

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

Bureau of Employment Programs
AGENCY: Workers' Compensation Division TITLE NUMBER: 85
RULE TYPE: Exempt Legislative; CITE AUTHORITY §21A-2-6(1), -6(2) & -6(14);
§21A-2-19; §21A-3-7(b) & -7(c);
AMENDMENT TO AN EXISTING RULE: YES X NO §23-1-1; §23-4-3b
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 13
TITLE OF RULE BEING AMENDED: Protocols and Procedures for Performing
Medical Evaluations in Noise-Induced Hearing Loss Claims
IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:
TITLE OF RULE BEING PROPOSED:

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON October 23, 1995 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Jamie J. Chenoweth, Counsel
Legal Services Division
Post Office Box 3922
Charleston, WV 25339-3922
(304) 926-5130

THE ISSUES TO BE HEARD SHALL BE
LIMITED TO THIS PROPOSED RULE.

Andrew N. Richardson
Andrew N. Richardson
Commissioner

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

4.80

Bureau of Employment Programs
112 California Avenue
Charleston, West Virginia 25305-0112

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner



September 20, 1995

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, West Virginia 25305

Re: Filing of Proposed Legislative Rule,
Title 85, Series 13; "Protocols and Procedures
For Performing Medical Evaluations in
Noise-Induced Hearing Loss Claims"

Dear Secretary Hechler:

Please consider this letter to be my written approval 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,

Andrew N. Richardson
Andrew N. Richardson
Commissioner

ANR:JJC:mw

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 Workers' Compensation Division, Bureau of Employment Programs

Address P.O. Box 3922
Charleston, WV 25339-3922
Contact Person: Jamie J. Chenoweth, Legal Services Division

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

This is merely an update to Series 13 of Title 85. There have been no substantive changes made to this rule.

3. Objectives of these rules:

These rules establish the protocols and procedures for the performance of examinations or evaluations by physicians or medical examiners in hearing loss claims.

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

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There is no economic impact because there have been no substantive changes made.

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

There is no economic impact because there have been no substantive changes made.

C. Economic Impact on Citizens/Public at Large.

There is no economic impact because there have been no substantive changes made.

Date: September 20, 1995

Signature of Agency Head or Authorized Representative

Andrew N. Richardson

SUMMARY OF PROPOSED EXEMPT LEGISLATIVE RULE
STATEMENT OF CIRCUMSTANCES
PROTOCOLS AND PROCEDURES FOR PERFORMING MEDICAL EVALUATIONS
IN NOISE-INDUCED HEARING LOSS CLAIMS

Title 85, Series 13

This legislative rule was established by the Health Care Advisory Panel to set forth proper procedures when physicians or medical examiners perform examinations or evaluations in hearing loss claims. Specifically, it differentiates how examinations are to be conducted based on which standards apply, i.e. Craddock, post-Craddock, or Bilbrey.

The changes herein will serve to update the existing rule as it exists upon the passage of Enrolled Committee Substitute for Senate Bill No. 250.

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

SERIES 13
PROTOCOLS AND PROCEDURES FOR PERFORMING MEDICAL EVALUATIONS IN
NOISE-INDUCED HEARING LOSS CLAIMS

§85-13-1. 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. -- West Virginia Code, §21A-2-6(1), -6(2) & -6(14); §21A-2-19; §21A-3-7(b) & -7(c); and §23-1-1; and §23-4-3b. Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed. 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 by the Governor, the Commissioner of the Bureau of Employment

Programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.

1.3. Filing Date. --

1.4. Effective Date. --

§85-13-2. Purpose of this rule.

The purpose of this rule is to implement the provisions of West Virginia Code, §23-4-3b.

§85-13-3. Definitions.

As used in this 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 pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §23-1-1, and any deputies designated pursuant to West Virginia Code, §21A-2-12 & -13.

3.2. "Division" means the Workers' Compensation Division within the Bureau of Employment Programs as provided for by West Virginia Code, §21A-1-4, and West Virginia Code, §23-1-1 et seq.

\$85-13-4. Protocols And Procedures For Performing Audiological
Examinations And Evaluations In Workers' Compensation
Claims for Noise-Induced Hearing Loss.

2-1-4.1. 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.

2-2-4.2. An audiogram performed at the request of 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 may 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.

2-3-4.3. 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.

~~2-4-4.4.~~ The ~~commissioner~~ division will inform all physicians evaluating noise-induced hearing loss claimants on ~~his-or-her~~ the division's behalf that standard air conduction and bone conduction testing, speech reception threshold, and speech discrimination testing must be routinely performed as a part of audiometric testing. If a physician fails to have the routine testing performed, as requested, he or she shall not be compensated for the evaluation by the workers' compensation division. W. Va. Code §23-4-8.

~~2-5-4.5.~~ In addition to the routine testing outlined in section ~~2-4-~~ 4.4 of this rule, 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.

~~2-6-4.6.~~ 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 he or 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-~~4.7. The audiologist shall perform speech discrimination testing 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-~~4.8. 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 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.

2-9-4.9. When a claimant has been exposed to steady state noise, his or 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.

2-10-4.10. 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 or 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.

§85-13-5. Severability.

If any provision of these rules or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of these rules which can be given effect without the invalid provisions or application and to this end the provisions of these rules are declared to be severable.



WORKERS' COMPENSATION FUND

801 MORRIS STREET

100 EAST MAIN STREET, MARTINSBURG, WEST VIRGINIA 26001

TIMOTHY E. HUFFMAN
Commissioner

November 8, 1984

Pursuant to an Order of the West Virginia Supreme Court in the case of Andy Craddock and Charles Kinder vs. Gretchen O. Lewis, Commissioner, West Virginia Workers' Compensation Fund, and based upon a report rendered in accordance therewith by a panel of physicians, this office adopts the following policy regarding the evaluation and the compensation of noise-induced hearing loss:

1. The low fence shall remain at 25 decibels.
2. The high fence shall remain at ninety-two decibels.
3. The audiometric frequencies to be used shall be: 500 Hz, 1000 Hz, 2000 Hz and 3000 Hz.
4. With regard to a compensation for permanent partial disability for subjective tinnitus, where such tinnitus is reliably, objectively clinically documented and measured by an audiologist or shown to cause permanent partial disability by an otologist, otolaryngologist, psychologist or psychiatrist, there shall be no greater than 3.25% whole man impairment.
5. Awards for reduced speech discrimination will be on the following basis:

Percent Discrimination	Percent Award PPD
90% - 100%	0%
80% - 90%	2%
70% - 80%	6%
60% - 70%	8%
0% - 60%	10%

The maximum award for impaired speech discrimination shall not exceed 10%. Only audiometric test results obtained by an audiologist having the certificate of clinical competence in audiology (CCC-A) are acceptable for purposes of awarding compensation. Speech discrimination scores will be obtained at a presentation level of 75 dB re hearing level (HL) unless the resultant score is less than 90% or 75dB HL is not sufficient to bring about maximum discrimination. When this is the case discrimination scores will be obtained at a level

which results in maximum discrimination (PB-Max) for the individual being tested. Discrimination scores will be shown for each ear as a function of presentation level. Recorded Central Institute for the Deaf phonetically balanced word lists (C.I.D. W-22) will be used. Full 50 word lists will be the basis for the discrimination score.

6. Calibration records should be maintained which are sufficient to demonstrate that the audiometer used was within tolerances specified by the American National Standards Institute specification S3.6-1969. Calibration records will include at least the following: 1. Biological calibration on the date of the test. 2. Semiannual electroacoustic calibration including calibration of stimulus frequency. 3. An exhaustive electroacoustic calibration at least every two years.

Acoustic measurement of the test environment should be completed at least annually and records of the measurement should be sufficient to demonstrate that the test environment is within tolerances specified by the American National Standards Institute Specification S3.1-1960 (rev 1971) Criteria for Noise in Audiometric Rooms.

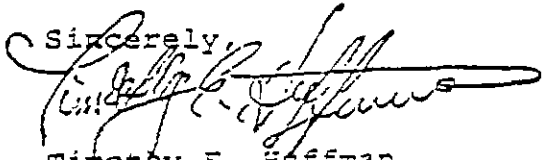
A complete audiometric evaluation should include:

- A. Preliminary otoscopy.
- B. Air and bone conduction thresholds.
- C. Speech reception thresholds and speech discrimination scores.
- D. Acoustic impedance testing to include tympanometry, acoustic reflex thresholds and acoustic reflex decay results as indicated.
- E. Stenger and Modified Stenger tests, Bekesy results, brief tone results and other special tests as indicated.

Please find attached a copy of tables and procedure developed pursuant to the hereinabove policy which will be used to calculate whole man impairment in hearing loss claims.

I trust that the information contained herein needs no further explanation. However, should you have further questions or need anything from this office, please do not hesitate to contact us.

Sincerely,


Timothy E. Huffman
Commissioner

TEH:cm
Enclosure