WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #5

Do Not Mark In This Box

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

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

CITE AUTHORITY: W. Va. Code §§ 23-1-1a(j)(3) and 23-2-9(b) & (m)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW
W. Va. Code § 23-1-1a(j)(3)

AMENDMENT TO AN EXISTING RULE: YES ____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: *This rule repeals and replaces section thirteen of 85CSR9.

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 18

TITLE OF RULE BEING PROPOSED: Self Insurance Self Administration & Third Party Administrators

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS July1, 2004

Authorized Signature

~~Proposed for Public Comment~~Draft
~~3-16-04~~5-18-04

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 18
SELF INSURANCE, SELF ADMINISTRATION & THIRD PARTY ADMINISTRATORS

§85-18-1. General.

1.1. Scope. --This exempt legislative rule provides for employers to administer and provide their own system of compensation to their injured employees. This rule applies to employers who previously received approval of their status as a self-insured employer and who are currently operating their own systems of compensation, former self-insured employers who may want to self-insure in the future, and employers who have not previously been granted self-insured status and who desire to apply for that privilege. Similarly, this rule applies to employers who desire to provide their own system of compensation with regard to coverage of catastrophic events. This rule applies to employers who desire to terminate their self-insurance coverage and return as regular subscribers to the Fund, or self-insured employers who wish to cease doing business. This rule applies to the responsibilities of self-insured employers with regard to their self-administration of workers' compensation claims filed by their employees. This rule also applies to the qualifications of third party administrators hired by self-insured employers to help process workers' compensation claims filed by the self-insured employer's injured workers.

1.2. Authority. -- W.Va. Code §§23-1-1a, 23-2-4, & 23-2-9. 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. --

1.5. Repeal and replacement. -- This rule repeals and replaces section thirteen of 85 C.S.R. 9, entitled "Risk Management."

§85-18-2. Purpose of Rule.

The purpose of this rule is to provide for the administration of a system of self-insurance consistent with the specific provisions and purposes of W. Va. Code § 23-2-9.

§85-18-3. 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. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.

3.2. "Audited statements" mean the financial statements accompanied by an independent auditor's report which provide reasonable assurance about whether the audited employer has presented fairly the financial position, results of operations, and cash flows in conformity with generally accepted accounting principles. This assurance is derived through a systematic process, governed by generally accepted auditing standards, of objectively obtaining and evaluating evidence regarding assertions about economic actions and events to determine whether (1) financial information is presented in accordance with established or stated criteria, (2) the entity has adhered to specific financial compliance requirements, if applicable, or (3) the entity's internal control structure over financial reporting and/or safeguarding assets is suitably designed and implemented to achieve the control objectives.

3.3. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W.Va. Code §23-1-1a.

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

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

3.6. "Decision" means a written statement issued by the commission containing the commission's findings of facts and conclusions as to any issue presented to the commission under this rule. Such decisions shall include, but not be limited to, notices of delinquency and notices of default. Any purported "decision" which is not in writing shall have no legal effect under this rule. "Decision" does not include a written statement in the form of e-mail.

3.7. "Default" for the purposes of a self-insured employer means the failure by a self-insured employer to make a payment or file a report due by it under the provisions of the Act or this rule and which has been notified of delinquency but has further failed to make the payment or file the report within the time period specified by the notice.

a. Any self-insured employer who, without good cause, ceases to make required payments to the employer's injured employees or dependents of fatally injured employees as benefits provided for by this chapter including second injury benefits and catastrophic injury benefits, if applicable, is in default.

b. Good cause for failure to promptly pay a claimant be limited to those instances where a self-insured employer fails to receive notice of a properly promulgated order, or those instances in which an order has been promulgated in substantive error, is on its face obviously in error as to the amount due or orders the payment of temporary total disability benefits past the date on which the claimant returned to work.

3.8. "Delinquent" means a self-insured employer has failed to timely pay premium taxes, to timely file a payroll report, to maintain an adequate premium deposit, to properly and timely pay

workers' compensation benefits to their injured employees or to make any other payment due under the terms of this rule or the Act.

3.9. "Dependent" has the meaning ascribed to that term by W. Va. Code, §23-4-10(d).

3.10. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

3.11. "Employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.

3.12. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W.Va. Code §23-1-1b.

3.13. "Good standing" with the commission means that the employer is not delinquent or in default on its obligations to make reports or payments to the commission.

3.14. "Injury" means compensable injuries or illnesses within the meaning of W. Va. Code §23-4-1 et seq.

3.15. "Payments" are obligations of the employer for the purposes of this rule including, but not limited to, the payment of premium taxes, the payment of premium deposits, the payment of any obligations due to be paid by an employer authorized by the commission to be a self-insurer, and late reporting and payment penalties, and interest.

3.16. "Payroll" means the entire gross wages of all employees, not excluded under provisions of the Act or rules of the commission, or such other wage related exposure base as may be determined by the board of managers.

3.17. "Premium" and "premium tax" mean the amounts of money due from an employer to the fund or commission as a result of quarterly and other periodic assessments by the commission under the provisions of the Act in order to establish, maintain, and replenish the fund and to pay the expenses of administration of the fund by the commission. "Premium" and "premium tax" includes, but is not limited to, assessments of: premium tax, premium deposit and interest, assessed to all employers; and also, that portion of self-insured premium tax required to be paid by the employer for the benefit of the employer's claimant employees as required by law.

3.18. "Quarter" means the four calendar quarters: January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through December 31 of each calendar year.

3.19. "Regular subscriber" and "subscriber" mean an employer who obtains coverage under any of the workers' compensation insurance plans offered by the commission.

3.20. "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.

3.21. "This rule" means this legislative rule designated as 85 C.S.R. 18, "Self Insurance, Self Administration & Third Party Administrators."

3.22. "Date stamp" means either a manual or an electronic date stamp.

3.23. "Claim correspondence" means the correspondence to which an employee is entitled due to a subsequent action or in anticipation of an action being taken.

3.24. "Rule" or "ruled" in the context of claims administration by a self-insured employer means the issuance of a written order to the claimant advising the claimant of actions undertaken or to be undertaken in the administration of a claim and advising the claimant of his or her rights to contest the ruling.

§85-18-4. Self Insurance Status.

4.1. Self insurance status. An employer may become self-insured with respect to the compensation fund and catastrophe coverage or to the compensation fund but not the catastrophe coverage, if the commission, with the approval of the board of managers, determines it meets the financial responsibility requirements and procedural requirements set forth in W. Va. Code §23-2-9, and in this rule.

4.2. An employer owned by another business may have its compensation risks guaranteed by a parent, if the relationship between the employer and parent is adequately documented, as determined by the commission, and if the parent can satisfy the requirements of the Act and this rule for both itself and for the subject employer.

~~4.2.~~4.3. Any employer granted the privilege of self-insurance, as to all or part of the compensation fund, shall give security or bond in the form, of the type, and in the amount required by the commission, with the approval of the board of managers, pursuant to the Act and this rule. Additionally, any employer granted the privilege of self-insurance, as to all or part of the compensation fund, shall abide by the requirements for maintaining, modifying, or terminating the self-insured status, as set forth in the Act and this rule.

§85-18-5. Application for Self Insurance.

5.1. An employer may apply for self-insurance by filing with the commission an application for self-insurance in the form prescribed by the commission. If a parent is to guarantee the employer's compensation risk, the relationship between the employer and the parent must be documented on the application.

5.2. A disclosure of the employer's management and financial structures and the employer's audited financial statements for each of the three (3) fiscal years preceding the date of application must be attached to the application. If a parent business is to insure the employer's compensation risk, the parent's disclosure of management and financial structures, and its audited financial statements for the three years preceding the date of application must also be attached to the application. The employer shall disclose to the commission all of the business entities

acquired, bought, transferred or merged by or into the employer applicant. Failure to disclose without good cause, as determined in the sole discretion of the commission, this information at the time the application is filed with the commission may result in rejection of the application or termination of self-insurance status if the privilege of self-insurance has already been granted to the employer.

a. The employer's application and the required audited financial statements must be signed and sworn to by the president alone or vice-president and secretary or assistant secretary of the employer or parent if the employer or parent is a corporation or limited corporation; or, by all of the partners if the employer or parent is a partnership; or, by all of the general partners if the employer or parent is a limited partnership; or, by all the members if the employer or parent is a limited liability company; or, by the owner if the employer or parent is neither a corporation, limited corporation, partnership, limited liability company, nor limited partnership.

b. If the employer is a government agency, the criteria used to determine financial stability and guaranties may be modified to accommodate for governmental accounting and other issues related to a going concern. Any modifications allowed by the board of managers in these cases will take into consideration the risk to the commission.

5.3. The employer may provide the commission with any additional information deemed relevant to its financial stability. After reviewing the application and audited financial statements, the commission may request additional information from the employer or parent relevant to the employer's or parent's financial stability, and the applicant must provide the requested information.

5.4. The employer applying for self-insurance shall pay to the commission a non-refundable application processing fee at the time each application is filed.

The minimal application fee is $2,500.00. If it is determined that the cost of processing the application will exceed $2,500.00, the application fee may be modified by the commission. If the original application cannot be processed or is considered to be invalid, future applications by the same employer shall be subject to additional filing fees.

5.5. An employer who is a subscriber to all or part of the West Virginia Workers' Compensation Fund may apply at anytime to self-insure all or part of its workers' compensation risk. If the application is approved by the board of managers, the self-insurance will be effective on the first day of the quarter, following the month in which the application was approved.

An employer new to the state of West Virginia, who has never subscribed to the compensation fund, may apply for self-insurance at the time it registers with the commission. Until self-insurance approval is granted, the new employer shall be considered to be in the guaranteed cost plan.

a. When an application for self-insurance is filed, the commission will review the application and inform the employer if there is a need for additional information, pursuant to subsection 5.3 of this rule. The employer must provide the commission with the additional information in order to complete the application process. The commission will complete an evaluation of the information. The commission will have a preliminary audit of the employer's account performed and issue to the employer a notice of the required remittance, which shall be paid within thirty (30) days of the notification or the application shall be considered to be null and

void. The commission will have the payment amounts, defined under section 6 of this rule, calculated and advise the employer of their options. The employer must notify the commission of their preferred method of satisfying the payment amount within thirty (30) days of notification. Self-insurance status shall not be granted until the payment amount is satisfied in accordance with the selected method. Finally, the commission, with the approval of the board of managers, will render a decision approving or disapproving the application within ninety (90) days from receipt of all full and complete information required by the commission, as determined in the sole discretion of the commission.

b. Each approved applicant for self-insurance is required to secure its liability in accordance with the provisions of 85 C.S.R. 19, "Risk Pools," and this rule.

5.6. Employers applying for self-insurance must continue to make timely premium payments or other required payments for its workers' compensation risk until self-insurance status is approved by the board of managers and the status is effective. No employer shall be granted self-insured status retroactively, unless the application has not been approved within ninety (90) days from receipt of all full and complete information required by the commission, as determined in the sole discretion of the commission, and unless the self-insured status and the retroactive status is specifically approved by the board of managers.

§85-18-6. Reconciliation and Settlement of Applicant's Account.

6.1. An audit of the employer's account will be performed using reconciled wage, premium and charge data and other sources that the commission deems relevant. This data shall be compiled on a fiscal year basis and it shall be considered to be an adequate source for use in determining any pre-audit liability. The commission shall not recommend for approval by the board of managers and shall not grant self-insured status under the Act to any employer whose record upon the books of the commission shows a liability against the compensation fund, incurred on account of injury to or death of any of its employees, in excess of premium taxes paid by such employer to the compensation fund, until it has paid into the compensation fund the amount of such excess liability, including excess liability incurred on account of catastrophes or second injuries. The employer must pay to the compensation fund the entire amount of the excess liability prior to the effective date of self-insurance. The excess liability must be satisfied within thirty (30) days of notification or the application for self-insurance will be considered to be null and void.

6.2. An employer is responsible for the future costs of awards and medical benefits granted after the effective date of self-insurance to its employees for injuries or deaths that occurred in any period during which it subscribed to the compensation fund. At the time of an employer's application for self-insured status, the commission will determine the amount of money that is sufficient to cover the applicant's liability for the future costs of the awards and medical expenses not previously used in calculating premium.

a. If the employer is to pay the amount estimated to cover the cost of future liability, this amount shall be paid prior to the effective date of self-insurance and within thirty (30) days of notification.

§85-18-7. Catastrophe Reserve Election.

7.1. The employer applying to self-insure its workers' compensation risk must at the time of application elect in writing to subscribe to catastrophic risk coverage or to self-insure the catastrophe risk pursuant to W. Va. Code §23-2-9(g).

a. If a self-insured employer elects not to self-insure its catastrophic injury risk, it shall pay premium taxes on the same basis and in the same percentages as subscribers to the general fund pay for catastrophic coverage.

b. If a self-insured employer elects to self-insure the catastrophe risk, then it must furnish a catastrophe security or bond, in an amount determined by the commission, with the approval of the board of managers, in addition to the security or bond furnished as a self-insurance requirement. The catastrophe security or bond shall be in an amount the commission considers adequate and sufficient to compel or secure payment of all compensation and expenses to the employer's employees and the employees' dependents for catastrophe-related injuries or deaths.

7.2. A self-insured employer may elect to insure its catastrophic risk through a policy of excess insurance obtained through a private insurance carrier approved by the commission.

a. The self-insured employer shall provide a copy of the policy to the commission for approval.

b. The commission may give approval of the election if the insurer meets the financial strength requirements as applied to self-insured employers and entities that provide surety to self-insured employers.

c. If approved to insure catastrophic risk through a private insurance carrier, the self-insured employer shall notify the commission within fifteen (15) days of the occurrence of any change in the terms of the policy, including cancellation, by filing a copy of the policy with the change and providing a written explanation of the type of change.

d. A self-insured employer approved to carry its catastrophic risk through a private insurance carrier shall not be charged premium taxes to insure against the catastrophic risk assumed by the private insurance carrier.

7.3. The employer may request a change in its election as to catastrophic coverage. The request must be in writing and filed with the commission on or before June 1 of any given year, to be effective on July 1 of that year. The commission will issue a decision approving or disapproving the change in election.

§85-18-8. Commission's Review of the Application for Self-Insurance.

8.1. In reviewing an employer's application for self-insurance, the commission must assess the employer's ability to demonstrate that its financial strength is sufficient to meet its obligations under the Act.

8.2. In assessing the employer's application, the commission shall review and evaluate the audited financial statements filed with the application, the employer's workers' compensation loss experience, and other information.

8.3. If an employer relies on the audited financial statements of its parent to be granted self-insured status, then the parent company shall provide a parental guaranty in a form acceptable to the commission. The required parental guaranty must be received and accepted by the commission before the application for self-insurance can be processed.

§85-18-9. Security and bond.

9.1. In accordance with the provisions of this rule and other rules of the commission, self-insured employers are required to secure certain obligations for payments. In such instances where security or bond is required by the commission, the security or bond shall be tendered to the commission in accordance with this section.

9.2. There are several acceptable types of security and bond including, but not limited to, occurrence type security or bond, marketable securities, and letters of credit. The commission has the discretion to find that a particular type of security or bond is acceptable or unacceptable.

a. If the self-insured employer obtains an occurrence-type security or bond, then the security or bond is liable in the place of the employer should the employer be unable to meet its obligations for any or all injuries or deaths that may occur during the time period for which the security or bond is effective, and the security or bond remains liable at the time any awards for the injuries or deaths are subsequently made and for the entire time period in which benefits will be paid under the awards, including death benefits to surviving dependents. The security or bond shall be deemed to define "occurrence" as including dates of injury prior to the effective date of self-insurance and coverage when the date of injury was prior to the effective date and the award date was after the effective date so that the liability provided in subsection 6.2. shall be secured by the security.

Nothing to the contrary contained in any writing associated with or included as a part of the security or bond shall defeat this obligation. Every surety, guarantor, warrantor, or other person or entity who purports to stand in the place of the self-insured employer for the payment of benefits shall be considered to have given the security or bond in compliance with this subsection, and no statement or disclaimer in the security or bond shall negate this requirement. The surety company issuing the bond must meet and maintain the commission's financial strength requirements. The commission shall review the financial strength of the issuers of all of the surety provided by the self-insured employer in the course of the commission's annual review and recommendation to the board of managers.

b. If the self-insured employer wishes to post marketable securities to meet its obligation for security or bond, the securities must satisfy the following requirements:

1. The securities must be fixed term debt instruments with a fixed and determinable principal amount;

2. The issuer of the securities must be a governmental entity or governmental agency or corporation of this state, or any other state, or the United States;

3. The maturity date of the instrument cannot be more than ten years from the date the securities are posted with the commission; and

4. The payment of both principal and interest are denominated and payable in United States dollars with the interest payable at fixed periodic payment dates and at a fixed rate of the principal amount of the indebtedness.

c. If the self-insured employer wishes to post a letter of credit to meet its obligation for security or bond, the letter of credit must satisfy the following requirements:

1. The letter of credit must be issued by a bank operating in the United States;

2. The letter of credit must utilize the letter of credit forms approved by the commission and in accordance with this rule; and

3. Before it will be considered security for self-insured risks, the letter of credit must contain an "evergreen" clause as specified by the commission, which holds the issuer responsible for the employer-applicant's liability resulting from all injuries incurred by or deaths of the employer's employees prior to the expiration of the letter of credit. In the event that the employer-applicant is unable to obtain the issuance of the evergreen form of letter of credit, then the employer-applicant must obtain permission from the commission to use the letter of credit for with a non-renewal draw clause. The employer must also provide the form letter of Authority and Acknowledgment which authorizes the draw of the entire amount of the letter of credit in the event of cancellation of the letter of credit, although the self-insured employer is not then in default under the Act or the rules.

4. The bank issuing the letter of credit must meet and maintain the commission's financial strength requirements.

9.3. Employers who are required to meet the security requirements defined by the commission, as approved by the board of managers, shall post an amount to be adequate and sufficient to compel or secure payment of compensation and expenses to the employer's employees, or their dependents, as required by the Act, and shall not be less than one million dollars ($1,000,000). The amount of security required of a self-insured employer shall be based upon, but not be limited to, such criteria as the employer's financial strength including the employer's demonstrated loss experience. A demonstrated loss experience includes general workers' compensation loss experience, second injury loss experience and catastrophe loss experience.

The commission shall utilize a financial ratio summarization, based upon a comparison of the employer-applicant's solvency, efficiency and profitability ratios to a specific industry's ratios, as defined, for example, in the current Dunn & Bradstreet Industry Norms and Key Business Ratios, in evaluating an employer's financial strength and in making a recommendation to the board of managers as to an appropriate amount of security. Whenever possible, the commission shall make a comparison of ratios utilizing the employer's workers' compensation industry classification.

a. If the commission determines that a self-insured employer's securities or bonds are inadequate or insufficient, the commission shall notify the employer. Thereafter,~~with the approval of the board of managers,~~ the commission shall enter an order directing the employer to increase its securities or bonds by the amount needed to reach the adequate and sufficient level for all time periods originally intended to be covered by the inadequate or insufficient security or

bond. An inadequate or failed security or bond includes, but is not limited to instances where the entity behind the security or bond is no longer a viable entity or, for whatever reason, can no longer meet its obligations.

The commission shall provide a reasonable amount of time for the employer to obtain the increased or added security or bond or develop a work out agreement and obtain the first installment payment; however, the period to secure additional security or period to develop a work out agreement and obtain the first installment payment shall not exceed ninety (90) days from the date of the commission's notification. The increased security or bond must meet the requirements set forth in this rule.

b. A self-insured employer's failure to obtain additional bond or security, as required by the commission's order, ~~may~~shall result in a revocation of the privilege of self-insurance and termination of the employer's self-insured status. The commission shall issue a notice specifying the effective date of any such action or actions.

c. If the commission determines that a decreased adjustment is merited, the self-insured employer may file a written request with the commission for a downward adjustment of the self-insured employer's security requirements.

§85-18-10. Self-insured Employer's Modification of Business.

10.1. In the event a self-insured employer reorganizes its business, assumes additional liability, acquires new assets or operations, buys an additional business, merges with another business, or otherwise changes its operation in any manner which impacts on its workers' compensation claims liability, the self-insured employer must notify the commission of the modification of business, immediately. The notice of modification must include specific information as to the nature of the modification, including but not limited to a copy of the executed contract causing the modification, and the names of other employers and/or businesses affected by the modification.

a. If a reconciliation audit is performed as a result of a self-insured employer's failure to properly report business modifications, any liabilities found against the commission in excess of premiums paid will be due and owing upon notification. Failure to comply may result in the revocation of the self-insured employer's self-insured status.

10.2. If the self-insured employer has acquired a new operation or business as a separate legal entity, and desires to self-insure that separate entity, then it must file an application for self-insurance on behalf of the separate entity. If the self-insured employer has acquired a new operation or business or has merged with another business the self- insured employer must notify the commission of the acquisition or merger as soon as practicable, but no less than one (1) day prior to the date of closing, then it must file an application for self-insurance on behalf of its new or additional business and must request that the new or additional business be merged into its existing self-insured account. The application to self-insure the new operation or business shall be processed in accordance with the Act and the commission's rules governing self-insurance.

10.3. Under subsections 10.1. and 10.2. of this rule, the commission will review the employer's security and bond requirements and make, if necessary, an appropriate recommendation to the board of managers for an adjustment to the security requirements.

10.4. If the modification of business requires processing that includes any type of an actuarial analysis, a $2,500.00 processing fee shall be ~~accessed.~~assessed.

10.5. If the modification causes a self-insured employer to no longer qualify for the privilege of self-insured status, the commission, with the approval of the board of managers, shall have the authority to terminate the status in accordance with the provisions of section 18 of this rule. Settlement of estimated liability at the time of revocation shall be determined in accordance with the provisions of this rule.

§85-18-11. Voluntary Termination of Self-Insured Status.

11.1. If a self-insured employer decides to continue doing business in the state of West Virginia, but terminate its self-insured status, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of all such liability, including the costs of the administration of that liability, in which case the future costs of the liability shall be paid from the compensation fund. The employer must pay a fee of $2,500.00 for the liability calculation. The employer shall provide written notice to the commission thirty (30) days prior to the termination of its status.

a. When the employer decides to terminate its self- insured status, the commission shall determine actuarially the amount of money that is sufficient to cover the future costs of the liability.

b. The commission shall not permit the employer to terminate the self-insured status and subscribe to another plan until it pays the actual estimate, or maintains security or bond in an amount sufficient to cover the estimated future cost of the liability. The commission must approve the employer's election for the payment of the estimated future cost of liability.

1. No self-insured employer will be allowed to remain self-insured once it elects and satisfies the buy out of its open and contingent claims liabilities, unless the buy out of its open and contingent claims liabilities is limited to that portion of its claims liabilities associated with the sale of a distinct unit or division of the employer.

~~1.~~2. If the employer elects or is required by the commission to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination of self-insurance, unless the employer and the commission enter into a repayment agreement. The commission has the authority to determine whether entering into a particular repayment agreement will meet its fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment.

Additionally, the agreement shall provide for the payment of interest on the principal, which shall be calculated on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate shall remain the same for the life of the agreement.

~~2.~~3. If the employer elects to cover the future costs of the liability with a security or bond, it must obtain the commission's approval of the election and the commission's approval of the form, type, and amount of the security or bond.

11.2. A self-insured employer must provide the commission with written notice thirty (30) days prior to termination if it ceases doing business in the state of West Virginia and intends to terminate its self-insurance status. If a self-insured employer so terminates its business, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability shall be paid from the compensation fund. When the employer decides to terminate its self-insured status, the commission shall estimate the amount of money that is sufficient to cover the future costs of the liability. The employer shall pay a fee of $2,500.00 for the liability calculation.

Upon terminating self-insurance, the employer may elect to continue making payment of benefits, pay the full amount of the future liability or enter into a repayment agreement with the commission for the amount of future liability. If the employer retains full liability or enters into a repayment agreement, the employer must maintain the security for self-insurance as defined by this rule and other rules of the commission.

a. If the employer elects or is required by the commission to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination and within forty-five (45) days of the date of the commission's notification, unless the employer and the commission enter into a repayment agreement. The commission has the authority to determine whether entering into a particular repayment agreement will meet its fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment.

Additionally, the agreement shall provide for the payment of interest on the principal, which shall be calculated on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate shall remain the same for the life of the agreement.

11.3. If a self-insured employer terminates its self-insured status because it ceases doing business in the state of West Virginia as the result of a sale or transfer of all or part of its business, the self- insured employer must notify the commission of the sale or transfer as soon as practicable, but no less than one (1) day prior to the date of closing. The self-insured employer so terminating its self-insured status remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability will be paid from the compensation fund. When the employer decides to terminate its self-insured status, the employer shall request the commission to estimate the amount of money that is sufficient to cover the future

costs of the liability defined in this section. The employer shall pay a fee of $2,500.00 for the liability calculation.

The employer shall pay the actual estimate, or post security or bond in an amount sufficient to cover the estimated future cost of the liability. The commission must approve the employer's election for the payment of the estimated future cost of liability.

a. If the employer elects to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination of self-insurance and within forty-five (45) days of the commission's notification, unless the employer and the commission enter into a repayment agreement. The commission has the authority to determine whether entering into a particular repayment agreement will meet the fiduciary responsibility of the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and agreeing to the specific terms of the repayment.

Additionally, the agreement shall provide for the payment of interest on the principal, which the commission shall calculate on the effective date of the agreement, pursuant to W. Va. Code § 23-2-13. The interest rate remains the same for the life of the agreement.

b. Upon terminating self-insurance, the employer may elect to continue making payment of benefits or pay the full amount of the future liability as specified in 11.2 or enter into a repayment agreement with the commission for the amount of the future liability. If the employer retains full liability or enters into a repayment agreement, the employer must maintain the security for self-insurance as defined by this rule and other rules of the commission.

11.4. Self-insured employers who become regular subscribers on or after July 1, 2004, and who do not buy out their liability shall continue to pay any applicable Security or Guaranty Pool assessments imposed by the rules of the commission.

11.5. If a contract of sale or transfer includes an agreement as to the parties' assumption of charges and contingent liabilities incurred by the self-insured seller prior to the effective date of the sale or transfer, and if a complete copy of the contract is filed with the commission, the employer may request the commission give effect to the agreement, so long as, in its opinion, the agreement meets the fiduciary requirements of the commission. The commission will issue a written decision on whether it will give effect to the agreement. The commission is under no obligation to give effect to such an agreement.

a. If a completed copy of the contract of sale is filed with the commission and the commission gives effect to the agreement, and if the agreement provides that the buyer or person acquiring the business assumes the liability defined and referenced in this subsection, the buyer or person acquiring the business must pay the actual estimate of all the self-insured seller's accrued and contingent liability, as calculated pursuant to that section or, alternatively, the buyer or person acquiring the self-insured employer's business must, with the board of managers' approval, post security or bond in an amount actuarially determined to be sufficient to cover the assumed liabilities. The security or bond must cover the seller's entire period of self-insurance. In the event of a security or bond being posted by the buyer to cover the seller's liabilities, or if the buyer pays the actual estimate of the seller's liability, then the commission will release the employer's like security or bond previously posted by the employer-seller.

b. If a complete copy of the contract of sale is not filed with the commission and/or if the commission does not give effect to the agreement, the commission will hold the self-insured seller liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to the effective date of the sale or transfer, unless the employer pays into the fund an amount sufficient to cover the estimated cost of all such liability, as set forth in this section.

§85-18-12. Present Value Payment of Unpaid but Awarded Claims Liabilities.

12.1. At any time, the commission, in its discretion, with the approval of the board of managers, may permit any self-insured employer to pay into the Fund an amount of money equal to the present value, as determined by the commission, of all unpaid but awarded claims liabilities for which the employer is liable.

12.2. Upon approval of the board of managers and by making the present value payment of unpaid but awarded claims liabilities with one lump sum, the self-insured employer is discharged from any further liability for the unpaid compensation and all future costs associated with the unpaid compensation shall be paid from the Fund.

12.3. In order to utilize this section, the employer is required to relinquish its self-insurance status, unless it meets the exception of 11.1.b.1.

§85-18-13. Subscribing Employers Buy-Out of Liability Previously Incurred as a Self-Insured Employer.

Employers who were previously self-insured employers and who on the effective date of this rule were continuing to pay compensation and expenses for certain of their employees due to their previous status as self-insured employers may elect to buy out their responsibility for those payments related to the prior self-insured status, pursuant to the provisions set forth in section 11 of this rule.

§85-18-14. Current Status of Employers Not Affected.

14.1. Employers who at the time of the effective date of this rule are self-insured employers as regards to all or part of the compensation fund shall not lose that status due to the mere promulgation of this rule.

14.2. Employers who at the time of the effective date of this rule are subscribers to all of the compensation fund shall not become self-insured due to the mere promulgation of this rule.

§85-18-15. Self-Administration of Claims.

15.1. Effective July 1, 2004, all self-insured employers shall administer their own claims. An injured worker, who is an employee of a self-insured employer, is entitled to all of the same benefits, as those afforded to injured workers whose claims are administered by the workers' compensation commission. These same benefits include the proper and timely payment of medical bills and compensation.

a. The commission shall make the allocation decision concerning occupational disease claims. Each claim shall be administered as directed by the commission.

b. The self-insured employer shall report all~~allocated~~ occupational disease claims and permanent total disability applications to the commission within five (5) days of the claimant's report of injury or disease. Occupational disease claims and permanent total disability claims shall thereafter be administered as set forth in section 15.12.

15.2. Transitional Notifications.

a. Upon the effective date of this rule, each self-insured employer shall within five (5) working days notify, in writing, the following persons, entities or adjudicatory bodies involved in active claims matters that that the self-insured employer is self-administering its claims.

1. Claimants;

2. Claimant representatives;

3. All parties to the claim;

4. All adjudicatory bodies that are currently proceeding in the claim; and

5. Vendors who are rendering services in the claim.

b. Upon the effective date of this rule, each self-insured employer shall within five (5) days notify its employees that it is self-administering its claims. This notice must be posted at each of the employer's places of business within the State.

c. The self-insured employer is required to state in each notice, whether the notice is individually written or posted, that the self-insured employer, and not the commission, is the primary contact for submitting invoices, claims inquiries, legal notices, medical reports and other communications concerning the claim.

15.3. Claims Contact. The self-insured employer shall maintain with the commission a current name, address and telephone number of the contact person responsible for administering payments on behalf of the injured employees.

15.4. Claims Reports. The self-insured employer shall report claims information to the commission as follows:

a. Within five (5) days of notification of a covered injury, the self-insured employer shall post basic information regarding the injury with the commission in a format prescribed by the Commission.

b. The commission shall assign a claim number to the claim.

c. The self-insured employer shall update claims information for each claim ~~on at least a quarterly basis in a~~in a time frame, form and format prescribed by the commission. The commission may determine the appropriate time to update the claims information on an individual self-insured employer basis. If any employer fails to maintain such records and other information as required under the provisions of this section, the commission may revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

15.5. Claims Actions.

a. Initial Rulings; Injury and occupational disease claims. Those claims based upon injuries and non-allocable occupational diseases that are filed with the self-insured employer, upon properly executed, prescribed forms created under the provisions of W. Va. Code §23-4-1a, shall be ruled upon within fifteen (15) working days from the date of receipt by the self-insured employer.

1. The self-insured employer may enter an order conditionally approving the claimant's application if the self-insured employer finds that obtaining additional medical evidence or evaluations or other evidence related to the issue of compensability would aid the self-insured employer in making a correct final decision. Benefits shall be paid during the period of conditional approval; however, if the final decision is one that rejects the claim, then any such payments shall be considered an overpayment. In the event that a self-insured employer conditionally approves a claim, the employer shall render a final decision concerning the compensability of the claim within ninety (90) days of the receipt of the claimant's notice of the occurrence of such injury.

b. Medical Authorizations.

1. Medical Treatment. The self-insured employer shall rule upon requests for authorization of medical treatment within fifteen (15) working days from the date of receipt by the self-insured employer.

2. Appliances, Devices, and Supplies. The self-insured employer shall rule upon requests for authorization for the purchase of prosthetic or other appliances, devices or medical supplies within fifteen (15) working days from the date of receipt by the self-insured employer.

c. Disability Benefits.

1. Awards of temporary total disability benefits. Written medical reports submitted upon properly executed, prescribed forms and providing proper and sufficient evidence that claimants are entitled to awards of temporary total disability benefits shall be acted upon by issuance of orders granting awards of benefits within fifteen (15) days from the date of receipt by the self-insured employer or the date of issuance of a compensability ruling in the claim. Payment pursuant to such awards shall be issued in accordance with the provisions of West Virginia Code article four, chapter twenty-three.

2. Cessation of temporary total disability. Written medical or other information providing proper and sufficient evidence that claimants have ceased to be temporarily

and totally disabled or have returned to work shall be acted upon by issuance of notices advising the parties that benefit payments shall be suspended pending final disposition. The self-insured employer shall issue such notices within five (5) working days from the date of receipt of incoming correspondence.

3. Notice of closing claim. After the thirty (30) day notice period provided in suspension notices has expired and review of claims reveals that sufficient medical evidence to support a further award of temporary total disability benefits has not been received, the self-insured employer shall issue an order within ten (10) working days from the end of the aforesaid notice period advising the parties that the claims have been closed upon a temporary total disability basis. Failure to issue the order in a timely fashion under this provision does not act as a bar to the issuance of the order by the self-insured employer.

4. The self-insured employer shall make referrals of claimants to physicians for independent medical examinations and evaluations as required by West Virginia Code within twenty (20) days of the end of the one hundred twenty (120) day period of temporary total disability. The self-insured employer shall make the referral from a list of independent medical evaluators qualified by the commission to perform independent medical evaluations.

5. The self-insured employer shall make referrals of claimants to physicians for examinations and evaluations in response to requests by or on behalf of claimants for consideration of permanent disability awards in claims based upon injuries and occupational diseases other than occupational pneumoconiosis within fifteen (15) working days from the date of receipt of such requests. The self-insured employer shall make the referral from a list of independent medical evaluators qualified by the commission to perform independent medical evaluations.

6. Self-insured employers are required to use and pay for the services of the occupational pneumoconiosis board (W. Va. Code § 23-4-8a) in appropriate cases arising under the Workers' Compensation Act.

d. Permanent disability rulings.

1. The self-insured employer shall act upon permanent disability evaluation reports received from physicians to whom claimants have been referred by the self-insured in claims based upon injuries and occupational diseases other than occupational pneumoconiosis within fifteen (15) working days from the date of receipt.

2. Payment pursuant to awards of permanent disability benefits shall be issued and delivered within fifteen (15) days from the date of the award in accordance with the provisions of West Virginia Code article four, chapter twenty-three.

3. Self-insured employers are required to use and pay for the services of the interdisciplinary examining board (W. Va. Code § 23-4-6(j)) in appropriate cases arising under the Workers' Compensation Act.

e. Petitions for reopening.

1. The self-insured employer shall rule upon petitions for reopening of claims upon a temporary total disability basis within thirty (30) days from the date of receipt.

2. The self-insured employer shall rule upon petitions for reopening of claims upon a permanent disability basis within thirty (30) days from the date of receipt.

f. Applications for modification of awards. Modification of awards initiated by self-insured employers shall be noticed to the claimant. The claimant shall have ten (10) working days to respond to application, which shall clearly and fully state the self-insured employer's reasons for pursuing a modification. The claimant shall also be apprised of the time period to respond to the self-insured employer's notice. Thereafter, the self-insured employer is required to issue a ruling within ten (10) working days after the date of the expiration of the time period for the claimant's response.

g. Vocational Rehabilitation; Training proposals. The self-insured employer shall rule upon Individualized Written Rehabilitation Programs received from vocational rehabilitation providers within twenty (20) working days from the date of receipt.

h. Invoices.

1. Health care vendors. The self-insured employer shall rule upon and pay invoices for payment or reimbursement of health care vendor services or health care supplies submitted upon properly executed prescribed forms within thirty (30) days from the date of receipt.

2. Travel expenses; wages. The self-insured employer shall rule upon and pay invoices for reimbursement of travel expenses and wages submitted upon properly executed, prescribed forms within thirty (30) days from the date of receipt.

i. Payments to claimants.

1. Self-insured employers shall make the initial temporary total disability payments to claimants in lost-time claims that are ruled compensable within fifteen (15) days of its ruling.

2. Self-insured employers shall make continuous bi-weekly temporary total disability payments to claimants for the extent of their temporary total disability as defined by the provisions of article four, chapter twenty-three of the West Virginia Code and the rules of the commission.

j. Orders. The self-insured employer shall comply with all orders of the office of judges and the board of review and all mandates of the West Virginia Supreme Court within fifteen (15) working days from the date of receipt, unless sooner required to act under the terms of the order or mandate.

15.6. Maintenance of Claim Records. For all actions taken on or after July 1, 2004, the self-insured employer is required to maintain a detailed claim record, either in

an electronic or paper format, for each claim. The claim record shall include, but not be limited to:

a. The completed report of injury as prescribed in the forms of the commission;

b. Wage calculations used to determine claimant benefits;

c. Dates that the claimant ceased work and returned to work as a result of the compensable injury;

d. Health care invoices;

e. Medical and vocational reports and summaries of psychiatric reports, if so restricted by the psychiatrist;

f. Motions, applications, and claim correspondence;

g. Rulings issued by the self-insured employer, including denial of benefit rulings; and

h. Rulings issued by all adjudicatory bodies involved with the claim, including the office of judges, the board of review and the West Virginia Supreme Court of Appeals.

15.7. Date stamp; Claims records. The self-insured employer is required to date stamp each report of injury, health care invoice, medical and vocational report, motion, application, claim correspondence, ruling issued by the self-insured employer and ruling issued by adjudicatory bodies on the date received or sent, as applicable.

15.8. Claims Records. The self-insured employer is required to maintain claim files for the benefit of the workers' compensation commission in the event of the self-insured employer's termination of business, termination of self-insured status, default or buy-out of claims liability.

a. The self-insured employer shall provide all claims records within five (5) working days for active claims and within thirty (30) working days for non-active claims after notification by the commission. The self-insured employer may retain copies for their records.

15.9. Requests for Claims Records by Injured Workers or Their Representatives. The self-insured employer shall provide a copy of the claim record to the claimant or his authorized representative within ten (10) working days of the date the written request is received by the self-insured employer. The initial copy of the record

will be provided at no cost by depositing the claims records, postage prepaid in the United States mail. Subsequent copies will be provided at a reasonable charge.

15.10. Settlements. The self-insured employer and the claimant may negotiate a final settlement of any and all issues in a claim with the approval of the office of judges in accordance with the provisions of West Virginia Code §23-5-7. The commission is not required to be a party to the settlement.

15.11. Recoveries of overpayments.

a. The self-insured employer is responsible for collecting all overpayments to claimants, whether made by the self-insured employer or by the fund, in the self-insured employer's self-administration of its claims.

1. The self-insured employer is required to document each recovery of overpayment from its claimants.

2. In circumstances when the self-insured employer collects an overpayment previously made by the fund, the self-insured employer shall remit the collected amount to the commission within thirty (30) days of recovery.

b. The commission is responsible for collecting all overpayments to claimants, whether made by the self-insured employer or by the fund, in the commission's administration of its claims.

1. In circumstances when the commission collects an overpayment previously made by a self-insured employer, the commission shall remit the collected amount to the self-insured employer within thirty (30) days of recovery.

c. The self-insured employer may seek recovery of vendor overpayment made by the self-insured employer directly from the service provider.

15.12 Occupation Disease and Permanent Total Disability Claims.

a. Occupational Pneumoconiosis Claims.

1. The self-insured employer shall examine the application and any other information to determine if the claimant has been exposed to the hazards of occupational pneumoconiosis in the State of West Virginia over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure to such hazards, or for any five of the fifteen years immediately preceding the date of such last exposure and to determine if the claim has been timely filed. If these jurisdictional prerequisites are satisfied and if it is determined that the claim is allocable, the employer shall provide notice of its findings along with all other relevant information to the Commission within thirty (30) days of receipt of the claim. If these jurisdictional

prerequisites are not satisfied, then the self-insured employer shall enter an Order denying the claim and shall provide notice to the claimant and Commission.

2. Upon receipt, the Commission shall process the occupational pneumoconiosis claim for submission to the Occupational Pneumoconiosis Board. The Commission shall enter a non-medical order determining whether the applicable statutory presumption regarding whether the occupational pneumoconiosis arose out of and in the course of the claimant's employment has been satisfied, the date of last exposure, the allocation of charges among employers, and any other appropriate matter.

3. Once the Commission has entered the non-medical order, the Commission will gather all necessary information as required by the Occupational Pneumoconiosis Board and shall then proceed to schedule the claimant for an examination with the Occupational Pneumoconiosis Board. The Board shall determine the absence or presence of the disease and impairment rating, if any, as more fully provided for in the applicable statutes and rules. The Occupational Pneumoconiosis Board shall thereafter issue a recommendation, which shall be entered as an order by the Commission.

4. The process outlined above shall be the sole responsibility of the self-insured employer in all cases determined to be non-allocable, and in occupational pneumoconiosis claims that the self-insured employer administers in accordance with the Commission's discretionary authorization under the provisions of 15.12.c.2. The self-insured employer shall make all determinations set forth in Section 15.12.a.1 and Section 15.12.a.2 and shall enter all required orders. Copies of the application, self-insured determinations and orders shall be timely provided to the Commission in an electronic format determined by the Commission. The Commission shall schedule the Occupational Pneumoconiosis Board examination and notify the parties as to its date, time and location. The Occupational Pneumoconiosis Board shall thereafter issue a recommendation, which shall be entered as an order by the self-insured employer.

b. Permanent Total Disability Claims.

1. The self-insured employer shall receive the permanent total disability applications of its employees and shall determine whether a complete application has been provided. The self-insured employer shall provide notice to the Commission of receipt of the permanent total disability application within five days of receipt of the completed application. The Commission shall thereafter forward to the self-insured employer that information necessary to make the initial eligibility threshold determination.

2. The self-insured employer shall determine whether the initial eligibility threshold has been satisfied pursuant to West Virginia Code Section 23-

4-6(n)(1)(2003). The self-insured employer shall issue an order granting or denying the eligibility of the application within 30 days of receipt of 1) a completed application and 2) the Commission data necessary to make the initial eligibility threshold decision

3. If the self-insured employer determines that the initial eligibility threshold has been satisfied, then the self-insured employer shall forward the application and all related information to the Commission to begin the IEB review process. The self-insured employer shall also communicate to the Commission at this time its choice of providers to perform any pertinent IME or other evaluations. The selection shall be from a Commission determined list of providers, if available.

4. Necessary examinations shall be obtained and the claim will proceed to the IEB docket for a determination of whole body medical impairment (WBMI) threshold.

5. The Commission shall enter the IEB initial WBMI recommendation and provide a 30 day comment period for all parties to the claims.

6. The IEB will make a final WBMI recommendation that shall be entered by Commission order.

7. If the IEB determines that the WBMI threshold has been satisfied, the Commission shall schedule a vocational rehabilitation review with a reviewer chosen by the employer.

8. Upon completion of the vocational evaluation, the claim will return to the IEB for a final permanent total disability entitlement determination.

c. Occupational Disease Claims (including hearing loss and carpal tunnel syndrome claims).

1. In occupational disease claims that may be allocable, the application and all supporting evidence shall be forwarded to the Commission within ten (10) business days of receipt by the self-insured employer, or its authorized agent. Upon receipt, the Commission will contact all potential chargeable employers and at any point in the process where it is identified as a single charge self-insured employer the claim will be forwarded to the self-insured employer or TPA for the appropriate order granting or denying compensability.

2. The Commission shall administer all occupational disease claims determined to be allocable, except in instances when the Commission may otherwise authorize the administration of the claim such as instances when the employers to which the claims are allocated share common ownership or when temporary total disability benefits are or are likely to be awarded to the claimant. In utilizing the

exception, the employer may request authorization to administer the claim. The Commission, in its sole discretion, may authorize the employer to administer the claim.

3. The self-insured employer shall administer all occupational disease claims determined to be non-allocable.

§85-18-16. Payroll Reports and Premium Taxes.

16.1. Upon filing an application for self-insured status, an employer acknowledges its obligation to continue to make all payments and file all reports required by the Act or by the rules adopted by the commission.

16.2. On or before the last day of the first month of each quarter, for the preceding quarter, each self-insured employer shall file with the commission a sworn statement of the total gross wages and earnings of all of its employees subject to the Act for the preceding quarter.

16.3. On or before the last day of the first month of each quarter, for the preceding quarter, each self-insured employer shall pay into the compensation fund as portions of its self-insured premium tax or surcharge, as applicable:

a. A sum sufficient to pay the employer's proper portion of the expense of the administration of the Act;

b. A sum sufficient to pay the employer's proper portion of the expense of claims for those employers who are in default in the payment of premium taxes or other obligations;

c. A sum sufficient to pay the employer's fair portion of the expenses of the disabled workers' relief fund;

d. A sum sufficient to maintain as an advance deposit an amount equal to the previous quarter's payment of each of the foregoing three sums;

e. A sum as determined by the commission to be sufficient to pay the employer's portion of rates, surcharges or deficit management and deficit reduction assessments;

f. A sum as determined by the commission to pay the employer's portion of self-insured catastrophic injury benefits, and second injury payments on all self-insured second injury claims other than second injury claims for those employers self-insured for second injury. Any employer previously self-insured for second injury benefits shall continue to be responsible for payment of those benefits; and

g. Risk pool assessments as may be required by the rules of the commission (85 C.S.R. 19, entitled "Risk Pools").

§85-18-17. Auditing, Monitoring and Inspections; Record Keeping.

17.1. Preservation of records. Every self-insured employer shall keep, preserve and maintain complete records showing in detail all expenditures for gross wages and the separation of such expenditures in the various classifications of the employer's business. The employer shall keep

such additional information necessary to determine classification of the employer's activities as well as other information necessary for a risk assessment. Such records shall be preserved for not less than ten (10) years after the respective times of the transaction upon which the records are based. The employer shall retain all records for periods in excess of ten (10) years in matters involving possible fraud or failure to report or disputes with the commission until the commission or appropriate administrative, judicial or appellate body finally resolves the matter and the time for appeal has been exhausted.

17.2. Pursuant to W. Va. Code §23-2-2(a), each self-insured employer shall furnish the commission, upon request, all information required by the commission to ascertain or verify the number of employees employed by the employer during a pertinent period, the names and social security numbers of the employees, the gross wages paid to employees during a pertinent period, occupations of employees, classification information, other information necessary for risk assessment, and payments owed to the commission, as premium taxes, premium tax deposits, interest, fees, penalties, or to carry out the various purposes of the Act.

17.3. Preservation of claims records. Every self-insured employer is required to keep, preserve and maintain all claims records.

17.4. Inspections of records; failure to maintain records.

a. All accounting records, books, records, papers and documents reflecting the amount and the classifications of the gross wage expenditures of an employer, as well as the nature of the business operation, shall be kept available for inspection at any reasonable time by the duly authorized representatives of the commission.

b. The self-insured employer shall keep all claims records available for inspection at any reasonable time by the duly authorized representatives of the commission. The commission shall review claims records of the employer on an annual basis or more frequently as the commission determines in its sole discretion to be necessary.

c. If any employer fails to keep, preserve and maintain such records and other information as required under the provisions of this section, or fails to make such records and information available for inspection, the commission may revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

17.5. Auditing records; adjustments. The commission shall have the right at any reasonable time to audit any or all books, records, papers, documents, operations and payroll of an employer for the purpose of verifying the correctness of reports made by an employer or such other reports as may be required by the commission or by State or federal law. The commission shall have the right to make adjustments, including adjustments to the amount of gross wage expenditures, premium tax rates and amount of premium tax.

17.6. In order to inspect, audit or review the information specified by the Act and this rule including, but not limited to payroll and claims records, the commission may direct that an agent or employee of the commission audit the information referred to in this section during the regular business hours of the employer or at another reasonable time and place within the state of West Virginia and the employer shall permit the audit to occur and shall cooperate with the auditors so that the audit may be successfully completed. Failure to cooperate with such an inspection may be

considered sufficient to revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

17.7. Either as an addition to or as part of the audit permitted under this rule, the commission may convene an administrative hearing or conduct a deposition for the purpose of receiving the information in testimonial or evidentiary form. The executive director, his or her designee, an inspector or a designated hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounting records, accounts, papers, records, documents, and testimony at any such hearing or deposition. Any such administrative hearing or deposition shall be convened and conducted in accordance with 85 C.S.R. 7, "Rules for Selected Hearings," and the commission shall have the right to have any employer or officer, agent, or employee of any employer examined under oath or affirmation. A deposition may be held pursuant to this subsection even if a hearing regarding the employer has not been previously noticed or requested; but, in that event, adequate notice of the deposition shall be given to all interested parties known to the commission.

17.8. The request for information provided for by the Act, this rule or other rules of the commission, the audit provided for by this rule, or the hearing provided for by this rule may be conducted at any time when necessary to carry out the purposes of the Act.

17.9. Noncompliance Penalties. Penalties may be assessed to self-insured employers who fail to comply with the statutes and rules governing workers' compensation benefits and self-administration. The penalty amount will be based upon the employer's overall compliance as determined by the commission's review of the employer's records.

a. The penalty assessed shall be in the sole discretion of the commission, not to exceed $5,000 per review, and shall be based on an employer's compliance with the following: (1) claims action, rulings, and payment; (2) claims support activities; and (3) administrative functions. Subsequent violations may result in a multiple of the initial fine up to and including revocation of self-insured status.

b. The self-insured employer's overall compliance with the applicable statutes and rules may be determined by the commission's review of the employer's claims and the activities taken within a prescribed time period as determined in the discretion of the commission.

c. In addition to penalties provided for in 17.9.a, the employer may be assessed penalties in an amount determined in the sole discretion of the commission, not to exceed $500 per occurrence, for administrative non-compliance, such as:

1. Failure to submit claims data transmissions in a timely and acceptable format;

2. Refusal to allow inspection of records for commission review purposes;

3. Failure to submit audited financial statements timely for annual review purposes;

4. When the employer elects to employ or contract with a third party administrator to administer its claims, the failure to utilize a third party administrator qualified by the commission; and

5. Failure to timely and fully respond to the commission's requests in regard to items 17.9.c.1 through 17.9.c.4, may result in penalties provided for in 17.9.a.

d. The assessment and payment of penalties under this section shall not prevent the commission from making recommendations to the board of managers concerning the employer's self-insurance status.

§85-18-18. Maintaining Self-Insured Status; Annual Review.

18.1. The employer's status as a self-insured employer with respect to all or part of the compensation fund shall continue on a year-to-year basis so long as the employer continues to maintain the requisite financial standing, as set forth in section 8 of this rule, and continues to satisfy the other requirements imposed by the Act, this rule and any other pertinent rule, and any order of the commission.

18.2. Annual review. The commission will perform a comprehensive claims, financial, compliance and security review of each self-insured employer on an annual basis. The commission may conduct an audit of all claims records, accounting records, books, records, papers, operations and documents deemed relevant by the commission in the possession or control of the employer.

a. The commission shall notify each self-insured employer of their annual review.

b. Upon notice of the commission, each self-insurer shall file or make available for inspection, whichever method as may be specified by the commission, documents and information requested to perform an annual review on the self-insured employer. If any employer fails to make such records and information available for inspection, the commission may revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

c. The commission shall notify the employer of the results of the annual review.

18.3. Financial review. In the performance of its annual financial and security review, the commission shall determine whether the self-insured employer continues to demonstrate sufficient financial capability to remain self-insured.. All the following benchmarks must be met in order to demonstrate a financial position that is not deteriorating.

a. The most recent three years of audited financial statements must be analyzed through the most current commission financial review model.

1. A score of medium to high must be met in the financial strength category.

2. A company cannot post net operating losses more than two years in a row.

3. The current ratio should not decline two years in a row and be at least one to one or should not decline 40% from one financial review to the next.

4. The total liabilities to total assets should not increase two years in a row or increase over 40% from one financial review to the next.

b. In addition to meeting all of the preceding benchmarks, one of the following three benchmarks must be met to demonstrate a financial condition that is not deteriorating:

1. Cash flow from operating activities should be greater than net income.

2. Total stockholders' equity should not decline two years in a row or decline over 40% from one financial review to the next.

3. An employer must have at least three (3) of the six (6) profitability and solvency ratios fall within the industry median as reported by Dun & Bradstreet or other company as specified by the commission. The six ratios are:

A. Profit margin;

B. Rate of return on assets;

C. Return on net worth;

D. Current ratio;

E. Current liabilities to net worth; and

F. Total liabilities to net worth.

18.4. The commission reserves the right to review or audit, at any time, a self-insured employer's compliance with the requirements of the Act or the rules of the commission.

18.5. Security Responsibility. The self-insured employer is responsible for maintaining adequate security for its claims liability for catastrophic coverage, for claims with dates of injury prior to July 1, 2004, and in instances of a deteriorating financial condition for claims liability for dates of injury on or after July 1, 2004, as provided by this and other rules of the commission.

18.6. Claims Responsibility. A self-insured employer with respect to all or part of the compensation fund is responsible for the direct payment of all pecuniary compensation due and owing under the Act to employees or employees' dependents; is responsible for the direct payment of health care provider and medical invoices; and is responsible for reimbursing the commission for any payments made by the commission that should have been paid by the self-insured employer.

a. The self-insured employer shall pay pecuniary compensation payable by the employer and reimbursements due from the employer within the time periods specified by the Act, the various rules promulgated by the board of managers, and the orders of all adjudicatory

bodies; or, in the absence of any of the above, employer shall pay the compensation and reimbursements in a prompt and timely fashion.

18.7. If the commission determines that the security requires adjustment in light of the self-insured employer's current financial status or liability, the commission shall recommend to the board of managers that the security requirements be adjusted. Prior to such action, the commission shall notify the employer of the forthcoming recommendation to the board of managers and the reasons for the recommendation. The employer shall be provided thirty (30) days for written response to the commission. The commission shall provide a copy of any such employer response to the board of managers if the commission recommends that the employer's security be adjusted.

18.8. The commission shall report directly to the board of managers any acts of non-compliance by the self-insured employer. The board of managers may direct the commission to terminate an employer's self-insurance status if the employer fails at any time to comply with the requirements of the Act, this rule or any other pertinent rule, or any order of the commission; or, otherwise defaults on a self-insurance obligation. The commission shall provide the employer with written notice of the termination.

§85-18-19. Involuntary revocation of self-insurance status.

19.1. Notification.

a. Prior to recommending to the board of managers that the self-insured employer's status of self-insurance be revoked, the commission shall:

1. Notify the self-insured employer regarding the forthcoming recommendation;

2. Provide to the employer the reasons for recommending revocation of self-insured status;

3. Provide to the employer fifteen (15) days for written response to the commission's reasons for recommending revocation of self-insurance status;

4. Inform the self-insured employer that failure to respond in writing to the notification shall result in the commission's recommendation to the board of managers that the self-insured employer's status of self-insurance be revoked; and

5. The notification to the self-insured shall be in writing and sent to the self-insured employer by certified United States mail, return receipt requested.

19.2. Presentation before the Board of Managers.

a. After the commission's review of the response from the self-insured employer or the expiration of the time for response, the commission may proceed to recommend to the board of managers that the employer's status of self-insurance be revoked.

b. The commission shall provide a copy of any such employer response to the board of managers when the commission recommends that the employer's status of self-insurance be revoked.

c. The commission shall make its recommendation to the board of managers at a meeting of the board. The recommendation may be provided to the board during an executive session of a meeting.

d. The employer shall be notified of the date, time and location of the meeting of the board of managers wherein the commission will make its recommendation. The employer may be present during the presentation of the commission's recommendation. The employer may address the board regarding the recommendation and for such time as may be appropriate in the discretion of the chair.

19.3. Approval of the Board of Managers.

a. After the commission presents its recommendation to the board of managers, the board shall determine whether to approve the commission's recommendation.

b. All decisions of the board of managers regarding the commission's recommendation shall be made in an open meeting of the board.

19.4. Revocation.

a. If the board of managers approves the commission's recommendations to revoke the employer's self-insurance status, the commission shall, by its order, notify the employer of the revocation of the status of self-insurance and the reasons for the revocation.

b. Upon revocation of the privilege of self-insurance, the employer shall remain liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to the termination of self-insured status.

c. The commission shall order the employer to pay into the compensation fund an amount sufficient to cover the estimated cost of all such liability or, in the alternative and in the commission's sole discretion, secure the liabilities in a manner consistent with other provisions of this rule.

§85-18-20. Name and Address of Employer; Legal Notice; Publications; Employer Correspondence.

20.1. General. Except as hereinafter provided, the name and address given by the employer on the application for coverage shall be used by the commission for giving any notice required by the statute or by this rule, unless a formal request for a change of name or address is made by the employer as hereinafter provided.

a. Self-insured employers are required to provide the name, telephone number, fax number and e-mail address of its designated primary contact person responsible for workers' compensation matters.

20.2. Change of name or address. Any employer changing the name or the address of the business must promptly notify the commission, in writing, and request that the name or address be changed on the commission's records. Every employer required to register with the Office of the Secretary of State shall provide evidence of any name change from that office.

a. In case of the appointment of a receivership, the full name of the receivership shall be reported.

b. If the employer wishes to have certain notices and correspondence directed to a subsidiary, a branch office or agent, the employer must notify the commission in writing of the name and address of said subsidiary, branch office or representative and specify the circumstances under which said notice is to be given. It will be the responsibility of the representative to notify the commission when such representation ceases and to provide a current address to which the employer's notices and correspondence are to be sent.

20.3. Effect of failure to request change of name or address. In the absence of a request for a change of name or address by the employer, any notice given by the commission to the employer at the address and in the name shown on the commission's records shall constitute constructive notice to the employer of any action taken.

20.4. Legal notice to attorney or agent. In any matter arising under this rule in which the commission is required to give notice to a party, if a party is represented by an attorney or other representative, then notice to the attorney or other representative shall be sufficient notice to the party so represented. "Other representative" shall include the employer's third party representative, if the employer is so represented.

20.5. Correspondence. All correspondence to the commission from an employer or its representative related to an employer's workers' compensation account, premiums, or coverage issues shall contain the employer's policy number as well as the employer's federal employer identification number.

§85-18-21. Third Party Administrators.

21.1. Self-insured employers may hire third party administrators to administer claims if the third party administrator meets certain qualifications.

21.2. Qualifications. In order to qualify to administer claims for a self-insured employer, a third party administrator is required to meet the same financial tests as required of third-party administrators governed by the State insurance commissioner pursuant to the provisions of article forty-six, chapter thirty-three of the West Virginia Code [W. Va. Code §§ 33-46-1 et ~~seq.~~].

seq.] provided, however, that a third party administrator which has been operating in West Virginia for a period of at least five (5) years in workers' compensation claims management and which has been previously recognized by the commission as competent in its administration of claims services shall be presumed to be initially qualified and shall not be required to meet the third-party administrator financial tests until July 1, 2006.

21.3. Each third party administrator, administering claims on behalf of a self-insured employer, shall within five (5) days from the effective date of this rule provide a list of self-insured employers for whom the third party administrator administers claims. The third party

administrator shall notify the commission within twenty-four (24) hours of entering into or terminating a third party administrator contract with a self-insured employer.

21.4. Each third party administrator shall re-apply bi-annually on forms provided by the commission to qualify as a third party administrator for the purpose of administering workers' compensation claims.

21.5. The commission shall notify third party administrators who no longer qualify to administer workers' compensation claims.

§85-18-22. Administrative Protests and Hearings.

22.1. Any self-insured employer who wishes to contest a decision made by the commission, under the provisions of chapter twenty-three, article two of the Code, may do so under the provisions of W. Va. Code, §23-2-17. The rule implementing that section requires the filing of a formal request for reconsideration, and following reconsideration, a petition within thirty days of the self insured employer's receipt of notice of the disputed decision or action or reconsidered decision or, in the absence of such receipt, within sixty days of the date of the commission's making such disputed decision or taking such disputed action or making such reconsideration decision. (See 85 C.S.R. 7, "Rules for Selected Hearings." However, as a mandatory prerequisite to hearing a petition after a reconsideration decision, the employer must deposit ~~with the commission the sum of any amounts in dispute or which arise from, may be calculated from or which are involved in the disputed decision; unless the employer has a financial inability to pay a part or all of the required deposit and~~sufficient assets with the Commission to guarantee payment of the amount determined to be due and owing by the Commission. The ~~then if so, except to the extent the same is proven by, at least, a competent written declaration of need for exception in an amount which is accompanied by three years of financial records to that extent and effect, pays that portion of the required deposit as has been thereafter approved by the commission. Furthermore, any amount due and unpaid by the employer, other than and except for any amount in dispute as defined above under petition and paid in deposit or not paid in deposit due to proved financial hardship, shall be charged to the employer's policy account and, if not paid timely, shall be delinquent and, if still not paid timely after notice given under the provisions of Section 23-2-5 of the W. Va. Code, shall be and cause default under the provisions of section 23-2-8 of the Code.~~deposit of assets shall be required in the following form(s):

a. The full cash amount of the money determined to be due by the Commission;

b. A reinstatement agreement issued and maintained in accordance with the provisions and terms of W. Va. Code §23-2-5 and, in accordance with the discretionary policies of the Commission, as authorized by law, including the authority to refuse to enter into a reinstatement agreement;

c. A cash or corporate surety bond or a bank letter of credit in the full amount claimed due by the Commission; or

d. Any combination of the above three methods that guarantees payment in full to the Commission in the event the employer does not prevail in the matter.

§85-18-23. 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.

WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In This Box

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), 23-2-9(b)&(m)

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: 18

TITLE OF RULE BEING PROPOSED: Self Insurance Self Administration & Third Party Administrators

DATE OF PUBLIC HEARING: April 20, 2004 TIME: 1:00 p.m.

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

*The comment period for this rule ends on April 20, 2004, at the close of this hearing.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T.J. Obrokta, General Counsel
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

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

4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone: (304) 926-1710

March 16, 2004

The Honorable Joe Manchin III
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 18
"Self Insurance Self Administration & Third Party Administrators"

Dear Secretary Manchin:

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. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 18 entitled, "Self Insurance Self Administration & Third Party Administrators," 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

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 18: Self Insurance, Self Administration & Third Party Administrators

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
1. ESTIMATED TOTAL COST	Unknown	0	Unknown	Unknown	Decrease
PERSONAL SERVICES	Unknown	0	Unknown	Unknown	Decrease
CURRENT EXPENSE	Unknown	0	Unknown	Unknown	Decrease
REPAIRS & ALTERNATIONS	0	0	0	0	0
ASSETS	0	0	0	0	0
OTHER	0	0	0	0	0
2. ESTIMATED TOTAL REVENUES	Unknown	0	Unknown	Unknown	Decrease

2. Explanation of above estimates:

It is expected that this rule will increase the Commission's personnel and other administrative expenses related to the auditing and review of self insured employers wage and claims records on an ongoing basis. Estimated annual costs, including possible contractual audits, resulting from the proposed rule cannot be reasonably determined and are shown as "unknown". In addition, implementation costs related to such items as data exchange processing and monitoring procedures may be significant. However, additional oversight and implementation costs should be offset by reductions in claims processing and adjudication costs related to the self insured claims. Although the initial implementation costs may exceed the claims processing savings on an annual basis, this rule is expected to result in an annual decrease in cost to the Commission over the long term.

Rule Title: Title 85 Series 18: Self Insurance, Self Administration & Third Party Administrators

3. Objectives of this rule:

This rule establishes additional policies and procedures of the Workers' Compensation Commission related to self insurance, self administration & third party administrators.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Although implementation costs may cause increased expenses in the next two years, the final impact of the rule should be an annual reduction in expenses.

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

It is expected that self insured employers and claimants will benefit from self administration. Improved oversight and control of claims information by the employers should help them to better service their own claims. This should result in accurate and timely processing of claims benefits for self insured claimants.

C. Economic Impact on Citizens/Public at Large.

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

Date: March 16 ,2004

Signature of Agency Head or Authorized Representative

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 18
Self-Insurance Self Administration &
Third Party Administrators

This rule repeals and replaces a portion of a rule of the former Workers' Compensation Division of the Bureau of Employment Programs entitled, 85 C.S.R 9 §13, "Risk Management."

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission was created, effective October 1, 2003, as a stand-alone agency of State government. Under that Bill, the Commission is required to revise each of its rules prior to July 1, 2006.

In addition, the provisions of S.B. 2013 made substantial changes to the provisions governing self-insurance. See W. Va. Code §23-2-9. In pertinent part, the new provisions provide:

W. Va. Code §23-2-9(b)(1):
"Notwithstanding any provision in this chapter to the contrary, self-insured employers shall, effective the first day of July, 2004, administer their own claims. The executive director shall, pursuant to rules promulgated by the board of managers, regulate the administration of claims by employers granted permission to self-insure their obligations under this chapter. Such rules shall be promulgated at least thirty days prior to the first day of July 2004. A self-insured employer shall comply with the rules promulgated by the board of managers governing the self-administration of its claims."

W. Va. Code §23-2-9(m):
"An employer may not hire any person or group to self-administer claims under this chapter as a third-party administrator unless the person or group has been determined to be qualified to be a third-party administrator by the commission pursuant to rules adopted by the board of Managers."

This exempt legislative rule establishes the requirements for self-insurance, the maintenance of self-insurance status, the self-administration of claims and the requirements for third party administrators under the workers' compensation system.

The rule was revised to comply with the Legislative directive.

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
PUBLIC HEARING
APRIL 20, 2004 – 1:00 P.M.
85CSR18 "SELF INSURANCE SELF ADMINISTRATION AND THIRD PARTY ADMINISTRATORS"

ATTENDANCE SHEET

The Board is required to keep a list of individuals attending its meetings and of those who wish to address the Board.

NAME	COMPANY	Do you wish To speak? (Yes/No)
Janet Howard	WV WCC / Communications	No
Bobby Pauley	GARMI	No
Steve Tedrick	AEP	
Susan Osborne	AMVEST	No
Larry Boggess	Peabody Energy	no
Gary Kennedy		no
Roger A Thaden	AEP / WVSIA	No.

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
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NAME	COMPANY	Do you wish To speak? (Yes/No)
Henry Bauer	West Va Self-Insurers Assoc	Yes
Phil Nicholson	CONSOL Energy / WVSIA	NO
Tim Huffman	JK	No
Ed Cook, CIA	Cook & Cook	No
Ricky Adams	ACS	No
Ron Chesto	AGS	No
Mimi Thurman	Occup & Envir Health	No

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
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NAME	COMPANY	Do you wish To speak? (Yes/No)
Mike Cavendish	Accdna	Yes
Wendle Cook	Cook and Cook	Yes
Karen Burgess	Frank Coates	No
Wanda Buckner	" "	NO
Donna McAngles	DHS	NO
Wanda Clem	Coney	—
Pat Marsey	AFL-CIO WVA	Yes

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
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ATTENDANCE SHEET

The Board is required to keep a list of individuals attending its meetings and of those who wish to address the Board.

NAME	COMPANY	Do you wish To speak? (Yes/No)
Roger Tincher	Shaftoe & Johnson	No
LARRY SWANN	Property & Casualty Ins. Assoc. of Am.	NO
Kim Costa	Academic Employee Service	No
Bob Weaver	Thomas P. Maroney, LC	NO

BEFORE THE WEST VIRGINIA WORKERS' COMPENSATION COMMISSION
BOARD OF MANAGERS

ORIGINAL

IN RE: RULE 18 - Self Insurance, Self Administration and Third Party Administrators

TRANSCRIPT OF PROCEEDINGS had at the public hearing in the above referenced matter, held on April 20, 2004, at 1:00 p.m., before the West Virginia Workers' Compensation Commission Board of Managers, at the Charleston Civic Center, Charleston, West Virginia, pursuant to notice duly given to all interested parties.

REBECCA L. BAKER
CERTIFIED COURT REPORTER
P. O. BOX 7822
CROSS LANES, WV 25356 - (304) 759-2471

ATTENDING REPORTER: JENNIFER L. JIMISON, CCR

A P P E A R A N C E S:

MEMBERS OF THE BOARD OF MANAGERS:

STEVE WHITE, Chairman
CRAIG SLAUGHTER
GENE F. BAILEY
EVERETTE SULLIVAN
ROBERT PHALEN
PAUL THOMPSON
CHRIS JARRETT
DOUG MERRITT
RICHARD HUMPHRIES
JOHN JOHNSON
ROBERT KISS
DAVID SATTERFIELD
VIC SPROUSE

(Call to order, 1:00 p.m.)

CHAIRMAN WHITE: Pursuant to Chapter 29-A of the West Virginia Code and pursuant to a notice of public hearing on proposed rule posted at the West Virginia Secretary of State's Office, we're hereby conducting a public hearing on Rule 18 of the Workers' Compensation Board of Managers, it's Self Insurance, Self Administration and Third Party Administrators.

I hereby declare the public hearing open to the public. There has been a sheet to sign up for comments. And the first person on the comment period, if they can come up, would be Henry Bowen.

MR. BOWEN: Thank you very much, Chairman White, members of the Board of Managers. I'm Henry Bowen, executive secretary for the West Virginia Self Insurers Association and I'm very privileged to be with you today to talk about Rule 18 in very general terms.

I wanted to express that through the stakeholder process our association through a

committee appointed by it has had numerous meetings on Rule 18 with representatives from the Workers' Compensation Commission regarding this proposed exempt legislative rule.

I'd like to commend the Board of Managers and Executive Director Greg Burton for his commitment to providing the self insured community the opportunity for continuous input in this process.

We believe that Rule 18 in its current form reflects an appropriate and reasonable balance of all of the interests quite clearly affording the rights and recognizing all of the statutory rights and remedies available to all employees under the Workers' Compensation law, while at the same time reflecting the responsibilities for self administration authorized by the legislature as part of Senate Bill 2013.

The rule quite clearly reflects that self administration will be an extraordinary

opportunity in the best sense of a private and government partnership to insure successful transition to self administration.

And our association believes that self administration will serve as a model to the best claim practices in the West Virginia Workers' Compensation system.

WVSIA is committed to continuing its primary role of facilitating information, involvement in educational processes. And we'll focus on regulatory interpretations, Commission policies and procedures as they implement self administration.

As the Board of Managers moves forward until next month's vote on Rule 18, and while you complete the other important work before you at the same time dealing with required rule making and other required rate making obligations, we ask you to take into consideration the following issues and concerns.

Certainly, self administration presents a

great opportunity for self insurers authorized under the Workers' Compensation law, but we want you to recognize that it will take on for these employers and their TPAs, an inordinate amount of additional work because of our statutory requirements.

Self insurers also assume a greater risk of bad faith allegation since we do not expect that they will be cloaked with the same immunity from complaints on those issues that the Workers' Compensation system currently statutorily and constitutionally enjoys.

Self insurers also recognize that they will be held to standards set by the statute, rules that you adopt, policies that will be interpreted by the Commission, and these all include time frames even in the statute and regulations adopted -- or rules adopted by the Board of Managers, that the agency itself has historically had great difficulty in meeting.

Finally, we ask that the Board of

Managers recognize that the proposed FY2005 raise contain the same level of administrative expense charged to self insurers as in fiscal year 2004.

While we understand and appreciate the rationale for the agency's recommendation in that regard, we understand the agency's need for additional cash, we ask you to keep in mind as you go forward and adopt all of these rules and assess the rate making for 2005, whether there is any justification legally which -- or what will amount as an excessive administrative cost.

There is no question that once the transfer of administration of self insured claims is in effect on July 1, the agency will have less demand on its staff, staff that can be used appropriately elsewhere, and we simply ask you in the face of other inevitable self insured costs, particularly dealing with security and other anticipated costs that may be resulting from Weirton Steel's anticipated default, that you evaluate whether or not you can find a way to

return some of that administrative charge to self insurers during this rate making year.

We remain committed to working with the agency to a fair and reasonable resolution of issues of that which we continue to disagree, and we appreciate the opportunity that Executive Director Burton has afforded to us to have the kind of input through the stakeholder process.

We're not sure that you perhaps may appreciate that that process does allow members of the parties to have numerous meetings with the agency and we fully recognize that the agency has full discretion to have done it differently had it chosen to do so and we are most appreciative that we have the continued opportunity to articulate our concerns and to continue to professionally identify the areas of that which we have disagreement with the Commission about its interpretation of the Workers' Compensation law.

Nevertheless, we recognize that the clear alternatives in rule making gave us a unique

opportunity that we might not have had but not for Executive Director Burton's commitment to this process that he's allowed to unfold.

Our association will support Rule 18 and we are committed to insuring through our communication and educational processes to all self insured that all of the appropriate information this year with the self insured community, and we understand that there are some on the board who may be somewhat suspicious about the concept of self administration.

Historically, that's certainly understandable. We urge you to give it time to let it unfold and we hope that we can demonstrate objectively that our optimism about self administration will be fulfilled.

Thank you very much, Mr. Chairman.

CHAIRMAN WHITE: Thank you, Mr. Bowen.

The next party wishing to speak is Mike Cavender.

MR. CAVENDER: Mr. Chairman, my comments

are related to fiscal year 2005, premium rate making process. I assume that the board is going to convene its regular meeting and then it would be more appropriate to handle that.

CHAIRMAN WHITE: That's fine. The next individual wishing to comment, Wendell Cooke.

MR. COOKE: Members of the Board, if I may, I have represented claimants for the past 18 years in Boone County.

One of our largest employers has been self insured for a long period of time, so I have several years of experience in dealing with self insured administration claims.

The thing that I have a lot of problems with, I have lots of problems with these proposed rules.

For years and years the employers have sought to gain control of the system. And if you approve these rules you will be giving the employers total control of the system.

The main way that they seek to control

the system is by making direct payments to doctors. Rule 15.5.c.5 states that the self employer shall make the referral from a list of independent medical evaluators qualified by the Commission to perform independent medical evaluations.

Now, in the past employers have always used the same experts over and over and over. And if you give them the choice of selecting certain doctors from one list, I have no doubt in my mind that they're going to select the doctors that they've used for years, that they presently have contracts for future performance with.

There's only one way to offset this that I can see, and that is to establish a rule that forbids employers from referring claimants for independent evaluations to doctors that they already have a contract with.

It means that the employer cannot refer a claimant for an independent physician to its own doctor.

The other problem that I had with this method of making referrals is that I don't see any method for actually making the payments. If you have a situation where employers are going to be making payments directly to doctors without any regulation, they will take full advantage of that.

They will maybe pay the doctor a little extra if he gives a good report or a little less, a little late if he doesn't give a good report. You have to have some type of safeguards to prevent this. And those safeguards simply aren't in these rules.

In the past the thing that kept the self insurers honest was the ability of the claimant to file a petition or revocation of the self insured status of the employer.

And these new regulations have about a 15 step process for the Commission to do that. It makes it virtually impossible to revoke the status of the self insured companies.

The best proposal that I can make would

be to establish a system whereby the employers are required to make payments directly to some official from the Commission, the doctors submit bills directly to the Commission, and the payments go through someone who has some independence about them.

Otherwise, you're creating a corrupt system. You're legalizing bribery if employers are going to be making payments directly to the doctors without any other checks and balances.

I can see lots of problems looking at the big picture. If you have a situation where these regulations are approved, they're going to give such a great advantage to the self insured employer that every large company in the state is going to go the self insured route.

And if they do that, we're going to have difficulty taking care of this deficit that's out there.

You're going to have to go back to the drawing board and do a much better job on these

particular regulations.

Thank you.

CHAIRMAN WHITE: Thank you. The next party wishing to testify is Pat Maroney.

MR. MARONEY: We believe that these entire rules need to have a complete review with a one-on-one session with the Commission, and we would respectfully request that.

We think that there has been a great deal of work that has gone into placing into letter form proposed rules, that in looking at the totality of them we would respectfully request that we have the opportunity to sit down with Mr. Obrokta, Mr. Burton and other members of his staff to go through them on a one-on-one basis to specifically make suggestions which we propose to do.

Self insured status, as we have said from the get-go and I'm speaking now for the AFL-CIO and all of its affiliated unions and United Mine Workers is that we think it's a dangerous concept

which gives far too much power to an employer, and particularly in light of what's occurring right now with the Weirton Steel situation.

Weirton Steel may be just the tip of the iceberg of companies in West Virginia who may not be able to meet their self insured financial responsibilities.

And unless this rule is specifically addressed on a cautious basis, then we may be in for a terrible, terrible financial crises that has not been contemplated the whole history of this state as far as Workers' Compensation and other indebtedness of concern.

So we would respectfully request that we do this on an individual basis with the Commission and its staff and at that time make a further and more complete recommendation to the Board of Managers.

Thank you very much.

CHAIRMAN WHITE: Thank you. Are there any other individuals wishing to testify with

respect to Rule 18?

MR. BURTON: Mr. Chairman, we have some written comments, but we don't have enough copies, we will send those to you, from an individual, we'll get those out in the mail to you today, we'll give one to the court reporter so she can have it. We'll send that to you.

CHAIRMAN WHITE: I hereby declare that the public hearing is closed. Thank you for your comments.

(Whereupon, the public hearing on Rule 18 was adjourned at 1:16 p.m.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

I, Jennifer L. Jimison, a Subcontractor for Rebecca L. Baker, Official Court 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 thereof.

Jennifer L. Jimison
Certified Court Reporter

OFFICIAL SEAL
Notary Public, State of West Virginia
JENNIFER L. JIMISON
P.O. Box 724
Barboursville, WV 25504
My commission expires May 10, 2009

WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In This Box

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), 23-2-9(b)&(m)

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: 18

TITLE OF RULE BEING PROPOSED: Self Insurance Self Administration & Third Party Administrators

DATE OF PUBLIC HEARING: April 20, 2004 TIME: 1:00 p.m.

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

*The comment period for this rule ends on April 20, 2004, at the close of this hearing.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T.J. Obrokta, General Counsel
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

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 18
SELF INSURANCE, SELF ADMINISTRATION & THIRD PARTY ADMINISTRATORS

§85-18-1. General.

1.1. Scope. --This exempt legislative rule provides for employers to administer and provide their own system of compensation to their injured employees. This rule applies to employers who previously received approval of their status as a self-insured employer and who are currently operating their own systems of compensation, former self-insured employers who may want to self-insure in the future, and employers who have not previously been granted self-insured status and who desire to apply for that privilege. Similarly, this rule applies to employers who desire to provide their own system of compensation with regard to coverage of catastrophic events. This rule applies to employers who desire to terminate their self-insurance coverage and return as regular subscribers to the Fund, or self-insured employers who wish to cease doing business. This rule applies to the responsibilities of self-insured employers with regard to their self-administration of workers' compensation claims filed by their employees. This rule also applies to the qualifications of third party administrators hired by self-insured employers to help process workers' compensation claims filed by the self-insured employer's injured workers.

1.2. Authority. -- W.Va. Code §§23-1-1a, 23-2-4, & 23-2-9. 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. --

1.5. Repeal and replacement. -- This rule repeals and replaces section thirteen of 85 C.S.R. 9, entitled "Risk Management."

§85-18-2. Purpose of Rule.

The purpose of this rule is to provide for the administration of a system of self-insurance consistent with the specific provisions and purposes of W. Va. Code § 23-2-9.

§85-18-3. 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. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.

3.2. "Audited statements" mean the financial statements accompanied by an independent auditor's report which provide reasonable assurance about whether the audited employer has presented fairly the financial position, results of operations, and cash flows in conformity with generally accepted accounting principles. This assurance is derived through a systematic process, governed by generally accepted auditing standards, of objectively obtaining and evaluating evidence regarding assertions about economic actions and events to determine whether (1) financial information is presented in accordance with established or stated criteria, (2) the entity has adhered to specific financial compliance requirements, if applicable, or (3) the entity's internal control structure over financial reporting and/or safeguarding assets is suitably designed and implemented to achieve the control objectives.

3.3. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W.Va. Code §23-1-1a.

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

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

3.6. "Decision" means a written statement issued by the commission containing the commission's findings of facts and conclusions as to any issue presented to the commission under this rule. Such decisions shall include, but not be limited to, notices of delinquency and notices of default. Any purported "decision" which is not in writing shall have no legal effect under this rule. "Decision" does not include a written statement in the form of e-mail.

3.7. "Default" for the purposes of a self-insured employer means the failure by a self-insured employer to make a payment or file a report due by it under the provisions of the Act or this rule and which has been notified of delinquency but has further failed to make the payment or file the report within the time period specified by the notice.

3.8. "Delinquent" means a self-insured employer has failed to timely pay premium taxes, to timely file a payroll report, to maintain an adequate premium deposit, to properly and timely pay workers' compensation benefits to their injured employees or to make any other payment due under the terms of this rule or the Act.

3.9. "Dependent" has the meaning ascribed to that term by W. Va. Code, §23-4-10(d).

3.10. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

3.11. "Employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any

other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.

3.12. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W.Va. Code §23-1-1b.

3.13. "Good standing" with the commission means that the employer is not delinquent or in default on its obligations to make reports or payments to the commission.

3.14. "Injury" means compensable injuries or illnesses within the meaning of W. Va. Code §23-4-1 et seq.

3.15. "Payments" are obligations of the employer for the purposes of this rule including, but not limited to, the payment of premium taxes, the payment of premium deposits, the payment of any obligations due to be paid by an employer authorized by the commission to be a self-insurer, and late reporting and payment penalties, and interest.

3.16. "Payroll" means the entire gross wages of all employees, not excluded under provisions of the Act or rules of the commission, or such other wage related exposure base as may be determined by the board of managers.

3.17. "Premium" and "premium tax" mean the amounts of money due from an employer to the fund or commission as a result of quarterly and other periodic assessments by the commission under the provisions of the Act in order to establish, maintain, and replenish the fund and to pay the expenses of administration of the fund by the commission. "Premium" and "premium tax" includes, but is not limited to, assessments of: premium tax, premium deposit and interest, assessed to all employers; and also, that portion of self-insured premium tax required to be paid by the employer for the benefit of the employer's claimant employees as required by law.

3.18. "Quarter" means the four calendar quarters: January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through December 31 of each calendar year.

3.19. "Regular subscriber" and "subscriber" mean an employer who obtains coverage under any of the workers' compensation insurance plans offered by the commission.

3.20. "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.

3.21. "This rule" means this legislative rule designated as 85 C.S.R. 18, "Self Insurance, Self Administration & Third Party Administrators."

3.22. "Date stamp" means either a manual or an electronic date stamp.

3.23. "Claim correspondence" means the correspondence to which an employee is entitled due to a subsequent action or in anticipation of an action being taken.

3.24. "Rule" or "ruled" in the context of claims administration by a self-insured employer means the issuance of a written order to the claimant advising the claimant of actions undertaken

or to be undertaken in the administration of a claim and advising the claimant of his or her rights to contest the ruling.

§85-18-4. Self Insurance Status.

4.1. Self insurance status. An employer may become self-insured with respect to the compensation fund and catastrophe coverage or to the compensation fund but not the catastrophe coverage, if the commission, with the approval of the board of managers, determines it meets the financial responsibility requirements and procedural requirements set forth in W. Va. Code §23-2-9, and in this rule.

4.2. Any employer granted the privilege of self-insurance, as to all or part of the compensation fund, shall give security or bond in the form, of the type, and in the amount required by the commission, with the approval of the board of managers, pursuant to the Act and this rule. Additionally, any employer granted the privilege of self-insurance, as to all or part of the compensation fund, shall abide by the requirements for maintaining, modifying, or terminating the self-insured status, as set forth in the Act and this rule.

§85-18-5. Application for Self Insurance.

5.1. An employer may apply for self-insurance by filing with the commission an application for self-insurance in the form prescribed by the commission. If a parent is to guarantee the employer's compensation risk, the relationship between the employer and the parent must be documented on the application.

5.2. A disclosure of the employer's management and financial structures and the employer's audited financial statements for each of the three (3) fiscal years preceding the date of application must be attached to the application. If a parent business is to insure the employer's compensation risk, the parent's disclosure of management and financial structures, and its audited financial statements for the three years preceding the date of application must also be attached to the application. The employer shall disclose to the commission all of the business entities acquired, bought, transferred or merged by or into the employer applicant. Failure to disclose without good cause, as determined in the sole discretion of the commission, this information at the time the application is filed with the commission may result in rejection of the application or termination of self-insurance status if the privilege of self-insurance has already been granted to the employer.

a. The employer's application and the required audited financial statements must be signed and sworn to by the president alone or vice-president and secretary or assistant secretary of the employer or parent if the employer or parent is a corporation or limited corporation; or, by all of the partners if the employer or parent is a partnership; or, by all of the general partners if the employer or parent is a limited partnership; or, by all the members if the employer or parent is a limited liability company; or, by the owner if the employer or parent is neither a corporation, limited corporation, partnership, limited liability company, nor limited partnership.

b. If the employer is a government agency, the criteria used to determine financial stability and guaranties may be modified to accommodate for governmental accounting and other issues related to a going concern. Any modifications allowed by the board of managers in these cases will take into consideration the risk to the commission.

5.3. The employer may provide the commission with any additional information deemed relevant to its financial stability. After reviewing the application and audited financial statements, the commission may request additional information from the employer or parent relevant to the employer's or parent's financial stability, and the applicant must provide the requested information.

5.4. The employer applying for self-insurance shall pay to the commission a non-refundable application processing fee at the time each application is filed.

The minimal application fee is $2,500.00. If it is determined that the cost of processing the application will exceed $2,500.00, the application fee may be modified by the commission. If the original application cannot be processed or is considered to be invalid, future applications by the same employer shall be subject to additional filing fees.

5.5. An employer who is a subscriber to all or part of the West Virginia Workers' Compensation Fund may apply at anytime to self-insure all or part of its workers' compensation risk. If the application is approved by the board of managers, the self-insurance will be effective on the first day of the quarter, following the month in which the application was approved.

An employer new to the state of West Virginia, who has never subscribed to the compensation fund, may apply for self-insurance at the time it registers with the commission. Until self-insurance approval is granted, the new employer shall be considered to be in the guaranteed cost plan.

a. When an application for self-insurance is filed, the commission will review the application and inform the employer if there is a need for additional information, pursuant to subsection 5.3 of this rule. The employer must provide the commission with the additional information in order to complete the application process. The commission will complete an evaluation of the information. The commission will have a preliminary audit of the employer's account performed and issue to the employer a notice of the required remittance, which shall be paid within thirty (30) days of the notification or the application shall be considered to be null and void. The commission will have the payment amounts, defined under section 6 of this rule, calculated and advise the employer of their options. The employer must notify the commission of their preferred method of satisfying the payment amount within thirty (30) days of notification. Self-insurance status shall not be granted until the payment amount is satisfied in accordance with the selected method. Finally, the commission, with the approval of the board of managers, will render a decision approving or disapproving the application within ninety (90) days from receipt of all full and complete information required by the commission, as determined in the sole discretion of the commission.

b. Each approved applicant for self-insurance is required to secure its liability in accordance with the provisions of 85 C.S.R. 19, "Risk Pools," and this rule.

5.6. Employers applying for self-insurance must continue to make timely premium payments or other required payments for its workers' compensation risk until self-insurance status is approved by the board of managers and the status is effective. No employer shall be granted self-insured status retroactively, unless the application has not been approved within ninety (90) days from receipt of all full and complete information required by the commission, as determined in the sole discretion of the commission, and unless the self-insured status and the retroactive status is specifically approved by the board of managers.

§85-18-6. Reconciliation and Settlement of Applicant's Account.

6.1. An audit of the employer's account will be performed using reconciled wage, premium and charge data and other sources that the commission deems relevant. This data shall be compiled on a fiscal year basis and it shall be considered to be an adequate source for use in determining any pre-audit liability. The commission shall not recommend for approval by the board of managers and shall not grant self-insured status under the Act to any employer whose record upon the books of the commission shows a liability against the compensation fund, incurred on account of injury to or death of any of its employees, in excess of premium taxes paid by such employer to the compensation fund, until it has paid into the compensation fund the amount of such excess liability, including excess liability incurred on account of catastrophes or second injuries. The employer must pay to the compensation fund the entire amount of the excess liability prior to the effective date of self-insurance. The excess liability must be satisfied within thirty (30) days of notification or the application for self-insurance will be considered to be null and void.

6.2. An employer is responsible for the future costs of awards and medical benefits granted after the effective date of self-insurance to its employees for injuries or deaths that occurred in any period during which it subscribed to the compensation fund. At the time of an employer's application for self-insured status, the commission will determine the amount of money that is sufficient to cover the applicant's liability for the future costs of the awards and medical expenses not previously used in calculating premium.

a. If the employer is to pay the amount estimated to cover the cost of future liability, this amount shall be paid prior to the effective date of self-insurance and within thirty (30) days of notification.

§85-18-7. Catastrophe Reserve Election.

7.1. The employer applying to self-insure its workers' compensation risk must at the time of application elect in writing to subscribe to catastrophic risk coverage or to self-insure the catastrophe risk pursuant to W. Va. Code §23-2-9(g).

a. If a self-insured employer elects not to self-insure its catastrophic injury risk, it shall pay premium taxes on the same basis and in the same percentages as subscribers to the general fund pay for catastrophic coverage.

b. If a self-insured employer elects to self-insure the catastrophe risk, then it must furnish a catastrophe security or bond, in an amount determined by the commission, with the approval of the board of managers, in addition to the security or bond furnished as a self-insurance requirement. The catastrophe security or bond shall be in an amount the commission considers adequate and sufficient to compel or secure payment of all compensation and expenses to the employer's employees and the employees' dependents for catastrophe-related injuries or deaths.

7.2. A self-insured employer may elect to insure its catastrophic risk through a policy of excess insurance obtained through a private insurance carrier approved by the commission.

a. The self-insured employer shall provide a copy of the policy to the commission for approval.

b. The commission may give approval of the election if the insurer meets the financial strength requirements as applied to self-insured employers and entities that provide surety to self-insured employers.

c. If approved to insure catastrophic risk through a private insurance carrier, the self-insured employer shall notify the commission within fifteen (15) days of the occurrence of any change in the terms of the policy, including cancellation, by filing a copy of the policy with the change and providing a written explanation of the type of change.

7.3. The employer may request a change in its election as to catastrophic coverage. The request must be in writing and filed with the commission on or before June 1 of any given year, to be effective on July 1 of that year. The commission will issue a decision approving or disapproving the change in election.

§85-18-8. Commission's Review of the Application for Self-Insurance.

8.1. In reviewing an employer's application for self-insurance, the commission must assess the employer's ability to demonstrate that its financial strength is sufficient to meet its obligations under the Act.

8.2. In assessing the employer's application, the commission shall review and evaluate the audited financial statements filed with the application, the employer's workers' compensation loss experience, and other information.

8.3. If an employer relies on the audited financial statements of its parent to be granted self-insured status, then the parent company shall provide a parental guaranty in a form acceptable to the commission. The required parental guaranty must be received and accepted by the commission before the application for self-insurance can be processed.

§85-18-9. Security and bond.

9.1. In accordance with the provisions of this rule and other rules of the commission, self-insured employers are required to secure certain obligations for payments. In such instances where security or bond is required by the commission, the security or bond shall be tendered to the commission in accordance with this section.

9.2. There are several acceptable types of security and bond including, but not limited to, occurrence type security or bond, marketable securities, and letters of credit. The commission has the discretion to find that a particular type of security or bond is acceptable or unacceptable.

a. If the self-insured employer obtains an occurrence-type security or bond, then the security or bond is liable in the place of the employer should the employer be unable to meet its obligations for any or all injuries or deaths that may occur during the time period for which the security or bond is effective, and the security or bond remains liable at the time any awards for the injuries or deaths are subsequently made and for the entire time period in which benefits will be paid under the awards, including death benefits to surviving dependents. The security or bond

shall be deemed to define "occurrence" as including dates of injury prior to the effective date of self-insurance and coverage when the date of injury was prior to the effective date and the award date was after the effective date so that the liability provided in subsection 6.2. shall be secured by the security.

Nothing to the contrary contained in any writing associated with or included as a part of the security or bond shall defeat this obligation. Every surety, guarantor, warrantor, or other person or entity who purports to stand in the place of the self-insured employer for the payment of benefits shall be considered to have given the security or bond in compliance with this subsection, and no statement or disclaimer in the security or bond shall negate this requirement. The surety company issuing the bond must meet and maintain the commission's financial strength requirements. The commission shall review the financial strength of the issuers of all of the surety provided by the self-insured employer in the course of the commission's annual review and recommendation to the board of managers.

b. If the self-insured employer wishes to post marketable securities to meet its obligation for security or bond, the securities must satisfy the following requirements:

1. The securities must be fixed term debt instruments with a fixed and determinable principal amount;

2. The issuer of the securities must be a governmental entity or governmental agency or corporation of this state, or any other state, or the United States;

3. The maturity date of the instrument cannot be more than ten years from the date the securities are posted with the commission; and

4. The payment of both principal and interest are denominated and payable in United States dollars with the interest payable at fixed periodic payment dates and at a fixed rate of the principal amount of the indebtedness.

c. If the self-insured employer wishes to post a letter of credit to meet its obligation for security or bond, the letter of credit must satisfy the following requirements:

1. The letter of credit must be issued by a bank operating in the United States;

2. The letter of credit must utilize the letter of credit forms approved by the commission and in accordance with this rule; and

3. Before it will be considered security for self-insured risks, the letter of credit must contain an "evergreen" clause as specified by the commission, which holds the issuer responsible for the employer-applicant's liability resulting from all injuries incurred by or deaths of the employer's employees prior to the expiration of the letter of credit. In the event that the employer-applicant is unable to obtain the issuance of the evergreen form of letter of credit, then the employer-applicant must obtain permission from the commission to use the letter of credit for with a non-renewal draw clause. The employer must also provide the form letter of Authority and Acknowledgment which authorizes the draw of the entire amount of the letter of credit in the event of cancellation of the letter of credit, although the self-insured employer is not then in default under the Act or the rules.

4. The bank issuing the letter of credit must meet and maintain the commission's financial strength requirements.

9.3. Employers who are required to meet the security requirements defined by the commission, as approved by the board of managers, shall post an amount to be adequate and sufficient to compel or secure payment of compensation and expenses to the employer's employees, or their dependents, as required by the Act, and shall not be less than one million dollars ($1,000,000). The amount of security required of a self-insured employer shall be based upon, but not be limited to, such criteria as the employer's financial strength including the employer's demonstrated loss experience. A demonstrated loss experience includes general workers' compensation loss experience, second injury loss experience and catastrophe loss experience.

The commission shall utilize a financial ratio summarization, based upon a comparison of the employer-applicant's solvency, efficiency and profitability ratios to a specific industry's ratios, as defined, for example, in the current Dunn & Bradstreet Industry Norms and Key Business Ratios, in evaluating an employer's financial strength and in making a recommendation to the board of managers as to an appropriate amount of security. Whenever possible, the commission shall make a comparison of ratios utilizing the employer's workers' compensation industry classification.

a. If the commission determines that a self-insured employer's securities or bonds are inadequate or insufficient, the commission shall notify the employer. Thereafter, with the approval of the board of managers, the commission shall enter an order directing the employer to increase its securities or bonds by the amount needed to reach the adequate and sufficient level for all time periods originally intended to be covered by the inadequate or insufficient security or bond. An inadequate or failed security or bond includes, but is not limited to instances where the entity behind the security or bond is no longer a viable entity or, for whatever reason, can no longer meet its obligations.

The commission shall provide a reasonable amount of time for the employer to obtain the increased or added security or bond or develop a work out agreement and obtain the first installment payment; however, the period to secure additional security or period to develop a work out agreement and obtain the first installment payment shall not exceed ninety (90) days from the date of the commission's notification. The increased security or bond must meet the requirements set forth in this rule.

b. A self-insured employer's failure to obtain additional bond or security, as required by the commission's order, may result in a revocation of the privilege of self-insurance and termination of the employer's self-insured status. The commission shall issue a notice specifying the effective date of any such action or actions.

c. If the commission determines that a decreased adjustment is merited, the self-insured employer may file a written request with the commission for a downward adjustment of the self-insured employer's security requirements.

§85-18-10. Self-insured Employer's Modification of Business.

10.1. In the event a self-insured employer reorganizes its business, assumes additional liability, acquires new assets or operations, buys an additional business, merges with another business, or otherwise changes its operation in any manner which impacts on its workers' compensation claims liability, the self-insured employer must notify the commission of the modification of business, immediately. The notice of modification must include specific information as to the nature of the modification, including but not limited to a copy of the executed contract causing the modification, and the names of other employers and/or businesses affected by the modification.

a. If a reconciliation audit is performed as a result of a self-insured employer's failure to properly report business modifications, any liabilities found against the commission in excess of premiums paid will be due and owing upon notification. Failure to comply may result in the revocation of the self-insured employer's self-insured status.

10.2. If the self-insured employer has acquired a new operation or business as a separate legal entity, and desires to self-insure that separate entity, then it must file an application for self-insurance on behalf of the separate entity. If the self-insured employer has acquired a new operation or business or has merged with another business the self- insured employer must notify the commission of the acquisition or merger as soon as practicable, but no less than one (1) day prior to the date of closing, then it must file an application for self-insurance on behalf of its new or additional business and must request that the new or additional business be merged into its existing self-insured account. The application to self-insure the new operation or business shall be processed in accordance with the Act and the commission's rules governing self-insurance.

10.3. Under subsections 10.1. and 10.2. of this rule, the commission will review the employer's security and bond requirements and make, if necessary, an appropriate recommendation to the board of managers for an adjustment to the security requirements.

10.4. If the modification of business requires processing that includes any type of an actuarial analysis, a $2,500.00 processing fee shall be accessed.

10.5. If the modification causes a self-insured employer to no longer qualify for the privilege of self-insured status, the commission, with the approval of the board of managers, shall have the authority to terminate the status in accordance with the provisions of section 18 of this rule. Settlement of estimated liability at the time of revocation shall be determined in accordance with the provisions of this rule.

§85-18-11. Voluntary Termination of Self-Insured Status.

11.1. If a self-insured employer decides to continue doing business in the state of West Virginia, but terminate its self-insured status, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of all such liability, including the costs of the administration of that liability, in which case the future costs of the liability shall be paid from the compensation fund. The employer must pay a fee of $2,500.00 for the liability calculation. The employer shall provide written notice to the commission thirty (30) days prior to the termination of its status.

a. When the employer decides to terminate its self- insured status, the commission shall determine actuarially the amount of money that is sufficient to cover the future costs of the liability.

b. The commission shall not permit the employer to terminate the self-insured status and subscribe to another plan until it pays the actual estimate, or maintains security or bond in an amount sufficient to cover the estimated future cost of the liability. The commission must approve the employer's election for the payment of the estimated future cost of liability. No self-insured employer will be allowed to remain self-insured once it elects and satisfies the buy out of its open and contingent claims liabilities.

1. If the employer elects or is required by the commission to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination of self-insurance, unless the employer and the commission enter into a repayment agreement. The commission has the authority to determine whether entering into a particular repayment agreement will meet its fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment.

Additionally, the agreement shall provide for the payment of interest on the principal, which shall be calculated on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate shall remain the same for the life of the agreement.

2. If the employer elects to cover the future costs of the liability with a security or bond, it must obtain the commission's approval of the election and the commission's approval of the form, type, and amount of the security or bond.

11.2. A self-insured employer must provide the commission with written notice thirty (30) days prior to termination if it ceases doing business in the state of West Virginia and intends to terminate its self-insurance status. If a self-insured employer so terminates its business, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability shall be paid from the compensation fund. When the employer decides to terminate its self-insured status, the commission shall estimate the amount of money that is sufficient to cover the future costs of the liability. The employer shall pay a fee of $2,500.00 for the liability calculation.

Upon terminating self-insurance, the employer may elect to continue making payment of benefits, pay the full amount of the future liability or enter into a repayment agreement with the commission for the amount of future liability. If the employer retains full liability or enters into a repayment agreement, the employer must maintain the security for self-insurance as defined by this rule and other rules of the commission.

a. If the employer elects or is required by the commission to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination and within forty-five (45) days of the date of the commission's notification, unless the employer and the commission enter into a repayment agreement. The commission has the authority to determine whether entering into a particular repayment agreement will meet its fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment.

Additionally, the agreement shall provide for the payment of interest on the principal, which shall be calculated on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate shall remain the same for the life of the agreement.

11.3. If a self-insured employer terminates its self-insured status because it ceases doing business in the state of West Virginia as the result of a sale or transfer of all or part of its business, the self- insured employer must notify the commission of the sale or transfer as soon as practicable, but no less than one (1) day prior to the date of closing. The self-insured employer so terminating its self-insured status remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability will be paid from the compensation fund. When the employer decides to terminate its self-insured status, the employer shall request the commission to estimate the amount of money that is sufficient to cover the future costs of the liability defined in this section. The employer shall pay a fee of $2,500.00 for the liability calculation.

The employer shall pay the actual estimate, or post security or bond in an amount sufficient to cover the estimated future cost of the liability. The commission must approve the employer's election for the payment of the estimated future cost of liability.

a. If the employer elects to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination of self-insurance and within forty-five (45) days of the commission's notification, unless the employer and the commission enter into a repayment agreement. The commission has the authority to determine whether entering into a particular repayment agreement will meet the fiduciary responsibility of the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and agreeing to the specific terms of the repayment.

Additionally, the agreement shall provide for the payment of interest on the principal, which the commission shall calculate on the effective date of the agreement, pursuant to W. Va. Code § 23-2-13. The interest rate remains the same for the life of the agreement.

b. Upon terminating self-insurance, the employer may elect to continue making payment of benefits or pay the full amount of the future liability as specified in 11.2 or enter into a repayment agreement with the commission for the amount of the future liability. If the

employer retains full liability or enters into a repayment agreement, the employer must maintain the security for self-insurance as defined by this rule and other rules of the commission.

11.4. Self-insured employers who become regular subscribers on or after July 1, 2004, and who do not buy out their liability shall continue to pay any applicable Security or Guaranty Pool assessments imposed by the rules of the commission.

11.5. If a contract of sale or transfer includes an agreement as to the parties' assumption of charges and contingent liabilities incurred by the self-insured seller prior to the effective date of the sale or transfer, and if a complete copy of the contract is filed with the commission, the employer may request the commission give effect to the agreement, so long as, in its opinion, the agreement meets the fiduciary requirements of the commission. The commission will issue a written decision on whether it will give effect to the agreement. The commission is under no obligation to give effect to such an agreement.

a. If a completed copy of the contract of sale is filed with the commission and the commission gives effect to the agreement, and if the agreement provides that the buyer or person acquiring the business assumes the liability defined and referenced in this subsection, the buyer or person acquiring the business must pay the actual estimate of all the self-insured seller's accrued and contingent liability, as calculated pursuant to that section or, alternatively, the buyer or person acquiring the self-insured employer's business must, with the board of managers' approval, post security or bond in an amount actuarially determined to be sufficient to cover the assumed liabilities. The security or bond must cover the seller's entire period of self-insurance. In the event of a security or bond being posted by the buyer to cover the seller's liabilities, or if the buyer pays the actual estimate of the seller's liability, then the commission will release the employer's like security or bond previously posted by the employer-seller.

b. If a complete copy of the contract of sale is not filed with the commission and/or if the commission does not give effect to the agreement, the commission will hold the self-insured seller liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to the effective date of the sale or transfer, unless the employer pays into the fund an amount sufficient to cover the estimated cost of all such liability, as set forth in this section.

§85-18-12. Present Value Payment of Unpaid but Awarded Claims Liabilities.

12.1. At any time, the commission, in its discretion, with the approval of the board of managers, may permit any self-insured employer to pay into the Fund an amount of money equal to the present value, as determined by the commission, of all unpaid but awarded claims liabilities for which the employer is liable.

12.2. Upon approval of the board of managers and by making the present value payment of unpaid but awarded claims liabilities with one lump sum, the self-insured employer is discharged from any further liability for the unpaid compensation and all future costs associated with the unpaid compensation shall be paid from the Fund.

12.3. In order to utilize this section, the employer is required to relinquish its self-insurance status.

§85-18-13. Subscribing Employers Buy-Out of Liability Previously Incurred as a Self-Insured Employer.

Employers who were previously self-insured employers and who on the effective date of this rule were continuing to pay compensation and expenses for certain of their employees due to their previous status as self-insured employers may elect to buy out their responsibility for those payments related to the prior self-insured status, pursuant to the provisions set forth in section 11 of this rule.

§85-18-14. Current Status of Employers Not Affected.

14.1. Employers who at the time of the effective date of this rule are self-insured employers as regards to all or part of the compensation fund shall not lose that status due to the mere promulgation of this rule.

14.2. Employers who at the time of the effective date of this rule are subscribers to all of the compensation fund shall not become self-insured due to the mere promulgation of this rule.

§85-18-15. Self-Administration of Claims.

15.1. Effective July 1, 2004, all self-insured employers shall administer their own claims. An injured worker, who is an employee of a self-insured employer, is entitled to all of the same benefits, as those afforded to injured workers whose claims are administered by the workers' compensation commission. These same benefits include the proper and timely payment of medical bills and compensation.

a. The commission shall make the allocation decision concerning occupational disease claims. Each claim shall be administered as directed by the commission.

b. The self-insured employer shall report all allocated occupational disease claims to the commission within five (5) days of the claimant's report of injury or disease.

15.2. Transitional Notifications.

a. Upon the effective date of this rule, each self-insured employer shall within five (5) working days notify, in writing, the following persons, entities or adjudicatory bodies involved in active claims matters that that the self-insured employer is self-administering its claims.

1. Claimants;

2. Claimant representatives;

3. All parties to the claim;

4. All adjudicatory bodies that are currently proceeding in the claim; and

5. Vendors who are rendering services in the claim.

b. Upon the effective date of this rule, each self-insured employer shall within five (5) days notify its employees that it is self-administering its claims. This notice must be posted at each of the employer's places of business within the State.

c. The self-insured employer is required to state in each notice, whether the notice is individually written or posted, that the self-insured employer, and not the commission, is the primary contact for submitting invoices, claims inquiries, legal notices, medical reports and other communications concerning the claim.

15.3. Claims Contact. The self-insured employer shall maintain with the commission a current name, address and telephone number of the contact person responsible for administering payments on behalf of the injured employees.

15.4. Claims Reports. The self-insured employer shall report claims information to the commission as follows:

a. Within five (5) days of notification of a covered injury, the self-insured employer shall post basic information regarding the injury with the commission in a format prescribed by the Commission.

b. The commission shall assign a claim number to the claim.

c. The self-insured employer shall update claims information for each claim on at least a quarterly basis in a form and format prescribed by the commission. The commission may determine the appropriate time to update the claims information on an individual self-insured employer basis. If any employer fails to maintain such records and other information as required under the provisions of this section, the commission may revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

15.5. Claims Actions.

a. Initial Rulings; Injury and occupational disease claims. Those claims based upon injuries and non-allocable occupational diseases that are filed with the self-insured employer, upon properly executed, prescribed forms created under the provisions of W. Va. Code §23-4-1a, shall be ruled upon within fifteen (15) working days from the date of receipt by the self-insured employer.

b. Medical Authorizations.

1. Medical Treatment. The self-insured employer shall rule upon requests for authorization of medical treatment within fifteen (15) working days from the date of receipt by the self-insured employer.

2. Appliances, Devices, and Supplies. The self-insured employer shall rule upon requests for authorization for the purchase of prosthetic or other appliances, devices or

medical supplies within fifteen (15) working days from the date of receipt by the self-insured employer.

c. Disability Benefits.

1. Awards of temporary total disability benefits. Written medical reports submitted upon properly executed, prescribed forms and providing proper and sufficient evidence that claimants are entitled to awards of temporary total disability benefits shall be acted upon by issuance of orders granting awards of benefits within fifteen (15) days from the date of receipt by the self-insured employer or the date of issuance of a compensability ruling in the claim. Payment pursuant to such awards shall be issued in accordance with the provisions of West Virginia Code article four, chapter twenty-three.

2. Cessation of temporary total disability. Written medical or other information providing proper and sufficient evidence that claimants have ceased to be temporarily and totally disabled or have returned to work shall be acted upon by issuance of notices advising the parties that benefit payments shall be suspended pending final disposition. The self-insured employer shall issue such notices within five (5) working days from the date of receipt of incoming correspondence.

3. Notice of closing claim. After the thirty (30) day notice period provided in suspension notices has expired and review of claims reveals that sufficient medical evidence to support a further award of temporary total disability benefits has not been received, the self-insured employer shall issue an order within ten (10) working days from the end of the aforesaid notice period advising the parties that the claims have been closed upon a temporary total disability basis. Failure to issue the order in a timely fashion under this provision does not act as a bar to the issuance of the order by the self-insured employer.

4. The self-insured employer shall make referrals of claimants to physicians for independent medical examinations and evaluations as required by West Virginia Code within twenty (20) days of the end of the one hundred twenty (120) day period of temporary total disability. The self-insured employer shall make the referral from a list of independent medical evaluators qualified by the commission to perform independent medical evaluations.

5. The self-insured employer shall make referrals of claimants to physicians for examinations and evaluations in response to requests by or on behalf of claimants for consideration of permanent disability awards in claims based upon injuries and occupational diseases other than occupational pneumoconiosis within fifteen (15) working days from the date of receipt of such requests. The self-insured employer shall make the referral from a list of independent medical evaluators qualified by the commission to perform independent medical evaluations.

6. Self-insured employers are required to use and pay for the services of the occupational pneumoconiosis board (W. Va. Code § 23-4-8a) in appropriate cases arising under the Workers' Compensation Act.

d. Permanent disability rulings.

1. The self-insured employer shall act upon permanent disability evaluation reports received from physicians to whom claimants have been referred by the self-insured in claims based upon injuries and occupational diseases other than occupational pneumoconiosis within fifteen (15) working days from the date of receipt.

2. Payment pursuant to awards of permanent disability benefits shall be issued and delivered within fifteen (15) days from the date of the award in accordance with the provisions of West Virginia Code article four, chapter twenty-three.

3. Self-insured employers are required to use and pay for the services of the interdisciplinary examining board (W. Va. Code § 23-4-6(j)) in appropriate cases arising under the Workers' Compensation Act.

e. Petitions for reopening.

1. The self-insured employer shall rule upon petitions for reopening of claims upon a temporary total disability basis within thirty (30) days from the date of receipt.

2. The self-insured employer shall rule upon petitions for reopening of claims upon a permanent disability basis within thirty (30) days from the date of receipt.

f. Applications for modification of awards. Modification of awards initiated by self-insured employers shall be noticed to the claimant. The claimant shall have ten (10) working days to respond to application, which shall clearly and fully state the self-insured employer's reasons for pursuing a modification. The claimant shall also be apprised of the time period to respond to the self-insured employer's notice. Thereafter, the self-insured employer is required to issue a ruling within ten (10) working days after the date of the expiration of the time period for the claimant's response.

g. Vocational Rehabilitation; Training proposals. The self-insured employer shall rule upon Individualized Written Rehabilitation Programs received from vocational rehabilitation providers within twenty (20) working days from the date of receipt.

h. Invoices.

1. Health care vendors. The self-insured employer shall rule upon and pay invoices for payment or reimbursement of health care vendor services or health care supplies submitted upon properly executed prescribed forms within thirty (30) days from the date of receipt.

2. Travel expenses; wages. The self-insured employer shall rule upon and pay invoices for reimbursement of travel expenses and wages submitted upon properly executed, prescribed forms within thirty (30) days from the date of receipt.

i. Payments to claimants.

1. Self-insured employers shall make the initial temporary total disability payments to claimants in lost-time claims that are ruled compensable within fifteen (15) days of its ruling.

2. Self-insured employers shall make continuous bi-weekly temporary total disability payments to claimants for the extent of their temporary total disability as defined by the provisions of article four, chapter twenty-three of the West Virginia Code and the rules of the commission.

j. Orders. The self-insured employer shall comply with all orders of the office of judges and the board of review and all mandates of the West Virginia Supreme Court within fifteen (15) working days from the date of receipt, unless sooner required to act under the terms of the order or mandate.

15.6. Maintenance of Claim Records. For all actions taken on or after July 1, 2004, the self-insured employer is required to maintain a detailed claim record, either in an electronic or paper format, for each claim. The claim record shall include, but not be limited to:

a. The completed report of injury as prescribed in the forms of the commission;

b. Wage calculations used to determine claimant benefits;

c. Dates that the claimant ceased work and returned to work as a result of the compensable injury;

d. Health care invoices;

e. Medical and vocational reports and summaries of psychiatric reports, if so restricted by the psychiatrist;

f. Motions, applications, and claim correspondence;

g. Rulings issued by the self-insured employer, including denial of benefit rulings; and

h. Rulings issued by all adjudicatory bodies involved with the claim, including the office of judges, the board of review and the West Virginia Supreme Court of Appeals.

15.7. Date stamp; Claims records. The self-insured employer is required to date stamp each report of injury, health care invoice, medical and vocational report, motion, application, claim correspondence, ruling issued by the self-insured employer and ruling issued by adjudicatory bodies on the date received or sent, as applicable.

15.8. Claims Records. The self-insured employer is required to maintain claim files for the benefit of the workers' compensation commission in the event of the self-

insured employer's termination of business, termination of self-insured status, default or buy-out of claims liability.

a. The self-insured employer shall provide all claims records within five (5) working days for active claims and within thirty (30) working days for non-active claims after notification by the commission. The self-insured employer may retain copies for their records.

15.9. Requests for Claims Records by Injured Workers or Their Representatives. The self-insured employer shall provide a copy of the claim record to the claimant or his authorized representative within ten (10) working days of the date the written request is received by the self-insured employer. The initial copy of the record will be provided at no cost by depositing the claims records, postage prepaid in the United States mail. Subsequent copies will be provided at a reasonable charge.

15.10. Settlements. The self-insured employer and the claimant may negotiate a final settlement of any and all issues in a claim with the approval of the office of judges in accordance with the provisions of West Virginia Code §23-5-7. The commission is not required to be a party to the settlement.

15.11. Recoveries of overpayments.

a. The self-insured employer is responsible for collecting all overpayments to claimants, whether made by the self-insured employer or by the fund, in the self-insured employer's self-administration of its claims.

1. The self-insured employer is required to document each recovery of overpayment from its claimants.

2. In circumstances when the self-insured employer collects an overpayment previously made by the fund, the self-insured employer shall remit the collected amount to the commission within thirty (30) days of recovery.

b. The commission is responsible for collecting all overpayments to claimants, whether made by the self-insured employer or by the fund, in the commission's administration of its claims.

1. In circumstances when the commission collects an overpayment previously made by a self-insured employer, the commission shall remit the collected amount to the self-insured employer within thirty (30) days of recovery.

c. The self-insured employer may seek recovery of vendor overpayment made by the self-insured employer directly from the service provider.

§85-18-16. Payroll Reports and Premium Taxes.

16.1. Upon filing an application for self-insured status, an employer acknowledges its obligation to continue to make all payments and file all reports required by the Act or by the rules adopted by the commission.

16.2. On or before the last day of the first month of each quarter, for the preceding quarter, each self-insured employer shall file with the commission a sworn statement of the total gross wages and earnings of all of its employees subject to the Act for the preceding quarter.

16.3. On or before the last day of the first month of each quarter, for the preceding quarter, each self-insured employer shall pay into the compensation fund as portions of its self-insured premium tax or surcharge, as applicable:

a. A sum sufficient to pay the employer's proper portion of the expense of the administration of the Act;

b. A sum sufficient to pay the employer's proper portion of the expense of claims for those employers who are in default in the payment of premium taxes or other obligations;

c. A sum sufficient to pay the employer's fair portion of the expenses of the disabled workers' relief fund;

d. A sum sufficient to maintain as an advance deposit an amount equal to the previous quarter's payment of each of the foregoing three sums;

e. A sum as determined by the commission to be sufficient to pay the employer's portion of rates, surcharges or deficit management and deficit reduction assessments;

f. A sum as determined by the commission to pay the employer's portion of self-insured catastrophic injury benefits, and second injury payments on all self-insured second injury claims other than second injury claims for those employers self-insured for second injury. Any employer previously self-insured for second injury benefits shall continue to be responsible for payment of those benefits; and

g. Risk pool assessments as may be required by the rules of the commission (85 C.S.R. 19, entitled "Risk Pools").

§85-18-17. Auditing, Monitoring and Inspections; Record Keeping.

17.1. Preservation of records. Every self-insured employer shall keep, preserve and maintain complete records showing in detail all expenditures for gross wages and the separation of such expenditures in the various classifications of the employer's business. The employer shall keep such additional information necessary to determine classification of the employer's activities as well as other information necessary for a risk assessment. Such records shall be preserved for not less than ten (10) years after the respective times of the transaction upon which the records are based. The employer shall retain all records for periods in excess of ten (10) years in matters involving possible fraud or failure to report or disputes with the commission until the commission or appropriate administrative, judicial or appellate body finally resolves the matter and the time for appeal has been exhausted.

17.2. Pursuant to W. Va. Code §23-2-2(a), each self-insured employer shall furnish the commission, upon request, all information required by the commission to ascertain or verify the number of employees employed by the employer during a pertinent period, the names and social security numbers of the employees, the gross wages paid to employees during a pertinent period, occupations of employees, classification information, other information necessary for risk assessment, and payments owed to the commission, as premium taxes, premium tax deposits, interest, fees, penalties, or to carry out the various purposes of the Act.

17.3. Preservation of claims records. Every self-insured employer is required to keep, preserve and maintain all claims records.

17.4. Inspections of records; failure to maintain records.

a. All accounting records, books, records, papers and documents reflecting the amount and the classifications of the gross wage expenditures of an employer, as well as the nature of the business operation, shall be kept available for inspection at any reasonable time by the duly authorized representatives of the commission.

b. The self-insured employer shall keep all claims records available for inspection at any reasonable time by the duly authorized representatives of the commission. The commission shall review claims records of the employer on an annual basis or more frequently as the commission determines in its sole discretion to be necessary.

c. If any employer fails to keep, preserve and maintain such records and other information as required under the provisions of this section, or fails to make such records and information available for inspection, the commission may revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

17.5. Auditing records; adjustments. The commission shall have the right at any reasonable time to audit any or all books, records, papers, documents, operations and payroll of an employer for the purpose of verifying the correctness of reports made by an employer or such other reports as may be required by the commission or by State or federal law. The commission shall have the right to make adjustments, including adjustments to the amount of gross wage expenditures, premium tax rates and amount of premium tax.

17.6. In order to inspect, audit or review the information specified by the Act and this rule including, but not limited to payroll and claims records, the commission may direct that an agent or employee of the commission audit the information referred to in this section during the regular business hours of the employer or at another reasonable time and place within the state of West Virginia and the employer shall permit the audit to occur and shall cooperate with the auditors so that the audit may be successfully completed. Failure to cooperate with such an inspection may be considered sufficient to revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

17.7. Either as an addition to or as part of the audit permitted under this rule, the commission may convene an administrative hearing or conduct a deposition for the purpose of receiving the information in testimonial or evidentiary form. The executive director, his or her designee, an inspector or a designated hearing officer may issue subpoenas and compel the attendance of

witnesses and the production of pertinent books, accounting records, accounts, papers, records, documents, and testimony at any such hearing or deposition. Any such administrative hearing or deposition shall be convened and conducted in accordance with 85 C.S.R. 7, "Rules for Selected Hearings," and the commission shall have the right to have any employer or officer, agent, or employee of any employer examined under oath or affirmation. A deposition may be held pursuant to this subsection even if a hearing regarding the employer has not been previously noticed or requested; but, in that event, adequate notice of the deposition shall be given to all interested parties known to the commission.

17.8. The request for information provided for by the Act, this rule or other rules of the commission, the audit provided for by this rule, or the hearing provided for by this rule may be conducted at any time when necessary to carry out the purposes of the Act.

17.9. Noncompliance Penalties. Penalties may be assessed to self-insured employers who fail to comply with the statutes and rules governing workers' compensation benefits and self-administration. The penalty amount will be based upon the employer's overall compliance as determined by the commission's review of the employer's records.

a. The penalty assessed shall be in the sole discretion of the commission, not to exceed $5,000 per review, and shall be based on an employer's compliance with the following: (1) claims action, rulings, and payment; (2) claims support activities; and (3) administrative functions. Subsequent violations may result in a multiple of the initial fine up to and including revocation of self-insured status.

b. The self-insured employer's overall compliance with the applicable statutes and rules may be determined by the commission's review of the employer's claims and the activities taken within a prescribed time period as determined in the discretion of the commission.

c. In addition to penalties provided for in 17.9.a, the employer may be assessed penalties in an amount determined in the sole discretion of the commission, not to exceed $500 per occurrence, for administrative non-compliance, such as:

1. Failure to submit claims data transmissions in a timely and acceptable format;

2. Refusal to allow inspection of records for commission review purposes;

3. Failure to submit audited financial statements timely for annual review purposes;

4. When the employer elects to employ or contract with a third party administrator to administer its claims, the failure to utilize a third party administrator qualified by the commission; and

5. Failure to timely and fully respond to the commission's requests in regard to items 17.9.c.1 through 17.9.c.4, may result in penalties provided for in 17.9.a.

d. The assessment and payment of penalties under this section shall not prevent the commission from making recommendations to the board of managers concerning the employer's self-insurance status.

§85-18-18. Maintaining Self-Insured Status; Annual Review.

18.1. The employer's status as a self-insured employer with respect to all or part of the compensation fund shall continue on a year-to-year basis so long as the employer continues to maintain the requisite financial standing, as set forth in section 8 of this rule, and continues to satisfy the other requirements imposed by the Act, this rule and any other pertinent rule, and any order of the commission.

18.2. Annual review. The commission will perform a comprehensive claims, financial, compliance and security review of each self-insured employer on an annual basis. The commission may conduct an audit of all claims records, accounting records, books, records, papers, operations and documents deemed relevant by the commission in the possession or control of the employer.

a. The commission shall notify each self-insured employer of their annual review.

b. Upon notice of the commission, each self-insurer shall file or make available for inspection, whichever method as may be specified by the commission, documents and information requested to perform an annual review on the self-insured employer. If any employer fails to make such records and information available for inspection, the commission may revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

c. The commission shall notify the employer of the results of the annual review.

18.3. Financial review. In the performance of its annual financial and security review, the commission shall determine whether the self-insured employer continues to demonstrate sufficient financial capability to remain self-insured.. All the following benchmarks must be met in order to demonstrate a financial position that is not deteriorating.

a. The most recent three years of audited financial statements must be analyzed through the most current commission financial review model.

1. A score of medium to high must be met in the financial strength category.

2. A company cannot post net operating losses more than two years in a row.

3. The current ratio should not decline two years in a row and be at least one to one or should not decline 40% from one financial review to the next.

4. The total liabilities to total assets should not increase two years in a row or increase over 40% from one financial review to the next.

b. In addition to meeting all of the preceding benchmarks, one of the following three benchmarks must be met to demonstrate a financial condition that is not deteriorating:

1. Cash flow from operating activities should be greater than net income.

2. Total stockholders' equity should not decline two years in a row or decline over 40% from one financial review to the next.

3. An employer must have at least three (3) of the six (6) profitability and solvency ratios fall within the industry median as reported by Dun & Bradstreet or other company as specified by the commission. The six ratios are:

A. Profit margin;

B. Rate of return on assets;

C. Return on net worth;

D. Current ratio;

E. Current liabilities to net worth; and

F. Total liabilities to net worth.

18.4. The commission reserves the right to review or audit, at any time, a self-insured employer's compliance with the requirements of the Act or the rules of the commission.

18.5. Security Responsibility. The self-insured employer is responsible for maintaining adequate security for its claims liability for catastrophic coverage, for claims with dates of injury prior to July 1, 2004, and in instances of a deteriorating financial condition for claims liability for dates of injury on or after July 1, 2004, as provided by this and other rules of the commission.

18.6. Claims Responsibility. A self-insured employer with respect to all or part of the compensation fund is responsible for the direct payment of all pecuniary compensation due and owing under the Act to employees or employees' dependents; is responsible for the direct payment of health care provider and medical invoices; and is responsible for reimbursing the commission for any payments made by the commission that should have been paid by the self-insured employer.

a. The self-insured employer shall pay pecuniary compensation payable by the employer and reimbursements due from the employer within the time periods specified by the Act, the various rules promulgated by the board of managers, and the orders of all adjudicatory bodies; or, in the absence of any of the above, employer shall pay the compensation and reimbursements in a prompt and timely fashion.

18.7. If the commission determines that the security requires adjustment in light of the self-insured employer's current financial status or liability, the commission shall recommend to the board of managers that the security requirements be adjusted. Prior to such action, the commission shall notify the employer of the forthcoming recommendation to the board of managers and the reasons for the recommendation. The employer shall be provided thirty (30) days for written response to the commission. The commission shall provide a copy of any such

employer response to the board of managers if the commission recommends that the employer's security be adjusted.

18.8. The commission shall report directly to the board of managers any acts of non-compliance by the self-insured employer. The board of managers may direct the commission to terminate an employer's self-insurance status if the employer fails at any time to comply with the requirements of the Act, this rule or any other pertinent rule, or any order of the commission; or, otherwise defaults on a self-insurance obligation. The commission shall provide the employer with written notice of the termination.

§85-18-19. Involuntary revocation of self-insurance status.

19.1. Notification.

a. Prior to recommending to the board of managers that the self-insured employer's status of self-insurance be revoked, the commission shall:

1. Notify the self-insured employer regarding the forthcoming recommendation;

2. Provide to the employer the reasons for recommending revocation of self-insured status;

3. Provide to the employer fifteen (15) days for written response to the commission's reasons for recommending revocation of self-insurance status;

4. Inform the self-insured employer that failure to respond in writing to the notification shall result in the commission's recommendation to the board of managers that the self-insured employer's status of self-insurance be revoked; and

5. The notification to the self-insured shall be in writing and sent to the self-insured employer by certified United States mail, return receipt requested.

19.2. Presentation before the Board of Managers.

a. After the commission's review of the response from the self-insured employer or the expiration of the time for response, the commission may proceed to recommend to the board of managers that the employer's status of self-insurance be revoked.

b. The commission shall provide a copy of any such employer response to the board of managers when the commission recommends that the employer's status of self-insurance be revoked.

c. The commission shall make its recommendation to the board of managers at a meeting of the board. The recommendation may be provided to the board during an executive session of a meeting.

d. The employer shall be notified of the date, time and location of the meeting of the board of managers wherein the commission will make its recommendation. The employer may be present during the presentation of the commission's recommendation. The employer may

address the board regarding the recommendation and for such time as may be appropriate in the discretion of the chair.

19.3. Approval of the Board of Managers.

a. After the commission presents its recommendation to the board of managers, the board shall determine whether to approve the commission's recommendation.

b. All decisions of the board of managers regarding the commission's recommendation shall be made in an open meeting of the board.

19.4. Revocation.

a. If the board of managers approves the commission's recommendations to revoke the employer's self-insurance status, the commission shall, by its order, notify the employer of the revocation of the status of self-insurance and the reasons for the revocation.

b. Upon revocation of the privilege of self-insurance, the employer shall remain liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to the termination of self-insured status.

c. The commission shall order the employer to pay into the compensation fund an amount sufficient to cover the estimated cost of all such liability or, in the alternative and in the commission's sole discretion, secure the liabilities in a manner consistent with other provisions of this rule.

§85-18-20. Name and Address of Employer; Legal Notice; Publications; Employer Correspondence.

20.1. General. Except as hereinafter provided, the name and address given by the employer on the application for coverage shall be used by the commission for giving any notice required by the statute or by this rule, unless a formal request for a change of name or address is made by the employer as hereinafter provided.

a. Self-insured employers are required to provide the name, telephone number, fax number and e-mail address of its designated primary contact person responsible for workers' compensation matters.

20.2. Change of name or address. Any employer changing the name or the address of the business must promptly notify the commission, in writing, and request that the name or address be changed on the commission's records. Every employer required to register with the Office of the Secretary of State shall provide evidence of any name change from that office.

a. In case of the appointment of a receivership, the full name of the receivership shall be reported.

b. If the employer wishes to have certain notices and correspondence directed to a subsidiary, a branch office or agent, the employer must notify the commission in writing of the name and address of said subsidiary, branch office or representative and specify the

circumstances under which said notice is to be given. It will be the responsibility of the representative to notify the commission when such representation ceases and to provide a current address to which the employer's notices and correspondence are to be sent.

20.3. Effect of failure to request change of name or address. In the absence of a request for a change of name or address by the employer, any notice given by the commission to the employer at the address and in the name shown on the commission's records shall constitute constructive notice to the employer of any action taken.

20.4. Legal notice to attorney or agent. In any matter arising under this rule in which the commission is required to give notice to a party, if a party is represented by an attorney or other representative, then notice to the attorney or other representative shall be sufficient notice to the party so represented. "Other representative" shall include the employer's third party representative, if the employer is so represented.

20.5. Correspondence. All correspondence to the commission from an employer or its representative related to an employer's workers' compensation account, premiums, or coverage issues shall contain the employer's policy number as well as the employer's federal employer identification number.

§85-18-21. Third Party Administrators.

21.1. Self-insured employers may hire third party administrators to administer claims if the third party administrator meets certain qualifications.

21.2. Qualifications. In order to qualify to administer claims for a self-insured employer, a third party administrator is required to meet the same financial tests as required of third-party administrators governed by the State insurance commissioner pursuant to the provisions of article forty-six, chapter thirty-three of the West Virginia Code [W. Va. Code §§ 33-46-1 et seq.].

21.3. Each third party administrator, administering claims on behalf of a self-insured employer, shall within five (5) days from the effective date of this rule provide a list of self-insured employers for whom the third party administrator administers claims. The third party administrator shall notify the commission within twenty-four (24) hours of entering into or terminating a third party administrator contract with a self-insured employer.

21.4. Each third party administrator shall re-apply bi-annually on forms provided by the commission to qualify as a third party administrator for the purpose of administering workers' compensation claims.

21.5. The commission shall notify third party administrators who no longer qualify to administer workers' compensation claims.

§85-18-22. Administrative Protests and Hearings.

Any self-insured employer who wishes to contest a decision made by the commission, under the provisions of chapter twenty-three, article two of the Code, may do so under the provisions of W. Va. Code, §23-2-17. The rule implementing that section requires the filing of a formal request for reconsideration, and following reconsideration, a petition within thirty days of the self insured

employer's receipt of notice of the disputed decision or action or reconsidered decision or, in the absence of such receipt, within sixty days of the date of the commission's making such disputed decision or taking such disputed action or making such reconsideration decision. (See 85 C.S.R. 7, "Rules for Selected Hearings." However, as a mandatory prerequisite to hearing a petition after a reconsideration decision, the employer must deposit with the commission the sum of any amounts in dispute or which arise from, may be calculated from or which are involved in the disputed decision; unless the employer has a financial inability to pay a part or all of the required deposit and then if so, except to the extent the same is proven by, at least, a competent written declaration of need for exception in an amount which is accompanied by three years of financial records to that extent and effect, pays that portion of the required deposit as has been thereafter approved by the commission. Furthermore, any amount due and unpaid by the employer, other than and except for any amount in dispute as defined above under petition and paid in deposit or not paid in deposit due to proved financial hardship, shall be charged to the employer's policy account and, if not paid timely, shall be delinquent and, if still not paid timely after notice given under the provisions of Section 23-2-5 of the W. Va. Code, shall be and cause default under the provisions of section 23-2-8 of the Code.

§85-18-23. 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.

Comments on behalf of Comp-Trol, Inc. on:
Title 85, Series 18, Self-Insurance/Self-Administration
& Third Party Administrators

Comp-Trol, Inc. is pleased to offer the Workers' Compensation Commission Board of Managers, comment on the proposed Series 18 Rule pertaining to self-insurance, self-administration and third-party administrators.

Comp-Trol is specifically concerned and objects to that section of the rule dealing with third-party administrators. Comp-Trol is a third-party administrator and has many years of experience providing services to both subscribers and self-insurers, including self-insurers which were previously authorized to directly manage and pay medical benefits. We believe that Section 85-18-21 should be amended to allow qualified third-party administrators to administer claims for self-insured employers without having to meet artificial financial tests required through reference to the State Insurance Commissioner pursuant to West Virginia Code § 33-46-1 et seq.

Comp-Trol objects to financial tests as being required to demonstrate qualifications; Comp-Trol believes that this was a recommendation of very large third-party administrators that have national offices. Comp-Trol respectfully suggests to the Board of Managers that it is not necessary to have national offices in order to be qualified to administer claims for self-insurers in West Virginia, and to the contrary, Comp-Trol believes that the Workers' Compensation Commission may have encountered instances in which large national TPAs have not demonstrated sufficient knowledge of the West Virginia law and regulations which may prevent effective representation for their self-insured clients. In summary, Comp-Trol recommends the Board of Managers modify Section 85-18-21.2 by eliminating the financial test as a requirement for third-party administrator qualification, and that a new Section 21.6 be inserted that smaller companies with established records in administration of Workers' Compensation claims be presumptively qualified to continue in that representation.

Thank you for your consideration of these recommendations.

From: "Michelle Cooper" <Michelle_Cooper@acordia.com>
To: <rsuter@wvwcc.org>
Date: 4/16/04 8:16AM
Subject: FW: Rule 18

Randy, I would like to make comment on rule 18. I feel that the commission should give consideration to adding the language contained in section 23-431c (1) related to ruling claims conditionally approved to section 15.5 in rule 18. I would also suggest that the commission consider placing a 90 day limit for the employer or TPA to make a final determination on compensability.

Thank you. Please let me know if you have additional questions. Have a nice weekend.

Brenda Brogan
Acordia Employers Service
Vice President
Phone 304.347.3716
Fax 304.556.4737

Acordia Employers Service
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Fax: 304.556.1165

FACSIMILE TRANSMITTAL SHEET

April 16 2004

To: **T. J. OBROKTA** **From:** **ANTONETTA STEVENS**

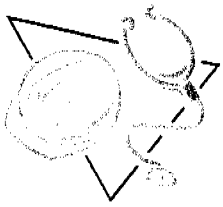
FAX: **926-5441** **Pages: 1**

ATTACHED IS A COPY OF OUR PROPOSAL ON OP CLAIMS FLOW. IT APPEARS TO BE CLOSE TO THAT WHICH YOU WERE DESCRIBING DURING OUR TELEPHONE CONFERENCE. WE APPRECIATE THE OPPORTUNITY FOR INPUT.

Occupational Pneumoconiosis Claim Flow

- If claim received by self-insured employer/TPA, claim information is submitted to the West Virginia Workers' Commission (WCC) and the claim number is assigned.
- If the claim is received by the WCC, claim number is assigned and the application is sent to the self-insured employer/TPA and other chargeable employers, if applicable.
- The self-insured employer completes the WC-305.
- The self-insured employer/TPA will assess the claim based on employment records and other information to determine the validity of the claim.
- The nonmedical ruling or denial is issued by the self-insured employer/TPA.
- If an issue of allocation exists in the claim, the claim is sent to WCC to determine allocation among all chargeable employers.
- The self-insured employer/TPA gathers pertinent medical evidence to present to the OP Board. The self-insured employer/TPA requests that the claimant be referred to the OP Board for an examination.
- The WCC makes arrangements for OP Board examination.
- The OP Board examines the claimant and renders an opinion on the existence of occupational pneumoconiosis. The OP Board's findings are sent to self-insured employer/TPA.
- The self-insured employer/TPA issues permanent partial disability ruling.
- Once the claim is finalized, a copy of the claim record will be sent to the WCC.

Note: The employer should be allowed a time period not to exceed six (6) months from the date of receipt of a properly completed application to gather medical evidence prior to referral to the OP Board. This will result in decreased litigation.



Occupational & Environmental Health, PLLC

Marsha Lee Bailey, MD, MPH, FACOEM
mbailey@ezwv.com
1203 Hospital Drive, Suite 1203
Hurricane, WV 25526
tel: (304) 757-0270

April 19, 2004

Workers' Compensation Commission
Attn: T.J. Obrokta, General Counsel
4700 MacCorkle Avenue, SE
Charleston, WV 25304

Dear Mr. Obrokta:

I am writing in reference to W. Va. Code 23-1-1a (j) (3), 23-2-9(b) & (m) that has been proposed to become effective July 1, 2004. As a medical vendor with the WV Workers' Compensation Commission there are some concerns that I have regarding the self administration of self insurance and third party administrators (TPA's) for self insured employers. Under section 85-18-15(2) the self insured employer is to notify all parties involved within five (5) working days that the self insured employer is self administrating their claims. What will the penalty be to the self insured employer if they do not notify our office that they are self administrating their own claims? Our four year experience with TPA's has lead me to write this letter and to notify you and the Commission of our concerns. Under section 85-18-15(5) the self insured employer shall rule upon requests for authorizations within fifteen (15) working days from the date of receipt by the self insured employer. As a medical vendor I am skeptical. I anticipate the third party administrators or the self insured employers will indicate that they had not received our request after both faxing and mailing on the date of the patient's office visit. This has been a common practice. Will there be some penalty that the third party administrators or the self insured employers will pay if they do not follow these rules? Included in the proposal it states that invoices for health care vendors shall be reimbursed within thirty (30) days from the date of receipt. What penalties lie ahead for the self insured employers or third party administrators who do not pay within thirty (30) days? As an active participating vendor with the West Virginia Worker's Compensation Commission our office knows first hand that third party administrators have a well established policy of not paying or honoring payorders within thirty (30) days. It is our office policy to both fax and mail invoices and office notes to the third party administrators within 24-48 hours of the date of service. Regularly TPA's tell us that they only receive the office note and not the invoice or that they haven't received the invoice or office note at all. Will vendors have someone within the Commission to notify of the problems with the self administration of claims? Or will the self insured employers and third party administrators run vendors out of the state of West Virginia by not paying within thirty (30) days of receipt? To allow TPA's to continue with the current "business as usual" policy will undoubtedly limit access to care for injured workers as physicians and other providers will grow tired of the repeated excuses for non-payment and payment delays. **I propose a late fee of 10% of the fee schedule allowed fee per month for fees that exceed the Commissions thirty (30) day time frame.** I will be attending the meeting on April 20, 2004 at the Civic Center in hopes that my questions and concerns will be answered. Thank you in advance for taking the time to review our concerns.

Thank you,

Terri L. Thevenin
OEH Manager

Comments on behalf of Comp-Trol, Inc. on:
Title 85, Series 18, Self-Insurance/Self-Administration
& Third Party Administrators

Comp-Trol, Inc. is pleased to offer the Workers' Compensation Commission Board of Managers, comment on the proposed Series 18 Rule pertaining to self-insurance, self-administration and third-party administrators.

Comp-Trol is specifically concerned and objects to that section of the rule dealing with third-party administrators. Comp-Trol is a third-party administrator and has many years of experience providing services to both subscribers and self-insurers, including self-insurers which were previously authorized to directly manage and pay medical benefits. We believe that Section 85-18-21 should be amended to allow qualified third-party administrators to administer claims for self-insured employers without having to meet artificial financial tests required through reference to the State Insurance Commissioner pursuant to West Virginia Code § 33-46-1 et seq.

Comp-Trol objects to financial tests as being required to demonstrate qualifications; Comp-Trol believes that this was a recommendation of very large third-party administrators that have national offices. Comp-Trol respectfully suggests to the Board of Managers that it is not necessary to have national offices in order to be qualified to administer claims for self-insurers in West Virginia, and to the contrary, Comp-Trol believes that the Workers' Compensation Commission may have encountered instances in which large national TPAs have not demonstrated sufficient knowledge of the West Virginia law and regulations which may prevent effective representation for their self-insured clients. In summary, Comp-Trol recommends the Board of Managers modify Section 85-18-21.2 by eliminating the financial test as a requirement for third-party administrator qualification, and that a new Section 21.6 be inserted that smaller companies with established records in administration of Workers' Compensation claims be presumptively qualified to continue in that representation.

Thank you for your consideration of these recommendations.

TC

15.12 Occupational Disease and Permanent Total Disability Claims

a. Occupational Pneumoconiosis Claims

1. The self-insured employer shall examine the application and any other information to determine if the claimant has been exposed to the hazards of occupational pneumoconiosis in the State of West Virginia over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure to such hazards, or for any five of the fifteen years immediately preceding the date of such last exposure and to determine if the claim has been timely filed. ~~This determination shall be made within ten (10) business days of receipt of the claim.~~ If these jurisdictional prerequisites are satisfied and if it is determined that that the claim is allocable, the employer shall provide notice of its findings along with all other relevant information to the Commission within thirty (30) business days of receipt of the claim. ~~and the Commission will begin processing the claim as set forth in Section 15.12.a.2.~~ If these jurisdictional prerequisites are not satisfied, then the self-insured employer shall enter an Order denying the claim and shall provide notice to the claimant and Commission.

2. Upon receipt and review of all relevant information, ~~the Commission shall process the occupational pneumoconiosis claim for submission to the Occupational Pneumoconiosis Board.~~ Tthe Commission shall enter a non-medical order determining whether the applicable statutory presumption regarding whether the occupational pneumoconiosis arose out of and in the course of the claimant's employment has been satisfied, the date of last exposure, the allocation of charges among employers, and any other appropriate matter.

3. Once the Commission has entered the non-medical order, the Commission will gather all necessary information as required by the Occupational Pneumoconiosis Board and shall then proceed to schedule the claimant for an examination with the Occupational Pneumoconiosis Board. The Board shall determine the absence or presence of the disease and ~~any disability, if any, and~~ impairment rating, ~~in~~ if any, as more fully provided for in the applicable ~~statues~~ statutes and rules. The Occupational Pneumoconiosis Board shall thereafter issue a recommendation which shall be entered as an ~~final~~ order by the Commission.

4. The process outlined above shall ~~not govern those claims that are conceded by the self-insured employer to be non-allocable and otherwise~~ be the sole responsibility of the self-insured employer in all cases determined to be non-allocable ~~if ultimately granted. Instead~~, The self-insured employer shall make all determinations set forth in Section

15.12.a.1 and Section 15.12.a.2, and shall enter all required orders. Copies of the application, self-insured determinations and orders, and Occupational Pneumoconiosis Board recommendations shall be timely provided to the Commission in an electronic format determined by the Commission. Once the self-insured employer has entered the non-medical order, the self-insured employer will gather all necessary information as required by the Occupational Pneumoconiosis Board and shall then proceed to provide the Commission with a complete record and request an examination by the Occupational Pneumoconiosis Board. The Commission shall schedule the Occupational Pneumoconiosis Board examination and notify the parties as to its date, time and location. The Occupational Pneumoconiosis Board shall thereafter issue a recommendation which shall be entered as an order by the self-insured employer.

c. Occupational Disease Claims (including hearing loss and carpal tunnel syndrome claims).

1. In occupational disease claims that may be allocable, the application and all supporting evidence shall be forwarded to the Commission within thirty (30) business days of receipt by the self-insured employer, or its authorized agent. Upon receipt, the Commission will contact all potential chargeable employers and at any point in the process where it is identified as a single charge self-insured employer the claim will be forwarded to the self-insured employer or TPA for the appropriate order granting or denying compensability.

2. The Commission shall administer all occupational disease claims determined to be allocable.

3. The self-insured employer shall administer all occupational disease claims determined to be non-allocable.

THOMAS P. MARONEY
GENERAL COUNSEL

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April 20, 2004

T.J. Obrokta, General Counsel
Executive Offices
West Virginia Workers' Compensation Commission
4700 MacCorkle Avenue, SE
Charleston, West Virginia 25301

Re: Proposed Title 85 Series 18

This letter contains responses to the above-proposed rule filed in the Office of the Secretary of State. On behalf of the West Virginia AFL-CIO and its affiliated members, including the United Mine Workers of America, the following changes are suggested:

§85-18-5.4 Strike "minimal" and insert "minimum"

§85-18-7.2 After commission, insert "and approved by the board of managers."

§85-18-11.1 Delete in its entirety and replace with:

In instances where an employer has elected to become self-insured, the self-insured employer must remain self-insured for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employers during the self-insured period. A self-insured employer may not return to regular subscriber status nor "buy-out" its obligations which were incurred during the period of its self-insured status.

§85-18-11.2 Delete all language following the word "insurance" at line 7 of the draft ("...and prior to termination...") will be deleted.

§85-18-11.3 Delete in its entirety.

§85-18-12.1 Should not be permitted since it does not take potential future cases into consideration. Any language allowing a buy-down would need additional work since this does NOT get covered by language of 85-18-11.1(a) or (b).

§85-18-15.5(c)(1)	Line 5 should be changed to read "or immediately upon the issuance."
§85-18-15.5(c)(3)	At line 4 – "10 working days" should be "5 working days."
§85-18-15.5(c)(4)	New sentence at the end needs to be added. "However, the physician selected for IME/PPD must be someone other than that which may have done a prior exam(s) used in an application for modification in the instant or any prior claim(s).
§85-18-15.5.(c)(5)	New sentence at the end needs to be added. "However, the physician selected for IME/PPD must be someone other than that which may have done a prior exam(s) used in an application for modification in the instant or any prior claim(s).
§85-18-15.5(d)(2)	Change "15 days" to "10 days."
§85-18-15.5(e)(1)	"30 days" should be "10 business days." (same as claimant gets on 85-15-5(f))
§85-18-15.5(e)(2)	"30 days" should be "15 business days."
§85-18-15.5(h)(2)	"30 days" should be "10 business days."
§85-18-1.5.5(i)	"15 days" should be "5 business days."
§85-18-15.6(b)	Should read "Wage calculations and the supporting documents used to determine claimant benefits."
§85-18-18.3(a)(3)	Should read "The current ratio should not decline two years in a row and be at least one to one or should not decline 20% from one financial reserve to the next."
85-18-18.3(a)(4)	Should read "The total liabilities to total assets should not increase two years in a row an increase over 20% from one financial review to the next."

85-18-18.3(b)(2)	Should read "Total stockholder's equity should not decline two years in a row or decline over 20% from one financial reserve to the next."
§85-18-21.3	Add to last sentence "and all interested parties."
§85-18-21.5	Add to last sentence "and all interested parties."
§85-18-22	Delete in third sentence from "unless" to "commission" at end of sentence.

These additional comments should be presented to the Board of Managers, and to a special subcommittee established by the Board. We would request additional public hearings should be held for input by other parties. I would be happy to meet with the Executive Director, you, and other members of the staff to discuss our thoughts on these issues.

Respectfully submitted,

Thomas P. Maroney

TPM/cls

THOMAS P. MARONEY
GENERAL COUNSEL

ROBERT M. WILLIAMS, ATTORNEY
J. ROBERT WEAVER, ATTORNEY
EDWIN H. PANCAKE, ATTORNEY
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TELECOPIER TRANSMITTAL SHEET

DATE: April 20, 2004

TO: T.J. Obrokta
General Counsel
West Virginia Workers' Compensation Commission
FAX NO.: 304/926-5372

FROM: Thomas P. Maroney, Esquire
Thomas P. Maroney, L.C.

RE: Proposed Title 85 Series 18

TOTAL NUMBER OF PAGES, INCLUDING THIS SHEET: 4

IF YOU DO NOT RECEIVE ALL THE PAGES AND/OR WE ARE DISCONNECTED DURING TRANSMISSION, PLEASE CALL CINDY AT 304/346-9629.

WORKERS' COMPENSATION COMMISSION BOARD OF MANAGERS
May 6, 2004

Minutes of the meeting of the Board of Managers held on Thursday, May 6, 2004, at 1:00 p.m. in the Charleston Civic Center, Rooms 207-209, Charleston, West Virginia.

Board members present:

Steve White, Chairman
Gene F. Bailey
Richard W. Humphreys
Chris E. Jarrett (by phone)
Matthew Jones (representing Craig Slaughter)
Senator Brooks McCabe
Douglas W. Merritt
Bob Phalen
David Satterfield
Senator Vic Sprouse
Everette E. Sullivan
Paul E. Thompson

Commission staff present:

Greg Burton
Melinda Ashworth Kiss
T. J. Obrokta
Randall B. Suter
Lisa Teel

1. Call To Order

Chairman White called the meeting to order at 1:07 p.m.

2. Approval Of Minutes

Mr. Sullivan moved to approve the minutes of the meeting held on March 30, 2004. The motion was seconded by Mr. Phalen and passed unanimously.

Mr. Bailey moved to approve the minutes of the meeting held on April 20, 2004. The motion was seconded by Mr. Sullivan and passed unanimously.

3. General Counsel Report – T. J. Obrokta

T. J. Obrokta: Mr. Chairman, members of the Board. On the agenda today, there are two rules. The procedural status of these two rules is that today I will be responding to the public comments you've already received on these two rules. There are no votes to be taken on these two rules today. I believe both Rules 18 and 19 will be on the agenda for a final vote at your May 18th meeting.

Before I get started, earlier in the week, an agenda went out which indicated we would also be discussing Rule 5 today. We have pulled Rule 5 from the agenda. Rule 5 generally was the rule that set forth how we were going to go about reviewing the six or seven thousand current TTD recipients to determine whether or not they should continue receiving TTD benefits. That rule will be directly impacted by the Supreme Court case -- the *Thompson* case. We still await a decision from the Court in that case. So, until we hear the decision from the Court, we've decided to pull that rule from the agenda and we'll bring it back to you at a later date.

So, for today's purposes, we'll discuss Rules 18 and 19. Just so the Board is aware, both of

these rules have gone through the extensive stakeholder process. Rule 19, the Risk Pool rule, first went out last December to everybody and has been going through the stakeholder process ever since. Rule 18, the Self-Administration Rule, has been out in discussion with the stakeholders since early February this year.

So, both these rules have been through the public stakeholder drafting process. They've been filed with the Secretary of State's Office for public comment. That public comment period has closed. The public hearing has been held on both of these rules, and we are now here today to respond to comments received from the public.

With that background, I believe the first rule on the agenda is Rule 19, which is the Risk Pool Rule. Each of you should have a yellow folder, and in that folder, there are two sets of documents – one set dealing with Rule 19 and one for 18.

Turning your attention to Rule 19 first, as this Board is well aware since you've seen this rule before now, Rule 19 provides for the creation and funding of two risk pools for the benefit of self-insured employers to assist them in securing the obligations of bankrupt and defaulted self insureds. The two pools are the security pool and the guaranty pool. The security pool is being established so that we can pay for claims of bankrupt and defaulted self-insured employers that have dates of injury prior to July 1, 2004. The guaranty pool is being created to pay for the claims of bankrupt and defaulted self-insured employers with dates of injuries on or after July 1, 2004.

You may recall in an earlier meeting, Mr. Suter went through, in great detail, this rule with the Board, and I'm not going to restate everything that he presented to the Board. What I will focus on, instead, are the changes that have been made to this draft from the time you've seen it until now.

The copy of the rule you have in front of you is a strike-and-insert type of document, highlighting the changes between what we filed with the Secretary of State on February 17th, comparing that document to the document's current state.

The first change that I would like to point your attention to is on page 3 – at the bottom of page 3. Again, Rule 19. This change involves Section 6.1. This provision addresses the security pool which, again, is the pool created to deal with claims with dates of injuries on or before July 1, 2004. The new language in 6.1 does the following. First, it requires that current employers who are not fully secured must become fully secured by July 1, 2006. Again, looking at the bottom of page 3, carrying over to page 4 of your document.

What this language, in essence, requires is that – we have a hundred and thirty – roughly – self-insured companies. A handful of them are under-secured. What this language requires is that these under-secured companies have until July 1, 2006, to get secured. What will happen is they will have to enter into a security increase plan that we will establish at the Commission, and that will require them to get fully secured by July 1, 2006.

Gene F. Bailey: Mr. Obrokta, the document that we have in front of us doesn't have that date, but I understand what you're saying.

Mr. Obrokta: If I could point your attention to page 4, paragraph b.2.

Mr. Bailey: Okay, Mr. Phalen and I are there. Thank you.

Mr. Obrokta: There have been some discussions this morning with various stakeholders and other individuals – actually, if I could back up.

If a company does not become fully secured as of June 30, '06, or doesn't maintain the appropriate security level after June 30, '06, paragraph c, that you will see on the middle of page 4, requires that they be removed from self-insured status. They will be sent back to the subscriber fund.

There were some discussions as recently as late this morning that – I'm going to come up with some language to modify this to the extent that may be seen as too harsh. We're going to insert language between now and your May 18th meeting that will provide, in essence, as follows. The June 30, '06 date holds. But, we're going to insert into the rule a six-month grace period – a one-time six-month grace period that will either extend from July 1, '06, for the balance of those extra six months, or, if sometime in '07 or '08, the company becomes under-secured, they will be given a six-month grace period to get their security up to the required level. If they don't, at that point, they will be required to leave self-insured status and re-enter the subscriber fund. They will, of course, do that by buying out as a self-insured company. There will be a one-time cash payment or we will negotiate a repayment agreement to enable them to buy out.

But, in essence, the new language you will receive before your May 18th meeting will keep the June 30, '06 date, but we will insert a six-month grace period, one time, for companies and give them an extra six months.

Chairman White: Mr. Obrokta, it's my understanding the change will require the unanimous vote of the Board of Managers.

Mr. Obrokta: A component of the language I will add will be, the company will petition – the way it will work is that a company who is not fully secured after June 30, '06, will petition this Board and request a six-month grace period to get their security up to par. The Board will have to vote unanimously to grant that petition. If you determine you do not want to grant that petition, that will be at the discretion of each individual member of the Board because it requires a unanimous vote.

Senator Brooks McCabe: Faced with a situation like this, one would have to assume that they can't provide the security or the bond – that there's some difficulty either in the market, their income, their balance sheet or whatever – and if you have to move towards the negotiation, aren't you getting into situations where there's really perhaps no answer? They can't get a bond, they can't provide the proper payments, then they're taken out of self insureds and they're put into the regular program which means they have to fund their obligations. I would also have to assume that would be a very difficult thing to do.

Mr. Obrokta: We have become acutely aware of how difficult this all is with the current situation up north. It does put us in a very difficult position when a company can no longer satisfy the surety requirements to keep them in the self-insured pool, when their liability ultimately may be spread to the self-insured employers.

Senator McCabe: I guess really where I'm going with my question is – I know you have to have some closure to this, which is what you're providing. The real policy should be, from my vantage point, monitoring it and preventing something like this reaching the point that there is no financial alternative. So, does this rule give you the necessary ability to make sure that a self-insured company does not, in fact, get into a catch-22 where there's no way out, other than perhaps what we just experienced with the bankruptcy?

Mr. Obrokta: This rule and Rule 18 provide the necessary monitoring to ensure that security levels are adequate. What this rule gives, for the first time, is real teeth to take action if, in fact, a company can't get to where it needs to be. That's what's been missing.

Greg Burton: I'd also add, Senator, Rule 18, which T. J. will go over in a few minutes, is related to the buyout part that would have to happen. It allows us the flexibility and structuring to buyout for someone that would be in financial trouble, so you wouldn't shut the door necessarily tomorrow. They'll have the ability to buyout over a period of time,

Mr. Obrokta: The changes I've just reviewed address Section 6 of the Rule and, again, it modifies the terms of the security pool and requires surety.

You'll see on page 5 of your document, a significant rewrite of Section 7. This language addresses the various funding mechanisms for the security pool. The new language that we tried to work out with the self-insured community – I'm not saying they're fully on board, but this is the best we've been able to do – addresses, again, on the bottom of page 5 – I'm starting with 7.1. – how the security pool will be funded. Obviously, the first source of revenue would be to draw down on any surety documents that may exist if a self-insured employer goes into default. Turning the page, at the top of page 6, all the GPT that has existed through June 30, '04 will go into that fund.

The real meat of the change starts on Section c, which you'll see underlined there at the top of page 6, assessments to fund the security pool generated under the provisions of *W. Va. Code §23-2-9(i)*. This is a provision in the *Code* that has existed for a handful of years actually, but it's never been utilized, that authorizes the creation of a security pool and authorizes this Board to assess self-insured employers the monies that will be put into this pool to satisfy the obligations of the self-insured community. You can see very clearly that we insert the language recognizing your right under *§23-2-9(i)* to create this pool and to make these assessments of the self insureds. I will point out that very specifically Senate Bill 2013 – this language – this provision of this Risk Pool Rule and this ability for you to assess under the *Code* is not, not subject to rate freeze.

Section d – you'll see new language on Section d, another source of revenue. After the rate freeze is lifted on July 1 of '06, Senate Bill 2013 provided additional ways for you to assess the self-insured community, and after the rate freeze is lifted in July 1, 2006, those monies will be available to this Board as well.

So, those are the changes on Section 7 and goes to the funding of the security pool.

Section 8, which is about halfway down page 6, an entirely new Section 8. This, again, further addresses how this security pool will be funded. It makes it very clear assessments – you'll

see in 8.1. – the assessments that I just discussed will begin on January 1, 2005 – this coming January. We would propose beginning the assessments at that date and, again, these are assessments allowed for under the *Code* and these assessments are not subject to rate freeze.

We would propose beginning those assessments on January 1, 2005. The Rule allows that the Commission will come up with a methodology specifically on how to make the assessments and then charge the self insureds accordingly. So, as you take time over the next couple weeks to review the rule, Section 8 sets forth how we would go about making the *§23-2-9(i)* assessments.

Chairman White: I would like the minutes to reflect that Chris Jarrett is participating in this meeting telephonically.

Mr. Obrokta: Before I move on to Section 9, the Guaranty Pool, I will, in the interest of full disclosure, advise the Board that the self-insured community has not consented and, in fact, disagrees with the January 1, '05 date. Obviously, they would like to see it further into...

Section 9, which begins on page 7 of the Rule, addresses the Guaranty Pool Funding. Again, this is the pool that will be created to pay for defaulted self insureds with claims with date of injury on or after July 1, 2004. Under the language as it currently exists, the Guaranty Pool will be funded in '05 and '06 using a two percent rate of the preceding fiscal year's claims indemnity payments. The methodology for how these payments are made into the pool will change in '07. They'll start with five percent of the projected claims of the self-insured employer for the fiscal year in which the charge is made. The assessment will continue until the Guaranty Pool is funded at $30 million and, again, the assessments will resume whenever the balance of that fund gets below $30 million. That's what you'll see in Section 9 which is on pages 7 and 8.

I guess to summarize, this Rule 19 is complex. I understand that. At its core, it creates this two pools – one for claims with dates of injuries before July 1, '04 and one for dates of injuries after July 1 of '04. The Rule sets forth how each will be funded and a disagreement remains....

There was very limited public comment on this. At your public hearing, I believe Mr. Cavender made some comments for Acordia. I believe he was the only one who spoke. Mr. Bowen sent us written comments on behalf of the self-insured community. His comments and Acordia's written comments are part of your package if you would like to review them at your leisure.

In essence, I will tell you that the objections as I currently understand them have to do with the assessments on the security pool. I believe there is a legal argument that the assessments violate the rate freeze in Senate Bill 2013. They will make the argument that it is unfair to assess only the self insureds for these debts and, in fact, we should be assessing all 38,000 employers.

I am comfortable, from a legal standpoint, that the Rule as written is within the parameters of Chapter 23 of the *Code*. I think we have all likelihood of prevailing if, in fact, we're challenged.

With that, unless there are any questions on Rule 19, I'll move on to Rule 18.

Rule 18 implements a very important provision of Senate Bill 2013. Senate Bill 2013, passed last summer, required that as of July 1, '04, the self-insured community – roughly a hundred and

thirty employers – administer their own claims. This will take about fifteen percent of our caseload out the door and put it in the hands of the self-insured community. They will receiving the claims. They will be ruling on the claims. They will be paying the indemnity – the medical benefit aspects of claims. They'll be doing almost all of it.

We have worked very closely with the self-insured community and other stakeholders, organized labor, and all other stakeholders to try to fashion a rule and set up this process that will recognize the freedom that should be given to the self insureds, but also to ensure adequate protections for the claimant community.

In my opinion, Rule 18, accomplishes that. The first draft of Rule 18 went out to the stakeholders on February 3. It has gone through significant revisions. Ultimately, on March 16th, it was filed with the Secretary of State's Office, on your approval. The public comment period has expired. There was a very short public hearing on the Rule. We've received various written comments on the Rule that are in your packet.

I'd like to go through the Rule as it currently exists, comparing to how it was as filed with the Secretary of State's Office. That will reflect what changes we've made pursuant to public comment.

I will say before beginning on the substance of the Rule, at the public hearings that were held on Rule 18, Mr. Bowen, as Executive Secretary of the Self-Insurers Association, made some very cogent comments that I would like to re-visit with this Board. The self-insured community, or Mr. Bowen, stated that he believed Rule 18 in its current form reflects an appropriate and reasonable balance of all the interests quite clearly and recognizes all of the statutory remedies available to employees. He felt that – his comments stated that the Rule quite clearly reflects that self administration will be an extraordinary opportunity in the best sense of a private and government partnership to ensure the successful transition to self administration.

We appreciated his comments very much at the public hearing. We do think we have a good product and look forward to moving forward.

With regard to the Rule itself – Rule 18 again – page 2, the first substantive change, you'll see at the bottom of page 2, two paragraphs, all underlined. The statute, Senate Bill 2013 required us to put language in this Rule that governed when a self-insured employer had good cause to not pay something they were supposed to pay for a claimant. This language satisfies that requirement of the statute. It is very restrictive. You'll see in paragraph b, good cause for failure to promptly pay a claimant is limited to those instances where a self-insured employer fails to receive notice of a properly promulgated order or those instances in which an order has been promulgated in substantive error, is on its face obviously in error as to the amount due or orders the payment of TTD benefits past the date on which the claimant returned to work.

That language has existed in other rules – Rule 9, in particular, I believe – in previous rules promulgated by the Commission. That's where we got that language. It's being inserted here to satisfy the statutory requirement. We addressed what would be good cause for a self insured to fail to pay what is otherwise due.

Page 4, you'll see paragraph 4.2 that's underlined. This was in response to some comments

received by the self-insured community. This re-inserts a provision that allows an employer owned by another business to have its compensation risks guaranteed by a parent, if certain elements are satisfied. It allows for a parental guaranty. It mentions full disclosure – I'm not sure that goes far enough for the self-insured community or not. They may want to go a little further. We may hear from them. If we do, we'll look at some language between now and May 18th.

Page 5, about two-thirds the way down the page, paragraph 5.4, minimal was changed to minimum at the request of Mr. Maroney. That was a change we agreed with.

On page 7, you'll see new language towards the bottom of page 7 – new 7.2.d. This makes it clear that a self-insured employer that has been approved to carry its catastrophic risk through a private insurance carrier shall not be charged premium tax by the Commission. This is also some language that I'm not sure goes as far as the self-insured community wants, so there may be some suggested additional amendments.

Page 11 – the very bottom of page 11 – paragraph 11.1.b.1. – the last sentence carrying over to the next page, some new language. What this does – the way the rule was originally written, if a self-insured employer wanted to buy out of their obligations, the rule required them to go into the subscriber fund upon doing that. The employer community asked for some relief on that, and we've inserted the language, as you will see, that basically states they can remain self insured, even after a buyout, if the buyout is in connection with the sale of a distinct unit or division of the employer. That language was requested by the employer community to address their concerns. I think we're okay with that.

On page 15 in your document, in the middle of the page, 15.1.b., this is new language. There has been significant work between when this was filed with the Secretary of State's Office to now. There's been significant work on how certain very unique claims will be processed through the self-administration procedure. These are claims, by and large, that can be allocated to different employers. It's clear that there could be a conflict of interest if an employer is administering its claim it could allocate to another employer. So, everyone agreed, including the employer community, that allocatable claims – claims that can be spread to numerous employers – had to be treated uniquely under this rule. Otherwise, you can't ask a TPA or an employer to allocate because it puts them into a conflict of interest position.

So, what you'll see is language is 15.1.b., and then you'll see language starting on page 21, page 22, and most of 23. All of this language sets forth how these allocatable claims, such as OP claims – permanent total disability claims are a little different, but they involve our IEB – then occupational disease claims on page 23. All the language that you'll see underlined on 21, 22, and 23, and the language on 15 – all address how we're going to deal with these claims that can be allocated to various employers or these OP claims that have to go back to the Commission because we have the OP Board that looks at these folks and makes disability impairment determinations, or on permanent total disability claims that have to come to our IEB because our IEB looks at them – at the claimants to determine whether or not they are disabled. So, all this language that I've just pointed out addresses how we're going to process these very unique claims.

I will tell you that it's my belief, ninety-five percent of it, is agreed to. I got an email yesterday that there may be some desired tinkering on the OP section. I will tell you and everyone else in the

room that I don't see any need to further tinker with it, but there may be some pressures we all receive over the next couple weeks to further tinker with the OP section coming from, maybe, the TPA community, but I think we ninety-nine percent there.

I will tell you that the balancing act you're walking here – just to be open about it – is generally the claimant community wants to see as much of this stay with the Commission as possible, and the employer community wants to see as much go to them as possible. We've struck a balance. I think there's about ninety-five percent agreement in the balance that we've arrived at and, hopefully, between now and the 18th, there won't be any significant pressure to change the rule.

Turning your attention to the bottom of page 16, this is a change requested by the employer community. Under the *Code*, the Commission, and now, by extension, the self insureds, have a right to conditionally approve a claim up front while they continue to investigate its true validity. We put that into the rule, recognizing their ability to do that. The first two sentences – the first six lines are roughly right out of the *Code*. The last sentence we put in there – we'll give you the right to conditionally approve but you've got to make a final decision within ninety days. That's what the language there on page 16 does.

On page 17, towards the bottom of the page, you'll see paragraph number 4. This language has to do with when a claimant is being referred out for an IME. I believe the suggestion came from Mr. Maroney that he thought the doctor doing the IME should someone wholly removed from the employer – not having any relationship with the employer. That was also a comment we received from Mr. Cook who gave public testimony at a public hearing.

We came up with some language basically requiring that the IME physician has to be someone who has not otherwise examined the claimant on behalf of any interested party in the same claim. If you want to get an objective IME, it's got to be someone who has not examined the claimant for anybody – for the employer or the claimant – a fresh set of eyes. So, we tried to accommodate Mr. Maroney's request there and turning the page on page 18, towards to top, you'll see some identical language there.

On page 19, two-thirds of the way down on the page, 15.6.b., this part of the rule talks about what information the self insured is required to maintain over a certain period of time. As filed with the Secretary of State's Office, it said wage calculations were used to determine claimant benefits. Mr. Maroney requested we insert "and the supporting documents," so we inserted that language.

Finally, on page 31 and page 32, this is language related to our pay before you litigate rule. What this language does is, any self-insured employer who wants to contest a decision made by the Commission historically had to pay before they litigated. What we've done is we've loosened that a little so they can either pay – you'll see on page 32, they can pay before they litigate or they can enter into a reinstatement agreement before they litigate or they can get a letter of credit or any combination of those. We're trying to open up some additional possibilities to enable them to litigate an issue but also fully protect the interests of the Commission. The language that you see in this section is identical to the language you already approved a while back relating to the revocation of business licenses, so that language is nothing new to this Board or to the various stakeholders.

With that, that's my review of the rule. You have the written public comments in your packet. A couple comments – there has been some suggestion – there are certain legal disputes that exist between the Commission and the stakeholders. The self-insured community continues to take the position that they cannot be required to buy out of self-insured status. I disagree with that and the Commission disagrees with that. They offered certain language to me basically deleting our ability to require them to buy out. You may hear additional comments from the self-insured community on that.

There was a comment from one TPA suggesting that we should not have any financial requirements on the TPAs to ensure qualifications to administer claims. We disagree with that. We think they play a vital role in this process, and they should meet the same TPA requirements that are required of other TPAs by the Insurance Commissioner in non-Workers' Comp areas.

There were some comments from Mr. Maroney. The self insureds didn't think we should require them to buy out. Mr. Maroney didn't think we should let them buy out. We disagree with both of them. Mr. Maroney wanted us to put some language in basically prohibiting the self insureds from buying out – once they're in self insured, they're always in self insured. That's contrary to *Code* and I'd be happy to review that with anybody. I believe Mr. Maroney recognizes that's not according to *Code*.

There were a couple suggestions Mr. Maroney made on time periods the self insureds are given to do certain things. Those are identical to the time periods of those on the Commission, so we don't see a need to change those.

With that, that's the rule. Those are the rule changes we are going to suggest at the next meeting to be adopted. At the May 18th meeting, we'll be bringing both rules to you and ask you to accept the changes reflected in the documents today and pass out the rules.

Chairman White: Thank you, Mr. Obrokta.

4. Weirton Steel Update – Greg Burton

Mr. Burton: As you all are aware, Weirton Steel has filed bankruptcy. As a matter of fact, there is a hearing scheduled later this afternoon. What has been asked of the Commission and the Board is to give the individual Board members of Weirton a release for any potential liability that we may find against them in any point in time. We have not agreed to do that. What we have agreed to is to give them a letter that basically says that we will not file a suit against them or take any action against them unless we have a good faith basis to do so. Also, in that, it says that filing of the bankruptcy in itself is not a good faith reason to go after them. So, we think it's a letter that basically doesn't say much other than the fact that we won't file a suit against them unless we have a good faith basis to do so.

Chairman White: Mr. Burton, will the letter have any impact at all on the ability of the Commission to file a lawsuit against the officers and directors if they have a good solid legal basis to do so?

WEST VIRGINIA WORKERS' COMPENSATION COMMISSION
BOARD OF MANAGERS
MAY 18, 2004

Minutes of the meeting of the Board of Managers held on Tuesday, May 18, 2004, 1:00 p.m., at the Charleston Civic Center, Rooms 207-209, 100 Civic Center Drive, Charleston, West Virginia.

Board of Managers Members Present:

Steve White, Chairman
Gene F. Bailey
Thomas Campbell
Paul Hardesty (designee for David Satterfield)
Richard W. Humphreys
Chris E. Jarrett
Douglas W. Merritt
Bob Phalen (via telephone)
Craig Slaughter
Everette E. Sullivan
Paul E. Thompson

Staff Members Present:

Gregory Burton
Andy Casto
Tonya Childress Gillespie
Chris Howat
Mike Jordan
Melinda Ashworth Kiss
Timothy Leach
Phil Lynch
Loralea Mullins
Becky Neal
T. J. Obrokta, Jr.
Sherry Risk
Phil Shimer
Randall Suter
Lisa Teel
David Townsend
Andy Wessels

1. Call to Order

Chairman Steve White called the meeting to order at 1:00 p.m.

Chairman White: I would like a silent roll call taken. Let the minutes reflect that we have a quorum.

2. Approval of Minutes

Chairman White: The first item of business is the approval of minutes for the April 20, 2004, Board of Managers meeting.

Everette Sullivan moved to approve the minutes of the April 20, 2004, Board of Managers meeting. The motion was seconded by Douglas Merritt and passed unanimously.

Chairman White: I declare that the minutes of April 20, 2004, have been passed.

3. Commission Report – Executive Director Gregory A. Burton

Gregory A. Burton: Thank you Mr. Chairman. I think you've been handed out the April 2004 Monthly Financial Report and I just want to briefly go over that report with you. On page one, again, we continue to hit our projected numbers in terms of cash received. One day this month, which is not reflected in this obviously, we received about $51 million dollars which is a one-day total for us in terms of premiums. We appreciate all the help that we got from the Treasurer's Office to get all those taken care of in that one day. Also, in terms of the payments, claims paid were down about 12% or about $69 million dollars. Some of the large ones – medical is down about 19% and TTD is down about 24%. In terms of general and administrative expenses paid, we're up about 7%. Again, a lot of that has to do with us spending some dollars at the beginning of the fiscal year on technology. In terms of our investments, cash provided by or used in investment activities were at $16 million dollars versus a $93 million dollar loss at the same time last year. Also, we've received. . .again, we've received all the money from the Legislature that we are suppose to for this fiscal year and you can see the cash balances at the bottom of the page. If you flip over to page three, one thing I would highlight in terms of. . .this is, again, the graph. . .one thing I would highlight and I would be very cautious about – this is the first month in a very long time that if you look at this time this year versus last year, we actually have more cash in the bank than we did in April 2003. But again I remind you we still have a very large unfunded liability and this is just one month and we are still awaiting the *Thompson* decision, which could change this greatly if we lose that case. But again T. J. has assured us we are going to win it. I don't want you to blame him if we don't, but he assures us. . .

Page four, again, is the listing of all statutory transfers from the Legislature under Senate Bill 2013. Page five is the Receivables Management report. Again, Dave Townsend's group continues to do a great job in collecting our receivables. At the bottom of the page for April, 91.9% is a record for us, and again they continue to monitor this a lot to make sure we get the payments. I think our Employer Violator System is starting to kick in and get some people to make some payments. Page six is the medical payments to top ten vendor specialties. In the top ten, we're down about 22% and overall we're down about 19%. Some of the larger ones are rehab at 57%, chiropractic services at 55%, claimants at 30%, decrease in physical and occupational therapists at 27%. Page seven is just a listing of the claim payments year to date by county for you to look at. Page eight is our claims performance. Again, Andy Casto and our Claims Department continue to bring these numbers down and they continue to do a great job. In particular, if you look down at the bottom of the page under the "indicators," those numbers continue to move in the direction that we want them to and they continue to monitor that to make sure those numbers go down. Percentage ruled within 30 days of receipt, we're at

94.01% versus 86.72% for March. Again, they do a great job. Page nine, Safety and Loss – Bob Bess and that group continue to have a lot of demands on their time and they've seen a lot of employers and continue to have a lot of requests. Safety videos continue to be a hit. As you know, we're under a marketing campaign now to try to get more people to utilize our Safety and Loss Control Unit. Page eleven is the investment summary. Again, remember this is always a month behind. This is for March 2004. Fiscal year to date through March 2004 is about a $12.5 million dollar gain versus about a $61 million dollar loss for the same period. And then on the last page, page fourteen, is the Office of Inspector General. Mike Jordan's group is getting geared up and I think he now has the majority of his positions filled. He is going to be revamping this report over the next couple of months to try to give you more information and we're working on that. So this may change the next time you see it. They continue to go after fraud and abuse and use the suspension method that we have available to us, and they to do a very good job. With that Mr. Chairman, I'll be happy to answer any questions you may have about the report.

Chairman White: Thank you Director Burton. Any questions? Thank you.

4. General Counsel Report – T. J. Obrokta, Jr.

T. J. Obrokta, Jr.: Mr. Chairman, members of the Board, I'm T. J. Obrokta, General Counsel, Workers' Compensation Commission. We are here today to discuss two Rules that if passed by this Board will truly be historic in the history of the Workers' Compensation Commission in West Virginia. Both of these Rules deal with the so called "self-insured community." As the members of this Board are well aware, we have about 38,000 employers in the State of West Virginia and about 130 of those are the so called "self-insured." They insure their own claims. We are here today at the end of the stakeholder process as it relates to two Rules that will regulate how the self-insured community continues to do business in West Virginia. The first Rule before you is Rule 18. This Rule is brought before you as part of the implementation plan for Senate Bill 2013 passed last summer. Senate Bill 2013, passed by the Legislature and signed by the Governor, required for the first time in West Virginia that self-insured employers not only now will they continue to insure and pay their claims, they will administer their claims as well. That is to say they will receive claim applications, they will Rule on the compensability of claims, they will approve or disapprove medical treatment, etc. They will in essence step into the shoes of the Commission. That is a policy decision made by the Legislature and we are here to implement it through Rule 18. Just so you know, Senate Bill 2013 required this concept to be implemented by July 1. We have had for several months now a Self-Insured Unit working very closely with the self-insured community headed up by Sherry Risk, Lisa Teel, Melinda Kiss and Randy Suter, and various other folks from our shop have worked very closely with the self-insured community to make sure that this transition is as seamless as possible and I think each of those individuals deserves quite a bit of credit. So with regard to Rule 18, this Rule has been through the stakeholder process that each of you are now very familiar with. I think the first draft of this Rule went out February 2 or 3. We brought it to you as a Board. You approved it for filing with the Secretary of State's Office. It went through

the public comment period. You received public comment. At your last meeting I addressed and responded to the public comments. Now we are here today hopefully for a final vote on passage of the Rule. Ultimately after my presentation I will therefore then be requesting that this Board approve for final filing Rule 18.

Each of you should have a green folder in front of you. The first document in that folder should be Rule 18. Let me describe to you its current format. At your last meeting you will recall I went through in detail our responses to the various public comments that had been received on Rule 18 and we discussed the changes that had been made in response to those comments. The Rule before you is largely as it was at your last meeting. There have been three minor changes that I want to draw your attention to and explain before I would then respectfully request a vote on the Rule or to answer, of course, any questions you may have. So again I am just going to focus on the changes that have been made in the Rule since your last meeting. These are changes that have been the product of continued discussions with the stakeholders and there are only three, and largely in my opinion cleanup.

Looking at Rule 18, if you would turn to page 14 please. In about the middle of page 14 you will see paragraph 12.3. Section 12 describes a certain calculation that takes place when a buyout occurs. Buyout is discussed in Section 11, the preceding section. By and large the Rule requires if a self-insured buys out, they have to then leave the self-insured community and go into the subscriber fund. Section 11 talks about an exception to that. If you are just buying out because you are selling a division or a unit of your company, then you can stay self-insured. That was a change I went over at your last meeting. The change I am drawing your attention to today at 12.3 simply clarifies that if you have to go through the calculation to buy out the way it was first written, 12.3 said, "You better relinquish your self-insured status." We've added the underlined phrase there, "unless it meets the exception of 11.1.b.1." All that means is we are referring back to the exception of if you are selling a unit or a division, you don't have to relinquish your self-insured status. That is all that language is intended to do. So it just clarifies that the exception we discussed last time also applies to the calculation set forth in Section 12.

The next change I would draw your attention to would be on page 21 of the Rule. On page 21 of the Rule, you will see just a little more than halfway down the page paragraph number 4. Almost all of this language was gone over with you at your last meeting. What this language is addressing are claims for OP – occupational pneumoconiosis. These types of claims are unique. Unlike most claims that can be administered by a self-insured company, OP claims can be allocated to different companies. So they're unique in nature and they have to be treated differently than other claims. If you have a workplace injury, it's easy to say, "Okay, the employing entity when that injury took place is the chargeable employer." Occupational pneumoconiosis claims are different because they can be allocated to different employers. Everyone agrees that we cannot allow the employer community to get in the business of allocating claims amongst themselves and other employers. There may be some self-interest there that should be avoided. So what we came up with, with the stakeholders, was this language setting forth special treatment for OP and occupational disease claims as well. The only change from your last meeting, if you will look at page four, you'll see starting at the end of

the second. . .I'm sorry, page 21, paragraph number 4. You will see at the end of the second line a phrase that begins, "and in occupational pneumoconiosis claims that the self-insured employer administers in accordance with the Commission's discretionary authorization under the provisions of 15.12.c.2." That language is new and it ties in obviously to 15.12.c.2., and 15.12.c.2. begins on page 22. At the bottom of page 22, paragraph number 2, four lines from the bottom, that sentence used to read, "The Commission shall administer all occupational disease claims determined to be allocable." We've added the remaining phrase. What this language does, instead of me just reading it to you, what this does is addresses a concern of the self-insured community that goes along these lines. If company "A" is a large corporation that has three subsidiaries, "B, C and D" where you have an OP or an OD claim that could be allocated, but it can only be allocated to "B, C and D" who are all owned by "A," what this language does is say, "Okay, we understand it could be allocated." So usually then we, as a Commission, would take over the claim. But since it can only be allocated to subsidiaries of the same parent company, we will go ahead and let you as a self-insured administer that claim because there is no risk of you allocating it back to another employer. This language simply allows the self-insured community to administer claims that are allocable, but only if they can be allocated only amongst subsidiaries of a parent corporation. So there is no risk we run in them allocating it to another company.

I know it is very technical and I apologize, but those are the changes that have been made to Rule 18 since you saw it last at your last meeting. Those were changes requested by the self-insured community that our team agreed with. With that I will answer any questions that the Board may have, and otherwise would request that the Rule as it is presented before you be passed for final filing.

Chairman White: Questions of Mr. Obrokta? For the benefit of the audience, Bob Phalen is also attending the meeting via telephone.

Bob Phalen [via telephone]: I can hear you real well, but it is very difficult to hear T. J. and to hear Greg. I heard T. J. a little better than I heard Greg, but I am here.

Chairman Sullivan: Mr. Chairman, if a motion is in order, I so move we as the Board of Managers approve Rule 18 as presented by Legal Counsel, Mr. Obrokta.

Chairman White: We have a motion for the approval of Rule 18. Do I have a second?

Gene Bailey: I second.

Chairman White: I have a motion and second. Discussion? I call for a vote. All those in favor please signify by saying "aye." Opposed? I declare the motion has passed that Rule 18, as presented, has been adopted.

Mr. Obrokta, Jr.: For the benefit of the Board, it will take us a couple of days to get the Rule in appropriate format and it will be filed with the Secretary of State's Office and effective 30 days thereafter thereby meeting the July 1 deadline of the Legislation.

The second Rule to be presented to the Board today for a final vote is in my opinion also historic in nature. It is somewhat unique because it is a Rule that is not implementing Senate Bill 2013, rather this is a Rule that is implementing Legislation passed in 1995. It was first recognized back in the mid 90's that there was a problem in the self-insured community with regard to bankrupt and defaulted self-insureds. Since 1995 the Commission, and what was then the Performance Council now the Board, has been authorized under that Legislation to create certain risk pools that could be used to pay the claims obligations of bankrupt and default self-insured employers. This is a particularly sensitive issue giving certain developments in the self-insured community. The time has clearly come for this very difficult problem to be addressed head on and that is what the Commission has attempted to do in Rule 19.

Again, the purpose of Rule 19 is to create two separate funds that will be used to pay the ongoing obligations of default and bankrupt self-insured companies. Since at least 1998 the self-insured community has been paying this type of expense to the tune of about $4 million dollars a year for the default and bankrupt self-insured companies. That is to say, you have defaulted and bankrupt self-insureds who can no longer meet their ongoing pay order obligations since at least 1998 and before then. Since at least 1998 the self-insured community, pursuant to West Virginia Code, has been paying those ongoing obligations of other self-insureds. So all this Rule does is create two funds that will formalize what has been taking place for several years. I went through in detail this Rule with you at your last meeting. There have been some changes to it that I would like to focus on and then take any questions you may have on this Rule. Given this Rule's complexity I will just touch on it again and what it provides without getting into too much detail, but I will touch again on it and then I'll focus on the three changes that have been made since your last meeting.

The Rule, again, sets up two pools. The first is a Security Pool. This pool is used to pay for any pay order that is going unpaid by a defaulted or bankrupt self-insured company for a claim that has a date of injury on or before July 1, 2004. That is the line of demarcation – July 1, 2004. If a claim has a date of injury before that date and the pay order is not being paid by defaulted or bankrupt self-insured, monies out of this pool will be used to pay that claim. In essence, this pool will be funded by the surety drawdown of any bankrupt or defaulted self-insured, the GPT – graduated premium tax – that has been paid into the Commission up and through June 30, 2004. And the final funding mechanism for this is the 1995 Legislation that I mentioned earlier §23-2-9(i). This allows this Board very clearly to assess self-insureds for the bankrupt or defaulted obligations of the self-insured community. This provision is not subject to the rate freeze of Senate Bill 2013 and therefore would be the third funding mechanism for the Security Pool. The Rule, as I explained at your last meeting, would require these assessments to begin January 1, 2005. Just to be blunt about it, that certainly is a point of contention with the self-insured community. That's the Security Pool. There is also in this Rule a Guaranty Pool that has a completely different funding mechanism. This pool will be used to pay for any claims

of defaulted or bankrupt self-insured companies when those claims have a date of injury on or after July 1, 2004. So these are for the claims that occur on or after July 1, 2004. The funding mechanisms are set forth in this Rule, but in essence they are based on a certain percentage of the preceding year's claims, indemnity payments or at a certain point in time it changes to a percentage of the projected claims liabilities. I went through some of those methodologies at your last meeting. I do not believe they are the subject of any debate among the stakeholders so I won't go into the great detail on those. Ultimately that Guaranty Pool will reach a level of $30 million dollars and then we will stop funding it until a time it dips below $30 million, then we'll fund it again. Those are the two pools that are set up by Rule 19. Again, I went through them in detail at your last meeting.

The changes that have taken place since your last meeting – if you will look at page three please, you will see paragraph 5.2. At the end of the first line of 5.2 you will see the word "inactive" has been stricken and the word "active" put in its place. The purpose of this was it really didn't read right before – "Inactive self-insured employers that become inactive on or after July 1, 2004. . ." Well, if they are inactive, they're not going to become inactive. So we're simply striking the word "inactive" and saying, "Active self-insured employers that become inactive. . ." It is more of a cleanup than anything else. It is a change and I want to draw it to your attention.

If you could, please turn to page eight of the Rule. You will see the second paragraph on page eight, begins with the small letter "b." We've added the last phrase to that which says, "or $5,000.00, whichever is greater." This is talking about a funding mechanism for the Guaranty Pool. It is setting a $5,000.00 minimum for the annual contribution into the fund.

Finally, the last change that I am going to draw your attention to is at the bottom of page eight. You will see some strikethroughs and underlining. What this language does is really clarify how we are going to treat the companies that are self-insured that either convert to a subscriber status or become inactive. And what the language requires is that if you become inactive on or after July 1, 2004, but you don't buy out, then the Rule sets forth how your payment obligations will be provided for, for the Security Pool and the Guaranty Pool.

Mr. Chairman and members of the Board, with that, those have been the only changes made to Rule 19 since your last meeting. It is. . .I acknowledge a complex Rule, but it is a Rule that could have been brought to you a long time ago and we are happy to do it now given the certain developments in the self-insured community. We think the time has come to protect the self-insured community in the future from future problems such as Weirton Steel and this will do it. With that I would ask the Board approve the Rule for final filing.

Chairman White: Thank you Mr. Obrokta. Do we have a motion with respect to Rule 19?

Mr. Bailey: I have a comment Mr. Chairman, if you will allow me.

Chairman White: Mr. Bailey. . .

Mr. Bailey: T. J. you definitely reviewed some of the items that this Rule provides for and I think the intent of this Rule is good. However, there are some things missing from there that do give me cause for concern. I know before. . .some time ago before some of the revisions were made there was $10 million dollars of seed money there -- funding, and that has been removed. Then I think the other thing that causes a great deal of concern, of course, is the date of implementation, and then probably the third thing is just the unknowns to the self-insured community. The unknowns consisting of the formula that the Commission will use and I just think there is going to be a lot of anxiety in the employer community if this Rule is passed. So I do have some concern. I know the intent is good, but I do think we are missing a few items that should be there. Thank you.

Chairman White: Do we have a motion with respect to Rule 19?

Mr. Sullivan: I so move Mr. Chairman.

Chairman White: The Rule 19 has been moved for passage in the form presented. Do we have a second?

Richard Humphreys: Second.

Chairman White: There has been a motion on the floor to adopt Rule 19 and a second. Discussion?

Douglas Merritt: Mr. Chairman, I just have a couple of comments. I'd like to echo some of the same sentiments that Mr. Bailey presented. It seems like at the eleventh hour some of the major items in this Bill – the $10 million dollar seed money was scratched and then the changing, moving up the date about 18 months from the implementation date. That was changed. And I've had several inquiries from the self-insured community who has expressed their displeasure with this Bill. There have been a lot of items that the self-insured community lately has been assessed with. For instance, there is additional. . .there has been some changes to the security arrangement and additional security has been requested or going to be requested of numerous self-insured employers. Also we're going to have a new assessment here for the Security Pool funding. We are also going to have another assessment for this Guaranty Pool funding, and there is also another assessment that I feel is unethical. We had some administrative charges that weren't taken out of their assessments, even though a lot of the duties of the. . .additional duties are going to be placed upon the self-insured community and the Workers' Compensation Commission won't be expending these monies. So with these items I have some serious concerns and I will not be able to support this Bill.

Chairman White: Do we have further discussion? Hearing none, all those in favor of the passage of Rule 19 in the form presented, please signify by saying "aye." Opposed?

[Gene Bailey and Douglas Merritt – Opposed.]

Chairman White: Let the minutes reflect that Rule 19 has been passed. Thank you Mr. Obrokta.

Mr. Phalen: Mr. Chairman, did I understand you to say that Rule 19 passed?

Chairman White: Yes. That is correct Mr. Phalen.

Mr. Phalen: Thank you sir.

5. Finance and Administration Report – Chris Jarrett

Chris Jarrett: Thank you Mr. Chairman. The Finance Committee was held last week. We reviewed the April financial statements. In addition we reviewed the Receivables Management report. You heard comments on both of those by the Commissioner earlier in this meeting. We do have a Resolution that we want to put up for consideration at this meeting. I think each of you have a copy in front of you. This Resolution pertains to the self-insured community. It contains a list of 61 employers I believe that are being approved for self-insurance status. I'll give you a moment just look through those if you like. I have no intention in reading all of them. I don't know that I'm required to.

Chairman White: Mr. Jarrett I will, for the benefit of the audience, I believe this Resolution is in the back if anyone in the audience is interested in picking up a copy, they can do that.

Mr. Jarrett: Absolutely. This list of self-insureds was reviewed by the Finance Committee and was approved to be brought before the Board of Managers for your consideration. I would recommend approval of this Resolution.

Chairman White: We have a motion on the floor for approval of the Resolution. Is there a second?

Mr. Humphreys: Second.

Chairman White: We have a second. Discussion? All those in favor please signify by saying "aye." Opposed? Let the minutes that the Resolution as presented is passed. Is there further information?

Mr. Jarrett: No. Nothing else.

Chairman White: Thank you Mr. Jarrett.