

**WEST VIRGINIA  
SECRETARY OF STATE  
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OFFICE OF THE WEST VIRGINIA  
SECRETARY OF STATE

**ADMINISTRATIVE LAW DIVISION**

Form #5

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

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

CITE AUTHORITY WV Code §§23-2C-22; 33-2-10(b); and 33-2-21(a)

RULE TYPE: PROCEDURAL \_\_\_\_\_ INTERPRETIVE \_\_\_\_\_

EXEMPT LEGISLATIVE RULE \_\_\_\_\_ X \_\_\_\_\_

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code §§23-2C-5(c)(2) and 33-2-10(b)

AMENDMENT TO AN EXISTING RULE: YES X NO \_\_\_\_\_

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 11

TITLE OF RULE BEING AMENDED: Enforcement of Reporting and Payment Requirements

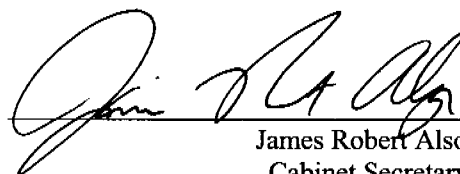
Employer Default, Enforcement, Collections and Related Matters

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: \_\_\_\_\_

TITLE OF RULE BEING ADOPTED: \_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS September 13, 2007



James Robert Alsop  
Cabinet Secretary  
West Virginia Department of Revenue

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

**SERIES 11  
EMPLOYER DEFAULT, ENFORCEMENT, COLLECTIONS  
AND RELATED MATTERS**

Section

- §85-11-1. General.
- §85-11-2. Definitions.
- §85-11-3. Default Employer not Permitted to Dissolve or Withdraw.
- §85-11-4. Notice to Employees of Default Employers.
- §85-11-5. Audits of Employers.
- §85-11-6. Methods of Collection of Payments and Enforcement.
- §85-11-7. Statutory Lien.
- §85-11-8. Civil Actions.
- §85-11-9. Injunctions From Carrying On Business.
- §85-11-10. Receivership and Insolvency Proceedings; Bankruptcy.
- §85-11-11. Distraint Upon Personal Property.
- §85-11-12. Payment Agreements.
- §85-11-13. Administrative Hearings.
- §85-11-14. Interest.
- §85-11-15. Reserved.
- §85-11-16. Criminal Penalties.
- §85-11-17. Freedom of Information Act.

Section (cont'd)

- §85-11-18. Placement on Workers' Compensation Default List; Due Process and Hearing.
- §85-11-19. Removal From the Default List.
- §85-11-20. Uninsured Fines.
- §85-11-21. Employer Violator System.
- §85-11-22. Severability.

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

**SERIES 11  
EMPLOYER DEFAULT, ENFORCEMENT, COLLECTIONS  
AND RELATED MATTERS**

**§85-11-1. General.**

1.1. Scope. -- This rule implements the provisions of W. Va. Code §§23-1-13, 23-2-1b, 1d, 5, 5a, 5b, 5c, 5d, 8, 9, 13, 14, 15 and 17; and 33-2-22, regarding the determination of workers' compensation employer default; enforcement of compliance by employers with West Virginia's workers' compensation laws; and collection of obligations arising from those requirements and others.

1.2. Authority. -- W. Va. Code §§23-2C-22; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules proposed by the Insurance Commissioner and approved by the Industrial Council 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.

1.3. Filing Date. -- August 14, 2007.

1.4. Effective Date. -- September 13, 2007.

**§85-11-2. Definitions.**

2.1. As used in this rule, the following terms, words, and phrases have the meanings stated unless in any instance where such term, word, or phrase is employed the context expressly indicates that another meaning is intended.

2.2. "Act" means the workers' compensation laws of the state of West Virginia which are codified at chapter twenty-three of the West Virginia Code of 1931, as amended.

2.3. "Default" or "default employer" means an employer that:

- a. Has an outstanding balance or liability to the Old Fund;
- b. Has an outstanding balance or liability to the Uninsured Employers' Fund, including owing money to the fund for benefit payments, administration costs or attorney fees as well as any fines owed to the fund for being uninsured pursuant to W. Va. Code §23-2C-8(d)(3) and this rule;

- c. Is in policy default;
- d. Fails to carry mandatory workers' compensation coverage;
- e. Is an electing employer that owes money to the Old Fund;
- f. Is a former self-insured employer whose status has been revoked but who has remaining unsecured obligations pursuant to its previous status as a self-insured employer; or
- g. Has any other outstanding obligation, balance, debt or other liability pursuant to the Act.

2.4. "Electing employer" means an employer which is not required to maintain workers' compensation insurance, but which chooses to do so as provided for by W. Va. Code §23-2-1.

2.5. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

2.6. "Employer" means either or both of the following:

a. The term "employer" has the meaning ascribed to that term by West Virginia Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.

b. The term "employer" shall also mean, for the purposes of this rule's enforcement provisions at subsection 6.1. and sections 7., 8., 10., and 11. any owners, officers, partners and directors of the employer.

2.7. "Insurance Commissioner" means the Insurance Commissioner of West Virginia as provided for in section one, article two, chapter thirty-three of the West Virginia Code.

2.8. "Payment" means any amount of money owed by an employer pursuant to the Act or any rules promulgated there under.

2.9. "This Rule" or "these Rules" means the present exempt legislative rule which is designated in the caption hereof as Title 85, Series 11, and entitled "Employer Default, Enforcement, Collections And Related Matters."

2.10. "Old Fund" means the fund created pursuant to W. Va. Code §23-2C-2(l).

2.11. "Policy Default" means a West Virginia workers' compensation policy holder having their policy cancelled as a result of a failure to comply with the terms of the policy.

2.12. "Self-insured" or "Self-insured employer" means an employer which is eligible and has been granted self-insured status under the provisions of W. Va. Code §23-2-9.

2.13. "Uninsured Employers' Fund" means the fund created pursuant to W. Va. Code §§23-2C-2(o) and 23-2C-8.

2.14. "West Virginia Code," "W. Va. Code" and "Code" mean the West Virginia Code of 1931, as amended.

2.15. "Workers' Compensation Default List" or "Default List," means a paper and/or database identification of employing units who are in default. This list, which may be created by the Insurance Commissioner, may be made accessible in the form of either a computerized database or other databases.

### **§85-11-3. Default Employer not Permitted to Dissolve or Withdraw.**

3.1. The Insurance Commissioner shall not certify to the secretary of state of West Virginia that all payments and interest due the Insurance Commissioner by an employer have been made until the employer cures any default or until the employer has made arrangements satisfactory to the Insurance Commissioner for that cure or until all payments due by the employer under the Act have been made or arranged for by agreement with the Insurance Commissioner.

3.2. Pursuant to W. Va. Code §23-2-5a, the secretary of state shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of West Virginia or organized under the laws of any other state and admitted to do business in this state until the secretary of state receives the subsection 3.1. certification.

### **§85-11-4. Notice to Employees of Default Employers.**

4.1. Upon the policy default or discovery that an employer is otherwise not carrying mandatory West Virginia workers' compensation insurance, the Insurance Commissioner shall issue a written notice to the employees of that employer. The notice shall be in the form prescribed by the Insurance Commissioner.

4.2. Contents of notice. -- The notice shall inform the employees of the default of their employer and the effective date thereof. The notice shall also inform the employees of the legal consequences, as it affects the employees, of the default or termination of their employer. The notice shall also contain the following statement which shall be printed in conspicuous type: "Any person who shall, prior to the reinstatement to good standing of the said employer, as hereinbefore provided for, or prior to sixty (60) days after the posting of this notice, whichever shall first occur, remove, deface, or render illegible this notice, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined one thousand dollars (\$1,000.00)."

4.3. Posting the notice. -- The Insurance Commissioner shall arrange for the posting of the notice as described in this section in a conspicuous place at the chief works of the employer,

as the same appears in the records of the Insurance Commissioner. If the chief works of the employer cannot be found or identified, then the notice as described in this section shall be posted at the front door of the courthouse of the county in which the chief works are located, according to the Insurance Commissioner's records. A copy of the notice shall also be sent to the office of the secretary of state for publication in the State Register.

4.4. The Insurance Commissioner may require any sheriff, deputy sheriff, or other official of the state of West Virginia, who may be authorized to serve civil process, to post the notice as described in this section and to make return thereof of the fact of such posting to the Insurance Commissioner, and any failure to post any notice within ten (10) days after he or she shall have received the same from the Insurance Commissioner, without just cause or excuse, shall constitute a willful failure or refusal to perform a duty required of him or her by law within the meaning of W. Va. Code §61-5-28. Any person actually injured by reason of such failure shall have an action against said official, and upon any official bond he or she may have given, for such damages as such person may actually have incurred, but not to exceed, in the case of any surety upon said bond, the amount of the penalty of said bond.

4.5. Fee for posting. -- Any official posting the notice as described in this section shall be entitled to the same fee as is now or may hereafter be provided for the service of process in suits instituted in courts of record in the state of West Virginia, which fee shall be paid by the Insurance Commissioner out of any funds at his or her disposal, but shall be charged by him or her against the account of the employer to whose default such notice relates.

#### **§85-11-5. Audits of Employers.**

5.1. Pursuant to W. Va. Code §23-2-2(a), the Insurance Commissioner has authority to perform audits of any employer in order to determine the amount of money owed to the Old Fund. The audits shall be in a manner as prescribed by the Insurance Commissioner, and employers shall be required to comply with all requirements of such audits. Any employer refusing to comply with an Insurance Commissioner audit as described in this subsection shall be deemed in default based on the estimated liability to the Old Fund as calculated by the Insurance Commissioner based on available and credible information, and shall further be subject to all enforcement provisions as contained in the Act and this rule.

5.2. The Insurance Commissioner is entitled to hold administrative hearings, conduct depositions, and issue subpoenas for production of persons for deposition or documents for inspection in order to obtain relevant information for determination of amount owed to the Old Fund. All administrative hearings or depositions shall be convened and conducted in accordance with section 13. of this rule.

#### **§85-11-6. Methods of Collection of Payments and Enforcement.**

6.1. Following the default of an employer, in addition to the remedies described in previous sections of this rule, the Insurance Commissioner shall have available to it the following remedies which shall each be described more fully below:

- a. Initiation of a civil action against the employer.
- b. Filing of a lien or liens enforceable against all the property of the employer.
- c. Initiation of an action in the Circuit Court of Kanawha County to enjoin the employer from continuing to carry on the business in which its liability was incurred or, in the alternative, to accept a bond from the employer.
- d. Filing a claim in any bankruptcy proceeding or in a receivership or insolvency proceeding which involves the employer.
- e. Informing the director of the commission of environmental protection when an employer is in default prior to the director's issuance of a coal mining permit so that the permit may not be issued until the applicant is in compliance with the Act, as provided in W. Va. Code §22-3-8.
- f. Informing the director, commissioner or head of any state agency when an employer is in default, so that the director may take appropriate remedial action against the employer in regard to a contract, license, permit, certificate or other authority to conduct a trade, profession or business.
- g. Requesting a criminal prosecution of any person, firm, corporation or other employer whose non-compliance with the Act is believed to be in violation of W. Va. Code §23-1-16 and section 16. of this rule.

6.2. In addition to the other remedies set forth here, the Insurance Commissioner may also initiate a proceeding or proceedings in the name of the state to distrain upon any personal property, including intangible property, of any default employer. If the Insurance Commissioner has good reason to believe that such property or a substantial portion thereof is about to be removed from the county in which it is situated, the Insurance Commissioner may initiate a distraint proceeding in the name of the state before the employer actually enters default. In exercising the power of distraint, the Insurance Commissioner may do so as provided for in section 11. of this rule.

6.3. In every case noted in this section where a monetary sum is to be collected, the Insurance Commissioner shall include a demand for interest as specified in section 14. of this rule.

6.4. The remedies set forth in subsection 6.1. and 6.2. of this section are described in greater detail in later sections of this rule.

#### **§85-11-7. Statutory Lien.**

7.1. Any payment and interest thereon due and unpaid under the Act, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured

constitutes a lien enforceable against all of the property of the owing employer. The property subject to the lien includes all of the employer's real estate, personal property of all types and combinations thereof.

7.2. In accordance with W. Va. Code §§23-2-5a and 38-10C-2, the Insurance Commissioner shall file a written notice of the lien as described in this section in the office of the clerk of the county commission of the county in which the property of the employer or licensee against whom such lien is claimed, is situate, or if the employer's or licensee's property is situated in more than one county, then in each such clerk's office in each such county. The notice shall certify the amount of money that is owed by the employer.

7.3. Pursuant to W. Va. Code §38-10C-2, the clerk or clerks of the county commission or commissions shall, upon the filing of the notice, index the notice in the judgment or tax lien docket of his or her office against the employer or licensee in favor of the state of West Virginia and the Insurance Commissioner. Upon the satisfaction of such lien, a properly acknowledged release thereof for recordation shall be delivered or mailed to the employer or licensee by the Insurance Commissioner or shall be delivered or mailed to the clerk of the county commission in the county in which the lien was filed. Such notice or notices of the lien shall be supplemented by additional notices from time to time whenever any additional liability is incurred by the employer or is determined by audit or other proceeding.

7.4. Until the lien is docketed as provided for in subsection 7.3. of this section, the lien is unenforceable against purchasers (including a lien creditor) of real estate or personal property for a valuable consideration except for such purchasers with actual notice of the Insurance Commissioner's lien. However, if a purchaser (including a lien creditor) of real estate or personal property for a valuable consideration has actual knowledge of the lien, then that lien shall be enforceable against such a purchaser even before the lien is docketed as provided for in subsection 7.3. of this section. Following the docketing pursuant to subsection 7.3. of this section, the lien is enforceable against any purchaser (including a lien creditor) with or without actual notice of the lien.

7.5. Once all amounts due from the employer are collected by the Insurance Commissioner, the Insurance Commissioner shall release the lien or liens as provided by law.

#### **§85-11-8. Civil Actions.**

8.1. The Insurance Commissioner in the name of the State may commence a civil action against a default employer to recover any payment and interest thereon due and unpaid under the Act, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured.

8.2. Such a civil action may be pursued under the applicable provisions of W. Va. Code §14-1-1, et seq., chapter thirty-eight of the West Virginia Code, or as otherwise provided by law. It is expressly noted that the provisions of sections 18a, 18b, and 18c of article 1, chapter fourteen of the West Virginia Code are not applicable to a civil action as described in this

section, but may be used as is otherwise proper.

8.3. Civil actions as described in this section shall be settled or dismissed only as provided by W. Va. Code §14-1-18 or the Act. All such settlement or dismissal orders shall be public information and shall not be placed under seal.

8.4. Pursuant to W. Va. Code §23-2-5a, if the judgment entered in a civil action as described in this section is against the defendant employer, the defendant shall pay the costs of the action. In addition, a civil action as described in this section shall be given preference on the calendar of the court over all other civil actions.

8.5. Upon obtaining a judgment in any civil action prosecuted under this section, the Insurance Commissioner shall enforce and execute upon that judgment as provided for by W. Va. Code §14-1-1, et seq., or as otherwise provided for by law. Any agreement to accept less than the full value of the judgment together with interest thereon shall be made solely as set forth in subsection 8.3. of this section and shall be stated in writing and that document shall be a public record.

#### **§85-11-9. Injunctions From Carrying On Business.**

9.1. Pursuant to the provisions of W. Va. Code §33-2-22(b), the Insurance Commissioner may bring an action against a default employer in the Circuit Court of Kanawha County to enjoin such default employer from continuing to carry on business.

9.2. Pursuant to the provisions of W. Va. Code §33-2-22(c), the Circuit Court of Kanawha County shall issue an injunction prohibiting the default employer from operating its business if the Insurance Commissioner proves by a preponderance of the evidence that the employer is in default status.

9.3. The Insurance Commissioner may, as an alternative to pursuing such an injunction as described in this section, require a default employer to file a bond in the form prescribed by the Insurance Commissioner with satisfactory surety in an amount not less than fifty percent more than the payments and interest due. The bond must be issued by a corporate surety satisfactory to the Insurance Commissioner.

#### **§85-11-10. Receivership and Insolvency Proceedings; Bankruptcy.**

10.1. In the event that a default employer owing payment and interest due thereon under the Act, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, shall be operated in connection with a receivership or insolvency proceeding in any state court in this state, the court under whose direction such business is operated shall, by the entry of a proper order or decree in the cause, make provisions, so far as the assets in administration will permit, for the regular payment of such payments as the same become due.

10.2. In any such case as is described in subsection 10.1. of this section, the Insurance Commissioner may file such pleadings, motions, and other documents and take any other legal action necessary to protect the interests of West Virginia's workers' compensation market during the pendency and resolution of such case.

10.3. In the event that a default employer owing payment and interest under the provisions of the Act, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, files for or is placed in a bankruptcy proceeding under the laws of the United States, the Insurance Commissioner may become a party to such proceedings and take any and all actions needed to protect the interests of the West Virginia's workers' compensation market during the pendency and resolution of the proceeding. The Insurance Commissioner may institute an involuntary proceeding against an employer in a bankruptcy court of the United States in any proper instance. All former premium tax assessments owed to the Old Fund and all surcharges and assessments owed by employers pursuant to the Act, including, but not limited to, the regulatory and Debt Reduction Fund surcharges and assessments pursuant to W. Va. Code §23-2C-3(f), assessments and liabilities owed to the Uninsured Employers' Fund pursuant to W. Va. Code §23-2C-8 and assessments for the Self-Insured Guaranty and Security Risk Pools as established in W. Va. Code §23-2C-1 et seq. and W. Va. Code St. R. §85-19-1 et seq., are special revenue taxes under and according to the provisions of state workers' compensation law and are deemed to be tax claims, as priority claims or administrative expense claims according to those provisions of law provided in the United States bankruptcy code.

#### **§85-11-11. Distraint Upon Personal Property.**

##### **11.1. General authority and provisions.**

a. Authority of the Insurance Commissioner. -- If any payment required by the Act, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, is due and the employer is in default for nonpayment of such obligation and notice thereof has been given as provided for by this rule and the demand is not then the subject of administrative or judicial review, then, if any employer liable to pay such payment, neglects or refuses to pay the same within the period of time provided for payment after notice and demand as provided in subdivision f. of this subsection hereof, it shall be lawful for the Insurance Commissioner to collect the amounts due and such further sums as are sufficient to cover the expense of the levy, by levy in the name of the state and Insurance Commissioner upon all personal property, including intangible property, and rights to property belonging to such employer or on which there is a lien as provided for by the Act for payment of the obligation due. If the Insurance Commissioner finds that the collection of such obligation is in jeopardy, notice and demand for immediate payment may be given by the Insurance Commissioner and, upon failure or refusal to pay such obligation, collection thereof by levy shall be lawful without regard to the time period provided in subdivision f. of this subsection. If the Insurance Commissioner has good cause to believe that such property or a substantial portion thereof is about to be removed from the state in which it is situated, the Insurance Commissioner

may likewise distrain before such default occurs.

b. The term "levy" as used in this section includes the power of distraint and seizure by any lawful means. Except as otherwise provided in this section, a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Insurance Commissioner may levy upon property or rights to property, the Insurance Commissioner may seize and sell such property in accordance with subsection 11.4. of this section.

c. The Insurance Commissioner may utilize the services of a sheriff, a sheriff's deputy, or a member of the department of public safety in levying upon any property under this section or in performing any of the tasks related to the disposition of the property once it is seized as are set forth in the remainder of this section of this rule.

d. Successive seizures. -- Whenever any property or a right to property upon which levy has been made by virtue of subdivision a. of this subsection is not sufficient to satisfy the claim of the Insurance Commissioner which levy is made, the Insurance Commissioner may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the employer against whom such claim exists until the amount due, together with all expenses, is fully paid.

e. Distress warrant. -- The Insurance Commissioner may issue a distress warrant to the sheriff of any county of this state commanding him or her to levy upon and sell any such property or rights to property subject to levy in accordance with the provisions of this section. A distress warrant shall be executed within sixty (60) days from the date the warrant was issued. The sheriff shall return the warrant and any money collected to the Insurance Commissioner within sixty-five (65) days from the date the warrant was issued. A sheriff so collecting any payment shall be entitled to such compensation as is provided by law for his or her services in the levy and enforcement of executions.

f. Requirement of notice before levy.

1. In general. -- Levy may be made under subdivision a. of this subsection upon the salary or wages or other property or right to property of any employer with respect to any unpaid obligation only after the Insurance Commissioner has notified such employer in writing of his or her intention to make such levy. A notice shall also be given by the Insurance Commissioner or other officer in the manner provided by applicable law to all entities other than the employer of whom the Insurance Commissioner or other officer has knowledge and who have a higher priority lien or right to the property than that of the Insurance Commissioner.

2. Notice time period and hearing requirement. -- The notice required under paragraph 1. of this subdivision shall be given in person, or by attorney-in-fact, or sent by regular United States mail to such employer's last address of record at the Insurance Commissioner, no less than twenty (20) days prior to the day of levy; however, no notice need be given prior to levy if the Insurance Commissioner has made a finding under either of the last two sentences of subdivision a. of this subsection that collection of the obligation is in jeopardy;

or, if the levy is made through the provisions of chapter thirty-eight of the West Virginia Code, including notice and hearing provisions therein, for execution upon liens and a notice of default was given by the Insurance Commissioner as required by subsection 18.2. of this rule and a notice of lien was docketed as required by subsection 7.2. of this rule.

3. Continuing levy on salary and wages. -- The effect of a levy on salary or wages payable shall be continuous from the date such levy is first made until the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time, at which time the Insurance Commissioner shall promptly release such levy and notify the employer upon whom such levy was made that such levy has been released.

#### 11.2. Property exempt from levy.

a. Enumeration. -- There shall be exempt from levy the greater of the value of exemptions as provided in chapter thirty-eight of the West Virginia Code or as provided below. In any case where the entity subject to the processes set forth in this section is an individual human being, then the term "individual" as used in this subsection applies solely and exclusively to such a human being and if the entity proceeded against is not an individual human being then the term "individual" does not apply to that entity:

1. Wearing apparel and school books. -- Items of wearing apparel and school books that are necessary for the individual or for members of his or her family.

2. Fuel, provisions, furniture and personal effects. -- If the individual is the head of a family, so much of the fuel, provisions, furniture and personal effects in his or her household and of the arms for personal use, livestock and poultry of the individual, as does not exceed one thousand five hundred dollars (\$1,500.00) in value, if the individual is not the head of a household, this exemption shall not exceed one thousand dollars (\$1,000.00).

3. Books and tools of a trade, business or profession. -- So many of the books and tools necessary for the trade, business, or profession of the individual as do not exceed in the aggregate one thousand dollars (\$1,000.00) in value.

4. Unemployment benefits. -- Any amount payable to an individual with respect to his or her unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, or of this state, or any other state.

5. Undelivered mail. -- Mail, addressed to any employer, which has not been delivered to the addressee.

6. Annuity and pension payments. -- Annuity or pension payments to any individual under any pension or retirement plan, including social security payments.

7. Workers' compensation. -- Any amount payable to an individual as workers' compensation (including any portion thereof payable with respect to dependents) under

a workers' compensation law of the United States, or of this state, or any other state; except that if the individual who will be receiving such payment is a person who as sole proprietor, partner, or corporate officer, employee, or member was responsible for and is liable for the payment of the obligation levied upon, then the amount payable as workers' compensation may be levied upon.

8. Judgments for support of minor children. -- If the individual is required by a judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of minor children, so much of his or her salary, wages or other income as necessary to comply with such judgment.

9. Public assistance. -- Any amount payable to any individual from a public assistance or relief fund created under the law of the United States, of this state, or of any other state.

10. Wages, salary and other income. -- Any amount payable to or receivable by an individual as wages or salary for services provided by an employee to his or her employer, or as income derived from other sources, during any period, to the extent that the total for such period does not exceed the applicable exempt amount determined under the provisions of articles 5A and 5B, chapter thirty-eight of the West Virginia Code, plus twenty-five dollars (\$25.00) for each additional dependent of the individual.

11. If the employer is a natural person and if he or she owns a homestead located in this state, the first five thousand dollars (\$5,000.00) thereof shall be exempt from levy.

b. Appraisal. -- The officer seizing property of the type described in subdivision a. of this subsection shall appraise and set aside to the owner the amount of such property declared to be exempt. If the individual objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Insurance Commissioner shall summon three disinterested individuals who shall make the valuation.

c. No other property exempt. -- Unless required by some other law, no personal property or rights to property shall be exempt from levy other than property specifically made exempt by subdivision a. of this subsection.

#### 11.3. Surrender of property subject to levy.

a. Requirement. -- Any person in possession of, or obligated with respect to, property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Insurance Commissioner, surrender such property or rights, or discharge such obligation, to the Insurance Commissioner, except such part of the property or rights as is, at the time of such demand, subject to any prior attachment, execution or levy.

b. Enforcement of levy and extent of personal liability. -- Any person in possession of or obligated with respect to property subject to levy upon which levy has been made, who fails or refuses to surrender any property or rights to property, subject to levy, upon

demand by the Insurance Commissioner, shall be subject to prosecution as provided for in section 16. of this rule.

c. Effect of honoring levy. -- Any person in possession of or obligated with respect to property or rights to property subject to levy upon which levy has been made, who upon demand by the Insurance Commissioner, surrenders such property or rights to property or discharges such obligation to the Insurance Commissioner shall be discharged from any obligation or liability to the default employer with respect to such property or rights to property arising from such surrender or payment.

d. The term "person" as used in this subsection includes, but is not limited to, any individual, employee, sole proprietor, partner, officer, member, joint venturer, receiver, trustee, executor, administrator, guardian, committee or official of any sole proprietorship, firm, partnership, limited partnership, limited liability company, company, association, corporation, organization, joint venture, receivership, trust, estate, governmental entity or other entity who as such person is under a duty to surrender the money, property or rights to property or to discharge the obligation or demand.

#### 11.4. Sale of seized property.

a. Notice of seizure. -- At the time of seizure or as soon as practicable after seizure of property, notice in writing shall be given by the Insurance Commissioner to the owner of the property, and to the possessor thereof, or shall be left at his or her usual place of abode or business if he or she has such within the county where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such county, the notice may be mailed to his or her last known address by use of the certified mail, return receipt requested. Such notice shall specify the sum demanded and shall state the appraised value and identity of the property seized.

b. Notice of sale. -- The Insurance Commissioner may sell any property seized under this section of this rule. As soon as practicable after the seizure of the property, the Insurance Commissioner shall give notice to the owner, in the manner prescribed in subdivision a. of this subsection, and shall cause a notice of sale to be published as a class II legal advertisement in some newspaper published or generally circulated within the county wherein such seizure is made, or the county where the property is located, the last date of publication being not less than five (5) days prior to sale. This notice shall identify the property to be sold, and the date, time, place, manner, and conditions of the sale thereof, all of which shall be at the discretion of the Insurance Commissioner. The sale shall be conducted by public auction, or by public sale under sealed bids. Before the sale, the Insurance Commissioner may determine a minimum price for which the property shall be sold, and if no person offers to purchase such property at the sale for the amount of the minimum price, the property shall be declared to be purchased at such price for the state of West Virginia for the benefit of whichever particular area(s) of workers' compensation the sale benefits (i.e., the Old Fund, Uninsured Fund, etc.); otherwise, the property shall be declared to be sold to highest bidder. In determining the minimum price, the Insurance Commissioner shall take into account the expense of making the levy and sale.

c. Sale of indivisible property. -- If any property liable to levy is not divisible, so as to enable the Insurance Commissioner by sale of a part thereof to raise the whole amount of the sum due and the expenses of making the levy and sale, the whole of such property shall be sold. However, where the property sold is co-owned or jointly owned by the employer and an innocent third party, the proceeds of the sale shall be divided, based on the respective interests of the entities owning the property immediately prior to the levy and sale, and the proceeds attributable to the interest of the innocent owner or owners shall be distributed to them: *Provided*, that where the property to be sold is so co-owned or jointly owned by an innocent third party, who has no independent liability under the Act, such innocent party may petition the circuit court of the county in which the property is located for relief, including postponement of the sale, in order that the court can determine if the property can be partitioned, so as to avoid sale of the innocent party's portion or grant and afford other relief by the court protective of the rights and interests of such innocent party as well as of the West Virginia's workers' compensation market and whichever particular area(s) of workers' compensation the sale would benefit (i.e., the Old Fund, Uninsured Fund, etc.).

11.5. Sale of perishable goods. -- If the Insurance Commissioner determines that any property seized is liable to perish or become greatly reduced in price or value by keeping, or that such property cannot be kept without great expense, the Insurance Commissioner shall appraise the value of such property and shall take one of the following actions:

a. Return to owner. -- If the owner of the property can be readily found, the Insurance Commissioner shall give him or her notice of such determination of the appraised value of the property. The property shall be returned to the owner if, within such time as may be specified in the notice, the owner either: (a) pays to the Insurance Commissioner an amount equal to the appraised value; or, (b) gives bond in such form, with such sureties, and in such amount as the Insurance Commissioner shall prescribe, to pay the appraised amount at such time as the Insurance Commissioner determines to be appropriate under the circumstances.

b. Immediate sale. -- If the owner does not pay such amount or furnish such bond in accordance with this subsection, the Insurance Commissioner shall, as soon as practicable, make public sale of the property.

11.6. Redemption of property.

a. Before sale. -- Any entity whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Insurance Commissioner at any time prior to the sale thereof, and upon such payment, the Insurance Commissioner shall restore such property to that entity and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

b. Subrogation to Insurance Commissioner's lien. -- Any entity redeeming the interest of another shall be subrogated to the lien of the Insurance Commissioner on such interest. Such entity shall lose his, her or its right to this lien, however, unless within thirty (30) days after receiving the certificate of sale of personal property, he, she or it shall file with the clerk of the county Insurance Commissioner of the county in which the personal property is

located or where the default employer resides or has its business location, or if neither be in this state, the clerk of the county Insurance Commissioner of Kanawha County, his, her or its claim against the default employer and a copy of the certificate of sale of personal property.

11.7. Certificate of sale. -- In the case of property sold as provided in subsection 11.4. of this section, the Insurance Commissioner shall provide to the purchaser a certificate of sale upon payment in full of the purchase price.

11.8. Legal effect of certificate of sale of personal property.

a. Certificate of sale of property. -- In all cases of sale of property pursuant to subsection 11.4. of this section, the certificate of such sale:

1. As evidence. -- Shall be prima facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of the proceedings in making the sale; and,

2. As conveyances. -- Shall transfer to the purchaser all right, title and interest of the employer in and to the property sold; and,

3. As authority for transfer of corporate stock. -- If such property consists of stocks, shall be notice of such transfer when received by any corporation, company or association and shall be authority to such corporation, company or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not; and,

4. As receipts. -- If the subject of sale is securities or other evidences of debt, shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of such securities or other evidences of debt; and,

5. As authority for transfer of title to motor vehicle. -- If such property consists of a motor vehicle, shall be notice, when received, to any public official charged with the registration of title to motor vehicles, of such transfer and shall be authority to such official to record the transfer on the books and records in the same manner as if the certificate of title to such motor vehicle has been transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

b. Effect of junior encumbrances. -- A certificate of sale of personal property given pursuant to subsection 11.7. of this section shall discharge such property from all liens, encumbrances and titles over which the lien of the Insurance Commissioner with respect to which the levy was made had priority.

11.9. Records of sale. -- The Insurance Commissioner shall for each county, keep a record of all sales of property under subsection 11.4. of this section and of redemptions of such property. The record shall set forth the debt for which any such sale was made, the date of

seizure and sale, the name of the debtor and all proceedings in making such sale, the amount of expenses and the names of the purchasers and the date and a copy of the certificate of sale. A copy of such report, or any part thereof, certified by the Insurance Commissioner shall be evidence in any court of this state of the truth of the facts therein stated.

11.10. Expense of levy and sale. -- The Insurance Commissioner shall determine the expenses to be allowed in all cases of levy and sale under this article.

11.11. Application of levy.

a. Collection of liability. -- Any money realized from a levy shall be applied as follows: (a) first, against the expenses of the proceedings; (b) second, any amount remaining shall then be applied against the liability in respect of which the levy was made and the sale was conducted; and, (c) third, any amount still remaining shall then be applied against any other default liability of the employer for which levy may be made under this rule.

b. Surplus proceeds. -- Any surplus proceeds remaining after the application of subdivision a. of this subsection shall, upon application and satisfactory proof in support thereof, be credited or refunded by the Insurance Commissioner to the person or persons legally entitled thereto.

11.12. Authority to release levy and return property.

a. Release of levy. -- It shall be lawful for the Insurance Commissioner to release the levy upon all or part of the property or rights to property levied upon where the Insurance Commissioner determines that such action will facilitate the collection of the liability, but such release shall not operate to prevent a subsequent levy.

b. Return of property. -- If the Insurance Commissioner determines that property has been wrongfully levied upon, it shall be lawful for the Insurance Commissioner to return: (a) the specific property levied upon; (b) an amount of money equal to the amount of money levied upon; or, (c) an amount of money equal to the amount of money received by the Insurance Commissioner from a sale of such property. Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of nine (9) months from the date of such levy or thereafter if a demand in writing to the Insurance Commissioner has been made within such time period. For purposes of this subsection, if property is declared purchased by the Insurance Commissioner at a sale pursuant to subsection 11.4. of this section, the Insurance Commissioner shall be treated as having received an amount of money equal to the minimum price determined pursuant to such subsection or, if larger, the amount received by the Insurance Commissioner from the resale of such property.

c. Public information. -- The Insurance Commissioner shall, upon request, make public the names and persons in whose favor a release of levy or return of property has been made as provided in subdivisions a. and b. of this subsection.

#### **§85-11-12. Payment Agreements.**

12.1. Any default employer owing payment and interest due thereon under the Act, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, may, at the discretion of the Insurance Commissioner, make application, on a form provided by the Insurance Commissioner, to enter into a payment agreement with the Insurance Commissioner which provides for payment of the entire default liability payment owed in installments.

12.2. As a prerequisite to entering into a payment agreement, a default employer as described in subsection 12.1. of this section must make a good faith payment of ten percent (10%) of the total current outstanding liability owed under the Act. The Insurance Commissioner has discretion to increase or reduce the required amount of the good faith payment if, in the sole discretion of the Insurance Commissioner, such reduction would be in the best interest of the State's workers' compensation market.

12.3. A default employer as described in subsection 12.1. of this section who enters into a payment agreement and also provides the Insurance Commissioner with a current certificate of workers' compensation insurance shall be removed from the Default List.

12.4. Pursuant to section 5. of this rule, the Insurance Commissioner may direct that a complete audit of the employer be made at any time after an application to enter into a payment agreement is received from the employer. Failure by the employer to comply with the audit shall be cause for the application to be denied, or for immediate nullification of the payment agreement, if entered into, and placement of the employer on the Default List.

12.5. An employer may make application to enter into a payment agreement despite the pendency of some other remedial action that may have been instituted by the Insurance Commissioner. The Insurance Commissioner may then delay or continue further pursuit of that remedial action if, in the Insurance Commissioner's sole discretion, the interests of the State's workers' compensation market will be protected or furthered despite such delay or continuance. One factor that the Insurance Commissioner may rely upon, but not to the exclusion of other possible factors, is whether the employer has previously defaulted on a payment agreement with the Insurance Commissioner or on a reinstatement agreement with the Insurance Commissioner or former Workers' Compensation Commission or its predecessors. In the event of a default by the employer on a previous agreement, the Insurance Commissioner will generally, unless some other good cause exists to the contrary, continue to proceed with the other remedies.

12.6. Permitting an employer to enter into a payment agreement is discretionary with the Insurance Commissioner. Such discretion shall be exercised with regard to the best interests of the State's workers' compensation market, including, but not limited to, the administration of the Old Fund, Uninsured Employers' Fund and the self-insured community. Should the Insurance Commissioner decline to enter into a payment agreement, then the Insurance Commissioner may proceed with any of the collection and enforcement efforts provided for by these rules; by W. Va. Code §23-2-5a or as otherwise provided for by the West Virginia Code.

12.7. The Insurance Commissioner may permit the payment of all amounts due to the Old Fund, Uninsured Employers' Fund, or owed pursuant to liabilities accrued by the employer while the employer was self-insured, or any combination thereof, upon the terms stated in a payment agreement. The Insurance Commissioner shall exercise discretion to enter into such an agreement and shall prescribe the terms of an agreement.

12.8. Pursuant to W. Va. Code §33-2-22(d), the Insurance Commissioner shall have authority, as part of a payment agreement, to waive or reduce penalty or interest due to the Old Fund. Additionally, pursuant to W. Va. Code §23-2C-8(d)(2)(C), and W. Va. Code St. R. §85-9-7.3., the Insurance Commissioner shall have authority, as part of a payment agreement, to waive or reduce any amount owed to the Uninsured Employers' Fund as part of a payment agreement. In all cases when the Commissioner agrees to waive or reduce amounts owed to the Old Fund and/or Uninsured Employers' Fund as described in this subsection, such decision shall be made consistent with the best interests of the Old Fund and/or Uninsured Fund, as the case may be. If the employer defaults on the payment agreement, the waiver or reduction will be null and void, and the employer will be deemed to owe the original amount.

12.9. The interest rate agreed to in a payment agreement shall not change over the term of the agreement.

12.10. Generally, absent exigent circumstances, the term of an agreement shall not exceed three (3) years, and in no instance shall the term of an agreement exceed five (5) years. The Insurance Commissioner shall set the payment agreement's term of payment for that period of months in which the Commissioner believes the applicant is financially capable of repaying the default liability. Upon written request, an employer currently under a payment agreement and in good standing in regard to such agreement may make a written request for the time frame of the payment agreement to be extended by up to two (2) years, or an amount of time which would make the total time frame of the payment agreement five (5) years, whichever time period is longer. The granting of an extension to a payment agreement shall be in the sole discretion of the Insurance Commissioner based on the Commissioner's determination of good cause for the same. If an extension is granted, it shall be done by a new written draft of the previous payment agreement.

12.11. The breach of a payment agreement by the employer shall render the agreement void and of no legal effect and the breaching employer shall be immediately placed on the Default List retroactive from the date that the employer's account originally entered default or delinquency in the case of certain Old Fund accounts: *Provided*, That the employer shall be credited for any amounts paid by the employer under the payment agreement prior to defaulting on the agreement. Nothing in this section shall apply to any other type of collection or enforcement method under the Act or this rule.

#### **§85-11-13. Administrative Hearings.**

All administrative hearings conducted pursuant to this rule will be held in accordance with the provisions of W. Va. Code § 29A-5-1, et seq., and with the provisions of Sections 4. through 10. of 85 C.S.R. 7, "Rules for Selected Hearings."

#### **§85-11-14. Interest.**

14.1. Any and all payments unpaid on the date on which due and payable, as prescribed by the Insurance Commissioner, shall immediately begin bearing interest. Interest shall be compounded quarterly until payment plus accrued interest is received by the Insurance Commissioner; except that future interest for payment agreements shall be calculated and provided at a simple rate of interest. Interest collected pursuant to this subsection shall be paid into the Old Fund, Uninsured Employers' Fund or Self-Insured Guaranty Risk Pool or Security Risk Pool (as established in W. Va. Code St. R. §85-19-1 et seq.), whichever is applicable.

14.2. Notwithstanding the provisions of subsection 14.1. of this section, in no event shall the rate of interest charged a political subdivision of the State or a volunteer fire department exceed ten percent per annum.

#### **§85-11-15. Reserved.**

#### **§85-11-16. Criminal Penalties.**

In addition to all other remedies available to the Insurance Commissioner under this rule or as contained in the Act, the Insurance Commissioner may elect to request prosecution of any person, firm, partnership, association, corporation or other entity who violates any part of the Act in accordance with W. Va. Code §61-3-24e. Notice should also be taken of the provisions of subsections 4.2. and subdivision b., subsection 11.3. of this rule for other specific provisions concerning criminal penalties.

#### **§85-11-17. Freedom of Information Act.**

Pursuant to the Freedom of Information Act, W. Va. Code §29B-1-1, et seq., as part of any hearing or proceeding held under this rule, all of the evidence and records submitted during a hearing, or as part of a stipulation, except insofar as those records contain confidential medical information or other information confidential to a workers' compensation claimant, employer, or other person or entity shall be subject to public inspection and copying; except that, if under the rules of evidence certain testimony or documentary evidence may be deemed privileged or confidential and placed under seal, then upon such a ruling by the hearing officer, such testimony or documentary evidence shall not be disclosed. If the privileged or confidential information cannot be excised from a record, then the record as a whole will be deemed confidential and sealed; however, the Insurance Commissioner shall release in its place a statement explaining in detail the basis for the withholding of the record.

#### **§85-11-18. Placement on Workers' Compensation Default List; Due Process and Hearing.**

18.1. As soon as the Insurance Commissioner is made aware that an employer is in default, the Commissioner will cause the employer to be placed on the Workers' Compensation Default List, subject to the due process and hearing provisions below.

18.2. Prior to being placed on the Workers' Compensation Default List, all employers,

except those who were in default with the Old Fund upon termination of the former Workers' Compensation Commission, shall be sent a notice by the Insurance Commissioner informing the employer that they are being placed on the applicable Default List. The notice shall state the reason for the employer being placed on the list, and provide the employer ten (10) days to file with the Insurance Commissioner a petition for an expedited administrative hearing before the Insurance Commissioner if the employer believes that the action by the Insurance Commissioner is factually or legally erroneous.

18.3. A petition for expedited administrative hearing, as described in this section, shall clearly identify why the employer believes the Insurance Commissioner's action of placing it on the Default List was erroneous. Upon receiving the petition, the Insurance Commissioner shall, within five (5) business days schedule a hearing which shall be conducted in accordance with the provisions of article five [§29A-5-1 et seq.], chapter twenty-nine-a of this code and W. Va. Code St. R. §85-7-4 through 10. An appeal from a final decision of the Insurance Commissioner shall be taken in accord with the provisions of articles five and six [§29A-6-1 et seq.] of said chapter: *Provided*, That all appeals shall be taken to the Circuit Court of Kanawha County.

18.4. If the final decision of the Insurance Commissioner following the hearing is to keep the employer on the Default List, the employer shall remain on the default list unless a higher court reverses the decision of the Insurance Commissioner.

18.5. The administrative appeal process described in this section does not interfere with or toll a private carrier's right to terminate the employer's workers' compensation coverage. The private carrier's right to terminate an employer's workers' compensation coverage is based upon the provisions of the insurance policy and the applicable law in chapter twenty-three of the West Virginia Code and the rules promulgated there under.

#### **§85-11-19. Removal From the Default List.**

19.1. If an employer has met all of its legal, fiscal or other obligations, including providing proof of current mandatory West Virginia workers' compensation coverage, thereby removing the employer from being in default, the Insurance Commissioner shall remove the employer from the Default List.

19.2. Employers on the Default List shall be permitted at any time to make a written request to the Insurance Commissioner for removal from the Default List: *Provided*, That such request is accompanied by evidence not previously submitted to the Insurance Commissioner which indicates that the employer making the request has met its legal, fiscal or other obligations and therefore is entitled to be removed from the Default List. The Insurance Commissioner shall render a written decision on employers' request for removal within ten (10) days of the receipt of the same.

19.3. Employers may file a petition with the Insurance Commissioner requesting an administrative hearing before the Insurance Commissioner if they disagree with the decision of the Insurance Commissioner in regard to a request for removal pursuant to subsection 19.2. of this section, and the Insurance Commissioner shall schedule a hearing within thirty (30) days, to

otherwise be conducted as described in the above section 18. of this rule: Provided, That the Insurance Commissioner reserves the right to summarily deny an employer's petition for a hearing if the Insurance Commissioner determines that the employer presented no new evidence to the Insurance Commissioner in support of its written request for removal, is presenting evidence of no probative value or is otherwise making a frivolous request which lacks merit.

#### **§85-11-20. Uninsured Fines.**

20.1. Any employer that is in policy default shall be fined by the Insurance Commissioner an amount equal to twice the amount of premium they would have owed to their private carrier for coverage up to the date on which the employer entered policy default. The fine shall be increased on a monthly basis using the same methodology until the employer obtains West Virginia workers' compensation policy.

20.2. Any employer discovered to be operating without mandatory West Virginia workers' compensation coverage, but who has never obtained a West Virginia workers' compensation policy, shall be fined an amount equal to twice the amount of premium they would have paid for coverage during the current half calendar year term had they obtained a West Virginia workers' compensation policy. The fine shall be increased on a monthly basis using the same methodology until the employer obtains West Virginia workers' compensation policy. The estimate of premium in this section shall be based on information available to the Insurance Commissioner through a reasonable investigation of the default employers' employment operations. If the default employer refuses to fully cooperate with the investigation, the maximum fine as set forth in subsection 20.3. of this rule shall be imposed.

20.3. Pursuant to W. Va. Code 23-2C-8(d)(3), no fine imposed in this section for any single instance of default shall exceed ten thousand dollars (\$10,000). However, if an employer is removed from default status and re-enters default, a new fine as described in this section may be imposed.

#### **§85-11-21. Employer Violator System.**

21.1. Every employer subject to placement on the Default List shall also be placed in the Employer Violator System {W. Va. Code §23-1-1b(g)(25)}, and shall remain in the Employer Violator System until such time as the employer is removed from the Default List.

21.2. All individuals who own, are officers or partners of, control, have a 10% ownership interest in, or are otherwise deemed to have a substantive or active ownership interest in an employer company which is on the Default List shall be placed in the Employer Violator System, and shall remain in the Employer Violator System until such time as the employer is removed from the Default List.

#### **§85-11-22. Severability.**

If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of this rule

which can be given affect without the invalid provisions or application and to this end the provisions of this rule are declared to be severable.

**INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND  
PUBLIC COMMENTS RECEIVED ON W. VA. CODE ST. R. § 85-11-1 ET SEQ.**

**Introduction**

Below is the written response of the Insurance Commissioner to the sole stakeholder and public comment received in regard to the proposed amendment of W. Va. Code St. R. § 85-11-1 et seq. ("Rule 11," or "the Rule" - "Employer Default, Enforcement, Collections and Related Matters"), which was filed with the West Virginia Secretary of State for public comment on 5/1/07.

**Ability to Waive Moneys Due to the Old Fund and Uninsured Employers' Fund**

An organization representing labor interests commented that section 12.8. of the rule should be amended to clarify that Insurance Commissioner may only waive interest and/or penalty due to the Old Fund or Uninsured Employers' Fund if such waiver is part of a full and final settlement. Specifically, the concern is that the Insurance Commissioner should not be permitted to waive interest and penalty due to these funds from employers as part of a payment agreement (an agreement between the Insurance Commissioner and employer to pay amounts owed in installments) as contemplated in section 12.8. It is argued that this is consistent with Code language and that also permitting waiver as part of a payment agreement could lead to abuse by recurring default employers.

The Insurance Commissioner disagrees with this comment. Specifically, pursuant to the provisions of W. Va. Code §§ 23-2C-8(d)(1)(C) (pertaining to the Uninsured Employers' Fund) and 33-2-22 (pertaining to the Old Fund), the Insurance Commissioner is permitted to waive interest and penalty due to the Old Fund and any amounts due to the Uninsured Employers' Fund as part of an agreement with the employer. Moreover, in regard to the concern that employers will more easily be able to abuse the workers' compensation system if waiver of moneys is permitted, first, the Insurance Commissioner stresses that pursuant to section 12.11. of the Rule, any payment agreement is void if the employer misses a payment, meaning that the employer reverts to the initial default status in which they were prior to entering into the agreement. Secondly, the Insurance Commissioner will use discretion in permitting waiver of moneys owed to funds as part of an agreement. Waivers will be permitted on a case-by-case basis based on the specific circumstances of the default employer. Certainly the existence of a previous default on a payment by an employer, absent exigent circumstances, would weigh significantly against any waiver being permitted in a subsequent payment agreement.

Finally, it was commented that the Insurance Commissioner should place into the Rule provisions making the specific terms of any waiver with an employer available to the public. The Insurance Commissioner does not see the need to place any such provisions in the Rule, and believes such issues are controlled by West Virginia's Freedom of Information Act and/or other relevant statutes.

**AFFILIATED  
CONSTRUCTION  
TRADES FOUNDATION**

A Division of the West Virginia State Building and Construction Trades Council, AFL-CIO



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May 29, 2007

Ryan Sims, Associate Counsel  
Office of the West Virginia Insurance Commissioner  
Post Office Box 50540  
Charleston, West Virginia 25305-0540

Re: Public Comments on Proposed Rule Title 85, Series 11

Dear Mr. Sims:

On behalf of the Affiliated Construction Trades Foundation, I would like to present the following comments and suggestions regarding the above-referenced proposed rule;

Title 85, Rule 11-

- Section 12.8.- Our suggestion is to go back to the original statute language regarding waiving interest and penalties. Add the language. "The commission shall only have the authority to waive or reduce penalty or interest due to the Old Fund and/or Uninsured Employer's Fund if the waiver is part of the full and final resolution of civil or administrative litigation". It is ACT's position that if such waivers do end up being allowed, the rule should include language making the details of any such waiver available to the public.

Thank you for your consideration of these suggestions. Should you have any questions, please feel free to contact me at my office.

Sincerely,

Lesly H. Messina  
Research Director



## **PUBLIC HEARING**

**MAY 31, 2007**

### **OFFICES OF THE WEST VIRGINIA INSURANCE COMMISSIONER WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

### **ENFORCEMENT OF REPORTING AND PAYMENT REQUIREMENTS TITLE 85, SERIES 11**

Transcript of the Public Hearing held on Thursday, May 31, 2007, at 3:00 p.m.,  
Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400,  
Charleston, West Virginia.

#### **Industrial Council Members Present:**

Bill Dean, Chairman  
Dan Marshall  
Walter Pellish (via telephone)  
Senator Don Caruth  
Senator Brooks McCabe

Chairman Dean: Ms. Messina, I see you are down to speak.

Lesly H. Messina (Affiliated Construction Trades Foundation): The ACT Foundation just has one brief suggestion on Rule 11, and that would be to go back to the original statute regarding the language waiving of interest and penalties. We would suggest that if the Insurance Commissioner continues to have the ability to waive interest and penalties that it remain in the purview of only when a case is under civil or administrative litigation. And the reason behind that is that it's our contention that if employers. . .if it becomes common knowledge that employers can have interest and penalties waived when they have failed to pay and they are taken to task to pay, we think that that's going to be even more of a disincentive for people to pay in a timely fashion. Now certainly we know that the Insurance Commissioner would take each case on a case-by-case basis to determine whether it would warrant the waiving of those penalties and interest. But we still think that it should stay with the original statute which requires. . .which allows that to happen only when something has been taken into some sort of administrative or civil process. To be able to just waive the interest and penalties any time that someone enters into a repayment plan, we think is a bad policy to have. We think that people should have to pay a fine and a penalty if in fact they become in arrears on their premiums, and we would suggest that you go back to the

**Public Hearing on Title 85, Series 11  
Enforcement of Reporting and Payment Requirements  
Workers' Compensation Industrial Council  
May 31, 2007  
Page 2**

original statutory language that requires that. If in fact it does pass and the Insurance Commissioner can waive that interest and penalties on an individual case-by-case basis, we would recommend that language be added so that the public can have access to that information and see how much money was waived. So we would make that recommendation as well. That's it. Are there any questions?

Chairman Dean: Any questions? Senator McCabe? Mr. Marshall? Mr. Pellish, do you have any questions?

Walter Pellish: No sir.

Chairman Dean: Very good. Thank you. Ryan, do you have any comments?

Ryan Sims: I guess at this point I'll just say we believe that the way it currently reads is consistent with the statutory language. But we will certainly continue to review it and make sure – based on Ms. Messina's comments – make sure that we're comfortable on that point. From our perspective there are situations where sometimes interest can pile up in a certain situation, and I guess the way we approach it is we're going to take a look at what situation that particular employer is in. We are certainly not going to be as lenient towards an employer that we deem is acting in bad faith and tempted to obfuscate our workers' compensation laws. But if there is an employer that may be out some financial trouble or misinterpreted the law or something like that, we might be more inclined to at least do something like waive interest or waive the penalty or reduce the penalty as part of a repayment agreement particularly if. . . in most cases enter into a repayment agreement. . . they have to put down usually a ten percent down payment to even begin it. Again, we feel it is consistent with the authority given to us in the statute, but it's something – based on those comments – that we will certainly take a look at.

Chairman Dean: Questions for Mr. Sims? Mr. Pellish, do you have any questions for Mr. Sims?

Mr. Pellish: No sir.

Chairman Dean: Thank you. Any other comments on Title 85, Series 11, from the public?

**Enforcement of Reporting and Payment Requirements**  
**Offices of the West Virginia Insurance Commissioner**  
**1124 Smith Street, Room 400, Charleston, WV**  
**May 31, 2007**

[illegible]