# WEST VIRGINIA
# SECRETARY OF STATE
## JOE MANCHIN, III
# ADMINISTRATIVE LAW DIVISION

Form #5

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2004 APR -5 P 1:51

OFFICE 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 Commission TITLE NUMBER: 85

CITE AUTHORITY: W.Va. Code §23-1-1a(j)(3), 23-4-9(b) & -(e)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W.Va. Code §23-1-1a(j)(3)

AMENDMENT TO AN EXISTING RULE: YES X NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 15

TITLE OF RULE BEING AMENDED: "Vocational and Physical Rehabilitation"
*Repeal and Replacement

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS May 5, 2004

Authorized Signature

# WEST VIRGINIA
# SECRETARY OF STATE
## JOE MANCHIN, III
# ADMINISTRATIVE LAW DIVISION

Form #1

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2003 DEC 31 A 10:38

OFFICE WEST VIRGINIA SECRETARY OF STATE

## NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W.Va. Code §23-1-1a(j)(3), 23-4-9(b) & (e)

AMENDMENT TO AN EXISTING RULE: YES X* NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 15

TITLE OF RULE BEING AMENDED: "Vocational and Physical Rehabilitation"
* Repeal and replacement.

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ____

TITLE OF RULE BEING PROPOSED: ____

DATE OF PUBLIC HEARING: February 18, 2004 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia

The comment period for this rule ends on February 18, 2004, at the close of this hearing.

COMMENTS LIMITED TO: ORAL ____, WRITTEN ____, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T. J. Obrokta, General Counsel
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304
Fax # 304-926-5372

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

# WEST VIRGINIA
# SECRETARY OF STATE
## JOE MANCHIN III
# ADMINISTRATIVE LAW DIVISION

Form #2

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2004 FEB 20 P 2:37

OFFICE WEST VIRGINIA
SECRETARY OF STATE

## NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

**AGENCY: Workers' Compensation Commission** **TITLE NUMBER: 85**

**RULE TYPE: Exempt Legislative** **CITE AUTHORITY: §§23-1-1a(j)(3); 23-4-9(b) & -(e)**

**AMENDMENT TO AN EXISTING RULE: YES X* NO**

**IF YES, SERIES NUMBER OF RULE BEING AMENDED: 15**

**TITLE OF RULE BEING AMENDED: "Vocational and Physical Rehabilitation" * Repeal and replacement.**

**IF NO, SERIES NUMBER OF 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 **March 4, 2004** AT **5:00 p.m.** ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Note: This Notice serves as an **extension of the public comment** period, which expired on February 18, 2004.

T. J. Obrokta, General Counsel

Workers' Compensation Commission

4700 MacCorkle Avenue, S.E.

Charleston, WV 25304

Fax # 304-926-5372

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

Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

WCC Insuring a Working West Virginia
Workers' Compensation Commission
Gregory A. Burton, Executive Director

4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone: (304) 926-1710

December 31, 2003

The Honorable Joe Manchin III
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 15
"Vocational and Physical Rehabilitation"

Dear Secretary Manchin:

Please consider this letter to be my written approval for the filing of the above-noted proposed Rule.

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission have approved the enclosed 85 C.S.R. 15 entitled, "Vocational and Physical Rehabilitation," for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

**SUMMARY OF PROPOSED RULE**
**STATEMENT OF CIRCUMSTANCES**
**TITLE 85, SERIES 15**
**Vocational and Physical Rehabilitation**

This rule is a repeal and replacement of a rule of the former Workers' Compensation Division of the Bureau of Employment Programs entitled, 85 C.S.R 15, "Vocational and Physical Rehabilitation", filed April 12, 1994, and effective July 1, 1994. The proposal also repeals and replaces section 14.13, "Payment for physical or rehabilitation services, or appliances," of WV 85 CSR 1, "Administration Of The Workers' Compensation Fund," filed April 15, 1986, and effective July 1, 1986.

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission was created, effective October 1, 2003, as a stand-alone agency of State government. Under that Bill, the Commission is required to revise each of its rules prior to July 1, 2006.

This exempt legislative rule establishes the requirements and procedures to be followed by the West Virginia Workers' Compensation Commission, parties to claims pending before the Commission, health care providers, vocational professionals, and others involved in the delivery or proposed delivery of physical or vocational rehabilitation services to claimants pursuant to W. Va. Code §23-4-9.

The rule was revised to comply with the Legislative directive.

**FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES**

Rule Title: Title 85 Series 15: Vocational and Physical Rehabilitation

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Avenue, S.E.

Charleston, WV 25301

**1. Effect of Proposed Rule**

| | Annual | | Fiscal Year | | |
|---|---|---|---|---|---|
| | INCREASE | DECREASE | CURRENT | NEXT | THEREAFTER |
| ESTIMATED TOTAL COST | Unknown | Unknown | Unknown | Unknown | Unknown |
| PERSONAL SERVICES | Increase | Increase | Increase | Increase | Increase |
| CURRENT EXPENSE | 0 | 0 | 0 | 0 | 0 |
| REPAIRS & ALTERNATIONS | 0 | 0 | 0 | 0 | 0 |
| EQUIPMENT | 0 | 0 | 0 | 0 | 0 |
| OTHER: Claims expense | Decrease | Decrease | Decrease | Decrease | Decrease |

**2. Explanation of above estimates:**

Implementation of the proposed rule changes may require additional personnel to coordinate and track the rehabilitation services provided to injured workers including, but not limited to, compliance with the rehabilitation plan, review of limitations of services and benefits provided and review of overhead items and services to be excluded from payment as mandated by the proposed rule changes. Also, a possible reduction in total temporary disability benefits may result from injured workers returning to work sooner as a result of a more effective delivery of physical and vocational rehabilitation services or as a result of an injured worker failing to sign a rehabilitation plan without good cause. There is no historical data readily available to estimate the additional personnel expenses or to determine the potential reduction in benefits paid. Therefore, it cannot be reasonably determined what amount of additional personnel services costs will be incurred or to estimate the amount of savings in claims expense that will be realized as a result of the proposed rule changes.

Rule Title: Title 85 Series 15: Vocational and Physical Rehabilitation

**3. Objectives of this rule:**

This rule establishes the policy and procedure of the Workers' Compensation Commission related to assisting workers to return to suitable gainful employment after injury and monitoring the rehabilitation process.

**4. Explanation of Overall Economic Impact of Proposed Rule.**

**A. Economic Impact on State Government.**

It is expected that this rule will increase the administrative expenses of tracking and maintaining the rehabilitation process of the affected claims while potentially reducing the amount of temporary total disability benefits paid on these same claims.

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

It is expected that employers who cooperate with the rehabilitation plan will benefit by minimizing the costs associated with work-related injuries. Injured workers will benefit by being returned to the workforce in the most effective manner and/or being awarded appropriate disability benefits.

**C. Economic Impact on Citizens/Public at Large.**

This rule will not have a direct economic impact on the citizens of West Virginia.

**Date:** December 31, 2003

**Signature of Agency Head or Authorized Representative**

Gregory A. Burton

**Gregory A. Burton**
**Executive Director, Workers' Compensation Commission**

# TITLE 85
# EXEMPT LEGISLATIVE RULE
# WORKERS' COMPENSATION COMMISSION
# SERIES 15
# VOCATIONAL AND PHYSICAL REHABILITATION

## §85-15-1. General.

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

1.2. Authority. -- W. Va. Code § 23-4-9(b) and (e). Pursuant to W.Va. Code Section 23—1a(j)(3), rules adopted by the Workers' Compensation Board of Managers are not subject to legislative approval as would otherwise be required under W.Va. Code Section 29A-3-1 *et seq*. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal of former rule. -- Section 14.13, "Payment for physical or rehabilitation services, or appliances," of WV 85 CSR 1, "Administration Of The Workers' Compensation Fund," filed April 15, 1986, and effective July 1, 1986, is hereby repealed. To the extent any other 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, then such provision is repealed and replaced by the provisions of this exempt legislative rule. WV 85 CSR 15, "Vocational and Physical Rehabilitation", filed April 12, 1994, and effective July 1, 1994, is hereby repealed and replaced by the provisions of this exempt legislative rule.

## §85-15-2. Purpose of Rule; Cooperation.

2.1 It is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after a compensable injury. The optimal goal of the rehabilitation process should be to achieve the goals of the priority hierarchy set forth in Section 4.1. -In order to assist injured workers to return to such employment and to encourage and assist employers in providing suitable gainful employment to injured employees, it shall be a priority of the Commission to achieve early identification of individuals likely to need rehabilitation services and to

assess/evaluate the rehabilitation needs of these injured workers. It shall be the goal of the Commission and all interested parties 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 gainful 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. It is the shared responsibility of the employer, the employee, the physical rehabilitation service provider, the qualified rehabilitation professional, the treating physician(s) and the Commission to cooperate in the development of a rehabilitation process designed to promote re-employment for the injured employee.

2.2. Every injured worker and his or her employer are required pursuant to this rule to participate in rehabilitation evaluations, and the development, implementation, and completion of rehabilitation plans. Additionally, the Commission, the injured worker, his or her employer, his or her treating physician(s), the physical rehabilitation service provider, and the qualified rehabilitation professional are required to share in the responsibility for the success of the individual injured worker's rehabilitation.

2.2.1. Injured workers who cooperate with the rehabilitation evaluation process, fully participate in authorized rehabilitation plans, and show satisfactory progress toward completion of the plan are eligible to receive temporary total rehabilitation or temporary partial rehabilitation benefits. An injured worker who fails, without a showing of good cause, to participate in a rehabilitation evaluation, to participate in an authorized rehabilitation plan, or fails to show satisfactory progress toward completion of the plan, may be denied any applicable form of benefits or may have temporary rehabilitation benefits suspended effective the date the worker ended his or her participation in the rehabilitation plan, ceased to be cooperative in and/or comply with the rehabilitation plan, or ceased making satisfactory progress toward completion of the plan. The determination of whether a claimant is making satisfactory progress, within the meaning of this section, shall be within the sole discretion of the Commission.

2.2.2. In determining whether an injured worker has cooperated in and/or complied with the rehabilitative effort, the following standards are to be used:

a. Whether medical, physical rehabilitation and/or and vocational opinion substantially concur that the treatment, service, or program is indicated to bring about a return to employment;

b. Whether it is reasonably safe and not attended by unusual suffering or risk for the injured worker to participate;

c. Whether it is likely that the treatment, service, or program will produce measurable physical and/or vocational improvement; and

d. Whether a person of ordinary prudence and courage would participate in the treatment, service, or program for his or her own betterment, regardless of compensation.

2.2.3. Employers who cooperate with the rehabilitation assessment/evaluation process and fully participate in authorized rehabilitation plans benefit from the rehabilitation process by minimizing the costs associated with work-related injuries. The Commission must consider an

employer's workers' compensation vocational rehabilitation record in assigning an experience rating if the employer is a subscriber and in establishing and reviewing a security requirement if the employer is self-insured, to the extent allowed by legislative rules governing ratemaking and underwriting practices and Chapter 23 of the West Virginia Code. Employer's cooperation regarding rehabilitation efforts and plans includes, but is not limited to: full participation in the rehabilitation evaluation, reasonable efforts to provide reemployment opportunities to injured workers upon full release or release with restrictions, reasonable efforts to provide assistance to the injured worker returning to transitional, part time, modified or alternate employment.

2.2.4. This rule establishes the minimum standard for an employer providing assistance to an injured worker to return to employment; it is not intended to limit additional assistance an employer may provide a worker.

2.3. In making a ruling that a party has failed to cooperate or comply, the Commission shall issue a protestable order. Where there are disagreements between the injured worker, the employer, or the Commission so as to cause the filing of a protest, the parties are encouraged to utilize the mediation process provided for by W. Va. Code §23-5-9(b).

2.4 Physicians and other health care providers are also responsible for assisting and encouraging injured workers to return to suitable gainful employment and providing assistance to employers in determining accommodations for each injured worker. Physician and other health care provider cooperation regarding rehabilitation efforts and plans includes, but is not limited to: the rehabilitation evaluation, full participation in providing updated medical documentation pertaining to current and anticipated treatment plans and restrictions to the Commission, injured worker, employer, and other treating or consulting physician or other health care provider, encouraging and participating in communications between the injured worker and his or her employer, familiarity with the injured worker's essential job functions, cooperating with and timely responding to rehabilitation providers, and provision of medical documentation to assist in returning to transitional, part-time, modified or alternate employment. Failure by a physician or other health care provider to cooperate in rehabilitation efforts may result in suspension or termination of the physician or health care provider pursuant to West Virginia Code Section 23-4-3c ~~of WV Code~~.

2.5 Providers of vocational rehabilitation services and qualified rehabilitation professionals are ~~responsible for assisting and encouraging~~ encouraged to assist injured workers, employers, physicians and other health care providers to fully participate and cooperate in the rehabilitation process. The providers and qualified rehabilitation professional must be knowledgeable of all applicable legislative rules, exempt legislative rules, and statutory requirements that relate, in any way, to the provision of rehabilitation services. Failure of a vendor and/or a qualified rehabilitation professional to be fully cooperative in the rehabilitation process may result in suspension or termination of the vendor and/or qualified rehabilitation provider and/or his/her employer/primary contractor pursuant to West Virginia Code Section 23-4-3c.

**§85-15-3. Definitions.**

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

3.1. "Executive Director" means the executive director of the West Virginia Workers' Compensation Commission pursuant to W.Va. Code §23-1-1b.

3.2. "Commission" means the West Virginia Workers' Compensation Commission as provided for by W. Va. Code §23-1-1.

3.3. "Injury" and derivative words have the meaning ascribed to the term "injury" by W. Va. Code §23-4-1.

3.4. "Injured worker" and "claimant" mean an employee entitled to workers' compensation benefits as the result of a work-related injury, as provided under W. Va. Code §23-4-1.

3.5. "Injured worker's employer" or "employer" means an employer charged, pursuant to Chapter 23 of the West Virginia Code and applicable rules and regulations, for the work-related injury and any physical and/or vocational rehabilitation associated with the injury.

3.6 "Suitable gainful employment" means employment which restores the injured worker as closely as possible to his or her pre-injury physical demand level and pre-injury level of earnings at the time of injury, or, if this is not possible, suitable gainful employment means other work for which the employee is, or may become, suited by training, experience, or education, but not limited by his or her previous level of earnings.

3.7 "Physical rehabilitation services" means physician ~~prescribed~~ approved health care services, which will likely increase the injured worker's ability to return to suitable gainful employment. Physical rehabilitation services include but are not limited to work hardening and work conditioning programs.

3.8 "Physical rehabilitation services provider" means a provider of health care services, provided the provider is:

3.8.1. A medicare certified rehabilitation agency;
3.8.2. A certified outpatient rehabilitation facility;
3.8.3. A duly licensed health care practitioner;
3.8.4. A physical rehabilitation hospital; or
3.8.5. A duly licensed acute care hospital.

3.9. "Physical rehabilitation hospital" means any of the following institutions or facilities:

3.9.1. 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; and that, for its in-patient services, obtains on or before December 31, 1994, and thereafter maintains accreditation from the Joint Commission on Accreditation of Health Care Organizations and,

further, on or before July 1, 1995, obtains and thereafter maintains accreditation from the Commission on the Accreditation of Rehabilitation Facilities.

3.9.2. A distinct 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

3.9.3. A facility operated by the West Virginia Division of rehabilitation services.

3.10. "Work Conditioning" means an intensive, work-related, goal-oriented conditioning program designated specifically to restore systemic neuromusculoskeletal functions (eg strength, endurance, movement, flexibility, motor control) and cardiopulmonary functions. The objective of the work conditioning program is to restore physical capacity and function to enable the injured worker to return to work. Programs are typically but not always ~~up to~~ greater than two (2) and less that four (4) hours per day, five (5) days per week and for a period of four (4) to eight (8) weeks in duration.

3.11. "Work Hardening" means a highly structured, goal-oriented, individualized progressive and supervised treatment program designed to return the client to work. Work hardening programs, which are often interdisciplinary in nature, use real or simulated work activities designed to restore physical, behavioral, and vocational functions. Work hardening addresses issues of productivity, safety, physical tolerances, and work behaviors. Programs are typically but not always ~~up to~~ greater than four (4) and less than eight (8) hours per day, five (5) days per week, and a period of four (4) to eight (8) weeks in duration.

3.12 "Assistive devices" means physical aides, appliances or mechanical devices that will increase the injured worker's independence or provide assistance in performing an essential job task to facilitate a return to suitable gainful employment.

3.13 "Vocational rehabilitation services" means professional services available to the injured worker under WV Code 23-4-9 which are reasonably necessary to enable ~~an~~ him/her to return to suitable gainful employment as soon as practical. This may include, but is not limited to, coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, job development and job placement. Furthermore, "vocational rehabilitation service" means services covered by West Virginia Code Section 23-4-9, which provide new skills or modified work to enable an injured worker to return to suitable gainful employment as soon as practical. Services may include, but are not limited to, Adult Basic Education, vocational-technical training, college training, on-the-job-training, travel expenses related to training, job modifications and placement tools.

3.14 "Vocational rehabilitation service providers" means licensed professionals, public agencies, companies and corporations which provide injured workers vocational rehabilitation services as defined in section 3.13 of this rule.

3.15 "Qualified rehabilitation professional" means a person who meets the criteria set forth in 85 CSR 27, Qualified Rehabilitation Professional.

3.16 "Rehabilitation plan" means a plan or a modified plan for physical and/or vocational rehabilitation designed to facilitate the injured worker's return to work developed in accordance with this rule by a qualified rehabilitation professional and approved by the Commission.

3.17 "Vocational evaluation" means a systematic evaluation of the injured worker's skills, aptitudes, interests and functional ability through standardized testing and may include work samples. A vocational evaluation may be used when an injured worker has a limited work history, limited perceived interests, suspected cognitive impairment or when additional information is required regarding the injured worker's transferable skills for appropriate rehabilitation plan development.

3.18 "Job analysis" means a systematic assessment of a specific job including essential functions, the physical and/or cognitive requirements, working conditions, work site structure/layout, tools and equipment used, required skills/abilities, and/or any other characteristic that may be pertinent to performing the job.

3.19 "Job development" means the process of consultation with employers and the development of job opportunities in a comprehensive, professional manner. The intent is to establish continuing and mutually beneficial relationships with potential employers through selective placement, job modification, and adjustment counseling. Job development activities should provide clients with an opportunity to reach their employment potential.

3.20 "Job placement services" means professional activities involved in assisting individuals to seek, obtain and maintain appropriate employment. It may include guidance in vocational decision making; a transferable skills analysis, training in job-seeking skills; supportive counseling; identifying job leads; negotiating with employers, supervisors and co-workers; and providing post-employment and follow-up services.

3.21 "Job seeking skills training" means teaching the injured worker how to obtain employment. Topics to be included in job search skills training include but are not limited to development of a resume, how to use a resume, completing applications, utilizing the want ads, cold calling techniques, networking, interviewing, cover and thank you letters, appropriate attire/hygiene, and tracking and developing job leads.

3.22 "Labor market survey" means an analysis of availability of jobs within a reasonable geographic region. The conclusions are based upon accumulation of data through employer contacts, review of help wanted listings, and use of published census wage and employment statistics. The survey is conducted considering employers within a reasonable distance of the injured worker's residence. The purpose is to determine if a proposed rehabilitation plan being considered has a reasonable likelihood of success.

3.23 "On-the-job-training" means a structured program under which an individual, over a specific vocational preparation period of time, learns a trade, business or occupation that will

ultimately result in gainful alternative re-employment that is consistent with the claimant's acquirable skills and residual physical capabilities ~~in an employment setting~~. Each training program, and the employer providing the training must be approved on a case-by-case basis by the Commission.

3.24 "Adult Basic Education" means a training service to assist an individual in acquiring the academic skills necessary to compete in a job or educational setting. This service may include GED preparation and testing, computer skills enhancement, or developmental skills courses. Remedial instruction must be from an accredited academic, business or vocational school. Remedial services on a part time basis are permitted so long as the injured worker's participation in plan services, in conjunction with other approved vocational rehabilitation services, are equal to full time. Return to work plan documentation is required from the qualified rehabilitation professional regarding the injured worker's current academic standing, the academic goal and the specific plan steps necessary to reach that goal.

3.25 "Vocational -Technical training"- means formal instruction to provide an individual specific mechanical or industrial skills or technical expertise to be applied to an occupation or trade. Vocational-technical schools or community colleges not already accredited by the North Central Association of Colleges and Schools Commissions on Institution of Higher Learning or approved by the State Dept. of Education must be individually approved by the Commission.

3.26 "College training" means academic education to prepare an individual for an occupation of a professional or technical nature through a college or university accredited by the North Central Association of Colleges and Schools Commission on Institutions of Higher Learning.

3.27 "Placement Tools" means tools and or equipment or other adaptive devices necessary to return an injured worker to employment or to enable participation in an approved program such as on the job training or formal training.

3.28 "Transferable skills analysis" means a process by which jobs are identified that are consistent with the injured worker's capabilities, skills, and residual physical abilities.

**§85-15-4. Priorities.**

4.1. Vendors of vocational rehabilitation services and qualified rehabilitation professionals must utilize the following priorities. No higher numbered priority may be utilized unless the Commission has determined all lower numbered priorities are unlikely to result in placement of the injured worker into suitable gainful employment. If a lower numbered priority is clearly inappropriate for the injured worker, the next higher numbered priority must be considered. The rehabilitation plan must explicitly state the reasons and rationale for the rejection of any lower numbered priority. The priorities are as follows:

4.1.1. Return to the same employer and pre-injury job;

4.1.2. Return to the same employer and pre-injury job with modification;

4.1.3. Return to the same employer in a different position;

4.1.4. Return to the same employer in a different position with on-the-job-training;

4.1.5. Employment by a new employer without retraining;

4.1.6. Employment by a new employer with on-the-job-training;

4.1.7. Enrollment of the injured worker in a retraining program which consists of a goal-oriented period of formal retraining designed to lead to suitable gainful employment in the labor market.

**§85-15-5. Identification of Rehabilitation Candidates; the Rehabilitation Assessment/ Evaluation Process.**

5.1. The Commission may, in its sole discretion, determine whether a claimant would be assisted in returning to suitable gainful employment with the provision of rehabilitation services.

5.2. The Commission may authorize a rehabilitation evaluation by a qualified rehabilitation professional of its sole choosing to determine whether physical and/or vocational rehabilitation services are appropriate for an injured worker. No provider is entitled to referrals from the Commission, the Commission is in no way required to adopt any referral method or system designed to include any or all of the vocational rehabilitation service providers or qualified rehabilitation providers, and the Commission has the sole discretion in the assignment of any referrals for an evaluation unless the employer has designated one or more preferred rehabilitation providers approved by the Commission pursuant to West Virginia Code Section 23-4-9, or has contracted with one or more rehabilitation providers as a part of a managed health care plan pursuant to West Virginia Code Section 23-4-3.

5.3 The rehabilitation evaluation process is comprised of a series of steps, as set forth in the following subsections.

5.3.1 Once referred to a vocational rehabilitation service provider or qualified rehabilitation professional, a qualified rehabilitation professional shall conduct a rehabilitation evaluation. In doing so, a qualified rehabilitation professional must: 1) conduct a personal interview of the injured worker; 2) contact, by telephone or otherwise, the injured worker's employer to ascertain return to work options and otherwise discuss the case; 3) obtain necessary input from the injured worker's attending physician and other treatment providers (with the written permission of the injured worker); and 4) analyze information about the injured worker's medical, educational, vocational, social, legal, and economic circumstances, including present physical and mental ability to participate in vocational rehabilitation services. The evaluation may also include

additional vocational testing if the qualified rehabilitation professional opines that the testing is warranted in order to provide a full evaluation and the Commission preauthorized the additional testing. The qualified rehabilitation professional must then decide and report in the form of a rehabilitation evaluation report, the format of which and method of transmission of which shall be approved by the Commission, as to whether the injured worker is likely to benefit from vocational rehabilitation services based upon the rehabilitation evaluation. The qualified rehabilitation professional must also report whether or not the evaluation was complete, and if not why not, and whether the injured worker, the injured worker's employer, or the injured worker's attending physician and other treatment providers cooperated in the process and must state the facts that form the basis of the conclusion.

5.3.2 The qualified rehabilitation professional must issue the rehabilitation evaluation report to the Commission with copies to the parties within ~~forty-five (45)~~ sixty (60) days of receipt of the ~~after the date of the~~ referral. A proposed rehabilitation plan, signed by the qualified rehabilitation professional and preferably the injured worker~~, and, preferably,~~ the injured worker's employer, may be included with the rehabilitation evaluation report. Upon receipt, the Commission may approve the plan as submitted, request modifications to the plan, or request plan development. Failure to provide the rehabilitation evaluation report within ~~forty-five (45)~~ sixty (60) days of receipt of the referral shall cause a 10% reduction in the agreed to fee due and owing the vocational rehabilitation service provider or the qualified rehabilitation provider. Failure to provide the rehabilitation evaluation report within ~~sixty (60) days~~ninety (90) days of receipt of the referral shall cause a 20% reduction in the original agreed to fee due and owing the vocational rehabilitation services provider and/or the qualified rehabilitation provider. Finally, failure to provide the rehabilitation evaluation report within ~~ninety (90)~~ one hundred twenty (120) days of receipt of the referral shall result in no payment for the referral and shall require the vocational rehabilitation services provider and/or the qualified rehabilitation provider to immediately return the referral to the Commission.

5.3.3 The purpose of a rehabilitation plan is to clearly identify the return to work objectives and to describe action steps to assist the injured worker in returning to suitable gainful employment. The following standards apply.

5.3.4 The injured worker is an active participant in rehabilitation plan development.

5.3.5 The plan must be signed by the injured worker and the qualified rehabilitation professional for the plan to be implemented. Failure to sign a plan the injured worker has actively participated in developing, without good cause, as determined in the sole discretion of the Commission, shall cause the suspension of all benefits payable to the claimant until such time as the plan is signed. The claimant is not entitled to the lost benefits upon signing the plan. The Commission shall reject the proposed plan based upon the claimant's failure to cooperate if the claimant refuses to sign the plan and will thereafter, within fifteen (15) days of such acceptance or rejection issue a protestable order within fifteen (15) days.

5.3.6 The plan must clearly outline the specific goals and actions required to achieve the goals.

5.3.7 The plan must identify the respective responsibilities, if any, of the injured worker, the employer , the physician, the qualified rehabilitation professional, the Commission, and other parties involved in the claim.

5.3.8 The time frames for completion of the plan must be specified.

5.3.9 The qualified rehabilitation professional must provide a plan justification explaining the need for rehabilitation services.

5.3.10 The qualified rehabilitation professional must provide plan rationale explaining how the goal was selected.

5.3.11 The qualified rehabilitation professional must describe placement prospects and earnings potential.

5.3.12 Criteria for completion and termination of the plan must be fully defined.

5.3.13 Costs associated with the services to be provided and the periods of temporary indemnity are to be listed in the plan.

5.3.14 The plan must be served upon the Commission and all parties to the claim by the qualified rehabilitation professional.

5.3.15 A rehabilitation plan must require that all vocational rehabilitation services be delivered by providers registered under the provisions of section 9 of these rules. Except with the prior consent of the Commission, no other providers may deliver ~~physical and/or~~ vocational rehabilitation services to an injured worker ~~unless the injured worker is~~ under an approved rehabilitation plan. The Commission's consent to utilize unregistered providers will not be given except upon a showing that an appropriate registered provider is not reasonably available to the injured worker. To the extent it is economically and otherwise feasible, providers who are located in the injured worker's geographic area and within the state of West Virginia are to be given preference. In-state providers and out-of-state providers are both to be compensated pursuant to section 10 of these rules.

5.3.16 A rehabilitation plan that provides for vocational retraining must give preference to schools and training facilities located in the injured worker's geographic area, thereby reducing the need for the injured worker to travel extensively or to relocate. A plan may be denied by the Commission if it concludes, in its sole discretion, that the plan requires the injured worker to travel excessively or to locations unreasonably distant from his or her home.

5.3.17 Any rehabilitation plan developed and implemented under this rule is subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision there under, or to any court or administrative order applying specifically to the injured worker's employer, and will further be subject to any applicable federal statutes or regulations.

5.4 The Commission shall enter a protestable order, within twenty (20) days of receipt of the finalized rehabilitation plan signed by the qualified rehabilitation professional and the injured worker.

**§85-15-6. Implementation of the Rehabilitation Plan.**

6.1 Although an employer is permitted to object to the plan pursuant to section 5.4 of this rule, the implementation of the plan will proceed notwithstanding the objection. In the event that the employer is successful in challenging the plan, the employer's account will be adjusted to reflect the appropriate charge associated with the rehabilitation plan. In the event the plan has not been completed at the time of the ultimate decision on the protest, the plan will be modified, if necessary, to conform with the ultimate decision.

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

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

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

6.2.3. A finding that an injured worker ~~or the injured worker's employer~~ is not cooperating with a plan;

6.2.4 A finding that the rehabilitation plan is no longer necessary for the injured worker's re-employment;

6.2.5 A finding that a change in economic conditions has caused the rehabilitation plan to be inappropriate.

6.2.6 A finding that the injured worker's employer is not cooperating and the failure to cooperate is an impediment to plan completion shall result in plan modification as necessary to accomplish the rehabilitation goal.

6.3. All physical and/or vocational rehabilitation services must be delivered in accordance with the rehabilitation plan developed under section 5 of this rule. The Commission may authorize the qualified rehabilitation professional to monitor compliance with and progress under the rehabilitation plan. Once authorized, the qualified rehabilitation professional must contact the injured worker and all other participating parties on a regular basis to monitor compliance with and progress under the plan. Report of these contacts must be submitted to the Commission in thirty (30) day intervals, unless otherwise directed by the Commission. Failure to so report may result in the denial of payment for services provided during the ~~30~~ thirty (30) days and thereafter until the required report is received.

6.4 In the event it is later determined the rehabilitation services provided will not meet the goal of the plan, the vocational rehabilitation service provider and/or the qualified rehabilitation professional must notify the Commission and recommend plan modifications as appropriate.

6.5 If the injured worker is not compliant with the rehabilitation plan, or is not making satisfactory progress under the plan, the vocational rehabilitation service provider and/or the qualified rehabilitation professional must immediately notify the Commission. The determination of whether satisfactory progress is being made shall be a collaborative effort involving the Commission and the vocational rehabilitation services provider. Failure to notify the Commission may result in a closing of the file, a mandated return of the file to the Commission, the finding of an overpayment to the vocational rehabilitation service provider and/or qualified rehabilitation service provider in an amount equal to the sum of all services provided to date on the file.

6.6 If, based upon reports of the qualified rehabilitation professional or other reliable evidence, the injured worker is not compliant with the rehabilitation plan, or is not making satisfactory progress under the plan, in the sole discretion of the Commission, all benefits payable to the injured worker may be suspended until such time as the injured worker becomes compliant or begins to make satisfactory progress under the plan.

**§85-15-7. Payment of Indemnity Benefits.**

7.1. In every case in which the Commission authorizes physical and/or vocational rehabilitation services pursuant to a rehabilitation plan, and the implementation of that plan has begun, the injured worker ~~may~~, shall, if otherwise appropriate under applicable law, receive temporary total rehabilitation disability benefits or temporary partial rehabilitation benefits as provided in West Virginia Code Section 23-4-9.

7.2 As part of a rehabilitation plan, an injured worker may return to work at an alternate, modified or transitional work assignment on a temporary basis. The duration of the temporary work must be determined on a case-by-case basis by the qualified rehabilitation professional and be justified in the rehabilitation plan.

7.2.1. Whenever it is proposed that an injured worker return to work under section 7.2 of this rule, the employer, with the assistance of the qualified rehabilitation professional, must furnish the injured worker's treating physician, the Commission and all parties to the claim a statement describing the work in terms that will enable the physician to relate the essential tasks, and other material job functions, of the job to the injured worker's functional abilities. The treating physician must then advise the qualified rehabilitation professional within fifteen (15) working days of receipt of information pertaining to the essential tasks of the job whether the injured worker is physically capable of performing the work described. When the information is furnished to the treating physician and the employer, the qualified rehabilitation professional shall inform the treating physician that the failure to respond within the time allotted may result in the Office of Medical Services review of the job description and issuance of a functional ability opinion. The injured worker may consent to undertake the work assignment without the approval of his or her treating physician. In cases where the injured worker has no treating physician or in cases in which

the treating physician has not fully cooperated in the rehabilitation process, the Commission's independent medical evaluator, including its Office of Medical Services, may review job descriptions and provide a functional ability opinion.

7.2.2 Upon undertaking employment under section 7.2 of this rule, the injured worker's temporary total disability benefits, if any, will be terminated and he or she may become eligible for temporary partial rehabilitation benefits, if applicable under section 7.3 of this rule. If the work impedes the injured worker's recovery to the extent that he or she cannot continue to work or if his or her compensable condition worsens due to the work being performed, the temporary total payments, if applicable, ~~may~~, shall, if otherwise appropriate under applicable law, be resumed when objective medical documentation is presented to the Commission directly relating the inability to work due to the compensable injury or results thereof. If the work ends or is no longer otherwise available, the Commission shall decide whether the injured worker has sufficiently recovered to permit the injured worker to return to his or her usual job or to other available work, or if other rehabilitative services are required to return the injured worker to employment. Benefits will not be reinstated solely because of lay-off or unavailability of work. If the decision is that the injured worker cannot return to employment, temporary total rehabilitation benefits or temporary total disability benefits, whichever applicable and otherwise payable under applicable law, ~~may~~shall be reinstated, if otherwise appropriate, but only for the period authorized by law.

7.3. If the injured worker, pursuant to a rehabilitation plan, returns to employment with the same employer or a new employer in either a full time or part time capacity, and to either gainful employment or to a transitional, modified or alternate work assignment, pursuant to section 7.2 of this rule, and if 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, then he or she ~~may~~ shall, if otherwise appropriate under applicable law, be entitled to receive temporary partial rehabilitation benefits. The injured worker's average weekly wage earnings upon return to work for the purposes of section 7.4 will be the injured worker's actual gross earnings, as reported to the state tax department and the federal internal revenue service and substantiated by payroll documentation or other information as requested by the Commission.

7.4. Temporary rehabilitation benefits are calculated, as follows:

7.4.1. The temporary partial rehabilitation benefit is seventy percent (70%) of the difference between the average weekly wage earned at the time of the injury and the average weekly wage earned at the new employment, to be calculated as provided under W. Va. Code §23-4-9(d);

7.4.2. The temporary partial rehabilitation benefits are not subject to the minimum benefit amounts required by the provisions of W. Va. Code §23-4-6(b); and

7.4.3. The temporary partial rehabilitation benefits cannot exceed the temporary total disability benefits to which the injured worker would be entitled pursuant to W. Va. Code §23-4-6, -6d, and -14, during any period of temporary total disability resulting from the injury in the claim. The temporary partial rehabilitation benefits plan must be reviewed at least every ninety (90) days to determine if continuation of such plan is appropriate.

7.5. Temporary partial rehabilitation benefits are only payable during the implementation and successful progress toward completion of a rehabilitation plan. Upon termination of the plan, as provided for under this rule, or upon expiration of the plan, payment of all temporary partial and/or total rehabilitation benefits must be stopped regardless of the injured worker's level of wages.

7.6. Payments of temporary partial rehabilitation benefits for differences of five percent (5%) or less in the pre-injury average weekly wage and the new employment average weekly wage will not be made because the benefit gives no economic incentive to the injured worker and would be administratively too costly.

7.7. The injured worker cannot receive both temporary total disability benefits and temporary partial rehabilitation benefits for the same time period.

7.8. The injured worker can receive both temporary partial disability benefits and permanent partial disability benefits for the same period of time. The limitations on rehabilitation benefits set forth in West Virginia Code Section 23-4-9 and the limitations on temporary total disability benefits set forth in West Virginia Code Section 23-4-6(c) are separate limitations and the receipt of rehabilitation benefits shall not be applied against the limitations on temporary total disability benefits. Likewise, the receipt of temporary total disability benefits shall not be applied against the limitations on rehabilitation benefits.

7.9. The aggregate award of temporary total rehabilitation or temporary partial rehabilitation benefits for a single injury shall be for a period not exceeding fifty-two (52) weeks. That is, an injured worker is entitled to 52 weeks of temporary total rehabilitation benefits and 52 weeks of temporary partial rehabilitation benefits. These limitations do not apply to rehabilitation awards made on or before July 1, 2003.

7.10 If payment of temporary total rehabilitation benefits is in conjunction with an approved vocational rehabilitation plan for retraining, the period of temporary total rehabilitation benefits may be extended for up to an additional fifty-two (52) weeks, but shall never exceed a total of one hundred four (104) weeks.

**§85-15-8. Rehabilitation Closure Report.**

8.1 The qualified rehabilitation professional authorized to assist the injured worker must file a rehabilitation closure report with the Commission and all parties to the claim when it is determined that their involvement in the rehabilitation services are no longer necessary unless otherwise specified by the Commission.

**§85-15-9. Registration of Rehabilitation Providers.**

9.1. Qualified rehabilitation professionals and other vocational rehabilitation vendors must register with the Commission using forms prescribed by the Commission. Any rehabilitation provider who does not meet the requirements set
forth in Rule 27 of Title 85 of the Code of State Rules cannot be accepted for registration.

9.2. The Commission must compile a list of registered qualified rehabilitation services professionals and their qualifications and areas of expertise and specialization. The Commission must use only registered qualified rehabilitation service professionals in making rehabilitation referrals. Rehabilitation services may also be provided by employees of the West Virginia Division of Rehabilitation Services or employees of the Commission. In addition, rehabilitation services providers who are located outside of West Virginia and are in areas in which appropriate services are not frequently used may provide services under these rules on a case by case basis if otherwise qualified.

9.3. All rehabilitation services must be provided in accordance with rehabilitation plans implemented pursuant to these rules and must be monitored by the qualified rehabilitation professional employed by or under contract with the Commission or employed by the West Virginia Commission of rehabilitation services. The Commission must remove or suspend from the list of vendors any provider of rehabilitation services who knowingly fails to comply with the provisions of these rules or a rehabilitation plan, or engages in other practices in violation of W. Va. Code §23-4-3c. Adherance to all applicable Codes of Ethics, including, but not limited to the Codes of Ethics associated with the certifications listed in 85 C.S.R. 27-6.5 is required and a breach of any applicable ethical provision shall be grounds for suspension and/or termination of the provider's right to receive payments from the Commission.

**§85-15-10. Payment for Physical and Vocational Rehabilitation Services.**

10.1. The Commission will pay for physical and vocational rehabilitation services in accordance with the fee schedule in effect at the time the service is rendered, adopted by the Commission pursuant to W. Va. Code §23-4-3 and otherwise as set forth in this rule. To the extent there are inconsistencies between the fee schedule and this rule, this rule shall govern. Only those physical rehabilitation services that are ~~medically~~ reasonable and necessary, in the sole discretion of the Commission, ~~and~~, within the scope of the applicable rehabilitation plan, and otherwise meet the standards as outlined in Sections 3.7 and 2.2.2 of this Rule and 85 C.S.R. 28, Section 9, can be reimbursed pursuant to these rules.

10.2 The following services are considered overhead and the Commission will not pay for these services:

10.2.1 Administrative and supervisory salaries and related personnel expenses;
10.2.2 Office rent;
10.2.3 Depreciation;
10.2.4 Office e~~E~~quipment purchase and rental;
10.2.5 Telephone expense including long distance phone call charges;
10.2.6 Postage
10.2.7 Shipping;
10.2.8 Expendable supplies;
10.2.9 Printing costs;
10.2.10 Copier costs;

10.2.11 Printing of fiche and department electronic files;
10.2.12 Maintenance and repair;
10.2.13 Taxes;
10.2.14 Automobile costs, maintenance, and mileage;
10.2.15 Insurance;
10.2.16 Dues and subscriptions;
10.2.17 Vacation, sick leave, and other expenses of a similar nature;
10.2.18 Internal staffing time;
10.2.19 Filing of material in case files;
10.2.20 Setting up files;
10.2.21 Activities associated with reports other than composing or dictating complete draft of the report (e.g., editing, filing, distribution, revising, typing, mailing, and any other related time spent by the vocational rehabilitation service provider reviewing the work of a qualified rehabilitation provider shall not be paid)
10.2.22 Generating and keeping internal record keeping forms;
10.2.23 Time spent on any administrative and clerical activity, including typing, copying, mailing, distributing, filing, payroll, record keeping, delivering mail, and picking up mail. This does not prohibit reimbursement for actual time spent writing/typing reports to the Commission.
10.2.24 Activities associated with counselors training, general discussions regarding office procedures, internal case file reviews by supervisors, meetings, and seminars;
10.2.25 Unanswered phone calls;
10.2.26 Any other item or service not specifically identified and separately billed;
10.2.27 No payment will be made for reports prepared by physicians and submitted through the counselor; and
10.2.28 No payment will be made for any activity after notification by the Commission of case closure or plan termination, unless a closure report is requested at which time only those charges directly related to the preparation of the closure report will be approved.

10.3 Any bill submitted to the Commission must include the following information:

10.3.1 Claimant's name;
10.3.2 Claimant's claim number
10.3.3 Claimant's social security number;
10.3.4 Dates of service;
10.3.5 Place of service;
10.3.6 Type of service;
10.3.7 Appropriate procedure code(s);
10.3.8 Charge, which must be broken down into $1/10^{th}$ of an hour (6 minute) increments;
10.3.9 Total bill charge;
10.3.10 The name and unique identification number of the qualified rehabilitation provider rendering the service;

10.3.11 Vendor number;
10.3.12 Date of billing;
10.3.13 An itemization of bills on Commission approved forms;

10.4 The expenditure for vocational rehabilitation shall not exceed twenty thousand dollars ($20,000) for any one injured employee. All services approved by the Commission as part of a rehabilitation plan, or the development thereof, shall be included in the twenty thousand dollar ($20,000) limitation, including, but not limited to, the following:

10.4.1 Vocational or on the job training;
10.4.2 Counseling, including all services rendered by a vocational rehabilitation service provider and a qualified rehabilitation professional. Counseling provided by psychiatrist or psychologists shall not be included within the $20,000 limitation. QRP charges for dates of service on or before the effective date of this rule shall not be included within the $20,000 limitation;
10.4.3 Assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification;
~~10.4.4 Physical rehabilitation services~~;
10.4.45 Job placement services;
10.4.56 Other services approved in the sole discretion of the Commission.

10.5 Temporary total disability benefits and temporary partial rehabilitation benefits are not to be included in the twenty thousand ($20,000.00) dollar limitation.

10.6 The Commission cannot reimburse providers for physical rehabilitation services which require prior authorization under the provisions of W. Va. Code §23-4-3, or any rule adopted there under, unless the physical rehabilitation services provider obtains prior authorization.

10.7. In order to obtain reimbursement for services rendered, including the costs of medicines and mechanical appliances or devices, physical and vocational rehabilitation services providers must submit a verified statement on forms (including in electronic format) prescribed by the Commission. The forms must be filed with the Commission within six (6) months after the service is provided or the medicines, mechanical appliances or devices are delivered. Failure to timely submit a reimbursement form bars the provider from any right of recovery from the Commission or any other party including, among others, the injured worker, the applicable employer, or any of their third party health care insurers.

10.8. All physical and vocational rehabilitation service providers are prohibited from making any charge against an injured worker or any other person, firm or corporation for any service rendered as a part of a rehabilitation plan or as a result of a compensable injury. Nothing in this section prevents another agency of any governmental unit, person, firm, corporation, or other entity from agreeing to reimburse a service provider for services rendered.

10.9. In the event that an injured worker insists upon the delivery of a physical and/or vocational rehabilitation service after being advised in writing by the Commission that the service has been determined not to be medically, physically, or vocationally necessary, the provider may

charge the injured worker for the costs of such service notwithstanding the provisions of section 10.8, but only if the provider first informs the injured worker that he or she will be personally responsible for the costs of the service and informs the injured worker as to the amount of the charge. If the injured worker has other health care insurance which will pay for the service described in this section, then the provider may bill that insurer for the service and no provision of these rules prevents the provider from receiving reimbursement under the terms of the insurance policy.

10.10. "Without limiting the general nature of various statutes respecting criminal fraud, and by way of illustration and not in limitation, the following are deemed unlawful acts and practices:

a. Billing for services not actually performed;
b. Billing for expenses not actually incurred;
c. ~~Billing services on dates other than the date on which they were actually performed~~ Billing with incorrect dates of service;
d. Offering consideration of any kind, including gifts, services or gratuities to Commission employees in exchange for or as a past reward for referring cases to the provider;
e. Failing to close claims for rehab services at the earliest practicable date when the claimant can no longer benefit from such services. The rehabilitation professional will be consulted before the claim is closed for the purpose of determining the earliest practicable date of closure;
f. Providing false information in any statement to the Commission, or forging or falsifying any record required to be kept by these Rules or any other statute or rule governing providers; and
g. "Rolling in" unreimbursable time or expenses by adding hours ~~for~~ to billable time or expenses.

10.11. All providers and employers shall retain for five (5) years and provide to the Commission on request and without a subpoena hard copies of the source underlying any bill, invoice, report, etc. submitted to the Fund by electronic or other means.

**§85-15-11. Trial Return to Work**

11.1. The provisions of West Virginia Code Section 23-4-7b regarding trial return to work have been reinstated and will be implemented by the Commission.

**§85-15-12. Employer-Preferred Vocational Rehabilitation Services.**

12.1. Any employer who desires to contract directly with one or more preferred vocational rehabilitation providers to provide vocational rehabilitation services to its injured workers and require its employees to use the preferred provider(s), shall notify the Commission of is contract and designation on forms prescribed by the Commission. Such selected providers must be registered with the Commission as required by Section 85-15-9. Notwithstanding the employer's right to select a preferred provider, the Commission shall remain the sole referral authority. An employer may identify to the Commission claimants whom it wants to be considered for rehabilitation services.

12.2. Upon motion by the injured worker or the employer, or upon its own initiative, the Commission may, with a showing of just cause, assign or reassign the injured worker to a qualified rehabilitation provider other than the provider designated by the employer. Such cause might include, but not be limited to, past or present family or social relationships between the injured worker and the employer's preferred rehabilitation services provider, common financial interests between the injured worker and the employer's preferred rehabilitation services provider, or evidence that the rehabilitation process or provider is not in compliance with this rule.

12.3. All preferred vocational rehabilitation providers shall comply with this Rule and Commission established guidelines, rules, regulations, and policies. Additionally, all preferred vocational rehabilitation providers shall utilize all reporting forms and reporting processes adopted by the Commission.

12.4 A vocational rehabilitation provider must be in good standing with the Commission in order to be designated an/or maintain its designation as a preferred provider. Additionally, the preferred provider shall adhere to the Commission's fee schedule for reimbursement of expenses and any expenses which exceed the fee schedule shall be the sole responsibility of the employer.

**§85-15-13. Severability.**

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

# PUBLIC HEARINGS

85 CSR 15 Rehabilitation
85 CSR 20 Medical Management of Claims

| ATTENDEES | DO YOU DESIRE TO ADDRESS THE BOARD? | | WHICH RULE DO YOU WANT TO ADDRESS: |
|---|---|---|---|
| (1) Martha Mangles | NO | | |
| (2) Bill Hays | NO | | |
| (3) Sue Barber | NO | | |
| (4) Diana Mealey | NO | | N/A |
| (5) Valarie Phillips | YES | ✓ | ✓ 85-CSR-15 |
| Catherine Moorehead | No | | |
| Jared Tully | No | | |
| ~~Joe Carman~~ | NO | | |
| Art Lucy | Yes | ✓ | 85-15 |
| PAUL BAILEY | NO | | |
| Joe Blanser | NO | | |
| LARRY BOGGESS | NO | | |
| TERESA McCallister | NO | | |
| Terri Myers | NO | | |
| Ginny Gruenewald | No | | |
| John Hays | | | |
| Jeff Summers | No | | |
| Kim Estep | NO | | |
| Sonya Moore | No | | |
| Mike Carmichael | N | | |
| Tina Walsh | N | | |
| Adrienne Stahl | N | | |
| Matt Graeff | N | | |
| ~~Karen~~ Burgess | NO | | |
| MARIN HEBIG | NO | | |
| MDREW Rotz | ~~No~~ NO | | Rule 15 |
| Edward Carter | | | |

| ATTENDEE | ADDRESS THE BOARD | Rule # |
|---|---|---|
| (20) Mick Bates | Yes ✓ | 15 + 20 |
| Corey Skiles | No | |
| Jeff Boggess | No | 15 & 20 |
| Michelle Moore | No | 15 + 20 |
| Bridget Zackery | No | 15 + 20 |
| Brad Stone | No | 15 + 20 |
| Jessica Strickler | No | 15 + 20 |
| Terrace Hodges | No | 15 + 20 |
| Jaime Pickett | No | 15 & 20 |
| Lesly Messina | No | — |
| Ed Watson | Yes ✓ | Rule 15 |
| Bruce Dunlap | maybe | Rule 15 |
| James Myers | No | 15 & 20 |
| Brian Black | No | Rule 15 |
| Tammy Pruitt | No | " |
| Todd Blalock | No | " |
| Ed Pancake | No | 15 + 20 |
| Bob Weaver | No | — |
| Pat Mahoney | no | 15 & 20 |
| (20) Pat Mahoney | Y | 15 & 20 |
| Bob Williams | No | " " |
| Joe Carter | no | 15 & 20 |
| (20) Robert Smith | Yes | 20 |
| Debbie Frost | Yes ✓ | 15 |
| RAY NUTTER | YES | 15 |
| [illegible] | | 15 |

| ATTENDEE | Speak to Board | Rule |
|---|---|---|
| Robert McKeown | No | |
| Steve Hall | NO | |
| Scott Caldwell | No | |
| Rhonda Bess | No | |
| Craig D. Tibbs | No | |
| Courtney Dudley | NO | |
| Debbie Kinnell | NO | |
| Rhonda Connard | No | |
| Steve Thaxton | No | |
| Kyle Hagel | NO | |
| Roger Tincher | No | |
| BOB Kamyszek | No | |
| Tim Hallman | No | |
| Jennifer Armstrong | NO | |
| Jenni Johnson | No | |
| * Pat Mahony | | ✓ |
| * Mick Bates | | ✓ |

ORIGINAL

BEFORE THE WEST VIRGINIA WORKERS' COMPENSATION COMMISSION
BOARD OF MANAGERS

IN RE: RULE 15 - Vocational and Physical Rehabilitation



TRANSCRIPT OF PROCEEDINGS had at the public hearing in the above referenced matter, held on February 18, 2004, at 1:00 p.m., before the West Virginia Workers' Compensation Commission Board of Managers, at the Charleston Civic Center, Charleston, West Virginia, pursuant to notice duly given to all interested parties.

REBECCA L. BAKER
CERTIFIED COURT REPORTER
P. O. BOX 7822
CROSS LANES, WV 25356 - (304) 759-2471

ATTENDING REPORTER: JENNIFER L. JIMISON, CCR

A P P E A R A N C E S:

MEMBERS OF THE BOARD OF MANAGERS:

STEVE WHITE, Chairman
CRAIG SLAUGHTER
GENE F. BAILEY
EVERETTE SULLIVAN
ROBERT PHALEN
PAUL THOMPSON
CHRIS JARRETT
DOUG MERRITT (via telephone)

(Call to order, 2:24 p.m.)

**CHAIRMAN WHITE:** We now go to Rule 15. Mr. Bates is the first one requesting to offer comments on Rule 15.

**MR. BATES:** I'm sorry. I got caught off guard when Mr. Smith stopped.

I'll use the same process. To change gears a little bit. With regard to Rule 15, which is the Vocational Physical Rehabilitation Rule. I'll go through this section by section again, and some of my comments are a little bit more elaborate. I'll try to be as brief as possible.

Section 3.7, "Physical rehabilitation services means physician prescribed health care services, which will likely increase the injured worker's ability to return to suitable gainful employment. Physical rehabilitation services include but are not limited to work hardening and work conditioning programs."

Some people say this is just a technicality or language issue. But, again, going

back to 28 and what's appropriate and reasonable treatment, the language I'm suggesting there is reasonably required, which is consistent with the statute.

So I'm proposing that the language be changed to physical rehabilitation services means reasonably required health care services which will allow to increase the injured worker's ability to return to suitable gainful employment.

I had suggested that the term "physician prescribed" be stricken. But that's sort of redundant. Physical rehabilitation services do not require a physician's prescription for referral. Physical therapists have been licensed to treat without referral since 1994.

It creates an additional step administrative process, it extends the period of time that the claimants will be eligible for indemnity benefits.

We all know that you can get a prescription for about anything if you ask the

right people the right way enough times.

This attempts to move what is physical rehabilitation services into a more objective standard as outlined in 28. Authorization is already required.

I would say there would be no way to -- this would be an additional cost to the Division. I can only see where this would speed the process up and remove the opportunity for further inconsistency in the services delivered to injured workers.

Under Section 2.2.2, there's language there that suggests that when an injured worker has or has not cooperated in the rehabilitation effort.

Now, the standard is that when medical or vocational opinion occurs, and whether or not it's likely that someone will have an improvement in physical or vocational level.

If you're going to tell them whether somebody has had an improvement in their physical

level, I think you need a physical opinion.

So I'm suggesting that that be changed to "Whether medical, physical rehabilitation or vocational opinion substantially concur with the treatment of service, or program."

With regard to Section 3.10 and 3.11, there are new definitions there for work conditioning and work hardening from the old physical and vocational rehab rule that we never actually got around to passing.

These are definitions that I've previously offered. They've been accepted, but there appears to be a typo and it does change the meaning of the word.

So that needs to be looked at and a comma added and a space added so that it's very clear that these programs are to be greater than two and less than four typically, but not always, as opposed to creating a situation where somebody could be seen for short periods of time and still be called physical conditioning or -- work

conditioning or work hardening.

Section 5.3.15. This appears to be a punctuation/grammatical/typographical error. The way it reads right now it says, "to an injured worker under an approved rehabilitation plan."

I think it needs to read, "injured worker unless the injured worker is under an approved plan." If the intent of the section is the way I read it.

10.2.2. The paragraph there suggests that the only physical rehabilitation services that are medically necessary and within the scope of the rules -- within the plan can be reimbursed.

I had spoken earlier about the issue associated with what's necessary, what's reasonably necessary, and Mr. Smith's quote extensively about what people should get and what people shouldn't get.

It's my position that you need a guideline. And if the guideline doesn't have any teeth, then there's no point in having a

guideline. So if we're not going to have something, just throw the whole thing out and forget about this whole process.

So I endorse the Rule as standard, but if we're going to do it, let's make sure the language is consistent so that some attorney can't go back and poke holes in your argument.

The term medically necessary is one that's -- one person's medical necessity is, again, another person's prescription.

So we need to be clear about our language. And there's been Rule 28 clearly determined what the standards were.

You passed that, that is law. You passed that. Use that language. And then there is some way of being able to be -- for these rules to have some ability to stand up to the challenges that will come to them.

So any place where the word medical necessity, I think reasonably necessary. And medically unsupported or medically supported

treatment, that needs to be consistent in all documentation so that there's some ground to support that when the challenges do come.

And they will come the first time the Division cuts somebody off for something or doesn't let somebody have something they shouldn't have.

So I suggested language there. And see that -- it needs to meet the standards outlined in Section 3.7 and 2.2.2 of this Rule and Section 9 of Exempt Legislative Rule 28.

10.2, there's a list of services, again, that the Commission says they will not pay for. One of those line items is equipment purchase and rental.

I don't think that it's the Commission's intent or legal service's intent to prevent claimants from having services.

Equipment purchase and rental for the treatment that they need, but the way it reads there that could be interpreted.

I'm suggesting that needs to be changed to make it clear that while equipment purchase and rental like videos and RVs are not clear, they should be in brackets, not including assisted devices as defined under Section 3.12 of these Rules and included as part of an approved vocational rehab plan.

Section 10.9, again, the term medical necessity is here again. I'm suggesting for similar reasons that it be physically or vocational necessary as defined under Sections 2.2 and Sections 3.7 of this Rule so there's some consistency there.

And, finally, with regard to 10.4, which is -- some in the audience may not necessarily agree with my opinion, and I'm not sure if I have an opinion on this, so -- this is where we've seen a reversal of the past policy, legalities of which I'm not exactly sure, have included physical rehabilitation services in the limit, under the limit.

So if we raise the limit from $10,000 to $20,000, as I understand it, now we've thrown physical rehab and a few other things in the mix.

So when you make your decision, I hope you make it based on what the facts are. So I'm going to try to give you some facts as best as I can understand them, because I've struggled with this myself.

This is important. As a general rule, excluding major traumatic injuries, injured workers requiring additional physical rehabilitation services over and above those provided in the course of medical treatment are less likely to require extensive vocational rehab.

Those injured workers requiring extensive vocational rehab, in most instances where the appropriate physical rehabilitation has been provided during the period prior to MMI, require less physical rehabilitation.

In instances, as unfortunately occurs now, in the current system of medical claims

management where injured workers do not receive appropriate and timely physical rehabilitation services as part of medical services or injured worker has multiple episodes of care, the above generalizations don't hold.

Work conditioning and work hardening is currently reimbursed at $20 to $25 an hour. It's in the region of a half to three-quarters of the amount that's reimbursed in the neighboring states of West Virginia.

If you take those numbers, and I'm putting a plug in for a bit of kick in that reimbursement rate for those services, but if you take those reimbursement rates -- and we call physical rehabilitation as defined as work conditioning or work hardening, it's going to cost you about $3,600.

So that's $3,600 that you've thrown into to take off the $20,000 you increased from $10,000.

Should Rule 20 and 15 as written with the

recommendations and suggestions I've made be implemented and enforced -- and that's the key. It needs to be implemented and enforced.

It's difficult for me to see where the cost of physical rehab as defined in this Rule would exceed $10,000.

If you don't enforce Rule 15 and 20, then there's no point in even doing this. Because there's no amount of physical rehab and there's no amount of vocational rehab that's ever going to fix the mess we're in.

Is that last point clear? Any questions?

**CHAIRMAN WHITE:** Questions of the Board?

**MR PHALEN:** I have one, Mr. Chairman.

Mr. Bates, you stated -- in regards to your comments on the Rules itself, I think both 15 and 20, I think this was in the reference that you made that you need to have a Rule as a guideline.

Do you agree with Mr. Smith's observance of the rule being that as a guideline that's not contrary to the statute?

**MR. BATES:** I'm not an attorney, so -- The question becomes, in my mind is, where is the relationship between legislative rule and statute? And my understanding is the statute -- you know, the legislative rule has all the force of statute it just doesn't' have to go through process. But I'm getting way outside what I went to school for.

So to try to answer your question. The way the Rule is written now, they might be called guidelines, but they're rules. They are rules. They have the weight of the law and it's written that way.

There are problems with that. And certainly there will be instances where people will maybe not get what they should have got. But right now people aren't getting what they need to get. And we're in a hell of a lot of hurt.

And if you weigh -- there's no magic solution to this thing. And I think that what's been done here, the work that's been done on these two rules is exceptional considering what all is

involved in doing it.

I believe under these -- living under these Rules as written right now is preferable as far as I see it as living under what we're living under right now.

And I don't think we have the luxury of 23 more public hearings and six more -- you know, this is four hours now.

Just take all the processes out there -- you know, again, there was some confusion about when these rules were active, but it was filed correctly, it was promulgated correctly, it's been out there. So you can take the public comments as they are as standard and, I think, make a decision on this.

Does that answer your question or not?

**MR. PHALEN:** No, sir.

**MR. BATES:** I'll try again.

**MR. PHALEN:** No, that's all right. That's all right.

**CHAIRMAN WHITE:** Thank you, Mr. Bates.

Mr. Watson. Ed Watson?

**MR. WATSON:** Good afternoon. My name is Ed Watson. I'm a relocation counselor. I've been at this business with Workers' Compensation cases since 1978.

I've made and submitted written comments, and made and submitted written comments, and made and submitted written comments to employees of the Commission.

Last week each of you received a letter from me with my comments, at least the major comments I had about this Rule. I'm not going to repeat that information.

I just wanted to briefly comment that I'm not here today to speak on behalf of rehabilitation professionals, I'm here as a rehabilitation professional doing what I'm out here professing to speak on behalf of injured workers.

I have had opportunity to speak to Commission employees. I think on some points we

may have made some headway on certain things that may be changed in the final draft. I don't know where we are. I can only comment on the draft as it stands now.

This Rule includes, to me, two or three provisions that as it reads now that are just heinous.

The provision definition of suitable gainful employment as it's written now very clearly says that you go back to something as you did before comparable in terms of wages or employment, or you can go back to doing anything regardless of what it pays and regardless of what you made before.

I started my work career at a K-Mart in Kanawha City. Went to college and then did some other -- have done some other things since.

Mr. Casto started his career apparently at Workers' Compensation and then went and spent a fair amount of time on the national level with K-Mart.

I doubt that either one of us would like to work as a greeter at the front door of K-Mart at the wages they pay based on what we make now.

But that's what we're talking about with injured workers who are not going to be able to return to their pre-injured employment.

The statute that went into effect July 1 imposed time limits on rehabilitation benefits.

On the surface there they look reasonable, but the problem is when you get out in the real world of when someone can actually start a training program, with limited resources available for training in West Virginia, school doesn't start every month at different schools.

We have to figure out and work with what we can. So the two-year limit it imposed for training cases sounds like a lot of money, a lot of time, but sometimes it's a real problem.

There were a number of issues related to the Commission's interpretation of the statute that I've inquired about. And I don't see that

these were addressed yet in the Rule.

Basically, if you want a Rule that generally gives a Workers' Compensation claims manager or a regular subscriber employer who has a preferred rehab provider or a self-administering, self-insured employer or when we have the private insurance claims manger, the real control, how an injured worker's time and all limited vocational rehabilitation benefits are depleted, this is the Rule to approve.

If you must reduce costs through a Rule that coupled with 22.4.9 which should go into effect July 1, makes meaningful vocational rehabilitation probable for those who need it most, this is a rule to approve.

Thank you for your attention. I'm willing to answer any questions about any written comments I've made previously to the Board.

**CHAIRMAN WHITE:** Questions of Mr. Watson?

(No response.)

**CHAIRMAN WHITE:** Thank you, sir.

**MR. WATSON:** Thank you.

**CHAIRMAN WHITE:** We'll take a five-minute recess at which point and we will continue public comment on Rule 15.

(Whereupon, a short recess was taken.)

**CHAIRMAN WHITE:** The first audience member that's asked to comment on Rule 15 after the recess is Art Lilly, please.

**MR. LILLY:** Good afternoon. I'm going to present an oral comment rather than a written at this time.

I've been providing services to West Virginia Comp. since the early '90s. My evaluation is in the industrial rehabilitation services area.

One thing that I work for large hospitals here in the State, there's compliance issues that are becoming very hot topics right now in hospital settings.

Compliance came to me the other day and

says, "Well, Art, how do we know we're in compliance with West Virginia Compensation rules?" I go, "Are they sending us people?" "Yes." "Are we being paid for those services?" "Yes."

But from a legal standpoint verbal is great, but if it's not in writing, how do you prove your cause? That's one problem that we're seeing.

The second issue I would like to see clarified, and right now I'm working along with Mick -- Mick, this is how a West Virginian sounds, okay?

And basically we're working through our functional capacity evaluation standards and then we'll move on to work conditioning/hardening standards.

But of those people, there are many providers under those services in clinics and hospital settings. They are not licensed health care providers, but they are Board certified.

We have people out in our clinics that

are nationally certified athletic trainers and exercise physiologists. I've been doing services for the employment litigation unit, our PTD unit and now the defense division unit.

And being an expert in those areas under common law in our court system, the issue is for me to be need to be identify and make sure our ancillary services -- and I do report to a nationally licensed physical therapist, and providers, not getting direct reimbursement, but under the supervision of the licensed physical therapist.

We have the majority of our athletic trainers are in the clinics and hospital settings in this State. Yes, they are going through the legislative process right now for licensure.

But they've been in the system -- and I've been doing this since the early '90s, since that long, why are we doing it? Comp. told us to do it.

We're providing services with compliance

with our physical therapists. So we need to address that issue quickly.

And under Dr. Becker and Dr. Short, Marsha Bailey and our community meetings, I think we're making good progress on that. But we need to get it from a legal standpoint and make sure you know who people are.

Simple way to solve that issue is under the provider registration as an ancillary service for that company, under the direct supervision of a licensed -- It's very simple. It costs you nothing. We need to save money.

But they're coming up with Medicaid/Medicare issues right now. They don't have enough health care professionals in those clinics.

So they are relying more and more on the ancillary service to help provide -- you have to provide services within our scope of practice and we do that on a daily basis.

So that's what I really want to try to

address. We are educating the national athletic trainers association of these issues. Ohio Comp. has just passed nationally certified athletic trainers as a third-party reimbursement provider.

I think the athletic trainers here in this State, they've got some ground to make up. They have to become licensed, yes.

Until that process, we need to make sure that we're under there as an ancillary service, so our hospitals and clinics know that, hey, we do provide the services and we are practicing within the scope instead of hearsay.

There may be, like Mick said, on a guideline. Is guideline a rule, a law, or, no it's -- I've only been told by the people who used to evaluate us for work conditioning/harding FCEs the guideline, you cannot dictate to a business absolute how to run their business.

So we rely on practice of care, we rely on our vocational rehabilitation specialists, are we providing care?

If we're not, then don't send us people. I think we are. The issue is, how do we recognize it? And I applaud Dr. Becker and Dr. Short and Marsha Bailey for getting us into the committees and working with Mick and these folks and getting this thing addressed. And it is time.

I've been out there doing this -- I've gone through court deposition after court deposition. But I do want to make sure that we are providing the services of care that we need for you.

And we have a few athletic trainers here today, they are interested, they are excited about helping with this process. And we ask you to look at this issue for us. That's the only comment I have.

**CHAIRMAN WHITE:** Thank you, sir. Questions of the Board?

(No response.)

**CHAIRMAN WHITE:** Debbie Frost, please.

**MS. FROST:** My name is Debbie Frost. I

wasn't sophisticated enough to bring copies for everybody and I apologize.

I have two comments. One on the $20,000 expenditure limit. The other on an omission of the Code of Ethics for qualified rehabilitation professionals in this State.

I'll first talk about the Code of Ethics. The proposed 15 doesn't cite that, nor does anything in there cite it. Although there is comment in 9.3 and it references 23.4.3c.

I also want to comment on Rule 27, which is the Rehabilitation Rule for QRPs does state that some of us who come with certifications have to maintain those certifications like LPC, CRC, CMS, CCM, and those certifications come with Codes of Ethics.

If we lose our certification, we lose the right to practice being a qualified rehabilitation professional in this State. Not every qualified rehabilitation professional in this State has a Code of Ethics that goes with what they do.

I understand that Rule 15, the new proposed Rule 15, the intent is to raise the benchmark on vocational rehabilitation services in this State and I think that's very important.

I would ask that for consideration be given to including a common Code of Ethics for everybody in here that practices in my profession, and without that I think that you will continually have conflicts with regards to the ethical standards for vocation rehabilitation counselors in this State.

You can do this by adopting Codes of Ethics -- there's a variety of them -- and certifications I mentioned. I know that Dr. Bob Rumstein (phonetic) from Marshall University who speaks on ethics and is one of the ethics speakers for the West Virginia Board of Examiners and Counseling has offered to help out with writing that or helping it to be included. But I would like to have that be considered, so there's that comment.

The second comment I have is about the $20,000 expenditure limit. The benchmark for moving services at a faster pace has now been set at either 52 weeks or 104 weeks. And I think that we need to move our patient rehabilitation services along quickly and pay attention to time lines.

Because, frankly, the longer a worker is out of work the harder it is to get them back to work.

While the 104 weeks to get somebody in a training program and to have enough time for that training program can be logistically difficult. It's just that, logistically difficult.

Realistically, we get clients in all stages of preparedness and we need to do different things whether that be adult basic education to get their skill up or whatever it is, there are different things that we need to do.

They will shoot out of those preparatory services that we put them and be ready for a

training program at a particular month, date and time.

The educational services in this State are not prepared at this time to start our injured workers in vocational programs when they are ready to do that.

So, for example, if my client lives in an area where the school may start a program in April or August and he's ready, or she's ready, in February, I've got a client that's not going to be receiving services who has to waste a couple of months until we can get them ready and doesn't have funds coming into their home while they're waiting for the program.

The $20,000 expenditure limit -- there are a lot of services that are in that cap. My proposal is to take the cost of the training program out of that $20,000.

And for that reason, it's difficult to deal with 104 weeks, line everything up, make sure that they have the correct time and then still

shop for the cheapest program around, because they just don't occur on a regular basis.

If that cost was taken out, that might be more helpful to injured workers be able to utilize funds to pay for a training program while we're getting them prepared for that.

That's all I have to say.

**CHAIRMAN WHITE:** Any questions?

(No response.)

**CHAIRMAN WHITE:** Thank you very much.

Pat Maroney?

**MR. MARONEY:** Again, I appreciate the opportunity to address the Board on Rule 15. But before I get to Rule 15, you could also say that we would also concur in the remarks made by former Commissioner Robert Smith regarding Rule 20.

And, also, perhaps to address a question which Mr. Phalen had on the legislative rules, a question that came up, I think, during Mr. Bates' discussion.

These are not legislative rules. These

are exempt from the legislative rule process. And it's my understanding as a matter of law that if there is a question, whether it be legislative rule or statute, or nonlegislative rule and statute, that the statute is going to prevail.

That's the guiding light that governs the ability of this Board or any other Board which has either legislative or nonlegislative rules, that it has to be within the framework of the rule itself.

And to get to the second issue on that, we're talking about guidelines. Guidelines. And I think that the controlling language, which we must see, which is permeated throughout this entire afternoon of hearings is whether or not it is reasonable and necessary.

Reasonable and necessary either from a medical standpoint, a vocational standpoint, or a physical rehabilitation standpoint.

If the medical provider or the rehabilitation provider from a voc. standpoint

says that it is reasonable and necessary. Those are the key words.

And as a result of this particular injury or whether it exacerbates an already existing condition, that it should be allowed.

And if you have guidelines which say, well, this may not be reasonable or necessary and your controlling part of that should be, we need to ask for a second opinion that should be done expeditiously to make sure that there is not an exacerbation of the claimant's condition, his medical condition, or that it does not prolong his stay on temporary total disability benefits or does not prolong the opportunity to get him physically and vocationally rehabilitated.

So these should be merely guidelines and not regulations cast in stone which says that if a person does not meet this particular standard, it's not allowed.

Because what you're then doing is overriding the medical doctor, the chiropractor,

doctor of osteopathic medicine, the vocational rehab specialist which has been hired to do this particular work for you, or the physical rehabilitation specialist who has been hired to do this particular work for you.

That's why those folks are there. It's their opinions that you need to rely on and if they say it's reasonable and necessary as a result of this particular injury or exacerbates a particular condition which the person already had, I think diabetic conditions was alluded to here, and that can happen with a traumatic injury, you can have peripheral nerve damage, which, again, can exacerbate a condition. So those are the people who you must rely on, the experts.

And now to get specifically to Rule 15, number one, I would like to say that we have had the opportunity to review the comments that were provided by Tina Walsh, the president of the West Virginia Association of Rehabilitation Professionals and that we concur 100 percent with

what Ms. Walsh has provided to you-folks and hope that you give that great weight in your considerations here.

Specifically, as to Rule 85-15-2 and 2.2.4, it says, "In the instances where the employer fails or refuses to cooperate or participate in the rehabilitation process," we're talking about where the employer refuses to participate, "that should be prima facie evidence of the claimant's entitlement to six weeks of benefits for each 1 percent."

That's why that's in the statute and if the employer fails, that's prima facie evidence of his acknowledgment of the -- that this person is entitled to those benefits.

Under 85-15-5, those requirements are extremely restrictive and don't make allowances for the claimant to request a transfer to rehabilitation. And so -- or of rehabilitation. We think that that needs to be there.

And 15-6.2.3, and this is all in our

handout, a rehabilitation plan can be suspended or terminated by finding that "an injured worker or an injured worker's employer is not cooperating with the plan."

The term "or the injured worker's employer" should be stricken since their noncompliance should never be a reason to terminate or suspend benefits.

What you're saying if the employer refuses to cooperate with the rehab plan, that the claimant who wants to participate in it is penalized. And that's just not fair.

Under 85-15-7, the payment of indemnity benefits, we believe that there are many instances where the injured worker either may receive either temporary total benefits or temporary partial benefits we they are within the plan.

If the claimant fully complies and participates, he should absolutely be entitled and therefore the word "may" should be changed to "shall" or "will."

There are other items here which we believe need to have your consideration in it and we've set those forward. So we appreciate this.

But, again, to reiterate, I think that the operative words here for both the rehab and for the Rule 20 is whether or not it's reasonably necessary, medically, vocationally, or physical rehab as determined by the professionals and not by restrictive guidelines that they're asking you to set forth.

Thanks very much. Any questions?

**CHAIRMAN WHITE:** Any questions of Mr. Maroney?

(No response.)

**MR. MARONEY:** Thanks very much.

**CHAIRMAN WHITE:** Are there any other individuals in the audience that would like to comment on Rule 15?

**MS. PHILLIPS:** I signed the paper.

**CHAIRMAN WHITE:** Some of these names are unclear.

**MS. PHILLIPS:** My name is Valerie Phillips. I'm an employer. I'm president of Mountain State Home Health Care.

I've read the Rule and for the most part it's good, but I do have some problems with it. I think there are too many constraints on rehab providers. And the constraints are sometimes too heavy handed.

The employers need more involvement in this role. I did notice in 5.1 where it says the Commission may in its sole discretion determine whether a claimant would be assisted in returning to suitable gainful employment with provisions of rehab services.

The employer needs to be in there, too. We need to include the employer in the rehab process everywhere in the Rule.

Two years ago -- or approximately two years ago -- when we could have preferred rehab providers, Mountain State Home Health Care reduced our claims by $100,000 in one year. I had a

preferred rehab provider. That's a lot of money.

Our rehab provider was McCoy and Associates. That company did very good for us.

Then we had the McKenzie decision and we couldn't have preferred rehab providers. Last year our claims went up $100,000. I'm right back where I was.

I have found that since last October or last September when we started the problems with Workers' Comp. The deficit, everything we were running to, and our claimants were not being referred to rehab.

It was a problem. They weren't being returned to work. If I have a return to work program in my office submitted to safety and loss control approved, I need rehab services for every single claimant.

If they are off two to three weeks, let's get them back to work in a month. I have some that have been off for two years now and do not have rehab.

The employer needs to participate in this. The employer needs to work with the Commission with the claims managers and rehab to get these people back to work quickly. The rehab is very important.

You'll need to take a hard look at the benefits that rehab was providing the employers. And employers should have equal involvement in the decision for the rehab services.

We have to remember that the employer is the entity paying the premium for the insurance. And we want what is best for the claimant, our employee, so that they can return to work.

And that's all I have. I thank you for your time.

**CHAIRMAN WHITE:** Thank you for your comments. Are there any questions?

**MR. BAILEY:** Question. You said you had employees that may have been off for a period of up to two years?

**MS. PHILLIPS:** Yes. They are still off.

**MR. BAILEY:** And not been referred to a rehab vendor. In your estimation or your opinion, they should have those services?

**MS. PHILLIPS:** I think every employee that I have that has a claim should have vocational rehab services to return them to work for my company.

I want to return 100 percent of my claimants to work. I have -- back when I had preferred rehab services, I had a 100 percent return to work.

Back in early November, December of last year I went through my loss activity statement just looking to see what was going on.

Going through each claim I had they had not had rehab services, they're not back to work, it goes on and on. Rehab is good for my company.

And I don't know that employers know how good rehab is. I don't know that they are educated in what rehab does for them.

**MR. BAILEY:** I would like to ask you to

give that list of names to someone within the Commission that deals with rehab and I'm asking that group to report to the claims committee within the next two months, whomever that is, for why those people have not been referred, what is the rational for that.

**MS. PHILLIPS:** It's been discussed with claims managers. I will get the names of the claims managers that it's already been discussed with.

**MR. BAILEY:** If you will talk to the people at the Commission and tell them that the claims committee has requested that we have a discussion regarding that, I would appreciate it -- with Mr. Sullivan's permission, he is the chair of that committee -- we will be glad to look into it.

**MS. PHILLIPS:** Okay. Thank you very much. I appreciate that.

**CHAIRMAN WHITE:** Thank you for your comments. Are there others in the audience

wishing to comment on Rule 15?

**MR. NUTTER:** My name is Ray Nutter. I've been a licensed social worker since 1990. I've been in the rehab business for about seven years. I've been self-employed for three years.

I agree with everyone's comments so far. I apologize, I did not prepare written comments to share with the members of the Board.

But I did go through Rule 15. The reason I went through the Rule is because I need this guidance, some direction, some advice on how to do my job.

And so I look at this exempt legislative rule as guidelines. Whether it's a rule, whether it's a guide, to me is irrelevant. I still need the guideline. So I look at this as guidance.

And so in the process of evaluating how good this is a tool for guiding me in my profession, I started making notes of what it was not telling me, because that's what I need. I need it to be a little bit more clarified.

And so my points are not criticism. My points are what I need as a QRP as a private sector rehab person to feel like I'm getting clearer guidance from the Fund as far as what they expect from me within the provision of voc rehab services.

The first point that I'd like to say is that there is or appears to be some lack of consistency primarily in the use and definition of the terms "suitable and gainful."

Suitable and gainful employment. And those are the two, in my opinion, two of the most important terms that we as voc rehab providers use for our return to work efforts for the injured workers in West Virginia.

As an example, in 85-15-2 purpose of the rule. It starts out by saying, you know, it's the goal of the Workers' Comp program to assist workers return to suitable gainful employment.

And my opinion is, in searching for guidance, I think it would be more beneficial for

me if the words suitable and gainful were separated by the word "and" because they are two different things and we all know that suitable and gainful are two separate issues.

Suitable referring to the physical requirements of the job and whether or not a job is physically suited for someone and then gainful referring to the remunerative aspect or the financial aspect of how much a job pays.

So I would recommend -- I would like to see that the phrase "suitable gainful" no longer exists, but the words "suitable" and "gainful" be separated so that they can be defined separately and then used separately.

One of the reasons that I think it would be beneficial to the private sector to have the words suitable and gainful separated is when we get into the hierarchy for rehab services.

Mr. Ed Watson pointed out that one of the issues for the private sector in terms of re-employment, the hierarchy in steps 5, 6 and 7 is

the aspect of gainfulness, which is really hard especially if we're dealing with someone who was making $15, $16 an hour and no longer able to go back to that type of suitable, physically suitable activity.

One of the suggestions that I had -- my background is a professional social worker comes into play because I work in southern West Virginia and I understand socially subculturally the folks that I work with. And I do support the Fund's notion of geographic proximity for the QRP.

I also have a background in geography. And that helps me because I have to understand the relative economic conditions of the areas in which I've been assigned to work.

One of the things that I think is very important for my claimants, my clients to understand is that when they agree to seek re-employment, they have to understand that they are seeking re-employment in a geographic area that is close proximity.

They have to understand that when they're seeking re-employment they have to seek re-employment in their local labor market.

And logically that means that they have to understand that that local labor market has certain gainful standards that may not meet their pre-injury standards of gainfulness.

And I would suggest that when we start talking about steps 5, 6 and 7 of the hierarchy job search, on the job training, re-training, that -- and I use a classic example with a lot of my claimants -- if a coal miner who was making $16 an hour or more with overtime is permanently limited to lifting no more that 25 pounds, they cannot expect me to help them find a job in a light duty capacity or category paying $16 an hour.

If they cannot go back to physically suitable type of employment, pre-injury employment, they cannot expect to make comparable pre-injury wages.

So gainful standards have to be

considered in the relative terms of the socioeconomic status of the labor market with which the claimants are working and the jobs in the area that we're trying to help them get back to work.

I personally don't have a problem with claimants not making pre-injury wages. It's not possible because they are no longer able to go back to customary pre-injury types of physical activity.

My goal is to get them into a re-employment situation that pays them at least their eligible TTD benefit rate. So that they can replace that dependency on the system with some independence.

I hope that there are opportunities for advancement in career of financial gain that takes them above and beyond their TTD rate, but I honestly don't feel like that if I can get someone in a re-employment situation in a physically suitable job based on the relative gainful

standards of their geographic labor market, that I've done a good job for them, if, in fact, they want to go back to work.

If they can't go back to work in the coal mines making $16 an hour and they want to go back to work, they have to do like a lot of other folks, they have to take the jobs that are available and not expect me to find them a job that is physically suitable and meets their pre-injury wages.

The gainful standard should be relative to the geographic area and to the local labor market conditions especially when we're considering steps 5, 6 and 7 in the hierarchy.

And I think that that should be put in the exempt rule in our guidelines that the claimant understands that if they agree to participate, especially in steps 5, 6 and 7 of the hierarchy, they understand that they are desiring to seek re-employment and that re-employment -- the gainful standards will be relative based on

their local labor market. That's one of the points, and in my opinion.

About 85-15-2 under purpose of the rule. I read this and I've read this for years and the thing that I note, it starts out is the goal of the Workers' Compensation program. Suitable and gainful, again, I separated them.

And I read all the way down through 2.1 down to 2.2. I believe my interpretation of the intent of 85-15-2.1 is to basically spell out the hierarchy that is mentioned several places throughout the rules and some of the statutes and some of the guidelines.

My recommendation for 2.1 would be to go ahead and clarify what we're saying in this first opening section of the purpose. As an example, we talk about steps 1, step 2, step 3, step 4, et cetera, et cetera. Then here as the draft that is now with the State, it's not as clear as it could be to help me do my job.

I think that if -- just as an example, if

we skip down a couple of sentences, down to the -- I think it's the third sentence -- it shall be the goal of the Commission and all interested parties to return injured workers to employment which is comparable to that which the individual performed prior to the injury.

Now, we know my definition that's step 1. But what it doesn't say is that it is initially the ultimate goal. But, also, individuals perform work prior to the injury to find a suitable, in regards to work demands, and gainful with respect to relative gross pre-injury income.

I've got several examples down through here, but my point is that it seems that the intention of 85-15-2.1 is to initially spell out the process in general terms.

And I would think that for purposes of clarity and consistency that it could be broken down to a line in agreement with the hierarchy itself. And I've done that in my notes. And I don't want to read through all that. That's the

point.

I've broken it down where it seems like they are speaking about step 1 and then it goes into the modified duties. But we all know that steps 2 through 4 are also with the pre-injury employer. So there are certain conditions that are different from steps 5 through 7.

The last -- the one thing that I would like to point out is the way that I finished this section, gross pre-injury income, self-sufficiency standards and the local labor market must be considered when exploring alternative re-employment opportunities; however, gross pre-injury income is not alone or predominately a limiting factor of the claimant's opportunities. Subtext logically speaking.

If the claimant's resulting residual, physical limitations prevent him or her from returning to comparable physical and therefore comparable remunerative activity, and the claimant desires to obtain physically appropriate

alternative re-employment with a new employer, then the claimant also desires to return to work which is gainful, but understands that gainful is relative to his or her local labor market, as such, the goal then also incorporates that remunerative re-employment will at least result in a gross monthly amount equal to the claimant's current benefit rate and within a two-year period, re-employment.

So the point there is that it just -- as much as I would like to help somebody get back to pre-injury wages, it's not always possible, especially if their physical permanent total or permanent partial disability prevents them from going back to comparable work, I think that we should include in our guidelines that re-employment wages should be relative and the claimant understands.

But they cannot expect us to find them a job making $16 an hour if they can't go back to the type of work that pays those wages.

On 85-15-2.5, it starts out, "Providers of vocational rehabilitation services and qualified rehabilitation professionals are additionally responsible for assisting and encouraging workers, employers, physicians and other health care providers to fully participate."

The way that it originally reads, it almost sounds -- and quite honestly, it almost feels like it's the QRP's responsibility.

And, again, if everyone in the process, all involved parties are responsible for their own level of cooperation.

In the next sentence I started out by saying that, "In order to elicit cooperation by all involved parties, the providers and QRPs must be knowledgeable about applicable legislative laws et cetera, et cetera, period.

"However, each of the involved parties is ultimately responsible for their own level of participation and cooperation."

I have no problem with a vendor being

dismissed from the referral list for not complying or not cooperating, for not be knowledgeable, et cetera, but I would have issue with QRP in this central area and full responsibility for a claimant, an employer or a medical provider's lack of cooperation in the process. Because that's how it could be interpreted on initial reading.

Under 3.6, I've broke 3.6 down into 3.6 and 3.7. I would encourage the Board of Managers to define suitable. There's a couple of different definitions throughout the Rule of what suitable means.

And also I would encourage the Board to come up a concise and consistent definition for gainfulness. And especially gainfulness may have a different definition when it comes to the steps 5, 6, and 7 of the hierarchy.

I have some other notes, but they are all basically about the division of -- separating the terms suitable and gainful, because they will mean different things at different points of the

hierarchy process.

I would also encourage under 3.2.2 to define reasonable geographic region. And reasonable likelihood.

Under 3.2.3, as it reads, on the job training means a structured program in an employment setting under which an individual -- I added -- over a specific vocational preparation period of time, because that's one of the tools we oftentimes use from the Dictionary of Occupational Titles by determining what an appropriate on the job training program is.

So I think we should include the language that we are using as a tool.

Over a specific vocational preparation period of time, learns a trade, business or occupation, and I added, "that will ultimately result in relatively gainful alternative re-employment that is consistent with the claimant's acquired skills and residual physical capabilities," because that's really what we do in

the field.

We have to take into consideration their required skills, their residual physical capabilities and their relative gainful standards based on the local labor market of their specific geographic region.

Under 3.2.8, I, again, added "acquired skills and residual physical abilities," because, again, that's one of the concepts that we have to employ since we're working in different regions of the State, they do differ economically, culturally.

Let's see. Under 10.2, 10.2.13 seems to have some duplication with 10.2.29. 10.2.29 says, "mileage," 10.2.13 says, "automobile cost, maintenance and mileage."

I don't know that 10.2.29 needs to be added as a separate issue.

Under 10.10, this talks about billing. Billing for services on dates other than the date on which they were actually performed.

When I started my business three years ago I started with electronic billing through the ASAP System. Bundling those services onto one date is really good in terms of paper reduction.

As an example, I typically don't have -- right now the Rule or the statute allows for 32 units of service per date. Most of my progress reports at the end of 30, 45 days, whenever it's appropriate to submit that are less than 32 units.

If I'm doing a good job and being cost effective. But the way this electronic system is set up is I have to submit one date of service per activity, six entries per invoice.

So if I have 28 days of service equaling less than 32 units, in reality according to this Exempt Rule, I have to submit six or seven invoices for one report.

I think that it's appropriate, as long as I indicate how many units I'm billing, what is the date of service, et cetera, in my report format, I think it's appropriate that I bill the 28 units on

the date of the report and call that the date of service as long as the QRP, the internal QRP or the claims manager, claims representative, can look at my report and see -- well, he actually did this on this date, et cetera, et cetera, it totals his total.

I think that bundling is acceptable especially for those of us that are doing electronic billing, because it actually reduces paperwork.

As long as we're clear about why we're doing it, were we get our numbers and it's all in the open essentially.

I do think that we should -- that the Board should consider allowing for bundling especially for the providers that are doing electronic billing. It's less paperwork. As long as it's clear and consistent and everyone understands where we come up with numbers.

The entire PRP issue is out of my hands and beyond my control. My background is social

work before I got into the voc rehab arena. And I see that there's a potential conflict of interest.

I do understand from the employer's perspective how having an approved rehab provider contract with a private sector vendor allows for more accountability on the part of the private sector vendor. And I know that that is an issue.

However, as a provider of services to my clients, there is a potential conflict of interest because if I have a PRP contract with an employer, then who is my client? Is the employer my client or is the claimant my client?

You know, I just threw it out because it's a potential conflict of interest. I don't necessarily disagree with the PRP issue. I do think that the PRP contract does allow for greater accountability on the part of the QRP.

That's the extent of my comments. And I'm available for questions.

**CHAIRMAN WHITE:** Do you have your comments in written form that you could leave with

Mr. Obrokta?

**MR. NUTTER:** If he can make sense of them, yes.

**CHAIRMAN WHITE:** Are there comments or questions of the Board?

(No response.)

**CHAIRMAN WHITE:** Thank you, Mr. Nutter.

**MR. NUTTER:** Thank you.

**CHAIRMAN WHITE:** Are there any other individuals in the audience that signed up to speak on Rule 15?

**MR. DUNLAP:** No, I didn't sign, but I have one quick comment.

**CHAIRMAN WHITE:** Please come to the podium.

**MR. DUNLAP:** My name is Bruce Dunlap. The lady that made the comment and she was an employer, the Home Health Agency, she made a very, very good comment and you felt like that this was an exception and not the rule.

**MR. BAILEY:** No, I did not say that. It

might be the rule instead of the exception.

**MR. DUNLAP:** Yeah, well, that's what I wanted to re-emphasize. Her comments were right on target.

If you would poll employers that take an active role in managing their Workers' Comp activities, you will find that her comment is very common with those people that take an active role with managing this activity.

I'd like to see the results of what you get from her as well, because I can supply you with four or five employers with the same activity.

**MR. BAILEY:** Mr. Dunlap, feel free to do so. Mr. Lynch is here today and some people know Mr. Lynch. I'm not trying to put something off on him, but if you use him as a conduit and we would like to pursue that. That does -- we think that's been a problem in the past and not addressed to our satisfaction.

**MR. DUNLAP:** Actually, I think there's a

number of associates in this industry in this room right now, not only my company, but a number of other companies can provide you with examples as well.

**MR. BAILEY:** Well, my suggestion would be to put it in writing and submit it to the Commission, maybe the Executive Director or Mr. Phil Lynch.

But I don't expect him to remember all these names today and I don't want everybody approaching Mr. Lynch at this point in time.

If you'll get it to the appropriate people at the Commission, we will follow up.

**MR. DUNLAP:** Thank you.

**CHAIRMAN WHITE:** We appreciate the comments of everyone. It's very helpful to the Board in making the Board decisions.

Mr. Obrokta, could you please clarify what remaining time that you have for public comments through the process, what procedures might have to be done to make additional written

comments.

**MR. OBROKTA:** Mr. Chairman, I believe today is the final day for public comments on these two rules. They were filed on December 31st, so it's almost 50 days they've been out for public comment.

And then, of course, procedurally going forward what we will do is have a transcript of today's proceeding prepared and I will create a document, essentially identifying every change or every suggestion you've heard here today, every suggestion I've received in writing, I'll put that together with the Commission's responses and I'll bring that to the Board to be acted upon on each individual suggestion.

Procedurally, that's how I would envision it going from here.

**CHAIRMAN WHITE:** Procedurally, do we have the ability to extend it for a period of time to receive additional written comments?

**MR. OBROKTA:** Yes, sir, you do.

**CHAIRMAN WHITE:** I'd like to extend the period of time to provide additional written comments based upon the items that were discussed today for another 15 days.

**MR. OBROKTA:** Yes, sir.

**CHAIRMAN WHITE:** So anyone in this room or outside the room that has additional comments as a result of hearing what has been discussed today, they have 15 days to submit it to the Commission.

I appreciate everybody taking the time to be here today. Thank you. And with that I declare that this public hearing is adjourned.

(Whereupon, the public hearing on Rule 15 was adjourned at 3:43 p.m.)

## REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

I, Jennifer L. Jimison, a Subcontractor for Rebecca L. Baker, Official Court Reporter, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption thereof.

Jennifer L. Jimison
Certified Court Reporter

SEAL
West Virginia
OFFICIAL SEAL
Notary Public, State of West Virginia
JENNIFER L. JIMISON
P.O. Box 724209
Barboursville, WV 25504
My commission expires July 10,

**From:** Thomas Obrokta
**To:** Divjak, Lynn
**Date:** 1/6/04 9:03AM
**Subject:** Re: Rule 15

Lynn = PP e-mail and 1st 2 attachments. Thanks,.

>>> "Mick Bates" <mickb_bodyworks@charterbn.com> 12/17/03 04:44PM >>>
Good afternoon. I hoped to have these comments to you earlier but we have had network issues due to the poor weather. My apologies. I have tried to limited my comments to apparent "typographical errors", sections dealing with "physician prescription" and what is considered "necessary". It is my understanding that issues pertaining to FCE's are to be dealt with in Rule 20. I highlighted the sections of the attached rule that my comments refer to.

My comments are largely unchanged from those offered for Stakeholder draft 11.14.03.

I noted that some of my previous suggestions were not incorporated into the Rule to be submitted for consideration for the Board Of Managers and to be filed with the Secretary Of State. I am unsure whether this was an oversight or whether the office of legal services does not consider my recommendations as "helpful". The fact that the "typographical errors" were not addressed suggests to me the first, not the second, is more likely. Never the less, I would respectively submit that if you are writing a rule dealing with Physical Rehabilitation then the input of an "expert" in the area of Physical Rehabilitation is important in the development of a sound Rule. I have taken the liberty of attaching my professional qualifications and humbly suggest that I am the most qualified of the "Stakeholders" to address issues pertaining the "Physical Rehabilitation".

My objective in participating in this process is to "save" the Commission money by moving decisions regarding denial/authorization, subsequent appeal and litigation of physical rehabilitation requests, as occurs currently, out of the arena of "medical opinion" which is highly subjective and into the arena of objective standards as defined under the rule.

I would be happy to discuss my rationale further. I would prefer to discuss this with you at your convenience than make comments that would delay the implementation of the rule at a scheduled public hearing. If I am unable to make a sound and rational argument for the inclusion of these changes, or there are other considerations that I am unaware of, then feel free to say so.

I thank you for your consideration. Sorry for the long email.

Mick.

Comments Regarding
TITLE 85
EXEMPT LEGISLATIVE RULEWORKERS' COMPENSATION COMMISSION
SERIES 15
VOCATIONAL AND PHYSICAL REHABILITATION

**[FILED 12.31.2003 FOR PUBLIC COMMENT - SECRETARY OF STATE]**
**PUBLIC HEARING 2.18.2004**

With regard to Section 3.7

*"Physical rehabilitation services" means physician prescribed health care services, which will likely increase the injured worker's ability to return to suitable gainful employment. Physical rehabilitation services include but are not limited to work hardening and work conditioning programs."*

1. WV Code Section 23-4-3 states

   *The division shall disburse and pay from the fund for such personal injuries to employees as may be entitled to hereunder as follows: (1) Such sums for health care services, rehabilitation services, durable medical and other goods and other supplies and medically related items as be reasonably required. The division shall determine that which is reasonably required with the meaning of t his section in accordance with the guidelines developed by the health care advisory panel pursuant to section three-b of this article.*

2. The Commission has recently promulgated Rule 28-9 "Standards for Medically Unsupported Treatment." Requiring among other things that treatment be *"curative or rehabilitative"*

3. WV Code Section 30 was amended with the passage of Exempt Legislative Rule 16 in 1994 to allow evaluation and treatment by licensed Physical with out physician prescription or referral.

4. "Physical rehabilitation services" may be required for purpose of returning an injured worker to "suitable gainful employment" with or with out being "physician prescribed".

5. Physical rehabilitation services can be indicated as part of a Vocational Rehabilitation plan in situations where a physician and/or physician prescription may be unwilling, un available, unobtainable or desirable for the purpose of returning an injured worker to "suitable gainful employment".

6. Sections 10.6 of the proposed rule require prior authorization by the Commission for reimbursement of physical rehabilitation services.

7. Section 2.2.2 of the proposed rule outlines the standards for determining if an injured worker has cooperated in the rehabilitation effort.

8. Section 7.2.1 of the proposed rule indicates that a worker may consent to undertake a work assignment without the approval of his or her treating physician.
9. Physician prescription creates an additional and un necessary administrative burden on the medical community and the Commission

10. Physician prescription delays the implementation of vocational rehabilitation plans, and injured workers return to suitable gainful employment

11. Physician prescription increases the medical and indemnity costs paid by the Commission.

12. With all due respect to many fine members of the West Virginia medical community, is common knowledge, that it is possible to get a physician prescription for just about anything if you ask enough or the "right" Doctors enough times or in the "right" way.

It is therefore proposed that Section 3.7 is amended to read:

*"Physical rehabilitation services" means reasonably required ~~physician prescribed~~ health care services, which will likely increase the injured worker's ability to return to suitable gainful employment. Physical rehabilitation services include but are not limited to work hardening and work conditioning programs.*

With regard to Section 2.2.2

*2.2.2. In determining whether an injured worker has cooperated in the rehabilitative effort, the following standards are to be used:*

*a. Whether medical and vocational opinion substantially concur that the treatment, service, or program is indicated to bring about a return to employment;*
*b. Whether it is reasonably safe and not attended by unusual suffering or risk for the injured worker to participate;*
*c. Whether it is likely that the treatment, service, or program will produce measurable physical and/or vocational improvement; and*
*d. Whether a person of ordinary prudence and courage would participate in the treatment, service, or program for his or her own betterment, regardless of compensation.*

1. To determine whether it is likely, under section c., that the treatment, service, or program will produce measurable physical improvement it is suggested that a physical rehabilitation opinion is required to substantially concur as indicated under section a.

2.The terms vocational and physical rehabilitation are used consistently thought out the course of the Rule and appears to be omitted in error under section a.

It is suggested that Section 2.2.2 is amended to read:

*2.2.2. In determining whether an injured worker has cooperated in the rehabilitative effort, the following standards are to be used:*

a. Whether medical, physical rehabilitation and or/vocational opinion substantially concur that the treatment, service, or program is indicated to bring about a return to employment;
b. Whether it is reasonably safe and not attended by unusual suffering or risk for the injured worker to participate;
c. Whether it is likely that the treatment, service, or program will produce measurable physical and/or vocational improvement; and

d. Whether a person of ordinary prudence and courage would participate in the treatment, service, or program for his or her own betterment, regardless of compensation.

With regard to Sections 3.10 & 3.11

*3.10. "Work Conditioning" means ..... Programs are typically but not always up to greater than two (2) and less that four (4) hours per day, five (5) days per week and for a period of four (4) to eight (8) weeks in duration.*

*3.11. "Work Hardening" means ..... Programs are typically but not always up to greater than four (4) and less than eight (8) hours per day, five (5) days per week, and a period of four (4) to eight (8) weeks in duration.*

1.This definitions were provided by and incorporated in the Draft as part of the Stakeholder process to bring them in line with acceptable clinical practices.

2. Unfortunately there appears to be a punctuation/grammatical/typographical error.

It is suggested that Sections 3.10 & 3.11 are amended to read:

3.10. *"Work Conditioning" means ..... Programs are typically, but not always, ~~up to~~ greater than two (2) and less that four (4) hours per day, five (5) days per week and for a period of four (4) to eight (8) weeks in duration.*

*3.11. "Work Hardening" means ..... Programs are typically, but not always, ~~up to~~ greater than four (4) and less than eight (8) hours per day, five (5) days per week, and a period of four (4) to eight (8) weeks in duration.*

With regard to Section 5.3.15

*5.3.15 A rehabilitation plan must require that all vocational rehabilitation services be delivered by providers registered under the provisions of section 9 of these rules. Except with the prior consent of the Commission, no other providers may deliver physical and/or vocational rehabilitation services to an injured worker under an approved rehabilitation plan.*

There appears to be a punctuation/grammatical/typographical error.

It is suggested that Section 5.3.15 be amended to read:

*5.3.15 A rehabilitation plan must require that all vocational rehabilitation services be delivered by providers registered under the provisions of section 9 of these rules. Except with the prior consent of the Commission, no other providers may deliver physical and/or vocational rehabilitation services to an injured worker unless the injured worker is under an approved rehabilitation plan.*

With regard to Section 10.2.2

*10.2.2 Only those physical rehabilitation services that are medically necessary and within the scope of the applicable rehabilitation plan can be reimbursed pursuant to these rules.*

1.Services can be medically necessary, or certified as such, with or with out being indicated for the purpose of bringing about a return to suitable gainful employment, as required under Section 3.7 and 2.2.2 a., or likely to produce measurable physical and/or vocational improvement, as required under Section 2.2.2 c..

2.Section 2.2.2 of the proposed rule outlines the standards for determining an injured workers cooperation under a vocational rehabilitation plan.

3. In many instances, injured workers participating in vocational rehabilitation plans, and receiving physical rehabilitation services have:

a. been previously determined to be "Maximally Medically Improved (MMI)"
b. may or may not be under the care of an attending physician
c. may or not require services that are medically necessary, that are or are not reasonably required to assist an injured worker returning to suitable gainful employment as defined under Section 3.7

It is suggested that Section 3.10 & 3.11 are amended to read:

*Only those physical rehabilitation services that are ~~medically~~ reasonably necessary and within the scope of the applicable rehabilitation plan, and meet the standards as outlined in Sections 3.7 & 2.2.2 of this rule and Section 9 of Exempt legislative rule 28 can be reimbursed pursuant to these rules.*

With regard to Section 10.2

*10.2 The following services are considered overhead and the Commission will not pay for these services:*

*10.2.1 Administrative and supervisory salaries and related personnel expenses;*
*10.2.2 Office rent;*
*10.2.3 Depreciation;*
*10.2.3 Equipment purchase and rental;*

1. It is suggested that the intent of this Section is to prevent the Commission from being inappropriately billed for "over head" and other expenses unrelated to services directly provided to injured workers by vocational rehabilitation service providers. Further more, that the intent of Section 10.2 is not to prevent injured workers from receiving "Assistive Devices" and other equipment to facilitate a return to suitable gainful employment.

2. Section 3.12 defines what is appropriate equipment.

It is suggested that Section10.2 is amended to read:

*10.2 The following services are considered overhead and the Commission will not pay for these services:*

*10.2.4 Administrative and supervisory salaries and related personnel expenses;*
*10.2.5 Office rent;*
*10.2.6 Depreciation;*
10.2.3 *Equipment purchase and rental <u>( not including Assistive devices as defined under Section 3.12 of these rules and included as part of the approved Vocational Rehabilitation plan.)</u>*

With regard to Section 10.9

*10.9. In the event that an injured worker insists upon the delivery of a physical and/or vocational rehabilitation service after being advised in writing by the Commission that the service has been determined not to be medically or vocationally necessary, the provider may charge the injured worker for the costs of such service .....*

1. Issues pertaining to "medical necessity", "physician prescription" and "physical rehabilitation opinion" addressed previously.

It is suggested that Section 10.9 is amended to read:

10.9. *In the event that an injured worker insists upon the delivery of a physical and/or vocational rehabilitation service after being advised in writing by the Commission that the service has been determined not to be ~~medically~~ <u>physically</u> or vocationally necessary <u>as defined under Sections 2.2.2 and Sections 3.7 of this Rule</u>, the provider may charge the injured worker for the costs of such service .....*

Finally with regard to Section 10.4.

which indicates a reversal of past policy of not including physical rehabilitation services in the limit on vocational rehabilitation services which has been raised from $10,000 to $20,000. The following should be considered.

1. As a general rule, excluding major traumatic injuries, injured workers requiring additional physical rehabilitation services over and above those provided in the course of medical treatment are less likely to require extensive vocational rehabilitation.

2. Those injured workers requiring extensive vocational rehabilitation are likely, in most instances where the appropriate physical rehabilitation has been provided during the period prior to MMI, to require less physical rehabilitation.

3. In instances, as unfortunately occurs under the current system of medical claims management, where injured workers do not receive appropriate and timely physical rehabilitation services as part of the medical services or an injured worker has multiple episodes of care the above generalizations are less likely to hold.

4. Work Conditioning and Hardening services are currently reimbursed at a rate of $20 and $25 per hour respectively under the current West Virginia Workers Compensation Commissions fee schedule. This level of reimbursement is in the region of ½ to ¾ of the reimbursement rate of the neighboring states.

5. The projected cost of a 8 week course of Work Conditioning/Hardening at these rates is in the region of $3600.00.

6. Should Rule 20 and Rule 15 as written with the recommendations and modifications be effectively implemented and enforced by the Commission then it is difficult to see instances where the costs of physical rehabilitation services as defined in this rule would exceed $10,000.

7. Should the Commission fail to implement and enforce Rule 15 & 20 then there is no amount of physical and vocational rehabilitation sufficient to address the issues of returning injured workers to suitable gainful employment.

RESPECTFULLY SUBMITTED.

MICK BATES B. APP. SCI. (PHYSIO), PT. CCM

PRESIDENT - PRAXIS CORPORATION
CHIEF CLINICAL OFFICER - BODYWORKS HEALTH FITNESS REHABILITATION

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TO: Worker' Compensation Board of Managers

RE: Rule 15 Proposed Physical & Vocational Rehabilitation

DATE: March 16, 2004

I understand from the Commission's responses to public comment that physical rehabilitation will not be charged to the $20 thousand limit from 23-4-9.

However, the Commission continues to view a new policy of charging the Services provided by Qualified Rehabilitation Professionals as a Statutory requirement. I continue to disagree and feel QRP services would be an appropriate exception to be specified by Rule, particularly in light of the fact QRP services are initiated and directed by either the Commission or the self-insured employer, often for claims management purposes alone.

That such control over time-and dollar-limited benefits is in the hands of the claims manager and not the injured worker is reinforced by comments made throughout the proposed Rule and Commission's responses.

As a QRP I must admit I find it quite daunting that for every single dollar of billable a service I provide in a claim that is a dollar the injured worker can never use for training purposes should that injury or any future injury in their lifetime necessitate training.

As elaboration, I bring the 5 cases in my current caseload that do or will involve training to your attention:

Craig was referred to me after an Office of Judges order. An earlier QRP had billed over $11000 for a job search; I have billed $4000 myself developing a series of plans that have cost about $3000 to date and will cost an additional $5000 to complete. He will not be able to finish if the QRP charges "count."

Tracy was referred to me recently with over $8000 in QRP services already billed. This man is was making over $800/week, is now limited to Light work and will likely need to be re-trained but I received the case with only 18 months of Rehab TTD still available and, under this Rule, less than $12000 for retraining purposes (and vocational testing and my services).

Troy was making $500 per week and is limited to Light work after back surgery. We tried job search but eventually moved on to retraining. My charges to date have been about $4,500; the training program will cost over $19000; if the QRP charges now "count", he will not be able to finish the authorized training program.

Andy was working as a Millwright when he injured his right arm and his medical restrictions prevent return to his pre-injury work. I have billed about $2500 and the projected cost of his training is $12500. He should finish with less than $20000 in expenditures under this Rule but I will have to pay strict attention to my future charges (including minimmizing job search assistance at the end of training) and any increases in tuition costs at the school.

Larry is a Welder who has had 2 back surgeries. He is in school and his training costs are projected to be $12000; I have billed about $2800. He should be OK but the same watchfulness about future costs will be required.

**If the Board plans to approve the Commission's position on this issue I BEG for an amendment that would qualify this inclusion to QRP services provided after the effective date of the Rule.**

**From:** Thomas Obrokta
**To:** Divjak, Lynn
**Date:** Tue, Mar 9, 2004 12:39 PM
**Subject:** Fwd: Re: Another Rule 15 comment

>>> "EDWIN WATSON" <watsonrehabwv@worldnet.att.net> 03/09/04 10:45AM >>>
SURE

----- Original Message -----
From: "Thomas Obrokta" <tobrokta@wvwcc.org>
To: <watsonrehabwv@worldnet.att.net>
Cc: "Lisa Hamrick" <lhamrick@wvwcc.org>
Sent: Tuesday, March 09, 2004 8:43 AM
Subject: Re: Another Rule 15 comment

Ed - I want to make sure that I have all of your rule 15 comments. I have this one, but I am having trouble locating the comprehensive letter you sent to the BOM. Can you send it to me so that I do not miss anything. Thanks.

>>> "EDWIN WATSON" <watsonrehabwv@worldnet.att.net> 01/14/04 02:33PM >>>
AS CURRENTLY PROPOSED

3.26 "College training" means academic education to prepare an individual for an occupation of a professional or technical nature through a college or university accredited by the North Central Association of Colleges and Schools Commission on Institutions of Higher Learning.

COMMENTS

An Associate degree typically requires completion of 64 to 69 hours.

The typical course outline for an Associate degree appearing in any college catalog calls for 14 to 18 (and most often 16 to 18) hours per semester.

For tuition calculation purposes, public schools consider 12 or more hours "full-time."

Schools typically encourage adult students to take no more than 12 hours per semester (I suspect to, in part, prolong the flow of tuition).

Summer class options have always been limited and are becoming more so in light of budget cuts.

At 12 hours per semester (and even with 6 applicable credits in the Summer, a student starting a program in 08/2004 would have, at best, only 54 hours by the end of the 4th full (Spring 2006) semester.

SUGGESTION

Add something like - The injured worker sponsored in college training is required to enroll in at least 15 hours per semester (or 12 hours per quarter) with the following exceptions: a minimum of 12 hours in a semester including required development courses in mathematics and/or English; a minimum of 12 hours in the final semester of a program if graduation requirements will be met with those 12 hours; and a minimum of 6 hours in a Summer semester: Provided, these minimums may be lowered in any semester if the injured worker can document, in writing, sufficient classes applicable to the degree or which would significantly enhance employment prospects are not available or at the sole discretion of the Commission; in such cases, the injured worker and the qualified rehabilitation professional are required to develop an internship for that semester.

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February 10, 2004

Worker' Compensation Board of Managers
4700 MacCorkle Avenue, SE
Charleston, WV 25304

RE: Rule 15 Proposed
Physical & Vocational Rehabilitation

Gentlemen:

I had an opportunity to hear Mr. Shimer of WCC speak on 01/15/2004. At that time he asserted the provision of the proposed Rule to which I most object - inclusion of physical rehabilitation and QRP service costs in the $20 thousand limit described in WV Code 23-4-9 - is a matter of Statutory mandate. That is simply not the case.

It is a clearly a matter of what the Commission chooses to include in the Rule and what the Board then approves. My arguments against those inclusions are detailed in pages 4 through 12 of the enclosed document.

My second greatest objection to the proposed Rule is the definition proposed for suitable gainful employment. I read it to say quite clearly that suitable gainful employment is your pre-injury work OR any minimum wage job (refer to pages 13 through 17 of the enclosed document).

Mr. Obrokta was good enough to meet with Board members from the West Virginia Association of Rehabilitation Professionals on 01/30/2004. After that meeting, it seemed he was agreeable to suggesting certain changes. At this point I do not know if any such changes will be adopted.

Even should physical rehabilitation be deleted from the list of services charged and the exact alternate definition of suitable gainful employment offered by Mr. Obrokta be incorporated in the Rule, I continue to object to the inclusion of QRP services in the $20 thousand limit (see pages 8 through 12 of the enclosed document) and continue to hope for multiple areas of clarification (see pages 18 through 23 of the enclosed document).

Thank you for considering these written comments prior to the 02/18/2004 public hearing.

Sincerely,

Edwin S. Watson

cc: Steven F. White
Richard W. Humphreys
Chris E. Jarrett
John P. Johnson
Douglas W. Merritt
Bob Phalen
Gene F. Bailey
David Satterfield
Craig Slaughter
Everette E. Sullivan
Paul E. Thompson

## WATSON PROPOSAL FOR RULE 15
**(same as the current definition in Rule 27)**

"Vocational rehabilitation services" means professional counseling, consulting or rehabilitation case management services reasonably necessary to enable an injured worker to return to suitable gainful employment as soon as practical. This may include, but is not limited to, coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, job development, and job placement.

Furthermore, "vocational rehabilitation services" means services covered by W.Va. Code § 23-4-9, which provide new skills or modified or alternative work to enable an injured worker to return to suitable gainful employment as soon as practical. Services may include, but are limited to, adult basic education, vocational-technical training, college training, on-the-job training, travel expenses related to training, job modifications and placement tools.

"Transferable skills analysis" means a process by which jobs are identified that are consistent with the worker's capabilities.

**TOO SIMPLISTIC/SUGGEST SOMETHING LIKE:**

**MEANS A THREE-STEP PROCESS: COMPLETING A COMPOSITE OF THE INJURED WORKER'S JOB-RELATED SKILLS ACQUIRED IN PREVIOUS EMPLOYMENT, TRAINING OR AVOCATIONAL ACTIVITIES; DETERMINING WHICH OF THESE ARE NOT ELIMINATED BY THE INJURED WORKER'S DISABILITY; AND IDENTIFYING SUITABLE GAINFUL EMPLOYMENT OPTIONS BASED ON THE RETAINED SKILLS.**

7.2.1. Whenever it is proposed that an injured worker return to work under section 7.2 of this rule, the employer, with the assistance of the qualified rehabilitation professional, must furnish the injured worker's treating physician, the Commission and all parties to the claim a statement describing the work in terms that will enable the physician to relate the essential tasks of the job to the worker's functional abilities. The treating physician must then advise the qualified rehabilitation professional within fifteen (15) working days of receipt of information pertaining to the essential tasks of the job whether the injured worker is physically capable of performing the work described. When the information is furnished to the treating physician and the employer, the qualified rehabilitation professional shall inform the treating physician that the failure to respond within the time allotted may result in the Office of Medical Services review of the job description and issuance of a functional ability opinion. The worker may consent to undertake the work assignment without the approval of his or her treating physician. In cases where the worker has no treating physician, the Commission's independent medical evaluator, including its Office of Medical Services, may review job descriptions and provide a functional ability opinion.

**WHILE IT SURE IS TRENDY (WELL IT WAS SEVERAL YEARS AGO WHEN ADA WENT INTO EFFECT) TO USE TERMS LIKE "ESSENTIAL TASKS," THIS MISSES OUT ON REALITY. SIMPLY PUT, JOBS JUST DO NOT CONSIST SOLELY OF "ESSENTIAL FUNCTIONS." (OR DUTIES OR TASKS OR ESSENTIAL WHATEVER) THE DESCRIPTION PROVIDED THE PHYSICIAN (AND ALL PARTIES). MUST DESCRIBE THE JOB THE EMPLOYER EXPECTS THE INJURED WORKER TO PERFORM. ANYTHING LESS PUTS THE INJURED WORKER IN HARM'S WAY.**

The Rule needs to clarify if an award of Rehab TTD (say 3 months of job search) made prior to 07/01/2003 "counts" toward the 52-week (or 104-week in training cases) limit.

I suggest it should **NOT** as the Statute reads:

*Provided, however,* That the aggregate award of temporary total rehabilitation or temporary partial rehabilitation benefits for a single injury for **which an award of temporary total rehabilitation** or temporary partial rehabilitation benefits ***is made on or after the effective date of the amendment and reenactment of this section*** in the year two thousand three shall be for a period not exceeding fifty-two weeks unless the payment of temporary total rehabilitation disability benefits is in conjunction with an approved vocational rehabilitation plan for retraining, in which event the payment period of temporary total rehabilitation disability benefits may be extended for a period not to exceed a total of one hundred four weeks. (MY EMPHASIS)

"... the aggregate award of temporary total rehabilitation **or** temporary partial rehabilitation benefits for a single injury ... shall be for a period not exceeding fifty-two weeks."

**The Statute allows for 104 weeks of rehab TTD for approved training. That being the case, why bother with the statutory stipulation that follows this "aggregate" provision?**

"...no payment of temporary partial rehabilitation benefits shall be made after the claimant has received the vocational training provided under the rehabilitation plan."

**Doesn't this infer the intent was two separate 52 weeks caps (that the person accepting training is taking a trade-off? If the Legislature wanted a single 52 week cap, they certainly would have written:**

"... the aggregate award of temporary total rehabilitation **and** temporary partial rehabilitation benefits for a single injury ... shall be for a period not exceeding fifty-two weeks."

Travel reimbursement should be included in Rule 15 (unless it can somehow be plugged into the Rule covering treatment/evaluation).

Travel related to re-training programs has stayed 10¢ per mile all these years only because of the $10K had to be conserved for other training costs.

**To be consistent the training-related travel reimbursement rate should be increased to 15¢ per mile.**

The Rule needs to clarify if the Rehab TTD can only be extended past 52 weeks (up to 104 weeks) for that period of time while the claimant is actually in school (see example A) or if the 104-week limit applies to the claim and/or the entire Plan (see example B).

A. After 45 days of Rehab TTD for rehabilitation/plan development, the Plan calls for the injured worker to attend an 18 month electronics technology program and then job search for 60 days; only the first 45 days and the 18 months is covered by Rehab TTD; the post-graduation job search period is not.
B. After 45 days of Rehab TTD for rehabilitation/plan development, the Plan calls for the injured worker to attend an 18 month electronics technology program and then job search for 60 days; as this Plan calls for less than 104 weeks of TTD, the entire time frame is covered under Rehab TTD

**Since, the Statute reads "in conjunction with an approved plan" and NOT "in conjunction with retraining" I believe the Rule should clarify the Rehab TTD should cover the entire Plan (up to 104 weeks per claim) as described in example B.**

**********

"Provided, however, That the aggregate award of temporary total rehabilitation or temporary partial rehabilitation benefits for a single injury for which an award of temporary total rehabilitation or temporary partial rehabilitation benefits is made on or after the effective date of the amendment and reenactment of this section in the year two thousand three shall be for a period not exceeding fifty-two weeks unless the payment of temporary total rehabilitation disability benefits is in conjunction with an approved vocational rehabilitation plan for retraining, in which event the payment period of temporary total rehabilitation disability benefits may be extended for a period not to exceed a total of one hundred four weeks." (my emphasis)

**IF WCC WANTS TO CLARIFY COMPARABLE WAGES IS NOT AN ABSOLUTE MANDATE FOR ALL CASES, PERHAPS THE FOLLOWING ADDITION TO THE EXISTING RULE COULD BE CONSIDERED.**

**3.13. "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, giving due consideration to the nature and extent of the injured worker's injury, the injured worker's qualifications, interests, motivation level, preinjury earnings, and future earning capacity, and the current and future condition of the labor market. This definition does not render a vocational objective unsuitable simply on the basis of projected return to work wages of less than 66 2/3% of the earnings at the time of the injury.**

# Proposed by Watson

10. The expenditure for vocational rehabilitation shall not exceed twenty thousand dollars ($20,000) for any one injured employee. All services approved by the Commission as part of a rehabilitation plan, including adult basic education, vocational-technical training, college training, on-the-job-training, travel expenses related to training, job modifications and placement tools, shall be included in the twenty thousand dollar ($20,000) limitation. The following rehabilitation services are excluded from the twenty thousand dollar ($20,000) limitation: physical rehabilitation and services provided by a qualified rehabilitation professional including coordination of medical services, rehabilitation evaluation, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, job development and job placement.

# WATSON PROPOSAL FOR RULE 15
## (same as the current definition in Rule 27)

"Vocational rehabilitation services" means professional counseling, consulting or rehabilitation case management services reasonably necessary to enable an injured worker to return to suitable gainful employment as soon as practical. This may include, but is not limited to, coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, job development, and job placement.

Furthermore, "vocational rehabilitation services" means services covered by W.Va. Code § 23-4-9, which provide new skills or modified or alternative work to enable an injured worker to return to suitable gainful employment as soon as practical. Services may include, but are limited to, adult basic education, vocational-technical training, college training, on-the-job training, travel expenses related to training, job modifications and placement tools.

The proposed Rule dictates that all QRP services will be applied to the $20 thousand dollar limit even though:

1. No prior administration has ever attempted this. In fact, when challenging an OOJ ruling to the Appeal Board, WC's argument was that QRP services are not included in the dollar limit had always been a matter of policy.

2. Existing Rule 15 specifically excludes rehabilitation evaluations and plan development (which is a large part of what QRPs do).

3. The depletion of these funds is dictated by the Commission or Employers (self-administering self-insured employers or those with preferred rehab providers) in a manner that is not necessarily in the best interest of the injured worker's vocational rehabilitation evaluation.

4. Those injured workers who with the most serious injuries and/or most serious vocational implications resulting from their injuries have the greatest need for QRP services in developing a Rehabilitation Plan. Addressing those needs will take more time; more time will equate to more QRP dollars; more QRP dollars results in less benefits for vocational rehabilitation training for those most likely to need it.

5. This benefit is per employee. If a worker injures his back and goes back to work after several thousands of dollars are expended for physical rehabilitation and QRP services, but then re-injures himself some years later resulting in a need for retraining, those funds have already been partially depleted.

6. The sole (non-precedent setting) ruling on this dollar limit and these exceptions did not specifically state follow-up QRP services (counseling, etc.) must be counted toward the dollar limit. It simply concluded the current Rule does not include job placement as one of the exceptions.

7. The Commission's proposed Rule does not include all items specified as rehabilitation services in the Statute (such as crutches and prosthetics) and includes a broad "sole discretion" provision.

8. Items 6 and 7 support the argument that what the Commission lists as inclusions and exclusions in Rule 15 is a matter of the Commission's discretion, not a Statutory requirement.

So, while the Statute provides a catch-all list of what is "rehabilitation services," the Statute and Rule differentiate "physical rehabilitation" and "vocational rehabilitation. The Statute specifies the $20 thousand limit is only for "vocational rehabilitation." What constitutes "vocational rehabilitation" that counts toward the dollar limit has always been and still can be a matter for discretion based on how this administration chooses to finalize this Rule.

3.6 "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 other work for which the employee is~~, or may become,~~ suited ~~by training, experience, or education,~~ but not limited by his or her previous level of earnings.

**AN EFFORT WAS MADE TO FIX THIS SO IT DOES NOT READ, "YOU CAN GO TO WORK AT MINIMUM WAGE" BUT IT FALLS SHORT (SEE HOW IT READS WITH THE STRIKE-THROUGHS ABOVE). APPARENTLY, THE SUBTLETIES OF THE EXISTING RULE'S (PERFECTLY GOOD) DEFINITION ARE NOT WELL-UNDERSTOOD (THOUGH ATTORNEYS REPRESENTING EMPLOYERS IN THEIR PROTESTS TO ANY AND ALL RETRAINING WILL HAVE ALL THEY NEED TO WIN ALL PROTESTS WITH THE ABOVE LANGUAGE):**

## CURRENT RULE

**3.13. "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, giving due consideration to the nature and extent of the injured worker's injury; the injured worker's qualifications, interests, motivation level, preinjury earnings, and future earning capacity; and the current and future condition of the labor market.**

**THE CURRENT RULE RECOGNIZES "SUITABLE GAINFUL; EMPLOYMENT FOR AN ILLITERATE, 60-YEAR OLD GENERAL LABORER LIMITED TO MEDIUM WORK MAY WELL BE JOBS PAYING QUITE A BIT LESS THAN HE WAS MAKING PRE-INJURY. BUT A 34-YEAR OLD WITH A HIGH SCHOOL DIPLOMA AND THE EXACT SAME WORK HISTORY AND MEDICAL RESTRICTIONS COULD BE A CANDIDATE FOR TRAINING TO ACQUIRE SKILLS TO EARN, OVER THE NEXT 30+ YEARS, WAGES COMPARABLE (OR AT LEAST CLOSER) TO WHAT HE WAS EARNING PRE-INJURY).**

## CURRENT RULE

**3.13. "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, giving due consideration to the nature and extent of the injured worker's injury; the injured worker's qualifications, interests, motivation level, preinjury earnings, and future earning capacity; and the current and future condition of the labor market.**

**THE CURRENT RULE RECOGNIZES "SUITABLE GAINFUL; EMPLOYMENT FOR AN ILLITERATE, 60-YEAR OLD GENERAL LABORER LIMITED TO MEDIUM WORK MAY WELL BE JOBS PAYING QUITE A BIT LESS THAN HE WAS MAKING PRE-INJURY. BUT A 34-YEAR OLD WITH A HIGH SCHOOL DIPLOMA AND THE EXACT SAME WORK HISTORY AND MEDICAL RESTRICTIONS COULD BE A CANDIDATE FOR TRAINING TO ACQUIRE SKILLS TO EARN, OVER THE NEXT 3O+ YEARS, WAGES COMPARABLE (OR AT LEAST CLOSER) TO WHAT HE WAS EARNING PRE-INJURY).**

**§23-4-9. Physical and vocational rehabilitation.**

(a) The Legislature hereby finds that it is a goal of the workers' compensation program to assist employees 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 is a priority of the commission to achieve early identification of individuals likely to need rehabilitation services and to assess the rehabilitation needs of these injured employees. **It is the goal of rehabilitation to return injured employees to employment which is 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 is 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.

**COMMENT: RULE AND/OR POLICY CANNOT BE MORE RESTRICTIVE IN BENEFITS THAN STATUTE**

# WorkForce Enterprises, LLC

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January 28, 2004

**Thomas J. Obrokta, General Counsel**
Workers' Compensation Division
4700 MacCorkle Avenue, SE
Charleston, WV 25322

Mr. Obrokta: **RE: Omission of a Code of Ethics**

This letter is in reference to Title 85 Exempt Legislative Rule Workers' Compensation Commission Series 15 Vocational and Physical Rehabilitation – second Stakeholder Draft 11-14-03 section 85-15-9. Registration of Rehabilitation Providers (9.3). This section states "The Commission must remove or suspend from the list of vendors any provider of rehabilitation services who knowingly fails to comply with the provisions of these rules or a rehabilitation plan, or engages in other practices in violation of W.Va. Code 23-4-3c" Title 85 Legislative Rule Workers' Compensation Division Series 27 Qualified Rehabilitation Providers state in 85-27-6.5 that "a qualified rehabilitation professional or provisional qualified rehabilitation professional whose eligibility was established based on certification as .... must maintain that certification to continue to be a qualified rehabilitation professional ..." Please consider the following in the continued creation of Series 15 Vocational and Physical Rehabilitation:

- The certifications listed in 85-27-6.5 all come with codes of ethics that if broken can result in losing the certifications. This places the benchmark for ethical behavior high.
- Not all qualified rehabilitation providers have or are eligible to have a certification in field of rehabilitation or case management.
- Without a common code of ethics or an adopted code of ethics that all practicing in this state such as the American Counseling Associations Code of Ethics and Standards of Practice, West Virginia will continue to have unclear ethical expectations of the qualified rehabilitation professionals practicing in this state.
- It is my opinion that the higher standards of care that you are trying to create through the new Series 15, without some way to include all practitioners in a code of ethics, will fall short of your goals.

I offer these comments constructively as I am aware that the undertaking of writing a new rehab law is difficult and time consuming. I appreciate your efforts.

D. Frost

Deborah S. Frost, MS, CRC, LPC, QRP
Vocational Rehabilitation Counselor

Copy: West Virginia Board of Examiners in Counseling

# WorkForce Enterprises, LLC

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January 28, 2004

COPY

**Thomas J. Obrokta, General Counsel**
Workers' Compensation Division
4700 MacCorkle Avenue, SE
Charleston, WV 25322

Mr. Obrokta: **RE: $20,000 expenditure limit**

This letter is in reference to Title 85 Exempt Legislative Rule Workers' Compensation Commission Series 15 Vocational and Physical Rehabilitation – second Stakeholder Draft 11-14-03 section 85-15-10. Payment for Physical and Vocational Rehabilitation Services (10.4). This section caps all expenditures for vocational rehabilitation at $20,000, includes a variety of services and specifically the cost of (10.4.1) Vocational or on the job training. Simply stated the inclusion of this specific item in this financial cap will not be productive. Please review the following.

- You have limited vocational services for training to 104 weeks. Logistically this is a tight timeline that is difficult to meet. In a perfect world where all clients are perfectly prepared to enter a training program at the exact moment the client's referral for services is received and their medical team and claims teams respond immediately to all requests it is possible to work within this timeframe.
- Realistically clients are ready for training programs at different rates and require a variety of preparatory services to help them reach the point where they can enter and successfully complete a training program. Professionals and paraprofessionals frequently are unable to respond immediately due to their schedules.
- Injured workers are not ready always at the exact moment that the lesser expensive training programs are starting, thus workers need the financial flexibility to choose from all available training programs. Some programs alone can cost close to $20,000.
- To meet the 104 week time limit and the $20,000 cap on all expenses is a little like hoping that the sun, moon and stars line up with the correct karma of the moment. **I suggest separating this one item out of the list of costs in Payment for Physical and Vocational Rehabilitation Services (10.4).**

Thank you for your time. I appreciate your review of my comments.

D. Frost

Deborah S. Frost, MS, CRC, LPC, QRP
Vocational Rehabilitation Counselor

Brunstetter (2015)

THOMAS P. MARONEY
GENERAL COUNSEL

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February 18, 2004

Mr. Thomas J. Obrokta, General Counsel
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

Re: Proposed Rehabilitation Rules under WV 85 CSR 15

Dear Mr. Obrokta:

A review of the proposed rules reflect that the responsibility and onus of these proposals fall most heavily on the injured worker and the rehabilitation provider although it infers the "shared responsibility" of the employer and all other parties, there are minimal or no penalty for a non-compliant employer.

We would therefore recommended the following revisions or additions to the proposals.

Under **§85-15-2**, at rule **2.2.4**, by adding the following sentence "In instances where the employer fails or refuses to cooperate or participate in the rehabilitation process, there shall be *prima facie* evidence of the claimant's entitlement to six weeks of benefits for each 1% of permanent partial disability, regardless of when the initial award of benefits was made, pursuant to W.Va. Code **§24-4-6(e)(2)**.

Under **§85-15-5**, the requirements are extremely restrictive and do not make allowances for the claimant to request a transfer of rehabilitation.

Under **§85-15-6.2.3**, a rehabilitation plan can be suspended or terminated by finding that "an injured worker or an injured worker's employer is not cooperating with the plan." The term "or the inured worker's employer" should be

stricken, since their non-compliance should never be a reason to terminate or suspend benefits.

Under **§85-15-7. Payment of Indemnity Benefits.** There are several instances where it states that the injured worker "may receive" either temporary total rehabilitation disability benefits or temporary partial rehabilitation benefits when they are compliant with the plan. If the claimant fully complies and participates in a rehabilitation plan he or she should absolutely be entitled and therefore the word "may" in §85-15-7.1 and §85-15-7.2.2, at line 2, and §85-15-7.3 at line 5, should all have the word "may" changed to "shall or will", whichever is appropriate.

In addition, there are occasions when an injured worker is informed by their treating physicians that they will never be able to return to their pre-injury employment. In many cases, motivated workers are able to find transitional employment on their own, thus, satisfying their physician's physical restriction requirements and relieving the Commission of the cost and effort in administering a rehabilitation program. In such instances, a worker should be entitled to the full support of the resources of the State of West Virginia to ensure that he or she does not suffer economic devastation. Therefore, it should be incumbent upon those responsible in developing rules and regulations relative to returning injured workers to employment to ensure that those individuals receive temporary partial rehabilitation benefits and supplemental permanent partial disability as an economic incentive and reward for the efforts in returning to work and relieving the State of West Virginia and their pre-injury employer of the cost and burden of a formal rehabilitation program.

We would also like to state our concurrence with the comments of Tina Riggs Walsh, President West Virginia Association of Rehabilitation Professionals.

Respectfully submitted,

Thomas P. Maroney

TPM/mmt

**From:** Thomas Obrokta
**To:** Divjak, Lynn
**Date:** Wed, Feb 4, 2004 12:50 PM
**Subject:** Fwd: Rule 15

pp and bring up - thanks

>>> "BStone" <pka00024@mail.wvnet.edu> 02/04/04 10:38AM >>>
Mr. Obrokta,

First wanted to give you an update on the billing problems - got a call yesterday and it all is going to be taken care of. Not sure if you had a part in this but if so - THANK YOU!

Reviewing Rule 15 - I needed to let you know of a Major Problem I foresee.

The part that says we are not allowed to charge for unanswered calls needs to be changed.

Here is why.

First - all calls need to be documented whether they are paid or not. If not paid - many may not document.

Second - I am continuously calling claims managers, employers, IW's, etc..... who are unavailable. I leave messages indicating what I need to have done, giving claim information, etc..... Now - if you all do not pay for the calls to leave a message - SERVICES are going to be delayed which will cause Serious problems.

By leaving a message - we let the other party know what is needed so they can respond to our messages. We can leave valuable information so they can act upon it. If not paid, Case Managers will just call and hang up if no one answers and not leave information.

I agree that no one should be able to charge more than the minimum amount you are allowed to bill.

I have no problem with phone messages either being received or sent should capped at a .1 (if you are going to the 1/10 billing system).

When someone leaves a message for me - they often do not say, "Call me back", they often leave what needs to be done in a claim and then I can get to work.

I spent most of the day yesterday - making phone calls (Many to WCC) and leaving messages. I have to leave claim information, what I need, or give an update on a file. I got some mailboxes that said they are "full" at WCC for days. I spend a lot of time having to go back and recall trying to make contact. That is valuable time for me. This rule makes it to where I can not be paid for the time to actually do file work. That is not fair.

Well, I hope you understand, what I am trying to relay here.

If you want to talk or need it better explained - I would be glad to discuss it.

My office # is 304-489-3810.

Please reply back to this to let me know you read it.

Thanks!

Sincerely,

Bondina Stone RN, BSN, BSBA, QRP, CCM
Medical/Vocational Case Manager
Professional Case Management Services
Ph-304-489-3810
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E-mail: pka00024@mail.wvnet.edu

**From:** Thomas Obrokta
**To:** Divjak, Lynn
**Date:** Mon, Feb 23, 2004 8:28 AM
**Subject:** Fwd: Rule 15

pp and bring up - thanks

>>> <James_Myers@corvel.com> 02/20/04 10:26AM >>>
In examining rue 15. I have noticed several discrepencies between the rule (to be approved) and actual occurrences. In rule 2.5 inicated that providers of rehabilitation services are responsiblle for encouraging the claimant to fully participate or the vendor may be terminated. With the advent of authorization numbers required, prior to services being rendered for the claimant severely inhibits the Vocational Rehabilitation of the claimant. On average it takes 2-3 months to obtain an authorization and once the authorization is received from the QRP at the division, no services has elapsed for the claimant and the requested amount of hours deemed necessary to perform the duties of a Vocational Rehab provider are severly reduced by the new QRP's with the division. This results in increased TTD benefits to the claimant as the claim remains outstanding longer than necessary and severely inhibits the "actual" work which could be completed for the claimant. Under 5.32 and 9.2, The first 60 referrals each month were referred to DRS, which is a division of the State Government and are not required to obtain authorizations for "hours" or education requiremnets. This has amounted to a backlog of cases not being serviced. The average amount of time from referral to Initial report is over three months with DRS, this is according to several TPA's I have spoken with. One TPA indicated "they had to go find a QRP for me to talk to!" If standards are set and adopted QRP's must have the ability to perform the "substantial duties to perform their occupation, for which they are qualified by education and experience". The claims manager at the division should be responsible for authorizations, not the new QRP"s at the division . The claims manager are knowledgeable in the case and can work hand in hand with the QRP in the field. I feel the implementation of the new QRP's has increased the cost to the division "payroll,benefits and extended TTD benefits to the claimant" To be fair,This is not really all the new QRP's fault. They do not have personal knowledge of the case or the claimant as a claims manager does. This results in delays and unnecessary administrative tasks to the field QRP, trying to perform their job. The only person that suffers in the end is the claimant, with increased costs to the division.

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T.J. Obrokta
General Counsel Worker's Compensation.

Rule 15-20
85CSR20
85-20-3

Dear Mr. Obrokta,

I understand that you are having an open meeting on February 18th, regarding rule 15 and 20 Vocational Rehabilitation. Definition 3.4 "Health care provider" is the reason I am writing this letter.
There are many health care providers left out of this definition who are currently providing services to the injured worker in West Virginia in hospital settings as well as in out patient clinics. LPTA's, COTA's and ATC's (Certified Athletic Trainers) to name a few. This letter is in support of the ATC's who are recognized by the American Medical Association as Allied Health Care Professionals. Currently ATC's are working with Work Hardening, Work Conditioning, and performing FCE's. ATC's also work in PT clinics and Hospitals providing rehab to injured workers, as well as working in the commercial occupational field as occupational ATC's. Certified Athletic Trainers are unique health care providers who specialize in the prevention, assessment, treatment, and rehabilitation of injuries and illness that occur to athletes and the physically active.
Health Care providers recognize ATC's with CPT codes for the profession.
Guidelines are scrutinized by compliance committees at many hospitals, and with ATC's providing ancillary care for the injured worker, I would like to see that ATC's are listed in the definition of "Health Care Provider" pursuant to rule 85-20-3 definition 3.4.

Respectfully,

Brenda M. Lilly MA, ATC

**From:** Thomas Obrokta
**To:** Divjak, Lynn
**Date:** Mon, Feb 23, 2004 8:01 AM
**Subject:** Fwd: Title 85:15 Comment

pp and bring up - thanks

>>> "B.J. Manning" <bjmanning@meer.net> 02/22/04 03:17PM >>>
Dear Sir:

I understand that the comment period has been extended on the policy writing of the recent changes to this law. I have a couple of observations as a DRS rehabilitation counselor who is a provider to the Commission.

I appreciate that the Commission needs to reduce costs to become acturarily sound at some point. If the Commission was purely a for profit venture in the Insurance business, I wouldn't waste my time or yours. Never the less, it would appear that one poorly written law which brought this travesty to our great State is about to be replaced, at least by practice, with a law driven by policy which will go to the other extreme of being so ruthless with the hapless receipients that it will create a bigger problem than already exists in our State of "the Disabled". I am concerned that if an injured worker has the inclination to continue working, that the recommended changes to include all costs both physical, professional and retraining in the 20K limit will effectively add to our already burgeoning SSDI roles. Again, if the Commission wasn't an Agency of the State of WV, it would be just too bad. However, I think there is a responsibility to those who are injured on the job to provide them the opportuninty to continue working inspite of disabling injuries, which prevent them from returning to their pre-injury employer. The majority of the people referred to me, are not interested nor do they require re-training in order to return to competitive employment. Therefore, my concern is for those who do require retraining to return to work. We need to be sure that there truly is a need and if so, to provide the services in a timely manner which will allow that person to move on with their life and not become an everlasting burden to our society. Please put the costs for rehabilitation in their own category to be applied where appropriate; you now have staff which are fully cabable of giving sound guidance on proposed rehabilitation plans from providers, such as I.

Lastly, the term "suitable employment" seems to be redefined in the new language to include any and all work. We have businesses in this state which habitually injure people, some with life long impairment with apparent impunity. If they want a license to maime then perhaps they need to find a State which feels that is socially acceptable; we shouldn't. The insurance side of the Commission needs to take the political risks and make it very expensive for these companies to continue with this travesty. The effect of the language, as proposed, is to send injured workers, who sometimes make fairly good wages, into the morass of minimum wage/part time jobs that provide much of the income in our rural state or across state lines injured and without skills to try and make an adequate living to provide for their families. Again the previous language which described "suitable employment" is fair and again, needs to be administered properly. Certainly, there are folks who can not benefit from services to return them to the kind of money that they once made; we should not make this the rule for injured workers in WV.

Thank you. B.J. Manning L.P.C.

**From:** Thomas Obrokta
**To:** Divjak, Lynn
**Date:** Mon, Feb 23, 2004 11:13 AM
**Subject:** Fwd: Title 85 - Series 15 - Public Comments

pp and bring up

>>> "Mike Reel" <mdreel@hotmail.com> 02/23/04 11:10AM >>>
Mr. Obrokta,

I apologize for not being able to attend the recent public comment session. I had planned on attending and presenting in person; however, I experienced computer problems at my office that required my attention.

Fortunately, I understand that you have extended the comment period. I have attached my comments on this Series for your review and consideration. Please do not hesitate to contact me at your convenience, should you have any questions or should you need any clarification.

Thank you for your time and consideration.

Michael D. Reel, C.D.M.S., A.B.D.A.
WORKTECH Occupational Consulting Services, LLC
Toll Free 1-866-214-0958

"A kind and compassionate act is often its own reward." William J. Bennett

**TITLE 85 - SERIES 15 VOCATIONAL AND PHYSICAL REHABILITATION**

**Comments submitted by: Michael D. Reel, WORKTECH Occupational Consulting Services, LLC**
**P.O. Box 113, Petersburg, WV 26847 304-257-9515**

**§85-15-3. Definitions.**

***.** "Vocational Assessment" means collecting and analyzing each of the economic, educational, legal, medical, social, and vocational circumstances of a disabled covered employee, including the present mental and physical ability of the covered employee to participate in vocational rehabilitation services; and determining the appropriate vocational rehabilitation services reasonably necessary to return the disabled covered employee to suitable gainful employment.**

3.17 "Vocational evaluation" means a systematic evaluation of the worker's skills, aptitudes, interests and functional ability through standardized testing and work samples. A vocational evaluation may be used when a worker has a limited work history, limited perceived interests, suspected cognitive impairment or when additional information is required regarding the worker's transferable skills for appropriate rehabilitation plan development.

****** Would recommend that the term "Vocational Assessment" be added to the list of definitions. A Vocational Assessments is what is actually being performed at the onset or initiation of the vocational rehabilitation process. Vocational Evaluations are much more extensive and involve a battery of testing and assessment tools. Vocational Evaluations are generally performed at a later date – in particular with cases that are likely to require retraining or further educational pursuit. They are also generally performed by a Certified Vocational Evaluator (CVE) and not by a typical vocational rehabilitation counselor. Vocational Evaluations are also more expensive, as they require more time and expertise to complete.***

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**§85-15-5. Identification of Rehabilitation Candidates; the Rehabilitation Assessment/ Evaluation Process.**

5.3 The rehabilitation evaluation process is comprised of a series of steps, as set forth in the following subsections.

5.3.1 Once referred to a vocational rehabilitation service provider or qualified rehabilitation professional, a qualified rehabilitation professional shall **conduct a rehabilitation evaluation.** In doing so, a qualified rehabilitation professional must: 1) conduct a personal interview of the injured worker; 2) contact, by telephone or otherwise, the injured worker's employer to ascertain return to work options and otherwise discuss the case; 3) obtain necessary input from the injured worker's attending physician and other treatment providers (with the written permission of the injured worker); and 4) analyze information about the injured worker's medical, educational, vocational, social, legal, and economic circumstances, including present physical and mental ability to participate in vocational rehabilitation services. **The evaluation may also include additional vocational testing if the qualified rehabilitation professional opines that the testing**

**is warranted in order to provide a full evaluation and the Commission preauthorized the additional testing.** The qualified rehabilitation professional must then decide and report in the form of a rehabilitation evaluation report, the format of which and method of transmission of which shall be approved by the Commission, as to whether the injured worker is likely to benefit from vocational rehabilitation services based upon the rehabilitation evaluation. The qualified rehabilitation professional must also report whether or not the evaluation was complete, and if not why not, and whether the injured worker, the injured worker's employer, or the injured worker's attending physician and other treatment providers cooperated in the process and must state the facts that form the basis of the conclusion.

***** Would recommend that the language in this section be changed to reflect that once referred, the rehabilitation professional will conduct a Rehabilitation Assessment vs. a Rehabilitation Evaluation. Further would recommend that the line referencing additional vocational testing be removed, as it pertains to services rendered as part of a Vocational Evaluation. If the rehabilitation professional believes that a Vocational Evaluation is indicated, he/she may request authorization for those services and the Commission can determine the necessity of it, prior to authorization.***

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**§85-15-10. Payment for Physical and Vocational Rehabilitation Services.**

10.3 Any bill submitted to the Commission must include the following information:

10.3.1 Claimant's name;
10.3.2 Claimant's claim number
10.3.3 Claimant's social security number;
10.3.4 Dates of service;
10.3.5 Place of service;
10.3.6 Type of service;
10.3.7 Appropriate procedure code(s);
10.3.8 Charge, which must be broken down into 1/10th of an hour (6 minute) increments;
10.3.9 Total bill charge;
**10.3.10 The name and unique identification number of the qualified rehabilitation provider rendering the service;**
10.3.11 Vendor number;
10.3.12 Date of billing;
10.3.13 An itemization of bills on Commission approved forms;

***** Just a quick reminder that rehabilitation providers have not been assigned unique identification numbers yet. Would recommend that each provider be given a unique identification number and that each sponsoring organization be given a unique identification number. This will allow for easier tracking on the part of provider and organization.***

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10.4 The expenditure for vocational rehabilitation shall not exceed twenty thousand dollars ($20,000) for any one injured employee. All services approved by the Commission as part of a rehabilitation plan, or the development thereof, shall be included in the twenty thousand dollar ($20,000) limitation, including, but not limited to, the following:

10.4.1 Vocational or on the job training;
10.4.2 Counseling, including all services rendered by a vocational rehabilitation service provider and a qualified rehabilitation professional;
10.4.3 Assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification;
10.4.4 Physical rehabilitation services;
10.4.5 Job placement services;
10.4.6 Other services approved in the sole discretion of the Commission.

***** The inclusion of services such as vocational rehabilitation and physical rehabilitation services is not a fair and reasonable means of controlling cost, for the disabled covered employee, the employer or the Commission. It severely hampers the rehabilitation options available to the disabled covered worker and it retards the rehabilitation process, which will ultimately lead to a higher rate of unsuccessful rehabilitation attempts.***

***The intent of the law was to increase the available training monies from $10,000 to $20,000 to accommodate the ever-increasing rise in training costs being charged by training facilities. By including vocational rehabilitation and physical rehabilitation costs with this total, the intent will be lost and the disabled covered worker will be faced with an even greater disadvantage.***

***Would recommend that this restriction of expenditure be limited to vocational rehabilitation training, and that vocational rehabilitation and physical rehabilitation expenses be set out and monitored/capped by some other means.***

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10.7. In order to obtain reimbursement for services rendered, including the costs of medicines and mechanical appliances or devices, physical and vocational rehabilitation services providers must submit a verified statement on forms prescribed by the Commission. The forms must be filed with the Commission within six (6) months after the service is provided or the medicines, mechanical appliances or devices are delivered. Failure to timely submit a reimbursement form bars the provider from any right of recovery from the Commission or any other party including, among others, the injured worker, the applicable employer, or any of their third party health care insurers.

***** This section does not reference the use of electronic billing to obtain reimbursement for services rendered. As many providers are using this mechanism for billing, would recommend that a reference to it be included in this section or an additional section be***

***added to cover this mode of obtaining reimbursement.***

**West Virginia Association of Rehabilitation Professionals**

PO Box 5116 Vienna, WV 26105 wvarp@citynet.net


January 9, 2004

Gregory A. Burton, Executive Director
Workers' Compensation Division
4700 MacCorkle Avenue, SE
Charleston, WV 25322

RE: Rule 15 / Physical & Vocational Rehabilitation

Dear Mr. Burton:

We are writing to thank you for the opportunity to provide input regarding this most important Rule's formulation prior to the formal public comment period.

While certain changes were made, numerous objections have been raised and these prohibit our association's endorsement of Rule 15 as now proposed.

Topics of concern include but are not limited to:

1. The new inclusion of physical rehabilitation and QRP costs being applied to the $20 thousand limit permitted for 23-4-9 expenditures.

2. The latest definition of "suitable gainful employment."

This letter describes just two of the issues raised by our members after review of the most recent draft of Rule 15; however, many individual members may have other issues of concern and we encourage them to participate by voicing their opinions during the public comment period.

Once again, the opportunity to participate in this process is appreciated.

Sincerely,

Tina Riggs Walsh, President
Adrienne Stahl, President Elect
Edwin Watson, Secretary
Brenda Johnson, Treasurer
Amy Snively, Northern Representative

cc: Thomas J. Obrokta
Steven F. White
Gene F. Bailey

**From:** "Sally Smith" <SSMITH@bowlesrice.com>
**To:** "Thomas Obrokta" <tobrokta@wvwcc.org>
**Date:** Thu, Mar 4, 2004 5:19 PM
**Subject:** FW: Public comments: Series 15

TJ, I drafted and hand delivered public comments on Series 15 on February 18, under the first deadline. I did not send a second copy today. However, I am forwarding to you a new electronic copy, as I just realized that my earlier electronic copy may not have shown all of our redlining in a format easy for you to read. (The paper copy sent did have the redlining properly formatted so you could easily locate our proposed changes and comments.) I hope this facilitates your review, and thanks for considering our suggestions.

-----Original Message-----
From: Sally Smith
Sent: Wednesday, February 18, 2004 12:22 PM
To: 'Thomas Obrokta'
Cc: 'Lynn Divjak'
Subject: Public comments: Series 15

TJ, Attached are public comments on the Commission's proposed rules for Vocational and Physical Rehabilitation. A hard copy has also been sent. Thank you for considering these comments.

We appreciate as well that our earlier informal comments were considered.

**CC:** <ldivjak@wvwcc.org>

**TITLE 85**
**EXEMPT LEGISLATIVE RULE**
**WORKERS' COMPENSATION COMMISSION**
**SERIES 15**
**VOCATIONAL AND PHYSICAL REHABILITATION**

## §85-15-1. General.

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

1.2. Authority.-- W. Va. Code § 23-4-9(b) and (e). Pursuant to ~~W. Va.~~West Virginia Code Section 23-1a(j)(3), rules adopted by the Workers' Compensation Board of Managers are not subject to legislative approval as would otherwise be required under ~~W. Va.~~West Virginia Section 29A-3-1 *et seq.* Public notice requirements of that chapter and article, however, must be followed.

COMMENT: Although we have not made changes throughout the rest of the rule, we note some inconsistency in the way the Workers' Compensation Act is cited. Our research suggests the proper form is to spell out West Virginia Code when the statute is referenced in a sentence. When used as a part of a citation only (as was used after Authority in this section), the correct format is W. Va. with a space between. Also, use of the § symbol is appropriate but sometimes in these rules section is also spelled out. This is not a substantive change, and we note this issue for consistency only.

1.3. Filing Date.--

1.4. Effective Date.

1.5. Repeal of former rule. --Section 14.13, "Payment for physical or rehabilitation services, or appliances," of ~~WV~~ 85 CSR 1, "Administration Of The Workers' Compensation Fund," filed April 15, 1986, and effective July 1, 1986, is hereby repealed. To the extent any other 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, then such provision is repealed and replaced by the provisions of this exempt legislative rule. ~~WV~~ 85 CSR 15, "Vocational and Physical Rehabilitation", filed April 12, 1994, and effective July 1, 1994, is hereby repealed and replaced by the provisions of this exempt legislative rule.

COMMENT: This subsection should be changed to properly reference the recently adopted version of 85 CSR 1.

## §85-15-2. Purpose of Rule; Cooperation.

2.1. It is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after a compensable injury. In order to assist injured workers to return to such employment and to encourage and assist employers in providing suitable gainful employment to injured employees, it shall be a priority of the Commission to achieve early identification of individuals likely to need rehabilitation services and to assess/evaluate the rehabilitation needs of these injured workers. It shall be the goal of the Commission and all interested parties 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. It is the shared responsibility of the employer, the employee, the physical rehabilitation service provider, the qualified rehabilitation professional, the treating physician(s) and the Commission to cooperate in the development of a rehabilitation process designed to promote re-employment for the injured employee.

2.2. Every injured worker and his or her employer are required pursuant to this rule to participate in rehabilitation evaluations, and the development, implementation, and completion of rehabilitation plans. Additionally, the Commission, the injured worker, his or her employer, his or her treating physician(s), the physical rehabilitation service provider, and the qualified rehabilitation professional are required to share in the responsibility for the success of the individual injured worker's rehabilitation.

2.2.1. Injured workers who cooperate with the rehabilitation evaluation process, fully participate in authorized rehabilitation plans, and show satisfactory progress toward completion of the plan are eligible to receive temporary total rehabilitation or temporary partial rehabilitation disability benefits. An injured worker who fails, without a showing of good cause, to participate in a rehabilitation evaluation, to participate in an authorized rehabilitation plan, or fails to show satisfactory progress toward completion of the plan, may be denied any applicable form of benefits or may have temporary rehabilitation benefits suspended effective the date the injured worker ended his or her participation in the rehabilitation plan, ceased to be cooperative in and/or comply with the rehabilitation or ceased making satisfactory progress toward completion of the plan. The determination of whether a claimant is making satisfactory progress, within the meaning of this section, shall be within the sole discretion of the Commission.

2.2.2. In determining whether an employer or an injured worker has cooperated in and/or complied with the rehabilitative effort, the following standards are to be used:

a. Whether medical and vocational opinions substantially concur that the treatment, service, or program is indicated to bring about a return to employment;
b. Whether it is reasonably safe and not attended by unusual suffering or risk for the injured worker to participate;

c. Whether it is likely that the treatment, service, or program will produce measurable physical and/or vocational improvement; and

d. Whether a person of ordinary prudence and courage would participate in the treatment, service, or program for his or her own betterment, regardless of compensation.

2.2.3. Employers who cooperate with the rehabilitation assessment/evaluation process and fully participate in authorized rehabilitation plans benefit from the rehabilitation process by minimizing the costs associated with work-related injuries. The Commission must consider an employer's workers' compensation vocational rehabilitation record in assigning an experience rating if the employer is a subscriber and in establishing and reviewing a security requirement if the employer is self-insured, to the extent allowed by legislative rules governing ratemaking and underwriting practices and Chapter 23 of the West Virginia Code. Employer's cooperation regarding rehabilitation efforts and plans includes, but is not limited to: full participation in the rehabilitation evaluation, reasonable efforts to provide reemployment opportunities to injured workers upon full release or release with restrictions, reasonable efforts to provide assistance to the injured worker returning to transitional, part time, modified or alternate employment.

2.2.4. This rule establishes the minimum standard for an employer providing assistance to an injured worker to return to employment; it is not intended to limit additional assistance an employer may provide an injured worker.

2.3. In making a ruling that a party has failed to cooperate or comply, the Commission shall issue a protestable order. Where there are disagreements between the injured worker, the employer, or the Commission so as to cause the filing of a protest, the parties are encouraged to utilize the mediation process provided for by W. Va. Code §23-5-9(b).

2.4. Physicians and other health care providers are also responsible for assisting and encouraging injured workers to return to suitable gainful employment and providing assistance to employers in determining accommodations for each injured worker. Physician and other health care provider cooperation regarding rehabilitation efforts and plans includes, but is not limited to: the rehabilitation evaluation, full participation in providing updated medical documentation pertaining to current and anticipated treatment plans and restrictions to the Commision, injured worker, employer, and other treating or consulting physician or other health care provider, encouraging and participating in communications between the injured worker and his or her employer, familiarity with the injured worker's essential job functions and provision of medical documentation to assist in returning to transitional, part-time, modified or alternate employment. Failure by a physician or other health care provider to cooperate in rehabilitation efforts may result in suspension or termination of the physician or health care provider pursuant to West Virginia Code § 23-4-3c ~~of WV Code~~.

2.5. Providers of vocational rehabilitation services and qualified rehabilitation professionals are responsible for assisting and encouraging injured workers, employers, physicians and other health care providers to fully participate and cooperate in the rehabilitation process. The providers and qualified rehabilitation professional must be knowledgeable of all applicable legislative rules, and statutory requirements that relate, in any way, to the provision of

rehabilitation services. Failure of a vendor and/or a qualified rehabilitation professional and/or his/her employer/primary contractor to be fully cooperative in the rehabilitation process may result in suspension or termination of the vendor and/or qualified rehabilitation provider and/or his/her employer/primary contractor pursuant to West Virginia Code § 23-4-3c.

## §85-15-3. Definitions.

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

3.1. "Executive Director" means the executive director of the West Virginia Workers' Compensation Commission pursuant to W.Va. Code §23-1-lb.

3.2. "Commission" means the West Virginia Workers' Compensation Commission as provided for by W. Va. Code §23-1-1.

3.3. "Injury" and derivative words have the meaning ascribed to the term "injury" by W. Va. Code §23-4-1.

3.4. "Injured worker" and "claimant" mean an employee entitled to workers' compensation benefits as the result of a work-related injury, as provided under W. Va. Code §23-4-1.

3.5. "Injured worker's employer" or "employer" means an employer charged, pursuant to Chapter 23 of the West Virginia Code and applicable rules and regulations, for the work-related injury and any physical and/or vocational rehabilitation associated with the injury.

3.6. "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 other work for which the employee is, or may become, suited by training, experience, or education, but not limited by his or her previous level of earnings.

3.7. "Physical rehabilitation services" means physician prescribed health care services, which will likely increase the injured worker's ability to return to suitable gainful employment. Physical rehabilitation services include but are not limited to work hardening and work conditioning programs.

3.8. "Physical rehabilitation services provider" means a provider of health care services, provided the provider is:

3.8.1. A medicare certified rehabilitation agency;
3.8.2. A certified outpatient rehabilitation facility;
3.8.3. A duly licensed health care practitioner;
3.8.4. A physical rehabilitation hospital; or
3.8.5. A duly licensed acute care hospital.

3.9. "Physical rehabilitation hospital" means any of the following institutions or facilities:

3.9.1. 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; and that, for its in-patient services, obtains on or before December 31, 1994, and thereafter maintains accreditation from the Joint Commission on Accreditation of Health Care Organizations and, further, on or before July 1, 1995, obtains and thereafter maintains accreditation from the Commission on the Accreditation of Rehabilitation Facilities.

COMMENT: We are not certain why the dates referenced are 1994 and 1995, and unless there is a particular law or regulation referencing these dates, we recommend a more recent accreditation.

3.9.2. A distinct 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

3.9.3. A facility operated by the West Virginia Division of rehabilitation services.

3.10. "Work Conditioning" means an intensive, work-related, goal oriented, conditioning program designated specifically to restore systemic neuromusculoskeletal functions (~~eg~~ e.g. strength, endurance, movement, flexibility, motor control) and cardiopulmonary functions. The objective of the work conditioning program is to restore physical capacity and function to enable the injured worker to return to work. Programs are typically but not always up to or greater than two (2) and less than four (4) hours per day, five (5) days per week and for a period of four (4) to eight (8) weeks in duration.

3.11. "Work Hardening" means a highly structured, goal-oriented, individualized progressive and supervised treatment program designed to return the client to work. Work hardening programs, which are often interdisciplinary in nature, use real or simulated work activities designed to restore physical, behavioral, and vocational functions. Work hardening addresses issues of productivity, safety, physical tolerances, and work behaviors. Programs are typically but not always up to or greater than four (4) and less than eight (8) hours per day, five (5) days per week, and a period of four (4) to eight (8) weeks in duration.

3.12. "Assistive devices" means physical aides, appliances or mechanical devices that will increase the injured worker's independence or provide assistance in performing an essential job task to facilitate a return to suitable gainful employment.

3.13. "Vocational rehabilitation services" means professional services available to the injured worker under W. Va. Code 23-4-9 which are reasonably necessary to enable ~~an~~ him/her to return to suitable gainful employment as soon as practical. This may include, but is not limited to, coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan

monitoring, job development and job placement. Furthermore, "vocational rehabilitation service" means services covered by West Virginia Code § 23-4-9, which provide new skills or modified work to enable an injured worker to return to suitable gainful employment as soon as practical. Services may include, but are not limited to, Adult Basic Education, vocational-technical training, college training, on-the-job-training, travel expenses related to training, job modifications and placement tools.

3.14. "Vocational rehabilitation service providers" means licensed professionals, public agencies, companies and corporations which provide injured workers vocational rehabilitation services as defined in section 3.13 of this rule.

3.15. "Qualified rehabilitation professional" means a person who meets the criteria set forth in 85 CSR 27, Qualified Rehabilitation Professional.

3.16. "Rehabilitation plan" means a plan or a modified plan for physical and/or vocational rehabilitation designed to facilitate the injured worker's return to work developed in accordance with this rule by a qualified rehabilitation professional and approved by the Commission.

3.17. "Vocational evaluation" means a systematic evaluation of the injured worker's skills, aptitudes, interests and functional ability through standardized testing and work samples. A vocational evaluation may be used when an injured worker has a limited work history, limited perceived interests, suspected cognitive impairment or when additional information is required regarding the injured worker's transferable skills for appropriate rehabilitation plan development.

3.18. "Job analysis" means a systematic assessment of a specific job including essential functions the physical and/or cognitive requirements, working conditions, work site structure/layout, tools and equipment used, required skills/abilities, and/or any other characteristic that may be pertinent to performing the job.

3.19. "Job development" means the process of consultation with employers and the development of job opportunities in a comprehensive, professional manner. The intent is to establish continuing and mutually beneficial relationships with potential employers through selective placement, job modification, and adjustment counseling. Job development activities should provide clients with an opportunity to reach their employment potential.

3.20. "Job placement services" means professional activities involved in assisting individuals to seek, obtain and maintain appropriate employment. It may include guidance in vocational decision making a transferable skills analysis; training in job-seeking skills; supportive counseling; identifying job leads; negotiating with employers, supervisors and co-workers; and providing post-employment and follow-up services.

3.21. "Job seeking skills training" means teaching the injured worker how to obtain employment. Topics to be included in job search skills training include but are not limited to development of a resume, how to use a resume, completing applications, utilizing the want ads, cold calling techniques, networking, interviewing, cover and thank you letters, appropriate attire/hygiene, and tracking and developing job leads.

3.22. "Labor market survey" means an analysis of availability of jobs within a reasonable geographic region. The conclusions are based upon accumulation of data through employer contacts, review of help wanted listings, and use of published census wage and employment statistics. The survey is conducted considering employers within a reasonable distance of the injured worker's residence. The purpose is to determine if a proposed rehabilitation plan being considered has a reasonable likelihood of success.

3.23. "On-the-job-training" means a structured program under which an individual, over a specific period of time, learns a trade, business or occupation in an employment setting. Each training program, and the employer providing the training must be approved on a case-by-case basis by the Commission.

3.24. "Adult Basic Education" means a training service to assist an individual in acquiring the academic skills necessary to compete in a job or educational setting. This service may include GED preparation and testing, computer skills enhancement, or developmental skills courses. Remedial instruction must be from an accredited academic, business or vocational school. Remedial services on a part time basis are permitted as long as the injured worker's participation in plan services, in conjunction with other approved vocational rehabilitation services, are equal to full time. Return to work plan documentation is required from the qualified rehabilitation professional regarding the injured worker's current academic standing, the academic goal and the specific plan steps necessary to reach that goal.

3.25. "Vocational -Technical training"- means formal instruction to provide an individual specific mechanical or industrial skills or technical expertise to be applied to an occupation or trade. Vocational-technical schools or community colleges not already accredited by the North Central Association of Colleges and Schools Commissions on Institution of Higher Learning or approved by the State Dept. of Education must be individually approved by the Commission

3.26. "College training" means academic education to prepare an individual for an occupation of a professional or technical nature through a college or university accredited by the North Central Association of Colleges and Schools Commission on Institutions of Higher Learning.

3.27. "Placement Tools" means tools and or equipment or other adaptive devices necessary to return an injured worker to employment or to enable participation in an approved program such as on the job training or formal training.

3.28. "Transferable skills analysis" means a process by which jobs are identified that are consistent with the injured worker's capabilities.

## §85-15-4. Priorities.

4.1. Vendors of vocational rehabilitation services and qualified rehabilitation professionals must utilize the following priorities. No higher numbered priority may be utilized unless the Commission has determined all lower numbered priorities are unlikely to result in

placement of the injured worker into suitable gainful employment. If a lower numbered priority is clearly inappropriate for the injured worker, the next higher numbered priority must be considered. The rehabilitation plan must explicitly state the reasons and rationale for the rejection of any lower numbered priority. The priorities are as follows:

4.1.1. Return to the same employer and pre-injury job;

4.1.2. Return to the same employer and pre-injury job with modification;

4.1.3. Return to the same employer in a different position;

4.1.4. Return to the same employer in a different position with on-the-job-training;

4.1.5. Employment by a new employer without retraining;

4.1.6. Employment by a new employer with on-the-job-training;

4.1.7. Enrollment of the injured worker in a retraining program which consists of a goal-oriented period of formal retraining designed to lead to suitable gainful employment in the labor market;

**§85-15-5. Identification of Rehabilitation Candidates; the Rehabilitation Assessment/Evaluation Process.**

5.1. The Commission may, in its sole discretion, determine whether a claimant would be assisted in returning to suitable gainful employment with the provision of rehabilitation services.

5.2. The Commission may authorize a rehabilitation evaluation by a qualified rehabilitation professional of its sole choosing to determine whether physical and/or vocational rehabilitation services are appropriate for an injured worker. No provider is entitled to referrals from the Commission, the Commission is in no way required to adopt any referral method or system designed to include any or all of the vocational rehabilitation service providers or qualified rehabilitation providers, and the Commission has the sole discretion in the assignment of any referrals for an evaluation unless the employer has designated one or more preferred rehabilitation provider approved by the Commission pursuant to West Virginia Code § 23-4-9, or has contracted with one or more rehabilitation providers as a part of a managed health care plan pursuant to West Virginia Code § 23-4-3.

COMMENT: These suggested changes comply with legislative changes effective July 1, 2003.

5.3. The rehabilitation evaluation process is comprised of a series of steps, as set forth in the following subsections.

5.3.1. Once referred to a vocational rehabilitation service provider or qualified rehabilitation professional, a qualified rehabilitation professional shall conduct a rehabilitation evaluation. In doing so, a qualified rehabilitation professional must: 1) conduct a personal

interview of the injured worker; 2) contact, by telephone or otherwise, the injured worker's employer to ascertain return to work options and otherwise

5.3.2. The qualified rehabilitation professional must issue the rehabilitation evaluation report to the Commission with copies to the parties within forty-five (45) days after the date of the referral. A proposed rehabilitation plan, signed by the qualified rehabilitation professional and preferably the injured worker~~,~~ and~~, preferably,~~ the injured worker's employer, may be included with the rehabilitation evaluation report. Upon receipt, the Commission may approve the plan as submitted, request modifications to the plan, or request plan development. Failure to provide the rehabilitation evaluation report within forty-five (45) days of receipt of the referral shall cause a 10% reduction in the agreed to fee due and owing the vocational rehabilitation service provider or the qualified rehabilitation provider. Failure to provide the rehabilitation evaluation report within sixty (60) days receipt of the referral shall cause a 20% reduction in the original agreed to fee due and owing the vocational rehabilitation service provider and/or the qualified rehabilitation provider. Finally, failure to provide the rehabilitation evaluation report within 90 days of the receipt of referral shall result in no payment for the referral and shall require the vocational rehabilitation services provider and/or the qualified rehab provider to immediately return the referral to the Commission.

COMMENT: The rehabilitation professional should be permitted to express an opinion on an appropriate rehabilitation plan even if the claimant and the employer disagree. Thus, neither the signature of the claimant or the employer should be required for a rehabilitation opinion to be expressed, although a plan cannot be implemented unless the claimant agrees. If either the signature of the claimant or the employer are required by this rule, then both should be required: one as the participant and one as the payer.

5.3.3. The purpose of a rehabilitation plan is to clearly identify the return to work objectives and to describe action steps to assist the injured worker in returning to suitable gainful employment. The following standards apply.

5.3.4. The injured worker is an active participant in rehabilitation plan development.

5.3.5. The plan must be signed by the injured worker and the qualified rehabilitation professional for the plan to be implemented. Failure to sign a plan the injured worker has actively participated in developing, without good cause, as determined in the sole discretion of the Commission, shall cause the suspension of all benefits payable to the claimant until such time as the plan is signed. The claimant is not entitled to the lost benefits upon signing the plan. The Commission shall reject the proposed plan based upon the claimant's failure to cooperate if the claimant refuses to sign the plan and will thereafter, within fifteen (15) days of such acceptance or rejection issue a protestable order within fifteen (15) days.

5.3.6. The plan must clearly outline the specific goals and actions required to achieve the goals.

5.3.7. The plan must identify the respective responsibilities of the injured worker, the employer, the physician, the qualified rehabilitation professional, the Commission, and other parties involved in the claim.

5.3.8. The time frames for completion of the plan must be specified.

5.3.9. The qualified rehabilitation professional must provide a plan justification explaining the need for rehabilitation services.

5.3.10. The qualified rehabilitation professional must provide plan rationale explaining how the goal was selected.

5.3.11. The qualified rehabilitation professional must describe placement prospects and earnings potential.

5.3.12. Criteria for completion and termination of the plan must be fully defined.

5.3.13. Costs associated with the services to be provided and the periods of temporary indemnity are to be listed in the plan.

5.3.14. The plan must be served upon the Commission and all parties to the claim by the qualified rehabilitation professional.

5.3.15. A rehabilitation plan must require that all vocational rehabilitation services be delivered by providers registered under the provisions of section 9 of these rules. Except with the prior consent of the Commission, no other providers may deliver physical and/or vocational rehabilitation services to an injured worker under an approved rehabilitation plan. The Commission's consent to utilize unregistered providers will not be given except upon a showing that an appropriate registered provider is not reasonably available to the injured worker. To the extent it is economically and otherwise feasible, providers who are located in the injured worker's geographic area and within the state of West Virginia are to be given preference. In-state providers and out-of state providers are both to be compensated pursuant to section 10 of these rules.

5.3.16. A rehabilitation plan that provides for vocational retraining must give preference to schools and training facilities located in the injured worker's geographic area, thereby reducing the need for the injured worker to travel extensively or to relocate. A plan may be denied by the Commission if it concludes, it its sole discretion, that the plan requires the injured worker to travel excessively or to locations unreasonably distant from his or her home.

5.3.17. Any rehabilitation plan developed and implemented under this rule is subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision there under, or to any court or administrative order applying specifically to the injured worker's employer, and will further be subject to any applicable federal statutes or regulations.

5.4. The Commission shall enter a protestable order, within fifteen (20) days of receipt of the finalized rehabilitation plan signed by the qualified rehabilitation professional and the injured worker.

## §85-15-6. Implementation of the Rehabilitation Plan.

6.1. Although an employer is permitted to object to the plan pursuant to section 5.4 of this rule, the implementation of the plan will proceed notwithstanding the objection. In the event that the employer is successful in challenging the plan, the employer's account will be adjusted to reflect the appropriate charge associated with the rehabilitation plan or the self-insured employer shall be reimbursed. In the event the plan has not been completed at the time of the ultimate decision on the protest, the plan will be modified, if necessary, to conform with the ultimate decision.

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

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

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

6.2.3. A finding that an injured worker or the injured worker's employer is not cooperating with a plan;

A finding that the rehabilitation plan is no longer necessary for the injured worker's reemployment.~~;~~

6.2.4. ~~A finding that a change in economic conditions has caused the rehabilitation plan to be inappropriate.~~

COMMENT: West Virginia Code § 23-4-6 states that the compensability of pre-injury to post-injury income cannot be considered in evaluating the claimant's entitlement to a permanent total disability award. Likewise, a change in economic conditions does not appear to be relevant to the claimant's ability to participate in rehabilitation, especially with the availability of temporary partial rehabilitation benefits.

6.3. All physical and/or vocational rehabilitation services must be delivered in accordance with the rehabilitation plan developed under section 5 of this rule. The Commission may authorize the qualified rehabilitation professional to monitor compliance with and progress under the rehabilitation plan. Once authorized the qualified rehabilitation professional must contact the injured worker, the employer, and all other participating parties on a regular basis to monitor compliance with and progress under the plan. Report of these contacts must be submitted to the Commission in (30) day intervals, unless otherwise directed by the Commission.

Failure to so report may result in the denial of payment for services provided during the thirty (30)~~30~~ days and thereafter until the required report is received.

6.4. In the event it is later determined the rehabilitation services provided will not meet the goal of the plan, the vocational rehabilitation service provider and/or the qualified rehabilitation professional must notify the Commission and recommend plan modifications as appropriate.

6.5. If the injured worker is not compliant with the rehabilitation plan, or is not making satisfactory progress under the plan, the vocational rehabilitation service provider must immediately notify the Commission. Failure to notify the Commission will result in a closing of the file, a mandated return of the file to the Commission, the finding of an overpayment to the vocational rehabilitation service provider and/or qualified rehabilitation service provider in an amount equal to the sum of all services provided to date on the file.

6.6. If, based upon reports of the qualified rehabilitation professional or other reliable evidence, the injured worker is not compliant with the rehabilitation plan, or is not making satisfactory progress under the plan, in the sole discretion of the Commission, all benefits payable to the injured worker shall be suspended until such time as the injured worker becomes compliant or begins to make satisfactory progress under the plan or the benefits may be terminated.

## §85-15-7. Payment of Indemnity Benefits.

7.1. In every case in which the Commission authorizes physical and/or vocational rehabilitation services pursuant to a rehabilitation plan, and the implementation of that plan has begun, the injured worker may receive temporary total rehabilitation disability benefits or temporary partial rehabilitation benefits as provided in West Virginia Code Section 23-4-9.

7.2. As part of a rehabilitation plan, an injured worker may return to work at an alternate, modified or transitional work assignment on a temporary basis. The duration of the temporary work must be determined on a case-by-case basis by the qualified rehabilitation professional and be justified in the rehabilitation plan.

7.2.1. Whenever it is proposed that an injured worker return to work under section 7.2 of this rule, the employer, with the assistance of the qualified rehabilitation professional, must furnish the injured worker's treating physician, the Commission and all parties to the claim a statement describing the work in terms that will enable the physician to relate the essential tasks of the job to the injured worker's functional abilities. The treating physician must then advise the qualified rehabilitation professional within 15 days of receipt of information pertaining to the essential tasks of the job whether the injured worker is physically capable of performing the work described. The injured worker may consent to undertake the work assignment without the approval of his or her treating physician. In cases where the injured worker has no treating physician or in cases in which the treating physician has not fully cooperated in the rehabilitation process, the Commission's independent medical evaluator, including its Office of Medical Services, may review job descriptions and provide a functional ability opinion.

7.2.2. Upon undertaking employment under section 7.2 of this rule, the injured worker's temporary total disability benefits, if any, will be terminated and he or she may become eligible for temporary partial rehabilitation benefits, if applicable under section 7.3 of this rule. If the work impedes the injured worker's recovery to the extent that he or she cannot continue to work or if his or her compensable condition worsens due to the work being performed, the temporary total payments, if applicable, may be resumed when objective medical documentation is presented to the Commission directly relating the inability to work due to the compensable injury or results thereof. If the work ends or is no longer otherwise available, the Commission shall decide whether the injured worker has sufficiently recovered to permit the injured worker to return to his or her usual job or to other available work, or if other rehabilitative services are required to return the injured worker to employment. If the decision is that the injured worker cannot return to employment, temporary total rehabilitation benefits or temporary total disability benefits, whichever applicable, may be reinstated, but only for the period authorized by law.

7.3. If the injured worker, pursuant to a rehabilitation plan, returns to employment with the same employer or a new employer on either a full time or part time capacity, and to either gainful employment or to a transitional, modified or alternate work assignment, pursuant to section 7.2 of this rule, and if 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, then he or she may be entitled to receive temporary partial rehabilitation benefits. The injured worker's average weekly wage earnings upon return to work for the purposes of section 7.4 will be the injured worker's actual gross earnings, as reported to the state tax department and the federal internal revenue service and substantiated by payroll documentation or other information as requested by the Commission.

7.4. Temporary rehabilitation benefits are calculated, as follows:

7.4.1. The temporary partial rehabilitation benefit is seventy percent (70%) of the difference between the average weekly wage earned at the time of the injury and the average weekly wage earned at the new employment, to be calculated as provided under W. Va. Code §23-4-9(d);

7.4.2. The temporary partial rehabilitation benefits are not subject to the minimum benefit amounts required by the provisions of W. Va. Code §23-4-6(b); and

7.4.3. The temporary partial rehabilitation benefits cannot exceed the temporary total disability benefits to which the injured worker would be entitled pursuant to W. Va. Code §234-6, -6d, and -14, during any period of temporary total disability resulting from the injury in the claim. The temporary partial rehabilitation benefits plan must be reviewed at least every ninety (90) days to determine if continuation of such plan is appropriate.

7.5. Temporary partial rehabilitation benefits are only payable during the implementation and successful progress toward completion of a rehabilitation plan. Upon termination of the plan, as provided for under this rule, or upon expiration of the plan, payment of all temporary partial and/or total rehabilitation benefits must be stopped regardless of the injured worker's level of wages.

7.6. Payments of temporary partial rehabilitation benefits for differences of five percent (5%) or less in the pre-injury average weekly wage and the new employment average weekly wage will not be made because the benefit gives no economic incentive to the injured worker and would be administratively too costly.

7.7. The injured worker cannot receive both temporary total disability benefits and temporary partial rehabilitation benefits for the same time period.

7.8. The injured worker can receive both temporary partial disability benefits and permanent partial disability benefits for the same period of time.

7.9. The aggregate award of temporary total rehabilitation or temporary partial rehabilitation benefits for a single injury shall be for a period not exceeding fifty-two (52) weeks.

7.10. If payment of temporary total rehabilitation benefits is in conjunction with an approved vocational rehabilitation plan for retraining, the period of temporary total rehabilitation benefits may be extended for up to an additional fifty-two (52) weeks, but shall never exceed a total of one hundred four (104) weeks.

## §85-15-8. Rehabilitation Closure Report.

8.1. The qualified rehabilitation professional authorized to assist the injured worker must file a rehabilitation closure report with the Commission and all parties to the claim when it is determined that their involvement in the rehabilitation services are no longer necessary unless otherwise specified by the Commission.

## §85-15-9. Registration of Rehabilitation Providers.

9.1. Qualified rehabilitation professionals and other vocational rehabilitation vendors must register with the Commission using forms prescribed by the Commission. Any rehabilitation provider who does not meet the requirements set forth in Rule 27 of Title 85 of the Code of State Rules cannot be accepted for registration.

9.2. The Commission must compile a list of registered qualified rehabilitation services professionals and their qualifications and areas of expertise and specialization. The Commission must use only registered qualified rehabilitation service professionals in making rehabilitation referrals. Rehabilitation services may also be provided by employees of the West Virginia Division of rehabilitation services or employees of the Commission. In addition, rehabilitation services providers who are located outside of West Virginia and are in areas in which appropriate services are not frequently used may provide services under these rules on a case by case basis if otherwise qualified.

9.3. All rehabilitation services must be provided in accordance with rehabilitation plans implemented pursuant to these rules and must be monitored by the qualified rehabilitation professional employed by or under contract with the Commission or employed by the West Virginia Commission of rehabilitation services. The Commission must remove or suspend from

the list of vendors any provider of rehabilitation services who knowingly fails to comply with the provisions of these rules or a rehabilitation plan, or engages in other practices in violation of W. Va. Code §23-4-3c.

## §85-15-10. Payment for Physical and Vocational Rehabilitation Services.

10.1. The Commission will pay for physical and rehabilitation services in accordance with the fee schedule in effect at the time the service is rendered, adopted by the Commission pursuant to W. Va. Code §23-4-3 and otherwise as set forth in this rule. To the extent there are inconsistencies between the fee schedule and this rule, this rule shall govern. Only those physical rehabilitation services that are medically necessary and within the scope of the applicable rehabilitation plan can be reimbursed pursuant to these rules. However, the Commission cannot reimburse providers for physical rehabilitation services which require prior authorization under the provisions of W. Va. Code §23-4-3, or any rule adopted there under, unless:

10.2. The following services are considered overhead and the Commission will not pay for these services:

10.2.1. Administrative and supervisory salaries and related personnel expenses;
10.2.2. Office rent;
10.2.3. Depreciation;
10.2.4. Equipment purchase and rental;
10.2.5. Telephone expense including long distance phone call charges;
10.2.6. Postage
10.2.7. Shipping;
10.2.8. Expendable supplies;
10.2.9. Printing costs;
10.2.10. Copier costs;
10.2.11. Printing of fiche and department electronic files;
10.2.12. Maintenance and repair;
10.2.13. Taxes;
10.2.14. Automobile costs, maintenance, and mileage;
10.2.15. Insurance;
10.2.16. Dues and subscriptions;
10.2.17. Vacation, sick leave, and other expenses of a similar nature;
10.2.18. Internal staffing time;
10.2.19. Filing of material in case files;
10.2.20. Setting up files;
10.2.21. Activities associated with reports other than composing or dictating complete draft of the report (e.g., editing, filing, distribution, revising, typing, mailing, and any other related time spent by the vocational rehabilitation service provider reviewing the work of a qualified rehabilitation provider shall not be paid)
10.2.22. Generating and keeping internal record keeping forms;

10.2.23. Time spent on any administrative and clerical activity, including typing, copying, mailing, distributing, filing, payroll, record keeping, delivering mail, and picking up mail,

10.2.24. Activities associated with counselors training, general discussions regarding office procedures, internal case file reviews by supervisors, meetings, and seminars;

10.2.25. Unanswered phone calls;

10.2.26. Any other item or service not specifically identified and separately billed;

10.2.27. No payment will be made for reports prepared by physicians and submitted through the counselor; and

10.2.28. No payment will be made for any activity after notification by the Commission of case closure or plan termination, unless a closure report is requested at which time only those charges directly related to the preparation of the closure report will be approved.

10.3. Any bill submitted to the Commission must include the following information:

10.3.1. Claimant's name;

10.3.2. Claimant's claim number

10.3.3. Claimant's social security number;

10.3.4. Dates of service;

10.3.5. Place of service;

10.3.6. Type of service;

10.3.7. Appropriate procedure code(s);

10.3.8. Charge, which must be broken down into $1/10^{th}$ of an hour (6 minute) increments;

10.3.9. Total bill charge;

10.3.10. The name and unique identification number of the qualified rehabilitation provider rendering the service;

10.3.11. Vendor number;

10.3.12. Date of billing;

10.3.13. An itemization of bills on Commission approved forms;

10.4. The expenditure for vocational rehabilitation shall not exceed twenty thousand dollars ($20,000) for any one injured employee. All services approved by the Commission as part of a rehabilitation plan, or the development thereof, shall be included in the twenty thousand dollar ($20,000) limitation, including, but not limited to, the following:

10.4.1. Vocational or on the job training;

10.4.2. Counseling, including all services rendered by a vocational rehabilitation service provider and a qualified rehabilitation professional;

10.4.3. Assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification;

10.4.4. Physical rehabilitation services;

10.4.5. Job placement services;

10.4.6. Other services approved in the sole discretion of the Commission.

10.5. Temporary total disability benefits and temporary partial rehabilitation benefits are not to be included in the twenty thousand ($20,000.00) dollar limitation.

10.6. The Commission cannot reimburse providers for physical rehabilitation services which require prior authorization under the provisions of W. Va. Code § 23-4-3, or any rule adopted there under, unless the physical rehabilitation services provider obtains prior authorization.

10.7. In order to obtain reimbursement for services rendered, including the costs of medicines and mechanical appliances or devices, physical and vocational rehabilitation services providers must submit a verified statement on forms prescribed by the Commission, The forms must be filed with the Commission within six (6) months after the service is provided or the medicines, mechanical appliances or devices arc delivered. Failure to timely submit a reimbursement form bars the provider from any right of recovery from the Commission or any other party including, among others, the injured worker, the applicable employer, or any of their third party health care insurers.

10.8. All physical and vocational rehabilitation service providers are prohibited from making any charge against an injured worker or any other person, firm or corporation for any service rendered as a part of a rehabilitation plan or as a result of a compensable injury. Nothing in this section prevents another agency of any governmental unit, person, firm, corporation, or other entity from agreeing to reimburse a service provider for services rendered.

10.9. In the event that an injured worker insists upon the delivery of a physical and/or vocational rehabilitation service after being advised in writing by the Commission that the service has been determined not to be medically or vocationally necessary, the provider may charge the injured worker for the costs of such service notwithstanding the provisions of section 10.8, but only if the provider first informs the injured worker that he or she will be personally responsible for the costs of the service and informs the injured worker as to the amount of the charge. If the injured worker has other health care insurance which will pay for the service described in this section, then the provider may bill that insurer for the service and no provision of these rules prevents the provider from receiving reimbursement under the terms of the insurance policy.

10.10. "Without limiting the general nature of various statutes respecting criminal fraud, and by way of illustration and not in limitation, the following are deemed unlawful acts and practices:

a. Billing for services not actually performed;

b. Billing for expenses not actually incurred;

c. Billing services on dates other than the date on which they were actually performed;

d. Offering consideration of any kind, including gifts, services or gratuities to Commission employees in exchange for or as a past reward for referring cases to the provider;

e. Failing to close claims for rehab services at the earliest practicable date when the claimant can no longer benefit from such services;

f. Providing false information in any statement to the Commission, or forging or falsifying any record required to be kept by these Rules or any other statute or rule governing providers; and

g. Rolling in unreimbursable time or expenses by adding hours for billable time or expenses.

10.11. All providers and employers shall retain for five (5) years and provide to the Commission on request and without a subpoena hard copies of the source underlying any bill, invoice, report, etc. submitted. to the Fund by electronic or other means.

## §85-15-11. Trial Return to Work

11.1. The provisions of West Virginia Code Section 23-4-7b regarding trial return to work have been reinstated and will be implemented by the Commission.

## §85-15-12. Employer-Preferred Vocational Rehabilitation Services.

12.1. Any employer who desires to contract directly with one or more preferred vocational rehabilitation providers to provide vocational rehabilitation services to its injured workers and require its employees to use the preferred provider(s), shall notify the Commission of is contract and designation on forms prescribed by the Commission. Such selected providers must be registered with the Commission as required by Section 85-1 5-9. Notwithstanding the employer's right to select a preferred provider, the Commission shall remain the sole referral authority.

12.2. Upon motion by the injured worker or the employer, or upon its own initiative, the Commission may, with a showing of just cause, assign or reassign the injured worker to a qualified rehabilitation provider other than the provider designated by the employer. Such cause might include, but not be limited to, past or present family or social relationships between the injured worker and the employer's preferred rehabilitation services provider, common financial interests between the injured worker and the employer's preferred rehabilitation services provider, or evidence that the rehabilitation process or provider is not in compliance with this rule.

12.3. All preferred vocational rehabilitation providers shall comply with this Rule and Commission established guidelines, rules, regulations, and policies. Additionally, all preferred vocational rehabilitation providers shall utilize all reporting forms and reporting processes adopted by the Commission.

12.4. A vocational rehabilitation provider must be in good standing with the Commission in order to be designated and/or maintain its designation as a preferred provider. Additionally, the preferred provider shall adhere to the Commission's fee schedule for reimbursement of expenses and any expenses which exceed the fee schedule shall be the sole responsibility of the employer.

## §85-15-13. Severability.

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

**AS CURRENTLY PROPOSED**

3.26 "College training" means academic education to prepare an individual for an occupation of a professional or technical nature through a college or university accredited by the North Central Association of Colleges and Schools Commission on Institutions of Higher Learning.

**COMMENTS**

An Associate degree typically requires completion of 64 to 69 hours.

The typical course outline for an Associate degree appearing in any college catalog calls for 14 to 18 (and most often 16 to 18) hours per semester.

For tuition calculation purposes, public schools consider 12 or more hours "full-time."

Schools typically encourage adult students to take no more than 12 hours per semester (I suspect to, in part, prolong the flow of tuition).

Summer class options have always been limited and are becoming more so in k=light of budget cuts.

At 12 hours per semester (and even with 6 applicable credits in the Summer, a student starting a program in 08/2004 would have, at best, only 54 hours by the end of the 4th full (Spring 2006) semester.

**SUGGESTION**

Add something like - The injured worker sponsored in college training is required to enroll in at least 15 hours per semester (or 12 hours per quarter) with the following exceptions: a minimum of 12 hours in a semester including required development courses in mathematics and/or English; a minimum of 12 hours in the final semester of a program if graduation requirements will be met with those 12 hours; and a minimum of 6 hours in a Summer semester: Provided, these minimums may be lowered in any semester if the injured worker can document, in writing, sufficient classes applicable to the degree or which would significantly enhance employment prospects are not available or at the sole discretion of the Commission; in such cases, the injured worker and the qualified rehabilitation professional are required to develop an internship for that semester.

**From:** Thomas Obrokta
**To:** Divjak, Lynn
**Date:** Tue, Mar 9, 2004 12:53 PM
**Subject:** Fwd: FW: Rule 15 Public Comment Document

another for rule 15

>>> "John Jordan" <John.Jordan@procura-inc.com> 03/04/04 04:29PM >>>
Mr. Obrockta,

I reviewed the email that I authored, forwarded to you by Sonya and I identified a couple of minor but significant errors in the text. Please discard the email from Sonya and accept my email as Procura's submitted public comment pertaining to rule 15.

I would welcome the chance to discuss this subject matter with you directly.

Sincerely,

John C. Jordan
President
Procura Management, Inc.

-----Original Message-----
From: Sonya Moore [mailto:Sonya.Moore@procura-inc.com]
Sent: Thursday, March 04, 2004 4:10 PM
To: John.Jordan@procura-inc.com
Subject: FW: Rule 15 Public Comment Document

Sonya Moore
Administrative/Billing Supervisor

Procura Management Inc.
600 Westmoreland Office Park
Dunbar, West Virginia 25064
304-768-0004 Ext. 222
Sonya.Moore@procura-inc.com

-----Original Message-----
From: Sonya Moore [mailto:Sonya.Moore@procura-inc.com]
Sent: Thursday, March 04, 2004 3:46 PM
To: 'TOBROKTA@wvwcc.org'
Subject: Rule 15 Public Comment Document

Mr. Obrokta,

I was instructed to send our comments regarding Rule 15 for the Board of Managers to your attention. (Please find attached)

Thank you in advance for your assistance. If you should have any questions please don't hesitate to contact me.

Sonya Moore
Administrative/Billing Supervisor

Procura Management Inc.
600 Westmoreland Office Park
Dunbar, West Virginia 25064
304-768-0004 Ext. 222
Sonya.Moore@procura-inc.com

**To:** **Board of Managers**

**Date:** **03/04/04**

**Re:** **Rule 15**

Procura Management, Inc. is a managed care provider, providing rehabilitation case management services in the State of West Virginia.

Procura wishes to provide comment, as invited by the board of managers. Specifically, this comment speaks to portions of rule 15 pertaining to "Preferred Provider" selection.

Prior to the McKenzie decision, employers in West Virginia were able to express a preference with respect to the selection of case management providers participating case management effort provided for their employees.

Procura has maintained before, during and after periods of consideration of the decision, that the process of an employer expressing a preference never constituted a contract. Further, "preferences" expressed by employers were never enforceable in determining vendor selection, but rather one item of data to be considered by the WVWCC Claims Manager to consider in the referral process. Claims Managers would respect the expressed preference, barring any other mitigating circumstances.

**"Preferred Provider", never violated the injured workers' rights in the vendor selection process.** Throughout, consistent with title 85, an injured worker has always had the ability to select a different case management provider, superceding the employer, or Claims Manager's selection.

One item of public comment offered on 2-18-04 suggested the "possibility" of conflict with employers expressing vendor preference. This is not so, or even possible. Injured workers continue to have the ability to supercede this method of vendor/provider selection with a simple letter and signature. This **eliminates the possibility of conflict of interest.**

In fact, **injured workers have retained this right before and after the McKenzie decision (a fact that has never been sufficiently acknowledged publicly).**

The process of "Preferred Provider" is essential to encouraging the employers in the state of West Virginia to become involved in the process of managing the costs of workers' compensation. **Processes and procedures since the McKenzie decision have been structured in a manner that has left both employers and claims managers at the WVWCC unable to fully realize the benefits of employers, providers and rehabilitation providers working in concert, cooperatively.**

Procura encourages the immediate implementation of this rehabilitation tool and anticipates a positive impact for injured workers, WVWCC and the premium-paying employers of West Virginia.

Procura Management gladly avails itself as a resource at this time and always, in discussing, reviewing and developing positive processes.

I personally welcome any contact, inquiry or further discussion.

John C. Jordan
President
Procura Management, Inc.

## WEST VIRGINIA WORKERS' COMPENSATION COMMISSION'S RESPONSES TO PUBLIC COMMENTS RECEIVED ON RULES 15

On March 4, 2004, the public comment period for Series 15 of Title 85 of the Code of State Rules ("Rule") expired. The Rule previously had been filed by the West Virginia Workers' Compensation Commission ("Commission") after receiving approval by the Workers' Compensation Board of Managers. The following are the Commission's responses to the public comments received on Rule 15:

### RULE 15: VOCATIONAL AND PHYSICAL REHABILITATION

**I. Mick Bates**

1. Section 3.7 be amended as follows:

> "Physical rehabilitation services" means reasonably required ~~physician prescribed~~ health care services, which will likely increase the injured worker's ability to return to suitable gainful employment. Physical rehabilitation services include but are not limited to work hardening and work conditioning programs.

Recommendation: Reject, but insert "approved" in lieu of "prescribed" to allow for non-physician stakeholders to propose physical rehabilitation services but preserve's the need for the physician to opine that the claimant is medically capable of receiving the services.

2. Section 2.2.2 be amended as follows:

> In determining whether an injured worker has cooperated in the rehabilitative effort, the following standards are to be used:
>
> a. Whether medical, physical rehabilitation and/or vocational opinion substantially concur that the treatment, service, or program is indicated to bring about a return to employment;

Recommendation: Accept.

3. Sections 3.10 and 3.11:

It is suggested that Sections 3.10 and 3.11 are amended to read:

3.10 Work Conditioning" means.....Programs are typically but not always ~~up to~~ greater than two (2) and less than four (4) hours per day, five (5) days per week and for a period of four (4) to eight (8) weeks in duration.

3.11 Work Hardening" means.....Programs are typically but not always ~~up to~~ greater than four (4) and less than eight (8) hours per day, five (5) days per week, and a period of four (4) to eight (8) weeks in duration.

Recommendation: Accept.

4. Section 5.3.15: Amend as follows: Except with the prior consent of the Commission, no other providers may deliver physical and/or vocational rehabilitation services to an injured worker unless the injured worker is under an approved rehabilitation plan.

Recommendation: Reject.

5. Section 10.1: Amend as follows: Only those physical rehabilitation services that are ~~medically~~ reasonable necessary and within the scope of the applicable rehabilitation plan, and meet the standards as outlined in Sections 3.7 and 2.2.2 of this rule and Section 9 of Exempt legislative rule 28 can be reimbursed pursuant to these rules.

Recommendation: Accept, and add "and" between "reasonable" and "necessary" and the phrase "in the sole discretion of the Commission" between "necessary" and "and."

6. Section 10.2.4: Amend as follows:
   10.2.4 Equipment purchase and rental (not including Assistive devices as defined under Section 3.12 of these rules and included as part of the approved Vocational Rehabilitation plan.)

Recommendation: Add "Office" at the beginning of 10.2.3.

7. Section 10.9 be amended to read:
   10.9 In the event that an injured worker insists upon the delivery of a physical and/or vocational rehabilitation service after being advised in writing by the Commission that the service has been determined not to be medically physically or vocationally necessary as defined under Sections 2.2.2 and Sections 3.7 of this Rule, the provider may charge the injured worker for the costs of such service.....

Recommendation: Accept.

1. Section 10.4: Which indicates a reversal of past policy of not including physical rehabilitation services in the limit on vocational rehabilitation services which has been raised from $10,000 to $20,000.

Recommendation: The Commission agrees to exclude physical rehabilitation services from the limit. Section 10.4.4 will be deleted.

**II. Ed Watson**

1. Section 3.26 "College Training" be amended to regulate specific number of hours a claimant is required to take each semester in school.

   Recommendation: Reject. This is a claim specific matter that should not be regulated in a rule that would not provide enough flexibility. Additionally, the Commission monitors course loads outside of the rule structure.

2. Section 3.6 Amend the definition of "suitable gainful employment."

   Recommendation: Insert ",or if this is not possible, suitable gainful employment means" between "or" and "other."

3. Pay vocational rehabilitation benefits in coordination with the school calendar.

   Recommendation: Reject. The Commission cannot postpone rehabilitation plans so that the plans and benefits coincide with the school calendar.

4. Section 7.9: Clarify that the 52 week limitation on TPR and rehabilitation TTD is a limitation that applies to both benefit types separately.

   Recommendation: Accept by adding a final sentence to Section 7.9 that reads as follows: "That is, an injured worker is entitled to 52 weeks of temporary total rehabilitation benefits and 52 weeks of temporary partial rehabilitation benefits."

5. Section 3.28: Further define "transferable skills analysis."

Recommendation: The current definition is sufficient and leaves desired flexibility.

6. Section 7.2.1: Expand the information provided to physicians beyond just the "essential functions" of a position.

   Recommendation: Accept by adding "and other material job functions" between the words "tasks" and "of" on line 5.

7. Section 7.9: Clarify that the 52 week limitation does not apply to awards made before July 1, 2003.

   Recommendation: Accept by adding at the end of Section 7.9 the following: "These limitations do not apply to awards made before July 1, 2003."

8. Increase injured worker travel reimbursement from $.10 to $.15.

   Recommendation: Reject. This would reduce the amount of the $20,000 available for more appropriate rehabilitation expenditures.

9. Section 10.10: Amend as follows: "Offering consideration of any kind, including gifts, services or gratuities to Commission employees ~~in exchange for or as a past reward for referring cases to the provider~~;

   Recommendation: Reject.

10. Believes "at the earliest practicable date" is too vague in Section 10.10.e

    Recommendation: No change necessary. This is a phrase used routinely in statute and rule and is found in such laws as the Americans with Disabilities Act.

11. Require a code of ethics for rehabilitation providers.

    Recommendation: The Commission should not and is not qualified to promulgate a code of ethics to govern a specific profession. However, we can Insert the following at the end of Section 9.3: "Adherence to all applicable Codes of Ethics, including, but not limited to the Codes of Ethics associated with the certifications listed in 85 C.S.R. 27-6.5, is required and a breach of any applicable ethical provision shall be grounds for suspension and or termination of the provider's right to receive payments from the Commission."

12. On January 9, 2004, Mr. Watson submitted a 43 page document to the Commission. The Commission attempted to respond to each specific suggestion made by Mr. Watson, but it is not responding to general commentary made by Mr. Watson throughout his submission. To the extent a matter raised by Mr. Watson is not specifically addressed in this response, it is deemed rejected.

III. Art Lilly

1. Recognize board certified athletic trainers/exercise physiologists as providers of ancillary services.

   Recommendation: This comment will be the subject of Rule 20.

## IV. Debbie Frost

1. **85-15-9.3:** Omission of a Code of Ethics. This section states "The Commission must remove or suspend from the list of vendors any provider of rehabilitation services who knowingly fails to comply with the provisions of these rules or a rehabilitation plan, or engages in other practices in violation of W.Va. Code 23-4-3c". Title 85 Legislative Rule Workers' Compensation Division Series 27 Qualified Rehabilitation Providers state in 85-27-6.5 that "a qualified rehabilitation professional or provisional qualified rehabilitation professional whose eligibility was established based on certification as … must maintain that certification to continue to be a qualified rehabilitation professional …" Please consider the following in the continued creation of Series 15 Vocational and Physical Rehabilitation:
   - The certifications listed in 85-27-6.5 all come with codes of ethics that if broken can result in losing the certifications. This places the benchmark for ethical behavior high.
   - Not all qualified rehabilitation providers have or are eligible to have a certification in field of rehabilitation or case management.
   - Without a common code of ethics or an adopted code of ethics that all practicing in this state such as the American Counseling Association's Code of Ethics and Standards of Practice, West Virginia will continue to have unclear ethical expectations of the qualified rehabilitation professionals practicing in this state.
   - It is my opinion that the higher standards of care that you are trying to create through the new Series 15, without some way to include all practitioners in a code of ethics, will fall short of your goals.

   Recommendation: Insert the following at the end of 9.3: "Adherence to all applicable Codes of Ethics, including, but not limited to the Codes of Ethics associated with the certifications listed in 85 C.S.R. 27-6.5, is required and a breach of any applicable ethical provision shall be grounds for suspension and or termination of the provider's right to receive payments from the Commission."

2. **85-15-10.4 and 85-15-10.4.1:** $20,000 Expenditure Limit. This section caps all expenditures for vocational rehabilitation at $20,000, includes a variety of services and specifically the cost of (10.4.1) Vocational or on the job training. I suggest separating this one item out of the list of costs in Payment for Physical and Vocational Rehabilitation Services (10.4).

   Recommendation: Reject. West Virginia Code Section 23-4-9 specifically applies the $20,000 limitation to "expenditure[s] for vocational rehabilitation." Vocational and on the job training are clearly a component of vocational rehabilitation, so they are subject to the $20,000 limitation.

## V. Pat Maroney

1. **Rule 85-15-2 and 2.2.4:** By adding the following sentence, "In instances where the employer fails or refuses to cooperate or participate in the rehabilitation process, there shall be prima facie evidence of the claimant's entitlement to six weeks of benefits for each 1 percent of permanent partial disability, regardless of when the initial award of benefits was made, pursuant to W.Va. Code §24-4-6(e)(2)."

   Recommendation: Reject. This expands the statutory provision. W.Va. Code §24-4-6(e)(2), which allows for a larger permanent partial disability award if the injured worker is released to return to work and his or her employer does not offer the injured work his or her pre-injury job, or a comparable pre-injury job. This is unrelated to the rehabilitation process.

2. §85-15-5: The requirements are extremely restrictive and do not make allowances for the claimant to request a transfer of rehabilitation.

   Recommendation: Section 6.2 affords injured workers the requested flexibility. No change necessary.

3. 15-6.2.3: A rehabilitation plan can be suspended or terminated by finding that "an injured worker or an injured worker's employer is not cooperating with the plan." The term "or the injured worker's employer" should be stricken since their noncompliance should never be a reason to terminate or suspend benefits.

   Recommendation: Agreed. The phrase "or the injured worker's employer" should be stricken and a new 6.2.6 should be added to read as follows: "A finding that the injured worker's employer is not cooperating and the failure to cooperate is an impediment to plan completion shall result in plan modification as necessary to accomplish the rehabilitation goal."

4. 85-15-7: There are several instances where it states that the injured worker "may receive" either temporary total rehabilitation disability benefits or temporary partial rehabilitation benefits when they are compliant with the plan." If the claimant fully complies and participates in a rehabilitation plan he or she should absolutely be entitled and therefore the word "may" in §85-15-7.1 and §85-15-7.2.2, at line 2, and §85-15-7.3 at line 5, should all have the word "may" changed to "shall" or "will", whichever is appropriate.

   Recommendation: Accept by replacing "may" with "shall [or will], if otherwise appropriate under applicable law, ..."

## VI. Valerie Phillips/Employer

1. Section 5.1: It says the Commission may in its sole discretion determine whether a claimant would be assisted in returning to suitable gainful employment with provisions of rehab services. We need to include the employer in the rehab process everywhere in the Rule.

   Recommendation: Accept by adding "An employer may identify to the Commission claimants it wants to be considered for rehabilitation services."

## VII. Ray Nutter/Licensed Social Worker

1. There is or appears to be some lack of consistency primarily in the use and definition of the terms "suitable" and "gainful." Words suitable and gainful should be separated by the word "and" because they are two different things and we all know that suitable and gainful are two separate issues.

   Recommendation: Partially accept by adding "pre-injury physical demand level and pre-injury" between the words "her" and "level" in Section 3.6.

2. Section 85-15-2.1: Recommends that section 2.1 clarify what we're saying this first opening section of the purpose. It's not as clear as it could be to help me do my job. The third sentence says, "it shall be the goal of the Commission and all interested parties to return injured workers to employment which is comparable to that which the individual performed prior to the injury". By definition, that's step 1, but it doesn't say that it's

initially the ultimate goal. The purpose of 85-15-2.1 is to initially spell out the process in general terms. For purposes of clarity and consistency, it could be broken down to a line in agreement with the hierarchy itself.

Recommendation: Accept by adding the following to Section 2.1: "The ultimate goal of the rehabilitation process should be to achieve the goals of the priority hierarchy set forth in Section 4.1."

3. Section 85-15-2.1: Gross pre-injury income, self-sufficiency standards and the local labor market must be considered when exploring alternative re-employment opportunities; however, gross pre-injury income is not alone or predominately a limiting factor of the claimant's opportunities. Recommends including in guidelines that re-employment wages should be relative and the claimant understands.

   Recommendation: No change recommended as the priority hierarchy in Section 4.1 and the new definition of "suitable gainful employment" in Section 3.6 address this.

4. 85-15-2.5: "Providers of vocational rehabilitation services and qualified rehabilitation professionals are additionally responsible for assisting and encouraging workers, employers, physicians and other health care providers to fully participate." The way it reads, it sounds like it's the QRP's responsibility. "However, each of the involved parties is ultimately responsible for their own level of participation and cooperation." I have no problem with a vendor being dismissed for not complying or cooperating or for not being knowledgeable, but I have issue with QRP in this central area and full responsibility for a claimant, employer or medical provider's lack of cooperation in the process. That's how it could be interpreted on initial reading.

   Recommendation: Accept by striking "responsible for assisting and encouraging" and inserting "encouraged to assist."

5. 3.22: Define "reasonable geographic region" and "reasonable likelihood".

   Recommendation: Reject as these terms are too subjective depending on where the claimant resides.

6. 3.23: It reads, "on the job training means a structured program in an employment setting under which an individual..." Recommends adding, "over a specific vocational preparation period of time" because that's one of the tools they oftentimes use from the Dictionary of Occupational Titles by determining what an appropriate on-the-job training program is.

   Recommendation: Accept.

7. 3.23: It reads, "over a specific vocational preparation period of time, learns a trade, business or occupation". Recommends adding "that will ultimately result in relatively gainful alternative re-employment that is consistent with the claimant's acquired skills and residual physical capabilities".

   Recommendation: Accept, but strike the word "relatively" and change "acquired" to "acquirable."

8. 3.28: Add "required skills and residual physical abilities".

   Recommendation: Accept, but strike the word "required."

9. **10.2:** 10.2.13 seems to have some duplication with 10.2.29. 10.2.29 says "mileage" and 10.2.13 says "automobile cost, maintenance and mileage". 10.2.29 may need to be added as a separate issue.

   Recommendation: This comment appears to be from an old draft. This matter has already been fixed.

10. **10.10:** This section pertains to billing for services on dates other than the date on which they were actually performed. The way this electronic system is set up is to submit one date of service per activity, six entries per invoice. Recommends being allowed to bill 28 units on the date of the report and call that the date of service as long as QRP, internal QRP, claims manager, claims rep can look at report to verify. Recommends the Board should consider allowing for bundling of invoices especially for the providers that are doing electronic billing.

    Recommendation: Partially accept by re-writing 10.10.c. to read as follows: "Billing with incorrect dates of service."

11. Sees potential conflict of interest with preferred rehab providers. If a rehab provider has a preferred rehab provider contract with an employer, who is the client – the employer or the claimant?

    Recommendation: The Code allows employers to have preferred rehabilitation providers. The rights and responsibilities of all parties are set forth in the applicable laws, rules, policies and procedures of the Commission.

## VIII. Bruce Dunlap

1.Agreed with Valerie Phillips' (VI. Employer) comments that we need to include the employer in the rehab process everywhere in the Rule.

Recommendation: See response to Ms. Philips' comments.

## IX. Bondina Stone, Medical/Vocational Case Manager

1. **Section 10.2.25**: Disagrees with disallowing charges for unanswered phone calls.

   Recommendation: No change recommended. The Commission is willing to revisit this issue after the financial impact of SB 2013 is fully appreciated, including the resolution of all relevant legal challenges to SB 2013.

2. Pay mileage and/or travel time to rehabilitation professionals.

   Recommendation: No change recommended. The Commission is willing to revisit this issue after the financial impact of SB 2013 is fully appreciated, including the resolution of all relevant legal challenges to SB 2013.

3. **Section 2.1:** Insert "gainful" between "suitable" and "employment" on the 9th line.

   Recommendation: Accept.

4. **Section 2.4:** Insert "cooperate with and timely respond to rehabilitation providers" as a duty of the physician and other medical care providers.

   Recommendation: Accept.

5. Concern over definition of "suitable gainful employment."

Recommendation: This has been addressed in earlier responses.

6. Section 5.2: Allow the injured worker to pick the rehabilitation provider when an employer has not selected a preferred provider.

Recommendation: Reject. This is contrary to the Commission's right to make rehabilitation referrals and will otherwise likely be addressed when the Commission creates its own PPO.

7. Section 7.2.2: Insert "Benefits will not be reinstated solely because of lay-off or unavailability of work" as the second to last sentence.

Recommendation: Accept.

8. Section 10.2.23: Clarify that reimbursement will be allowed for communicating with the commission, particularly preparing reports.

Recommendation: Accept by inserting as a final sentence, "This does not prohibit reimbursement for actual time spent writing/typing reports to the Commission."

## X. B. J. Manning, DRS Rehabilitation Counselor

1. Concerned with including physical, professional and retraining expenses in the $20,000 limit

Recommendation: We have agreed to remove physical rehabilitation from the limit. The remaining charges are clearly vocational rehabilitation expenses and are required, by Code, to be within the $20,000 limitation.

2. Concerned with the definition of "suitable employment"

Recommendation: Already addressed in earlier comments.

## XI. Michael D. Reel

1. Recommends a definition of "vocational assessment

Recommendation: No change recommended. Vocational assessments are preliminary steps taken by the Commission, not outside providers, to determine if the injured worker would potentially benefit from rehabilitation services.

2. Insert a "vocational assessment" step in the rehabilitation process set forth in Section 5.

Recommendation: No change recommended. Vocational assessments are preliminary steps taken by the Commission, not outside providers, to determine if the injured worker would potentially benefit from rehabilitation services.

3. Just a quick reminder that rehabilitation providers have not been assigned unique identification numbers yet. Would recommend that each provider be given a unique identification number and that each sponsoring organization be given a unique

identification number. This will allow for easier tracking on the part of provider and organization.

Recommendation: The Commission agrees, is working on this, and will not require such an identification number until numbers are provided.

4. Disagrees with the inclusion of vocational and physical rehabilitation expenses within the $20,000 limitation

Recommendation: We have agreed to remove physical rehabilitation from the limit. Vocational rehabilitation expenses and are required, by Code, to be within the $20,000 limitation.

5. Section 10.7 does not reference electronic billing.

Recommendation: Insert the phrase "including electronic format" between the words "forms" and "prescribed" in Section 10.7.

## XII. Tina Riggs Walsh, West Virginia Association of Rehabilitation Professionals

1. The new inclusion of physical rehabilitation and QRP costs being applied to the $20 thousand limit permitted for 23-4-9 expenditures.

Recommendation: Accept.

2. Definition of "suitable gainful employment".

Recommendation: New definition, as provided for in recommendations above, should address this.

3. Concern over Section 2.5's requirement that vocational rehabilitation professionals be responsible for assisting and encouraging other participants in the rehabilitation process.

Recommendation: This has been addressed in response to Mr. Nutter's Comment No.4.

4. Insert "may include" between words "and" and "work" in Section 3.17.

Recommendation: Accept.

5. Clarify that the days begin to run upon receipt of the referral in Section 5.3.2.

Recommendation: Accept.

6. Objection to Section 5.3.2's allowing the Commission to modify a rehabilitation plan. Proposes to remove language.

Recommendation: Reject. The Commission needs this flexibility. The rehabilitation provider is a vendor and the Commission should have the right to modify the services being provided by the vendor.

7. Section 10.10.e Allow the rehabilitation professional input into determining the "earliest practicable date" a claim can be closed for rehabilitation services.

Recommendation: Accept by inserting the following: "The rehabilitation professional will be consulted before the claim is closed for the purpose of determining the earliest practicable date of closure."

8. Section 10.10.g Change the word "for" to "to."

Recommendation: Accept.

9. Section 10.4.2. Concern of the usage of the term "counseling."

Recommendation: Add "Counseling provided by psychiatrist or psychologists shall not be included within the $20,000 limitation."

XIII. **Sarah Smith, Attorney**

1. 85-15-2.2.1, 2.2.3, 2.2.4: Add the word "injured" in front of worker where appropriate.

Recommendation: Accept.

2. 2.4, 2.5: Add/delete the following language:

2.4: Physicians and other health care providers are also responsible for assisting and encouraging injured workers to return to suitable gainful employment and providing assistance to employers in determining accommodations for each injured worker. Physician and other health care provider cooperation regarding rehabilitation efforts and plans includes, but is not limited to: the rehabilitation evaluation, full participation in providing updated medical documentation pertaining to current and anticipated treatment plans and restrictions to the Commission, injured worker, employer, and other treating or consulting physician or other health care provider, encouraging and participating in communications between the injured worker and his or her employer, familiarity with the injured worker's essential job functions and provision of medical documentation to assist in returning to transitional, part-time, modified or alternate employment. Failure by a physician or other health care provider to cooperate in rehabilitation efforts may result in suspension or termination of the physician or health care provider pursuant to West Virginia Code § 23-4-3c ~~of WV Code~~.

2.5: Providers of vocational rehabilitation services and qualified rehabilitation professionals are responsible for assisting and encouraging injured workers, employers, physicians and other health care providers to fully participate and cooperate in the rehabilitation process. The providers and qualified rehabilitation professional must be knowledgeable of all applicable legislative rules, and statutory requirements that relate, in any way, to the provision of rehabilitation services. Failure of a vendor and/or a qualified rehabilitation professional and/or his/her employer/primary contractor to be fully cooperative in the rehabilitation process may result in suspension or termination of the vendor and/or qualified rehabilitation provider and/or his/her employer/primary contractor pursuant to West Virginia Code § 23-4-3c.

Recommendation: Accept.

3. 85-15-3.5: Add the following language:

"Injured worker's employer" or "employer" means an employer charged, pursuant to Chapter 23 of the West Virginia Code and applicable rules and regulations, for the work-related injury and any physical and/or vocational rehabilitation associated with the injury.

Recommendation: Accept.

a. 3.10, 3.11, 3.12, 3.13, 3.17, 3.24, 3.28: Add/delete the following language:

**3.10:** "Work Conditioning" means an intensive, work-related, goal oriented, conditioning program designated specifically to restore systemic neuromusculoskeletal functions (~~eg~~ e.g. strength, endurance, movement, flexibility, motor control) and cardiopulmonary functions. The objective of the work conditioning program is to restore physical capacity and function to enable the injured worker to return to work. Programs are typically but not always up to or greater than two (2) and less than four (4) hours per day, five (5) days per week and for a period of four (4) to eight (8) weeks in duration.

**3.11:** "Work Hardening" means a highly structured, goal-oriented, individualized progressive and supervised treatment program designed to return the client to work. Work hardening programs, which are often interdisciplinary in nature, use real or simulated work activities designed to restore physical, behavioral, and vocational functions. Work hardening addresses issues of productivity, safety, physical tolerances, and work behaviors. Programs are typically but not always up to or greater than four (4) and less than eight (8) hours per day, five (5) days per week, and a period of four (4) to eight (8) weeks in duration.

**3.12:** "Assistive devices" means physical aides, appliances or mechanical devices that will increase the injured worker's independence or provide assistance in performing an essential job task to facilitate a return to suitable gainful employment.

**3.13:** "Vocational rehabilitation services" means professional services available to the injured worker under W. Va. Code 23-4-9 which are reasonably necessary to ~~an~~ enable him/her to return to suitable gainful employment as soon as practical. This may include, but is not limited to, coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, job development and job placement. Furthermore, "vocational rehabilitation service" means services covered by West Virginia Code § 23-4-9, which provide new skills or modified work to enable an injured worker to return to suitable gainful employment as soon as practical. Services may include, but are not limited to, Adult Basic Education, vocational-technical training, college training, on-the-job-training, travel expenses related to training, job modifications and placement tools.

**3.17:** "Vocational evaluation" means a systematic evaluation of the injured worker's skills, aptitudes, interests and functional ability through standardized testing and work samples. A vocational evaluation may be used when an injured worker has a limited work history, limited perceived interests, suspected cognitive impairment or when additional information is required regarding the injured worker's transferable skills for appropriate rehabilitation plan development.

**3.24:** "Adult Basic Education" means a training service to assist an individual in acquiring the academic skills necessary to compete in a job or educational setting. This service may include GED preparation and testing, computer skills enhancement, or developmental skills courses. Remedial instruction must be from an accredited academic, business or vocational school. Remedial services on a part time basis are permitted as long as the injured worker's participation in plan services, in conjunction with other approved vocational rehabilitation services, are equal to full time. Return to work plan documentation is required from the qualified rehabilitation professional regarding the injured worker's current academic standing, the academic goal and the specific plan steps necessary to reach that goal.

**3.28:** "Transferable skills analysis" means a process by which jobs are identified that are consistent with the injured worker's capabilities.

Recommendation: Accept.

b. 85-15-5.2: Add the following language:

The Commission may authorize a rehabilitation evaluation by a qualified rehabilitation professional of its sole choosing to determine whether physical and/or vocational rehabilitation services are appropriate for an injured worker. No provider is entitled to referrals from the Commission, the Commission is in no way required to adopt any referral method or system designed to include any or all of the vocational rehabilitation service providers or qualified rehabilitation providers, and the Commission has the sole discretion in the assignment of any referrals for an evaluation unless the employer has designated one or more preferred rehabilitation provider approved by the Commission pursuant to West Virginia Code § 23-4-9, or has contracted with one or more rehabilitation providers as a part of a managed health care plan pursuant to West Virginia Code § 23-4-3.

Recommendation: Accept.

4. 5.3.2, 5.3.5: Add/delete the following language:

5.3.2: The qualified rehabilitation professional must issue the rehabilitation evaluation report to the Commission with copies to the parties within forty-five (45) days after the date of the referral. A proposed rehabilitation plan, signed by the qualified rehabilitation professional and preferably the injured worker~~, and, preferably,~~ the injured worker's employer, may be included with the rehabilitation evaluation report.

5.3.5: The plan must be signed by the injured worker and the qualified rehabilitation professional for the plan to be implemented. Failure to sign a plan the injured worker has actively participated in developing, without good cause, as determined in the sole discretion of the Commission, shall cause the suspension of all benefits payable to the claimant until such time as the plan is signed. The claimant is not entitled to the lost benefits upon signing the plan. The Commission shall reject the proposed plan based upon the claimant's failure to cooperate if the claimant refuses to sign the plan and will thereafter, within fifteen (15) days of such acceptance or rejection issue a protestable order within fifteen (15) days.

Recommendation: Accept.

5. 85-15-6.1, 6.2.4, 6.2.5, 6.3, 6.6: Add/delete the following language:

6.1: Although an employer is permitted to object to the plan pursuant to section 5.4 of this rule, the implementation of the plan will proceed notwithstanding the objection. In the event that the employer is successful in challenging the plan, the employer's account will be adjusted to reflect the appropriate charge associated with the rehabilitation plan or the self-insured employer shall be reimbursed. In the event the plan has not been completed at the time of the ultimate decision on the protest, the plan will be modified, if necessary, to conform with the ultimate decision.

Recommendation: Reject. With self-administration, self-insureds are no longer entitled to reimbursements from the Commission.

**6.2.4:** A finding that the rehabilitation plan is no longer necessary for the injured worker's reemployment.;

~~**6.2.5** A finding that a change in economic conditions has caused the rehabilitation plan to be inappropriate.~~

Recommendation: Reject.

**6.3:** ... Failure to so report may result in the denial of payment for services provided during the thirty (30) ~~30~~ days and thereafter until the required report is received.

Recommendation: Accept.

**6.6:** If, based upon reports of the qualified rehabilitation professional or other reliable evidence, the injured worker is not compliant with the rehabilitation plan, or is not making satisfactory progress under the plan, in the sole discretion of the Commission, all benefits payable to the injured worker shall be suspended until such time as the injured worker becomes compliant or begins to make satisfactory progress under the plan or the benefits may be terminated.

Recommendation: Reject. This would result in the injured worker being removed from the rehabilitation process and therefore likely not returning to work. This defeats the purpose of the Commission's rehabilitation efforts.

6. **85-15-7.2, 7.2.1, 7.3:** Add/delete the following language:

**7.2:** As part of a rehabilitation plan, an injured worker may return to work at an alternate, modified or transitional work assignment on a temporary basis. The duration of the temporary work must be determined on a case-by-case basis by the qualified rehabilitation professional and be justified in the rehabilitation plan.

**7.2.1:** Whenever it is proposed that an injured worker return to work under section 7.2 of this rule, the employer, with the assistance of the qualified rehabilitation professional, must furnish the injured worker's treating physician, the Commission and all parties to the claim a statement describing the work in terms that will enable the physician to relate the essential tasks of the job to the injured worker's functional abilities. The treating physician must then advise the qualified rehabilitation professional within 15 days of receipt of information pertaining to the essential tasks of the job whether the injured worker is physically capable of performing the work described. The injured worker may consent to undertake the work assignment without the approval of his or her treating physician. In cases where the injured worker has no treating physician or in cases in which the treating physician has not fully cooperated in the rehabilitation process, the Commission's independent medical evaluator, including its Office of Medical Services, may review job descriptions and provide a functional ability opinion.

**7.3:** If the injured worker, pursuant to a rehabilitation plan, returns to employment with the same employer or a new employer on either a full time or part time capacity, and to either gainful employment or to a transitional, modified or alternate work assignment, pursuant to section 7.2 of this rule, and if 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, then he or she may be entitled to receive temporary partial rehabilitation benefits. The injured worker's average weekly wage earnings upon return to work for the purposes of section 7.4 will be the injured worker's actual gross earnings, as reported to the state tax department and the federal internal revenue service and

substantiated by payroll documentation or other information as requested by the Commission.

Recommendation: Accept.

7. **85-15-12.2:** Add/delete the following language:

**12.2:** Upon motion by the injured worker or the employer, or upon its own initiative, the Commission may, with a showing of just cause, assign or reassign the injured worker to a qualified rehabilitation provider other than the provider designated by the employer. Such cause might include, but not be limited to, past or present family or social relationships between the injured worker and the employer's preferred rehabilitation services provider, common financial interests between the injured worker and the employer's preferred rehabilitation services provider, or evidence that the rehabilitation process or provider is not in compliance with this rule.

Recommendation: Accept.

**XIV. Beth Hayes**

1. **Section 5.3.2:** Allow QRP's 60 days instead of 45 to issue a rehabilitation evaluation report.

Recommendation: Accept.

2. **Section 5.3.5:** Change "plan" to "provider" at the end of the first sentence.

Recommendation: Accept.

3. **Section 6.5:** Allow the rehabilitation services provider input into the determination of "satisfactory progress."

Recommendation: Accept by add the following as the second sentence: "The determination of whether satisfactory progress is being made shall be a collaborative effort involving the Commission and the vocational rehabilitation services provider."

4. **Section 10.2.28**: Payment should be made for closure reports.

Recommendation: This was already done before the rule was filed with the Secretary of State's office. See Section 10.2.28.

5. **Section 10:** Allow reimbursement for up to 2 hours of travel time per day.

Recommendation: Reject. The Commission is willing to revisit this issue after the financial impact of SB 2013 is fully appreciated, including the resolution of all relevant legal challenges to SB 2013.

6. **Section 10.3:** The current billing system cannot accommodate the requiring billing information.

Recommendation: Agreed. The Commission acknowledges that its current billing system will not accommodate the required information and providers will not be required to provided the requested information until the Commission's electronic billing system is upgraded.

7. Section 10.4.2: Usage of the term "counseling" is troubling because not all QRP's are licensed counselors.

Recommendation: No change necessary. If a QRP is not a licensed counselor, then he or she should not perform the services and/or bill for services that would require licensure.

8. Section 12.1: Clarify that the employer's right to select a preferred provider cannot be "usurped" by the Commission.

Recommendation: Language in the draft filed for public comment with the Secretary of State's office should be acceptable to address this concern.

**XV. Holtzer Medical Clinic**

1. Requests that a code or reimbursement rate be listed for transitional work services.

Recommendation: Such billing matters are not appropriate for a rule, but the suggestion will be considered for implementation outside of the rule making process.

**XVI. John Jordan, Procura Management**

1. Procura encourages the immediate implementation of this rehabilitation tool and anticipates a positive impact for injured workers, WVWCC and the premium-paying employers of West Virginia.

Recommendation: Accept.

# WEST VIRGINIA WORKERS' COMPENSATION COMMISSION
## BOARD OF MANAGERS
## MARCH 16, 2004

Minutes of the meeting of the Board of Managers held on Tuesday, March 16, 2004, 1:00 p.m., at the Charleston Civic Center, Rooms 207-209, 100 Civic Center Drive, Charleston, West Virginia.

Board of Managers Members Present:

Steve White, Chairman
Gene F. Bailey
Paul Hardesty (Designee David Satterfield)
Richard W. Humphreys
Chris Jarrett
John L. Johnson
Brooks McCabe
Douglas W. Merritt
Bob Phalen
Craig Slaughter
Everette E. Sullivan
Paul E. Thompson

Staff Members Present:

Dr. James Becker
Gregory Burton
Alan Drescher
Lisa Hamrick
Chris Howat
Melinda Ashworth Kiss
Timothy Leach
Phil Lynch
Loralea Mullins
T. J. Obrokta, Jr.
Phil Shimer
Ed Shoop
Randall B. Suter
Dave Townsend
Andy Wessels

### 1. Call to Order

Chairman Steve White called the meeting to order at 1:08 p.m.

Chairman White: Would you please take silent roll call? I declare that we do have a quorum here. Welcome everybody.

### 2. Approval of Minutes

Chairman White: The first order of business is the approval of the February 17, 2004, minutes.

Everette Sullivan moved to approve the minutes of the February 17, 2004, meeting meeting. The motion was seconded by Gene Bailey and passed unanimously.

Chairman White: Thank you Mr. Suter.

Mr. Suter: Would you like for me to file that for public hearing on April 20, sir?

Chairman White: Mr. Burton, has that been put on the calendars?

Mr. Burton: Yes.

Chairman White: That should have already scheduled?

Mr. Burton: Yes sir.

Chairman White: Okay. We will do that. We will put that on for public hearing on the 20th. The next item on the agenda is Rule 15. I will say that we will have Mr. Obrokta walk through the various comments that have been received. This rule was addressed earlier by this Board and there have been many comments, suggestions and input from various stakeholders. Mr. Obrokta will walk us through where we are right now and the response of the Commission to the various input from the stakeholders, after which I would like to. . .for those that have signed up for public comment – any public comment that relates specifically to this rule we will give them an opportunity to address that after Mr. Obrokta has finished his presentation.

**4. 85CSR15, "Vocational and Physical Rehabilitation" – T. J. Obrokta, Jr.**

T. J. Obrokta, Jr.: Mr. Chairman, members of the Board, I'm T. J. Obrokta, General Counsel to the West Virginia Workers' Compensation Commission. I'm here today to discuss Rule 15, which many of you, of course, are already familiar with. Rule 15 has been in place for quite a while at the Commission and essentially governs how we provide rehabilitation services to the injured workers who suffer injuries at West Virginia employers. The reason that we have amended and updated Rule 15 is initially at least connected with Senate Bill 2013. As you all know, that's the Legislation passed last summer that overhauled Workers' Comp. That Legislation had two provisions in particular that needed to be put into Rule 15. In addition to addressing those two provisions, we seized on the opportunity to completely overhaul Rule 15 and it's been a long and I think successful process. But the two provisions in Senate Bill 2013 that had to be addressed in this rule were first an increase of the monies available to injured workers from $10,000.00 to $20,000.00 in connection with rehab services. So the Legislature doubled the amount of money available to claimants from $10,000.00 to $20,000.00 when it comes to the rehab plans. The second provision of Senate Bill 2013 that had to be implemented in this rule had to do with employers. There's some background and history here. Historically employers were allowed to have preferred providers of voc rehab services. That is to say if an injured at company ABC needed rehab services, that injured worker would have to go to the rehab provider selected by the employer. But the West Virginia Supreme Court struck that down in a case a few years ago and said, "No, the employer does not get to pick the voc

rehab provider." Well now in Senate Bill 2013 the Legislature has come back and said, "Yes, the employer can have a preferred provider of voc rehab services." So this rule reinstates that provision that used to exist before it was struck down by the Supreme Court. Those are the two primary elements of Senate Bill 2013 that caused us to look at Rule 15. As I mentioned we seized upon this opportunity really to completely overhaul Rule 15. We expend between roughly $35 million dollars a year in one form or fashion when it comes to rehab. So this is a big issue for the Commission – $35 million dollars roughly – that's quite a bit of money.

Just a little bit of background to tell you how rehab kind of comes into play at the Commission. When an injured worker files a claim with the Commission he or she receives, as you know, temporary total disability benefits that replaces their wages in essence. Once that individual has been off work for 60 days our systems flags it and refers that claimant to our Rehab Division. We have about 12 or 15 folks who review these cases and determine whether or not that claimant would be a candidate for rehab services. And if we determine "yes" this person is a candidate for rehab services then we refer that person out to a rehab provider, a private company. Those private companies are staffed by individuals called QRP's – Qualified Rehabilitation Professionals. You will hear the term QRP quite a bit. So after 60 days we decide whether or not a claimant needs rehab services. If so, we refer them out to a rehab provider commonly referred to as a QRP. That rehab provider develops a plan – a rehab plan. They submit it to us. We approve it or modify it and the QRP essentially monitors the claimant's participation in that plan through its duration. That in essence is the role rehab plays at Workers' Comp.

With regard to Rule 15, this rule in its first form showed its head roughly last November. We put together a draft. We circulated it to the stakeholders. We received a lot of comments. We incorporated as many of those comments as we could. We sent out a second draft to the stakeholders only. We received additional input. At that point we thought the rule was in good enough shape to bring to you to file with the Secretary of State's Office for public comment. We did that I do believe at your December meeting. You approved it for filing with the Secretary of State's Office for what ended up being a 60-day public comment period. That public comment period has expired. You will recall a couple weeks ago there was a public hearing on this rule and now we're at the stage in the process where I am to respond to the public comments. And then, as I understand it, the rule will be up for a final vote with the Board at your March 30 meeting. So in essence I'll respond to the comments today and you will still have a couple more weeks to go back to the stakeholders and make sure the rule is to their satisfaction.

With that said I would like to. . .you have each been given a green folder that has several documents in it. Before I get to those documents I do want to make one more comment about the process. This rule – more than any other – has gone through an extensive process with the stakeholders. I think by and large everyone is pleased with the rule. There may be one or two issues. . .there is definitely one issue that we will discuss later – you are going to have give direction on. But by and large I think the stakeholders are pleased. I received an e-mail this morning that is represented of comments I've received and I would like to read it to the Board.

The author of this e-mail has authorized me to do so. You may recall the gentleman during the public comment period – he's the only man I know from Raleigh County who has a British accent, Mick Bates. He is with the West Virginia Chapter of the American Physical Therapy Association. This rule governs rehab and physical therapies. This is one of the primary stakeholders. Mr. Bates wrote to me this morning and asked me to read this: "The West Virginia Chapter of the American Physical Therapy Association endorses Rule 15, as proposed to the Board, encourages the implementation of Rule 15 for the good of injured workers, the Commission and the employers of West Virginia. Furthermore, the Association commends the Commission for the inclusive and balanced approach to the implementation of Senate Bill 2013 through the stakeholder process." I think that comment from Mr. Bates is representative of the comment most stakeholders have provided to me. I will tell you that the West Virginia Hospital Association and the State Medical Association have no additional comments on this rule. I received none. The only stakeholder I think you may hear from today will be the Rehabilitation Association. They may have some comments. But by and large the stakeholder feedback to me has been very, very positive.

With that said, turning to the specifics. The first document in your folder is a document that specifically responds to each of the comments you heard either at the public hearing or that I received in writing, as a very technical document, very difficult to read. But I want you to have it. The second document in your pamphlet is what I would like to go through with you. That is the rule as you approved it for filing with the changes that we've made highlighted. I think that's an easier way to go through this. What I would like to do instead of going through the "mays" and "shalls" and the typos, etc., hit on the twelve or so big points that I've identified. Given the process the Chairman has set forth if additional comments are made by the stakeholders, I'd be happy to come back up and address additional issues. If I could just hit on the twelve or so big points that I think have been resolved with the stakeholders.

If you turn to page three, Section 2.4 – see the paragraph 2.4. About two thirds of the way down the paragraph you'll see the words underlined, "cooperating with and timely responding to rehabilitation providers." That was a significant issue with the rehab profession. They expressed some concern to me regarding the timeliness and the cooperation they receive from the physicians. I added language in here that requires the physician community to cooperate with and timely respond to the rehab providers. So that was requested by the Rehab Association and we inserted it there at 2.4.

Paragraph 2.5, the very first sentence as it initially read required the QRP's or the rehab profession. . .stated that they were responsible for assisting and encouraging the other shareholders in this process. They thought that was too strong. They didn't think they should be responsible for assisting and encouraging so I softened that language and now it just reads, "The QRP's are encouraged to assist everyone else." So instead of saying they are "responsible for doing it," we're just simply saying, "Okay QRP's, please, you are encouraged to get everyone else to work together but we're not going to hold you directly responsible for it." Again, a request from the rehab community that we agreed with.

If you turn to the next page, page four. There really were three big issues with the rehab community. This is the first of three biggest – the definition of "suitable gainful employment" at paragraph 3.6. You would have heard significant comment on that definition at the public hearing a couple weeks ago. We have to my knowledge conceded and adopted the language preferred by the rehab community on this definition. In essence the definition now makes it very clear that the number one priority is to get the injured worker back to work at his or her previous job. And only then if that is not possible, do you look at other potential jobs. I believe this language. . .it's been represented to me that this language is agreeable and acceptable to the rehab community. That is the first of three big issues they brought of concern and we've conceded and adopted their position.

The fourth issue I want to talk about is paragraph 3.7, just below 3.6. This paragraph deals with physical rehab services. The way it was originally written the physical rehab had to be "prescribed" by a physician before the physical and voc rehab folks could get involved. They thought that was too much of a hurdle – that doctors were sometimes unwilling to get involved or actually prescribe physical rehab so we softened it and said it just has to be approved by a physician. At least have that. That gives the claimants protection because you want to have their doctor at least approving the rehab plan before they initiate the plan. So this will not require to be prescribed by a doctor, but the doctor still has to be involved to at least approve it. So now the rehab community can propose it to the doctor. It takes that burden off the doctor, but again the doctor has to approve it. That keeps the safeguard in place of protecting the claimant.

If you'll turn to page nine of the rule, paragraph 5.3.2 – in essence once we've identified a rehab candidate and referred that candidate out to a QRP the QRP has to do a rehab evaluation and submit a report to us. The rule, as originally written, gave the QRP 45 days to get that report to us. The rehab community expressed concern that that was too tight so we agreed to increase it to 60 days.

If you'll turn to page 11 of the document, Section 6 discusses the implementation of a rehab plan. 6.2 discusses when that plan can be suspended or terminated or changed in some way. Mr. Maroney raised a very good point that the way one of the sentences is read, 6.2.3 – it could have been read to penalize an injured worker if the employer is not cooperating. Obviously that was not our intent and we appreciate Mr. Maroney bringing that to our attention. So we fixed that. At 6.2.3 we can change the plan or modify it if the injured worker is not cooperating. Then we added 6.2.6 and it says now we can also change the plan, "If the employer is not cooperating," and that failure to cooperate is impeding plan success. So again that was an issue raised by Mr. Maroney. We thought it was very well taken and we believe we've addressed that.

On the next page, page 12, the second paragraph, 6.5 – We had written a requirement into the rule that if the injured worker was not making satisfactory progress under the plan that the

QRP was to notify us immediately, and their failure to notify us could result in the termination of the plan. We need to know if something is not working. The rehab community thought that was too heavy handed so I've added the sentence you'll see underlined: "The determination of whether satisfactory progress is being made shall be a collaborative effort involving the Commission and the vocational rehabilitation services provider." We wanted to get the involved in the decision making process. We think that address their concern.

If you look at page 14 of the document, paragraph 7.9 – when an injured worker goes off on a TTD and then they're identified as a rehab candidate and once they enter a rehab plan – what's called temporary total rehab benefit or a temporary partial rehab benefit if they are working part-time, this is another indemnity benefit that pays their wages if they're off work and in a rehab plan. Another change in Senate Bill 2013, which I should have mentioned earlier, capped both temporary total rehab benefits and temporary partial rehab benefits at 52 weeks. They can be extended to 104 in certain circumstances. A question arose from the rehab community. Does each benefit type. . .do they get 52 weeks of both or just 52 weeks total, i.e. 26 at one and 26 of the other? Do you add them together in terms of temporary total rehab and temporary partial or is 52 of one and 52 of the other? That was an interpretation that we had to make and we decided on the side of the claimants that they should be entitled to 52 weeks of temporary total rehab benefits and separately 52 weeks of temporary partial rehab if in fact the circumstances warrant. So that language that I've added in 7.9 clarifies that. On the next page. . .

Chairman White: Mr. Obrokta, what's the July 1, 2003? What's the significance of that date?

Mr. Obrokta, Jr.: That is the effective date of Senate Bill 2013. On the next page, page 15, paragraph 9.3. We received various comments from the rehab community on putting something in here with regard to a Code of Ethics that should govern their profession. Well I tried to come up with some language that would refer to the extent they exist – external Code of Ethics. We as a Workers' Comp Commission don't want to be in the business of coming up with the Code of Ethics for a profession. But what I tried to do was come up with some language that would at least refer to the extent it exists any Code of Ethics and the underlined language says: "To the extent your profession is governed by a Code of Ethics you need to follow it and if you don't, you could be suspended or terminated from participating as a Workers' Comp provider." Again, that was a comment requested by the rehab community itself and I think in an essence to try to police some of their own.

Turn to page 16, paragraph 10.2.23. This section of the rule makes it very clear for the first time what we will and will not pay for. It's been a little loose in that area and we put in the rule what we will and will not pay for. At paragraph 10.2.23 we make it clear we are not going to pay for administrative or clerical activities. That's overhead. There was some concern so we added the sentence you'll see underlined: "This does not prohibit reimbursement for actual time spent writing/typing reports to the Commission." So we'll still pay them of course when they're writing

the reports to us, typing their reports. Again, a request from the rehab community that we agreed to.

Next page, page 17, paragraph 10.4 – You will recall earlier I mentioned to you that there were three really big points of contention with the rehab community. The first was on the definition of suitable gainful employment, which we essentially adopted their position. The second and third points that are a real issue with the rehab community are found in rule 10.4. Senate Bill 2013 as I mentioned increased from $10,000.00 to $20,000.00 the amount of money available for a rehab plan. And just so we're all clear and this list is in your packet but you don't have to turn to it right now, I've given you an excerpt from the Code so we all have the same language in front of us. The direction from the Legislature is, "Expenditure for vocational rehabilitation shall not exceed twenty thousand dollars for any one injured employee." Expenditure for vocational rehabilitation shall not exceed $20,000.00. In 10.4 we try to identify really for the first time what is and is not charged against that $20,000.00 limitation. Looking at 10.4.4, when we first wrote the rule we thought that physical rehab services should be charged against that cap. The rehab community strongly disagreed with that; argued that physical rehab is distinguishable from vocational rehab. The statute says "vocational rehab," therefore the "physical rehab" should not be included in that $20,000.00 cap. After much debate back and forth, we have conceded to their position and accepted their position and stricken 10.4.4, physical rehab services – the charges for that will not be charged against the $20,000.00 cap. That was the second of three biggest if you will.

If you look at 10.4.2, the rehab community was concerned that counseling – a lot of times counseling is provided by psychiatrists or psychologists. That's a medical benefit as opposed to a rehab benefit so I put language in here to make it clear that there is counseling being provided by a psychiatrist or psychologist that will not be charged against the $20,000.00 cap. I'm just finishing up the points that we agreed on then I'll come back to 10.4.

If you look at 10.7, another issue raised by the rehab community – they wanted to make clear they could continue to bill us in electronic format. So at 10.7 on the third line you will see we added some language to make it clear that they can bill us in electronic format.

Turning the page to page 18, 10.10 subsection (e) – We make it clear that significant penalties will attach if a rehab provider fails to close a claim at its earliest practicable date. The community thought that would be somewhat heavy handed so we added language into the rule that makes it clear that the QRP will be consulted before the claim is closed and their input will be received to determine the soonest practicable date. So, again, making them part of that process.

The final change I want to draw your attention to is at the bottom of page 18, paragraph 12.1. The employer community asked that there be specific language put into the rule that recognizes their right to request the Commission refer a particular claimant out for rehab

services. So you will see the sentence I added making it clear that "the employer may identify to the Commission claimants whom it wants to be considered for rehab services."

Those are I believe the 14 points. . .the substantive of points I wanted to bring to your attention. If we could go back to page 17 now to discuss the one issue I know remains outstanding with at least one of the stakeholder groups. Again, drawing your attention to 10.4, specifically 10.4.2. You will see that we are going to. . .it is the Commission's position that the charges for services rendered by the QRP's should be counted towards the $20,000.00. That is a significant issue that at least some rehab providers – not all – but some still have a problem with. If I could just take a couple moments to explain why it is in fact our position that that should be charged against the $20,000.00 cap. First and foremost the law is clear. "Expenditure for vocational rehabilitation shall not exceed twenty thousand dollars. . ." Well, is an expenditure for the charges provided by a qualified rehabilitation professional, is that an expenditure for voc rehab? I think very clearly the answer is "yes." The sole job these individuals have is to come up with a rehab plan, submit it to us, get it approved by us and then they implement and oversee and suggest modifications to the voc rehab plan. They charge us $65.00 an hour to do that. I could not in good conscience bring you a rule when the Legislature tells us that the $20,000.00 cap applies to all expenditures for voc rehab – period. I could not in good conscience bring you a rule that would say to the contrary. So it is the Commission's position that the $65.00 an hour that the voc rehab specialists charge us to develop and implement and oversee these plans must be part of the $20,000.00 limitation.

If you look at the third document in your folder, it's a one-page document. Its entitled "Retraining Expenses By Fiscal Year." This will highlight for you why this is such an important issue. I had to type some stuff at the bottom, excuse that, but I did that this morning. The items in the spreadsheet from "retraining travel" on down to "other," those are the charges that historically have gone against what used to be the $10,000.00 cap. Now of course it's $20,000.00. Retraining travel – that's mileage paid to claimants. Tuition and fees – most of this money goes to the re-education of injured workers – tuition, room, board, books, etc. Equipment, supplies, room and board, other – you will see those listed there. That in essence, and you'll see the amounts each fiscal year that we paid, the highest amount by far – fiscal year 2003 – we spent a total of $703,587.59 on these items for claimants; $519,458.64 of that was tuition and fees. The charges we paid the rehab profession for fiscal year 2003 – $20.2 million dollars. You will not in my opinion be able to get a handle on rehabilitation expenditures through Workers' Comp unless you do something about that expenditure in terms of bringing it in under the $20,000.00 cap, monitoring it, and regulating it. Otherwise you will never be able to get a handle, in my opinion, on rehab expenditures. So I think it is clearly the correct thing to do under the law as written. I think this statistic will clearly show you that in terms of the rehab dollars going out of Workers' Compensation a lot of it is going to the QRP's and every dollar may be earned. I am not at all suggesting that a single dollar of this is inappropriate or otherwise not deserving. What I'm simply saying is we need to bring it in under the fold and monitor it.

Those are all the comments. Again, the outstanding issue is whether or not 10.4.2 and the charges of the rehab providers – whether or not that should be charged against the $20,000.00 cap. The Commission's position is "yes it is." It is legally the right thing to do and I think it's the fiscally responsible thing to do. With that I'll answer any questions.

Chairman White: Thank you Mr. Obrokta. As I indicated earlier, after Mr. Obrokta's presentation we will allow any individuals that signed up to make a public comment to go ahead and do it at this time rather than wait until the end of the meeting. With that said, are there any questions for Mr. Obrokta from members of the Board? Mr. Slaughter. . .

Craig Slaughter: Is Vocational Rehabilitation defined in the statute?

Mr. Obrokta, Jr.: There is not a definition section, but there is section in the Code that talks about. . .it doesn't specifically provide a definition, but talks about some of the things that. . .in particularly what's not voc rehab. When it says "crutches" and "artificial limbs" and things like this are all medical. Therefore, they would be excluded from that $20,000.00 cap.

Chairman White: Mr. Humphreys. . .

Richard W. Humphreys: Under the $10,000.00 cap, are the QRP's under that cap?

Mr. Obrokta, Jr.: No sir. Their charges were excluded from the $10,000.00 cap. The cap has doubled and we think their charges should be brought in at this point.

Chairman White: Is that by prior rule?

Mr. Obrokta, Jr.: No sir, practice.

Chairman White: Practice.

Mr. Obrokta, Jr.: This is really the first time in a rule we've tried to address what we are going to pay for, what we're not and what's charged against the cap.

Chairman White: Thank you. Mr. Jarrett, do you have a question?

Chris E. Jarrett: No.

Chairman White: Any further questions from members of the Board? I have the sign-up sheet for the public comments. Mr. Watson, do you have comments related to this particular rule?

Ed Watson [Watson Rehabilitation Services]: Yes.

Chairman White: Would you like to make them now?

Ed Watson: Thank you. My name is Ed Watson. I'm a rehabilitation counselor in private practice. I've been involved in this work since 1978. I had some written comments which I'll provide, but while it's fresh I do want to point out that this is not the first time that there has been some rule regarding what's to be charged to § 23-4-9 benefits. In fact Rule 15 as it presently exists includes some provisions that exclude development of rehabilitation plans and modification rehabilitation plans, which is a big part of what you just heard qualified rehabilitation professionals do. Beyond that I want to point out a couple of things. First of all, I really want to thank Mr. Obrokta for all of his work and putting up with me personally. I do want to point out some clarification on some of his comments. It was a gradual focus on private sector rehabilitation. And in fact a significant number of referrals are made to the public sector rehabilitation as well, and they also charge for their services after return to work. The change regarding what's counseling does in fact is an improvement. It specifically excludes the work being provided by a psychologist and psychiatrist. I guess the argument could be extended to licensed professional counselors. . .providing by definition by rule elsewhere. . .West Virginia rule elsewhere – a mental health service. So I guess that argument could be extended there as well. But I also want to point out that that definition that says, "Rehabilitation services including but not limited to vocational or on the job training counseling assistance in obtaining, etc.," which Mr. Obrokta. . .has been around for at least, I'm not sure, but at least 10 years. So nothing has changed between the time the last rule was written which permitted exceptions and the new rule, which now includes counting the costs of the QRP services. I understand the problem. I see it clearly there was a great deal money spent on QRP services and I think a great deal has been done to rein that in already. I don't accept that a doubling from $10,000.00 to $20,000.00, which has been in effect since 1976, and in case you don't know it the costs of going to school has gone up quite a bit since 1976. . .is a rational for now including the QRP services. It's almost like we're going to take this money away from injured workers to somehow rein in someone else. And the whole point of rehabilitation ultimately is to get injured workers back to work. There has only been one. . .you know I'm sitting here giving what it amounts to I think a legal opinion and we got Mr. Obrokta as an attorney up here, but I want to tell you about the only case law I know on this subject. There was a case in January 1992. . .2002 that was before the Office of Judges. And in that case the administrative law Judge ruled that job placement services. . .in fact I think it was something in the neighborhood of $12,000.00 in job placement services. God only knows what was going on there that they provided $12,000.00 worth of job placement services, but that's what was billed. The administrative law Judge ruled that was an exception. And if you look at the rules as written now clearly job placement services is not specified as an exception. The Judge didn't say that having exceptions was contrary to statute. In fact it seems there have been exceptions. And to me it's reasonable to consider the services being provided by a qualified rehabilitation professional as exception rather than take away money that would be available to injured workers.

I have some examples and these are not made up things. There are current cases in my caseload. I have a fellow who, when the case was referred to me, $11,000.00 had already been

billed for job search. Now, again, if I comment I'll just say that's the amount of money that was spent. I'll tell you I have a bill for $4,000.00 myself in the case. We've had a series of rehab plans on this man's case and he needs. . .and there's been about $3,000.00 spent on training so far and he needs about $5,000.00 to finish. You add that up and it's more than $20,000.00. He will not finish. I had another fellow referred to me – assigned from another rehab person – that already $8,000.00 had been spent for an assortment of services. And on top of that seven months of his rehab temporary total – and that's a matter of statute – that's something nothing the rule can do about, but statute limits what's available. But in his case we start now with 18 months. . .or less than 24 months for a training program because he is definitely going to need training in my opinion, and less than $12,000.00 to spend for training purposes before I even got started with the case. I have another fellow who is in a training program that I developed and it's kind of an unusual program and the program actually costs just short of $20,000.00. It's either going to be one of my best cases or my biggest disaster. I haven't decided how it's going to turn out yet. But in any case, the training program itself costs over $19,000.00. I've billed in that particular case over $4,000.00. Now if suddenly the QRP services are going to apply, he is not going to be able to finish that rehab plan that he is in the middle of right now. I have another fellow who. . .a couple other fellows who are in programs and we are trying to bill around $2,200.00 – $2,500.00 and their training programs are going to cost in the neighborhood of $12,500.00. The both happen to be going to West Virginia State. Excuse me, West Virginia State and the other one is also taking some classes at WVU at Parkersburg. They are going to be okay, but hopefully they are going to be able to find jobs on their own after they finish school because there is not going to be money available for me to help them with job search. I have to very carefully monitor things like increases in tuition and fees, books and supplies to make sure we're not going to run out of money now. So the point is if – IF the Board is absolutely insistent on approving what amounts to a policy decision, and I don't think this. . .I do not agree that this is statutory mandate because if it was a statutory mandate there has been a lot of attorneys that had a chance to look at over the last 10 years and challenge. . .certain things are being not charged in § 23-4-9 and the practice has. . .but certainly at least one attorney challenged it for an employer and won to the extent. I think if there had been a mandate that development of rehab plans should not have been covered, then I think it would have been ruled out by now. But if. . .if the Board is going to approve the Commission's decision to pursue this policy, I at least hope there will be an amendment. The very least. . .I really beg you for this so that programs not underway won't all fall apart. I mean I'm relatively a small fish in this. I have a few cases and I have several cases that worry me right off the bat. At least put an exception in. . .qualification that services provided prior to the effective date of this rule by qualified rehabilitation requirements won't count towards the $20,000.00 limit. At least – at the very least consider that. Thank you gentlemen.

Chairman White: Thank you sir.

Mr. Bailey: Mr. White, could I ask Mr. Watson a question?

Chairman White: Yes.

Mr. Bailey: Mr. Watson, just one quick question please. What percentage do you think of your cases that you either handle now or have handled in the last three or fours would this impact? This $20,000.00 limit? I mean is it going to impact. . .are we talking about 10%, 20% or do you have a feel? It may be in unfair question.

Mr. Watson: Well, first of all I appreciate the question. I think all the times I've been up here. . .I think it's my first.

Mr. Bailey: You're welcome.

Mr. Watson: I don't know for sure. I can tell you what my present caseload is and what percentage of cases. . .I'm worried about five of my present cases and right now I've got 17 cases.

Mr. Bailey: So it would be less than one third at the present time?

Mr. Watson: Well, right now it would be one third of my cases which. . .you know my training cases are longer term cases because I keep them through a training program, whereas a placement case might last 60 days or whatever. Some other processes are shorter so I'm in and out of those cases. Of the cases I currently have open, I'm worried about five of 17 being able to finish their program if this rule goes in and my services are suddenly plugged into the equation.

Mr. Bailey: Also, I believe that I heard you say that a couple or three of these cases may have been referred to you after someone else had them. . .

Mr. Watson: Yes.

Mr. Bailey: And it appears like that they may not have been handled correctly. You inferred that. You didn't state that because you don't really know and I don't either. But those cases probably wouldn't have reached the $20,000.00 limit had they been handled properly initially. Would that be a fair assessment?

Mr. Watson: Let me just say this. I think. . .I wasn't happy with what I saw had happened in at least one of them. But I will tell you that every one of them followed the hierarchy as being interpreted by Workers' Comp claims managers. And they were being told what to do. In fact, the one I referred to that involved $11,000.00 the initial report from the private rehab company recommended this man to be retrained and the claims manager said, "No, we're going to job search." And when he couldn't find a job in Clay County with no particular skills, they determined him basically to be uncooperative and then the case sat in limbo for a year until an administrative law Judge said, "Refer it back out to rehab and for retraining purposes." So. . .but the rehab company made $11,000.00 and the man's job being. . .Suzi's Hamburgers and

Wal Mart and this sort of thing. Whereas before he had been I'm thinking of $13.00 or so dollars an hour, but he didn't have any particular skills because he had ever done was trim trees.

Mr. Bailey: Thank you.

Chairman White: Mr. Watson, I have a question also. When you submit a plan, do you project a fee for the QRP in that plan?

Mr. Watson: No, I don't. I've been told that some people do. I haven't. In all honesty it would be a. . .you almost need a crystal ball.

Chairman White: If in fact the. . .

Mr. Watson: If the Division requires it or the Commission requires it, certainly I would.

Chairman White: Then you have to do that?

Mr. Watson: Sure. It would be a guess estimate though. I mean I really don't know. . .

Chairman White: Your comment with respect to the grandfather would be that when you recommended certain plans up to this point that did not come into the equation so you had knowledge of the overall limitation but not the $20,000.00 limitation?

Mr. Watson: Well, I mean I was aware of a cap, but I wasn't aware that there was a potential that what I would be charging would have to be put into the equation.

Chairman White: As a matter of fact, the cap was $10,000.00 and now it will be $20,000.00.

Mr. Watson: Right.

Chairman White: It's a new set of rules and you're asking for some time of grandfather provision.

Mr. Watson: Yeah, really. . .but I want to point out again that the only change that happened regarding in listing the possible rehab services in the Code was that. . .well there was no difference in the listing of possible services – at least not in 2003. The only difference that happened related to that was they changed the cap. Now there were some other provisions regarding TTD and temporary partial caps and that sort of thing.

Chairman White: Any further questions?

Mr. Humphreys: It is my understanding that the cap is intended to rein in costs amongst the rehab professionals. I think I heard T. J. say. Are you saying that this may also rein in claimant benefits?

Mr. Watson: I don't think there is any doubt that it will make it far more difficult for injured workers to be rehabilitated for suitable gainful employment. The reasoning that. . .including it in the cap. . .QRP services in the cap would rein in QRP's and not being an argument I've heard before. Yes, it probably would. I will tell you this is a lifetime benefit. This $20,000.00 isn't just this one claim. I literally. . .I told somebody a few months ago that since July 1 when you started to have a time cap my job literally got three times harder. If you're going to start throwing. . .throwing my stuff into those dollar caps, it's going to make it even more difficult. The. . .it just eliminates a number of possibilities for what you could train someone for and it shortens the possibility. You put a dollar limit and a time limit then the options. . .and then we're living in West Virginia frankly and our resources in West Virginia for people who happen to need to be retrained or find employment elsewhere are limited so it takes that much more work. On top of that if you're dealing with someone who is significantly injured, they're the ones that need more attention from the QRP so you are spending even more of their money. And again this is a lifetime benefit. So I worry when I'm doing anything in a case. I say, "Okay, I'm going to do this because it needs to be done." But because I'm doing it that's a dollar or an hour of activity at $65.00 that that person will never have available to them ever again the rest of their life for vocational rehabilitation training because I'm basically taking it from them. And that kind of worries me a little bit.

Chairman White: Thank you Mr. Watson. Is there another public comment? Mr. Bates signed up. Is it related to this rule? T. J., did you have a response to this? Okay.

Mr. Obrokta, Jr.: Just very briefly Mr. Chairman. If you look at the one-page document I gave you that shows you where this money has been going, the overwhelming bulk of this money – almost 70% or so – goes to tuition. So I thought to myself this morning – what's it cost to get an education? I jumped on the Marshall University web page and an individual can get a two-year associate degree at Marshall and their tuition – all in – total for both years is going to be $6,500.00. Six thousand five hundred dollars for a two-year degree at Marshall, a couple thousand more for books, fees and you may get up to about $8,500.00. You got a $20,000.00 cap. Where else is the money going to go? Let's talk about the QRP's for just a minute. The QRP gets a $500.00 fee for an initial evaluation from the Commission. They then get 10 hours to develop a plan at $65.00 an hour. So the initial $500.00 plus the $650.00 for plan development – that's $1,150.00. Then you get an entire associate degree at Marshall for $8,500.00. Well, right now you are almost at $10,000.00 and you're only halfway through the count. How much more does a QRP need to charge on that file to eat up another $10,000.00? Thank you.

Mr. Phalen: Mr. Chairman, may I ask T. J. one question?

Chairman White: Yes sir.

Mr. Phalen: T. J., in regards to the $20,000.00 limitation, are the claimants notified as to what has been expended towards the $20,000.00 or previously the $10,000.00? Are they kept abreast of that amount?

Mr. Obrokta, Jr.: I think the answer to that is "no." Ms. Hamrick who runs our rehab section shakes her head "no." But I think that's an excellent and they should be.

Mr. Phalen: I think so too.

Mr. Humphreys: Mr. Chairman. . .

Chairman White: Mr. Humphreys. . .

Mr. Humphreys: T. J., am I sensing that the Commission. . .that it's is not getting its money worth for this program?

Mr. Obrokta, Jr.: The Commission senses that the statute is clear. Expenditures for vocational rehabilitation shall not exceed $20,000.00 and we think this is an expenditure for voc rehab. This is the heart and soul of voc rehab. So we're simply trying to write a rule that is consistent with the law.

Chairman White: Thank you Mr. Obrokta.

Mr. Obrokta, Jr.: I think it could be idea of applying this cap to all new plans written on or after the effective date of this rule. It makes a lot of sense and I would to that extent agree with Mr. Watson.

Chairman White: I appreciate that comment. Mr. Bates, did you have a comment with respect to this rule?

Mick Bates [Praxis Corporation]: Only in the event that I help to assist the Board make up its mind up on the issue, which has already been decided. I want to comment. . .

Chairman White: There have been no decisions made. We will make the decisions next week.

Mr. Bates: I think that's the first point is that. . .I've got to correct two points. . .the first one is I'm the only person from Raleigh County with an Australian accent, not an English accent.

Chairman White: Thank you for the correction.

Mr. Bates: And the second point is that this issue has been around since 2000. I mean I stood here in 2000 before the Performance Council and we talked about vocational rehabilitation. And decisions like *Blankenship* probably came about because of a failure to move in a clear regulation associated with vocational rehabilitation services. So we have to do something here. The democratic process ended with the passage of 2013. The Board of Managers responsibility is to. . .the Board of Managers responsibility, the Commission has been charged to develop and implement rules. We need to develop and implement rules. And if we continue to discuss and try to come up with a point where everybody agrees on every single point, we will never get to a place where everybody will be happy. There are injured workers right now; they are in the system that need vocational and physical rehabilitation services. Without this rule they continue to flounder. I took a minute to review the financial statements. You've seen claims costs go up. Part of the reason is we're out there right now trying to operate without guidelines, without vocational rehab rules, without medical rules. So that's the first point I would like to make. The second point is that. . .my original opinion on this process was that physical rehabilitation probably should not have been included in the rule itself, but the Commission saw different and included physical rehabilitation services. I'm kind of like the wolf in sheep's clothing in the vocational community. I'm a physical rehabilitation provider that's also involved with the vocational rehabilitation community's professional association so I kind of see both sides of this issue. Twenty thousand dollars is a lot of money in anybody's terms. I think that T. J. pointed out what you can get for $20,000.00. I don't like the thought of somebody being unable to be retrained to a particular job. The physical needs are severe and we've got to look at places to cut and I think we've identified where it could be done. So I believe that it's a good rule. It's the right rule. It's a rule that moves the Commission closer to its objective and there might be individuals that do not receive everything they could be entitled to. There are other sources of funding for rehabilitation, other sources of funding for schooling. You have to find somebody that really wants an education that couldn't find some way to be able to get it. I believe this rule needs to be passed as its written and as recommended.

Chairman White: Thank you Mr. Bates.

Mr. Humphreys: Mr. Chairman. . .

Chairman White: Mr. Humphreys. . .

Mr. Humphreys: I'm not understanding why putting the cap at $20,000.00. . .is going to help the claimant.

Mr. Bates: I didn't see any injured workers here complaining about the $20,000.00 cap. I didn't see any claimant's attorneys here complaining about the $20,000.00 cap. What I see is QRP's here concerned about the cap. Now I believe that when you operate under a budget and when you've got to be careful with your money like I do working. . .say with your Blue Cross/Blue Shield. I've got $1,500.00 to deal with. I'm going to be very careful about what I'm going to do and what I'm not going to do. I think we all operate a little bit better when we got a

budget. I find that in my house. I think we all do that. When there is no limit then there is no limit.

Mr. Humphreys: You probably don't intend to be casting disparages on the community. . .but it sounds that way.

Mr. Bates: In what way sir?

Mr. Humphreys: I listen to what you say and that's what I hear.

Mr. Bates: I work with injured workers every day. I work with the vocational rehabilitation community. I work with the medical community. I work with the Commission. I'm an employer. I pay premiums into the fund. I have somewhat of a unique perspective on this whole issue. I think it's time to pass the vocational and physical rehabilitation rule, including the $20,000.00 cap and move on to other pressing issues.

Mr. Humphreys: You disagree with Mr. Watson?

Mr. Bates: I have a lot of respect for Mr. Watson. I think that Mr. Watson, particularly because he is knowledgeable of this system through a vast number of years. . .I mean Ed has seen things come and go at Worker's Compensation and the ups and downs. I agree with a lot of what he said. I do think that his comment regarding grandfathering QRP costs spent prior to the passage of this bill is worth consideration. I think there was a lot of money that was misspent. I would hate to see somebody that was injured tomorrow not have anything available to them because some vocational rehabilitation company somewhere took advantage of the leniency in the system previously. I think that's worth some consideration.

John Johnson: I have a question and not necessarily directed to Mr. Bates, but perhaps he could comment on it. A few years back we as the Performance Council had tossed around the idea I believe of coming up with some way of measuring the effectiveness of QRP's. I don't think we ever really got around to that. So my question is this – from a claimant's standpoint is it fair to saddle him/her with an ineffective QRP, regardless of how that's defined, and have it go against his/her lifetime allotment given? All he or she's got is $20,000.00 and if this particular QRP is ineffective, that limits what he or she can do in the future. Again, it's not necessarily for you, but I just wanted to throw that out.

Mr. Burton: Mr. Johnson, we agree with you. We are trying to come up with, and I know that this probably came up a couple years ago as you mentioned, a way to qualify whether or not a QRP is doing a good job. That is something that Lisa Hamrick and her group is working on and we hope to have that very soon to be able to compare QRP's – how often do they return the employee back to work is a big thing. We don't track that right now. I was amazed by that fact the other day when I asked that question. We don't track that. We'd have to do that manually, but we can go back and do it. We are in the process of trying to develop some

software that will allow us to do that. That's one way to track QRP's. There are a number of other ways to do it. So we agree with you. We need to do a better job of monitoring who is good, who is bad and we will do that in the future. We will bring that to you for. . .

Mr. Johnson: Wouldn't it be better to include – before we have a system like that in place – before we include the charges into that $20,000.00 limit?

Mr. Burton: That is something we can look at. I think, again, I agree with his comments that we need to get this rule out. We need to monitor. The other thing is we can get it out there and if it's not working, we can come back to you and say that too much money is getting spent on the other side and we're not getting this people rehab and we need to change that. We can monitor that starting whatever date. I agree the grandfather clause that Mr. Watson mentioned is an excellent idea. I think that is something that we ought to look at and do it as we move forward.

Chairman White: Thank you Director Burton. Thank you Mr. Bates. Thank you for all the public comments and the input from all the stakeholders on this vary important rule. We will have this rule on the agenda on the 30th of March and we will address it at that time. We appreciate all the input from all parties today.

**5. Audit Report – Gregory Burton, Executive Director**

Mr. Burton: We have sent to you previously, and I think Chris Howat has passed out again in case you didn't bring your copy with you, the 2003 Audited Financial Statements along with a three or four page overview of that. What I wanted to do is take a few minutes and go over some highlights and then Chris Howat is going to come up and give you a brief presentation also.

First I want to thank Chris and Melinda Kiss for their hard work in getting this audit out. It's been delayed a little bit, a lot of information in it. A lot of things were pending based on Senate Bill 2013 and whether or not we got a ruling form the Supreme Court kind of held this audit up. The first thing I want to point out and it's on the very first page of the audit I believe is this language: "There is pending litigation regarding Senate Bill 2013. If the Division ultimately loses this litigation, it will have a material negative impact on the financial condition of the Division." We have said that over and over. We need to get a decision from the Supreme Court on the *Thompson* case. So what we're going to over with you today assumes we win the *Thompson* case. If we do not win that *Thompson* case, these numbers will change in the tune of about $330 million dollars to the bad. Also, from a cash flow standpoint it will have great implications on us being able to survive over the next three or four years. It's about a $700 million dollar swing in our cash flow over that three or four year period. If we lose that case, we go from having a positive cash balance to a negative cash balance – about 2008. So, again, we're awaiting that and hopefully the Supreme Court will make a decision very soon.

**AMENDMENT TO RULE 15 AS PROPOSED TO THE BOARD OF MANAGERS ON MARCH 16, 2004**

1. Page 4, Section 3.6 - Insert "pre-injury physical demand level and pre-injury" between "her" and "level."

2. Page 17, Section 10.4.2 – Add "QRP charges for dates of service on or before the effective date of this rule shall not be included within the $20,000 limitation."

adopted 3/30/04