WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

FILED

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

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

CITE AUTHORITY: WVC, § 21A-2-6(2); 21A-3-7(b) 8-7(c); 23-1-1; 23-1-13; 23-1-15; and 23-4-6(i)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____
CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WVC, § 21A-3-7(c)

AMENDMENT TO AN EXISTING RULE: YES X, 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 ADOPTED: _____

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS February 26, 1996

Andrew N. Richardson
Authorized Signature

9.20

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

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner

January 21, 1996

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, WV 25304

Dear Secretary Hechler:

RE: "Guidelines for Permanent Impairment Evaluations, Evidence, and Ratings," 85 CSR 16 - Revision

Enclosed herewith, please find the necessary documentation for the filing of this revision. This rule is exempt from the legislative rule making process pursuant to West Virginia Code § 21A-3-7(c). This rule has my approval as the Commissioner of the Bureau of Employment Programs.

Sincerely,

Andrew N. Richardson
Commissioner

w/ Enclosures

ANR/JHK

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, West Virginia 25339-3922
Attn: John H. Kozak, Director, Legal Services Division

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$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 limited 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: January 22, 1996

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

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. -- January 24, 1996.

1.4. Effective Date. -- February 26, 1996.

§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.

MEETING ATTENDANCE SHEET

MEETING OF MAY 22, 1995

COMPENSATION PROGRAMS PERFORMANCE COUNCIL

YOUR NAME (Please Print)	WHO YOU REPRESENT (Please Print)	DO YOU WISH TO SPEAK? (Y/N)
Tim Leach	Greene, Ketchum, Bailey, + Tweel	No
Babette Robinson	ACORDIA of WV	No
Lynn C. Mostert	Bowles Rice McDavid Graff + Love	No
Pam Jarvis	ESC	no
Lois J. Atkins	ESC	no

NOTE: IF YOU WISH TO BE PUT ON A MAILING LIST TO RECEIVE NOTICES OF FUTURE MEETINGS, PLEASE INCLUDE YOUR MAILING ADDRESS. YOU NEED NOT FURNISH YOUR ADDRESS AGAIN IF YOU ARE ALREADY ON THE LIST.

BEFORE THE WORKERS' COMPENSATION PERFORMANCE COUNCIL

IN RE: PUBLIC HEARING ON THE PROPOSED GUIDELINES FOR PERMANENT IMPAIRMENT EVALUATIONS, EVIDENCE AND RATINGS

TRANSCRIPT OF PROCEEDING had at the public hearing in the above-referenced matter, held on Monday, May 22, 1995, at 10:20 a.m. in the Days Inn Convention Center, Flatwoods, West Virginia, pursuant to notice.

ANGELA A. ROBINSON, Subcontractor

REBECCA L. BAKER
Certified Court Reporter
2300 Shadyside Road #5
St. Albans, West Virginia 25177
(304) 727-2965

APPEARANCES FOR THE WORKERS' COMPENSATION PERFORMANCE COUNCIL

MR. PAUL E. THOMPSON

MR. DAN SCHERDER

MR. TOM ROTENBERRY

MR. THAD EPPS

MR. FRED TUCKER

MR. RICHARD HUMPHREYS

MR. DAVID HARRIS

MR. EVERETT SULLIVAN

MR. ANDREW RICHARDSON

MR. JOHN KOZAK

* * * * * * * * * *

I N D E X

May 22, 1995.

MR. RICHARDSON: I would like to call to order this public hearing of the Compensation Program's Performance Council. The issue before the council today are amendments to Title 85, Series 16, legislative rules and guidelines for permanent impairment evaluations, evidence and ratings.

These regulations were adopted last fall by the compensation program's performance council to be used in the determination of the extent of the disability suffered by an injured worker. These regulations substantively were effective February 1st as conducted by physicians throughout West Virginia and on February 10th the West Virginia State Code was changed to base permanent partial awards solely on impairment as opposed to the concept of disability. That's necessitated the amendments that are before us today.

The date and time of the public comments

having arrived, I've reviewed the list of attendees at the meeting and would note that no one wishes to speak to those regulations. I have, however, asked John Kozak, the director of legal services for the West Virginia Bureau of Employment Programs, to briefly provide an overview to the changes that the regulations propose.

If anyone shows during that time of his comments we will certainly welcome their input. Otherwise, we'll adjourn until 1:00 for the performance council meeting.

MR. KOZAK: Thank you. If you have a copy of the revision in front of you, strike through and then underline what I think may be best to follow. Briefly go through there; it's not very long in the first place. As the commissioner mentioned, one of the primary reasons for the revision was the passage of 15 and its requirements to the whole body medical impairment as the standard for disability cases and the permanent total disability cases.

There was some thought that because of the specific mention and Senate Bill 250 doing that, that the impairment rules as previously thought may not be the rules this statute calls for. I think that briefly covers -- rather too much of a hair splitting argument but nonetheless we're going through the exercise. It also helps just to clean up the rules.

As a result on Page 1 in Subsection 1.1, regarding the procedures, forms, evidence, and standards which is placed in Senate Bill 250 language where the impairment rule was discussed. And the change goes on to note that it's for the evaluation of claimants and the determination of the claimant's degree of whole body medical impairment. And the operative phrase there is whole body medical impairment. This is the new standard and the rule throughout to reflect that that is the standard of physicians and others have to follow.

There will be a new filing date, effective date, which I've struck through. And of course, 1.5 was

put in there originally to explain why the rules related to implementation and what not and that later was no longer necessary. 1.5 is no longer necessary.

At the top of Page 2, the remainder of Section 2 there, one paragraph. The main point there is that the old rule, the current rule refers to disability in addition to impairment and disability factors are no longer pertinent for permanent partial ratings. That's the reason why the one sentence in the middle is struck through and then it goes on to note that the rules to be used by the Senate Bill 250 and interdisciplinary examining board in determining the 50 percent threshold requirement as it evaluates those for permanent total awards.

At the bottom of Page 2 there is a section there, 3.3. Striking the very end of the sentence there where it talks about guides, where it says "or such later edition as may have then been published." There's a rather technical argument that's been made about something that hasn't been established yet by

another body. And if the rule is ever amended -- or I should say the guides are ever amended -- it will be necessary to come back to the performance council and amend this rule.

Basically there's a body of case law that says you shouldn't do that. So, that's basically a correction of the original version of that.

3.4 brings into -- people's attention specifically to the glossary in the rule itself and the impairment guidelines themselves in Page 315 of the guidelines as published and specifically what's noted there is that's where they define -- they refer to whole person impairment, which is saying the rules definition of whole body impairment.

5.1.4 on Page 4 it relates a lot of reference to the same as opposed to impairment.

On Page 5, in Subsection 6.1, the original rule has there plus the sentence that's underlined added and that was just to make clear that the occupational pneumoconiosis board can use the AMA

Guides. The original rule exempted them from doing so since they have a separate rule of how they accept OP awards as well their practices.

I talked to Dr. Walker on a couple of occasions now and they do have to make a change in their process. Before their rulings have been based upon the degree of pulmonary impairments and that has to change whole body impairment now as well. And I thought at the time that this was put together that the board should choose to go to the AMA guides for that determination and this would allow them to do so but not require them to do so.

Also on Page 5, 6.3, the original version of this contained as an attachment the evaluation guide for mental and behavioral disorders. Since then that guide has been amended by the health care advisory panel and is now out for public comment, has been out for public comment as a separate rule.

Comment period ended for that and the comments have now been collected and given back to the health

care panel for their review and advice to the claim's committee.

So, basically what 6.3 does is takes that subject matter out of this rule and into another rule now and they will be consider it later.

6.4, bottom of Page 5 carries over. It's also a Senate Bill amended. You'll recall that in Section 23-4-6(f) of the code, there's this rather recent list of what happens if different pieces of the body are lost and how much each is to be rated. The language to that section reads that numbers that were given included a minimum amount of permanent partial to be awarded. Senate Bill 250 changed that to say that that is the amount that is to be awarded, which puts West Virginia in the same scheme with most other states that have a schedule like that.

Talking to Peter Barkley (phonetic) he indicated that we were the only state that he was aware that had a schedule to a minimum and not a set amount. So, Senate Bill 250 put us into a set amount. So, the

reference to minimum there involves the rest of that sentence. If it is a scheduled injury, then that's the amount that you get and that's all. There is no more impairment rating.

And, of course, those injuries which automatically become permanent total awards and losses, both limbs, both eyes, that sort of thing. And there was a reference in the rule that needs struck out. This revision does not apply to that. That is still a conclusive presumption. And if you're misfortunate enough to fall under 6(m), you're still going to get the permanent total award.

There's one I jumped over and I want to go back and pick up. On Page 3, 4.3, that little section is dealing with the statute's section 7a(c)(1). That is the statute in one place provides that a treating physician can give an opinion of up to 15 percent permanent partial impairment disability and that it has to be accepted by the division without further question.

The change here is saying that the impairment rule will apply to the physicians putting together that 15 percent rating so that they do have to follow the AMA guides and it has to be impairment ratings as opposed to disability ratings. So, that's the direct change from what the original rule had said because the original had said that the impairment rule did not apply because a physician was taking into account the other disability factors. Since those are no longer part of the code's definition of what permanent partial is, then it's necessary to reverse 4.3 language and say now that the term does not apply to that.

That's really all the comments I have on the rules. I note that they are increasingly being used and litigated over a number of states. Texas most recently coming out of its 1991 Reform Act has as part of its program, eluded whether or not to use the AMA guides. And as a matter of fact, the AMA has intervened in Texas to allow them to do so. The situation there was a bit different in the sense that they were saying that

there would also be a disability as well as impairment and I think our statute limits it now strictly to impairment.

But anyway, the Texas Supreme Court ultimately upheld the Texas Statute on that. And I think there are something like 14 or 15 other states that are either by statute or regulations adopting the guides for their impairment rating systems. Any questions?

MR. SULLIVAN: Of the states that have -- is there any -- do you have any opinion as to how this will work?

MR. KOZAK: I think any system like this is going to have its faults. Even the AMA states in the rules themselves that they're not scientifically completely satisfied and they're continuing to move forward.

I think that some of the problems that the other states have had is when they tried to apply them too rigidly. And the revision continues allowing some individual physicians to use some other system as long

as the physician explains why its necessary. And I think having that loophole, if you will, that a physician can use and explain why with John Doe's situation the rules don't make any sense and allow us to handle that.

I think that overall the Fourth Edition has been proven to be more conservative than the previous edition since the numbers have come out in most areas. One of the things that our staff is looking at is the computer program put together by which results of the evaluations -- physical measurements have been put together and put the numbers in the system and it comes out the range for evaluation results. And that is taking some of the more negative uses of the factors out of the picture and allowing the type of range --.

MR. RICHARDSON: Paul, go ahead.

MR. THOMPSON: John, in the letter from Greene, Ketchum, Bailey and Tweel on April the 3rd, they bring out some fine points there. Senate Bill 250 was intended to reduce the expenditures of the Workers'

Compensation Fund and reading this letter and the examples that he has given under the final paragraph and last paragraph of the summary, if what they have listed in this letter then it seems that there is confusion and not particularly reduction in finances pertaining to doctors and the examination. It seems to me like that's going increase if the substance of this letter is right and I would like to have an exclamation if this letter does reflect the truth as to this bill.

MR. KOZAK: I think as I mentioned overall, the guides are more conservative as far as the outcome. I think there are specific areas where they will result in greater awards as Mr. Leach has set out in the letter here. It is reflective of that. They have changed, for instance, how pain is dealt with in some of the other areas. They have two different ways now, a preferred way and a secondary way for certain orthopedic injuries that happen. I think the best I can respond to that is that the AMA guides are the best available sources in the literature at this point.

There's not an alternative to it, other than allowing doctors to go back to their own individual systems and I believe one of the reasons why that council adopted the initial -- was to try to come with some sort of standardization of systems so that folks are rating similarly and have similar injuries rather necessarily one push benefits down and one push benefits up.

Again, as I mentioned to Mr. Epps, I think the loophole that's in the rule that allows the exceptional case to be dealt with exceptionally rather than trying to put the square peg through a round hole, other deal with some of the inherent affects that still remain in the rulings.

MR. THOMPSON: What happens to paragraphs one, two and three on the first page? Has that been clarified?

MR. KOZAK: As I was mentioning the AMA does not like to have a rule to use as a final disability determination system in the sense of having disability

include the vocational factors and the other things beyond just physical impairment. That's what the Texas litigation was all over.

Again, as I mentioned, the Texas Supreme Court ultimately did uphold using the rules. The most recent cases of jurisdiction have also upheld using them. I think as long as there's a flexibility left for individual peculiar cases to be dealt with peculiarly that the courts should continue to allow that. You know, there is at least one case in West Virginia which arguably allow the agency to doctor them by practicing, not by rules of the court as we touched on earlier, as far as --

MR. THOMPSON: Give me an explanation of the summary.

MR. KOZAK: An explanation of what?

MR. THOMPSON: The summary of that letter from the attorney.

MR. KOZAK: I think part of what is going on is the impairment rating measures the degree of effect

on the body itself. The Fourth Edition treats the outcome of the surgery differently than they did in the Third Edition. They don't give bad outcomes of surgery as much weight as the Fourth Edition does. And I can have folks come up with the exact reasoning for that. I don't have it with me as to why they made that change but that wasn't specific policy when they put the Fourth Edition together. They weren't as concerned with the badness or goodness of the outcome of surgery itself so much as the remaining impairment. To function I should say. Now, as to the scientific basis for doing that, I'll have to try to find that for you.

MR. THOMPSON: Will they be relying on the Third or Fourth Edition?

MR. KOZAK: The rule will be relying upon the Fourth as the current does.

MR. THOMPSON: Has consideration for this been applied to final argument for public hearing today?

MR. KOZAK: Well, this is the only comments

we've received so far as far as written comments and we're not receiving any public comments today. Mr. Leach is present and may want amplify on his letter or respond to what I'm saying about it.

MR. THOMPSON: I'm sorry I didn't know that was Mr. Leach.

MR. KOZAK: The period doesn't close until the 5th and we'll be going through the claim's committee and let them respond to that. And I suspect the claim's committee will be going through Mr. Leach's letter quite specifically. And I'll be contacting Health Care Panel people to try and get some specific answers to those questions.

MR. THOMPSON: Thank you.

MR. SULLIVAN: Comment period end June 5.

MR. KOZAK: Yes. June 5th at 5 o'clock.

MR. RICHARDSON: Any other questions for John? Dan?

MR. SCHERDER: No.

MR. RICHARDSON: David?

MR. HARRIS: No.

MR. RICHARDSON: Everett?

MR. SULLIVAN: No.

MR. RICHARDSON: John, I have one question. 6.5 refers to the -- includes conclusive presumptions under 23-4-6(m). I want you to conform or repute my understanding of that. A person does not need to literally lose an arm and a leg or to literally lose both legs or whatever. However, if it's an issue of their affective usage.

MR. KOZAK: As I recall the wording is the use of, loss of use of and I know that if you have -- a paraplegic for instance can have a loss of use of both legs and would fall under 23-4-6(m) as far as permanent total. There are cases out there that don't fall under that provision as far as my understanding of the policy. Someone may have a stroke, where that would leave one side of the body paralyzed, an arm or leg for instance, and they would still qualify under 6(m) if the stroke were somehow work induced.

MR. RICHARDSON: The reason I'm bringing that to your attention is the example Tim used. He gave three examples where the AMA guides and this is an indicative issue. That the loss of both legs that they are in three different places in the guides and I would point out that our law would apply to all three of those as I understand it.

MR. KOZAK: Right. The rules as far as what the statute specifically addresses in 6(m), the statute numbers is controlled. You don't use the AMA guides so that if you lose a limb -- one place -- I for forget the number -- that that's the number that you're going to result in if you lose both legs. 6(m) is going to apply. But when you get to the guide for basically nonscheduled injuries, which is anything not contained in 6(m) or 6(l). Most other states that have been in a system like this for some time and never had the minimum language, the battle has always been between the employer and the claimant to get the people off of a scheduling order. Try to find some reason why this

particular injury -- even though it looks like it involves a loss of an arm for instance but really has something else going on with it in addition that should be treated as a scheduled injury.

I suspect what's going to happen we're going to be joining the rest of our states and having battles over that and get away from just doctors hollowing at each other over what a specific injury --.

MR. RICHARDSON: My memory of our schedule is in comparison to the guides as a general rule our upper extremity use was lower in the guides generally. The lower extremities on this was higher in the guides.

MR. KOZAK: As a general rule, that's correct.

MR. RICHARDSON: In addition to that, one area where we are distinguished from some states is that some states have actually begun to try to schedule some soft-tissue injuries.

MR. KOZAK: That's correct.

MR. RICHARDSON: And we have been meeting with the injured back or the injured knee or things of that nature. The joints -- they came up with a scheduled amount. This is what you get under their code. And we have not attempted to do that. We do not intend to amend the schedule itself for the legislature.

MR. TUCKER: After these Series 16 and comments about that has been discussed. Has there been discussion with HCAP about the possibility of increased medical costs due to the AMA guidelines?

MR. KOZAK: I think there will be an increase in cost of the evaluation. Again, the guide is not to be used for treatments. The evaluations will be more time consuming for the physician if they do them correctly so that they will be more costly.

I'm trying to remember what the original physical notes, the bill were for the upper back. I'll be the first to agree that there was an amount of money put into that physical note that projected that

increase in cost. There shouldn't be any change as far as that from this version and the first version of the rule because they're still the same guides. There shouldn't be a change in costs. But there will be more cost as of February 1st of this year. As far as the outcome, again, as I said a couple of times generally they're going to be resulting in lower ratings than before but not across the boards. There are exceptions in some areas.

MR. TUCKER: I'm thinking about maybe involving more specialists than they would when getting evaluations. You know, we got doctor guidelines -- AMA -- is HCAP going to have any input into that? We may have more consultation with other doctors.

MR. KOZAK: Well, one purpose in standardizing the evaluation in the opinion process of the guides is, of course, that there should be a reduction in the number of different evaluations that are needed. If it works the way anticipated and has been working to my knowledge, after several months

operating under the first version of this, there has been less of a need for so many doctor reports.

I think that as for this software program that I mentioned, there's more wide use by the division and more widely used outside the division. And that will take a lot of the argument out as to how the results of the evaluations should be used to calculate the final numbers. As far as more experts or not -- one of the things I think that you have to concentrate on is that since we're talking about an evaluation or impairment as opposed to treatment of that sort of thing, the need for a state board certified orthopedist or orthopedic type of evaluation isn't as necessary as it is to have somebody who's qualified to be able to use the guides themselves.

So for instance, I would anticipate that a chiropractor could become very proficient in knowing how to apply the guides, taking measurements, and coming up with a final result and would again through training, experience and that sort of thing become more

credible than an orthopedist for instance.

Of course, that wouldn't be true as far as treatment and stuff like that. Focusing upon what the specific issue is, I would see no problem why a general practitioner type, chiropractor type couldn't become as proficient in the use of the guides as an orthopedist or nurse or whatever.

MR. TUCKER: What about the division? Are they going to have any anticipation of being able to rely on any type of specialist to agree of disagree with the impairment rating that Dr. Jones gives?

MR. KOZAK: You might want to address that to Mr. Burdette in the afternoon session. What I can gather second and third hand is that they recognized, stated that it was less of a necessity for referring to the specialists for this impairment rating itself. At least in our general type of cases.

MR. TUCKER: Thank you.

MR. RICHARDSON: Other questions for John? John, thank you very much.

Lois, Pam, Beth, Lynn, Tim, Pam last chance for a bite of the apple if you would like to provide any comments.

Okay. Then I'm going to declare the public hearing adjourned at approximately 11:08.

(Whereupon, the deposition was concluded)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

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

Angela A. Robinson

ANGELA A. ROBINSON, Court Reporter
Subcontractor for Rebecca L. Baker,
Official Reporter

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April 3, 1995

COMPENSATION PROGRAMS PERFORMANCE COUNCIL
C/O JOHN H. KOZAK
P O BOX 3922
CHARLESTON WV 25339-3922

RE: PROPOSED REVISED RULES - SERIES 16
GUIDELINES FOR PERMANENT IMPAIRMENT RATINGS

Dear Members of the Council:

I would like to express my comments regarding this rule proposed by your committee. My objection concerns the exclusive use of the A.M.A.'s "Guides to the Evaluation of Permanent Impairment" for determining Permanent Partial Disability awards.

I recently attended an A.M.A. conducted seminar in Charleston concerning the use of the "Guides". The comments of the speakers - many of whom had authored parts of the "Guides" - were very informative and you should be aware of them.

First: the A.M.A. insists that the "Guides" must not be used to determine monetary impairments. This statement is emphasized in the introduction and attempts in other states to so utilize the "Guides" have resulted in ongoing litigation. The "Guides" are a diagnostic medical tool and are not intended for monetary rating purposes. Misuse of this tool for such purpose corrupts the tool and ruins its medical benefit for which it was intended. Speaker after speaker stood up and emphasized that these "Guides" are "not the Bible".

Second: the "Guides" are full of errors and mistakes which have not been fully identified and corrected.

Third: the "Guides" are internally inconsistent. Depending upon which body part is the location of the injury, identical symptoms and findings result in different impairment ratings. For example: the amputation of both legs results in a 64% impairment

rating, but the loss of use of both legs confining a patient to a wheel chair is an 80% impairment, and paraplegia due to spine injury is a 70% impairment. That is just one of many examples of inconsistencies.

Fourth: the current edition allows the examining physician to chose which of several "models" for determining impairment are to be used. The results of the impairment rating fluctuates widely depending upon which model is used. However, the "Guides" does not dictate which model must be used.

Fifth: the Guides require so many more diagnostic tests in order to determine impairment that the costs of examinations for the Division, the employer, and the claimant are going to increase multi-fold. For instance, full flexion and extension spine x-rays are required for spine injury. My clients currently pay my examiners in the neighborhood of $300-$350 per exam. I was approached at the seminar by a doctor who is going to be doing exams in full compliance with the "Guides" and he is going to charge $2500-$4000 per exam depending upon how many specialists must be consulted. I can only assume that employers' and Commissioner's examiners will have similar charges increases. Did we really intend to take money away from overcharged employers and from injured workers and give it to disability examiners?

Sixth: the exclusive use of the "Guides" is going to result in <u>increased</u> litigation, not less litigation as anticipated. The exam procedures demanded by the "Guides" are so complicated, numerous, and detailed that lawyers will have to cross-examine many more doctors about their examinations. That means more money to doctors for witness fees. Combining the exclusive use of the "Guides" with the 50% threshold for Total Disability application and with the new limitations on reopenings makes every 1% rating during a claimant's working life vitally important to claimant and employer alike. Therefore, many small awards that would not have been protested in the past will now be subject to litigation. That results in more money paid by the employers to their lawyers and more money paid by the injured workers to their lawyers.

Seventh: the examining physicians in attendance at the seminar were unable to agree on the "Guides" impairment ratings of model cases. Even without the disagreement over which "model" of impairment to use, doctors are not going to be in the uniformity of opinion that the advocates of the "Guides" predict.

Eighth: according to the authors speaking at the seminar, the "Guides" make no allowance for pain. Pain is built into the Diagnoses Related Estimate (D.R.E.) model and no allowance is permitted for the medical fact that pain varies from individual to individual and is impairing in and of itself.

Finally: the "Guides" have many anomalies in them that result in unfair ratings for both employers and claimants. For instance, on spine injuries the results of surgery - either positive or negative - are not included in the impairment rating (see page 100). If, hypothetically, a patient had a cervical disc injury which was 15% impairing and the surgery was a bad outcome resulting in paralysis, that patient would still have only 15% impairment under the "Guides". Contrarily, if the same patient had a marvelous result and ended up completely symptom free and back to work, the impairment would still be 15%. Surely neither the employer nor the injured worker would believe the results to be fair in one case or the other.

Another example of anomalies: the "Guides allow for up to 20% impairment for sexual dysfunction caused by injury. That component has almost never been a portion of disability awards in the past.

In summation, relying exclusively on the "Guides" corrupts a medical tool by misusing it. The result will be unfair ratings for both sides, increased costs for both sides, more payments to doctors, more time in court, awards for conditions not traditionally covered by disability awards, and denial of awards for impairing conditions.

Thank you for considering our comments.

Very truly yours,

Timothy G. Leach

tgl

RESPONSE TO COMMENTS
85 CSR 16 ---- REVISION
"GUIDELINES FOR PERMANENT IMPAIRMENT EVALUATIONS, EVIDENCE, AND RATINGS"

The only comment received on this revision was a letter dated April 3, 1995, from Mr. Timothy G. Leach, Esquire, of the law firm of Greene, Ketchum, Bailey & Tweel. A copy of the letter is attached. Although a public hearing was held on May 22, 1995, at which several members of the public were in attendance, no comments were presented. The only person to testify at the public hearing was the Director of the Bureau's Legal Service Division who explained the rule and addressed questions posed by members of the Compensation Programs Performance Council. A copy of the transcript of that public hearing is attached.

With regard to Mr. Leach's comments, the points he raised were also raised with regard to the original filing of the predecessor version of this rule. In addition, the same points were raised when the state of Texas adopted the "Guides to the Evaluation of Permanent Impairment," (4th edition 1993). In a test case, the Texas Supreme Court addressed each of the points and held against each of them. Texas Workers' Compensation Commission vs. Garcia, 893 S.W.2d 504 (Texas 1995.

For the those reasons, the objections to the rule were rejected and the rule as submitted was approved without changes.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

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94 NOV -3 AM 11:47 REP-LEGAL DIVISION

TO: John Kozak

AGENCY: Workers' Compensation

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: November 1, 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: 16 TITLE: 85 Workers' Compensation

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: John H Kozak

TITLE OF PERSON SIGNING: Director, Legal Services Division

DATE: November 18, 1994

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

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

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