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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code §§23-1-1a(j)(3); 23-4-1 et seq.

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 RULE BEING PROPOSED: 16

TITLE OF RULE BEING PROPOSED: "Workers' Compensation Allocation of Employer Liability in Occupational Pneumoconiosis, Hearing loss and Occupational Disease Claims"

DATE OF PUBLIC HEARING: October 20, 2005 TIME: 1:00 p. m.

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

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T. J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

Fax# (304) 926-5372

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

$4.00

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

Office of General Counsel
4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone Number (304) 926-3423
Fax Number (304) 926-5441

September 13, 2005

The Honorable Betty Ireland
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 16
"Workers' Compensation Allocation of Employer Liability in Occupational Pneumoconiosis, Hearing Loss and Occupational Disease Claims"

Dear Secretary Ireland:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. The Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 16 for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 16
Workers' Compensation Allocation of Employer Liability in Occupational Pneumoconiosis, Hearing Loss and Occupational Disease Claims

Pursuant to Senate Bill 1004, First Special Session, 2005, the Workers' Compensation Commission may terminate. Thereafter, Workers' Compensation insurance in West Virginia will be provided through the successor to the Commission and other private insurance carriers.

This rule is amended to address the termination of the Commission and to transition the responsibility and process for allocation of employer liability in occupational pneumoconiosis, hearing loss and occupational disease claims to the Office of the Insurance Commissioner.

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 16: Workers' Compensation Allocation of Employer Liability in Occupational Pneumoconiosis, Hearing Loss and Occupational Disease Claims

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Avenue, S.E.

Charleston, WV 25301

1. Effect of Proposed Rule

	Annual		Fiscal Year		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	0	0	0	N/A	N/A
PERSONAL SERVICES	0	0	0	N/A	N/A
CURRENT EXPENSE	0	0	0	N/A	N/A
REPAIRS & ALTERNATIONS	0	0	0	N/A	N/A
EQUIPMENT	0	0	0	N/A	N/A
OTHER	0	0	0	N/A	N/A

2. Explanation of above estimates:

The proposed rule addresses the procedures and responsibilities related to allocation of occupational pneumoconiosis, hearing loss and occupational disease claims. The above estimates are based on the assumption that the rule becomes effective in the current fiscal year (FY'06). There should be no significant change in the estimated costs associated with the Workers' Compensation Commission as the rule identifies the Office of the Insurance Commissioner as being responsible for determining and issuing claims allocation orders. Subject to the governor issuing the proclamation set forth in chapter twenty-three, article 2C of the Code of West Virginia that terminates the Workers' Compensation Commission on or before 12/31/05, the Office of Insurance Commissioner will become responsible for issues related to claims allocation orders and determining the responsible administrator for each allocated claim, beginning on 1/1/06.

3. Objectives of this rule:

This rule establishes guidelines for self-insured employers and private carriers to follow in requesting the Office of the Insurance Commissioner to allocate occupational pneumoconiosis, hearing loss and occupational disease claims among chargeable employers and to designate the employer or carrier responsible for administration of individual allocated claims. It also establishes the procedures for any affected party or parties to follow when filing protests of allocated orders with the Office of the Insurance Commissioner.

Rule Title: Title 85 Series 16: Workers' Compensation Allocation of Employer Liability in Occupational Pneumoconiosis, Hearing Loss and Occupational Disease Claims

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that the there will be no direct economic impact from the rule changes.

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

It is expected that there will be no impact from the rule changes.

C. Economic Impact on Citizens/Public at Large.

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

Date: September 13, 2005

Signature of Agency Head or Authorized Representative

Gregory A. Burton
Executive Director, Workers' Compensation Commission

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 16
WORKERS' COMPENSATION
ALLOCATION OF EMPLOYER LIABILITY IN OCCUPATIONAL PNEUMOCONIOSIS, HEARING LOSS AND OCCUPATIONAL DISEASE CLAIMS

§85-16-1. General.

1.1. Scope. --This exempt legislative rule provides for the allocation of liability for certain types of workers' compensation claims.

1.2. Authority. -- W.Va. Code §§23-1-1a, 23-4-6b(j), 23-4-8a, 23-4-8b, 23-4-8c, 23-4-8c(f), 23-4-15b(b), and 23-2C-20(d). Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission 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.

1.3. Filing Date. --

1.4. Effective Date. --

§85-16-2. Purpose of Rule.

This rule provides for procedures concerning the allocation of occupational pneumoconiosis, occupational disease and hearing loss claims among employers.

§85-16-3. Definitions.

As used in this rule, the following terms, words, and phrases have the meanings stated unless in any instance where such term, word, or phrase is employed and the context expressly indicates that another meaning is intended.

3.1. "Allocated claims" means claims alleging occupational pneumoconiosis, hearing loss or any other occupational disease in which more than one employer is responsible for payment of benefits.

3.2. "Chargeable employer" means any employer identified as responsible for payment of benefits in a specific claim.

3.3. "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

3.4. "Commission" means the Workers' Compensation Commission created pursuant to the provisions of W.Va. Code §23-1-1.

3.5. "Date of last exposure" means the last day of harmful (hazardous) exposure that a claimant experiences with a chargeable employer in a claim for occupational pneumoconiosis, hearing loss or any other occupational disease. A claimant will have a different date of last exposure for each named chargeable employer in an allocated claim. Each date of last exposure will constitute the occurrence event that triggers insurance coverage for individual employers under occurrence-based workers' compensation policies. The date of last exposure with the chargeable employer who most recently employed the claimant will be the date utilized to determine the timeliness of the claim filing and to identify the claim for administrative purposes.

3.6. "Hazardous exposure" means exposure to conditions or substances in sufficient quantity, duration, concentration and (when appropriate) force to result in an abnormal physical condition that is generally recognized by peer reviewed medical literature as being a physiological result of such exposure. If an employer submits credible evidence as part of the application process demonstrating that it has been in compliance with OSHA and/or MSHA permissible exposure levels for the exposure alleged by the injured worker, then the Office of the Insurance Commissioner shall determine that the exposure alleged by the injured worker was not hazardous and 1) does not suffice to be considered in establishing the exposure requirements for a valid claim for occupational pneumoconiosis, occupational disease or hearing loss, and 2) does not suffice to establish exposure for which an employer may be assessed liability. Periods for which employees can demonstrate by credible evidence that the employer's testing data does not accurately reflect conditions as they existed in the work place may be included by the Office of the Insurance Commissioner in the period of exposure which the claimant has alleged to be harmful.

3.7. "Insurance Commissioner" means the insurance commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code.

3.8. "Occupational disease" means hazardous exposure in the workplace which can result in an occupational injury and/or occupational disease. Exposure without resulting pathophysiologic changes does not constitute an occupational injury or an occupational disease, unless the exposure is capable of causing a life-threatening disease that is amenable to prophylactic treatment or therapy prior to the manifestation of symptoms. This is not to be confused with the concept of medical monitoring based upon a fear of injury arising out of an alleged hazardous exposure. Fear of injury does not constitute an occupational injury or disease and medical monitoring is not a benefit or expense covered by chapter twenty-three of the West Virginia Code.

An occupational disease is distinguished from an exposure-induced occupational injury based upon the timing of the onset of related-symptoms and the timing of the resolution of those symptoms. Exposure-induced occupational injuries are typically the result of one-time, limited-duration hazardous exposures that create immediate acute pathophysiologic changes. It is most common for such changes to resolve completely in a period of days, weeks or months. Occupational diseases can result from isolated or prolonged hazardous exposures, but they create chronic pathophysiologic changes that develop over time and that are more likely to result in prolonged sequelae and/or permanent physical impairment. An exposure-induced occupational injury can progress into an occupational disease if it is accompanied by pathophysiologic complications.

3.9. "Private carrier" means any insurer, including the successor to the Commission, authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.10. "Responsible administrator" means he carrier or self-insured employer that administers a claim in accordance with chapter twenty-three of the West Virginia Code and its implementing rules, including issuance of authorization for payment of all benefits and expenses. In allocated claims, the employer with the largest share of allocated liability, or its carrier when the employer is not self-insured, will be designated by the Office of the Insurance Commissioner as the responsible administrator. If the employer with the largest share of allocated liability does not have insurance coverage for the assigned liability or is determined by the Office of the Insurance Commissioner to be incapable of properly administering an allocated claim, the Office of the Insurance Commissioner will designate the employer with next largest share of allocated liability, or its carrier when the employer is not self-insured, as the responsible administrator.

3.11. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.12. "This rule" means this legislative rule designated as 85 C.S.R. 16, "Allocation of Employer Liability in Occupational Pneumoconiosis, Hearing Loss and Occupational Disease Claims."

§85-16-4. Filing a completed application.

4.1. Filing. All occupational pneumoconiosis, hearing loss and occupational disease claims will be filed by claimants with the last employer with whom the employee who is the subject of the claim is alleging hazardous exposure.

4.2. Completed application. A properly completed application must include a listing by the claimant of all alleged hazardous exposures, including the type of exposure, the extent and duration of each exposure with each employer. The application must also list the symptoms experienced by claimant as a result of each exposure, including date of onset, duration, and severity.

§85-16-5. Request for allocation.

5.1. The employer or its carrier will assess a completed application for potential allocation of liability with other employer(s). If the employer or its carrier determines that the employer is not responsible in whole or in part for the claimed liability, it will file a "request for allocation" with the Office of the Insurance Commissioner.

5.2. Any request for allocation must be filed with the Office of the Insurance Commissioner by the employer or its carrier within five (5) days of its receipt of a completed application. The employer or its carrier may file supplemental information with the Office of the Insurance Commissioner at any time prior to the issuance of an allocation order. The failure of the employer or its carrier to file a request for allocation within the applicable five (5) day period will not affect the right of the employer or its carrier to protest the allocation order when it is issued.

5.3. The request for allocation will explain why the submitting employer or carrier believes that allocation is appropriate.

5.4. The request for allocation will be accompanied by the completed application and any other employment or exposure information developed by the submitting employer or carrier. The request for allocation will also provide the date when the claimant's completed application was received by the employer or its carrier, whichever is earlier.

5.5. The Office of the Insurance Commissioner will undertake any additional investigation that may be necessary to resolve all allocation issues.

§85-16-6. Issuance of allocation order.

6.1. The Office of the Insurance Commissioner will issue an allocation order within fifteen (15) days of the date when the claimant's completed application was received by the employer or carrier that filed the request for allocation.

6.2. If an investigation by the Office of the Insurance Commissioner to develop facts necessary to resolve all allocation issues will cause it to be unable to issue its allocation order within fifteen (15) days of the filing of a completed application with the employer or its carrier, the Office of the Insurance Commissioner will issue a notice of extended processing to all parties advising of the administrative delay created by the investigation. Such notice will not extend the period for issuing an allocation order by more than thirty (30) additional calendar days.

6.3. The allocation order will provide the following information.

a. In occupational pneumoconiosis claims, the allocation order will be the non-medical order mandated by W. Va. Code 23-4-15b. Said order will:

1. Determine whether the claimant has satisfied the requirements for harmful (hazardous) occupational exposure set forth in W. Va. Code 23-4-1(b);

2. Determine whether the claimant has satisfied the requirements for a timely claim filing as set forth in W. Va. Code 23-4-15(b);

3. Determine if claimant has had sufficient occupational exposure to qualify for the W. Va. Code 23-4-8c(b) presumption;

4. Identify all chargeable employers and their proportionate share of liability for any benefits that may be awarded in accordance with W. Va. Code 23-4-1(b);

5. Assign a date of last harmful (hazardous) occupational exposure with each chargeable employer; and

6. Designate the employer (or carrier) that will be the Responsible Administrator for the claim.

b. In occupational disease and hearing loss claims, the allocation order will:

1. Assign a date of last harmful (hazardous) exposure;

2. Identify all chargeable employers and their proportionate share of liability for any benefits that may be awarded in accordance with the methodology set forth in W. Va. Code 23-4-6b(g), such methodology being specifically adopted for all occupational disease claims pursuant to authority granted to the Commission by W. Va. Code 23-4-1(f); and

3. Designate the employer (or carrier) that will be the responsible administrator for the claim.

§85-16-7. Procedure when allocation order is contested.

7.1. The allocation order will be protestable and will be served on the claimant and all employers identified in the order as chargeable employers.

7.2. If an allocation order is protested by one of the parties, any benefits or expenses authorized during the pendency of that protest will be paid as hereafter provided until such time a final resolution of the protest has been achieved.

7.3. If the final resolution of the allocation issue results in a reassignment of the proportional liability of one or more of the chargeable employers, the Office of the Insurance Commissioner will adopt the judicially determined reassignment and issue a revised non-protestable allocation order. The Office of the Insurance Commissioner will also issue a protestable order designating the amount of any overpayments and/or underpayments by the affected employers which have resulted from the judicially determined reassignment of proportional liability. These overpayments and/or underpayments will be reconciled by the Office of the Insurance Commissioner via credits and debits against annual fees and assessments collected from each employer by the Office of the Insurance Commissioner pursuant to chapter twenty-three of the West Virginia Code.

§85-16-8. Claim administration following entry of allocation order.

8.1. Following the issuance of an allocation order in an occupational pneumoconiosis claim, the responsible administrator will refer the claim to the occupational pneumoconiosis board for its consideration and handling.

8.2. Following the issuance of an allocation order in an occupational disease claim, the responsible administrator will issue a ruling on whether the claim is compensable. Copies of the compensability decision will be served on all parties to the claim.

8.3. Following the issuance of an allocation order in a hearing loss claim, the responsible administrator will issue a ruling on whether the claim is compensable. Copies of the compensability decision will be served on all parties to the claim.

8.4. The responsible administrator will serve all parties to a claim with copies of all correspondence that it generates in conjunction with its administration of the claim. Such correspondence will contain a conspicuous notation identifying the claim as an allocated claim.

8.5. Whenever payment of a benefit or an expense is authorized by the responsible administrator, notice of such authorization will be provided to each chargeable employer and each such chargeable employer shall remit its pro rata share of the payment, as determined by the Allocation Order, to the claimant or vendor for whom payment has been authorized.

§85-16-9. Severability.

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