WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #5

Do Not Mark In This Box

FILED

2005 AUG 31 P 2:42

OFFICE WEST VIRGINIA SECRETARY OF STATE

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

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

CITE AUTHORITY: W. Va. Code §§23-1-1a(j)(3), 23-2-1 et seq.

RULE TYPE: PROCEDURAL ______ INTERPRETIVE ______

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W. Va. Code §23-1-1a(j)(3)

AMENDMENT TO AN EXISTING RULE: YES X NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 11

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

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ______

TITLE OF RULE BEING PROPOSED: ______

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS October 1, 2005

Authorized Signature

WEST VIRGINIA SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In This Box

FILED

2005 MAY 18 P 4: 13

OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code §§23-1-1a(j)(3); 23-2-1 et seq.

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

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

DATE OF PUBLIC HEARING: June 23, 2005 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

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

Fax # (304) 926-5372

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

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

Office of General Counsel
4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone Number (304) 926-3423
Fax Number (304) 926-5441

May 18, 2005

The Honorable Betty Ireland
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 11
"Enforcement of Reporting and Payment Requirements"

Dear Secretary Ireland:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. The Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 11 for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 85, Series 11: Enforcement of Reporting and Payment Requirements

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency Workers' Compensation Commission

Address 4700 MacCorkle Avenue, S.E.

Charleston, WV 25304

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

Proposed changes since the last filing for this rule address the transition of authority for enforcing employer reporting and payment requirements of the Workers' Compensation Commission (commission) for the period of time up to and including the termination of the commission. The above estimates are based on the assumption that the rule changes become effective in the current fiscal year (FY'05). There should be no significant change in the estimated costs associated with enforcing employer reporting and payment requirements for the Workers' Compensation Commission thru 12/31/05. After 12/31/05, subject to the governor issuing the proclamation set forth in chapter twenty-three, article 2C of the Code of West Virginia that terminates the Workers' Compensation Commission, the employer reporting and payment requirements for certain delinquent, defaulted and self-insured policies will be administered by the Insurance Commission. As a result, costs related to these policies after 12/31/05 will be incurred by the West Virginia Insurance Commission.

3. Objectives of this rule:

This rule provides for the enforcement of reporting and payment requirements related to certain delinquent and default employers. The payment obligations include amounts due for premium taxes, premium deposits, penalties, interest, or other payments required by the Act. It also establishes the process and requirements necessary for defaulted employers to apply for reinstatement.

Rule Title: Title 85, Series 11: Enforcement of Reporting and Payment Requirements

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

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

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

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

C. Economic Impact on Citizens/Public at Large.

The rule changes will not have a direct economic impact on the citizens of West Virginia.

Date: 5/18/05

Signature of Agency Head or Authorized Representative

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 11
Enforcement of Reporting and Payment Requirements

Pursuant to Senate Bill 1004, First Special Session, 2005, the Workers' Compensation Commission may terminate. Thereafter, Workers' Compensation insurance in West Virginia will be provided through the successor to the Commission and other private insurance carriers.

This rule is amended to address the termination of the Commission and to transition the enforcement of this rule to the Office of the Insurance Commissioner. The rule is also amended to strengthen provisions relating to guaranteeing the collection of amounts due after litigation of the issues.

FILED

2005 AUG 31 P 2: 42

OFFICE WEST VIRGINIA SECRETARY OF STATE

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

SERIES 11
ENFORCEMENT OF REPORTING AND PAYMENT REQUIREMENTS

§85-11-1. General.

1.1. Scope. -- This rule implements the provisions of West Virginia Code, §§23-1-13 and 16; §§23-2-1, 1b, 1d, 5, 5a, 5b, 5c, 5d, 8, 9, 13, 14, 15 and 17; and §23-3-1,regarding the determination of delinquency and default by employers; reporting and payment requirements; enforcement of compliance by employers with reporting and payment requirements; and, collection of payments arising from those requirements and others.

1.2. Authority. -- West Virginia Code, ~~§21A-2-6(1) & 6(2); §21A-3-7(b) & 7(e);~~ §23-1-1 and §23-2-18. Pursuant to West Virginia Code, ~~§21A-3-7(e)~~ §23-1-1a(j)(3), rules adopted by the ~~Compensation Programs Performance Council and the Commissioner~~ board of managers and the commission are not subject to legislative approval as would otherwise be required under 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. -- ~~July 23, 1996.~~

1.4. Effective date. -- ~~August 22, 1996.~~

~~1.5. Purpose and Effective Date of Amendments to Rule. — The purpose of amendments to this rule is to implement the amended provisions of West Virginia Code, as amended by the Acts of the Legislature, as set forth in Enrolled Committee Substitute for Senate Bill No. 250, passed on February 10, 1995, and in effect from passage, as well as other amendments which are refinements of the prior rules which were designed to ensure effective administration and financial viability of the workers' compensation system.~~

§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. The term "Act" or "West Virginia Workers' Compensation Act" means the workers' compensation laws of the state of West Virginia which are codified at chapter 23 of the West Virginia Code of 1931, as amended.

2.3. The terms "West Virginia Code," "W. Va. Code" and "Code" mean the West Virginia Code of 1931, as amended.

2.4. ~~The term "commissioner" means the Commissioner of the Bureau of Employment Programs or the West Virginia Commissioner of Employment Programs as provided by West Virginia Code, §21A-2-1 and §23-1-1~~ "Commission" means the workers' compensation commission created pursuant to the provisions of W. Va. Code §23-1-1.

2.5. The term "default" means either or both of the following:

a. The failure by a subscriber or a self-insured employer which has not made a payment or filed a report due by it under the provisions of the Act and which has received a subsection 3.3. notice of delinquency but has further failed to make the payment or file the report within the time period specified by the notice. For the purposes of this definition, the employer may be a regular subscriber to the Fund or a self-insured employer with the Fund and either an employer required to subscribe to the Fund or an employer electing to subscribe to the Fund.

b.

(1) The omission or failure by an employer to subscribe to and pay premiums into the Fund and to comply with the requirements of the West Virginia Workers' Compensation Act at chapter 23 of the W. Va. Code, and the rules prescribed by the ~~division and the compensation programs performance council~~ commission and the board of managers, as provided by the Code at §23-2-1(a) ~~and at §21A-3-7(c)~~ prior to the first date of employment of any employee of the employer and thereafter, shall cause default to occur immediately prior to the moment of employment of any employee upon the employer's omission or failure to subscribe or comply by that time. Default, as defined in this subsection, shall immediately, without notice as required by W. Va. Code, §23-2-5, for delinquencies of subscribing employers, subject the employer to all the penalties prescribed by law, including interest on unpaid amounts, late reporting or payment penalty, ~~penalty premium rate~~ and other penalties and collection actions prescribed by Code and these rules, including particularly the penalty prescribed by W. Va. Code at §23-2-8; that is, the default employer shall be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, without the benefit of the common law defenses set forth in that section. This default may be cured through the employer's compliance with the Act and the rules. If the default employer has not filed an application for coverage, the application must be filed. The provisions at W. Va. Code, §23-2-5(f), are applicable to this default in providing for restoration of the benefits and protection of the Act, prospectively from the date of complete reporting and payment in full of the employer's delinquency and default liability or from the date of a complete filing of an application for reinstatement with adequate reinstatement deposit.

(2) Default as defined in this rule is not affected or altered by the provisions for a grace period, for the first thirty (30) days from and including the date of employment of any employee; except that, if the employer files the application and deposit within thirty (30) days from the first date of employment, the employer may avoid the imposition of interest on payments unpaid when due, ~~penalty premium rate,~~ late reporting or payment penalty or other monetary penalties which may be imposed under law by the ~~division~~ commission for the employer's omission or failure to file an application for coverage and premium deposit prior to the first date of employment of any employee. Therefore, the provisions of W. Va. Code, §23-2-8, regarding civil liability for the injury or death of an employee, are not affected or altered by provision for such grace period. Furthermore, according to the exception set forth in the last sentence of W. Va. Code, §23-2-1(h), regarding coverage of sole proprietors, partners and corporate officers, notwithstanding the provision for

a grace period from the imposition of certain other stated penalties, no sole proprietor, partner or corporate officer who may be lawfully elected out of mandatory coverage under subsections (g) and (h) of W. Va. Code, §23-2-1, may be afforded any benefits of coverage if injured within such thirty day grace period or thereafter until actual subscription occurs through application for coverage prior to the date of injury of such person.

2.6. ~~The term "division" means the Workers' Compensation Division of the Bureau of Employment Programs of West Virginia as provided by West Virginia Code, §21A-1-4 and §23-1-1.~~ <u>"Board" means the workers'' compensation board of managers created pursuant to the provisions of W. Va. Code §23-1-1a.</u>

2.7. The term "electing employer" means an employer which is not required to subscribe to the Fund but which chooses to do so as provided for by West Virginia Code, §23-2-1.

2.8. The term "employee" has the meaning ascribed to that term by West Virginia Code, §23-2-1 and §23-2-1a.

2.9. The term "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 7.2. and sections 8., 9., 11. and 12., any "responsible person" as defined in subsection 3.10. of this rule, including owners, partners, officers and employees who are required or who have the duty under the Act, corporation law, or other applicable law, bylaw or rule to truthfully account for and pay to the ~~division~~ <u>commission</u>, or to cause the same to occur, any premium tax, premium deposit, interest, penalty or other payment required by the Act.

2.10. The term "executive director" means the person ~~designated by the commissioner to be Executive Director to serve~~ <u>who serves</u> as the chief ~~operating~~ <u>executive</u> officer for the ~~daily~~ operations of the workers' compensation ~~division~~ <u>commission</u>, as provided by West Virginia Code, §23-1-~~4, and who was formerly titled as "secretary" therein and as "executive secretary" in this rule~~.

2.11. The term "Fund" means the West Virginia Workers' Compensation Fund~~, including the surplus fund, created by West Virginia Code, §23-3-1~~, as well as the "Disabled Workers' Relief Fund" created by West Virginia Code, §23-4A-1.

2.12. The term "payment" means any amount of money owed by an employer to the ~~division~~ <u>commission</u> by reason of the operation of any provision of the Act or any other applicable law, or the various rules promulgated by the ~~commissioner or the compensation programs performance council~~ <u>commission and the board of managers</u>.

2.13. The terms "premium" and "premium tax" mean the amounts of money due from an employer to the Fund or ~~division~~ <u>commission</u> as the result of the quarterly and periodic assessments by the ~~division~~ <u>commission</u> under the provisions of the Act in order to establish, maintain, and replenish the Fund and to pay the expenses of administration of the Fund by the ~~division~~ <u>commission</u>. "Premium" and "premium tax" includes, but is not limited to, assessments of: premium tax, premium deposit, ~~penalty premium rate premium tax~~ and interest, assessed to regular subscriber employers and to self-insured employers alike; and also, that portion of self-insured premium tax assessed in arrears through benefit pay orders to the employer for the employer's claimant employees, on behalf of and for the benefit of the Fund as provided by law, assessed in arrears in lieu of direct, advance premium tax payments to the ~~division~~ commission.

2.14. The term "premium deposit" means the amount of money an employer is required to pay and to maintain as an advance upon quarterly, or other periodic interval, premium tax pursuant to West Virginia Code, §23-2-5 and §23-2-9.

2.15. The term "self-insurer" or "self-insured" means an employer who has applied for permission to elect and thereafter has elected to maintain its own benefit fund or system of compensation to ensure the payment of benefits to its injured employees and their dependents in amounts at least equal in value to the workers' compensation benefits provided by law and ordered to be paid under the provisions of the Act.

2.16. The term "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 "Enforcement of Reporting and Payment Requirements."

2.17. "Commission Default List" means a paper or database identification of employing units that are in default with the Workers' Compensation Commission, the Old Fund or the uninsured employer fund. The list, which will be created by the Commission, may be provided to the agency in the form of either a computerized database or other databases that the agency can access. Upon termination of the Commission, the administration of the Commission Default List shall transfer to the insurance commissioner.

2.18. "Policy Default" means a policy holder that has failed to comply with the terms of its workers' compensation insurance policy and is consequently without workers' compensation coverage and shall include, but not be limited to, an employing unit's failure to pay the regulatory surcharge and deficit reduction surcharge required by article two-c of chapter twenty-three of the West Virginia Code.

2.19. "Private Market Default List" means a paper or database identification of employing units that are or have been in policy default with a private carrier or that are in default based upon failure to comply with self-insured premium requirements, including the payment of the regulatory surcharge and the deficit reduction surcharge imposed by article two-c of chapter twenty-three of the West Virginia Code. The list, which will be created by the insurance commissioner, may be provided to the agency in the form of either a computerized database or other databases that the agency can access.

§85-11-3. Employer Delinquency and Default or Termination.

3.1. Delinquency. -- An employer shall be declared to be delinquent by the ~~division~~ commission if any one or more of the following omissions occurs:

a. The employer fails to timely pay its premium tax, ~~including penalty premium rate premium tax,~~ if assessed to the employer. Premium tax shall be paid quarterly, or other permitted periodic interval, on or before the last day of the month following the end of the quarter or interval.

b. The employer fails to maintain an adequate premium deposit, including ~~adjustments for the penalty premium rate, if assessed,~~ interest accrued on late payments, late reporting or payment penalty and other penalties and charges which may be assessed to the employer under applicable law. Increases in premium deposit, when necessary to be made, must be remitted with the applicable quarterly, or other permitted interval, premium tax, or timely upon notice as prescribed by W. Va. Code, §23-2-5(b) & 5(c), and subsection 3.3. of this rule..

c. The employer fails to timely file a gross wages payroll report, which report shall be due on or before the last day of the month following the end of each quarter, or other permitted interval, and which report shall be filed with the quarterly, or other interval, premium.

3.2. No employer will be declared delinquent or be assessed any penalty for such delinquency if the ~~division~~ commission determines that such delinquency has been caused by delays in the administration of the Fund, including the commission of errors by the ~~division~~ commission. An employer may demand an administrative hearing on this issue and the hearing, if granted by the ~~commissioner or the division~~ commission, shall be conducted as provided for in section 14. of this rule.

3.3. Notice of delinquency. -- Within sixty (60) days of the end of each quarter, the ~~division~~ commission shall, in writing, notify all delinquent employers of their delinquency and the reason therefor. In any event when the notice of delinquency must be given at a later time because the delinquency is discovered later or it is discovered that the ~~division~~ commission did not give notice within sixty (60) days of the end of the quarter for which the delinquency occurred, then the ~~division's~~ commission's notice shall provide for thirty (30) days within which the employer may cure the delinquency before default shall occur.

3.4. Contents of notice. -- The notice required by subsection 3.3. of this rule and W. Va. Code, §23-2-5, shall state the following:

a. A demand that the employer cure its failure before the end of the third month following the end of the preceding quarter or, if the notice of delinquency was not given timely within sixty (60) days of the end of the quarter for which the delinquency occurred, within thirty (30) days of the notice of delinquency and a statement that failure to cure the delinquency will result in the automatic default or termination of the employer at the end of the period provided by notice and by law for curing the delinquency but that such default employer's liability under the Code shall be retroactive to midnight of the last day of the month following the end of the quarter, or other interval, for which the delinquency occurs.

b. A demand that the employer pay interest if the delinquency arises from a delinquent premium tax payment or a delinquent premium deposit.

c. An explanation of the legal consequences of a subsequent default by the employer if the employer is one who is required to subscribe to the Fund or an explanation of the legal consequences of termination of any electing employer's account.

d. An explanation of how the employer may cure its delinquency.

e. A statement that, once the employer is in default or has been terminated, the employer's employees will receive written notice of that fact and of the legal consequences thereof.

f. An explanation that any person, firm or corporation which is required by the provisions of the Act to subscribe to the Fund and which knowingly fails to subscribe thereto, or which knowingly fails to make any report (including a gross wages payroll report) or perform any other act or duty required by the ~~division~~

commission (including payments of premium tax, ~~penalty premium rate premium tax,~~ premium deposit, late reporting or payment penalty, interest or other charges, fees or penalties) within the time specified by the ~~division~~ commission, or any person or firm or the officer of a corporation who knowingly and willfully makes a false report or statement under oath, affidavit or certification respecting any information required to be provided under the Act, shall be guilty of a felony and, upon conviction thereof, shall be fined from one thousand dollars to twenty-five thousand dollars or imprisoned in the penitentiary for one year to three years, as provided by W. Va. Code, §23-1-16.

3.5. An employer who is required to subscribe to the Fund (which includes a self-insured employer) and who fails to cure a delinquency within the time period provided by notice shall be in default and shall lose the benefits and protection of the Act and shall incur additional liabilities as noted below:

a. An employer who loses the benefits and protection of the Act shall be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, sustained in the course of employment.

b. The additional liabilities of an employer include liability to its employees for all damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful action, neglect, or default of the employer or any of the employer's partners, officers, agents or employees, while acting within the scope of their employment and in the course of their employment and also to the personal representatives of such employees where death results from such personal injuries. The employer may also lose the right to assert certain defenses during the course of a civil action brought by its injured employee or the employee's personal representative to collect such damages.

c. The default liabilities described under subsection 3.5. of this rule are retroactive to Midnight of the last day of the month following the end of the quarter for which the delinquency occurs.

3.6. An employer who voluntarily elects to subscribe to the Fund and who fails to cure a delinquency shall have its election to pay into the Fund terminated and such an employer shall lose the benefits and protection of the Act and may incur the additional liabilities described in subsection 3.5. of this rule. The default liabilities of the employer are retroactive on the same basis as set forth in subsection 3.5.c. of this rule.

3.7. An employer who is a subscriber to the Fund, whether such subscription is mandatory or voluntary, or who is self-insured with the Fund and who does not cure its delinquency, as required by the subsection 3.3. notice of delinquency, shall be in default and, if an elective subscriber, have its account and the benefits and protection of the Act terminated upon default, without further action by or notice from the ~~division~~ commission, by operation of the provisions of law for immediate and automatic default upon the employer's failure to cure timely the delinquency.

3.8. An employer who is required to subscribe to the Fund and who fails to subscribe and otherwise comply with the Act and the rules prior to the first date of employment of any employee of the employer shall be in default immediately prior to the moment of employment of any such employee and default shall occur without the need for notice of delinquency as required for an employer who has subscribed or has been permitted to be self-insured and is delinquent.

3.9. Notice of default.

a. After the delinquency and default of a subscriber or self-insured employer, the ~~division~~ commission shall notify the default employer of the methods by which the employer may be reinstated and restored with the Fund to the benefits and protection of the Act through a notice of default.

b. After the default of a non-complying employer, as defined in subsection 2.5.b. of this rule, upon discovery of the occurrence and the name and address of the employer, the ~~division~~ commission shall notify the default employer of the methods by which the employer may be reinstated and restored with the Fund to the benefits and protection of the Act through a notice of default.

c. Upon default, although notice of default is not required prior to the initiation or commencement by the ~~division~~ commission of any action to obtain the employer's compliance with the Act, notice of default and intention to levy, as provided in subsection 12.1.f., shall be given prior to any action of distraint or levy upon personal property of the employer or a responsible person.

3.10. Any person required to truthfully account for and pay over to the ~~division~~ commission any premium tax, premium deposit, ~~penalty premium rate premium tax,~~ late reporting or payment penalty, interest or other penalty pursuant to the provisions of W. Va. Code, §23-2-1, et seq., or to cause the same to occur, who willfully fails to truthfully account for and pay over the premium tax, premium deposit, ~~penalty premium rate premium tax,~~ late reporting and payment penalty, interest or other penalty, or to cause the same to occur, or willfully attempts in any manner to evade or defeat any such premium, premium deposit, interest or penalty or the payment thereof, is, in addition to other penalties provided by law, liable for a sum equal to the total amount of the premium tax, premium deposit, ~~penalty premium rate premium tax,~~ late reporting or payment penalty, interest or other penalty evaded, or not accounted for and paid over. The sum of liability is a personal obligation of the responsible person, or persons, and is immediately due and owing to the ~~division~~ commission and, in addition thereto, is a lien enforceable against all the property of the person or persons.

§85-11-4. Further Effects of Delinquency.

4.1. The ~~division~~ commission shall not certify to the secretary of state of West Virginia that all payments and interest due the ~~division~~ commission by an employer have been made until the employer cures any delinquency, default, or termination or until the employer has made arrangements satisfactory to the ~~division~~ commission for that cure or until all payments and reports due by the employer under the Act have been made or arranged for by agreement with the ~~division~~ commission.

4.2. 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 4.1. certification.

§85-11-5. Notice to Employees of Default Employers.

5.1. Upon the default or termination of an employer, the ~~division~~ commission shall issue a written notice to the employees of that employer. The notice shall be in the form prescribed by the ~~division~~ commission.

5.2. Contents of notice. -- The notice shall inform the employees of the default or termination 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. In the case of an employer which is required to subscribe to the Fund, the notice shall inform the employees that the default employer is liable to its employees for injury or death, both in workers' compensation benefits and in damages at common law or by statute in a civil action in court. In the case of an employer which is not required to subscribe to the Fund, but has voluntarily elected to do so, the notice shall inform the employer and the employees that neither the default and terminated employer nor its employees are protected by the Act as to any injury or death after the date of default. The notice shall also contain the following statement which shall be printed in conspicuous type: "Any person who shall, prior to the reinstatement of the said employer, as hereinbefore provided for, or prior to sixty 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 ($1,000.00) dollars."

5.3. Posting the notice. -- The ~~division~~ commission shall arrange for the posting of the subsection 5.1. notice in a conspicuous place at the chief works of the employer, as the same appears in the records of the ~~division~~ commission. If the chief works of the employer cannot be found or identified, then the subsection 5.1. notice shall be posted at the front door of the courthouse of the county in which the chief works are located, according to the ~~division's~~ commission'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.

5.4. The ~~division~~ commission 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 subsection 5.1. notice and to make return thereof of the fact of such posting to the ~~division~~ commission, and any failure to post any notice within ten days after he or she shall have received the same from the ~~division~~ commission, 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.

5.5. Fee for posting. -- Any official posting the subsection 5.1. notice 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 ~~division~~ commission 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 delinquency such notice relates.

§85-11-6. Audits of Employers.

6.1. Pursuant to W. Va. Code, §23-2-2(a), every employer shall furnish the ~~division~~ commission, upon request, all information required by the ~~division~~ commission to ascertain or verify the number of employees employed by the employer during a pertinent period, the wages paid to employees during a pertinent period, any payments owed to the Fund, as premium tax, premium deposit, interest, penalties, fees, or to carry out the various purposes of the Act.

6.2. In order to inspect the information specified in subsection 6.1. of this rule, the ~~division~~ commission may direct that an agent or employee of the Fund audit the books and other records of the employer during the regular business hours of the employer or at another reasonable time whether located at the employer's place or places of business or elsewhere and the employer shall permit the audit to occur and shall cooperate with the auditors so that the audit may be successfully completed.

6.3. Either as an addition to or as an alternative to the audit permitted under subsection 6.2. of this rule, the ~~division~~ commission may convene an administrative hearing or conduct a deposition for the purpose of receiving the subsection 6.1. information in testimonial or evidentiary form. The ~~commissioner, the~~ executive director, an inspector or a designated hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents and testimony at any such hearing or deposition. Any such administrative hearing or deposition shall be convened and conducted in accordance with section 14. of this rule and the ~~division~~ commission shall have the right to have any employer or officer, agent, or employee of any employer examined under oath or affirmation. A deposition may be held pursuant to this subsection even if a hearing regarding the employer has not been previously noticed or requested; but, in that event, adequate notice of the deposition shall be given to all interested parties known to the ~~division~~ commission.

6.4. The request for information provided for by subsection 6.1., the audit provided for by subsection 6.2., or the hearing provided for by subsection 6.3. may be conducted at any time when necessary to carry out the purposes of the Act including when the ~~division~~ commission has good cause to believe that the employer may be delinquent. Such times may be before the issuance of a subsection 3.3. notice of delinquency, after the issuance of a subsection 3.3. notice of delinquency, before or after an employer has defaulted pursuant to subsection 3.7. or has been terminated pursuant to subsection 3.8. of this rule, or before, during, or after the implementation of an attempt to collect or enforce upon the employer's delinquency as provided for in subsection 7.2. of this rule.

§85-11-7. Methods of Collection of Payments and Enforcement.

7.1. Prior to a subsection 3.5. default or a subsection 3.6. termination, an employer may cure its delinquency by paying in full the amounts claimed to be owed by the ~~division~~ commission and by filing a complete gross wages payroll report, if not filed. At this stage, the amounts claimed to be owed to the ~~division~~ commission shall include a requirement for the payment of interest on all delinquent payments pursuant to W. Va. Code, §23-2-13.

~~a. In the event that the employer disputes the amounts claimed to be owed to the division or disputes the completeness or accuracy of an alleged delinquent gross wages payroll report, the employer may file a petition setting forth the facts upon which it bases its dispute and may demand that the division convene an administrative hearing pursuant to section 14. of this rule for the purpose of taking evidence to resolve the dispute. As a part of the petition, the employer must pay the full amount claimed to be due by the division. The division shall deposit the disputed payment into the division's account until the dispute is resolved.~~

~~b. During the time from the receipt of the hearing demand and until the issuance of an order by the commissioner or division following the hearing which resolves the dispute, the delinquency of an employer shall be tolled as being a delay caused by the administration of the Fund. Following the issuance of the commissioner's or division's order, the time for the employer to cure its delinquency will resume until any previously unexpired days have elapsed. The order shall be deemed to be issued on the date it is received by the employer's representative as shown by the return receipt of the United States Postal Service's certified mail system. The order resolving the dispute shall be interlocutory in nature and shall not be a final order for appeal purposes.~~

~~c. During the period affected by this subsection, neither the commissioner or division, nor any representative or agent of the commissioner or division, shall have the authority to waive any part of any payments owed to the Fund. The employer can cure its delinquency only by paying the full amount found to be owed. If the order rules in whole or in part in the favor of the employer, then the appropriate sum, without interest, will be reimbursed to the employer from the amount previously paid by the employer.~~

a. Any employer who wishes to contest a decision made by the commission regarding amounts claimed to be owed to the commission or disputes the completeness or accuracy of an alleged delinquent gross wages payroll report, under the provisions of chapter twenty-three, article two of the Code, may do so under the provisions of W. Va. Code, §23-2-17. The rule implementing that section requires the filing of a formal request for reconsideration, and following reconsideration, a petition within thirty days of the employer's receipt of notice of the disputed decision or action or reconsidered decision or, in the absence of such receipt, within sixty days of the date of the commission's making such disputed decision or taking such disputed action or making such reconsideration decision. (See 85 C.S.R. 7, "Rules for Selected Hearings." However, as a mandatory prerequisite to hearing a petition after a reconsideration decision, the employer must deposit sufficient assets with the commission to guarantee payment of the amount determined to be due and owing by the commission. The deposit of assets shall be required in the following form(s):

1. The full cash amount of the money determined to be due by the commission;

2. A reinstatement agreement issued and maintained in accordance with the provisions and terms of W. Va. Code §23-2-5 and, in accordance with the discretionary policies of the commission, as authorized by law, including the authority to refuse to enter into a reinstatement agreement;

3. A cash or corporate surety bond or a bank letter of credit in the full amount claimed due by the commission; or

4. Any combination of the above three methods that guarantees payment in full to the commission in the event the employer does not prevail in the matter.

7.2. Following the default or termination of an employer, the ~~division~~ commission shall have available to it the following remedies which shall each be described more fully below:

a. Initiation of a civil action, including a civil action against all officers and directors of the employer.

b. Filing of a lien or liens enforceable against all the property of the employer and the persons, partners and officers who are or were responsible for payment or causing the payment of the default liability for which the liens were filed.

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.

e. Informing the director of the ~~division~~ commission of environmental protection when an employer is delinquent, default or terminated with the Fund 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 delinquent, in default or terminated, 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 17. of this rule.

7.3. In addition to the other remedies set forth here, the ~~division~~ commission may also initiate a proceeding or proceedings in the name of the state to distrain upon any personal property, including intangible property, of any delinquent employer and responsible persons. If the ~~division~~ commission 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 ~~division~~ commission may initiate a distraint proceeding in the name of the state before the employer actually becomes delinquent. In exercising the power of distraint, the ~~division~~ commission may do so as provided for in section 12. of this rule.

7.4. In every case noted in this section 7. where a monetary sum is to be collected, the ~~division~~ commission shall include a demand for interest as specified in section 15. of this rule.

7.5. The remedies set forth in subsection 7.2. and 7.3. of this section are described in greater detail in later sections of this rule.

§85-11-8. Statutory Lien.

8.1. Any payment and interest thereon due and unpaid under the Act constitutes a lien enforceable against all of the property of the owing employer. By way of example, and not by limitation, payments owed may include delinquent or default premium taxes, premium deposits, ~~penalty premium rate premium taxes,~~ late reporting or payment penalties, claims benefits paid by the Fund for employees, or their dependents, of a delinquent, defaulted, or terminated employer, costs of serving or posting notices, dishonored check service fees, court and hearing charges and fees and all other unresolved claims shown upon the account of an employer by the records of the ~~division~~ commission, plus interest thereon as calculated under W. Va. Code, §23-2-13, and section 15. of this rule. The property subject to the lien includes all of the lienee's real estate, personal property of all types and combinations thereof.

8.2. In accordance with W. Va. Code, §23-2-5a and §38-10C-2, the ~~division~~ commission shall file a written notice of the subsection 8.1. lien in the office of the clerk of the county commission of the county in which the property of the employer or lienee against whom such lien is claimed, is situate, or if the employer's or lienee'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 to the Fund by the employer.

8.3. 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 lienee in favor of the state of West Virginia and the ~~division~~ commission. Upon the satisfaction of such lien, a properly acknowledged release thereof for recordation shall be delivered or mailed to the employer or lienee by the ~~division~~ commission 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.

8.4. Until the lien is docketed as provided for in subsection 8.3. of this rule, 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 ~~division's~~ commission'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 8.3. of this rule. Following the docketing pursuant to subsection 8.3., the lien is enforceable against any purchaser (including a lien creditor) with or without actual notice of the lien.

8.5. Once all amounts due from the employer are collected by the ~~division~~ commission, the ~~commissioner~~ commission shall release the lien or liens as provided by law.

§85-11-9. Civil Actions.

9.1. The ~~division~~ commission in the name of the state may commence a civil action against an employer, which includes for the purposes of this section a responsible person, as defined in subsection 3.10. of this rule, including its officers or directors or both, who, after due notice, defaults in any payment or duty required by the Act and this rule. Such payments may include, but are not limited to, premium taxes, premium deposit, ~~penalty premium rate premium taxes,~~ late reporting or payment penalties, claims benefits paid by the Fund, costs of serving or posting notices, court and hearing charges and fees or any other amounts lawfully owed, and interest thereon, by employers in default; by employers who have been terminated from coverage by the Fund; or, by employers who elected to self insure.

9.2. Such a civil action may be pursued under the applicable provisions of W. Va. Code, §14-1-1, et seq., W. Va. Code, chapter 38, or as otherwise provided by law. ~~The division commission shall be represented in such a civil action by a representative or designee of the office of the attorney general.~~ It is expressly noted that the provisions of sections 18a, 18b, and 18c of article 1, chapter 14 of the West Virginia Code are not applicable to a subsection 9.1. civil action, but may be used as is otherwise proper.

9.3. Subsection 9.1. civil actions 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.

9.4. Pursuant to W. Va. Code, §23-2-5a, if the judgment entered in a subsection 9.1. civil action is against the defendant employer, the defendant shall pay the costs of the action. In addition, a subsection 9.1. civil action shall be given preference on the calendar of the court over all other civil actions.

9.5. Upon obtaining a judgment in any civil action under this section 9., the ~~division~~ commission 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 9.3. of this rule and shall be stated in writing and that document shall be a public record.

§85-11-10. Injunctions From Carrying On Business.

10.1. In any case when an employer required to subscribe to the Fund defaults in payment of premium, premium deposit, penalty, or interest thereon, for as many as two calendar quarters, which quarters need not be consecutive, and remains in default after due notice, the ~~division~~ commission may bring an action in the circuit court of Kanawha County to enjoin such employer from continuing to carry on the business in which such liability was incurred.

10.2. The ~~division~~ commission may, as an alternative to pursuing such an injunction, require such delinquent employer to file a bond in the form prescribed by the ~~division~~ commission 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 ~~division~~ commission.

§85-11-11. Receivership and Insolvency Proceedings; Bankruptcy.

11.1. In accordance with the provisions of W. Va. Code, §23-2-5a, in case a business subject to the payments and interest thereon imposed under the Act 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.

11.2. In any such case as is described in subsection 11.1., ~~the division commission shall be represented by a representative or designee of the office of the attorney general and~~ the ~~division~~ commission may file such pleadings, motions, and other documents and take any other legal action so as to protect the interests of the Fund during the pendency and resolution of such case.

11.3. In the event that any employer which owes any payment and interest under the provisions of the Act files for or is placed in a bankruptcy proceeding under the laws of the United States, the ~~division~~ commission may become a party to such proceedings and take any and all actions needed to protect the interests of the Fund during the pendency and resolution of the proceeding. The ~~division~~ commission may institute an involuntary proceeding against an employer in a bankruptcy court of the United States in any proper instance. All premium tax assessments, as defined in subsection 2.13. and elsewhere in this rule and in the Act, 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.

§85-11-12. Distraint Upon Personal Property.

12.1. General authority and provisions.

a. Authority of the ~~division~~ commission. -- If any premium tax, premium deposit, penalty, interest, claims benefit or other payment required by the Act 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, premium tax, or penalty neglects or refuses to pay the same within the period of time provided for payment after notice and demand as provided in subsection 12.1.f. hereof, it shall be lawful for the ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission finds that the collection of such obligation is in jeopardy, notice and demand for immediate payment may be given by the ~~division~~ commission and, upon failure or refusal to pay such obligation, collection thereof by levy shall be lawful without regard to the time period provided in subsection 12.1.f. If the ~~division~~ commission 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 ~~division~~ commission may likewise distrain before such delinquency 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 ~~division~~ commission may levy upon property or rights to property, the ~~division~~ commission may seize and sell such property in accordance with section 12.4. of this rule.

c. The ~~division~~ commission 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 12. of this rule 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 subsection 12.1.a. is not sufficient to satisfy the claim of the ~~division~~ commission for which levy is made, the ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission 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.

A. In general. -- Levy may be made under subsection 12.1.a. upon the salary or wages or other property or right to property of any employer with respect to any unpaid obligation only after the ~~division~~ commission has notified such employer in writing of his or her intention to make such levy. A notice shall also be given by the ~~division~~ commission or other officer in the manner provided by applicable law to all entities other than the employer of whom the ~~division~~ commission or other officer has knowledge and who have a higher priority lien or right to the property than that of the ~~division~~ commission.

B. Notice time period and hearing requirement. -- The notice required under subsection 12.1.f.A. 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 ~~division~~ commission, no less than twenty days prior to the day of levy, unless the notice of intention to levy and right to a hearing are set forth in the notice of delinquency as required by subsection 3.3. of this rule and W. Va. Code, §23-2-5(b) and (c); however, no notice need be given prior to levy if the ~~division~~ commission has made a finding under either of the last two sentences of subsection 12.1.a. that collection of the obligation is in jeopardy; or, if the levy is made through the provisions of chapter 38, W. Va. Code, including notice and hearing provisions therein, for execution upon liens and a notice of delinquency was given by the ~~division~~ commission as required by subsection 3.3. of this rule and a notice of lien was docketed as required by subsection 8.2. of this rule.

C. 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 ~~division~~ commission shall promptly release such levy and notify the employer upon whom such levy was made that such levy has been released.

12.2. Property exempt from levy.

a. Enumeration. -- There shall be exempt from levy the greater of the value of exemptions as provided in chapter 38 of the West Virginia Code or as provided below. In any case where the entity subject to the processes set forth in this section 12. is an individual human being, then the term "individual" as used in this subsection 12.2. 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:

A. 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.

B. 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 in value, if the individual is not the head of a household, this exemption shall not exceed one thousand dollars.

C. 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 in value.

D. 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.

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

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

G. 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.

H. 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.

I. 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.

J. 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 chapter 38, articles 5A and 5B, W. Va. Code, plus twenty-five dollars for each additional dependent of the individual.

K. If the employer is a natural person and if he or she owns a homestead located in this state, the first five thousand dollars thereof shall be exempt from levy.

b. Appraisal. -- The officer seizing property of the type described in subsection 12.2.a. 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 ~~division~~ commission 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 subsection 12.2.a.

12.3. 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 ~~division~~ commission, surrender such property or rights, or discharge such obligation, to the ~~division~~ commission, 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 ~~division~~ commission, shall be subject to prosecution as provided for in section 17. 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 ~~division~~ commission, surrenders such property or rights to property or discharges such obligation to the ~~division~~ commission shall be discharged from any obligation or liability to the delinquent 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 12.3. 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.

12.4. 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 ~~division~~ commission 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 ~~division~~ commission may sell any property seized under this section 12. of this rule. As soon as practicable after the seizure of the property, the ~~division~~ commission shall give notice to the owner, in the manner prescribed in subsection 12.4.a., 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 ~~division~~ commission. The sale shall be conducted by public auction, or by public sale under sealed bids. Before the sale, the ~~division~~ commission 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 the Fund; otherwise, the property shall be declared to be sold to highest bidder. In determining the minimum price, the ~~division~~ commission 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 ~~division~~ commission 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 to the Fund, 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 Fund.

12.5. Sale of perishable goods. -- If the ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission an amount equal to the appraised value; or, (b) gives bond in such form, with such sureties, and in such amount as the ~~division~~ commission shall prescribe, to pay the appraised amount at such time as the ~~division~~ commission 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 ~~division~~ commission shall, as soon as practicable, make public sale of the property.

12.6. 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 ~~division~~ commission at any time prior to the sale thereof, and upon such payment, the ~~division~~ commission 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 ~~division's~~ commission's lien. -- Any entity redeeming the interest of another shall be subrogated to the lien of the ~~division~~ commission 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 commission of the county in which the personal property is located or where the delinquent employer resides or has its business location, or if neither be in this state, the clerk of the county commission of Kanawha County, his, her or its claim against the delinquent employer and a copy of the certificate of sale of personal property.

12.7. Certificate of sale. -- In the case of property sold as provided in subsection 12.4., the ~~division~~ commission shall provide to the purchaser a certificate of sale upon payment in full of the purchase price.

12.8. 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 12.4., the certificate of such sale:

A. 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,

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

C. 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,

D. 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,

E. 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 12.7. shall discharge such property from all liens, encumbrances and titles over which the lien of the ~~division~~ commission with respect to which the levy was made had priority.

12.9. Records of sale. -- The ~~division~~ commission shall for each county, keep a record of all sales of property under subsection 12.4. 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 ~~division~~ commission shall be evidence in any court of this state of the truth of the facts therein stated.

12.10. Expense of levy and sale. -- The ~~division~~ commission shall determine the expenses to be allowed in all cases of levy and sale under this article.

12.11. 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 delinquent liability of the employer for which levy may be made under this rule.

b. Surplus proceeds. -- Any surplus proceeds remaining after the application of subsection 12.11.a. shall, upon application and satisfactory proof in support thereof, be credited or refunded by the ~~division~~ commission to the person or persons legally entitled thereto.

12.12. Authority to release levy and return property.

a. Release of levy. -- It shall be lawful for the ~~division~~ commission to release the levy upon all or part of the property or rights to property levied upon where the ~~division~~ commission 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 ~~division~~ commission determines that property has been wrongfully levied upon, it shall be lawful for the ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission has been made within such time period. For purposes of this subsection 12.12.b., if property is declared purchased by the ~~division~~ commission at a sale pursuant to subsection 12.4., the ~~division~~ commission 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 ~~division~~ commission from the resale of such property.

c. Public information. -- The ~~division~~ commission 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 subsections 12.12.a. and 12.12.b.

§85-11-13. Applications for Reinstatement.

13.1. Any employer, who is required to subscribe to the Fund and subsequently defaults, or who elects to subscribe and whose account is subsequently terminated upon default, shall be restored immediately to the benefits and protection of the Act only upon the filing of all delinquent gross wages payroll and other reports required by the ~~division~~ commission and upon payment into the Fund of all unpaid premium taxes, an adequate premium deposit, accrued interest, penalties and any other amount due under the Act or the rules promulgated by the ~~commissioner or the compensation programs performance council~~ commission and the board of managers.

13.2. Any employer who is in default or who's account is terminated upon default under the Act may be reinstated to the benefits and protection of the Act by filing an application for reinstatement and entering into a reinstatement agreement with the ~~division~~ commission which provides for repayment of the entire delinquency and default liability in installments, as provided by W. Va. Code, §23-2-5. No application for reinstatement may become effective until the applicant's default occurs, although the application may be filed prior to default. Application for reinstatement shall be made upon forms prescribed by the ~~division~~ commission and shall include a report of the gross wages payroll of the employer during the entire period of delinquency and subsequent default or termination, which payroll information shall be verified by the employer or its authorized agent, and an application shall further include an application deposit payment equal to one half of one percent of the gross wages payroll during the entire period of delinquency and default, or one hundred ($100.00) dollars, whichever amount shall be greater, or equal to another portion of the liability as may be determined from time to time by rule but not to exceed the amount of the entire liability due and owing for the period of delinquency and default.

13.3. A default or terminated employer who applies for reinstatement shall be entitled to the benefits and protection of the Act on the day that a properly completed and acceptable application and proper application deposit is received by the ~~division~~ commission and thereafter. However, if the ~~division~~ commission subsequently reinstates an employer subject to the terms of a reinstatement agreement, then the subsequent failure of the employer to make scheduled payments in accordance with the reinstatement agreement, to timely file and pay current premium tax or to restore the premium deposit to the required amount by the end of the repayment period shall cause the reinstatement agreement to be null, void and of no effect, and the employer shall be denied the benefits and protection of the Act effective from the date that such employer's account originally became delinquent. Similarly, the withdrawal of an application for reinstatement; the failure to timely file reports or make quarterly or current premium tax payments to the ~~division~~ commission during the pendency of the application prior to execution of a reinstatement agreement; or refusal or failure to timely sign, execute and return to the ~~division~~ commission, within thirty (30) days of the applicant's receipt of the agreement, the reinstatement agreement offered by the ~~division~~ commission, shall cause the application for reinstatement to be null, void and of no effect and the employer shall be denied the benefits and protection of the Act effective from the date that such employer's account originally became delinquent.

13.4. Pursuant to section 6. of this rule, the ~~division~~ commission may direct that a complete audit of the employer's account be made at any time after an application for reinstatement is received from the employer.

13.5. An employer may file an application for reinstatement despite the pendency of some other remedial action that may have been instituted by the ~~division~~ commission. The ~~division~~ commission may then delay or continue further pursuit of that remedial action if, in the ~~division's~~ commission's sole discretion, the interests of the Fund will be protected or furthered despite such delay or continuance. One factor that the ~~division~~ commission may rely upon, but not to the exclusion of other possible factors, is whether the application is the first the employer has filed or whether the employer has filed and then defaulted on previous applications. In the latter event, the ~~division~~ commission will generally, unless some other good cause exists to the contrary, continue to proceed with the other remedies.

13.6. In addition, entry into a reinstatement agreement is discretionary with the ~~division~~ commission. Such discretion shall be exercised in keeping with the fiduciary obligations owed to the workers' compensation fund. Should the ~~division~~ commission decline to enter into a reinstatement agreement and should the employer not comply with the provisions of subsection 13.1., then the ~~division~~ commission may proceed with any of the collection efforts provided for by these rules; by §23-2-5a of the W. Va. Code or as otherwise provided for by the W. Va. Code.

13.7. The ~~division~~ commission may permit the payment of all amounts due to the Fund or the filing of all reports due to the Fund, or both, upon the terms stated in a reinstatement agreement. The ~~division~~ commission shall exercise ~~it's~~ its discretion to enter into such an agreement and shall prescribe the terms of an agreement. The reinstatement agreement shall not authorize or permit the reduction or waiver of any part of the premium or premium deposit, or other amount due. Further, the reinstatement agreement shall provide for the payment of interest by the employer upon the amounts payable to the Fund over the life of the repayment agreement. The interest rate shall not change over the term of the agreement. Except in extreme 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 ~~division~~ commission shall set the reinstatement agreement's term of repayment for that period of months in which it believes the applicant is financially capable of repaying the default liability and restoring the premium deposit to the required amount but the term shall be set at not more than thirty-six (36) months, unless the applicant employer shall file, with its application for reinstatement, a request for extension of up to twenty-four (24) additional months in the term, with financial proof of good cause why and for what extended term the request should be granted by the ~~division~~ commission in the reinstatement agreement. The breach of a reinstatement agreement by the employer shall render the application for reinstatement and reinstatement of the employer void and of no legal effect and the employer shall be denied the benefits and protection of the Act effective from the date that such employer's account originally became delinquent; except that, the account of the employer shall be credited for any amounts paid by the employer. Nothing in this section shall apply to any other type of collection method under the Act or this rule.

§85-11-14. 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 ~~Procedural Rule, Bureau of Employment Programs, Workers' Compensation Division,~~ 85 C.S.R. 7, Rules for Selected Hearings.

§85-11-15. Interest.

15.1. Any and all payments unpaid on the date on which due and payable, as prescribed by the ~~division~~ commission, shall immediately begin bearing interest. Interest shall be compounded quarterly until payment plus accrued interest is received by the ~~division~~ commission; except that future interest for reinstatement agreements shall be calculated and provided at a simple rate of interest. Interest collected pursuant to this subsection shall be paid into the Fund.

15.2. Notwithstanding the provisions of subsection 15.1. of this rule, in no event shall the rate of interest charged a political sub~~division~~ commission of the state or a volunteer fire department exceed ten percent per annum.

§85-11-16. Reserved. ~~Clearance of Backlog.~~

~~16.1. Any employer which was or became delinquent or in default in the payment of any sum owed or report due under the Act or the various rules promulgated by the commissioner prior to July 1, 1989, and which was not previously notified of that delinquency or default by the division shall receive the initial notice of that delinquency or default within sixty (60) days of the division's becoming aware of that delinquency and the employer who is so notified shall have thirty (30) days after notice in which to cure such delinquency without default or to pay such default without commencement of collection actions, except that liens may be filed.~~

~~16.2. Any employer which was or became delinquent or in default in the payment of any sum owed or report due under the Act or the various rules promulgated by the commissioner prior to July 1, 1989, and which was previously notified of that delinquency or default by the division shall now be pursued for the payment of the sums owed or the report due under the provisions of this rule. All employers receiving a notice under subsection 16.1. of this rule shall also be pursued for the payment of the sums owed or the report due as in each case the type of notice requires.~~

~~16.3. In each instance described in subsections 16.1. and 16.2. of this rule all interest, penalties, claims benefits and other calculations shall begin with the dates upon which the delinquencies or defaults actually occurred and without regard to the other provisions of this section. In addition, the losses of the benefits and protection of the Act, as well as the incurring of liabilities under the Act by a delinquent, default or terminated employer, shall also be determined as if this section 16. were not in place.~~

§85-11-17. Criminal Penalties.

In addition to all other remedies available to the ~~division~~ commission under this rule or as contained in the Act, the ~~division~~ commission 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, §23-1-16. Notice should also be taken of the provisions of subsections 3.4.f., 5.2., and 12.3.b. of this rule for other specific provisions concerning criminal penalties.

§85-11-18. Freedom of Information Act.

Pursuant to the Freedom of Information Act, W. Va. Code, §29B-1-1, et seq., 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 Fund claimant or employer subscriber, 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 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 confidential information cannot be excised from a record, then the record as a whole will be deemed confidential; however, the ~~division~~ commission shall release in its place a statement explaining in detail the basis for the withholding of the record.

§85-11-19. Employers in default with the Old Fund upon termination of the commission.

19.1. Upon termination of the commission, private carriers shall not write workers' compensation insurance for any employers that are in default status with regard to obligations to old fund.

19.2. Default status employers will be placed on the Commission Default List with the Insurance Commissioner, and the Insurance Commissioner will have all of the available remedies against such employers as the commission had in regard to employers who were in default with the workers' compensation commission prior to the termination of the commission, as set forth in W. Va. Code §23-2-1 et seq.

19.3. Default status employers will be deemed to not be carrying mandatory workers' compensation coverage as described in W. Va. Code §§23-2-1 and 23-2C-15. Therefore, in accordance with the provisions of W. Va. Code §23-2C-19(f), the insurance commissioner may impose an administrative fine of up to $10,000 and take other actions, including referring the default status employer to other state agencies for adverse action pursuant to W. Va. Code §23-2C-19(g).

19.4. Default status employers will remain on the Commission Default List with the Insurance Commissioner until all of the employer's obligations to the old fund are paid or the employer enters into a reinstatement agreement in regard to such obligations.

§85-11-20. Employers that default to the Old Fund, or that are discovered to be in default to the Old Fund after the termination of the Commission.

20.1. Upon termination of the Commission, employers that default on a reinstatement agreement entered into with the Workers' Compensation Commission or the Insurance Commissioner in regard to Old Fund obligations, or are otherwise discovered to be in default to the Old Fund, will be deemed to be in default status with the Old Fund, retroactive to the date of the original default.

20.2. An employer that defaults on a reinstatement agreement will immediately be placed on the Commission's Default List. The Insurance Commissioner will have all of the available remedies against the employer as the Commission had in regard to employers who were in default with the workers' compensation fund prior to the termination of the Commission, as set forth in W. Va. Code §23-2-1 et seq.

20.3. The provisions of this section include employers that were required, but failed to, subscribe for workers' compensation coverage during a period prior to the termination of the Commission, but were not deemed to be in default or in non-compliance with the law because the Commission had no knowledge of the illegal status of such employers. Employers in this category are deemed to be in default status with the Old Fund, retroactive to the date on which they should have been subscribing to the Commission for workers' compensation coverage, and the money that should have been paid to the Commission will become a debt owed to the Old Fund.

20.4. The Insurance Commission shall immediately notify the private carriers of all such employers that have been placed on the Commission Default List, and, upon such notification, the private carriers shall immediately issue a notice of non-renewal to the default employer. The notice of non-renewal shall provide that the employer's policy shall not be renewed at the end of its current term, unless the private carrier receives notification from the Insurance Commissioner that the employer has been removed from the Commission Default List.

20.5. Default status employers will be deemed to not be carrying mandatory workers' compensation coverage as described in W. Va. Code §§23-2-1 and 23-2C-15. Therefore, in accordance with the provisions of W. Va. Code §23-2C-19(f), the insurance commissioner may impose an administrative fine of up to $10,000 and take other actions, including referring the default status employer to other state agencies for adverse action pursuant to W. Va. Code §23-2C-19(g).

20.6. Default status employers will remain on the Commission Default List with the Insurance

Commissioner until all of the employer's obligations to the old fund are paid or the employer enters into a reinstatement agreement in regard to such obligations.

§85-11-21. Employers that default to private carriers.

21.1. After termination of the Commission, private carriers shall notify the Insurance Commissioner, within one (1) business day, of employers that have their coverage cancelled or suspended as a result of failure to pay premiums. These Policy Default employers will then immediately be placed on the Private Market Default List with the Insurance Commissioner.

21.2. The Insurance Commissioner will have all of the available remedies against such employers (policy defaulting and others not carrying mandatory workers' compensation coverage) as the Commission had in regard to employers that were in default with the workers' compensation fund prior to the termination of the commission, as set forth in W. Va. Code §23-2-1 et seq.: Provided, That the Insurance Commissioner will have no duty to collect from such employers the premiums owed to private carriers.

21.3. Policy default status employers will be deemed to not be carrying mandatory workers' compensation coverage as described in W. Va. Code §§23-2-1 and 23-2C-15. Therefore, in accordance with the provisions of W. Va. Code §23-2C-19(f), the insurance commissioner may impose an administrative fine of up to $10,000 and take other actions, including referring the default status employer to other state agencies for adverse action pursuant to W. Va. Code §23-2C-19(g).

21.4. Employers shall remain on the Private Market Default List with the Insurance Commissioner until they regain good standing with the private carrier to which they defaulted on premiums, and obtain mandatory workers' compensation coverage as described in W. Va. Code §§23-2-1 and 23-2C-15.

§85-11-22. Employers owing money to the uninsured employers fund.

22.1. All employers that incur liability under the uninsured employers' fund but, for whatever reason, were not on the Commission Default List or Private Market Default List prior to incurring such liability, will immediately be placed on the Commission Default List by the Insurance Commissioner.

22.2. Employers with obligations to the uninsured employers' fund will remain on the Commission Default List until they pay off all their obligations to the uninsured employers' fund or enter into a reinstatement agreement in regard to their obligations.

22.3. The Insurance Commissioner will have all of the available remedies against such employers as the Commission had in regard to employers who were in default with the workers' compensation fund prior to the termination of the commission, as set forth in W. Va. Code §23-2-1 et seq.

22.4. Employers that default on a reinstatement agreement entered into with the Insurance Commissioner in regard to obligations to the uninsured employers' fund will immediately be placed on the Commission Default List with the Insurance Commissioner, retroactive to the original date of liability to the uninsured employers' fund.

§85-11-23. Private carriers prohibited from offering insurance to employers on the Commission or Private Market Default lists.

23.1. The Insurance Commission shall notify the private carriers of all such employers that have been placed on the Commission or Private Market Default Lists.

23.2. Upon such notification, the private carriers shall immediately issue a notice of non-renewal to any default employer to which the private carrier is providing coverage. The notice of non-renewal shall provide that the employer's policy shall not be renewed at the end of its current term, unless the private carrier receives notification from the Insurance Commissioner that the employer has been removed from the Commission or Private Market Default List.

23.3. A private carrier shall not offer, reinstate or renew workers' compensation insurance coverage to any employers on the Commission or Policy Default List.

23.4. Any private carrier offering, reinstating or renewing workers' compensation insurance coverage to any employers on the Commission or Private Market Default List is subject to administrative action by the Insurance Commissioner, including an administrative fine of up to $10,000.

§85-11-24. Hearing.

24.1. Prior to being placed on the Commission or Private Market Default List, all employers, except those who were in default with the old fund upon termination of the 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.

24.2. 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 Commission or Private Market 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. 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.

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

24.4. The administrative appeal process does not interfere with or toll a private carrier's right to terminate the employer's workers' compensation coverage.

§85-11-25. Removal from the default list.

25.1. If an employer has met all of its legal, fiscal or other obligations, the Insurance Commissioner shall remove the employer from the applicable default list: Provided, That the Insurance Commissioner shall not have discretion to remove an employer from the Commission or Private Market Default List if the employer remains in default status with the old fund, a private carrier or the uninsured employers' fund: Provided further, That an employer shall not be considered to be in default status with the old fund or uninsured employers' fund if the employer is under a reinstatement agreement with the Insurance Commissioner in regard to obligations to either or both funds, and shall not be considered to be in default status with a private carrier if the private carrier is willing to offer insurance to the employer or state that the employer is in good standing with the private carrier.

25.2. Employers on the Commission or Private Market Default List shall be permitted at any time to make a written request to the Insurance Commissioner for removal from the applicable 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 applicable 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.

25.3. Employers may file a petition with the Insurance Commissioner requesting an administrative hearing before the Insurance Commissioner if the they disagree with the decision of the Insurance Commissioner in regard to a request for removal, and the Insurance Commissioner shall schedule a hearing within thirty (30) days, to otherwise be conducted as described in the above section (§85-11-24, "Hearing"): 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.

§85-11-26. Employer violator system.

26.1. Every employer subject to placement on the Commission or Private Market Default List shall 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 applicable default list pursuant to this rule.

26.2. All individuals who own, are officers 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 Commission or Private Market 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 applicable default list pursuant to this rule.

§85-11-27. Termination of the Commission.

Upon termination of the commission, this rule shall be administered by the insurance commissioner for the purposes of collecting Old fund assets as defined in West Virginia Code §23-2C-2(l), regulating self-insured employers, regulating employers in regard to maintaining mandatory workers' compensation coverage under chapter twenty-three, article two-c, and collecting obligations owed to the uninsured employer fund, and the Insurance commissioner shall have the same rights, powers and duties which are conferred upon the commission in this rule. This rule shall have no force and effect over the collection of New Fund assets or other matters involving the collection of premiums by carriers from their insureds.

§85-11-~~19~~28. 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.

ORIGINAL

WEST VIRGINIA WORKERS' COMPENSATION
BOARD OF MANAGERS

IN THE MATTER OF:	)	
	)	
PUBLIC HEARING,	)	RULE 11, COLLECTIONS
WORKERS COMPENSATION	)	
BOARD OF MANAGERS	)	
JUNE 23, 2005	)	

****

Transcript of proceedings had in the above-styled matter, were held as therein appears at the Charleston Civic Center, Rooms 207-209, 100 Civic Center Drive, Charleston, West Virginia, on the 23rd day of June, 2005, 1:05 p.m., pursuant to notice, before David T. Bolin, Court Reporter and Notary Public in and for the State of West Virginia.

****

BILLANTI AND ASSOCIATES
COURT REPORTERS
1033 RIDGEMONT DRIVE
ELKVIEW, WV 25071
304-965-7444

APPEARANCES

BOARD MEMBERS

ROB ALSOP, BOARD CHAIR

GENE F. BAILEY

CHRIS JARRETT

DOUGLAS MERRITT

PAUL THOMPSON

RICHARD HUMPHREYS

PAUL HARDESTY

BOB PHALEN

EVERETTE SULLIVAN

CRAIG SLAUGHTER

P R O C E E D I N G S

1:05 p.m.

CHAIRMAN ALSOP: The next rule up for public hearing is Rule 11 regarding Collections. I'll open the public hearing on Rule 11.

Again, no one has signed up to speak to this rule, but if there's anyone who didn't have a chance to sign up who would like to speak, please come forward.

(No response.)

If not, we'll close the public hearing on Rule 11.

(WHEREUPON, the hearing was adjourned.)

REPORTER'S CERTIFICATE

I, DAVID T. BOLIN, a Court Reporter and Notary Public in and for the State of West Virginia, hereby certify that the foregoing is a true and correct transcript of all proceedings had and evidence adduced, together with all the objections made and rulings thereon, and exceptions thereto, as stated in the caption hereto, as reported by me by means of the stenomask and stenographic characters and transcribed into the English language.

Given under my hand and official seal this 30th day of June, 2005.

DAVID BOLIN
Court Reporter and
Notary Public

My commission expires July 27, 2014.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
DAVID T. BOLIN
1033 Ridgemont Drive
Elkview, WV 25071
My Commission Expires July 27, 2014

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
PUBLIC HEARING
JUNE 23, 2005 – 1:00 P.M.
RULE 11 – COLLECTIONS

ATTENDANCE SHEET

The Board is required to keep a list of individuals attending its meetings and of those who wish to address the Board.

NAME	COMPANY	Do you wish To speak? (Yes/No)

Bowles Rice
McDavid Graff & Love LLP

Telephone — (304) 347-1115
Facsimile — (304) 347-1196
E-Mail: ssmith@bowlesrice.com

600 Quarrier Street Charleston, West Virginia 25301 ❖ Post Office Box 1386 Charleston, West Virginia 25325-1386 (304) 347-1100 ❖ www.bowlesrice.com

June 23, 2005

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

Re: Series 11 - 85 C.S.R. 11
PUBLIC COMMENTS

Dear Mr. Obrokta:

Please consider these comments related to the proposed new regulation on Enforcement of Reporting and Payment Requirements.

We propose amendments to the proposed language of the regulation as follows:

7.1 Prior to a subsection 3.5. default or a subsection 3.6. termination, an employer may cure its delinquency by paying in full the amounts claimed to be owed by the commission and by filing a complete gross wages payroll report, if not filed. At this stage, the amounts claimed to be owed to the commission shall include a requirement for the payment of interest on all delinquent payments pursuant to W. Va. Code, §23-2-13, unless the payment of premiums and/or accrued interest has been waived as part of a full and final resolution of administrative or civil litigation pursuant to West Virginia Code § 23-2-5(f)(1).

COMMENT: West Virginia Code §23-2-5(f)(1) permits the Commission to settle cases by determining whether the waiver of certain alleged amounts due should be compromised or waived. We have changed the proposed language so as not to be contrary to this statutory language.

7.1.a. Any employer who wishes to contest a decision made by the commission regarding amounts claimed to be owed to the commission or disputes the completeness or accuracy of an alleged delinquent gross wages payroll report, under the provisions of chapter twenty-three, article two of the Code, may do so under the provisions of W. Va. Code, §23-2-17. The rule implementing that section requires the filing of a formal request for reconsideration, and following reconsideration, a petition within thirty days of the employer's receipt of notice of the disputed decision or action or reconsidered decision or, in the absence of such receipt, within sixty days of the date of the commission's making such disputed decision or taking such disputed action or making such reconsideration decision. (See 85 C.S.R. 7. "Rules for Selected Hearings." ~~However, as a mandatory prerequisite to hearing a petition after a reconsideration decision, the employer must deposit sufficient assets with the commission to guarantee payment of the amount determined to be due and owing by the commission. The deposit of assets shall be required in the following form(s):~~

~~1. The full cash amount of the money determined to be due by the commission;~~

~~2. A reinstatement agreement issued and maintained in accordance with the provisions and terms of W. Va. Code §23-2-5 and, in accordance with the discretionary policies of the commission, as authorized by law, including the authority to refuse to enter into a reinstatement agreement;~~

~~3. A cash or corporate surety bond or a bank letter of credit in the full amount claimed due by the commission; or~~

~~4. Any combination of the above three methods that guarantees payment in full to the commission in the event the employer does not prevail in the matter.~~

COMMENT: The unconstitutional "pay first, litigate later" provisions have been deleted. If there is a concern that employers must be required to prove the financial ability or willingness to pay while a proceeding is pending, the provisions of subsections 7.2 (which permit the filing of a civil action, the filing of liens, the filing of an injunction from carrying on business, the filing of a claim in bankruptcy, informing other agencies of the default, and requesting criminal prosecution) and 7.3 (permitting the taking of personal property) offer sufficient protection for the Commission. The "pay first, litigate later" provisions contained in the proposed language assume guilt in a legal system that prohibits that presumption, deprives employers of the due process right to a hearing as provided in our state and federal Constitutions, and assumes that the Commission is incapable of or rarely has made errors in alleging and calculating monies owed by employers. If additional protection far beyond what is necessary in other similar proceedings is to be required, the posting of a bond could be considered as the only reasonable pre-hearing requirement.

In addition, ALL references to "delinquent" should be deleted in this section and in the ENTIRE REGULATION as the legal ramifications contained in this regulation should apply only upon an employer's default. Delinquency notices have often been received by employers in error, as was discussed by Governor Manchin in a recent Board of Managers meeting. Yet even if a delinquency notice is not issued in error, the employer who makes an inadvertent mistake should be provided the 30 days permitted by law to cure a delinquency prior to being publicly labeled as having violated the law.

7.4. In every case noted in this section 7. where a monetary sum is to be collected, the division shall include a demand for interest as specified in section 15. of this rule, unless the payment of premiums and/or accrued interest has been waived as part of a full and final resolution of administrative or civil litigation pursuant to West Virginia Code § 23-2-5(f)(1).

COMMENT: As previously noted, West Virginia Code §23-2-5(f)(1) permits the Commission to settle cases by determining whether the waiver of certain alleged amounts due should be compromised or waived. We have changed the proposed language so as not to be contrary to this statutory language.

12.2. Property exempt from levy.

a. Enumeration. -- There shall be exempt from levy the greater of the value of exemptions as provided in chapter 38 of the West Virginia Code or as provided below. In any case where the entity subject to the processes set forth in this section 12. is an individual human being, then the term "individual" as used in this subsection 12.2. 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:

A. 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.

B. 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 in value, if the individual is not the head of a household, this exemption shall not exceed one thousand dollars.

C. 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 in value.

D. 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.

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

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

G. 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.

H. 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.

I. 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.

J. 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 chapter 38, articles 5A and 5B, W.Va. Code, plus twenty-five dollars for each additional dependent of the individual.

K. If the employer is a natural person and if he or she owns a homestead located in this state, the first five thousand dollars thereof shall be exempt from levy.

b. Appraisal. -- The officer seizing property of the type described in subsection 12.2.a. shall appraise and set aside to the owner of 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 division 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 subsection 12.2.a.

COMMENT: This section is provided here in its entirety to illustrate the absurdity of the need to protect a company's bookkeeper (who is the "responsible person" for the payment of an employer's workers' compensation premiums within the meaning of 2.9 and 3.10 of this regulation) from losing her school books as she takes night classes after work and from losing her personal family effects based upon her employer's dispute with the Commission. In addition, "no personal property" of the bookkeeper is exempt from levy if not specifically exempted in this subsection if her employer is found to be in default in the payment of some of those premiums.

Bottom line: the corporate veil exists in other areas of the law and should apply in the workers' compensation area as well. Personal liability and the ability to ignore the basis for corporate legal protections primarily exist in the workers' compensation system because the history of the Commission has included too many times when premium collection and payment procedures were inadequate. Thus, bad facts and poor enforcement made bad law. Given recent changes in the law and the Commission's own procedures which require and more closely monitor premium payments, and given the upgrade of personnel and expertise at the Commission, a complete disregard for corporate law and a complicated and litigious system that even defines how the remainder of the bookkeeper's personal property is appraised before it can be seized should be

deleted from this regulation, along with all personal liability for corporate debts absent a specific showing of fraud.

13.7. The commission may permit the payment of all amounts due to the Fund or the filing of all reports due to the Fund, or both, upon the terms stated in a reinstatement agreement. The commission shall exercise ~~it's~~ its discretion to enter into such an agreement and shall prescribe the terms of an agreement. ~~The reinstatement agreement shall not authorize or permit the reduction or waiver of any part of the premium or premium deposit, or other amount due.~~

<u>COMMENT</u>: One typographical error has been corrected. In addition, the language has been deleted that is inconsistent with the Commission's right to negotiate and compromise cases related to the payment of premiums provided in the Senate Bill 1004 as previously noted.

I regret that I am out of town and unable to attend the public hearing to make these comments personally. Thank you and the Board of Managers for considering these recommendations.

Very truly yours,

Sarah E. Smith

Sarah E. Smith

SES/skh

85 CSR 11

IC Comments 5-16-05

TJ - Below are comments on series' 11 and 12. There are no comments on series' 23 and 24, in light of the fact that these rules will not be applicable upon termination of the WCC. We are still in the process of reviewing and discussing series' 6, 15 and 18, and anticipate making substantive comments regarding the same. We hope to have the comments on these rules to you by Monday, but they may not be completed by then, as a result of the necessity for multiple individuals within the IC to review and give internal comment on these rules before our final comments are made. We will, of course, get these comments out to you as soon as possible.

Series 11

Comment/change regarding 85-11-19 (the transition section)

At the end of this rule is a "catch-all" transition section in 85-11-9, which makes it clear that upon termination of the WCC, the rule is administered by the IC. While utilizing a single transition section rather than placing transition language throughout this lengthy rule is more efficient and will probably suffice, it is important that this transition section is as broad as possible, so it is clear that all of the powers and duties of the WCC and Board of Managers under the rule transfer to the IC. Additionally, this section states that the IC will only administer this rule "for the sole purpose of collecting Old fund assets as defined in West Virginia Code § 23-2C-2(l)." This limitation - a similar limitation placed on Article 2 hearings in series 7 - is problematic. Specifically, the IC will also administer Series 11 in regard to self-insured employers, both regarding old obligations and new ones. It is therefore suggested that this transition clause be amended to read as follows:

Upon termination of the commission, this rule shall be administered by the insurance commissioner for the purpose of collecting Old fund assets as defined in West Virginia Code §23-2C-2(l), as well as for the purpose of regulating self-insured employers, and he Insurance Commissioner shall have the same rights, powers and duties which are conferred upon the commission in this rule. This rule shall have no force and effect over the collection of New Fund assets or other matters involving the collection of premiums by carriers from their insureds.

Additional comments/changes

* 85-11-7.2 - Only sentence, after "civil action", add "including a civil action against all officers and directors of the employer." [This clarifies the right of the WCC/IC to pursue legal remedies against the officers and directors of the employer].

* 85-11-7.2 - After subdivision d., add a subsection which states "Informing the director, commissioner or head of any state agency when an employer is delinquent, in default or terminated, 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." [This clarifies the right of the WCC/IC to take such action against an employer as one possible remedy].

* 85-11-9.1 - First sentence, after "as defined in subsection 3.10 of this rule," add "including its officers and directors." [Again clarifying the right of the WCC/IC to pursue legal remedies against the officers and directors of the employer].

* 85-11-9.2 - Delete second sentence. [To provide the WCC/IC flexibility in regard to whether or not it utilizes the AG's office in pursuing a civil action, consistent with Supreme Court guidance in State ex rel. McGraw v. Burton].

* 85-11-11.2 - First sentence, delete "the commission shall be represented by a representative or designee of the office of the attorney general. . . ." [To provide the WCC/IC flexibility in regard to whether or not it utilizes the AG's office in pursuing a civil action, consistent with Supreme Court guidance in State ex rel. McGraw v. Burton].

Insurance Commissioner ("IC") Comments
-
See bracketed portions of rule.

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

SERIES 11
ENFORCEMENT OF REPORTING AND PAYMENT REQUIREMENTS

§85-11-1. General.

1.1. Scope. -- This rule implements the provisions of West Virginia Code, §§23-1-13 and 16; §§23-2-1, 1b, 1d, 5, 5a, 5b, 5c, 5d, 8, 9, 13, 14, 15 and 17; and §23-3-1,regarding the determination 0of delinquency and default by employers; reporting and payment requirements; enforcement of compliance by employers with reporting and payment requirements; and, collection of payments arising from those requirements and others.

1.2. Authority. -- West Virginia Code, ~~§21A-2-6(1) & 6(2); §21A-3-7(b) & 7(e);~~ §23-1-1 and §23-2-18. Pursuant to West Virginia Code, ~~§21A-3-7(e)~~ §23-1-1a(j)(3), rules adopted by the ~~Compensation Programs Performance Council and the Commissioner~~ board of managers and the commission are not subject to legislative approval as would otherwise be required under 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. -- ~~July 23, 1996.~~

1.4. Effective date. -- ~~August 22, 1996.~~

~~1.5. Purpose and Effective Date of Amendments to Rule. -- The purpose of amendments to this rule is to implement the amended provisions of West Virginia Code, as amended by the Acts of the Legislature, as set forth in Enrolled Committee Substitute for Senate Bill No. 250, passed on February 10, 1995, and in effect from passage, as well as other amendments which are refinements of the prior rules which were designed to ensure effective administration and financial viability of the workers' compensation system.~~

§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. The term "Act" or "West Virginia Workers' Compensation Act" means the workers' compensation laws of the state of West Virginia which are codified at chapter 23 of the West Virginia Code of 1931, as amended.

2.3. The terms "West Virginia Code," "W. Va. Code" and "Code" mean the West Virginia Code of 1931, as amended.

2.4. ~~The term "commissioner" means the Commissioner of the Bureau of Employment Programs or the West Virginia Commissioner of Employment Programs as provided by West Virginia Code, §21A-2-1 and §23-1-1~~ "Commission" means the workers' compensation commission created pursuant to the provisions of W. Va. Code §23-1-1.

2.5. The term "default" means either or both of the following:

a. The failure by a subscriber or a self-insured employer which has not made a payment or filed a report due by it under the provisions of the Act and which has received a subsection 3.3. notice of delinquency but has further failed to make the payment or file the report within the time period specified by the notice. For the purposes of this definition, the employer may be a regular subscriber to the Fund or a self-insured employer with the Fund and either an employer required to subscribe to the Fund or an employer electing to subscribe to the Fund.

b.

(1) The omission or failure by an employer to subscribe to and pay premiums into the Fund and to comply with the requirements of the West Virginia Workers' Compensation Act at chapter 23 of the W. Va. Code, and the rules prescribed by the ~~division and the compensation programs performance council~~ commission and the board of managers, as provided by the Code at §23-2-1(a) ~~and at §21A-3-7(e)~~ prior to the first date of employment of any employee of the employer and thereafter, shall cause default to occur immediately prior to the moment of employment of any employee upon the employer's omission or failure to subscribe or comply by that time. Default, as defined in this subsection, shall immediately, without notice as required by W. Va. Code, §23-2-5, for delinquencies of subscribing employers, subject the employer to all the penalties prescribed by law, including interest on unpaid amounts, late reporting or payment penalty, ~~penalty premium rate~~ and other penalties and collection actions prescribed by Code and these rules, including particularly the penalty prescribed by W. Va. Code at §23-2-8; that is, the default employer shall be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, without the benefit of the common law defenses set forth in that section. This default may be cured through the employer's compliance with the Act and the rules. If the default employer has not filed an application for coverage, the application must be filed. The provisions at W. Va. Code, §23-2-5(f), are applicable to this default in providing for restoration of the benefits and protection of the Act, prospectively from the date of complete reporting and payment in full of the employer's delinquency and default liability or from the date of a complete filing of an application for reinstatement with adequate reinstatement deposit.

(2) Default as defined in this rule is not affected or altered by the provisions for a grace period, for the first thirty (30) days from and including the date of employment of any employee; except that, if the employer files the application and deposit within thirty (30) days from the first date of employment, the employer may avoid the imposition of interest on payments unpaid when due, ~~penalty premium rate,~~ late reporting or payment penalty or other monetary penalties which may be imposed under law by the ~~division~~ commission for the employer's omission or failure to file an application for coverage and premium deposit prior to the first date of employment of any employee. Therefore, the provisions of W. Va. Code, §23-2-8, regarding civil liability for the injury or death of an employee, are not affected or

altered by provision for such grace period. Furthermore, according to the exception set forth in the last sentence of W. Va. Code, §23-2-1(h), regarding coverage of sole proprietors, partners and corporate officers, notwithstanding the provision for a grace period from the imposition of certain other stated penalties, no sole proprietor, partner or corporate officer who may be lawfully elected out of mandatory coverage under subsections (g) and (h) of W. Va. Code, §23-2-1, may be afforded any benefits of coverage if injured within such thirty day grace period or thereafter until actual subscription occurs through application for coverage prior to the date of injury of such person.

2.6. ~~The term "division" means the Workers' Compensation Division of the Bureau of Employment Programs of West Virginia as provided by West Virginia Code, §21A-1-4 and §23-1-1.~~ "Board" means the workers'' compensation board of managers created pursuant to the provisions of W. Va. Code §23-1-1a.

2.7. The term "electing employer" means an employer which is not required to subscribe to the Fund but which chooses to do so as provided for by West Virginia Code, §23-2-1.

2.8. The term "employee" has the meaning ascribed to that term by West Virginia Code, §23-2-1 and §23-2-1a.

2.9. The term "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 7.2. and sections 8., 9., 11. and 12., any "responsible person" as defined in subsection 3.10. of this rule, including owners, partners, officers and employees who are required or who have the duty under the Act, corporation law, or other applicable law, bylaw or rule to truthfully account for and pay to the ~~division~~ commission, or to cause the same to occur, any premium tax, premium deposit, interest, penalty or other payment required by the Act.

2.10. The term "executive director" means the person ~~designated by the commissioner to be Executive Director to serve~~ who serves as the chief ~~operating~~ executive officer for the ~~daily~~ operations of the workers' compensation ~~division~~ commission, as provided by West Virginia Code, §23-1-4~~, and who was formerly titled as "secretary" therein and as "executive secretary" in this rule~~.

2.11. The term "Fund" means the West Virginia Workers' Compensation Fund~~, including the surplus fund, created by West Virginia Code, §23-3-1~~, as well as the "Disabled Workers' Relief Fund" created by West Virginia Code, §23-4A-1.

2.12. The term "payment" means any amount of money owed by an employer to the ~~division~~ commission by reason of the operation of any provision of the Act or any other applicable law, or the various rules promulgated by the ~~commissioner or the compensation programs performance council~~ commission and the board of managers.

2.13. The terms "premium" and "premium tax" mean the amounts of money due from an employer to the Fund or ~~division~~ commission as the result of the quarterly and periodic assessments by the ~~division~~ commission under the provisions of the Act in order to establish, maintain, and replenish the Fund and to pay the expenses of administration of the Fund by the ~~division~~ commission. "Premium" and "premium tax" includes, but is not limited to, assessments of: premium tax, premium deposit, ~~penalty premium rate premium tax~~ and interest, assessed to regular subscriber employers and to self-insured employers alike; and also, that portion of self-insured premium tax assessed in arrears through benefit pay orders to the employer for the employer's claimant employees, on behalf of and for the benefit of the Fund as provided by law, assessed in arrears in lieu of direct, advance premium tax payments to the ~~division~~ commission.

2.14. The term "premium deposit" means the amount of money an employer is required to pay and to maintain as an advance upon quarterly, or other periodic interval, premium tax pursuant to West Virginia Code, §23-2-5 and §23-2-9.

2.15. The term "self-insurer" or "self-insured" means an employer who has applied for permission to elect and thereafter has elected to maintain its own benefit fund or system of compensation to ensure the payment of benefits to its injured employees and their dependents in amounts at least equal in value to the workers' compensation benefits provided by law and ordered to be paid under the provisions of the Act.

2.16. The term "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 "Enforcement of Reporting and Payment Requirements."

2.17. "Commission Default List" means a paper or database identification of employing units that are in default with the Workers' Compensation Commission ~~or the Old Fund or the uninsured employer fund~~. The list, which will be created by the Commission, may be provided to the agency in the form of either a computerized database or other databases that the agency can access. Upon termination of the Commission, the administration of the Commission Default List shall transfer to the insurance commissioner. Comment #1 IC

2.18. "Policy Default" means a policy holder that has failed to comply with the terms of its workers' compensation insurance policy and is consequently without workers' compensation coverage and shall include, but not be limited to, an employing unit's failure to pay the regulatory surcharge and deficit reduction surcharge required by article two-c of chapter twenty-three of the West Virginia Code.

2.19. "Private Market Default List" means a paper or database identification of employing units that are or have been in policy default with a private carrier or that are in default based upon failure to comply with self-insured premium requirements, including the payment of the regulatory surcharge and the deficit reduction surcharge imposed by article two-c of chapter twenty-three of the West Virginia Code. The list, which will be created by the insurance commissioner, may be provided to the agency in the form of either a computerized database or other databases that the agency can access.

§85-11-3. Employer Delinquency and Default or Termination.

3.1. Delinquency. -- An employer shall be declared to be delinquent by the ~~division~~ commission if any one or more of the following omissions occurs:

a. The employer fails to timely pay its premium tax, ~~including penalty premium rate premium tax,~~ if assessed to the employer. Premium tax shall be paid quarterly, or other permitted periodic interval, on or before the last day of the month following the end of the quarter or interval.

b. The employer fails to maintain an adequate premium deposit, including ~~adjustments for the penalty premium rate, if assessed,~~ interest accrued on late payments, late reporting or payment penalty and other penalties and charges which may be assessed to the employer under applicable law. Increases in premium deposit, when necessary to be made, must be remitted with the applicable quarterly, or other permitted interval, premium tax, or timely upon notice as prescribed by W. Va. Code, §23-2-5(b) & 5(c), and subsection 3.3. of this rule..

c. The employer fails to timely file a gross wages payroll report, which report shall be due on or before the last day of the month following the end of each quarter, or other permitted interval, and which report shall be filed with the quarterly, or other interval, premium.

3.2. No employer will be declared delinquent or be assessed any penalty for such delinquency if the ~~division~~ commission determines that such delinquency has been caused by delays in the administration of the Fund, including the commission of errors by the ~~division~~ commission. An employer may demand an administrative hearing on this issue and the hearing, if granted by the ~~commissioner or the division~~ commission, shall be conducted as provided for in section 14. of this rule.

3.3. Notice of delinquency. -- Within sixty (60) days of the end of each quarter, the ~~division~~ commission shall, in writing, notify all delinquent employers of their delinquency and the reason therefor. In any event when the notice of delinquency must be given at a later time because the delinquency is discovered later or it is discovered that the ~~division~~ commission did not give notice within sixty (60) days of the end of the quarter for which the delinquency occurred, then the ~~division's~~ commission's notice shall provide for thirty (30) days within which the employer may cure the delinquency before default shall occur.

3.4. Contents of notice. -- The notice required by subsection 3.3. of this rule and W. Va. Code, §23-2-5, shall state the following:

a. A demand that the employer cure its failure before the end of the third month following the end of the preceding quarter or, if the notice of delinquency was not given timely within sixty (60) days of the end of the quarter for which the delinquency occurred, within thirty (30) days of the notice of delinquency and a statement that failure to cure the delinquency will result in the automatic default or termination of the employer at the end of the period provided by notice and by law for curing the delinquency but that such default employer's liability under the Code shall be retroactive to midnight of the last day of the month following the end of the quarter, or other interval, for which the delinquency occurs.

b. A demand that the employer pay interest if the delinquency arises from a delinquent premium tax payment or a delinquent premium deposit.

c. An explanation of the legal consequences of a subsequent default by the employer if the employer is one who is required to subscribe to the Fund or an explanation of the legal consequences of termination of any electing employer's account.

d. An explanation of how the employer may cure its delinquency.

e. A statement that, once the employer is in default or has been terminated, the employer's employees will receive written notice of that fact and of the legal consequences thereof.

f. An explanation that any person, firm or corporation which is required by the provisions of the Act to subscribe to the Fund and which knowingly fails to subscribe thereto, or which knowingly fails to make any report (including a gross wages payroll report) or perform any other act or duty required by the ~~division~~ commission (including payments of premium tax, ~~penalty premium rate premium tax,~~ premium deposit, late reporting or payment penalty, interest or other charges, fees or penalties) within the time specified by the ~~division~~ commission, or any person or firm or the officer of a corporation who knowingly and willfully makes a false report or statement under oath, affidavit or certification respecting any information required to be provided under the Act, shall be guilty of a felony and, upon conviction thereof, shall be fined from one thousand dollars to twenty-five thousand dollars or imprisoned in the penitentiary for one year to three years, as provided by W. Va. Code, §23-1-16.

3.5. An employer who is required to subscribe to the Fund (which includes a self-insured employer) and who fails to cure a delinquency within the time period provided by notice shall be in default and shall lose the benefits and protection of the Act and shall incur additional liabilities as noted below:

a. An employer who loses the benefits and protection of the Act shall be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, sustained in the course of employment.

b. The additional liabilities of an employer include liability to its employees for all damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful action, neglect, or default of the employer or any of the employer's partners, officers, agents or employees, while acting within the scope of their employment and in the course of their employment and also to the personal representatives of such employees where death results from such personal injuries.The employer may also lose the right to assert certain defenses during the course of a civil action brought by its injured employee or the employee's personal representative to collect such damages.

c. The default liabilities described under subsection 3.5. of this rule are retroactive to Midnight of the last day of the month following the end of the quarter for which the delinquency occurs.

3.6. An employer who voluntarily elects to subscribe to the Fund and who fails to cure a delinquency shall have its election to pay into the Fund terminated and such an employer shall lose the benefits and protection of the Act and may incur the additional liabilities described in subsection 3.5. of this rule. The default liabilities of the employer are retroactive on the same basis as set forth in subsection 3.5.c. of this rule.

3.7. An employer who is a subscriber to the Fund, whether such subscription is mandatory or voluntary, or who is self-insured with the Fund and who does not cure its delinquency, as required by the subsection 3.3. notice of delinquency, shall be in default and, if an elective subscriber, have its account and the benefits and protection of the Act terminated upon default, without further action by or notice from the ~~division~~ commission, by operation of the provisions of law for immediate and automatic default upon the employer's failure to cure timely the delinquency.

3.8. An employer who is required to subscribe to the Fund and who fails to subscribe and otherwise comply with the Act and the rules prior to the first date of employment of any employee of the employer shall be in default immediately prior to the moment of employment of any such employee and default shall occur without the need for notice of delinquency as required for an employer who has subscribed or has been permitted to be self-insured and is delinquent.

3.9. Notice of default.

a. After the delinquency and default of a subscriber or self-insured employer, the ~~division~~ commission shall notify the default employer of the methods by which the employer may be reinstated and restored with the Fund to the benefits and protection of the Act through a notice of default.

b. After the default of a non-complying employer, as defined in subsection 2.5.b. of this rule, upon discovery of the occurrence and the name and address of the employer, the ~~division~~ commission shall notify the default employer of the methods by which the employer may be reinstated and restored with the Fund to the benefits and protection of the Act through a notice of default.

c. Upon default, although notice of default is not required prior to the initiation or commencement by the ~~division~~ commission of any action to obtain the employer's compliance with the Act, notice of default and intention to levy, as provided in subsection 12.1.f., shall be given prior to any action of distraint or levy upon personal property of the employer or a responsible person.

3.10. Any person required to truthfully account for and pay over to the ~~division~~ commission any premium tax, premium deposit, ~~penalty premium rate premium tax,~~ late reporting or payment penalty, interest or other penalty pursuant to the provisions of W. Va. Code, §23-2-1, et seq., or to cause the same to occur, who willfully fails to truthfully account for and pay over the premium tax, premium deposit, ~~penalty premium rate premium tax,~~ late reporting and payment penalty, interest or other penalty, or to cause the same to occur, or willfully attempts in any manner to evade or defeat any such premium, premium deposit, interest or penalty or the payment thereof, is, in addition to other penalties provided by law, liable for a sum equal to the total amount of the premium tax, premium deposit, ~~penalty premium rate premium tax,~~ late reporting or payment penalty, interest or other penalty evaded, or not accounted for and paid over. The sum of liability is a personal obligation of the responsible person, or persons, and is immediately due and owing to the ~~division~~ commission and, in addition thereto, is a lien enforceable against all the property of the person or persons.

§85-11-4. Further Effects of Delinquency.

4.1. The ~~division~~ commission shall not certify to the secretary of state of West Virginia that all payments and interest due the ~~division~~ commission by an employer have been made until the employer cures any delinquency, default, or termination or until the employer has made arrangements satisfactory to the ~~division~~ commission for that cure or until all payments and reports due by the employer under the Act have been made or arranged for by agreement with the ~~division~~ commission.

4.2. 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 4.1. certification.

§85-11-5. Notice to Employees of Default Employers.

5.1. Upon the default or termination of an employer, the ~~division~~ commission shall issue a written notice to the employees of that employer. The notice shall be in the form prescribed by the ~~division~~ commission.

5.2. Contents of notice. -- The notice shall inform the employees of the default or termination 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. In the case of an employer which is required to subscribe to the Fund, the notice shall inform the employees that the default employer is liable to its employees for injury or death, both in workers' compensation benefits and in damages at common law or by statute in a civil action in court. In the case of an employer which is not required to subscribe to the Fund, but has voluntarily elected to do so, the notice shall inform the employer and the employees that neither the default and terminated employer nor its employees are protected by the Act as to any injury or death after the date of default. The notice shall also contain the following statement which shall be printed in conspicuous type: "Any person who shall, prior to the reinstatement of the said employer, as hereinbefore provided for, or prior to sixty 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 ($1,000.00) dollars."

5.3. Posting the notice. -- The ~~division~~ commission shall arrange for the posting of the subsection 5.1. notice in a conspicuous place at the chief works of the employer, as the same appears in the records of the ~~division~~ commission. If the chief works of the employer cannot be found or identified, then the subsection 5.1. notice shall be posted at the front door of the courthouse of the county in which the chief works are located, according to the ~~division's~~ commission'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.

5.4. The ~~division~~ commission 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 subsection 5.1. notice and to make return thereof of the fact of such posting to the ~~division~~ commission, and any failure to post any notice within ten days after he or she shall have received the same from the ~~division~~ commission, 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.

5.5. Fee for posting. -- Any official posting the subsection 5.1. notice 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 ~~division~~ commission 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 delinquency such notice relates.

§85-11-6. Audits of Employers.

6.1. Pursuant to W. Va. Code, §23-2-2(a), every employer shall furnish the ~~division~~ commission, upon request, all information required by the ~~division~~ commission to ascertain or verify the number of employees employed by the employer during a pertinent period, the wages paid to employees during a pertinent period, any payments owed to the Fund, as premium tax, premium deposit, interest, penalties, fees, or to carry out the various purposes of the Act.

6.2. In order to inspect the information specified in subsection 6.1. of this rule, the ~~division~~ commission may direct that an agent or employee of the Fund audit the books and other records of the employer during the regular business hours of the employer or at another reasonable time whether located at the employer's place or places of business or elsewhere and the employer shall permit the audit to occur and shall cooperate with the auditors so that the audit may be successfully completed.

6.3. Either as an addition to or as an alternative to the audit permitted under subsection 6.2. of this rule, the ~~division~~ commission may convene an administrative hearing or conduct a deposition for the purpose of receiving the subsection 6.1. information in testimonial or evidentiary form. The ~~commissioner, the~~ executive director, an inspector or a designated hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents and testimony at any such hearing or deposition. Any such administrative hearing or deposition shall be convened and conducted in accordance with section 14. of this rule and the ~~division~~ commission shall have the right to have any employer or officer, agent, or employee of any employer examined under oath or affirmation. A deposition may be held pursuant to this subsection even if a hearing regarding the employer has not been previously noticed or requested; but, in that event, adequate notice of the deposition shall be given to all interested parties known to the ~~division~~ commission.

6.4. The request for information provided for by subsection 6.1., the audit provided for by subsection 6.2., or the hearing provided for by subsection 6.3. may be conducted at any time when necessary to carry out the purposes of the Act including when the ~~division~~ commission has good cause to believe that the employer may be delinquent. Such times may be before the issuance of a subsection 3.3. notice of delinquency, after the issuance of a subsection 3.3. notice of delinquency, before or after an employer has defaulted pursuant to subsection 3.7. or has been terminated pursuant to subsection 3.8. of this rule, or before, during, or after the implementation of an attempt to collect or enforce upon the employer's delinquency as provided for in subsection 7.2. of this rule.

§85-11-7. Methods of Collection of Payments and Enforcement.

7.1. Prior to a subsection 3.5. default or a subsection 3.6. termination, an employer may cure its delinquency by paying in full the amounts claimed to be owed by the ~~division~~ commission and by filing a complete gross wages payroll report, if not filed. At this stage, the amounts claimed to be owed to the ~~division~~ commission shall include a requirement for the payment of interest on all delinquent payments pursuant to W. Va. Code, §23-2-13.

~~a. In the event that the employer disputes the amounts claimed to be owed to the division or disputes the completeness or accuracy of an alleged delinquent gross wages payroll report, the employer may file a petition setting forth the facts upon which it bases its dispute and may demand that the division convene an administrative hearing pursuant to section 14. of this rule for the purpose of taking evidence to resolve the dispute. As a part of the petition, the employer must pay the full amount claimed to be due by the division. The division shall deposit the disputed payment into the division's account until the dispute is resolved.~~

~~b. During the time from the receipt of the hearing demand and until the issuance of an order by the commissioner or division following the hearing which resolves the dispute, the delinquency of an employer shall be tolled as being a delay caused by the administration of the Fund. Following the issuance of the commissioner's or division's order, the time for the employer to cure its delinquency will resume until any previously unexpired days have elapsed. The order shall be deemed to be issued on the date it is received by the employer's representative as shown by the return receipt of the United States~~

~~Postal Service's certified mail system. The order resolving the dispute shall be interlocutory in nature and shall not be a final order for appeal purposes.~~

~~e. During the period affected by this subsection, neither the commissioner or division, nor any representative or agent of the commissioner or division, shall have the authority to waive any part of any payments owed to the Fund. The employer can cure its delinquency only by paying the full amount found to be owed. If the order rules in whole or in part in the favor of the employer, then the appropriate sum, without interest, will be reimbursed to the employer from the amount previously paid by the employer.~~

a. Any employer who wishes to contest a decision made by the commission regarding amounts claimed to be owed to the commission or disputes the completeness or accuracy of an alleged delinquent gross wages payroll report, under the provisions of chapter twenty-three, article two of the Code, may do so under the provisions of W. Va. Code, §23-2-17. The rule implementing that section requires the filing of a formal request for reconsideration, and following reconsideration, a petition within thirty days of the employer's receipt of notice of the disputed decision or action or reconsidered decision or, in the absence of such receipt, within sixty days of the date of the commission's making such disputed decision or taking such disputed action or making such reconsideration decision. (See 85 C.S.R. 7, "Rules for Selected Hearings." However, as a mandatory prerequisite to hearing a petition after a reconsideration decision, the employer must deposit sufficient assets with the commission to guarantee payment of the amount determined to be due and owing by the commission. The deposit of assets shall be required in the following form(s):

1. The full cash amount of the money determined to be due by the commission;

2. A reinstatement agreement issued and maintained in accordance with the provisions and terms of W. Va. Code §23-2-5 and, in accordance with the discretionary policies of the commission, as authorized by law, including the authority to refuse to enter into a reinstatement agreement;

3. A cash or corporate surety bond or a bank letter of credit in the full amount claimed due by the commission; or

4. Any combination of the above three methods that guarantees payment in full to the commission in the event the employer does not prevail in the matter.

7.2. Following the default or termination of an employer, the ~~division~~ commission shall have available to it the following remedies which shall each be described more fully below:

a. Initiation of a civil action, including a civil action against all officers and directors of the employer.

b. Filing of a lien or liens enforceable against all the property of the employer and the persons, partners and officers who are or were responsible for payment or causing the payment of the default liability for which the liens were filed.

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.

e. Informing the director of the ~~division~~ commission of environmental protection when an employer is delinquent, default or terminated with the Fund 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 delinquent, in default or terminated, 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 17. of this rule.

7.3. In addition to the other remedies set forth here, the ~~division~~ commission may also initiate a proceeding or proceedings in the name of the state to distrain upon any personal property, including intangible property, of any delinquent employer and responsible persons. If the ~~division~~ commission 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 ~~division~~ commission may initiate a distraint proceeding in the name of the state before the employer actually becomes delinquent. In exercising the power of distraint, the ~~division~~ commission may do so as provided for in section 12. of this rule.

7.4. In every case noted in this section 7. where a monetary sum is to be collected, the ~~division~~ commission shall include a demand for interest as specified in section 15. of this rule.

7.5. The remedies set forth in subsection 7.2. and 7.3. of this section are described in greater detail in later sections of this rule.

§85-11-8. Statutory Lien.

8.1. Any payment and interest thereon due and unpaid under the Act constitutes a lien enforceable against all of the property of the owing employer. By way of example, and not by limitation, payments owed may include delinquent or default premium taxes, premium deposits, ~~penalty premium rate premium taxes,~~ late reporting or payment penalties, claims benefits paid by the Fund for employees, or their dependents, of a delinquent, defaulted, or terminated employer, costs of serving or posting notices, dishonored check service fees, court and hearing charges and fees and all other unresolved claims shown upon the account of an employer by the records of the ~~division~~ commission, plus interest thereon as calculated under W. Va. Code, §23-2-13, and section 15. of this rule. The property subject to the lien includes all of the lienee's real estate, personal property of all types and combinations thereof.

8.2. In accordance with W. Va. Code, §23-2-5a and §38-10C-2, the ~~division~~ commission shall file a written notice of the subsection 8.1. lien in the office of the clerk of the county commission of the county in which the property of the employer or lienee against whom such lien is claimed, is situate, or if the employer's or lienee'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 to the Fund by the employer.

8.3. 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 lienee in favor of the state of West Virginia and the ~~division~~ commission. Upon the satisfaction of such lien, a properly acknowledged release thereof for recordation shall be delivered or mailed to the employer or lienee by the ~~division~~ commission 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.

8.4. Until the lien is docketed as provided for in subsection 8.3. of this rule, 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 ~~division's~~ commission'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 8.3. of this rule. Following the docketing pursuant to subsection 8.3., the lien is enforceable against any purchaser (including a lien creditor) with or without actual notice of the lien.

8.5. Once all amounts due from the employer are collected by the ~~division~~ commission, the ~~commissioner~~ commission shall release the lien or liens as provided by law.

§85-11-9. Civil Actions.

9.1. The ~~division~~ commission in the name of the state may commence a civil action against an employer, which includes for the purposes of this section a responsible person, as defined in subsection 3.10. of this rule, including its officers or directors or both, who, after due notice, defaults in any payment or duty required by the Act and this rule. Such payments may include, but are not limited to, premium taxes, premium deposit, ~~penalty premium rate premium taxes,~~ late reporting or payment penalties, claims benefits paid by the Fund, costs of serving or posting notices, court and hearing charges and fees or any other amounts lawfully owed, and interest thereon, by employers in default; by employers who have been terminated from coverage by the Fund; or, by employers who elected to self insure.

9.2. Such a civil action may be pursued under the applicable provisions of W. Va. Code, §14-1-1, et seq., W. Va. Code, chapter 38, or as otherwise provided by law. ~~The division commission shall be represented in such a civil action by a representative or designee of the office of the attorney general.~~ It is expressly noted that the provisions of sections 18a, 18b, and 18c of article 1, chapter 14 of the West Virginia Code are not applicable to a subsection 9.1. civil action, but may be used as is otherwise proper.

9.3. Subsection 9.1. civil actions 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.

9.4. Pursuant to W. Va. Code, §23-2-5a, if the judgment entered in a subsection 9.1. civil action is against the defendant employer, the defendant shall pay the costs of the action. In addition, a subsection 9.1. civil action shall be given preference on the calendar of the court over all other civil actions.

9.5. Upon obtaining a judgment in any civil action under this section 9., the ~~division~~ commission 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 9.3. of this rule and shall be stated in writing and that document shall be a public record.

§85-11-10. Injunctions From Carrying On Business.

10.1. In any case when an employer required to subscribe to the Fund defaults in payment of premium, premium deposit, penalty, or interest thereon, for as many as two calendar quarters, which quarters need not be consecutive, and remains in default after due notice, the ~~division~~ commission may bring an action in the circuit court of Kanawha County to enjoin such employer from continuing to carry on the business in which such liability was incurred.

10.2. The ~~division~~ commission may, as an alternative to pursuing such an injunction, require such delinquent employer to file a bond in the form prescribed by the ~~division~~ commission 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 ~~division~~ commission.

§85-11-11. Receivership and Insolvency Proceedings; Bankruptcy.

11.1. In accordance with the provisions of W. Va. Code, §23-2-5a, in case a business subject to the payments and interest thereon imposed under the Act 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.

11.2. In any such case as is described in subsection 11.1., ~~the division, commission shall be represented by a representative or designee of the office of the attorney general, and~~ the ~~division~~ commission may file such pleadings, motions, and other documents and take any other legal action so as to protect the interests of the Fund during the pendency and resolution of such case.

11.3. In the event that any employer which owes any payment and interest under the provisions of the Act files for or is placed in a bankruptcy proceeding under the laws of the United States, the ~~division~~ commission may become a party to such proceedings and take any and all actions needed to protect the interests of the Fund during the pendency and resolution of the proceeding. The ~~division~~ commission may institute an involuntary proceeding against an employer in a bankruptcy court of the United States in any proper instance. All premium tax assessments, as defined in subsection 2.13. and elsewhere in this rule and in the Act, 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.

§85-11-12. Distraint Upon Personal Property.

12.1. General authority and provisions.

a. Authority of the ~~division~~ commission. -- If any premium tax, premium deposit, penalty, interest, claims benefit or other payment required by the Act 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, premium tax, or penalty neglects or refuses to pay the same within the period of time provided for payment after notice and demand as provided in subsection 12.1.f. hereof, it shall be lawful for the ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission finds that the collection of such obligation is in jeopardy, notice and demand for immediate payment may be given by the ~~division~~ commission and, upon failure or refusal to pay such obligation, collection thereof by levy shall be lawful without regard to the time period provided in subsection 12.1.f. If the ~~division~~ commission 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 ~~division~~ commission may likewise distrain before such delinquency 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 ~~division~~ commission may levy upon property or rights to property, the ~~division~~ commission may seize and sell such property in accordance with section 12.4. of this rule.

c. The ~~division~~ commission 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 12. of this rule 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 subsection 12.1.a. is not sufficient to satisfy the claim of the ~~division~~ commission for which levy is made, the ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission 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.

A. In general. -- Levy may be made under subsection 12.1.a. upon the salary or wages or other property or right to property of any employer with respect to any unpaid obligation only after the ~~division~~ commission has notified such employer in writing of his or her intention to make such levy. A notice shall also be given by the ~~division~~ commission or other officer in the manner provided by applicable law to all entities other than the employer of whom the ~~division~~ commission or other officer has knowledge and who have a higher priority lien or right to the property than that of the ~~division~~ commission.

B. Notice time period and hearing requirement. -- The notice required under subsection 12.1.f.A. 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 ~~division~~ commission, no less than twenty days prior to the day of levy, unless the notice of intention to levy and right to a hearing are set forth in the notice of delinquency as required by subsection 3.3. of this rule and W. Va. Code, §23-2-5(b) and (c); however, no notice need be given prior to levy if the ~~division~~ <u>commission</u> has made a finding under either of the last two sentences of subsection 12.1.a. that collection of the obligation is in jeopardy; or, if the levy is made through the provisions of chapter 38, W. Va. Code, including notice and hearing provisions therein, for execution upon liens and a notice of delinquency was given by the ~~division~~ <u>commission</u> as required by subsection 3.3. of this rule and a notice of lien was docketed as required by subsection 8.2. of this rule.

C. 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 ~~division~~ <u>commission</u> shall promptly release such levy and notify the employer upon whom such levy was made that such levy has been released.

12.2. Property exempt from levy.

a. Enumeration. -- There shall be exempt from levy the greater of the value of exemptions as provided in chapter 38 of the West Virginia Code or as provided below. In any case where the entity subject to the processes set forth in this section 12. is an individual human being, then the term "individual" as used in this subsection 12.2. 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:

A. 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.

B. 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 in value, if the individual is not the head of a household, this exemption shall not exceed one thousand dollars.

C. 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 in value.

D. 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.

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

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

G. 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.

H. 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.

I. 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.

J. 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 chapter 38, articles 5A and 5B, W. Va. Code, plus twenty-five dollars for each additional dependent of the individual.

K. If the employer is a natural person and if he or she owns a homestead located in this state, the first five thousand dollars thereof shall be exempt from levy.

b. Appraisal. -- The officer seizing property of the type described in subsection 12.2.a. 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 ~~division~~ commission 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 subsection 12.2.a.

12.3. 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 ~~division~~ commission, surrender such property or rights, or discharge such obligation, to the ~~division~~ commission, 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 ~~division~~ commission, shall be subject to prosecution as provided for in section 17. 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 ~~division~~ commission, surrenders such property or rights to property or discharges such obligation to the ~~division~~ commission shall be discharged from any obligation or liability to the delinquent 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 12.3. 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.

12.4. 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 ~~division~~ commission 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 ~~division~~ commission may sell any property seized under this section 12. of this rule. As soon as practicable after the seizure of the property, the ~~division~~ commission shall give notice to the owner, in the manner prescribed in subsection 12.4.a., 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 ~~division~~ commission. The sale shall be conducted by public auction, or by public sale under sealed bids. Before the sale, the ~~division~~ commission 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 the Fund; otherwise, the property shall be declared to be sold to highest bidder. In determining the minimum price, the ~~division~~ commission 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 ~~division~~ commission 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 to the Fund, 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 Fund.

12.5. Sale of perishable goods. -- If the ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission an amount equal to the appraised value; or, (b) gives bond in such form, with such sureties, and in such amount as the ~~division~~ commission shall prescribe, to pay the appraised amount at such time as the ~~division~~ commission 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 ~~division~~ commission shall, as soon as practicable, make public sale of the property.

12.6. 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 ~~division~~ commission at any time prior to the sale thereof, and upon such payment, the ~~division~~ commission 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 ~~division's~~ commission's lien. -- Any entity redeeming the interest of another shall be subrogated to the lien of the ~~division~~ commission 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 commission of the county in which the personal property is located or where the delinquent employer resides or has its business location, or if neither be in this state, the clerk of the county commission of Kanawha County, his, her or its claim against the delinquent employer and a copy of the certificate of sale of personal property.

12.7. Certificate of sale. -- In the case of property sold as provided in subsection 12.4., the ~~division~~ commission shall provide to the purchaser a certificate of sale upon payment in full of the purchase price.

12.8. 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 12.4., the certificate of such sale:

A. 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,

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

C. 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,

D. 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,

E. 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 12.7. shall discharge such property from all liens, encumbrances and titles over which the lien of the ~~division~~ commission with respect to which the levy was made had priority.

12.9. Records of sale. -- The ~~division~~ commission shall for each county, keep a record of all sales of property under subsection 12.4. 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 ~~division~~ commission shall be evidence in any court of this state of the truth of the facts therein stated.

12.10. Expense of levy and sale. -- The ~~division~~ commission shall determine the expenses to be allowed in all cases of levy and sale under this article.

12.11. 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 delinquent liability of the employer for which levy may be made under this rule.

b. Surplus proceeds. -- Any surplus proceeds remaining after the application of subsection 12.11.a. shall, upon application and satisfactory proof in support thereof, be credited or refunded by the ~~division~~ commission to the person or persons legally entitled thereto.

12.12. Authority to release levy and return property.

a. Release of levy. -- It shall be lawful for the ~~division~~ commission to release the levy upon all or part of the property or rights to property levied upon where the ~~division~~ commission 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 ~~division~~ commission determines that property has been wrongfully levied upon, it shall be lawful for the ~~division~~ commission 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 ~~division~~ commission 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 ~~division~~ commission has been made within such time period. For purposes of this subsection 12.12.b., if property is declared purchased by the ~~division~~ commission at a sale pursuant to subsection 12.4., the ~~division~~ commission 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 ~~division~~ commission from the resale of such property.

c. Public information. -- The ~~division~~ commission 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 subsections 12.12.a. and 12.12.b.

§85-11-13. Applications for Reinstatement.

13.1. Any employer, who is required to subscribe to the Fund and subsequently defaults, or who elects to subscribe and whose account is subsequently terminated upon default, shall be restored immediately to the benefits and protection of the Act only upon the filing of all delinquent gross wages payroll and other reports required by the ~~division~~ commission and upon payment into the Fund of all unpaid premium taxes, an adequate premium deposit, accrued interest, penalties and any other amount due under the Act or the rules promulgated by the ~~commissioner or the compensation programs performance council~~ commission and the board of managers.

13.2. Any employer who is in default or who's account is terminated upon default under the Act may be reinstated to the benefits and protection of the Act by filing an application for reinstatement and entering into a reinstatement agreement with the ~~division~~ commission which provides for repayment of the entire delinquency and default liability in installments, as provided by W. Va. Code, §23-2-5. No application for reinstatement may become effective until the applicant's default occurs, although the application may be filed prior to default. Application for reinstatement shall be made upon forms prescribed by the ~~division~~ commission and shall include a report of the gross wages payroll of the employer during the entire period of delinquency and subsequent default or termination, which payroll information shall be verified by the employer or its authorized agent, and an application shall further include an application deposit payment equal to one half of one percent of the gross wages payroll during the entire period of delinquency and default, or one hundred ($100.00) dollars, whichever amount shall be greater, or equal to another portion of the liability as may be determined from time to time by rule but not to exceed the amount of the entire liability due and owing for the period of delinquency and default.

13.3. A default or terminated employer who applies for reinstatement shall be entitled to the benefits and protection of the Act on the day that a properly completed and acceptable application and proper application deposit is received by the ~~division~~ commission and thereafter. However, if the ~~division~~ commission subsequently reinstates an employer subject to the terms of a reinstatement agreement, then the subsequent failure of the employer to make scheduled payments in accordance with the reinstatement agreement, to timely file and pay current premium tax or to restore the premium deposit to the required amount by the end of the repayment period shall cause the reinstatement agreement to be null, void and of no effect, and the employer shall be denied the benefits and protection of the Act effective from the date that such employer's account originally became delinquent. Similarly, the withdrawal of an application for reinstatement; the failure to timely file reports or make quarterly or current premium tax payments to the ~~division~~ commission during the pendency of the application prior to execution of a reinstatement agreement; or refusal or failure to timely sign, execute and return to the ~~division~~ commission, within thirty (30) days of the applicant's receipt of the agreement, the reinstatement agreement offered by the ~~division~~ commission, shall cause the application for reinstatement to be null, void and of no effect and the employer shall be denied the benefits and protection of the Act effective from the date that such employer's account originally became delinquent.

13.4. Pursuant to section 6. of this rule, the ~~division~~ commission may direct that a complete audit of the employer's account be made at any time after an application for reinstatement is received from the employer.

13.5. An employer may file an application for reinstatement despite the pendency of some other remedial action that may have been instituted by the ~~division~~ commission. The ~~division~~ commission may then delay or continue further pursuit of that remedial action if, in the ~~division's~~ commission's sole discretion, the interests of the Fund will be protected or furthered despite such delay or continuance. One factor that the ~~division~~ commission may rely upon, but not to the exclusion of other possible factors, is whether the application is the first the employer has filed or whether the employer has filed and then defaulted on previous applications. In the latter event, the ~~division~~ commission will generally, unless some other good cause exists to the contrary, continue to proceed with the other remedies.

13.6. In addition, entry into a reinstatement agreement is discretionary with the ~~division~~ commission. Such discretion shall be exercised in keeping with the fiduciary obligations owed to the workers' compensation fund. Should the ~~division~~ commission decline to enter into a reinstatement agreement and should the employer not comply with the provisions of subsection 13.1., then the ~~division~~ commission may proceed with any of the collection efforts provided for by these rules; by §23-2-5a of the W. Va. Code or as otherwise provided for by the W. Va. Code.

13.7. The ~~division~~ commission may permit the payment of all amounts due to the Fund or the filing of all reports due to the Fund, or both, upon the terms stated in a reinstatement agreement. The ~~division~~ commission shall exercise ~~it's~~ its discretion to enter into such an agreement and shall prescribe the terms of an agreement. The reinstatement agreement shall not authorize or permit the reduction or waiver of any part of the premium or premium deposit, or other amount due. Further, the reinstatement agreement shall provide for the payment of interest by the employer upon the amounts payable to the Fund over the life of the repayment agreement. The interest rate shall not change over the term of the agreement. Except in extreme 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 ~~division~~ commission shall set the reinstatement agreement's term of repayment for that period of months in which it believes the applicant is financially capable of repaying the default liability and restoring the premium deposit to the required amount but the term shall be set at not more than thirty-six (36) months, unless the applicant employer shall file, with its application for reinstatement, a request for extension of up to twenty-four (24) additional months in the term, with financial proof of good cause why and for what extended term the request should be granted by the ~~division~~ commission in the reinstatement agreement. The breach of a reinstatement agreement by the employer shall render the application for reinstatement and reinstatement of the employer void and of no legal effect and the employer shall be denied the benefits and protection of the Act effective from the date that such employer's account originally became delinquent; except that, the account of the employer shall be credited for any amounts paid by the employer. Nothing in this section shall apply to any other type of collection method under the Act or this rule.

§85-11-14. 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 ~~Procedural Rule, Bureau of Employment Programs, Workers' Compensation Division,~~ 85 C.S.R. 7, Rules for Selected Hearings.

§85-11-15. Interest.

15.1. Any and all payments unpaid on the date on which due and payable, as prescribed by the ~~division~~ commission, shall immediately begin bearing interest. Interest shall be compounded quarterly until payment plus accrued interest is received by the ~~division~~ commission; except that future interest for reinstatement agreements shall be calculated and provided at a simple rate of interest. Interest collected pursuant to this subsection shall be paid into the Fund.

15.2. Notwithstanding the provisions of subsection 15.1. of this rule, in no event shall the rate of interest charged a political sub~~division~~ commission of the state or a volunteer fire department exceed ten percent per annum.

§85-11-16. Reserved. ~~Clearance of Backlog.~~

~~16.1. Any employer which was or became delinquent or in default in the payment of any sum owed or report due under the Act or the various rules promulgated by the commissioner prior to July 1, 1989, and which was not previously notified of that delinquency or default by the division shall receive the initial notice of that delinquency or default within sixty (60) days of the division's becoming aware of that delinquency and the employer who is so notified shall have thirty (30) days after notice in which to cure such delinquency without default or to pay such default without commencement of collection actions, except that liens may be filed.~~

~~16.2. Any employer which was or became delinquent or in default in the payment of any sum owed or report due under the Act or the various rules promulgated by the commissioner prior to July 1, 1989, and which was previously notified of that delinquency or default by the division shall now be pursued for the payment of the sums owed or the report due under the provisions of this rule. All employers receiving a notice under subsection 16.1. of this rule shall also be pursued for the payment of the sums owed or the report due as in each case the type of notice requires.~~

~~16.3. In each instance described in subsections 16.1. and 16.2. of this rule all interest, penalties, claims benefits and other calculations shall begin with the dates upon which the delinquencies or defaults actually occurred and without regard to the other provisions of this section. In addition, the losses of the benefits and protection of the Act, as well as the incurring of liabilities under the Act by a delinquent, default or terminated employer, shall also be determined as if this section 16. were not in place.~~

§85-11-17. Criminal Penalties.

In addition to all other remedies available to the ~~division~~ commission under this rule or as contained in the Act, the ~~division~~ commission 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, §23-1-16. Notice should also be taken of the provisions of subsections 3.4.f., 5.2., and 12.3.b. of this rule for other specific provisions concerning criminal penalties.

§85-11-18. Freedom of Information Act.

Pursuant to the Freedom of Information Act, W. Va. Code, §29B-1-1, et seq., 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 Fund claimant or employer subscriber, 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 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 confidential information cannot be excised from a record, then the record as a whole will be deemed confidential; however, the ~~division~~ commission shall release in its place a statement explaining in detail the basis for the withholding of the record.

§85-11-19. Employers in default with the Old Fund upon termination of the commission.

19.1. Upon termination of the commission, private carriers shall not write workers' compensation insurance for any employers that are in default status with regard to obligations to old fund.

19.2. Default status employers will be placed on the Commission Default List with the Insurance Commissioner and the Insurance Commissioner will have all of the available remedies against such employers as the commission had in regard to employers who were in default with the workers' compensation commission prior to the termination of the commission, as set forth in W. Va. Code §23-2-1 et seq.

19.3. Default status employers will be deemed to not be carrying mandatory workers' compensation coverage as described in W. Va. Code §§23-2-1 and 23-2C-15. Therefore in accordance with the provisions of W. Va. Code §23-2C-19(f), the insurance commissioner may impose an administrative fine of up to $10,000 and take other actions including referring the default status employer to other state agencies for adverse action pursuant to W. Va. Code §23-2C-19(g).

19.4. Default status employers will remain on the Commission Default List with the Insurance Commissioner until all of the employer's obligations to the old fund are paid or the employer enters into a reinstatement agreement in regard to such obligations.

§85-11-20. Employers that default to the Old Fund, or that are discovered to be in default to the Old Fund after the termination of the Commission.

20.1. Upon termination of the Commission, employers that default on a reinstatement agreement entered into with the Workers' Compensation Commission or the Insurance Commissioner in regard to Old Fund obligations, or are otherwise discovered to be in default to the Old Fund, will be deemed to be in default status with the Old Fund, retroactive to the date of the original default.

20.2. An employer that defaults on a reinstatement agreement will immediately be placed on the Commission's Default List. The Insurance Commissioner will have all of the available remedies against the employer as the Commission had in regard to employers who were in default with the workers' compensation fund prior to the termination of the Commission, as set forth in W. Va. Code §23-2-1 et seq. Comment #2 IC

20.3. The provisions of this section include employers that were required, but failed to, subscribe for workers' compensation coverage during a period prior to the termination of the Commission, but were not deemed to be in default or in non-compliance with the law because the Commission had no knowledge of the illegal status of such employers. Employers in this category are deemed to be in default status with the Old Fund, retroactive to the date on which they should have been subscribing to the Commission for workers' compensation coverage, and the money that should have been paid to the Commission will become a debt owed to the Old Fund.

20.4. The Insurance Commission shall immediately notify the private carriers of all such employers that have been placed on the Commission Default List, and upon such notification the private carriers shall immediately issue a notice of non-renewal to the default employer. The notice of non-renewal shall provide that the employer's policy shall not be renewed at the end of its current term, unless the private carrier receives notification from the Insurance Commissioner that the employer has been removed from the Commission Default List.

20.5. Default status employers will be deemed to not be carrying mandatory workers' compensation coverage as described in W. Va. Code §§23-2-1 and 23-2C-15. Therefore, in accordance with the provisions of W. Va. Code §23-2C-19(f), the insurance commissioner may impose an administrative fine of up to $10,000 and take other actions including referring the default status employer to other state agencies for adverse action pursuant to W. Va. Code §23-2C-19(g).

20.6. Default status employers will remain on the Commission Default List with the Insurance Commissioner until all of the employer's obligations to the old fund are paid or the employer enters into a reinstatement agreement in regard to such obligations.

§85-11-21. Employers that default to private carriers.

21.1. After termination of the Commission private carriers shall notify the Insurance Commissioner, within one (1) business day, of employers that have their coverage cancelled or suspended as a result of failure to pay premiums. These Policy Default employers will then immediately be placed on the Private Market Default List with the Insurance Commissioner.

21.2. The Insurance Commissioner will have all of the available remedies against such employers (policy defaulting and others not carrying mandatory workers' compensation coverage) as the Commission had in regard to employers that were in default with the workers' compensation fund prior to the termination of the Commission, as set forth in ~~chapter twenty-three, article two~~ W. Va. Code §23-2-1 et seq. Provided, That the Insurance Commissioner will have no duty to collect from such employers the premiums owed to private carriers. Comment #3 I.C.

21.3. Policy default status employers will be deemed to not be carrying mandatory workers' compensation coverage as described in W. Va. Code §§23-2-1 and 23-2C-15. Therefore, in accordance with the provisions of W. Va. Code §23-2C-19(f), the insurance commissioner may impose an administrative fine of up to $10,000 and take other actions including referring the default status employer to other state agencies for adverse action pursuant to W. Va. Code §23-2C-19(g).

21.4. Employers shall remain on the Private Market Default List with the Insurance Commissioner until they regain good standing with the private carrier to which they defaulted on premiums, and obtain mandatory workers' compensation coverage as described in W. Va. Code §§23-2-1 and 23-2C-15.

§85-11-22. Employers owing money to the uninsured employers fund.

22.1. All employers that incur liability under the uninsured employers' fund but for whatever reason were not on the Commission Default List or Private Market Default List prior to incurring such liability, will immediately be placed on the Commission Default List by the Insurance Commissioner.

22.2. Employers with obligations to the uninsured employers' fund will remain on the Commission Default List until they pay off all their obligations to the uninsured employers' fund or enter into a reinstatement agreement in regard to their obligations.

22.3. The Insurance Commissioner will have all of the available remedies against such employers as the Commission had in regard to employers who were in default with the workers' compensation fund prior to the termination of the commission as set forth in ~~chapter twenty-three, article two~~ W. Va. Code §23-2-1 et seq. Comment #4 I.C.

22.4. Employers that default on a reinstatement agreement entered into with the Insurance Commissioner in regard to obligations to the uninsured employers' fund will immediately be placed on the Commission Default List with the Insurance Commissioner, retroactive to the original date of liability to the uninsured employers' fund.

§85-11-23. Private carriers prohibited from offering insurance to employers on the Commission or Private Market Default lists.

23.1. The Insurance Commission shall notify the private carriers of all such employers that have been placed on the Commission or Private Market Default Lists.

23.2. Upon such notification the private carriers shall immediately issue a notice of non-renewal to any default employer to which the private carrier is providing coverage. The notice of non-renewal shall provide that the employer's policy shall not be renewed at the end of its current term, unless the private carrier receives notification from the Insurance Commissioner that the employer has been removed from the Commission or Private Market Default List.

23.3. A private carrier shall not offer, reinstate or renew workers' compensation insurance coverage to any employers on the Commission or Policy Default List.

23.4. Any private carrier offering, reinstating or renewing workers' compensation insurance coverage to any employers on the Commission or Private Market Default List is subject to administrative action by the Insurance Commissioner, including an administrative fine of up to $10,000.

§85-11-24. Hearing.

24.1. Prior to being placed on the Commission or Private Market Default List, all employers, except those who were in default with the old fund upon termination of the 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 ~~disagrees with~~ the action by the Insurance Commissioner is factually or legally erroneous. Comment #5 I.C.

24.2. A petition for expedited administrative hearing, as described in this section, shall clearly identify why the employer believes ~~disputes~~ the Insurance Commissioner's action of placing it on the Commission or Private Market 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. 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 Comment #6 I.C.

the circuit court of Kanawha County.

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

24.4. The administrative appeal process does not interfere with or toll a private carrier's right to terminate the employer's workers' compensation coverage.

§85-11-25. Removal from the default list.

25.1. If an employer has met all of its legal, fiscal or other obligations, the Insurance Commissioner shall remove the employer from the applicable default list: Provided, That the Insurance Commissioner shall not have discretion to remove an employer from the Commission or Private Market Default List if the employer remains in default status with the old fund, a private carrier or the uninsured employers' fund: Provided further, That an employer shall not be considered to be in default status with the old fund or uninsured employers' fund if the employer is under a reinstatement agreement with the Insurance Commissioner in regard to obligations to either or both funds, and shall not be considered to be in default status with a private carrier if the private carrier is willing to offer insurance to the employer or state that the employer is in good standing with the private carrier.

25.2. Employers on the Commission or Private Market Default List shall be permitted at any time to make a written request to the Insurance Commissioner for removal from the applicable 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 applicable 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.

25.3. Employers may file a petition with the Insurance Commissioner requesting an administrative hearing before the Insurance Commissioner if the they disagree with the decision of the Insurance Commissioner in regard to a request for removal, and the Insurance Commissioner shall schedule a hearing within thirty (30) days, to otherwise be conducted as described in the above section (§85-11-24. "Hearings"): 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. Comment # 7 I.C.

§85-11-26. Employer violator system.

26.1. Every employer that is on the Commission or Private Market Default List shall 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 applicable default list pursuant to this rule.

26.2. All individuals who own, are officers 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 Commission or Private Market 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 applicable default list pursuant to this rule.

§85-11-27. Termination of the Commission.

Upon termination of the commission, this rule shall be administered by the insurance commissioner for the ~~sole~~ purposes of collecting Old fund assets as defined in West Virginia Code §23-2C-2(l), ~~as well as for the purpose of~~ regulating self-insured employers, regulating employers in regard to maintaining mandatory workers' compensation coverage under chapter twenty-three, article two-c, and collecting obligations owed to the uninsured employer fund, and the Insurance commissioner shall have the same rights, powers and duties which are conferred upon the commission in this rule. This rule shall have no force and effect over the collection of New Fund assets or other matters involving the collection of premiums by carriers from their insureds. Comment #8 IC

§85-11-~~19~~28. 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.

<u>Commission Responses</u>
"Enforcement of Reporting & Payment Requirements"
85CSR11

2.17. Definition of "Commission Default List" added.
2.18. Definition of "Policy Default" added.
2.19. Definition of "Private Market Default List" added.
Response; The three definitions were added as a result of the Insurance Commissioner's request to add additional language regarding employers who go into default after the termination of the Commission. The definitions added are consistent with the definitions contained within 85CSR32.

Bowles Rice
§7.1. (See also 7.4 & 13.7 below for same analysis.) Change suggested to acknowledge the provisions of W. Va. Code §23-2-5(f)(1) that allows the waiver of accrued premium and interest and permits settlement of amounts owed.

Response:
Disagree. No change. The provisions of W. Va. Code §23-2-5(f)(1) allowing settlement of accrued interest and outstanding premium amounts expires upon termination of the Commission. This rule is intended to last beyond the termination of the Commission.

Bowles Rice
§7.1.a. Change suggested to eliminate provisions requiring various forms of security as a requirement of filing a petition in dispute of premiums owed.

Response:
Disagree. The language in the rule, as amended, was adapted from recent language approved by the Board of Managers in the passage of 85CSR18, "Self-Insurance Self Administration," §22. This language provides options to employers that want to dispute amounts owed and guarantees payment to the Commission without requiring a cash deposit.

7.2.a. Insurance Commissioner. Request made to include reference to allow actions against officer and directors of the employer.
Response: Agreed. Change made.

7.2.f. Insurance Commissioner. Request made to include language to allow the Insurance commissioner to take action against default employers through license and permit actions with other agencies.
Response: Agreed. Change made.

Bowles Rice
§7.4. Change suggested to acknowledge the provisions of W. Va. Code §23-2-5(f)(1) that allows the waiver of accrued premium and interest and permits settlement of amounts owed.

Response:
Disagree. No change. The provisions of W. Va. Code §23-2-5(f)(1) allowing settlement of accrued interest and outstanding premium amounts expires upon termination of the Commission. This rule is intended to last beyond the termination of the Commission.

9.1. Insurance Commissioner. Request made to include reference to allow actions against officer and directors of the employer.
Response: Agreed. Change made.

9.2. Insurance Commissioner. Request made to remove reference to attorney general's office so that the Insurance Commissioner retains flexibility in selecting counsel.
Response: Agreed. Change made.

11.2. Insurance Commissioner. Request made to remove reference to attorney general's office so that the Insurance Commissioner retains flexibility in selecting counsel.
Response: Agreed. Change made.

Bowles Rice
§12.2. Suggested change. Eliminate personal liability and levies against responsible persons absent a showing of fraud.
Response:
Disagree. Personal responsibility for the payment of workers' compensation obligations has long been a part of the West Virginia Code {23-2-5a(b)}. In addition, the Legislature has created the employer violator system which further enhances and underscores the requirement that parties responsible for the remittance of workers' compensation obligations be personally accountable.

Bowles Rice
13.7. Change suggested to acknowledge the provisions of W. Va. Code §23-2-5(f)(1) that allows the waiver of accrued premium and interest and permits settlement of amounts owed. (Typo also noted and corrected.)
Response:
Disagree. No change. The provisions of W. Va. Code §23-2-5(f)(1) allowing settlement of accrued interest and outstanding premium amounts expires upon termination of the Commission. This rule is intended to last beyond the termination of the Commission.

§§19-26. Insurance Commissioner. The Office of the Insurance Commissioner requested language to clarify their recourse against:
(1) employers in default with the Old Fund upon termination of the Commission;
(2) employers that fail to honor repayment agreements or who are discovered to have not provided coverage prior to the termination of the Commission;
(3) employers that default to private carriers;
(4) employers owing money to the uninsured fund; and

(5) carriers that offer insurance to default list employers.
In addition, the Insurance Commissioner requested language to afford due process to those employers place on a default list and a process to remove an employer from a default list. Further, the Insurance commissioner requested language to tie in the placement of certain default employer and certain individuals to the Employer violator system.
Response: Agreed. Various sections 19-26 added to the rule.

§27. Insurance Commissioner. The Insurance Commissioner requested that the provision apply to regulating self-insured employers, collecting obligations to the uninsured employer's fund, and regulating employers with regard to maintaining mandatory workers' compensation coverage.
Response; Agreed. Changes made.