

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

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

RULE TYPE: Exempt Legislative; CITE AUTHORITY §23-1-1; 23-4-6(i)
§21A-3-7(c)

AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 16

TITLE OF RULE BEING AMENDED: Guidelines for Permanent Impairment
Evaluations, Evidence, and Ratings

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: Monday, May 22, 1995 TIME: 10:00 a.m.

LOCATION OF PUBLIC HEARING: Days Inn

Convention Center

Flatwoods, West Virginia

COMMENTS LIMITED TO: ORAL ☐, WRITTEN ☐, BOTH ☒

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: John H. Kozak, Director

Comment period closes at 5:00 p.m.

Monday, June 5, 1995

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

Legal Services Division

P. O. Box 3922

Charleston, WV 25339

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Andrew N. Richardson

Authorized Signature

4.00

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

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner



SUMMARY OF PROPOSED REVISED EXEMPT LEGISLATIVE RULE

Guidelines for Permanent Impairment Evaluations, Evidence, and Ratings

TITLE 85, SERIES 16

This proposed rule is a revision of an existing exempt legislative rule of the same name and series number. The revision is required by the provisions of the Enrolled Committee Substitute for Senate Bill 250 which was enacted at the Legislature's 1995 session.

The act requires that all permanent partial disability awards be premised solely upon the degree of medical whole body impairment that an injured employee has suffered as a result of a compensable injury or disease. It also provides that the workers' compensation division shall adopt standards to implement this change. While the existing rule does conform to the substance of the changes by the act, the existing rule makes reference to disability concepts which need to be removed.

The revision also notes that the percentages stated for the scheduled injuries set forth in West Virginia Code, §23-4-6(f), are not longer the minimum amounts to be awarded but are the exact amounts to be awarded. The rule also notes that treating physicians making recommendations for the degree of permanent partial disability under West Virginia Code, §23-4-7a, must also be based solely upon the degree of whole body medical impairment that a claimant has suffered and must be determined in accordance with the rule. Finally, the revised rule also deletes references to the evaluation of psychiatric injuries as that subject matter is now provided for in another rule.

Offices located at 601 Morris Street

An Equal Opportunity/Affirmative Action Employer

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Guideline for Permanent Impairment Evaluations, Evidence, and Ratings

Type of Rule: Exempt
X Legislative Interpretive Procedural

Agency Bureau of Employment Programs, Workers' Compensation Division

Address P. O. Box 3922

Charleston, WV 25339-3922

Attn: John H. Kozak, Director, Legal Services Division

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

This is a revision to an existing rule and it is not expected to have any impact upon the division's appropriated budget.

3. Objectives of these rules:

To bring these rules into conformity with enrolled committee substitute for Senate Bill 250.

Rule Title: Guidelines for Permanent Impairment Evaluations, Evidence, and Ratings

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Enrolled Committee Substitute Senate Bill 250 was intended to reduce expenditures from the Workers' Compensation Fund by limiting permanent partial disability awards to medical impairment issues.

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

It is expected that permanent partial disability awards will be reduced in amount. This will lower payments to claimants and reduce expenses to employers.

C. Economic Impact on Citizens/Public at Large.

Enrolled Committee Substitute S.B. 250 and, in some part, this rule, will prevent the Workers' Compensation Fund from being bankrupt within ten (10) days. Bankruptcy by the Fund would be cataclysmic to the well being of the state's citizens.

Date: April 3, 1995

Signature of Agency Head or Authorized Representative

Andrew N. Richardson

Andrew N. Richardson
Commissioner, Bureau of Employment Programs

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

FILED

APR 5 7 37 AM '95

SERIES 16

Guidelines for Permanent Impairment Evaluation
Evidence, and Ratings

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§85-16-1. General.

1.1. Scope. -- This rule implements the provisions of West Virginia Code, §23-4-3b(b), §23-4-6(i), §23-4-7a(h), and §23-4-8, regarding the procedures, forms, evidence, and standards for the evaluation of claimants and the determination of a claimant's degree of whole body medical impairment ratings of claimants for workers' compensation benefits.

1.2. Authority. -- West Virginia Code, §21A-2-6(2); §21A-3-7(b) & -7(c); §23-1-1; §23-1-13, and §23-1-15, and §23-4-6(i). Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.

1.3. Filing Date. -- ~~September-13-1994-~~

1.4. Effective Date. -- ~~February-17-1995-~~

~~-----1.5.---The effective date of these rules has been set at February-17-1995, for two reasons.---First, the council is of the opinion that the six-(6)-month period will afford the medical community---and---the---other---participants---in---the---workers' compensation system sufficient time to become familiar with the "Guides to the Evaluation of Permanent Impairment,"---(4th ed. 1993).---A training and education period was requested in a number of the comments received on the rule.---Second, the council intends to develop the additional standards necessary for the determination of requests for permanent disability beyond physical impairment.---A number of the comments received for these rules recommended that these rules not be implemented without the other standards.~~

§85-16-2. Purpose of rule.

The purpose of this rule is to implement the provisions of West Virginia Code, §23-4-3b(b), §23-4-6(i), §23-4-7a(h), and §23-4-8, which relate to the development of standards for the rating of permanent whole body medical impairments suffered by claimants as a proximate result of their compensable injuries or diseases. The standards adopted by this rule have been approved by the health care advisory panel and recommended to the compensation programs performance council for its adoption. ~~This rule does not apply to the additional factors, beyond impairment, that determine the degree of disability suffered by a claimant.~~ The rule is applicable to all ratings for permanent whole body medical impairment. The rule is applicable to evidence submitted by any party to a claim, and to evidence gathered by the division and to recommendations made to the division by the interdisciplinary examining board pursuant to West Virginia Code, §23-4-6(j) & -6(n).

§85-16-3. 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.

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. "Guides" means the "Guides to the Evaluation of Permanent Impairment," (4th ed. 1993), as published by the American Medical Association ~~or such later edition as may have then been published.~~

3.4. "Permanent impairment" means an impairment that is related to a compensable injury "that has become static or stabilized during a period of time sufficient to allow optimal tissue repair, and one that is unlikely to change in spite of further medical or surgical therapy." Guides at page 1/1. An "impairment" is defined as "an alteration of an individual's health status" and is "assessed by medical means and is a medical issue. An impairment is a deviation from normal in a body part or organ system and its functioning." Id. Reference should also be made to the Glossary beginning at page 315 of the Guides. A claimant's degree of permanent whole body medical impairment is to be determined in keeping with the determination of whole person permanent impairment as set forth in the Guides. For the purposes of these rules, the Guides' use of the term "whole person" impairment is the equivalent of the term "whole body" impairment.

§85-16-4. Adoption of Standards.

4.1. Except as provided for in section 6 of this rule, on and after the effective date of this rule all evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment which a claimant has suffered shall be conducted and composed in accordance with the "Guides to the Evaluation of Permanent Impairment," (4th ed. 1993), as published by the American Medical Association. If in any particular claim, the examiner is of the opinion that the Guides or the section 6 substitutes cannot be appropriately applied or that an impairment guide established by a recognized medical speciality group may be more appropriately applied, then the examiner's report must document and explain the basis for that opinion. Deviations from the requirements of the Guides or the section 6 substitutes shall not be the basis for excluding evidence from consideration. Rather, in any such instance such deviations shall be considered in determining the weight that will be given to that evidence. An example of an acceptable recognized medical speciality group's own guides is the "Orthopaedic Surgeons Manual in Evaluating Permanent Physical Impairment."

4.2. These revised rules are not applicable to any permanent impairment rating examination performed prior to the effective date of these revised rules. Accordingly, the revised rules are not applicable to any reports or opinions based upon those examinations, in whole or in part, which are submitted either before or after the effective date of these revised rules.

4.3. These rules are ~~not~~ applicable to examinations and opinions provided to the ~~commissioner~~ division by a claimant's treating physician pursuant to West Virginia Code, §23-4-7a(c)(1).

§23-16-5. Evidentiary Requirements.

5.1. The evidentiary weight to be given to a report will be ~~influenced~~ determined by how well it demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by a claimant was arrived at and composed in accordance with the requirements of the Guides.

5.1.1. The report must state the factual findings of all tests, evaluations, and examinations that were conducted and must state the manner in which they were conducted so as to clearly indicate their performance in keeping with the requirements of the Guides. For any evaluation and examination of a compensable back injury, the back examination form previously adopted by the health care advisory panel must be

completed and submitted with the narrative report. A copy of the current edition of the back examination form is attached hereto and is incorporated herein as if fully set forth. A report and opinion submitted regarding the degree of permanent whole body medical impairment as a result of a back injury without a completed back examination form shall be disregarded.

5.1.2. The opinion stated in the report as to the degree of permanent whole body medical impairment must reflect the process of calculation as stated in the Guides so as to demonstrate how the degree of permanent whole body medical impairment was arrived at and calculated.

5.1.3. As stated in the Guides, at page 1/5, section 1.5: "The physician performing an impairment evaluation must provide more than a number or percentage. The physician should provide as comprehensive a medical picture of the patient as possible, using the Report of Medical Evaluation form (p.11) as an outline. If this is done, the person receiving the evaluation will be able to determine how the medical information fits with the nonmedical information and will have the basis for an improved understanding of how the impairment may affect the patient's employability and daily activities." (Insertion in the original).

5.1.4. To the extent that factors other than the compensable injury may be affecting the claimant's whole body medical impairment, the opinion stated in the report must, to the extent medically possible, determine the contribution of those other impairments whether resulting from an occupational or a nonoccupational injury, disease, or any other cause, ~~whether-or-not-disabling~~.

5.2. The qualifications of the expert giving the opinion on the degree of permanent whole body medical impairment must be shown by way of an attachment to the report or by annually filing an appropriate document with the commissioner division. The attachment may be in the form of a resume or curriculum vitae and must be sufficient to qualify the opinion giver as an expert in the field of whole body medical impairment determination. Failure to so qualify the opinion giver shall affect the evidentiary weight given to the opinion and findings in the reports offered by that opinion giver. Those individuals who are conducting examinations and providing reports and opinions for injuries within their field of practice or specialty and who have been trained in the use of the Guides shall be deemed an expert for the purposes of these rules. Additional qualifications such as board certification or eligibility to become board certified shall go to the weight to be afforded the report and opinion. Acceptable training must be accomplished by attendance at a training event or accomplished in a manner which is sanctioned for continuing medical education credit purposes. On an individual-by-individual basis,

consideration will be given to other persons who do not meet the above stated criteria.

5.3. In any claim for occupational pneumoconiosis benefits (section 6.1), for noise induced hearing loss (subsection 6.2), or for mental and emotional loss (subsection 6.3), the application of these evidentiary requirements of this section 5 shall be based upon the guidelines referred to in subsections 6.1, 6.2, and 6.3 in lieu of the Guides. All of the other requirements of section 5 shall be accordingly applied.

§23-16-6. Exceptions to the Guides.

The following portions of the Guides or their successor provisions shall not be used in the determination of the degree of permanent impairment that has been suffered by a claimant for workers' compensation benefits.

6.1. In claims for occupational pneumoconiosis benefits, the provisions of Chapter 5, "The Respiratory System," are exempted from this rule. The provisions of the statute related to occupational pneumoconiosis, rules adopted in accordance with the statute, and policies and procedures adopted by the occupational pneumoconiosis board adequately and separately control the determination of the degree of permanent impairment suffered by such a claimant. The occupational pneumoconiosis board may, in any given case and in its discretion, utilize the Guides to the extent the board deems appropriate.

6.2. In claims for noise induced hearing loss, the provisions of section 9.1, Chapter 9, "Ear, Nose, Throat, and Related Structures," are exempted from this rule. The legislative rule styled "Protocols and Procedures for Performing Medical Evaluations in Noise-Induced Hearing Loss Claims," 85 CSR 13 (1993), were previously promulgated for such claims.

6.3. In claims for mental and emotional loss, the provisions of Chapter 14, "Mental and Behavioral Disorders," are exempted from this rule. ~~Separate standards for such claims have been developed by the health care advisory panel and are attached hereto and incorporated herein as if fully set forth until such standards are promulgated as a rule of their own.~~ The legislative rule styled "Guidelines for Psychiatric Permanent Impairment Evaluations, Evidence and Ratings of Psychiatric Impairment Due to Workers' Compensation Injuries," 85 CSR 22 (1995), shall be utilized in lieu of Chapter 14. It is expressly noted that Chapter 4, "The Nervous System," is not excluded and shall be used when applicable.

6.4. In those claims affected by the provisions of West Virginia Code, §23-4-6(f), the minimum degree of disability stated there shall be applied ~~in lieu of any lesser finding~~.

~~based-upon-any-degree-of-permanent-impairment-which-may-have been-determined-in-accordance-with-the-Guides.~~

6.5. In those claims affected by the provisions of West Virginia Code, §23-4-6(m), the conclusive presumption of total disability stated there shall be applied ~~in-lieu-of-any-lesser finding-based-upon-any-degree-of-permanent-impairment-which-may have-been-determined-in-accordance-with-the-Guides.~~

§85-16-7. Payment for evaluations.

The division shall not make payment to any impairment examiner whose reports, opinions, examinations, or evaluations are not conducted, performed, and composed in accordance with this rule. In the event payment was made prior to a determination that the report, opinion, examination, or evaluation was not conducted, performed, or composed in accordance with this rule, then the amount so paid shall be recovered from the examiner either by way of a direct repayment to the division or by way of an offset against any future sums that may be owed by the division to the examiner for any services rendered for or to the division or for or to a claimant. A later submission or supplement to the report which demonstrates compliance with these rules shall serve to permit such payment.

§85-16-8. Severability

If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall 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.

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

SERIES 16
Guidelines for Permanent Impairment Evaluations,
Evidence, and Ratings

\$85-16-1. General.

1.1. Scope. -- This rule implements the provisions of West Virginia Code, §23-4-3b(b), §23-4-6(i), §23-4-7a(h), and §23-4-8, regarding the procedures, forms, evidence, and standards for the evaluation of claimants and the determination of a claimant's degree of whole body medical impairment for workers' compensation benefits.

1.2. Authority. -- West Virginia Code, §21A-2-6(2); §21A-3-7(b) & -7(c); §23-1-1; §23-1-13, and §23-4-6(i). Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.

1.3. Filing Date. --

1.4. Effective Date. --

\$85-16-2. Purpose of rule.

The purpose of this rule is to implement the provisions of West Virginia Code, §23-4-3b(b), §23-4-6(i), §23-4-7a(h), and §23-4-8, which relate to the development of standards for the rating of permanent whole body medical impairments suffered by claimants as a proximate result of their compensable injuries or diseases. The standards adopted by this rule have been approved by the health care advisory panel and recommended to the compensation programs performance council for its adoption. The rule is applicable to all ratings for permanent whole body medical impairment. The rule is applicable to evidence submitted by any party to a claim, to evidence gathered by the division and to recommendations made to the division by the

interdisciplinary examining board pursuant to West Virginia Code, §23-4-6(j) & -6(n).

§85-16-3. 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.

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. "Guides" means the "Guides to the Evaluation of Permanent Impairment," (4th ed. 1993), as published by the American Medical Association.

3.4. "Permanent impairment" means an impairment that is related to a compensable injury "that has become static or stabilized during a period of time sufficient to allow optimal tissue repair, and one that is unlikely to change in spite of further medical or surgical therapy." Guides at page 1/1. An "impairment" is defined as "an alteration of an individual's health status" and is "assessed by medical means and is a medical issue. An impairment is a deviation from normal in a body part or organ system and its functioning." Id. Reference should also be made to the Glossary beginning at page 315 of the Guides. A claimant's degree of permanent whole body medical impairment is to be determined in keeping with the determination of whole person permanent impairment as set forth in the Guides. For the purposes of these rules, the Guides' use of the term "whole person" impairment is the equivalent of the term "whole body" impairment.

§85-16-4. Adoption of Standards.

4.1. Except as provided for in section 6 of this rule, on and after the effective date of this rule all evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment which a claimant has suffered shall be conducted and composed in accordance with the "Guides to the Evaluation of Permanent Impairment," (4th ed. 1993), as published by the American Medical Association. If in any particular claim, the examiner is of the opinion that the Guides or the section 6 substitutes cannot be appropriately applied or that an impairment guide established by a recognized medical speciality group may be more appropriately applied, then the examiner's report must document and explain the basis for

that opinion. Deviations from the requirements of the Guides or the section 6 substitutes shall not be the basis for excluding evidence from consideration. Rather, in any such instance such deviations shall be considered in determining the weight that will be given to that evidence. An example of an acceptable recognized medical speciality group's own guides is the "Orthopaedic Surgeons Manual in Evaluating Permanent Physical Impairment."

4.2. These revised rules are not applicable to any permanent impairment rating examination performed prior to the effective date of these revised rules. Accordingly, the revised rules are not applicable to any reports or opinions based upon those examinations, in whole or in part, which are submitted either before or after the effective date of these revised rules.

4.3. These rules are applicable to examinations and opinions provided to the division by a claimant's treating physician pursuant to West Virginia Code, §23-4-7a(c)(1).

§23-16-5. Evidentiary Requirements.

5.1. The evidentiary weight to be given to a report will be determined by how well it demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by a claimant was arrived at and composed in accordance with the requirements of the Guides.

5.1.1. The report must state the factual findings of all tests, evaluations, and examinations that were conducted and must state the manner in which they were conducted so as to clearly indicate their performance in keeping with the requirements of the Guides. For any evaluation and examination of a compensable back injury, the back examination form previously adopted by the health care advisory panel must be completed and submitted with the narrative report. A copy of the current edition of the back examination form is attached hereto and is incorporated herein as if fully set forth. A report and opinion submitted regarding the degree of permanent whole body medical impairment as a result of a back injury without a completed back examination form shall be disregarded.

5.1.2. The opinion stated in the report as to the degree of permanent whole body medical impairment must reflect the process of calculation as stated in the Guides so as to demonstrate how the degree of permanent whole body medical impairment was arrived at and calculated.

5.1.3. As stated in the Guides, at page 1/5, section 1.5: "The physician performing an impairment evaluation

must provide more than a number or percentage. The physician should provide as comprehensive a medical picture of the patient as possible, using the Report of Medical Evaluation form (p.11) as an outline. If this is done, the person receiving the evaluation will be able to determine how the medical information fits with the nonmedical information and will have the basis for an improved understanding of how the impairment may affect the patient's employability and daily activities." (Insertion in the original).

5.1.4. To the extent that factors other than the compensable injury may be affecting the claimant's whole body medical impairment, the opinion stated in the report must, to the extent medically possible, determine the contribution of those other impairments whether resulting from an occupational or a nonoccupational injury, disease, or any other cause.

5.2. The qualifications of the expert giving the opinion on the degree of permanent whole body medical impairment must be shown by way of an attachment to the report or by annually filing an appropriate document with the division. The attachment may be in the form of a resume or curriculum vitae and must be sufficient to qualify the opinion giver as an expert in the field of whole body medical impairment determination. Failure to so qualify the opinion giver shall affect the evidentiary weight given to the opinion and findings in the reports offered by that opinion giver. Those individuals who are conducting examinations and providing reports and opinions for injuries within their field of practice or specialty and who have been trained in the use of the Guides shall be deemed an expert for the purposes of these rules. Additional qualifications such as board certification or eligibility to become board certified shall go to the weight to be afforded the report and opinion. Acceptable training must be accomplished by attendance at a training event or accomplished in a manner which is sanctioned for continuing medical education credit purposes. On an individual-by-individual basis, consideration will be given to other persons who do not meet the above stated criteria.

5.3. In any claim for occupational pneumoconiosis benefits (section 6.1), for noise induced hearing loss (subsection 6.2), or for mental and emotional loss (subsection 6.3), the application of these evidentiary requirements of this section 5 shall be based upon the guidelines referred to in subsections 6.1, 6.2, and 6.3 in lieu of the Guides. All of the other requirements of section 5 shall be accordingly applied.

§23-16-6. Exceptions to the Guides.

The following portions of the Guides or their successor provisions shall not be used in the determination of the degree

of permanent impairment that has been suffered by a claimant for workers' compensation benefits.

6.1. In claims for occupational pneumoconiosis benefits, the provisions of Chapter 5, "The Respiratory System," are exempted from this rule. The provisions of the statute related to occupational pneumoconiosis, rules adopted in accordance with the statute, and policies and procedures adopted by the occupational pneumoconiosis board adequately and separately control the determination of the degree of permanent impairment suffered by such a claimant. The occupational pneumoconiosis board may, in any given case and in its discretion, utilize the Guides to the extent the board deems appropriate.

6.2. In claims for noise induced hearing loss, the provisions of section 9.1, Chapter 9, "Ear, Nose, Throat, and Related Structures," are exempted from this rule. The legislative rule styled "Protocols and Procedures for Performing Medical Evaluations in Noise-Induced Hearing Loss Claims," 85 CSR 13 (1993), were previously promulgated for such claims.

6.3. In claims for mental and emotional loss, the provisions of chapter 14, "Mental and Behavioral Disorders," are exempted from this rule. The legislative rule styled "Guidelines for Psychiatric Permanent Impairment Evaluations, Evidence and Ratings of Psychiatric Impairment Due to Workers' Compensation Injuries," 85 CSR 22 (1995), shall be utilized in lieu of chapter 14. It is expressly noted that chapter 4, "The Nervous System," is not excluded and shall be used when applicable.

6.4. In those claims affected by the provisions of West Virginia Code, §23-4-6(f), the degree of disability stated there shall be applied.

6.5. In those claims affected by the provisions of West Virginia Code, §23-4-6(m), the conclusive presumption of total disability stated there shall be applied.

§85-16-7. Payment for evaluations.

The division shall not make payment to any impairment examiner whose reports, opinions, examinations, or evaluations are not conducted, performed, and composed in accordance with this rule. In the event payment was made prior to a determination that the report, opinion, examination, or evaluation was not conducted, performed, or composed in accordance with this rule, then the amount so paid shall be recovered from the examiner either by way of a direct repayment to the division or by way of an offset against any future sums that may be owed by the division to the examiner for any services rendered for or to the division or for or to a claimant. A later submission or supplement to the report which

demonstrates compliance with these rules shall serve to permit such payment.

§85-16-8. Severability

If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall 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.