WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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Form #7

Effective Date

Oct 16, 1992

NOTICE OF AN EMERGENCY RULE

AGENCY: Bureau of Employment Programs
Workers' Compensation Division TITLE NUMBER: 85

CITE AUTHORITY: W.Va. 23-4-3b; W.Va. 23-4-8; Bilbrey v. W.C.C.

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES ____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Not Applicable

TITLE OF RULE BEING AMENDED ____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 13

TITLE OF RULE BEING FILED AS AN EMERGENCY: Protocols and Procedures for Performing Medical Evaluations in Noise-Induced Hearing Loss Claims.

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Use Additional Sheets If Necessary.

Andrew N. Richardson
Signature

DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY
State Capitol, Room R-151
Charleston, West Virginia 25305-0310
Telephone: (304) 558-3255
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GASTON CAPERTON
Governor

JOHN M. RANSON
Cabinet Secretary

August 12, 1992

John H. Kozak, Executive Secretary
Bureau of Employment Programs
Worker' Compensation Division
601 Morris Street
Charleston, West Virginia 25301-1416

RE: 1992 Emergency Rules - Title 85, Series 13 (Protocols and procedures for performing medical evaluations in noise-induced hearing loss claims)

Dear John:

Pursuant to West Virginia Code §5F-2-2(a)(12), I hereby consent to the proposal of the rules specified above.

You may attach a copy of this letter to your filing with the Secretary of State as evidence of my consent.

Sincerely yours,

John M. Ranson
Cabinet Secretary

JMR:cjb
cc: Andrew N. Richardson
B:RULE-WC.RUL

DATE:

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Commissioner Andrew N. Richardson
Bureau of Employment Programs
Workers' Compensation Division

EMERGENCY RULE TITLE: Protocols and Procedures for Performing Medical Evaluations in Noise-Induced Hearing Loss Claims

1. Date of filing: _____

2. Statutory authority for promulgating the emergency rule: W.Va. 23-4-3b; W.Va. 23-4-8.

3. Date of filing of proposed legislative rule: August 17, 1992

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

   The emergency rule adopts new language.

5. Has the same or similar emergency rule previously been filed and expired?

   No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

   The rule establishes the protocol and procedures for the performance of examinations by medical experts in hearing loss claims, as mandated by the WV Supreme Court of Appeals in the decision of Bilbrey v. W.C.C., No. 20142 (WV December 12, 1991). The emergency rule is necessary to immediately implement a standard that will insure consistent decisions in Workers' Compensation claims for hearing loss benefits. A benefit to the public welfare.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

Not Applicable

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

If the rule is not implemented as an emergency rule, then awards in hearing loss claims will continue to be granted without benefit of the Workers' Compensation Health Care Panel's protocols and procedures, a standard designed to promote a consistent approach to granting awards in hearing loss claims. Additionally, the Commissioner can not implement the directives of the WV Supreme Court of Appeals, as set forth in the Bilbrey v. W.C.C., decision, without benefit of the rule.

85 CSR
TITLE 85
EMERGENCY RULES
WORKERS' COMPENSATION DIVISION, BUREAU OF EMPLOYMENT PROGRAMS
SERIES ___
PROTOCOLS AND PROCEDURES FOR PERFORMING MEDICAL EVALUATIONS IN NOISE-INDUCED HEARING LOSS CLAIMS

PURPOSE AND SUMMARY OF PROPOSED RULE

An emergency rule is necessary to establish the protocols and procedures for performing medical evaluations in Workers' Compensation claims for noise-induced hearing loss.

In Bilbrey v. W.C.C., No. 20142 (WV December 12, 1991), the West Virginia Supreme Court of Appeals recognized that hearing loss is caused by many factors, including but not limited to age, illness, trauma, medications and noise. Additionally, the court recognized that the Workers' Compensation Commissioner and parties to workers' compensation claims have had a long term problem in obtaining recommendations from medical experts with regard to ascertaining hearing loss impairment due to noise. In light of the Bilbrey decision, the Workers' Compensation Commissioner asked the Workers' Compensation Health Care Advisory Panel to develop protocols and procedures for hearing loss testing which would promote a standard approach to assessing hearing loss and would identify criteria for ascertaining impairment related to noise exposure. As a result, the Panel studied the issue and devised the protocols and procedures that are embodied in the proposed Legislative rule.

The proposed rule sets forth testing requisite to performing an adequate noise-induced hearing loss evaluation, and provides that medical reports must be prepared by experts. Additionally, the rule identifies scientific principles to be utilized by medical experts in identifying hearing loss impairment related to noise exposure.

The proposed rule is essential to addressing the problems associated with hearing loss claims, as outlined by the West Virginia Supreme Court of Appeals in Bilbrey v. W.C.C., No. 20142 (WV December 12, 1991). The proposed rule will promote a consistent and even-handed approach to granting workers' compensation awards for noise-induced hearing loss.

TITLE 85
LEGISLATIVE RULES
WORKERS' COMPENSATION DIVISION, BUREAU OF EMPLOYMENT PROGRAMS
SERIES __
PROTOCOLS AND PROCEDURES FOR PERFORMING MEDICAL EVALUATIONS
IN NOISE-INDUCED HEARING LOSS CLAIMS

§ 85- -1 General.

1.1. Scope. -- This legislative rule establishes the protocols and procedures, as defined by the workers' compensation health care advisory panel, for the performance of examinations or evaluations by physicians or medical examiners in hearing loss claims.

1.2 Authority. -- W.Va. Code §23-4-3b; W.Va. Code §23-4-8; Bilbrey v. W.C.C, No. 20142 (W.V. Dec. 12, 1991).

1.3 Filing Date. --

1.4 Effective Date --

§ 85- -2. Protocols And Procedures For Performing Audiological Examinations And Evaluations In Workers' Compensation Claims for Noise-Induced Hearing Loss.

2.1 The protestable compensability order entered in any noise-induced hearing loss claim shall state whether the claim is to be considered under the Craddock standard set forth in the commissioner's policy dated November 8, 1984, attached, or the post-Craddock standard set forth in W.Va. Code 23-4-6b.

2.2 An audiogram performed for any physician may be utilized by the claimant for the purpose of completing the workers' compensation application, form WC 123HL. However, only physicians who are qualified otologists or otolaryngologists shall be permitted to interpret the results of audiograms in assessing the degree of the claimant's noise-induced hearing loss impairment for the purpose of determining the percentage of the claimant's disability, if any.

2.3 A physician examining and evaluating a claimant in a noise-induced hearing loss claim must consider the claimant's medical and occupational history, as well as available audiograms, in determining the etiology of the hearing loss.

2.4 In referring claimants to a physician for hearing loss evaluations, the commissioner shall inform the physician that standard air conduction and bone conduction testing, speech reception threshold, and speech discrimination testing should be routinely performed as a part of audiometric testing. If a physician fails to have the routine testing

performed in a referred claim, as requested, he/she shall not be compensated for the evaluation by the workers' compensation division. W.Va. Code 23-4-8.

2.5 In addition to the routine testing outlined in section 2.4, physicians evaluating hearing loss claimants should have tympanometry, acoustic reflex and other tests performed, including but not limited to a brain stem audiometry test, any time such tests are needed to reach an informed decision.

2.6. Conductive hearing loss is not caused by exposure to noise, but can be caused by injury to the external or middle ear. Conductive hearing loss can be identified if bone conduction and air conduction testing are utilized in the audiometric evaluation. Therefore, in examining and evaluating a workers' compensation claimant for noise-related hearing loss, a physician shall utilize only audiograms that include both bone conduction and air conduction test results. The physician shall also have tympanometry and acoustic reflex tests performed if he/she suspects the claimant has a conductive hearing loss.

When a conductive loss is identified on an audiogram, the evaluating or examining physician should use the bone conduction levels rather than air conduction levels to calculate a claimant's four frequency total, pursuant to W.Va. Code 23-4-6b. The examining physician should consider that part or all of a sensory neural loss may be the result of a primary disease process.

2.7 Speech discrimination testing shall be performed using standard audiologic procedures. The standard procedures require that the testing be performed with a speech signal 40 decibels above the threshold established for the claimant. The audiologist also may need to use other decibel levels, either higher or lower than 40 decibels, to obtain the most accurate and best speech discrimination score. The 75 decibel level is not the standard.

The physician interpreting the speech discrimination results shall use the formula set forth in W.Va. Code 23-4-6b, to calculate the claimant's impairment rating.

2.8 In interpreting an audiogram, a physician should recognize that medical evidence indicates noise-induced hearing loss usually will start in the higher frequencies and progress to the lower frequencies; noise-induced hearing loss will not cause an audiometric pattern that reflects a claimant's best hearing is at the 1000 or 2000 Hz. frequencies, with poorer hearing in the lower frequencies; noise-induced hearing loss usually will not cause an audiometric pattern that reflects an ascending curve and will not cause a flat audiometric pattern; and, noise usually does not affect hearing in the low frequencies.

If an audiogram presents a pattern that is atypical of a noice-induced hearing loss pattern, then the physician interpreting the audiogram should consider causes other than noise exposure in determining the etiology of a hearing loss.

2.9 When a claimant has been exposed to steady state noise, his/her noise-induced hearing loss should be symmetrical between the ears and if the hearing loss is asymmetrical, then the evaluating physician should consider all causes for hearing loss, including nonoccupational noise.

2.10 If a physician determines that a claimant's hearing loss is the result of noise exposure and other causes, the physician shall calculate the hearing loss disability rating pursuant to the formula set forth in W.Va. Code 23-4-6b, and shall state in his/her report the percentage of the calculated hearing loss that is attributable to noise exposure and the percentage of the hearing loss that is attributable to other causes.

TITLE 85
LEGISLATIVE RULES
WORKERS' COMPENSATION DIVISION, BUREAU OF EMPLOYMENT PROGRAMS

SERIES __
PROTOCOLS AND PROCEDURES FOR PERFORMING MEDICAL EVALUATIONS
IN NOISE-INDUCED HEARING LOSS CLAIMS

Section		Page
1.	General.	1
2.	Protocols And Procedures For Performing Audiological Examinations And Evaluations In Workers' Compensation Claims for Noise-Induced Hearing Loss.	1

AMENDED FORM, FILED OCTOBER 16, 1992

DATE:

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Commissioner Andrew N. Richardson
Bureau of Employment Programs
Workers' Compensation Division

EMERGENCY RULE TITLE: Protocols and Procedures for Performing Medical Evaluations in Noise-Induced Hearing Loss Claims

1. Date of filing: September 11, 1992

2. Statutory authority for promulgating the emergency rule: W.Va. 23-4-3b; W.Va. 23-4-8.

3. Date of filing of proposed legislative rule: August 17, 1992

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

   The emergency rule adopts new language.

5. Has the same or similar emergency rule previously been filed and expired?

   No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

   The rule establishes the protocol and procedures for the performance of examinations by medical experts in hearing loss claims, as mandated by the WV Supreme Court of Appeals in the decision of Bilbrey v. W.C.C., No. 20142 (WV December 12, 1991). The emergency rule is necessary to immediately implement a standard that will insure consistent decisions in Workers' Compensation claims for hearing loss benefits, a benefit to the public welfare.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

   Bilbrey v. W.C.C. No. 20142 (WV December 12, 1991). In the Bilbrey case, the West Virginia Supreme Court of Appeals held that the medical standard set forth in their opinion would control workers' compensation hearing loss evaluations until the Workers' Compensation Health Care Advisory Panel established protocols and procedures for performing the evaluations.

AMENDED FORM FILED OCTOBER 1st, 1992

DATE:

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[illegible]

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Date [illegible] September 11, 1992

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No

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8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

If the rule is not implemented as an emergency rule, then awards in hearing loss claims will continue to be granted without benefit of the Workers' Compensation Health Care Panel's protocols and procedures, a standard designed to promote a consistent approach to granting awards in hearing loss claims. Additionally, the Commissioner can not implement the directives of the WV Supreme Court of Appeals, as set forth in the Bilbrey v. W.C.C., decision, without benefit of the rule.

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KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
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Director, Corporations

(Plus all the volunteer help we can get)

October 16, 1992

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Workers' Compensation Division

RULE: Series 13, New Rule Protocols and Procedures for Performing Medical Evaluations in Noise-Induced Hearing Loss Claims

DATE FILED AS AN EMERGENCY RULE: September 11, 1992

DECISION NO. 27-92

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.

KEN HECHLER
Secretary of State

FILED
OCT 16 2 53 PM '92
OFFICE OF WEST VIRGINIA SECRETARY OF STATE

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(Plus all the volunteer help we can get)

DECISION

EMERGENCY RULE DECISION
(ERD 27-92)

AGENCY: Workers' Compensation Division
RULE: Series 13, New Rule, Protocols and Procedures for Performing Medical Evaluations in Noise-Induced Hearing Loss Claims
FILED AS AN EMERGENCY RULE: September 11, 1992

par. 1 The Workers' Compensation Division (Division) has filed the above new rule as an emergency rule.

par. 2 West Virginia Code 29A-3-a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [(29A-3-a(a)].

par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Division filed this emergency rule with supporting documents with the Secretary of State September 11, 1992 and with the LRMRC October 16, 1992.

par. 7 It is the determination of the Secretary of State that the Division has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §23-4-3b reads:

> The commissioner shall establish a health care advisory panel consisting of representatives of the various branches and specialties among health care providers in this state.
> (a) Establish guidelines for the health care which is reasonably required for the treatment of the various types of injuries and occupational diseases within the meaning of §23-4-3 of this article.
> (b) Establish protocols and procedures for the performance of examinations or evaluations performed by physicians or medical examiners pursuant to §23-4-7a and §23-4-8 of this article.
> (c) Assist the commissioner in establishing guidelines for the evaluation of the care provided by health care providers to injured employees for purposes of §23-4-3c of this article.
> (d) Assist the commissioner in establishing guidelines as to the anticipated period of disability for the various types of injuries pursuant to §23-4-7a(b) of this article.
> (e) Assist the commissioner in establishing appropriate professional review of requests by health care providers to exceed the guidelines for treatment of injuries and occupational diseases established pursuant to subsection (a) of this section.

par. 9. WV Code further states in §23-4-8 in part:

> The Commissioner shall have authority, after due notice to the employer and claimant, whenever in the commissioner's opinion it shall be necessary, to order a claimant of compensation for personal injury other than occupational pneumonoconiosis to appear for examination before a medical examiner or examiners selected by the commissioner; and the claimant and employer, respectively, shall each have the right to select a physician of the claimant's or employer's own choosing and at the claimant's or the employer's own expense to participate in such examination. All such examinations shall be performed in accordance with the protocols and procedures established by the health care advisory panel pursuant to §23-4-3b of this article: Provided, That the physician may exceed these protocols when additional evaluation is medically necessary. The claimant and employer shall, respectively, be furnished with a copy of the report of examination made by the medical examiner or examiners selected by the commissioner. The respective physicians selected by the claimant and employer shall have the right to concur in any report made by the

medical examiner or examiners selected by the commissioner, or each may file with the commissioner a separate report, which separate report shall be considered by the commissioner in passing upon the claim... In any case the claimant shall be entitled to reimbursement for loss of wages, and to reasonable traveling and other expenses necessarily incurred by him in obeying such order.
Where the claimant is required to undergo a medical examination or examinations by a physician or physicians selected by the employer, as aforesaid or in connection with any claim which is in litigation, the employer shall reimburse the claimant for loss of wages and reasonable traveling and other expenses in connection with such examination or examinations, not to exceed the expenses paid when a claimant is examined by a physician or physicians selected by the commissioner.

par. 10 It is the determination of the Secretary of State that the Division has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (C) Emergency WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 12 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 13 The facts and circumstances as presented by the Division are as follows:

The rule establishes the protocol and procedures for the performance of examinations by medical experts in hearing loss claims, as mandated by the WV Supreme Court of Appeals in the decision of Bilbrey v. W.C.C., No 20142 (WV December 12, 1991). The emergency rule is necessary to immediately implement a standard that will insure consistent decisions in Workers' Compensation claims for hearing loss benefits, a benefit to the public welfare.

Bilbrey v. W.C.C. No 20142 (WV December 12, 1991). In the Bilbrey case, the West Virginia Supreme Court of Appeals held that the medical standard set forth in their opinion would control workers' compensation hearing loss evaluations until the Workers' Compensation Health Care Advisory Panel established protocols and procedures for performing the evaluations.

If the rule is not implemented as an emergency rule, then awards in hearing loss claims will continue to be granted without benefit of the Workers' Compensation Health Care Panel's protocols and procedures, a standard designed to promote a consistent approach to granting awards in hearing loss claims. Additionally, the Commissioner can not implement the directives of the WV Supreme Court of Appeals, as set forth in the Bilbrey v. W.C.C., decision, without benefit of the rule.

par. 14 The WV Supreme Court Decision, Bilbrey v. W.C.C. No. 20142 (WV December 12, 1991) reads in part:

Syllabus by the Court (6) In referring a claimant to a physician for a hearing loss examination, the Commissioner should inform the physician what tests the physician is to conduct, at what decibel level, the standards to be used in making a rating, and any other specifics necessary for the Commissioner to reach an informed decision. **Failure to do as requested will result in the physician not being compensated for the testing and report.**

Justice Brotherton: This case involves four consolidated appeals from decisions of the Workers' Compensation Appeal Board and the Workers' Compensation Commissioner dealing with hearing loss. The consolidation grows out of the confusion that confronts this Court by the records on appeal for hearing loss awards. Uniform testing is not something that is routinely found in the cases which come before us. The lack of standardized hearing loss testing creates utter confusion for the claimants, employers, lawyers and most certainly for this Court when we consider the record on appeal. While we realize the Commissioner is creating a Health Care Advisory Panel (Panel) to study the problem of uniform testing, we are, by this opinion, setting forth certain criteria that we find necessary for a proper review of the cases which come before us. **These new standards are to be used from this time forward and lay a foundation for the Panel to use in writing standard testing requirements for hearing loss.**

...Finally, in referring a claimant to a physician for a hearing loss examination, the Commissioner should inform the physician what tests the physician is to conduct, at what decibel level, the standards to be used in making a rating and any other specifics necessary for the Commissioner to reach an informed decision. **Failure to do as requested will result in the physician not being compensated for the testing and report.** (Emphasis added)

par. 15 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(g). . . "time limitation as set forth by the Supreme Court."

par. 16 This decision shall be cited as Emergency Rule Decision 27-92 or ERD 27-92 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Workers' Compensation Division, the Attorney General and the Legislative Rule Making Review Commission.

KEN HECHLER
Secretary of State

Entered_____

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

water guides to "conform to the standard of care expected of members of their profession." This statute establishes such standard of care as a statutory safety standard for the protection of participants in whitewater rafting expeditions. As stated previously, when a statute imposes a standard of care, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for failure to conform to that statutory standard is unenforceable. Therefore, to the extent that the anticipatory release in the present case purports to exempt the defendant from tort liability to the plaintiff for the failure of the defendant's guide to conform to the standard of care expected of members of his occupation, it is unenforceable. *See also Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 693, 408 S.E.2d 634, 643 (1991) (ski area operator liable for violation of statutory duty to maintain ski area in reasonably safe condition).

[15] The affidavit on behalf of the plaintiff in opposition to the defendant's motion for summary judgment avers, in essence, a failure of the defendant's guide to conform to the standard of care expected of members of his occupation, for that affidavit by an experienced whitewater rafting guide alleges that there were reasonable alternatives to the type of rescue operation undertaken here which would have posed no risk of harm to the occupants of the plaintiff's raft. This allegation raises a genuine issue as to a material fact, and the trial court consequently should not have granted the defendant's motion for summary judgment. *See W.Va. R.Civ.P.* 56(c).

[16, 17] Furthermore, the complaint here explicitly alleges that the defendant's conduct was reckless, as well as negligent.[10] As stated previously, a general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff's intention. This rule parallels the rule that "[a] release is construed from the standpoint of the parties at the time of its execution. Extrinsic evidence is admissible to show both the relation of the parties and the circumstances which surrounded the transaction." Syl. pt. 1, *Cassella v. Weirton Construction Co.*, 161 W.Va. 317, 241 S.E.2d 924 (1978). Similarly:

> "While the general rule is that the construction of a writing is for the court; yet where the meaning is uncertain and ambiguous, parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract by the parties themselves either contemporaneously or subsequently. If the parol evidence be not in conflict, the court must construe the writing; but if it be conflicting on a material point necessary to interpretation of the writing, then the question of its meaning should be left to the jury under proper hypothetical instructions." Syllabus Point 4, *Watson v. Buckhannon River Coal Co.*, 95 W.Va. 164, 120 S.E. 390 (1923).' Syllabus Point 1 [sic; sole syllabus point], *McShane v. Imperial Towers, Inc.*, [165] W.Va. [94], 267 S.E.2d 196 (1980).

Syl. pt. 1, *Leasetronics, Inc. v. Charleston Area Medical Center, Inc.*, 165 W.Va. 773, 271 S.E.2d 608 (1980). *Accord*, syl. pt. 2, *Hays & Co. v. Ancro Oil & Gas, Inc.*, No. 20213, 186 W.Va. 153, 411 S.E.2d 478 (1991).

[18, 19] In light of the inquiry needed here concerning the relation of the parties and the circumstances surrounding the execution of the anticipatory release in order to determine the parties' intent with respect to reckless conduct of the defendant, the trial court improperly granted the defendant's motion for summary judgment. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963). *Accord*, syl. pt. 1, *Hays & Co. v. Ancro Oil & Gas, Inc.*, 186 W.Va. 153, 411 S.E.2d 478 (1991).[11]

Accordingly, this Court reverses and vacates the summary judgment entered in favor of the defendant and remands this case for further proceedings consistent with this opinion.

Reversed and remanded.

chapter, by the rules of the commercial whitewater advisory board, or by the duties placed on such commercial whitewater outfitter or commercial whitewater guide by the provisions of this article.

The statutory duties are set forth in general terms in *W.Va.Code*, 20-3B-3 [1987]:

(a) All commercial whitewater outfitters and commercial whitewater guides offering professional services in this state shall provide facilities, equipment and services as advertised or as agreed to by the commercial whitewater outfitter, commercial whitewater guide and the participant. All services, facilities and equipment provided by commercial whitewater outfitters and commercial whitewater guides in this state shall conform to safety and other requirements set forth in article two of this chapter and in the rules promulgated by the commercial whitewater advisory board created by section twenty-three-a, article two of this chapter.

(b) In addition to the duties set forth in subsection (a) of this section, *all commercial whitewater guides providing services for whitewater expeditions in this state shall, while providing such services, conform to the standard of care expected of members of their profession.*

(emphasis added)

10. We do not attribute to the *legislature* the intent to immunize commercial whitewater outfitters or commercial whitewater guides from liability for intentional or reckless misconduct or gross negligence. *See Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 693, 408 S.E.2d 634, 643 (1991) (same under Skiing Responsibility Act). On the other hand, we also do not attribute to the legislature the intent that the *parties* may not have the contractual freedom to agree that the plaintiff assumes the risk of such conduct.

11. The plaintiff did not raise the "contract of adhesion" issue before the trial court. We, therefore, do not address that issue. The parties should develop the facts on the contract of adhesion issue on remand.

412 S.E.2d 513

James BILBREY, Appellant,

v.

WORKERS' COMPENSATION COMMISSIONER and Ranger Fuel Corporation, Appellees.

RANGER FUEL CORPORATION, Appellant,

v.

WORKERS' COMPENSATION COMMISSIONER and James O. Bilbrey, Appellees.

Granville GREGORY Appellant,

v.

WORKERS' COMPENSATION COMMISSIONER and Kaiser Aluminum & Chemical Corporation, Appellees.

Billie LAFFERTY, Appellant,

v.

WORKERS' COMPENSATION COMMISSIONER and Milburn Colliery Company, Appellees.

Nos. 20142, 20244, 20180 and 20190.

Supreme Court of Appeals of West Virginia.

Submitted Oct. 1, 1991.

Decided Dec. 12, 1991.

Four decisions of Workers' Compensation Appeal Board dealing with claims alleging hearing loss were appealed. The Supreme Court of Appeals, Brotherton, J., held that remand was required to Workers' Compensation Commissioner for examination of cases in light of criteria set forth in opinion for testing hearing loss.

1. Workers' Compensation ⇐1950

Remand was required of workers' compensation claims alleging hearing loss for

examination by Workers' Compensation Commissioner in light of criteria set forth in opinion regarding testing requirements for hearing loss. Code, 23-4-6.

2. Workers' Compensation ⇐902

In order to rule out conductive losses of hearing due to injuries to external and middle ear, bone conduction testing should be performed routinely in workers' compensation cases.

3. Workers' Compensation ⇐902

If conductive hearing loss exists, four frequency total should be adjusted by physician to deduct amount of conductive loss from total used to estimate wholeman impairment in workors' compensation cases.

4. Workers' Compensation ⇐902

Speech discrimination testing is valuable in workers' compensation cases alleging hearing loss, except where such testing is performed at improper decibel level; thus, all speech discrimination testing must be performed at same decibel level in order to be considered valid; unless health care advisory panel reaches different conclusion, 75 decibel level identified by *Craddock* committee should be used as uniform testing level.

5. Workers' Compensation ⇐1768

At time Workers' Compensation Commissioner rules claim of alleged hearing loss compensable, order should identify whether claim is to be considered under *Craddock* standard or post-*Craddock* 1986 amendments.

6. Workers' Compensation ⇐1310

Only physicians who are qualified otologists or otolaryngologists are permitted to interpret results of audiograms in workers' compensation cases alleging hearing loss; interpretation by nonexpert physicians will be given little weight and will be considered secondary to expert opinion.

7. Workers' Compensation ⇐1312

In referring claimant to physician for hearing loss examination, Workers' Compensation Commissioner should inform physician what tests physician is to conduct, at what decibel level, standards to be used in making rating, and any other specifics necessary for Commissioner to reach informed decision as to claim; failure to do as requested will result in physician not being compensated for testing and report.

Syllabus by the Court

1. In order to rule out conductive losses due to injuries to the external and middle ear, bone conduction testing should be performed routinely.

2. If a conductive loss exists, the four frequency total should be adjusted by the physician to deduct the amount of the conductive loss from the total used to estimate wholeman impairment.

3. Speech discrimination testing is valuable, except where it is performed at an improper decibel level. Thus, all speech discrimination testing must be performed at the same decibel level in order to be considered valid. Unless the Health Care Advisory Panel reaches a different conclusion, we believe the 75 decibel level identified by the *Craddock* committee should be used as the uniform testing level.

4. At the time the Commissioner rules the claim compensable, the order should identify whether it is to be considered under the *Craddock* standard or the post-*Craddock* 1986 amendments.

5. Only physicians who are qualified otologists or otolaryngologists are permitted to interpret the results of the audiograms. Interpretation by non-expert physicians will be given little weight and will be considered secondary to expert opinion.

6. In referring a claimant to a physician for a hearing loss examination, the Commissioner should inform the physician what tests the physician is to conduct, at what decibel level, the standards to be used in making a rating, and any other specifics necessary for the Commissioner to reach an informed decision. Failure to do as requested will result in the physician not being compensated for the testing and report.

S.F. Raymond Smith, Rundle & Rundle, Pineville, for appellant, James Bilbrey.

Robert J. Smith, Charleston, for Workers' Compensation Comm'r.

William F. Richmond, Jr., Abrams, Byron, Henderson & Richmond, Beckley, for Ranger Fuel Corp.

Thomas P. Maroney, Charleston, for appellants, Granville Gregory and Billie Lafferty.

Sarah E. Smith, Bowles, Rice, McDavid, Graff & Love, Charleston, for appellee, Kaiser Aluminum & Chemical Corp.

Robert J. Busse, Jackson & Kelly, Charleston, for appellee, Milburn Colliery Co.

BROTHERTON, Justice:

This case involves four consolidated appeals from decisions of the Workers' Compensation Appeal Board and the Workers' Compensation Commissioner dealing with hearing loss. The consolidation grows out of the confusion that confronts this Court by the records on appeal for hearing loss awards. Uniform testing is not something that is routinely found in the cases which come before us. The lack of standardized hearing loss testing creates utter confusion for the claimants, employers, lawyers, and most certainly for this Court when we consider the record on appeal. While we realize the Commissioner is creating a Health Care Advisory Panel (Panel) to study the problem of uniform testing, we are, by this opinion, setting forth certain criteria that we find necessary for a proper review of the cases which come before us. These new standards are to be used from this time forward and lay a foundation for the Panel to use in writing standard testing requirements for hearing loss.

I. & II.

The first case involves an appeal by James Bilbrey from a decision of the Workers' Compensation Appeal Board and Commissioner. The employer, Ranger Fuel Corporation, also files an appeal from the decision of the Appeal Board and Commissioner. The claimant, James Bilbrey, filed a petition for hearing loss benefits on October 17, 1985. Dr. A.J. Paine completed the physician's section and diagnosed a sensorineural hearing loss. The claim was ruled compensable, and on April 22, 1986, the Commissioner granted the claimant a 17.75% permanent partial disability (PPD) award based upon Dr. P.C. Corro's report dated March 17, 1986. However, Dr. Corro's report estimated only a 13.4375% PPD due to hearing loss. Thus, Ranger Fuel protested the April 22, 1986, award.

The claimant filed a supplemental report prepared by Dr. Paine dated May 7, 1986, in which he calculated Dr. Corro's audiogram to equate to a 21.75% hearing loss. Dr. Paine also calculated his first audiogram from the initial application to equal 20.0625% PPD.

By letter dated June 12, 1986, Ranger Fuel filed medical records from Dr. George Miller, which included audiograms from December 1, 1972, and June 15, 1976. The records indicated a history of external ear infections and sinus problems.

Dr. Corro testified on October 21, 1987. At that time, Dr. Corro stated that based upon Dr. Miller's notes, the claimant had a long standing sinus problem which would affect his hearing as a conductive component and noted that he found a conductive component in both his audiogram and Dr. Paine's audiogram. Thus, he stated that the conductive component should be factored out of the total audiogram results to determine the hearing loss due solely to noise exposure. Thus, by supplemental report dated October 21, 1987, Dr. Corro stated that the claimant was entitled to a 12.65% PPD award based upon only the nonconductive portion of the audiogram.

On December 14, 1987, the claimant was examined by Sherman Hatfield, M.D. Dr. Hatfield found that, based upon the *Craddock* standards, the claimant was entitled to a 9.5% PPD award. Shortly thereafter, the claimant filed the report of Dr. Robert Miller dated January 12, 1988, in which the claimant's hearing loss was identified as 27.65%.

On July 13, 1989, Dr. Miller testified that the best results obtained after the noise exposure is terminated should be used in demonstrating the amount of hearing loss

due to noise exposure. That amount, he admitted, was Dr. Hatfield's 9.5% impairment.

However, by order dated October 3, 1989, the Commissioner affirmed the prior order awarding the claimant a 17.75% PPD award. On December 21, 1990, the Appeal Board affirmed the Commissioner's order of October 3, 1989, which granted the claimant a 17.75% PPD award for noise-induced hearing loss arising out of his employment. Both parties appeal from that ruling, the claimant arguing that he is entitled to a greater PPD award, while Ranger Fuel claims that the claimant is entitled to 9.5% PPD award as demonstrated by Dr. Hatfield's audiogram and Dr. Miller's testimony.

III.

The next case involves the appeal of Billie Lafferty from a decision of the Workers' Compensation Appeal Board. The claimant filed for occupational hearing loss benefits on October 20, 1986. The Commissioner ruled the claim compensable and referred the claimant to Dr. William C. Morgan for an evaluation. Dr. Morgan noted that the audiogram revealed low tone loss that was "very possibly" not due to noise. Without correction, Dr. Morgan stated that the audiogram revealed a 2.9% wholeman impairment. With correction in the low frequencies, the claimant was entitled to a .46% wholeman impairment. However, it was subsequently noted that Dr. Morgan was incorrectly using the *Craddock* standards, which were not applicable in this case, since the case was filed after April 7, 1986. Thus, the Commissioner recomputed the results from the audiogram and issued an order dated May 29, 1987, which held the claimant had no permanent partial disability. The claimant protested this ruling.

In support of his protest, the claimant introduced an audiogram from Ms. N.J. Woody, an audiologist, dated July 23, 1987. The audiogram demonstrated a full frequency loss of 120 dB in the right ear and 125 dB in the left ear. That audiogram calculated out to a 2.3% wholeman impairment.

On September 26, 1989, the Commissioner affirmed the compensability ruling, but set aside the May 29, 1987, order holding the claimant had no permanent partial disability. Instead, the Commissioner granted the claimant a .50% PPD award on the basis of Dr. Morgan's findings and, strangely enough, stated that "the April 21, 1987, report of Dr. William C. Morgan most accurately indicates the true extent of the claimant's noise-induced hearing loss.

By corrected order dated March 13, 1991, the Appeal Board affirmed the Commissioner's final order granting a .50% PPD award. This proceeding is the employer's appeal from that final ruling.

IV.

The fourth appeal involves a claimant, Granville Gregory, who filed his application for hearing loss benefits on June 27, 1988. Dr. Viall completed the physician's portion of the application and diagnosed a noise-induced hearing loss. The claim was ruled compensable and the claimant was examined by Dr. James L. Bryant at the request of the Commissioner. Dr. Bryant stated that much of the claimant's hearing loss was due to presbycusis and noise exposure. Following the audiogram, Dr. Bryant stated the claimant had only a 1.10% wholeman impairment related to noise exposure after he reduced the four frequency total of 185 in the right ear to 110, and 190 in the left ear to 115. He stated that "this reduction is to approach a hearing pattern that I feel is directly related to noise exposure." However, by order dated November 18, 1988, the Commissioner granted the claimant a 14.50% PPD award. Both parties protested this ruling.

The employer submitted a report of Dr. R.A. Wallace dated May 12, 1989. Dr. Wallace stated that the initial audiogram on the claimant's application by Dr. Viall was insufficient in that no bone conduction testing was performed. He also stated that the claimant had a significant ascending low-frequency hearing loss which was incompatible with noise-induced hearing loss. Thus, Dr. Wallace corrected the lower frequencies to factor out the nonoccupational element of the claimant's hearing loss and stated that the claimant had a 1.28% PPD related to noise-induced hearing loss.

The employer also submitted a report of Dr. Corro dated July 14, 1989. Dr. Corro noted that only 50% of the claimant's hearing loss could be attributed to noise exposure and thus, recommended a 6.5% PPD award due to noise at work.

By final order dated June 12, 1989, the Commissioner affirmed the prior rulings granting the claimant a 14.5% PPD award. The employer appealed to the Workers' Compensation Appeal Board and, on February 15, 1991, the Appeal Board set aside the Commissioner's order and directed the Commissioner to enter an order granting the claimant a 6.5% PPD award. This proceeding is the claimant's appeal from that final ruling.

V.

[1] These cases were consolidated by this Court in a joint appeal in order to address an issue which has plagued both this Court and the workers' compensation system. As illustrated by the cases described above, there is little or no consistency in the manner in which the Commissioner grants permanent partial disability awards for noise-induced hearing impairment or in the tests that are required in order to determine what percentage of loss is actually due to noise.

Unlike other types of compensable injuries, the area of hearing loss lends itself to a structured approach in determining the amount of wholeman impairment due to noise exposure. Experts agree on several crucial facts regarding the etiology and progression of sensorineural hearing losses. First, a hearing loss is visually demonstrated on an audiogram, which can record two types of results: air conduction and bone conduction.[1] Air conduction scores measure the response to sound traveling through the outer, middle, and into the inner ear. Bone conduction measures the sound which reaches the inner ear by placing a vibrating device behind the ear to transmit the sound, bypassing the middle ear. The audiogram can show losses in both the high and low frequencies. Losses in the high frequencies are generally due to noise exposure, such as those which occur at work. However, losses in the lower frequencies generally are not due to noise exposure and are often caused by damage to the external or middle ear. A loss due to external or middle ear damage is known as a conductive loss. A conductive component can be identified on the audiogram and should be factored out of the equation when the amount of the sensorineural hearing loss is being calculated.[2]

Second, without discussing the anatomy of the ear in great depth, it is also well accepted by experts that once exposure to noise ceases, hearing loss existing at that time must also cease any progression, unless other factors are involved in creating the hearing loss. Damage can be caused by many different factors other than noise, including, but not limited to, diabetes, hypertension and vascular diseases, otosclerosis, medications, hereditary problems, acoustic trauma, aging (presbycusis), and surgery.[3] We should also note that the audiogram is a subjective test, as it measures a subject's response to noise. Thus, the reliability of the test and the validity of the results are important factors.

Third, experts have pointed out that if there is a fluctuation in the hearing loss between audiograms which is greater than the margin of error, then the audiogram which shows the least amount of hearing loss should be used to determine the hear-

1. *See* American Medical Association *Guides to the Evaluation of Permanent Impairment* (2d ed. 1984).

2. The amount of wholeman impairment is calculated by adding the results given for 500, 1000, 2000, and 3000 hertz. This four frequency total should be adjusted to reflect the amount of any conductive loss identified on the audiogram.

3. *See* W. Clark, Ph.D., W.C. Morgan, M.D., S.J. Wetmore, M.D., Charleston Area Medical Center, West Virginia University Health Sciences Center, *Seminar on the Evaluation of Hearing Loss for Workers Compensation* (1991).

ing loss due to noise exposure. The reasoning behind this rule is complicated, but important. As we noted above, once noise exposure stops, so does the progression of the hearing loss unless other factors are involved. Damage to hearing is permanent: Once the hair cells in the cochlea are destroyed, the cells cannot be rejuvenated. Thus, once the damage is done, one's hearing can get neither better nor worse because of noise exposure, but it can get worse because of a secondary condition, such as the conditions listed above. Thus, if one audiogram shows a substantially worse four frequency total than a second audiogram, the expert must work with the premise that since a noise-induced loss is static, some other factor must be responsible for the difference between the two audiograms, such as a sinus or eustachian tube problem. Accordingly, the better audiogram of the two should be used as the audiogram most representative of the sensorineural loss, since the difference between the best and the worst audiograms must be caused by something other than noise.[4]

During oral argument, counsel for the Commissioner informed this Court that a Health Care Advisory Panel has been formed within the Workers' Compensation office, in which protocols for testing are being established for the various occupational diseases and injuries which are subject to dispute before the Workers' Compensation Fund. Unfortunately, the Panel is not due to address this issue for several months. In the meantime, we believe the Workers' Compensation Commissioner needs direction in developing a uniform manner of determining the percentage of impairment. While we do not claim to be specialists in the field of otolaryngology, we are aware, from the numerous cases and briefs which have come before us, that certain tests are necessary for this Court to make an accurate review of the record, and thus, must be necessary for the Commissioner to reach an informed decision.

This Court has previously found it necessary to identify certain requirements in hearing loss cases. *Craddock v. Lewis*, No. 16420 (W.Va., October 3, 1984), involved an agreed order in which we directed the Commissioner to adopt a new formula for evaluating hearing loss claims based upon the recommendations of a committee of experts. The Commissioner later adopted new standards known as the *Craddock* standards based upon the recommendation of the Court and committee. The *Craddock* standards required that only certified audiologists perform the audiogram and set forth a standard for assessing the degree of hearing impairment. It also provided a table for determining the degree of impairment in speech discrimination, allowed an award for tinnitus, set the high and low boundaries of decibel hearing loss to be used in assessing impairment, and discussed the use of the treating physician's report in assessing a claimant's hearing loss. Although the Legislature subsequently amended *Craddock* in 1986, this Court has clearly demonstrated its obligation to require certain standards when none exist below.[5]

[2-7] The cases now before us are no exception. From our review, we believe that certain tests are required in all hearing loss claims in order for the Commissioner to reach a consistent result. However, our opinion today does not instruct the physicians how to perform the tests discussed, but instead, advises as to what tests must be performed in order for this Court to reach an informed decision on appeal. First, air conduction testing, which is always performed as part of an audiogram, is but half the picture. In order to rule out conductive losses due to injuries to the external and middle ear, bone conduction testing should also be performed routinely. Second, if a conductive loss exists, the four frequency total should be adjusted by the physician to deduct the amount of the conductive loss from the total used to estimate wholeman impairment. Speech discrimination testing is valuable, except when it is performed at an improper decibel level. Thus, all speech discrimination testing must be performed at the same decibel level to be considered valid. Unless the Panel reaches a different conclusion, we believe the 75 decibel level identified by the *Craddock* committee should be used as the uniform testing level. Third, at the time the Commissioner rules the claim compensable, the order should identify whether it is to be considered under the *Craddock* standard or the post-*Craddock* 1986 amendments. Next, as we have pointed out before, the determination of the percentage of sensorineural hearing impairment is a complex issue. Thus, only physicians who are qualified otologists or otolaryngologists are permitted to interpret the results of audiograms. Interpretation by non-expert physicians will be given little weight and will be considered secondary to expert opinion. Finally, in referring a claimant to a physician for a hearing loss examination, the Commissioner should inform the physician what tests the physician is to conduct, at what decibel level, the standards to be used in making a rating, and any other specifics necessary for the Commissioner to reach an informed decision. Failure to do as requested will result in the physician not being compensated for the testing and report.

Although each of the cases listed above involve expert opinion, bone conduction was not performed in all the cases, nor was the amount of the conductive loss, if identified, deducted from the four frequency totals. Further, the necessary standards, whether *Craddock* or post-*Craddock*, were not identified and resulted in much confusion. Accordingly, we remand these cases to the Commissioner to be examined in light of this opinion set forth today.

Remanded.

4. If the claimant is still exposed to noise on the job, then the expert must consider the temporary threshold shift in hearing which occurs when a person leaves a noisy environment for a quieter one.

5. In 1986, the Legislature amended W.Va.Code § 23-4-6, the Code section dealing with hearing loss, after careful consideration of this Court's opinion in *Craddock*. The new post-*Craddock* standard, among other things, recalculated the table for disability ratings for pure-tone loss, provided a new table for determining the impairment due to speech discrimination, reduced the rating for total loss of hearing in one and both ears, and did away with benefits for tinnitus, psychogenic loss, recruitment, and loss above 3000 hertz.

412 S.E.2d 519

Holmes R. "Butch" SHAVER and Sharon Shaver Klopp, Plaintiffs Below, Appellees

v.

Glenn MEMEL, Joe Memel, Carl "Butch" Memel, Nancy Memel, Defendants Below, Appellants,

and

Jay Memel, Defendant Below, Appellee,

and

Robert K. Tebay, Jr., and Robert K. Tebay, III, Defendant Below, Appellees.

No. 19957.

Supreme Court of Appeals of West Virginia.

Submitted Sept. 17, 1991.

Decided Dec. 13, 1991.

Beneficiaries under earlier will brought action to determine whether testator had necessary testamentary capacity when he executed last will. The Circuit Court, Wood County, Arthur N. Gustke, J., entered judgment on jury verdict that testator lacked necessary testamentary capacity at time he executed last will and testament. Appeal was taken. The Supreme Court of Appeals held that extensive witness testimony supported jury finding that testator lacked required testamentary capacity on date that last will and testament was executed.

Affirmed.