WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

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NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Bureau of Employment Programs-Workers' Comp. Div. TITLE NUMBER: 85

RULE TYPE: Legislative ; CITE AUTHORITY W.Va. Code, §23-4-9(e)

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: Vocational and Physical Rehabilitation

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 Friday, June 7, 1991 AT 5:00 p.m.

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

John H. Kozak
Executive Secretary
601 Morris Street
Post Office Box 3824
Charleston, WV 25338

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

4.00

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

SERIES 12
VOCATIONAL AND PHYSICAL REHABILITATION

§85-12-1. General.

1.1. Scope. -- This legislative rule establishes the requirements and procedures to be followed by the Division of Workers' Compensation, parties to claims pending before the division, health care providers, vocational professionals, and others involved in the delivery or proposed delivery of physical or vocational rehabilitation of claimants pursuant to West Virginia Code, §23-4-9. Other types of health care services provided or proposed to be provided to claimants under other provisions of West Virginia Code, §23-4-3, are not within the scope of this rule.

1.2. Authority. -- West Virginia Code, §23-4-9(e).

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal of former rule. -- To the extent that any provision of WV 85 CSR 1 "Administration Of The Workers' Compensation Fund" filed April 15, 1986, and effective July 1, 1986, conflicts with this rule, especially section 14.13 "Payment for physical or vocational rehabilitation services, or appliances", such provision and section 14.13 are repealed and replaced by the provisions of this legislative rule.

§85-12-2. Purpose of rule; cooperation.

2.1. West Virginia Code, §23-4-9(a), states the legislative findings that led to the remaining provisions of that section. "The Legislature hereby finds that it is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after an injury. In order to encourage workers to return to employment and to encourage and assist employers in providing suitable employment to injured employees, it shall be a priority of the commissioner to achieve early identification of individuals likely to need rehabilitation services and to assess the rehabilitation needs of these injured employees. It shall be the goal of rehabilitation to return injured workers to employment which shall be comparable in work and pay to that which the individual performed prior to the injury. If a return to comparable work is not possible, the goal of rehabilitation shall be to return

the individual to alternative suitable employment, using all possible alternatives of job modification, restructuring, reassignment and training, so that the individual will return to productivity with his or her employer or, if necessary, with another employer. The Legislature further finds that it is the shared responsibility of the employer, the employee, the physician and the commissioner to cooperate in the development of a rehabilitation process designed to promote re-employment for the injured employee."

2.2. In addition, on July 26, 1990, the Congress of the United States enacted the "Americans with Disabilities Act of 1990," Public Law 101-336, 104 Stat. 327, 42 USC 12101 et seq. Two of the stated purposes of that act are "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities...." 42 USC 12101(b). It is the view of the Commissioner that this federal act directly impacts upon these rules and the Workers' Compensation Fund's vocational rehabilitation programs. The federal act prohibits discrimination in employment against injured workers by their employers, other employers, and by the Workers' Compensation Fund itself in the administration of the laws entrusted to it. Hence, the new federal law is consistent with and adds to the obligations imposed upon employers by West Virginia Code, § 23-4-9, in accepting previously injured workers for return to work and for new employment.

2.3. In order to encourage both injured workers and their employers to participate in rehabilitation programs and to assume their shared responsibility for the success of the individual injured worker's rehabilitation plan, the failure of either the injured worker or the employer to fully participate and fully cooperate shall be a factor to be considered in determining the amount of any permanent partial or permanent total disability to which the injured worker might otherwise be entitled.

§85-12-3. Definitions.

As used in this legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. "Commissioner" means the Commissioner of the Bureau of Employment Programs pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §23-1-1.

3.2. "Fund" means the Division of Workers' Compensation within the Bureau of Employment Programs and also sometimes referred to as the Workers' Compensation Fund as provided for by

West Virginia Code, §21A-1-4, and West Virginia Code, §23-1-1 et seq.

3.3. "Injury" and derivative words have the meaning ascribed to that term by West Virginia Code, §23-4-1.

3.4. "Physical rehabilitation hospital" means:

a. A duly licensed hospital that meets the requirements for rehabilitation hospitals as described in section 2803.2 of the medicare provider reimbursement manual, part 1, as amended, or any successor provision, as published by the United States Health Care Financing Administration;

b. A distinct part rehabilitation unit in a duly licensed hospital which distinct part unit meets the requirements of section 2803.61 of the medicare provider reimbursement manual, part 1, as amended, or any successor provision, as published by the United States Health Care Financing Administration; or

c. A facility operated by the division of rehabilitation services.

3.5. "Physical rehabilitation services" means health care services such as medicines, or medical, surgical, dental, or hospital treatments or evaluations, or the provision of crutches, artificial limbs, or other approved mechanical appliances and devices.

3.6. "Physical rehabilitation services provider" means a provider of health care services, which may include vocational rehabilitation services, provided that such a provider is:

a. A medicare certified rehabilitation agency;

b. A certified outpatient rehabilitation facility;

c. A duly licensed health care practitioner;

d. A physical rehabilitation ~~facility~~ hospital; or

e. A duly licensed acute care hospital.

3.7. "Qualified rehabilitation professional" means a person with the necessary education, experience and skills to make judgments, to counsel, and to make recommendations concerning the medical, intellectual, emotional, physical or motivational abilities of a person to accept and perform suitable gainful employment and who has the skills to design, implement and supervise programs to enhance a person's capacity to accept and perform suitable gainful employment. A "qualified rehabilitation professional" need not personally have the

ability to administer and interpret all medical, psychological or vocational testing, but must be able to evaluate the test results provided by other professionals. Rehabilitation counselors employed by or under contract with the commissioner or employed by the division of rehabilitation services shall always be considered qualified rehabilitation professionals for the purposes of this definition. Self-insured employers, their employees, or wholly owned subsidiaries shall not be considered "qualified rehabilitation services providers" with regard to their own injured workers.

3.8. "Rehabilitation plan" means a plan or amended or modified plan for vocational or physical rehabilitation, or both, developed in accordance with this rule by a qualified rehabilitation professional and approved by the commissioner.

3.9. "Suitable gainful employment" means employment which restores the injured worker as closely as possible to his or her level of earnings at the time of injury or higher, giving due consideration to the injured worker's qualifications, interests, incentives, preinjury earnings, and future earning capacities, the nature and the extent of the injury, and the current and future condition of the national labor market. Nothing in this definition shall prohibit the provision of vocational rehabilitation services in accordance with this rule which result in the injured worker obtaining a job with a higher economic status than he or she would have attained without the provision of such services, provided that it can be demonstrated that such rehabilitation is necessary to increase the likelihood of reemployment.

3.10. "Vocational rehabilitation services" shall mean professional services reasonably necessary during or after medical treatment to enable an injured worker, as soon as practical, to return to suitable gainful employment. Such services may include, but not be limited to, coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, vocational rehabilitation training, job development and job placement.

3.11. "Vocational rehabilitation services providers" means licensed registered nurses, vocational rehabilitation counselors, and public and private agencies, companies, and corporations which provide to injured workers vocational rehabilitation services including vocational retraining, testing, counseling, evaluation and job placement services. To qualify as a provider of vocational rehabilitation services, the purported provider must have access to the necessary space and equipment needed to provide the intended service. The Fund will decide on a case-by-case basis whether or not a purported provider has such access. Such term does not include licensed

physicians or psychologists or hospitals where the services being provided to an injured employee fall under the provisions of West Virginia Code, §23-4-3, and are outside the scope of the pertinent rehabilitation plan.

§85-12-4. Priorities.

Any rehabilitation plan developed pursuant to West Virginia Code, §23-4-9, and this rule shall utilize the following priorities. No higher numbered priority may be utilized unless all lower numbered priorities have been determined by the commissioner to be unlikely to result in suitable job placement for the injured worker. If a lower numbered priority is clearly inappropriate for the injured worker, the next higher number priority shall be utilized. The rehabilitation plan shall explicitly state the reasons and rational for the rejection of any lower numbered priority. The priorities are as follows:

4.1. Return of the employee to the preinjury job with the same employer;

4.2. Return of the injured worker to the preinjury job with the same employer and with modification of task, work structure or work hours;

4.3. Return to employment with the preinjury employer in a different position;

4.4. Return to employment with the preinjury employer in a different position with on-the-job training;

4.5. Employment with a new employer without training;

4.6. On-the-job training for employment with a new employer; or

4.7. Retraining which shall consist of a goal-oriented period of formal retraining which is designed to lead to suitable gainful employment in the national labor market.

§85-12-5. Reimbursement for physical and vocational rehabilitation services.

5.1. The commissioner shall reimburse physical rehabilitation providers for physical rehabilitation services in accordance with the fee schedule then in effect as adopted by the commissioner pursuant to West Virginia Code, §23-4-3. Only those physical rehabilitation services that are medically necessary and within the scope of the applicable rehabilitation plan shall be so reimbursed pursuant to this rule. Any physical rehabilitation service which requires prior authorization under

the provisions of West Virginia Code, §23-4-3, or any rule adopted thereunder, shall not be reimbursed unless:

a. The physical rehabilitation services provider first obtains such prior authorization; or

b. The physical rehabilitation services provider has requested such prior authorization but has not received the approval of the commissioner prior to the rendering of the service provided that the commissioner later decides that the service would have received authorization as being medically necessary and related to a compensable injury.

5.2. The commissioner shall reimburse vocational rehabilitation providers for vocational rehabilitation services in accordance with any fee schedule then in effect or in accordance with any agreement entered into between the provider and the commissioner. No injured worker shall receive vocational rehabilitation services which will result in reimbursement in excess of ten thousand ($10,000.00) under any rehabilitation plan.

a. However, should any injured worker who previously was the beneficiary of a rehabilitation plan who subsequently suffers a new injury for which a rehabilitation plan is appropriate shall be entitled to receive additional vocational rehabilitation services reimbursable up to an additional ten thousand ($10,000.00) dollars.

b. The costs of evaluations, reevaluations, preparation or modifications of a rehabilitation plan or plans, temporary total disability benefits, and temporary partial rehabilitation benefits shall not be considered a part of the reimbursements which may not exceed the sum of ten thousand ($10,000.00) under this section 5.2.

c. With the consent of the employer and of the commissioner, an individual injured worker's rehabilitation plan's total reimbursement may exceed ten thousand ($10,000.00) by an amount agreed upon by the employer and the commissioner.

5.3. The costs of physical rehabilitation services shall not be included with the costs which may not exceed ten thousand ($10,000.00) dollars as such limit applies solely to the costs of vocational rehabilitation services.

5.4. In order to obtain reimbursement for services rendered, including the costs of medicines or mechanical appliances or devices, physical and vocational rehabilitation services providers must submit a verified statement on forms prescribed by the commissioner. Such forms must be filed with the commissioner within two (2) years after the cessation of such services or the delivery of such medicines or mechanical

appliances or devices. Failure to timely submit such a form shall bar the provider form any right of recovery from the commissioner or any other party including, among others, the injured worker, the applicable employer, or any of their third party health care insurers.

5.5. No physical and vocational rehabilitation services provider shall be entitled under any circumstances to receive reimbursement from any source other than the commissioner or the applicable self insured employer for any services, including the costs of medicines or mechanical appliances or devices, deemed to be medically necessary as part of the rehabilitation plan or as a result of the compensable injury. Any physical and vocational rehabilitation services provider is prohibited from making any charge or charges for any such services or with respect thereto against the injured worker or any other person, firm or corporation which would result in a total charge for the services rendered, including the costs of medicines or mechanical appliances or devices, in excess of the maximum amount set forth therefor in the commissioner's fee schedule or pursuant to any agreement entered into between the provider and the commissioner. Nothing in this section shall be deemed to prevent another agency of any governmental unit from agreeing to reimburse for any services which it decides to undertake.

5.6. Notwithstanding the provisions of subsection 5.5, in the event that an injured worker, after being advised in writing by the provider that a service has been deemed not to be medically necessary, insists upon the delivery of such service, then the provider may charge the injured worker for the costs of such service provided that the provider first informs the injured worker that he or she will be personally responsible for the costs of such services and informs the injured worker of the amount of such costs. If the injured worker has other health care insurance which would permit the payment by the insurer for such service, then the provider may bill such insurer as well which may reimburse such provider under the terms of its agreement with the injured worker.

§85-12-6. Evaluations and development of rehabilitation plan.

6.1. In every case in which an injured worker:

a. Is reasonably suspected to have sustained a permanent disability;

b. Has been found to have sustained a permanent disability;

c. Has sustained an injury likely to result in temporary disability in excess of one hundred and twenty (120) days; or

d. Was previously evaluated one hundred (100) days earlier and found to not then be a candidate for vocational or physical rehabilitation services but was noted as possibly needing such services in the future,

then the commissioner shall direct that the injured worker be evaluated for the delivery of physical or vocational, or both rehabilitation services and the possible development of a rehabilitation plan. Such evaluation or evaluations shall be conducted by a qualified rehabilitation professional.

6.2. An injured worker shall be reasonably suspected to have sustained a permanent disability if his or her treating physician so indicates to the commissioner or if the injury that he or she has suffered is of a type that usually and customarily leads to a permanent disability. In addition, if other facts associated with the individual injured worker and the injury he or she has suffered would reasonably lead to the conclusion that the worker has sustained a permanent disability, then an evaluation pursuant to subsection 6.1 of this rule will also be appropriate.

6.3. The scheduling of the subsection 6.1 evaluation shall be completed within forty-five (45) days of the commissioner's receiving evidence that an injured worker is reasonably suspected to have sustained a permanent disability, or within forty-five (45) days of having been found to have sustained a permanent disability, or within forty-five (45) days of the commissioner's receiving evidence that an injured worker has sustained an injury likely to result in temporary disability in excess of one hundred and twenty (120) days. The actual conducting of the evaluation or evaluations shall be done within sixty (60) days of the initial scheduling of the evaluation.

6.4. The purpose of the evaluation shall be to determine whether the injured worker would be assisted in returning to remunerative employment with the provision of physical or vocational rehabilitation services. If it is the conclusion of the commissioner based upon the report of the evaluator that such services would not so assist the injured worker either because he or she will be able to return to his or her preinjury job with the same employer without modification of task, work structure or work hours or because he or she will not be able to return to any remunerative work under any circumstances, then the evaluation report and the commissioner shall so state and the injured worker shall not then be the subject of a rehabilitation plan; however, the commissioner may direct that a further evaluation be made of the injured worker at some future time if, in the opinion of the commissioner, it later appears that the injured worker may be in need of either vocational or physical, or both, rehabilitation services.

6.5. Where the commissioner determines that the injured worker would be assisted in returning to remunerative employment with the provision of physical or vocational rehabilitation services, then the evaluation shall continue. The initial evaluation shall include the collecting and analyzing of the medical, educational, vocational, social, legal, and economic circumstances of the injured worker including the injured worker's present physical and mental ability to participate in vocational rehabilitation services. The initial evaluation may also include additional medical, vocational, or psychological testing if in the judgment of the qualified rehabilitation professional such testing is warranted in order to provide a full assessment and if such additional testing is authorized, prior to the testing, by the commissioner. In conjunction with this evaluation, the employer and the treating physician shall provide, on forms prescribed by the commissioner, information to assist in determining whether the injured worker is likely to return to the previous employment and any other information deemed necessary by the commissioner. The initial evaluation shall indicate whether the injured worker is likely to benefit from vocational rehabilitation services. If the qualified rehabilitation professional determines from performing the initial evaluation that the medical, physical or emotional status of the injured worker precludes a full initial assessment, then the qualified rehabilitation professional shall prepare a preliminary report, indicating why such an assessment cannot be performed. The qualified rehabilitation professional performing the initial evaluation shall likewise report if the injured worker fails to cooperate with the performance of the assessment.

6.6. In determining whether the injured worker is likely to benefit from vocational rehabilitation services, the commissioner shall give consideration to the injured worker's qualifications including, but not limited to, work history, level and nature of physical disability, interests, aptitude, education, existing skills, work life expectancy, and likelihood of reemployment in the national job market.

6.7. The written report of the initial evaluation shall be filed with the commissioner and copies given to the injured worker or his or her representative and to the injured worker's employer or its representative within thirty days of the date the injured worker's evaluation is completed. If it is the conclusion of the evaluator that a rehabilitation plan is appropriate, then the written report shall also contain the rehabilitation plan but shall not then be due until forty-five (45) days from the date the injured worker's evaluation is completed. In every case in which the evaluation or plan are performed by individuals not employed by the commissioner, the evaluation or plan shall be reviewed and, if appropriate, revised by a qualified rehabilitation professional employed by the commissioner.

6.8. The rehabilitation plan may include, but need not be limited to, any of the following: prosthetic or adaptive devices and training that enables work at the same or similar occupation as at the time of injury; counseling; work site or work hours modification to make it possible for the injured worker to resume suitable employment, including, when agreed to by the employer, assistance from individuals with expertise in biomechanical engineering to assess any necessary job modifications; vocational training or on-the-job training to assist the injured worker to pursue a similar or new occupation; payment of benefits under the provisions of subsection 8.2 of this rule; and such other programs or services which comply with the provisions of subsection 5.2 of this rule governing maximum disbursement for vocational rehabilitation services and which would result in or increase the likelihood of reemployment of the injured worker in suitable gainful employment when the plan is completed.

6.9. A rehabilitation plan shall require that all physical rehabilitation services be provided by a physical rehabilitation services provider registered under the provisions of section 9 of this rule. Similarly, a rehabilitation plan shall require that all vocational rehabilitation services be provided by a vocational rehabilitation services provider registered under the provisions of section 9 of this rule. Except with the prior consent of the commissioner, no other providers shall be permitted to deliver physical or vocational rehabilitation services to an injured worker under an approved rehabilitation plan. Such consent shall not be given by the commissioner except upon a showing that an appropriate registered provider is not reasonably available to the injured worker. In every instance, preference shall be given to the utilization of providers who are located in the injured worker's geographic area and within the state of West Virginia

6.10. If it is the conclusion of the commissioner that the injured worker would be assisted in returning to remunerative employment with the provision of physical or vocational rehabilitation services and if, based upon the evaluator's report, the commissioner further concludes that the injured worker can be physically and vocationally rehabilitated and returned to remunerative employment by the provision of rehabilitation services, including but not limited to, vocational or on-the-job training, counseling, assistance in obtaining appropriate temporary or permanent work site, work duties, or work hours modification, by the provision of crutches, artificial limbs, other approved mechanical appliances or devices, or medicines, medical, surgical, dental or hospital treatment, then the commissioner shall proceed to consider the developement of a rehabilitation plan for the injured worker. If the commissioner concludes that the plan submitted with the report is adequate or if a modified plan or new plan is deemed appropriate, the commissioner shall thereafter approve the plan.

If the rehabilitation plan submitted with the evaluation report is deemed to be inadequate, the commissioner shall refer the injured worker to the qualified rehabilitation professional or to another one for the modification of the previous plan or the development of a new plan. The commissioner shall then notify the injured worker or his or her representative and the injured worker's employer or its representative of his or her decision.

6.11. Following the giving of the notices of the acceptance of the rehabilitation plan, the commissioner shall proceed to implement the plan. An employer or the injured worker is permitted to object to the plan pursuant to the provisions of West Virginia Code, §23-5-1 et seq. However, implementation of the plan shall proceed notwithstanding the protest. In the event that the employer or the injured worker is successful, in whole or in part, in challenging the commissioner's decisions, then an appropriate adjustment shall be made to the charges made to the employer's account with regard to the costs of the implementation of the plan. In the event that the plan has not been completed at the time of the ultimate affirmance or decision on the protest, then the plan shall be modified, if necessary, to conform with the ultimate affirmance or decision.

§85-12-7. Implementation of rehabilitation plan.

7.1. Upon the commissioner's approval of the rehabilitation plan, the commissioner shall notify the injured worker who shall forthwith notify the commissioner regarding his or her willingness to receive rehabilitation services in accordance with the plan. If the injured worker does desire to receive such vocational or physical rehabilitation services, the commissioner shall forthwith expend, after due notice to the employer, or shall forthwith order the self-insured employer to expend, such amounts as may be necessary for vocational or physical rehabilitation purposes. In the event that the injured worker declines to receive rehabilitation services in accordance with the plan, then the provisions of subsection 2.2 of this rule shall be applicable.

7.2. The duration of any rehabilitation plan developed hereunder shall not exceed one hundred and four (104) weeks, unless the commissioner agrees to an extension pursuant to the provisions of subsection 7.3(e) of this rule.

7.3. Upon request of any party or upon a determination by the commissioner, the commissioner may order the suspension, termination, or modification of a rehabilitation plan based upon a showing of good cause including, but not limited to:

a. A changed physical condition which does not allow the injured to continue pursuing the rehabilitation plan;

b. The injured worker's performance level which indicates that he or she cannot complete the plan successfully;

c. A finding that an injured worker is not cooperating with a plan;

d. A finding that a change in the economic conditions that existed when the plan was initially implemented renders the plan infeasible; or

e. Action based upon a joint petition submitted by the employer and the injured worker seeking modification or termination of the plan. Any such joint petition may include a request to extend the provisions of a rehabilitation plan, including an extension beyond the maximum duration as set out in subsection 7.2 of this rule, and further may include a request to extend benefits beyond the maximum duration otherwise stated in subsection 7.2. In ruling upon any petition to extend the rehabilitation plan beyond the maximum period set out in subsection 7.2 of this rule, the commissioner shall consider whether extension of the rehabilitation plan would be likely to result in less cost to the Fund or self-insured employer than would denial of said petition.

7.4. All rehabilitation services must be delivered in accordance with the rehabilitation plan developed under this section. The commissioner shall assign a qualified rehabilitation professional employed by or under contract with the commissioner or employed by the division of rehabilitation services to monitor compliance with and progress under the plan. This assigned qualified rehabilitation professional shall contact the injured worker, the employer, the injured worker's treating physician, and the injured worker's rehabilitation services provider on a regular basis to determine compliance with and progress under said plan. In no event shall such contacts be less than at thirty day intervals with each of the foregoing individuals or parties. In the event that the services or employment provided under this section do not comply with the plan, the commissioner shall be so notified and the plan shall be modified as is just and necessary under the circumstances.

7.5. As part of a rehabilitation plan, an injured worker may return to work at a transitional, light duty, restructured or modified work assignment, on either a temporary, trial or permanent basis. Such assignment may include modifications of the duties assigned or of the hours of work or any other modification which may assist the injured worker in attaining the goals of the rehabilitation program and the rehabilitation plan. Whenever the injured worker is asked to return to work under this subsection, the prospective employer, whether the original employer or a new employer, shall furnish to the injured worker's treating physician and the assigned qualified

rehabilitation professional a statement describing the available work in terms that will enable the physician to relate the physical activities of the job to the injured worker's disability. A copy of this statement shall be filed with the commissioner and sent to the injured worker. The physician shall then advise the assigned qualified rehabilitation professional as to whether the injured worker is physically capable of performing the work described. The injured worker may consent to undertake the job without the consent of his or her treating physician if a physician selected by the commissioner determines that the injured worker is physically capable of performing the work described. Upon undertaking the job, the injured worker's temporary total disability benefits, if any, shall be terminated and he or she shall be eligible for the receipt of temporary partial rehabilitation benefits, if applicable. Should the available work described, once undertaken by the injured worker, impede his or her recovery to the extent that he or she should not continue to work, the injured worker's temporary total disability payments, if applicable, shall be resumed when the he or she ceases such work, as provided in subsection 8.1 of this rule, but only for the period allowed by the rehabilitation plan or the period provided for in West Virginia Code, §23-4-1c, whichever is longer. If the injured worker is released for said work and the work thereafter comes to an end before his or her recovery is sufficient in the judgment of the commissioner to permit him or her to return to his or her usual job or to perform other available work, the injured worker's temporary total disability benefits, if applicable, shall be resumed. Once the injured worker returns to work under the terms of this subsection, he or she shall not be assigned by the employer to work other than the work described to the physician without the injured worker's written consent, or without prior review and approval by his or her physician.

7.6. In cases where vocational retraining is a service to be provided under a rehabilitation plan, preference shall be given to the utilization of training facilities located in the injured worker's geographic area, thus eliminating the need for extensive travel or relocation on the injured worker's part. Preference shall also be given to the utilization of public schools and training facilities over private institutions and to facilities located within the state of West Virginia.

§85-13-8. Payment of indemnity benefits.

8.1. Except as provided for in section 8.2 of this rule, in every case in which the commissioner shall order, pursuant to a rehabilitation plan, physical or vocational rehabilitation of an injured worker as provided for in this rule, the injured worker shall, during the time he or she is receiving any vocational or physical rehabilitation services that renders him or her totally disabled during the period thereof, be

compensated on a temporary total disability basis for such period.

8.2. If pursuant to a rehabilitation plan the injured worker returns to gainful employment or, pursuant to subsection 7.5 of this rule, to work at a transitional, light duty, restructured or modified work assignment, on either a temporary, trial or permanent basis and the injured worker's average weekly wage earnings are less than the average weekly wage earnings earned by the injured worker at the time of the injury, he or she shall receive temporary partial rehabilitation benefits. For the purposes of this rule, the placement of an injured worker pursuant to a rehabilitation plan into a full-time educational program or a part-time educational program where the injured worker is not otherwise employed shall be deemed to be a modified work assignment which shall entitle the injured worker to the receipt of temporary partial rehabilitation benefits. In such event, the injured worker's average weekly wage earnings for the purposes of section 8.3 shall be zero. In the event that such an injured worker is otherwise employed, then the worker's average weekly wage earnings for the purposes of section 8.3 shall be the worker's actual such earnings.

8.3. Temporary partial rehabilitation benefits shall be calculated as follows.

a. The temporary partial rehabilitation benefit shall be seventy percent of the difference between the average weekly wage earnings earned at the time of the injury and the average weekly wage earnings earned at the new employment, both to be calculated as provided in West Virginia Code, §§23-4-6, -6d, and -14, as such calculation is performed for temporary total disability benefits;

b. But, in no event shall such benefits be subject to the minimum benefit amounts required by the provisions of West Virginia Code, §23-4-6(b); and

c. Nor shall such benefits exceed the temporary total disability benefits to which the injured worker would be entitled pursuant to West Virginia Code, §§23-4-6, -6d, and -14, during any period of temporary total disability resulting from the injury in the claim.

8.4. Under no circumstances shall the injured worker receive both temporary total disability benefits and temporary partial rehabilitation benefits for the same time period.

8.5. The amount of temporary partial rehabilitation benefits payable under this section shall be reviewed at least every ninety days to determine whether the injured worker's average weekly wage in the new employment has changed and, if

such change has occurred, the amount of benefits payable hereunder shall be adjusted prospectively.

8.6. Temporary partial rehabilitation benefits shall only be payable when the injured worker is receiving vocational rehabilitation services in accordance with a rehabilitation plan. Upon termination of the plan, payment of all temporary partial rehabilitation benefits shall cease irregardless of the injured worker's then level of wages.

8.7. Payments of temporary partial rehabilitation benefits below the sum of ten ($10.00) shall not be made as being administratively too costly to process and as being of little economic incentive to the injured worker.

§85-12-9. Registration of providers.

On or before the first day of January 1992 and yearly thereafter, physical and vocational rehabilitation services providers shall register with the commissioner using forms prescribed by the commissioner. New providers entering the field during the year may register upon their beginning to offer services. The commissioner shall compile a list of rehabilitation services providers, which list shall include the qualifications and areas of expertise and specialization of the providers, and shall use the list for referral for such services. However, such services may also be provided by employees of the division of rehabilitation services or the commissioner. All rehabilitation services shall be provided in accordance with the rehabilitation plan and shall be monitored by a qualified rehabilitation professional employed by or under contract with the commissioner or employed by the division of rehabilitation services. The commissioner shall remove or suspend from the list of vendors any provider of rehabilitation services who knowingly fails to comply with the provisions of a rehabilitation plan or engages in other practices in violation of West Virginia Code, §23-4-3c.

§85-12-10. Cooperative efforts.

The Fund shall engage, where feasible and cost-effective, in cooperative programs with the division of rehabilitation services to provide vocational rehabilitation services and with the other divisions of the Bureau of Employment Programs to provide job placement services for injured employees. The Fund shall develop and cultivate other cooperative programs with other human service agencies and organizations both public and private to maximize the availability of services to the industrially injured.

§85-12-11. Preexisting rehabilitation plans.

Nothing in this rule shall prohibit the completion of vocational rehabilitation plans approved prior to the effective date of this rule. Injured workers referred for vocational rehabilitation services after the effective date of this rule shall be provided services consistent with this rule.

§85-12-12. Severability

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

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

SERIES 12
VOCATIONAL AND PHYSICAL REHABILITATION

INDEX

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Vocational and Physical Rehabilitation

Type of Rule: X Legislative _____ Interpretive _____ Procedural

Agency Bureau of Employment Programs
Workers' Compensation Division Address Post Office Box 3824

Charleston, WV 25338

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

2. Explanation of above estimates:

This rule will not affect the Division's administrative budget as the Division believes it is presently adequately staffed or has contracted staff unavailable to implement this rule.

3. Objectives of these rules:

To provide for an efficient and effective physical and vocational rehabilitation program the purpose of which is to return previously injured workers to their prior employment or to new employment.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

As the Division is a special revenue agency, there will not be an economic impact upon state government.

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

An effective return to work program for injured workers will result in savings to the state's employers in terms of lesser rates of premiums that will be charged. This is because less permanent total disability life awards and smaller permanent partial disability awards could be granted. Injured workers will benefit by being returned to productive work at higher incomes than they would receive without rehabilitation.

C. Economic Impact on Citizens/Public at Large.

As employers bear less costly premiums and employees return to more productive work, the state's economy should be favorably impacted.

Date: MAY 1, 1991

Signature of Agency Head or Authorized Representative

Andrew N. Richardson
Commissioner

Workers' Compensation Fund
601 Morris Street
Charleston, West Virginia 25301-1416

April 30, 1991

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, W. Va. 25305

Dear Secretary Hechler:

RE: Filing of Proposed Legislative Rule, Title 85, Series 12; "Vocational and Physical Rehabilitation"

Pursuant to West Virginia Code, §5F-2-2(a)(12), please consider this letter to be my written approval of the above noted proposed legislative rule.

With much appreciation for your assistance in this matter, I remain

Very truly yours,

John M. Ranson
Secretary

JMR/jhk

Workers' Compensation Fund
601 Morris Street
Charleston, West Virginia 25301-1416

SUMMARY OF PROPOSED

LEGISLATIVE RULE

VOCATIONAL AND PHYSICAL REHABILITATION

TITLE 85, SERIES 12

This proposed legislative rule establishes the requirements and procedures to be followed by the Workers' Compensation Division, parties to claims pending before the division, health care providers, vocational professionals, and others involved in the delivery or proposed delivery of physical or vocational rehabilitation of claimants pursuant to West Virginia Code, §23-4-9. Other types of health care services provided or proposed to be provided to claimants under other provisions of West Virginia Code, §23-4-3, are not within the scope of this rule.

The purpose of the program to be implemented by the rule is to return previously injured workers to productive work, thus avoiding relegating such workers to less productive employment or to subsistence on an award from the division. The rule establishes as a priority the returning of the worker to his or her previously held job with the preinjury employer. If that is not possible, then other alternatives are listed in priority order.

The rule provides for reimbursement to the providers of physical and vocational rehabilitation services, for the evaluation of the injured worker with regard to the possible benefits of a rehabilitation effort, the developement of an individually crafted rehabilitation plan, and for the payment of temporary partial rehabilitation benefits or temporary total benefits during the course of the rehabilitation effort.

Registration of providers is required. The rule requires cooperation between the division and the division of rehabilitation services where feasible. Finally, the rule validates previously existing rehabilitation plans and contains a severability clause.