WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

FILED

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

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

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

CITE AUTHORITY: §21A-2-6(1), -6(2) & -6(14); §21A-2-19; §21A-3-7(b) & -7(c); §23-1-1; §23-4-3b

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

§21A-2-6(1), -6(2), -6(14); §21A-2-19; §21A-3-7(b), -7(c); §23-1-1

AMENDMENT TO AN EXISTING RULE: YES X , NO ____

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 ADOPTED: _____

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS February 22, 1996

Andrew N. Richardson

Authorized Signature

4.40

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

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner

January 23, 1996

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

Re: Final Filing of Exempt 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 as my written approval for the final filing of the above noted exempt legislative rule.

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

Thank you very much for your assistance in this matter.

Very truly yours,

Andrew N. Richardson
Commissioner

85 CSR 13

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.

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.

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.

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.

4.4. The division will inform all physicians evaluating noise-induced hearing loss claimants on 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.

4.5. In addition to the routine testing outlined in section 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. Brain stem audiometric testing should be performed only when there is suspicion of an acoustic neuroma.

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 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.

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.

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.

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.

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

[illegible] MORRIS STREET
[illegible] CHARLESTON, WEST VIRGINIA 25301

[illegible] ROCKEFELLER IV
Governor

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.

G. 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 53.6-1969. 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

Huntington Ear Clinic, Inc.

Joseph B. Touma, M.D., F.A.C.S.
Diplomate American
Board of Otolaryngology
Fellow American College of Surgeons
Ear Diseases and Balance Disorders

October 4, 1995

Mr. Jamie Chenoweth, Counsel
Legal Services Division
P.O. Box 3922
Charleston, West Virginia 25339-3922

Dear Mr. Chenoweth:

I thoroughly reviewed the copy of Series 13 of Title 85 regarding Noise-Induced Hearing Loss claims. First, the guidelines are markedly improved over the previous guidelines and I support all the provisions, however, I have the following observations:

1) Paragraph 4.5: Brain Stem Audiometric test should be performed only when there is suspicion of acoustic neuroma. This addition will eliminate overuse of this test.
2) I strongly recommend the use of the AMA formula to calculate the whole man impairment in noise-induced hearing loss instead of the state formula.

I am enclosing copies of several articles I wrote on noise-induced hearing loss which reflect these changes, and I want to take this opportunity to congratulate the Commissioner and all who worked to draft these changes.

If I can be of any further help, please contact me.

Sincerely,

Joseph B. Touma, M.D.

JBT:cls

Robert C. Byrd Health Sciences Center of West Virginia University
Department of Otolaryngology—Head and Neck Surgery

Administrative Offices
Post Office Box 9200
Morgantown, WV 26506-9200
(304) 293-3457
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Post Office Box 782
Morgantown, WV 26507-0782
(304) 598-4825
(304) 598-4897 (FAX)

November 21, 1995

Mr. Jamie J. Chenoweth
Counsel Legal Services Division
Bureau of Employment Programs
Post Office Box 3922
Charleston, WV. 25339-3922

Re: Proposed Legislative Rule 85 CSR 13.

Dear Mr. Chenoweth:

I am responding to your letter dated October 27, 1995 regarding the proposed update to series 13. Dr. Touma's suggestion for paragraph 4.5 is a good one. I would suggest adding the sentence that he suggests, that is "***brainstem audiometric testing should be formed only when there is suspicion of an acoustic neuroma***". I do not know whether brainstem audiometry is currently being over utilized but adopting Dr. Touma's suggestion should at least make it clear that other reasons for performing brainstem audiometry are probably not indicated.

Thank you for allowing me to comment.

Sincerely,

Stephen J. Wetmore, M.D., F.A.C.S.
Professor and Chairman

/cbp:

Response to Comments:
85 CSR 13
"Protocols and Procedures for Performing
Medical Evaluations in Noise-Induced Hearing Loss Claims"

One comment was received during the comment period for the subject rule. By letter dated October 4, 1995, Dr. Joseph B. Touma of Huntington Ear Clinic, Inc., suggested the following: (1) Paragraph 4.5: Brain Stem Audiometric test should be performed only when there is suspicion of acoustic neuroma. This addition will eliminate overuse of this test; and (2) I strongly recommend the use of the AMA formula to calculate the whole man impairment in noise-induced hearing loss instead of the state formula.

By letter dated November 21, 1995, Dr. Stephen J. Wetmore, Professor and Chairman of the Department of Otolaryngology -- Head and Neck Surgery, responded that Dr. Touma's suggestion regarding Paragraph 4.5 is a good one.

The Workers' Compensation Division agrees with the suggestion regarding Paragraph 4.5 and would recommend the following addition:

4.5. In addition to the routine testing outlined in section 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. Brain stem audiometric testing should be performed only when there is suspicion of an acoustic neuroma.

KEN HECHLER
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BEP-LEGAL DIVISION
96 MAR 14 PM 3:25

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

PENNEY BARKER
Supervisor, Corporations

(Plus all the volunteer help we can get)

STATE OF WEST VIRGINIA
SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

FILED
MAR 21 9 28 AM '96
OFFICE OF WEST VIRGINIA SECRETARY OF STATE

TO: John Kozak

AGENCY: Workers' Comp.

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: March 11, 1996

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

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

SERIES: 13 TITLE: 85 Workers' Comp.

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

****

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

SIGNED: Donna Winkler

TITLE OF PERSON SIGNING: Supervisor

DATE: March 19, 1996

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