

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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FILED
1991 APR 11 AM 9:07
OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

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

AGENCY: Workers' Compensation Fund TITLE NUMBER: 85
CITE AUTHORITY: WV Code, 23-1-1; 23-1-5; 23-1-8; 23-1-14; 23-1-15; 23-5-1; 23-5-1f;
23-5-1g; 23-5-1h
RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____
CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code, 23-5-1g; 29A-3-8; 29A-3-9

AMENDMENT TO AN EXISTING RULE: YES _____, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 12

TITLE OF RULE BEING ADOPTED: Rules for Settlement of Permanent Partial
Disability Awards.

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS May 13, 1991



Senior Counsel
Workers' Compensation Fund

TITLE 85

PROCEDURAL RULES

BUREAU OF EMPLOYMENT PROGRAMS

WORKERS' COMPENSATION FUND

SERIES 12

SETTLEMENT OF PERMANENT PARTIAL DISABILITY AWARDS

85-8-1. General.

1.1. Scope. -- These rules shall govern the compromise and settlement of permanent partial disability awards in contested Workers' Compensation claims.

1.2. Authority. -- W. Va. Codes, 23-1-1; 23-1-5; 23-1-8; 23-1-13; 23-1-14; 23-1-15; 23-5-1; 23-5-1f; 23-5-1g; and 23-5-1h.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Purpose. -- On July 1, 1990, West Virginia Code, 23-5-1f became effective. This particular section provided for the compromise and settlement of permanent partial disability awards to which objections had been made by any party. Prior to this date no such settlement was allowed.

85-8-2. Settlement Process.

2.1. Parties.

(a) Any parties to a Workers' Compensation claim may enter into an agreement to settle or compromise such claim pursuant to the requirements of West Virginia Code, 23-5-1f and the regulations hereinafter set forth. All corporate employers must be represented by an attorney licensed to practice law in the State of West Virginia. Any claimant or employer who is a natural person may represent themselves in any settlement agreement or proceedings. In cases in which all parties are represented by attorneys, a copy of the settlement agreement shall be mailed to the Commissioner or, after July 1, 1991, the Office of Judges for approval. No hearing or further proceedings shall be necessary for approval or rejection of the agreement.

(b) In cases in which any party is not represented by an attorney, the parties to said agreement shall request a hearing before a hearing examiner, or after July 1, 1991, an administrative law judge. This hearing may be on an add-on basis to existing dockets of Workers' Compensation claims and said request may be in writing or by telephone or orally to the presiding

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officer of an ongoing docket. Before accepting the settlement agreement, the presiding officer shall make an inquiry of the unrepresented party or parties to ascertain if such party has entered the agreement voluntarily and without fraud, coercion, or undue influence and is fully cognizant of their procedural rights. The unrepresented party or parties shall be given the same oath or affirmation as witnesses and a record shall be made of all such inquiries. Said inquiry is attached hereto in the appendix.

(c) If the presiding officer is a hearing examiner, the agreement and record of said inquiry shall then be forwarded to the Commissioner for approval or rejection. An administrative law judge acting as presiding officer shall approve or disapprove the agreement within sixty days pursuant to Rule 2(a). All such agreements must be signed by the actual parties as well as by their respective counsel but such agreement need not be signed in the presence of the presiding officer. In the case of corporations, any employee of the corporation who is authorized by said corporation may sign the agreement on behalf of said corporation. It shall not be necessary for any such corporate representative to attend the hearing to present the settlement for approval if the corporation is represented by an attorney.

2.2 Procedure.

The claimant and employer or employers in any Workers' Compensation claim may jointly petition the Commissioner or, after July 1, 1991, an administrative law judge, for approval of a compromise settlement as follows:

(a) The parties to any petition for a compromise settlement shall provide documentation sufficient to show that the settlement is a fair, reasonable and just compromise. The Commissioner or administrative law judge, whichever is the appropriate approving authority, shall have discretion to approve or reject a petition for a compromise settlement. Said petition shall be approved or rejected in writing within sixty (60) days after the receipt by either the Commissioner or the Office of Judges, whichever is appropriate. In reviewing said petitions, the Commissioner or administrative law judge may consider among other things, the facts and circumstances involved, medical reports, and any other factors deemed relevant to said settlement.

(b) The parties may settle any permanent partial disability award or any permanent partial disability award made pursuant to a reopening of the claim to which a timely protest was filed. Said awards may be from no permanent partial disability up to and including 15% permanent partial disability. In multiple employer claims, all employers must be parties to the settlement agreement. Bankrupt or otherwise defunct employers shall be represented by the Commissioner or the Commissioner's duly authorized representative.

(c) The parties to any settlement may arrange for any amount paid thereto to be paid in a lump sum or in incremental payments of not less than one month of benefits per payment.

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(d) The parties may agree for a final award of greater than 15% permanent partial disability or greater than 15% permanent partial disability in addition to that previously paid in the claim, provided that no settlement shall be approved which provides for or would result in a permanent total disability award either chargeable to the employer or employers or payable from the second injury reserve pursuant to West Virginia Code, 23-3-1.

(e) The order of the Commissioner or of the administrative law judge, whichever is appropriate, shall fully conform to the terms of the agreement if such agreement is approved.

(f) Any order approving or rejecting any settlement agreement shall be appealable, and shall state with particularity the reasons for rejecting the agreement.

(g) Rejection of any settlement agreement petition shall make said agreement null and void. Said rejection shall be without prejudice. In claims in which any settlement agreement is rejected, the claim shall proceed in the same manner as in a case in which no such settlement petition was filed and litigation shall proceed during the appellate process. Further petitions for compromise settlement under different terms than those previously rejected may be filed subsequent to the rejection of any petition.

(h) The terms of a compromise settlement, whether approved or rejected, shall not constitute an admission against interest by any party.

2.3. Effective Date of Settlement.

The effective date of any settlement shall be the effective date of the order based upon said settlement agreement. Such orders and the awards made pursuant thereto shall be considered awards for all disability, both physical, mental, and any other form, suffered by the claimant up to and including the date of said order.

2.4. 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 compromise settlement of such claim with the employer or employers involved. If such compromise settlement is approved by the Commissioner or administrative law judge, whichever is appropriate, the legal guardian shall proceed as set forth in West Virginia Code, 44-10-14. The appointment of said guardian shall be done as set forth in Article 10 of Chapter 44 of the West Virginia Code. No bond shall be required of said guardian by the Commissioner or administrative law judge, whichever is appropriate, 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 Article 10 of Chapter 44 of the West Virginia Code.

2.5. Forms.

Said settlement agreement and petition shall be on form or forms prescribed by the Commissioner, attached hereto in the appendix. Upon showing of good cause, the parties may amend or substitute language on said form or forms to adequately describe the terms of the settlement.

2.6. Death of Claimant.

Should a claimant to whom an award has been made pursuant to a compromise settlement of a permanent partial disability award die from a sickness or non-compensable injury, the unpaid balance of such award shall be paid to the claimant's dependents as defined in 23-4-10 of the West Virginia Code, if any. Such 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 such 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 such estate.

2.7. Vacating Order Approving Settlement

Any party may petition to vacate an order approving a settlement agreement as set forth in West Virginia Code, 23-5-1f(f).

2.8. 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.

FORM ORDER REJECTING SETTLEMENT AGREEMENT

Claimant

Employer

Re: Claim No.
S. S. No.
D. O. I.
Claimant

Gentlemen:

This claim came on this day pursuant to West Virginia Code, 23-4-1f and particularly upon the Commissioner's ruling of _____ granting the claimant a _____% permanent partial disability award and upon the attached joint written memorandum of settlement signed by all parties. It appearing that _____ and that the settlement of the protest to the _____ ruling is not fair and reasonable, it is hereby ordered that the attached written memorandum of settlement be and hereby is incorporated by reference in this order, that said settlement be rejected, and that said agreement is hereby null and void.

Any party has thirty (30) days from receipt of this order in which to appeal therefrom. In the event an appeal is taken, appeal forms must be filed with the Commissioner within thirty (30) days from receipt of this notice.

Very truly yours,

Andrew N. Richardson
Commissioner

ANR:
Attachment
cc:

FORM ORDER APPROVING SETTLEMENT AGREEMENT

Claimant

Employer

Re: Claim No.
S. S. No.
D. O. I.
Claimant

Gentlemen:

This claim came on this day pursuant to West Virginia Code, 23-5-1f and upon the entire record, particularly upon the Commissioner's ruling of _____ granting the claimant a ____% permanent partial disability award, upon protest thereto, and upon the attached joint written memorandum of settlement signed by all parties. It appearing that the claimant has at least a ____% permanent partial disability and that the settlement of the protest to the _____ ruling for ____% permanent partial disability is fair and reasonable, it is hereby ordered that the attached written memorandum of settlement be and hereby is incorporated by reference in this order, that the ruling of _____ be set aside and the claimant be granted a ____% permanent partial disability award. The effective date of this order is _____. [Variable 1 and/or Variable 2]

Any party may seek to vacate this settlement order by filing a petition with the Commissioner of Office of Judges within six (6) months after the date of this order but only on the grounds that this settlement order was obtained by fraud, undue influence, or coercion. Such petition shall state with particularity the facts upon which alleged grounds it is based and shall be served upon all other parties to the settlement.

Re: Claim No.
Claimant

-2-

Date

Any party has thirty days from receipt of this order in which to appeal therefrom. In the event an appeal is taken, appeal forms must be filed with the Commissioner within thirty days from receipt of this notice.

Very truly yours,

Andrew N. Richardson
Commissioner

ANR:
Attachment
cc:

NOTE:

Variable 1: It is hereby ordered that the amount paid over and above a ____% permanent partial disability award be considered an overpayment and recovered pursuant to West Virginia Code, 23-4-1d;

Variable 2: It is hereby ordered that the ____% permanent partial disability award be paid in _____ (a lump sum; _____ monthly payments(s)).

FORM INQUIRY FOR PRESIDING OFFICER AT WORKERS' COMPENSATION HEARING

Do you fully understand that you have the right to be represented in this settlement proceeding by an attorney?

Do you understand that if you wish an attorney you must hire one?

If you are a claimant, you are hereby advised that you may hire an attorney to represent you. His fee will be limited to no more than 20% of your benefits for up to a 208 week period.

Having been so advised, is it now your desire to proceed with this settlement agreement without a lawyer and that this is your own voluntary decision?

Do you regularly speak and understand the English language as I am speaking it to you now?

Do you believe that this is a fair agreement?

Have you been coerced or forced in any way to enter into this agreement?

Has any undue influence been made upon you to enter into this agreement?

Have any representations been made to you by the other party as to what will happen if you enter into this agreement? If so, please state them.

Have any promises been made to you which are not set forth in this agreement?

Can you read and write? If not, have the terms of this agreement been fully explained to you by the other party?

SETTLEMENT AGREEMENT

Claimant

Employer

Re: Claim No.
S. S. No.
D. O. I.

The claimant and employer agree that the claimant was granted a _____% permanent partial disability award by the Commissioner's ruling of _____, that a timely protest was filed to this ruling, that the parties mutually agree that they wish to settle and compromise the protest to the ruling, and that they agree that a _____% permanent partial disability award to be paid _____ is a fair and reasonable settlement.

The claimant and employer, by signing this settlement, acknowledged that:

1. The Commissioner or Office of Judges must approve this settlement for it to be a valid settlement and that the settlement will not be effective until the date of the Commissioner's order,

2. The settlement order can only be vacated by a petition filed with the Commissioner or Office of Judges within six months of the date of said order, accompanied by proof that the settlement was obtained by fraud, undue influence or coercion,

3. The settlement is final as to all physical, medical, mental, or other disability of the claimant as of the date of the Commissioner's order but does not affect the claimant's right to future medical benefits, to physical or vocational rehabilitation, or to a reopening for permanent partial disability

benefits based upon an aggravation or progression of the compensable injury after the date of Commissioner's order approving this settlement, and

4. In an occupational pneumoconiosis case, any benefits paid under this claim may cause an offset of benefits paid under the Federal Black Lung Program.

5. The effective date of this agreement is _____.

Claimant Date

Counsel for Claimant Date

Employer Date

Counsel for Employer Date

WORKERS' COMPENSATION FUND

Transcript of public hearing for comment on a Proposed Procedural Rule designated as Title 85, Series 8, "Hearing", held at 10:00 a.m. on Friday, March 1, 1991, in the Third Floor Conference Room, Workers' Compensation Fund, 601 Morris St., Kanawha County, Charleston, West Virginia.

APPEARANCES: HENRY HASLEBACHER, Hearing Examiner
WV Workers' Compensation Fund

EXAMINER HASLEBACHER: This is the public hearing for comment on a Proposed Series of Procedural Rules designated as Title 85, Series 8, which deals with settlement of Workers' Compensation claims. The original notice of this hearing was filed with the Secretary of State for publication one month prior to these hearings, proper notice having gone out. To date we have received in the mail one set of comments from Timothy Leach. No one has appeared today to present written comments for the record. There being no comments tendered at this time, I am now closing this hearing.

STATE OF WEST VIRGINIA
WORKERS' COMPENSATION FUND, to wit:

I, Betsy L. Chapman, Reporter for the Workers' Compensation Fund, do hereby certify that the foregoing is a correct record of the proceedings.

Given under my hand this the 1st day of March 1991.


Betsy L. Chapman, Reporter.

Workers' Compensation Fund
Charleston, WV

Workers' Compensation Fund
601 Morris Street
Charleston, West Virginia 25301-1416

Gaston Caperton, Governor
Andrew N. Richardson, Commissioner
John H. Kozak, Executive Secretary



April 9, 1991

Honorable Ken Hechler
Building 1, Suite 157-K
Capitol Complex
Administrative Law Division
Charleston, WV 25305

ATTN: Judy D. Cooper

RE: Workers' Compensation Procedural Rules for Settlement of Permanent Partial
Disability Awards

Dear Ms. Cooper:

Attached is a copy of the final addition of the Workers' Compensation Rules for Settlement of Permanent Partial Disability Awards. This addition incorporates amendments made pursuant to comments received upon these rules. I am enclosing a transcript of the public hearing held pursuant to your rules and regulations and the Administrative Procedures Act. No one attended the hearing. Written comments were received from Timothy G. Leach, Esquire, Henry Bowen, Esquire of the law firm of Robinson & McElwee, and Sarah E. Smith of the law firm of Bowles, Rice, McDavid, Graff & Love.

The following is a list of the amendments made to the rules:

1. Series 8 was changed to Series 12. The reason is that I was informed by your office that Series 8, 9, 10 & 11 had already been used by the Workers' Compensation Fund.
2. Rule 2.1(b) was changed as follows: In the second sentence the word "will" was stricken and the word "may" was added. The sentence was also modified so that requests could be in writing as well as by telephone or orally. In Rule 2.1(c) in the second sentence the following phrase was added to the end: "but such agreement need not be signed in the presence of the presiding officer." A sentence was added to the end of Section 2.1(c): "It shall not be necessary for any such corporate representative to attend the hearing to present the settlement for approval if the corporation is represented by an attorney."
3. Section 2.2(f) was amended to add the following phrase to the end of the sentence: "and shall state with particularity the reasons for rejecting the agreement."

April 9, 1991

4. Rule 2.2(g) was changed as follows. The last sentence was changed to state further petitions for compromise settlement under different terms than those previously rejected may be filed subsequent to the rejection of any petition.
5. In Rule 2.4 the first sentence was changed as follows: "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 a claimant is an infant, the legal guardian of such infant may negotiate a compromise settlement of such claim with the employer or employers involved."
6. In Rule 2.5 the follow sentence was added: "Upon showing of good cause, the parties may amend or substitute language on said form or forms to adequately describe the terms of the settlement."

These amendments were made pursuant to the comments sent to the Commissioner. The reasons were that they clarified the original intent of the rules or made them easier to apply. In the case of Rule 2.4, the comments pointed out that the rule in its original form applied to dependents' benefits. The statute authorizing the rule did not make any such application. It should have been applied only to permanent partial disability awards.

We wish the effective date of these rules to be thirty days after the filing of these amended versions with you office. If there are any further procedures which we must undertake, please inform me. Thank you very much for your cooperation and assistance in this matter.

Very truly yours,



Henry Haslebacher
Senior Counsel
Legal Division

HE:se

Enclosure

TO: John H. Kozak

AGENCY: Worker's Compensation

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: July 6, 1992

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

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

SERIES: 12 TITLE: 85 Worker's Compensation

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

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

SIGNED: [Signature]

TITLE OF PERSON SIGNING: Executive Secretary

DATE: 12/11/92

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