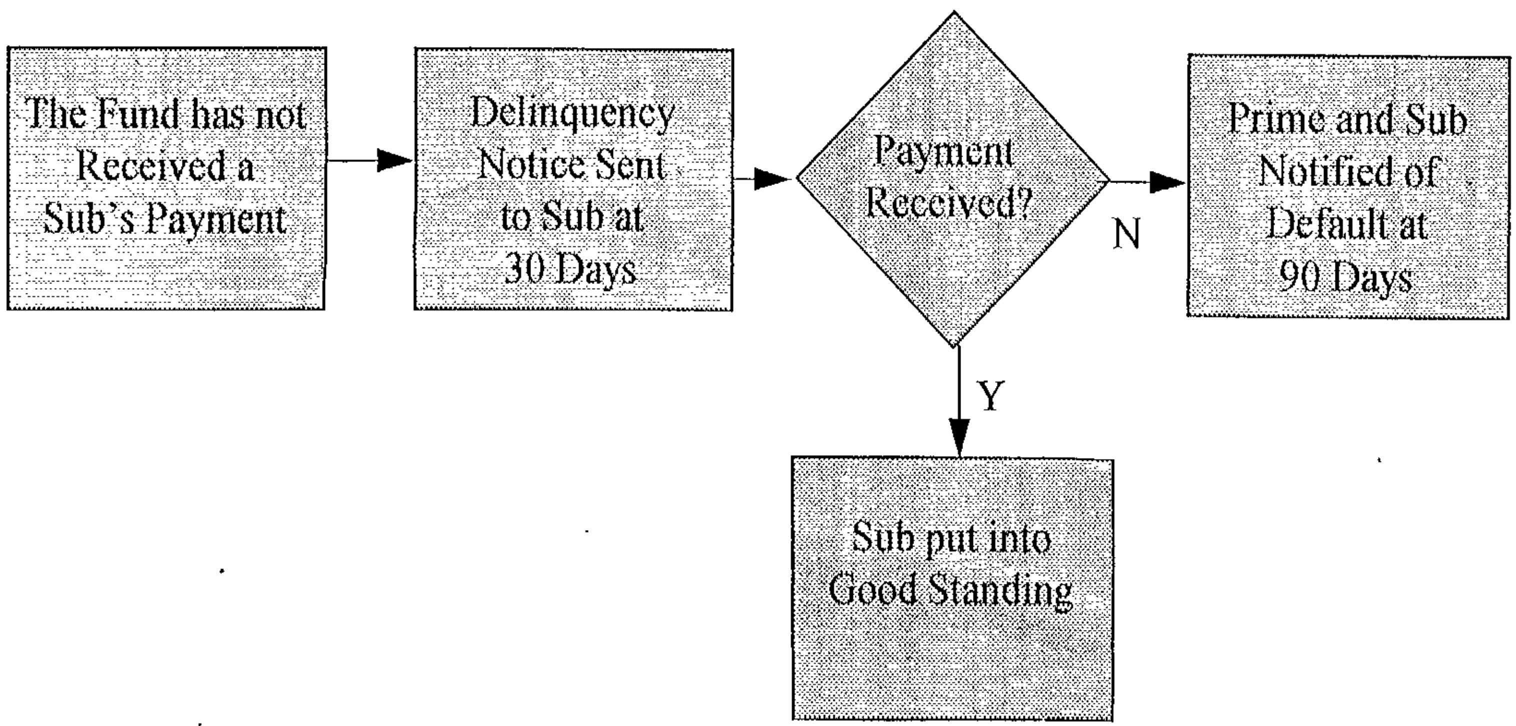
As with item b) above, the agreement would not be a subcontract under these rules as they have now been amended.

w/ Attachments

Prime Contractor Liability Definition



The Fund's Notification of Delinquent Sub-Contractors



RECEIVED
EMPLOYMENT PROGRAMS
94 APR -7 AM 9:34
OFFICE OF COMMISSIONER

Contractors Association of West Virginia

2114 Kanawha Boulevard, E., • Charleston, West Virginia 25311 • (304) 342-1166 FAX (304) 342-1074

April 5, 1994

Mr. Andrew N. Richardson, Commissioner
West Virginia Bureau of Employment Programs
112 California Avenue - Room 610
Charleston, West Virginia 25305

Dear Commissioner Richardson:

The Contractors Association of West Virginia appreciates the opportunity to review recommendations of the Workers' Compensation Performance Council regarding the implementation of the Prime Contractor Liability Section in the new Workers' Compensation Reform Act, H.B. 2802.

We are pleased that the draft of the primary contractor rules, dated February 28, 1994, follows many of the recommendations that the CAWV task force presented to the members of the Performance Council's Finance Committee.

We do have a few comments which we have enclosed with this letter. One issue we need to resolve is the effective date of the regulations, and how we handle contracts that were entered into between January 1, 1994 and the effective date. Our concern is that we have told contractors not to submit any documentation on their subcontractors pending the outcome of the regulations. We don't want to penalize contractors for not complying with the January 1, 1994 date when we specifically told them to wait until regulations were promulgated.

Commissioner, we thank you for allowing the contracting industry to have input on this very important issue.

Sincerely,

Michael L. Clowser
Executive Director

cc: Ed Staats
John Kozak

ARTBA

RESPONSE BY
CONTRACTORS ASSOCIATION OF WEST VIRGINIA
TO DRAFT OF
PRIMARY CONTRACTOR RULES

APRIL 4, 1994

Page 3, Section 2.2

The draft contains the following sentence: "West Virginia coverage is required for employees who are employed in West Virginia by an out-of-state employer merely temporarily to be involved in the performance of the work under contract, regardless of the place of hire or the personal domicile of the temporary employee."

Issue: Many contractors along the border hire people from other states to perform work who are covered by those state's workers' compensation system. Does this section dictate to other states on which state applies coverage? Also, what constitutes "temporarily?"

Page 4, Section 3.2a.

The draft follows state law that this rule applies to projects entered into after the first day of January, 1994. However, the final rules will probably not go into effect until April or May, 1994. Contractors have been told that they haven't needed to conform to this law until the Workers' Compensation Performance Council promulgates the final rules. If the rules don't go into effect after all contractors have been notified, will the rules only apply on projects entered into after the effective date?

Page 12, Section 5.4

The CAWV doesn't understand why the primary contractor could not enter into a repayment agreement for the subcontractor's liabilities. It is clear that the subcontractor may enter into such an agreement, therefore, we are not sure why the primary contractor could not enter into such an agreement. Repayment agreements normally extend up to a period not to exceed three years.

Page 14, Section 6.1

This section notes that the primary contractor may become liable for the subcontractor's "penalty" premium. What is this penalty and is it defined in the regulations?

Page 16, Section 6.6

This section is somewhat confusing. It states that the penalty imposed upon the primary contractor under provisions of Section 7 of this rule cannot be collected from the subcontractors by the primary contractor. We assume this means that these are liabilities assessed against the primary contractor for their violations. If this is the case, we feel that this section should be deleted.

Page 17, Section 7.3

This section noted that the "penalty premium rate, if imposed, shall be set at the level of one hundred ten percent of the amount of premium ..." Is this the penalty that is mentioned in Section 6.1 and 6.6?

Page 18, Section 7.4

The last sentence notes that the prime contractor would have to not only pay the subcontractor's premium at the penalty rate, but the prime contractor would also have to pay its own premiums at the penalty rate. Why would the prime contractor be assessed penalty payments due to the subcontractor's default? Is this included in the legislation or does this provision go above the intent of the bill?

Notification Request

More space should be provided for both contractors and subcontractors to write in their addresses. Also, a subcontractor may work many different jobs for one primary contractor. Hopefully, the intent of these regulations is to fill out a form when a subcontractor begins working for a primary contractor and not to fill out a form each time a new project begins.

If this is the case, the length of the contract may not be applicable.

Ed B.
Ed S. } FYI
GK.

Home Builders Association of West Virginia

RECEIVED
EMPLOYMENT PROGRAMS
AM 10:02
OFFICE OF COMMISSIONER

700 Virginia Street, W.
Charleston, WV 25302
P.O. Box 6250
Charleston, WV 25362-0250
Phone: (304) 342-5176
FAX (304) 342-5177

April 1, 1994

Andrew N. Richardson
Commissioner
Bureau of Employment Programs
112 California Avenue
Charleston, WV 25305-0112

Dear Mr. Commissioner:

I have had a chance to review the proposed rules (3.2.b) which were Faxed to Beth Thomasson on March 18th.

This information has been circulated to members of our Legislative Committee .. and, while I have not had a chance to speak to all of them .. I am confident that they will share my personal opinion that this clarification of the primary/subcontractor obligation will exempt over 90% of the small contractors that our association represents and that they, like me, will consider this a major victory for our Association.

Commissioner Richardson, I want to thank you for your keen sensitivity to the burden this would have placed on our members (many of whom are sole proprietors) and your personal understanding and response to our concerns.

Beth has let us know that your door (and phone) was always open to hear her concerns .. on our behalf .. and we are very appreciative.

Along with our thanks, please consider this letter our official support of this rule clarification which would exempt a primary contractor's liability for subcontractor defaults for those contracts of a lesser length of time than thirty (30) actual work days within ninety (90) calendar days.

Sincerely,

Robert L. Carvell

Robert L. Carvell
President

94 APR -6 PM 3:29
BEP-LEGAL DIVISION

BOWLES RICE
McDAVID GRAFF & LOVE

ATTORNEYS AT LAW

16TH FLOOR COMMERCE SQUARE • LEE STREET
POST OFFICE BOX 1386
CHARLESTON, WEST VIRGINIA 25325-1386
TELEPHONE 304-347-1100
FACSIMILE 304-343-2867

206 SPRUCE STREET
MORGANTOWN, WEST VIRGINIA 26505
TELEPHONE 304-296-2500
FACSIMILE 304-296-2513

601 AVERY STREET
POST OFFICE BOX 48
PARKERSBURG, WEST VIRGINIA 26102
TELEPHONE 304-485-8500
FACSIMILE 304-485-7973

105 W. BURKE STREET
POST OFFICE DRAWER 1419
MARTINSBURG, WEST VIRGINIA 25401-1419
TELEPHONE 304-263-0836
FACSIMILE 304-267-3822

WRITER'S DIRECT DIAL NUMBER

347-1708

May 13, 1994

John Kozak, Esquire
Legal Division
Workers' Compensation Fund
Post Office Box 3151
Charleston, West Virginia 25322

Re: Proposed Rules for Primary Contractor Liability

Dear Mr. Kozak:

Enclosed please find the amendments proposed by Bowles Rice McDavid Graff & Love to the proposed rules regarding primary contractor liability.

Very truly yours,

Lynn C. Photiadis

Lynn C. Photiadis

LCP/cjw
Enclosure

244699

94 MAY 16 AM 10:35

BEP-LEGAL DIVISION

DRAFT OF PROPOSED RULES WITH AMENDMENTS PROPOSED BY BOWLES RICE MCDAVID GRAFF & LOVE

TITLE 85
LEGISLATIVE RULES
BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION

SERIES 15
PRIMARY CONTRACTOR LIABILITY

§85-15-1. General.

1.1. Scope. -- This rule implements the provisions of West Virginia Code, §23-2-1d, regarding the liability of a primary contractor for payments due to the workers' compensation division by a subcontractor under certain circumstances. This rule is applicable only to contracts that are entered into or extended on or after the first day of January, one thousand nine hundred ninety-four.

1.2. Authority. -- West Virginia Code, §21A-2-6(2); §21A-3-7(b) & -7(c); §23-1-1; and §23-2-18. Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia Code, §29A-3-1 *et seq*. Public notice requirements of that chapter and article, however, must be followed. This rule has received the approval of the Secretary of the Department of Commerce, Labor and Environmental Resources.

1.3. Filing Date. --

1.4. Effective Date. --

§85-15-2. Purpose of rule.

2.1. The purpose of this rule is to implement the provisions of West Virginia Code, §23-2-1d, which was adopted by the legislature during the 1993 session. The section became operational on January 1, 1994. This section imposes liability upon primary contractors, under certain circumstances, for payments due and owing to the workers' compensation division. These payments include premium, premium deposits, interest, and certain penalties. This rule provides the procedures for employers to follow to avoid the imposition of this liability as well as the procedures by which the workers' compensation division will impose this liability. The rule also offers guidance on the substantive application of the section.

2.2. 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 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. West Virginia coverage is required for employees who are 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.

§85-15-3. 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 pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §23-1-1, and any deputies designated pursuant to West Virginia Code, §21A-2-12 & -13.

3.2. "Contract" means an agreement, oral or written, under which some service is to be performed. 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 sale and purchase of goods, such as coal, is no an affected contract. However, if the contract provides for the extraction of the coal by the contractor where the coal is not being sold, then the contract could be affected by this rule. Conversely, if the contracting party sells the coal, 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 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.a. Contracts affected by this rule are those which are entered into or extended on or after the first day of January, one thousand nine hundred ninety-four. It does not apply to any other contracts entered into or extended prior to that date.

3.2.b. For ease of administration both by the state's employers and the division, contracts for services which are thirty (30) calendar days or less in length are not subject to this rule or to West Virginia Code, §23-2-1d. However, if the parties entered into two or more contracts whose combined length exceeds thirty (30) days in any ninety (90) day period, then all of the contracts will be subject to the provisions of this rule and West Virginia Code, §23-2-1d.

3.3. "Division" means the Workers' Compensation Division within the Bureau of Employment Programs as provided for by West Virginia Code, §21A-1-4, and West Virginia Code, §23-1-1 *et seq*.

3.4. "Good standing" with the division means that the subcontractor has not defaulted on its obligations to make payments to the division. Being in delinquent status, as provided for in West Virginia 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 West Virginia Code, §§23-2-5(d), -5(e), -6, & -8. The term default also includes those situations under West Virginia Code, §23-2-5(f)(2)-(4), where an employer returns to default status upon breaching a repayment 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.

3.5. "Payments" that are obligations of the subcontractor for the purposes of this rule include the payment of premiums, the payment of premium deposits, interest, and penalty premiums. It does not include the payment of benefits to an injured worker or to the health care providers of an injured worker.

3.6. "Primary contractor" means 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. 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. ~~However, the other party must not be operating under a contract of its own with some third party a portion of which contract is being subcontracted to the "primary contractor."~~ [or clarify] 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 purpose of liability under this Rule and W. Va. Code §23-2-1d.

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 ~~for the performance of~~ to directly perform all or part of the services to be rendered under the contract between the primary contractor and a third party. Examples of subcontracts that would not be subject to this rule include: contacts to clean, repair, or maintain the primary contractor's facility or machinery, such as janitorial services, copier repairs, or vehicle maintenance. 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-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.

§85-15-4. Primary contractor's liability; generally.

4.1. The liability of the primary contractor for the payments due to the workers' compensation division by its subcontractors can arise in only two ways.

4.1.a. If the subcontractor is not in good standing with the division 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 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 which became due prior to the start of the subcontractor's work.

4.1.b. The second way in which the primary contractor can become liable to the division for the subcontractor's payments is if the subcontractor loses its good standing with the division 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 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 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.a. The determination of which payments the primary contractor becomes liable for is set forth in subsection 5.3.

§85-15-5. Avoiding primary contractor liability.

5.1. In order to avoid liability under subdivision 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 or from the subcontractor. ~~If the certificate of good standing was issued for some earlier quarter than the one immediately preceding the current quarter, then the certificate is no longer valid. In that situation, the primary contractor must obtain a more recent certificate or run the risk of being liable under subdivision 4.1.a.~~ The certificate of good standing is valid only if it is issued for the immediately preceding quarter; provided, however, that since premium 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, it will be considered valid if issued for the next preceding quarter. In addition, if the proffered certificate of good standing is fraudulent on its face, and the primary contractor is aware of the fraud at the time the certificate is offered, then the primary contractor can become liable under subdivision 4.1.a.

5.2. In order to avoid liability under subdivision 4.1.b, the primary contractor must first given notice to the division that the primary contractor wishes to be notified by the division if the subcontractor defaults. The primary contractor must provide the division 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 number that is assigned by the division 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 will be accepted, such notices must contain, at a minimum, the information 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 division the division 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.b. Notice of default by the division 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 by the primary contractor.

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

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 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 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 West Virginia Code, §23-2-5(b).

5.3.b. For purposes of primary contractor liability, in the example set forth in subdivision 5.3.a, the notice of default by the division 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 defaulted until December 31st and, thus, no notice of default could be issued before that date. According to West Virginia 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 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.b.

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.a is not timely made. Should that happen with regard to a subcontractor affected by West Virginia Code, §23-4-1d, then the time period described in subdivision 5.3.b may be affected. West Virginia 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 default status. If in the example set forth in subdivisions 5.3.b and 5.3.c, the "sixtieth day" 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 last "sixtieth day" delinquency notice). Default would being on January 14th. ~~Presumably, the notice of default to the primary contractor would still be issued sometime between January 14th and March 30th so that the primary contractor's liability would being on April 1st unless corrective action was taken. However, if the "sixtieth day" delinquency notice were not issued until late in March or after April 1st, then the thirty day period before default would be set back to match. In this situation, the primary contractor's liability would not begin until July 1st.~~ Even later issuance of the "sixtieth day" delinquency notice would move the liability date back accordingly. In the event a notice of default is issued less than 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.b. and 5.3.c., if the notice is issued between March 2 and March 31, the primary contractor's liability would not begin until July 1.

5.4. The corrective action that a primary contractor can take to avoid subdivision 4.1.b liability is either to arrange payment of the amounts due to the division 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 repayment agreement covering all of a subcontractor's periods of delinquency and default may be considered based upon the best interests of the fund.

5.5. In the event that the primary contractor elects to terminate its subcontract, West Virginia 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 contract provision in the contract.

5.6. Exclusively for the purposes of West Virginia Code, §23-2-1d, and of this rule, a certificate of good standing issued by the division furnishes an irrebuttable presumption that the subcontractor is in good standing with the division 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.a liability. For example, if clerical error resulted in the division issuing a certificate of good standing for a subcontractor whose record with the division 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. Similarly, if the division's records indicated that a subcontractor was in good standing and a certificate is then issued, but a later determination is made 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.

5.7. Under this rule no liability will arise if all of the subcontractor's employees are appropriately 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 West Virginia 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, however, then the wages for that employee must be reported and premiums paid. Then all of the provisions of this rule would be applicable to such a subcontractor to the extent of the reportable wages.

§85-15-6. Extent of liability.

6.1. The liability which the primary contractor incurs is the obligation to pay to the division the true and correct amount of premium, premium deposit, and any interest thereon that the subcontractor owes to the division. In addition, if a subcontractor does not pay any premium penalty that may be due the division, then the primary contractor may become liable for that penalty premium 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 is not limited to the amounts of wages reported by the subcontractor. Rather, the division 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, premium deposit, interest, and penalty premium, if any, will be determined in calculating the primary contractor's liability.

6.3. 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 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 wages earned as a result of working under the contract in issue.

6.5. If the subcontractor's default occurs because of a breach of a prior repayment 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 repayment 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 January 1, 1994.

6.6. In the event that the primary contractor makes payment to the division in the place of the subcontractor, then the primary contractor has a legal right to seek reimbursement or indemnification for the amounts paid to the division from the subcontractor. 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. Recovery must be made through the state's judicial system. In the event that a penalty is imposed upon the primary contractor under the provisions of section 7 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.

§85-15-7. Additional penalties; limitations.

7.1. Under certain circumstances, the division will impose a penalty premium rate upon either the primary contractor or the subcontractor, or both. Under no circumstances shall be 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 West Virginia 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 West Virginia 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 rate upon the subcontractor shall be done solely as provided for in West Virginia Code, §23-2-5(f)(1).

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

7.3.a. If the primary contractor incurs liability under subsection 4.1.a three or more times within any five (5) year period, then ~~the~~ a pattern will ~~be proved~~ presumed; however, this presumption is rebuttable under the process set forth at §85-15-9.

7.3.b. If the primary contractor incurs liability under subsection 4.1.b three or more times within any five (5) year period, then ~~the~~ a pattern will ~~be proved~~ presumed; however, this presumption is rebuttable under the process set forth at §85-15-9.

7.4. It must be noted that, if a subcontractor was subject to a penalty premium 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 rate. In addition, if subsection 7.3 is invoked, then the primary contractor would be subject to paying the subcontractor's premium at the penalty rate and would also have to pay its own premiums at the penalty rate.

§85-15-8. Collections efforts.

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

§85-15-9. Appeal process.

Any primary contractor affected by this rule or West Virginia Code, §23-2-1d, who wishes to contest any determination made by the division may do so under the provisions of West Virginia Code, §23-2-17. That section requires the filing of a formal petition within thirty days of the primary contractor's receipt of notice of the disputed decision or action or, in the absence of such receipt, within sixty days of the date of the division's making such disputed decision or taking such disputed action.

§85-15-10. Severability.

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

226023

QUESTIONS FOR MR. KOZAK:

1) If the fee owner of coal property (who has contracts to sell the coal) contracts with a contract miner, is the contract mining agreement a "subcontract" within the meaning of the rules?

2) If the lessee or sublessor of coal property (who has contracts to sell the coal) contracts with a contract miner, is the contract mining agreement a "subcontract" within the meaning of the rules?

3) If the fee owner of coal property hires someone to remove debris or equipment from his property or to make repairs on his equipment or facility, is the contractor's agreement a "subcontract" within the meaning of the rules?

4) If the lessee or sublessor of coal property hires someone to remove debris or equipment from his property or to make repairs on his equipment or facility, is the contractor's agreement a "subcontract" within the meaning of the rules?

231888

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DEP-LEGAL DIVISION

TO: John Kozak

AGENCY: Workers' Compensation

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: November 1, 1994

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 10 TITLE: 85 Workers' Compensation

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: ____________________

TITLE OF PERSON SIGNING: ____________________

DATE: ____________________

****

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: John H Kozak

TITLE OF PERSON SIGNING: Director, Legal Services

DATE: November 18, 1994

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.