WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

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

AGENCY: W. Va. Workers' Compensation Division Bureau of Employment Programs TITLE NUMBER: 85

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

RULE TYPE: PROCEDURAL ________ INTERPRETIVE ________

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

§§ 21A-3-7(b) and 7(c)

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 NEW RULE BEING ADOPTED: ________

TITLE OF RULE BEING ADOPTED: ________

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS August 22, 1996

Compensation Programs Performance Council
W. Va. Bureau of Employment Programs
By: Andrew N. Richardson
Andrew N. Richardson, Commissioner

13.60

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

SERIES 11
ENFORCEMENT OF REPORTING AND PAYMENT REQUIREMENTS

§85-11-1. General.

1.1. Scope. -- This ~~legislative~~ 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,** ~~provides for~~ **regarding** the determination of delinquency and default ~~on the part of~~ **by** employers; reporting and payment requirements; ~~for the~~ enforcement of **compliance by employers with reporting and payment requirements;** and, collection of payments **arising** from those requirements and ~~for enforcement of other required payments~~ others.

1.2. Authority. -- West Virginia Code, ~~§§23-3-1; 23-2-5; 23-2-9; 23-1-13; 23-4A-6; 29A-3-3; & 5F-2-2(a)(11) & (12).~~ **§21A-2-6(1) & 6(2); §21A-3-7(b) & 7(c); §23-1-1 and §23-2-18. Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia Code, §29A-3-1, et seq. Public notice requirements of that chapter and article, however, must be followed. Pursuant to Enrolled Committee Substitute for House Bill 4030, Regular Session, 1994, the Department of Commerce, Labor and Environmental Resources was abolished. Pursuant to that same bill and to Executive Order No. 5-94 by the Governor, the Commissioner of the Bureau of Employment Programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.**

1.3. Filing date. -- ~~July 2, 1993.~~

1.4. Effective date. -- ~~July 2, 1993.~~

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 ~~Code of~~ West Virginia **Code** of 1931, as amended.

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

2.4. The term "commissioner" means the ~~West Virginia Workers' Compensation~~ Commissioner **of the Bureau of Employment Programs or the West Virginia Commissioner of Employment Programs** as provided ~~for~~ by West Virginia Code, **§21A-2-1 and** §23-1-1.

2.5. The term "default" means **either or both of the following:** ~~the failure by an employer which has not made a payment or filed a report due by it under the Act and which has received a subsection 3.3 delinquency notice of its failure 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 and either an employer required to subscribe to the Fund or an electing employer.~~

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, 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 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.**

~~2.6.~~ **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.

~~2.7.~~ **2.8.** The term "employee" has the meaning ascribed to that term by West Virginia Code, **§23-2-1 and** §23-2-1a.

~~2.8.~~ **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, ~~copartnership,~~ **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, 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 as the chief operating officer for the daily operations of the workers' compensation division, as provided by West Virginia Code, §23-1-4, and who was formerly titled as "secretary" therein and as "executive secretary" in this rule.**

~~2.9.~~ **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.

~~2.10.~~ **2.12.** The term "payment" means any amount of money owed by an employer to the ~~commissioner~~ **division** 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**.

~~2.11.~~ **2.13.** The ~~term~~ **terms** "premium" **and "premium tax"** ~~means~~ **mean** the **amounts of** money due from an employer to the Fund **or division** as the result of the **quarterly and** periodic ~~assessment~~ **assessments** by the ~~commissioner~~ **division** under the ~~various~~ 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. "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.**

~~2.12.~~ **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,** ~~premiums~~ **premium tax** pursuant to West Virginia Code, ~~§23-2-5(a)~~ **§23-2-5 and §23-2-9**.

~~2.13.~~ **2.15.** The term "self-insurer" **and "self-insured"** means an employer who has **applied for permission to elect and thereafter has** elected to ~~provide~~ **maintain** its own **benefit fund or** system of compensation to ~~its employees under any or all of the various provisions of the Act allowing that option~~ **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.**

~~2.14.~~ **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 ~~titled~~ **entitled** "Enforcement of Reporting and Payment Requirements."

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

3.1. Delinquency. -- An employer shall be declared to be delinquent by the ~~commissioner~~ **division** 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**. ~~Premiums~~ **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 ~~deposits~~ **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 ~~commissioner~~ **division** determines that such delinquency has been caused by delays in the administration of the Fund, including the commission of errors by the ~~Fund.~~ **division.** An employer may demand an administrative hearing on this issue ~~which~~ **and the** hearing, if granted by the commissioner **or the division**, 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 ~~commissioner~~ **division** 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 did not give notice within sixty (60) days of the end of the quarter for which the delinquency occurred, then the division'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 third month following the end of the preceding quarter~~ **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 ~~default~~ **delinquency.** ~~or, if the employer has been terminated, how that employer may also be reinstated with the Fund.~~

e. A statement that, once the employer is ~~declared to be~~ 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,~~ **firm** or corporation which is required by the provisions of the Act to subscribe to the ~~Fund,~~ **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 ~~commissioner~~ **division** (including payments of premium **tax, penalty premium rate premium tax,** premium deposit, **late reporting or payment penalty,** ~~or~~ interest **or other charges, fees or penalties**) within the time specified by the ~~commissioner~~ **division, 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 ~~misdemeanor,~~ **felony** and, upon conviction thereof, shall be fined ~~not more than five thousand dollars pursuant to~~ **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-insuring~~ **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** ~~protections~~ **protection** of the Act and shall incur ~~potential~~ additional liabilities as noted below:

a. An employer who loses the **benefits and** protection of the Act ~~may be required~~ **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 ~~potential~~ 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,~~ **agents** or ~~employers~~ **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. ~~Depending upon the type of employer, the~~ **The** employer may also lose the right to assert certain defenses during the course of a civil action **brought** by its ~~employees~~ **injured employee or the employee's personal representative** to collect such damages.

c. The **<u>default</u>** liabilities described under subsection ~~3.5.b~~ **<u>3.5.</u>** of this rule are retroactive to ~~twelve o'clock p.m. (midnight)~~ **<u>Midnight</u>** 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 **<u>benefits and</u>** ~~protections~~ **<u>protection of the Act</u>** ~~described in subsection 3.5.a of this rule~~ and ~~to~~ **<u>may</u>** incur the additional liabilities described in subsection ~~3.5.b~~ **<u>3.5.</u>** of this rule. ~~Similarly, the subsection 3.5.b~~ **<u>The default</u>** liabilities **<u>of the employer</u>** are retroactive on the same basis as set forth in subsection 3.5.c. of this rule.

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

3.8. An employer who ~~voluntarily elects to subscribe to the Fund who does not cure its delinquency and make the payments as required by the subsection 3.3. notice shall be terminated from further participation in the Fund without further action by or notice from the commissioner.~~ **<u>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.</u>**

<u>3.9. Notice of default.</u>

<u>a. After the delinquency and default of a subscriber or self-insured employer, the division 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.</u>

<u>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 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.</u>

<u>c. Upon default, although notice of default is not required prior to the initiation or commencement by the division 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</u>

prior to any action of distraint or levy upon personal property of the employer or a responsible person.

~~3.9.~~ **3.10.** Any person required to ~~collect,~~ truthfully account ~~for,~~ **for** and pay over to the ~~commissioner~~ **division** 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 ~~collect the premium, premium deposit, interest or penalty, or~~ 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 ~~penalty~~ **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 collected,~~ or not accounted for and paid over. The ~~penalty~~ **sum of liability** is a personal obligation of the responsible person**, or persons, and is** immediately due and owing to the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** shall not certify to the secretary of state of West Virginia that all payments and interest due the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division**.

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 ~~Delinquent~~ Default Employers.

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

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 ~~not to exceed five hundred ($500.00)~~ **one thousand ($1,000.00)** dollars."

5.3. Posting the notice. -- The ~~commissioner~~ **division** 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 ~~commissioner~~ **division**. 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** records**.** ~~in the commissioner's office.~~ 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 ~~commissioner~~ **division** may require any sheriff, deputy sheriff, ~~constable,~~ 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 ~~commissioner~~ **division**, and any failure to post any notice within ten days after he or she shall have received the same from the ~~commissioner,~~ **division,** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division**, upon request, all information required by the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~secretary,~~ **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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division**.

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 ~~commissioner~~ **division** 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 ~~commissioner or~~ **division and** by filing a complete **gross wages** payroll report, ~~as may be applicable~~ **if not filed**. At this stage, the amounts claimed to be owed to the ~~commissioner~~ **division** shall include a requirement for the payment of interest on ~~the~~ **all** delinquent ~~premium payment~~ **payments** ~~and/or premium deposit~~ pursuant to W. Va. Code, §23-2-13. ~~The amounts claimed to be owed shall not include the amount of any penalty for claims losses.~~

a. In the event that the employer disputes the amounts claimed to be owed to the ~~commissioner~~ **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 ~~commissioner~~ **division** convene an administrative hearing pursuant to ~~subsection 13.11 and~~ 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 ~~commissioner~~ **division**. The ~~commissioner~~ **division** shall deposit the **disputed** payment into ~~his or her normal interest bearing~~ **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 ~~commissioner's~~ 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 ~~commissioner's~~ order resolving the dispute shall be interlocutory in nature and shall not be a final order for ~~appeals~~ **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 ~~commissioner's~~ 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,~~ **employer** ~~together with the interest earned on that portion,~~ from the amount previously paid by the employer.

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

a. Initiation of a civil action.

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. ~~Under certain additional circumstances, as specified below, initiation~~ **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. ~~Upon receipt of written application for reinstatement filed by the defaulted or terminated employer, the commissioner must issue notice of an administrative hearing upon the delinquency, the cure thereof, and any possible waiver of a portion of that cure.~~ **Informing the director of the division 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. 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** may initiate a distraint proceeding in the name of the state before the employer actually becomes delinquent. In exercising the power of distraint, the ~~commissioner~~ **division** shall do so only 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 ~~commissioner~~ **division** 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 ~~7.~~ 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** ~~premiums,~~ **premium taxes,** ~~delinquent~~ premium deposits, **penalty premium rate premium taxes, late reporting or payment penalties,** claims ~~losses~~ **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 ~~in~~ **of** the ~~commissioner's office~~ **division,** 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 ~~employer's~~ **lienee's** real estate, personal property of all ~~types,~~ **types** and combinations thereof.

8.2. In accordance with W. Va. Code, §23-2-5a and §38-10C-2, the ~~commissioner~~ **division** 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 ~~clerks' offices~~ **clerk's office** in each such county. The notice shall certify the amount of money that is owed to the Fund by the employer. ~~In addition, a duplicate original of each such notice shall be filed with the office of the secretary of state.~~

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 ~~commissioner.~~ **division.** 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 ~~commissioner.~~ **division 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 ~~all~~ purchasers (including a lien creditor) of real estate or personal property for a valuable consideration except for such purchasers with actual notice of the ~~commissioner's~~ **division'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 ~~commissioner's~~ 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 ~~commissioner's~~ lien.

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

§85-11-9. Civil Actions.

9.1. The ~~commissioner~~ **division** 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 3.9. of this rule, 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, ~~premiums,~~ **premium taxes,** premium ~~deposits.~~ **deposit, penalty premium rate premium taxes, late reporting or payment penalties,** claims ~~losses~~ **benefits** paid by the Fund, costs ~~and fees~~ of **serving or posting** notices**,** ~~and posting and service thereof,~~ **court and hearing charges and fees or any other amounts lawfully owed,** and interest thereon, ~~for~~ **by** employers in default; ~~or any amounts lawfully owed~~ by employers who have been terminated from coverage by the Fund; or**,** ~~amounts lawfully owed to the Fund~~ by employers who ~~elect~~ **elected** to self insure.

9.2. Such a civil action ~~shall~~ **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 ~~commissioner~~ **division** 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 section 18a, 18b, and 18c of article 1, chapter 14 of the ~~Code of~~ 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 ~~for~~ by W. Va. Code, §14-1-18. ~~In determining whether to settle or dismiss such a civil action, the commissioner~~

~~and the attorney general shall be guided by the six equitable considerations set forth at W. Va. Code §23-2-5(f), the evaluation of which shall be set forth in the settlement or dismissal order of the circuit court. The commissioner and the attorney general shall deviate from those six equitable considerations only for good cause which cause shall be fully described in any settlement or dismissal order of the circuit court.~~ 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 ~~employer~~ **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 ~~commissioner~~ **division** 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 ~~which~~ **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 ~~payments~~ **payment** of premium, premium ~~deposits,~~ **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, ~~and the commissioner has been unable to collect such payments by use of one or more of the following remedies -- a civil action, enforcement of lien, use of a distraint procedure, os collection from a court in a receivership or insolvency proceeding, all as provided for by W.Va. Code §23-2-5a, and by this rule --~~ the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** may, as an alternative to pursuing such an injunction, require such ~~a~~ delinquent employer to file a bond in the form prescribed by the ~~commissioner~~ **division** 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 ~~commissioner~~ **division**.

§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 ~~commissioner~~ **division** shall be represented by a **representative or** designee of the office of the attorney general and the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~Commissioner~~ **the division**. -- If any premium **tax**, premium deposit, penalty, interest, claims ~~losses,~~ **benefit** or other payment required by the Act is due and the employer is ~~delinquent, terminated, or~~ 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 ~~fifteen days~~ **the period of time provided for payment** after notice and demand as provided in subsection ~~12.1.e~~ **12.1.f.** hereof, it shall be lawful for the ~~commissioner~~ **division** 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** 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 ~~commissioner~~ **division** finds that the collection of such obligation is in jeopardy, notice and demand for immediate payment may be given by the ~~commissioner~~ **division** and, upon failure or refusal to pay such obligation, collection thereof by levy shall be lawful without regard to the ~~fifteen-day~~ **time** period provided in subsection 12.1.f. If the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~

division may levy upon property or rights to property, the ~~commissioner~~ **division** may seize and sell such property in accordance with section 12.4. of this rule.

c. The ~~commissioner~~ **division** ~~shall only~~ **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 ~~12.~~ 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 ~~commissioner~~ **division** for which levy is made, the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** has notified such employer in writing of his or her intention to make such levy. ~~Such~~ **A** notice shall also be given by the ~~commissioner~~ **division or other officer in the manner provided by applicable law** to all entities other than the employer of whom the ~~commissioner~~ **division or other officer** has knowledge and who have a higher priority lien or right to the property than that of the ~~commissioner~~ **division**.

B. ~~Fifteen day~~ **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 ~~certified mail,~~ **regular United States mail** ~~restricted delivery,~~ to such employer's last ~~known~~ address **of record at the division**, no less than ~~fifteen~~ **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 ~~commissioner~~ **division** 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 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 ~~commissioner~~ **division** 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 ~~Code of~~ 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;~~ **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. ~~Minimum exemption for wages,~~ **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 ~~subsection 12.2.d.~~ **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 ~~commissioner~~ **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.

~~d. Exempt amount of wages, salary and other income. -- In the case of an individual who is paid or receives all of his or her wages, salary and other income on a weekly basis, the amount of the wages, salary and other income payable to or receivable by the individual during any week which is exempt from levy under subsection 12.2.a.J shall be thirty (30) times the state minimum wage per hour, plus twenty-five dollars for each additional dependent of the individual.~~

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 ~~commissioner,~~ **division,** surrender such property or rights, or discharge such obligation, to the ~~commissioner,~~ **division,** 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 ~~commissioner,~~ **division,** 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 ~~commissioner,~~ **division,** surrenders such property or rights to property or discharges such obligation to the ~~commissioner~~ **division** 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 an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee or member~~ **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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** may sell any property seized under this section 12. of this rule. As soon as practicable after the seizure of the property, the ~~commissioner~~ **division** 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 ~~commissioner.~~ **division.** The sale shall be conducted by public auction, or by public sale under sealed bids. Before the sale, the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~is~~ sold is co-owned or ~~jointly-owned~~ **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~~ **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 ~~commissioner~~ **division** 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, ~~he or she~~ **the division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** an amount equal to the appraised value; or, (b) gives bond in such form, with such sureties, and in such amount as the ~~commissioner~~ **division** shall
prescribe, to pay the appraised amount at such time as the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** at any time prior to the sale thereof, and upon such payment, the ~~commissioner~~ **division** 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 ~~commissioner's~~ **division's** lien. -- Any entity redeeming the interest of another shall be subrogated to the lien of the ~~commissioner~~ **division** on such interest. Such entity shall lose his, ~~her,~~ **her** or its right to this lien, however, unless within thirty (30) days after receiving the certificate of sale of personal property, he, ~~she,~~ **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,~~ **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 ~~commissioner~~ **division** 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 ~~given~~ 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, to~~ **received by** any corporation, company or association ~~of such transfer,~~ 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 ~~commissioner~~ **division** with respect to which the levy was made had priority.

12.9. Records of sale. -- The ~~commissioner~~ **division** 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,~~ **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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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; ~~and~~ (b) second, ~~the amount, if any~~ **any amount** remaining shall then be applied against the liability in respect of which the levy was made ~~of~~ **and** the sale **was** conducted**; and, (c) third, any amount still** ~~The amount, if any,~~ remaining shall then be applied against any other delinquent liability of the employer for which levy may be made under ~~this section 12 of~~ 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 ~~commissioner~~ **division** 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 ~~commissioner~~ **division** to release the levy upon all or part of the property or rights to property levied upon where the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** determines that property has been wrongfully levied upon, it shall be lawful for the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** 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 has been made within such time period.** For purposes of this ~~section~~ **subsection** 12.12.b., if property is declared purchased by the ~~commissioner~~ **division** at a sale pursuant to subsection 12.4., the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** from the resale of such property.

c. Public information. -- The ~~commissioner~~ **division** 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 ~~subsequently~~ 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 ~~commissioner~~ **division** and upon payment into the Fund of all unpaid ~~premiums,~~ **premium taxes,** an adequate premium deposit, accrued interest, ~~claims losses paid during the period of delinquency and any subsequent default or termination,~~ **penalties** and any other amount due under the Act or the rules promulgated by the commissioner **or the compensation programs performance council.**

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 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.** ~~Applications~~ **Application** for reinstatement shall be made upon forms prescribed by the ~~commissioner~~ **division** and shall include a report of the gross **wages** payroll of the employer during the entire period of ~~delinquencies~~ **delinquency** and ~~any~~ subsequent default or termination, which payroll information shall be verified by the employer or its authorized agent, and **an application** shall further include ~~a~~ **an application deposit** payment equal to one half of one percent of the gross **wages** payroll ~~reported~~ 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. ~~An~~ **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** ~~the~~ application **and proper application deposit** is received by the ~~commissioner~~ **division** and thereafter. However, if the ~~commissioner~~ **division** subsequently reinstates an employer subject to the terms of a ~~repayment~~ **reinstatement** agreement, then the subsequent failure of the employer to make scheduled payments in accordance with the ~~repayment~~ **reinstatement** agreement, to timely file **and pay** current ~~premiums,~~ **premium tax** or to restore the premium deposit to the required amount by the end of the repayment period shall cause the ~~repayment~~ **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, ~~either~~ the withdrawal of an application for reinstatement**;** ~~or~~ the failure to timely file reports or make ~~the~~ **quarterly or current premium tax** payments ~~determined to be owed~~ to the ~~commissioner~~ **division 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, within thirty (30) days of the applicant's receipt of the agreement, the reinstatement agreement offered by the division, ~~following the entry of a final order~~ shall cause the application for reinstatement to be null, void and of no ~~effect,~~ **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.~~

~~13.5.~~

~~13.6.~~

~~13.7.~~

~~13.8.~~

~~13.9.~~

~~13.10.~~ **13.4.** Pursuant to section 6. of this rule, the ~~commissioner~~ **division** may direct that a complete audit of the employer's account be made at any time after ~~a reinstatement~~ **an** application **for reinstatement** is received from the employer. ~~The purpose of the audit shall be to develop or verify, or both, the evidence to be presented at the administrative hearing.~~

~~13.11.~~

~~13.12.~~ **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 ~~commissioner.~~ **division.** The ~~commissioner~~ **division** may then delay or continue further pursuit of that remedial ~~action, if~~ **action if,** in the ~~commissioner's~~ **division's** sole discretion, the interests of the Fund will be protected or furthered despite such delay or continuance. One factor that the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** will generally, unless some other good cause exists to the contrary, continue to proceed with the other remedies. ~~Further, such earlier repayment agreements and defaults thereon shall be considered as evidence in weighing the six (6) factors set out in subsection 13.5 of this rule.~~

~~13.13.~~

~~13.14.~~ **13.6. In addition, entry into a reinstatement agreement is discretionary with the division. Such discretion shall be exercised in keeping with the fiduciary obligations owed to the workers' compensation fund. Should the division decline to enter into a reinstatement agreement and should the employer not comply with the provisions of subsection 13.1., then the division 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.**

~~13.15.~~ **13.7.** The ~~commissioner~~ **division** 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 ~~repayment~~ **reinstatement** agreement. The ~~commissioner~~ **division** shall exercise ~~his or her~~ **it's** discretion to enter into such an agreement and shall prescribe the terms of an agreement**.** ~~solely upon the basis of the factors set forth in subsection 13.5 of this rule. The repayment agreement may not authorize or permit any further reduction or waiver of the penalties to be imposed upon the employer beyond that expressly provided for in the commissioner's final order.~~ The ~~repayment~~ **reinstatement** agreement shall not authorize or permit the reduction or waiver of any part of the premium or premium deposit, or other amount ~~found to be~~ due**,** ~~by the commissioner's final order.~~ Further, the ~~repayment~~ **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. ~~Interest shall be charged at the rate of two percentage points above the prime rate as listed in the guide to general levels of money rates in the first New York edition of the Wall Street Journal published in the month during which the agreement was executed. Interest shall be compounded quarterly over the term of the 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 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 in the reinstatement agreement.** The breach of a ~~repayment~~ **reinstatement** agreement by the employer shall ~~constitute a withdraw by the employer of its original reapplication request and shall~~ render the ~~reapplication~~ **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.

~~14.1.~~ 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 ~~this section~~ **Procedural Rule, Bureau of Employment Programs, Workers' Compensation Division, 85 C.S.R. 7, Rules for Selected Hearings**.

~~14.2. Unless waived by all the parties to the hearing and by the commissioner,~~ ~~**division,**~~ ~~all hearings shall be preceded by at least ten (10) days written notice. The notice shall be given either by personal delivery thereof to the person or to the entity to be notified or by depositing such notice in the certified United States mail, postage prepaid, return receipt requested, in an envelope addressed to such person or other entity at the last known address of such person or other entity. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or~~

~~assistant or employee of the Fund, or by affidavit of any person over eighteen years of age, naming the person or other entity to which or to whom such notice was given and specifying the time, place and manner of the giving thereof. If certified mail is used, then a copy of the return receipt shall be attached to the proof of notice.~~

~~14.3. Notice of the hearing and service of any document or order shall be upon the parties of record except that any party who is represented by an attorney shall be deemed to have designated that attorney as the proper recipient of all such notices, documents or orders and service upon that attorney will be the equivalent for all purposes as service upon the party~~**~~, as provided in W. Va. Code, §23-1-13(g).~~** ~~Notice shall be complete if the written notice is personally tendered to the intended recipient and is either accepted or refused by that recipient. Similarly, notice shall be complete if the written notice is sent by certified mail, return receipt requested, to the recipient and the return receipt shows that it was either accepted by a person at the last known address or was refused by a person at the last known address. In every case, a copy of the notice shall be sent to the office of the secretary of state for publication in the State Register.~~

~~14.4. In any instance where any form of notice~~ **~~is given~~**~~, including one arising under subsection 14.2. of this rule or one contained in any order or document, the time period will begin to elapse with the first day following the date of the notice, order, or document. This rule is applicable whether the notice is delivered personally or served by mail.~~

~~14.5. The subsection 14.2. notice shall contain the date, time, and place of the hearing and a short and plain statement of the matters asserted~~ **~~or the issues to be heard.~~** ~~If the commissioner~~ **~~division~~** ~~is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application by a party, a more definitive and detailed statement shall be furnished.~~

~~14.6. The hearing shall be held in the county selected by the commissioner.~~ **division.**

~~14.7. At the hearing, an opportunity shall be afforded all parties to present evidence and argument with respect to the matters and issues involved. Any person interested in the proceeding, but not a party thereto, shall be permitted to testify as to the issues in controversy after first being placed under oath or affirmation. Any such interested person, who is not a party, shall not, however, be permitted to submit argument or to cross-examine other witnesses; except that, argument may be restricted to a presentation in written form. All of the testimony and evidence at the hearing shall be reported by stenographic notes and characters or by mechanical~~ **~~or electronic~~** ~~means. All rulings on the admissibility of testimony and evidence shall also be reported. The Fund shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. Upon request from any party to the hearing, all reported testimony and evidence at a hearing shall be transcribed and a copy thereof furnished to the party at its expense pursuant to W. Va. Code, §23-1-12. The Fund shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence and such transcription shall be accomplished with all dispatch.~~

~~14.8. Evidentiary depositions may be taken and read as in civil actions in the circuit court~~ ~~**courts**~~ ~~of this state.~~

~~14.9. Except to the extent required by statute or by this rule, all hearings under this rule will be conducted in accordance with the then-current versions of the~~ ~~**West Virginia**~~ ~~"Rules of Civil Procedure for Trial Court~~ ~~**Courts**~~ ~~of Record", "Trial Courts~~ ~~**Court**~~ ~~Rules for Trial Courts of Record" and "Local Rules for Kanawha County Civil Courts" as those rules would apply to a trial court sitting without a jury.~~

~~14.10. All hearings shall be conducted in an impartial manner and shall be open to members of the public. The commissioner, the executive secretary~~ ~~**director,**~~ ~~and every hearing officer appointed by the commissioner~~ ~~**or the division**~~ ~~shall have the power to administer oaths and affirmations, certify official acts, take depositions, rule upon offers of proof and receive relevant evidence, regulate the course of the hearing, hold conferences for the settlement or simplification of the issues (subject to the limitations stated elsewhere in this rule) by consent of the parties, dispose of procedural requests, motions, or similar matters, and take such other actions as are authorized by this rule.~~

~~14.11. During a hearing, irrelevant, immaterial or unduly repetitious evidence shall be excluded. The then current "Rules of Evidence" as applied in civil cases by a court sitting without a jury shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their office. The hearing officer shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record, but exceptions to rulings by the hearing officer shall not be made. Any party to any hearing may vouch the record as to any excluded testimony or other evidence provided that~~ ~~**evidence; however,**~~ ~~the hearing officer may elect to require that the excluded testimony be submitted in written form following the hearing.~~

~~14.12. All evidence, including papers, records, agency staff memoranda and documents in the possession of the Fund, of which it desires to avail itself, shall be offered and made a part of the record in the case, and~~ ~~**case; and,**~~ ~~no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies of excerpts or by incorporation by reference. In all cases, copies of orders, proceedings, or records in the office~~ ~~**offices**~~ ~~of the commissioner~~ ~~**division**~~ ~~shall be equal to the original in evidence.~~

~~14.13. Every party, including the Fund, shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence.~~ ~~**If a party wishes to cross-examine the Fund's actuary or accountant with regard to any relevant information or issue, the party shall bear the travel expenses involved in taking such witness' testimony. In addition, the party shall pay for the witness' time in preparing to testify, for testifying and for travel to and from the place of testifying at the witness' standard hourly rates.**~~ ~~No subpoena will be issued without prepayment of the travel costs and an acknowledgment of responsibility for paying for the~~

~~witness' time. Subsequent failure to pay for the witness' costs and time shall be deemed a withdrawal of the reinstatement request or a withdrawal of the elicited testimony at the discretion of the commissioner.~~ **division.** ~~If the commissioner~~ **division** ~~eventually pays for the witness' costs or time, then the employer's account will be charged for such payments and~~ **~~such charge~~** ~~will constitute a payment due to the commissioner under the Act and this rule.~~

~~14.14. All witnesses who testify during a hearing shall first be subject to oath or affirmation and any testimony submitted by deposition shall show on the face thereof that the witness was so qualified.~~

~~14.15. The hearing officer may take notice of judicially cognizable facts. All parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.~~

~~14.16. Upon motion in writing, served by any party or by the Fund as notice may be served pursuant to subsection 14.2. of this rule, and therein assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the hearing officer shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing or shall direct that the transcript be corrected and revised in the respects designated by the hearing officer, so as to make it conform to the whole truth.~~

~~14.17. The commissioner,~~ **the division,** ~~the executive secretary,~~ **director** ~~or a hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents and testimony. All subpoenas and subpoenas duces tecum shall be issued in the name of the commissioner, but any party requesting their issuance must see that they are properly served. Service of subpoenas duces tecum issued at the instance of the Fund shall be the responsibility of the Fund. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay service fees and fees for the attendance and travel of witnesses as specified in subsection 14.19. of this rule.~~

~~14.18. Every subpoena or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail. But a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail. If service is by mail, then the five (5) days notice period shall not begin to run until the date the subpoena or subpoena duces tecum is received by the person or entity subject thereto as shown by the date on the return receipt.~~

~~14.19. Any person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this state. All such fees shall be paid by the Fund if the subpoena or subpoena duces tecum was issued, without the request of an interested party, at the instance of the Fund. All such fees related~~

~~to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued.~~

~~14.20. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held, or the circuit court in which the subpoena duces tecum was served, or the judge of either such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such court, under the West Virginia "Rules of Civil Procedure for Trial Courts of Record," could grant, and for any of the same reasons, with respect to a subpoena duces tecum issued from either such court.~~

~~14.21. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the commissioner,~~ ~~**division,**~~ ~~shall compel obedience by attachment proceedings for contempt of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein.~~

~~14.22. The issuance of a subpoena duces tecum will be refused only in an instance when there is good cause to believe that the subpoena power is being abused. All subpoenas and subpoenas duces tecum will state on their face the name of the party who requested it.~~

~~14.23. Prehearing discovery shall be engaged in only with the consent of the hearing officer or, if a hearing officer has not yet been assigned, with the consent of the commissioner or the executive secretary.~~ **director.** ~~All discovery requests will be submitted to the appropriate official at the same time as the discovery request is served upon the other party. If the official determines that the requested information is relevant and material to the issues to be heard and not unduly burdensome, the official will permit the discovery and set a reasonable time frame for the disclosure of the information. Determination of a reasonable time frame will be premised upon the nature and scope of the information requested and the date on which the hearing is scheduled. The official shall attempt to avoid continuing a previously scheduled hearing.~~

~~14.24. Every hearing officer appointed by the commissioner~~ ~~**or the division**~~ ~~to conduct a hearing under this rule shall be an attorney licensed to practice law in this state.~~

~~14.25. The hearing officer is authorized to receive and rule upon any procedural matter arising before, during or after a hearing. All final rulings on substantive matters shall be made by the commissioner.~~

~~14.26. The hearing officer shall continue a hearing upon motion of the commissioner.~~ ~~**division.**~~ ~~Requests for continuances by any other party shall not be granted as a matter of course, but only upon a showing of good cause which cause shall be strictly construed against the requests.~~

~~14.27. At the conclusion of the hearing, the parties shall be permitted to file prepared findings of fact and conclusion **conclusions** of law and such legal briefs or memoranda as they wish. The parties shall be permitted seven (7) days to file such items which **and such** filings shall be concurrent. The parties shall be permitted three (3) days to respond to the filing of any other party. No further argument shall be permitted.~~

~~14.28. Thereafter, the hearing officer will prepare a report and recommendation which shall contain proposed findings of fact and conclusions of law as suggested by the hearing officer for the commissioner's approval. The parties to the hearing shall then be permitted five (5) days in which to file objections or comments upon the report and recommendation. Thereafter, the commissioner shall decide whether to accept the report and recommendation, to reject it, to modify it or to remand the matter to the hearing officer for further proceedings or upon other instructions. In approving or modifying a report and recommendation, the commissioner shall not have the discretion to waive any portion of any payment due by the employer under the Act. except for the penalty provided for by the payment of interest and claims losses. In making any such waiver, the commissioner's discretion shall also be limited to the use of the six criteria contained in subsection 13.5 of this rule. However, the commissioner retains his or her right to review any and all proposed findings of facts **fact** against the record and to disagree therewith provided that the commissioner states the basis for the disagreement in his or her final order. The commissioner shall render either a final order or an interlocutory order, as his or her decision may require, in which the commissioner accepts in whole or in part the proposed findings of fact and conclusions of law submitted by the hearing officer and, to the extent that the commissioner rejects or modifies the report and recommendation of the hearing officer, the commissioner shall furnish his or her own findings of fact and conclusions of law.~~

~~14.29. A copy of the final order or decision of the commissioner shall be served upon each party and the party's attorney of record, if any, either in person or by registered or certified mail. A copy of every final order or decision shall be sent to the office of the secretary of state for publication in the State Register.~~

~~14.30. All appeals from the final order or decision of the commissioner shall be taken pursuant to W. Va. Code, §29A-5-4.~~

~~14.31. As part of every final order or decision, the commissioner shall note the expense to the Fund of conducting the hearing upon the reinstatement application. **hearing.** Such items as the expense in retaining a hearing officer to conduct the hearing and make a report and recommendation to the commissioner, the cost of a court reporter to attend the hearing and transcribe the proceedings, the costs and fees for witnesses, and such other costs incurred by the Fund shall be noted in the final order or decision. However, such other costs shall not include costs of administration of the Fund, including salaries, which would have been paid by the Fund even if the hearing had not taken place. Unless waived by the commissioner as part of his or her findings, under subsection 13.5, these amounts shall, in whole or in part, be charged to the employer's account and shall constitute a payment due by the employer to the commissioner. **division.**~~

§85-11-15. Interest.

15.1. Any and all payments unpaid on the date on which due and payable, as prescribed by the ~~commissioner,~~ **division,** shall immediately begin bearing interest. ~~at the rate of two percentage points above the prime rate as listed in the guide to general levels of money rates in the first New York edition of the Wall Street Journal published in the month during which such payments were due.~~ Interest shall be compounded quarterly until payment plus accrued interest is received by the ~~commissioner.~~ **division; except that future interest for reinstatement agreements shall be calculated and provided at a simple rate of interest.** ~~This interest rate shall be in effect for the remainder of the quarter during which the premium payment is due. Except as provided for in subsection 13.15 of this rule, the interest shall be redetermined quarterly in accordance with this subsection.~~ 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 subdivision of the state or a volunteer fire department exceed ten percent per annum.

§85-11-16. 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 ~~commissioner~~ **division** shall receive the initial notice of that delinquency or default within sixty (60) days of the ~~commissioner's~~ **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 commencment 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 ~~commissioner~~ **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 ~~losses,~~ **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 ~~protections~~ **protection** of the Act, as well as the incurring of ~~special~~ liabilities under the Act by a delinquent, ~~defaulted,~~ **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 ~~commissioner~~ **division** under this rule or as contained in the Act, the ~~commissioner~~ **division** may elect to request prosecution of any person, firm, partnership, association, ~~or~~ 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~~ of Information Act.

Pursuant to the Freedom ~~Of~~ **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 ~~to~~ 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 ~~commissioner~~ **division** shall release in its place a statement explaining in detail the basis for the withholding of the record.

§85-11-19. 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.

c. Public information. -- The ~~commissioner~~ **division** 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 ~~subsequently~~ 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 ~~commissioner~~ **division** and upon payment into the Fund of all unpaid ~~premiums,~~ **premium taxes,** an adequate premium deposit, accrued interest, ~~claims losses paid during the period of delinquency and any subsequent default or termination,~~ **penalties** and any other amount due under the Act or the rules promulgated by the commissioner **or the compensation programs performance council.**

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 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.** ~~Applications~~ **Application** for reinstatement shall be made upon forms prescribed by the ~~commissioner~~ **division** and shall include a report of the gross **wages** payroll of the employer during the entire period of ~~delinquencies~~ **delinquency** and ~~any~~ subsequent default or termination, which payroll information shall be verified by the employer or its authorized agent, and **an application** shall further include ~~a~~ **an application deposit** payment equal to one half of one percent of the gross **wages** payroll ~~reported~~ 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. ~~An~~ **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** ~~the~~ application **and proper application deposit** is received by the ~~commissioner~~ **division** and thereafter. However, if the ~~commissioner~~ **division** subsequently reinstates an employer subject to the terms of a ~~repayment~~ **reinstatement** agreement, then the subsequent failure of the employer to make scheduled payments in accordance with the ~~repayment~~ **reinstatement** agreement, to timely file **and pay** current ~~premiums,~~ **premium tax** or to restore the premium deposit to the required amount by the end of the repayment period shall cause the ~~repayment~~ **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, ~~either~~ the withdrawal of an application for reinstatement**;** ~~or~~ the failure to timely file reports or make ~~the~~ **quarterly or current premium tax** payments ~~determined to be owed~~ to the ~~commissioner~~ **division** **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, within thirty (30) days of the applicant's receipt of the agreement, the reinstatement agreement offered by the division, ~~following the entry of a final order~~ shall cause the application for reinstatement to be null, void and of no ~~effect,~~ **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.~~

~~13.5.~~

~~13.6.~~

~~13.7.~~

~~13.8.~~

~~13.9.~~

~~13.10.~~ **13.4.** Pursuant to section 6. of this rule, the ~~commissioner~~ **division** may direct that a complete audit of the employer's account be made at any time after ~~a reinstatement~~ **an** application **for reinstatement** is received from the employer. ~~The purpose of the audit shall be to develop or verify, or both, the evidence to be presented at the administrative hearing.~~

~~13.11.~~

~~13.12.~~ **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 ~~commissioner.~~ **division.** The ~~commissioner~~ **division** may then delay or continue further pursuit of that remedial ~~action, if~~ **action if,** in the ~~commissioner's~~ **division's** sole discretion, the interests of the Fund will be protected or furthered despite such delay or continuance. One factor that the ~~commissioner~~ **division** 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 ~~commissioner~~ **division** will generally, unless some other good cause exists to the contrary, continue to proceed with the other remedies. ~~Further, such earlier repayment agreements and defaults thereon shall be considered as evidence in weighing the six (6) factors set out in subsection 13.5 of this rule.~~

~~13.13.~~

~~13.14.~~ **13.6. In addition, entry into a reinstatement agreement is discretionary with the division. Such discretion shall be exercised in keeping with the fiduciary obligations owed to the workers' compensation fund. Should the division decline to enter into a reinstatement agreement and should the employer not comply with the provisions of subsection 13.1., then the division 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.**

~~13.15.~~ **13.7.** The ~~commissioner~~ **division** 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 ~~repayment~~ **reinstatement** agreement. The ~~commissioner~~ **division** shall exercise ~~his or her~~ **it's** discretion to enter into such an agreement and shall prescribe the terms of an agreement**.** ~~solely upon the basis of the factors set forth in subsection 13.5 of this rule. The repayment agreement may not authorize or permit any further reduction or waiver of the penalties to be imposed upon the employer beyond that expressly provided for in the commissioner's final order.~~ The ~~repayment~~ **reinstatement** agreement shall not authorize or permit the reduction or waiver of any part of the premium or premium deposit, or other amount ~~found to be~~ due**.** ~~by the commissioner's final order.~~ Further, the ~~repayment~~ **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. ~~Interest shall be charged at the rate of two percentage points above the prime rate as listed in the guide to general levels of money rates in the first New York edition of the Wall Street Journal published in the month during which the agreement was executed. Interest shall be compounded quarterly over the term of the 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 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 in the reinstatement agreement.** The breach of a ~~repayment~~ **reinstatement** agreement by the employer shall ~~constitute a withdraw by the employer of its original reapplication request and shall~~ render the ~~reapplication~~ **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.

~~14.1.~~ 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 ~~this section~~ **Procedural Rule, Bureau of Employment Programs, Workers' Compensation Division, 85 C.S.R. 7, Rules for Selected Hearings**.

~~14.2. Unless waived by all the parties to the hearing and by the commissioner,~~ ~~**division,**~~ ~~all hearings shall be preceded by at least ten (10) days written notice. The notice shall be given either by personal delivery thereof to the person or to the entity to be notified or by depositing such notice in the certified United States mail, postage prepaid, return receipt requested, in an envelope addressed to such person or other entity at the last known address of such person or other entity. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or~~

~~assistant or employee of the Fund, or by affidavit of any person over eighteen years of age, naming the person or other entity to which or to whom such notice was given and specifying the time, place and manner of the giving thereof. If certified mail is used, then a copy of the return receipt shall be attached to the proof of notice.~~

~~14.3. Notice of the hearing and service of any document or order shall be upon the parties of record except that any party who is represented by an attorney shall be deemed to have designated that attorney as the proper recipient of all such notices, documents or orders and service upon that attorney will be the equivalent for all purposes as service upon the party~~~~**, as provided in W. Va. Code, §23-1-13(g).**~~ ~~Notice shall be complete if the written notice is personally tendered to the intended recipient and is either accepted or refused by that recipient. Similarly, notice shall be complete if the written notice is sent by certified mail, return receipt requested, to the recipient and the return receipt shows that it was either accepted by a person at the last known address or was refused by a person at the last known address. In every case, a copy of the notice shall be sent to the office of the secretary of state for publication in the State Register.~~

~~14.4. In any instance where any form of notice~~ ~~**is given,**~~ ~~including one arising under subsection 14.2. of this rule or one contained in any order or document, the time period will begin to elapse with the first day following the date of the notice, order, or document. This rule is applicable whether the notice is delivered personally or served by mail.~~

~~14.5. The subsection 14.2. notice shall contain the date, time, and place of the hearing and a short and plain statement of the matters asserted~~ ~~**or the issues to be heard.**~~ ~~If the commissioner~~ **division** ~~is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application by a party, a more definitive and detailed statement shall be furnished.~~

~~14.6. The hearing shall be held in the county selected by the commissioner.~~ **division.**

~~14.7. At the hearing, an opportunity shall be afforded all parties to present evidence and argument with respect to the matters and issues involved. Any person interested in the proceeding, but not a party thereto, shall be permitted to testify as to the issues in controversy after first being placed under oath or affirmation. Any such interested person, who is not a party, shall not, however, be permitted to submit argument or to cross-examine other witnesses; except that, argument may be restricted to a presentation in written form. All of the testimony and evidence at the hearing shall be reported by stenographic notes and characters or by mechanical~~ ~~**or electronic**~~ ~~means. All rulings on the admissibility of testimony and evidence shall also be reported. The Fund shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. Upon request from any party to the hearing, all reported testimony and evidence at a hearing shall be transcribed and a copy thereof furnished to the party at its expense pursuant to W. Va. Code, §23-1-12. The Fund shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence and such transcription shall be accomplished with all dispatch.~~

~~14.8. Evidentiary depositions may be taken and read as in civil actions in the circuit court~~ ~~**courts**~~ ~~of this state.~~

~~14.9. Except to the extent required by statute or by this rule, all hearings under this rule will be conducted in accordance with the then current versions of the~~ ~~**West Virginia**~~ ~~"Rules of Civil Procedure for Trial Court~~ ~~**Courts**~~ ~~of Record", "Trial Courts~~ ~~**Court**~~ ~~Rules for Trial Courts of Record" and "Local Rules for Kanawha County Civil Courts" as those rules would apply to a trial court sitting without a jury.~~

~~14.10. All hearings shall be conducted in an impartial manner and shall be open to members of the public. The commissioner, the executive secretary~~ ~~**director**~~~~, and every hearing officer appointed by the commissioner~~ ~~**or the division**~~ ~~shall have the power to administer oaths and affirmations, certify official acts, take depositions, rule upon offers of proof and receive relevant evidence, regulate the course of the hearing, hold conferences for the settlement or simplification of the issues (subject to the limitations stated elsewhere in this rule) by consent of the parties, dispose of procedural requests, motions, or similar matters, and take such other actions as are authorized by this rule.~~

~~14.11. During a hearing, irrelevant, immaterial or unduly repetitious evidence shall be excluded. The then current "Rules of Evidence" as applied in civil cases by a court sitting without a jury shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their office. The hearing officer shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record, but exceptions to rulings by the hearing officer shall not be made. Any party to any hearing may vouch the record as to any excluded testimony or other evidence provided that~~ ~~**evidence; however,**~~ ~~the hearing officer may elect to require that the excluded testimony be submitted in written form following the hearing.~~

~~14.12. All evidence, including papers, records, agency staff memoranda and documents in the possession of the Fund, of which it desires to avail itself, shall be offered and made a part of the record in the case, and~~ ~~**case; and,**~~ ~~no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies of excerpts or by incorporation by reference. In all cases, copies of orders, proceedings, or records in the office~~ ~~**offices**~~ ~~of the commissioner~~ ~~**division**~~ ~~shall be equal to the original in evidence.~~

~~14.13. Every party, including the Fund, shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence.~~ ~~**If a party wishes to cross-examine the Fund's actuary or accountant with regard to any relevant information or issue, the party shall bear the travel expenses involved in taking such witness' testimony. In addition, the party shall pay for the witness' time in preparing to testify, for testifying and for travel to and from the place of testifying at the witness' standard hourly rates.**~~ ~~No subpoena will be issued without prepayment of the travel costs and an acknowledgment of responsibility for paying for the~~

~~witness' time. Subsequent failure to pay for the witness' costs and time shall be deemed a withdrawal of the reinstatement request or a withdrawal of the elicited testimony at the discretion of the commissioner.~~ **division.** ~~If the commissioner~~ **division** ~~eventually pays for the witness' costs or time, then the employer's account will be charged for such payments and~~ **such charge** ~~will constitute a payment due to the commissioner under the Act and this rule.~~

~~14.14. All witnesses who testify during a hearing shall first be subject to oath or affirmation and any testimony submitted by deposition shall show on the face thereof that the witness was so qualified.~~

~~14.15. The hearing officer may take notice of judicially cognizable facts. All parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.~~

~~14.16. Upon motion in writing, served by any party or by the Fund as notice may be served pursuant to subsection 14.2. of this rule, and therein assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the hearing officer shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing or shall direct that the transcript be corrected and revised in the respects designated by the hearing officer, so as to make it conform to the whole truth.~~

~~14.17. The commissioner,~~ **the division,** ~~the executive secretary,~~ **director** ~~or a hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents and testimony. All subpoenas and subpoenas duces tecum shall be issued in the name of the commissioner, but any party requesting their issuance must see that they are properly served. Service of subpoenas duces tecum issued at the instance of the Fund shall be the responsibility of the Fund. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay service fees and fees for the attendance and travel of witnesses as specified in subsection 14.19. of this rule.~~

~~14.18. Every subpoena or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail. But a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail. If service is by mail, then the five (5) days notice period shall not begin to run until the date the subpoena or subpoena duces tecum is received by the person or entity subject thereto as shown by the date on the return receipt.~~

~~14.19. Any person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this state. All such fees shall be paid by the Fund if the subpoena or subpoena duces tecum was issued, without the request of an interested party, at the instance of the Fund. All such fees related~~

~~to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued.~~

~~14.20. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held, or the circuit court in which the subpoena duces tecum was served, or the judge of either such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such court, under the West Virginia "Rules of Civil Procedure for Trial Courts of Record," could grant, and for any of the same reasons, with respect to a subpoena duces tecum issued from either such court.~~

~~14.21. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the commissioner,~~ **division,** ~~shall compel obedience by attachment proceedings for contempt of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein.~~

~~14.22. The issuance of a subpoena duces tecum will be refused only in an instance when there is good cause to believe that the subpoena power is being abused. All subpoenas and subpoenas duces tecum will state on their face the name of the party who requested it.~~

~~14.23. Prehearing discovery shall be engaged in only with the consent of the hearing officer or, if a hearing officer has not yet been assigned, with the consent of the commissioner or the executive secretary.~~ **director.** ~~All discovery requests will be submitted to the appropriate official at the same time as the discovery request is served upon the other party. If the official determines that the requested information is relevant and material to the issues to be heard and not unduly burdensome, the official will permit the discovery and set a reasonable time frame for the disclosure of the information. Determination of a reasonable time frame will be premised upon the nature and scope of the information requested and the date on which the hearing is scheduled. The official shall attempt to avoid continuing a previously scheduled hearing.~~

~~14.24. Every hearing officer appointed by the commissioner~~ **or the division** ~~to conduct a hearing under this rule shall be an attorney licensed to practice law in this state.~~

~~14.25. The hearing officer is authorized to receive and rule upon any procedural matter arising before, during or after a hearing. All final rulings on substantive matters shall be made by the commissioner.~~

~~14.26. The hearing officer shall continue a hearing upon motion of the commissioner.~~ **division.** ~~Requests for continuances by any other party shall not be granted as a matter of course, but only upon a showing of good cause which cause shall be strictly construed against the requests.~~

~~14.27. At the conclusion of the hearing, the parties shall be permitted to file prepared findings of fact and conclusion **conclusions** of law and such legal briefs or memoranda as they wish. The parties shall be permitted seven (7) days to file such items which **and such** filings shall be concurrent. The parties shall be permitted three (3) days to respond to the filing of any other party. No further argument shall be permitted.~~

~~14.28. Thereafter, the hearing officer will prepare a report and recommendation which shall contain proposed findings of fact and conclusions of law as suggested by the hearing officer for the commissioner's approval. The parties to the hearing shall then be permitted five (5) days in which to file objections or comments upon the report and recommendation. Thereafter, the commissioner shall decide whether to accept the report and recommendation, to reject it, to modify it or to remand the matter to the hearing officer for further proceedings or upon other instructions. In approving or modifying a report and recommendation, the commissioner shall not have the discretion to waive any portion of any payment due by the employer under the Act. except for the penalty provided for by the payment of interest and claims losses. In making any such waiver, the commissioner's discretion shall also be limited to the use of the six criteria contained in subsection 13.5 of this rule. However, the commissioner retains his or her right to review any and all proposed findings of facts **fact** against the record and to disagree therewith provided that the commissioner states the basis for the disagreement in his or her final order. The commissioner shall render either a final order or an interlocutory order, as his or her decision may require, in which the commissioner accepts in whole or in part the proposed findings of fact and conclusions of law submitted by the hearing officer and, to the extent that the commissioner rejects or modifies the report and recommendation of the hearing officer, the commissioner shall furnish his or her own findings of fact and conclusions of law.~~

~~14.29. A copy of the final order or decision of the commissioner shall be served upon each party and the party's attorney of record, if any, either in person or by registered or certified mail. A copy of every final order or decision shall be sent to the office of the secretary of state for publication in the State Register.~~

~~14.30. All appeals from the final order or decision of the commissioner shall be taken pursuant to W. Va. Code, §29A-5-4.~~

~~14.31. As part of every final order or decision, the commissioner shall note the expense to the Fund of conducting the hearing upon the reinstatement application. **hearing.** Such items as the expense in retaining a hearing officer to conduct the hearing and make a report and recommendation to the commissioner, the cost of a court reporter to attend the hearing and transcribe the proceedings, the costs and fees for witnesses, and such other costs incurred by the Fund shall be noted in the final order or decision. However, such other costs shall not include costs of administration of the Fund, including salaries, which would have been paid by the Fund even if the hearing had not taken place. Unless waived by the commissioner as part of his or her findings, under subsection 13.5, these amounts shall, in whole or in part, be charged to the employer's account and shall constitute a payment due by the employer to the commissioner. **division.**~~

§85-11-15. Interest.

15.1. Any and all payments unpaid on the date on which due and payable, as prescribed by the ~~commissioner,~~ **division,** shall immediately begin bearing interest, ~~at the rate of two percentage points above the prime rate as listed in the guide to general levels of money rates in the first New York edition of the Wall Street Journal published in the month during which such payments were due.~~ Interest shall be compounded quarterly until payment plus accrued interest is received by the ~~commissioner.~~ **division; except that future interest for reinstatement agreements shall be calculated and provided at a simple rate of interest.** ~~This interest rate shall be in effect for the remainder of the quarter during which the premium payment is due. Except as provided for in subsection 13.15 of this rule, the interest shall be redetermined quarterly in accordance with this subsection.~~ 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 subdivision of the state or a volunteer fire department exceed ten percent per annum.

§85-11-16. 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 ~~commissioner~~ **division** shall receive the initial notice of that delinquency or default within sixty (60) days of the ~~commissioner's~~ **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 commencment 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 ~~commissioner~~ **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 ~~losses,~~ **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 ~~protections~~ **protection** of the Act, as well as the incurring of ~~special~~ liabilities under the Act by a delinquent, ~~defaulted,~~ **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 ~~commissioner~~ **division** under this rule or as contained in the Act, the ~~commissioner~~ **division** may elect to request prosecution of any person, firm, partnership, association, ~~or~~ 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~~ of Information Act.

Pursuant to the Freedom ~~Of~~ **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 ~~to~~ 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 ~~commissioner~~ **division** shall release in its place a statement explaining in detail the basis for the withholding of the record.

§85-11-19. 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.

Bureau of Employment Programs
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Gaston Caperton
Governor

Andrew N. Richardson
Commissioner

April 12, 1996

Ken Hechler
Secretary of State
Administrative Law Division
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Charleston, West Virginia 25305

85 C.S.R. 11 - Enforcement of Reporting and Payment Requirements: Comment Period, Comments, Responses to Comments and Amendments to Proposed Rule and Reasons Therefore Resulting From Comments

The comment period ended on February 29, 1996, at 4:00 o'clock p.m. The public hearing was held on February 15, 1996, at 10:00 o'clock a.m. Oral comments were heard and recorded at the public hearing. All written comments were received or deemed delivered prior to the end of the written comment period.

Oral comments, Responses and Resulting Amendments:

Comment: At public hearing on February 15, 1996, the Chairman and a Member of the Compensation Programs Performance Council stated that there is a need to limit an employer's eligibility for repeated reinstatement agreements. It was stated that some default employer's file application for reinstatement to obtain good standing eligibility for bidding on projects or for contractor's licenses or mining permits, etc.; enter into a reinstatement installment repayment agreement; void the reinstatement agreement by failing to make timely payments of installments or current premiums; and, then, repeatedly repeat the process. It was suggested that reinstatement be limited to a prescribed number of times by the rules. (See pages 9 through 12 of the transcript of the hearing for the entire comments.)

Response: Mr. Randall B. Suter, Counsel, responded contemporaneously at hearing to each of the comments and stated that the Series 1 (now proposed to be renumbered 9) rules would provide, more appropriately, for standards and restrictions on eligibility for repeated reinstatement agreements. Responses to his comments indicated agreement that these standards and restrictions should be a part of Series 1 rules.

Reason and Amendment: However, these comments prompted a review by the preparer of the Series 11 rules. It was found that the rules could be written more clearly on the subject of Applications for Reinstatement at §85-11-13, by providing more of the statutory language from §23-2-5, W. Va. Code, regarding the Division's discretion to refuse to enter into a reinstatement agreement with an applicant employer. §85-11-13 is amended by adding a new subsection as follows and by renumbering Subsection 13.6. as 13.7.:

> 13.6. In addition, entry into a reinstatement agreement is discretionary with the Division. Such discretion shall be exercised in keeping with the fiduciary obligations owed to the workers' compensation fund. Should the division decline to enter into a reinstatement agreement and should the employer not comply with the provisions of subsection 13.1., then the division 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 this Code.

Comment: Following the public hearing, John H. Kozak, Director, Legal Services Division, West Virginia Bureau of Employment Programs, stated that the provisions for administrative hearings which are embodied in this rule at §85-11-14, have been duplicated in Rule, 85 C.S.R. 7, Rules for Selected Hearings, effective May 6, 1996. He stated that this duplicity would be redundant because Rule, 85 C.S.R. 7, is applicable to the hearings provided for in Rule, 85 C.S.R. 11. He requested that the provisions for hearing at §85-11-14, be amended by removing such provisions and making new provisions for hearing rules by making reference to the applicable Rules for Selected Hearings at 85 C.S.R. 7.

Response: A comparison of the provisions discloses that they are substanitially the same and that the purpose for hearing rules in 85 C.S.R. 11, would be served by the hearing rules at 85 C.S.R. 7.

Reason and Amendment: To avoid redundancy of provisions in 85 C.S.R. 11 and in 85 C.S.R. 7, Section 85-11-14 is amended by deleting its subsections numbered 14.2 through 14.31 and deleting the numbering for Subsection 14.1 and by amending that subsection as follows:

> ~~14.1.~~ 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.

Written Comments, Responses and Resulting Amendments:

A. Timothy E. Huffman, Esquire, Jackson & Kelly, Attorneys at Law, Charleston, West Virginia:

Comment: §85-11-2.5.b. The proposed changes to the existing rule would attach default liability to an employer, for the failure to subscribe to the Fund prior to the first date of employment of any employee, without notice of such default or the right to cure the same.

Attachment of such "default" liability, without notice of the existence of such liability and the steps necessary of cure the same, would be unfair to any new employer. A better course of action would be a provision that would allow appropriate notice and a period within which the default may be resolved before the attachment of any penalty.

Response: §23-2-8, W. Va. Code, has provided, since 1974, that, as a matter of law, any employer who is required to subscribe to and pay premiums into the workers' compensation fund and who does not do so as required by the W. Va. Workers' Compensation Act, Chapter 23, W. Va. Code, shall be in default. Notice of the existence of delinquency and default liability is deemed, as a matter of law, to be known by the employer. No one has the authority to amend the clear and express language of the statutory law by rule. The addition of §2.5.b. to the rules was made merely for the purpose of communication of information so as to advise employers of the law, with more clarity.

Comment: §85-11-2.9.b.: The proposed addition of this section would expand the definition of "employer" beyond the statutory definition of the same. The effect of such expanded definition would be not only to dispense with the necessity of "piercing the corporate veil" before requisite liability would attach, but would also essentially attach criminal liability to any "responsible person" for the failure of the corporate employer to meet its obligations under the statute. Had the Legislature intended the definition of "employer" to be as broad as proposed in this rule, the same would have been addressed in the last revision of Code §23-2-1. The expansion of the definition of "employer" as proposed by this rule, is more appropriately the subject of legislative action rather than promulgation of an exempt rule.

Response: In 1990, upon the recommendation of the Legislative Rule Making Review Committee, the Legislature approved §85 C.S.E.11, which included a definition of "employer" at Subsection 2.8. therein, which clarified the legislative intent of that portion of §23-2-5a(b), W. Va. Code, wherein the Legislature had provided in 1974 that any default liability shall be a personal obligation of the employer. Subsequently, in 1993, upon the recommendation of the Legislative Rule Making Review Committee, the Legislature amended the 1990 rules at Subsection 2.8. and added Subsection 3.9 (renumbered 3.10. in the currently proposed amendments to §85 C.S.R.11). In the 1993 Acts of the Legislature, the Legislature also enacted §21A-3-7(c), W. Va. Code, which exempted from legislative review future rules promulgated by the Employment Programs Performance Council. The proposed addition, Subsection 2.9.b., is not an exempt expansion of the definition of "employer" but, rather, is a clarification of the meaning of the definition, enacted by the Legislature in Subsections 2.9 and 3.9 in 1993, of a "responsible person" of the employer.

Comment: §85-11-3.9.c.: This section provides that notice of default is unnecessary prior to the initiation of any action by the Division to collect past due amounts. Such a provision is contrary to West Virginia Code §23-2-5a (a).

Response: The provisions of Subsection 3.9.c. is not contrary but, rather, conforms to the provisions of §23-2-5a(a), W. Va. Code, Subsection 23-2-5a(a), authorizes the commencement of a civil action against an employer who defaults after due notice. Since default occurs after delinquency and §23-2-5(c) provides for a notice of delinquency to be given prior to default and requires that such notice explain the legal consequences of subsequent default, the §23-2-5a(a) requirement for "due notice" prior to commencement of a civil action must refer to the notice of delinquency and not to the notice of default. Furthermore, the provision for a notice of default at §23-2-5(d) of the Code only requires notice of the method by which the employer may be reinstated with the fund. However, as a matter of routine compliance with the requirement that a notice of default be given, the Division gives such notice to the employer immediately following default.

B. Michael Idleman, Director, Special Services, Employers Service Corporation, Charleston, West Virginia:

Comment: §85-11-2.5.a.: We believe the first sentence should be rewritten as follows: The failure by a subscriber or a self-insured employer which has not made a payment as defined in Section 2.12 or filed a policyholder payroll and premium tax report due by it under the provisions of the Act, ...

Response: While this suggestion is a good and accurate one under current law and forms policy, no amendment should be or need be made. The meanings of both payment and report are contained in the Act and the Rules. Future changes in law or forms, e.g., a change in the name of the quarterly premium report, would require a change in the Rules to broaden the definitions if the subsection's terms were narrowed as suggested.

Comment: §85-11-2.5.b.: We believe the first sentence of this section should be as follows: 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 West Virginia Code, and the rules promulgated by the Compensation Programs Performance Council, ...

Response: Section 23-2-1(a), W. Va. Code, provides that the Division shall promulgate rules. (Prior to the 1995 Acts of the Legislature, the Commissioner was charged with that responsibility.) Section 21A-3-7(c) of the Code provides that the Compensation Programs Performance Council shall review and approve, reject or modify rules promulgated by the Commissioner, now the Division.

Reason and Amendment: It is more correct to include within this subsection, language which reflects the role of the Council in prescribing rules. §85-11-2.5.b. is amended in the first sentence as follows:

> b. 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 **<u>and the Compensation Programs Performance Council</u>**, as provided by the Code at §23-2-1(a) **<u>and at §21A-3-7 (c)</u>**, 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 Rule, 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 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.

Comment: §85-11-2.5.b.: The second paragraph of this same section is overly harsh. Past practice has been that the Workers' Compensation Division would allow a new employer to file their application within 30 days from the date they first had employees without considering that account to be in default. We have no problem with the Workers' Compensation Division charging an employer interest on the initial deposit that should have been submitted prior to the company having coverage. However, we feel it is much too tough to consider this employer to be in default. We understand that the Workers' Compensation Division needs to collect interest on the deposit, but to consider this employer to be in default is overbearing in our opinion. We ask that the Workers' Compensation Division and the Compensation Programs Performance Council allow all employers 30 days in order to file the Application of Coverage after they have hired their first covered employee. If the employer does not file the Application for Coverage within that 30-day period, then we agree the employer should be considered to be in default. In a perfect world, this should never happen. However, especially for small employers, obtaining workers' compensation coverage may be the last thing on their mind in trying to start up a new operation. We feel the Workers' Compensation Division should encourage new employers starting business in West Virginia, instead of hammering them for their oversight.

Response: Please see prior response to written comments of Timothy E. Huffman within part A., regarding the same Subsection 2.5.b. Furthermore, past practice has considered the employer in default for late application because default occurs as a matter of law and the determination of same is not within the discretion of the Division, its employees or the Commissioner or other person. However, the Division has had a policy of permitting a grace period of 30 days, including the date of first employment, from the imposition of any monetary penalties which are provided by the Act for late reporting or payment. This policy is written in the second paragraph of this Subsection 2.5.b.

Comment: §85-11-2.9.b.: On line 3 of this section, it refers to Section 3.9 of this rule. The responsible person definition is actually found in Section 3.10 of this rule. We ask that you correct this error.

Response: This reference to Subsection 3.9. is an error.

Reason and Amendment: The erroneous reference to Subsection 3.9. must be corrected by referring to Subsection 3.10. in Subsection 2.9.b. as follows:

> 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 ~~3.9.~~ **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, or to cause the same to occur, any premium tax, premium deposit, interest, penalty or other payment required by the Act.

Comment: §85-11-2.12.: We recommend that you delete "or any other applicable law" on lines 2 and 3 of this paragraph. The term payment should be payments made on behalf of the Workers' Compensation Act. To make this so broad to include any other applicable law is unnecessary.

Response: It is necessary to define "payment" in terms of the Act and also in terms of other law such as federal bankruptcy law, state collections law and other law which may further define the limits or constraints on the payments due under the workers' compensation law.

Comment: §85-11-2.13.: We feel the last half of the last sentence is unnecessary. We recommend putting a period after the word "alike" and deleting the rest of that sentence. We feel this language is too broad and unclear.

Response: The portion of the sentence following "alike" defines and explains the implementation of the statutory provisions found at §23-2-9(c), (c)(1) and (c)(2), W. Va. Code, which provide that benefit pay orders issued to self-insured employers represent assessments of premium tax.

Comment: §85-11-2.15.: We recommend that you insert the word "proper" between the word "the" and the word "payment" on line 4, and we further recommend that you delete the language "at least equal in value to the workers' compensation benefits" on line 5.

Response: The language which was recommended to be changed is the language of the statutory provisions at §23-2-9(a)(1)(A) and (B), W. Va. Code. No authority exists to amend this statutory declaration.

Comment: §85-11-3.3: We recommend that you add an additional sentence to this section. The sentence would be as follows: If not met, the employer will have 30 days from the receipt of such notice to cure the delinquency.

We know that for the quarter ending September 30, 1995, the Workers' Compensation Division did not meet the statutory requirements of notifying employers of their delinquency within the 60-day time frame stated in the law. The Division did give employers until January 15, 1996, in order to resolve their delinquency before they went into default. However, the regulations need to allow for this type of event happening in the future.

Response: Section 23-2-5 (b), W. Va. Code, provides for at least thirty days after the notice of delinquency is given in which the employer may file the report or make the payment, or both, as required to cure the delinquency, to avoid default. This is provided by the statutory requirement that the employer must, after notice of delinquency, cure the delinquency by the end of the quarter after the end of the quarter for which the delinquency occurred. Since the Legislature provided for notice of delinquency to the employer within 60 days of the delinquent quarter's ending, the Legislature intended that the employer be given at least thirty days in which to cure the delinquency to avoid default. No express provision was made for situations in which the Division did not discover the delinquency until after sixty days after the end of the quarter for which the employer is delinquent or in which the Division did not give the notice for another reason.

Reason and Amendment: To effect the intention of the Legislature that at least thirty days notice be given by the Division and to inform employers of the method of application of such legislative intent by the Division, the proposed rules are amended at §85-11-3.3., as follows:

> 3.3. Notice of delinquency. -- Within sixty (60) days of the end of each quarter, the division 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 did not give notice within sixty (60) days of the end of the quarter for which the delinquency occurred, then the division's notice shall provide for thirty (30) days within which the employer may cure the delinquency before default shall occur.**

Comment: §85-11-3.4.f.: We feel this entire section can be deleted as the fines or imprisonments are stated in the Workers' Compensation Law under Section 23-1-16. To repeat the same penalties in these regulations is unnecessary.

Response: This statement is made in the rules to inform employers, who have not read the statutory law, of the consequences of default and to better insure that the notice which is given by the Division complies with the statutory requirements for the content of the notice.

Comment: §85-11-3.5.: We feel this section should be rewritten as follows: Any employer which is required to subscribe to the Fund and which 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 which loses the benefits and protections 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 and arising out 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 and arising out of employer caused by the wrongful action, neglect, or default of the employer or any of the employer's partners, officers, agent, or employees, while acting within the scope of their employment and in the course of their employment and also to the dependents 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 dependents to collect such damages.

Also, in Section C of that same section, the default actually would be effective as of 12 a.m., not 12 p.m.

Response: This subsection was written using the words and language of Sections 23-2-6 and 8 of the W. Va. Code. The commentor suggests that the phrase "sustained in the course of employment" be amended by adding "and arising out of" employment. The words and phrases used in the proposed rule are those of the statute; which have clear legal meaning: and, which have been interpreted and defined by the Supreme Court of Appeals of West Virginia in numerous opinions.

Regarding the last comment about Subsection 3.5.c., the statute at §23-2-5(d) and (e) of the Code merely refers to the effective time of default as being "midnight."

Reason and Amendment: Although researched publications prove that "midnight" is 12:00 p.m., the use of 12:00 p.m. may confuse the reader. Since "midnight," alone offers absolute clarity of meaning, Subsection 3.5.c. is amended as follows:

> 3.5.c. The default liabilities described under subsection 3.5. of this rule are retroactive to ~~twelve o'clock p.m. (midnight)~~ **Midnight** of the last day of the month following the end of the quarter for which the delinquency occurs.

Comment: §85-11-3.8.: We feel that section should start by saying: Except as provided in Subsection 2.5b, an employer who . . .

Response: Subsection 2.5.b. provides no exception to the default status which is discussed in Subsection 3.8. The subsection provides an exception for thirty days to the imposition of penalties after the default status has occurred. Therefore this limited exception is not relevant to Subsection 3.8.

Comment: §85-11-3.9.c.: We feel this language is confusing and vague. Notice of default should be given prior to taking any action against an employer. We would encourage you to either clarify this language or delete it.

Response: The subsection is confusing. Subsections 3.9.a. and b. provide for notice of default to all default employers.

Reason and Amendment: To make the subsections understandable, Subsections 3.9.a, b. and c. are amended as follows:

a. After the delinquency and default of a subscriber of self-insured employer, the division 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 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 of any action to obtain the employer's compliance with the Act**;** ~~and the payment of any amounts due to the Fund; except that, in the case of an employer who was required by the Act to subscribe and the default occurred, as defined in subsection 2.5.b. of this rule, because of the employer's failure to subscribe and to comply with the Act,~~ notice of default and ~~notice of~~ 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.

Comment: §85-11-3.10.: This section is too broad and too vague. To go after the officers or owners of a corporation seems to be appropriate. However, to go after a bookkeeper because the company does not have the money to pay is wrong. We would encourage you to alter this section accordingly.

Response: Please see prior response to written comments of Timothy E. Huffman within part A., regarding the same Subsection 3.10. Furthermore, this subsection is clear in its meaning and statement of who may affected by its provisions. A bookkeeper will not become personally responsible or liable for any sum merely because the employer does not have the money to pay the sum due to the Division.

Comment: We also note that several sections of these regulations continue to mention claims losses as being the responsibility of a defaulted employer. We felt the Workers' Compensation Division had eliminated claims losses by law changes in 1993. We would encourage you to delete all references to claims losses in these regulations.

Response: "Claims losses" is not written in these proposed rules. In Subsections §85-11-8.1. and 9.1., the words "claims losses" were amended to the words "claims benefits." These two references are references to liabilities which a self-insured employer may incur, either as a condition to becoming self-insured or, upon default while having self-insured status.

C. Randall B. Suter, Esquire, Counsel, Legal Services Division, West Virginia Bureau of Employment Programs, Charleston, West Virginia:

Comment: Please note , the grace period information cited in 85 CSR 11 [85-11-2.5.b.] as appearing in 85 CSR 1 - will not be appearing at that location but will appear - to the best of my knowledge - in a new rule entitled Underwriting (probably at 85 CSR 9).

Response: In the proposed rule, §85 C.S.R. 9, the "grace period" provision is printed at Subsection 85-9-5.5.a. Since the new §85 C.S.R. 9 has not become effective and is subject to amendment through public comment prior to final review, approval and filing with the Secretary of State the reference to 85 C.S.R. 1 or by amendment, to §85 C.S.R.9, in this proposed rule, §85-11-2.5.b., is either erroneous or premature, or both.

Reason and Amendment: The reference to §85 C.S.R.1, in Subsection 85-11-2.5.b., is either erroneous or premature, or both; and, therefore, Subsection 2.5.b. is amended as follows:

> 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, as provided by the Code at §23-2-1 (a), 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 Rule, 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 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 of Rule, 85 C.S.R. 1, providing~~ **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 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.

D. Henry C. Bowen, Esquire, Executive Secretary, West Virginia Self-Insurer's Association, Charleston, West Virginia:

Comment: §85-11-2.5.b.: The Association recommends that the first sentence should be rewritten to reflect that default may occur when an employer does not comply with the requirements of the West Virginia Workers' Compensation Act and the "rules promulgated by the Compensation Programs Performance Council," not the "rules prescribed by the Division."

The Association recommends that the Division strike the proposed second paragraph of this subsection. The proposed language does not allow new employers a 30-day grace period to file an application of coverage after they hire their first employee. This is unnecessarily inflexible and intolerant. Unfortunately, due diligence does not always include through Workers' Compensation rule consideration. The proposed language is counter to past practice followed by the Division in which it would allow a new employer to file their application within 30 days from the date it first hired an employee without considering the employer to be in default. The Association urges that the past practice be continued. Allowing the 30-day grace period provides any new employer with the flexibility to address start-up issues and priorities in an efficient manner; of course, filing an application for coverage timely must be of the utmost priority of any new employer. The Division should strive to work <u>with</u> new employers to facilitate voluntary compliance, and the Association urges this change as a positive change to avoid unnecessary hardship on new businesses.

Response: In response to the first paragraph of the comments regarding Subsection 2.5.b., please see in part B., Response, Reason and Amendment to this subsection made in response to the comments of Michael Idleman, regarding this subsection.

In response to the second paragraph of the comments regarding Subsection 2.5.b., the language does provide for a thirty day grace period which follows exactly the past policy of the Division. Furthermore, please see prior responses to written comments of Timothy E. Huffman within part A. and of Michael Idleman within part B., regarding the same Subsection 2.5.b.

Comment: §85-11-2.9.b.: Because this expanded definition of employer affects the substantial rights or obligations of the parties to the employment contract, the definition should not be given retroactive application. The Association recommends that specific language precluding retroactive application be added to this subsection.

The Association believes that the proposed language, which includes that any "responsible person" as defined in subsection 3.9 (presumably, the Division means 3.10) of the Rule will be deemed an "employer" for the purposes of the enforcement provisions at Subsection 7.2 and Sections 8, 9, 11, and 12, needs further refinement by definition. For example, the term "responsible person" as defined in Subsection 3.10 imposes liability on any person required to truthfully account for and pay over to the Division premium taxes, etc., but willfully fails to truthfully account for and pay over" the money. (emphasis added). This language may include a bookkeeper or accountant whose job it is to pay bills, even when the employer may not have sufficient funds to render full payment. Relevant case law requires that for a responsible person to be personally liable, there must be willful of grossly negligent wrong-doing on the part of the employee. State, ex rel. Richardson v. McCompton & Son Lumber Company, Inc., 449 S.E.2d 71 (W. Va. 1994). Of course, those employers who willfully and wrongfully evade obligations to the Division should be subject to personal liability for default, but the language in this subsection should clearly clarify and insulate from liability those employer representatives who cannot tender payment in full because of insufficient funds.

Response: Subsection 2.9.b. was added to more fully communicate, within the "definitions" subsections of the Rule, the meaning given to "employer" through Subsection 3.10. and §23-2-5a, W. Va. Code, when read together, by use of a succinct definitional statement which informs that a "responsible person" may be an owner, partner or officer, as well as an employee, who has the duty under the law to cause the payment to be made to the Division; and, by referring the reader to Subsection 3.10. for a reading of the complete provision which defines "responsible person," which was provided by the Legislature in 1993, and which was the subject of the Supreme Court of Appeals of West Virginia's decision in the McCompton & Son Lumber Company, Inc. Case cited by the commentor. The Court in McCompton limit the retroactive application of Subsection 3.10. by the Division.

Comment: §85-11-2.13: The Association notes that the expanded definition of premium and premium tax is appropriate up to and including the first half of the last sentence. However, the Association recommends that the last half of the last sentence is overly broad, unclear and, therefore, unnecessary. We recommend that the definition should end after the word "alike."

Response: The portion of the sentence following "alike" defines and explains the implementation of the statutory provisions found at §23-2-9 (c), (c)(1) and (c) (2), W. Va. Code, which provide that benefit pay orders issued to self-insured employers represent assessments of premium tax.

Comment: §85-11-2.15.: The Association believes that the term "self-insurer" and "self-insured" is properly defined as "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 proper payment of benefits to its injured employees and their dependents." The Association recommends that the proposed language "in amounts at least equal in value to the workers' compensation benefits provided by law in order to be paid under the provisions of the Act" should be struck.

Response: The language which was recommended to be changed is the language of the statutory provisions at §23-2-9 (a)(1)(A) and (B), W. Va. Code. No authority exists to amend this statutory declaration.

Comment: §85-11-3.3. and 3.4.: The Association believes that the language of these sections imply that the employer will have 30 days from the receipt of the Notice of Delinquency to cure any delinquency before it is deemed in default. In the past, the Division has not met its obligation to notify timely delinquent employers of their delinquencies within 60 days of the end of each quarter, thereby narrowing or eliminating the 30-day window. The Association recommends that the language of these subsections expressly provide that employers may cure the delinquencies within 30 days after receipt of the notice of delinquencies.

Response: Please see prior Response, Reason and Amendment made in response to the comment of Michael Idleman within part B., regarding the same Subsection 3.3.

Comment: §85-11-3.4.f.: The Association believes this section is unnecessary, as the same language is provided in the statute at W. Va. Code §23-1-16. Therefore, it would appear it is unnecessary to reiterate the statutory provision.

Response: This statement is made in the rules to inform employers, who have not read the statutory law, of the consequences of default and to better insure that the notice which is given by the Division complies with the statutory requirements for the content of the notice.

Comment: §85-11-3.5.a. and b.: The Association believes that references to injuries sustained "in the course of employment" should be changed to "in the course of and arising out of employment," as such language is consistent with statutory and case law.

Response: This subsection was written using the words and language of Sections 23-2-6 and 8 of the W. Va. Code. The commentor suggests that the phrase "sustained in the course of employment" be amended to add "and arising out of" employment. The words and phrases used in the proposed rule are those of the statute; which have clear legal meaning: and, which have been interpreted and defined by the Supreme Court of Appeals of West Virginia in numerous opinions.

Comment: §85-11-3.5.c.: This subsection indicates 12 o'clock p.m. is "midnight;" however, midnight occurs at 12 o'clock a.m.

Response: Please see prior Response, Reason and Amendment made in response to the comment of Michael Idleman within part B., regarding the same Subsection 3.5.c.

Comment: §85-11-3.8.: The Association recommends that this subsection begin with the phrase "except as provided in subsection 2.5.b."

Response: Subsection 2.5.b. provides no exception to the default status which is discussed in Subsection 3.8. The subsection provides an exception for thirty days to the imposition of penalties after the default status has occurred. Therefore this limited exception is not relevant to Subsection 3.8.

Comment: §85-11-3.9.1.: The Association suggests that the proposed language that allows the initiation or commencement by the Division of any action necessary to obtain the employer's compliance with the Act and payment of any amount due to the Fund prior to providing the employer with a Notice of Default is objectionable. The Association believes that this language is unfair and violates a notion of due process. The very purpose of a Notice of Default is to provide the default employer notice of its status with the Fund and of the methods by which it may be reinstated or restored with the Fund to the benefits and protections of the Act.

Response: Please see prior Response, Reason and Amendment made in response to a comment of Michael Idleman within part B., regarding the same Subsection 3.9.c.

Comment: §85-11-3.10.: Please refer to our comment to Subsection 2.9.

The Association recommends the adoption of a new subsection, designated Subsection 3.11. The Association believes that the Division should recognize and acknowledge by rule its responsibility to process requests in a timely manner, just as it expects employers to respond timely to its proper demands. This provision will, of course, result in increased voluntary compliance by employers with both the reporting and payment requirements of the West Virginia Workers' Compensation Act. Specifically, the Association recommends the addition of the following language:

> If an employer makes a request for a classification change, a deposit reduction, a refund of excess deposits, or a premium tax rate review, the Division shall respond to the employer of its agent within 30 days of receipt of the request. Failure to timely respond to or process the request shall preclude the Division from imposing interest on amounts due and owing to the Division during the time the request is pending. If the Division fails to respond within 30 days of the employer's request and monies are due and owing to the employer, the Division shall pay interest to the employer subsequent to the expiration of the initial 30-day period.

Response: Section 23-2-5 (b), W. Va. Code, provides, as a matter of statutory law, that "[n]o employer will be declared delinquent or be assessed any penalty therefor if the division determines that such delinquency has been caused by delays in the administration of the fund." This provision provides the protection for employers which is sought by the commentor in the first two sentences of his recommended new subsection 3.1.. The last sentence of the recommended new subsection cannot be promulgated as it would be unlawful because the Legislature has not provided for, nor granted any authority to the Division to provide for, the payment of interest on amounts due to an employer.

Comment: §85-11-5.2.: The Association suggests that the proposed language added to this subsection may be legally incorrect. The proposed language provides that 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." (emphasis added). To the contrary, default renders the employer "liable to their employees for all damages suffered by reason of personal injury sustained in the course of employment caused by the wrongful act, neglect or default of the employer ... ." See, W. Va. Code §23-2-8 (emphasis added). The proposed language implies that there is strict liability placed upon the employer on default, when in fact, fault of the employer must be proved by the claimant to recover in a civil action. The Association urges that this section be rewritten so as to avoid the misleading nature of this subsection as it is presently drafted.

Response: The language used in this subsection is the language used by the Legislature in §23-2-5(h)(3), W. Va. Code, in providing for the notice to employees of the default of their employer. That statutory provisions, when interpreted properly, provides the words "is liable" and qualifies those words with the words "in damages at common law or by statute." "In damages" has the definite legal meaning that a person harmed by the fault or negligence of another must bring a civil action with cause of action proven by adequate evidence of negligence. The language suggested by the commentor, taken from §23-2-8, W. Va. Code, has the same meaning as the language provided by the subsection which provided for the relevant notice, §23-2-5 (h)(3).

Comment: §85-11-7.1.: The Association recommends that the phrase "claimed to be" be deleted as the language places too little a burden on the Division. In fact, the Division should be required to objectively prove the amounts owed.

The Association strongly believes that it is wrong for the Division to charge interest on debts owed by employers, but to not pay interest when it owes money to employers. The Association urges that the proposed language setting forth such an unbalanced system should be stricken from these rules.

Response: The amount of premium tax, interest and other penalties, if any, assessed to the employer for payment are the result of an audit of the account. If the audit produces an incorrect assessment, it is because the employer has not reported or reported properly, the gross wages and premium due and, neither has the payment been made or made properly. The amount claimed by the Division to be due is the amount assessed by the Division after audit. The Act provides at §23-2-17, W. Va. Code, and these Rules provide in Subsection 7.1.a. administrative recourse which the employer may use to correct the assessment. An employer will not be required to utilize §23-2-17 and §85-11-7.1.a., to correct an error caused by necessary estimation of the liability, when the employer is forthcoming with quarterly gross wages reports which accurately show the actual gross wages of the employees and the payment of the calculated premiums, within the time provided for the curing of the delinquency. Regarding the comment about paying interest on an amount due to the employer, please see the previous response to this commentor within this part D. At comment on §85-11-3.9.c.

Comment: §85-11-9.1.: Please see our comment to Subsection 2.9.

Response: Please see prior response to this commentor in this part D., regarding the comment about Subsection 2.9.

E. Finance Committee, Compensation Programs Performance Council, Charleston, West Virginia:

Comment: §85-11-3.4.a.: Upon meeting to review and recommend changes in proposed Rule, §85 C.S.R. 11, or to recommend approval, as written, of the rule by the Compensation Programs Performance Council, the Finance Committee recommended amendment of Subsection 3.4.a. to cause its language to be consistent with the language of Subsection 3.3.

Response: The language of Subsection 3.4.a. was inconsistent with that of Subsection 3.3. as a result of previous amendment to Subsection 3.3.

Reason and Amendment: To cure the inconsistency between those subsections, Subsection 3.4.a. is amended further, as follows:

> 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 third month following the end of the preceeding quarter~~ **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.**

Compensation Programs Performance Council
WV Bureau of Employment Programs

By: Andrew N. Richardson
Andrew N. Richardson, Commissioner

ORIGINAL

WEST VIRGINIA WORKERS' COMPENSATION DIVISION
BUREAU OF EMPLOYMENT PROGRAMS

RE: Public Hearing on
Rule 85 C.S.R. 11
Enforcement of Reporting and Payment Requirements

Transcript of proceedings had in the above-entitled matter held at the Charleston Civic Center, Room 206, 200 Civic Center Drive, Charleston, West Virginia, on the 15th day of February, 1996, commencing at 10:10 a.m., pursuant to notice.

KARON L. VORHOLT
Certified Court Reporter
634 Pioneer Lane
Charleston, West Virginia 25312
(304) 984-1242

APPEARANCES: PERFORMANCE COUNCIL MEMBERS:

Thad D. Epps

Chris E. Jarrett

Fred Tucker

David Harris

Richard Humphreys

ALSO PRESENT: ANDREW N. RICHARDSON, Commissioner
Bureau of Employment Programs

RANDALL B. SUTER, Counsel
Legal Division

Reporter's Certificate 16

MR. EPPS: I would then like to call the public hearing to order on the Enforcement of Reporting and Payment Requirements proposed rule, and Randy, would you like to speak to that?

MR. SUTER: I will note that my name is Randall B. Suter. I work on behalf of the Bureau of Employment Programs, Legal Services Division. I think the B, this morning, Randall B. Suter, stands as Plan B. Richard Stephenson was the individual who had drafted the particular revisions to this rule and after the implementation of the public hearing, the bankruptcy judge scheduled him in court this morning.

The rule title is the Enforcement of Reporting and Payment Requirements. There's a two-fold purpose to this particular rule, and this is an old rule by the way and we're only implementing the particular changes that have occurred as a result of the 1995 legislation and changes that were necessary as a result of experience to interpret, strengthen, beef-up the rule where necessary. So, there have been significant changes but many of the provisions will stand as they are.

If you'll notice, and probably the best outline of this is the summary of proposed changes, the

1995 legislation -- that would be a couple pages down in your package. The primary changes with regard to simple name changes, for example, "Commissioner" has been referred to now as "Division;" "premium" is now "premium tax;" "executive secretary" or "secretary" is now "executive director." There were some of those changes that were occasioned by the 1995 legislation, and you'll find them throughout the course of the rule.

The rule consists of 19 sections. Beginning with Section 2.5, there is an enhancement -- I'm skipping over some of the smaller changes, but there is an enhancement at 2.5, on Page 2, with regard to the term "default." You'll note it's a and b now on Page 2. A is pretty much what it was before. B is for an initial failure to comply with Workers' Compensation laws, and before you had to basically fail to comply once you had implemented business. This is the preemption where an individual just never files, and that's a clarity point in the rule.

If you'll note the provisions of 2.9, the term "employer," that has been enhanced to include any responsible person. That is pretty much in conjunction with some of the recent case law that -- and it's not out of line with what the Tax Department currently does with regard to people who are responsible for paying over those types of money. They can be held individually accountable, and I think that's a significant change.

The provisions of 3.4 beef-up the requirements of the contents of the Notice of Delinquency. Some of this again is informational and for the benefit of the staff at Workers' Compensation to provide additional information to the employers as to what may or may not happen to them as a result of their delinquency or default.

3.8, it talks about default without delinquency. Generally, you think of one coming before the other, and that's most normally the case except if they've never filed to do business with us in the first place and then it's a little difficult for us to give them the proper notification on delinquency. They are immediately in default as of the day they start business if they never tell us about it. That's a little bit of a change there, an enhancement strengthening provision. The requirements for Notice of Default are a little bit, as with the Notice of Delinquency, are enhanced somewhat as you'll notice on Page 7.

There is another change at the provisions of 5.2, and it's with regard -- and that's on Page 8 -- with regard to the contents of notice to employees of default employers. That also adds provisions where an employer has been in noncompliance by never filing with Workers' Compensation and letting us know that they're in business, and what the requirements of such a notice to the employees of a default employer might be.

If you'll notice on Page 10 and 11, the provisions -- I'm sorry, that would be 11 and 12, the provisions of 7.2, and it comes generally under the heading of "Methods of Collection of Payments and Enforcement," there is an enhancement at the bottom of Page 11, e, which also provides as a remedy, and this again is more informational to the staff, the ability and the duty to notify the Director of the Division of Environmental Protection regarding those people that are in default with regard to their mine permits.

And there is also at the top of Page 12 under "f" an additional remedy that involves the notification of the prosecuting attorney with regard to any criminal violations that might be involved. Again, this was more informational to staff. It doesn't create necessarily new crimes. Those are taken care of with regard to the statute. This is merely a handy guide for the staff to use with regard to the types of action they may wish to take against the employer. Most of the changes after that, up until Section 11, are fairly commonplace.

The provisions of 11.3, and that's on Page 15, it indicates that the premiums due under the Workers' Compensation provisions or premium taxes are special revenue taxes and as a result they have a priority as tax claims or administrative expense claims under the U.S. Bankruptcy Code. We're trying to enhance that.

There is a case out there that says that with regard to the Fourth Circuit. However, again, this is informational, and the Fourth Circuit is one circuit and sometimes we find ourselves in other areas of the country with regard to particular employers and other circuits may have an interpretation. We would like it more as a cleanup as to what the statement of the law currently is.

In Section 14, most of the other changes throughout are merely reiterations of what we've gone over up to this point in time. With regard to "Administrative Hearings" under 14.13, there is a provision put in there that if a party wishes to cross-examine the Fund's actuary or accountant the party shall bear the travel expenses for that party and pay for their preparation of witness time preparation and travel to and from. That is a change with regard to at least the clarity of it.

With regard to most of the other provisions of the particular rule, they again are reiterations of what we've gone over before, and I really don't have too much in the way of significant comment on that. And that pretty well concludes what I have to offer. Hopefully, I can answer questions if Mr. Stephenson hasn't arrived yet.

MR. EPPS: Do any members of the Council have any questions of Mr. Suter?

(No response.)

MR. EPPS: I have one. As I understand, the overall intent of this is the clean-up language to get the terms correct and the second basic purpose is to make the rule and have the rule conform with the provisions of both the 1993 and 1995 Workers' Compensation laws; is that correct?

MR. SUTER: That's correct.

MR. EPPS: What you're saying is there's no policy change as a result of this rule. The rule merely reflects the implementation of Workers' Compensation law '93/95.

MR. SUTER: Yes, pretty much that's the case. I guess there may be a few exceptions to that but those are enhancements or clarity with regard to what the Fund has done in the past, you know, how the treatment of bankruptcy, for example, is handled.

COMMISSIONER RICHARDSON: I've got a question, Randy. I'm looking at Page 24, 13.6. Is there any provision made in the regulation limiting the ability of employers to term repayment agreements? We have had a problem from time to time in the past of a company agreeing to a repayment agreement, agreeing to terms we thought were generous or appropriate, avoiding that repayment agreement, low and behold the staff agrees subsequently to another repayment agreement and then perhaps yet another repayment agreement. Is there anything that can be done to prevent that? We're trying to prevent it internally now. It's not always that simple to prevent, but it seems to me there comes a point where enough's enough.

MR. SUTER: There are some things that can be utilized, I believe that needs done. I've given a lot of thought to this. However, I have indicated -- I've been working on a draft of the first regulation and I have tried to include in that particular regulation some comments that

I've received from the staff of the Office of Employer Accounts with regard to the ability of the people to have reinstatement agreements and whether or not they should be assessed additional sums of money as their up-front money in a reinstatement agreement. It significantly enhanced over, I think, it's over one-half of a percent of their payroll. So, if they would go through -- and maybe there are some legitimate reasons why a person may need a second reinstatement agreement, but you're certainly correct, once you get beyond that, you start getting a third and fourth and fifth or sixth reinstatement agreements then obviously, to me at least, they're not too inclined to repay the Fund the sums that they owe them. So if the up-front money could be enhanced perhaps that might be one way to ...

COMMISSIONER RICHARDSON: Well, let me just say that one of the ways firms have avoided the payment of premiums over the years was entering into a repayment agreement, avoiding it and when their hand was called, entering into another repayment agreement. And I know later this month there will be a consideration of some behavior like by the Kanawha County Grand Jury.

So, I think that it would be worth your while to take a long, hard look at this and see if there's some way to -- I mean, you know, I understand circumstances come up where you've made a commitment and then you can't meet the commitment but come on, some of these folks are really just trying to figure out a way to beat the system, and I'd like us to try to tighten that up some.

MR. TUCKER: Along those lines, Randy, do you think there ought to be an "X" amount of number of times that we can do that for an employer? I mean, you know, if I get in trouble with a creditor that I have, you know, they want to go along and work with me as long as -- they'll do that, you know --

MR. SUTER: Up to a point.

MR. TUCKER: -- up to a point but, you know. They may have a fiduciary responsibility to, you know, say "Well, you know, we went the extra mile with you. We've extended everything we can do." I think that we need to take a look to see what the feasibility is of putting a limit to that. So the Commissioner's absolutely correct, there are people that can do that to the point that use the law and the good graces of the Division, the humanistic side of it, to their advantage because they don't intend to pay to start with and that's just another way of prolonging their -- arrive at their ability to pay. I think you need to look and see from a legal standpoint whether we can put a limitation on the number of times that the Division can go to the well with an employer under that circumstance.

MR. EPPS: Any other questions from the Council?

(No response.)

MR. EPPS: Thank you very much, Mr. Suter. According to the attendance sheet and speakers' list there was no one that signed up to speak to this rule. However, if there's anybody in the room that would like to do so, now is the time.

(No response.)

MR. EPPS: Any member of the Council want to speak to the rule?

(No response.)

MR. EPPS: I'd like to remind everybody that this is the only public hearing we will be having on this rule. However, written comment period will end on February 29th, and again, as with the previous rule, any comments that are received on this rule will be reviewed by the appropriate committee of the Performance Council. The Performance Council will amend the rules as we deem appropriate based on those comments and our positions on it and then we will vote on the rule. Before we adjourn this hearing, Commissioner, do you have a comment?

COMMISSIONER RICHARDSON: Well, I know on several occasions I've heard folks express, as the lady on the front row, that they would like to be put on the mailing list for regulatory proposals and comments. Randy, stand up again. If that is your desire, please let this gentlemen know. He does an exceptional job of shepherding along various regulatory proposals for the organization and we do not do as good a job as we need to do on circulating those proposals out to individuals on mailing lists and so forth and we want to do a better job of that. So, if you'll let Randy know we'll make a conscious effort to do that and --

MR. SUTER: If you'll provide me with a card or something that'd be great.

COMMISSIONER: Yeah. Just so he's got an address and then we'll begin building a better master file on that. The second comment I want to make is, you know, these proposals, these regulations are only as good as the input we receive. We don't want to operate in a vacuum. I'm glad about the turnout today. This is probably the best turnout that we've had in a long time at one of these public hearings. Isn't it guys? But the fact is that we just have a few folks talk and we usually just get a few written comments even on the most significant issues, and these are very significant issues. And I think gentlemen -- sir, your comments about concerns about small businesses and your concerns about whether anybody's got a vested interest, so to speak, in these proposals, these are legitimate points that we want to be able to take into consideration as we continue to work to try to improve this system.

I want to thank all of you for being here but I don't want you to just sit there like a knot on a log. I hope you'll forward any thoughts or comments that you have in writing to the Division by February 29th.

MR. EPPS: 29th. Yes, it's leap year. I have one closing comment, sort of parallel with the Commissioner's. For those of you that may not know, the Performance Council process in terms of promulgating rules is that -- the process we use pretty much universally now is that the staff of the Division prepares the rule. We have some discussion possibly on the rule but generally speaking our committees do not review these rules before they go out for public comment, and when we started we tried to do that. We found out that we went around the barn twice. The committees would agonize over these rules and we'd get them all to where we thought they were pretty nice and then we put them out for public comment and you-all would come back and say, "You messed it up," and so we'd have to go back and do it all over again, and we decided that was kind of dumb.

So what we now do is we really put the rule out pretty much as it was proposed by the staff and then we take into account all the comments, and our committee work relative to these rules occurs after, not before, your comments. So as Commissioner says, they are very important. Does anyone else have any comments to make?

(No response.)

MR. EPPS: If not, I declare the public hearing adjourned. Thank you very much.

(Whereupon, the public hearing was concluded at 10:58 a.m.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to wit:

I, Karon L. Vorholt, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the testimony adduced or proceedings had in the aforementioned case as set forth in the caption hereof.

Given under my hand this 22nd day of February, 1996.

Karon L. Vorholt
Certified Court Reporter

OFFICIAL SEAL
NOTARY PUBLIC
VIRGINIA
ORHOLT

ATTENDANCE SHEET & SPEAKER'S LIST

PUBLIC HEARING FEBRUARY 15, 1996

RE: PROPOSED RULE 85CSR11,
"ENFORCEMENT OF REPORTING AND PAYMENT REQUIREMENTS"

NAME	REPRESENTING	CHECK IF YOU WANT TO SPEAK
		YES ___ NO ___
Morris Alderson	Eastern Elec	YES ___ NO ✓
Brenda Grant	CAMC	YES ___ NO ✓
John W. Crawford	Pittston Coal Mgmt Co.	YES ___ NO ✓
David Slater	Gates McDonald	YES ___ NO ✓
Smasel	Robinson + McElwee	YES ___ NO ✓
Brad Crouser	Jackson & Kelly	YES ___ NO ✓
Linda Nord	Steptoe & Johnson	YES ___ NO ✓
Bob Hazlett	Genuine Parts Company	YES ___ NO ✓
Wayne Tawney	Genuine Parts Co	YES ___ NO ✓
Fred Dillon	Simpson & Osborne, CPA's	YES ___ NO ___
[illegible]	WC	YES ___ NO ✓
Steve White	Power Maintenance, Inc	YES ___ NO ✓
		YES ___ NO ___
		YES ___ NO ___
		YES ___ NO ___
		YES ___ NO ___

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

STEPHEN N. REED
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

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STATE OF WEST VIRGINIA

SECRETARY OF STATE

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Charleston, WV 25305-0770

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

PENNEY BARKER
Supervisor, Corporations

(Plus all the volunteer
help we can get)

TO: JOHN KOZAK

AGENCY: WORKERS' COMP

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: August 26, 1996

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

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

SERIES: 11 TITLE: 85 WORKERS' COMP

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: ______________________________

TITLE OF PERSON SIGNING: ______________________________

DATE: ______________________________

****

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

SIGNED: ______________________________

TITLE OF PERSON SIGNING: ______________________________

DATE: ______________________________

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

Richard Stephenson Refused to accept our format - Sent back with their format for proofread - 3 Months Later - No Response - Sent in Supplement