WEST VIRGINIA
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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

CITE AUTHORITY W.Va. Code §§ 23-2-9, 23-2C-5(c)(2), 23-2C-22, 33-2-10(b), and 33-2-21(a)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W.Va. Code § 23-2C-5(c)(2)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 18

TITLE OF RULE BEING AMENDED: Self Insurance, Self Administration and Third Party Administrators

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

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS August 17, 2008

Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES
OF THE WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 18
SELF INSURANCE, SELF ADMINISTRATION AND THIRD PARTY ADMINISTRATORS

§85-18-1. General.

1.1. Scope. -- This exempt legislative rule addresses employers approved to administer and provide their own system of compensation to their injured employees, pursuant to W. Va. Code §23-2-9. This rule applies to employers who previously were in this status, currently are in this status or enter this status at some point in the future, and to all liabilities of an employer pursuant to being in this status. This rule also applies to the qualifications of third party administrators hired by self-insured employers to help administer workers' compensation claims filed by the injured workers of self-insured employers.

1.2. Authority. -- W. Va. Code §§23-2-9; 23-2C-22; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules proposed by the Commissioner and approved by the Industrial Council 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. -- July 18, 2008.

1.4. Effective Date. -- August 17, 2008.

§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. "Audited financial 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 or those of another recognized accounting body. This assurance is derived through a systematic process, governed by generally

accepted auditing standards or Public Company Accounting Oversight Board 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.

3.2. "Commissioner" means the Commissioner of Insurance of the State of West Virginia.

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

3.4. "Default" for the purposes of a self-insured employer means the failure by a self-insured employer to cure a delinquency after notification within the time specified in the notice.

3.5. "Delinquent" means a self-insured employer has failed, without good cause, to timely pay workers' compensation benefits or to make any other payment due under the terms of chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

For purposes of this subsection, "good cause" means the self-insured employer has:

a. Failed to receive notice of a properly entered order; or

b. Failed to act on an order that has been entered in substantive error, is on its face obviously in error as to the amount due or mandates the payment of temporary total disability benefits in excess of those permitted by law.

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

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

3.8. "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.

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

3.10. "Payments" are obligations of the self-insured employer for workers' compensation benefits to their injured employees or any other obligations due under the terms of chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

3.11. "Payroll" means the term as defined in the most current approved filing of the Commissioner's designated rating organization for workers' compensation.

3.12. "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.

3.13. "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

3.14. "Industrial Council" is the body created pursuant to W. Va. Code §23-2C-5.

§85-18-4. Self Insurance Status.

4.1. Self insurance status. An employer may become self-insured if the Commissioner, with the approval of the Industrial Council, determines the employer meets the financial responsibility 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 self-insured workers' compensation risks guaranteed by a parent, if the relationship between the employer and parent is adequately documented, as determined by the Commissioner, and if the parent can satisfy the financial responsibility requirements set forth in W. Va. Code §23-2-9 and this rule

4.3. Any employer granted the privilege of self-insured status shall give security or bond in the form, of the type, and in the amount required by the Commissioner, with the approval of the Industrial Council, pursuant to W. Va. Code §23-2-9 and this rule. Additionally, any employer granted the privilege of self-insured status shall abide by the requirements for maintaining, modifying, or terminating the self-insured status, as set forth in W. Va. Code §23-2-9 and this rule.

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

5.1. An employer may apply for self-insured status by filing with the Commissioner an application for self-insured status in the form prescribed by the Commissioner. If an employer relies on the audited financial statements of its parent to be granted self-insured status, the relationship between the employer and the parent must be documented on the application, and the parent company must provide a parental guaranty in a form acceptable to the Commissioner. The required parental guaranty must be received and accepted by the Commissioner before the application for self-insured status can be processed.

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 self-insured workers' compensation risk, the parent's disclosure of management and financial structures, and its audited financial statements for the three (3) years preceding the date of application must also be attached to the application. The employer shall disclose to the Commissioner all of the business entities acquired, bought, transferred or merged by or into the employer applicant. Failure to disclose this information at the time the application is filed without good cause, as determined in the sole discretion of the Commissioner, may result in rejection of the application

a. The employer's application, the required audited financial statements and other information must be signed and sworn to by:

1. Either the president alone or vice-president and secretary or assistant secretary if the employer making application is a corporation or limited corporation;

2. All of the partners if the employer making application is a partnership;

3. If the employer making application is a limited liability company ("LLC"), then by all of the general members;

4. The owner if the employer making application is a sole proprietorship; or

5. The appropriate officer(s), partner(s), member(s) or owner(s) of the parent shall also sign and swear to the application and information included therewith, as described in this subdivision, if the employer making application is relying on the financial statements of the employer's parent in making the application.

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 in these cases will take into consideration the risk to the self-insured employer community.

5.3. The employer making application may provide the Commissioner with any additional information deemed relevant to its financial stability. After reviewing the application and information included therewith, the Commissioner may request additional information from the employer or parent. The applicant must provide the information within the requested time frame in order for the application to be processed.

5.4. The employer applying for self-insured status shall pay to the Commissioner a non-refundable application processing fee at the time each application is filed. The minimum 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 Commissioner. If the original application cannot be processed or is considered to be invalid, future applications made by the same employer are subject to additional filing fees.

5.5. An employer who insures its West Virginia workers' compensation risks through coverage from a private carrier may apply at anytime to self-insure its workers' compensation risk. If the application is approved by the Commissioner and Industrial Council, the self-insured status will be effective on the first day of the calendar quarter following the month in which the application was approved. An employer new to the state of West Virginia, who has never had any West Virginia workers' compensation obligations, may apply for self-insured status in anticipation of engaging in employment operations in West Virginia which will subject the employer to such obligations: *Provided*, That until the employer's application is granted, the new employer shall be required to secure its West Virginia workers' compensation obligations through a private carrier.

a. The Commissioner will evaluate the application and assess whether the employer qualifies for self insured status. The Commissioner will make a recommendation to the Industrial Council within ninety (90) days of receiving the completed application and any additional requested information. The Industrial Council, at its next regularly scheduled meeting, will render a decision approving or disapproving the application.

b. Each approved applicant for self-insured status is required to secure its West Virginia self-insured workers' compensation liability in accordance with the provisions of 85 CSR 19, "Risk Pools," and this rule.

5.6. Employers applying for self-insured status must continue to make timely premium payments to their West Virginia private carrier, if applicable, until self-insured status is approved by the Industrial Council and the status is effective.

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

6.1. The Commissioner will review the standing of any employer making application for self-insured status regarding the West Virginia Workers' Compensation Old Fund and Uninsured Fund and any other potential liabilities owed to the State of West Virginia pursuant to chapter twenty-three of the West Virginia Code or the rules promulgated thereunder. The Commissioner will not approve any application for self-insured status made by an employer whose record upon the books of the Commissioner shows any money owed pursuant to chapter twenty-three of the West Virginia Code or rules promulgated thereunder until the employer has paid in full all existing liabilities.

6.2. This section applies equally to any outstanding liabilities as described herein owed by any employer with whom any owner, officer, partner or member of the applying employer was previously affiliated as an owner, officer, partner or member. In other words, the employer making application for self-insured status will not be approved until all liabilities of all employers with whom any owner, officer, partner or member of the applying company is or was previously affiliated have been paid in full.

§85-18-7. Coverage for catastrophic occurrences.

In addition to all other security required to be posted for the purpose of maintaining self-insured status under this rule and 85 CSR 19, the Commissioner may require self-insured employers to post an additional amount of security, procure a policy of excess insurance, or both, for the purpose of covering potential catastrophic occurrences. Whether a self-insured employer is required to post security and/or maintain a policy of excess insurance pursuant to this section, and, if so, the amount of security and/or excess insurance required, shall be determined by the application of objective criteria by the Commissioner which will be used to determine the need for additional financial protection against catastrophic risks. Any policy of excess insurance or security required in this section shall be in a form approved by the Commissioner. The self-insured retention amount of any excess policy as described in this section shall be subject to the approval of the Commissioner.

§85-18-8. Security and Bond.

8.1. In accordance with the provisions of the rules of the Commissioner, self-insured employers must secure certain obligations for payments. In such instances where security or bond is required by the Commissioner, the security or bond shall be tendered to the Commissioner in accordance with this section.

8.2. Acceptable types of security and bond include, but are not limited to, occurrence type security or bond, marketable securities, and letters of credit. The Commissioner has sole discretion to determine 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, 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. 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.

No language to the contrary contained in any writing associated with or included as a part of the security or bond shall defeat this obligation of the security or bond posted by a self-insured employer as described herein. 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 Commissioner's financial strength requirements. The Commissioner shall review the financial strength of the issuers of all the surety provided by the self-insured employer in the course of the Commissioner's annual review and recommendation to the Industrial Council.

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 of 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 Commissioner; 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 Commissioner 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 Commissioner, 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 Commissioner to use the letter of credit 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 chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

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

8.3. Employers who are required by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder to provide security shall post an amount as determined by the Commissioner 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 chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

The Commissioner 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 Industrial Council as to an appropriate amount of security. Whenever possible, the commission shall make a comparison of ratios using the employer's workers' compensation

industry classification.

a. If the Commissioner determines that, based on this rule and 85 CSR 19, a self-insured employer's securities or bonds are inadequate or insufficient, the Commissioner shall notify the employer. Thereafter, the Commissioner shall enter a decision 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 issuing the security or bond, based upon the sole discretion of the Commissioner, is no longer a viable entity or, for whatever reason, can no longer meet its obligations.

b. The Commissioner 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. Absent extenuating circumstances, as determined by the sole discretion of the Commissioner, the period to secure additional security or period to develop a work out agreement and obtain the first installment payment may not exceed ninety (90) days from the date of the Commissioner's notification. The increased security or bond must meet the requirements set forth in this rule.

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

§85-18-9. Self-insured Employer's Modification of Business.

9.1. 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 is likely to impact its West Virginia workers' compensation claims liability, or ability to satisfy its financial responsibility requirements, the self-insured employer must immediately notify the Commissioner of the business modification. The notice of modification must contain 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 or businesses affected by the modification, any information filed with the Securities Exchange Commission related to the modification, any audited or restated audited financial information related to the modification which was not previously submitted to the Commissioner and any pro forma financial information prepared pursuant to the modification. The employer shall also provide any additional information requested by the Commissioner regarding the transaction, within the timeframes specified.

9.2. If, after reviewing and analyzing all relevant information regarding the self-insured employer's business modification, the Commissioner determines that the transaction creates a substantial new risk to the self-insured community, the Commissioner may, in his or her sole discretion, require any entity involved in the relevant transaction to file a new application for self-insured status.

9.3. Under subsections 9.1. and 9.2. of this section, the Commissioner will review the employer's security and bond requirements following any changes made to the self-insured employer's account and, if necessary, make an appropriate recommendation to the Industrial Council for an adjustment to the security requirements.

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

9.5. If the modification causes a self-insured employer to no longer qualify for the privilege of self-insured status, the Commissioner, with the approval of the Industrial Council, may terminate the self-insured employer's status in accordance with the provisions of section 14 of this rule. Settlement of estimated liability at the time of revocation shall be determined in accordance with the provisions of this rule.

§85-18-10. Voluntary Termination of Self-Insured Status.

10.1. A self-insured employer may terminate its self-insured status with the following conditions:

a. The employer shall remain forever liable for all accrued and contingent liabilities which the employer has incurred as a result of being self-insured;

b. The employer shall provide written notice to the Commissioner a minimum of thirty (30) days prior to the termination of its status. Upon the expiration of the thirty (30) days of notice, self-insured status shall terminate the first day of the succeeding calendar quarter.

c. The employer shall post bond or security in an amount estimated sufficient to cover the costs of all future accrued and contingent liabilities resulting from the period of self-insured status. The security or bond is subject to the Commissioner's approval of the form, type and amount of the security or bond.

10.2. A self-insured employer may enter into a contract for sale of its business or for transfer of some or all of its assets to another entity, including, either expressly or impliedly, an agreement as to the assumption by the purchasing entity or transferee of the self-insured employer's accrued and contingent liabilities resulting from the employer's self-insured status: *Provided*, That in the event such a contract is entered into, the provisions of this rule shall be adhered to, both with regard to section 9 ("Self-Insured Employer's Modification of Business") and this section. Any contract described in this subsection and any resulting sales, transfers and consequential effect on the employer's self-insured liabilities are subject to approval of the Commissioner prior to taking effect.

§85-18-11. Self-Administration of Claims.

11.1. All self-insured employers shall administer their own claims consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder. An injured worker who is an employee of a self-insured employer is entitled to all

of the workers' compensation benefits, pursuant to chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, as those afforded to injured workers whose claims are paid and administered by private workers' compensation insurance carriers. These same benefits include the proper and timely payment of medical bills and compensation.

11.2. Notifications.

a. Each new 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 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. 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 previously utilized private carrier, is the primary contact for submitting invoices, claims inquiries, legal notices, medical reports and other communications concerning the claim.

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

§85-18-12. Payroll Reports, Assessments and Surcharges.

12.1. 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 chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

12.2. 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 Commissioner a sworn statement of the total payroll of all of its employees subject to chapter twenty-three of the West Virginia Code for the preceding quarter.

12.3. In addition to properly and timely administering and paying workers'

compensation claims, self-insured employers are also responsible for timely remittance of debt reduction and regulatory surcharges pursuant to W. Va. Code §23-2C-3 and W. Va. CSR §85-6-1 et seq. and, if applicable, remission of self-insured pool assessments pursuant to W. Va. CSR §85-19-1 et seq. Failure to timely remit the surcharges and assessments will result in delinquency and, if the delinquency is not cured, default, which can subject the self-insured employer to penalties, including revocation of self-insured status.

§85-18-13. Auditing, Monitoring and Inspections; Record Keeping.

13.1. Preservation of records. Every self-insured employer shall keep, preserve and maintain complete records showing in detail all expenditures for payroll 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. 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 Commissioner until the Commissioner or appropriate administrative, judicial or appellate body finally resolves the matter and the time for appeal has been exhausted.

13.2. Pursuant to W. Va. Code §23-2-2(a), each self-insured employer shall furnish to the Commissioner, upon request, all information required to determine risk assessment, the amount of surcharges and assessments owed, or to carry out any other duties under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder. This information may include, but is not limited to, the number of employees employed by the employer during a pertinent period and the names, social security numbers, payroll during relevant periods, occupations and classification information of the self-insured employer's employees,.

13.3. Preservation of claims records. Every self-insured employer is required to keep, preserve and maintain all records relevant to workers' compensation claims.

13.4. Inspections of records; failure to maintain records.

a. The self-insured employer shall keep available for inspection at any reasonable time by the duly authorized representatives of the Commissioner:

1. All accounting records, books, records, papers and documents, whether in hard copy or electronic form, reflecting the amount and the classifications of the payroll expenditures of an employer, as well as the nature of the business operation; and

2. All records relevant to workers' compensation claims, whether in hard copy or electronic from.

b. The Commissioner shall review claims records of the employer on an annual basis or more frequently as the Commissioner determines in his or her sole discretion to be necessary.

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

13.5. Auditing records; adjustments. The Commissioner may at any reasonable time, 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 Commissioner or by State or federal law. The Commissioner may make adjustments, including adjustments to the amount of payroll expenditures, surcharge rates and assessment rates.

13.6. In order to inspect, audit or review information specified in this rule including, but not limited to payroll and claims records, the Commissioner may direct that an agent or employee of the Commissioner 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. 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 an inspection or audit may result in revocation of the employer's self-insurance status or, in the Commissioner's discretion, impose penalties on the self-insured employer.

13.7. Either as an addition to or as part of the audit permitted under this rule, the Commissioner may convene an administrative hearing or conduct a deposition for the purpose of receiving the information in testimonial or evidentiary form. The Commissioner, 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 administrative hearing or deposition shall be convened and conducted in accordance with 85 CSR 7, "Rules for Selected Hearings," and the Commissioner may 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; provided that adequate notice of the deposition is given to all interested parties known to the Commissioner.

13.8. The request for information provided for by chapter twenty-three of the West Virginia Code or rules promulgated thereunder, 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 chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

13.9. Noncompliance Penalties. Penalties may be assessed against self-insured employers who fail to comply with any provisions of chapter twenty-three of the West Virginia Code or rules promulgated thereunder with regard to their self-insured status, including, but not limited to, failing to timely administer claims, failing to timely pay benefits, failing to properly, timely and accurately report requested information and failing to remit surcharges and assessments as required. The penalty amount will be based upon the employer's overall

compliance as determined by the Commissioner's review of the employer's records and conduct.

a. The penalty assessed under this subsection is in the sole discretion of the Commissioner, not to exceed $500 per occurrence of non-compliance.

b. The assessment and payment of penalties under this section shall not prevent the Commissioner from making recommendations to the Industrial Council concerning the employer's self-insurance status.

c. In addition to penalties as described in this section, if the Commissioner, in his or her sole discretion, believes that it would be effective, the Commissioner may place a self-insured employer on a corrective action plan to remediate non-compliance issues. The corrective action plan shall be established with standards, time frames and other parameters as deemed appropriate by the Commissioner. Failure by a self-insured employer to comply with a corrective action plan may result in the imposition of additional penalties, including monetary penalties or revocation of self-insured status.

§85-18-14. Maintaining Self-Insured Status; Annual Review.

14.1. The employer's status as a self-insured employer shall continue on a year-to-year basis so long as the employer continues to maintain the requisite financial standing and continues to satisfy the other requirements imposed by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, and any order of the Commissioner.

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

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

b. Upon notice of the Commissioner, each self-insurer shall file or make available for inspection, by whichever method specified by the Commissioner, all 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 Commissioner may recommend to the Industrial Council that the employer's self-insurance status be revoked or, in the Commissioner's discretion, impose penalties on the self-insured employer.

c. The Commissioner shall notify the employer of the results of the annual review or interim reviews if such reviews reflect a deteriorating financial condition.

14.3. Financial review. In the performance of its annual financial and security review, the Commissioner 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 Commissioner 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 may not decline two years in a row and be at least one to one or may not decline 40% from one financial review to the next.

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

5. The auditor's opinion on the financial statements for the most recent fiscal year must not contain any comments indicating a deteriorating financial condition and/or express a going concern qualification.

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 is greater than net income.

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

3. An employer has 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 specified by the Commissioner. 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.

c. In addition to the annual review, the Commissioner reserves the right to take action

against a self-insured employer based upon any information obtained by the Commissioner between annual reviews which reflects that the self-insured employer's company is in a deteriorating financial condition. The self-insured employer shall be notified of any such reviews or ensuing action.

14.4. The Commissioner reserves the right to review or audit, at any time, a self-insured employer's compliance with the requirements of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, and to otherwise ensure that, with regard to claims handling practices, the self-insured employer is not operating in an illegal, improper or unjust manner. The Commissioner may assess penalties pursuant to subsection 13.9. of this rule for all instances of non-compliance.

14.5. Security Responsibility. The self-insured employer is responsible for maintaining adequate security for its claims liability for:

a. Catastrophic occurrences, if required by the Commissioner;

b. Claims with dates of injury prior to July 1, 2004; and

c. In instances of a deteriorating financial condition, whether discovered during annual review or during an interim period, claims liability for dates of injury on or after July 1, 2004, as provided by this and other rules of the Commissioner.

14.6. Claims Responsibility. A self-insured employer with respect to all or part of the compensation fund is responsible for:

a. The direct payment of all pecuniary compensation due and owing under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder to employees or employees' dependents;

b. The direct payment of health care provider and medical invoices; and

c. Reimbursing the Commissioner for any payments made by the Commissioner that should have been paid by the self-insured employer.

14.7. The self-insured employer shall pay pecuniary compensation payable by the employer and reimbursements due from the employer within the time periods specified by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder 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.

14.8. If the Commissioner determines that the security requires adjustment in light of the self-insured employer's current financial status or liability, the Commissioner shall recommend to the Industrial Council that the security requirements be adjusted. Prior to such action, the Commissioner shall notify the employer of the forthcoming recommendation to the Industrial Council and the reasons for the recommendation. The employer shall be provided thirty (30)

days for written response to the Commissioner. The Commissioner shall provide a copy of any such employer response to the Industrial Council if the Commissioner recommends that the employer's security be adjusted.

14.9. The Commissioner shall report to the Industrial Council any acts of non-compliance by a self-insured employer which the Commissioner deems to be a major violation in nature and/or poses a significant threat to the self-insured community and its workforce. The Industrial Council may direct the Commissioner to terminate an employer's self-insurance status if the Council believes that the self-insured employer has shown an inability to carry out the responsibilities of being in self-insured status and that no other lesser penalties or corrective action plans would be effective. The Commissioner shall provide the employer with written notice of the termination.

§85-18-15. Involuntary revocation of self-insurance status.

15.1. Notification.

a. Prior to recommending to the Industrial Council that the self-insured employer's status of self-insurance be revoked, the Commissioner 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 Commissioner's reasons for recommending revocation of self-insurance status;

4. Inform the self-insured employer that failure to respond in writing to the notification will result in the Commissioner's recommendation to the Industrial Council that the employer's self-insured status be revoked; and

5. Provide the notification to the self-insured in writing and by certified United States mail, return receipt requested.

15.2. Presentation before the Industrial Council.

a. After the Commissioner's review of the response from the self-insured employer or the expiration of the time for response, the Commissioner may recommend to the Industrial Council that the employer's status of self-insurance be revoked.

b. If the Commissioner recommends that the employer's self-insured status be revoked, he or she shall provide a copy of the employer's response to the Industrial Council.

c. The Commissioner shall make its recommendation to the Industrial Council at

a meeting of the Council. The recommendation may be provided to the Council during an executive session of a meeting.

d. The employer shall be notified of the date, time and location of the meeting of the Industrial Council wherein the Commissioner will make his or her recommendation. The employer may be present during the presentation of the Commissioner's recommendation. The employer may address the Council regarding the recommendation and for such time as may be appropriate in the discretion of the chair.

15.3. Approval of the Industrial Council.

a. After the Commissioner presents his or her recommendation to the Industrial Council, the Council shall determine whether to approve the Commissioner's recommendation.

b. All decisions of the Industrial Council regarding the Commissioner's recommendation shall be made in an open meeting of the board.

15.4. Revocation.

a. If the Industrial Council approves the Commissioner's recommendations to revoke the employer's self-insurance status, the Commissioner shall, by its order, notify the employer of the revocation of its self-insured status 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. In the event that an employer's self-insured status is revoked, the Commissioner may, in his or her sole discretion, order the employer to pay into the Self-Insured Employer Guaranty Risk Pool and Self-Insured Employer Security Risk Pool (if applicable) an amount sufficient to cover the estimated cost of all of the self-insured employer's accrued and contingent liabilities resulting from the period of self-insured status, or, in the alternative and in the Commissioner's sole discretion, secure the liabilities in a manner consistent with other provisions of this rule.

§85-18-16. Name and Address of Employer; Legal Notice; Publications; Employer Correspondence.

16.1. General. Self-insured employers are required to provide the Commissioner with the name, telephone number, fax number and e-mail address of its designated primary contact person responsible for workers' compensation matters. Except as hereinafter provided, the name and address given by the employer on the application for coverage shall be used by the Commissioner 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.

16.2. Change of name or address. Any self-insured employer changing the name or the

address of its business must promptly notify the Commissioner, in writing, and request that the name or address be changed on the Commissioner '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 Commissioner 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. The representative shall notify the Commissioner when such representation ceases and provide a current address to which the employer's notices and correspondence are to be sent.

16.3. 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 Commissioner to the employer at the address and in the name shown on the Commissioner 's records shall constitute constructive notice to the employer of any action taken.

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

16.5. Correspondence. All correspondence to the Commissioner 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 and the employer's federal employer identification number.

§85-18-17. Third Party Administrators.

Self-insured employers may hire third party administrators to administer claims if the third party administrator is licensed to perform workers' compensation claims services for the self-insured employer, consistent with the provisions of W. Va. Code §23-2C-17(c). Additionally, any third-party administrator performing services for self-insured employers shall comply with relevant provisions of chapters twenty-three and thirty-three of the West Virginia Code and the rules promulgated thereunder.

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

Any self-insured employer who wishes to contest a decision made by the Commissioner, under the provisions of chapter twenty-three, article two of the West Virginia Code, may do so under the provisions of W. Va. Code, §23-2-17 and 85 CSR 7, "Rules for Selected Hearings."

PUBLIC HEARING

MAY 29, 2008

OFFICES OF THE WEST VIRGINIA INSURANCE COMMISSIONER
WORKERS' COMPENSATION INDUSTRIAL COUNCIL

"SELF INSURANCE, SELF ADMINISTRATION AND THIRD PARTY ADMINISTRATORS"
TITLE 85, SERIES 18

Transcript of the Public Hearing held on Thursday, May 29, 2008, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
Charles Bayless, Chairman
Bill Dean
Senator Don Caruth
Delegate Nancy Guthrie
Kent Hartsog
Dan Marshall (via telephone)
Senator Brooks McCabe
Walter Pellish (via telephone)

Chairman Bayless: We have Title 85, Series 18, which is "Self Insurance, Self Administration and Third Party Administrators." Mary Jane, anything from the staff?

Mary Jane Pickens (General Counsel OIC): No.

Chairman Bayless: Any comments from members of the Council? Are there any comments from the public on Series 18 on the proposed rule? We've got quite a few written comments. [No public comments.]

PUBLIC HEARING
TITLE 85, SERIES 18
"SELF INSURANCE, SELF ADMINISTRATION AND THIRD PARTY ADMINISTRATORS"
Industrial Council Meeting
Offices of the West Virginia Insurance Commissioner
1124 Smith Street, Room 400, Charleston, WV 25301
May 29, 2008

Name	Address	Telephone Number	Group Affiliation	Do you desire to address the Council?	Agenda item to which you desire to speak

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May 30, 2008

Mary Jane V. Pickens, Esquire
West Virginia Insurance Commission, Legal Division
Post Office Box 50540
Charleston, West Virginia 25305-0540

Re: *Comments to Proposed Rule 18 Amendments*

Dear Ms. Pickens:

Please find enclosed herewith comments which I wish to file regarding the proposed amendments to Rule 18.

Very truly yours,

TIMOTHY E. HUFFMAN

TEH/nkl

COMMENTS TO:
SELF INSURANCE SELF ADMINISTRATION AND THIRD-PARTY ADMINISTRATORS SERIES 18

Section 4.2

This section should be amended to read as follows:

"An employer owned by another business may have its self-insured workers' compensation risks guaranteed by a parent, if the relationship between the employer and parent is adequately documented, as determined by the Commissioner, and if the parent can satisfy the financial responsibility requirements set forth in *W. Va. Code* § 23-2-9 and this rule, by the posting of surety determined by the Commissioner to be adequate to ensure the payment of benefits required under Chapter 23 or participation in the Guaranty Pool as provided for in 85 C.S.R. 19."

Section 5.1

This section should be amended to read as follows:

"An employer may apply for self insured status by filing with the Commissioner an application for self insured status in the form prescribed by the Commissioner. If an employer relies on the audited financial statements or other financial information of its parent to be granted self insured status, the relationship between the employer and the parent must be documented on the application and the parent company shall provide a parental guarantee in a form acceptable to the Commissioner. The required parental guarantee must be received and accepted by the Commissioner before such self insured status can become effective."

Section 5.2

This section should be amended to read as follows:

"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 or such other financial information as may be determined by the Commissioner to be adequate for such review, must be attached to the application. If a parent business is to insure the employer's self-insured workers' compensation risks, a parent's disclosure of management and financial structures and its audited financial statements for the three (3) years preceding the date of application

or such other financial information as may be determined by the Commissioner to be adequate for such review, must also be attached to the application. The employer shall disclose to the Commissioner all of the business entities acquired, bought, transferred or merged by or into the employer applicant. Failure to disclose this information at the time the application is filed without good cause, as determined by the Commissioner, may result in rejection of the application or termination of existing self-insured status."

Section 5.2.a.5

This section should be amended to read as follows:

"If the employer making the application is relying on the financial statements or other financial information of the employer's parent in making the application, then the appropriate officer, partner, member or owner of the parent shall also sign and swear to the application and information included therewith, as described in this subdivision."

Section 14.3.a

This section should be amended to read as follows:

"The most recent three years of audited financial statement or such other financial information as may be determined by the Commissioner to be adequate for such review, must be analyzed through the most current Commissioner financial review model."

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May 30, 2008

Mary Jane V. Pickens, Esquire
West Virginia Insurance Commission, Legal Division
Post Office Box 50540
Charleston, West Virginia 25305-0540

Re: *Comments to Proposed Rule Amendments*

Dear Ms. Pickens:

Please find enclosed herewith comments which I wish to file on behalf of the Workers' Compensation Committee of the West Virginia Chamber of Commerce to the proposed amendments presently being considered to Rule 1, Rule 2, Rule 6 and Rule 18.

Very truly yours,

TIMOTHY E. HUFFMAN

TEH/nkl

cc: Ms. Brenda Nichols Harper

COMMENTS TO:
SERIES 1
CLAIMS MANAGEMENT AND ADMINISTRATION RULE

- **Section 2.14**

This definition is too restrictive and does not include medical, disability or voluntary retirements.

- **Section 2.4.c**

The amended rule defines filing to include a document that is e-mailed and deems the date of filing to be the date upon which the e-mail was sent to the e-mail address for the recipient. A filing should only be completed upon proof of receipt, however filed. Additionally, specific standards should be developed regarding the use of e-mail transmissions under these and other rules.

- **Section 5.1**

This Section needs further amendment to be consistent with *W. Va. Code* § 23-4-5. Specifically, that Code Section requires that temporary total disability benefits are not paid unless the period of disability lasts longer than three days from the date the employee leaves work as a result of the injury. This Section, as written, does not specifically require three days of consecutive disability from scheduled work before temporary total disability benefits are payable.

- **Section 5.3**

This Section should be further amended to apply specifically to seasonal reductions in work force and seasonal layoffs.

- **Section 6.2**

The proposed rule would delete Section 6.2 as written. Section 6.2 should not be deleted or amended.

- **Section 7.2**

This Section needs further amendment to provide for the statutory requirement of a 30-day protest period for decisions of the Occupational Pneumonoconiosis Board.

- **Section 9.3**

See comments under Section 12.2.

- **Section 10.1**

The proposed amendments to this Section shorten the time period for ruling on claims from 15 working days to 15 days. This Rule should continue to permit 15 working days for the responsible party to rule on a claim.

- **Section 10.4.a**

This Section should be deleted entirely. Notwithstanding the fact that, the statute continues to require 120-day evaluations, neither self-insured employers nor insurance carriers wait 120 days before referring a claimant out for an evaluation.

- **Section 10.5.b**

The word "working" should not be deleted from this section.

- **Section 10.5.c**

This Section should be amended to provide that the payment of permanent partial disability awards in either monthly installments or in a lump sum amount, should be at the discretion of the responsible party.

- **Section 10.5.d**

This Section should not be amended from 30 working days to 30 days.

- **Section 10.6**

This Section should be further amended by striking "total" from line 2, so that it is applicable only to applications for the reopening for temporary or permanent disability benefits and does not include permanent total disability benefits.

- **Section 12.2**

This Section as amended limits the collection of overpayments contrary to the provisions of *W. Va. Code* § 23-4-1C(h) and 23-4-1D(d). The statute permits the collection of overpayments from future claims that the claimant may file. The limitation proposed in the amendment leads to the unintended financial enrichment of claimants. Additionally, a system should be developed to track and manage intercarrier reimbursements for such overpayments.

- **Section 13.1**

This Section should not be amended as proposed. The amendments will allow a claimant to file an OP cancer claim as an occupational disease claim and thus avoid having to satisfy statutory exposure requirements as a prerequisite to establishing a valid OP claim.

- **Section 16**

This new Section should be further amended to require that a responsible party receives a copy of any response made by the Office of the Insurance Commissioner to a complaint.

- **Section 18.1**

The proposed amendments would delete this Section entirely. Section 18.1 as exists in the current Rule should remain intact.

COMMENTS TO:
SERIES 2
WORKERS' COMPENSATION CLAIMS INDEX

- **Section 4.2**

This Section should be further amended to provide that the data collected in this Rule must be sortable by the claimant's full name and must include all of the claims filed by each claimant.

A system to manage and report intercarrier reimbursements for overpayments should be created under this rule.

COMMENTS FOR:
A SERIES 6
WORKERS' COMPENSATION DEBT REDUCTION FUND ASSESSMENTS AND REGULATORY SURCHARGES

- **Section 4.1**

This Section should be further amended to provide that a detailed accounting of all sums collected and expended by the Commissioner are to be reported to the Industrial Council on a semiannual basis within sixty (60) days of January 31st and June 30th of each year.

- **Section 5.1.b**

This Section should be further amended to provide that the Insurance Commissioner may only change the percentage as needed to meet the funding requirements of *W. Va. Code* § 23-2C-3(f) on an annual basis.

COMMENTS TO SERIES 18 SELF INSURANCE, SELF ADMINISTRATION AND THIRD-PARTY ADMINISTRATORS

Section 3.1

What other "recognized accounting body" is contemplated by this proposed change in the definition of audited statements?

Section 3.8

This definition is in conflict with the provisions of *W. Va. Code* § 23-2-9(f). That Section specifically defines the period of inactivity as four or more consecutive quarters without payroll.

Section 3.11

The use of the term "payroll" should be consistent throughout this rule and should utilize the definition of "payroll" incorporated from Rule 6. The use of the term "gross wages" in this rule should be replaced with the term "payroll".

Section 5.1

This last line of that Section should be amended to read "The required parental guarantee must be received and accepted by the Commissioner before the applicant's self insured status may become effective."

Section 5.2

The current provisions of this rule provide that failure to disclose certain information may result in termination of a self insured account as determined at the "sole discretion" of the Commission and is contrary to the provisions of Section 15 regarding the involuntary revocation of self insured status, which requires approval by the Industrial Council.

The rule provisions should be amended to require only the signature of an individual with authority to act on behalf of the entity seeking self insurance.

Section 5.5

Self insurance should become effective on the first day of the month following approval by the Industrial Council or on a later date as determined by the self insured employer.

Section 5.5.a

The Commission should be required to make a recommendation to the Industrial Council within sixty (60) days of receipt of the completed application and additional requested information.

Section 6.1

This section should be deleted from this rule as the subject matter is covered by Rule 32.

Section 6.2

This section should be deleted from this rule as the subject matter is covered by Rule 32.

Section 7

This section should be deleted as unnecessary.

Section 8

All the provisions of this section should be covered under Rule 19 and should not be part of this particular rule.

Section 8.3

Because future self insured liability is secured through the Guaranty Pool, it is unnecessary to continue requiring employers to post minimum security of any level.

Section 8.3.b

This section should be amended to require that a self insured's failure to obtain additional bond or security may result in a revocation.

Section 9

The proposed language with regard to employer's modification of business constitutes an unreasonable expansion of this section. There should be no reporting requirement by the employer unless the modification impacts on the employer's claim liability. An employer should be required to provide such financial information only if the modification of the employer's business results in a substantial change in the financial ability of the company that provides the surety or parental guarantee.

Section 9.4

This section should be amended to provide that a processing fee may be assessed rather than shall be assessed.

Section 10.1.a

The word "forever" should be deleted as it is unnecessary.

Section 10.1.b

This section should be amended to provide that termination of a self insured account should occur on the first day of the month or on a date agreed upon between the Commission and the self insured employer.

Section 10.1.c

This section should be amended to provide that if surety is posted by the employer upon termination of the account, no further contribution to the Guaranty Pool will be required.

Section 10.2

This section should be amended to provide simply that without prior approval, the OIC is not bound by the terms of any such agreement.

This section should be amended to permit approved risk portfolio transfers of a self insured employer's past liability.

Section 11.1

This section should be amended to delete the following language "as those afforded to injured workers whose claims are paid and administered by the Workers' Compensation Commission private workers' compensation insurance carriers. These same benefits include the proper and timely payment of medical bills and compensation".

Section 12

"Payroll" as defined herein should be substituted for "gross wages and earnings".

Section 12.2

This section should be amended to replace "gross wages and earnings" with "payroll" as defined earlier in this rule.

Section 12.4

This section should be numbered 12.3.

Section 13.1

"Payroll" as defined herein, should be substituted for "gross wages".

Section 13.2

"Payroll" as defined herein, should be substituted for "gross wages".

Section 13.4.b

The word "shall" should be replaced with "may".

Section 13.5

"Payroll" as defined herein, should be substituted for "gross wages".

Section 13.9

The words "and conduct" should be deleted from the end of this section.

Section 13.9.a

This section should be amended to provide a penalty of $500.00 per review and not per occurrence.

Section 14.2

This section should be amended to provide that the Commissioner shall perform a financial review on an annual basis and may perform a comprehensive claims review on a less frequent basis.

Section 14.2.b

This section should be amended to provide that the Commissioner may recommend revocation of the employer's self insured status consistent with the involuntary revocation provisions of this rule.

Section 14.2.c

This section should be amended to read "The Commissioner shall notify the employer of the results of any review."

Section 14.3.a.5

This section should be amended to read "The auditor's opinion on the financial statements for the most recent fiscal year must not express a going concern qualification."

Section 14.4

The amendments to this section are unnecessary.

Section 14.5

These amendments are unnecessary and currently covered under the provisions of Rule 19. Additionally, catastrophic surety is not required by statute.

Section 14.8

The proposed language to be added to this section should be amended to read "The Commissioner shall report to the Industrial Council any acts of noncompliance by the self insured employer which the Commissioner deems to be major violations."

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May 28, 2008

VIA FACSIMILE ONLY 304-558-1362

Ryan Sims, Esquire
Associate Counsel
WV Office of the Insurance Commissioner
Post Office Box 50541
Charleston, West Virginia 25305

Re: Comments to Proposed Rules 1, 2, 8 and 18

Dear Mr. Sims:

This letter contains responses to the above-proposed rules filed with 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:

RULE 85 CSR 1, CLAIMS MANAGEMENT AND ADMINISTRATION

85-1-2 Definitions

Pg. 2 2.10 Delete the word "deposited" and replace it with the word "received."

85-1-3 Injured Workers' Report of Injury and Application for Compensation

Pg. 3 3.1 Delete sentence beginning with "Failure to immediately..." and the remaining two sentences of Section 3.1

Pg. 4 3.2 Line 6, delete sentence beginning with "There shall be no retroactive adjustments..."

85-1-4 Employers' Report of Injuries

Line 3, Keep in the two deleted sentences beginning with "Failure to comply..."

85-1-5 Special Rules for Temporary Total Disability Claims

Pg. 5 5.2 Line 4, insert the words "temporary total disability" immediately prior to the word "indemnity."

Pg. 5 5.3 Delete Section 5.3 in it's entirety.

85-1-9 Special Rules for Non-Awarded Partial Benefits

Pg. 6 9.2 Delete this Section in it's entirety.

85-1-10 Time Standards

Pg. 7 10.2 Line 2, reinsert the word "fifteen (15)" and delete the word "ninety (90)."

Line 9, reinsert the word "fifteen (15)" and delete the word "ninety (90)."

Pg. 7 10.3 Line 1, insert the word "prescriptions" after the word "Treatment."

Line 2, insert the word "prescriptions" after the word "treatment."

Pg. 8 10.6 Lines 2 and 3, reinsert the word "ten (10)" and delete the word "thirty (30)."

Line 9, reinsert the word "ten (10)" and delete the word "thirty (30)."

85-1-12 Overpayments

Pg. 10 12.1 Lines 7 and 8, delete the words "dependents benefits, fatal (104 week) benefits."

The following new Section needs to be added:

"85-1-14A Procedure for Abuse by Employer and Responsible Party

Misrepresentation of any statement and information by Employer or Responsible Party shall be considered fraudulent and subject to a $1,000.00 fine for each occurrence for failure by Employer and/or Responsible Party to timely file information, provide information and act

on information shall result in a $1,000.00 fine for each occurrence, and after five occurrences fines shall be increased to $2,500.00."

"Coercing and discouraging a worker not to report an injury is an offense that will result in a fine of $2,500.00 and result in a ruling in an automatic ruling for the claimant."

85-1-15 Travel Expenses-Medical Examination and Treatment

Pg. 12 15.1 Line 6, delete the number (15) and insert the number (54.5) and insert "($54.50) and delete ($0.15)."

85-1-16 Complaints

Pg. 13 Add "failure to respond within 15 days will result in a $1,500.00 fine for each occurrence."

85-1-17 Expert Witness Appearances

Pg. 13 17.1 Line 1, insert the words "authorized independent medical examiner" after the words "treating physician."

RULE 85 CSR 2, WORKERS' COMPENSATION CLAIMS INDEX

85-2-4 Claims Index

Pg. 3 4.2 Add the following:

"h. All wage information"

"i. Any other fields of information as the Commissioner deems necessary."

RULE 85 CSR 8, WORKERS' COMPENSATION POLICIES, COVERAGE ISSUES AND RELATED TOPICS

85-8-3 Definitions

Pg. 3 3.8 Add the following:

"e. Any business involving first responders including, but not limited to, policeman, fireman, EMTs, and other emergency personnel."

85-8-6 Employees Covered; Independent Contractors; Coverage Elections; Assignment

Pg. 7 6.2a.3 Line 7, delete the entire sentence beginning with the word "Provided."

6.2.a.5 Line 1, delete the first thirteen sentences of this Section through the words "legal right to use the same."

RULE 85 CSR 18, SELF INSURANCE, SELF ADMINISTRATION, AND THIRD PARTY ADMINISTRATORS

85-18-3 Definitions

Pg. 2 3.4 Line 1, delete the words "without good cause."

Line 15, delete the remainder of this Section beginning with the words "For purposes of."

In closing, I would be happy to meet with the members of the Industrial Council, Commissioner Cline or any members of her staff to discuss our thoughts on these issues.

Respectfully submitted,

Thomas P. Maroney

TPM/clw

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REPLY TO: CHARLESTON

SENDER'S E-MAIL: jbrannon@pffwv.com
www.pffwv.com

Date: May 29, 2008

Re: Comments regarding Proposed Rules:
85 C.S.R. § 1
85 C.S.R. § 2
85 C.S.R. § 6
85 C.S.R. § 8
85 C.S.R. § 18
Public Comment period expires 5/29/2008
Public Hearing to be held on 5/29/2008 at 3:00 p.m. at OIC Office in Charleston, West Virginia

Please accept this correspondence as our public comments regarding the Offices of Insurance Commissioner's Proposed Rules 85 C.S.R. §§ 1, 2, 6, 8, and 18, which has been submitted for public comment.

85 C.S.R. § 1 et seq.: "Claims Management and Administration"

General Comment: We applaud the OIC's determination to modify Rules 1 and 18 to provide one consistent claims management and administration standard for all "responsible parties" as a beneficial change that now standardizes all claims management and claims administration requirements.

85 C.S.R.§ 1-2

This section has been amended to provide a definition for "retire" which means "an individual has permanently ceased working due to age or years of service and has no intent to return to work."

Comment:

The phrase "has no intent to return to work" is subjective to the individual seeking benefits. Please consider that the use of this phrase in the amendments to this rule regarding the eligibility to receive benefits, in some instances, would incentivize a "retired" claimant to state that they do have an "intent to return to work" in order to receive benefits. The "responsible party" or employer would be unable to refute such a statement as it would be impossible to contradict the individual's statement of his/her intent.

85 C.S.R. § 1-3

The changes in this section provide specifically that the fact that an injury was reported more than 2 days after the injury cannot, by itself, be a reason to deny the claim. Retained in the draft is the language that enforcement of an employer's personnel policy requiring immediate reporting of a work-place injury is not a discriminatory practice.

No Comment.

85 C.S.R. § 1-4

The section was amended to delete the $250 dollar fine for failure by an employer to report injuries to the "responsible party" within 5 days. However, the reporting requirement itself was retained and still requires the employer to notify the "responsible party" within five (5) days of receipt of notice of the employees desire to file a claim.

Comment:

It is recommended that the OIC define "receipt of notice of the employees desire to file a claim". Some workers' who sustain a work related injury may report the injury to the employer but never file an application for benefits. Some "responsible parties" have interpreted this section to require the employer to report the injury to them within five (5) days of the occurrence of an injury and then, based on the employer's report, have taken the position that the employer's report under this section is sufficient to issue a ruling on the claim. This interpretation is contrary to West Virginia Code § 23-4-1a and 23-4-15(a) which requires the injured worker to complete and file an application for benefits with the responsible party. Any interpretation that does not require an application for benefits to be filed prejudices the employer's rights under the applicable statute of limitations. Further, without a completed application for benefits, as required by the statute, the "responsible party" does not have the injured workers' allegation regarding the injury, does not have medical evidence indicating that an injured worker sustained an injury, and does not have a valid release to obtain medical records related to the alleged claim.

85 C.S.R. §1-5

This section relates to "special rules of temporary total disability claims." § 1-5-2 has been amended to reflect that when an individual retires "as long as the individual remains retired", the individual is disqualified from receiving temporary total disability indemnity

benefits as a result of an injury received from the place of employment from which he or she is retired.

Comment:

As with the definition of retire discussed above, the inclusion of the language "as long as the individual remains retired" is subjective to the claimant. Please consider that the use of this phrase in the amendments to this rule regarding the eligibility to receive benefits, in some instances, would incentivize a "retired" claimant to state that they do not have an intent to "remain retired" in order to receive benefits. The "responsible party" or employer would be unable to refute such a statement as it would be impossible to contradict the individual's statement of his/her intent.

Further, **§1-5.3** was amended regarding the closure of temporary total disability benefits when the claimant would not have been working for the employer. Previously, this section said a reasonably ascertainable period of time during which the injured worker would not have been compensated from his or her employer and now says a reasonable ascertainable period of time during which the claimant would not have been "performing work for any employer."

Comment:

The previous language in this section had been interpreted to relate to seasonal employees or temporary employees who did not work year-round of full-time for an employer. Under the previous language and employer of seasonal or temporary employees was not charged for temporary total disability benefits and the worker was not entitled to temporary total disability benefits during periods in which they would not have been compensated by the employer, i.e., during the off-season or after the termination of the temporary employment. The proposed amendment to this section now permits the worker to receive, and the employer to be charged, temporary total disability benefits even when the employee would not have been working for the employer. Further, even if the employee would not have been working for another employer during the off-season or after the conclusion of the temporary employment, this section incentivizes the worker to state that but for the injury he/she would/could have been working for another employer. If this is the intent of the amendment to this section, then the section should be deleted as it is superfluous. However, the previous language provided a significant benefits to employers of seasonal or temporary employees, who would naturally only be operating a portion of the year, to minimize the impact of claims on their premiums and to properly charge their policies with benefits during periods only when they would be working. This employer's are most likely smaller employer's who can not easily absorb additional workers' compensation premiums based on the amount of benefits which could be authorized under this section. It must be remembered that temporary total disability benefits are granted to compensate an injured worker for wages lost due to the injury. Clearly, the previous language in this section was consistent with the purpose of these benefits as the employee received benefits during

periods he/she would have been working for the employer, and not for periods when the worker would not have been receiving wages from the employer.

85 C.S.R. §1-7

§1-7: This section is completely new and relates to "Notice and Litigation." Language has been included which again re-states that there are only two (2) parties to a claim, the claimant or the claimant's dependents and the employer, with the exception of funds created by article two-c of Chapter 23, the Insurance Commissioner is also a party.

Comment:

While it is clear that the Insurance Commissioner is a party in all "Old Fund" claims created in article two-c of Chapter 23, it does not appear that the Insurance Commissioner is a party to "Uninsured Fund Claims" created in West Virginia Code § 23-2C-8. While the Insurance Commissioner, or its designee, is the claims administrator, the statute does not provide that he Insurance Commissioner is a party to the actual claim. If it is the intent of the Insurance Commissioner not to be a party to these Uninsured Fund Claims then this language should be amended to specify that the Insurance Commissioner is a party only in "Old Fund" claims.

§ 1-7.2: This section requires that upon the making of any decision, the responsible party is required to send written notice of the decision to all parties which sets forth the basis of the decision and "informing the claimant or claimant's dependents of the right to protest the decision by filing a protest with the Office of Judges within sixty days of the receipt of the decision."

Comment:

The language in this section purports to require notice of only the claimant's right to protest a decision and thus preclude the employer's right to protest a decision. This section should be amended to require notice "informing **the parties** of the right to protest the decision by filing a protest with the Office of Judges within sixty days of receipt of the decision."

The language which purports to provide only the claimant or the claimant's dependent's a right to protest a decision, and preclude the employer from filing a protest, is contrary to the plain language of West Virginia Code § 23-5-1(b)(1) as amended, and is inconsistent with numerous other sections of Chapter 23 which specifically provide the employer the right to protest decisions of the claims administrator.

Initially, West Virginia Code § 23-5-1(b)(1), as amended states "An employer may protest decisions incorporating findings made by the Occupational Pneumoconiosis Board, decision made by the Insurance Commissioner acting as administrator of claims involving funds created in article two-c of this chapter, or decisions entered pursuant to subdivision (1), subsection (c), section seven-a, article four of this chapter." There is no language contained

in this statute which eliminates or abolishes the employer's right to protest a decision by the claims administrator. In State ex rel McKenzie v. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002), the West Virginia Supreme Court of Appeals stated that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syllabus Point 1, *Consumer Advocate Div'n v. Public Service Comm'n*, 182 W.Va. 152, 386 S.E.2d 650 (1989)." Syl. pt. 11, State ex rel McKenzie v. Smith, 212 W.Va. 288, 569 S.E.2d 809 (2002). Further, the West Virginia Supreme Court of Appeals has stated that "[a]ny rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute." Syl. pt. 4, *Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W.Va. 691, 527 S.E.2d 802 (1999)". Syl. Pt. 4, Repass v. Workers' Compensation Division, 212 W.Va. 86, 569 S.E.2d 162 (2002).

Further, an "interpretation" of this language which serves to administratively abolish the employer's right to protest decisions by the claims administrator does not reflect the "Legislatures" intent and is inconsistent with the remainder of Chapter 23. It must be remembered that "[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975)." Syl. pt. 7, Verizon v. West Virginia Bureau of Employment Programs, 214 W.Va. 95, 586 S.E. 2d 170 (2003).

When Chapter 23 is reviewed *in toto*, it is clear that the Legislature did not abolish the employer's right to protest a decision by a claims administrator. Had the Legislature intended to abolish the employer's right to protest such decisions, the Legislature could have done so clearly with language to effectuate that purpose. At Syllabus Point 5, the Verizon Court stated that "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938)." Id. at Syl. Pt. 5. Additionally, in Syllabus Point 4 of Kessel v. Monongalia County General Hospital, 220 W.Va. 602, 648 S.E.2d 366 (2007) the West Virginia Supreme Court of Appeals stated that "[a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)." Id. Bearing this in mind, it can not be asserted that the Legislature "intended" to abolish the employer's right to protest when the Legislature is presumed to have been familiar with the remaining sections of Chapter 23, such as West Virginia Code §§ 23-5-2, 23-5-4, 23-5-5, 23-4-1b, 23-4-1c(a)(3), 23-4-1c(h), 23-4-1d, 23-4-

6(j)(6), 23-4-7a(g), and 23-4-16a, all of which reference the rights of either both parties to protest a decision or the employer specifically.

Further, as the employer and the claimant are the only parties to a workers' compensation claim, it is fundamentally unfair, and potentially a violation of the employer's constitutional equal protection rights (Article III, § 10 of the West Virginia Constitution) and the certain remedy provision of the West Virginia Constitution (Article III, § 17 of the West Virginia Constitution) to allow the claimant to protest any order entered by the claims administrator while denying, or attempting to severally limit, the employer's right to do the same.

§1-7.3: This section re-states the language from House Bill 4636 relating to the private carrier who is providing coverage to the employer, has full authority to act on behalf of the employer in the claim, including but no limited to, the ability to make claims decisions, appoint counsel for defense of the claim and make determinations regarding litigation strategy. Further, this section states that an insured employer generally may not independently protest the decision by its carrier and then lists the two (2) circumstances in which, according to the OIC, an employer may still protest a decision by its carrier. These two (2) exceptions are decisions incorporating findings made by the OP Board and decisions entered pursuant to West Virginia Code § 23-4-7a(c)(1). However, the proposed rule goes on to state that even in these circumstances the carrier has the sole authority to act on the employer's behalf in the litigation of the claim.

No Comment:

85 C.S.R. §1-10

This section deals with time standards related to actions and claims. The major change, obviously, is that these standards are now applicable to both private carriers and self insured employers.

Regarding injury and occupational disease claims under §1-10.1, this section has been amended to state that the responsible party is required to rule on a properly executed and filed application within fifteen (15) days from the date of the receipt of all required information. However, the section also provides that whenever a claim has not been adequately or properly developed for consideration, the responsible party may require the production of additional evidence and the fifteen (15) days to rule on the claim is tolled during that evidence gathering process.

Regarding occupational pneumoconiosis claims, in §1-10.2, the amendment requires that a non-medical ruling be issued within ninety (90) days and that this ninety (90) day period can be extended for up to an additional thirty (30) days to develop further evidence.

§1-10.3 relates to medical treatment, appliances, devices and supplies and requires that a request for authorization for the same be acted upon within fifteen (15) days from the date of the receipt of the request.

§1-10.4 relates to medical evaluations and requires that a referral for a one-hundred twenty (120) day exam be made within twenty (20) days of the end of the one-hundred twenty (120) day period. However, an amendment was added to allow that the expected period of temporary total disability exceeds one-hundred twenty (120) days, the referral can be made within twenty (20) days of the expected day of the end of the temporary total disability.

§1-10.5 has been amended to require that the responsible party act upon a permanent partial disability evaluation report within thirty (30) days of the receipt of that report. Furthermore, a section was added to permit the permanent partial disability awards to be paid either in a lump sum or in installments and requires that temporary total disability awards commence within thirty days of the decision granting the award.

§1-10.6 relates to applications for re-opening and requires that an application for re-opening for "temporary or permanent total disability benefits" be ruled on within thirty (30) days from the date of the receipt by the responsible party. However, this section also provides an additional thirty (30) days to rule if additional evidence is required. It should be noted that this section mentions temporary and permanent total disability benefits and the language regarding permanent total disability is contrary to West Virginia Code §23-4-6 requirements for ruling on a permanent total disability applications. It appears that the OIC meant to include re-opening requests for temporary total disability and permanent partial disability, not permanent total disability.

Further, §1-10.7 requires that a responsible party comply with orders of the Office of Judges Board of Review or the West Virginia Supreme Court of Appeals within thirty (30) days of the date of receipt, unless required to act sooner or unless the order issued is subject to a lawfully ordered stay.

No Comment.

85 C.S.R. §1-12

This section relates to overpayments and the definition of an overpayment includes any money received from or paid on an injured workers behalf by the responsible party which is subsequently determined that the injured worker was not entitled. Further, overpayments may include TTD, PPD, PTD, NAP TTR, TPR, dependent's benefits, fatal benefits, travel or medical benefits. The section also permits a responsible party to withhold the overpayment from future disability benefits payable to the worker or the dependents in the same claim or other claims which are pending with the same responsible party to whom the overpayment is due.

Comment:

This section should be amended to allow for the responsible party to collect the overpayment from a prior or subsequent responsible party. Additional changes may have to

be made in Rule 2 to provide a mechanism to place prior and subsequent responsible parties on notice that a claimant has an overpayment in a claim and to whom the withheld overpayment should be forwarded.

85 C.S.R. §1-17

This section relates to expert witness appearance fees and requires a responsible party to reimburse a treating physician or authorized consulting physician who appears at a hearing to give testimony at a rate of $100.00 per quarter hour. Additionally, all other expert witness appearance fees are also paid at the rate of $100.00 per quarter hour; however, if the expert demands an amount in excess of that, it is the responsibility of the party who has retained the services of the expert or submitted a report or record to pay the additional monies.

Comment:

The net effect of this is to put in a requirement that allows expert witnesses to charge in excess of the rate set by the Office of the Insurance Commissioner and the Office of Judges and essentially costs the carrier, or the claimant, additional money for the deposition as the deponent is now allowed to charge the additional sum to the parties who submitted the report. This was not the case previously and may prove to have a negative impact on employers, carriers and even claimants depending on the evaluating physician that they use.

85 C.S.R. §2-1, *et seq.* "Workers' Compensation Claims Index"

Comment:

As noted in the Comment to 85 C.S.R. § 1-12 above, it is recommended that this Rule be amended to include a field in the Claims Index for overpayments made by a responsible party in a claim. Further, each responsible party should be required to confirm by review of the Claims Index that no overpayments have been made to a claimant before paying benefits. Similar to the requirement to confirm no outstanding child or spousal support debts. This would serve as notice to the responsible party preparing to make an indemnity benefit payment in a claim to withhold any prior or subsequent overpayment in a claim for another responsible party.

85 C.S.R. §6-1 et seq. "Debt Reduction Fund Assessment and Regulatory Surcharges"

No Comment.

85 C.S.R. §8-1 "Workers' Compensation Policies, Coverage Issues and Related Topics"

No Comment.

85 C.S.R. §18-1, et seq. "Self Insurance, Self Administration and Third Party Administrators"

§ 18-14.4. was amended to prohibit self-insured employers from operating in an "illegal, improper or unjust manner" with regard to claims handling. This is similar to language found in chapter 33 pertaining to carriers. According to the OIC, the concept is to create a "catchall" provision for self-insured employers similar to that which applies to insurance companies.

Comment:

The language contained in this amendment, "illegal, improper or unjust" is vague and ambiguous, does not provide a consistent standard which will be applied, and presents an opportunity for misinterpretation of claims handling decisions. There is a potential for severe penalties based on the subjective interpretation of a claims handling reviewer. This section should be deleted.

Thank you for your consideration of these comments. If you have any additional questions, please feel free to contact me.

Sincerely yours,

Jeffrey B. Brannon

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May 27, 2008

Workers Compensation Industrial Council
Office of the Insurance Commissioner
1124 Smith Street Room 400
P.O. Box 50540
Charleston, WV 25301-0540

Re: United Mine Workers of America
Comments on Proposed Workers' Compensation Rules 85-1, 85-18.

Dear Sirs:

On behalf of the United Mine Workers of American, I am enclosing for filing with the Industrial Council the enclosed comments regarded proposed rules under consideration by the Council, specifically Rule 01 (85 CSR 1) Rule 18 (85 CSR 18).

Very truly yours,

Bradley J. Pyles
Attorney at Law

BJP: bd

cc: Grant Crandall, General Counsel

COMMENTS OF THE UNITED MINE WORKERS OF AMERICA ON THE PROPOSED AMENDMENTS TO RULES 85 CSR 1 AND 85 CSR 18

May 27, 2008

Grant Crandall, General Counsel
Judith Rivlin, Associate General Counsel
United Mine Workers of America
8315 Lee Highway
Fairfax VA 22031-2215

The United Mine Workers of America represents thousands of coal miners in the United States and Canada. Coal mining is a dangerous occupation, and the UMWA has a special interest in protecting the rights of injured employees to a fair, prompt, and financially secure workers' compensation system. In that light, the UMWA offers the following comments and suggestions regarding the proposed amendments to Rules 1 and 18 (85 CSR 1 and 85 CSR 18), pending before the Industrial Council for approval.

85 CSR Rule 01

§85-1-3. Injured Worker's Report of Injury and Application for Compensation.

3.1. General.

Immediately after ~~a work place~~ sustaining an occupational injury or becoming aware of an occupational disease, an injured worker 1) should seek necessary medical care; 2) shall immediately on the occurrence of the injury or as soon as practicable give or cause to be given to the employer or any of the employer's agents a written notice of the occurrence of the injury; and 3) should file a workers' compensation claim or request that one be filed on his or her behalf. Failure to immediately give notice to the employer of the injury shall weigh against a finding of compensability in the weighing of the evidence mandated by W. Va. Code §23-4-1g and will dilute the credibility and reliability of the injured workers' claim.

Comments: The addition of the phrase "or becoming aware of an occupational disease" is problematic and should be deleted. While it may be reasonable to require prompt notice of an *injury* in order to permit a prompt investigation of compensability and secure immediate medical treatment, those considerations usually do not apply to occupational diseases, most of which do not require immediate treatment.

Imposing a requirement that an employee who becomes aware of an occupational disease to immediately give notice to the employer and file a claim on penalty of "diluting the credibility and reliability" of the claim clearly conflicts with the statutory limitation period for occupational diseases

of three years from last exposure or three years from the time a claimant knew or should have known of the disease. Employees with occupational pneumoconiosis, hearing loss, or carpal tunnel syndrome may often know that they have the disease, but elect to continue to work and not to file claims immediately. An employee who receives notice of a diagnosis of occupational pneumoconiosis from a NIOSH screening x-ray, or gets the results of a periodic audiogram arranged by the employer, or has a discussion with their family physician regarding pain and numbness in their wrists may all be "aware" that they have an occupational disease, but don't choose to pursue treatment immediately. In the unusual situation where an occupational disease requires immediate medical treatment, the treating physician will identify it as an occupational disease and assist the claimant in filing a claim, simply in order to be paid for his or her services. A requirement of prompt notice and filing for occupational diseases makes no sense and is clearly contrary to the statute.

§85-1-~~9~~ 10. Time Standards

~~9~~ 10.2. Occupational Pneumoconiosis claims. -- Non-medical rulings shall be entered in occupational pneumoconiosis claims within ~~fifteen (15)~~ ninety (90) ~~working~~ days from the date of receipt by the ~~Insurance Commissioner or private carrier~~ responsible party of properly executed, prescribed forms ~~from all parties involved~~. The ~~Insurance Commissioner or private carrier~~ responsible party shall consider all information and proof properly submitted in connection with each claim. Whenever the ~~Insurance Commissioner or private carrier~~ responsible party is of the opinion that a claim has not been adequately or properly developed for consideration, it may require the ~~parties to produce~~ production of additional evidence. The ~~fifteen (15)~~ ninety (90) ~~working~~ days shall be tolled for no more than thirty (30) additional days during this evidence gathering process.

Comments: There is no justification for extending the time standard for processing a non-medical order in an occupational pneumoconiosis claim from 15 days to 90 days, with an extra 30 days available for "evidence gathering." When the additional time for referral to the Occupational Pneumoconiosis Board, scheduling of an examination, the findings of the Board and the processing of an award, if made, a claim may take six months or more from filing to decision.

The non-medical order in an occupational pneumoconiosis claim is one of the simplest decisions in the workers' compensation system. It requires three findings: (1) was the claimant exposed within the state for 2 of the last 10 years or 5 of the last 15; (2) the allocation of liability among employers who employed the claimant for at least 60 days within the last three years; and (3) is the claimant entitled to the presumption of pneumoconiosis (10 of last 15 years). W.Va. Code 23-4-15b. All the necessary information is on the claim form. In many cases, the employer has all the information required in their own employment files. The allocation seldom involves more than two or three employers, one of which is the employer with which the claim was filed. At most it may require a couple of phone calls to verify the information on the application. There is no reason why it should require a three or four month investigation to perform what is virtually a clerical function.

85 CSR Rule 18

§85-18-~~11~~10. Voluntary Termination of Self-Insured Status.

~~11~~10.1. ~~If a self-insured employer decides to continue doing business in the state of West Virginia, but~~ A self-insured employer may terminate its self-insured status with the following conditions:

a. ~~the~~ The employer remains forever 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.~~ which the employer has incurred as a result of being self-insured; ~~The employer must pay a fee of $2,500.00 for the liability calculation.~~

10.2. A self-insured employer may enter into a contract of sale of its business or which transfers some or all of its assets to another entity, and such contract may include, either expressly or impliedly, an agreement as to the assumption by the purchasing entity or transferee of the self-insured employer's accrued and contingent liabilities resulting from the employer's self-insured status: *Provided*, That in the event that such a contract is entered into, the provisions of this rule be adhered to, both with regard to section 9 ("Self-insured employer's modification of business") and this section. Any such contract as described in this subsection and any resulting sales, transfers and consequential effect on the employer's self-insured liabilities are subject to approval of the commissioner prior to taking effect.

Comments: Section 10.1 of the rule makes it clear that an employer seeking to terminate its self-insured status "remains forever liable for all accrued and contingent liabilities" incurred while self-insured. Section 10.2, however, addressing situations where a self-insured employer sells or transfers its business or assets to a purchaser, does not contain language similar to the language in §10.1 that the seller remains liable for the accrued and contingent liabilities in the event of a default by the purchaser. Section 10.2 seems to suggest that the Commissioner may approve such a sale and that such approval may sanction the transfer of existing obligations from the seller to the purchaser, exonerating the purchaser from further liability.

There is no reason to treat a sale of a self-insured employer's business or assets differently from a voluntary termination of self-insured status. It is appropriate to require approval for the sale by Commissioner in order to assure that the existing workers' compensation obligations are provided for. However, such approval should not exonerate the selling employer of those obligations. The seller should remain liable as a surety in the event of a default by the purchaser.

Under ordinary contract law, a purchaser of a business or assets may agree to assume obligations of the seller, including pre-existing obligations to other parties, including injured employees. In such agreements, the purchaser becomes the principal obligor but the seller remains a surety, responsible for the obligation in the event the purchaser defaults. Injured employees for whom the self-insured seller was responsible are creditor beneficiaries of the seller's promise to assume the obligation.

Restatement of Contracts, 2d, comment (b); Petty v. Warren, 90 W.Va. 397, 110 S.E.2d 826 (1922), ["... as between the parties to the agreement the first is the principal and the second becomes the surety, the creditor is entitled in equity to be substituted in his place for the purpose of compelling the party who thus becomes principal to pay the debt"].

The recent experience of the Horizon Natural Resources bankruptcy illustrates the potential problem. Horizon purchased a number of mining operations in the years leading up to the bankruptcy, accruing in the process more debt than it could handle. In many of those purchases, Horizon assumed existing obligations for employee benefits, workers' compensation and environmental liabilities, and other obligations. When the spectacular implosion occurred, the assets were sold free and clear of those obligations and many governmental and private parties to whom those obligations were owed were left holding the bag.

If another such situation arises and the seller has been exonerated by the Commissioner's approval, the existing liabilities of a large bankrupt purchaser could swamp the guaranty pool and jeopardize the benefits of injured employees.

The proposed rule should be amended to make it clear that the seller in a transfer of workers' compensation obligations remains "forever liable for all accrued and contingent liabilities" as a surety in the event of a default by the purchaser. The Commissioner's approval should also require a showing by the seller that it could meet those obligations.

The Surety & Fidelity Association of America

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May 29, 2008

Via Electronic Mail and U.S. Mail

Ryan Sims, Esq.
Associate Counsel
Office of the Insurance Commissioner
P.O. Box 50540
Charleston, WV 25305-0540

Re: Proposed Rule
Amendments to Rule 18
West Virginia Code of State Rules
Workers' Compensation Rules

Dear Mr. Sims:

The Surety & Fidelity Association of America ("SFAA") is a trade association of approximately 500 companies that are licensed to write surety and fidelity insurance. SFAA members collectively account for the vast majority of workers' compensation self-insurance bonds written in the United States, and West Virginia in particular. We hereby submit comments in connection with the captioned proposed amendment to Rule 18. Specifically, although the provisions regarding the surety bond requirement remain largely unchanged, we submit comments and suggested revisions regarding the bond requirement.

The bond requirement is set forth in W. Va. Code St. R. § 85-18-8, as proposed. Under the rule, the self-insured employer must post an acceptable type of security, including an "occurrence-type security or bond." Surety bonds are an effective means to pre-qualify employers who are, in the surety's estimation, capable of fulfilling its statutory and regulatory self-insurance obligations. Surety bonds also provide the necessary financial protection in the event the employer defaults.

The applicable statute requires the self-insured employer to "[p]rovide security or bond, in an amount and form determined by the Insurance Commissioner." W. Va. Code. § 23-2-9(a)(2)(B). Our comments address the bond form required by the Insurance Commissioner

(Surety Bond Form SISB 1/06). We note that an amendment to the regulations may require certain revisions to the bond form as some regulatory references in the form may change. We request that the Insurance Commissioner consider our comments as revisions to the bond form are made.

As an initial matter, sureties generally favor the form's scope of coverage – coverage for "all past, present, existing, potential and future" liability. ¶ 1, Surety Bond Form. Sureties refer to this type of coverage as coverage on a "last surety on" basis. The availability of surety bonds is determined, in part, by the terms and conditions of the surety bond. One consideration is the duration of the obligation. By its nature, the duration of obligations under a workers' compensation bond can be long term. The obligation to pay benefits to an injured employee could span several years. By writing a bond, a surety is making an assessment of the employer's financial viability over the length of the obligation. As the obligation extends further into the future, the assessment becomes more uncertain. A bond that is on a "last surety on" basis is a means for the surety to control the duration of its obligation to a degree. Under ¶ 9 of the bond form, a surety that terminates its bond is released from all liability if the employer posts a replacement bond. Thus, there is a definite termination to the obligation and does not linger indefinitely. Therefore, we support the bond form's "last surety on" approach.

To more accurately describe the form prescribed by the Insurance Commissioner in the regulations, we suggest that the Commissioner delete the reference to "occurrence type security or bond" in the regulations (proposed W. Va. Code St. R. § 85-18-8). Proposed § 85-18-8.2 lists acceptable types of security, including but not limited to, an occurrence type security or bond, which is described as covering the employer's obligations "for any or all injuries or deaths that may occur during the time period for which the security or bond is effective." This description does not correspond to the scope of coverage of a "last surety on" bond that covers "all past, present, existing, potential and future" liability.

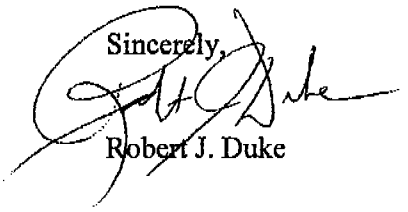
The surety's liability under the Surety Bond Form is limited by the bond's penal sum. However, ¶ 4 states that legal and administrative costs are in excess of the penal sum. A bond's penal sum provides the surety certainty with respect to its maximum potential liability. Liability for amounts in excess of the penal sum diminishes this certainty and increases the surety's risk. A surety typically addresses increased risk by tightening its underwriting thresholds. As a result, fewer employers are able to qualify for the bond. We suggest that all of the surety's liability should be within the penal sum.

Under the bond, an event of default, which triggers the surety's obligations, includes the commencement of voluntary or involuntary bankruptcy. ¶ 6, Surety Bond Form. We suggest that the primary interest of the Insurance Commissioner is that the employer continues to meet its payment obligations under the workers' compensation law. In many cases, an employer, as a debtor-in-possession, can continue to fulfill its pre-petition obligations with court authorization. Thus, simply a filing of a bankruptcy petition does not necessarily translate into a breach of the employer's payment obligations and should not necessarily trigger the surety's obligations.

Lastly, we request that the Insurance Commissioner consider extending the time the surety must pay a demand, currently 20 days under ¶ 7. Twenty days may be a sufficient amount of time in some cases for a surety to assess a claim and determine the nature and extent of the default. However, 20 days may not be sufficient in all cases. Alternatively, instead of extending the time to pay, we suggest that the form should provide the surety the ability to request additional time if needed.

We hope the foregoing comments will be helpful as the Insurance Commissioner revises the form to reflect the proposed changes of Rule 18. Please contact me if you have any questions.

Sincerely,



Robert J. Duke

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West Virginia Self-Insurers Association
Public Comment on Rule 85 C.S.R. §18
Public Hearing May 29, 2008

Below is a summary of the Commissioner's proposed changes to Rule 18 pertaining to self-insurance and self-administration and comments from the West Virginia Self-Insurers Association (hereafter "WVSIA"). Comments are provided regarding proposed changes which impact on substantive or procedural matters.

85 C.S.R. §18-3.1

Section 3.1 (p. 2) pertains to audited financial statements which are to provide reasonable assurance about the financial position of the employer, . . . in conforming with generally accepted accounting principles or another recognized accounting body . . . .

Comment:

WVSIA recommends that additional clarity be provided to this section. What is another recognized accounting body?

85 C.S.R. §18-3.8.

Section 3.8 (p. 3) defines "inactive self-insured employer". This is a new definition and means an employer whose self-insured status has been terminated.

Comment:

WVSIA recommends further definition of this section as it appears to conflict with W. Va. Code §23-2-9.

85 C.S.R. §18-3.11.

Section 3.11 (p. 4) defines payroll as that term is defined in the most current approved filing of the Commissioner's designated rating organization for workers' compensation (currently NCCI).

Comment:

WVSIA recommends that the term payroll be used throughout Rule 18 where the current and proposed rule changes reflect the term "gross wages". The term "payroll" is defined in §85 C.S.R. 6, commonly referred to as Rule 6. WVSIA suggests that the term payroll does not mean the same as "gross wages" or "gross wages and benefits".

85 C.S.R. §18-5.1

Section 5.1 (p. 5) pertains to an application for self-insurance. The last sentence requires that a parental guarantee must be received and accepted by the Commissioner before the application can be processed.

Comment:

WVSIA recommends that the last sentence be changed. The parental guarantee should be received and accepted by the Commissioner before self-insurance status may become effective. The Commissioner should reduce the time for processing an application for self-insurance. Hence, there is no reason why it cannot proceed with its evaluation before receipt of a parental guarantee.

85 C.S.R. §18-5.2.

Section 5.2 (p. 6) pertains to disclosure of information and provides that if the Commissioner perceives a self-insured employer failed to disclose information, she may terminate self-insurance at her sole discretion.

Comment:

WVSIA recommends that this section be rewritten. As proposed, the language is vague and unclear. Section 15 (p. 35) of this rule pertains to involuntary revocation of self-insured status, which requires approval of the Industrial Council. Hence, Section 5.2 is contrary to the provisions in Section 15. Additionally, WVSIA recommends that this section be changed to allow for the signature of an individual with authority to act on behalf of the employer seeking self-insurance (see 5.2.a. requiring all appropriate officers, partners, members or owners to sign and swear to the application). Multiple signatures are onerous and a sworn declaration appears likewise to be unnecessary. In sum, WVSIA recommends that the process for applying for self-insurance be simplified.

85 C.S.R. §18-5.5.

Section 5.5 (p. 7) requires that self-insurance status becomes effective (after approval of the Commission and Industrial Council) on the first day of the calendar quarter following the month in which the application was approved.

Comment:

WVSIA recommends that the section be changed to reflect the more practical alternative, that self-insurance may become effective on the first day of the month following approval by the Industrial Council or on a later date determined by the employer authorized to self-insure. The current practice is a carryover from the former Workers' Compensation Commission which needed a significant period of time to adjust its records before allowing an employer to begin self insuring after approval. This practice is antiquated. The change to a private competitive workers' compensation market should allow an employer obtaining self-insured status to begin self-insurance status as soon as practical after authorization is obtained. Otherwise, unnecessary delay, cost and confusion may result. For example, if the Industrial Council approved an application for self-insurance recommended to it by the Commissioner at its July, 2008 meting, under the proposed rule, that employer's self-insurance may not become effective until October 1, 2008.

85 C.S.R. §18-5.5.a.

Section 5.5.a (p. 7) pertains to the timeframe for the Commissioner to complete her evaluation of an employer's application for self-insurance, and provides that a recommendation to the Industrial Council shall be made by the Commissioner within 90 days from receipt of a completed application.

Comment:

WVSIA recommends that the application process should be reduced to 60 days from 90 days from receipt of a completed application. The application process requires and directs detailed information be presented at filing. A long delay occurs by the Commissioner's check with other state agencies regarding the employer's compliance with other laws and regulations. This delay is unnecessary and the process should be streamlined.

85 C.S.R. §18.6.1.

Section 6.1 (pp. 8-9) refers to the self-insured employer's standing to apply by requiring compliance with the law and all regulations.

Comment:

WVSIA recommends that this section be deleted. All employers are subject to Rule 32. The application process should encompass a timely compliance review.

85 C.S.R. §18-6.2.

Section 6.2 (p. 9) pertains to an employer's standing to apply for self-insurance.

Comment:

WVSIA recommends that this section be deleted, as the subject matters are covered by Rule 32.

85 C.S.R. §18-7.

Section 7 (pp. 9-10) refers to coverages for catastrophic occurrences and this section adds new language referring to §85 C.S.R. 19 (Self-Insurance Risk Pools).

Comment:

WVSIA recommends that this section be deleted. Rule 19 is the rule encompassing requirements for self-insurance security and risk pool obligations. Having sections in Rule 18 referring to these obligations is unnecessary. They result also in vagueness and lack of clarity, particularly since the workers' compensation law in 2007 deleted the requirement that catastrophic occurrences be secured separately.

85 C.S.R. §18-8.

Section 8 (pp. 10-13) pertains to self-insurance security and bonds.

Comment:

WVSIA recommends that this section be deleted since the provisions of this section are covered within Rule 19 and otherwise these provisions do not need to be covered within Rule 18.

85 C.S.R. §18-8.3.

Section 8.3 (p. 12) pertains to security requirements. The section requires a one million dollar security posted without references to dates of injuries.

Comments:

WVSIA recommends that the section be deleted. Rule 19 defines the type of security fund obligations and guaranty fund obligations. The proposed language is unclear and appears to conflict with Rule 19.

85 C.S.R. §18-8.3.b.

Section 8.3.b (p. 13) refers to a self-insurer's failure to post additional bond or security as required by Commissioner's order, shall result in revocation.

Comment:

WVSIA recommends that the section be changed so that it may result in revocation.

85 C.S.R. §18-9.

Section 9 (p. 13) pertains to a self-insurer's modification of business.

Comment:

WVSIA recommends that the section be rewritten because it is vague and lacks clarity. The proposed language is an unreasonable expansion of the section. The self-insured employer should not have a reporting requirement unless business modification impacts its claims liabilities. A self-insured employer should only be required to provide additional financial information when a business modification results in a substantial change in its financial ability to provide surety or parental guarantee.

85 C.S.R. §18-9.4.

Section 9.4 (p. 14) refers to modification of business processing by the agency and mandates that the self-insured employer be assessed a $2,500 actuary fee.

Comment:

WVSIA recommends that the mandatory "shall" be changed to "may". The prior Workers' Compensation Commission established the $2,500 fee for applications and modifications on the basis that it was usually required to consult an actuary. It seems reasonable to permissibly require the fee, in lieu of "mandating" a fee. Self-insurers pay regulatory assessment and additional fees should not be arbitrarily charged.

85 C.S.R. §18-10.1.a

Section 10.1.a (p. 15) pertains to voluntary termination of self-insurer status. The proposed rule adds the term "forever" to the provision stating that the employer remains liable for all liability incurred as a result of being self-insured.

Comment:

WVSIA recommends retaining the proposed sentence without the word "forever" as it adds nothing and is unnecessary.

85 C.S.R. §18-10.1.b

Section 10.1.b (p. 15) provides that voluntary self-insurance termination may only become effective on the first day of the succeeding calendar quarter, following the minimum 30 days written notice to the Commissioner.

Comment:

WVSIA recommends that termination of a self-insured policy should be allowed to occur on the first day of the month following the 30 day notice or on a date agreed upon between the Insurance Commissioner and the self-insured employer. There is no public policy reason to delay termination for several months if the employer terminating is fully secured and contracts for a policy of workers compensation insurance having an earlier effective date.

85 C.S.R. §18-10.1.c

Section 10.1.c (p. 16) provides that the terminating employer must post bond or security to cover costs of the future liabilities.

Comment:

WVSIA believes that this section conflicts with Rule 19. If the Industrial Council wishes to require an employer terminating self-insurance voluntarily to fully secure all incurred liability, the Rule 19 requirement for cash payments into the guaranty fund must be reconciled.

85 C.S.R. §18-10.2.

Section 10.2 (pp. 16-17) pertains to contract of sale of business by a self-insurer which may transfer all or part of its business and which may include an assumption of liabilities by the purchasing, entity, etc.

Comment:

WVSIA recommends that this section be rewritten as it is vague and unclear as proposed. The section should say simply that the selling self-insurer must obtain approval by the Insurance Commissioner; otherwise, she is not bound legally by the terms of a sale agreement. WVSIA also recommends that the section be amended further to permit risk portfolio transfers upon approval by the Insurance Commissioner.

85 C.S.R. §18-11-1.

Section 11.1 (p. 19) pertains to self-administration of claims. The section restates the statutory obligations for benefits.

Comment:

WVSIA recommends that the section be rewritten. Benefits are created by statute and are defined in the statute. It is unnecessary for the rule to state that self-insurers have to provide the same benefits as insurance carriers. All benefits provided by law must be properly and timely paid. This section, if deemed to be needed, would suffice by leaving in the first sentence and deleting the remainder.

85 C.S.R. §18-12.

Section 12 (p. 28) refers to payroll reports and premium taxes.

Comment:

WVSIA recommends that this section be named "Payroll Reports, Assessments and Surcharges". Further, the term "gross wages and payroll" should be replaced by the term "payroll". See Section 3.11

85 C.S.R. §18-12.2.

Section 12 .2 (p. 28) requires a payroll report be filed each quarter requiring "gross wages and earnings".

Comment:

WVSIA recommends the words "gross wages and earnings" be replaced by the word "payroll".

85 C.S.R. §§18-13.1, 13.2.

Sections 13.1 and13.2 (p. 29) pertain to records that self-insured employers must retain records of "gross wages".

Comment:

WVSIA recommends that the words "gross wages" be struck and the word "payroll" inserted in both sections.

85 C.S.R. §18-13.4.b

Sections 13.4.b (p. 30) refers to required records that self-insurers must retain. This section, as written, compels the Commissioner to review claims records annually or more frequently.

Comment:

WVSIA recommends that the word "shall" be replaced with the word "may". W. Va. Code §23-2-9 does not require the Insurance Commissioner to review annually self-insurers claims records; rather, the annual review required is related to the self-insurer's continuing ability to financially meet its incurred claims liabilities. Insurance companies are placed in separate categories from other corporations and it is also clear that self-insured corporations and municipalities are not considered insurers as that term is used. However, it is inappropriate to mandate annual claims review for self-insured corporations and cities but not for insurance carriers, which by statute is permissive, except for its mandatory examination of domestic and foreign insurers licensed in the state, not less frequently than once every five years. With respect to claims administration and practices, self-insurers should be subject to the same frequency of claims review. Regular audits have been performed by the former Workers Compensation Commission and the Offices of Insurance Commissioner since self-administration was mandated in 2004. Third party self-administrators in the state representing approximately 80% of the active self-insurers with payroll, have very high audit compliance results. Other rule changes focus on the comprehensive complaint process that contains clear remedies for the Insurance Commissioner, if non-compliance is identified. Annual review of claims by those having high audit scores is unnecessary and costly.

85 C.S.R. §18-13.5.

Section 13.5 (p. 30) pertains to the auditing of records . . . .

Comment:

WVSIA recommends that the words "gross wages" be deleted from this section and the word "payroll" be inserted in lieu thereof.

85 C.S.R. §18-13.9.

Section 13.9 (p. 31) refers to non-compliance penalties. The section contains new language but ends with a sentence referring to an employer's record and conduct.

Comment:

WVSIA recommends that the last sentence of the section be clarified by deleting the vague term "and conduct".

85 C.S.R. §18-13.9.a.

Section 13.9.a (p. 30) pertains to penalty not to exceed $500 per occurrence of non-compliance.

Comment:

WVSIA commends the proposed reduction of penalty from $5,000 to $500 but recommends that the stricken language "per review" be reinserted and that the remaining part of the sentence be deleted.

85 C.S.R. §18-14.2.

Section 14.2 (p. 32) refers to the annual review. Annual review in the section includes, claims, compliance and security review.

Comment:

WVSIA reiterates its comments to Section 13.4. The statute does not mandate an annual comprehensive review of claims. Certainly compliance issues are subject to the complaint process and, of course, adequate financial capability must be demonstrated annually by audited financials or an equivalent financial assessment.

85 C.S.R. §18-14.2.b.

Section 14.2.b (p. 33) pertains to review of records and penalty for non-compliance.

Comment:

WVSIA recommends that the section be rewritten to provide that the Insurance Commissioner may recommend revocation of the employer's self-insured authority, consistent with the involuntary revocation provisions of this rule. See Section 15 (p. 35).

85 C.S.R. §18-14.2.c.

Section 14.2.c (p. 33) refers to the Commissioner's obligation to notify the employer of the results of the required annual review.

Comment:

WVSIA recommends that the section be written to require notification to the employer of the results "of any review".

85 C.S.R. §18-14.3.a.5.

Section 14.3.a.5 (p. 33) pertains to financial reviews.

Comment:

WVSIA recommends that this be rewritten by striking the words "indicating a deteriorating financial condition" as these words are unnecessary. Financial condition is embodied within the terms "express a going concern qualification".

85 C.S.R. §18-14.4.

Sections 14.4 (p. 34) is a new section. An apparent effort to prohibiting "illegal, improper or unjust conduct".

Comment:

These terms are vague and unclear. The proposed section is unnecessary. Corporations and cities authorized to self-insure are aware that Chapters 23 an 61 require compliance with the law.

85 C.S.R. §18-14.5.

Section 14.5 (p. 34) pertains to security responsibility.

Comment:

WVSIA recommends the section be deleted. This subject is covered comprehensively within Rule 19; moreover, the prior surety requirement for catastrophic coverage has been eliminated from W. Va. Code §23-2-9. The Commissioner lacks jurisdiction to require separate surety for catastrophic events, defined in the statutes an incident resulting in three (3) fatalities or three (3) totally disabling injuries. See W. Va. Code §§23-2-9 and 23-3-1.

85 C.S.R. §18-14.8.

Section 14.8 (p. 35) as proposed pertains to Commissioner's obligation to report to the Industrial Council any acts of non-compliance by self-insurers.

Comment:

WVSIA recommends that the proposed language be changed to state that "The Commissioner shall report to the Industrial Council any acts of non-compliance by a self-insured employers which are deemed to be major.

INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND PUBLIC COMMENTS RECEIVED ON W. VA. CODE ST. R. § 85-18-1 ET SEQ.

Introduction

Below is the written response of the Insurance Commissioner to the stakeholder and public comments received in regard to the proposed amendment of Title 85 Rule, W. Va. Code St. R. § 85-18-1 et seq. ("Self Insurance, Self Administration and Third Party Administrators"), which was filed with the West Virginia Secretary of State for public comment on 04/29/08. This response is itemized by topic, and addresses all of the substantive comments received at the 5/29/08 Industrial Council meeting as well as written comments received from stakeholders.

Definition of "Delinquency"

Comment was made that subsection 3.4. of the Rule, which defines "delinquency", should not include an exception for "good cause" which provides an exception for placing the self-insured employer into delinquent status. The Commissioner does not agree with this comment. There are some rare situations where a self-insured employer could have good cause for not paying its obligations. Therefore, it is appropriate to leave this language in the definition.

Definition of "Inactive" Self-insured Employer

Comments were made that the definition of "inactive self-insured employer" in subsection 3.8. of the Rule is too broad, because W. Va. Code §23-2-9 establishes a more narrow definition of inactive self-insured employer. The Commissioner disagrees. The relevant code section in 23-2-9 merely states that the Commissioner can declare a self-insured employer inactive if they have no employees in the State and report no payroll for at least four (4) calendar quarters. However, it does not preclude a self-insured employer from being deemed inactive for other reasons, such as being voluntarily or involuntarily terminated. Notwithstanding this legal opinion, since the only provision in the Rule where the term "inactive" is used was stricken in the most recent version (the second part of subsection 8.3.), the definition of "inactive self-insured employer" in no longer required, and has therefore been stricken.

Claims Handling Standards and Review

Several stakeholders made comment that the provisions of subdivision 13.4.b., subsection 14.2. and subdivision 14.2.b., which require annual reviews and audits of self-insured employers claims records and claims handling compliance be amended to only make this annual review and audit discretionary and not mandatory. The primary argument is that insurance companies are not required to be annually reviewed under the W.Va. Insurance Code, so it is therefore inappropriate to require the same of self-insured employers. The Commissioner disagrees. While generally the Commissioner agrees that self-insurers and carriers should be treated the same with regard to worker's

compensation, there is a stark difference between insurance companies and self-insured employers in this regard, in that insurance companies are nearly always subject to heavy regulations in multiple states (their home state and other states in which they write business). On the other hand, self-insured employers in West Virginia are only regulated by the Commissioner and are subject to much fewer regulations than insurance carriers (for example, self-insured employers are not subject to provisions of West Virginia's insurance code. Therefore, the Commissioner is not inclined to make the annual reviews of self-insured employers' claims records and practices merely discretionary.

Additionally, it was commented that the language in 14.4. which permits the Commissioner to review or audit at any time in order to ensure self-insured employers are not operating with regard to claims handling practices in an "illegal, improper or unjust" manner", be stricken. The argument made is that this language is too broad and vague. The Commissioner disagrees. This is the same language to which private carriers are subject under Chapter 33 of the Code. The Commissioner believes that it is important that self-insured employers are held to the same standards for claims handling as private carriers. Therefore, placing language in this Rule similar to language which applies to private carriers is appropriate.

Sale or Transfer of Liabilities

Comments were made regarding the provisions of subsection 10.2. of the Rule, which permit a self-insured employer to enter into a contract of sale for its business which includes an assumption by the purchaser of some or all of the self-insured employer's workers' compensation liabilities. First, one stakeholder commented that these provisions were not appropriate because under no circumstances should a self-insured employer be permitted to transfer their liability to another entity. The Commissioner disagrees. There are situations where it may be appropriate for a self-insured entity to transfer its workers' compensation liability to another entity. For example, if a large and financially well off firm wants to purchase outright a much smaller and less well-off self-insured employer, and the contract includes a provision that the purchasing company is assuming all of the seller's debt, this is actually a favorable situation for the self-insured community, as the account of a smaller more risky self-insured employer is being assumed by a much larger and more financially healthy company. The Commissioner also points out that 10.2. requires all such transactions to be reviewed and approved on a case-by-case basis by the Commissioner, as this subsection specifically requires the transaction to meet the requirements of section 9. of the Rule pertaining to business modifications.

Second, comment was made that subsection 10.2. should not require a contract which creates a purchase and assumption of workers' compensation liability to be approved by the Commissioner. The Commissioner disagrees. As explained above, in these scenarios it is important that they be reviewed on a case-by-case basis. Without requiring Commissioner approval of the transaction, this would not enable the Commissioner to review the nature to the transaction and financial status of the entities involved to ensure the transaction is in the best interest of the self-insured community.

Security and Bonds

Several comments were made regarding the provisions of the Rule pertaining to security and bond requirements of a self-insured employer. First, it was commented that this language in 8.2. should be amended to eliminate the language permitting an "occurrence type security bond", because the bonding industry prefers bonds to be issued to instead use "last surety on" language. The Commissioner disagrees with this comment. Subsection 8.2. merely states that an "occurrence type security bond" is ***one type*** of bond that can be utilized for security of self-insured employers. This does not mean that other forms of bonds would not be considered. Ultimately, 8.2. states that the Commissioner has discretion to determine that a particular type of security or bond is acceptable. The Commissioner carefully promulgates and updates the bond form language that it prefers on an ongoing basis, based on what is in the best interest of protecting the self-insured guaranty pool. As such, permitting discretion regarding bond language is important, and the Commissioner is not inclined to strike language permitting an occurrence type security bond.

Second, it was commented that the provisions addressing security as a whole are not necessary because Title 85, Series 19 of the W. Va. Code of State Rules ("Rule 19") addresses these topics. The Commissioner disagrees. Rule 19 is a more narrow rule addressing the requirements of self-insured employers regarding the security and guaranty risk pools, while this Rule addresses security requirements generally for a self-insured employer. Consequently, the Comissioner is not inclined to strike this section.

Third, it was commented that subsection 8.3., which sets forth the general formula for determining the amount of security to be posted by a self-insured employer when any security is required to be posted, and also requires a minimum $1 million in security be posted by all self-insured employers, be stricken. The Commissioner agrees as to the latter provision in subsection 8.3. which mandates all self-insured employers maintain $1 million in security. This requirement is not required by code and is not necessary in light of the creation of the self-insured guaranty pool for claims liabilities after July 1, 2004. Therefore, the Commissioner has stricken this requirement from the subsection. However, the first part of this subsection is appropriate, but has been amended to read more clearly.

Fourth, it was commented that subdivision 8.3.b., which states that if a self-insured employer fails to obtain required security its self-insured status "shall" be terminated be amended to say instead it "may" be terminated. The Commissioner agrees. Terminating self-insured status is ultimately at the discretion of the Industrial Council based on recommendation of the Commissioner. Therefore, this amendment has been made.

Requirement of Audited Financial Statements

Comment was made that provisions in various sections of the Rule requiring self-insured employers to provide three years of audited financial statements should be

amended to permit alternative information in lieu of audited financial statements. The Commissioner disagrees with this comment. Audited financial statements are the only type of financial information which are reliable for purposes of measuring a firm's financial status. Other information, such as pro forma financial information, is simply not reliable because it has not been audited (signed off on by a CPA). Further, the Commissioner performed research of other jurisdictions and found that most other jurisdictions researched require audited financial statements and do not permit alternative information to be substituted. Therefore, the Commissioner is not inclined to amend these provisions.

Parental Guarantee

Comment was made that the requirement that, if applicable, a parental guarantee of the applying subsidiary's liabilities be submitted before an application for self-insured status be processed should be amended to state that the self-insured status will not be effective until the guarantee is received. The Commissioner disagrees with this comment. Specifically, substantial resources are placed into processing an application. The Commissioner does not believe it would be efficient to process an application prior to receiving the necessary parental guarantee, because then if the guarantee is not provided, agency resources would have been unnecessarily expended in fully processing the application. Moreover, it is not unduly burdensome to require the parental guarantee to be provided prior to processing the application. The guarantee is a relatively simple document that can be quickly executed and submitted by the parent.

Application Process

Several comments were made regarding the self-insurance application process in section 5. of the Rule. First, comment was made that subsection 5.2. should be amended to not include termination of self-insured status as a remedy if the employer fails to disclose required information in the application process. The Commissioner agrees with this comment, as termination could not occur prior to an application being granted. Therefore, 5.2. has been amended accordingly.

Second, comment was made that the requirements of the application and related documents being signed and sworn to by certain executive officers, partners, members or owners, as applicable should be amended to only require anyone with authority to act on behalf of the applying company to sign the application. The Commissioner disagrees with these comments. The application process involves the submission of critical financial and other information which enables the Commissioner to properly assess whether a particular candidate is appropriate for self-insured status. The accuracy and reliability of this data is crucial, and in turn, requiring certain officers, partners, members and/or owner to sign and swear to the application and included documents helps assure this accuracy and reliability, and further creates a higher degree of accountability on the part of the company. Moreover, it is not, in this day and age of fax machines and scanning, unduly burdensome to require the application to be signed and notarized by

certain individuals. Therefore, the Commissioner is not inclined to amend this section as requested.

Third, it was commented that subdivision 5.5.b. be amended to require the Commissioner to process self-insured applications in sixty (60) days rather than ninety (90) days. The Commissioner disagrees. It is reasonable to provide the Commissioner up to ninety (90) days to process an application, and not unduly burdensome on the applicant to wait up to ninety (90) days for its application to be processed. Further, the Commissioner notes that the ninety (90) day time frame is a maximum, and the Commissioner almost always processes applications in much less than the ninety (90) day time frame.

Review of Self-insured Employer's Standing with the State

Comments were made that the provisions of 6.1. and 6.2., which require the Commissioner to review the applicant company's standing with regard to West Virginia workers' compensation and any other potential accounts of other State agencies or entities to make sure the applicant does not owe any money to the State of West Virginia, should be stricken. The argument made in support of this suggestion is the Title 85, Series 32 of the West Virginia Code of State Rules ("Rule 32") already addresses this issue. The Commissioner disagrees. Rule 32 is a rule addressing employer enforcement and preventing employers who owe the State workers' compensation system money from obtaining or maintaining licenses, permits, etc. from other State agencies. Rule 32 only tangentially references self-insured employers. The requirements of 6.1. and 6.2. specifically apply to the self-insured application process, and appropriately require the Commissioner to ensure the applicant owes no money to the State prior to approving self-insured status. Therefore, the Commissioner will not amend these subsections as requested.

Excess Insurance and Security for Catastrophic Occurrences

Comments were made that section 7. and subdivision 14.5.a. of the Rule, which provide the Commissioner discretion to require a self-insured employer to obtain excess insurance or security to provide coverage for potential workers' compensation liability for catastrophic occurrences, should be stricken. The Commissioner disagrees. While there is no express provision in the Code for self-insured employers to provide excess coverage or security for catastrophic occurrences in particular, this provision clarifies that the Commissioner may require certain employers to whom catastrophic occurrences pose a significant threat to obtain excess insurance or security providing a safety net for such risk. The Commissioner believes that for certain self-insured employers (such as employers with just a single site in the State), a single catastrophic occurrence could pose a threat to the solvency of such employers, and in turn a threat to the self-insured community in the form of assessments in the guaranty pool. Consequently, it is appropriate for the Commissioner to require such employers to maintain a safety net for such occurrences.

Effective Dates for Self-Insured Status or Termination of Self-Insured Status

It was commented that subsection 5.5. and subdivision 10.1.b., which require that the effective date of self-insured status or voluntary termination of self-insured status be effective the next calendar quarter following the decision to grant or terminate the status, respectively, be amended to make the effective date the first day of the first month following the Commissioner's approval. The Commissioner disagrees with this comment. In all other aspects, including reporting of payroll and remittance of surcharges and assessments, self-insured accounts are handled on a quarterly basis. Therefore, it would not make sense to handle effective dates for self-insured status and termination any differently. Further, it is not unduly burdensome on an employer to wait until the next quarter to begin or end self-insured status. Consequently, the Commissioner is not inclined to make this amendment.

Business Modifications

Several comments were made regarding section 10. of the Rule pertaining to business modifications by self-insured employers. First, it was commented that the section as amended in the Rule is too vague and lacks clarity and should be re-written. The Commissioner disagrees. The section was amended to provide the Commissioner more discretion in processing business modifications, determining their impact and determining what action, if any, needs to be taken to protect the self-insured community. Having this discretion is crucial to handling business modifications on a case-by-case basis to ensure the correct decision is made. Therefore, the Commissioner will not re-write this section.

Second, it was commented that the requirement in subsection 9.4. of the Rule which requires a self-insured employer to pay a fee of $2500 if the business modification requires actuarial analysis, should be made discretionary rather than mandatory. The Commissioner disagrees. Actuarial analysis is generally costly, and, if needed, a fee of $2500 is reasonable and not unduly burdensome to the entity(s) paying the fee.

Voluntary Termination of Self-insured Status

Several comments were made regarding section 10. pertaining to a self-insured employer's voluntary termination of self-insured status. First, it was suggested that subdivision 10.1.a. of the Rule, which requires that a self-insured employer remain "forever" liable for its workers' compensation liabilities following voluntarily terminating its status be amended to not use the word "forever". The Commissioner disagrees with this comment. There are no provisions under the Code which state that a self-insured employer's liability for workers' compensation benefits during its period of being self-insured ever is absolved. Therefore, the word "forever" is appropriate in this context.

Second, comment was made that subdivision 10.1.c. of the Rule, which requires a self-insured employer voluntarily terminating its status be required to post bond or

security in an amount sufficient to cover the costs of all future workers' compensation liability resulting from the period of self-insured status, should be stricken because the guaranty pool addresses this liability. The Commissioner disagrees. Requiring a self-insured employer who voluntarily terminates its status to post security is a measure to protect the self-insured community from self-insured employers who terminate their self-insured status voluntarily and then at some point later attempt to wind down their business and not pay their remaining workers' compensation liabilities. The guaranty pool and its obligations are broader. This pool provides coverage for any self-insured employer default, whether active, inactive or terminated. The pool is the "last line of defense" against a default, and therefore it is appropriate to create additional safety nets, such as the security required in this subdivision as well as excess insurance, in order to protect the self-insured community as a whole.

Non-Compliance Penalties

Several comments were made regarding the provisions of subsection 13.9. of the Rule pertaining to monetary penalties for non-compliance. First, comment was made that self-insured employers can be fined based upon review of the Commissioner's review of the self-insured employer's records *and* conduct. It was suggested that the Commissioner strike "and conduct" from this section. The Commissioner disagrees. A self-insured employer's conduct may not always be completely reflected in its records. Therefore, it is reasonable to include the term "conduct" here.

Secondly, it was commented that the penalty amount in the Rule be changed from $500 *per occurrence* to $500 *per review* (this was changed from former language stating $5000 per review). The Commissioner disagrees. There could potentially be numerous violations in a single review, and permitting a maximum fine of $500 for any single review would be inappropriate. Further, fines being levied on a "per occurrence" basis is the general standard with regard to fines of insurance companies; therefore, this treats self-insured employers in a similar manner. Consequently, the Comissioner is not inclined to make this amendment.

Notice to Self-insured Employer of Financial Reviews

It was suggested that subdivision 14.2.c. of the Rule be amended to require the Commissioner to notify the self-insured employer of any review of the self-insured employer which takes place, in addition to notice regarding the results of annual reviews. The Commissioner agrees that a self-insured employer should be notified if an "interim" review of the self-insured employer reflects a deteriorating financial condition. Therefore, this section has been amended as such. However, if the Commissioner's regular interim review of a particular issue involving a self-insured employer reflects no concerns with the firm, there is no need to notify the company.

It was also commented that paragraph 14.3.a.5. of the Rule, which includes within the scope of the annual financial review of the company that there be no opinion expressed by the auditor of a going concern or deteriorating financial condition, be

amended to strike the terminology "deteriorating financial condition". The Commissioner disagrees. While normally concerns about a deteriorating financial condition of a firm will be expressed using the terminology "going concern", it should not be the only terminology of which the Commissioner can take note in a financial review. Therefore, this amendment will not be made.