WEST VIRGINIA
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OFFICE WEST VIRGINIA SECRETARY OF STATE

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

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

CITE AUTHORITY WV Code §§23-2C-5(c)(2); 23-2C-22; 33-2-10(b); 33-2-20(a); 23-4-1 et seq.; 23-5-1; & 23-5-7

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code §§23-2C-5(c)(2) & 33-2-10(b)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 12

TITLE OF RULE BEING AMENDED: Compromise & Settlement of Workers' Compensation Issues

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

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS July 19, 2006

John C. Musgrave
Acting Cabinet Secretary
West Virginia Department of Revenue

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

SERIES 12
COMPROMISE & SETTLEMENT OF WORKERS' COMPENSATION ISSUES

Section

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

SERIES 12
COMPROMISE & SETTLEMENT OF WORKERS' COMPENSATION ISSUES

§85-12-1. General.

1.1. Scope. -- These rules shall govern the compromise and settlement of workers' compensation issues pursuant to W. Va. Code §23-5-7.

1.2. Authority. -- W. Va. Code §§23-2C-5(c)(2); 23-2C-22; 33-2-10(b); 33-2-20(a); 23-4-1 et seq.; 23-5-1; 23-5-7. Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), rules adopted by the industrial council and the Insurance Commissioner are not subject to legislative approval as would otherwise be required under W. Va. Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- June 19, 2006.

1.4. Effective Date. -- July 19, 2006.

§85-12-2. Purpose.

The purpose of this rule is to establish a consistent process to govern the settlement of workers' compensation issues.

§85-12-3. Definitions.

As used in this legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. "Insurance Commissioner" means the Insurance Commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code, or any designated third-party administrator of the Insurance Commissioner.

3.2. "Industrial Council" means the industrial council created pursuant to the provisions of W. Va. Code §23-2C-5.

3.3. "Orthopedic occupational disease" means an occupational disease that involves the musculoskeletal system as it functions for the purpose of mobility. The musculoskeletal system includes the following component parts: (1) bone(s); (2) muscle(s); (3) tendon(s); (4) ligament(s); and (5) nerve(s). An orthopedic occupational disease may affect one or more component parts of the musculoskeletal system.

3.4. "Nonorthopedic occupational disease" is an occupational disease that is not an orthopedic occupational disease.

3.5. "Occupational exposure injury" means a one-time, limited-duration hazardous exposure that creates an immediate acute pathophysiologic change.

3.6. "Occupational disease," as further defined in W. Va. Code §23-4-1(f), is related to prolonged hazardous exposure and creates chronic pathophysiologic changes that develop over time and that are more likely to result in prolonged sequelae and/or permanent physical impairment.

3.7. "Private carrier" means any insurer authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.8. "Self-insurer" or "self-insured employer" mean an employer who is eligible and has been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.9. "Review process" refers to the period between the identification of a potential claim and the final closure of the claim pursuant to the statute.

3.10. "An employer that 'is not active in the claim'", as described in W. Va. Code §23-5-7, means all employers other than those employers that have been granted self-insured status pursuant to W. Va. Code §23-2-9: Provided, That the role of an insured employer to participate in the settlement of a workers' compensation claim shall be controlled by the terms of the workers' compensation insurance policy.

§85-12-4. Parties.

The claimant and the Insurance Commissioner, other private insurance carriers, or self-insured employer, whichever is applicable, may negotiate a settlement of any and all issues in a claim or claims, except for medical benefits for nonorthopedic occupational disease claims, pursuant to the requirements of W. Va. Code §23-5-7 and the regulations herein set forth. An insured employer is permitted to participate in the settlement of a claim only to the extent that the employer is permitted to do so under the terms of the applicable workers' compensation insurance policy.

§85-12-5. Issues Subject to Settlement.

If the claim is in the review or appellate process, all claim issues, except for medical benefits for non-orthopedic occupational disease claims, may be settled, even though the issues may not be currently contested. These issues include, but are not limited to, temporary total disability, temporary partial disability, permanent partial disability, permanent total disability, vocational rehabilitation and any other issues within the settlement provisions of W. Va. Code §23-5-7.

§85-12-6. Manner of Payment.

The parties to any settlement may arrange for any amount to be paid to the claimant or for

the benefit of the claimant in a lump sum or in incremental payments or in any manner as agreed upon by the parties. If no mention is made in the settlement agreement regarding a permanent disability percentage, the claim record will not reflect a percentage for the settlement award.

§85-12-7. Dependent's Benefits.

Except in cases where the claimant has previously been granted a permanent total disability award, dependents are not entitled to one hundred four (104) weeks of benefits as set forth in W. Va. Code §23-4-10 if the agreement is silent as to the claimant's entitlement to a permanent total disability award.

§85-12-8. Settlement Not to be Considered an Admission Against Interest.

The terms of a settlement agreement shall not constitute an admission against interest by any party. All communications and correspondence between the parties during settlement negotiations are confidential and may not be used against a party if a settlement is not reached.

§85-12-9. Effective Date of Settlement.

Unless otherwise agreed upon by the parties, the effective date of a settlement shall be the date the agreement is executed by the claimant and the Insurance Commissioner, private insurance carrier, or self-insured employer, whichever is applicable.

§85-12-10. Minor Dependents and Claimants.

In any case in which a surviving dependent infant may be entitled to receive the balance of a permanent partial disability award due to the death of a claimant before such award was paid in full or in any case in which the claimant is an infant, the legal guardian of such infant may negotiate a settlement of such claim with the Insurance Commissioner, private insurance carriers, and self-insured employers, whichever is applicable. The legal guardian shall proceed as set forth in W. Va. Code §44-10-14. The appointment of said guardian shall be done as set forth in W. Va. Code §44-10-1 et seq. No bond shall be required of said guardian by the Insurance Commissioner in addition to that required by the appointment of said guardian or approval by the circuit court of any settlement pursuant to the provisions of W. Va. Code §44-10-1 et seq.

§85-12-11. Death of Claimant.

Unless otherwise agreed upon by the parties, should a claimant to whom an award has been made pursuant to a settlement die, the unpaid balance of the award shall be paid to the claimant's dependents as defined in W. Va. Code §23-4-10, if any. The payment shall be made in the same installments which would have been made to the claimant if living, but, unless otherwise specified in the settlement agreement, no payment shall be made to a surviving spouse of the claimant after his or her remarriage and such liability shall not accrue to the estate of such claimant and shall not be subject to any debts or charges against the estate.

If the claimant dies while the settlement is pending and the claimant is survived by

dependents, the settlement may continue as if the death had not occurred. The payment shall be made to the dependents.

§85-12-12. Deductions From Settlement Awards.

12.1. Pursuant to W. Va. Code §23-4-18, any amounts owed for child or spousal support will be withheld from settlement payments.

12.2. Overpayments will be deducted pursuant to W. Va. Code §§23-4-1c and 23-4-1d, unless otherwise agreed upon by the parties in the agreement.

12.3. Any award of monetary benefits entered by the office of judges, the Appeal Board or the Supreme Court of Appeals of West Virginia after the date the settlement agreement was signed by the necessary parties shall be deducted from the agreed upon settlement amount: Provided, That the deduction in this subsection can only be applied for amounts of award(s) of monetary benefits which involve the same issue(s) that the settlement involved, or if the settlement was a full and final settlement of all issues involved in the claim. If the amount of any such award is greater than the agreed upon settlement amount, the claimant's recovery shall be limited to the amount specified in the settlement agreement.

§85-12-13. Settlement Terms.

Under the terms of the agreement, the claimant shall be provided five (5) business days to revoke the executed settlement agreement. In addition and in accordance with the provisions of W. Va. Code §23-5-7, each settlement agreement shall provide the toll free number of the West Virginia State Bar.

§85-12-14. Insurance Commissioner Review.

14.1. In accordance with the provisions of W. Va. Code §23-5-7, the Insurance Commissioner may review any workers' compensation settlement entered into between an unrepresented claimant and the Insurance Commissioner, private insurance carriers, or self-insured employer, and may declare any such settlement void if the Insurance Commissioner determines the settlement to be unconscionable pursuant to the criteria set forth in subsection 14.2 of this section.

14.2. A workers' compensation settlement shall be considered unconscionable, and therefore be declared void as against public policy, if it is found to constitute a gross miscarriage of justice or if the terms of the settlement shock the conscience.

Criteria to be considered by the Insurance Commissioner in determining whether a settlement is unconscionable include, but are not limited to:

a. The relative position of the parties involved in the settlement at the time the settlement was entered into;

b. The adequacy of the bargaining position of the parties at the time the settlement

was entered into;

c. The meaningful alternatives available to the claimant at the time the settlement was entered into;

d. The existence of specific unfair terms in the settlement agreement;

e. The nature of the entire agreement;

f. Whether the claimant was provided ample opportunity to read and review the settlement agreement and/or whether the settlement agreement was read to the claimant;

g. Whether the claimant was not informed of his ability to obtain a lawyer to assist in the review of the agreement;

h. Whether any of the material terms of the settlement agreement were not conspicuous;

i. The percentage of total benefits provided for under the settlement terms which have actually been received by the claimant when the claimant requested the settlement be reviewed; and

j. The time that has elapsed between the time the settlement was entered into and the time the claimant requested the settlement be reviewed.

14.3. All workers' compensation settlements are presumed not to be unconscionable. The claimant shall at all times have the burden of proving that a settlement agreement is unconscionable. The facts that the terms of a workers' compensation settlement are such that the claimant may not have received the same amount of benefits which he would have received under chapter twenty-three of the West Virginia Code, that the claimant may have been able to obtain more benefits had the claimant chose to not enter into the settlement, or that the claimant's injury or occupational disease has unexpectedly progressed or become worse since the time of the settlement was entered into are not sufficient to render a settlement unconscionable. Rather, the claimant must prove the settlement was unconscionable based on the criteria and standards set forth in subsection 14.2 of this section.

14.4. Procedure for review.

a. Any claimant who believes that a settlement entered into while the claimant was unrepresented by counsel is unconscionable may, within one hundred-eighty (180) calendar days of the date of the settlement, file with the Insurance Commissioner, on a form prescribed by the Insurance Commissioner, a request for review of settlement. The one hundred-eighty (180) day time limitation is jurisdictional, and a claimant may under no circumstances have a settlement reviewed beyond the time limitation: Provided, That a claimant may, within one hundred-eighty (180) calendar days of July 19, 2006 request a review of any settlement entered into with the former Workers' Compensation Commission, self-insured employer or a private carrier between January

29, 2005 and July 19, 2006.

b. Following the receipt of a request for settlement review, the Insurance Commissioner will then forward the request to a hearing examiner. The hearing examiner shall permit all parties involved in the disputed settlement to present, as part of the record, written argument and evidence as to each party's position regarding the settlement. Additionally, each party shall be permitted to request a hearing before the hearing examiner in regard to the settlement review, with the opportunity to present at the hearing argument and evidence regarding the settlement. The hearing examiner shall have broad discretion in regard to the scope of evidence and discovery, if any, permitted in conjunction with such hearings and the settlement review process in general. Hearings shall otherwise be in accordance with the provisions of Sections 4 through 10 of 85 CSR 7.

c. Within forty-five (45) days after the request for review is submitted, the hearing examiner shall submit to the Insurance Commissioner factual findings, legal conclusions and a proposed decision either affirming the settlement or declaring the settlement void due to it being unconscionable: *Provided*, That upon request of one of the involved parties, the hearing examiner may, for good cause, extend the settlement review period for a period of an additional forty-five (45) days.

d. Upon receipt of the hearing examiner's recommended decision, the Insurance Commissioner shall then either enter an order consistent with the hearing examiner's recommended decision or an order based on a rejection or modification of the hearing examiner's decision. To the extent that the Insurance Commissioner rejects or modifies the recommended decision of the hearing examiner, the Commissioner shall furnish his or her own findings of fact and conclusions of law.

e. A copy of the final order or decision of the Insurance Commissioner shall be served upon each involved party, or if a party is represented by counsel, its attorney of record. Service shall occur in person or by certified mail.

14.5. Any aggrieved party shall have the right to appeal the order of the Insurance Commissioner to Circuit Court under the provisions of W. Va. Code §29A-5-4.

§85-12-15. Severability.

If any provision of these rules or the application thereof to any person, party, or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.

PUBLIC HEARING

MARCH 24, 2006

WEST VIRGINIA INSURANCE COMMISSION
WORKERS' COMPENSATION INDUSTRIAL COUNCIL
COMPROMISE AND SETTLEMENT OF WORKERS' COMPENSATION ISSUES
TITLE 85, SERIES 12

Transcript of the Public Hearing held on Friday, March 24, 2006, at 3:00 p.m., Charleston Civic Center, 100 Civic Center Drive, Charleston, West Virginia, related to Rule 85CSR12, Compromise and Settlement of Workers' Compensation Issues.

Industrial Council Members Present:

Charles Bayless, Chairman
Bill Dean, Vice-Chairman
Jane L. Cline, Commissioner
Dan Marshall
Walter Pellish
Rick Slater

Public Hearing on Rule 85CSR12, Relating to Unconscionable Settlements

Chairman Bayless: This is the rule on the compromise, the settlement and how the Commissioner can set aside settlements if she deems them unconscionable, etc. I would propose we start off by having Ryan Sims, an attorney with the Commission, give us a brief overview of the rule and the public comments.

Ryan Sims: Good afternoon Chairman Bayless and members of the Industrial Council. We came to you a little over a month ago with this rule to initially file before the Secretary of State and we had already received some comments from stakeholders at that time. Now we are here today for the public comment opportunity on that rule. Of course, members of the public can come before you and make comments to you regarding Rule 12 pertaining to compromise and settlement of workers' compensation claims. We received a handful of written comments and they have all really been from what you described as stakeholders rather than from the public. Stakeholders include people such as claimant attorneys, employer attorneys, TPA's, that type of thing – people with a vested interest in this rule and the way it applies to workers' compensation settlements.

I'll just run down what I believe is four predominant topics that came about in regard to this rule after reviewing the written comments we have received to date. All those written comments have been forwarded to you by our secretary, Elizabeth Webb. These are in no particular order.

This is what I think are the biggest issues that have risen as a result of the comments we've received. The first one is to place a time limitation in regard to the ability for a claimant to request a review of the settlement by the Insurance Commission. In other words something similar to a statute of limitations if they entered into a settlement, say on April 1 of this year. For example, six months or nine months they would have to ask the Commissioner to overturn the settlement. This would provide some repose to employers, particularly the insurer in regard to knowing that the settlement is final. In other words, they don't have to wait two, three years down the road. I think that point was well taken by the Insurance Commission and we will in fact place some type of statute of limitations within the rule. Additional points that have come up that I would say have not been resolved and that we are still deliberating within the Insurance Commission are: A provision which would enable employers to be actively involved in the claim along with the insurance company. For example, can BrickStreet settle the claim within policy limits or within the purview of Chapter 23 and the benefits they are allowed to have? Is the employer allowed to separately settle the claim in conjunction with BrickStreet or does the employer have equal say to the insurer in regard to the settlement of the claim? Another point that was made – there has been some discussion about the standards that are within the rule in regard to what makes a settlement "unconscionable." At the last meeting I explained to you the process we used to come up with those standards. Specifically we got them both from looking in the legal dictionary in regard to the definition of "unconscionable," as well as a West Virginia Supreme case, the Art's Flowers case. I believe our secretary, Elizabeth, has forwarded that case to you, pursuant to your request at the last meeting. Finally there was a request that we put a provision for the receipt of attorney fees – that there be some ability for attorney fees. In most cases there will be an attorney involved when there is a request to review the settlement for unconscionability. Sometimes it could be a pro se request, but normally there will be an attorney involved. And there was a request for a provision to be placed in there that attorneys can recover some type of fees for having to take their client through the process of getting the settlement review, particularly if the settlement was found to be unconscionable. So, those were the real issues that came up. Again, the first one about placing the limitations. I think everyone within our agency is in agreement that there should be some type of statute of limitation placed within the rule so there is some type of repose for the insurance company or the self-insured employer. On the other three issues that I mentioned, again, this is something we are still internally deliberating and we'd be glad for you all to provide your thoughts on these topics. And, of course, for the public to come and speak about these topics or other topics which they think should be brought before you in regard to this rule. I would be glad to answer any questions.

Chairman Bayless: Does any member of the Council have any questions or comments?

Dan Marshall: What I'm hearing you say is that although we are going to receive some public comments today this matter is not yet right for action by our Body because you are going to come back with some changes and revisions. Correct?

Mr. Sims: That is correct. This is the stage where the public has an opportunity to come before you and speak, and that hasn't been sent to us in written form. What we have received so far is written comments from stakeholders. There is really no vote today. You have the

opportunity to hear from the public what they think about this rule. The third stage will be next month when we come before you with a rule that will have already been sent to you at least a week ahead of time – what we believe should be the final version of this rule and you all will be sent that ahead of time. And then at that point you will have an opportunity to vote "yea" or "nay" on the rule.

Mr. Marshall: The question that I have is when the final draft is submitted to us, will there be an additional comment period where stakeholders or the general public can look at the final version and have their say about it? Or is that not the way the process works?

Mr. Sims: If I recall the way the procedure worked before the Board of Managers – I don't specifically recollect – but it seems to me that if you want to you can provide some final public comment opportunity before you vote "yes" or "no" on the final version of the rule we present to you. I think that that would be within the discretion of Chairman Bayless to some degree. This is really the opportunity for the public to comment. But, again, if Chairman Bayless or you all decide that you would like to provide a final opportunity for public comments, you could do that as well. I follow what you are saying because the rule will be amended. The final version will be different from the current version. So, again, I would think that would be within Chairman Bayless' discretion to provide a comment ability right before you vote on the rule, or you could deliberate amongst yourselves during that period as well – publicly.

Mr. Marshall: I would have some concern about voting at the next meeting on this issue when we haven't had any extensive discussion about it. The only opportunity we would have for discussion would be immediately before a vote is taken. I think we've got some serious issues here and I don't want to take too much time, but I think the issue of employer standing is something that deserves a great deal of careful consideration. With respect to the good faith issue – and I know this is difficult and time consuming to do – but I would ask if you could perhaps do a little bit more research on some out of state cases, directly on point to insurance bad faith because the state of our lawyer on bad faith seems to be pretty much limited to that yellow pages' case. Just make sure that we've looked at options dealing specifically with insurance of bad faith cases.

Mr. Pellish: Mr. Chairman, I have a comment and a question as well. As you know, I stated the last time I was really bothered by the term "unconscionable," and I heard some of the discussion. I'm still not satisfied. It seems to me there's got to be a better way to address the situation than continue to use that word, even though it is in the statute and it would be a pain in the neck to try and get it changed. I read through the court case and when I finished it I just sat there and said, "huh?" It provided no clarity to me, and I know in your attempt to provide some definition you picked up on some of the terminology in that case. But it's still to me very, very unclear. I'm mostly concerned about it from the standpoint of a claimant. If those of us who are somewhat educated have a problem dealing with this subject, I think it is going to be worse with a claimant who is trying to figure the whole thing out. The question I have is why are we so intent on pursuing this as the first rule that needs to be revised? What's the driving force behind moving so quickly with this when there are so many issues to be resolved?

Mr. Sims: The driving force was the Legislature essentially instructed the Insurance Commissioner to establish some criterion to determine if settlements are unconscionable. At least, based on our interpretation of §23-5-7, until we do that there can be no review whatsoever. I could actually review the statute with you if you like. It's West Virginia Code 23-5-7. And, again, our interpretation is that the Insurance Commissioner can overturn settlements by criterion established in a rule. I might be paraphrasing, but the last part of that statute as it currently reads says, "by rule of the Commissioner." And our interpretation was until we establish a rule there is no ability for us to review settlements. We thought it was important because presumably there will be settlements going on between BrickStreet and claimants and between self-insured employers and claimants that we get this criterion established so on a going forward basis they can get them reviewed.

Mr. Pellish: That's a good answer. Thank you.

Chairman Bayless: I would make a further comment on the time limitation. Let's assume it doesn't get adopted until July. I think it will be before that. I would put in the time limitation it would be six months from the date of the settlement or six months from the date of the adoption of the rule so somebody doesn't get their time period shortened once the rule comes out.

Mr. Sims: Mr. Chairman, we actually have a provision in the rule that provides for retroactive review. The Legislature passed the current version of §23-5-7, which essentially withdraw the ability of the Office of Judges to approve settlements. Until we establish this rule there will be kind of a "no man's land" period where there is no review ability. So what we did is we placed a retroactive provision in there that allows us to review settlements from the date the Legislature passed that until this rule is passed.

Chairman Bayless: I think I would argue sort of the other way from Mr. Pellish and being a lawyer. The word "unconscionable" is a fairly well-defined legal term. I am a member of the Bar in a couple different states, and that's pretty much the settlement standard or the standard for review of legal decisions. For instance, for an appellate court to overturn the matter of fact from a lower court, it's got to be proved to be unconscionable. And I would presume the Legislature knew precisely what they meant when they said unconscionable. So I wonder if we should tinker with it because the Legislature used the word which is a legal term and there are enough lawyers in there that my guess is that they knew exactly what they meant. And should we go substituting our own judgment over that of the Legislature? I wish some of the legislators were here today to tell us exactly what it was that they meant.

Mr. Pellish: I guess my reaction to that, Mr. Chairman, is that they went to great lengths trying to define what it is and it's still not clear.

Chairman Bayless: Again, I think you have to balance off legal terminology which is very clear. Unfortunately the lawyers. . .you can't have "wishy-washy" standards and sometimes if you try to make it overly clear and write it in non legal language it doesn't. . .I know exactly what you're saying and that's why we have lawyers – people can hire lawyers. They know what the standards are. But we do need to have a very definite standard and people can understand it.

Mr. Pellish: Absolutely. I agree. That's what I'm after.

Chairman Bayless: Things like the overall bargaining power – you can't put that in numbers in legal standard. It's one of those. . .you know it when you see it. The court has to balance that and look at the total facts surrounding the case. It's a tough standard. It's hard to put that in numbers and say was it 70% or was it 70.5% for bargaining power? Commissioner, you can always jump in at any time. Are there any comments from any member of the public on this rule? Let's go down the list [sign-in sheet where people signed up to speak] in the order that people signed up on Rule 12, and the first is Michael Keener from Acordia.

Michael W. Keener (Managing Senior Vice-President, Acordia): My name is Michael Keener and I am Senior Vice-President with Acordia Employers Service. Good afternoon. I have provided you copies of my comments and I will attempt where possible to paraphrase in order to distill as much time as possible. Mike Cavender, who is also here and will offer comment following me, has submitted comments in regard to Rule 12 to Ryan Sims, and we appreciate the opportunity to do that. He has in fact acknowledged specific parts of the statute to which we attribute the compromise and settlement component that we want to talk about a little bit.

We have a lot of experience in other jurisdictions in other states with compromise and settlement. And we acknowledge that the policy under NCCI, that the employer is obligated to sign and be a party to, says that they can in fact settle claims without the participation of the employer. We also know the most enlightened carriers in other states recognize the significance and importance of involving the employer in the communication process and the compromise and settlement process in particular. We are currently in the initial processes of privatization. Although the marketplace prospectively will help shape the behavior of the carriers, we only have one carrier in place at this time. And I think it makes it even more imperative that we have enlightened regulation to shape the behavior of the carriers going forward and this one in particular going forward simply because we're new at it, if no other purpose.

I have some additional supporting thoughts as to why communication from the employer needs to be involved. I think it is imperative that we cause the carriers to engage the employer in the communication process to cause them to develop a trust relationship with the employer community. Experienced carriers in competitive states also know a few things as well and they pick up on it very quickly. They know that it is ultimately the employer's funds that they are using to settle claims and so what they do is they try to strike a balance between their attempt preserve their assets and build surplus and their need to preserve customers as well. The carrier's primary employer contact also needs to participate in it because they need to know the desired mode and negotiation that the employer would choose to have engaged in with their employees. They also have to mutually agree via communication on what in fact is considered to be a "fair" offer. The employer oftentimes is more knowledgeable of what's going on in the workplace than the carrier obviously can be and so therefore can provide additional points of information and knowledge about how in fact this claim will pay out if in fact it goes to the end of the claim. There are many human resources factors that the employer knows that the carrier

will not know and so therefore the employer's representative needs to be engaged. Also, contingent upon a fair offer, it requires updated information. And at this point the employer is not getting updated information. In fact they are not getting any information at all in regard to their claims arrays. Therefore it is difficult to formulate a fair offer or be engaged in developing a fair offer if they don't know in fact what reserves are actually on the books.

We need to actually have access to what in fact is called the employer loss activity statement. You will find that the employer needs to look at that statement to determine what reserves are on there. But we find that when we look at the reserves based upon the mechanism that is in place now, which is called MIRA, which is the Micro Insurance Reserve Analysis automating reserving process. In fact what it does is it places reserves on claims that don't make sense on a claim-by-claim basis and in fact may be over reserve. But in the aggregate, it's probably correct. But when you go in and take a look on a claim-by-claim bases it makes no sense at all. So if in fact you attempt to make a proffer for a claim based upon the reserve and you know more facts about it than the carrier and you make what you consider to be a "fair" offer based upon a risk assessment – if you're just taking a look at the reserve and taking a look at the offer – it may in fact appear to you to be unconscionable because you are offering a significantly reduced amount of money based upon what the reserve is.

All that being said, what I'm trying to say in summary is the following. We have concerns about being able to make a fair offer and therefore it requires accurate and up to date information. It requires communication. We also are concerned about not making decisions that create unfair precedence inside the organization relative to human resources. I've talked to a few people, and let me give you an example. In some instances an individual has been back to work for months and there is still a significant reserve on the books for that particular claim and there has been no activity on that claim. The likelihood of any activity on that claim coming again is pretty remote. Do you in fact offer a settlement to that particular individual in order to get that reserve off the books when in fact that reserve should have been taken off the books anyway after a reasonable period of time? What I'm concerned about is making sure that the employer at all times is engaged in something that will in fact drive their premium as well as in fact perhaps adversely affect their human resources environment back at their work site if in fact they are not a party to the claim. Thank you very much.

Chairman Bayless: Steve White, you want to make a comment later. You don't want to do it on Rule 12? Okay. Mike Cavender from Acordia

Mike Cavender (Acordia Employers Service): Good afternoon. My name is Mike Cavender and I am also with Acordia Employers Service. Acordia is a third party administrator for workers' comp programs and we represent many West Virginia employers. We have hundreds of clients that are insured for their work comp programs and their combined experience represents over 20% of the insured claim volume in the State. With 2005 changes to our workers' compensation statute gives employers the right to designate a representative to act on their behalf. We offer comment today in that capacity and on behalf of our clients collectively. We appreciate this opportunity to make comment and submit to you that the proposed Rule 12 amendments are in conflict with the clear meaning of the language contained

in our statute, specifically through the exclusion of any insured employer from the settlement process. In settlement situations the statute recognizes two types of insured employers – those that are active and those that are not. The amendments to the rule should reflect this fact and any active employer should be recognized as a party of equal standing in the settlement process. The proposed amendments eliminate all employers from the process altogether. The fact is that the language in §23-5-7 make the active insured employers equal participants in the settlement process along with their insurance carrier and the claimant. Any of the three can pursue settlement negotiations, but all three must agree to the settlement terms or no settlement can be entered into. Since all payments made in the settlement situation will be applied to an employer's experience and the employer will pay premiums that are affected by those losses, our statutory language is correct in making employers equal participants in the process. The Series 12 language should do so also. The written comments that we provided previously offer recommendations on changes to Rule 12 that would accomplish the objectives that I've outlined today. Any questions? Thank you.

Henry C. Bowen (Executive Secretary, WV Self-Insurers Association): Thank you very much, Mr. Chairman. Good afternoon members of the Industrial Council and Commissioner Cline. I'm Henry Bowen. I'm Executive Secretary of the West Virginia Self-Insurers Association. This of course is a noticed Public Hearing under the Administrative Procedures Act that is required under the rule making authority that the statute gives the Commissioner that is exempt from rule making review. The past processes that the Workers' Compensation Commission create opportunity for both dialogue before a Public Hearing, historically we've not had any problem whatsoever in continuing to discuss concerns about language contained in rules. And I wanted to publicly acknowledge this Council's position on that. It really is a position that makes for flexibility among all of us who have interests in this area. I am a stakeholder, but a member of the public and I have some 25 years of workers' compensation claim defense.

I am going to focus primarily on Section 14.2 dealing with "unconscionability." We are stuck with the fact the Legislature chose to use that. As I said in my written comments, the Association certainly acknowledges the difficulty and challenges of trying to define standards and criteria that can be used objectively to evaluate whether or not a settlement – which is of course otherwise a contract for which consideration is paid – whether that may be legally voided. You may recall from looking at §23-5-7, the fundamental tenant is that any contract that is induced for settlement on the basis of fraud is of course a violation of public policy. So regardless of whether or not an individual has legal representation or not, if the issue rises to the level of fraud, that settlement is void in violation of public policy just as the settlement would be void if counsel were involved.

Prior to 2004 only the Workers' Compensation Commission and authorized parties to a claim could settle claims in West Virginia. With the 2003 legislation, self-insurance was expanded and self-administration mandated by law. So, self-insurers who are authorized to direct pay their benefits are required by law to administer their claims just as any carrier will after the market opens in 2008, just as BrickStreet is doing now as the sole carrier authorized by law to write workers' compensation coverage. We are permitted under Chapter 23 to directly negotiate a settlement. We are permitted to directly agree to a settlement that is binding on the

claimant, just as any settlement that BrickStreet enters into with any of BrickStreet's insured policyholders will be binding on the injured employee or the claimant so long as the settlement is not found to be either fraudulently obtained under §23-5-7 or fraudulently induced or unconscionable under the criteria that you are going to have to develop. The biggest problem with trying to reduce this to writing is it's a difficult challenge and unfortunately, inevitably, vagueness can occur. I think Mr. Pellish at the last meeting made it very clear that as a non lawyer he read this and he felt is was vague. I'm a lawyer of some 30 years of experience and I can tell you it's replete with vagueness. And this is not intended to be a criticism of the writers. It's just a fact that we cannot allow a criterion to be used in evaluating a veto right of a settlement agreement when the criteria itself is subject to multiple interpretation by those people applying it. So, you simply have to have something more specific. Chairman Bayless, you've already commented "unconscionability" legally is definable. It's got to be something higher, different than or more significant than just simply subjectively concluding that a settlement is grossly unfair. What is grossly unfair? The simple fact of the matter is a man or woman who is injured in West Virginia should not have to engage a lawyer to protect his or her rights. Although as an attorney I'm comfortable with the notion that people certainly are going to have greater confidence if they are represented by counsel in settlement of any dispute.

Why are we concerned about this? It is simply because we are in the same standing as a carrier; regulated by the Commission; subject to annual audit; subject to complaints if we are perceived in self-administration to be doing something wrong. We need two things in this process. We need predictability and we need consistency. Neither of those have been regularly available to the employer community in West Virginia workers' compensation's recent past. And, of course, it has been considerably different in more recent years. But up until this new legislation and new opportunity, settlement has never really been a part of dispute resolution of workers' comp. People aren't comfortable settling. We don't have any significant settlement history by volume. But it is a very important claims management tool in other jurisdictions. And I believe this Council has committed publicly before that it wishes to see our State evolve from a privatization of workers' compensation insurance in manner similar to those in other states. And if that's the case, I would submit to you settlement must become a part of the culture of West Virginia. It will take time indeed. I predict to you that within the near future we will see increased activity to settle claims because of federal law in accounting and financial disclosure obligations. There is a real need for companies who are authorized to self-insure to be exactly on top of what their liabilities are and to use any lawful means in claims management that will allow them to extinguish those liabilities. So from large employer perspective settlement is a necessary part of the workers' compensation claims management. Whether it's a disputed claim in litigation as alternative resolution to going through administrative litigation to its conclusion or simply in non litigated claims, it is very common practice outside of West Virginia for claims to be settled or resolved without workers' compensation litigation being a part of that process.

As a more recent historical figure that is an example of this, our system really was quite liberal and as a consequence legally incented litigation. It was not anything that individuals should be criticized for if they take advantage of the liberal system to increase cash indemnity by trying to increase awards. That has been addressed by our legislation in the 2003 legislation

that was enacted in Senate Bill 2013. We have a very fair and balanced workers' compensation law from the perspective of the employer community, and certainly the self-insured community feels that that's the case.

How do we ensure that we have predictability and finality? Do we want to have an unrepresented claimant have to give a statutory 20% of any cash award to an attorney if the claimant doesn't want to have counsel? This issue won't be an issue if counsel is there because there are other remedies available to that individual worker if his claim is settled and that settlement is subsequently found to be unconscionable and he is represented. This is only an issue that's going to be to address those men and women who don't want to spend the time or money to pay for a workers' compensation counsel.

Prior to this 2005 law change, the Legislature had the Office of Judges require to review and approve all settlements. At that time the review and approval standard was that they had to be fair and reasonable. By practice the Office of Judges had a hearing of any unrepresented claimant's settlement and would make a written record. The officer who presided in the hearing would ask the claimant to explain why the claimant felt it was a fair and reasonable settlement. The Legislature concluded to remove the Office of Judges in the 2003 settlement provisions in the law. As Mr. Sims told you, there is currently no review process there. But the simple fact of the matter is we have to have a definition that makes clear that you can't retrospectively say, "Gee, I settled and I think that's an unfair settlement." We have to find this balance between the individual responsibility and the diligence that's required and vigilance that's required by the claimant in entering into the settlement. So, once we have that settlement agreed to and that consideration, that cash payment is made, and that liability is then resolved, and those reserves can then be legally removed from the self-insured employers' reserves or the carriers' reserves, and all of that goes in for the carrier. It's the same position. That goes into the insured employers' experience for their future rates. For the self-inured it's a direct cost that has to be dealt with.

We respectfully suggest that the language has to be rewritten. We have suggested some alternative language. There is no magic to our language. All we were trying to do is say please don't adopt the rule that allows anybody to come and say, "Well, you know, I didn't have a lawyer and I needed the money. I settled for this. My family is on the verge of bankruptcy," and that's unconscionable or whatever, and then requiring a response; legal counsel in another type of related process. I'm not suggesting that you do anything that chills the right of anyone to complain or raise a concern, but there should be a very high level of proof required. And the only way I know to do that is to say it's got to be unconscionable as something that is shockingly unfair. Not just something that Ryan and I might go into a discussion in six months and say, "You know that case was settled for $50,000.00 and that man could have had over the life of that claim $450,000.00 if paid over life." That's grossly unfair or that's unfair or whatever. And that's where we're going to. . .we're concerned about. I have an incentive representing a self-insured to look for any opportunity on serious injury cases to look for structured settlements and anything that will allow us to properly handle that claim. What we need to do is make sure that someone can't come along later, if there is a settlement, and simply, "Well, I've changed my mind. I'm going to use this process."

I respectfully suggest that the current form would allow complaints and that it is just too confusing. It's simply too arbitrary. Any time that six or eight of us could look at this and probably come to different conclusions on the same facts, I suggest that's criterion that's not appropriate. It's got to be something succinct that allows for objective review in a high level of burden. I thank you for the opportunity of speaking with you and I would be happy to address any questions if you have any.

Chairman Bayless: The standard in 14.2 says, "A workers' compensation settlement shall be considered unconscionable, and therefore be declared void as against public policy, if is found to constitute a gross miscarriage of justice or is otherwise found to be clearly unfair." And then it lists items that come out of the court cases that say what could be clearly unfair. Your standard that you have suggested just says, "Shall be considered unconscionable and be declared against public policy if it is found to constitute a gross miscarriage of justice." Doesn't that actually sound less clear? That's not as clear to me. I mean if you are saying you want something that's clear, that's actually to me less clear than having these things. You talk about somebody that comes in and says, "I didn't have an attorney and I was almost bankrupt." Isn't that the kind of settlement that ought to be examined?

Mr. Bowen: Not for unconscionability. The issue, it seems to me, Mr. Chairman, would be – and the reason that I suggested the alternative and struck the remainder of that sentence – it's the remainder of the sentence that causes me the concern or as found to be clearly unfair. Well, what is clearly unfair? And is clearly unfair unconscionable? Well, no. Clearly unfair is what it is. I mean there may be some things that are unfair that are not shockingly unconscionable as "unconscionability" has been defined as in other cases. If that's not where you want to go, you certainly have great discretion to go where you want to go as a Board in defining this. But to me it should not be something that would make. . .perhaps there's a better way of saying it. There is an obligation I think for us all to be mindful that claimants have a right to be protected, and they have a responsibility to be vigilant. I'm ambivalent myself about. . .I mean if you said to me that you wanted to have a rule that said every claimant ought to have an attorney, someone else would say, "Well, that just benefits lawyers." Well does it benefit lawyers or does it protect individuals? It's in the eye of the beholder. You know, what is unconscionability? Is it like what the Supreme Court of the United States said pornography is – hard to define but everybody knows it when it's seen. All I'm suggesting is that our concern is if we enter into a good faith settlement agreement and someone doesn't have a representative, we don't want them to have an easy path forward to simply go into the Insurance Commission and say, "Hey, I didn't have counsel and this thing is grossly unfair. I could have gotten a total disability payment to age 70 that was worth $300,000.00 and I settled for $75,000.00. That's unconscionable." Well perhaps if were induced by misrepresentation or some deceit or some misinformation, then those facts might rise to that. There's got to be a balance between making a bad deal, which the law doesn't protect us from, and that balance of protecting individuals from themselves, which historically was always the concern when the Legislature was asked to authorize settlement.

The number one concern of organized labor was a very legitimate concern. People are injured. People will need money. People will settle when it's not to their advantage. That hasn't changed. That's a very legitimate concern. But people may choose to settle and make a decision about settlement that they want to change their mind about later. To me that's not what unconscionability is all about. I'm not saying it has to be equivalent to fraud because the law doesn't make it equivalent to fraud, but it has to be something more. And frankly when I look at the criteria you could say in every case, "Well, the meaningful alternative is available to the claimant." What does that mean? Could he have had an attorney? Could he not have an attorney? The severity of the injury; the timing of the settlement. Frankly what we've seen most of and hopefully we'll see more opportunities prospectively, but who knows. But mostly what we see are people coming in and saying, "I went to the doctor. I'd like to settle this and get my medical benefits paid. I don't have anything else." And sometimes claims managers could say, "Oh, hotdog, let's go settle that. That's great. Let's just do this on a full and final basis." That waives rights under the law. And that's really what we're talking about here is making sure that we have a system that people who waive their rights to benefits and protections under the law are doing that in a knowing way so to make it fair and reasonable.

Our language is simply suggested language that was given to you to say, "Hey, we are concerned about this language in this form." It is not intended to be an insult to the attorneys in the Insurance Commission who drafted this. It is hard to draft this type of definitional criteria. Regardless of whether you like our approach or some other approach, this approach is simply too ambiguous and would allow for too many interpretations. The more interpretations you have then I submit the more difficult it is to apply objectively the standard, and that's really the point I was trying to make. And I am unfortunately going to make Mr. Keener correct by saying that you would regret letting me speak last.

Chairman Bayless: This language could be reworded and drop the "clearly unfair" and just say, "shall be considered unconscionable," and then you could have indicia of unconscionable because you brought up the point on the adequacy of meaningful alternatives. Although the Supreme Court says unconscionable, our analysis therefore must focus on "the relative position of the parties; the nature of the entire contract; the adequacy of the bargaining position; the meaningful alternatives available. . ." The point is that's what the Supreme Court is going to use. The Legislature has said "unconscionable" and we tell the Commissioner, "Okay, it really means something else in our mind." When it gets to the Supreme Court do they say, "No, no, no that's not what unconscionable is." Are they going to overturn her constantly?

Mr. Bowen: It's a fair point. But when I read some of these syllabus points, some syllabus points say that the law is real clear on how you can set aside a settlement agreement in a civil case. And then it will start referring to mistake or neglect or fraud. Then there is a whole body of law that has interpreted all three of those wholly differently. But you look at the syllabus points – is a mistake the same level as fraud? Well, obviously I don't think that's what the syllabus point stands for, but I could certainly anticipate someone would argue that "mistake" is all that's necessary. If you ultimately conclude, that's fine. An unrepresented party making a mistake should be able to change his or her mind and come back later because the mistake is unconscionable and it leads to an unconscionable settlement, then that's your prerogative. I

was simply trying to suggest that we have to balance all of these interests. And from our perspective we want to know that when we enter a fair and reasonable settlement that absent facts that would allow it to be attacked under well established law – absent that sort of thing – that we can remove those reserves and consider that liability gone without worrying six months from now somebody is going to come back in. Or does that mean that all reserves have to be held out there until the six-month period goes by? Then can somebody make a good case – excusable and neglect complaint after six months? That's where I was concerned we were going in terms of leaving it so open ended. At the same time I realize that there are very legitimate rights of individuals that need to be considered and protected. I just don't want to see us adopt something that would allow a clever lawyer to simply say, "Ha, I'm going to be able to attack this because it was this, this and this. . ." That is all I'm suggesting. Thank you very much.

Chairman Bayless: Does anybody else have questions? Does any other member of the public that hasn't had a chance to comment that didn't sign up wish to make a statement? Would you please state your name for the record?

Marion Ray: My name is Marion Ray. Like Henry, I am also a lawyer, but I want to be real brief and I want you to hold me to that. The point that I want to make is this, and I mentioned it to Ryan and I believe I heard him touch on this as I was walking in. But my concern is any business person – and my Dad was a small business person – believes that when he makes a deal, he makes deal. I'm not suggesting that a claimant should not be able to come back in and say that something is unconscionable. My concern is this – how long do they have to do that? If we can address that, then I think we've moved a long way. Otherwise what happens is no business person ever wants to enter into an agreement because they never know that they actually can put that behind them. That's my comment. Thank you.

Chairman Bayless: Thank you very much.

Rick Slater: Mr. Chairman, is there not a time period?

Chairman Bayless: That was one of the original comments. We need a 60-day or 90-day or six-month statute of limitations, and I haven't heard any real disagreement with that. Does anybody have any more comments? Commissioner, do you have any comments? You are going to end up administering this.

Commissioner Jane Cline: No. Actually the challenge is sometimes in legislation. We are giving things that we have to try to find a way to make them work. In another area of the general insurance code we have the definition of "what is egregious?" And then having to put in processes to allow for the consumers to be able to get redress if there is something they feel is unfair, and I think clearly that is what we've attempted to do. Through the public comment period there is always opportunity to make improvement upon what we originally started with. Ryan has looked at the comments and had discussions with them. I don't know if you have anything to add to that, Ryan.

Mr. Sims: Again, as I said at the beginning, much of what has been discussed by the people that spoke before you today are issues that we are already aware of and we are going to try to work through these in our updated draft of the rule and take into consideration all of the comments we received, and make our best attempt to create a version of the rule that strikes a compromise between all of the comments we have received so far. I think that's all you can really try to do.

Commissioner Cline: I would further point out that people bring different experiences to the table and that's the benefit of the public comment period. We are operating from the experience we have and how the process works for us, but other people that have been practicing in this area obviously have a lot to offer and can sometimes point out and bring to light things that we just quite honestly didn't have the background that would lead us down the path to come to that conclusion as well. Again, it is still sometimes a challenge.

Mr. Pellish: Mr. Chairman, I would just like to add one thing. I think the Legislature, our Governor and our State took a giant step forward to try and fix a very significant problem in this State – workers' compensation. We have a golden opportunity right now administratively to try and get things right, whatever that means. I think we need to walk carefully and make sure we touch all bases and do the best job we can. I don't envy your job at all. You've got to have a tough time sleeping at night trying to wrestle with all of this stuff. It's very, very difficult and I commend you where you've gotten so far. But it seems to me that we still have a ways to go and we've got to do this very carefully. If we're going to err, let's err on the part of using some common sense in addressing some things.

Mr. Slater: Mr. Chairman, I also would like to echo Mr. Pellish's comments. I'll say at least for me personally Mr. Bowen's comments brought this a little clearer for me as we talk about the ambiguity of reading all of this and what it means. It sounds to me like we're stuck with this term "unconscionable." For me, if that's the case, when you go down through the section and it references "unconscionable" and it references "the gross miscarriage of justice," I mean to me gross miscarriage of justice means something deep, it's threatening, it's callous, it's egregious, it's over the top. Although I think the peripheral examples given in the section is a good attempt to try to lay some of that foundation out. For me it further kind of muddies the water. I think it does open it up to much more interpretation and much more problems when we get to that term "unconscionable." So, I guess what I'll say is that I thought that Mr. Bowen's comments were right on point and I think we need to certainly be careful with the language and maybe in this case "less may be more."

Chairman Bayless: I think the staff has heard the concerns of the Commissioners, and don't ever take my questioning – I'm a lawyer – if Mr. Bowen zigs I will zag. If he zags I will zig. I just try to probe. But I think the staff has heard the comments. If anybody's got any great ideas on what the definition of "unconscionable" is, please get them to Ryan because it is tough. As I said, how do you define it? Every case is different and what the court has tried to do is lay out indicia and said, "These are the things that lead to unconscionability." And that's what the court has tried to do. But you will never find an absolute Webster's dictionary definition that is

going to apply to every case. It's almost that you've got to give the Commissioner latitude and just say these are the guidelines. Thank you very much.

If anybody has any more comments, please get them in, in writing. I think that next time we will look at what is there and depending on the magnitude of the changes and the comments at the time, we can decide whether it is time to go ahead or more public hearings.

INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND PUBLIC COMMENTS RECEIVED ON 85 C.S.R. 12

Introduction

Below is the written response of the Insurance Commissioner of West Virginia to the stakeholder and public comments received in regard to the amended version of 85 C.S.R. 12, which was filed with the West Virginia Secretary of State for public comment at the February 2006 meeting. This response is itemized by topic, and addresses all of the comments received by the public at the 3/24/06 Industrial Council meeting as well as other selected substantive written comments received by stakeholders.

Attorneys' Fees

Several individuals expressed concern that the new version of the rule did not address attorneys' fees in regard to the review of workers' compensation settlements for unconscionability. The Insurance Commissioner believes that this issue would best be addressed through the current attorney fee system in place for workers' compensation claims. Specifically, W. Va. Code § 23-5-16 provides that claimant attorneys can receive up to 20% percent of a workers' compensation award. If a claimant attorney is successful in having a settlement being declared void as unconscionable, the claimant attorney will then be permitted to receive 20% of any increased award the claimant receives as a result of the resolution of the claim after the settlement was voided.

Moreover, there is no statutory authority in W. Va. Code § 23-5-7 for the Insurance Commissioner to allow additional attorneys' fees for representation of claimants in settlement review proceedings before the Insurance Commissioner. In the absence of any specific statutory authority, the Insurance Commissioner believes it would go beyond the purview of the statute to provide for additional attorneys' fees in Rule 12.

Medical Fee Guidelines and Medicare/Medicaid Offsets

There was some concern expressed regarding the ramifications for a claimant of settling in regard to post-settlement medical fees incurred by the claimant not being subject to the maximum fee schedule and medicare and medicaid offsets to which the settlement proceeds may be subjected. While the Insurance Commissioner understands that these are real concerns for the unsophisticated workers' compensation claimants, the Commissioner believes that Rule 12 is not the appropriate place to address these issues. Specifically, 23-5-7 provides no requirement that workers' compensation claimants be informed of these issues by the private carrier or self-insured employer prior to entering into a settlement. Therefore, the Insurance Commissioner believes it would go beyond the purview of the statute to require that private carriers or self-insured employers address this issue with claimants prior to entering into a settlement.

The Insurance Commissioner believes these important issues can be addressed through appropriate legal advice and consumer outreach, however. Claimants are

required to be given the telephone number to the West Virginia State Bar Association prior to entering into the settlement and are given five (5) days to revoke the settlement. Therefore, claimants have the opportunity to seek legal advice prior to the settlement becoming "final" (claimants are given five (5) days following the execution of the settlement to revoke it). Additionally, the Consumer Services Division of the Insurance Commissioner is available to answer questions about these matters.

Ability of an Insured Employer to Participate in the Settlement

Several comments were made in regard to an insured employers' ability to actively participate in a workers' compensation settlement and be a separate signatory party to the settlement. The primary legal argument presented in support of the position that an insured employer should be an active, signatory participant workers' compensation settlements involving its employees is that W. Va. Code § 23-5-7 indicates that employers are permitted to participate in workers' compensation settlements unless they are "not active in the claim." Therefore, the argument was made that any active, good-standing employer (in regard to its workers' compensation premiums) is "active in the claim", and therefore should be a participant in the settlement.

In regard to this legal argument, the Insurance Commissioner believes that it has the authority to interpret the provisions of Chapter 23 in a manner consistent with what the intent of the legislature was in enacting the statutes. The Commissioner believes that the intent of the legislature in enacting Senate Bill 1004 was to create a new, privatized workers' compensation insurance market. With that goal in mind, the Insurance Commissioner believes that employers that are insured through a private carrier should not be considered "active in the claim" under W. Va. Code § 23-5-7. This is because, as a general principle of insurance, and particularly in casualty insurance[1], the extent of the insureds' involvement in the handling of a claim is controlled by the terms of the insurance policy. The Insurance Commissioner does not see any reason why workers' compensation insurance should be treated differently than other casualty lines in this regard.

In addition to the above described legal argument, there was also a policy argument made as to why employers should be permitted to be active, signatory participants in workers' compensation settlements. Specifically, it was argued that the employer has a vested interest in the outcome of workers' compensation claims because it directly affects their experience, which in turn affects future rates for the employer.

While this argument raises a valid point, again, the Insurance Commissioner believes that the goal of the legislature in enacting Senate Bill 1004 – to create a privatized workers' compensation insurance market – needs to be considered. Therefore, it is important that workers' compensation insurance be treated as other lines of casualty insurance in this regard, and that the terms of the insurance policy control. Moreover, the Insurance Commissioner points out that this same argument exists in other lines of

[1] Pursuant to W. Va. Code 33-1-10(e)(14), the legislature made workers' compensation insurance a line of casualty insurance to be regulated by the Insurance Commissioner.

casualty insurance. However, it should not be a significant concern for the insured, because, generally speaking, the interests of the insurer and the interests of the insured should be consistent in regard to settling claims, at least from a fiscal perspective – that is, both the insurer and the insured benefit by settling with the claimant if the settlement makes sense in light of all the facts and circumstances of the claim. In other words, there should be no reason or motivation for a workers' compensation insurer to want to "liberally" settle claims, as the insurance company has a motivation, as well as a duty to its members and/or stockholders, to make settlement decisions which are fiscally sound.

Finally, the Insurance Commissioner would like to point out on this topic that, regardless the terms of the insurance policy, it is considered "good business" for an insurance company to actively work with its insureds in adjusting a claim. Generally, casualty companies want to work with their insureds in adjusting claims, both because it is helpful to have the input of the insured from a factual investigatory perspective, and because it creates good will for the insurer to do so.

Having said all this, the Insurance Commissioner respectfully disagrees with the position that insured employer should be active, signatory participants in all workers' compensation settlement negotiations. However, Rule 12 has been amended to reflect that the terms of the insurance policy control the degree of involvement which employers have in regard to settlement negotiations. (See specifically sections 3.11 and 4 of Rule 12).

Definition of "Unconscionable" and Criterion to be Considered in Determining if a Settlement is Unconscionable

Several comments were made regarding the definition of "unconscionable" and the criterion to be considered in determining whether a settlement is unconscionable, as set forth in Section 14.2 of the amended version of the Rule. Most of the comments expressed concern as to the definition being too vague, or not setting forth standards which are objective enough, and therefore resulting in inconsistent results when settlements are reviewed for unconscionability.

Based on the comments received, the Insurance Commissioner revised the definition and criterion set forth in Section 14.2. The definition at the beginning of 14.2 was amended to create a stronger standard in favor of parties being able to freely negotiate a settlement without it being scrutinized and overturned simply because it may not be perceived as "fair." Further, several more standards were added to the list of criterion to this end. Finally, Section 14.4 was amended to clarify that the fact that a claimant was not represented by counsel at the time of settlement cannot be a criterion considered when reviewing a settlement for unconscionability.

While the Insurance Commissioner understands the concern that the definitions and standards set forth in Section 14.2 are vague and subjective, the Commissioner believes that, by its nature, the term "unconscionable", which the Commissioner has been charged by the legislature with defining, is a subjective term. Therefore, to attempt to

create concrete, objective standards for the term would be contrary to the purpose of the legislative charge in W. Va. Code 23-5-7. Consequently, the Commissioner has attempted to create a definition and criterion for the term "unconscionable" which will provide the hearing examiner, and appellate tribunals, with appropriate guidelines for reviewing settlements. Moreover, it is made clear in the rule that there is a presumption that settlement are *not* unconscionable, and that a claimant has a heavy burden to overcome in order to show that a settlement is unconscionable. (See Sections 14.3 and 14.4 of the Rule). However, because of the nature of the term "unconscionable", it must ultimately lie within the sound judgment and discretion of the reviewing individual whether a settlement is in fact unconscionable.

Time Limitation for Settlement Review

Several comments were made regarding the initial draft version of Rule 12 not including a time limitation for claimants to request a review of the settlement for unconscionability. The Insurance Commissioner agrees that the rule should contain a time limitation, so that private carriers and self-insured employers will have the repose of knowing that a settlement is final after a certain date. Therefore, a time limitation was placed in Section 14.5 of the rule, which requires a claimant make a request that a settlement be reviewed within one hundred and eighty (180) calendar days of entering into the settlement.

Defining certain medical terms

As a result of the limitation in W. Va. Code § 23-5-7 stating that "medical benefits for nonorthopedic occupational disease claims" cannot be settled, it was suggested that definitions be placed in Rule 12 to provide some clarity as to this limitation. The Insurance Commissioner agrees. Therefore, in Section 3 of the Rule ("Definitions"), definitions for the following terms were added: "Nonorthopedic occupational disease"; "Occupational exposure injury"; "Occupational disease"; and "Private carrier". These definitions provide clarity as to what constitutes a "nonorthopedic occupational disease claim" under W. Va. Code § 23-5-7.

Ryan Sims

From: wvcomplaw@aol.com
Sent: Monday, February 06, 2006 5:02 PM
To: Ryan Sims
Subject: Rule 12 Draft

Ryan:

Thank you for forwarding the proposed Rule 12 amendments for review. Please accept this as my response.

Although there are few claimant attorneys left these days, I would like to see the rule include some protection for claimants in the area of legal fees. The current statute was written at a time when there was no ability to settle claims. This might seem to be a straightforward question in terms of the statutory limitation on fees, however, the percentage of fees charged claimants is 20% of an "award". There was previously been no question that medical treatment issues did not directly generate a fee. My concern is that when future medicals are settled by reducing those benefits to a dollar amount, that fees will be taken from the overall "award" and that it will be difficult to cap that amount by a 208 week limitation.

In addition, I am concerned about the applicability of the medical fee guidelines and whether claimants will continue to enjoy the fee limitations after a full and final settlement. As you are aware, the cost containment provisions of the statute are substantial, and if claimants settle future medicals, will the Commission retain some jurisdiction to the extent that health care providers will not be able to charge "full price" to claimants who have settled claims? If not, claimants need to be aware that they will lose that protection if they agree to settle future medicals. If they use the fee guidelines under the statute as a reference to estimate future medicals, and medical costs are incurred outside fee limitations, a $500 MRI could easily triple in cost.

Finally, you are also likely aware that there is an ongoing national debate about CMS and Medicare/Medicaid offsets. At a minimum, there should be some assurance or required notice to claimants (particularly unrepresented claimants) regarding this offset prior to the settlement.

Claimants almost surely have no idea that they might need an approval letter prior to valuing and settling their claims when they are receiving (or might receive within 30 months) Social Security benefits.

They need to know that cost-shifting is no longer available. It is my understanding that CMS has broad authority to pursue collection of its liens from claimants, lawyers, insurers and the State, so I believe there exists a compelling state interest in considering CMS compliance.

Thank you for considering the above.

Sue Howard

Ryan Sims

From: Idleman, Michael [MIdleman@msigusa.com]
Sent: Wednesday, February 08, 2006 12:05 PM
To: Elizabeth Webb
Cc: Ryan Sims; Mary Jane Pickens
Subject: RE: Series 12 Rule

Ryan,

I have finally had a chance to review this rule. I only have one question.

We are currently the TPA for about 300 employers who have their WC coverage through BrickStreet. If we identify a claim in which we believe the employer should try and settle it, we first get a settlement range from BrickStreet. We then turn this claim over to an attorney to make the settlement offer to the claimant.

My question is this. Do we have to have an attorney involved in the settlement process, or can we just make the offer to the claimant ourselves, on behalf of BrickStreet? I don't want us to be accused of practicing law, but I know in other states, the TPA can make the offer to the claimant as we are on record as being an agent of the employer.

Let me know your thoughts. Thanks.

Mike

From: Elizabeth Webb [mailto:Elizabeth.Webb@wvinsurance.gov]
Sent: Monday, February 06, 2006 1:49 PM
Cc: Ryan Sims; Mary Jane Pickens
Subject: Series 12 Rule

Attached please find Series 12 Rule with proposed amendments to address the review of settlements. Please respond to Ryan Sims @ Ryan.Sims@wvinsurance.gov with your comments before the February 13th Industrial Council meeting.

Thank you,

Elizabeth

Elizabeth Webb
West Virginia Insurance Commission
1124 Smith Street, Rm 413
Charleston, WV 25301
(304) 558-6279 Ext. 1177
(304) 558-0412

Ryan Sims

From: Sally Smith [ssmith@bowlesrice.com]
Sent: Thursday, February 09, 2006 1:39 AM
To: Ryan Sims
Subject: Series 12

Mr. Sims, Thank you for the opportunity to review the draft of these regulations.

In the following paragraph in the 10th line, I believe "had the claimant chose to not enter into the settlement" should be changed to "had the claimant chosen not to enter into the settlement".

14.3 Burden of proof. The claimant shall at all times have the burden of proving that a settlement agreement is unconscionable. The mere fact that the terms of a workers' compensation settlement are such that the claimant may not have received the same amount of benefits which he would have received under Chapter 23 of the West Virginia Code, or that the claimant may have been able to obtain more benefits had the claimant chose to not enter into the settlement, is not sufficient to render a settlement unconscionable. Rather, the claimant must prove the settlement was unconscionable based on the criterion and standards set forth in section two of this section.

Sally Smith
Bowles Rice McDavid Graff & Love LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1115
Facsimile: (304) 347-1196
ssmith@bowlesrice.com

Joy Zirkle

From: Randy Suter [Randy.Suter@brickstreet.com]
Sent: Thursday, February 09, 2006 4:03 PM
To: Mary Jane Pickens; Ryan Sims
Cc: TJ Obrokta; William Brotherton
Subject: Preliminary Comments 85CSR12, "Settlements"

Attachments: R12 Prelim comments for 2-6-06 draft.doc

R12 Prelim
nments for 2-6-0

Ryan and Mary Jane:

Attached you will find our comments concerning the possible revisions to 85CSR12.

Thank you for the opportunity to help craft this rule.

Randy

Randall Suter
Attorney
BrickStreet Mutual Insurance Company
Randy.Suter@brickstreet.com
(304) 926-3423

Brickstreet INSURANCE
Office of General Counsel

February 9, 2005

Ryan M. Sims, Associate Counsel
West Virginia Insurance Commission
Legal Division
Charleston, WV

Via E-mail

Re: Stakeholder Comments
85CSR12, "Settlements"

Ryan:

Thank you for the opportunity to provide preliminary comments prior to the introduction of 85CSR12, "Settlements," to the Industrial Council.

- Regarding drafts of this rule or of subsequent rules, please make the rule(s) available in Word format as opposed to a PDF format. The Word format allows the reviewer to cut and paste portions of the rule with comments. The PDF format does not allow this. Providing the draft in Word format will make commenting easier and encourage public comment.

- Title – Remove reference to Workers' Compensation Commission

- 1.2. Did not understand authority reference to 33-2-20(a) which appears to relate to the withdrawal from the State by a provider of auto insurance.

- 3.3. Request: With the establishment of an identity (BrickStreet) separate from the Workers' Compensation Commission and in anticipation of the opening of the private market, it would be more reasonable to define "private carrier" and "self-insured employers" and use this terminology throughout the rule. We would request removal of the definition of "Successor to the commission" and like references throughout the rule. In this term's place we would recommend from 85CSR8, the following:

  "Private carrier" means any insurer authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code

  "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions

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of W. Va. Code §23-2-9.

These terms might also be defined more generically as "insurers."

- §11. You have added a provision that states "unless otherwise specified in the settlement agreement, no payment shall be made to the surviving spouse after his or her remarriage and such liability shall not accrue to the estate of such claimant and shall not be subject to any debts or charges against the estate. "

  This addition appears to be inconsistent with the treatment of benefit payments under W. Va. Code §§23-4-6(f), -6(g), -6(l), 23-4-10(c) & 23-2-7.

- The following is a re-write of the provisions of 14.2, which determines the criteria to be used by the Insurance Commissioner in determining whether a settlement is "unconscionable." The re-write considers both procedural and substantive abuses in this determination. We believe that the re-write provides a clearer, more enforceable standard for use by the Insurance Commissioner.

§14.2. Standards and criteria for determining if settlement is unconscionable. If procedural abuse arising out of the contract formation and substantive abuse relating to the terms of the settlement are proved, a workers' compensation settlement agreement between a claimant, unrepresented by an attorney, and an insurer, including both private carriers and self-insured employers, shall be considered unconscionable and declared void.

14.2.a. "Procedural abuse" means that the claimant was not aware of the terms of the agreement at the time the agreement was entered because:

(1) Either the claimant was provided no opportunity to read the settlement agreement or the settlement agreement was not read to the claimant;

(2) The claimant was not informed of his ability to obtain a lawyer to assist in the review of the agreement;

(3) The terms of the settlement agreement were not conspicuous;

(4) The claimant was not informed of the right to revoke the executed settlement agreement within five (5) business days; or

(5) The claimant was not provided the toll free number of the West Virginia State Bar.

14.2.b. "Substantive abuse" means that at the time the agreement was entered:

(1) The claimant did not have any alternative but to enter the settlement, and

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(2) The settlement is, under the circumstances, so outrageous and unfair in its wording or its application that it shocks the conscience.

- 14.4. Request removal of the words "unexpected" and "unexpectedly." As worded, a claimant could argue that the settlement was "unconscionable" because it was "expected" that his injury would progress into the future. I do not believe that this is the Insurance Commission's intent.

- 14.5. Please continue to clarify that this process is for unrepresented claimants under the terms of the statute.

In addition, it would be very reasonable to set a time limitation for claimants who request that their settlements be voided. We would suggest that the limitation be placed at 6 months. Under the current language, a claimant could argue to set aside a settlement that occurred decades ago. A reasonable time limit helps to settle the expectations of all parties who enter into an agreement which is the purpose of a settlement.

Again, thank you very much for the opportunity to provide preliminary comment in this matter.

Very truly yours,
s/s
Randall B. Suter

Ryan Sims

From: Mike Cavender [Mike_Cavender@acordia.com]
Sent: Friday, February 17, 2006 12:28 PM
To: Ryan Sims
Subject: Comments on Series 12 Rule

Image.pdf (407 KB)

Mr. Sims and members of the Industrial Council:

Acordia appreciates the opportunity to provide comment to the Industrial Council on the proposed amendments to the Series 12 Rule, Compromise & Settlement of Workers' Compensation Issues. We submit to you that Rule 12 in its current form, and with the proposed amendments, are in conflict with the clear meaning of the language contained in 23-5-7, specifically in the exclusion of an insured employer from the settlement process. For reference I have copied the language from that section at the bottom of this e-mail.

Current language in the rule attempts to do this in the way that it defines the term an "employer that is not active in the claim". The definition now in the rule includes all insured employers. The statute recognizes two types of insured employers, those that are active and those that are not. The amendments to the rule should do the same and, as in the statute, an active employer should be recognized as a party of equal standing in the settlement process. The proposed amendments eliminate the employer from the process altogether. Again, giving no recognition to statutory language that includes active employers in the settlement process.

The fact is that the language in 23-5-7 makes active, insured employers equal participants in the settlement process, along with their insurance carrier and the claimant. Any of the three can initiate settlement negotiations, but all three must agree to the settlement terms, or no settlement can be entered into.

Since all payments made in a settlement situation will be applied to an employer's loss experience, and the employer will pay premiums that are affected by those losses, our statutory language is correct in making employers equal participants in the process. The Series 12 language should do so also.

Regarding the proposed definition of unconscionable in Section 14.2, we would suggest consideration be given to additional criteria, specifically found in Chapter 33 of the code. In 33-11-4(9) there is a list of unfair claim settlement practices. I don't know if "unfair" reaches the level of unconscionable, but it seems that the listing in this section provides guidelines that should be included or referenced in the rule.

One final comment regarding appeals of settlements when a claimant is not represented by an attorney. We would suggest that a time limitation be imposed in Section 14.5. Otherwise these settlements will not be full and final, since an appeal can be filed at any time. Given that the WV Bar Association is offered as a resource to unrepresented claimants, an additional 30 days to appeal beyond the 5 business days to revoke an agreement seems reasonable to us.

Since the proposed amendments were provided as a pdf file, we have included an attachment with hand written suggestions that would address the concerns that we have expressed.

Consideration of these comments is appreciated.

Mike Cavender, CWCP
Vice President
Acordia Employers Service
Phone 304-347-3701

Fax 304-556-4737

<<Image.pdf>>
§ 23-5-7. Compromise and settlement.

With the exception of medical benefits for nonorthopedic occupational disease claims, the claimant, the employer and the workers' compensation commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, may negotiate a final settlement of any and all issues in a claim wherever the claim is in the administrative or appellate processes. If the employer is not active in the claim, the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, may negotiate a final settlement of any and all issues in a claim except for medical benefits for nonorthopedic occupational disease claims with the claimant and said settlement shall be made a part of the claim record. Except in cases of fraud, no issue that is the subject of an approved settlement agreement may be reopened by any party, including the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable. Any settlement agreement may provide for a lump-sum payment or a structured payment plan, or any combination thereof, or any other basis as the parties may agree. If a self-insured employer later fails to make the agreed-upon payment, the commission shall assume the obligation to make the payments and shall recover the amounts paid or to be paid from the self-insurer employer and its sureties or guarantors or both as provided in section five [§ 23-2-5] and five-a [§ 23-2-5a], article two of this chapter.
Each settlement agreement shall provide the toll free number of the West Virginia State Bar Association and shall provide the injured worker with five business days to revoke the executed agreement. The insurance commissioner may void settlement agreements entered into by an unrepresented injured worker which are determined to be unconscionable pursuant to criteria established by rule of the commissioner.
The amendments to this section enacted during the regular session of the Legislature in the year one thousand nine hundred ninety-nine shall apply to all settlement agreements executed after the effective date.
History
[1995, c. 253; 1999, c. 294; 2003, 2nd Ex. Sess., c. 27; 2005, 1st Ex. Sess., c. 4.]

WVIC-2/6/06

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 12
COMPROMISE & SETTLEMENT OF WORKERS' COMPENSATION ISSUES

§85-12-1. General.

1.1. Scope. -- These rules shall govern the compromise and settlement of workers' compensation issues pursuant to W. Va. Code §23-5-7.

1.2. Authority. -- W. Va. Code §§~~23-1-1; 23-1-1a(j)(3); 23-1-5; 23-1-8; 23-1-13; 23-1-14; 23-1-15;~~ 23-2C-5(c)(2); 23-2C-22; 33-2-10(b); 33-2-20(a); 23-4-1 et seq.; 23-5-1; 23-5-7. Pursuant to W. Va. Code §§~~23-1-1a(j)(3)~~ 23-2C-5(c)(2) and 33-2-10(b), rules adopted by the ~~board of managers~~ industrial council and the Insurance Commissioner ~~commission~~ are not subject to legislative approval as would otherwise be required under W. Va. Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. ~~July 20, 2005~~.

1.4. Effective Date. ~~September 1, 2005~~.

§85-12-2. Purpose.

The purpose of this rule is to establish a consistent process to govern the settlement of workers' compensation issues.

§85-12-3. Definitions.

As used in this legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. ~~"Commission" means the workers' compensation commission created pursuant to the provisions of W. Va. Code §23-1-1.~~ "Insurance Commissioner" means the Insurance Commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code, or any designated third-party administrator of the Insurance Commissioner.

3.2. ~~"Board" means the workers' compensation board of managers created pursuant to the provisions of W. Va. Code §23-1-1a.~~ "Industrial Council" means the industrial council created pursuant to the provisions of W. Va. Code § 23-2C-5.

3.3. ~~Until the termination of the commission,~~ "an employer that is not active in the claim" means an employer that is either defunct or has bought out its liability. ~~For claims that are not in litigation, an employer will be considered inactive if the employer is not represented by counsel or is not represented by an employer service company in accordance with W. Va. Code §23-1-13 and has failed to respond to the commission's notice of settlement negotiations. For claims that are in litigation, an employer will be considered inactive if the employer is not represented by counsel and has failed to respond to the commission's notice of settlement negotiations.~~

~~Upon termination of the commission, an "employer that is not active in the claim" means an employer that has, as its workers' compensation insurance carrier, the successor to the commission or other private carrier, or an employer which is in default or which has employee claims under the Old fund or other various funds regulated by the Insurance Commissioner.~~

"Successor to the Commission" means the Employers' Mutual Insurance Company as created by W. Va. Code § 23-2C-1, et seq.

3.4. "Review process" refers to the period between the identification of a potential claim and the final closure of the claim pursuant to the statute.

REINSTATE THIS LANGUAGE

~~3.5. "Insurance Commissioner" means the insurance commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code, or any designated third-party administrator of the insurance commissioner.~~

§85-12-4. Parties. REINSTATE

The claimant, ~~the employer~~ and the Insurance Commissioner, ~~commission,~~ the successor to the commission or other private insurance carriers, or self-insured employer, whichever is applicable, may negotiate a settlement of any and all issues in a claim or claims, except for medical benefits for nonorthopedic occupational disease claims, pursuant to the requirements of W. Va. Code §23-5-7 and the regulations herein set forth. ~~The Insurance Commissioner, commission, the successor to the commission or other private insurance carriers, whichever is applicable, and the claimant may negotiate a settlement of a claim when the employer is not active in the claim. In multiple employer claims, all employers active in the claim must be parties to the settlement agreement. All corporate employers must be represented by an attorney licensed to practice law in the State of West Virginia.~~ REINSTATE

~~**§85-12-5. Notice.**~~

~~If the employer has not been notified of pending settlement negotiations, the Insurance Commissioner, the commission, the successor to the commission or other private insurance carrier, whichever is applicable, will notify the employer by certified mail, giving the employer thirty (30) days to respond to the Insurance Commissioner, commission, the successor to the commission or other private insurance carrier, whichever is applicable. If the employer fails to respond to the notice or chooses not to participate, the Insurance Commissioner, commission, the successor to the commission or other private insurance carrier, whichever is applicable, may negotiate a settlement on behalf of the employer in accordance with W. Va. Code §23-5-7.~~ REINSTATE

§85-12-65. Issues Subject to Settlement.

If the claim is in the review or appellate process, all claim issues, except for medical benefits for non-orthopedic occupational disease claims, may be settled, even though the issues may not be currently contested. These issues include, but are not limited to, temporary total disability, temporary partial disability, permanent partial disability, permanent total disability, vocational rehabilitation and any other issues within the settlement provisions of W. Va. Code §23-5-7.

§85-12-76. Manner of Payment.

The parties to any settlement may arrange for any amount paid to be paid to the claimant or for the benefit of the claimant in a lump sum or incremental payments or in any manner as agreed upon by the parties. If no mention is made in the settlement agreement regarding a permanent disability percentage, the claim record will not reflect a percentage for the settlement award.

§85-12-87. Dependent's Benefits.

Except in cases where the claimant has previously been granted a permanent total disability award, dependents are not entitled to one hundred four (104) weeks of benefits as set forth in W. Va. Code §23-4-10 if the agreement is silent as to the claimant's entitlement to a permanent total disability award.

§85-12-98. Settlement Not to be Considered an Admission Against Interest.

The terms of a settlement agreement shall not constitute an admission against interest by any party. All communications and correspondence between the parties during settlement negotiations are confidential and may not be used against a party if a settlement is not reached.

§85-12-109. Effective Date of Settlement.

Unless otherwise agreed upon by the parties, the effective date of a settlement shall be the date the agreement is executed by the claimant and ~~by~~ the ~~employer and~~ Insurance Commissioner, ~~commission,~~ the successor to the

commission or other private insurance carrier, or self-insured employer, whichever is applicable.

§85-12-~~11~~10. Minor Dependents and Claimants.

In any case in which a surviving dependent infant may be entitled to receive the balance of a permanent partial disability award due to the death of a claimant before such award was paid in full or in any case in which the claimant is an infant, the legal guardian of such infant may negotiate a settlement of such claim with the ~~employer or employers involved and the~~ Insurance Commissioner~~, commission~~, the successor to the commission or other private insurance carriers, and self-insured employers, whichever is applicable. The legal guardian shall proceed as set forth in W. Va. Code §44-10-14. The appointment of said guardian shall be done as set forth in W. Va. Code §44-10-1 et seq. No bond shall be required of said guardian by the Insurance Commissioner ~~or commissioner whichever is applicable,~~ in addition to [illegible] required by the appointment of said guardian [illegible] approval by the circuit court of any settlement pursuant to the provisions of W. Va. Code §44-10-1 et seq.

REINSTATE

§85-12-~~12~~11. Death of [illegible]imant.

Unless otherwise agreed [illegible] by [illegible]rties, should a claim[illegible] whom an [illegible]rd has [illegible] made pursu[illegible]t to a [illegible]ment d[illegible]e unpaid balance [illegible] the award [illegible] be p[illegible] to the claim[illegible] dependents as def[illegible] in W. [illegible]ode §23-4-10, [illegible]y. The payment[illegible] all be made in the same ins[illegible]ments which w[illegible]ld have been made to the [illegible]mant if liv[illegible], but, unless otherwise specified [illegible] the settl[illegible]ent agreement, no payment shall be [illegible]e to [illegible] surviving spouse of the claimant after h[illegible] her remarriage and such liability shall not accrue to the estate of such claimant and shall not be subject to any debts or charges against the estate.

If the claimant dies while the settlement is pending and the claimant is survived by dependents, the settlement may continue as if the death had not occurred. The payment shall be made to the dependents.

§85-12-~~13~~12. Deductions From Settlement Awards.

13.1. Pursuant to W. Va. Code §23-4-18, any amounts owed for child or spousal support will be withheld from settlement payments.

13.2. Overpayments will be deducted pursuant to W. Va. Code §23-4-1c and 23-4-1d, unless otherwise agreed upon by the parties in the agreement.

13.3. A[illegible] award of monetary benefits entered in [illegible]im being settled by the ~~workers' co[illegible]nsation~~ Insurance Comm[illegible]sioner, ~~commi[illegible]on~~, successor to the co[illegible]mission or other p[illegible]e carrier, or self-[illegible]sured employer, the of[illegible] of judges, the [illegible]peal Boa[illegible]d or the Supreme [illegible] of Appeals o[illegible]est Vi[illegible]ia after the date the settlement agre[illegible] was signed by the necessary parties shall [illegible] deducted from the agreed upon settlement [illegible]ount. If the amount of any such award is gre[illegible] than the agreed upon settlement [illegible]mount, the cla[illegible]t's recovery shall be limited [illegible] amoun[illegible] specified in the settlement agree[illegible]

§85-12-~~14~~13. Settlement Terms.

Under the terms of the agreement, the claimant shall be provided five (5) business days to revoke the executed settlement agreement. In addition and in accordance with the provisions of W. Va. Code §23-5-7, each settlement agreement shall provide the toll free number of the West Virginia State Bar. ~~Also, in accordance with the provisions of W. Va. Code §23-5-7, upon termination of the commission and upon promulgation of the rule required by statute, the Insurance Commissioner may void settlement agreements entered into by an unrepresented injured worker which are determined to be unconscionable pursuant to criteria established by rule of the Insurance Commissioner.~~

§ 85-12-14. Insurance Commissioner Review.

14.1 Authority to review. In accordance with the provisions of W. Va. Code § 23-5-7, the Insurance Commissioner may review any workers' compensation settlement entered into

between an unrepresented claimant and the Insurance Commissioner, the successor to the commission or other private insurance carriers, or self-insured employer, and may declare any such settlement void if the Insurance Commissioner determines the terms of the settlement to be unconscionable pursuant to the criterion set forth in subsection two of this section. The authority of the Insurance Commissioner to review and void settlements also includes all settlements entered into between unrepresented claimants and the former Workers' Compensation Commission between January 29, 2005 and December 31, 2005.

14.2 Standards and criteria for determining if settlement is unconscionable. A workers' compensation settlement shall be considered unconscionable, and therefore be declared void as against public policy, if is found to constitute a gross miscarriage of justice or is otherwise found to be clearly unfair.

Criteria to be considered by the Insurance Commissioner in determining whether a settlement is unconscionable include, but are not limited to:

a. the relative position of the parties involved in the settlement at the time the settlement was entered into;

b. the adequacy of the bargaining position of the parties at the time the settlement was entered into;

c. the meaningful alternatives available to the claimant at the time the settlement was entered into;

d. the existence of specific unfair terms in the settlement agreement;

e. the nature of the entire agreement;

f. the percentage of total benefits provided for under the settlement terms which have actually been received by the claimant when the claimant requested the settlement be reviewed; and

g. the time that has elapsed from the time the settlement was entered into to the time the claimant requested the settlement be reviewed.

14.3 Burden of proof. The claimant shall at all times have the burden of proving that a settlement agreement is unconscionable. The mere fact that the terms of a workers' compensation settlement are such that the claimant may not have received the same amount of benefits which he would have received under Chapter 23 of the West Virginia Code, or that the claimant may have been able to obtain more benefits had the claimant chose to not enter into the settlement, is not sufficient to render a settlement unconscionable. Rather, the claimant must prove the settlement was unconscionable based on the criterion and standards set forth in subsection two of this section.

14.4 Future unexpected progression of injuries or diseases not to be considered. The fact that a claimant's injury or occupational disease has unexpectedly progressed or become worse since the time the settlement was entered into cannot be a justification for a settlement to be deemed unconscionable.

14.5. Procedure for review.

a. Any claimant who believes that a settlement previously entered into is unconscionable may file with the Insurance Commissioner, on a form prescribed by the Insurance Commissioner, a request for review of settlement. The Insurance Commissioner will then forward the request to a hearing examiner. The hearing examiner shall permit all parties involved in the disputed settlement to present, as part of the record, written argument and evidence as to each party's position regarding the settlement. Additionally, each party shall be permitted to request a hearing before the hearing examiner in regard to the settlement review, with the opportunity to present at the hearing argument and evidence regarding the settlement. The hearing examiner shall have broad discretion in regard to the scope of evidence and discovery, if any, permitted in conjunction with such hearings and the settlement review process in general. Hearings shall otherwise be in accordance with the provisions of W. Va. C.S.R. Title 85, Series 7, Sections 4 through 10.

b. Within forty-five (45) days after the request for review is submitted, the hearing examiner

CONSIDER CRITERIA DEFINED IN CODE 33-11-4(9)

THE REQUEST FOR REVIEW MUST BE FILED WITHIN THIRTY DAYS OF CLOSE OF THE FIVE BUSINESS DAYS ALLOWED TO THE CLAIMANT TO REVOKE AN AGREEMENT

shall submit to the Insurance Commissioner factual findings, legal conclusions and a proposed decision either affirming the settlement or declaring the settlement void due to it being unconscionable: Provided, That upon request of one of the involved parties, the hearing examiner may, for good cause, extend the settlement review period for a period of an additional forty-five (45) days.

c. Upon receipt of the hearing examiner's recommended decision, the Insurance Commissioner shall then either enter an order consistent with the hearing examiner's recommended decision or an order based on a rejection or modification of the hearing examiner's decision. To the extent that the Insurance Commissioner rejects or modifies the recommended decision of the hearing examiner, the Commissioner shall furnish his or her own findings of fact and conclusions of law.

d. A copy of the final order or decision of the Insurance Commissioner shall be served upon each involved party, or if a party is represented by counsel, its attorney of record. Service shall occur in person or by certified mail.

14.6 Appeal. Any aggrieved party shall have the right to appeal the order of the Insurance Commissioner to Circuit Court under the provisions of W. Va. Code §[illegible]-5-

§85-12-15. Severability.

If any provision of these rules or the application thereof to any person, party, or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.

Joy Zirkle

From: Randy Suter [Randy.Suter@brickstreet.com]
Sent: Tuesday, March 07, 2006 2:14 PM
To: Ryan Sims
Cc: Andy Casto; Greg Burton; James Becker; Phil Lynch; Phil Shimer; TJ Obrokta; Mary Jane Pickens
Subject: 85CSR12, "Settlements" Comments and Proposals

Attachments: R12 comments for Proposed Rule 3-2-06.doc; R12 IC Proposal w-rbs markup.rtf


R12 comments for Proposed Rule... R12 IC Proposal w-rbs markup.r...

Ryan:

Thanks for the opportunity to comment on Rule 12. I would like to schedule an appointment with you to further explain our position and answer any comments that you might have. I would anticipate that Dr. Becker and Andy Casto will want to participate as well.

I like to schedule a meeting next week. If you would e-mail to me some possible times for next week, I'll try to mix and match everyone's schedule.

I provided the red-line mark up of the rule to show the practical effect of our comments on the rule.

I hope this is helpful.

Randy

Randall Suter
Attorney
BrickStreet Mutual Insurance Company
Randy.Suter@brickstreet.com
(304) 926-3423

Brickstreet INSURANCE
Office of General Counsel

March 7, 2006

Ryan M. Sims, Associate Counsel
West Virginia Insurance Commission
Legal Division
Charleston, WV

Via E-mail

Re: Comments on Proposed Rule 85CSR12, "Settlements"

Ryan:

Please express our thanks to the Insurance Commissioner and the Industrial Council for the opportunity to provide comments concerning the proposed revisions to 85CSR12, "Settlements." I would like to schedule a meeting with you to explain our comments and answer any questions you might have.

- Thank you for making the rule proposal available in Word format. Preparing comments are much easier when we receive a Word document.

- **§1.2.** I did not understand how the authority reference to W. Va. Code §33-2-20(a) relates to settlements. The cited provision allows the Insurance Commissioner to promulgate rules setting forth criteria for withdrawal plans for an insurer that elects to nonrenew or cancel a particular type or line of coverage.

- **Definitions.**

As you are aware, medical benefits for nonorthopedic occupational disease claims may not be settled under W. Va. Code §23-5-7. The term "nonorthopedic" is undefined. We urge the adoption of the following definitions to clarify this term.

> "Orthopedic occupational disease" means an occupational disease that involves the musculoskeletal system as it functions for the purpose of mobility. The musculoskeletal system includes the following component parts: (1) bone(s); (2) muscle(s); (3) tendon(s); (4) ligament(s); and (5) nerve(s). An orthopedic occupational disease may affect one or more component parts of the musculoskeletal system.

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"Nonorthopedic occupational disease" is an occupational disease that is not an orthopedic occupational disease.

While there is a definition of "occupational disease" in W. Va. Code §23-4-1(f), there is a requirement of sufficient exposure to the hazard. The following definitions seek to delineate between an injury and a disease for the purpose of determining the extent of the settlement allowed.

"Occupational exposure injury" means a one-time, limited-duration hazardous exposure that creates an immediate acute pathophysiologic change.

"Occupational disease," as further defined in W. Va. Code §23-4-1(f), is related to prolonged hazardous exposure and creates chronic pathophysiologic changes that develop over time and that are more likely to result in prolonged sequelae and/or permanent physical impairment.

With the establishment of an identity (BrickStreet) separate from the Workers' Compensation Commission and in anticipation of the opening of the private market, it would add clarity to define "private carrier" and "self-insured employer" and use this terminology throughout the rule instead of "successor to the commission." Further, the term "successor to the commission" is confusing because the Office of the Insurance Commissioner is also viewed as the "successor to the commission" in regulatory matters. In this term's place in the "definitions" portion of the rule **[and in §§4, 9, 10, 11 & 14]**, we would recommend the following:

"Private carrier" means any insurer authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code

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

- **§14.1.** (1) In light of the requested change at §14.2 (below), the words "the terms" are requested to be removed from this section. The definition of "unconscionability" provided considers both procedural abuse as well as substantive abuse and is not limited to the terms of the agreement.

  (2) The proposal includes language to allow the Insurance Commissioner to review and void settlements entered into from January 29, 2005 through December 31, 2005, between unrepresented claimants and the former Workers' Compensation Commission. The general rule is that laws are not made retroactive unless specifically

authorized by the legislature. There is no such specificity in the authorizing statute, W. Va. Code §23-5-7. Generally, final rules become effective thirty days after filing.

- **§14.2.** This section provides the criteria to be used by the Insurance Commissioner in determining whether a settlement is "unconscionable." The criteria contained within the commissioner's proposed rule are very subjective. We have provided a re-write of the section that considers both procedural and substantive abuses in the determination of "unconscionability." We believe that the re-write provides a clearer, more objective and enforceable standard for use by the Insurance Commissioner.

Suggested change:

§14.2. Standards and criteria for determining if settlement is unconscionable. If procedural abuse arising out of the contract formation and substantive abuse relating to the terms of the settlement are proved, a workers' compensation settlement agreement between a claimant, unrepresented by an attorney, and an insurer, including both private carriers and self-insured employers, shall be considered unconscionable and declared void.

14.2.a. "Procedural abuse" means that the claimant was not aware of the terms of the agreement at the time the agreement was entered because:

(1) Either the claimant was provided no opportunity to read the settlement agreement or the settlement agreement was not read to the claimant;

(2) The claimant was not informed of his ability to obtain a lawyer to assist in the review of the agreement;

(3) The terms of the settlement agreement were not conspicuous;

(4) The claimant was not informed of the right to revoke the executed settlement agreement within five (5) business days; or

(5) The claimant was not provided the toll free number of the West Virginia State Bar.

14.2.b. "Substantive abuse" means that at the time the agreement was entered:

(1) The claimant did not have any alternative but to enter the settlement, and

(2) The settlement is, under the circumstances, so outrageous and unfair in its wording or its application that it shocks the conscience.

- **§14.4.** Request removal of the word "unexpectedly." Whether the claimant's injury may "expectedly" or "unexpectedly" progress is a distinction that does not have to be made in the rule.

- **14.5.** Please continue to clarify that this process is for unrepresented claimants under the terms of the statute. In addition, it would be very reasonable to set a time limitation for claimants who request that their settlements be voided. We would suggest that the limitation be placed at 180 days. Under the current language, a future claimant could argue to set aside a settlement that occurred decades ago. A reasonable time limit helps to settle the expectations of all parties who enter into an agreement which is the purpose of a settlement.

Again, thank you very much for the opportunity to provide comments regarding the proposed rule. For your convenience, I have attached a red-lined version of the proposed rule that shows our proposed revisions.

Very truly yours,

s/s

Randall B. Suter

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

SERIES 12
COMPROMISE & SETTLEMENT OF WORKERS' COMPENSATION ISSUES

Section

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

SERIES 12
COMPROMISE & SETTLEMENT OF WORKERS' COMPENSATION ISSUES

§85-12-1. General.

1.1. Scope. -- These rules shall govern the compromise and settlement of workers' compensation issues pursuant to W. Va. Code §23-5-7.

1.2. Authority. -- W. Va. Code §§~~23-1-1; 23-1-1a(j)(3); 23-1-5; 23-1-8; 23-1-13; 23-1-14; 23-1-15~~ 23-2C-5(c)(2); 23-2C-22; 33-2-10(b); 23-4-1 et seq.; 23-5-1; 23-5-7. Pursuant to W. Va. Code ~~§23-1-1a(j)(3)~~ §§23-2C-5(c)(2) and 33-2-10(b), rules adopted by the ~~board of managers~~ industrial council and the ~~commission~~ Insurance Commissioner are not subject to legislative approval as would otherwise be required under W. Va. Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

Deleted: 33-2-20(a);

1.3. Filing Date. -- ~~July 20, 2005~~.

1.4. Effective Date. -- ~~September 1, 2005~~.

§85-12-2. Purpose.

The purpose of this rule is to establish a consistent process to govern the settlement of workers' compensation issues.

§85-12-3. Definitions.

As used in this legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. ~~"Commission" means the workers' compensation commission created pursuant to the provisions of W. Va. Code §23-1-1.~~ "Insurance Commissioner" means the Insurance Commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code, or any designated third-party administrator of the Insurance Commissioner.

3.2. ~~Board" means the workers' compensation board of managers created pursuant to the provisions of W. Va. Code §23-1-1a.~~ "Industrial Council" means the industrial council created pursuant to the provisions of W. Va. Code §23-2C-5.

3.3. ~~Until the termination of the commission, "an employer that is not active in the claim" means an employer that is either defunct or has bought out its liability. For claims that~~

~~are not in litigation, an employer will be considered inactive if the employer is not represented by counsel or is not represented by an employer service company in accordance with W. Va. Code §23-1-13 and has failed to respond to the commission's notice of settlement negotiations. For claims that are in litigation, an employer will be considered inactive if the employer is not represented by counsel and has failed to respond to the commission's notice of settlement negotiations.~~

~~Upon termination of the commission, an "employer that is not active in the claim" means an employer that has, as its workers' compensation insurance carrier, the successor to the commission or other private carrier, or an employer which is in default or which has employee claims under the Old fund or other various funds regulated by the Insurance Commissioner.~~

"Orthopedic occupational disease" means an occupational disease that involves the musculoskeletal system as it functions for the purpose of mobility. The musculoskeletal system includes the following component parts: (1) bone(s); (2) muscle(s); (3) tendon(s); (4) ligament(s); and (5) nerve(s). An orthopedic occupational disease may affect one or more component parts of the musculoskeletal system.

3.4. "Nonorthopedic occupational disease" is an occupational disease that is not an orthopedic occupational disease.

3.5. "Occupational exposure injury" means a one-time, limited-duration hazardous exposure that creates an immediate acute pathophysiologic change.

3.6. "Occupational disease," as further defined in W. Va. Code §23-4-1(f), is related to prolonged hazardous exposure and creates chronic pathophysiologic changes that develop over time and that are more likely to result in prolonged sequelae and/or permanent physical impairment.

3.7. "Private carrier" means any insurer authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.8. "Self-insurer" or "self-insured employer" mean an employer who is eligible and has been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.9. "Review process" refers to the period between the identification of a potential claim and the final closure of the claim pursuant to the statute.

~~3.5. "Insurance Commissioner" means the insurance commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code, or any designated third party administrator of the insurance commissioner~~.

§85-12-4. Parties.

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The claimant~~, the employer~~ and the Insurance Commissioner, ~~commission,~~ private insurance carriers, or self-insured employer, whichever is applicable, may negotiate a settlement of any and all issues in a claim or claims, except for medical benefits for nonorthopedic occupational disease claims, pursuant to the requirements of W. Va. Code §23-5-7 and the regulations herein set forth. ~~The Insurance Commissioner, commission, the successor to the commission or other private insurance carriers, whichever is applicable, and the claimant may negotiate a settlement of a claim when the employer is not active in the claim. In multiple employer claims, all employers active in the claim must be parties to the settlement agreement. All corporate employers must be represented by an attorney licensed to practice law in the State of West Virginia.~~

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~~§85-12-5. Notice.~~

~~If the employer has not been notified of pending settlement negotiations, the Insurance Commissioner, the commission, the successor to the commission or other private insurance carrier, whichever is applicable, will notify the employer by certified mail, giving the employer thirty (30) days to respond to the Insurance Commissioner, commission, the successor to the commission or other private insurance carrier, whichever is applicable. If the employer fails to respond to the notice or chooses not to participate, the Insurance Commissioner, commission, the successor to the commission or other private insurance carrier, whichever is applicable, may negotiate a settlement on behalf of the employer in accordance with W. Va. Code §23-5-7.~~

§85-12-6~~5~~. Issues Subject to Settlement.

If the claim is in the review or appellate process, all claim issues, except for medical benefits for non-orthopedic occupational disease claims, may be settled, even though the issues may not be currently contested. These issues include, but are not limited to, temporary total disability, temporary partial disability, permanent partial disability, permanent total disability, vocational rehabilitation and any other issues within the settlement provisions of W. Va. Code §23-5-7.

§85-12-~~7~~6. Manner of Payment.

The parties to any settlement may arrange for any amount paid to be paid to the claimant or for the benefit of the claimant in a lump sum or in incremental payments or in any manner as agreed upon by the parties. If no mention is made in the settlement agreement regarding a permanent disability percentage, the claim record will not reflect a percentage for the settlement award.

§85-12-~~8~~7. Dependent's Benefits.

Except in cases where the claimant has previously been granted a permanent total disability award, dependents are not entitled to one hundred four (104) weeks of benefits as set forth in W. Va. Code §23-4-10 if the agreement is silent as to the claimant's entitlement to a permanent total disability award.

§85-12-~~9~~8. Settlement Not to be Considered an Admission Against Interest.

The terms of a settlement agreement shall not constitute an admission against interest by any party. All communications and correspondence between the parties during settlement negotiations are confidential and may not be used against a party if a settlement is not reached.

§85-12-~~10~~9. Effective Date of Settlement.

Unless otherwise agreed upon by the parties, the effective date of a settlement shall be the date the agreement is executed by the claimant and ~~by~~ the ~~employer and~~ Insurance Commissioner, ~~commission,~~ private insurance carrier, or self-insured employer, whichever is applicable.

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§85-12-~~11~~10. Minor Dependents and Claimants.

In any case in which a surviving dependent infant may be entitled to receive the balance of a permanent partial disability award due to the death of a claimant before such award was paid in full or in any case in which the claimant is an infant, the legal guardian of such infant may negotiate a settlement of such claim with the ~~employer or employers involved and the~~ Insurance Commissioner, ~~commission,~~ private insurance carriers, and self-insured employers, whichever is applicable. The legal guardian shall proceed as set forth in W. Va. Code §44-10-14. The appointment of said guardian shall be done as set forth in W. Va. Code §44-10-1 et seq. No bond shall be required of said guardian by the Insurance Commissioner ~~or commission, whichever is applicable,~~ in addition to that required by the appointment of said guardian or approval by the circuit court of any settlement pursuant to the provisions of W. Va. Code §44-10-1 et seq.

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§85-12-~~12~~11. Death of Claimant.

Unless otherwise agreed upon by the parties, should a claimant to whom an award has been made pursuant to a settlement die, the unpaid balance of the award shall be paid to the claimant's dependents as defined in W. Va. Code §23-4-10, if any. The payment shall be made in the same installments which would have been made to the claimant if living, but, unless otherwise specified in the settlement agreement, no payment shall be made to a surviving spouse of the claimant after his or her remarriage and such liability shall not accrue to the estate of such claimant and shall not be subject to any debts or charges against the estate.

If the claimant dies while the settlement is pending and the claimant is survived by dependents, the settlement may continue as if the death had not occurred. The payment shall be made to the dependents.

§85-12-~~13~~12. Deductions From Settlement Awards.

~~13.1.~~ 12.1. Pursuant to W. Va. Code §23-4-18, any amounts owed for child or spousal support will be withheld from settlement payments.

~~13.2.~~ 12.2. Overpayments will be deducted pursuant to W. Va. Code §§23-4-1c and 23-4-1d, unless otherwise agreed upon by the parties in the agreement.

~~13.3.~~ 12.3. Any award of monetary benefits entered in the claim being settled by the ~~workers' compensation~~ Insurance Commissioner, ~~commission,~~ private carrier, or self-insured employer, the office of judges, the Appeal Board or the Supreme Court of Appeals of West Virginia after the date the settlement agreement was signed by the necessary parties shall be deducted from the agreed upon settlement amount. If the amount of any such award is greater than the agreed upon settlement amount, the claimant's recovery shall be limited to the amount specified in the settlement agreement.

§85-12-~~14~~13. Settlement Terms.

Under the terms of the agreement, the claimant shall be provided five (5) business days to revoke the executed settlement agreement. In addition and in accordance with the provisions of W. Va. Code §23-5-7, each settlement agreement shall provide the toll free number of the West Virginia State Bar. ~~Also, in accordance with the provisions of W. Va. Code §23-5-7, upon termination of the commission and upon promulgation of the rule required by statute, the Insurance Commissioner may void settlement agreements entered into by an unrepresented injured worker which are determined to be unconscionable pursuant to criteria established by rule of the Insurance Commissioner.~~

§85-12-14. Insurance Commissioner Review.

14.1. In accordance with the provisions of W. Va. Code §23-5-7, the Insurance Commissioner may review any workers' compensation settlement entered into between an unrepresented claimant and the Insurance Commissioner, private insurance carriers, or self-insured employer, and may declare any such settlement void if the Insurance Commissioner determines the settlement to be unconscionable pursuant to the criterion set forth in subsection 14.2 of this section.

§14.2. Standards and criteria for determining if settlement is unconscionable. If procedural abuse arising out of the contract formation and substantive abuse relating to the terms of the settlement are proved, a workers' compensation settlement agreement between a claimant, unrepresented by an attorney, and an insurer, including both private carriers and self-insured employers, shall be considered unconscionable and declared void.

14.2.a. "Procedural abuse" means that the claimant was not aware of the terms of the agreement at the time the agreement was entered because:

(1) Either the claimant was provided no opportunity to read the settlement agreement or the settlement agreement was not read to the claimant;

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¶
Criteria to be considered by the Insurance Commissioner in determining whether a settlement is unconscionable include, but are not limited to:¶
¶
a. The relative position of the parties involved in the settlement at the time the settlement was entered into;¶
¶
b. The adequacy of the bargaining position of the parties at the time the settlement was entered into;¶
¶
c. The meaningful alternatives available to the claimant at the time the settlement was entered into; ¶
¶
d. The existence of specific unfair terms in the settlement agreement;¶
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e. The nature of the entire agreement;¶
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f. The percentage of total benefits provided for under the settlement terms which have actually been received by the claimant when the claimant requested the settlement be reviewed; and¶
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(2) The claimant was not informed of his ability to obtain a lawyer to assist in the review of the agreement;

(3) The terms of the settlement agreement were not conspicuous;

(4) The claimant was not informed of the right to revoke the executed settlement agreement within five (5) business days; or

(5) The claimant was not provided the toll free number of the West Virginia State Bar.

14.2.b. "Substantive abuse" means that at the time the agreement was entered:

(1) The claimant did not have any alternative but to enter the settlement, and

(2) The settlement is, under the circumstances, so outrageous and unfair in its wording or its application that it shocks the conscience.

14.3. The claimant shall at all times have the burden of proving that a settlement agreement is unconscionable. The mere fact that the terms of a workers' compensation settlement are such that the claimant may not have received the same amount of benefits which he would have received under chapter twenty-three of the West Virginia Code, or that the claimant may have been able to obtain more benefits had the claimant chose to not enter into the settlement, is not sufficient to render a settlement unconscionable. Rather, the claimant must prove the settlement was unconscionable based on the criterion and standards set forth in subsection 14.2 of this section.

14.4. The fact that a claimant's injury or occupational disease has progressed or become worse since the time the settlement was entered into cannot be a justification for a settlement to be deemed unconscionable.

14.5. Procedure for review.

a. Any unrepresented claimant who believes that a settlement entered into after the effective date of this rule is unconscionable may file with the Insurance Commissioner within one hundred-eighty (180) days of the date of the settlement, on a form prescribed by the Insurance Commissioner, a request for review of settlement. The Insurance Commissioner will then forward the request to a hearing examiner. The hearing examiner shall permit all parties involved in the disputed settlement to present, as part of the record, written argument and evidence as to each party's position regarding the settlement. Additionally, each party shall be permitted to request a hearing before the hearing examiner in regard to the settlement review, with the opportunity to present at the hearing argument and evidence regarding the settlement. The hearing examiner shall have broad discretion in regard to the scope of evidence and discovery, if any, permitted in conjunction with such hearings and the settlement review process in general. Hearings shall otherwise be in accordance with the provisions of Sections 4 through 10 of 85CSR7.

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b. Within forty-five (45) days after the request for review is submitted, the hearing examiner shall submit to the Insurance Commissioner factual findings, legal conclusions and a proposed decision either affirming the settlement or declaring the settlement void due to it being unconscionable: *Provided*, That upon request of one of the involved parties, the hearing examiner may, for good cause, extend the settlement review period for a period of an additional forty-five (45) days.

c. Upon receipt of the hearing examiner's recommended decision, the Insurance Commissioner shall then either enter an order consistent with the hearing examiner's recommended decision or an order based on a rejection or modification of the hearing examiner's decision. To the extent that the Insurance Commissioner rejects or modifies the recommended decision of the hearing examiner, the Commissioner shall furnish his or her own findings of fact and conclusions of law.

d. A copy of the final order or decision of the Insurance Commissioner shall be served upon each involved party, or if a party is represented by counsel, its attorney of record. Service shall occur in person or by certified mail.

14.6. Any aggrieved party shall have the right to appeal the order of the Insurance Commissioner to Circuit Court under the provisions of W. Va. Code §29A-5-4.

§85-12-15. Severability.

If any provision of these rules or the application thereof to any person, party, or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.

14.2. A workers' compensation settlement shall be considered unconscionable, and therefore be declared void as against public policy, if it is found to constitute a gross miscarriage of justice or is otherwise found to be clearly unfair.

Criteria to be considered by the Insurance Commissioner in determining whether a settlement is unconscionable include, but are not limited to:

a. The relative position of the parties involved in the settlement at the time the settlement was entered into;

b. The adequacy of the bargaining position of the parties at the time the settlement was entered into;

c. The meaningful alternatives available to the claimant at the time the settlement was entered into;

d. The existence of specific unfair terms in the settlement agreement;

e. The nature of the entire agreement;

f. The percentage of total benefits provided for under the settlement terms which have actually been received by the claimant when the claimant requested the settlement be reviewed; and

g. The time that has elapsed from the time the settlement was entered into to the time the claimant requested the settlement be reviewed.

Ryan Sims

From: Suter Randy [Randy.Suter@brickstreet.com]
Sent: Thursday, March 23, 2006 9:31 AM
To: Ryan Sims
Cc: Obrokta TJ
Subject: Procedural and Substantive unconscionability

Ryan:

You asked for some follow-up information regarding the concepts of procedural and substantive unconscionability.

For such a discussion, please read Gillman v. Chase Manhattan Bank, 534 NE2d 824(1988). According to Gillman, elements of both procedural unconscionability (i.e. elements that would deprive a party from meaningful choice) and substantive unconscionability (focusing on the unreasonableness of the contract terms) are normally required to find an unconscionable agreement.

Whether a settlement is procedurally unconscionable depends on the facts of the case and focuses on elements that would deprive the claimant of a meaningful choice. A checklist of objective actions (i.e. read the settlement to the claimant or provide ample time to read it, make the terms conspicuous, inform the claimant of their right to protest adverse decisions through the office of judges) that we could perform would help both the claimant and the insurer to reach a settlement agreement that would settle the interests of the parties and not be subject to claims of unconscionability.

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