WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #5

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2005 JUL 20 P 12: 17

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

CITE AUTHORITY: W. Va. Code §§23-1-1a(j)(3), 23-5-7

RULE TYPE: PROCEDURAL ______ INTERPRETIVE ______

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW
W. Va. Code §23-1-1a(j)(3)

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 12

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

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ______

TITLE OF RULE BEING PROPOSED: ______

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

Authorized Signature

$6.60

WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #1

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2005 MAY 18 P 4: 12

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code §§23-1-1a(j)(3); 23-5-7

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 RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

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

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

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

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

Fax # (304) 926-5372

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

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

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

May 18, 2005

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

Re: Proposed Rule
Title 85, Series 12
"Compromise & Settlement of Workers' Compensation Issues"

Dear Secretary Ireland:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. The Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 12 for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 85, Series 12: Compromise & Settlement of Workers' Compensation Issues

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency Workers' Compensation Commission

Address 4700 MacCorkle Avenue, S.E.

Charleston, WV 25304

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

Proposed changes since the last filing for this rule address issues related to the settlement of claims for the Workers' Compensation Commission (commission) until the termination of the commission. The above estimates are based on the assumption that the rule changes become effective in the current fiscal year (FY'05). There should be no significant change in the estimated costs associated with claims settlements for the Workers' Compensation Commission thru 12/31/05. After 12/31/05, subject to the governor issuing the proclamation set forth in chapter twenty-three, article 2C of the Code of West Virginia that terminates the Workers' Compensation Commission, claims settlements will be the responsibility of the successor to the commission, private carriers and self-insured employers, whichever may be applicable. The Office of Judges will no longer be responsible for the approval of settlement agreements.

3. Objectives of this rule:

This rule provides required procedures for the commission, the successor to the commission or other private carriers or self-insured employers, whichever is applicable, the employer and the claimant to negotiate a settlement of any and all issues in a claim or claims except for medical benefits for nonorthopedic occupational disease claims.

Rule Title: Title 85 Series 12: Compromise & Settlement of Workers' Compensation Issues

4. **Explanation of Overall Economic Impact of Proposed Rule.**

   A. **Economic Impact on State Government.**

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

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

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

   C. **Economic Impact on Citizens/Public at Large.**

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

Date: 5/18/05

Signature of Agency Head or Authorized Representative

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 12
Compromise & Settlement of Workers' Compensation Issues

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

This rule is amended to address the termination of the Commission and to transition the enforcement of this rule to the Office of the Insurance Commissioner.

In addition, as a result of the Legislation, settlements of claims matters are no longer approved by the Office of Judges. The rule was amended to reflect this change and to provide safeguards as contained in the provisions of W. Va. Code §23-5-7.

TITLE 85
~~PROCEDURAL~~ EXEMPT LEGISLATIVE RULE
~~BUREAU OF EMPLOYMENT PROGRAMS~~
WORKERS' COMPENSATION ~~FUND~~ COMMISSION

FILED
2005 JUL 20 P 12:20
OFFICE WEST VIRGINIA
SECRETARY OF STATE

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 ~~§§21A-2-6(2); 21A-3-7(b); 21A-3-7(e);~~ §§23-1-1; 23-1-1a(j)(3); 23-1-5; 23-1-8; 23-1-13; 23-1-14; 23-1-15; 23-4-1 et seq.; 23-5-1; 23-5-7. Pursuant to W. Va. Code §23-1-1a(j)(3), rules adopted by the board of managers and the 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. -- ~~August 12, 2002~~.

1.4. Effective Date. -- ~~September 12, 2002~~.

~~1.5. Repeal of former rule. -- This legislative rule repeals and replaces WV 85 CSR 12 "Settlement of Permanent Partial Disability Awards" filed April 11, 1991 and effective May 13, 1991.~~

§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. "Commissione~~r~~" means the ~~commissioner of the bureau of employment programs~~ workers' compensation commission created pursuant to the provisions of W. Va. Code §23-1-1.

3.2. ~~"Division" refers to the workers' compensation division of the bureau of employment programs.~~ "Board" means the workers'' compensation board of managers created pursuant to the provisions of W. Va. Code §23-1-1a.

3.3. Until the termination of the commission, "~~An~~ 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 ~~division's~~ 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 ~~division's~~ 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.

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.

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.

The claimant, the employer and the ~~commissioner, or the commissioner's appointed designee,~~ 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, ~~excluding~~ 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 ~~division~~ 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.

§85-12-5. Notice.

If the employer has not been notified of pending settlement negotiations, the ~~division~~ 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 ~~division~~ 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 ~~division~~ 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. Issues Subject to Settlement.

If the claim is in the review or appellate process, all claim issues, ~~excluding~~ 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 ~~jurisdiction of~~ the ~~division~~ settlement provisions of W. Va. Code §23-5-7.

§85-12-7. 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. 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. Settlement Not to be Considered an Admission Against Interest.

The terms of a settlement agreement~~, whether approved, rejected or denied,~~ 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. Effective Date of Settlement.

Unless otherwise agreed upon by the parties, the effective date of a settlement shall be the date ~~of the order approving the agreement from the Office of Judges~~ 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. 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. ~~If such settlement is approved by the office of judges, the~~ 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 ~~commissioner or administrative law judge, whichever is appropriate,~~ 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.

§85-12-12. 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 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 ~~but before it is approved by the office of judges and~~ the claimant is survived by dependents, the settlement may continue as if the death had not occurred. ~~If the settlement agreement is approved,~~ the payment shall be made to the dependents.

§85-12-13. 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. Any award of monetary benefits entered in the claim being settled by the workers' compensation ~~division~~ Insurance Commissioner, commission, successor to the commission or other private carrier, or self-insured employer, the office of judges, the Appeal Board or the Supreme Court of Appeals of West Virginia~~, between~~ after the date the settlement agreement was signed by the necessary parties ~~to the date that it is approved by the Office of Judges~~ 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. 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.

§85-12-15. 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.

ORIGINAL

WEST VIRGINIA WORKERS' COMPENSATION
BOARD OF MANAGERS

IN THE MATTER OF:	)	
	)	
PUBLIC HEARING,	)	RULE 12, SETTLEMENTS
WORKERS COMPENSATION	)	
BOARD OF MANAGERS	)	
JUNE 23, 2005	)	

****

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

****

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

APPEARANCES

BOARD MEMBERS

ROB ALSOP, BOARD CHAIR

GENE F. BAILEY

CHRIS JARRETT

DOUGLAS MERRITT

PAUL THOMPSON

RICHARD HUMPHREYS

PAUL HARDESTY

BOB PHALEN

EVERETTE SULLIVAN

CRAIG SLAUGHTER

P R O C E E D I N G S

1:05 p.m.

CHAIRMAN ALSOP: Next we will open up the public hearing for Rule 12 regarding Settlements. Again, no one has signed up to speak to this rule, but if there's anyone who didn't have a chance to sign up who would like to speak to this rule, please come forward.

(No response.)

If not, we'll close the public hearing on Rule 12.

(WHEREUPON, the hearing was adjourned.)

REPORTER'S CERTIFICATE

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

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

DAVID BOLIN
Court Reporter and
Notary Public

My commission expires July 27, 2014.

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

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
PUBLIC HEARING
JUNE 23, 2005 – 1:00 P.M.
RULE 12 – SETTLEMENTS

ATTENDANCE SHEET

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

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

From: "Ryan Sims" <Ryan.Sims@wvinsurance.gov>
To: <rsuter@wvwcc.org>, <tobrokta@wvwcc.org>
Date: 5/16/05 3:30PM
Subject: Initial comments on rules 6, 15, 18, additional comment on rule 12.

Gentlemen - Below are the IC's initial comments on rules 6, 15 and 18. The IC is still in the process of reviewing these rules, as well as 11 and 12, and reserves the right to submit further comments regarding the same. We appreciate your cooperation during this arduous process.

Series 6

Comment regarding providing the IC flexibility to change the percentage amounts for the surcharge and assessment

Pursuant to W.Va. Code 23-2C-3(f)(3), the surcharges/assessments made against the private carrier premiums and the self-insured employers need to be sufficient to produce $45 million and $9 million, respectively. In light of the requirement under the law that the law requires the IC to produce specific amounts of income on an annual basis from these surcharges/assessments, the rule should include language permitting the IC flexibility to change the percentage amounts as necessary (including during the annual period). Therefore, the following amendments should be made to the rule:

* Amend 85-6-4.1 as follows:

From the termination of the Commission through June 30, 2006, a surcharge shall be levied against every employer of 10.5% to the total premium due from each policy holder. The successor to the Commission shall collect said surcharge, and shall remit said surcharge to the insurance commissioner. The insurance commissioner may change the percentage surcharge at any time, as needed to meet the annual funding requirements as set forth in W.Va. Code § 23-2C-3(f). The insurance commissioner shall provide sufficient notice to employers and the successor to the Commission prior to changing the percentage amount.

* Amend 85-6-4.2 as follows:

From the termination of the Commission through June 30, 2006, a gross wages payroll assessment shall be levied against each self-insured employer at the rate of 0.0035%. Each self-insured employer shall, as otherwise provided in this Rule, remit the assessment to the insurance commissioner. The insurance commissioner may change the percentage of the assessment at any time, as needed to meet the annual funding requirements as set forth in W.Va. Code § 23-2C-3(f). The insurance commissioner shall provide sufficient notice to self-insured employers prior to changing the percentage amount.

* Amend 85-6-5.1 as follows:

Beginning on July 1, 2006, the insurance commissioner shall assess, as otherwise provided for in this Rule, a surcharge percentage to the total premium due from each policy holder. The private carrier shall collect said surcharge and shall remit said surcharge to the insurance commissioner. The surcharge percentage shall be set by the insurance commissioner annually on or before May 1. The rate set by the insurance commissioner shall be effective July 1 of that year. The insurance commissioner may change the percentage surcharge at any time, as needed to meet the annual funding requirements as set forth in W.Va. Code § 23-2C-3(f). The insurance commissioner shall provide sufficient notice to employers and private carriers prior to changing the percentage amount.

* Amend 85-6-5.3 as follows:

Beginning on July 1, 2006, a payroll assessment shall be levied against each self-insured employer at a rate established annually by the insurance commissioner on or before May 1. Each self-insured employer shall, as otherwise provided for in this Rule, remit the assessment to the insurance commissioner. The rate set by the insurance commissioner shall be effective July 1 of that year. The insurance commissioner may change the percentage of the assessment at any time, as needed to meet the annual funding requirements as set forth in W.Va. Code § 23-2C-3(f). The insurance commissioner shall provide sufficient notice to self-insured employers prior to changing the percentage amount.

Comment regarding terms "Revenue Cabinet" and "funding commission" as used in 85-6-6.2

The terms "funding commission" and "Revenue Cabinet" are referred to in 85-6-6.2 in regard to self-insured employers or insurance carriers providing information and reports and agreements with other agencies for the exchange of information. These terms do not appear anywhere in SB 1004, and it is not clear how these entities are involved in the collection process in regard to this rule. Some clarification as to the purpose of this section would be appreciated. This subsection would be appropriate if "funding commission" and "Revenue Cabinet" were replaced with "insurance commissioner."

Series 15

Comment regarding the term "insurance commissioner" as used in the transition language contained within the rule.

This rule appears to appropriately insert "transition" language where applicable, which generally required inserting "insurance commissioner, self-insured employer or private carrier" where the WCC was referenced. It is assumed that the IC was included in this transition language because of the claimants which the IC will ultimately be responsible for under the various funds under SB 1004, such as the old fund, uninsured fund and adverse risk fund. While it is appropriate to include the IC in this "transition language" along with private carriers and self-insured employers, it should be clarified in the rule that the IC may (and most likely will) designate a TPA to administer the vocational and physical rehabilitation requirements as set forth in this rule (as well as all the other duties which are required to administer a claim). Therefore, 85-15-3.29 should be amended as follows:

3.29. "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.

Comment regarding payment for physical and vocational rehab. services under 85-15-10

85-15-10.1 discusses the fee schedule for physical and voc. rehab services pursuant to W.Va. Code 23-4-3. The rules states that the WCC or the IC will pay for these services in accordance with the fee schedule in effect at the time of service, which fee schedule is adoptee by the WCC or IC. Then, subdivision a. states that self-insured employers and private carriers may deviate from the fee schedule in paying providers. This is in conflict with W.Va. Code 23-4-3(a), which states that "[t]he workers' compensation commission, and effective upon termination of the commission, the insurance commissioner, shall establish and alter from time to time, as it determines appropriate, a schedule of the maximum reasonable amounts to be paid to . . . providers of rehabilitation services . . . to injured employees under this chapter." This section can only be interpreted to mean that, upon termination of the WCC, the IC will maintain the schedule of maximum amounts to be paid to providers of rehab. services, and that self-insured employers, private carriers or the IC (or its designated administrator) cannot pay the rehab provider more than this amount. There does not appear to be any portion of SB 1004 which states that private carriers are permitted to deviate from this maximum schedule (of course, they could negotiate to pay less than the schedule amount, as the schedule is just a "ceiling"). Therefore, 85-15-10 should be amended to read as follows:

10.1. The Commission or, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, will pay for physical and vocational rehabilitation services in accordance with the fee schedule of maximum reasonable amounts in effect at the time the service is rendered, adopted by the Commission or Insurance Commissioner, whichever is applicable, pursuant to W. Va. Code §23-4-3 and otherwise as set forth in this rule. To the extent there are inconsistencies between the schedule and this rule, this rule shall govern. Only those physical rehabilitation services that are reasonable and necessary, in the sole discretion of the Commission, within the scope of the applicable rehabilitation plan, and otherwise meet the standards as outlined in Sections 3.7 and 2.2.2 of this Rule and 85 C.S.R. 28, Section 9, can be reimbursed pursuant to these rules.

a. Upon termination of the Commission, self-insured employers and private carriers may contract for physical and vocational rehabilitation services with providers for fees other than contained in the fee schedule.

Comment regarding the insertion of a transition "catchall" provision in this rule.

As this rule is a lengthy and detailed rule, it would probably be appropriate to insert a "transition section" into the rule similar to what has been done with the other rules. Therefore, a section should be added at the end of the rule as follows:

§ 85-15-13 Transfer to the Insurance Commissioner; provisions in conflict with SB 1004 inapplicable

Upon termination of the Commission, responsibility for the regulatory enforcement of this exempt legislative rule shall transfer to the Insurance Commissioner to be administered in a manner otherwise consistent with chapter twenty-three of the West Virginia Code. All provisions of this rule which have been rendered moot by, or are otherwise in conflict with Senate Bill 1004 are not applicable.

Series 18

Comment/changes to 85-18-7 regarding catastrophic risk coverage

In light of the changes in SB 1004 regarding catastrophic risk coverage for self-insured employers (WV Code 23-2-9(g)), section 7 of the rule should be changed. Specifically, upon termination of the WCC, self-insured employers can no longer subscribe to catastrophic coverage in the WC fund. Additionally, all catastrophic risks must be "reinsured" by self-insured employers. We interpret this to mean that self-insured employers must carry, at the very least, some type of "umbrella" coverage insurance on all catastrophic risks. Therefore, 85-18-7 should be amended as follows:

§85-18-7. Catastrophe Reserve Election.

7.1. The employer applying to self-insure its workers' compensation risk must at the time of application elect in writing to subscribe to catastrophic risk coverage or to self-insure the catastrophe risk pursuant to W. Va. Code §23-2-9(g).

a. If a self-insured employer elects not to self-insure its catastrophic injury risk, it shall pay premium taxes on the same basis and in the same percentages as subscribers to the general fund pay for catastrophic coverage.

b. If a self-insured employer elects to self-insure the catastrophe risk, then it must furnish a catastrophe security or bond, in an amount determined by the commission, with the approval of the board of managers, in addition to the security or bond furnished as a self-insurance requirement. The catastrophe security or bond shall be in an amount the commission considers adequate and sufficient to compel or secure payment of all compensation and expenses to the employer's employees and the employees' dependents for catastrophe-related injuries or deaths.

7.2. A self-insured employer may elect to insure its catastrophic risk through a policy of excess insurance obtained through a private insurance carrier approved by the commission.

a. The self-insured employer shall provide a copy of the policy to the commission for approval.

b. The commission may give approval of the election if the insurer meets the financial strength requirements as applied to self-insured employers and entities that provide surety to self-insured employers.

c. If approved to insure catastrophic risk through a private insurance carrier, the self-insured employer shall notify the commission within fifteen (15) days of the occurrence of any change in the terms of the policy, including cancellation, by filing a copy of the policy with the change and providing a written explanation of the type of change.

d. A self-insured employer approved to carry its catastrophic risk through a private insurance carrier shall not be charged premium taxes to insure against the catastrophic risk assumed by the private insurance carrier.

7.3. The employer may request a change in its election as to catastrophic coverage. The request must be in writing and filed with the commission on or before June 1 of any given year, to be effective on July 1 of that year. The commission will issue a decision approving or disapproving the change in election.

7.4. Upon termination of the commission, those self-insured employers which previously subscribed to catastrophic risk coverage through the workers' compensation fund shall either elect to insure their catastrophic risks through a policy of excess insurance obtained through a private insurance carrier, as described in section 7.2 above, or elect to self-insure their catastrophic risk as described in section 7.1 above. Those self-insured employers which self-insure their catastrophic risks shall obtain a policy of excess insurance which covers the excess of an amount which the Insurance Commissioner determines the self-insured employer will sufficiently be able to provide payment for in the event of a catastrophic occurrence.

Comment/change 85-18-15.10 regarding negotiating final settlements

85-18-15.10 provides that self-insured employers may negotiate a final settlement with a claimant, and that such settlements are subject to approval of the OOJ in accordance with W.Va. Code 23-5-7. This section is problematic in regard to the settlements being subject to OOJ approval, because upon termination of the WCC, the OOJ will not approve settlements between self-insured employers and claimants (see W.Va. Code 23-5-7). Rather, the self-insured employer will have the ability to negotiate the settlement without OOJ approval. The proposed new version of Series 12, which was sent out with the most recent set of rules, reflects this change in the law. Therefore, 85-18-15.10 should be amended as follows:

15.10. Settlements. The self-insured employer and the claimant may negotiate a final settlement of any and all issues in a claim, subject to the provisions of W.Va. Code §23-5-7 and W.Va. C.S.R. 85-12-1, et. seq.

Comment/change to 85-18-23 regarding transition to IC, workers' compensation fund references

There are various references in this rule, such as in 85-18-5, to the workers' compensation fund, or an employer subscribing to or making premium payments to the workers' compensation fund. As this fund will not longer exist upon termination of the commission, it would be proper to place some language in the rule which clarifies that these sections are inapplicable, and that the references in this rule to the WC fund or subscribing to or paying premiums into the same are replaced by "obtaining insurance from," or "the payment of premiums to" "the successor to the commission or another private workers' compensation carrier." This will help to avoid any possible confusion in regard to the transition into the new privatized system. Additionally, as this rule is detailed and lengthy, and has probably not been reviewed substantively for appropriate changes under SB 1004, a general "catchall" provision should be included which makes inapplicable all provisions of the rule that have been rendered moot or are otherwise in conflict with SB 1004. Therefore, 85-18-23 should be amended as follows:

§85-18-23. Transfer to the Insurance Commissioner; workers' compensation fund references and other provisions in conflict with SB 1004 inapplicable

Upon termination of the Commission, responsibility for the regulatory enforcement of this exempt legislative rule shall transfer to the Insurance Commissioner to be administered in a manner otherwise consistent with chapter twenty-three of the West Virginia Code. References to the Commission and the Board of Managers are thereafter replaced by the term "Insurance Commissioner" or "Industrial Council," whichever may be applicable. Additionally, upon termination of the Commission, references within this rule to the workers' compensation fund, including payment in to, or responsibilities of, the fund, will have no applicability, except to the extent that such references are applicable to claims or employer liability in regard to "old fund liabilities" as defined in West Virginia Code § 23-2C-2. To the extent applicable, references to subscribing to, or the payment of premiums into, the workers' compensation fund are thereafter replaced with "obtaining insurance from," or "the payment of premiums to" "the successor to the commission or another private workers' compensation carrier." All other provisions of this rule which have been rendered moot by, or are otherwise in conflict with Senate Bill 1004 are not applicable.

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Response to Comments – 85CSR12, "Settlements"

Insurance Commissioner
§3.3. Suggestion to change the post-WC termination definition of "employer that is not active in the claim" under 3.3.

> **Response:**
> Agreed.

Insurance Commissioner
The Insurance Commissioner should be inserted within this rule, in all relevant portions, as another entity which has the authority to settle claims with claimants. Additionally, a definition for "Insurance Commissioner" should be added in section 85-12-3

> **Response:**
> Agreed. See 3.5, definition of "Insurance Commissioner." See various changes throughout rule reflecting addition of "insurance commissioner" where authority to settle is discussed.

Insurance Commissioner
§14. Suggested change to clarify that the insurance Commissioner has the authority to void settlement agreements as unconscionable under W. Va. Code §23-5-7.

> **Response:**
> Agreed. Language added to reflect the provisions of W. Va. Code §23-5-7. Note: the Insurance Commissioner is required to develop criteria to set aside unconscionable settlements with unrepresented claimants.

Internal
§14. Suggested technical correction to provide for the toll free number of the "West Virginia State Bar" as opposed to the "West Virginia State Bar Association."

> **Response:**
> Agreed.