

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III**

ADMINISTRATIVE LAW DIVISION

Form #5

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FILED

2002 AUG 12 A 11:55

WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Bureau of ^{Workers Compensation} Employment Programs TITLE NUMBER: 85

CITE AUTHORITY: W.Va. Code 21A-2-6(2); 21A-3-7(b); 21A-3-7(c); 23-1-1,
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
RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____ X _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W.Va. Code 21A-2-6 (1)-(2) & (14); 21A-2-19; 21A-3-7(b) & (c)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

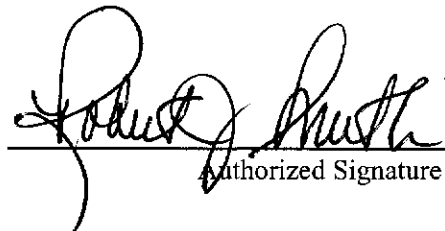
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 12

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 11, 2002


Authorized Signature

SCANNED

\$10.60

Bob Wise
Governor
Robert J. Smith
Commissioner



West Virginia Bureau of Employment Programs

• Job Service • Labor Market Information
• Unemployment Compensation • Workers' Compensation
an equal opportunity/affirmative action employer

August 8, 2002

The Honorable Joe Manchin, III
Secretary of State
Capitol Building, Room W-157
Charleston, West Virginia 25305

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

Dear Secretary Manchin:

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

Pursuant to Enrolled Committee Substitute for House Bill 4030, Regular Session, 1994, the Department of Commerce, Labor and Environmental Resources was abolished. Pursuant to that same bill and to Executive Order No. 5-94 of the Governor, the Commissioner of the Bureau of Employment Programs is empowered to promulgate rules without the consent or approval of a department secretary.

Thank you very much for your assistance in this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert J. Smith".

Robert J. Smith
Commissioner

RJS/mab

Enclosures

Workers' Compensation Division - Rating Services

Post Office Box 3587, Charleston, West Virginia 25336-3587 • www.state.wv.us/bep
Offices located at 4700 MacCorkle Avenue SE Charleston WV 25304

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #1

Do Not Mark In This Box

FILED

2002 FEB -8 A 10:38

WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Bureau of Employment Programs TITLE NUMBER: 85
RULE TYPE: Procedural CITE AUTHORITY: W.Va Code 21A-2-6(2); 21A-3-7(b);
21A-3-7 (c); 23-1-1; 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
AMENDMENT TO AN EXISTING RULE: YES NO
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 12

TITLE OF RULE BEING AMENDED: "Settlement of Permanent Partial Disability Awards"

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: March 21, 2002 TIME: 2:30 p.m.

LOCATION OF PUBLIC HEARING: Holiday Inn Civic Center
100 Civic Center Drive
Charleston, WV

COMMENTS LIMITED TO: ORAL _____, WRITTEN _____, BOTH

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

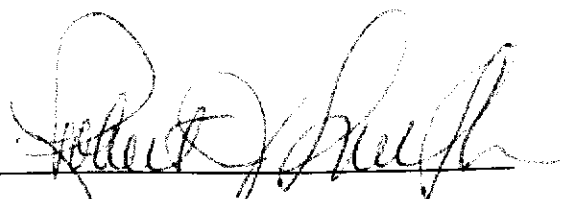
The comment period will close on the 21st day
of March, 2002, at 5:00 p.m.

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

Melissa A. Blatt, Esq.
Workers' Compensation Division
Rating Services - Settlement Unit
P. O. Box 3587
Charleston, WV 25336-3587



Authorized Signature
Robert J. Smith
Commissioner, BEP

Bob Wise
Governor
Robert J. Smith
Commissioner



West Virginia Bureau of Employment Programs

• Job Service • Labor Market Information
• Unemployment Compensation • Workers' Compensation
an equal opportunity/affirmative action employer

February 8, 2002

The Honorable Joe Manchin, III
Secretary of State
Capitol Building, Room W-157
Charleston, West Virginia 25305

Re: Proposed Procedural Rule
Title 85, Series 12
"Settlement of Permanent Partial Disability Awards"

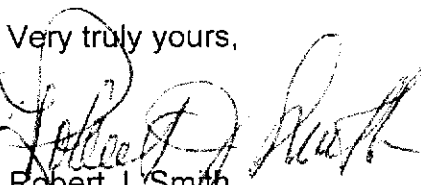
Dear Secretary Manchin:

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

Pursuant to Enrolled Committee Substitute for House Bill 4030, Regular Session, 1994, the Department of Commerce, Labor and Environmental Resources was abolished. Pursuant to that same bill and to Executive Order No. 5-94 of the Governor, the Commissioner of the Bureau of Employment Programs is empowered to promulgate rules without the consent or approval of a department secretary.

Thank you very much for your assistance in this matter.

Very truly yours,



Robert J. Smith
Commissioner

RJS/mab

Enclosures

**SUMMARY OF PROPOSED PROCEDURAL RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 12
SETTLEMENT OF PERMANENT PARTIAL DISABILITY AWARDS**

The proposed changes to "Settlement of Permanent Partial Disability Awards" involve the process by which parties to a workers' compensation claim can settle the claim pursuant to *W. Va. Code §23-5-7*.

The rule became effective in 1991 and was used in accordance with *W. Va. Code §23-5-1f* in providing for the settlement of permanent partial disability awards. This *Code* section was later repealed by the 1995 Act and was replaced by *W. Va. Code §23-5-7*.

The following are the primary changes included in this proposal.

The current rule provides that the parties may only settle permanent partial disability issues with awards of 15% or less. The proposed changes are consistent with *W. Va. Code §23-5-7*, which allows the parties to settle any and all issues in a claim, except medical benefits, wherever the claim may be in the review or appellate processes. Further, the parties may agree to settle the claim on a final basis, whereby the claimant agrees to waive any rights to reopen the claim for future indemnity benefits.

The current rule also provides that the Commissioner has the discretion to participate in the settlement process when the employer is a subscriber to the fund. The proposed changes, in accordance with *W. Va. Code §23-5-7*, provide that the Commissioner of the Bureau of Employment Programs must consent to all agreements and the Office of Judges must undertake a review of all agreements to ascertain that the agreement is fair and reasonable to all parties.

Finally, the current rule provides that the Administrative Law Judge's final order is appealable. The proposed changes provide that the order of the Office of Judges is final and non-appealable, in accordance with *W. Va. Code §23-5-7*.

The proposal takes into consideration these major statutory changes and aligns the rule with *W. Va. Code §23-5-7*.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Series 12 Settlement of Permanent Partial Disability Awards

Type of Rule: Legislative Exempt Interpretive Procedural

Agency Bureau of Employment Programs

Address 112 California Avenue

Charleston, WV 25305

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	Unknown	Unknown	Unknown	Unknown	Unknown
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	Unknown	Unknown	Unknown	Unknown	Unknown

2. Explanation of above estimates:

The proposed changes to this rule will make the rule consistent with current legislative authority, which has been in effect since 1999. Therefore, there should be no change in expenses associated with this proposal.

3. Objectives of this rule:

The purpose of this rule is to establish a process whereby the parties to a workers' compensation claim can resolve issues in a claim by agreement and in accordance with legislative authority.

Rule Title: Series 12 Settlement of Permanent Partial Disability Awards

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that the impact of this rule will lead to a more efficient settlement process, which could result in savings for the Bureau.

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

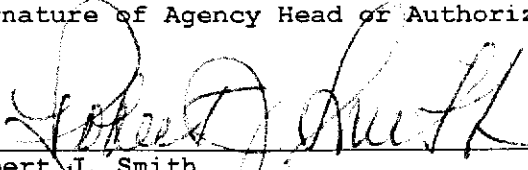
It is expected that the impact of this rule will encourage parties to a workers' compensation claim to settle claims rather than litigating, which could improve the timeliness of final decisions and reduce dockets at each level of the system.

C. Economic Impact on Citizens/Public at Large.

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

Date: February 8, 2002

Signature of Agency Head or Authorized Representative



Robert J. Smith
Commissioner, Bureau of Employment Programs

FILED

TITLE 85

2002 AUG 12 A 11:55

PROCEDURAL RULE

BUREAU OF EMPLOYMENT PROGRAMS

WEST VIRGINIA
SECRETARY OF STATE

WORKERS' COMPENSATION FUND

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(c); 23-1-1; 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.

1.3. Filing Date. --

1.4. Effective Date. --

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 "Commissioner" means the commissioner of the bureau of employment programs.

3.2 "Division" refers to the workers' compensation division of the bureau of employment programs.

3.3 "An employer that is not active in the claim" means an employer who has not participated in the settlement negotiation process. ~~An employer is considered inactive for settlement purposes either when the 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 WV Code §23-1-13 and when the division has notified the employer of settlement negotiations by certified mail and the employer has failed to respond to the division'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 notice of settlement negotiations. or has chosen not to participate or when the employer is a corporation and has failed to hire an attorney to represent it in the claim.~~

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.

§85-12-4. Parties.

The claimant, the employer and the ~~division~~ commissioner, or the commissioner's appointed designee, may negotiate a settlement of any and all issues in a claim or claims, excluding medical benefits, pursuant to the requirements of W. Va. Code §23-5-7 and the regulations herein set forth. The division and the claimant may negotiate a settlement of a claim when the employer is not active in the claim. ~~All settlement agreements must be signed by the claimant. Counsel may sign an agreement on behalf of an employer.~~ In multiple employer claims, all employers 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 will notify the employer by certified mail, giving the employer ~~fifteen (15)~~ thirty (30) days to

respond to the division. If the employer fails to respond to the notice or chooses not to participate, the division 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 medical benefits, 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.

§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. Office of Judges.~~

~~9.1. The office of judges shall have discretion to approve, reject or deny a proposed settlement agreement. The agreement shall be approved, rejected or denied in writing. In reviewing the agreement, the office of judges may consider, among other things, the facts and circumstances involved, medical reports and any other factors deemed relevant to the settlement.~~

~~9.2. In cases in which a claimant is not represented by an attorney, a hearing shall be conducted before the office of judges pursuant to their procedural rules to ascertain if the~~

~~claimant has entered the agreement voluntarily and without fraud, coercion, or undue influence and is fully cognizant of their procedural rights. Other cases may be subject to hearing at the discretion of the Office of Judges or at the request of the parties.~~

~~9.3. The order of the office of judges shall fully conform to the terms of the agreement if the agreement is approved.~~

~~9.4. Any order approving, rejecting or denying any settlement agreement shall not be appealable, and shall state with particularity the reasons for rejecting or denying the agreement.~~

~~9.5. Rejection or denial of any settlement agreement shall make the agreement null and void. Said rejection or denial shall be with prejudice. In claims in which any settlement agreement is rejected or denied, the claim shall proceed in the same manner as in a case in which no such settlement agreement was filed. The office of judges may grant time frame extensions to allow the parties to further develop evidence if the time frames expired during the settlement process and the proposed settlement agreement is rejected or denied by the office of judges. Further settlement agreements, under different terms than those previously rejected or denied, may be filed subsequent to the rejection or denial of any agreement.~~

§85-12-109. 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.

§85-12-110. 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.

§85-12-1211. 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. If such settlement is approved by the office of judges, 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, 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-~~13~~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-~~14~~13. Deductions from settlement awards.

~~14~~13.1. Pursuant to W. Va. Code §23-4-18, any amounts owed for child or spousal support will be withheld from settlement payments.

~~14~~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.

~~14~~13.3. Any award of monetary benefits entered in the claim being settled by the workers' compensation division, the office

of judges, the Appeal Board or the Supreme Court of Appeals of West Virginia, between 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-~~15~~14. 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.

BEFORE THE WEST VIRGINIA OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION PERFORMANCE COUNCIL

IN RE: RULE 85 C.S.R. 12 SETTLEMENTS

ORIGINAL

TRANSCRIPT OF PROCEEDINGS had at the public hearing in the above referenced matter, held on Thursday, March 21, 2002, at 1:50 p.m., before the West Virginia Bureau of Employment Programs Workers' Compensation Performance Council, at the Holiday Inn, 100 Civic Center Drive, Charleston, West Virginia, pursuant to notice duly given to all interested parties.

JENNIFER L. JIMISON, CCR
P. O. BOX 724
BARBOURSVILLE, WV 25504 - (304) 733-3476

SUBCONTRACTOR FOR:
REBECCA L. BAKER, CCR

A P P E A R A N C E S:

MEMBERS OF THE PERFORMANCE COUNCIL:

PAUL THOMPSON
EVERETTE SULLIVAN
FRED TUCKER (PRESIDING)
DOUG MERRITT

1 (Call to order, 1:50 p.m.)

2 MR. TUCKER: We will call the public
3 hearing for Rule 85 C.S.R. 12 Settlements. My
4 name is Fred Tucker. Mr. Paul Thompson to my
5 right, Mr. Everette Sullivan. And Doug Merritt.
6 We will open up the public hearing for the comment
7 period and anyone who wishes to speak. Would you
8 please come forward to the microphone and identify
9 yourself for our court reporter.

10 MR. BOWEN: Thank you very much, Mr.
11 Chairman. My name is Henry Bowen. I'm here today
12 in my capacity as Executive Secretary of
13 the West Virginia South Assureds Association. It
14 is always a pleasure and a distinct privilege to
15 speak to the Council regarding pending rules.

16 I think as a member of the public and
17 also as a Workers' Compensation professional,
18 there's probably no greater authority that's given
19 to this Council than its power to adopt rules to
20 implement the Workers' Compensation Act and this
21 settlement rule is extremely important.

22 And we appreciate the opportunity of
23 making public comments today. We will be filing

1 with Ms. Blatt written comments. And those
2 comments should mirror the one or two substantive
3 points that we had to make.

4 The current rule before you, Rule 12, was
5 adopted in 1991, about two years before this
6 Council was created, invested with the Rule making
7 authority.

8 That Rule was adopted to implement the
9 limited settlement authority of the legislative
10 branch that the Legislature granted to the
11 Workers' Compensation Division during the special
12 session in 1990.

13 Since then there has been a number of
14 policy determinations made by the Division, and
15 the Association certainly supports the Division's
16 recognition that this Rule should be clarified and
17 amended to reflect not only those policy
18 determinations made by the Division, but more
19 importantly to be consistent with the Statute as
20 amended in 1995.

21 The Rule that you have in front of you as
22 the current Rule was limited in its scope because
23 the Statute only allowed for only a very limited

1 use of settlement. Since that time, with the 1995
2 change in the law, virtually any and all issues
3 subject to review are subject to settlement on a
4 full and final basis except for medical benefits.

5 So again, the Association continues to
6 advocate the need for settlement. And we
7 recognize that the Division has made these
8 proposed changes to you so that it can be more
9 effective in obtaining that alternative dispute
10 resolution.

11 We do however have some specific concerns
12 with regard to the proposed language. And this,
13 of course, is within the definition section, 85
14 12-3, Subsection 3 on Page 2 of the draft that you
15 may have in front of you. If you do not I would
16 simply like to tell you that our Board of Managers
17 reviewed this language in our most recent meeting.

18 And was concerned that this language
19 might impose on self-insurers an obligation for
20 settlement when there may be a good faith effort
21 made by the Division to notice the company. And
22 the notice not to be received within the company's
23 designated response for Workers' Compensation

1 Administration.

2 There's no uniform way companies
3 administer their Workers' Comp. Some delegate
4 that responsibility by out sourcing it to third-
5 party claims administrators.

6 Most have a company representative either
7 in human resources department, risk management
8 department, or some other similar type of
9 department that have the ultimate Workers'
10 Compensation responsibility.

11 And normally its been our practice
12 experience that those individuals may not be the
13 individuals whom Workers' Compensation may have as
14 the company's representative. And so in its
15 current form we find the language to be of concern
16 and would suggest a specific change to clarify
17 this language.

18 And the specific language that I would
19 recommend is as follows: We recommend that the
20 employer that is not active in the claim means,
21 "An employer which is inactive for settlement
22 purposes." So we would recommend that language be
23 substituted in the first sentence of Subsection

1 3.3.

2 Moreover, we would suggest the following
3 change: "An employer is considered inactive for
4 settlement purposes either when the employer is
5 defunct or when the employer has been relieved by
6 the Division of Liability associated with its
7 account."

8 And that language is suggested and
9 recommended to you so there will not be any
10 confusion with respect to the status of prior
11 self-insurance accounts that have been the subject
12 of buyouts.

13 You may remember from prior discussions
14 that I had with you on the subject of buyouts. A
15 buyout is a payment into the agency of an
16 actuarially determined amount to extinguish claims
17 liability. And honestly, the legal liability is
18 assigned back to the State's Workers' Compensation
19 Division and is no longer the responsibility of
20 that employer.

21 So we think it's important that there be
22 something in there to recognize that the
23 obligation of dealing with an employer that has

1 retired or bought out its Workers' Compensation
2 liabilities is an obligation strictly with the
3 Division and the claimant.

4 And we think that language will clarify
5 that so that you will not have future reports
6 coming in that Company A had 15 cases settled and
7 didn't respond to any of the Division's letters,
8 because if Company A was self-insured and bought
9 out that liability, I can assure you they probably
10 won't even have anybody that knows what's going on
11 in West Virginia.

12 Because they won't have active payroll in
13 West Virginia and they won't have active claims,
14 unless they are an active subscriber account. And
15 the last thing that we would recommend to you goes
16 under the notice provisions of 85 12-5.

17 There the Division proposes to you that
18 it be allowed to send a certified letter to an
19 employer and if there is no response within 15
20 days, then the Division can deem that as an
21 employer who is not participating in the
22 settlement negotiation process.

23 We respectively suggest to the Council,

1 and with no disrespect intended to the Workers'
2 Compensation Division, they have a mammoth job in
3 keeping up with the addresses and the employer
4 representatives.

5 They are not the same for the employer
6 accounts side of the issue as they may be on the
7 Workers' Comp Claims Management side. And as I
8 have already noted a few minutes ago, you might
9 have people who are solely responsible within the
10 risk management for making sure that all quarterly
11 reports are filed timely.

12 That person may have his or her name on
13 file with underwriting and with the self-insured
14 unit, and yet you may have another professional
15 within that organization who is solely responsible
16 for management of claims who has nothing to do
17 with the underwriting side or the premium tax
18 filing side of the business.

19 So we think that it's appropriate for all
20 employers to be given an opportunity to notify the
21 Division that it chooses not to participate. And
22 if that notification then comes in, then the
23 Division certainly as a party is free to continue

1 with negotiations.

2 All we're trying to do is recommend to
3 you some changes in the language that will
4 eliminate the possibility that somebody simply
5 doesn't get noticed because it didn't provide the
6 correct name of the Workers' Compensation manager
7 to the Workers' Compensation Division.

8 And while one could certainly suggest
9 that an employer always has an obligation to know
10 that the agency has the correct name of the
11 person, many of these companies have out of state
12 managers of Workers' Compensation.

13 We just want to make sure that the
14 Division doesn't inadvertently by sending to the
15 wrong address, settle self-insured accounts --
16 claims, excuse me, and then simply order the
17 payment.

18 And we don't think that that will inhibit
19 or limit the Division's goal of being able to
20 implement its settlement authority. And implement
21 its settlement policy as part of an active
22 alternative dispute resolution process in any way.
23 None of these comments are intended to throw up

1 barriers to the Division.

2 They are simply suggestions that we think
3 will protect against the possibility that cases
4 might be settled without a participating employer
5 that would ordinarily be participating if it has
6 received the notice.

7 In 15 days in the current language,
8 simply while it may appear to be reasonable, that
9 is not a time that is adequate, so that's why we
10 suggested the additional change in that
11 subsection.

12 Other than that, we have no other changes
13 to suggest that are of any significance. I did
14 mention to Counsel for the Division that there was
15 a recent Supreme Court Case that was handed down
16 by our West Virginia Supreme Court of Appeals that
17 seems to impact on the issue of 85 12-13 after the
18 death of the claimant.

19 I did not intend to offer a substantive
20 comment by that. But I did want to make Council
21 aware that the Court did recently render a
22 decision which seems to be suggestive that the
23 death of a claimant would not extinguish rights of

1 an estate or rights of the dependent. But I'll
2 leave that for Ms. Blatt and her colleagues to
3 straighten out.

4 I thank you very much for the opportunity
5 of addressing these comments to you. And as I
6 indicated I'll send the written form of them to
7 Ms. Blatt this afternoon. I apologize for not
8 having them already in advance for you. Be happy
9 to entertain any questions if there are any.

10 MR. TUCKER: Thank you, Mr. Bowen. Does
11 anybody -- Council have any questions of Mr.
12 Bowen, pertaining to his comments?

13 (No response.)

14 MR. TUCKER: Thank you, Mr. Bowen.

15 MR. BOWEN: Thank you, Mr. Tucker.

16 MR. TUCKER: Is there anyone else at the
17 present time who wishes to speak to the Rule 12
18 Settlement Hearing?

19 (No response.)

20 MR. TUCKER: If not we will stand in
21 recess till 2:30 p.m.

22 (Whereupon, a short recess was held.)

23 MR. TUCKER: We'll reconvene here at 2:30

1 on this public hearing on this Rule 12 Settlement.
2 We have been in recess for one half hour. And
3 we're making one final search to see if anyone
4 wants to speak on the Rule.

5 MR. SUTER: Mr. Weaver is here and unless
6 he wants -- I don't think he wants to make any
7 comments.

8 MR. TUCKER: We're in the comment period
9 for Rule 12 Settlements?

10 MR. WEAVER: Just here to observe, thank
11 you.

12 MR. TUCKER: Okay. Mr. Sutter, do you
13 think we should take another look?

14 MR. SUTER: Mr. Weaver was the only one
15 out in the hall.

16 MR. TUCKER: Let me ask a question, Mr.
17 Sutter, the comment period ends today?

18 MR. SUTER: Yes, sir. It will be written
19 comments by the close of business at 5:00 p.m.

20 MR. TUCKER: We went through the
21 procedure on that as far as the notice and things
22 of that nature. So your written comments will be
23 -- anyone that wants to make written comments by

1 close of business today will generally presumed to
2 be 5:00 p.m. will be directed to the appropriate
3 people.

4 And therefore, having no one else to
5 comment on the Rule 12 Settlement, we declare the
6 public hearing closed.

7 (Whereupon, the hearing concluded at
8 2:30 p.m.)

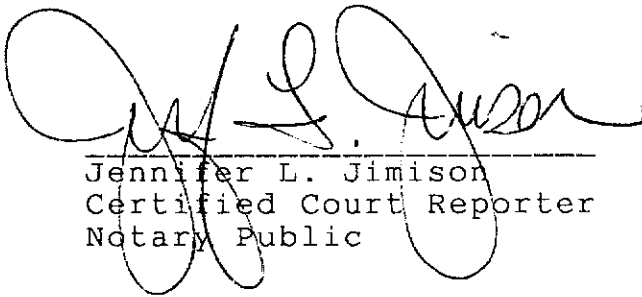
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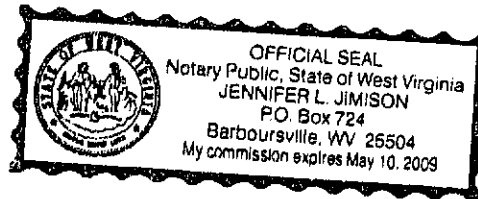
REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

I, Jennifer L. Jimison, a Subcontractor for Rebecca L. Baker, Official Court Reporter, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption thereof.


Jennifer L. Jimison
Certified Court Reporter
Notary Public



CLAIMS AND ADMINISTRATION COMMITTEE

ATTENDANCE SHEET

Meeting of March 21, 2002

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

Name	Company	Mailing address if you wish to receive notices of meetings (if previously provided, leave blank)	Do you wish to speak? (yes/no)
MARK D. CLARK	ACORDIA	Address City, state, zip	NO
Phil Nicholson	CONSOC	Address City, state, zip	NO
Karin Burges	TOSC	Address City, state, zip	
Maida Torrey	FSSC	Address City, state, zip	
MIKE TOLEMAN	GARM	Address City, state, zip	
Mike C... ..	Coach	Address City, state, zip	N

CLAIMS AND ADMINISTRATION COMMITTEE

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

Name	Company	Mailing address if you wish to receive notices of meetings (if previously provided, leave blank)	Do you wish to speak? (yes/no)
Henry Thomas	WV SFG	Address City, state, zip	N
Scott Retrack	CONSEL	Address 38 Pinnacle Lane Morgantown WV 26508 City, state, zip	N
Stacie Archer	CMT	Address City, state, zip	N
David Slater	Gates McDonald	Address City, state, zip	N
Debbie Filler	Cascade Disability	Address 4099 William Penn Hwy City, state, zip Monroeville PA 15146	N
Amanda Jones	Lascade	Address City, state, zip Morgantown, WV	N

Comment on Proposed Amendments to
The Series 12 Rule Addressing Settlement
Of Workers' Compensation Issues

Prepared by Acordia of West Virginia
March 21, 2002

The incorporation in Section 3.3 of the rule of an overly broad definition of the term "An employer that is not active in the claim" is not appropriate nor in keeping with the intent that is clear in the statutory language governing compromise and settlement (23-5-7). The statute references an employer "not active in the claim", not an employer who has "chosen not to participate" in settlement discussions, or "has failed to respond" to certified mail notification of settlement discussions from the division, as the proposed rule states.

An employer can be active in a claim on many levels aside from settlement negotiations, attempting to return a claimant to work or honoring pay-orders charged against a claim to name a few. The proposed language seems intended to allow the division to pursue settlement unilaterally, whether an employer wishes to do so or not. The statute clearly indicates that all three parties should be involved in the negotiations. A lack of desire on the part of one of the parties to settle should not negate this requirement. Since any outcome of settlement negotiations has the potential to have a substantial impact on an employer's costs, this definition in the rule should be narrowed significantly.

We recommend that in any claim in which the employer may incur financial consequences, whether in the form of charges against an account and the subsequent effect on premium rate, or direct payment in the case of self insurers, that the definition in Section 3.3 be extremely narrow as follows:

"An employer that is not active in the claim" means an employer that has no financial interest in a claim, or has financial interest and has indicated in writing that they do not wish to participate in settlement discussions, but grants the division permission to do so on their own.

A companion change to Section 5 should alter the last sentence in that section as follows:

If the employer ~~fails to respond to the notice or chooses not to participate~~ and grants permission in writing for the division to pursue settlement without their participation, the division may negotiate a settlement on behalf of the employer in accordance with W.Va. Code 23-5-7.

The proposed rule also opens the possibility of additional involvement of attorneys in our already over-litigious system. The language in Section 3.3 that assumes an employer is not active in the claim if they have not hired an attorney assumes all issues that can be settled are in litigation. This is not the case, and in fact compromise and settlement should be given an opportunity to act in prevention of litigation.

In closing, we feel the title of the rule should reflect the section of the statute that it is intended to regulate. This being the case it should be titled "Compromise and Settlement of Workers' Compensation Issues". Too often the compromise piece is forgotten. Compromise involves mutual concessions. The rule governing the process should not ignore half the formula.

March 21, 2002

Melissa A. Blatt, Esquire
Workers' Compensation Division
Rating Services - Settlement Unit
P. O. Box 3587
Charleston, West Virginia 25336-3587

Re: Series 12 - Settlement of Workers' Compensation Issues

Dear Ms. Blatt:

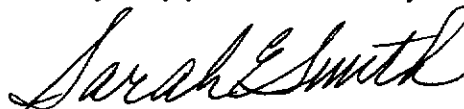
Thank you for permitting us to respond to your proposed regulations related to the settlement of workers' compensation issues.

We agree that the settlement of claims is a positive feature in the system which should be encouraged.

We suggest by way of changes that the definition of "an employer that is not active in the claim" is too broad in § 85 CSR 12-3.3. The language should more clearly follow the language of the statute, and the only time an employer should be considered "not active in a claim" is if a subscriber employer has closed its account, is defunct, has no current payroll, has agreed that settlement negotiations can proceed without the employer's participation, or has bought out its liability. In addition, the Division should never have the authority to unilaterally settle a claim on behalf of an active self-insured employer unless a specific waiver of participation has been received or a buy out of liability has occurred. Since the Division would not settle a claim for a living or "active" claimant without his or her participation, employers should be provided that same protection.

Please consider these comments in amending your proposed regulations.

Very truly yours,



Sarah E. Smith

SES/pfl

JACKSON & KELLY PLLC

ATTORNEYS AT LAW

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P. O. BOX 563

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TELEPHONE 304-340-1300

TELEPHONE 304-340-1130

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(304) 340-1301

March 21, 2002

TIMOTHY E. HUFFMAN
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TELEPHONE 304-340-1130JENNIFER STEEL
1000 FAMILY TOWER
TELEPHONE 304-340-1130THE EAST VIRGINIA INSTITUTE
JENKINS BUILDING
TELEPHONE 304-340-1130DAVID HENNINGSON
1000 FAMILY TOWER
TELEPHONE 304-340-1130JAMES L. JENKINS
1000 FAMILY TOWER
TELEPHONE 304-340-1130P.O. BOX 1000
MARTINSBURG, WEST VIRGINIA 26151
TELEPHONE 304-253-4101256 HUSSELL AVENUE
NEW MARTINSBURG, WEST VIRGINIA 26151
TELEPHONE 304-253-4101600 HAMPDEN CENTER
MORGANTOWN, WEST VIRGINIA 26505
TELEPHONE 304-253-4101100 MARKET STREET
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE 304-340-13002000 TECHNOLOGY PARK
RICHMOND, WEST VIRGINIA 26361
TELEPHONE 304-340-1301

Melissa A. Blatt, Esquire
Workers' Compensation Division
Eating Service - Settlement Unit
P.O. Box 3587
Charleston, WV 25336-3507

RE: Comments to Proposed Procedural Rule Regarding Settlement

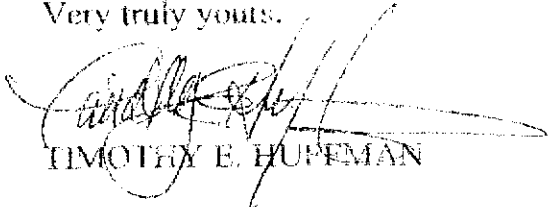
Dear Ms. Blatt:

Having reviewed the proposed revisions to the Series 12 Rules on Settlements, I offer these brief comments:

1. Rule 3.3 defines an employer "not active in the claim" to include regular subscribers and self-insureds. This definition should be restricted to only regular subscribers or self insured's who have "bought out" their self insured liability with further claim payments the responsibility of the Division.
2. Rule 5 should require a negative response from the employer after notice before the Division negotiates a settlement without the employer involved. If the employer is defunct, or otherwise out of business, only notice would be required.

I trust these comments will be passed on to the members of the Performance Council.

Very truly yours,



TIMOTHY E. HUFFMAN

TEH/ib

West Virginia Self-Insurers Association

Post Office Box 1573
Charleston, West Virginia 25326
Tax ID# 55-0654337

Tel: (304) 353-8128
bcwvnh@steples-johnson.com



March 21, 2002

VIA FACSIMILE ONLY

Melissa A. Blatt, Esq.
Bureau of Employment Programs
Workers' Compensation Division
Internal Management Services
P.O. Box 3587
Charleston, WV 25336-3587
Facsimile: (304) 926-5414

Re: Comments to Proposed Procedural Rule
on Settlements, 85 CSR Series 12

Dear Ms. Blatt:

On behalf of the West Virginia Self-Insurers Association (WVSIA) I make the following comments regarding the Workers' Compensation Division's recommended changes to Rule 12, 85 CSR § 12.

1. WVSIA objects to the proposed definition of inactive employer recommended in subsection 3.3. WVSIA requests that the Performance Council adopt the following:

An employer that is not active in the claim means an employer which is inactive for settlement purposes. An employer is considered inactive for settlement purposes either when the employer is defunct or when the employer has been relieved by the Division of liability associated with its account; or, when the Division has notified the employer of settlement negotiations by certified mail and the employer has notified the Division that it has chosen not to participate."

2. § 85-12-5. Notice. WVSIA objects to the notice provision and requests that the Council adopt the following changes:

Melissa A. Blitt, Esq.

March 21, 2002

Page 2

If the employer notifies the Division that it chooses not to participate, the Division may negotiate a settlement on behalf of the employer in accordance with W.Va. Code § 23-5-7.

WVSLA appreciates the Council's consideration of these requests.

Very truly yours,



Henry C. Bowen
Executive Secretary

HCB/npk

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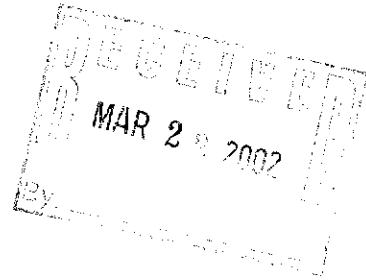
Bob Wise
Governor

Timothy G. Leach
Chief Administrative
Law Judge



West Virginia
Workers' Compensation Office of Judges
an equal opportunity/affirmative action employer

March 20, 2002



Ms. Melissa Blatt
Workers' Compensation
Rating Services
4700 MacCorkle Avenue
Charleston, WV 25335

Re: Comment to Proposed
Changes to Rule 12

Dear Ms. Blatt:

Please find attached for your consideration comment to the proposed changes to Rule 12. This comment is not representing the official position of the Office of Judges, but rather represents comment from various individuals employed by this office which has been consolidated for ease of review.

Thank you for the opportunity to comment on this rule. Should you have any questions regarding this comment, please contact me at your convenience.

Sincerely,

Alan M. Drescher, Deputy Chief
Administrative Law Judge

AMD/ddm

Enclosure

COMMENT TO PROPOSED CHANGES TO RULE 12

Section 3.3 – A corporate employer is not required to have an attorney when a claim is before the Division. This rule may be unclear since a corporation's failure to have an attorney representing it should only cause such employer to be considered "inactive" when the matter is in litigation before the Office of Judges, Workers' Compensation Appeal Board, or Supreme Court.

Section 4 – A) The rule should clarify who has the authority to bind the Division to a settlement agreement.

B) This section should include language that medical benefits are excluded from settlement.

C) Language should be clarified to make clear that both claimant and claimant's counsel (if claimant is represented) must sign the agreement.

D) A representative of the employer should be required to sign the agreement as well as the employers' counsel.

E) Does the employer have the right not to settle by not participating in the settlement process?

Section 5 – Since silence cannot be taken as assent, does this section abrogate the employer's right to not settle a claim?

Section 7 – A percentage of impairment should be stated in agreement, so to avoid future issues regarding PTD minimum threshold impairment or whether a progression has been shown in a PPD re-opening.

Section 9.1 – Does the Division have the authority to promulgate rules governing procedures for the Office of Judges?

Section 9.5 – A) What is the intended purpose of the term "prejudice" in this context? The first sentence is confusing and should be eliminated.

B) The language "the claim shall proceed in the same manner as in a case in which no such settlement agreement was filed" implies that the same or another settlement agreement may be negotiated, renegotiated, or refiled. This appears to contradict the "prejudice" referred to in the first sentence.

Section 10 – This sentence, while true, is unnecessary.

Section 11 – Make the effective date be the date the agreement is signed by the last party in case one party dies before the Office of Judges approves the agreement.

Section 12 – Provide for appointing the Circuit Court Judge a "Special Administrative Law Judge" for the purpose of approving the settlement at the same time the legal guardianship is approved.

Section 13 – The recent Supreme Court decision in Martin implies that an award (or approval of a settlement) is not required prior to the claimant's (or any party's) death in

order for the dependents to be paid funds. The “default” should be that the Office of Judges review the agreement for approval even after the death of one of the parties, as long as the settlement was consented to by all parties prior to the death. The parties could negotiate a different process if they so desired to do so.

Section 14.3 – This section should begin with “Unless the agreement states otherwise...”

Settlement Rule
 Response to Comments

Section	Source	Comment	Recommendation
Title	Mike Cavender – Acordia Employers Service	<ul style="list-style-type: none"> The title should reflect the section of the statute it is intended to regulate. 	<ul style="list-style-type: none"> The Division agrees that the title of the rule should include the word “compromise”.
3 - Definitions	Henry Bowen – Executive Secretary of WV Self-Insurers Association Timothy Huffman – Jackson & Kelly, PLLC Sarah Smith – Bowles Rice McDavid Graff & Love, PLLC Mike Cavender – Acordia Employers Service	<ul style="list-style-type: none"> The definition of “inactive employer” is too broad. 	<ul style="list-style-type: none"> The Division agrees that the definition needs to be narrowed. However, in a majority of situations, when the employer is notified of pending settlement negotiations, the Division does not receive any response from the employer. Many of these employers never make any appearance in the claim or defend the claim. Thus, the Division does not agree that the employer should always notify the Division in writing if the employer has no objection to the Division negotiating on its behalf, as this would remove settlement potential from many claims and may increase the litigation process. The Division agrees that the definition of “inactive employer” should include those employers that are either defunct or have bought out their liability. <p>1. Further, for claims that are not in litigation, an employer will be considered “inactive” if</p>

Rule 12 – Response to Comments
 Risk Management Steering Committee
 6/13/02

			<p>the employer is not represented by counsel or is not represented by an employer service company in accordance with <u>WV Code §23-1-13</u> and has failed to respond to the Division's notice of settlement negotiations.</p> <p>2. 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 notice of settlement negotiations.</p> <ul style="list-style-type: none"> • An employer that does not fit into this definition will also be notified of pending negotiations by certified mail and will be given 30 days to respond. The Division will use the address of the employer that is contained in the claim record. If the employer fails to respond to this notice, the Division may negotiate a settlement on behalf of the employer.
<p>4 -- Parties</p>	<p>Office of Judges</p>	<ul style="list-style-type: none"> • The rule should clarify who has the authority to bind the Division to a settlement agreement. • The section should include language that medical benefits are excluded. • Language should be clarified to make 	<ul style="list-style-type: none"> • The Commissioner or a designee of the Commissioner has the authority to bind the Division to a settlement agreement. The language in this section has been clarified to include this information. • The Division agrees that this information be included. • While the Division recommends that both

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 Risk Management Steering Committee
 6/13/02

		<p>clear that both claimant and claimant's counsel, if represented, must sign the agreement</p> <ul style="list-style-type: none"> • A representative of the employer and employer's counsel, if represented, should be required to sign the agreement. • Does the employer have the right not to settle by not participating in the settlement process? 	<p>the claimant and claimant's counsel sign the agreement, we did not make this a requirement because there may be circumstances where the claimant is unable or unavailable to sign the agreement. This situation has arisen in the past and the Division relied on the attorney contract on file, which granted power of attorney to sign on behalf of the claimant.</p> <ul style="list-style-type: none"> • The Division recommends that a representative of the employer, as well as counsel for the employer, sign the agreement. However, it may be impractical in some instances to require the employer's representative to sign the agreement if the representative can not do so in a timely manner. • The Division will not negotiate a settlement on behalf of an employer if the employer advises the Division that it does not want to settle the claim.
5 – Notice	Office of Judges	<ul style="list-style-type: none"> • Since silence cannot be taken as assent, does this section abrogate the employer's right to not settle a claim? 	<ul style="list-style-type: none"> • Affirmative action is required by the employer to make the parties aware of its position. If the employer does not wish to settle the claim and makes the parties aware of this position, the claim cannot be settled.
7 – Manner of Payment	Office of Judges	<ul style="list-style-type: none"> • A percentage of impairment should be stated in the agreement to avoid issues regarding PTD threshold or 	<ul style="list-style-type: none"> • The language in the rule makes it clear that if the agreement is silent as to a percentage of impairment then the claim

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		<p>progression of the injury/disease for reopening.</p>	<p>record will not reflect a percentage for the settlement award. If the parties intend to settle for an additional percentage, that needs to be clearly stated in the agreement. Otherwise, no additional percentage of impairment will be entered in the claim record for PTD threshold or reopening purposes.</p>
<p>9 – Office of Judges</p>	<p>Office of Judges</p>	<ul style="list-style-type: none"> • Does the Division have the authority to promulgate rules governing procedures for the Office of Judges? • What is the intended purpose of the term “prejudice” in this context? The language “the claim shall proceed in the same manner as in a case in which no such settlement agreement was filed” appears to contradict the “prejudice” referred to in the earlier sentence. 	<ul style="list-style-type: none"> • The Division agrees. While the section was included for easy reference, the information is provided in the procedural rules and W. Va. Code §23-5-7 and should not be included in this rule. • This section should be removed.
<p>10 – Settlement not to be considered an admission against interest</p>	<p>Office of Judges</p>	<ul style="list-style-type: none"> • This sentence is unnecessary. 	<ul style="list-style-type: none"> • This section was included in the rule at the suggestion of the employer community since an employer’s willingness to settle is based on many factors, including rate making and litigation costs. As an example, an employer may agree to settle a claim for an additional permanent partial disability percentage even though there may not be evidence that the injury has progressed. The employer would not want that willingness to settle the claim to be

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11 – Effective date of settlement	Office of Judges	<ul style="list-style-type: none"> The effective date should be the date the agreement is signed by the last party in case one party dies before the agreement is approved. 	<p>used as an unfair admission against them in a deliberate intent case or otherwise.</p> <ul style="list-style-type: none"> The Supreme Court recently held in <u>Martin v. WCD and W-P Coal Co.</u> that if a claimant dies while the claim is pending in the claims process, the claim will proceed as if the claimant had not died and any compensation awarded that would have been paid to the claimant will be paid to the claimant's dependents. Thus, the claimant's dependent(s) can step into the shoes of the claimant and proceed with the settlement. Therefore, it would not be necessary to make this change.
12 – Minor dependents and claimants	Office of Judges	<ul style="list-style-type: none"> Provide for appointing the Circuit Court Judge a "Special Administrative Law Judge" for the purpose of approving the settlement at the same time the legal guardianship is approved. 	<ul style="list-style-type: none"> This does not go along with the statutory requirements. <u>WV Code §23-5-7</u> specifically states that the Office of Judges must approve all settlement agreements.
13 – Death of claimant	Office of Judges	<ul style="list-style-type: none"> The <u>Martin</u> decision implies that an award is not required prior to the claimant's death in order for the dependents to receive the funds. 	<ul style="list-style-type: none"> This section was drafted prior to the <u>Martin</u> decision. The language should be clarified to that extent.
14 – Deductions from settlement awards	Office of Judges	<ul style="list-style-type: none"> This section should begin with "unless the agreement states otherwise." 	<ul style="list-style-type: none"> Since the litigation is not stayed while settlement approval is pending and the issue in litigation is contemplated in the agreement, the Division would not have good reason to pay both the award and the settlement.