WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

FILED

APR 12 9 02 AM '94

OFFICE OF WEST VIRGINIA SECRETARY OF STATE

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

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

CITE AUTHORITY: §21A-3-7(b)(c); §23-4-9c

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X
CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW
§21A-3-7(c)

AMENDMENT TO AN EXISTING RULE: YES___, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 15

TITLE OF RULE BEING ADOPTED: Vocational and Physical Rehabilitation

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS July 1, 1994

Andrew N. Richardson
Andrew N. Richardson
Commissioner

21.30 w comments
7.80 w/o

Bureau of Employment Programs
Legal Services Division
Post Office Box 3922
Charleston, West Virginia 25339-3922

M E M O R A N D U M

TO: The Honorable Ken Hechler
Secretary of State

FROM: John H. Kozak
Director, Legal Services Division

DATE: April 12, 1994

RE: Filing of Legislative Rule

Attached hereto, please find a copy of the legislative rule titled "Vocational and Physical Rehabilitation" and a completed copy of your form #5. This rule is exempt from legislative review, West Virginia Code, §21A-3-7(c).

Also attached hereto you will find copies of all the written comments that were received from the public regarding this rule. A hearing was not held on this rule; hence, there were no oral comments received and there is no attendance sheet. The rule as filed today contains the changes that the Compensation Programs Performance Council made to the original draft in response to the comments. A memorandum from the Council to you is also attached. It reviews each of the comments that were made and states the Council's responses to them and the reasons for the changes that were made to the original draft.

Also enclosed herewith, please find a computer diskette containing the rule. It is encoded in Display Write 4 Version 2 and is named A:\REHABRUL.RFT.

Thank you for your assistance in this matter.

w/ Attachments

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

SERIES 15
VOCATIONAL AND PHYSICAL REHABILITATION

§85-15-1. General.

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

1.2. Authority. -- West Virginia Code, §§21A-3-7(b) & (c) and 23-4-9(e).

1.3. Filing date. -- April 12, 1994.

1.4. Effective date. -- July 1, 1994.

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 that 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 these rules, then such provision is repealed and replaced by the provisions of this legislative rule.

§85-15-2. Purpose of rule; cooperation.

2.1. West Virginia Code, §23-4-9(a), sets forth the legislative findings that are the basis of West Virginia Code 23-4-9, et seq. "The Legislature hereby finds that it is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after an injury. In order to encourage workers to return to employment and to encourage and assist employers in providing suitable employment to injured employees, it shall be a priority of the commissioner to achieve early identification of individuals likely to need rehabilitation services and to assess the rehabilitation needs of these injured employees. It shall be the goal of rehabilitation to return injured workers to employment which

shall be comparable in work and pay to that which the individual performed prior to the injury. If a return to comparable work is not possible, the goal of rehabilitation shall be to return the individual to alternative suitable employment, using all possible alternatives of job modification, restructuring, reassignment and training, so that the individual will return to productivity with his or her employer or, if necessary, with another employer. The Legislature further finds that it is the shared responsibility of the employer, the employee, the physician and the commissioner to cooperate in the development of a rehabilitation process designed to promote re-employment for the injured employee."

2.2. Every injured worker and his or her employer are required pursuant to these rules to participate in rehabilitation evaluations, the development of rehabilitation plans and the implementation of rehabilitation programs. Additionally, the injured worker and his or her employer are required to share responsibility for the success of the individual injured worker's rehabilitation plan.

2.2.1. Injured workers who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans are entitled to receive the support benefits set forth under West Virginia Code, §23-4-9, and these rules. Further, injured workers who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans benefit from the rehabilitation services by being returned to the workforce or being awarded appropriate disability benefits. An injured worker's refusal to cooperate with the rehabilitation assessment process or to participate in an authorized rehabilitation plan without a showing of good cause is a factor(s) for the commissioner to consider in determining the amount of any permanent partial disability or permanent total disability award to which the injured worker might otherwise be entitled.

2.2.2. Employers who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans benefit from the rehabilitation process by minimizing the costs associated with work-related injuries. The commissioner 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 the legislative rules on workers' compensation premium rates and self-insurance, 85 CSR 1 and 85 CSR 9, and the workers' compensation act, chapter 23 of the West Virginia Code. The commissioner may consider an employer's failure to cooperate with the development or implementation of a rehabilitation plan under these rules without a showing of good cause in determining the amount of any permanent partial disability or permanent

total disability award. If the preinjury employer cooperates in the development of a rehabilitation plan that result in the injured worker returning in an employment capacity with the preinjury employer pursuant to a rehabilitation plan, then the preinjury employer shall have its account adjusted so that two-thirds of the costs of the vocational rehabilitation services are charged to its account and the remaining costs are charged to the surplus fund. In a similar instance, a self insured employer will be reimbursed one-third of the vocational rehabilitation costs incurred.

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

a. Whether medical, surgical, or vocational opinion substantially concur that the operation, treatment, service, or program is indicated;

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

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

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

If each of these requirements are met and continue to be met during the course of the rehabilitative effort, then a claimant's failure to participate or to continue to participate in the program will result in a denial of further compensation benefits or a reduction in those benefits as may be proper in the individual case. If each of the these requirements are met and continue to be met during the course of the rehabilitative effort, then an employer's failure to participate or to continue to participate in the program may lead to an increase in the claimant's benefits should other arrangements prove infeasible and is otherwise proper.

2.2.4. Injured workers and employers may provide the division with an explanation of actions or inaction and how that action or inaction affects the disability of the injured worker which shall be considered by the commissioner in making the aforesaid determinations under subsections 2.2.1 and 2.2.2.

2.2.5. Notwithstanding any other provision of these rules, section 2.3 of the rule does not prohibit an employer

from assisting an employee in returning to suitable gainful employment.

2.3. In making a ruling that a party has failed to cooperate, the division shall issue a protestable order. Where there are disagreements between the injured worker, the employer, or the division so as to cause the filing of a formal objection, the parties are encouraged to utilize the mediation process provided for by West Virginia Code, §23-5-1(d).

§85-15-3. Definitions.

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

3.1. "Commissioner" means the commissioner of the bureau of employment programs pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §23-1-1, and any deputies designated pursuant to West Virginia Code, §§21A-2-12 & -13. For the purposes of these rules the executive secretary, the director of the office of benefits management, and the supervisor of the rehabilitation section or those positions' respective successors, are designated as deputies. Additional deputies may be designated, as deemed appropriate.

3.2. "Division" means the workers' compensation division within the bureau of employment programs as provided for by West Virginia Code, §21A-1-4, and West Virginia Code, §23-1-1 et seq.

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

3.4. "Injured worker" means an employee entitled to workers' compensation benefits as the result of a work-related injury, as provided under West Virginia Code, §23-1-4.

3.5. "Injured worker's employer" means an employer charged pursuant to West Virginia Code, §23-4-1, for a work-related injury and any physical and/or vocational rehabilitation associated with the injury.

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

3.6.1. 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.

3.6.2. A distinct part rehabilitation unit in a duly licensed hospital which distinct part unit meets the requirements of section 2803.61 of the medicare provider reimbursement manual, part 1, as amended, or any successor provision, as published by the United States health care financing administration; or

3.6.3. A facility operated by the West Virginia division of rehabilitation services.

3.7. "Physical rehabilitation services" means health care services and devices including but not limited to medical, surgical, dental, or hospital treatments or evaluations; medicines; and crutches, artificial limbs, or other approved mechanical appliances and devices.

3.8. "Physical rehabilitation services provider" means a provider of health care services, including but not limited to vocational rehabilitation services, provided that 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. "Qualified rehabilitation professional" means a person who has the education, experience and skills necessary to counsel, to make judgments, and to make recommendations concerning an injured worker's medical, physical, emotional, intellectual, or motivational ability to accept and perform suitable gainful employment and who has the skills necessary to design, implement and supervise programs to enhance an injured worker's capacity to accept and perform suitable gainful employment. The workers' compensation health care advisory panel will establish guidelines for defining the levels of education, experience and skill necessary for a person to qualify as a rehabilitation professional under this section. A qualified rehabilitation professional need not personally have the ability to administer and interpret all medical, psychological or vocational testing, but must be able to evaluate the test results provided by other professionals. Rehabilitation counselors employed by or under contract with the

commissioner or employed by the West Virginia division of rehabilitation services are presumed to be qualified rehabilitation professionals for the purposes of this definition.

3.9.1. Until the health care advisory panel establishes such guidelines for qualified rehabilitation professionals, any organization meeting the then applicable standards and requirements of the commission on accreditation of rehabilitation facilities, "Standards Manual and Interpretive Guidelines for Organizations Serving People with Disabilities," (1994) shall be presumed to be qualified unless proven otherwise.

3.9.2. Nothing in this subsection precludes an employer from developing a managed care program or a vocational rehabilitation program, defined by section 13 of these rules, to promote the worker's return to productive employment; provided that, all providers of physical and vocational rehabilitation services must meet the qualifications requirements of these rules and must be registered under section 10 to these rules.

3.10. "Vocational rehabilitation services" means professional services reasonably necessary to enable an injured worker to return to suitable gainful employment as soon as practical. The rehabilitation services include but are not limited to the coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, vocational rehabilitation training, job development, job placement, and job modifications.

3.10.1. The workers' compensation health care advisory panel will establish guidelines for defining the types and requirements of services in order for the services to be included under this section.

3.10.2. Until the health care advisory panel establishes such guidelines, vocational rehabilitation services offered by organization meeting the then applicable standards and requirements of the commission on accreditation of rehabilitation facilities, "Standards Manual and Interpretive Guidelines for Organizations Serving People with Disabilities," (1994) shall be presumed to be qualified unless proven otherwise.

3.11. "Vocational rehabilitation services providers" means licensed physicians, licensed psychologists, hospitals, licensed registered nurses, vocational rehabilitation counselors and public and private agencies, companies, and corporations which provide to injured workers vocational rehabilitation services including but not limited to vocational retraining, testing, counseling, evaluation and job placement services. To

qualify as a vocational rehabilitation service provider under these rules, a person must demonstrate that he or she has adequate education, training and experience in the rehabilitation field and must have access to the necessary space and equipment needed to provide the service offered, or the entity must demonstrate that it employs workers who have adequate education, training and experience in the rehabilitation field and that it has access to the necessary space and equipment needed to provide the service offered. The workers' compensation health care advisory panel will establish guidelines on the education, training and experience necessary to qualify as a vocational rehabilitation service provider under these rules. The division must decide on a case-by-case basis whether an individual has the education, training, and access or an entity employs individuals who have the education, training and access necessary to qualify as a vocational rehabilitation service provider under these rules.

3.11.1. Until the health care advisory panel establishes such guidelines for vocational rehabilitation services providers, any organization meeting the then applicable standards and requirements of the commission on accreditation of rehabilitation facilities, "Standards Manual and Interpretive Guidelines for Organizations Serving People with Disabilities," (1994) shall be presumed to be qualified unless proven otherwise.

3.11.2. The term does not include licensed physicians, licensed psychologists or hospitals where the services being provided to an injured employee fall under the provisions of West Virginia Code, §23-4-3, and are outside the scope of the pertinent rehabilitation plan.

3.12. "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 these rules by a qualified rehabilitation professional and approved by the commissioner.

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. Nothing in this definition prohibits providing an injured worker with vocational rehabilitation services which enable the injured worker to obtain a job with a higher economic status than he or she would have been able to attain without such vocational rehabilitation, provided the rehabilitation plan demonstrates that the injured worker is not able to return to his or her prior employment and such vocational rehabilitation

services are necessary to increase the likelihood of reemployment.

3.14. "Served upon the parties" means depositing the document to be served in the regular United States Mail, properly addressed and postage paid.

§85-15-4. Priorities.

4.1. Qualified rehabilitation professionals must utilize the following priorities. No higher numbered priority may be utilized unless the commissioner has determined that all lower numbered priorities are unlikely to result in the 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 utilized. 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 of the injured worker to the preinjury job with the same employer;

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

4.1.3. Return of the injured worker to employment with the same employer in a different position;

4.1.4. Return of the injured worker to employment in a different position with the same employer and with on-the-job training;

4.1.5. Employment of the injured worker by a new employer and without training;

4.1.6. On-the-job training of the injured worker for employment with a new employer; or

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; provided, that there exists a reasonable expectation of the injured worker actually obtaining such employment upon completion of the program.

§85-15-5. Identification of rehabilitation candidates; the rehabilitation evaluation process.

5.1. The commissioner may presume an injured worker does not need rehabilitation services if the evidence of record establishes that the injured worker will receive less than 120

days of temporary total disability benefits, that the injured worker will be able to return to his or her former job after reaching maximum medical improvement, that the injured worker has no permanent disability, or that the injured worker is receiving retirement benefits. The commissioner must make an entry to the file that a finding that rehabilitation services are not needed was made.

5.2.1. The commissioner must order a rehabilitation evaluation under subsection 5.4.1 of the injured worker by a qualified rehabilitation professional, as defined by these rules, to determine whether physical and/or vocational rehabilitation services and development of a rehabilitation plan are appropriate for the worker in each of the following cases:

a. a worker has sustained an injury likely to result in temporary disability in excess of one hundred and twenty (120) days;

b. a worker has not returned to work after incurring an injury reasonably suspected to result in a permanent disability;

c. a worker has not returned to work and has been found to have sustained a permanent disability;

d. a worker was evaluated one hundred (100) days earlier and was not then found to be a candidate for physical or vocational rehabilitation services and has not returned to work as a result of the injury; or

e. a worker for whom a section 5.1 presumption was not made and whose possible need for rehabilitation services remains undecided.

5.2.2. An injured worker is reasonably suspected to have sustained a permanent disability if his or her treating physician indicates to the commissioner that the injury resulted in permanent impairment, if the body part injured is important to the performance of the injured worker's job, if the injury suffered is the type of injury that usually and customarily requires frequent medical attention, if the injury suffered is the type of injury that usually and customarily leads to a permanent disability, or if other facts associated with the individual injured worker and the injury he or she has suffered reasonably lead to the conclusion that the worker has sustained a permanent disability. The workers' compensation health care advisory panel will develop guidelines for determining the type of injuries that usually and customarily lead to permanent disability. Each injured worker's situation will be examined individually in making these decisions.

5.2.3. For the purposes of these rules, a five percent (5%) permanent partial disability award for occupational pneumoconiosis is not considered an indication of a permanent disability.

5.3. The commissioner must direct that an injured worker be evaluated for the delivery of physical and/or vocational rehabilitation services and the possible development of a rehabilitation plan in any workers' compensation claim pending before the commissioner for a permanent total disability evaluation if a medical or vocational report indicates a reasonable possibility that the injured worker can benefit from rehabilitation services. Action on any pending petition or other request for a permanent total disability award is stayed pending the outcome of the vocational evaluation performed pursuant to section 5.4 of these rules.

5.3.1. If the commissioner determines pursuant to section 5.5 of these rules that physical and/or vocational rehabilitation services cannot assist the injured worker in returning to suitable, gainful employment, as defined by section 3.13 of these rules, then he or she will lift the stay and enter an order on the permanent total disability petition or request. Thereafter, in any such decision on such an injured worker's entitlement to a permanent total disability award, the commissioner will disregard any medical or vocational expert's recommendation for physical and/or vocational rehabilitation.

5.3.2. If the commissioner determines pursuant to section 5.5 of these rules that physical and/or vocational rehabilitation services can assist an injured worker in returning to suitable, gainful employment, as defined by section 3.13 of these rules, then he or she will lift the stay and enter an order on the permanent total disability petition or request. In his or her decision, the commissioner will issue a further stay on the petition or request for a permanent total disability award and refer the injured worker to physical and/or vocational rehabilitation, as recommended by the qualified rehabilitation professional under the authorized rehabilitation plan; Provided that, the decision shall direct that, if the rehabilitation effort fails, then the stay of the permanent total disability petition or request shall be removed and the petition or request acted upon.

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

5.4.1. Upon determining that the injured worker may be eligible for physical and/or vocational rehabilitation services, the commissioner must refer the injured worker to a qualified rehabilitation professional for a rehabilitation assessment. The qualified rehabilitation professional must review the injured workers' file and gather additional

information, as necessary, to assess the injured worker's potential for returning to the workforce. The qualified rehabilitation professional must decide whether the injured worker is able to quickly return to his or her preinjury job with the same employer without modification of task, work structure, or work hours or whether the injured worker is not able to return to any renumerative work under any circumstances.

a. If the decision is in the affirmative on either of the above issues, then the qualified rehabilitation professional must issue a written opinion to that effect within fifteen (15) days after the date of the referral and cause copies to be served upon the commissioner and the parties. If the commissioner agrees with the opinion, then a protestable order setting forth the decision based upon the qualified rehabilitation professional's opinion must be entered within fifteen (15) days after receipt of the opinion. The order must inform the parties of their rights of review as defined by W.V. Code, §§23-5-1 & -1h. The order terminates the injured worker's rehabilitation evaluation. If the commissioner disagrees with the opinion, then within fifteen (15) days of its receipt, the commissioner shall return the claimant's file to the qualified rehabilitation professional with appropriate instructions. The purpose of this paragraph is to quickly and inexpensively identify those injured workers who will not benefit from further rehabilitation efforts.

b. If an affirmative decision on both issues cannot be made, then the qualified rehabilitation professional must proceed with a rehabilitation evaluation in accordance with subsection 5.4.2 of these rules, which action is interlocutory in nature and not subject to objection.

5.4.2. The qualified rehabilitation professional must comply with this subsection and with section 4.1 whenever an in-depth evaluation is necessary to accurately assess an injured worker's status. The evaluation must be scheduled within forty-five (45) days after the commissioner receives evidence that an injured worker has sustained an injury likely to result in temporary disability in excess of one hundred and twenty (120) days, or within forty-five (45) days after the commissioner receives evidence that an injured worker is reasonably suspected to have sustained a permanent disability and has not returned to work, or within forty-five (45) days after the commissioner finds that in fact the injured worker has sustained a permanent disability and has not returned to work. An evaluation that is required because the injured worker was previously evaluated one hundred (100) days earlier and was noted as possibly needing physical and/or vocational rehabilitation services in the future must be scheduled within fifteen (15) days after the elapse of the one-hundredth day following the last evaluation. The follow-up evaluation must be conducted within thirty (30) days after it is scheduled.

5.4.3. In conducting a subsection 5.4.2 evaluation, a qualified rehabilitation professional must collect and analyze information about the injured worker's medical, educational, vocational, social, legal, and economic circumstances, including his or her present physical and mental ability to participate in vocational rehabilitation services. The evaluation may also include additional medical and/or vocational testing if the qualified rehabilitation professional opines that the testing is warranted in order to provide a full assessment and if the additional testing is preauthorized by the commissioner. The injured worker's employer and treating physician must provide information on forms prescribed by the commissioner to assist the qualified rehabilitation professional in the rehabilitation assessment process. The qualified rehabilitation professional must decide whether the injured worker is likely to benefit from vocational rehabilitation services based upon the evaluation.

a. If the qualified rehabilitation professional determines from performing the subsection 5.4.2 evaluation that the medical, physical or emotional status of the injured worker precludes a full assessment, then the qualified rehabilitation professional must prepare a preliminary report setting forth the facts and reasons that an assessment cannot be performed. The qualified rehabilitation professional must state in his or her report whether the injured worker's employer or the injured worker failed to cooperate in the assessment process and must state the facts that form the basis of the conclusion.

b. If the qualified rehabilitation professional determines that the injured worker cannot benefit from rehabilitation services, he or she must issue a written opinion to that effect explaining the basis for the opinion to the commissioner within fifteen (15) days after completing the evaluation.

c. If the qualified rehabilitation professional determines that the injured worker can benefit from rehabilitation services, he or she must issue a written opinion to that effect to the commissioner within fifteen (15) days after completing the evaluation.

5.5. The commissioner must, within fifteen (15) days of receipt of the report, decide whether the injured worker is likely to benefit from vocational rehabilitation services based upon a consideration of the qualified rehabilitation professional's report and all other relevant information including information about the nature and degree of the injured worker's physical disability and the injured worker's employment history, existing skills, work life expectancy, interests, aptitude, education, and likelihood of reemployment in the labor market.

5.5.1. If the commissioner concludes that rehabilitation services are not warranted either because the injured worker has returned to work or because he or she can return quickly to his or her preinjury job with the same employer without modification of task, work structure, or work hours or because he or she cannot return quickly to work even with the assistance of physical and/or rehabilitation services, then the commissioner will state this finding in a protestable order, entered pursuant to section 5.6 of these rules, and a rehabilitation plan will not be developed for the injured worker; however, the commissioner may direct at some future time that the injured worker be further evaluated if, in the opinion of the commissioner, it later appears that the injured worker maybe in need of either physical and/or vocational rehabilitation services.

5.5.2. If the commissioner concludes that a rehabilitation plan is appropriate, then the qualified rehabilitation professional who performed the subsection 5.4.2 evaluation must prepare a written report and serve it upon the commissioner and the parties within forty-five (45) days after the date on which the injured worker's evaluation is completed. The commissioner's decision shall be interlocutory and not subject to objection. The written report must contain the rehabilitation plan. In every case in which the evaluation is performed and/or the plan is developed by a qualified rehabilitation professional who is not employed by or under contract with the commissioner, the evaluation and/or plan must be reviewed to insure that the guidelines are met and, if appropriate, revised by a qualified rehabilitation professional who is employed by or under contract with the commissioner. Copies of any revised plan must be served upon the parties. In addition, the information obtained and developed by the qualified rehabilitation professional will be made available to the parties. The injured worker and/or the injured worker's employer may file comments and request changes to the rehabilitation plan by filing the comments and requested changes in writing with the division within fifteen (15) days after receipt of the rehabilitation plan. The comments must be served upon the other party. Thereafter, the commissioner must make any appropriate modifications to the rehabilitation plan within fifteen (15) days after his or her receipt of the comments and suggested changes and issue the final rehabilitation plan in a protestable order, entered pursuant to section 5.6 of these rules.

5.5.3. The injured worker must notify the commissioner regarding his or her willingness to receive rehabilitation services in accordance with the rehabilitation plan within fifteen (15) days after receiving notice of the final rehabilitation plan in the protestable order issued pursuant to subsection 5.5.2. The injured worker must provide the employer with a copy of this notification. If the injured

worker does desire to receive the physical and/or vocational rehabilitation services, the commissioner must forthwith expend, after due notice to the employer, or must forthwith order the self-insured employer to expend the amounts as may be necessary for physical and/or vocational rehabilitation purposes. This action is to be taken despite any objection by the employer to the plan.

5.5.4. In the event that the injured worker declines to receive rehabilitation services or fails to participate and cooperate with the rehabilitation services in accordance with the plan or if the injured worker's employer fails to participate and cooperate in accordance with the plan, the commissioner will invoke the provisions of section 2.2 of these rules.

5.6. The commissioner must issue any protestable decision rendered pursuant to sections 5.5 of these rules in writing and must serve the decision upon the parties, with notice of the rights of review defined by West Virginia Code, §23-5-1 and -1h. If the commissioner decides that the development of a rehabilitation plan is appropriate, then development of the plan will go forward despite the filing of an objection. In lieu of filing an objection, either the injured worker or the injured worker's employer may file with the division a request for reconsideration of the decision within fifteen (15) days of its receipt. The request must set forth in detail the basis for a reconsideration. The request must be served upon the other party. Once filed, the request terminates the need to file an objection to the initial decision. However, once the commissioner rules upon the request, the parties have the right to file an objection to both the initial decision and/or the ruling on the request for reconsideration.

§85-15-6. The rehabilitation plan

6.1. A rehabilitation plan may include, but need not be limited to, any of the following: vocational and psychological counseling; prosthetic or adaptive devices that enables an injured worker to work at the same or similar occupation as at the time of injury; work site, work duties or work hours modification to make it possible for the injured worker to resume suitable gainful employment, including, when agreed to by the employer, assistance from individuals with expertise in biomechanical engineering to assess any necessary job modifications; vocational training or on-the-job training to assist the injured worker to pursue a similar or new occupation; job placement assistance; payment of benefits under the provisions of section 8.2 of these rules; and such other programs or services which comply with the provisions of section 11 of these rules governing maximum disbursement for vocational rehabilitation services and which increase the likelihood of reemployment of the injured worker in suitable gainful

employment when the plan is completed. Should an employer refuse to agree to assistance from biomechanical engineers, such refusal shall not constitute a failure to cooperate pursuant to subsection 2.2.2.

6.2. A rehabilitation plan must require that all physical and/or vocational rehabilitation services be provided by providers registered under the provisions of section 10 of these rules. Except with the prior consent of the commissioner, no other providers may deliver physical and/or vocational rehabilitation services to an injured worker under an approved rehabilitation plan. The commissioner'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 11 of these rules.

6.3. A rehabilitation plan that provides for vocational retraining must give preference to the utilization of schools and training facilities located in the injured worker's geographic area and within the state of West Virginia, thereby reducing the need for the injured worker to travel extensively or to relocate. The plan must also give preference to the utilization of public schools and training facilities over private institutions.

6.4. Any rehabilitation plan developed and implemented under these rules is subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision thereunder, 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.

§85-15-7. Implementation of the rehabilitation plan.

7.1. The commissioner must implement a rehabilitation plan after the injured worker's acceptance notice is received pursuant to subsection 5.5.3 of these rules. While an employer or the injured worker is permitted to object to the plan pursuant to section 5.6 of these rules, the implementation of the plan will proceed notwithstanding the objection. In the event that the employer or the injured worker is successful in challenging the plan, the employer's account will be adjusted to reflect the appropriate charge for costs associated with the rehabilitation plan. In the event that 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.

7.2. The duration of any rehabilitation plan developed, modified, or amended hereunder shall be specified in the plan.

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

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

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

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

7.3.4. A finding that the rehabilitation plan is no longer necessary for the injured worker's reemployment;

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

7.3.6. A joint petition submitted by the employer and the injured worker seeking modification or termination of the plan. Any joint petition may include a request to modify the provisions of a rehabilitation plan, including a request to extend benefits beyond the maximum amount otherwise stated in section 11 of these rules. Supporting reports must be filed with the petition. In ruling upon any petition to exceed the maximum cost stated in section 11 of these rules, the commissioner must consider whether an extension of the rehabilitation plan is more likely than a denial of the petition to result in less overall cost to the division or a self-insured employer.

7.4. All physical and/or vocational rehabilitation services must be delivered in accordance with the rehabilitation plan developed under section 5 of these rules. The commissioner must assign a qualified rehabilitation professional employed by or under contract with the commissioner or employed by the West Virginia division of rehabilitation services to monitor compliance with and progress under the rehabilitation plan. The assigned qualified rehabilitation professional must contact the injured worker, the employer, the injured worker's treating health care provider and other pertinent health care providers, and the injured worker's rehabilitation services providers on a regular basis to monitor compliance with and progress under the plan. In no event are the contacts to be less than at thirty day intervals with each of the foregoing individuals or parties. In the event that the rehabilitation services provided to the

injured worker or the injured worker's employment do not comply with the rehabilitation plan, the assigned rehabilitation professional must notify the commissioner and the plan must be modified as is just and necessary under the circumstances.

§85-15-8. Modification of work and payment of indemnity benefits.

8.1. As part of a rehabilitation plan, an injured worker may return to work at a transitional, light duty, restructured or modified work assignment, on either a temporary or trial basis. The length of time of the temporary or trial return to work must be determined on a case-by-case basis and must be specified in the rehabilitation plan. The work assignment may include modifications of the duties, hours, or any other modification which may assist the injured worker in attaining the goals of the rehabilitation program and the rehabilitation plan.

8.1.1. Whenever the injured worker is asked to return to work under this section, the prospective employer, whether the original employer or a new employer, must furnish to the injured worker's treating physician and the assigned qualified rehabilitation professional a statement describing the available work in terms that will enable the physician to relate the physical activities of the job to the injured worker's impairment. A copy of this statement must be filed with the commissioner and sent to the injured worker. The physician must then advise the assigned qualified rehabilitation professional as to whether the injured worker is physically capable of performing the work described. The injured worker may consent to undertake the work assignment without the approval of his or her treating physician if a physician selected by the commissioner determines that the injured worker is physically capable of performing the work described.

8.1.2. Upon undertaking a section 8.1 job, the injured worker's temporary total disability benefits, if any, are terminated and he or she becomes eligible for the receipt of temporary partial rehabilitation benefits, if applicable under section 8.3 of these rules. If the work impedes the injured worker's recovery to the extent that he or she cannot continue to work, the injured worker's temporary total disability payments, if applicable, may be resumed when he or she stops working, as provided in section 8.2 of these rules. If the work ends or is no longer otherwise available, the commissioner 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. If the decision is that the injured worker cannot so return, then temporary total disability benefits will again be paid but only for the period allowed by the rehabilitation plan or the period provided for in West Virginia Code, §23-4-1c, whichever is applicable.

8.1.3. Once the injured worker returns to work under the terms of this section 8.1, the employer may assign the worker only to the work that was approved by the treating health care provider, unless the injured worker gives his or her written consent.

8.2. Except as stated in section 8.3, in every case in which the commissioner orders physical and/or vocational rehabilitation pursuant to a rehabilitation plan, the injured worker shall be compensated on a temporary total disability basis for any period in which either the rehabilitation treatment renders him or her totally disabled or he or she is receiving vocational rehabilitation services.

8.3. If the injured worker, pursuant to a rehabilitation plan, returns to employment with the same employer or a new employer on either a temporary, trial or permanent basis, in either a full time or part time capacity, and to either gainful employment or a transitional, light duty, restructured or modified work assignment, pursuant to section 8.1 of these rules, 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 for the purposes of section 8.4 will be the worker's actual earnings. Participation in a full-time or part-time educational program undertaken pursuant to a rehabilitation plan entitles the injured worker to temporary total disability benefits if the injured worker is not otherwise employed or receiving state or federal assistance to pursue the program through the job training partnership act or similar program. If the injured worker is receiving income or assistance, then the amount of that income or assistance shall be used in calculating temporary partial rehabilitation benefits that are payable to the injured worker. Temporary partial rehabilitation benefits must be paid on the same schedule as are temporary total disability benefits.

8.4. Temporary partial rehabilitation benefits are calculated, as follows:

8.4.1. 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 West Virginia Code, §§23-4-6, -6d and -14, for calculating temporary total disability benefits;

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

8.4.3. The temporary partial rehabilitation benefits cannot exceed the temporary total disability benefits to which the injured worker would be entitled pursuant to West Virginia Code, §§23-4-6, -6d, and -14, during any period of temporary total disability resulting from the injury in the claim.

8.5. The amount of temporary partial rehabilitation benefits payable under this section must be reviewed at least every ninety (90) days to determine whether the injured worker's average weekly wage in the new employment has changed and, if such change has occurred, the amount of benefits payable hereunder must be adjusted prospectively.

8.6. Temporary partial rehabilitation benefits are only payable during the implementation of a rehabilitation plan. Upon termination of the plan, as under section 7.3 of these rules or upon expiration of the plan, payment of all temporary partial rehabilitation benefits must be stopped irregardless of the injured worker's then level of wages.

8.7. Payments of temporary partial rehabilitation benefits below the sum of five ($5.00) dollars will not be made because the benefit gives no economic incentive to the injured worker and would be administratively too costly.

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

8.9. An injured worker who has attained maximum medical improvement but cannot return to his or her old job and who is undergoing evaluation pursuant to section 5 of these rules is eligible to receive temporary total disability benefits pursuant to West Virginia Code, §23-4-9.

85-15-9. Final report on rehabilitation plan.

The qualified rehabilitation professional assigned to monitor an individual injured worker's rehabilitation plan pursuant to section 7.5 of these rules must file a final report with the commissioner within 60 days after the rehabilitation plan is terminated or expires. The report must include a description of the plan's outcome, including but not limited to the following information:

9.1. Whether the injured worker successfully completed the plan;

9.2. Whether the injured worker has been placed in suitable gainful employment as defined by section 3.13 of these rules;

9.3. Whether the injured worker continues to search for suitable, gainful employment and the nature of that job search; and

9.4. Whether the injured worker is not likely to return to suitable, gainful employment.

The final report must be served on the parties of record. The parties may file comments on the report within fifteen (15) days after receipt of the report.

§85-15-10. Registration of providers.

10.1. On or before the first day of September 1994, and by every first day of July thereafter, physical and vocational rehabilitation services providers must register with the commissioner using forms prescribed by the commissioner. New providers who enter the field during the year may register at the time their service is first offered. Any provider who does not meet the requirements set forth in section 3 of these rules cannot be accepted for registration.

10.2. The commissioner must compile a list of registered rehabilitation services providers and their qualifications and areas of expertise and specialization. The commissioner or an employer with a program approved under section 13 of these rules must use only registered rehabilitation service providers in making rehabilitation referrals. Rehabilitation services may also be provided by employees of the West Virginia division of rehabilitation services or employees of the commissioner. 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.

10.3. All rehabilitation services must be provided in accordance with rehabilitation plans implemented pursuant to these rules and must be monitored by qualified rehabilitation professional employed by or under contract with the commissioner or employed by the West Virginia division of rehabilitation services. The commissioner 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 West Virginia Code, §23-4-3c.

§85-15-11. Reimbursement for physical and vocational rehabilitation services.

11.1. The commissioner must reimburse physical rehabilitation providers for physical rehabilitation services in accordance with the fee schedule in effect at the time the

service is rendered, adopted by the commissioner pursuant to West Virginia Code, §23-4-3. Only those physical rehabilitation services that are medically necessary and within the scope of the applicable rehabilitation plan can be reimbursed pursuant to these rules. The costs of physical rehabilitation services are not included in the ten thousand dollar ($10,000.00) limit on the cost of vocational rehabilitation, set forth under West Virginia Code, §23-4-9 and section 11.2 of these rules. However, the division cannot reimburse providers for physical rehabilitation services which require prior authorization under the provisions of West Virginia Code, §23-4-3, or any rule adopted thereunder, unless:

11.1.1. The physical rehabilitation services provider obtains prior authorization;

11.1.2. The physical rehabilitation services provider requested prior authorization but did not receive the approval of the commissioner prior to the rendering of the service, provided that the commissioner later determines the service should have been authorized as being medically necessary and related to a compensable injury; or

11.1.3. The physical rehabilitation service provider did not request prior authorization, but later filed a reasonable explanation for the failure to request authorization prior to the delivery of the service, and the commissioner determines that the request would have been authorized if it had been submitted.

11.2. The commissioner reimburses vocational rehabilitation providers for vocational rehabilitation services in accordance with the fee schedule in effect at the time the service is rendered and as adopted by the commissioner pursuant to West Virginia Code, §23-4-3, or in accordance with an agreement entered into between the provider and the commissioner. No payment may be made for vocational rehabilitation services unless the service is preauthorized by the commissioner. Additionally, no injured worker may receive vocational rehabilitation services which cost in excess of ten thousand ($10,000.00) under any rehabilitation plan, with the following exceptions:

11.2.1. Any injured worker who previously was the beneficiary of a rehabilitation plan or plans and who subsequently suffers a new compensable injury is entitled to receive additional vocational rehabilitation services reimbursable up to an additional ten thousand ($10,000.00) dollars, if the commissioner determines that a new rehabilitation plan is appropriate;

11.2.2. The costs of evaluations, reevaluations, preparation or modification of a rehabilitation plan or plans,

temporary total disability benefits, and temporary partial rehabilitation benefits are not considered a part of the reimbursements which may not exceed the sum of ten thousand ($10,000.00) dollars under this section; or

11.2.3. With the consent of the employer and the commissioner and upon a showing of good cause, the total reimbursement for an individual injured worker's rehabilitation plan may exceed ten thousand ($10,000.00) dollars pursuant to section 7.3 of these rules. The excess amount must be agreed upon by the employer and the commissioner. Should an employer refuse to agree to exceed ten thousand ($10,000.00) dollars, such refusal shall not constitute a failure to cooperate pursuant to subsection 2.2.2.

11.3. 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 commissioner. The forms must be filed with the commissioner within two (2) years 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 commissioner or any other party including, among others, the injured worker, the applicable employer, or any of their third party health care insurers.

11.4. No physical or vocational rehabilitation service provider is entitled to receive reimbursement from any source other than the commissioner or a self insured employer for any service, including the costs of medicines, mechanical appliances or devices, deemed to be medically or vocationally necessary as part of the rehabilitation plan or as a result of the compensable injury. Further, 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 from agreeing to reimburse a service provider for services rendered.

11.5. 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 service provider 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 11.4, 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.

§85-15-12. Cooperative efforts.

The division engages, where feasible and cost-effective, in cooperative programs with the West Virginia division of rehabilitation services to provide vocational rehabilitation services to injured workers and with the other divisions of the bureau of employment programs to provide job placement services for injured employees. The division develops and cultivates other cooperative programs with other human service agencies and organizations, both public and private, to maximize the availability of physical and vocational rehabilitation services to the industrially injured.

85-15-13. Employer-managed physical and vocational rehabilitation services.

13.1. Except with regard to section 12 of these rules, after first obtaining the commissioner's approval an employer may establish its own vocational and physical rehabilitation services program for its injured workers. Once approved, such a program will encompass all of that employer's injured workers: provided that, in a specific case for which the employer's program does not provide appropriate services, the employer will defer to the division's program and. Every such employer must file a renewal petition for extension of its approval by the first day of January of every year thereafter. Previously approved programs may continue to operate until and if renewal is denied.

13.2. In order to obtain the commissioner's approval to provide its own program, the employer must petition the commissioner for authorization to provide physical and/or vocational rehabilitation services to its injured workers. The petition must describe in detail the manner in which the employer's program functions and must affirmatively state that the employer's program meets all of the requirements of these rules. The employer's program must assure that claimant specific medical and vocational rehabilitation information is treated and handled in a confidential manner and on a need to know basis only. The employer's program may supply services over and above the minimum requirements of these rules and may pay for services which would not be paid for under these rules if the program were being operated by the division. If it is the employer's intention to contract with a vendor of physical and/or vocational rehabilitation services on a standing basis, then the identity and qualifications of the vendor or vendors

must be disclosed in the petition. Any such vendor must be registered or must obtain registration under section 10 of these rules before the vendor may provide any services.

13.3. The petition must acknowledge that the employer will undertake the processing and direct payment of all invoices and charges for physical and/or vocational rehabilitation services. If the petition is approved, the division will not be responsible for receiving, processing or issuing payorders for the invoices or charges. The employer's program may utilize any fee schedule promulgated by the division for reimbursement for services to be provided under these rules. Any provider of such services will be bound by such fee schedule in the same manner in which the vendor would be bound if the services were being provided under the division's program. Disputes over the application of the fee schedule shall be submitted to the division for resolution.

13.4. The employer must post the "petition for authorization to provide rehabilitation services" and each renewal petition at its worksite in a manner sufficient to provide all of its employees with notice of the petition. The employees may file with the commissioner comments regarding the petition. If the petition is approved, the employer may undertake the responsibilities and duties of the commissioner as stated in these rules, with the exception of section 12. The employer must post notice of the petition's approval at its worksite in a manner sufficient to provide all of its employees with notice of the approval. In addition, the employer must provide to each new employee and must annually provide to every employee thereafter, a description of its program, the services offered, and the procedures to be followed by an injured worker to obtain such services.

13.5. After a petition is approved, the employer need not obtain the prior approval of the commissioner on any issue pertinent to an injured worker's rehabilitation services. The employer's decisions must be in writing and must inform the injured worker of his or her right to file a petition with the commissioner objecting to the decision pursuant to the provisions of section 13.6 of these rules. The written decision must explain the section 13.6 specifications for the objection petition and the time and manner in which the petition must be filed.

13.6. If an injured worker disagrees with a decision rendered by his or her employer pursuant to section 13, he or she may file with the commissioner a petition setting forth the disputed decision and the basis for the disagreement. The injured worker must file the petition with the commissioner within fifteen (15) days after receiving the employer's decision and must serve a copy of the petition upon the employer. The employer may file a response with the

commissioner within fifteen (15) days after receiving the petition and must serve a copy of the response upon the injured worker. The injured worker must file any reply he or she wishes to make to the employer's response within ten (10) days after he or she receives the response. A copy of the reply must be served upon the employer. The employer must furnish the division and the injured worker with all available factual information in its possession or the possession of any vendor under its control which relates to the disputed decision. Thereafter, the commissioner must enter a protestable order affirming, modifying, or reversing the disputed decision within thirty (30) days of the receipt of all requested information. Any order entered by the commissioner pursuant to this section 13.6 may be objected to by either the injured worker or the employer pursuant to the provisions of West Virginia Code, §23-5-1 and §23-5-1h.

13.7. After an employer's petition is approved, the employer must provide the division with interim reports on its rehabilitation activities. These interim reports are due on the dates specified by the division in the notice of approval. An annual report of the employer's rehabilitation activities for the period covered by the division's fiscal year must be filed by the employer with the division not later than sixty (60) days following the end of each state fiscal year. The interim and annual reports must provide all information requested by the division and must be in the form required by the division. The information must be provided on both an individual injured worker basis and an aggregate basis. The employer must immediately report to the division any changes it makes with regard to vendors under a standing contract with the employer, which report must identify any new vendor and its qualifications.

13.8. Failure by the employer to comply with any of the requirements of these rules is good cause for the division to revoke the employer's authorization to provide physical and/or vocational rehabilitation services to its injured workers. If the authorization is revoked, the commissioner must provide the employer with a notice of revocation, including notice of the employer's rights to a hearing, as defined by West Virginia Code, §29A-5-1 et seq. Any such hearing and all appeals resulting therefrom shall be conducted in accordance with West Virginia Code, §29A-5-1 et seq. The employer must post all notices of revocation in the manner described under section 13.4 of these rules.

§85-15-14. Preexisting rehabilitation plans.

Nothing in these rules prohibits the completion of vocational rehabilitation plans approved prior to the effective date of these rules.

§85-15-15. Periodic review of the implementation of these rules and of employer managed programs.

The compensation programs performance council will undertake periodic reviews of the implementation and effectiveness of these rules. The compensation programs performance council will monitor division, claimant, and employer compliance with these rules. The compensation programs performance council anticipates the receipt of monthly reports from the division regarding the division's compliance with the time requirements of these rules and of the outcomes of claims in which these rules are applied. Based upon these reviews, reports, and any comments received from the public, the compensation programs performance council will consider taking corrective action regarding the rules. In addition, the compensation programs performance council will closely monitor the implementation of approved employer managed programs and will make any changes that are then found to be necessary to these rules to correct any problems that are encountered.

§85-15-16. Severability.

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.

TITLE 85

LEGISLATIVE RULES

BUREAU OF EMPLOYMENT PROGRAMS

DIVISION OF WORKERS' COMPENSATION

SERIES 15

VOCATIONAL AND PHYSICAL REHABILITATION

INDEX

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

M E M O R A N D U M

TO: The Honorable Ken Hechler
Secretary of State

FROM: Andrew N. Richardson, Commissioner and
Chairperson, Compensation Programs Performance
Council

DATE: April 12, 1994

RE: Vocational Rehabilitation Rules: Response to
Comments from the Public.

The following are the responses of the Compensation Programs Performance Council (hereinafter, Council) to the various comments that were received from the public with regard to the proposed vocational rehabilitation rule. This memorandum must be read in conjunction with the comments themselves - copies of which are attached hereto - and in conjunction with the revised rule also attached.

Some minor wording changes have also been made to correct typographical errors or to make references consistent and clear.

WEST VIRGINIA PSYCHOLOGICAL ASSOCIATION, INC.

1). The change proposed to section 3.11, which is the definition of "vocational rehabilitation services providers," appears to be designed to more specifically state that licensed physicians and licensed psychologists are included within the definition. While this inclusion was intended and is shown by the proviso excluding these groups' and hospitals' services if they are purely medical in nature from the definition, there is no problem with explicitly including them. Rather than the method suggested, however, the Council inserted the two groups plus hospitals earlier in the definition.

2). The next section commented upon is 6.1. The Association appears to want to specify that "counseling" includes that provided by licensed psychologists as well as by other types of counselors. Rather than making the change suggested, however, the Council inserted before the word "counseling" in section 6.1 the phrase "vocational and psychological" to indicate that all types of counseling are included in the term.

WEST VIRGINIA PSYCHOLOGICAL ASSOCIATION, INC.

3). The next suggested change is to section 7.4. The Association suggests changing from the term "treating physician" to the term "primary health care provider." This would broaden the number of health care providers that the rehabilitation professional would have to contact in order to monitor the rehabilitation plan's effectiveness. The point that all health care providers delivering ongoing services to a claimant should be contacted is well taken. Hence, the Council inserted the phrase "and other pertinent health care providers" into section 7.4 and deleted the term "physician" which is one type of provider.

4). The next suggested change is to subsection 8.1.3 and is more problematic. Section 8.1 requires that if the injured worker's employer agrees to take him or her back on a trial basis and to perform modified or light duty work, then the employer cannot change the claimant's work assignment unless the injured worker or the treating physician agrees to the change. The Association's revision to subsection 8.1.3 changes the order of decision making by having the provider describe to the employer what the work will consist of rather than having the provider receive the description and then either approve it or modify it - or possibly reject it. The Association also wishes to expand from the term "treating physician" to once again include all types of health care providers.

The Council did not think that the order of providing the description should be changed. The employer needs to define the work it is willing to have the injured worker perform and the physician should review that proposal. In addition, it is not agreed that the approval process needs to be expanded beyond the treating physician. The rehabilitation professional will consult all of the injured worker's health care providers when he or she composes the trial return to work. In addition, the Council favored the concept of a "gate keeper" in the person of the treating physician to coordinate the evaluation of the claimant's capabilities to go back to work on a trial basis. A trial basis return assumes that there is still some medical concern with regard to the claimant's ability to return to work.

Subsection 8.1.3 in its definition of the term "described to" was rather inartful and was changed to "approved by" which does not change the intended meaning but makes it more clear.

INTRACORP

This organization did not offer suggested changes.

WEST VIRGINIA HOSPITAL ASSOCIATION

This organization did not offer suggested changes. The Association's letter does note that rules for defining

rehabilitation programs themselves - the actual requirements for the programs - are still being developed by a committee working in conjunction with providers of those services. When those suggested rules are completed, they will be reviewed by the Health Care Advisory Panel which will make recommendations on them to the Council.

WEST VIRGINIA SELF-INSURERS ASSOCIATION

1). The Association begins with three general observations on the rule.

First, it notes a disagreement with regard to the length of benefits that an injured worker could receive under the circulated rule. That is, the rule indicated that, potentially, a claimant could receive the full length of temporary total disability (TTD) benefits for 208 weeks and then receive the full length of temporary partial rehabilitation benefits (TPRB) for another 208 weeks.

The initial response to this comment is that, if the Council's and the Total Quality Initiative (TQI) project's intention of achieving early identification of claimants in need of rehabilitation benefits is achieved, then the claimant will not receive regular TTD benefits for the full 208 weeks. Upon identification, the claimant would be switched into the rehabilitation program and TTD benefits would be paid pursuant to section 9 rather than pursuant to section 1c. Proper management of the claim should prevent the concern expressed by the Association from occurring.

Section 7.2 has been amended to eliminate the 208 weeks provision. This has the affect of switching to using the $10,000.00 maximum that can be spent on vocational rehabilitation as the limit on how long a rehabilitation plan can last. When that amount is expended, then the rehabilitation plan will usually end. The section now specifies that the rehabilitation plan will set its length.

Second, the Association expresses a concern that the injured worker not be retrained for a job that is unlikely to be available upon completion of the plan. Such a result would be wasteful of the money expended on the plan. This comment appears to be directed to subsection 4.1.7 of the rule. Section 4.1 sets forth the required order in which options for rehabilitation are to be explored. The plan must explain why each of the lower numbered options are not feasible before a higher number option can be used. The last option, subsection 4.1.7, provides that if all other options are not available, then the claimant can be provided with extended retraining or educational programs. The example of being sent through a four year college program to become a teacher is often used as an example.

Subsection 4.1.7 uses the term "suitable gainful employment" in describing the aim of the retraining program. It was intended that the word "gainful" would address this concern. However, the subsection was made more explicit on this point without narrowing the intended scope of services. Please see the changes to subsection 4.1.7.

Third, the Association notes that disputes between the employer and the claimant ought to be settled through mediation rather than through litigation. The Council agrees that this would be the preferred way of handling such disputes. However, the statute does not allow the division to block the use of formal objections leading to litigation. But, the mediation section is available for these types of disputes and its use should be encouraged. A new section 2.3 has been inserted in order to draw the parties' attention to this provision.

2). The Association notes a concern with regard to section 2.1 that closely parallels its second concern under number 1) above. The comment would define "labor market" first as being national in scope and then, second, as being statewide in scope in order to achieve the goal that the retraining actually lead to a new job. However, a change made was to subsection 4.1.7 with regard to the potential of obtaining an actual job instead of defining the term labor market.

3). The Association suggests that former section 2.2 be dropped. This section addresses the Americans with Disabilities Act of 1990 (ADA) and was included in the very early versions of this rule when that Act was still fairly new. It was intended to alert the reader that there is some correspondence between the ADA and workers' compensation rehabilitation. The ADA is now some four years old and the need to alert readers is past and it has been dropped. The following sections have been renumbered.

4). The next section commented upon is 2.3.1 - now 2.2.1 in the attached rule. The comment criticizes a term in that subsection as being ambiguous. In response to another commentator, this portion of the subsection has been deleted.

5). The Association's next comment is directed to former subsection 2.3.2 - now 2.2.2. The comment is directed at the lack of definition of the term "cooperate" - in this instance as applied to the employer. Other comments that were received also critiqued the term in its application to the claimant. As stated in the rule, either party's failure to cooperate in the rehabilitation process can lead to adverse action against that party. For a claimant, that action would be a reduction in the award of permanent partial disability (PPD) benefits or the denial of a permanent total disability (PTD) award. For the employer, the action could include not only a higher PPD award or the granting of a PTD award, but, if

the Council so chooses under the safety provisions of article 2B of Chapter 23, a penalty with regard to its premium rates.

The statute notes that all of the parties have an obligation to cooperate in the rehabilitation process. The term is not defined and the consequences of failure to cooperate are not defined. Case law as it pertains to a claimant's failure to undergo recommended medical or surgical treatment which would better the claimant's condition was researched. While medical or surgical treatment is one aspect of rehabilitation, vocational rehabilitation would not appear to be as threatening to a claimant as would potentially dangerous surgery. The Council used the same standards and applied them both to the claimant and the employer.

The change that was made to the rule, by inserting a new subsection 2.2.3, is modeled after Syllabus Point Number 5 from the Supreme Court of Appeal's decision in Posey v. SWCC, 201 S.E.2d 102 (W.Va. 1973) written by Justice Sprouse. That Syllabus Point reads as follows:

> "'Rehabilitative surgical operations may be required of a claimant for workmen's compensation, by the State Compensation Commissioner or by the Workmen's Compensation Appeal Board as a condition precedent to further compensation, only when surgical opinion substantially concurs that the operation is indicated, that it is reasonably safe and not attended by unusual suffering, that it will likely produce material physical improvement and that it is one which a person of ordinary prudence and courage would undergo for his own betterment, regardless of compensation.'"

The line of court decisions reflected by this syllabus point all arise under the rehabilitation section. The Court has found that not only is the Commissioner empowered to provide rehabilitation, but that the claimant is expected to participate if the requirements set forth are fulfilled. Similarly, if a claimant wishes to undergo rehabilitation efforts and is able to prove that such efforts will benefit him or her, then the Commissioner must provide the program despite any objections from the employer. The Court's requirements are set forth in the following syllabus point which has been approved of most recently in the case of Wilson v. Lewis, 273 S.E.2d 96, 99 (W.Va. 1980):

> "A claimant who has sustained a permanent disability and who has shown by a preponderance of the evidence that he can be physically and vocationally rehabilitated and returned to remunerative employment by vocational training is entitled to the relief provided for in Code, 1931, 23-4-9, as amended."

The Court was quoting from syllabus point number 2 in Dillon v. SWCC, 129 W.Va. 223, 39 S.E.2d 837 (1946).

That an employer is under a duty to cooperate is supported by the Court's decision in Cardwell v. SWCC, 301 S.E.2d 790 (W.Va. 1983), Syllabus Point Number 9:

> "An employer's refusal to reemploy an injured worker because of his medical condition in light work that he can do, can be persuasive evidence of a claimant's inability to get work."

Similarly, if an employer refuses to cooperate in the implementation of the priorities stated in subsections 4.1.1 through 4.1.4 for the claimant's return to work with that employer, then that refusal can be persuasive evidence of the claimant's inability to get work.

The proposed rule only dealt with what award was to be made to a claimant if his or her employer refuses to cooperate in the program. Subsection 2.2.2 has been amended to relieve an employer of a portion of the charges if the claimant returns to work with that employer as provided in the rehabilitation plan.

The comment also addresses the competency of the division's staff to address compliance with other statutes. The deletion of the reference to the ADA addresses that concern. In addition, subsection 2.2.2 has been amended to specify that the employer's workers' compensation record is to be reviewed and not any other type of vocational rehabilitation record.

6). The Association's concern that the definition of "rehabilitation plan" stated in section 3.12 should address return to work is agreed with and the change has been made to that section.

7). Section 3.13's definition of "suitable gainful employment" is next commented upon by the Association. The Association is concerned by the use of the term "future earning capacity". The Supreme Court of Appeals has indicated that the determination of the proper amount of PPD benefits that are to be awarded to a claimant should consider the loss of future earning capacity that is suffered by the claimant. Projection of that capacity is commonly done in personal injury litigation through the use of a qualified expert.

Section 3.13 makes reference to "future earning capacity" as one factor in deciding whether the proposed employment is both suitable and gainful. A comparison would be made of the claimant's before injury earning capacity and his or her post injury earning capacity. While it is not intended that the proposed employment match the preinjury earnings level, a comparison of the two is helpful in sorting through all factors in order to make a decision. Hence, no change with regard to this comment was made.

The comment also addresses the definition of labor market. The earlier change to subsection 4.1.7 eliminates the need for a definition here.

8). The Association wishes to see an insertion to section 4.1 which would require that a functional capacities examination be performed as part of the evaluation of the claimant in determining which priority is to be used. The rule assumes that the vocational examination of the claimant will include functional capacities testing. As noted earlier in response to the Hospital Association's comments, another set of rules is being developed to address the specific requirements for testing, examination, and rehabilitation. No change was made in response to this comment.

9). The next comment addresses section 5.1. This section addresses situations where the division may presume that a claimant does not need rehabilitation efforts. The criteria of this section will be used as part of the early intervention process. The Association suggests that any claimant with less than a 15% PPD should be presumed not to need rehabilitation services. The basis for using the 15% level is not clear; however, section 7a(c) of the statute directs that the division enter an award of up to 15% if the treating physician offers an opinion to that effect.

This suggestion is not in keeping with the other criteria of section 5.1 all of which more closely show that a claimant will not need rehabilitation. It is quite possible that a claimant could receive less than a 15% award yet be so disabled that he or she cannot go back to his or her past work without assistance. Hence, the Council did not agree with this suggestion and, further, notes that not making this change does not mean that the claimant automatically goes into a rehabilitation program. Rather, such a claimant is eligible for review to see if rehabilitation is necessary as stated in section 5.2. Only if that evaluation indicates a need for rehabilitation would such a claimant enter a program.

10). The next comment states a hope that the Health Care Advisory Panel (hereinafter, HCAP) will address guidelines for determining the type of injuries that usually and customarily lead to permanent disability. This work is ongoing by the HCAP which has a subcommittee working on that project. In addition, the division through the TQI project is developing additional data on this subject.

11). The Association next correctly notes that section 5.3 is not consistent with the new provisions for reviewing PTD requests as enacted in 1993. Corrections have been made to section 5.3 and its subsections. They also provide a better method for staying the PTD request while the rehabilitation effort is pending. This latter change addresses a concern regarding the timeliness of any subsequent request for a PTD award that a claimant might have to

make if the rehabilitation effort fails. It is also designed to avoid needless protective litigation due to what would have been a technical denial of the PTD request at the start of the rehabilitation effort. Entry of the stay will be an interlocutory order rather than one which could be objected to and placed into litigation.

12). The Association next comments upon subsection 5.4.1 and suggests that it be amended to include a reference to the priorities set forth in section 4. An amendment to this effect is made, but it is made in subsection 5.4.2. The latter subsection dictates the full evaluation of the claimant and the decision on whether to proceed with a rehabilitation plan and, if so, what it should contain. Subsection 5.4.1 concerns the more rudimentary decision whether no rehabilitation effort is needed because the claimant will return to work without assistance or will clearly never be able to return to work.

The Association also expresses concern that the division will not be able to meet the fifteen day requirements of subsection 5.4.1. Admittedly, the division has not been able to respond this quickly in the past. However, in order to fulfill the policy decision that intervention be early and speedy, extending the time periods is not satisfactory. It is actually hoped that the division will be able to respond faster than within fifteen days as is required throughout section 5. This will depend upon the resources available to the division.

13). The Association in its comment on subsection 5.4.3 repeats its concern that functional capacity testing be performed. As stated above, it is assumed that functional capacity testing will be performed where indicated and in accordance with the HCAP's standards when they are developed and approved.

14). With regard to section 5.5, the Association reiterates its concern that the planned for employment must actually be likely based upon the national and state labor markets. The change made to subsection 4.1.7 satisfactorily addresses this point.

15). The Association expresses a desire for imposing a five year statute of limitations into subsection 5.5.1 for the purposes of limiting the number of deferred evaluations that a claimant can have. The law already contains statutes of limitations for specific types of benefits and states that medical benefits are not subject to time restrictions. It is believed that the Court would treat rehabilitation benefits in general as falling under the exception made for medical benefits. In addition, a claimant's condition could improve at any time following an award. This was recognized in the 1993 legislation which authorizes reopening of claims in which PTD benefits have been awarded. Section 16(c) specifies that an award may be modified later if it appears that the claimant's situation has changed. Such a change could include being able to

benefit from rehabilitation. It is also noted that section 16(c) provides its own statutes of limitation.

16). The Association comments that subsection 5.5.2 imposes too stringent a time requirement by giving the parties only fifteen days to file comments and request changes to a rehabilitation plan. Lengthening this time period would defeat the goal of early and speedy intervention into claims. The Court has often noted that workers' compensation should be administered speedily and efficiently. The system has often failed to meet that standard and undue delay should not be built into the rehabilitation process. As recently noted in Lyons v. Richardson, 429 S.E.2d 44 (W.Va. 1993), the Court is concerned with the length of workers' compensation proceedings and desires that they be sped up considerably.

The comment also notes that the qualified rehabilitation professional's file should be accessible to the parties during their review of the proposed plan. A change has been made in subsection 5.5.2 to that effect.

17). With regard to subsection 5.5.4, the Association contends that a claimant's failure to cooperate with the rehabilitation program should not only lead to a reduction in the level of any permanent disability award but should also cause the claim to be closed for TTD purposes. This suggestion was not agreed to since the remaining issues - other than permanent disability - in a claim where the claimant has refused to cooperate should be dealt with individually and not by an across the board rule. In most cases where a finding is made that the claimant could be rehabilitated but refuses to cooperate in a plan would lead to a claim's closure for additional TTD. This is because any temporary disability that prevents the claimant from being able to work will, in most cases, be the same disability that is the subject of the rehabilitation plan. Claimant's failure to remedy that disability would not only affect any award for permanent disability but would also go to the continuing nature of any temporary disability. However, as it is possible that there could be a distinction that would allow TTD to continue, a blanket prohibition against TTD would not be feasible.

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In the course of reviewing section 5.4, 5.5, and 5.6 as a result of the Associations comments, several changes to the phrasing of the sections were made. The changes are meant to be clarifications as opposed to being direction changing.

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18). The Association notes some concern that section 6.2 might prohibit the use of out-of-state providers despite the fact that a multi-state employer might have a contractual arrangement with the provider or despite the fact that the best available care for a claimant may be with an out-of-state provider. In recognition of these concerns, the section has been modified to accommodate them. Any such provider still must be registered.

19). The Association objects to the requirement stated in section 7.1 that, despite the objection to the plan by either party, the plan is to proceed while the protest is resolved in litigation. The comment suggests a six month delay. This suggestion is rejected because it defeats the need to implement rehabilitation efforts in a speedy and efficient manner. Delays caused by litigation are inimical to this purpose. The statute requires in several places that a service or benefit be provided despite the objection by the employer. If the commissioner's decision is reversed, appropriate adjustments to the employer's account or repayments to a self insured employer are to be made. The statute favors erring on the side of providing benefits that may ultimately be rejected rather than delaying benefits that may ultimately be ruled appropriate.

20.) The Association objects to the provision in section 7.2 that a rehabilitation plan may extend for up to 208 weeks. Section 7.2 has been amended as noted earlier.

21). The Association objects to section 7.5 which attempts to define when the employment relationship ends in the event that the claimant is being trained for another job with another employer. This section was inserted into earlier drafts of the rule at the request of other employer interests. Upon further reflection, it was agreed that the division should not intervene into this legal issue and to allow the courts to develop the rules in this area. Hence, the section is struck.

22). The Association objects to section 8.1 because it lacks a specific definition of a "rehabilitation plan." This objection is without merit. Section 3.12 defines rehabilitation plan as being one developed in accordance with the rule. Section 6 of the rule then goes to some lengths to describe how the plan is to be put together.

23). The Association appears to misunderstand subsection 8.1.3 which does not give the claimant the right to determine whether he or she can perform the assigned work. Subsection 8.1.3 sets the approval process for assigning transitional or light duty work. Subsection 8.1.3 deals with situations where the claimant returns to work under an agreement to perform certain types of light duty, but the employer then wants to change the work assignments - often back to the claimant's original work duties. Subsection 8.1.3 requires that the claimant consent to the change or that his or her treating

physician first review and approve the changes. The suggested changes were refused.

24). With regard to section 8.6, the Association comments that the section would permit payment of TPRB in instances other than under a plan developed under this section. As with number 22 above, the term rehabilitation plan is adequately defined and limited. Adding the suggested limitation would be redundant.

25). The Association complains that section 8.9 exceeds statutory authority by permitting payment of TTD benefits to claimants who have reached their maximum degree of medical improvement, who are unable to return to work, and who are participating in evaluation for a rehabilitation plan. The Association ignores the fact that the TTD benefits to be paid under this section are derived from section 9 of the statute and not section 1c. Payment of rehabilitation TTD while the claimant is undergoing evaluation furthers the purpose of section 9 of the statute by encouraging claimants to cooperate and participate. Successful completion of the plan will result in awarding lower PPD benefits rather than a higher amount or even a PTD award. The statute provides that: "the claimant shall, during the time he or she is receiving any vocational rehabilitation or rehabilitative treatment that renders him or her totally disabled during the period thereof, be compensated on a temporary total disability basis for such period." The Association would have the phrase "that renders him or her totally disabled during the period thereof" apply to both "vocational rehabilitation" and "rehabilitative treatment." Such a narrow reading of the statute is not required. Rather, it is more rational that the disability will result from treatment rather than mere vocational rehabilitation which might involve attending a full time schooling or retraining program. Treatment contemplates such things as surgery that can result in days, weeks, or months of disability as a normal consequence of its performance. By not construing the phrase so as to modify the term "vocational rehabilitation" with the disability phrase, the rule then defines "vocational rehabilitation" to include the necessary prior evaluations.

As a final response to this comment, it must be noted that the Association's suggestion would result in the claimant being placed on nonawarded partial disability benefits - normally called NAP benefits. These benefits are a lesser amount than TTD benefits which often leads a claimant who cannot return to his or her former job to be more interested in being placed back on regular TTD rather than participating in any effort that does not directly address his or her economic needs.

25). With regard to section 11.2, the Association's comment again ignores the earlier definition of "rehabilitation plan" as described above.

26). The Association objects to subsection 11.2.1 by arguing that an individual claimant who undergoes rehabilitation efforts as a result of an injury may not exceed the single limit of $10,000.00 if he or she suffers a later unrelated compensable injury. That is, the $10,000.00 ceiling is a lifetime limit per individual according to the Association. This construction of the statute is not in keeping with its remedial purposes nor is it rational. The context of the statutory phrase does not require the Association's reading. Rather, the context shows that the statute is addressing the development of a rehabilitation plan for an individual and that the vocational costs of that plan are not to exceed $10,000.00. The reference to "one injured employee" is meant to indicate that each individual injured worker's plan is to be counted separately from other plans that may be put into effect at the same time and which may be affecting the same work site with regard to modifications, etc. It is not consistent with the remedial purposes of the Act to place a lifetime limit on an individual who may suffer one work related injury, be rehabilitated, return to work, and be injured again by something completely out of his or her control such as an automobile accident. The Court has often stated that the statute is to be construed to the benefit of the claimant. The Association's construction is not in keeping with that direction.

27). The Association objects that subsection 11.2.2 does not include within the $10,000.00 ceiling amounts spent for TTD and TPRB. Rather than enacting legislation as the Association asserts, the rule is clearly following the way the statute is drafted. The $10,000.00 ceiling is placed after a recitation of vocational and physical rehabilitation services. It authorizes the division to "expend such an amount as may be necessary for the aforesaid purposes" (emphasis added). The $10,000.00 limit is then placed as follows: "Provided, That such expenditure for vocational rehabilitation shall not exceed" $10,000.00 (emphasis added). It could not be clearer that the statute is applying the limit to the expenditures it was just addressing.

It must also be noted that the $10,000.00 limit is placed in subsection (b) of the statute while TTD benefits are provided for in subsection (c) and TPRB is provided for in subsection (d). Nothing in the $10,000.00 phrase indicates that these later appearing benefits are to be encompassed by the limit.

28). Finally, the Association states its understanding that section 13 of the rule does not affect managed care services that are already provided by employers. This is not correct. Any such services that pertain to vocational or physical rehabilitation will have to meet the requirements of the rule in order to continue. They will also be subject to the review provided for in section 13.6.

1). Under general comments, the law firm asserts that the rule is unconstitutional because it is an attempt at legislation. Further, the law firm advises that the division should await the outcome of the national health care efforts before taking any action related to health care. The Council disagrees that the rule is unconstitutional. It implements the statute according to the constructions set forth in it. While the law firm and others may disagree with those constructions, that does not make the rule unconstitutional. The construction, application, and implementation of a statute is a proper function of a legislative rule. With regard to waiting for national health care reform, the wait may be overly long and is not necessary.

2). The law firm objects to section 2.1 as being superfluous in that it merely restates subsection (a) of the statute. This section was placed in the rule to remind the reader of the intention of the Legislature in enacting the statute.

3). Former section 2.2 is objected to due to the reference to the Americans With Disabilities Act. As noted above, this section has been deleted. The following sections have been renumbered.

4). The law firm objects to subsection 2.2.1 by asserting that the standard for determining cooperation by a claimant are vague and ambiguous. It also notes that the Act does not elaborate on what the division may include in determining the amount of permanent partial disability awards and then contends that the Act "contemplate[s] only the injury and its residual effects." As noted above, subsection 2.2.3 has been inserted which sets forth standards for determining the initial cooperation of an injured worker and an employer with the rehabilitative effort. "Good cause" is often used in the law as as standard for measuring an action or refusal to act. The Court has repeatedly stated that the complexity of workers' compensation cases requires a claim by claim application of the law and review. The Court has often spoken out against strict standards that would apply in each and every claim. A standard of "good cause" allows the party to explain the basis for its actions or refusals to act. The division can then judge the explanation for the party's behavior. The circumstances of life and business are too complex and varied to fit within tight rules.

With regard to determining the amount of PPD, the law firm is ignoring the Supreme Court of Appeals cases described earlier which do exactly what the law firm is saying cannot be done. Further, the law firm notes that the statute looks solely to "the injury and its residual effects" (emphasis added). As the Court decisions note, the willingness of the employer or the claimant to cooperate directly impacts upon residual effects. As stated in Barnes v. SCC, 116 W.Va.9, 178 SE 70, 71 (1935):

> "No man can be forced to undergo a surgical operation. At the same time, a man cannot demand the compensation

> provided for him by law on the basis of a physical impairment that he himself permits to continue by reason of this refusal to accept the benefit of other provisions of the law intended to restore him to health and usefulness, without expense to him, and involving no unusual risk and making no harsh exaction."

5). The law firm argues that section 3.5 which defines employer should not be applied to claims in which charges are allocated. Allocation of charges only occurs in occupational pneumoconiosis claims and claims for noise induced hearing loss. Injury claims and occupational disease claims are not allocated. The law firm would exempt all claims from the rule because of the perceived difficulty in involving several employers to whom charges are being allocated.

In allocating a claim, the division determines the percentage of charges that are to be made to each employers' account or to be paid through pay orders. There is no reason that the costs of rehabilitation services cannot be allocated on the same basis. The presence of a number of employers in a claim involving rehabilitation will undoubtedly be administratively trying. However, the rights of claimants ought not be determined by the difficulty the division has in administering its duties.

6). The law firm next contends that section 3.9 is vague and allows qualified rehabilitation professional's to make judgments and recommendations. It says the same thing applies to 3.13 and 4.1.7 without further explanation. Section 3.9 merely defines the expertise needed to qualify as a qualified rehabilitation professional. The law firm forgets that such professionals do make judgements and recommendations every day of their professional lives. While those same judgments and recommendations are subject to review if offered in the course of any legal proceeding, it does not mean that the professional - as an expert in the field noted - cannot formulate and offer opinions.

7). The law firm next critiques section 3.13, which defines "suitable gainful employment" as being "ripe for fraud" because it allows a "program which will enhance the worker's status." This situation is controlled by the provisions of section 4.1 which directs the order in which options are to be reviewed. It should be noted that the first six options either require that no training be necessary or that only on-the-job training be required. It is only when one reaches the very last available option that more than on-the-job training is permitted. In short, all other options have been reviewed and have been found to be unavailable to the claimant. While it should not be the intent of subsection 4.1.7 to train all such applicants to be brain surgeons or lawyers, to arbitrarily restrict the claimant's options so as to keep him or her in his or

her proper station in life can and will prevent some claimants from returning to the workforce and consign them to PTD benefits.

The law firm also notes that section 3.13 does not define "labor market." The Council has discussed various definitions of what should constitute the labor market. However, the Council has left the term undefined, for the present, and the status quo on the application of this concept is not disturbed until there is time for further consideration of the issues involved as part of the Council's work on defining vocational standards for permanent disability decisions.

8). The law firm comments that section 5.1 is deficient by creating a presumption of who will need rehabilitation services and especially with regard to the provision that a claimant who is likely to return to work after less than 120 days of TTD would not benefit from rehabilitation. The comment is also made that the section does not define who will be making the determination or what information they will use.

Section 5.1 is intended to implement the following provision from section 9(b) of the statute: "In cases where an employee has sustained a permanent disability, or has sustained an injury likely to result in temporary disability in excess of one hundred twenty days, and such fact has been determined by the commissioner...." In those cases, the commissioner is to make available appropriate services. The 120 day provision in the rule is thus taken straight from the statute itself. The specific situations covered by the section are those that indicate that the claimant has not suffered a permanent disability that will prevent him or her from returning to work.

As the Commissioner generally makes claims decisions through delegations to his or her staff or to contracted vendors, the section indicates that this will be the case with the determinations here. Appropriately qualified staff will have to be retained or contracted with to make the evaluations. Such staff is already present, albeit in limited numbers, and the division has a contract with the Division of Rehabilitation Services for additional help in this area.

With regard to standards and information, both the TQI project and the HCAP are addressing that need. The TQI results will be sufficient to implement the rule until the HCAP finishes its work. The Council also simplified section 5.1 by requiring a file entry be made rather than a formal notice be entered.

9). The law firm next comments that subdivision 5.2.a (which has been renumbered to be 5.2.1.a in the attached draft) will be unduly expensive due to its requirement that all claimants who sustained an injury likely to result in temporary disability in excess of 120 days to be evaluated for rehabilitation services. It

suggests this be approached on a case-by-case basis. The law firm fails to place subdivision 5.2.a (now subdivision 5.2.1.a) in context with subsection 5.4.1. The latter section provides that claimants referred for evaluation for potential rehabilitation services, including those referred under subdivision 5.2.1.a, are to undergo an initial assessment. If it is determined that the individual claimant either will be able to return to his or her preinjury job without assistance or will never be able to return to any remunerative work, then the assessment is complete and the qualified rehabilitation professional will so report. Thus, the case-by-case review sought by the law firm is provided for and the requirement of the statute that all claims expected to be in excess of 120 days of TTD be reviewed is met. A reference to subsection 5.4.1 is inserted in subsection 5.2.1 to highlight this relationship.

10). The law firm next comments that subdivision 5.2.d (now subdivision 5.2.1.d) requires all persons whose first evaluation did not indicate a need for services but who might need them in the future, to be evaluated if he or she is still on benefits 100 days later. As with subdivision 5.2.a (now subdivision 5.2.1.a), this subdivision is subject to the provisions of subsection 5.4.1 and the case-by-case review provided for there is applicable here. In response to a later comment, subdivision 5.2.1.d has also been amended to specify that it only applies where the claimant has not returned to work.

11). The law firm would expand the provisions of subsection 5.2.3 to include claimants who have been awarded noise induced hearing loss benefits. Unlike the statutory 5% occupational pneumoconiosis awards, noise induced hearing loss awards do reflect a disability. While most claimants receiving such awards will not be in need of rehabilitation services, in the more extreme cases of loss of hearing some type of services may well be needed. The minor noise loss claimants will be screened out by subsection 5.4.1 while those few in need of services will be identified.

12). With regard to section 5.4, the law firm suggests including a requirement for functional capacities testing in the development of a rehabilitation plan. As noted above, it is presumed that this testing will be part of the vocational evaluation process as will be required by the standards to be adopted by the HCAP.

13). As with the self insured employers association, the law firm suggests that the fifteen day period for the evaluator to report to the division his or her findings under subdivision 5.4.1.a is too short. Again, lengthening the time will defeat early and speedy intervention. If resources are dedicated to this function, then it can be complied with; but, to the extent that resources are not available, it is agreed that it will be impossible to comply with.

14). The law firm again notes that the fifteen day period provided for in subsection 5.4.2 is too short. It also worries over the case of claimants whose medical condition might foreclose immediate rehabilitation evaluation or services such as following surgery. Subsection 5.4.2 must be read in conjunction with 5.4.3 which states the factors to be looked at by the evaluator. Included among those factors is the injured worker's medical condition. A case such as that suggested by the law firm would be noted as not ready for further evaluation or services due to this factor and a report issued to that effect. The report could then identify a date when the claimant should be looked at again.

15). The law firm asserts that subsection 5.4.3 does not allow for the use of functional capacities evaluations. This is not correct. Such evaluations are included in determining the injured worker's medical condition, his or her vocational condition, and his or her present physical ability to participate in the services.

16). The law firm comments that section 6.1 requires the agreement of the employer before a biomechanical engineer can be utilized as part of a plan. It states a need to clarify that refusal to agree not be deemed a failure to cooperate in the development of the plan which would then lead to subsection 2.2.2 findings. The section has been clarified to meet this comment.

17). With regard to section 7.2, the law firm notes its disagreement with providing that a rehabilitation plan may extend for up to 208 weeks. As was noted earlier, this subsection has been amended.

18). The law firm critiques section 8.1 as unduly interfering with the operation of a business with regard to the employer providing light duty or otherwise modified work. Subsection 8.1.1 states that the employer is to furnish a statement of available work for light duty or which can otherwise be modified. In the event that the employer believes that no such work is available, the employer can state that and offer its explanations to support that position. If those explanations demonstrate good cause as to why such opportunities are not available, then the matter will be closed. If the employer fails to demonstrate good cause, then an adverse finding under subsection 2.2.2 would be made. While this may be viewed as "unduly interfering" with the employer's operation of its business, it furthers the social policy of reducing reliance upon workers' compensation benefits by claimants and helps address the financial difficulties of the fund. Various studies have shown that the preinjury employer's continued involvement with the injured worker leads to the greatest number of most satisfactory outcomes.

19). With regard to subsection 8.1.1, the law firm suggests that the last sentence be stricken on the belief that if a qualified physician opines that the claimant can return to light duty work, then the claimant should be required to do so. This is not the

point addressed by the last sentence. The last sentence addresses the recurrent situation where a treating doctor refuses to consent to the return to work yet the claimant believes he or she can return. The sentence states that if the a division selected physician agrees with the claimant, then the claimant can return to the light duty work. The second opinion is only sought where the treating physician is against returning to work and is needed to protect the claimant who would unwittingly overextend himself or herself.

20). The law firm comments that subsection 8.1.2 should require that the employer determine whether the work has come to an end. This phrase is intended to refer to the work ending due to the fact that it impeded the claimant's recovery or because the term agreed to, if any, for the light duty work has expired. While this will not generally be a difficult finding, it is a finding that determines the claimant's substantive rights and must be made by the division. The employer can, of course, offer its views on the matter. Clarifications to address this intended purpose have been made to the subsection.

21). The law firm objects to the wording of subsection 8.1.3 on the basis that it understands the section to mean that the claimant can "supersede the judgment of a qualified physician." The subsection was clarified in response to a previous comment, but that clarification probably does not address this comment. The subsection contemplates an employer wishing to change the work duties for a light duty injured worker from that previously approved under subsection 8.1.1. The subsection them contemplates either the injured worker agreeing on his or her own to the change or for its review by his or her physician. The claimant is not necessarily superseding the judgement of any physician. Rather, if the claimant feels comfortable with the change, the change can happen. If the claimant is uncomfortable with the suggested change, then the physician can review it. Changes that later lead to difficulties for the claimant would then be dealt with under subsection 8.1.2 or by the trial return to work section of the statute.

22). The law firm comments that section 8.3 repeats provisions of the statute and should be stricken as superfluous. The Council disagrees as the provisions of the statute are needed to understand the applications being made in the section.

23). The law firm suggests that section 8.9 be changed to award NAP benefits rather than rehabilitation TTD benefits. This issue was discussed above. In addition, it is noted that NAP benefits were introduced into the statute in order to deal with delays in entering PPD awards after a claimant was determined to be no longer eligible for TTD benefits. NAP benefits should be restricted to that purpose since they were intended to deal with aberrations rather than as an established part of a program under the statute.

24). The law firm suggests that section 9.1 serves no purpose save to evaluate the claimant after the plan ends. This is incorrect. The evaluation is intended to complete the record on the application of the plan to the injured worker so as to document the claimant's status in the event of future developments. In addition this state's workers' compensation program suffers from a lack of information on the outcomes of various services and treatments. In order to do outcome analysis, the data must be preserved. Section 9.1 is intended to accomplish these goals.

25). The law firm's comment on section 9.2 is unclear. Section 9.2 requires documentation of the injured workers' obtaining suitable gainful employment. Such employment can be with the preinjury employer or with another employer depending upon the plan and the use of the section 4.1 factors. It is not intended to be of substantive significance with regard to the determination of any responsibilities of any party.

26). The law firm expresses a similar concern regarding subsection 11.2.1 as did the self insured employers association. For the reasons previously stated, the Council does not believe the statute caps an individual's lifetime benefits at $10,000.00. A new injury requires a separate plan and separate services. As such, it should be treated as any other injury and not require any special consent from the employer.

27). Repeating an earlier concern, the law firm comments that the refusal of an employer to agree to expending a sum greater than $10,000.00 under subsection 11.2.3 should not lead to subsection 2.2.2 findings. The subsection did not intend that result and has been clarified.

BOWLES, RICE, MCDAVID, GRAFF & LOVE

Addressing the comments in the October 14, 1993, cover letter first:

1). The first comment notes that the circulated proposed rule contains language related to the former PTD remand process. The comment also suggests that the vocational standards for PTD decisions should be made prior to the implementation of this rule. As noted earlier, the provisions of section 5.3 and its subsections have been amended to reflect the end of the remand system and the implementation of the 1993 petition process. With regard to development of vocational standards, the Council has been developing a system of early intervention for rehabilitation efforts as a major component of those standards. The rule as drafted and revised reflects that work. Further delay in the rule will retard the Council's overall work. In addition, because of the consent order in the Anderson case before the Supreme Court of Appeals, some action on this rule must be taken by April 15, 1994.

2). The second comment from the law firm suggests that the rule be delayed until the HCAP has developed protocols for vocational and physical rehabilitation assessments and plans. The HCAP and the TQI project team have been working on those standards for sometime. Nothing in this rule should negatively impact upon the use of those standards when they are completed. Should some impact actually occur that needs corrected, amendments to this rule can be made at any time by the Council.

3). The third comment in the cover letter suggests that the rule adds a "complicated new layer of bureaucracy" by requiring that every claimant with a disability or with the prospect of one be evaluated. The law firm suggests that some standard, such as 15%, be selected as a cutoff point for the evaluation process. The Council's work to date has suggested the need for early intervention into any claim that has a prospect of affecting a claimant's return to work. Further, the historical development of PTD claims indicates that the gathering together of many minor earlier claims is a common method for putting together a second injury life award claim.

The rule creates a three tier process for evaluation. First, section 5.1 provides that the division will review claims and determine whether "the injured workers will be able to return to his or her former job after reaching maximum medical improvement...." Even if the claimant will have some minor disability, if it is insufficient to prevent the claimant's return to work without further assistance, then no further evaluation process is needed. This complies with the statutory requirement that "the commissioner shall at the earliest possible time determine whether the employee would be assisted in returning to remunerative employment with the provision of rehabilitation services...." See section 9(b) of the statute.

The second step begins with subsection 5.2.1 (of the final edition) which now identifies five categories of injured workers that should be further evaluated. This step would include those claimants who are identified in the first step above as possibly needing assistance which has been addressed by inserting a new subdivision e. Under section 5.4, these injured workers are to be reviewed by a qualified rehabilitation professional to determine whether they will be able to return to work without assistance or will never be able to go back to any work. See subdivision 5.4.1.a. If neither determination can be made (that is, there is either a finding that the claimant will need assistance or that it is possible that the claimant, despite a severe disability, will be able to return to remunerative employment, then the claimant proceeds to the third step under subdivision 5.4.1.b which has been clarified. Subsection 5.4.2 then directs that this third group of claimants will be evaluated for the development of a plan.

From this description, it is apparent that the rule will phase in greater involvement with the claimant upon a finding of a greater need for services at each of the first two steps. It is true that all claimants with a permanent disability will be reviewed in the initial step, however, most will not proceed to the second step.

4). The next comment suggests that the rule be delayed pending the development of a team approach to reviewing a claimant's situation. The Council has been discussing this issue which is proceeding separately through the HCAP and the TQI project. There is no reason to delay the rule while this effort proceeds.

5). The last comment in the cover letter suggests that a special incentive package needs to be developed for employers to provide GED programs as part of their benefits packages or rehabilitation plans. GED programs are already available under the rehabilitation program of the division. Preinjury assistance by an employer to its employees in obtaining a GED would seem to be part of an overall training program. There is a possible connection of such a program with a safety or risk management program rather than as part of a rehabilitation program. Subsection 2.2.2 was amended to add an incentive for the employer to cooperate.

The remainder of the law firm's comments are presented in a revision of the rule which it prepared. The law firm has provided one version which shows new language and stricken language. The second version shows only the cleaned up version but with changes highlighted. The following responses will be addressed to the version which shows both new language and stricken language.

6). The law firm suggests a change to section 2.1 by inserting the shown language. It must be noted that the passage in section 2.1 is a direct quote from the statute - section 9(a). Further, the suggested items - education level and current job market - are contained in the definition of "suitable gainful employment" set out at 3.13. That section includes as review factors "injured worker's qualifications" as well as "the current and future condition of the labor market." It also must be noted that these factors attain their greatest importance with regard to subsection 4.1.7 which is the only priority that provides for extensive retraining and is the last priority to be reached. It has also already been amended to include the provision related to there being a reasonable expectation of the claimant actually obtaining the planned employment.

7). The law firm suggests striking section 2.2 which is the section describing the Americans With Disabilities Act. As noted earlier, this section has been struck.

8). With regard to renumbered subsection 2.2.1, the law firm suggests two changes. The first adds the phrase shown for the apparent purpose of indicating that the injured worker cannot cite

the fact that he or she is receiving disability benefits from another source as a reason for not cooperating. Presumably, the claimant would fear the loss of such benefits if the plan proved successful. If that presumption is correct, then the suggested change does not add anything to the section. Other benefit plans are not taken into consideration by the division for any purpose other than as evidence that the claimant does suffer a disability. The receipt of social security disability benefits or other disability benefits is generally noted as negative factor by a vocational evaluator in assessing the claimant's rehabilitation potential. However, as the earlier quotation from the Barnes case indicates, a claimant cannot refuse to better his or her condition because of loss of a benefit that another law provides to him or her. The addition was not accepted because there is no need to set forth this one example of lack of good cause.

The second addition to the subsection is to insert a provision into a portion of the subsection that was previously deleted.

9). This comment suggests an insertion to subsection 2.2.2 which should be made. The suggestion does clarify the subsection by stating that the same good cause standard will be applicable to both employers and claimants.

10). The next comment pertains to the subsection renumbered as 2.2.4. The Council agrees with the suggestion as a clarification of what was expected to be part of the explanation from the party. Also changing the word "should" to "shall" with regard to considering the offered explanation is appropriate.

11). With regard to the suggested change to section 3.7, the definition of "physical rehabilitation services," the suggestion is premature and, when mature, will not be needed. As noted in response to the hospital association's comments, standards for services are being developed by a subcommittee of the HCAP. It is anticipated that the HCAP's recommendations will be presented to the Council for its approval. Upon obtaining that approval, a set of rules will need to be drafted to implement the recommendations. That rule will be tied to the present rule for the sake of conformity. Until the HCAP's recommendations are made, the division will continue to have to use the industry's best practices as a guide. This is what the division would have to do if this rule were delayed until the HCAP makes its suggestions. Hence, delaying the rule would not correct this problem.

12). With regard to the suggested change to section 3.10, it should be rejected for the same reasons set forth in number 11.

13). The suggested change to section 3.13 addresses four (4) components. First, adding the word "education" to the definition of suitable gainful employment is redundant and unnecessary. The term "the injured workers' qualifications" is understood to mean the

claimant's education, experience, and prior training. Second, striking the term "motivation level" would avoid having to deal with a real life issue that will be present in every situation. In designing a plan, the qualified rehabilitation professional must take into account the claimant's motivation level. If he or she is more motivated to be trained for one type of employment rather than another, this must be considered. The real issue here is whether the fact that a claimant is unmotivated for any type of training or rehabilitation is sufficient cause to excuse him or her from further efforts. The rule taken as a whole already addresses this concern and that such a situation would not constitute good cause. Reference should be made to the quotation from the Barnes case set forth above.

The first sentence of the next suggested change to section 3.13 includes the motivation issue already noted and adds to it the question of the effect of the claimant's age. That is, should the fact that a claimant is probably too old to engage in employment that he or she is otherwise qualified for be recognized or not in determining whether there exists "suitable gainful employment" for the claimant? This is a very valid question and is one which the Council faces with regard to the vocational standards for subsection (n) of section 6 of the statute. Accepting this suggestion would have the effect of eliminating age as a consideration in developing a plan for the claimant. His or her refusal to participate in such a plan because he or she believes himself or herself to be or is too old to do that work would not be good cause for not participating. At this time, however, the Council has decided to defer the change and leaves the status quo in place with regard to using age as a highlighted factor.

The last suggested change to section 3.13 raised the issue of whether to rely solely upon objective evidence rather than also including subjective evidence is dealt with by statute in many states or by regulation. This also goes to the heart of the vocational standards issue as an evidentiary issue. Reliance only upon objective evidence eliminates subjective complaints about pain and other matters. Looked at as a whole, this state's system uses both types of evidence for all pertinent matters or issues. This issue is also deferred until the vocational standards are further refined.

14). The next suggested change is to add an eighth priority to section 4.1 thus creating a 4.1.8. Adding relocation of the injured worker as a possible outcome is, in itself, a very valid idea. What all would be included in relocation costs would have to be determined. It must be noted, however, that the suggested change also affects another issue; that is, what definition of the labor market to use. Obviously, if relocation costs are to be included, a plan which would require a move to California would more easily defeat a refusal by the claimant to cooperate because he or she does not want to leave the state or his or her home area. However, a

more explicit treatment of the term "labor market" should be considered rather than such a back door approach. The suggested change is deferred pending further consideration.

15). The suggested changes to section 5.1 reflects the comments made in the cover letter in paragraph numbered 3. They should be rejected for the reasons stated there.

16). Taking the next several changes together, the law firm would delete all of section 5.2 (now 5.2.1), 5.2.2, and 5.3. See pages 9 through 11 of the law firm's revision. These sections should not be deleted. Subsection 5.2.1 and 5.2.2 are not redundant with section 5.1. Rather, they constitute the second and part of the three tiers of review that were described earlier. The law firm would have everything reviewed under section 5.1. As noted earlier, section 5.1 is an initial review that will probably be done in house and will probably be limited to a review of the file of the claimant. The review contemplated under subsections 5.2.1 and 5.2.2 is more in depth and will probably be performed by either a Division of Rehabilitation Services counselor or a private vendor counselor under contract with the division. These reviews will be more than just a file review and will include aggressive gathering of information from the employer, the claimant, and the involved health care providers. Testing and evaluation may well be conducted. Deletion of these provisions would be destructive to any meaningful rehabilitation evaluation process.

The deletion of section 5.3 is also refused. The revision has modified that section to reflect the change in law in 1993. It is still necessary to have a process in place to handle the petitions for PTD awards that are now being filed and that will continue to be filed. Deletion of the section would remove any process for dealing with current claims.

17). The suggested change to section 5.4 on page 11 of the law firm's revision is also rejected. Inserting the reference to the section 4.1 priorities is not necessary since that section states that all evaluations and plans must be conducted and composed using them. The phrase "as necessary" also covers any need to insert the word "may." With regard to the portion that is suggested to be deleted, again this is a portion of the three tier review process and should not be deleted.

18). With regard to the change the law firm designates as 5.3.2 which is the revision's 5.4.1.a, the revision has been reworked in response to an earlier comment so that the commissioner will issue the suggested order. The law firm also suggests changing the 15 day periods to 30 days. The reasons for keeping the 15 day periods were addressed above.

19). The suggested changes designated "b." at the bottom of the law firm's page 11 which is the revision's subdivision 5.4.1.b as

well as the suggested striking of the revision's subsection 5.4.2 are both rejected. These sections begin the process of developing a full scale evaluation and plan for those claimant's found to be in need of them. The suggested changes as well as those suggested to subsection 5.4.3 serve to create a different review process than the proposed rule contains. The suggested changes would be needed if the other suggested changes to the proposed rule's three tier review process are made. If that structure is not eliminated, then these suggested changes are not needed.

20). The suggested change to the revision's section 5.4 is accepted as clarifying the original intention of the section. The revision reflects the change.

21). The suggested change to section 5.5 is rejected. This point was discussed above. The law firm wishes to apply section 1a of article 5 of the statute to rehabilitation benefits. Section 1a and section 16 of article 4 of the statute together impose a five (5) year statute of limitations period on requests to reopen a claim for additional permanent disability benefits. It is believed that rehabilitation benefits are more similar to medical and other expenses which are not covered by section 16's period of limitation.

22). With regard to the suggested changes to the revision's subsection 5.5.2 (denominated subsection 5.4.2 in the law firm's revision on page 13), the Council refused to make the changes. The revision has been amended to note that the division's order under this subsection is interlocutory. The next two suggested changes (inserting "comprehensive" and "containing a rehabilitation plan") are only necessary if the three tier system is gutted. Changing the period for the development of the plan to 60 days from 45 days will again lengthen the development process to the determent of early intervention. Finally, inserting a right of the employer to develop its own plan will also serve to delay intervention. Further under section 13 of these rule, those employers wishing to have their own programs will be able to develop specific plans in lieu of the division doing so. The division will then serve in an oversight or regulatory function.

23). With regard to the suggested change to the revision's section 5.6 (noted as section 5.5 in the law firm's draft), use of the phrase "of review" in place of the term "appellate" is accepted.

With regard to the suggested deletion of the reconsideration process, this suggestion is not accepted. An informal method of resolving a disagreement on a plan is preferable to going into litigation right away. Also, since both parties must agree to pursue mediation under the statute, mediation will not always be available to resolve disputes.

24). The suggested change in section 6.3 is accepted.

25). With regard to the suggested change to section 7.5, the revision has dropped this section as noted earlier.

26). The suggested change to section 8.3 is accepted.

27). The suggested deletion of section 8.9 is rejected. As was explained above, the law firm also misunderstands the basis for paying TTD benefits during the evaluation portion of the rehabilitation process. The law firm's comments to the suggested change refer to section 7a(e)(3) of the statute. However, the TTD addressed in section 8.9 arises from section 9(c) of the statute - the rehabilitation section itself. Hence, the law firm's argument based upon section 7a is misplaced. With regard to an incentive, it is believed that the payment of TTD benefits, which are higher than PPD or NAP benefits, creates more of an incentive for the claimant to participate in the rehabilitation effort. Those payments will continue only as long as the claimant continues to cooperate in the rehabilitative effort.

28). The law firm next suggests deleting section 9.4. Section 9 addresses the qualified rehabilitation professional's final report on the outcome of the plan. Section 9.4 addresses whether the claimant is not likely to obtain suitable gainful employment despite the plan's completion. There could be any number of reasons for this and for some of those reasons the division may be able to offer further help - such as getting the claimant in touch with the job service division of the bureau. Again, this section is primarily reporting in nature and is designed for the division to monitor outcomes of the program.

29). The suggested insertion of the word "compensable" into subsection 11.2.1 is accepted.

30). The suggested deletion of section 13.4 is rejected. The comment on page 23 misses the point by assuming the authorization must be posted for every claimant. What is intended here is for the employer to post a notice that its general program has been submitted for authorization by the division and to inform the employees of that fact and that they may review the petition and comment upon it. It does not mean that anybody's individual claim or plan will be posted.

31). Similarly, the suggested deletion of the sentence from section 13.5 is refused. This sentence serves to notify the employees generally that the program has been approved. This will give the employees the information that the employer is entitled to work with them to develop a plan if and when any employee is subsequently injured.

THOMAS P. MARONEY

1). Counsel comments that section 2.3 (which is now renumbered as section 2.2 in the revised draft) requires the addition of criteria by which the claimant's and the employer's shared responsibility will be determined. He also suggests that an agreement of some sort must be entered into with regard to measuring the fulfillment of this shared responsibility. Section 2.2 is the introduction to its subsections which follow it. The criteria discussed earlier with regard to "cooperation" which were inserted as new subsection 2.2.3 and taken from Supreme Court cases as the standards for determining cooperation with rehabilitation were added for this purpose. Shared responsibility is the same as saying both the injured worker and the employer must cooperate in putting the plan together and then implementing it.

With regard to an agreement, it is the rehabilitation plan itself which is the agreement. The plan will set forth each party's obligations and what is expected of them. Their agreement to participate in the plan then binds them to its terms. It must be noted that under proper circumstances the plan can be modified pursuant to section 7.3 of the rule if the facts in place or thought to be in place when the plan is put together later change or prove to be different.

2). Counsel next contends that the criteria for good cause for failure to cooperate must take into account the claimant's medical condition. This has been done by the addition of subdivisions 2.2.3.a & -.b both of which address the medical condition of the injured worker.

3). The next comment addresses disputes in the medical evidence and whether a protestable order will be issued. Section 2.3 has been amended to indicate that a formal protest is permitted but that mediation is available if the parties so choose.

4). The next comment is addressed to section 2.2.1 and specifically to its last provisions. As noted above and as is shown in the draft, this section has been dropped. Hence, counsel's concern over the lawfulness of declaring an overpayment is dispelled.

5). Counsel next notes the lack of definition of the term "labor market" in section 3.13 which defines "suitable gainful employment." This issue has been raised several times earlier and was discussed above.

6). The next comment suggests that section 5.1 needs to be amended so that injured workers who receive less than 120 days of TTD may still receive rehabilitation services if their condition merits them. All of section 5.1 must be read in addressing this issue and, taken as a whole, the point is covered. The section lists several circumstances where the division <u>may</u> assume that the claimant will not need rehabilitation services. Not only is this

section not mandatory (that is, a claimant who receives less than 120 days of TTD can still be considered for rehabilitation benefits - the division is not forced to ignore him or her by the rule), but a later provision notes that the claimant must not have a permanent disability. Under the scenario that counsel suggests, this provision would not allow the use of the presumption against the claimant. Reference must be made to section 5.2.2 which states that a claimant "is reasonably suspected to have sustained a permanent disability" if any of the listed factors are met. These include the importance of the injured body part to the performance of the claimant's work and whether other facts indicate that the claimant has suffered a permanent disability. The section 5.1 criteria serve only to guide the division's actions, it does not dictate them.

7). Counsel's comments to subsection 5.2.2 with regard to reviewing cases individually corresponds to the proper use of a guideline. A guideline by definition is a guide not a rigid rule that must be applied in all cases regardless of exceptions. As noted earlier, the Supreme Court has often stated that workers' compensation is not a field where rigid rules have much application. An insertion has been made noting that cases must be reviewed one at a time and on the basis of their own facts.

8). Counsel objects to subsection 5.3.2 and the last sentence thereof. However, that sentence has been dropped from the revised draft and the subsection itself changed to reflect the elimination of the old remand process and the use of the new petition process for applying for PTD awards.

9). With regard to section 5.5, counsel repeats his comment that the term "labor market" must be defined as being limited to the claimant's geographical location. This issue was addressed earlier.

10). Counsel next questions subsection 5.5.2's requirement that plans developed by private rehabilitation firms must be reviewed and, if necessary, revised by a qualified rehabilitation professional employed by or under contract with the division. He is concerned that this will delay the process. The purpose for the review is that the division will not have the same amount of assurance that the plan was developed in accordance with the standards developed by HCAP and elsewhere when it is done by a private vendor. In order for the division to accept the plan as its own, a review must be made. An insertion has been made to indicate that the review is to verify that the appropriate guidelines have been followed.

11). Counsel again notes his concern that the injured workers' medical condition must be considered in determining his or her cooperation. This time the point is raised with regard to subsection 5.5.4. Looking to that subsection, is is noted that the reference to section 2.3 has been changed to 2.2 because of the deletion of the section that discussed the Americans With

Disabilities Act. In order to determine whether an injured worker has cooperated for the purposes of subsection 5.5.4, one must look to the provisions of section 2.2. As noted in response number 2 above, subsection 2.2.3 lists the case law standards and the first two of those standards include the claimant's medical condition. Hence, the addition of subsection 2.2.3 addresses counsel's concerns.

12). Counsel objects to the provision for reconsideration requests as stated in section 5.6 and notes his concern that this will serve to delay the rehabilitation process. The reconsideration provision was placed in the rule to provide for a speedier and less cumbersome review of a plan than that provided by formal litigation. Hence, its purpose is to avoid delay rather than to cause it. Counsel's concern that the reconsideration process could be abused by employers invoking it needlessly has also been addressed by the insertion of the provision in subsection 5.5.3 which states that a plan can be implemented despite an employer's objection. This is similar to the payment of TTD and medical expenses after a claim is ruled compensable even if the employer objects to the ruling. Also, a fifteen (15) day period in which the reconsideration request must be made has been added. This will hold the possible use of this procedure as a delaying tactic to a minimum.

13). The comments next address section 6.3's requirement that preference be given to instate schools and facilities by noting that sometimes only out-of-state facilities can provide the needed services. The nature of a "preference" is that an instate facility must offer the needed service - only then can it be preferred. If no instate facility offers the service, then none can be preferred and the claimant will have to seek the service out-of-state.

14). Counsel next expresses a concern that subsections 7.3.1 through 7.3.5 do not state what the burden of proof is to make the necessary findings. This rule does not attempt to address or change the usual "burden of proof" rules used in workers' compensation. The burden of proof is generally upon the party who is attempting to demonstrate something. Hence, if the claimant wishes the division to find that circumstances have changed so as to modify a plan, then the claimant will have to prove the change; that is, the claimant will have to carry the burden of proof by showing that a preponderance of the evidence supports his or her position. The employer would have to do so if it wanted to have the change made. It must also be noted that the so-called "rule of liberality" is applicable here as well. That is, in deciding whether the claimant has either carried his or her burden of proof or whether the employer has carried its burden of proof, the evidence still must be construed in the light most favorable to the claimant. This is the standard way evidence is reviewed in any remedial program.

15). Counsel objects to the provisions of section 7.5. This section has been dropped from the revised draft.

16). Counsel objects to subsection 8.1.3 by asserting that employers will be able to change a claimant's duties in a light duty program from that approved by a physician and that the division will only have the claimant's word versus that of the employer in trying to decide the matter. While such a skeptical view is undoubtedly applicable in relation to some employers, a rule should not be based upon a belief that such a fraud will occur in all or most cases. These rules assume that there will be a very active role played by the qualified rehabilitation professional and a claims analyst. That person will be obligated to closely monitor the claimant's light duty return to work by visiting the work site and observing the claimant at work. This oversight by the qualified rehabilitation professional and the claims analyst will handle the situations stated by counsel and is preferable to rejecting the concept of light duty trial return to work which is the natural outcome of counsel's suppositions.

17). With regard to subsection 11.2.3, counsel contends that the consent of the employer should not be required in order for the $10,000.00 limit to be exceeded. As subsection (b) of section 9 of the statute expressly states that this amount cannot be exceeded, the division cannot order it exceeded on its own. The limit can only be exceeded if the employer waives the limit and if the commissioner, in keeping with his or her fiduciary obligations to the fund, believes such an additional expenditure is not only best for the particular claimant but is also in the best interests of all employers and all claimants of the state by limiting the total cost to the fund of the claim. Subsection 11.2.1 has been amended to indicate that a claimant may be entitled to several different rehabilitation plans over his or her working life if he or she suffers serial compensable injuries. Each separate plan is then individually subject to the $10,000.00 limit. Hence, a claimant with serial plans could exceed the sum of $10,000.00 when the cost of all the plans are added together.

18). Counsel lastly states that section 13 is totally unacceptable because of the employer's control over a program administered by it. It must be remembered that in forty-four of the other states of the United States self insured employers administer their own workers' compensation program from beginning to end. The role of the state agency in those states is to serve as the arbiter of disputes between the employer and the claimant. Thus, the concept expressed in section 13 is not unique and is in operation every day of the year in the great majority of the states.

Section 13 states that an employer may administer its own rehabilitation program if that program is found to meet the standards of the division's own program. Injured workers who are dissatisfied with the employer's program such as a proposed plan or proposed program can complain to the division which will then act as the arbiter on the dispute. Formal objections to the Office of Judges can be made if the claimant is still unsatisfied. As with

objectionable decisions of the division, the decisions that the employer makes are subject to this right of the claimant's.

This section was placed in the draft of the rule following the circulation of the earlier version of the rule for comments in 1991. At that time, employer comments included a desire for the opportunity to provide these programs. In addition, there are such programs now in operation by some employers where the claimant can voluntarily participate. Those employers' success with their programs caused them to fear that the first draft of this rule would prevent their programs form continuing to operate.

The success of those employers' programs is reflected in the national literature. Rehabilitation programs offered by the employer work better than a program administered by the insurance company. The continued involvement by the employer with the injured worker keeps the worker in contact with the employer, with his or her fellow workers, and keeps the injured worker from feeling that the employer has discarded him or her following the injury.

The study of the Boeing Company's workers' compensation experience clearly demonstrated that the single best factor for determining how successful workers' compensation would be in returning a claimant to work was how well that claimant got along with his or her boss. If the injured worker believes that the boss no longer cares for his or her well-being following the injury, then the claimant's motivation and morale for returning to work will be greatly lowered if not destroyed. A well run and effective program by the employer can keep the injured workers' motivation high and his or her morale good and thus speed the workers' recovery and his or her return to work.

These rules have been amended in several places, including section 13, to more clearly indicate that an employer managed program must meet, at a minimum, the same standards as a program administered by the division. Only registered, qualified providers may be used. Also, the division retains the right to monitor individual claimants and take all necessary corrective action including revoking its approval of the employer's plan. If this proposal proves to be unsatisfactory, then the Council is empowered to change the rule at anytime.

CRANDALL, PYLES & HAVILAND

1). The third paragraph of this letter begins the comments. The law firm's initial comment is to subsection 2.3.1 regarding the requirement of cooperation. The law firm objects to the rule's requiring cooperation by the injured worker upon pain of a negative decision being made upon the claim. The comment states that there are other mechanisms available to induce cooperation but does not describe them. As has been explained above, Supreme Court decisions

have required claimants to take reasonable medical steps to rehabilitate themselves even going so far as to require surgery. Those cases arose under earlier versions of the rehabilitation section, but the current version does not differ with regard to the essential language.

2). The next comments are directed to the definition of "suitable gainful employment" set forth in section 3.13. First, the law firm suggests that the labor market be defined as being a local one rather than a statewide or national labor market. This issue was addressed in earlier responses.

The second component of the comment suggests setting a floor or minimum regarding any new job's wage and benefit package. It appears that this minimum amount would vary depending upon the wage and benefit package that the claimant's preinjury employment provided. The definition lists as one factor to be considered the injured workers' "preinjury earnings." It would be a mistake to raise this factor from one element among several for consideration to an element that would be controlling such as a minimum wage or benefit level would become. Following any successful return to work and the completion of a rehabilitation plan, a determination on the amount, if any, of disability will still have to be made. The disability rating will reflect the difference between the injured workers' preinjury condition and earnings levels and capacities versus the post rehabilitation condition and earnings and levels. An appropriate PPD award would still be made.

It is unfortunate but nonetheless true that no legal system can return an injured person to the exact same status he or she had prior to the injury. The current PTD situation of the division does not accomplish this either. An injured workers' wages as, for example, a unionized coal miner will be several times larger than the maximum benefit level - which is 70% of the statewide average weekly wage, currently $420.33. What can be expected of a workers' compensation system is an effort to return the injured worker to meaningful employment, the provision of some amount of compensation in the form of a PPD award, and lifetime medical benefits for the injury. To draw any absolute line below which a job will not be considered "suitable gainful employment" serves to defeat the primary goal of returning the claimant to meaningful employment and to cast him or her upon dependence of PTD benefits. It is believed that comparability of wages and benefits should remain one factor of several to be looked at and that it should not be made a controlling issue.

3). The next comment is to section 7.3 and its subsections. The comment suggests that the rule not use 208 weeks as a maximum length of a rehabilitation plan and that TPRBs be available even after the end of the plan. This section has been amended to drop the 208 weeks provision.

The remainder of this paragraph (the first complete paragraph on page 2) is an argument that temporary partial rehabilitation benefits should be permitted to extend for some unstated length of time beyond the conclusion of the rehabilitation plan. As drafted, the rule only permits payment of TPRBs during the time the claimant is participating in a plan. At the conclusion of the plan, if not earlier, the TPRBs would end. The reason for this is found in the last sentence of subsection (d) of section 9 of the statute which states: "Temporary partial rehabilitation benefits shall only be payable when the injured employee is receiving vocational rehabilitation services in accordance with a rehabilitation plan developed under this section." The benefit was intended to assist the injured worker during the transition from TTD benefits through initial stages during the rehabilitation process and until the plan is completed. At that time, the claimant will be back to work and will, in all probability, be evaluated for a PPD award.

4). The next comments suggests that section 7.5 be eliminated which has been done as stated earlier in response to comments from the self insured employers association.

5). The last comment from the law firm is directed to the provisions of section 13 which would permit an employer to develop its own rehabilitation program and obtain the approval of the division for its implementation. The comment suggests that the employer's program's rehabilitation plan be authorized by the division before it is implemented. The comment finds this to be preferable to requiring the claimant to make an objection to the division if the claimant finds some fault in the proposed plan.

During the comment phase on an earlier version of this proposed rule, the employer community suggested that the division permit employers to operate their own programs if the employer so chose provided that the program was at least as protective of the claimant's interest as is the division's plan. This suggestion was accepted in the current draft largely because the literature indicates that an employer managed rehabilitation program is much more successful in returning claimants to work than is a program administered by the employer's insurance company. The direct involvement of the employer in the program appears to maintain the claimant's morale and contact with the work place. He or she is much less likely to think that the employer has abandoned him or her if the employer remains actively involved in the claimant's recovery.

The rule as proposed requires that the division review and approve the program if it meets the division's own requirements. If the claimant disagrees with a proposed plan or its implementation, the claimant can use the division's informal processes (as opposed to a formal protest to the Office of Judges) to resolve the problem. It is also anticipated that the division will monitor the employers' programs to make sure that the programs continue to meet approval

requirements. Changes have been made throughout the rules to clarify these points.

EDWARD G. ATKINS

1). All but the last paragraph on page 2 of Mr. Atkins' letter addresses the lack of substantive guidelines in the proposed draft. This is a correct observation. However, as stated earlier, the HCAP and the TQI project are addressing the substantive issues for disability determination and rehabilitation programs. As that work is still progressing, it is not possible to incorporate the results into this rule. When that work is completed, then another rule or a revision to this one will be necessary. Also, the rule was amended to incorporate substantive provisions with regard to determining cooperation.

2). The last paragraph of Mr. Atkins' letter raises another valid issue. The current rehabilitation section staff, even as supplemented by the Division of Rehabilitation Services, is not adequate to handle their present work load. Adding to that work load the many demands that this rule will impose without making major changes in the resources devoted to rehabilitation will not be possible.

The fiscal note attached to the rules would double the size of the rehabilitation section. Also, a new section 15 has been added to the rule that authorizes the Compensation Programs Performance Council to monitor the implementation of the rules, including employer managed programs, and to address any necessary changes as they become apparent.

West Virginia Psychological Association, Inc.

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September 1, 1993

Mr. Andrew N. Richardson
Executive Office
Workers' Compensation Division
P.O. Box 3824
Charleston, WV 25338

Dear Commissioner Richardson:

Title Number: 85
21A-3-7(b) & (c); 23-4-9(e)
Vocational and Physical Rehabilitation

On behalf of the West Virginia Psychological Association, the official professional organization of licensed psychologists in West Virginia, I would like to submit the following comments to the above-referenced rules.

As filed, the rules seem to be somewhat ambiguous about the practice of psychologists as related to vocational and physical rehabilitation, even though there are repeated references to "emotional status," "counseling," and "an analysis of the injured worker's medical, educational, vocational, social, legal and economic circumstances, including his or her present physical and mental ability to participate in vocational rehabilitation services."

We recommend the following amendments to the rule as filed:

In Section 3.11 vocational rehabilitation services providers are defined to include "licensed registered nurses, vocational rehabilitation counselors. The term does not include licensed physicians, licensed psychologists or hospitals where the services being provided to an injured employee fall under the provisions of West Virginia Code 23-4-3, and are outside the scope of the pertinent rehabilitation plan. (Emphasis ours.)

We would suggest section 3.11 be amended to read as follows:

3.11. "Vocational rehabilitation services providers" means licensed registered nurses, vocational rehabilitation counselors and public and private agencies, companies and corporations which provide to injured workers vocational rehabilitation services including but not limited to vocational retraining, testing, counseling, evaluation and job placement services. To qualify as a vocational rehabilitation service provider under this rule, a person must demonstrate that he or she has adequate education, training and experience in the rehabilitation

> field and must have access to the necessary space and equipment needed to provide the service offered, or the entity must demonstrate that it employs workers who have adequate training and experience in the rehabilitation field and that it has access to the necessary space and equipment needed to provide the services offered. The Workers' Compensation Health Care Advisory Panel will establish guidelines on the education, training and experience necessary to qualify as a vocational rehabilitation service provider under this rule. The division must decide on a case-by-case basis whether an individual has the education, training, and access or whether an entity employs individuals who have the education training and access necessary to qualify as a vocational rehabilitation service provider under this rule. The term does not include licensed physicians, licensed psychologists or hospitals where the services being provided to an injured employee fall under the provisions of West Virginia Code 23-4-3, and are outside the scope of the pertinent rehabilitation plan. Provided, that a licensed physician or a licensed psychologist may serve as a vocational rehabilitation services provider if he or she meets all the requirements for such a provider set forth in this rule and is functioning under the scope of a pertinent rehabilitation plan.

Likewise, in 6.1, the rule states, "A rehabilitation plan may include, but need not be limited to, any of the following: counseling, [emphasis ours] prosthetic or similar adaptive devices that enables an injured worker to work at the same or similar occupation as at the time of injury... The rules does not speak to the whether or not the qualified rehabilitation professional will offer the counseling or if it will be offered by another qualified health care professional. We would suggest the rule be revised as follows with the underlining denoting new language:

> A rehabilitation plan may include, but need not be limited to, any of the following: counseling by a licensed psychologist or other duly licensed health care professional interested in the injured worker's rehabilitation;...

Following is section 7.4 with our suggested changes. The new language is denoted by underlining. Language to be removed is suggested by strike troughs.

> 7.4 All physical and/or vocational rehabilitation services must be delivered in accordance with the rehabilitation plan developed under section 5 of this rule....The assigned qualified rehabilitation professional must contact the injured worker, the employer, the injured worker's ~~treating physician~~ primary health care provider, and the injured worker's rehabilitation services providers on a regular basis to monitor compliance with and progress under the plan...

Likewise, we suggest 8.1.3 be amended as follows:

8.1.3. Once the injured worker returns to work under the terms of this section 8.1, the employer may assign the worker only to the work that was described to the employer by the ~~physician~~ injured worker's primary health care provider unless the injured worker gives his or her written consent, or his or her ~~physician~~ primary health care provider conducts a prior review and gives approval.

Please contact John Law in the central office if you have any questions.

Very truly yours,

Steven Dreyer, Ph. D.
President

by:

John D. Law
Assistant Executive Director

INTRACORP

2121 Electric Road, S.W.
Roanoke, VA 24018
703 989 9019
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September 20, 1993

cc: John K.
Ed B
F XI

Mr. Andrew N. Richardson, Commissioner
Bureau of Employment Programs
112 California Avenue, Room 610
Charleston, West Virginia 25305-0112

Dear Mr. Richardson:

This correspondence is in regards to the *"Summary of Proposed Legislative Rule-- Vocational and Physical Rehabilitation, Title 85, Series 15"* Report. I have reviewed the document and I believe it is an excellent proposal! In my many years of vocational rehabilitation service to injured workers, I have seen the difference early assessment can make in successful return to work of disabled individuals. The early identification process outlined is a very positive aspect of this proposal. The responsibilities of the injured employee, employer, and medical/vocational rehabilitation service providers as outlined is very appropriate. The listed placement priorities and development of an approved individualized written rehabilitation plan for injured worker's needing further services is very important, as indicated in the report. And finally, I strongly support the development of qualifications for vocational rehabilitation providers.

Overall, I believe this proposal can significantly increase the number of injured workers who successfully return to suitable gainful employment, either with the same or new employer. I also believe it will substantially reduce the number of permanent total awards.

As always, please feel free to contact me for any additional comments or questions regarding vocational rehabilitation.

Sincerely,

Mark A. Hileman

Mark A. Hileman, M.A., CRC, CIRS
Vocational Rehabilitation Supervisor

WVHA
West Virginia Hospital Association

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South Charleston, West Virginia 25303
(304) 744-9842 FAX (304) 744-9889

September 30, 1993

Executive Office
Workers' Compensation Division
P.O. Box 3824
Charleston, WV 25338

RE: TITLE 85, SERIES 15
VOCATIONAL AND PHYSICAL REHABILITATION

Dear Commissioner Richardson:

We applaud the work of the Division of Workers' Compensation in developing rules and regulations geared toward the rehabilitation of West Virginians injured on the job. We are in general agreement with the Series 15 rules and regulations; however, would point out that it will be necessary to implement a corresponding set of rules which have been worked extensively over the last 10 to 12 months in order to complete the program. Those rules deal with definitions of rehabilitation programs, especially along the lines of work hardening or in the areas of work hardening in several other rehabilitation services.

Again, we have appreciated the input that medical rehabilitation facilities in West Virginia have had in the Workers' Compensation program. We look forward to working with you and your staff but would encourage the expedient implementation of the additional rules necessary to fully implement the program.

Thanks again for your assistance and please do not hesitate to contact us if we can be of further service.

Sincerely,

Dennis Armington

Dennis Armington, Chair
WVHA Rehabilitation Subcommittee

WVSIA *West Virginia Self-Insurers Association*
Post Office Box 1573 • Charleston, West Virginia • 25326

October 1, 1993

Mr. John H. Kozak, Director of Legal Division
Bureau of Employment Programs
Workers' Compensation Division
601 Morris Street
Charleston, West Virginia 25301-1416

Dear Mr. Kozak:

Enclosed you will find a copy of the Comments to the Proposed Rule on Vocational and Physical Rehabilitation, filed on behalf of the West Virginia Self-Insurers Association.

If you have any questions or comments about the Association's position with respect to this Rule, please do not hesitate to contact me.

Very truly yours,

Henry C. Bowen

HCB:tw

Enclosure

WEST VIRGINIA SELF-INSURERS ASSOCIATION COMMENTS TO THE PROPOSED RULE ON VOCATIONAL AND PHYSICAL REHABILITATION

§ 85-15-1 General

The Association is concerned with a provision contained in the "Fiscal Note" of this Rule and throughout, specifically under the heading "Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens." A statement contained thereunder asserts that temporary total and temporary partial rehabilitation benefits are limited to 208 weeks each. This would seem to be excessive because an employer may face up to eight years of being obligated for benefits in a situation where, in theory, the employee may be rehabilitated.

We are also concerned that this Rule may be subject to abuse, specifically, where a claimant would attempt to obtain rehabilitation and benefits for employment that would otherwise not be available due to economic conditions. Often, adverse economic conditions will not allow a return to work, and the Association is troubled by the fact that benefits will be paid regardless of this fact.

Finally, as a general matter, we urge that disputes and protests concerning a rehabilitation plan ought to be subject to mediation or some other alternative dispute resolution so that the parties will be provided with an informal process to determine why the rehabilitation plan includes what it does.

§ 85-15-2 Purpose of Rule; Cooperation

2.1

Although the goal of rehabilitation, as stated, is to return the employee to alternative suitable employment, there should also be consideration of a national labor market and, if there is no national market for the employment at issue, then the state labor market should be considered. If there is no national or state market, then there should be no rehabilitation. In other words, there should be no comparable pay at all if there are no jobs to be filled.

2.2

This section, concerning the Americans with Disabilities Act, should be struck from the Rule altogether inasmuch as it is not necessary to provide claimants with an additional vehicle with which to force employers to back down in defending against workers' compensation claims.

2.3.1

The phrase "amount of money expended in conjunction with the implementation of the rehabilitation plan" is vague. There is nothing in this provision to indicate what the "amount of money expended" includes. If the rule is intended to mean that employers may not recover temporary total disability benefits that are overpaid, then it should be so stated.

2.3.2

This provision, which grants the Commissioner the authority to consider an employer's failure to cooperate with the development or implementation of a rehabilitation plan is vague and violates the Workers' Compensation Act. First, the term "cooperate" should be defined, because a rehabilitation counselor's subjective impression of an employer's failure to cooperate would be sufficient to penalize an employer under the way this provision is now written. This, of course, should not be the case. The newly created Performance Council will deal with setting premiums based on experience ratings. Moreover, pursuant to general principles of administrative law, this provision would, more than likely, not pass judicial scrutiny. No one in the workers' compensation agency has the training to make a judgment on an employer's compliance with other statutory mandates.

§ 85-15-3 Definitions

3.12

The definition of "rehabilitation plan" is not adequate because it should include the critical term "return to work" as part of its definition so as to set forth such a return as a goal, and allow the opportunity for vocational rehabilitation personnel to work with those who need rehabilitation.

3.13

The definition of "suitable gainful employment" is troublesome in its use of the term "future earning capacity," because this is a factor that cannot be projected. Furthermore, a return to "suitable gainful employment" should include a reference to whether a national labor market exists for such employment, as well as a state labor market.

§ 85-15-4 Priorities

4.1

The priorities utilized by qualified rehabilitation professionals are well stated and clearly set forth. However, the Association would suggest that the end of this provision contain a limitation that, under no circumstances, should a placement or retraining program be recommended unless a functional capacities evaluation is performed.

§ 85-15-5 Identification of Rehabilitation Candidates; The Rehabilitation Evaluation Process

5.1

The conditions under which the Commissioner may presume an injured worker does not need rehabilitation services should include where the claimant's permanent partial disability is a total of 15% or less.

5.2.2

The Association would merely recommend that a provision be placed in the Rule mandating that the Workers' Compensation Health Care Advisory Panel proceed as expeditiously as possible in developing guidelines for determining the type of injuries that usually and customarily lead to permanent disability.

5.3.1

The language contained in this provision seems to indicate that it is not consistent with the 1993 legislation, specifically with respect to the remand proceeding for a permanent total disability award. Under the new legislation, the remand proceeding has been eliminated and an attempt to obtain a permanent total disability award is a proceeding that must originate with the Commissioner. See W. Va. Code § 23-4-24 [1993].

5.4.1

The steps comprising the rehabilitation assessment process should include a reference to the seven-step order of priorities which are contained in § 4.1 of the Rule. With respect to the 15-day time periods for the issuance of a written opinion on whether an injured worker is able to quickly return to his pre-injury job, and the 15-day time limit for the Commissioner to enter a protestable order setting forth a decision based on the qualified rehabilitation professional's opinion, the Association believes that such time frames are not realistic because they clearly do not provide enough time for the events which are called for in this Rule to take place.

5.4.3

When a qualified rehabilitation professional conducts an in-depth evaluation to accurately assess an injured worker's status, this should include not only additional medical and/or vocational testing, as called for by the proposed Rule, but should also incorporate a functional capacities evaluation so as to provide a full assessment.

5.5

The Commissioner, in deciding whether an injured worker is likely to benefit from vocational rehabilitation services, again, must look to national and state labor markets to determine if

suitable employment exists. Obviously, if there is not a market for the employment at issue, then rehabilitation should not take place.

5.5.1

A statute of limitations setting five years, at most, should be imposed as a limitation for further evaluation of injured workers.

5.5.2

Fifteen days is clearly not enough time for an employer to file comments and request changes in writing with respect to a rehabilitation plan. This provision should also require the Division of Rehabilitation Services to maintain an accessible file with the rehabilitation plan. This would ensure efficiency for all parties involved.

5.5.4

This section provides that the Commissioner may reduce permanent partial disability benefits for claimants who decline to receive rehabilitation services or fail to participate and cooperate with the rehabilitation services in accordance with their plan. The Association believes that this provision fails to afford employers due process. Rather, under such circumstances, the claim should be closed on a temporary total disability basis.

§ 85-15-6 The Rehabilitation Plan

6.2

This provision demonstrates a priority in utilization of in-state physical and vocational rehabilitation services. The Association believes that this provision may be prohibitive, because employers that are located in multi-state regions may, on a regular basis, utilize providers who operate outside of West Virginia. The Association would merely point out that nothing in this provision should be construed to prejudice the rights of the parties so as to take away the ability of a claimant to get the best care, even if it is outside of West Virginia.

§ 85-13-7 Implementation of the Rehabilitation Plan

7.1

This provision permits implementation of a rehabilitation plan over the objection of an employer, merely allowing the employer's account to be adjusted if it mounts a successful challenge. Absent proper documentation of the Workers' Compensation Division, implementation of the rehabilitation plan should be stayed until a resolution is achieved. Evidentiary development on the employer's objection could be subject to a six-month time frame, after which a decision would be made, and implementation, if appropriate, could then take place.

7.2

The duration of any rehabilitation plan should not be permitted to last for 208 weeks, as this is entirely too long. Rather, 104 weeks is more appropriate, and more consistent with the authoritative statute, W. Va. Code § 23-4-9.

7.5

This provision clearly infringes upon federal law and represents a raw usurpation of legislative power by the Workers' Compensation Division in its promulgation of this Rule. By setting forth an event which would terminate an employment relationship, the Agency has, in effect, enacted its own version of legislation. Federal law is clear that employment rights are defined under ERISA. Furthermore, because it is likely that a rehabilitation program is not going to lead to the same job with the same employer, this provision would seem to be unnecessary.

§ 85-15-8 Modification of Work and Payment of Indemnity Benefits

8.1

This section, which permits an injured worker to return to work at a transitional or light-duty work assignment, should contain language that such a return should be part of an approved rehabilitation plan pursuant to utilization of the priorities set forth in § 4.1. As the Proposed Rule is written, this type of return is merely "as part of a rehabilitation plan." From a broader standpoint, this provision would appear to be unnecessary in light of W. Va. Code § 23-4-7b, which permits a trial return to work.

8.1.3

This provision permits an employee who has returned to work on a light-duty or transitional basis to determine whether he can or cannot perform the assigned job duties. This provision should be deleted from the Rule in its entirety because the Workers' Compensation Division does not have the staff, capability, nor the expertise to monitor this determination. At the very least, it should require that the employee undergo a functional capacities evaluation every 30 days.

8.6

This provision should follow the provisions of W. Va. Code § 23-4-9, which permit the payment temporary partial rehabilitation benefits only as part of a rehabilitation plan developed under this section.

8.9

This section represents another attempt by the Workers' Compensation Division to enact workers' compensation law. The Workers' Compensation Act is very clear that once maximum medical

improvement is attained, temporary total disability benefits cease. By providing that an injured worker who cannot return to his or her old job despite attaining maximum medical improvement is eligible to receive temporary total disability benefits, the Agency has created a rule which is clearly in violation of the Workers' Compensation Act.

§ 85-15-11 Reimbursement for Physical and Vocational Rehabilitation Services

11.2

As in other provisions, the Association believes that the provision setting forth the limitation on cost of a rehabilitation plan should apply to any approved rehabilitation plan pursuant to the order of priorities set forth in § 4.1.

11.2.1

This section, which permits an injured worker who previously was the beneficiary of a rehabilitation plan and who subsequently suffers a new injury to receive additional vocational rehabilitation services up to $10,000, clearly violates the Workers' Compensation Act. W. Va. Code § 23-4-9, in no uncertain terms, states that "such expenditure for vocational rehabilitation shall not exceed ten thousand dollars for any one injured employee[.]" (Emphasis added.) Had the Legislature intended to provide $10,000 for each injury, then the statute would have said so. The Association is confident that this provision, if subjected to judicial scrutiny, would fall.

11.2.2

This section, which excludes temporary total disability and temporary partial rehabilitation benefits from being considered as part of the $10,000 limit, seems to go beyond the legislative intent of W. Va. Code § 23-4-9. Because temporary total disability benefits are so fundamental to workers' compensation law, it is the belief of the Association that the Legislature would have included this exclusion in its enactment of that statute. Because it did not, then, once again, the Workers' Compensation Division appears to be inappropriately enacting legislation.

§ 85-15-13 Employer-Managed Physical and Vocational Rehabilitation Services

With respect to physical rehabilitation, the Association would merely note that it interprets this section as not affecting managed care services that are already provided by employers.

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October 1, 1993

340-1301
WRITER'S DIRECT DIAL NO.

HAND DELIVER

Honorable Andrew N. Richardson
Workers' Compensation Commissioner
Workers' Compensation Division
Executive Office
Post Office Box 3824
Charleston, West Virginia 25338

RE: Proposed Vocational And Physical Rehabilitation Rules

Dear Commissioner Richardson:

Please find enclosed herewith comments which have been prepared on behalf of Jackson & Kelly for review in relation to the above proposed rules.

Very truly yours,

TIMOTHY E. HUFFMAN

TEH:tsn

Enclosure

COMMENTS REGARDING COMMISSIONER'S

PROPOSED VOCATIONAL REHABILITATION RULES

GENERAL COMMENTS

As a preface to the following specific comments, it is submitted that the proposed rules, drafted by the Division of Workers' Compensation, an administrative agency, are unconstitutional and therefore, should not be implemented. As a general rule, an administrative agency cannot declare legislation which empowers it.

As the Commissioner is surely aware of the proposed national health care plan and its far reaching implications, it seems ill advised to go forward with the implementation of any new rules affecting health care until a determination regarding the federal plan is made.

COMMENTS ON INDIVIDUAL RULES

Rule 2.1.

This rule is simply a regurgitation of West Virginia Code §23-4-9(a), which sets forth the legislative findings that are the basis of West Virginia Code §23-4-9, et seq. As Rule 2.1 merely restates the purposes behind vocational rehabilitation as set forth by the statute, it is superfluous and should be deleted.

Rule 2.2.

This rule purports to set forth an employer's duties under the "Americans With Disabilities Act of 1990" Public Law 101-336, 104 Stat. 327, 42 USC 12101 et seq. West Virginia Code §23-4-9 as written is in actuality broader than the Americans with

Disabilities Act because it fails to accurately define the purposes of the federal statute. The federal act prohibits discrimination against those who have disabilities. The state rule misconstrues the term "disability" and equates it with an injury. The federal act does not place an injury or injuries on the same plane as a "disability"; thereby recognizing that one can have multiple injuries without any resulting disability.

Any and all language which misquotes or misstates the federal act should be stricken from the state rule. Rule 2.2 contains at least one misstatement of the federal act. Rule 2.2 states "The federal act prohibits discrimination in employment against injured workers by their employers and other employers, and by the Workers' Compensation Division in the administration of the Workers' Compensation act and rules." The federal act requires only that an employer make reasonable accommodations. The Fund apparently is moving to expand the state law by means of the Americans with Disabilities Act. Because the state rule misinterprets the federal law, the state rule should be entirely stricken.

Rule 2.3.1.

Under this rule, injured workers are required to cooperate with rehabilitation assessment process and fully participate in authorized rehabilitation plans to be entitled to receive benefits under West Virginia Code §23-4-9 and Rule 2.3.1. The difficulty in interpreting this rule lies in its vagueness. The degree of cooperation required on the part of the injured

worker is at no time set forth or defined. By the same token, "good cause", which must be shown whenever an injured worker fails to cooperate is vague and nowhere defined. The failure to set forth these terms clearly and concisely will lead to inconsistency in the implementation of this rule.

Additionally, Rule 2.3.1 assumes the ability of the commissioner to look at a worker's refusal to enter rehabilitation in setting the amount of any permanent partial disability award. The statute, however, does not elaborate on what the Commissioner must look at in determining the amount, if any, of permanent partial disability. Thus, Rule 2.3.1 is contrary to the definitions of permanent partial disability and permanent total disability which contemplate only the injury and its residual effects.

Rule 3.5.

Rule 3.5 states that an "injured worker's employer" means an employer charged pursuant to West virginia Code §23-4-1 for a work-related injury and any physical and/or vocational rehabilitation associated with the injury. This rule clearly fails to contemplate the situation where a claim has been allocated and therefore, more than one employer exists. The question arises, "Will vocational rehabilitation also be allocated?"

In allocated claims, the practical effect is that all costs are divided among the employers. Allocation of vocational rehabilitation costs would be nearly impossible. A greater problem develops if the allocated employers each propose and develop

separate and distinct vocational rehabilitation plans as allowed under proposed Rule 3.9. Because of the near impossibility of allocating vocational rehabilitation costs and the potential for more than one valid vocational rehabilitation plan, all claims with the potential for allocation should be exempt under these rules.

Rule 3.9.

The vague definitions contained in this rule once again make its effective implementation nearly impossible. This rule allows a "qualified rehabilitation professional" to make judgments and recommendations regarding the worker's ability to accept and perform "suitable gainful employment." This problem arises again under Rule 3.13 and 4.1.7.

Rule 3.13.

"Suitable gainful employment" is a nebulous term which purports to return the claimant as closely as possible to his pre-injury earnings, but may potentially require the employer to place the claimant in a rehabilitation program which will enhance the worker's status. A rule which implicitly requires an employer to pay for his worker's advance degree or training, is ripe for fraud. The employer should be required only to return the claimant as near as possible to his pre-injury status. To that end, the following language should be stricken from the proposed rule:

> Nothing in this definition prohibits providing an injured worker with vocational rehabilitation services which enable the injured worker to obtain a job with a higher economic status than he or she would have been able to attain without such vocational rehabilitation, provided the rehabilitation plan demonstrates that the injured worker is not able to return to his or her prior employment and such vocational rehabilitation services

are necessary to increase the likelihood of reemployment.

At the very least, the employer should be provided with the option, at its election, to provide training which would enable the injured worker to obtain a job with a higher economic status than he or she would have been able to attain without rehabilitation. To do otherwise, would require employers to subsidize their workers' education.

Rule 3.13 contains yet another vague term which should be defined; "labor market." No guideline has been provided to rehabilitation specialists. The rule should specify whether a national, state, or local "labor market" is to be utilized in determining the type of rehabilitation program best suits the worker's needs.

Rule 4.1.

Setting forth priorities to be used by qualified rehabilitation professionals in effecting a return to work by an injured employee is wise; however, in setting forth the priorities in Rule 4.1., the Commissioner has neglected an important and necessary step. The only way to objectively measure whether a worker is able to perform his usual and customary employment is by a Functional Capacity Evaluation. The claimant should be directed to undergo such an evaluation as the first step in the rehabilitation process. Qualified evaluators should be required to be familiar with the specific duties for the injured worker's employment. To ensure that he or she is familiar with these duties, the evaluator should be required to visit the worker's job

site and actually observe the day-to day activities required for the position.

Rule 5.1.

This rule allows the Commissioner to "presume an injured worker does not need rehabilitation services if the evidence of record establishes that the injured worker will receive less than 120 days of temporary total disability benefits." This does not appear to be a manageable standard. In the past, the Commissioner has not been required to contemplate rehabilitation services unless the claimant reached 15% permanent partial disability. This allows for a definite determination of when rehabilitation services may or may not be presumed necessary. An additional problem arises as no guidelines have been established which set forth who determines if an jured worker is likely to receive less than 120 days of temporary total disability and upon what information they must rely in making that determination.

Rule 5.2.a.

This rule requires the Commissioner to order a rehabilitation evaluation when an injured worker has sustained an injury which would likely result in temporary disability in excess of 120 days. The mere fact that a worker has remained temporarily and totally disabled for 120 days should not automatically entitle him or her to a rehabilitation evaluation. Some workers may need extra recovery time in order to return to their usual and customary employment. Requiring an evaluation of everyone who remains temporarily disabled for more than 120 days will be a costly

process which may be avoided simply by evaluating rehabilitation needs on a case by case basis.

Rule 5.2.d.

Under the provisions of Rule 5.2.d., the Commissioner is required to order a rehabilitation evaluation of an injured worker who has not been found to be a candidate for physical or vocational rehabilitation services, but was noted as "possibly needing the services in the future." As stated, this rule entitles every injured worker to rehabilitation services, regardless of their actual need. Again, this is likely to be cost prohibitive.

Rule 5.2.3.

Proposed Rule 5.2.3., exempts five percent permanent partial disability awards for occupational pneumoconiosis as an indication of permanent disability. It is respectfully submitted that occupational disease hearing loss claims should also be included under the umbrella of Rule 5.2.3. It is also submitted that the percentage of permanent partial disability awards which are not considered as indicative of permanent disability in occupational pneumoconiosis and occupational disease hearing loss claims should in fact be greater.

Rule 5.4.

Again, it is submitted that the Fund should require that an injured worker undergo a Functional Capacity Evaluation as a necessary step in the vocational rehabilitation process.

Rule 5.4.1.a.

This rule allows rehabilitation specialists only fifteen days

within which to prepare and serve upon the Commissioner and parties, a written opinion regarding the claimant's status. This time frame is unrealistic and will not work.

Rule 5.4.2

Again, this rule while ambitious, is not likely to be manageable. The proposed rule does not take into consideration cases in which the claimant is not ready for rehabilitation services within 45 days of the determination of eligibility. For example, a worker recovering from surgery may be unable to engage in activity such as a functional capacity evaluation or job retraining. Consideration should be given to a worker's physical capabilities, not merely the passage of time.

Rule 5.4.3.

Proposed Rule 5.4.3. sets forth the procedures to be followed by a rehabilitation professional in conducting an evaluation of an injured worker. Rule 5.4.3. does not contemplate the use of a Functional Capacity Evaluation. As the only means of objectively measuring the abilities of an injured worker, a Functional Capacity Evaluation is essential.

Rule 6.1.

Under the terms of this rule, a rehabilitation plan may include the services of a biomechanical engineer if, those services are agreed to by the employer. The rule should clearly state that the failure of the employer to agree to such services will not be construed as failure to cooperate in the rehabilitation of the worker. The Commissioner cannot give the employer the right to

decline the services of a biomechanical engineer and then penalize the employer for exercising that right.

Rule 7.2.

This rule expands temporary total disability from 104 weeks to 208 weeks. It is respectfully submitted that 208 weeks is entirely too long for anyone to remain on temporary total disability.

Rule 8.1.

Employers must be allowed to conduct business without interference from the State. For that reason, proposed Rule 8.1. should read, " As part of a rehabilitation plan, an injured worker may, at the discretion of the employer, return to work at a transitional, light duty, restructured, or modified work assignment, on either a temporary or trial basis." Employers must be allowed to conduct business and assess their needs and abilities pertaining to the workforce.

Rule 8.1.1.

It is submitted that the last sentence of Proposed Rule 8.1.1., should be entirely stricken. If a qualified physician determines that a worker is able to undertake a work assignment, the worker should be required to undertake the task.

Rule 8.1.2.

This rule should state with specificity that it lies within the employer's discretion to determine whether "work comes to an end."

Rule 8.1.3.

This rule should be amended to read, "once the injured worker

returns to work under the terms of this section 8.1, the employer may assign the worker only to the work that was described to the physician. To allow otherwise, would produce the ridiculous result of allowing a worker to supersede the judgment of a qualified physician.

Rule 8.3.

To the extent that the requirements set forth in Rule 8.3. are set forth in the workers' compensation statute, Rule 8.3. should be stricken as superfluous.

Rule 8.9.

Rule 8.9. states that an injured worker who has attained maximum medical improvement, but is unable to return to his or her old job and who is undergoing evaluation pursuant to section 5 of this rule is eligible to receive temporary total disability benefits pursuant to West Virginia Code, Section 23-4-9. It is respectfully submitted that this rule should contemplate the receipt of nonawarding partial (NAP) benefits and not temporary total disability benefits.

Rule 9.1.

This rule does nothing more than require a subsequent rehabilitation evaluation after the expiration or termination of a rehabilitation plan.

Rule 9.2.

Proposed Rule 9.2. does not contemplate that under these rules, the employer's responsibility to the worker ends upon the completion of the rehabilitation program.

Rule 11.2.1.

This rule should be eliminated as an employer is not obligated to expend more than $10,000.00 under any rehabilitation plan. To that end, a lifetime cap of $10,000.00 per worker for rehabilitation should be enacted. If the Rule is not deleted, it should be amended to read, " With the consent of the employer, an injured worker may receive additional rehabilitation services."

Rule 11.2.3

In instances where the employer withholds consent for excess funds for rehabilitation, this lack of consent should not be construed as a lack of cooperation by the employer.

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WRITER'S DIRECT DIAL NUMBER

347-1115

October 14, 1993

The Honorable Andrew N. Richardson
Workers' Compensation Fund
Post Office Box 3151
Charleston, West Virginia 25322

Re: Proposed Regulations for Vocational and Physical Rehabilitation

Dear Commissioner:

Thank you for this opportunity to offer comments on your proposed legislative rule which establishes the requirements and procedures to be followed in the delivery of physical or vocational rehabilitation to claimants pursuant to W. Va. Code §23-4-9.

The stated purpose of the rule, to return injured workers to the job market, is of critical importance in resolving the deficit in the Workers' Compensation Fund and in changing the philosophy of a system that seems to encourage potentially productive workers toward a life of public assistance rather than remunerative employment. Permitting employers to participate as a provider of rehabilitation programs, rather than only as a payor, is also a positive feature in the proposed rule, as employers may be best qualified to develop rehabilitation programs suited to the practical requirements of today's job market. Too often rehabilitation improves mental and physical education, but with no achievable employment goals.

In addition, however, we recommend that the rule be reviewed to address the following concerns:

1) The proposed draft appears to have been written prior to amendments to the Workers' Compensation Act effective April 8, 1993, which eliminated the remand procedure in potential permanent total disability claims and which established the Compensation Programs Performance Council. Given the business and labor representation on the Council, practical suggestions from this group on how to use rehabilitation in the workers' compensation system are critical prior to the adoption of any procedural or legislative rules. We recommend that the final draft of the rule be

deferred until the Council adopts vocational standards pursuant to W. Va. Code §23-4-6(n), as those standards should be integrated into the rule.

2) The proposed draft contains definitions and priorities, but no protocols for physical or vocational rehabilitation assessments and plans. No program of this magnitude should be implemented without protocols being established by the Health Care Advisory Panel. The panel would also be an appropriate body to review the definitions section of the rule to insure consistent and appropriate provider qualifications. Therefore, we recommend that the Panel gather input on issues related to the proposed draft, particularly the role of physical rehabilitation in the system, that the panel report those findings to the Council, and that protocols be drafted by the Panel to achieve the Council's objectives. The provisions of W. Va. Code §23-4-9 expire July 1, 1994, and work should begin now to develop the plan that will replace those provisions so that any necessary statutory language can be introduced in the 1994 legislative session.

3) The proposed draft, though obviously the product of considerable time and effort by members of your staff, seems to add a complicated new layer of bureaucracy that is doomed to failure because of overbreadth. The worker who suffers a 2% disability related to a mashed thumb will seldom benefit from a vocational evaluation. Yet the proposal may require that such an evaluation take place at the employer's expense. A better use of resources would be to presume that an employee with permanent disability of 15% or less is capable of returning to suitable employment without needing rehabilitation services. That presumption[1] would not preclude a petition for a rehabilitation assessment upon a showing in a particular case that the employee is, in fact, unable to return to his former job. However, narrowing the scope of rehabilitation assessments to those employees likely to benefit is a better use of your staff's and employers' resources, and enhances the potential for successful results.

4) The proposed draft suggests expanding the number of rehabilitation evaluators at the Workers' Compensation Fund. Before additional resources are spent, we recommend that the Council consider this issue in a broader context. Once the goals of rehabilitation are established through consensus reached by business and labor on the Council, the process should be viewed in light of the need for overall government efficiency. "One-stop shopping" concepts are being proposed by small business groups and by consultants for government reporting and assessment programs. With the recent

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[1]The statutory provisions of W. Va. Code §23-4-9 require that "the Commissioner shall at the earliest time determine whether the employee would be assisted in returning to remunerative employment with the provision of rehabilitation services." That determination need not require a rehabilitation evaluation in every claim, even prior to July 1, 1994, when the provisions of §23-4-9 are terminated.

combination of programs under your leadership as the Bureau of Employment Programs, should not current programs under the Job Training Partnership Act, the state's community college and vocational educational system, and certainly the assessment programs already in place in the Department of Employment Security be considered as a whole in achieving the mutual goal of assisting West Virginia's citizens to find and return to suitable employment? Input to the Council on programs already in place may eliminate the additional expense to employers of being required to fund programs that mirror or run parallel to existing state and federal programs.

5) As the Council reviews this issue and also vocational standards to be considered in making decisions on permanent total disability awards, an opportunity may arise to address one of the problems which directly affects the potential for success in any rehabilitation program: education. The high number of West Virginia employees who do not have a high school education, or its equivalent, severely hampers placement and retraining opportunities. Special incentives should be provided for employers who integrate GED or similar classes into their benefit packages or rehabilitation plans.

Additional comments related to the specific language of the proposed text are attached in a redlined copy of the version circulated for comment. Your efforts to achieve the goals of increased employment, while reducing permanent total disability awards in workers' compensation claims are appreciated, and our office will be happy to assist you in any manner you deem appropriate.

Very truly yours,

Sarah E. Smith

SES/cjw
Attachment

187772

COPY REDLINED BY BOWLES RICE McDAVID GRAFF & LOVE

SUMMARY OF PROPOSED LEGISLATIVE RULE VOCATIONAL AND PHYSICAL REHABILITATION

TITLE 85, SERIES 15

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

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

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

The rule permits employers to establish their own rehabilitation programs so long as they comply with the requirements of the division's program. Additional benefits may be provided beyond those offered by the division's program. The rule provides for termination of the employer's right to provide its own program.

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

Rule Title: Vocational and Physical Rehabilitation

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

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

Workers' Compensation is funded solely by special revenue. Hence there will be no iMpact on the general revenue of the State.

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

There is a cap of $10,000 per claimant for physical and vocational rehabilitation. Temporary total and temporary partial rehabilitation benefits are limited to 208 weeks each. There is no limit on medical expenses.

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

Each permanent total disability award can cost the system from $300,000 to over $500,000. Permanent partial disability adds to that expense. To the extent individual claimants can be returned to work, the number of permanent totals will decrease and the percentages awarded under permanent partial claims will decrease.

Date: August 3, 1993

Signature of Agency Head or Authorized Representative

Andrew N. Richardson

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

SERIES 15
VOCATIONAL AND PHYSICAL REHABILITATION

§85-15-1. General.

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

1.2. Authority. -- West Virginia Code, §§21A-3-7(b) & (c) and 23-4-9(e).

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 that 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 legislative rule.

§85-15-2. Purpose of rule; cooperation.

2.1. West Virginia Code, §23-4-9(a), sets forth the legislative findings that are the basis of West Virginia Code 23-4-9, et seq. "The Legislature hereby finds that it is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after an injury. In order to encourage workers to return to employment and to encourage and assist employers in providing suitable employment to injured employees, it shall be a priority of the commissioner to achieve early identification of individuals likely to need rehabilitation services and to assess the rehabilitation needs of these injured employees. It shall be the goal of rehabilitation to return injured workers to employment which shall be comparable in work and pay to that which the individual performed prior to the injury. If a return to comparable work is not possible, the goal of rehabilitation shall be to return the individual to alternative suitable employment, considering the individual's educational level and the current job market,

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

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

[COMMENT: This section may be appropriate to include in the Summary, as it states the purpose for the rule, but has no purpose as a part of the rule.]

2.32. Every injured worker and his or her employer are required pursuant to this rule to participate in rehabilitation evaluations, the development of rehabilitation plans and the implementation of rehabilitation programs. Additionally, the injured worker and his or her employer are required to share responsibility for the success of the individual injured worker's rehabilitation plan.

2.32.1. Injured workers who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans are entitled to receive the support benefits set forth under West Virginia Code §23-4-9 and this rule. Further, injured workers who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans benefit from the rehabilitation services by being returned to the workforce or being awarded appropriate disability benefits. An injured worker's refusal to cooperate with the rehabilitation assessment process or to participate in an authorized rehabilitation plan without a showing of good cause is a factor(s) for the commissioner to consider in determining the amount of any permanent partial disability or permanent total disability award to which the injured worker might otherwise be entitled, even if the injured worker is receiving disability benefits from any other state or federal program. If a rehabilitation plan is suspended or terminated as a result of an injured workers' failure to cooperate or fully participate in an authorized rehabilitation plan, pursuant to section 7.3 of this rule, including approved programs requiring exercise therapy, weight reduction therapy, smoking cessation therapy, or similar preventive treatment regimes, the commissioner must credit or refund to the employer, whichever is applicable, the amount of money expended in conjunction with the implementation of the rehabilitation plan. The amount of the credit or refund is an

overpayment that the commissioner may collect from the injured worker, as prescribed by law.

2.32.2. Employers who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans benefit from the rehabilitation process by minimizing the costs associated with work-related injuries. The commissioner must consider an employer's 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 the legislative rules on workers' compensation premium rates and self-insurance, 85 CSR 1 and 85 CSR 9, and the Workers' Compensation Act, Chapter 23 of the West Virginia Code. The commissioner may consider an employer's failure to cooperate with the development or implementation of a rehabilitation plan under this rule without a showing of good cause in determining the amount of any permanent partial disability or permanent total disability award.

2.32.3. Injured workers and employers may provide the division with an explanation of actions or inaction, and how that action or inaction affects the disability of the injured worker, which ~~should~~ shall be considered by the commissioner in making the aforesaid determinations under subsections 2.3.1 and 2.3.2.

2.32.4. Notwithstanding any other provision of this rule, section 2.3 of the rule does not prohibit an employer from assisting an employee in returning to suitable, gainful employment.

§85-15-3. Definitions.

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

3.1. "Commissioner" means the Commissioner of the Bureau of Employment Programs pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §23-1-1, and any deputies designated pursuant to West Virginia Code, §§21A-2-12 & -13. For the purposes of this rule the Executive Secretary, the Director of the Office of Medical Case Management, and the supervisor of the rehabilitation section or those positions' respective successors, are designated as deputies. Additional deputies may be designated, as deemed appropriate.

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

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

3.4. "Injured worker" means an employee entitled to workers' compensation benefits as the result of a work-related injury, as provided under West Virginia Code, §23-1-4.

3.5. "Injured worker's employer" means an employer charged pursuant to West Virginia Code, §23-4-1, for a work-related injury and any physical and/or vocational rehabilitation associated with the injury.

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

3.6.1. 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.

3.6.2. A distinct part rehabilitation unit in a duly licensed hospital which distinct part unit meets the requirements of section 2803.61 of the Medicare Provider Reimbursement Manual Part 1, as amended, or any successor provision, as published by the United States Health Care Financing Administration; or

3.6.3. A facility operated by the West Virginia Division of Rehabilitation Services.

3.7. "Physical rehabilitation services" means health care services and devices provided pursuant to protocols adopted by the Workers' Compensation Health Care Advisory Panel including but not limited to medical, surgical, dental, or hospital treatments or evaluations; medicines; and crutches, artificial limbs, or other approved mechanical appliances and devices.

3.8. "Physical rehabilitation services provider" means a provider of health care services, including but not limited to vocational rehabilitation services, provided that 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. "Qualified rehabilitation professional" means a person who has the education, experience and skills necessary to counsel, to make judgments, and to make recommendations concerning an injured worker's medical, physical, emotional, intellectual, or motivational ability to accept and perform suitable gainful employment and who has the skills necessary to design, implement and supervise programs to enhance an injured worker's capacity to accept and perform suitable gainful employment. The Workers' Compensation Health Care Advisory Panel will establish guidelines for defining the levels of education, experience and skill necessary for a person to qualify as a rehabilitation professional under this section. A qualified rehabilitation professional need not personally have the ability to administer and interpret all medical, psychological or vocational testing, but must be able to evaluate the test results provided by other professionals. Rehabilitation counselors employed by or under contract with the commissioner or employed by the West Virginia Division of Rehabilitation Services are presumed to be qualified rehabilitation professionals for the purposes of this definition.

Nothing in this subsection precludes an employer from developing a managed care program or a vocational rehabilitation program, defined by Section 13 of this rule, to promote the worker's return to productive employment.

3.10. "Vocational rehabilitation services" means professional services provided pursuant to protocols adopted by the West Virginia Health Care Advisory Panel reasonably necessary to enable an injured worker to return to suitable gainful employment as soon as practical. The rehabilitation services include but are not limited to the coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, vocational rehabilitation training, job development, job placement, and job modifications.

3.11. "Vocational rehabilitation services providers" means licensed registered nurses, vocational rehabilitation counselors and public and private agencies, companies, and corporations which provide to injured workers vocational rehabilitation services including but not limited to vocational retraining, testing, counseling, evaluation and job placement services. To qualify as a vocational rehabilitation service provider under this rule, a person must demonstrate that he or she has adequate education, training and experience in the rehabilitation field and must have access to the necessary space and equipment needed to provide the service offered, or the entity must demonstrate that it employs workers who have adequate education, training and experience in the rehabilitation field and that it has access to the necessary space and equipment needed to provide the service offered. The Workers' Compensation Health Care Advisory Panel will establish guidelines on the education, training and experience necessary to qualify as a vocational rehabilitation service provider under this rule. The division must decide on a case-by-case basis whether an individual has the education, training, and access or an entity employs individuals who have the education, training and access necessary to qualify as a vocational rehabilitation service provider under this rule. The term does not include licensed physicians, licensed psychologists or hospitals where the services being provided to an injured employee fall under the provisions of West Virginia Code, §23-4-3, and are outside the scope of the pertinent rehabilitation plan.

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

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, education, interests, ~~motivation level,~~ preinjury earnings, and future earning capacity; and the current and future condition of the labor market. Suitable gainful employment shall include employment for which the injured worker is otherwise qualified, but for his or her advanced age or motivational level. The assessment process shall give appropriate weight to objective, rather than subjective, testing procedures wherever possible. Nothing in this definition prohibits providing an injured worker with vocational rehabilitation services which enable the injured worker to obtain a job with a higher economic status than he or she would have been able to attain without such vocational rehabilitation, provided the rehabilitation plan demonstrates that the injured worker is not able to return to his or her prior employment and such vocational rehabilitation services are necessary to increase the likelihood of reemployment.

3.14. "Served upon the parties" means depositing the document to be served in the regular United States Mail, properly addressed and postage paid.

§85-15-4. Priorities.

4.1. Qualified rehabilitation professionals must utilize the following priorities. No higher numbered priority may be utilized unless the commissioner has determined that all lower numbered priorities are unlikely to result in the 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 utilized. 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 of the injured worker to the preinjury job with the same employer;

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

4.1.3. Return of the injured worker to employment with the same employer in a different position;

4.1.4. Return of the injured worker to employment in a different position with the same employer and with on-the-job training;

4.1.5. Employment of the injured worker by a new employer and without training;

4.1.6. On-the-job training of the injured worker for employment with a new employer; or

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.

~~4.1.8. Relocation of the injured worker to achieve 4.1.5., 4.1.6., or 4.1.7.~~

[COMMENT: A worker who loses his job pursuant to a reduction in work force may be required to travel or relocate to seek new employment. A worker who claims an injury the week before the lay-off and then fully recovers thereafter, may be entitled to benefits to assist with job location and re-training, but he is not entitled to have the need for him to travel or relocate completely eliminated.]

§85-15-5. Identification of rehabilitation candidates; the rehabilitation evaluation process.

5.1. The commissioner may presume an injured worker does not need rehabilitation services if the evidence of record establishes that the injured worker will receive less than 120 days of temporary total disability benefits, that the injured worker ~~will~~ is likely to be able to return to his or her former job after reaching maximum medical improvement or has returned to work, that the injured worker has ~~no~~ less than a fifteen percent (15%) combined permanent disability from work-related injuries, or that the injured worker is receiving retirement benefits. The commissioner must issue a notice to the parties informing them of the finding that rehabilitation services are not needed. Within thirty (30) days after receipt of the notice, the injured worker and/or the injured worker's employer may submit evidence to the commissioner to rebut the finding. Within sixty (60) days after the date of the notice, the commissioner must affirm or reverse his or her initial finding based upon the existing record, including any rebuttal evidence. If the initial finding is affirmed, the commissioner must issue the decision in a protestable order, pursuant to West Virginia Code, §§ 23-5-1 and 1h. If the initial finding is reversed, the commissioner must order a rehabilitation evaluation of the injured worker to determine whether physical and/or vocational rehabilitation services and development of a rehabilitation plan are appropriate for the worker, as set forth in section 5.~~2~~3 of this rule.

~~5.2. The commissioner must order a rehabilitation evaluation of the injured worker by a qualified rehabilitation professional, as defined by this rule, to determine whether physical and/or vocational rehabilitation services and development of a rehabilitation plan are appropriate for the worker in each of the following cases:~~

~~a. A worker has sustained an injury likely to result in temporary disability in excess of one hundred and twenty (120) days;~~

~~b. A worker has not returned to work after incurring an injury reasonably suspected to result in a permanent disability;~~

c. A worker has not returned to work and has been found to have sustained a permanent disability; or

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

[COMMENT: This section is redundant or inconsistent with §85-15-5.1.]

5.2.2. An injured worker is reasonably suspected to have sustained a permanent disability if his or her treating physician indicates to the commissioner that the injury resulted in permanent impairment, if the body part injured is important to the performance of the injured worker's job, if the injury suffered is the type of injury that usually and customarily requires frequent medical attention, if the injury suffered is the type of injury that usually and customarily leads to a permanent disability, or if other facts associated with the individual injured worker and the injury he or she has suffered reasonably lead to the conclusion that the worker has sustained a permanent disability. The Workers' Compensation Health Care Advisory Panel will develop guidelines for determining the type of injuries that usually and customarily lead to permanent disability.

[COMMENT: A more appropriate assessment is possible under §85-15-5.1.]

5.32. For the purposes of this rule, a five percent (5%) permanent partial disability award for occupational pneumoconiosis is not considered an indication of a permanent disability.

5.3. The commissioner must direct that an injured worker be evaluated for the delivery of physical and/or vocational rehabilitation services and the possible development of a rehabilitation plan in any workers' compensation claim pending before the commissioner for a permanent total disability evaluation if a medical or vocational report indicates that the injured worker possibly can benefit from rehabilitation services. The permanent total disability proceeding is stayed pending the outcome of the vocational evaluation performed pursuant to section 5.4 of this rule.

5.3.1. If the commissioner determines pursuant to section 5.5 of this rule that physical and/or vocational rehabilitation services cannot assist the injured worker in returning to suitable, gainful employment, as defined by section 3.13 of this rule, then he or she will lift the stay and enter an order on the permanent total disability request. In rendering a decision on such an injured worker's entitlement to a permanent total disability award, the commissioner must presume that any medical or vocational expert's recommendation for physical and/or vocational rehabilitation, set forth in a report submitted in conjunction with the remand proceeding, is not reliable.

5.3.2. If the commissioner determines pursuant to section 5.5 of this rule that physical and/or vocational rehabilitation services can assist an injured worker in returning to suitable, gainful employment, as defined by section 3.13 of this rule, then he or she will lift the stay and enter an order on the permanent total disability request.

~~In his or her decision, the commissioner must deny a permanent total disability award and refer the injured worker to physical and/or vocational rehabilitation, as recommended by the qualified rehabilitation professional under the authorized rehabilitation plan; Provided that, the decision shall direct that, if the rehabilitation effort fails, then the permanent total disability request shall be reinstated and acted upon. Such a reinstated request will be found to be timely filed if it was timely when first filed.~~

[COMMENT: This section is inconsistent with W. Va. Code §23-4-24, and the repeal of §23-5-1j pursuant to 1993 amendments to the Workers' Compensation Act.]

5.~~4~~3. The rehabilitation assessment process is comprised of a series of steps, as set forth in the following subsections.

5.~~4~~3.1. Upon determining that the injured worker may be eligible for physical and/or vocational rehabilitation services, the commissioner must refer the injured worker to a qualified rehabilitation professional for a rehabilitation assessment. The qualified rehabilitation professional must review the injured workers' file and may gather additional information, as necessary to assess the injured worker's potential for returning to the workforce, using the priorities set forth in §85-15-4.1. as guidelines. ~~The qualified rehabilitation professional must decide whether the injured worker is able to quickly return to his or her preinjury job with the same employer without modification of task, work structure, or work hours or whether the injured worker is not able to return to any remunerative work under any circumstances.~~

5.3.2. If ~~the decision is in the affirmative on either of the above issues, then~~ the qualified rehabilitation professional finds that a decision can be reached without a comprehensive evaluation of the injured worker, then he or she must issue a written opinion to that effect within ~~fifteen (15)~~ thirty (30) days after the date of receipt of the referral and cause copies to be served upon the commissioner and the parties. The commissioner must enter a protestable order ~~setting forth as a decision the qualified rehabilitation professional's opinion~~ within ~~fifteen (15)~~ thirty (30) days after receipt of the opinion. The order must inform the parties of their ~~appellate~~ rights to review, defined by W.V. Code, §§23-5-1 and 1h. If the order finds that the injured worker would not benefit from rehabilitation services, ~~T~~the order terminates the injured worker's rehabilitation evaluation. The purpose of this paragraph is to quickly and inexpensively identify those injured workers who will not benefit from further rehabilitation efforts.

[COMMENT: Though the order of the Commissioner will likely mirror the opinion of his evaluator, it is the responsibility of the Commissioner to render a decision based upon a review of all of the evidence. That responsibility cannot be delegated entirely to any expert consultant and the Commissioner should not be required to enter an order that sets forth the findings of any one expert as his opinion.]

~~b. If an affirmative decision on either issue cannot be made, then the qualified rehabilitation professional must proceed with a rehabilitation evaluation in accordance with subsection 5.4.2 of this rule, which action is interlocutory in nature and not subject to objection.~~

5.~~43~~.23. If ~~T~~the qualified rehabilitation professional ~~must comply with this subsection whenever an in-depth evaluation~~ finds that a decision cannot be immediately reached and that a comprehensive evaluation is necessary to accurately assess an injured worker's status:. ~~T~~the evaluation must be scheduled within forty-five (45) days ~~after the commissioner receives evidence that an injured worker has sustained an injury likely to result in temporary disability in excess of one hundred and twenty (120) days, or within forty-five (45) days after the commissioner receives evidence that an injured worker is reasonably suspected to have sustained a permanent disability and has not returned to work, or within forty-five (45) days after the commissioner finds that in fact the injured worker has sustained a permanent disability and has not returned to work. An evaluation that is required because the injured worker was previously evaluated one hundred (100) days earlier and was noted as possibly needing physical and/or vocational rehabilitation services in the future must be scheduled within fifteen (15) days after the elapse of the one-hundredth day following the last evaluation. The follow-up evaluation must be conducted within thirty (30) days after it is scheduled~~ after receipt of the referral.

~~5.4.3.~~ In conducting a ~~subsection 5.4.2~~ comprehensive evaluation, a qualified rehabilitation professional must collect and analyze information about the injured worker's medical, educational, vocational, social, legal, and economic circumstances, including his or her present physical and mental ability to participate in vocational rehabilitation services. The evaluation may also include additional medical and/or vocational testing if the qualified rehabilitation professional opines that the testing is warranted in order to provide a full assessment and if the additional testing is ~~preauthorized by the commissioner~~ in accordance with the protocols established by the Workers' Compensation Health Care Advisory Panel. The injured worker's employer and treating physician must provide reasonable information on forms prescribed by the commissioner to assist the qualified rehabilitation professional in the rehabilitation assessment process. The qualified rehabilitation professional must decide whether the injured worker is likely to benefit from vocational rehabilitation services based upon the evaluation, and shall issue a written report within fifteen (15) days after completing the evaluation.

~~a.~~ If the qualified rehabilitation professional determines ~~from performing the subsection 5.4.2 evaluation~~ that the medical, physical or emotional status of the injured worker precludes a full assessment, then the qualified rehabilitation professional must prepare a preliminary report setting forth the facts and reasons that an assessment cannot be performed. The qualified rehabilitation professional must state in his or her report whether the injured worker's employer or the injured worker failed to cooperate in the assessment process and must state the facts that form the basis of the conclusion.

~~b. If the qualified rehabilitation professional determines that the injured worker cannot benefit from rehabilitation services, he or she must issue a written opinion to that effect explaining the basis for the opinion to the commissioner within fifteen (15) days after completing the evaluation.~~

~~c. If the qualified rehabilitation professional determines that the injured worker can benefit from rehabilitation services, he or she must issue a written~~

~~opinion to that effect to the commissioner within fifteen (15) days after completing the evaluation.~~

5.~~5~~4. The commissioner must decide whether the injured worker is likely to benefit from vocational rehabilitation services based upon a consideration of all relevant information, including the qualified rehabilitation professional's report, ~~including but not limited to~~ information about the nature and degree of the injured worker's physical disability and the injured worker's employment history, existing skills, work life expectancy, interests, aptitude, education, and likelihood of reemployment in the labor market.

5.~~5~~4.1. If the commissioner concludes that rehabilitation services are not warranted either because the injured worker has returned to work or because he or she can return quickly to his or her preinjury job with the same employer without modification of task, work structure, or work hours or because he or she cannot return quickly to work with the assistance of physical and/or rehabilitation services, then the commissioner will state this finding in a protestable order, entered pursuant to section ~~5.6~~ 5.5 of this rule, and a rehabilitation plan will not be developed for the injured worker; however, the commissioner may direct at some future time that the injured worker be further evaluated if, in the opinion of the commissioner, it later appears pursuant to a proper motion for reconsideration pursuant to W. Va. Code §23-5-1a that the injured worker may be in need of either physical and/or vocational rehabilitation services.

[COMMENT: Unless reference is made to W. Va. Code §23-5-1a, no statute of limitations applies.]

5.~~5~~4.2. If the commissioner concludes that a rehabilitation plan is appropriate, then the Commissioner shall enter an interlocutory order directing that the qualified rehabilitation professional who performed the ~~subsection 5.4.2~~ comprehensive evaluation must prepare a written report containing a rehabilitation plan and serve it upon the commissioner and the parties within ~~forty-five (45)~~ sixty (60) days after the date ~~on which the injured worker's evaluation is completed~~ of the order granting the rehabilitation plan; Provided, however, that the employer may request the opportunity to develop its own rehabilitation plan if a request is made within thirty (30) days after receipt of the order and served not only upon the parties but also upon the Commissioner's qualified rehabilitation professional notifying him or her that a plan need not be developed. ~~The written report must contain the rehabilitation plan.~~ In every case in which the evaluation is performed and/or the plan is developed by a qualified rehabilitation professional who is not employed by the commissioner, the evaluation and/or plan must be reviewed and, if appropriate, revised by a qualified rehabilitation professional who is employed by the commissioner. Copies of any revised plans must be served upon the parties. The injured worker and/or the injured worker's employer may file comments and request changes to the rehabilitation plan by filing the comments and requested changes in writing with the division within fifteen (15) days after receipt of the rehabilitation plan. The comments must be served upon the other party. Thereafter, the commissioner must make any appropriate modifications to the rehabilitation plan within fifteen (15) days after his or her receipt of the comments and suggested changes and

issue the final rehabilitation plan in a protestable order, entered pursuant to section 5.6 of this rule.

[COMMENT: Amendments suggested permit employers to establish their own rehabilitation programs, as stated in the Summary to this rule.]

5.54.3. The injured worker must notify the commissioner regarding his or her willingness to receive rehabilitation services in accordance with the rehabilitation plan within fifteen (15) days after receiving notice of the final rehabilitation plan in the protestable order issued pursuant to subsection 5.54.2. The injured worker must provide the employer with a copy of this notification. If the injured worker does desire to receive the physical and/or vocational rehabilitation services, the commissioner must forthwith expend, after due notice to the employer, or must forthwith order the self-insured employer to expend the amounts as may be necessary for physical and/or vocational rehabilitation purposes.

5.54.4. In the event that the injured worker declines to receive rehabilitation services or fails to participate and cooperate with the rehabilitation services in accordance with the plan or if the injured worker's employer fails to participate and cooperate in accordance with the plan, the commissioner will invoke the provisions of section ~~2.3~~ 2.2 of this rule.

5.65. The commissioner must issue any protestable decision rendered pursuant to ~~sections 5.5 of~~ this rule in writing and must serve the decision upon the parties, with notice of the ~~appellate~~ rights of review defined by West Virginia Code, §23-5-1 and -1h. If the commissioner decides that the development of a rehabilitation plan is appropriate, then development of the plan will go forward despite the filing of an objection. ~~In lieu of filing an objection, either the injured worker or the injured worker's employer may file with the division a request for reconsideration of the decision. The request must set forth in detail the basis for a reconsideration. The request must be served upon the other party. Once filed, the request terminates the need to file an objection to the initial decision. However, once the commissioner rules upon the request, the parties have the right to file an objection to both the initial decision and the ruling on the request for reconsideration.~~

§85-15-6. The Rehabilitation Plan

6.1. A rehabilitation plan may include, but need not be limited to, any of the following: counseling; prosthetic or adaptive devices that enables an injured worker to work at the same or similar occupation as at the time of injury; work site, work duties or work hours modification to make it possible for the injured worker to resume suitable gainful employment, including, when agreed to by the employer, assistance from individuals with expertise in biomechanical engineering to assess any necessary job modifications; vocational training or on-the-job training to assist the injured worker to pursue a similar or new occupation; job placement assistance; payment of benefits under the provisions of section 8.2 of this rule; and such other programs or services which comply with the provisions of section 11 of this rule governing maximum disbursement

for vocational rehabilitation services and which increase the likelihood of reemployment of the injured worker in suitable gainful employment when the plan is completed.

6.2. A rehabilitation plan must require that all physical and/or vocational rehabilitation services be provided by providers registered under the provisions of section 10 of this rule. Except with the prior consent of the commissioner, no other providers may deliver physical and/or vocational rehabilitation services to an injured worker under an approved rehabilitation plan. The commissioner'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. Providers who are located in the injured worker's geographic area and within the state of West Virginia must be utilized, if possible. In state providers and out of state providers are both compensated pursuant to section 11 of this rule.

6.3. A rehabilitation plan that provides for vocational retraining must give preference to the utilization of schools and training facilities located in the injured worker's geographic area and within the state of West Virginia, thereby ~~eliminating~~ reducing the need for the injured worker to travel extensively or to relocate. The plan must also give preference to the utilization of public schools and training facilities over private institutions.

6.4. 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 thereunder, 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.

§85-13-7. Implementation of the rehabilitation plan.

7.1. The commissioner must implement a rehabilitation plan after the injured worker's acceptance notice is received pursuant to subsection 5.5.3 of this rule. While an employer or the injured worker is permitted to object to the plan pursuant to section 5.6 of this rule, the implementation of the plan will proceed notwithstanding the objection. In the event that the employer or the injured worker is successful in challenging the plan, the employer's account will be adjusted to reflect the appropriate charge for costs associated with the rehabilitation plan. In the event that 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.

7.2. The duration of any rehabilitation plan developed, modified, or amended hereunder may not exceed two hundred and eight (208) weeks, unless the commissioner agrees to an extension pursuant to the provisions of section 7.3 of this rule.

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

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

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

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

7.3.4. A finding that the rehabilitation plan is no longer necessary for the injured worker's reemployment;

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

7.3.6. A joint petition submitted by the employer and the injured worker seeking modification or termination of the plan. Any joint petition may include a request to modify the provisions of a rehabilitation plan, including an extension beyond the maximum duration as set out in section 7.2 of this rule or a request to extend benefits beyond the maximum amount otherwise stated in section 11 of this rule. Supporting reports must be filed with the petition. In ruling upon any petition to extend the rehabilitation plan beyond the maximum period set out in section 7.2 of this rule or to exceed the maximum cost stated in section 11 of this rule, the commissioner must consider whether an extension of the rehabilitation plan is more likely than a denial of the petition to result in less overall cost to the division or a self-insured employer.

7.4. All physical and/or vocational rehabilitation services must be delivered in accordance with the rehabilitation plan developed under section 5 of this rule. The commissioner must assign a qualified rehabilitation professional employed by or under contract with the commissioner or employed by the West Virginia Division of Rehabilitation Services to monitor compliance with and progress under the rehabilitation plan. The assigned qualified rehabilitation professional must contact the injured worker, the employer, the injured worker's treating physician, and the injured worker's rehabilitation services providers on a regular basis to monitor compliance with and progress under the plan. In no event are the contacts to be less than at thirty day intervals with each of the foregoing individuals or parties. In the event that the rehabilitation services provided to the injured worker or the injured worker's employment do not comply with the rehabilitation plan, the assigned rehabilitation professional must notify the commissioner and the plan must be modified as is just and necessary under the circumstances.

7.5. The employment relationship between the injured worker and the injured worker's employer terminates after the employer is charged for the costs associated with a rehabilitation plan implemented pursuant to this rule, if the plan does not provide that the injured worker will return to employment with that preinjury employer or if the injured worker in fact does not return to employment with that preinjury employer. However, the injured worker's employer continues to bear the responsibility for the injured worker's disability and medical benefits related to compensable injuries with that

employer, other than permanent total disability benefits or benefits charged to the employer's account with the Second Injury Reserve Fund, as provided under the Workers' Compensation Act, Chapter 23 of the West Virginia Code of 1931, as amended.

[COMMENT: Successful completion of a rehabilitation plan paid by the former employer should eliminate the potential for a subsequent claim of permanent total disability. Otherwise, the incentive to provide adequate rehabilitation is reduced.]

§85-15-8. Modification of work and payment of indemnity benefits.

8.1. As part of a rehabilitation plan, an injured worker may return to work at a transitional, light duty, restructured or modified work assignment, on either a temporary or trial basis. The length of time of the temporary or trial return to work must be determined on a case-by-case basis and must be specified in the rehabilitation plan. The work assignment may include modifications of the duties, hours, or any other modification which may assist the injured worker in attaining the goals of the rehabilitation program and the rehabilitation plan.

8.1.1. Whenever the injured worker is asked to return to work under this section, the prospective employer, whether the original employer or a new employer, must furnish to the injured worker's treating physician and the assigned qualified rehabilitation professional a statement describing the available work in terms that will enable the physician to relate the physical activities of the job to the injured worker's impairment. A copy of this statement must be filed with the commissioner and sent to the injured worker. The physician must then advise the assigned qualified rehabilitation professional as to whether the injured worker is physically capable of performing the work described. The injured worker may consent to undertake the work assignment without the approval of his or her treating physician if a physician selected by the commissioner determines that the injured worker is physically capable of performing the work described.

8.1.2. Upon undertaking a section 8.1 job, the injured worker's temporary total disability benefits, if any, are terminated and he or she becomes eligible for the receipt of temporary partial rehabilitation benefits, if applicable under section 8.3 of this rule. If the work impedes the injured worker's recovery to the extent that he or she cannot continue to work, the injured worker's temporary total disability payments, if applicable, may be resumed when he or she stops working, as provided in section 8.2 of this rule. If the work comes to an end before the injured worker's recovery is sufficient in the judgment of the commissioner to permit a return to his or her usual job or to other available work, the injured worker's temporary total disability benefits, if applicable, may be resumed but only for the period allowed by the rehabilitation plan or the period provided for in West Virginia Code, §23-4-1c, whichever is longer.

8.1.3. Once the injured worker returns to work under the terms of this section 8.1, the employer may assign the worker only to the work that was described to the physician, unless the injured worker gives his or her written consent, or his or her physician conducts a prior review and gives approval.

8.2. In every case in which the commissioner orders physical and/or vocational rehabilitation pursuant to a rehabilitation plan, the injured worker may be compensated on a temporary total disability basis for any period in which the rehabilitation services render him or her totally disabled, pursuant to West Virginia Code, §23-4-1c.

8.3. If the injured worker, pursuant to a rehabilitation plan, returns to employment with the same employer or a new employer on either a temporary, trial or permanent basis, in either a full time or part time capacity, and to either gainful employment or a transitional, light duty, restructured or modified work assignment, pursuant to section 8.1 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 for the purposes of section 8.4 will be the worker's actual earnings. A full-time or part-time educational program undertaken pursuant to a rehabilitation plan is considered a modified work assignment for the purposes of this rule and participating in the program entitles the injured worker to temporary partial rehabilitation benefits if the injured worker is not otherwise employed or receiving state or federal assistance to pursue the program through the Job Training Partnership Act or similar program. ~~The injured worker's average weekly wage earnings is zero for the purpose of calculating temporary partial rehabilitation benefits.~~ Temporary partial rehabilitation benefits must be paid on the same schedule as are temporary total disability benefits, and the injured worker's average weekly wage earnings is zero for the purpose of calculating temporary partial rehabilitation benefits; Provided, however, that other state or federal assistance paid to an injured worker pursuant to a full-time or part-time educational or vocational rehabilitation program shall be considered wages for purposes of calculating temporary partial rehabilitation benefits.

8.4. Temporary partial rehabilitation benefits are calculated, as follows:

8.4.1. 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 West Virginia Code, §523-4-6, -6d and -14, for calculating temporary total disability benefits;

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

8.4.3. The temporary partial rehabilitation benefits cannot exceed the temporary total disability benefits to which the injured worker would be entitled pursuant to West Virginia Code, §§23-4-6, -6d, and -14, during any period of temporary total disability resulting from the injury in the claim.

8.5. The amount of temporary partial rehabilitation benefits payable under this section must be reviewed at least every ninety (90) days to determine whether the injured

worker's average weekly wage in the new employment has changed and, if such change has occurred, the amount of benefits payable hereunder must be adjusted prospectively.

8.6. Temporary partial rehabilitation benefits are only payable during the implementation of a rehabilitation plan. Upon termination of the plan, as under section 7.3 of this rule or upon expiration of the plan, payment of all temporary partial rehabilitation benefits must be stopped irregardless of the injured worker's then level of wages.

8.7. Payments of temporary partial rehabilitation benefits below the sum of five ($5.00) dollars will not be made because the benefit gives no economic incentive to the injured worker and would be administratively too costly.

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

~~8.9. An injured worker who has attained maximum medical improvement but cannot return to his or her old job and who is undergoing evaluation pursuant to section 5 of this rule is eligible to receive temporary total disability benefits pursuant to West Virginia Code, §23-4-9.~~

[COMMENT: This section is contrary to the provisions of W. Va. Code §23-4-7a(e)(1), and discourages cooperation with prompt rehabilitation assessments. Benefits would be available under §23-4-7a(e)(3) as non-awarded permanent benefits, if appropriate.]

§85-15-9. Final report on rehabilitation plan.

The qualified rehabilitation professional assigned to monitor an individual injured worker's rehabilitation plan pursuant to section 7.5 of this rule must file a final report with the commissioner within 60 days after the rehabilitation plan is terminated or expires. The report must include a description of the plan's outcome, including but not limited to the following information:

9.1. Whether the injured worker successfully completed the plan;

9.2. Whether the injured worker has been placed in suitable gainful employment as defined by section 3.13 of this rule; and

9.3. Whether the injured worker continues to search for suitable, gainful employment and the nature of that job search; ~~and~~

~~9.4. Whether the injured worker is not likely to return to suitable, gainful employment.~~

The final report must be served on the parties of record. The parties may file comments on the report within fifteen (15) days after receipt of the report.

§85-15-10. Registration of providers.

On or before the first day of January 1994, and yearly thereafter, physical and vocational rehabilitation services providers must register with the commissioner using forms prescribed by the commissioner. New providers who enter the field during the year may register at the time their service is first offered. Any provider who does not meet the requirements set forth in section 3 of this rule cannot be accepted for registration. The commissioner must compile a list of rehabilitation services providers and their qualifications and areas of expertise and specialization. The commissioner must use the list of rehabilitation service providers in making rehabilitation referrals. Rehabilitation services may also be provided by employees of the West Virginia Division of Rehabilitation Services or employees of the commissioner. All rehabilitation services must be provided in accordance with rehabilitation plans implemented pursuant to this rule and must be monitored by qualified rehabilitation professional employed by or under contract with the commissioner or employed by the West Virginia Division of Rehabilitation Services. The commissioner must remove or suspend from the list of vendors any provider of rehabilitation services who knowingly fails to comply with the provisions of this rule or a rehabilitation plan, or engages in other practices in violation of West Virginia Code, 523-4-3c.

§85-15-11. Reimbursement for physical and vocational rehabilitation services.

11.1. The commissioner must reimburse physical rehabilitation providers for physical rehabilitation services in accordance with the fee schedule in effect at the time the service is rendered, adopted by the commissioner pursuant to West Virginia Code, §23-4-3. Only those physical rehabilitation services that are medically necessary and within the scope of the applicable rehabilitation plan can be reimbursed pursuant to this rule. The costs of physical rehabilitation services are not included in the ten thousand dollar ($10,000.00) limit on the cost of vocational rehabilitation, set forth under West Virginia Code, §23-4-9 and section 11.2 of this rule. However, the division cannot reimburse providers for physical rehabilitation services which require prior authorization under the provisions of West Virginia Code, §23-4-3, or any rule adopted thereunder, unless:

11.1.1. The physical rehabilitation services provider obtains prior authorization;

11.1.2. The physical rehabilitation services provider requested prior authorization but did not receive the approval of the commissioner prior to the rendering of the service, provided that the commissioner later determines the service should have been authorized as being medically necessary and related to a compensable injury; or

11.1.3. The physical rehabilitation service provider did not request prior authorization, but later filed a reasonable explanation for the failure to request authorization prior to the delivery of the service, and the commissioner determines that the request would have been authorized if it had been submitted.

11.2. The commissioner reimburses vocational rehabilitation providers for vocational rehabilitation services in accordance with the fee schedule in effect at the time the service is rendered and as adopted by the commissioner pursuant to West Virginia Code, §23-4-3, or in accordance with an agreement entered into between the provider and the commissioner. No payment may be made for vocational rehabilitation services unless the service is preauthorized by the commissioner. Additionally, no injured worker may receive vocational rehabilitation services which cost in excess of ten thousand ($10,000.00) under any rehabilitation plan, with the following exceptions:

11.2.1. Any injured worker who previously was the beneficiary of a rehabilitation plan and who subsequently suffers a new compensable injury is entitled to receive additional vocational rehabilitation services reimbursable up to an additional ten thousand ($10,000.00) dollars, if the commissioner determines that a new rehabilitation plan is appropriate;

11.2.2. The costs of evaluations, reevaluations, preparation or modification of a rehabilitation plan or plans, temporary total disability benefits, and temporary partial rehabilitation benefits are not considered a part of the reimbursements which may not exceed the sum of ten thousand ($10,000.00) dollars under this section; or

11.2.3. With the consent of the employer and the commissioner and upon a showing of good cause, the total reimbursement for an individual injured worker's rehabilitation plan may exceed ten thousand ($10,000.00) dollars pursuant to section 7.3 of this rule. The excess amount must be agreed upon by the employer and the commissioner.

11.3. 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 commissioner. The forms must be filed with the commissioner within two (2) years 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 commissioner or any other party including, among others, the injured worker, the applicable employer, or any of their third party health care insurers.

11.4. No physical or vocational rehabilitation service provider is entitled to receive reimbursement from any source other than the commissioner or a self insured employer for any service, including the costs of medicines, mechanical appliances or devices, deemed to be medically or vocationally necessary as part of the rehabilitation plan or as a result of the compensable injury. Further, 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 from agreeing to reimburse a service provider for services rendered.

11.5. 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 service

provider 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 11.4, 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 this rule prevents the provider from receiving reimbursement under the terms of the insurance policy.

§85-15-12. Cooperative efforts.

The division engages, where feasible and cost-effective, in cooperative programs with the West Virginia Division of Rehabilitation Services to provide vocational rehabilitation services to injured workers and with the other divisions of the Bureau of Employment Programs to provide job placement services for injured employees. The division develops and cultivates other cooperative programs with other human service agencies and organizations, both public and private, to maximize the availability of physical and vocational rehabilitation services to the industrially injured.

§85-15-13. Employer-managed physical and vocational rehabilitation services.

13.1. Except with regard to section 12 of this rule, an employer may provide its own vocational and physical rehabilitation services to its injured workers.

13.2. In order to avail itself of the provisions of section 13.1, the employer must petition the commissioner for authorization to provide physical and/or vocational rehabilitation services to its injured workers. The petition must describe in detail the manner in which the employer's program functions and must affirmatively state that the employer's program meets all of the requirements of this rule. The employer's program may supply services over and above the minimum requirements of this rule and may pay for services which would not be paid for under this rule if the program were being operated by the division. If it is the employer's intention to contract with a vendor of physical and/or vocational rehabilitation services on a standing basis, then the identity and qualifications of the vendor or vendors must be disclosed in the petition.

13.3. The petition must acknowledge that the employer will undertake the processing and direct payment of all invoices and charges for physical and/or vocational rehabilitation services. If the petition is approved, the division will not be responsible for receiving, processing or issuing payorders for the invoices or charges.

~~13.4. The employer must post the "petition for authorization to provide rehabilitation services" at its worksite in a manner sufficient to provide all of its employees with notice of the petition. The employees may file with the commissioner comments regarding the petition.~~

[COMMENT: An injured worker whose job must be modified with a seat pillow or permission to take regular restroom breaks or other reasonable accommodations related to his or her disability has the right not to have every co-worker aware of disabling conditions or diseases.]

13.5~~4~~. If the petition is approved, the employer may undertake the responsibilities and duties of the commissioner as stated in this rule, with the exception of section 12. ~~The employer must post notice of the petition approval at its worksite in a manner sufficient to provide all of its employees with notice of the approval.~~ The employer need not obtain the approval of the commissioner on any pertinent issue, after the petition is approved, but may make its own decisions. The employer's decisions must be in writing and must inform the injured worker of his or her right to file a petition with the commissioner objecting to the decision pursuant to the provisions of section 13.6 of this rule. The written decision must explain the section 13.6 specifications for the objection petition and the time and manner in which the petition must be filed.

13.6~~5~~. If an injured worker disagrees with a decision rendered by his or her employer pursuant to section 13, he or she may file with the commissioner a petition setting forth the disputed decision and the basis for the disagreement. The injured worker must file the petition with the commissioner within fifteen (15) days after receiving the employer's decision and must serve a copy of the petition upon the employer. The employer may file a response with the commissioner within fifteen (15) days after receiving the petition and must serve a copy of the response upon the injured worker. The injured worker must file any reply he or she wishes to make to the employer's response within ten (10) days after he or she receives the response. A copy of the reply must be served upon the employer. The employer must furnish the division and the injured worker with all available factual information in its possession or the possession of any vendor under its control which relates to the disputed decision. Thereafter, the commissioner must enter a protestable order affirming, modifying, or reversing the disputed decision within thirty (30) days of the receipt of all requested information. Any order entered by the commissioner pursuant to this section 13.6 may be objected to by either the injured worker or the employer pursuant to the provisions of West Virginia Code, §§23-5-1 and 1h.

13.7~~6~~. After an employer's petition is approved, the employer must provide the division with interim reports on its rehabilitation activities. These interim reports are due on the dates specified by the division in the notice of approval. An annual report of the employer's rehabilitation activities for the period covered by the division's fiscal year must be filed by the employer with the division not later than sixty (60) days following the end of each state fiscal year. The interim and annual reports must provide all information requested by the division and must be in the form required by the division. The information must be provided on both an individual injured worker basis and an aggregate basis. The employer must immediately report to the division any changes it makes with regard to vendors under a standing contract with the employer, which report must identify any new vendor and its qualifications.

13.8~~7~~. Failure by the employer to comply with any of the requirements of this rule is good cause for the division to revoke the employer's authorization to provide physical

and/or vocational rehabilitation services to its injured workers. If the authorization is revoked, the commissioner must provide the employer with a notice of revocation, including notice of the employer's rights to a hearing, as defined by West Virginia Code, §29A-5-1 et seq. The employer must post all notices of revocation in the manner described under section 13.4 of this rule.

§85-15-14. Preexisting rehabilitation plans.

Nothing in this rule prohibits the completion of vocational rehabilitation plans approved prior to the effective date of this rule.

§85-15-15. Severability

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

187622

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

SERIES 15
VOCATIONAL AND PHYSICAL REHABILITATION

INDEX

BOWLES RICE McDAVID GRAFF & LOVE
SUGGESTED AMENDMENTS, WITH ADDITIONS HIGHLIGHTED AND DELETIONS ELIMINATED FROM THE TEXT

SUMMARY OF PROPOSED LEGISLATIVE RULE VOCATIONAL AND PHYSICAL REHABILITATION

TITLE 85, SERIES 15

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

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

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

The rule permits employers to establish their own rehabilitation programs so long as they comply with the requirements of the division's program. Additional benefits may be provided beyond those offered by the division's program. The rule provides for termination of the employer's right to provide its own program.

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

Rule Title: Vocational and Physical Rehabilitation

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

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

Workers' Compensation is funded solely by special revenue. Hence there will be no iMpact on the general revenue of the State.

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

There is a cap of $10,000 per claimant for physical and vocational rehabilitation. Temporary total and temporary partial rehabilitation benefits are limited to 208 weeks each. There is no limit on medical expenses.

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

Each permanent total disability award can cost the system from $300,000 to over $500,000. Permanent partial disability adds to that expense. To the extent individual claimants can be returned to work, the number of permanent totals will decrease and the percentages awarded under permanent partial claims will decrease.

Date: August 3, 1993

Signature of Agency Head or Authorized Representative

Andrew N. Richardson

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

SERIES 15
VOCATIONAL AND PHYSICAL REHABILITATION

§85-15-1. General.

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

1.2. Authority. – West Virginia Code, §§21A-3-7(b) & (c) and 23-4-9(e).

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 that 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 legislative rule.

§85-15-2. Purpose of rule; cooperation.

2.1. West Virginia Code, §23-4-9(a), sets forth the legislative findings that are the basis of West Virginia Code 23-4-9, et seq. "The Legislature hereby finds that it is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after an injury. In order to encourage workers to return to employment and to encourage and assist employers in providing suitable employment to injured employees, it shall be a priority of the commissioner to achieve early identification of individuals likely to need rehabilitation services and to assess the rehabilitation needs of these injured employees. It shall be the goal of rehabilitation to return injured workers to employment which shall be comparable in work and pay to that which the individual performed prior to the injury. If a return to comparable work is not possible, the goal of rehabilitation shall be to return the individual to alternative suitable employment, considering the individual's educational level and the current job market,

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

2.2. Every injured worker and his or her employer are required pursuant to this rule to participate in rehabilitation evaluations, the development of rehabilitation plans and the implementation of rehabilitation programs. Additionally, the injured worker and his or her employer are required to share responsibility for the success of the individual injured worker's rehabilitation plan.

2.2.1. Injured workers who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans are entitled to receive the support benefits set forth under West Virginia Code §23-4-9 and this rule. Further, injured workers who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans benefit from the rehabilitation services by being returned to the workforce or being awarded appropriate disability benefits. An injured worker's refusal to cooperate with the rehabilitation assessment process or to participate in an authorized rehabilitation plan without a showing of good cause is a factor(s) for the commissioner to consider in determining the amount of any permanent partial disability or permanent total disability award to which the injured worker might otherwise be entitled, even if the injured worker is receiving disability benefits from any other state or federal program. If a rehabilitation plan is suspended or terminated as a result of an injured workers' failure to cooperate or fully participate in an authorized rehabilitation plan, pursuant to section 7.3 of this rule, including approved programs requiring exercise therapy, weight reduction therapy, smoking cessation therapy, or similar preventive treatment regimes, the commissioner must credit or refund to the employer, whichever is applicable, the amount of money expended in conjunction with the implementation of the rehabilitation plan. The amount of the credit or refund is an overpayment that the commissioner may collect from the injured worker, as prescribed by law.

2.32.2. Employers who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans benefit from the rehabilitation process by minimizing the costs associated with work-related injuries. The commissioner must consider an employer's 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 the legislative rules on workers' compensation premium rates and self-insurance, 85 CSR 1 and 85 CSR 9, and the Workers' Compensation Act, Chapter 23 of the West Virginia Code. The commissioner may consider an employer's failure to cooperate with the development or implementation of a rehabilitation plan under this rule without a showing of good cause in determining the amount of any permanent partial disability or permanent total disability award.

2.2.3. Injured workers and employers may provide the division with an explanation of actions or inaction, and how that action or inaction affects the disability of the injured worker, which shall be considered by the commissioner in making the aforesaid determinations under subsections 2.3.1 and 2.3.2.

2.2.4. Notwithstanding any other provision of this rule, section 2.3 of the rule does not prohibit an employer from assisting an employee in returning to suitable, gainful employment.

§85-15-3. Definitions.

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

3.1. "Commissioner" means the Commissioner of the Bureau of Employment Programs pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §23-1-1, and any deputies designated pursuant to West Virginia Code, §§21A-2-12 & -13. For the purposes of this rule the Executive Secretary, the Director of the Office of Medical Case Management, and the supervisor of the rehabilitation section or those positions' respective successors, are designated as deputies. Additional deputies may be designated, as deemed appropriate.

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

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

3.4. "Injured worker" means an employee entitled to workers' compensation benefits as the result of a work-related injury, as provided under West Virginia Code, §23-1-4.

3.5. "Injured worker's employer" means an employer charged pursuant to West Virginia Code, §23-4-1, for a work-related injury and any physical and/or vocational rehabilitation associated with the injury.

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

3.6.1. 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.

3.6.2. A distinct part rehabilitation unit in a duly licensed hospital which distinct part unit meets the requirements of section 2803.61 of the Medicare Provider Reimbursement Manual Part 1, as amended, or any successor provision, as published by the United States Health Care Financing Administration; or

3.6.3. A facility operated by the West Virginia Division of Rehabilitation Services.

3.7. "Physical rehabilitation services" means health care services and devices provided pursuant to protocols adopted by the Workers' Compensation Health Care Advisory Panel including but not limited to medical, surgical, dental, or hospital treatments or evaluations; medicines; and crutches, artificial limbs, or other approved mechanical appliances and devices.

3.8. "Physical rehabilitation services provider" means a provider of health care services, including but not limited to vocational rehabilitation services, provided that 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. "Qualified rehabilitation professional" means a person who has the education, experience and skills necessary to counsel, to make judgments, and to make recommendations concerning an injured worker's medical, physical, emotional, intellectual, or motivational ability to accept and perform suitable gainful employment and who has the skills necessary to design, implement and supervise programs to enhance an injured worker's capacity to accept and perform suitable gainful employment. The Workers' Compensation Health Care Advisory Panel will establish guidelines for defining the levels of education, experience and skill necessary for a person to qualify as a rehabilitation professional under this section. A qualified rehabilitation professional need not personally have the ability to administer and interpret all medical, psychological or vocational testing, but must be able to evaluate the test results provided by other professionals. Rehabilitation counselors employed by or under contract with the commissioner or employed by the West Virginia Division of Rehabilitation Services are presumed to be qualified rehabilitation professionals for the purposes of this definition.

Nothing in this subsection precludes an employer from developing a managed care program or a vocational rehabilitation program, defined by Section 13 of this rule, to promote the worker's return to productive employment.

3.10. "Vocational rehabilitation services" means professional services provided pursuant to protocols adopted by the West Virginia Health Care Advisory Panel reasonably necessary to enable an injured worker to return to suitable gainful employment as soon as practical. The rehabilitation services include but are not limited to the coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, vocational rehabilitation training, job development, job placement, and job modifications.

3.11. "Vocational rehabilitation services providers" means licensed registered nurses, vocational rehabilitation counselors and public and private agencies, companies, and corporations which provide to injured workers vocational rehabilitation services including but not limited to vocational retraining, testing, counseling, evaluation and job placement services. To qualify as a vocational rehabilitation service provider under this rule, a person must demonstrate that he or she has adequate education, training and experience in the rehabilitation field and must have access to the necessary space and equipment needed to provide the service offered, or the entity must demonstrate that it employs workers who have adequate education, training and experience in the rehabilitation field and that it has access to the necessary space and equipment needed to provide the service offered. The Workers' Compensation Health Care Advisory Panel will establish guidelines on the education, training and experience necessary to qualify as a vocational rehabilitation service provider under this rule. The division must decide on a case-by-case basis whether an individual has the education, training, and access or an entity employs individuals who have the education, training and access necessary to qualify as a vocational rehabilitation service provider under this rule. The term does not include licensed physicians, licensed psychologists or hospitals where the services being provided to an injured employee fall under the provisions of West Virginia Code, §23-4-3, and are outside the scope of the pertinent rehabilitation plan.

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

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, education, interests, preinjury earnings, and future earning capacity; and the current and future condition of the labor market. Suitable gainful employment shall include employment for which the injured worker is otherwise qualified, but for his or her advanced age or motivational level. The assessment process shall give appropriate weight to objective, rather than subjective, testing procedures wherever possible. Nothing in this definition prohibits providing an injured worker with vocational rehabilitation services which enable the injured worker to obtain a job with a higher economic status than he or she would have been able to attain without such vocational

rehabilitation, provided the rehabilitation plan demonstrates that the injured worker is not able to return to his or her prior employment and such vocational rehabilitation services are necessary to increase the likelihood of reemployment.

3.14. "Served upon the parties" means depositing the document to be served in the regular United States Mail, properly addressed and postage paid.

§85-15-4. Priorities.

4.1. Qualified rehabilitation professionals must utilize the following priorities. No higher numbered priority may be utilized unless the commissioner has determined that all lower numbered priorities are unlikely to result in the 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 utilized. 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 of the injured worker to the preinjury job with the same employer;

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

4.1.3. Return of the injured worker to employment with the same employer in a different position;

4.1.4. Return of the injured worker to employment in a different position with the same employer and with on-the-job training;

4.1.5. Employment of the injured worker by a new employer and without training;

4.1.6. On-the-job training of the injured worker for employment with a new employer; or

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.

4.1.8. Relocation of the injured worker to achieve 4.1.5., 4.1.6., or 4.1.7.

[COMMENT: A worker who loses his job pursuant to a reduction in work force may be required to travel or relocate to seek new employment. A worker who claims an injury the week before the lay-off and then fully recovers thereafter, may be entitled to benefits to assist with job location and re-training, but he is not entitled to have the need for him to travel or relocate completely eliminated.]

§85-15-5. Identification of rehabilitation candidates; the rehabilitation evaluation process.

5.1. The commissioner may presume an injured worker does not need rehabilitation services if the evidence of record establishes that the injured worker will receive less than 120 days of temporary total disability benefits, that the injured worker is likely to be able to return to his or her former job after reaching maximum medical improvement or has returned to work, that the injured worker has less than a fifteen percent (15%) combined permanent disability from work-related injuries, or that the injured worker is receiving retirement benefits. The commissioner must issue a notice to the parties informing them of the finding that rehabilitation services are not needed. Within thirty (30) days after receipt of the notice, the injured worker and/or the injured worker's employer may submit evidence to the commissioner to rebut the finding. Within sixty (60) days after the date of the notice, the commissioner must affirm or reverse his or her initial finding based upon the existing record, including any rebuttal evidence. If the initial finding is affirmed, the commissioner must issue the decision in a protestable order, pursuant to West Virginia Code, §§ 23-5-1 and 1h. If the initial finding is reversed, the commissioner must order a rehabilitation evaluation of the injured worker to determine whether physical and/or vocational rehabilitation services and development of a rehabilitation plan are appropriate for the worker, as set forth in section 5.3 of this rule.

5.2. For the purposes of this rule, a five percent (5%) permanent partial disability award for occupational pneumoconiosis is not considered an indication of a permanent disability.

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

5.3.1. Upon determining that the injured worker may be eligible for physical and/or vocational rehabilitation services, the commissioner must refer the injured worker to a qualified rehabilitation professional for a rehabilitation assessment. The qualified rehabilitation professional must review the injured workers' file and may gather additional information, as necessary to assess the injured worker's potential for returning to the workforce, using the priorities set forth in §85-15-4.1. as guidelines.

5.3.2. If the qualified rehabilitation professional finds that a decision can be reached without a comprehensive evaluation of the injured worker, then he or she must issue a written opinion to that effect within thirty (30) days after the date of receipt of the referral and cause copies to be served upon the commissioner and the parties. The commissioner must enter a protestable order within thirty (30) days after receipt of the opinion. The order must inform the parties of their rights to review, defined by W.V. Code, §§23-5-1 and 1h. If the order finds that the injured worker would not benefit from rehabilitation services, the order terminates the injured worker's rehabilitation evaluation. The purpose of this paragraph is to quickly and inexpensively identify those injured workers who will not benefit from further rehabilitation efforts.

5.3.3. If the qualified rehabilitation professional finds that a decision cannot be immediately reached and that a comprehensive evaluation is necessary to accurately

assess an injured worker's status, the evaluation must be scheduled within forty-five (45) days after receipt of the referral. In conducting a comprehensive evaluation, a qualified rehabilitation professional must collect and analyze information about the injured worker's medical, educational, vocational, social, legal, and economic circumstances, including his or her present physical and mental ability to participate in vocational rehabilitation services. The evaluation may also include additional medical and/or vocational testing if the qualified rehabilitation professional opines that the testing is warranted in order to provide a full assessment and if the additional testing is in accordance with the protocols established by the Workers' Compensation Health Care Advisory Panel. The injured worker's employer and treating physician must provide reasonable information on forms prescribed by the commissioner to assist the qualified rehabilitation professional in the rehabilitation assessment process. The qualified rehabilitation professional must decide whether the injured worker is likely to benefit from vocational rehabilitation services based upon the evaluation, and shall issue a written report within fifteen (15) days after completing the evaluation. If the qualified rehabilitation professional determines that the medical, physical or emotional status of the injured worker precludes a full assessment, then the qualified rehabilitation professional must prepare a preliminary report setting forth the facts and reasons that an assessment cannot be performed. The qualified rehabilitation professional must state in his or her report whether the injured worker's employer or the injured worker failed to cooperate in the assessment process and must state the facts that form the basis of the conclusion.

5.4. The commissioner must decide whether the injured worker is likely to benefit from vocational rehabilitation services based upon a consideration of all relevant information, including the qualified rehabilitation professional's report, information about the nature and degree of the injured worker's physical disability and the injured worker's employment history, existing skills, work life expectancy, interests, aptitude, education, and likelihood of reemployment in the labor market.

5.4.1. If the commissioner concludes that rehabilitation services are not warranted either because the injured worker has returned to work or because he or she can return quickly to his or her preinjury job with the same employer without modification of task, work structure, or work hours or because he or she cannot return quickly to work with the assistance of physical and/or rehabilitation services, then the commissioner will state this finding in a protestable order, entered pursuant to section 5.5 of this rule, and a rehabilitation plan will not be developed for the injured worker; however, the commissioner may direct at some future time that the injured worker be further evaluated if, in the opinion of the commissioner, it later appears pursuant to a proper motion for reconsideration pursuant to W. Va. Code §23-5-1a that the injured worker may be in need of either physical and/or vocational rehabilitation services.

5.4.2. If the commissioner concludes that a rehabilitation plan is appropriate, then the Commissioner shall enter an interlocutory order directing that the qualified rehabilitation professional who performed the comprehensive evaluation must prepare a written report containing a rehabilitation plan and serve it upon the commissioner and the parties within sixty (60) days after the date of the order granting the rehabilitation plan; Provided, however, that the employer may request the opportunity to develop its own rehabilitation plan if a request is made within thirty (30) days after

receipt of the order and served not only upon the parties but also upon the Commissioner's qualified rehabilitation professional notifying him or her that a plan need not be developed. In every case in which the evaluation is performed and/or the plan is developed by a qualified rehabilitation professional who is not employed by the commissioner, the evaluation and/or plan must be reviewed and, if appropriate, revised by a qualified rehabilitation professional who is employed by the commissioner. Copies of any revised plans must be served upon the parties. The injured worker and/or the injured worker's employer may file comments and request changes to the rehabilitation plan by filing the comments and requested changes in writing with the division within fifteen (15) days after receipt of the rehabilitation plan. The comments must be served upon the other party. Thereafter, the commissioner must make any appropriate modifications to the rehabilitation plan within fifteen (15) days after his or her receipt of the comments and suggested changes and issue the final rehabilitation plan in a protestable order, entered pursuant to section 5.6 of this rule.

5.4.3. The injured worker must notify the commissioner regarding his or her willingness to receive rehabilitation services in accordance with the rehabilitation plan within fifteen (15) days after receiving notice of the final rehabilitation plan in the protestable order issued pursuant to subsection 5.4.2. The injured worker must provide the employer with a copy of this notification. If the injured worker does desire to receive the physical and/or vocational rehabilitation services, the commissioner must forthwith expend, after due notice to the employer, or must forthwith order the self-insured employer to expend the amounts as may be necessary for physical and/or vocational rehabilitation purposes.

5.4.4. In the event that the injured worker declines to receive rehabilitation services or fails to participate and cooperate with the rehabilitation services in accordance with the plan or if the injured worker's employer fails to participate and cooperate in accordance with the plan, the commissioner will invoke the provisions of section 2.2 of this rule.

5.5. The commissioner must issue any protestable decision rendered pursuant to this rule in writing and must serve the decision upon the parties, with notice of the rights of review defined by West Virginia Code, §23-5-1 and -1h. If the commissioner decides that the development of a rehabilitation plan is appropriate, then development of the plan will go forward despite the filing of an objection.

§85-15-6. The Rehabilitation Plan

6.1. A rehabilitation plan may include, but need not be limited to, any of the following: counseling; prosthetic or adaptive devices that enables an injured worker to work at the same or similar occupation as at the time of injury; work site, work duties or work hours modification to make it possible for the injured worker to resume suitable gainful employment, including, when agreed to by the employer, assistance from individuals with expertise in biomechanical engineering to assess any necessary job modifications; vocational training or on-the-job training to assist the injured worker to pursue a similar or new occupation; job placement assistance; payment of benefits under

the provisions of section 8.2 of this rule; and such other programs or services which comply with the provisions of section 11 of this rule governing maximum disbursement for vocational rehabilitation services and which increase the likelihood of reemployment of the injured worker in suitable gainful employment when the plan is completed.

6.2. A rehabilitation plan must require that all physical and/or vocational rehabilitation services be provided by providers registered under the provisions of section 10 of this rule. Except with the prior consent of the commissioner, no other providers may deliver physical and/or vocational rehabilitation services to an injured worker under an approved rehabilitation plan. The commissioner'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. Providers who are located in the injured worker's geographic area and within the state of West Virginia must be utilized, if possible. In state providers and out of state providers are both compensated pursuant to section 11 of this rule.

6.3. A rehabilitation plan that provides for vocational retraining must give preference to the utilization of schools and training facilities located in the injured worker's geographic area and within the state of West Virginia, thereby reducing the need for the injured worker to travel extensively or to relocate. The plan must also give preference to the utilization of public schools and training facilities over private institutions.

6.4. 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 thereunder, 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.

§85-13-7. Implementation of the rehabilitation plan.

7.1. The commissioner must implement a rehabilitation plan after the injured worker's acceptance notice is received pursuant to subsection 5.5.3 of this rule. While an employer or the injured worker is permitted to object to the plan pursuant to section 5.6 of this rule, the implementation of the plan will proceed notwithstanding the objection. In the event that the employer or the injured worker is successful in challenging the plan, the employer's account will be adjusted to reflect the appropriate charge for costs associated with the rehabilitation plan. In the event that 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.

7.2. The duration of any rehabilitation plan developed, modified, or amended hereunder may not exceed two hundred and eight (208) weeks, unless the commissioner agrees to an extension pursuant to the provisions of section 7.3 of this rule.

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

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

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

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

7.3.4. A finding that the rehabilitation plan is no longer necessary for the injured worker's reemployment;

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

7.3.6. A joint petition submitted by the employer and the injured worker seeking modification or termination of the plan. Any joint petition may include a request to modify the provisions of a rehabilitation plan, including an extension beyond the maximum duration as set out in section 7.2 of this rule or a request to extend benefits beyond the maximum amount otherwise stated in section 11 of this rule. Supporting reports must be filed with the petition. In ruling upon any petition to extend the rehabilitation plan beyond the maximum period set out in section 7.2 of this rule or to exceed the maximum cost stated in section 11 of this rule, the commissioner must consider whether an extension of the rehabilitation plan is more likely than a denial of the petition to result in less overall cost to the division or a self-insured employer.

7.4. All physical and/or vocational rehabilitation services must be delivered in accordance with the rehabilitation plan developed under section 5 of this rule. The commissioner must assign a qualified rehabilitation professional employed by or under contract with the commissioner or employed by the West Virginia Division of Rehabilitation Services to monitor compliance with and progress under the rehabilitation plan. The assigned qualified rehabilitation professional must contact the injured worker, the employer, the injured worker's treating physician, and the injured worker's rehabilitation services providers on a regular basis to monitor compliance with and progress under the plan. In no event are the contacts to be less than at thirty day intervals with each of the foregoing individuals or parties. In the event that the rehabilitation services provided to the injured worker or the injured worker's employment do not comply with the rehabilitation plan, the assigned rehabilitation professional must notify the commissioner and the plan must be modified as is just and necessary under the circumstances.

7.5. The employment relationship between the injured worker and the injured worker's employer terminates after the employer is charged for the costs associated with a rehabilitation plan implemented pursuant to this rule, if the plan does not provide

that the injured worker will return to employment with that preinjury employer or if the injured worker in fact does not return to employment with that preinjury employer. However, the injured worker's employer continues to bear the responsibility for the injured worker's disability and medical benefits related to compensable injuries with that employer, other than permanent total disability benefits or benefits charged to the employer's account with the Second Injury Reserve Fund, as provided under the Workers' Compensation Act, Chapter 23 of the West Virginia Code of 1931, as amended.

[COMMENT: Successful completion of a rehabilitation plan paid by the former employer should eliminate the potential for a subsequent claim of permanent total disability. Otherwise, the incentive to provide adequate rehabilitation is reduced.]

§85-15-8. Modification of work and payment of indemnity benefits.

8.1. As part of a rehabilitation plan, an injured worker may return to work at a transitional, light duty, restructured or modified work assignment, on either a temporary or trial basis. The length of time of the temporary or trial return to work must be determined on a case-by-case basis and must be specified in the rehabilitation plan. The work assignment may include modifications of the duties, hours, or any other modification which may assist the injured worker in attaining the goals of the rehabilitation program and the rehabilitation plan.

8.1.1. Whenever the injured worker is asked to return to work under this section, the prospective employer, whether the original employer or a new employer, must furnish to the injured worker's treating physician and the assigned qualified rehabilitation professional a statement describing the available work in terms that will enable the physician to relate the physical activities of the job to the injured worker's impairment. A copy of this statement must be filed with the commissioner and sent to the injured worker. The physician must then advise the assigned qualified rehabilitation professional as to whether the injured worker is physically capable of performing the work described. The injured worker may consent to undertake the work assignment without the approval of his or her treating physician if a physician selected by the commissioner determines that the injured worker is physically capable of performing the work described.

8.1.2. Upon undertaking a section 8.1 job, the injured worker's temporary total disability benefits, if any, are terminated and he or she becomes eligible for the receipt of temporary partial rehabilitation benefits, if applicable under section 8.3 of this rule. If the work impedes the injured worker's recovery to the extent that he or she cannot continue to work, the injured worker's temporary total disability payments, if applicable, may be resumed when he or she stops working, as provided in section 8.2 of this rule. If the work comes to an end before the injured worker's recovery is sufficient in the judgment of the commissioner to permit a return to his or her usual job or to other available work, the injured worker's temporary total disability benefits, if applicable, may be resumed but only for the period allowed by the rehabilitation plan or the period provided for in West Virginia Code, §23-4-1c, whichever is longer.

8.1.3. Once the injured worker returns to work under the terms of this section 8.1, the employer may assign the worker only to the work that was described to the physician, unless the injured worker gives his or her written consent, or his or her physician conducts a prior review and gives approval.

8.2. In every case in which the commissioner orders physical and/or vocational rehabilitation pursuant to a rehabilitation plan, the injured worker may be compensated on a temporary total disability basis for any period in which the rehabilitation services render him or her totally disabled, pursuant to West Virginia Code, §23-4-1c.

8.3. If the injured worker, pursuant to a rehabilitation plan, returns to employment with the same employer or a new employer on either a temporary, trial or permanent basis, in either a full time or part time capacity, and to either gainful employment or a transitional, light duty, restructured or modified work assignment, pursuant to section 8.1 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 for the purposes of section 8.4 will be the worker's actual earnings. A full-time or part-time educational program undertaken pursuant to a rehabilitation plan is considered a modified work assignment for the purposes of this rule and participating in the program entitles the injured worker to temporary partial rehabilitation benefits if the injured worker is not otherwise employed or receiving state or federal assistance to pursue the program through the Job Training Partnership Act or similar program. Temporary partial rehabilitation benefits must be paid on the same schedule as are temporary total disability benefits, and the injured worker's average weekly wage earnings is zero for the purpose of calculating temporary partial rehabilitation benefits; Provided, however, that other state or federal assistant paid to an injured worker pursuant to a full-time or part-time educational or vocational rehabilitation program shall be considered wages for purposes of calculating temporary partial rehabilitation benefits.

8.4. Temporary partial rehabilitation benefits are calculated, as follows:

8.4.1. 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 West Virginia Code, §523-4-6, -6d and -14, for calculating temporary total disability benefits;

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

8.4.3. The temporary partial rehabilitation benefits cannot exceed the temporary total disability benefits to which the injured worker would be entitled pursuant to West Virginia Code, §§23-4-6, -6d, and -14, during any period of temporary total disability resulting from the injury in the claim.

8.5. The amount of temporary partial rehabilitation benefits payable under this section must be reviewed at least every ninety (90) days to determine whether the injured worker's average weekly wage in the new employment has changed and, if such change has occurred, the amount of benefits payable hereunder must be adjusted prospectively.

8.6. Temporary partial rehabilitation benefits are only payable during the implementation of a rehabilitation plan. Upon termination of the plan, as under section 7.3 of this rule or upon expiration of the plan, payment of all temporary partial rehabilitation benefits must be stopped irregardless of the injured worker's then level of wages.

8.7. Payments of temporary partial rehabilitation benefits below the sum of five ($5.00) dollars will not be made because the benefit gives no economic incentive to the injured worker and would be administratively too costly.

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

§85-15-9. Final report on rehabilitation plan.

The qualified rehabilitation professional assigned to monitor an individual injured worker's rehabilitation plan pursuant to section 7.5 of this rule must file a final report with the commissioner within 60 days after the rehabilitation plan is terminated or expires. The report must include a description of the plan's outcome, including but not limited to the following information:

9.1. Whether the injured worker successfully completed the plan;

9.2. Whether the injured worker has been placed in suitable gainful employment as defined by section 3.13 of this rule; and

9.3. Whether the injured worker continues to search for suitable, gainful employment and the nature of that job search; and

The final report must be served on the parties of record. The parties may file comments on the report within fifteen (15) days after receipt of the report.

§85-15-10. Registration of providers.

On or before the first day of January 1994, and yearly thereafter, physical and vocational rehabilitation services providers must register with the commissioner using forms prescribed by the commissioner. New providers who enter the field during the year may register at the time their service is first offered. Any provider who does not meet the requirements set forth in section 3 of this rule cannot be accepted for registration. The commissioner must compile a list of rehabilitation services providers and their qualifications and areas of expertise and specialization. The commissioner must use the list of rehabilitation service providers in making rehabilitation referrals.

Rehabilitation services may also be provided by employees of the West Virginia Division of Rehabilitation Services or employees of the commissioner. All rehabilitation services must be provided in accordance with rehabilitation plans implemented pursuant to this rule and must be monitored by qualified rehabilitation professional employed by or under contract with the commissioner or employed by the West Virginia Division of Rehabilitation Services. The commissioner must remove or suspend from the list of vendors any provider of rehabilitation services who knowingly fails to comply with the provisions of this rule or a rehabilitation plan, or engages in other practices in violation of West Virginia Code, 523-4-3c.

§85-15-11. Reimbursement for physical and vocational rehabilitation services.

11.1. The commissioner must reimburse physical rehabilitation providers for physical rehabilitation services in accordance with the fee schedule in effect at the time the service is rendered, adopted by the commissioner pursuant to West Virginia Code, §23-4-3. Only those physical rehabilitation services that are medically necessary and within the scope of the applicable rehabilitation plan can be reimbursed pursuant to this rule. The costs of physical rehabilitation services are not included in the ten thousand dollar ($10,000.00) limit on the cost of vocational rehabilitation, set forth under West Virginia Code, §23-4-9 and section 11.2 of this rule. However, the division cannot reimburse providers for physical rehabilitation services which require prior authorization under the provisions of West Virginia Code, §23-4-3, or any rule adopted thereunder, unless:

11.1.1. The physical rehabilitation services provider obtains prior authorization;

11.1.2. The physical rehabilitation services provider requested prior authorization but did not receive the approval of the commissioner prior to the rendering of the service, provided that the commissioner later determines the service should have been authorized as being medically necessary and related to a compensable injury; or

11.1.3. The physical rehabilitation service provider did not request prior authorization, but later filed a reasonable explanation for the failure to request authorization prior to the delivery of the service, and the commissioner determines that the request would have been authorized if it had been submitted.

11.2. The commissioner reimburses vocational rehabilitation providers for vocational rehabilitation services in accordance with the fee schedule in effect at the time the service is rendered and as adopted by the commissioner pursuant to West Virginia Code, §23-4-3, or in accordance with an agreement entered into between the provider and the commissioner. No payment may be made for vocational rehabilitation services unless the service is preauthorized by the commissioner. Additionally, no injured worker may receive vocational rehabilitation services which cost in excess of ten thousand ($10,000.00) under any rehabilitation plan, with the following exceptions:

11.2.1. Any injured worker who previously was the beneficiary of a rehabilitation plan and who subsequently suffers a new compensable injury is entitled to receive additional vocational rehabilitation services reimbursable up to an additional ten thousand ($10,000.00) dollars, if the commissioner determines that a new rehabilitation plan is appropriate;

11.2.2. The costs of evaluations, reevaluations, preparation or modification of a rehabilitation plan or plans, temporary total disability benefits, and temporary partial rehabilitation benefits are not considered a part of the reimbursements which may not exceed the sum of ten thousand ($10,000.00) dollars under this section; or

11.2.3. With the consent of the employer and the commissioner and upon a showing of good cause, the total reimbursement for an individual injured worker's rehabilitation plan may exceed ten thousand ($10,000.00) dollars pursuant to section 7.3 of this rule. The excess amount must be agreed upon by the employer and the commissioner.

11.3. 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 commissioner. The forms must be filed with the commissioner within two (2) years 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 commissioner or any other party including, among others, the injured worker, the applicable employer, or any of their third party health care insurers.

11.4. No physical or vocational rehabilitation service provider is entitled to receive reimbursement from any source other than the commissioner or a self insured employer for any service, including the costs of medicines, mechanical appliances or devices, deemed to be medically or vocationally necessary as part of the rehabilitation plan or as a result of the compensable injury. Further, 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 from agreeing to reimburse a service provider for services rendered.

11.5. 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 service provider 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 11.4, 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 this rule prevents the provider from receiving reimbursement under the terms of the insurance policy.

§85-15-12. Cooperative efforts.

The division engages, where feasible and cost-effective, in cooperative programs with the West Virginia Division of Rehabilitation Services to provide vocational rehabilitation services to injured workers and with the other divisions of the Bureau of Employment Programs to provide job placement services for injured employees. The division develops and cultivates other cooperative programs with other human service agencies and organizations, both public and private, to maximize the availability of physical and vocational rehabilitation services to the industrially injured.

§85-15-13. Employer-managed physical and vocational rehabilitation services.

13.1. Except with regard to section 12 of this rule, an employer may provide its own vocational and physical rehabilitation services to its injured workers.

13.2. In order to avail itself of the provisions of section 13.1, the employer must petition the commissioner for authorization to provide physical and/or vocational rehabilitation services to its injured workers. The petition must describe in detail the manner in which the employer's program functions and must affirmatively state that the employer's program meets all of the requirements of this rule. The employer's program may supply services over and above the minimum requirements of this rule and may pay for services which would not be paid for under this rule if the program were being operated by the division. If it is the employer's intention to contract with a vendor of physical and/or vocational rehabilitation services on a standing basis, then the identity and qualifications of the vendor or vendors must be disclosed in the petition.

13.3. The petition must acknowledge that the employer will undertake the processing and direct payment of all invoices and charges for physical and/or vocational rehabilitation services. If the petition is approved, the division will not be responsible for receiving, processing or issuing payorders for the invoices or charges.

13.4. If the petition is approved, the employer may undertake the responsibilities and duties of the commissioner as stated in this rule, with the exception of section 12. The employer need not obtain the approval of the commissioner on any pertinent issue, after the petition is approved, but may make its own decisions. The employer's decisions must be in writing and must inform the injured worker of his or her right to file a petition with the commissioner objecting to the decision pursuant to the provisions of section 13.6 of this rule. The written decision must explain the section 13.6 specifications for the objection petition and the time and manner in which the petition must be filed.

13.5. If an injured worker disagrees with a decision rendered by his or her employer pursuant to section 13, he or she may file with the commissioner a petition setting forth the disputed decision and the basis for the disagreement. The injured worker must file the petition with the commissioner within fifteen (15) days after receiving the employer's decision and must serve a copy of the petition upon the employer. The employer may file a response with the commissioner within fifteen (15)

days after receiving the petition and must serve a copy of the response upon the injured worker. The injured worker must file any reply he or she wishes to make to the employer's response within ten (10) days after he or she receives the response. A copy of the reply must be served upon the employer. The employer must furnish the division and the injured worker with all available factual information in its possession or the possession of any vendor under its control which relates to the disputed decision. Thereafter, the commissioner must enter a protestable order affirming, modifying, or reversing the disputed decision within thirty (30) days of the receipt of all requested information. Any order entered by the commissioner pursuant to this section 13.6 may be objected to by either the injured worker or the employer pursuant to the provisions of West Virginia Code, §§23-5-1 and 1h.

13.6. After an employer's petition is approved, the employer must provide the division with interim reports on its rehabilitation activities. These interim reports are due on the dates specified by the division in the notice of approval. An annual report of the employer's rehabilitation activities for the period covered by the division's fiscal year must be filed by the employer with the division not later than sixty (60) days following the end of each state fiscal year. The interim and annual reports must provide all information requested by the division and must be in the form required by the division. The information must be provided on both an individual injured worker basis and an aggregate basis. The employer must immediately report to the division any changes it makes with regard to vendors under a standing contract with the employer, which report must identify any new vendor and its qualifications.

13.87. Failure by the employer to comply with any of the requirements of this rule is good cause for the division to revoke the employer's authorization to provide physical and/or vocational rehabilitation services to its injured workers. If the authorization is revoked, the commissioner must provide the employer with a notice of revocation, including notice of the employer's rights to a hearing, as defined by West Virginia Code, §29A-5-1 et seq. The employer must post all notices of revocation in the manner described under section 13.4 of this rule.

§85-15-14. Preexisting rehabilitation plans.

Nothing in this rule prohibits the completion of vocational rehabilitation plans approved prior to the effective date of this rule.

§85-15-15. Severability

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

187622

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

SERIES 15
VOCATIONAL AND PHYSICAL REHABILITATION

INDEX

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October 1, 1993

Honorable Andrew N. Richardson, Commissioner
Workers' Compensation Division
Bureau of Employment Programs
Post Office Box 3151
Charleston, West Virginia 25328

RE: Proposed Rules For Vocational And Physical Rehabilitation

Dear Commissioner Richardson:

As General Counsel for the West Virginia Labor Federation, AFL-CIO, I am hereby submitting my comments regarding the proposed Physical and Vocational Rehabilitation legislative rules. Such comments will be limited to the sections of the proposed rules which raise concern.

Section 2.3 addresses the shared responsibility by the injured worker and the employer. However, this section fails to address what criteria is to be used to determine this shared responsibility. If the vocational rehabilitation plan is approved by the commissioner, there would also have to be some agreement between the injured worker and the employer which would go the issue of shared responsibility. Additionally, "conduct" on the part of either party would have to be determined by the facts. As this section is currently written, there is no guideline as to what constitutes "shared responsibility."

Section 2.3.1 mentions an injured worker's refusal to cooperate in an authorized rehabilitation plan without a showing of good cause. However, there is no language in this section which addresses the issue of the claimant's medical condition at the time of his or her refusal. There could conceivably be cases such as a back injury where the claimant is in such pain as to render him incapable of participating in a rehabilitation program. Is the Commissioner going to consider something of this nature as good cause? Will the Commissioner consider any subsequent change in the claimant's condition based upon prior medical evidence as constituting good cause for the claimant's nonparticipation? This section needs to address what the Commissioner will construe as "good cause."

It is also unclear what will happen in the case of a claimant's claim which has conflicting medical evidence as to the claimant's ability to participate in a rehabilitation plan. Will there be a protestable order issued?

This section also speaks to the issue of overpayment for the claimant's nonparticipation which may be refunded to the employer and collected from the claimant as an overpayment. What statutory authority is there for such a rule?

Section 3.13 defines "suitable gainful employment." This definition is extremely poor. It must be "suitable gainful employment" in the claimant's geographical location.

Section 5.1 establishes the presumption that if a claimant receives less than 120 days of temporary total disability benefits, he or she does not need rehabilitation services. This is entirely too narrow. This does not take into consideration situations where medical evidence in the file indicates that the claimant is unlikely to return to his or her original job or that the original job could exacerbate the injury. There should be language in this section that these types of cases will be reviewed on a case-by-case basis in the light of the relevant medical evidence.

Section 5.2.2 states that the Workers' Compensation Health Advisory Panel will develop guidelines for determining the type of injuries that usually and customarily lead to permanent disability. However, in addition to guidelines, each case must be analyzed individually on the relevant medical evidence.

The last sentence of Section 5.3.2 regarding vocational evidence and permanent total disability is <u>totally unacceptable</u>.

Section 5.5 addresses the various factors the Commissioner must evaluate in deciding whether the injured worker is likely to benefit from vocational rehabilitation services. The last factor listed regarding likelihood of re-employment in the labor market should be narrowed to the likelihood of re-employment in the labor market <u>in the claimant's geographical location.</u>

Section 5.5.2 mentions that, "In every case in which the evaluation is performed and/or the plan is developed by a qualified rehabilitation professional who is not employed by the commissioner, the evaluation and/or plan must be reviewed and, if appropriate, revised by a qualified rehabilitation professional who is employed by the commissioner." If the qualified rehabilitation professional meets or exceeds the guidelines set by the Health Care

Advisory Panel, why would there need to be the extra delay of having the evaluation or plan re-reviewed by one of the Commissioner's rehabilitation professionals?

Section 5.5.4 fails to include any language to protect the injured worker if he is medically unable to participate in the rehabilitation plan.

Section 5.6 contains a provision for a reconsideration request which will only serve to delay an already drawn out process. It could arguably be used as a delay tactic, one which could possibly slow down implementation of the claimant's rehabilitation program.

Section 6.3 mentions the utilization of providers of rehabilitation with the State of West Virginia and public schools and training facilities. What if the approved rehabilitation plan covers training which is not available in the Sate of West Virginia? As an example, there was one claimant who was approved for rehabilitation as a gunsmith. The Fund approved his training at the Colorado School of Trades in Colorado. I think this section should be sufficiently broadened to include those cases where the claimant is found to be retrainable in an area not offered in West Virginia.

Sections 7.3.1 through 7.3.5, inclusive, are too vague as currently written because they do not indicate what the burden of proof is which constitutes "A finding...."

Section 7.5 is entirely too vague regarding termination of the employer/employee relationship and is unacceptable as currently written.

Section 8.1.3 is completely worthless, as well as unenforceable from the standpoint of protecting the claimant's rights. There is no mechanism which would protect the injured worker from being jerked around by the employer and placed in job assignments which are completely inconsistent with the rehabilitation plan. The employer could inform the physician that they had the injured worker doing the type of work that they were supposed to, when, in fact, they had him doing work that was beyond his physical demand level, and the disagreement would boil down to the employer's word versus the injured worker's word.

Section 11.2.3 should allow the total reimbursement for individual injured worker's rehabilitation plan to exceed $10,000 based upon a showing of good cause along with the consent of the Commissioner. However, there is absolutely no reason that the

consent of the employer should be required before the $10,000 amount limit is allowed to be exceeded. If good cause has been shown and the Commissioner acknowledges that good cause has been shown, then there is no rationale to also require the consent of the employer.

Sections 13.1 through 13.8, inclusive, regarding employer-managed physical and vocational rehabilitation services are completely unacceptable and will never be agreed to by the West Virginia Labor Federation, AFL-CIO. There is absolutely no provision which allows for any control over the employer regarding the implementation of the rehabilitation program. Additionally, it is indicated in Section 13.5 that the employer need not obtain the approval of the Commissioner on any pertinent issue after the petition is approved, and the employer may make its own decisions. Such a proposed rule is absolutely ludicrous based upon its disastrous potential for injured workers.

Thanking you for you consideration of all the foregoing, I am

Sincerely yours,

Thomas P. Maroney

TPM/k

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September 30, 1993

Mr. Andrew N. Richardson
Executive Office
Workers' Compensation Division
P. O. Box 3824
Charleston, WV 25338

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

Dear Mr. Richardson:

Comment has been invited with regard to the above-mentioned proposed rules. Let me begin by saying that the attempt to provide a more effective system by which to return workers to active employment is clearly needed and has been for some time. The general thrust of many of the rules contained in the extant proposal is a good beginning in the revitalization of this process.

At the same time, there appear to be certain deficiencies in the rules as proposed. The fact that these comments focus on some of those deficiencies does not in any sense reflect overall criticism of the general effort, which I believe to be a necessary and worthy one.

Turning to Rule 2.3.1., there does not appear to be any logical connection between the proposal to take into account as a factor in determining permanent total or permanent partial disability benefits the cooperation, or lack thereof, of an injured worker regarding rehabilitation assessment and participation. There are other more logical ways of inducing cooperation by injured workers and efforts of this nature which will be perceived to be punitive will not accomplish the goals generally provided for by the regulations.

Regulation 3.13 addresses the concept of suitable gainful employment. Initially, it should be made clear that the labor market which is relevant is a local, rather than statewide or national, labor market. Additionally, there should be added a floor, or minimum, below which a worker's wage and benefit package

may not fall regarding that worker's particular suitable gainful employment, should the worker not be able to return to his or her former work. These additional protective guarantees relating to Rule 3.13 should, of course, be integrated into the priorities set forth at Rule 4.1 et seq.

The provisions relating to the modification or extension of a rehabilitation plan in Rule 7.3 et seq. need some alteration. The present structure of those rules seem to suggest that extensions beyond 208 weeks will not be permitted without employer concurrence. There is no reason why, upon a showing of good cause, a claimant may not petition for such an extension, regardless of employer concurrence. Likewise, an employee should be able, upon showing of good cause, to extend eligibility for partial benefit payments. The appropriate question is whether the modified or extended rehabilitation plan is more likely than a denial of the petition to result in less overall costs to the division, the employer, the employee and, in the long term, to the overall work force in the state of West Virginia, and the future likelihood that government will have to provide supportive services for that worker should the plan not be approved.

The termination of the employment relationship contemplated in Rule 7.5 is inappropriate. There is no reason to relate the rehabilitation plan to whether the worker returns to work for the former employer. The present language could cause significant problems in terms of an unintended effect of the "termination" of the employment relationship for the employee. Rule 7.5 simply should be eliminated or drastically revamped.

A mechanism for the prompt evaluation of all claims in relation to temporary partial benefits (Rule 8.3) needs to be added.

Rule 13 involving employer-managed rehabilitation program and return-to-work programs appears to put the onus on the employee to petition should problems arise with regard to such a program. This places the responsibility on the wrong foot. Our experience with regard to the need to have the Fund be involved in the authorization of the provision of medical services and the like in circumstances involving self-insured employers, and for that matter other employers, who have attempted to force workers to go to certain doctors without going through the Workers' Compensation Fund has led many to question any system that does not require approval by the Fund in such matters. Accordingly, this rule should be revamped to require that the Fund approve rehabilitation and return-to-work actions by employers and for there not to be a requirement that the employee has to initiate some form of protest to trigger review.

While there are other provisions that may require some modification, and there are others about which I have not had the opportunity to think through all of the implications, I hope that these comments may prove to be of some value.

If you have any questions regarding these matters, please do not hesitate to contact me.

Sincerely,

Grant Crandall

GC/kle

Edward G. Atkins
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(304) 346-0318

September 22, 1993

Executive Offices
Workers' Compensation Division
P. O. Box 3824
Charleston, West Virginia 25338

Re: Comment - Title 85, Series 15
Proposed Legislative Rule -
Vocational and Physical Rehabilitation

Dear Sir:

I have reviewed the proposed Legislative Rule with respect to Vocational and Physical Rehabilitation now on file with the Office of the Secretary of State. The following comment is a general comment on these regulations as opposed to addressing specific language or technical aspects of these rules.

The Rule, at least in part, is designed to address the issue of total and permanent disability and how vocational rehabilitation plays a role in that determination. The Rule is very specific with respect to procedure however, it contains very little in the way of substantive determination of what constitutes vocational disability. The Rule does not specifically address how age, education and previous work experience play a role in vocational disability or vocational rehabilitation, nor does the Rule address how exertional and nonexertional limitations caused by an injury play a role in disability determination or vocational rehabilitation.

Vocational considerations have been part of Workers' Compensation law since the enactment of West Virginia Code 23-4-6(n). Vocational considerations were further emphasized in the Posey/Cardwell cases. Even though vocational considerations have been part of the law for some time, no systematic approach has been proposed to deal with that issue. For example, there is no "guides" available that I know of for vocational disability equivalent to the AMA "guides" for the evaluation of whole man medical impairment. This lack of any systematic approach leads to a highly subjective determination of what vocational disability is.

West Virginia Workers' Compensation Law, on the issue of total disability, has moved inexorably toward the Social Security definition of disability. As you know, the Social Security

determination of disability places heavy emphasis on vocational considerations. Unfortunately, mechanisms are not in place in the Office of Workers' Compensation similar to those mechanisms in place under the Social Security system to address vocational issues.

Social Security determination of total disability is essentially a two step process. Impairments are first determined, e.g. ability to walk, stand, push, pull, lift, etc... Then, on the basis of these impairments, a vocational determination of disability is undertaken. This vocational determination adds age, education, and previous work experience to this determination. On vocational issues, this two-step practice is not followed in the administration of the Workers' Compensation law. Consequently, in many instances, the vocational evaluator is required to make medical decisions for which he or she is not qualified or to base vocational determinations on assumed medical findings still in controversy. For example, a vocational evaluator may base his or her evaluation on an assumption that an individual can lift and carry 20 pounds before a determination is made that that assumption is correct. If it is later determined that the claimant could not lift and carry 20 pounds, then the vocational evaluation becomes meaningless. I do not see how the proposed Rule addresses this problem. Unless and until this problem is addressed in some fashion, the current, and highly subjective process, will continue.

I do have one comment with respect to the implementation and administration of these rules. Under the Fiscal Note, it is estimated that the implementation of the Rule would require doubling of the size of the rehabilitation staff. In reviewing the technical complexity of these Rules and having some practical experience in dealing with the administration of Workers' Compensation laws for twenty years, I doubt that this Rule can be implemented and administered effectively with a doubling only of the staff. It is my understanding that the rehabilitation staff at present, consists of approximately 10 counselors, 2 clerks and 1 supervisor. Further, the counselors, do some of their own clerical work. It is my opinion that even doubling the size of the current staff would not allow for the efficient administration of this Rule. I believe that the fiscal "impact" of this Rule has been vastly underestimated. Further, if only $10,000.00 per person is assigned as the average expense for additional personnel, it is my opinion that you will not be able to get the talent or dedication necessary for the proper and efficient administration of this Rule.

Sincerely yours,

Edward G. Atkins
EGA/pjh

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STATE OF WEST VIRGINIA

SECRETARY OF STATE

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

TO: John Kozak

AGENCY: Workers' Comp.

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: May 6, 1994

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

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

SERIES: 15 TITLE: 85 Workers' Comp.

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

****

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

SIGNED: John H Kozak

TITLE OF PERSON SIGNING: Legal Services Director

DATE: May 26, 1994

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