

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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1992 SEP 18 PM 2:00
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Workers Compensation Division TITLE NUMBER: 85-13

CITE AUTHORITY §§23-4-3b; 23-4-8

AMENDMENT TO AN EXISTING RULE: YES___ NO___**x**

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 13

TITLE OF RULE BEING PROPOSED: Protocols & Procedures for Performing
Medical Evaluations in Noise-Induced Hearing Loss Claims

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Protocols and Procedures for Performing Medical Evaluations in Noise-Induced Hearing Loss Claims.

Type of Rule: X Legislative Interpretive Procedural

Agency Bureau of Employment Programs Address 601 Morris Street
Workers' Compensation Division Charleston, WV 25301

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services	0	0	0	0	0
Current Expense	0	0	0	0	0
Repairs and Alterations	0	0	0	0	0
Equipment	0	0	0	0	0
Other	0	0	0	0	0

2. Explanation of above estimates: _____

The rule should not generate any cost to the State's revenue accounts. The rule requires medical experts to utilize specific tests in examining Workers' Compensation claimants. The reimbursement schedule for these tests is attached. However, the cost of the tests is factored into the employers' experience ratings and the Workers' Compensation Fund recoups the cost through premium payments if the employer is a subscriber to the Fund or through administrative fees if the employer is a self-insurer. Additionally, any increase in litigation costs, for e.g., an increase in deposition appearances by experts, will be recouped in administrative fees charged to employers.

3. Objectives of these rules:

The objection of the rule is to standardize hearing loss evaluations for the purpose of making appropriate Workers' Compensation awards in hearing loss claims.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There will be no specific economic impact on State Government, however, the standardized testing requirements will promote granting benefits in a consistent manner which will help preserve the economic health of the Workers' Compensation Fund.

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

The rule will impact on the employer and employee community in general in that workers' compensation awards in hearing loss claims will be based on the new standardized testing; i.e., the awards should be granted in a more consistent manner. However, it is not possible to determine the exact nature of the impact or to assess whether the standardized testing will result in an increase, decrease, or no change in the number and amount of permanent partial disability awards granted by the Commissioner.

C. Economic Impact on Citizens/Public at Large.

The standardization of medical evaluations in hearing loss claims should promote consistency in granting awards and stabilize the economic impact of the claims on the Workers' Compensation Fund, thus promoting the preservation of the Fund, a positive economic impact on the public at large.

Date: September 14, 1992

Signature of Agency Head or Authorized Representative

Andrew N. Richardson

DATE:

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

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

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

1. Authorizing statute(s) citation W.Va. Code §23-4-3b; W.Va.

Code §23-4-8

2. a. Date filed in State Register with Notice of Hearing:
Notice of Hearing not applicable. Proposed rule only
requires a public comment period.

b. What other notice, including advertising, did you give
of the hearing?

c. Date of hearing(s): _____

d. Attach list of persons who appeared at hearing, comments
received, amendments, reasons for amendments.

Attached X No comments received _____

e. Date you filed in State Register the agency approved
proposed Legislative Rule following public hearing:
(be exact)

Following public comment period, the approved proposed
Legislative Rule was filed in the State Register on September 18, 1992

f. Name and phone number(s) of agency person(s) to contact
for additional information:

Tracy S. Ferguson

Director of Legal Office

601 Morris Street, Charleston, WV 25301

Phone: 558-2426

2. d. C. Patrick Carrick, Attorney at Law, 1543 Fairmont Avenue, Fairmont, WV 26554, filed written comment to proposed rule, attached.

85 CSR
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

PURPOSE AND SUMMARY OF PROPOSED RULE

A legislative 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.

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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.

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If an audiogram presents a pattern that is atypical of a noise-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

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Bureau of Employment Programs
Workers' Compensation Division
601 Morris Street
Charleston, West Virginia 25301-1416

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



September 18, 1992

West Virginia
Secretary of State
Ken Hechler
Administrative Law Division
Capitol Complex
Charleston, WV 25305

Dear Secretary of State:

I have reviewed the proposed legislative rule, "Protocols and Procedures for Performing Medical Evaluations in Noise-Induced Hearing Loss Claim", filed with the Secretary of State on August 17, 1992. The Workers' Compensation Division received public comments on the proposed rule, as follows:

1. Patrick Carrick
Manchin Professional Building
Suite 203
1543 Fairmont Avenue
Fairmont, WV 26554-2100
August 5, 1992

I have enclosed the public comment.

I have reviewed the public comment and am of the opinion that the proposed rule should not be amended. I approve of the proposed rule and have submitted it to the Legislative Rule Making Committee.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Andrew N. Richardson".
Andrew N. Richardson
Commissioner

ANR:TSF:cdw

cc: John H. Kozak, Executive Secretary



RECEIVED

DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES

OFFICE OF THE SECRETARY

State Capitol, Room R-151

Charleston, West Virginia 25305-0310

Telephone: (304) 558-3255

Fax No.: (304) 558-4983

GASTON CAPERTON
Governor

1992 SEP 11 AM 10:27

OFFICE OF THE SECRETARY
STATE OF WEST VIRGINIA

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
John M. Ranson
Cabinet Secretary

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

3 AUG 92 9:13

Bureau of Employment Programs
Workers' Compensation Division
601 Morris Street
Charleston, West Virginia 25301-1416

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



M E M O R A N D U M

TO: Tracy S. Ferguson, Director
Legal Division

FROM: Benjamin R. Taylor, Administrative Assistant^{BR}
Office of Medical Case Management

DATE: August 3, 1992

RE: ODHL Medical Costs

As requested I have located the fee schedule for each hearing loss test listed in the Protocols and Procedures. They are:

Air and Bone Conduction (CPT 92553)	\$ 35
Speech Reception Threshold (92555)	\$ 8
Speech Discrimination (No separate CPT procedure for this test)	---
Basic Comprehensive Test (92557) This combines Air and Bone, speech, threshold and discrimination.	\$ 40
Acoustic Reflex (92568)	\$ 11
Tympanometry (92567)	\$ 11
Brain Stem Test (92585) Note, we pay as billed for this procedure. The quoted figure is the average cost.	\$225

I hope this information is of use to you. Should you require additional information, please contact me. Thank you.

BRT

MANCHIN, ALOI & CARRICK

ATTORNEYS AT LAW

MANCHIN PROFESSIONAL BUILDING

SUITE 203

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* ALSO ADMITTED IN PA.

August 5, 1992

Tracy S. Ferguson, Director
Legal Division
Bureau of Employment Programs
Workers' Compensation Division
601 Morris Street
Charleston, WV 25301-1416

RE: Proposed Legislative Rules
Concerning Noise Induced
Hearing Loss Claims

Dear Tracy:

I wish to thank you for the opportunity to review and comment upon the proposed legislative rules concerning noise induced hearing loss claims. My comments follow.

Rule 2.6

I would suggest that the first phrase of the first sentence in this rule be changed to "conductive hearing loss is not usually caused by exposure to noise." It is my understanding from members of the medical community that there are certain conditions of noise exposure, such as excessively high frequency noise or extremely large blasts of noise, which can produce a perforation of the tympanic membrane and in that way can be associated with the development of conductive component to one's hearing loss.

Concerning the second paragraph under this rule, I would suggest that the first phrase of the first sentence be changed to "when a significant conductive loss is identified on an audiogram." It is again my understanding from the medical community that when the difference between the bone scores and air score at a given frequency is not more than 5 decibels, then this may not represent a true bone-air gap and thus may not be indicative of a true conductive component.

Tracy S. Ferguson, Director
August 5, 1992
Page 2

Concerning the last sentence of the second paragraph under this rule, this sentence as presently written seems to be predisposed to deny a claim. In the interest of fairness, I would suggest modifying this sentence to "the examining physician should consider whether a portion of the sensorineural hearing loss may be due to a primary disease process or other non-occupational cause."

Rule 2.8

This proposed rule, to the first semicolon, does seem to state a well recognized medical principle and one that should be followed. However, all information following the first semicolon is quite superfluous, confusing and should be deleted.

Rule 2.9

This rule, as presently written, does correctly indicate that most noise induced hearing loss should be bilateral and symmetrical. However, to account for the exceptional cases, I would suggest adding the following sentence: "The physician should also take a very complete history of occupational noise exposure to determine whether there is some reasonable occupational explanation for the claimant's asymmetrical hearing loss."

Again, I wish to thank you for the opportunity to briefly comment on the proposed rules. If you have any questions concerning my comments, please do not hesitate to contact me.

Very truly yours,



C. Patrick Carrick

CPC/lm

Bureau of Employment Programs
Workers' Compensation Division
601 Morris Street
Charleston, West Virginia 25301-1416

Gaston Caperton, Governor
Andrew N. Richardson, Commissioner
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M E M O R A N D U M

TO: Tracy S. Ferguson, Director
Legal Division

FROM: Benjamin R. Taylor, Administrative Assistant *BRT*
Office of Medical Case Management

DATE: August 3, 1992

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BRT