WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #4

Do not mark in this box

FILED
[illegible] JAN 10 AM 9 44
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Division of Workers' Compensation TITLE NUMBER: 85

CITE AUTHORITY W.Va. 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)

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 11

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

---

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

Emily A. Spieler

Emily A. Spieler
Commissioner

WORKERS' COMPENSATION FUND
601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE: (304) 348-0475

GASTON CAPERTON
GOVERNOR

EMILY A. SPIELER
COMMISSIONER

JOHN H. KOZAK
EXECUTIVE SECRETARY

January 9, 1990

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, W. Va. 25305

Dear Secretary Hechler:

RE: Filing of Amendments to Proposed Legislative Rule, Title 85, Series 11; "Enforcement of Reporting and Payment Requirements," Division Of Workers' Compensation."

Pursuant to West Virginia Code, §5F-2-2(a)(12), please consider this letter to be my written approval for the filing of amendments to the above noted proposed legislative rule. These amendments are the result of modifications to the proposed rule as required by the Legislature's Rule Making Review Committee.

With much appreciation for your assistance in this matter, I remain

Very truly yours,

Taunja Willis Miller

Taunja Willis Miller
Secretary

TWM/jhk

FILED

TITLE 85
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
DIVISION OF WORKERS' COMPENSATION

SERIES 11
Enforcement of Reporting and Payment Requirements

§85-11-1. General.

1.1. Scope - This legislative rule provides for the determination of delinquency and default on the part of employers regarding reporting and payment requirements, for the enforcement of collection of payments from those requirements, and for enforcement of other required payments.

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).

1.3. Filing Date -

1.4. Effective Date -

1.5. Pursuant to West Virginia Code, §5F-2-2(a)(12), this legislative rule has received the written consent of the secretary of the Department of Health and Human Resources.

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

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

2.4. The term "commissioner" means the West Virginia Workers' Compensation Commissioner as provided for by West Virginia Code, §23-1-1.

2.5. The term "default" means 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.

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

2.8 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, firm, partnership, limited partnership, copartnership, joint venture, association, corporation, organization, receiver, estate, trust, guardian, executor, administrator, and also any owner, partner, official, officer, employee or member of any of the foregoing who, as such owner, partner, official, officer, employee or member, is by virtue of his or her position under a duty to perform or to cause performance by another or who is responsible for the performance of an act prescribed by the provisions of the Act or the various rules promulgated by the commissioner.

2.9. 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. The term "payment" means any amount of money owed by an employer to the commissioner by reason of the operation of any provision of the Act or the various rules promulgated by the commissioner.

2.11. The term "premium" means the money due from an employer to the Fund as the result of the periodic assessment by the commissioner under the various provisions of the Act in order to establish, maintain, and replenish the Fund.

2.12. The term "premium deposit" means the amount of money an employer is required to pay as an advance upon premiums pursuant to West Virginia Code, §23-2-5(a).

2.13. The term "self-insurer" means an employer who has elected to provide its own system of compensation to its employees under any or all of the various provisions of the Act allowing that option.

2.14. The term "this rule" means the present legislative rule which is designated in the caption hereof as Title 85, Series 11, and titled "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 if any one or more of the following omissions occurs.

3.1.a. The employer fails to timely pay its premium. Premiums shall be paid quarterly on or before the last day of the month following the end of the quarter.

3.1.b. The employer fails to maintain an adequate premium deposit. Increases in premium deposits, when necessary to be made, must be remitted with the applicable quarterly premium.

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

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

3.3. Notice - Within sixty (60) days of the end of each quarter, the commissioner shall, in writing, notify all delinquent employers of their delinquency and the reason therefor.

3.4. Contents of Notice - The notice required by subsection 3.3 of this rule shall state the following.

3.4.a. A demand that the employer cure its failure before the end of the third month following the end of the preceding quarter 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.

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

3.4.c. An explanation of the legal consequences of a 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.

3.4.d. An explanation of how the employer may cure its default or, if the employer has been terminated, how that employer may also be reinstated with the Fund.

3.4.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.

3.4.f. An explanation that any person, firm, or corporation, which is required by the provisions of the Act to subscribe to the Fund, and which knowingly fails to subscribe thereto, or which knowingly fails to make any report (including a payroll report) or perform any other act or duty required by the commissioner (including payments of premium, premium deposit, or interest) within the time specified by the commissioner, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars pursuant to West Virginia Code, §23-1-16.

3.5. An employer who is required to subscribe to the Fund (which includes a self-insuring employer) and who fails to cure a delinquency shall be in default and shall lose the protections of the Act and shall incur potential additional liabilities as noted below.

3.5.a. An employer who loses the protection of the Act may be required 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.

3.5.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 officers, agents, or employers 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 employer may also lose the right to assert certain defenses during the course of a civil action by its employees to collect such damages.

3.5.c. The liabilities described under subsection 3.5.b of this rule are retroactive to twelve o'clock p.m.

(midnight) of the last day of the month following the end of the quarter for which the delinquency occurs.

3.6. An employer who voluntarily elects to subscribe to the Fund and who fails to cure a delinquency shall have its election to pay into the Fund terminated and such an employer shall lose the protections described in subsection 3.5.a of this rule and to incur the additional liabilities described in subsection 3.5.b of this rule. Similarly, the subsection 3.5.b liabilities 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 to the Fund and who does not cure its delinquency and make the payments as required by the subsection 3.3 notice shall be in default without further action by or notice from the commissioner.

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.

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

4.1. The commissioner shall not certify to the secretary of state of West Virginia that all payments and interest due the commissioner 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 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.

4.2. Pursuant to West Virginia 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 Employers.

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

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. 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) dollars."

5.3. Posting the Notice - The commissioner 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. 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 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 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, and any failure to post any notice within ten days after he or she shall have received the same from the commissioner, without just cause or excuse, shall constitute a willful failure or refusal to perform a duty required of him by law within the meaning of West Virginia 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 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 West Virginia Code, §23-2-2(a), every employer shall furnish the commissioner, upon request, all information required by the commissioner 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, premium deposit, interest, 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 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 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, 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. ~~pursuant to West Virginia Code, §23-1-8.~~ Any such administrative hearing or deposition shall be convened and conducted in accordance with section 14 of this rule and the commissioner 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.

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 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 by filing a complete payroll report, as may be applicable. At this stage, the amounts claimed to be owed to the commissioner shall include a requirement for the payment of interest on the delinquent premium payment and/or premium deposit pursuant to West Virginia Code, §23-2-13. The amounts claimed to be owed shall not include the amount of any penalty for claims losses.

7.1.a. In the event that the employer disputes the amounts claimed to be owed to the commissioner or disputes the completeness or accuracy of an alleged delinquent payroll report, the employer may file a petition setting forth the facts upon which it bases its dispute and may demand that the commissioner 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. The commissioner shall deposit the payment into his or her normal interest bearing account.

7.1.b. During the time from the receipt of the hearing demand and until the issuance of an order by the commissioner 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 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 purposes.

7.1.c. During the period affected by this subsection, neither the commissioner nor any representative or agent of the commissioner 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 will be reimbursed to the 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 shall have available to him or her the following remedies which shall each be described more fully below.

7.2.a. Initiation of a civil action.

7.2.b. Filing of a lien enforceable against all the property of the employer.

7.2.c. Under certain additional circumstances, as specified below, 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.

7.2.d. Filing a claim in any bankruptcy proceeding or in a receivership or insolvency proceeding.

7.2.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.

7.3. In addition to the other remedies set forth here, the commissioner may also initiate a proceeding in the name of the state to distrain upon any personal property, including intangible property, of any delinquent employer. If the commissioner has good reason to believe that such property or a substantial portion thereof is about to be removed from the county in which it is situated, the commissioner 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 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 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 premiums, delinquent premium deposits, claims losses paid by the Fund for employees, or their dependents, of a delinquent, defaulted, or terminated employer, costs of serving or posting notices, and all other unresolved claims shown upon the account of an employer by the records in the commissioner's office plus interest thereon as calculated under West Virginia Code,

§23-2-13, and section 15 of this rule. The property subject to the lien includes all of the employer's real estate, personal property of all types, and combinations thereof.

8.2. In accordance with West Virginia Code, §23-2-5a and §38-10C-2, the commissioner 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 against whom such lien is claimed, is situate, or if the employer's property is situate in more than one county, then in each such clerks' offices 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 West Virginia 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 in favor of the state of West Virginia and the commissioner. Upon the satisfaction of such lien, a properly acknowledged release thereof for recordation shall be delivered to the employer by the commissioner. 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 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 notice of the commissioner's lien.

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

§85-11-9. Civil Actions.

9.1. The commissioner in the name of the state may commence a civil action against an employer who, after due notice, defaults in any payment required by the Act. Such payments may include, but are not limited to, premiums, premium deposits, claims losses paid by the Fund, costs and fees of notices and posting and service thereof, and interest thereon for 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 to self-insure.

9.2. Such a civil action shall be pursued under the applicable provisions of West Virginia Code, §14-1-1 et seq., or as otherwise provided by law. The commissioner 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 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 West Virginia 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 West Virginia 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 West Virginia Code, §23-2-5a, if the judgment entered in a subsection 9.1 civil action is against the employer, the employer 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 shall enforce and execute upon that judgment as provided for by West Virginia 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 document shall be a public record.

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

10.1. In any case when an employer required to subscribe to the Fund defaults in payment of premium, premium deposit, 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, or collection from a court in a receivership or insolvency proceeding, all as provided for by West Virginia Code, §23-2-5a, and by this rule - the commissioner 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 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 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.

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

11.1. In accordance with the provisions of West Virginia 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 shall be represented by a designee of the office of the attorney general and the commissioner 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 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 may institute an involuntary proceeding against an employer in a bankruptcy court of the United States in any proper instance.

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

12.1. General authority and provisions.

12.1.a. Authority of commissioner. - If any premium, premium deposit, penalty, interest, claims losses, 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, or penalty neglects or refuses to pay the same within fifteen days after notice and demand as provided in subsection 12.1.e hereof, it shall be lawful for the commissioner to collect the amounts due and such further sums as are sufficient to cover the expense of the levy, by levy in the name of the state 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 finds that the collection of such obligation is in jeopardy, notice and demand for immediate payment may be given by the commissioner and, upon failure or refusal to pay such obligation, collection thereof by levy shall be lawful without regard to the fifteen-day period provided in subsection 12.1.f. If the commissioner has good cause to believe that such property or a substantial portion thereof is about to be removed from the state in which it is situated, the commissioner may likewise distrain before such delinquency occurs.

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

12.1.c. The commissioner shall only 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.

12.1.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 for which levy is made, the commissioner may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the employer against whom such claim exists until the amount due, together with all expenses, is fully paid.

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

12.1.f. Requirement of notice before levy.

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

12.1.f.B. Fifteen day 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, restricted delivery, to such employer's last known address, no less than fifteen days prior to the day of levy; however, no notice need be given if the commissioner has made a finding under either of the last two sentences of subsection 12.1.a that collection of the obligation is in jeopardy.

12.1.f.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 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.

12.2.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 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.

12.2.a.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.

12.2.a.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.

12.2.a.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.

12.2.a.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.

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

12.2.a.F. Annuity and pension payments. - Annuity or pension payments to any individual under any pension or retirement plan, including Social Security payments.

12.2.a.G. Workers' compensation. - Any amount payable to an individual as workers' compensation (including any portion thereof payable with respect to dependents) under a workers' compensation law of the United States, or of this state, or any other state; except that if the individual who will be receiving such payment is a person who as sole proprietor, partner, or corporate officer, employee, or member was responsible for and is liable for the payment of the obligation levied upon, then the amount payable as workers' compensation may be levied upon.

12.2.a.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.

12.2.a.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.

12.2.a.J. Minimum exemption for 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.

12.2.a.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.

12.2.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 shall summon three disinterested individuals who shall make the valuation.

12.2.c. No other property exempt. - Unless required by some other law, no personal property or rights to property shall be exempt from levy other than property specifically made exempt by subsection 12.2.a.

12.2.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.

12.3.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, surrender such property or rights, or discharge such obligation, to the commissioner, except such part of the property or rights as is, at the time of such demand, subject to any prior attachment, execution or levy.

12.3.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, shall be subject to prosecution as provided for in section 17 of this rule.

12.3.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, surrenders such property or rights to property or discharges such obligation to the commissioner 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.

12.3.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 is under a duty to surrender the property or rights to property or to discharge the obligation.

12.4. Sale of seized property.

12.4.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 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.

12.4.b. Notice of sale. - The commissioner may sell any property seized under this section 12 of this rule. As soon as practicable after the seizure of the property, the commissioner 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 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. The sale shall be conducted by public auction, or by public sale under sealed bids. Before the sale, the commissioner may determine a minimum price for which the property shall be sold, and if no person offers to purchase such property at the sale for the amount of the minimum price, the property shall be declared to be purchased at such price for the state of West Virginia for the benefit of the Fund; otherwise, the property shall be declared to be sold to highest bidder. In determining the minimum price, the commissioner shall take into account the expense of making the levy and sale.

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

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

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

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

12.6. Redemption of property.

12.6.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 at any time prior to the sale thereof, and upon such payment, the commissioner shall restore such property to that entity and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

12.6.b. Subrogation to commissioner's lien. - Any entity redeeming the interest of another shall be subrogated to the lien of the commissioner on such interest. Such entity shall lose his, her, or its right to this lien, however, unless within thirty (30) days after receiving the certificate of sale of personal property, he, she, or it shall file with the clerk of the county commission of the county in which the personal property is located or where the delinquent employer resides or has its business location, or if neither be in this state, the Clerk of the County Commission of Kanawha County, his, her, or its claim against the delinquent employer and a copy of the certificate of sale of personal property.

12.7. Certificate of sale. - In the case of property sold as provided in subsection 12.4, the commissioner 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.

12.8.a. Certificate of sale of property. - In all cases of sale of property pursuant to subsection 12.4, the certificate of such sale:

12.8.a.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

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

12.8.a.C. As authority for transfer of corporate stock. - If such property consists of stocks, shall be notice when received, to 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

12.8.a.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

12.8.a.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.

12.8.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 with respect to which the levy was made had priority.

12.9. Records of sale. - The commissioner shall for each county, keep a record of all sales of property under subsection 12.4 and of redemptions of such property. The record shall set forth the debt for which any such sale was made, the date of seizure and sale, the name of the debtor and all proceedings in making such sale, the amount of expenses, and the names of the purchasers and the date and a copy of the certificate of sale. A copy of such report, or any part thereof, certified by the commissioner 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 shall determine the expenses to be allowed in all cases of levy and sale under this article.

12.11. Application of levy.

12.11.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, remaining shall then be applied against the liability in respect of which the levy was made of the sale conducted. 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.

12.11.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 to the person or persons legally entitled thereto.

12.12. Authority to release levy and return property.

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

12.12.b. Return of property. - If the commissioner determines that property has been wrongfully levied upon, it shall be lawful for the commissioner to return: (a) the specific property levied upon; (b) an amount of money equal to the amount of money levied upon; or (c) an amount of money equal to the amount of money received by the commissioner from a sale of such property. Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of nine (9) months from the date of such levy. For purposes of this section 12.12.b, if property is declared purchased by the commissioner at a sale pursuant to subsection 12.4, the commissioner shall be treated as having received an amount of money equal to the minimum price determined pursuant to such subsection or, if larger, the amount received by the commissioner from the resale of such property.

12.12.c. Public information. - The commissioner shall, upon request, make public the names and persons in whose favor a release of levy or return of property has been made 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 terminated, shall be restored immediately to the benefits and protection of the Act only upon the filing of all delinquent payroll and other reports required by the commissioner and upon payment into the Fund of all unpaid premiums, an adequate premium deposit, accrued interest, claims losses paid during the period of delinquency and any subsequent default or termination, and any other amount due under the Act or the rules promulgated by the commissioner.

13.2. Applications for reinstatement shall be made upon forms prescribed by the commissioner and shall include a report of the gross payroll of the employer during the entire period of delinquencies and any subsequent default or termination, which payroll information shall be verified by the employer or its authorized agent, and shall further include a payment equal to one half of one percent of the gross payroll reported during the period of default, or one hundred ($100.00) dollars, whichever amount shall be greater.

13.3. An employer who applies for reinstatement shall be entitled to the benefits and protection of the Act on the day the application is received by the commissioner and thereafter. However, if the commissioner subsequently reinstates an employer subject to the terms of a repayment agreement, then the subsequent failure of the employer to make scheduled payments in accordance with the repayment agreement, to timely file current premiums, or to restore the premium deposit to the required amount by the end of the repayment period shall cause the repayment 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 payments determined to be owed to the commissioner following the entry of a final order shall cause the application for reinstatement to be null, void and of no effect, and the employer shall be denied the benefits and protection of the Act effective from the date that such employer's account originally became delinquent.

13.4. The payments which must be made under subsection 13.1 of this rule include a penalty designated as interest and claims losses paid by the Fund during the period of delinquency, default, or termination. The amount of that penalty is subject to the following limitations.

13.4.a. The amount of the penalty shall not exceed an amount equal to fifty percent of the premium otherwise due and owing for the period of delinquency and subsequent default or termination.

13.4.b. The period for which the penalty is assessed may be limited to a period of five (5) years immediately preceding the date of the commissioner's receipt of the employer's application for reinstatement. If an employer wishes for the commissioner to consider limiting the period to five (5) years, then the employer's application shall so state. The employer shall present its evidence in support of the commissioner's exercise of that discretionary authority in its favor at the hearing provided for in this section 13 or by entering into a stipulation as provided for in subsection 13.7 of this rule. The commissioner shall exercise his or her discretion to limit the period solely by use of the six factors set forth in subsection 13.5 below.

13.5. Upon receipt of a written application for reinstatement as filed by an employer, the commissioner shall issue a notice of an administrative hearing prior to reinstatement to determine the terms of repayment of all delinquent premiums, premium deposits, accrued interest, and other payments due, and the extent, if any, to which interest and claims losses may be waived. The commissioner shall grant such a waiver or enter into a repayment agreement only after equitably considering the evidence received at the administrative hearing on each of the following factors or by way of a stipulation of such evidence.

13.5.a. The exact nature of the default or termination.

13.5.b. The amount of the claims losses.

13.5.c. The solvency of the Fund.

13.5.d. The financial condition of the employer.

13.5.e. The degree of willfulness exhibited by the employer's conduct resulting in the default or termination.

13.5.f. The potential economic impact upon the state and the specific geographic area in which the employer is located, if the employer should cease operations.

13.6. An employer may waive its right to an administrative hearing by agreeing to pay the full amount of the delinquent premium, premium deposit, accrued interest thereon, other payments due, claims losses paid by the Fund and interest thereon subject only to reduction as specified in subsection 13.4.a of this rule. Except as provided for by subsection 13.7 of this rule, no other reduction, waiver, or limit shall be allowed.

13.7. An employer may also waive its right to an administrative hearing by entering into a proposed stipulation and settlement agreement with the attorney for the Fund.

13.7.a. The stipulation shall contain detailed findings of fact pertaining to the employer's default and in particular shall address the six criteria contained in subsection 13.5 of this rule if the parties and the Fund's representative are recommending that the commissioner waive any part of the penalty or limit the collectibility period. The attorney for the Fund is not under any obligation to enter into such a stipulation or settlement agreement if that attorney disagrees concerning any of the proposed stipulated facts or with the proposed agreement.

13.7.b. If the full amount of the delinquent premium, premium deposit, accrued interest thereon, other payments due, claims losses paid by the Fund and interest thereon subject only to the reduction as specified in subsection 13.4.a of this rule is equal to or less than Fifty Thousand Dollars ($50,000.00), then any stipulation recommending that the commissioner accept less than such full amount or recommending a repayment agreement of all of or part of such full amount shall be presented directly to the commissioner for his or her inspection, approval, or rejection on the same terms provided for below for final review of the commissioner.

13.7.c. If such full amount is in excess of Fifty Thousand Dollars ($50,000.00), then the proposed stipulation and settlement agreement, if agreed to by the parties and the Fund's representative, shall be submitted to the hearing officer for his or her inspection. The hearing officer may reject the proposal if he or she finds it deficient for failure to adequately address any necessary evidentiary point or for being an unreasonable settlement. If the proposal is rejected, the case shall proceed to hearing unless an acceptable substitute proposal is submitted. If a proposal is accepted by the hearing officer, then it shall be forwarded to the commissioner along with the hearing officer's written recommendation to accept it for the commissioner's review.

13.7.d. The commissioner's review shall be on the same basis as that of the hearing officer. In any case where the proposal is accepted by the attorney for the Fund, the hearing officer, and the commissioner, the final agreement may not waive any portion of any payment due by the employer under the Act except for the penalty provision for interest and claims losses. Further, those penalty provisions may only be waived on the basis of the six criteria set forth in subsection 13.5 of this rule.

13.8. The administrative hearing provided for by subsection 13.5 of this rule shall be conducted pursuant to article five, chapter twenty-nine-A of the Code of West Virginia and pursuant to the requirements of section 14 of this rule. For the purposes of a subsection 13.5 administrative hearing and the receipt of evidence on the solvency of the Fund, in every such case the hearing officer shall be deemed to have taken notice of the most recent report from the Fund's actuary and the three (3) most recent annual financial statements from the Fund's accountant. Counsel for the Fund appearing at the hearing may request that the hearing officer take notice of such additional reports on the solvency of the Fund as may be in the possession of the commissioner. Except upon objection by the employer and the sustaining of that objection, the hearing officer shall take notice of any such additional reports. Copies of all documents of which notice is either deemed to have been taken or which is taken shall be made available to the employer at its request.

13.9. The Fund shall be represented at a subsection 13.5 administrative hearing either by an attorney representative or designee of the office of the attorney general or by an attorney on the staff of the commissioner. Such attorney shall present the Fund's evidence during the administrative hearing in order to establish the fact of the employer's delinquency, default, or termination, the amounts owed as premium, premium deposit, other payment due, accrued interest, claim losses paid by the fund during the employer's delinquency, default, or termination and accrued interest thereon as determined from the records in the commissioner's office, payroll reports and other reports due, and evidence regarding any waiver, reduction, or limit of the penalty amount to be paid by the employer. Such attorney shall also cross-examine the employer's witnesses at the hearing and shall otherwise fully participate in the hearing including the submission of argument thereafter to the hearing officer and the submission of comments upon the hearing officer's report and recommendation following the hearing.

13.10. Pursuant to section 6 of this rule, the commissioner may direct that a complete audit of the employer's account be made at any time after a reinstatement application 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. If pursuant to subsection 7.1 of this rule or if otherwise for the first time an employer asserts that its delinquency and subsequent default or termination were caused by delays (including errors) in the administration of the Fund, it shall present its evidence to support that assertion at the administrative hearing. If, however, a hearing had previously been held under subsection 7.1 of this rule on the issue of the cause of the delay, then the employer is not entitled to relitigate this issue during a proceeding under this section 13 of this rule unless the employer establishes good cause to believe that the commissioner's earlier ruling was in error. The burden of proof on the cause of the delinquency and subsequent default or termination shall in all cases remain with the employer who must carry that burden by a preponderance of the evidence presented at the hearing. The Fund's attorney may submit rebuttal evidence on this issue. In the event that the employer successfully establishes that its delinquency, default, or termination was caused by a delay in the administration of the Fund then a penalty shall not be assessed and the employer's default or termination shall be voided and of no legal effect if within ten (10) days of the commissioner's final order on the reinstatement application, the employer pays in full the amount of premium, premium deposit, or other payments due or files its payroll report or other reports which may be due.

13.12. An employer may file an application for reinstatement despite the pendency of some other remedial action that may have been instituted by the commissioner. The commissioner may then delay or continue further pursuit of that remedial action, if in the commissioner's sole discretion, the interests of the Fund will be protected or furthered despite such delay or continuance. One factor that the commissioner 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 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. Following the entry of a final order by the commissioner which finds the amount of payment due or the reports due, or both, from the employer, the commissioner shall send a copy of the final order to the employer's representative, or if none, to the employer, by United States certified mail, return receipt requested, postage prepaid. The employer shall then have ten (10) calendar days, not including the date of receipt, in which to make payment in full or to file the required requests, or both. Such payment or filing, or both, must be in the commissioner's office by said tenth day. Failure to comply with this time period for any reason save the filing of an appeal to the circuit court and the granting of a stay by that court shall constitute an abrogation of the reinstatement application and render it null, void, and of no effect and the employer shall be denied the benefits and protection of the Act effective from the date that such employer's account originally became delinquent.

13.14. Notwithstanding the provisions of subsection 13.13 of this rule, if the commissioner's final order grants an employer's request for a repayment agreement, then payment of all amounts found to be due and filing of all reports found to be due, or both, shall be made in accordance with the terms of the repayment agreement as approved by the commissioner.

13.15. The commissioner 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 agreement. The commissioner shall exercise his or her 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 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 agreement shall provide for the payment of interest by the employer upon the amounts payable to the Fund over the life of 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 breach of a repayment agreement by the employer shall constitute a withdraw by the employer of its original reapplication request and shall render the reapplication 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 West Virginia Code, §29A-5-1 et seq., and with the provisions of this section.

14.2. Unless waived by all the parties to the hearing and by the commissioner, 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. 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, 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. If the commissioner 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.

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 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 West Virginia 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 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 "Rules of Civil Procedure for Trial Courts of Record," "Trial 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, and every hearing officer appointed by the commissioner 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 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 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 of the commissioner 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 the materials that are to be noticed pursuant to subsection 13.8 of this rule, 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 all 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. If the commissioner eventually pays for the witness' costs or time, then the employer's account will be charged for such payments and 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 executive secretary, 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) day 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, 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. 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 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. 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 of law and such legal briefs or memoranda as they wish. The parties shall be permitted seven (7) days to file such items which 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 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 West Virginia 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. 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.

§85-11-15. Interest.

15.1. Any and all payments unpaid on the date on which due and payable, as prescribed by the commissioner, 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. 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 shall receive the initial notice of that delinquency or default within sixty (60) days of the commissioner's becoming aware of that delinquency.

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 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, 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 of the Act as well as the incurring of special liabilities under the Act by a delinquent, defaulted, 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 under this rule or as contained in the Act, the commissioner may elect to request prosecution of any person, firm, partnership, association, or corporation who violates any part of the Act in accordance with West Virginia Code, §23-1-16. Notice should also be taken of the provisions of subsections 3.4.f, 5.2, and 12.3.b of this rule for other specific provisions concerning criminal penalties.

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

Pursuant to the Freedom Of Information Act, West Virginia 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, 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 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.

TITLE 85
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
DIVISION OF WORKERS' COMPENSATION

SERIES 11
Enforcement of Reporting and Payment Requirements.

TABLE OF CONTENTS

WEST VIRGINIA LEGISLATURE
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
Room M-438, State Capitol
Charleston, West Virginia 25305
(304) 340-3286

FILED

1990 JAN 19 AM 11:46

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Senator Lloyd Jackson, Co-Chairman
Delegate Patrick H. Murphy, Co-Chairman

Debra A. Graham, Counsel
Marie Nickerson, Receiving Clerk

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

January 10, 1990

TO: Ken Hechler, Secretary of State, State Register

TO: Mr. John Kozak, Executive Secretary
Division of Workers' Compensation
Dept. of Health and Human Resources
601 Morris Street
Charleston, WV 25301

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Enforcement of Reporting and Payment Requirements

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule
   (a) as originally filed ______
   (b) as modified by the agency __X__

2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. ______

3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. ______

4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached. ______

5. Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached. ______

Pursuant to Code 29A-3-11(c), this notice has been filed in the State Register and with the agency proposing the rule.