

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #1

FILED

JUL 26 8 44 AM '94

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 §21A-3-7(b), (c) & (M);
§21A-2-6(1), (2) & (14)
AMENDMENT TO AN EXISTING RULE: YES NO X §21A-2-19; §23-1-1

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 17

TITLE OF RULE BEING PROPOSED: Vocational Standards for Permanent
Disability Claims

DATE OF PUBLIC HEARING: Two (1) August 10, 1994 Sept 8 9:00 a.m.
(2) TIME: 10:00

LOCATION OF PUBLIC HEARING: (1) Parlors A & B Charleston Civic Center,
2. Large Court Room
WVU College of Law Charleston, West Virginia
Morgantown, WV (2) _____

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: John H. Kozak
Comments may be filed until September 23, 1994

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

Director, Legal Services Div.
P. O. Box 3922
Charleston, WV 25339-3922

Andrew N. Richardson
Authorized Signature

3.80

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Vocational Standards for Permanent Disability Claims
Type of Rule: X ^{Exempt} Legislative Interpretive Procedural
Agency Workers' Compensation Division, Bureau of Employment Programs
Address Attn: John H. Kozak, Director
Legal Services Division
P. O. Box 3922, Charleston, WV 25339-3922

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:

There will not be any costs incurred by the administrative, appropriated budget of the division.

3. Objectives of these rules:

To fulfill the requirements of West Virginia Code, §21A-3-7(m) and §23-4-6(n) to establish vocational standards to be considered in making decisions on permanent total disability awards and for other purposes.

Rule Title: Vocational Standards for Permanent Disability Claims

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The rule will not have an impact upon state government appropriations.

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

In adopting West Virginia Code, §21A-3-7(m) and §23-4-6(n), as amended, the Legislation anticipated reducing the number of permanent total disability awards granted each year. Doing so will conserve the assets of the Fund so that the requirements of each awards will be those injured employees whose disability foreclosed them from being employed in their labor markets.

C. Economic Impact on Citizens/Public at Large.

Conservation of the assets of the Fund will slow the increase in the actuarial deficit of the Fund and lessen the need for additional premium assessments in the future.

Date: July 22, 1994

Signature of Agency Head or Authorized Representative

Andrew N. Richardson

Andrew N. Richardson
Commissioner

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 EXEMPT LEGISLATIVE RULE

85 CSR 17

VOCATIONAL STANDARDS FOR PERMANENT DISABILITY CLAIMS

These proposed rules are required by the 1993 amendments to chapters 21A and 23 of the West Virginia Code of 1931, as amended. In West Virginia Code, §21A-3-7(m) and §23-4-6(n), the Legislature directed the Compensation Programs Performance Council to establish vocational standards to be considered in making decisions on permanent total disability awards. These proposed rules will meet that requirement and will be used in decisions on permanent disability awards in general. In putting these rules out for public comment, the Council anticipates the receipt of suggestions for improving the rules in general and to generate public input into the development of these important standards. Such information will greatly assist the Council in formulating the final contents for these rules.

As proposed, the rules establish standards for the determination of the individual claimant's labor market, the standards for determining the skills which a claimant possesses or can be trained for that might be transferable to another area of employment, and the definition of an acceptable deviation in wages between the claimant's preinjury employment and the claimant's post injury employment.

The Council intends to hold two public hearings on the proposed rules - one in Morgantown and one in Charleston - and requests written comments from the public as well.

Offices located at 601 Morris Street

An Equal Opportunity/Affirmative Action Employer

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

FILED

JUL 26 8 44 AM '94

SERIES 17
VOCATIONAL STANDARDS FOR PERMANENT DISABILITY CLAIMS
OFFICE OF WEST VIRGINIA
DEPARTMENT OF STATE

§85-17-1. General.

1.1. Scope. -- These rules implement the provisions of West Virginia Code, §21A-3-7(m) and §23-4-6(n), regarding the vocational standards to be used in considering requests for permanent disability awards including second injury life awards.

1.2. Authority. -- West Virginia Code, §21A-2-6(1), -6(2) & -6(14); §21A-2-19; §21A-3-7(b), -7(c) & -7(m); and §23-1-1. 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. --

§85-17-2. Purpose of rule.

The purpose of these rules is to implement the provisions of West Virginia Code, §23-4-6(n), with regard to the vocational standards to be used in the review of and decision making upon requests for permanent disability awards including second injury life awards. These rules are to be used by all levels of review, administrative and appellate, in the workers' compensation system of this State.

§85-17-3. 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. "Injury" and like terms shall include all compensable, occupational injuries, diseases, and occupational pneumoconiosis.

3.4. "Permanent total disability awards" and "permanent total disability benefits" or like terms includes the concept of second injury life awards or benefits that result from an injured workers' combination of impairments from whatever sources.

§85-17-4. Findings and Intentions.

4.1. At various times the legislature has stated the purposes and philosophy of the workers' compensation system.

4.1.1. "The Legislature hereby finds and declares that two of the primary objectives of the workers' compensation system established by this chapter are to provide benefits to an injured claimant promptly and to effectuate his return to work at the earliest possible time...." West Virginia Code, §23-4-7(a).

4.1.2. "The Legislature hereby finds and declares that it is in the interest of employees, employers and the commissioner that injured employees be encouraged to return to work as quickly as possible after an injury and that appropriate protections be afforded to injured employees who return to work on a trial basis." West Virginia Code, §23-4-7b(a).

4.1.3. "The Legislature hereby finds that it is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after an injury.... It shall be the goal of rehabilitation to return injured workers' to employment which shall be comparable in work and pay to that which the individual performed prior to the injury. If a return to comparable work is not possible, the goal of rehabilitation shall be to return the individual to alternative suitable employment, using all possible alternatives of job modification, restructuring, reassignment and training, so that the individual will return to productivity with his or her employer or, if necessary, with another employer." West Virginia Code, §23-4-9(a).

4.2. The legislature has clearly manifested an intent that the preferable outcome of any claim for workers' compensation benefits is the attainment of return to health through the

prompt provision of high quality and appropriate medical care and the return of the previously injured employee to his or her work or to work of significant productivity so as to maintain the integrity and dignity of the individual worker.

4.3. The intention of these rules is to make sure that every reasonable effort is made to ensure that injured workers receive the medical care, rehabilitation, and vocational training necessary to hasten the healing process and the return to employment in the workers' labor market in suitable employment commensurate with the workers' skills, experience, and training and for as nearly as possible comparable pay. The awarding of permanent total disability benefits is an indication that the medical, rehabilitative, and vocational efforts of the workers' compensation system has failed the individual injured worker. In order to avoid that failure, such an award is appropriate only after it has been demonstrated that the injured worker cannot be healed and retrained for work and pay reasonably comparable to the injured workers' preinjury employment.

4.4. It is also recognized that the resources of the State and of the workers' compensation system are finite. In their fiduciary capacities, the commissioner and the compensation programs performance council are obligated to expend the resources of the fund for those injured workers' who are truly in need of medical care and rehabilitative services and to compensate injured workers for the impairment of their earnings capacity. The workers' compensation system was not intended to be a substitute for employment or as a supplement to retirement for individuals capable of productive and meaningful employment.

§85-17-5. Construction and application of these rules.

These rules are to be read, construed, and applied in combination with the other rules and programs of the workers' compensation division. In particular, the rules titled "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994), and such rules as may later be promulgated for the rating of impairment and disability and for the procedures and standards for making permanent disability awards must be considered in the construction and application of these rules. In addition, the provisions of these rules must be considered when those other rules and programs are construed and applied.

§85-17-6. Labor market.

6.1. The labor market in which an individual's potential for obtaining suitable gainful employment shall be determined by use of the following standards using whichever standard results in the greater resulting area.

6.1.1. The geographical area within a fifty (50) mile radius of the residence of the individual; or

6.1.2. The distance the individual previously traveled to work in his or her last employment immediately preceding the filing of the permanent disability claim; whichever is greater.

6.2. If an objective review of the recommendations of health care providers indicates that the individual's health and physical conditions resulting from the compensable injury restrict the individual to a lesser radius of travel to and from a place of employment, then the geographic area determined by the lesser radius shall be determined to be the appropriate labor market.

6.3. If any portion of a county of any state falls within the radius of travel to be used under this section, then all of that county shall be considered to be within the individual's labor market.

§85-17-7. Vocational assessment of transferable skills.

7.1. Any injured worker seeking the award of permanent disability benefits shall be first medically and vocationally assessed, examined, and evaluated as required by the other rules and programs of the division. The vocational assessment shall take into account the priorities stated in section 4 of the rules "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994). The vocational assessment shall be conducted so as to take into account the employment opportunities existing in the injured workers' labor market as well as his or her physical impairments.

7.2. The assessment instruments used in the vocational examinations and evaluations shall be the same as those then in use by the vocational education system of the state or by the job training partnership act system of the state. The use of any other assessment instrument shall only be permitted upon a clear and convincing demonstration of the superior applicability of that other instrument.

7.3. A permanent total disability award shall be granted only if the assessments indicate that the injured worker has no transferable skills then needed in his or her labor market or if the injured worker does not have the aptitude to acquire skills then in demand in the injured workers' labor market. In the absence of either of those findings, a rehabilitation plan shall be developed pursuant to the rules "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994). A claimant's cooperation in the acquisition of those skills shall be determined in accordance with subparagraph 2.2.3 of those rules.

§85-17-8. Comparable wages.

The determination of comparability of wages for other suitable employment shall be made based upon an acceptable deviation of not greater than twenty (20%) percent less in gross wages than the injured workers' preinjury employment or his or her last employment before the filing of the request for a permanent disability award. Such determination shall take into account increases in the cost of living for inflation as determined by the federal government.

§85-17-9. Applicability.

These rules shall be applicable to all requests for permanent total disability awards made on and after the effective date of chapter 171, acts of the legislature of 1993; that is, April 8, 1993, and to all requests for other permanent disability awards made on or after their effective date.

§85-17-10. Severability

If any provision of these rules or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not effect 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.