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

Form #5

Do Not Mark In This Box

FILED

2004 MAY 25 P 2:27

WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

CITE AUTHORITY: W. Va. Code §§ 23-1-1a(j)(3); 23-2-4 and 23-2-9(i)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W. Va. Code § 23-1-1a(j)(3)

AMENDMENT TO AN EXISTING RULE: YES ____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 19

TITLE OF RULE BEING PROPOSED: Self Insurance Risk Pools

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS July 1, 2004

Authorized Signature

FILED
2004 MAY 25 P 2:27
OFFICE WEST VIRGINIA
SECRETARY OF STATE

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 19
SELF INSURANCE
RISK POOLS

§85-19-1. General.

1.1. Scope. --This exempt legislative rule provides for the creation of risk pools for the benefit of self-insured employers to secure the payment of obligations of self-insured employers.

1.2. Authority. -- W.Va. Code §§23-1-1a, 23-2-4; 23-2-9(i). Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission are not subject to legislative approval as would otherwise be required under West Virginia Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. –

§85-19-2. Purpose of Rule.

This rule provides for the creation and funding of two risk pools to secure the obligations of self-insured employers.

§85-19-3. Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

3.14. "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.

3.15. "This rule" means this legislative rule designated as 85 C.S.R. 19, "Self Insurance Risk Pools."

§85-19-4. Self Insurance Pools; Establishment; Application of Funds.

4.1. The Commission shall establish two pools of funds to cover claims payments of default and bankrupt self-insured employers.

4.2. The Commission shall establish a Security Pool. The Security Pool shall pay claims for bankrupt and default self-insured employers with dates of injury prior to July 1, 2004.

a. The Commission shall segregate all contributions to the Security Pool, including all investment income earned from Security Pool proceeds.

b. The Commission shall not expend proceeds from the Security Pool corpus or its earnings for any other purposes than for obligations of the security pool.

4.3. The Commission shall establish a Guaranty Pool. The Guaranty Pool shall pay claims for bankrupt and default self-insured employers with dates of injury on or after July 1, 2004.

a. The Commission shall segregate all contributions to the Guaranty Pool, including all investment income earned from Guaranty Pool proceeds.

b. The Commission shall not expend proceeds from the Guaranty Pool corpus or its earnings for any other purposes than for obligations of the Guaranty Pool.

§85-19-5. Participation.

5.1. All active self-insured employers and inactive self-insured employers having active claims shall participate in the Security Pool.

a. Inactive self-insured employers having active claims who decline to participate shall extinguish their liability through a buyout as calculated by the Commission.

5.2. All active self-insured employers shall participate in the Guaranty Pool. ~~Inactive~~Active self-insured employers that become inactive on or after July 1, 2004, may be required to participate in the Guaranty Pool under the provisions of section ten of this rule.

§85-19-6. Surety Requirements.

6.1. ~~6.1.~~ All employers who participate in the Security Pool ~~must fully secure their liabilities as of June 30, 2004, with the exception of those that meet the following criteria:~~are required to fully secure their claims liabilities for all claims with dates of injury on or prior to June 30, 2004.

~~a. Employers that have been complying, and continue to comply with a Commission approved security installment increase plan; or~~

~~b. Employers that meet the eligibility requirements and pay the alternate security surcharge as provide in section seven of this rule.~~

a. All employers who are fully secured for their claims liabilities as of the effective date of this rule shall maintain and increase their security as necessary to remain fully secured for their claims liabilities.

b. All employers who are not fully secured for their claims liabilities as of the effective date of this rule are required to fully secure their claims liabilities and maintain and increase that security as necessary.

1. The Commission shall establish the terms and conditions of a security increase plan for each employer.

2. The security increase plan is required to be completed such that the employer is fully secured on or before June 30, 2006.

3. Employers whose unsecured liabilities increase less than one million dollars shall not be eligible for a security increase plan and shall provide the full amount of security within the time frames as specified by the rules of the Commission.

c. The failure by an employer to fully secure and maintain security on their claims liabilities in accordance with this rule shall result in revocation of self-insurance status. The Commission is authorized by this rule to provide notice of the revocation to the self-insured employer without any action or approval by the Board of Managers. The provisions of other rules of the Commission requiring the Commission to present the revocation recommendation to the Board of Managers and for the Board of Managers to approve the revocation are expressly made inapplicable to revocation of self-insurance under this section.

1. An employer who receives a notification of revocation of self-insured status for failure to fully secure or maintain security on their claims liability may file a petition with the Board of Managers to be granted a six (6) month grace period to obtain security.

A. The employer shall file its petition for grace period with the Executive Director of the Workers' Compensation Commission who will distribute the petition to the Board of Managers.

B. The Board of Managers shall consider the petition for grace period at such time as is convenient to the Board. The Board shall consider the petition in an executive session. The Board may consider the written petition only or request the employer, the Commission or both to make an oral presentation. The Board shall make any decision regarding the petition for grace period in an open meeting.

C. The Board of Managers shall only grant a petition for grace period upon a unanimous vote of the Board.

D. An employer may only be granted one grace period.

6.2. New self-insured employers who were previously regular subscribers must secure their liability up through June 30, 2004 or must pay the Commission an amount equal to the liability amount attributable to periods through June 30, 2004, including incurred but not reported liabilities.

6.3. The Commission shall perform an annual surety review based upon the Commission's actuarial calculations to determine the required surety level for periods prior to July 1, 2004.

a. Existing surety using old bond language will be credited to the employer at the estimated actual value of the bond as determined by the Commission's actuary.

6.4. Self insured employers shall not be required to provide surety, other than through Guaranty Pool~~assessments or alternate surety~~ assessments, for liabilities attributable to claims with dates of injury on or after July 1, 2004.

a. The Commission may require additional surety for claims with dates of injury on or after July 1, ~~2004 or permit the employer to pay the alternate surety surcharge in the manner prescribed in the requirements for under-secured self-insured employers~~2004, if it is determined that an employer's financial condition has deteriorated compared to the previous year's financial analysis by the Commission. The employer's financial condition will be analyzed using objective benchmarks to determine a deteriorating financial condition as provided in the rule governing self-administration of self-insurance.

§85-19-7. ~~Under-secured self-insured employers.~~

~~7.1. Self-insured employers who are not fully secured as of June 30, 2004 may be eligible to pay an alternate surety surcharge into the Security Pool. The alternate security surcharge shall not be applicable to those employers that are successfully meeting installment increases in security, as describe in subsection 6.1.~~

~~7.2. Eligibility. To be eligible to pay the alternate surety surcharge, the under-secured self-insured employer must provide evidence that it is unable to obtain the required amount of surety. Upon receipt of the evidence provided by the self-insured employer, the Commission shall take the following steps:~~

~~a. The Commission shall secure a financial consultant knowledgeable in the surety market to verify the employer's evidence of their inability to obtain surety.~~

~~b. The consultant shall make a recommendation to the Commission as to whether the employer should be permitted to pay the alternate surety surcharge instead of providing surety.~~

~~7.3. Surcharge. The alternate surety surcharge shall be based on the individual self-insured employer's commercial cost of surety if it were commercially available to that employer.~~

~~a. The consultant engaged for the purpose of assisting the Commission in determining eligibility for this surcharge shall also make a recommendation to the Commission regarding the individual self-insured employer's commercial cost of surety, if available.~~

~~7.4. Determinations. Upon receipt of the financial consultant's recommendations, the Commission shall render a decision regarding the eligibility of the self-insured employer for the alternate surety surcharge and the amount of the surcharge.~~

~~7.5. The alternate surety surcharge is in addition to the required assessments to fund the Guaranty Pool.~~

~~§85-19-8.~~ Security Pool Funding.

7.1. The Security Pool shall be funded by the following sources:

a. Proceeds received from the draw-down on surety documents in the event of a self-insured employer's default;

~~b. Proceeds from any alternate security surcharge;~~

~~c. Proceeds received from assessments pursuant to chapter twenty-three of the West Virginia Code;~~

~~d.~~b. All graduated premium tax payments made by participating self-insured employers for periods through the quarter ending June 30, 2004;~~ and~~

c. Assessments to fund the Security Pool generated under the provisions of W. Va. Code §23-2-9(i);

~~d. All graduated premium tax payments made by participating self-insured employers for periods through the quarter ending June 30, 2004; and~~

d. Beginning July 1, 2006, proceeds received from assessments pursuant to W. Va. Code §23-2-9(c)(2); and

e. Proceeds received from any alternative funds identified and made available through legislative enactment.

~~8.1. The initial funding for the Security Pool shall be ten million dollars ($10,000,000.00).~~

~~8.3.~~7.2. Should the proceeds identified in subsection ~~8.1~~7.1 be inadequate to fully satisfy the obligations of the Security Pool, the Executive Director and the Board of Managers shall identify and pursue such alternative funding as shall be necessary.

§85-19-8. Security Pool Assessments Pursuant to W. Va. Code §23-2-9(i).

8.1. Beginning January 1, 2005, Security Pool assessments to self-insured employers shall be made as follows:

a. The Commission shall determine the projected claims payments to be made in the fiscal year, with the first projection based upon the period July 1, 2004 through June 30, 2005.

b. The Commission shall determine the amount necessary to fund the Security Pool through assessments.

c. The Commission shall determine the methodology employed to allocate to each self-insured employer, based upon the self-insured employer's claims reserves and financial strength, a fair and equitable portion of the projected claims payment.

d. In accordance with the methodology employed, the Commission shall determine the amount of each Security Pool assessment.

e. Notification. The Commission shall notify every employer who is assessed under this provision the amount of the assessment and the methodology employed to determine the assessment. The Commission shall provide notice to each affected employer at least thirty (30) days prior to the period for which the assessment is applicable.

f. Payments required under this provision shall be pro-rated and made on a quarterly basis.

§85-19-9. Guaranty Pool Funding.

9.1. ~~In order to initially~~Beginning the calendar quarter immediately following the effective date of this rule and in order to fund the Guaranty Pool, the Commission shall assess self-insured ~~employers.~~employers, as follows:

a. ~~Assessments~~The initial annual assessment shall be equal to 2% of the self-insured employer's preceding fiscal year's annual claims indemnity ~~payments, less settlements,~~payments [excluding payments to settle claims on a full and final basis] or a minimum of $5,000 whichever is greater. ~~Assessments shall continue until the initial funding level of the Guaranty Pool is met.~~
The initial annual assessment shall be imposed for each of Fiscal Years 2005 and

~~9.2. The initial funding level for the Guaranty Pool shall be ten million dollars ($10,000,000).~~

~~a. The initial funding level represents approximately two (2) times the payments made during calendar year 2003 for bankrupt and defaulted self-insured employers.~~

~~9.3. After the initial funding level is reached, the Guaranty Pool shall be funded at a level equal to two (2) times the previous year's payout from the Guaranty Pool.~~

~~a. The Commission shall assess self-insured employers to fund the Guaranty Pool in any fiscal year in which the aggregate proceeds for the Guaranty Pool are less than the required funding level.~~

~~b. Assessments shall be equal to 2% of the preceding year's annual claims indemnity payments, less settlements, or a minimum of $5,000 whichever is greater.~~2006.

For example, a self-insured employer has paid one million dollars ($1,000,000.00) in indemnity payments in the preceding fiscal year. Of the one million dollars ($1,000,000.00), two hundred thousand dollars ($200,000.00) has been paid to settle claims on a full and final basis. The self-insured employer would be assessed two percent (2%) of eight hundred thousand dollars ($800,000.00), which yields sixteen thousand dollars ($16,000.00) as an assessment to the self-insured employer; and

b. Beginning with Fiscal Year 2007 (July 1, 2006 through June 30, 2007), annual assessments shall be based on five percent of the projected claims liabilities of the self-insured employer for the fiscal year in which the charge is made or $5,000.00, whichever is greater.

c. Payments made under this subsection shall be pro-rated and made on a quarterly basis.

~~9.4.~~9.2. Employers who become self-insured after the establishment of the Guaranty Pool will be assessed an amount equal to 5% of the preceding year's base-rated premium, or a minimum of $5,000 whichever is greater, for a period of 3 years. Thereafter, assessments shall be made as needed in accordance with the same methodology utilized for other self-insured employers.

9.3. Assessments to fund the Guaranty Pool shall continue until the Guaranty Pool is fully funded.

a. The Guaranty Pool shall be considered fully funded when it contains the sum of thirty million dollars ($30,000,000.00) or five percent (5%) of the total claims liability of all self-insured employers, whichever is greater.

b. If assessments cease because the Guaranty Pool is fully funded and thereafter the funding level for the Guaranty Pool drops below the required amount, the assessments shall resume in the same manner and amounts as required by this section.

9.4. In the event that actual claims defaults exceed the amounts of defaulted claims reserves recognized in the most recent audited financial statement of the Commission, the Board of Managers shall determine the methodology to assess additional amounts to self-insured employers to fund the Guaranty Pool.

§85-19-10. Converting to Regular Subscriber Status or Becoming Inactive.

Active self-insured employers who become regular subscribers or inactive, either voluntarily or involuntarily on or after July 1, 2004, and who do not buy out their liability shall leave all existing surety in place and shall~~continue to~~ be assessed the Security Pool and Guaranty Pool assessments for a period of up to ten (10) years with Security Pool assessments ~~years~~ beginning January 1, 2005. In these circumstances, Guaranty Pool assessments shall be based upon five percent (5%) of the prior year's indemnity payments or $5,000.00, whichever is greater. This provision is not to be construed as excusing any obligation of a terminated self-insured employer imposed by the Act or by other rules of the Commission.

§85-19-11. Severability.

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

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

Form #1

Do Not Mark In This Box

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: §§23-1-1a(j)(3); 23-2-9(i)

AMENDMENT TO AN EXISTING RULE: YES___NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 19

TITLE OF RULE BEING PROPOSED: Self Insurance Risk Pools

DATE OF PUBLIC HEARING: April 12, 2004** (Previously scheduled for 4/14/04) TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleson, West Virginia
**Please note the change of the date for this public hearing from 4/14/04 to 4/12/04.
However, written comments will be received through 5:00 p.m. on 4/14/04.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T. J. Obrokta
Executive Offices
Workers' Compensation Commission
~~4700 MacCorkle Avenue, S.E.~~
Charleston, WV 25304
Fax # (304) 926-5372

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

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

Form #1

Do Not Mark In This Box

FILED

2004 FEB 18 P 3:51

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: §§23-1-1a(j)(3), 23-2-9(i)

AMENDMENT TO AN EXISTING RULE: YES___NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 19

TITLE OF RULE BEING PROPOSED: Self Insurance Risk Pools

DATE OF PUBLIC HEARING: April 14, 2004 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia
*The comment period expires at the conclusion of the public hearing.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T. J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
~~4700 MacCorkle Ave., S.E.~~
Charleston, WV 25304
Fax # (304) 926-5372

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

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

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

February 17, 2004

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

Re: Proposed Rule
Title 85, Series 19
"Self Insurance Risk Pools"

Dear Secretary Manchin:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 19 entitled, "Self Insurance Risk Pools," for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 19: Self Insurance Risk Pools

Type of Rule: X Legislative Exempt ___Interpretive __Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Ave. S.E.

Charleston, WV 25304

1. Effect of Proposed Rule

	Annual		Fiscal Year		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	Unknown	Unknown	Unknown	Unknown	Unknown
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER:					
Benefit payments	Unknown	Unknown	Unknown	Unknown	Unknown
Benefit related payments	Unknown	Unknown	Unknown	Unknown	Unknown

2. Explanation of above estimates:

Implementation of this rule will result in the Commission initially segregating funds of $10,000,000 for the Security Pool. The Security Pool shall pay claims for bankrupt and default self-insured employers with dates of injury prior to July 1, 2004. The Guaranty Pool shall pay claims for bankrupt and default self-insured employers on or after July 1, 2004. Both pools, together with their earnings, cannot be expended for any other purposes. An undetermined amount in benefit and benefit related payments might have to be paid from these pools. These payments would be contingent on the actual number of default and bankrupt self-insured employers that occur, together with the adequacy of their security and the amount of their future claims benefits at the time of their default or bankruptcy. Due to the unpredictable nature of these types of occurrences, the annualized amount of these potential payments cannot be reasonably estimated.

Rule Title: Title 85 Series 19: Self Insurance Risk Pools

3. Objectives of this rule:

This rule creates and defines the funding of two risk pools to secure the obligations of self-insured employers.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that this rule will help to simplify the efforts required in reviewing and maintaining the surety required for the obligations of self-insured employers.

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

It is expected that this rule will help secure the obligations of existing self-insured employers and also facilitate the process required for any potential employers who may want to become self-insured.

C. Economic Impact on Citizens/Public at Large.

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

Date: 02-18 , 2004

Signature of Agency Head or Authorized Representative

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 19
SELF INSURANCE RISK POOLS

This exempt legislative rule provides for the creation and funding of two risk pools for the benefit of self-insured employers to assist in securing the obligations of bankrupt and default self-insured employers.

The Security Pool is established to pay claims of bankrupt and default self-insured employers with dates of injury prior to July 1, 2004.

The Guaranty Pool is established to pay claims for bankrupt and default self-insured employers with dates of injury on or after July 1, 2004.

The rule requires participation in the program by self-insured employers. The rule requires that self-insured employers obtain security for certain claims and provides for alternate security payment in the event the self-insured employer is under-secured. The rule provides for the funding of each pool.

The rule complies with the provisions of W. Va. Code § 23-2-9(i).

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
PUBLIC HEARING
APRIL 12, 2004 – 1:00 P.M.

ATTENDANCE SHEET

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

NAME	Do you wish To speak? (Yes/No)	Which Rule or Rules Do You Want to Discuss?
Tom Hudson		
Mike Alberson		
Mike Carmenda	Yes	19
Leslie Blackburn	no	
Rachel Naylor	No	
Gary Kennedy	NO	

WEST VIRGINIA WORKERS' COMPENSATION BOARD OF MANAGERS
PUBLIC HEARING
APRIL 12, 2004 – 1:00 P.M.

ATTENDANCE SHEET

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

NAME	Do you wish To speak? (Yes/No)	Which Rule or Rules Do You Want to Discuss?
Roger Tincher	No	
Twila St. Clair - Frank Gates	No	
Bob Weaver Thomas P. Maroney, LC.	NO	
Becky Holmes	No	
Susan Osborne	No	
Frank Kottmyer	No	
Phil Nicholson	No	
Ron Casto	No	

BEFORE THE WEST VIRGINIA WORKERS' COMPENSATION COMMISSION
BOARD OF MANAGERS

IN RE: RULE 19 - Self Insurance Risk Pools

ORIGINAL

TRANSCRIPT OF PROCEEDINGS had at the public hearing in the above referenced matter, held on April 12, 2004, at 1:06 p.m., before the West Virginia Workers' Compensation Commission Board of Managers, at the Charleston Civic Center, Charleston, West Virginia, pursuant to notice duly given to all interested parties.

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

ATTENDING REPORTER: JENNIFER L. JIMISON, CCR

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

MEMBERS OF THE BOARD OF MANAGERS:

STEVE WHITE, Chairman
CRAIG SLAUGHTER
GENE F. BAILEY
EVERETTE SULLIVAN
ROBERT HARDESTY
PAUL THOMPSON
CHRIS JARRETT
DOUG MERRITT
RICHARD HUMPHRIES
JOHN JOHNSON (via telephone)

(Call to order, 1:06 p.m.)

CHAIRMAN WHITE: Pursuant to Chapter 29-A of the West Virginia Code and pursuant to the February 18, 2003 (sic), notice of public hearing on proposed Rule 5 by the Workers' Compensation Commission with the West Virginia Secretary of State's Office, I hereby call to order the public hearing on Rule 19, Self Insurance Risk Pools.

I have a -- it's been indicated in the attendance sheet that there's Mike Cavender wishes to address Rule 19. Would you please come forward, sir?

MR. CAVENDER: Good afternoon. My name is Mike Cavender. I'm with Acordia Employer Service Company.

First of all, I'd like to say that Acordia welcomes the opportunity to offer comment on the proposed rule to establish security risk pools in accordance with 23-2-9 of the West Virginia Code.

Before making comments specifically on

the rule, we'd like to offer some general observations that we hope the Board of Managers will consider in the review of this rule as well as in future actions.

Senate Bill 2013 was passed in response to a crisis situation. Because of a combination of factors the Workers' Compensation Fund deficit was increasing and its cash position was deteriorating at an alarming pace.

The legislature put in place changes in structure benefit level, and eligibility to allow the new Board of Managers and Workers' Compensation Commission leadership the opportunity to reverse the inflation in cash losses and continued high levels of incurred costs.

At the same time, the legislature recognized the relatively high financial burden that Workers' Compensation represents to West Virginia employers by forbidding any increase in premium rates through FY07, after allowing a maximum 15 percent increase for the current fiscal

year.

We believe that this was prudent and necessary to keep West Virginia from lengthening its lead as the highest cost state to employers for Workers' Compensation expenses.

I would like to point out to the Board that while one of the objectives of SB2013 was to provide insulation to increased costs to state businesses while solutions can be studied, that self-insured employers have received less protection from costs increases than others.

To begin with, the legislation handed back $80 million in insured liabilities for second injury life awards for self-insured employers, as described clearly in the fiscal year 2003 audited financial statements, and you can find that in the Financial Highlights section on page 8 of those statements.

This $80 million goes directly to self-insured employers' balance sheets.

Secondly, a revised security assessment

formula, in combination with changes in the discount rate, is resulting in some substantial increases in security requirements. The many recent notices that we've received from the Commission when our clients show an average increase in excess of 30 percent.

And this is at a time when most self-insurers are having a very difficult time finding bonds. Even when bonds are available collateral approaching 100 percent is often required which ties up much needed capital and inhibits growth.

And finally, self-insured employers face the added expenses of self-administration on July 1st. While the opportunity to administer claims directly is a long sought improvement to the West Virginia system, it must be recognized that it is not a cost neutral change.

The Commission itself charges self-insured employers in excess of $20 million a year for the work that it will hand over on July 1st.

This constitutes more added expense for

self-insured companies, although the Board will have the opportunity to adjust fees paid to the Commission for administrative services when premium rate components are considered in the near future.

During the moratorium on rate increases imposed by SB2013, the Board of Managers is to do many things, including studying alternative deficit management strategies.

Unsecured liabilities of defaulted self-insured employers are part of the deficit and therefore they should be included in the review of the alternatives, and not considered apart from them.

While Rule 19 is a reasonable approach to establishing a pool to cover self-insured liability, we believe that it should be made clear in the rule that it is not meant to provide an alternative means of increasing charges to self-insured employers that were prohibited under Senate Bill 2013.

The collection of funds to cover under-secured cash payment made by the Commission is a component in self-insured premium rates. These rates cannot be increased until fiscal year 2007.

We therefore recommend that the language in Section 8.1.c of the proposed rule be amended to recognize the statutory prohibition on increases.

While there will still be increases in cost imposed in the form of contributions to the Guaranty Pool, for the most part this change will preserve the intent of legislature to hold the line on aggregate costs to West Virginia employers while universal solutions to deficit problems can be considered.

Thank you.

CHAIRMAN WHITE: Thank you, Mr. Cavender. Are there any questions for Mr. Cavender?

(No response.)

CHAIRMAN WHITE: Thank you, Mr. Cavender.

Are there any other individuals seeking

to public comment on Rule 19?

MR. HUFFMAN: Mr. Chairman, if I could for a second. I'm Tim Huffman from Jackson and Kelly. Henry Bowen, who is chair of the West Virginia Self-Insurers Association was to speak today.

He's supposed to be on his way. I don't know where he is. I know today is the close of pubic comment, so would it be possible to wait a few minutes to give him an opportunity to get here?

MR. SUTER: A statement that you just made, I wanted to clarify for the record. It is not the close of public comment today.

If you will recall, we had originally scheduled -- I'm sorry, for the record, this is Randy Suter.

We had originally scheduled this public hearing for April the 14th and had moved it back two days to accommodate some members' schedule.

When we did that we left the comment

period, the period that we will receive written comments, open until 5:00 on April the 14th. So we did not change the end date at all.

MR. HUFFMAN: With that understanding, Mr. Chair, I would reserve Mr. Bowen's right to file whatever comments he has in written form. He's apparently unable to make it.

CHAIRMAN WHITE: That will be done. Any further public comments?

(No response.)

CHAIRMAN WHITE: Is there any business to come before the Board?

(No response.)

CHAIRMAN WHITE: Having no more comments, I hereby declare the public hearing on Rule 19, Self Insurance Risk Pools closed.

Having no further business, entertain a motion of adjourn?

MR. SULLIVAN: So moved.

MR. JARRETT: Seconded.

CHAIRMAN WHITE: Motion seconded. All

those in favor by saying aye.

(Chorus of ayes.)

CHAIRMAN WHITE: Opposed?

(No response.)

CHAIRMAN WHITE: The meeting and the hearing is adjourned. Thank you.

(Whereupon, the public hearing on Rule 19 was adjourned at 1:13 p.m.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

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

Jennifer L. Jimison
Certified Court Reporter

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

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

Form #1

Do Not Mark In This Box

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: §§23-1-1a(j)(3); 23-2-9(i)

AMENDMENT TO AN EXISTING RULE: YES___NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 19

TITLE OF RULE BEING PROPOSED: Self Insurance Risk Pools

DATE OF PUBLIC HEARING: April 12, 2004** (Previously scheduled for 4/14/04) TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleson, West Virginia
**Please note the change of the date for this public hearing from 4/14/04 to 4/12/04.
However, written comments will be received through 5:00 p.m. on 4/14/04.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T. J. Obrokta
Executive Offices
Workers' Compensation Commission
~~4700 MacCorkle Avenue, S.E.~~
Charleston, WV 25304
Fax # (304) 926-5372

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

FILED
2004 FEB 19 P 3:51
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 19
SELF INSURANCE
RISK POOLS

§85-19-1. General.

1.1. Scope. --This exempt legislative rule provides for the creation of risk pools for the benefit of self-insured employers to secure the payment of obligations of self-insured employers.

1.2. Authority. -- W.Va. Code §§23-1-1a, 23-2-4; 23-2-9(i). Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission are not subject to legislative approval as would otherwise be required under West Virginia Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. –

§85-19-2. Purpose of Rule.

This rule provides for the creation and funding of two risk pools to secure the obligations of self-insured employers.

§85-19-3. Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

3.14. "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.

3.15. "This rule" means this legislative rule designated as 85 C.S.R. 19, "Self Insurance Risk Pools."

§85-19-4. Self Insurance Pools; Establishment; Application of Funds.

4.1. The Commission shall establish two pools of funds to cover claims payments of default and bankrupt self-insured employers.

4.2. The Commission shall establish a Security Pool. The Security Pool shall pay claims for bankrupt and default self-insured employers with dates of injury prior to July 1, 2004.

a. The Commission shall segregate all contributions to the Security Pool, including all investment income earned from Security Pool proceeds.

b. The Commission shall not expend proceeds from the Security Pool corpus or its earnings for any other purposes than for obligations of the security pool.

4.3. The Commission shall establish a Guaranty Pool. The Guaranty Pool shall pay claims for bankrupt and default self-insured employers with dates of injury on or after July 1, 2004.

a. The Commission shall segregate all contributions to the Guaranty Pool, including all investment income earned from Guaranty Pool proceeds.

b. The Commission shall not expend proceeds from the Guaranty Pool corpus or its earnings for any other purposes than for obligations of the Guaranty Pool.

§85-19-5. Participation.

5.1. All active self-insured employers and inactive self-insured employers having active claims shall participate in the Security Pool.

a. Inactive self-insured employers having active claims who decline to participate shall extinguish their liability through a buyout as calculated by the Commission.

5.2. All active self-insured employers shall participate in the Guaranty Pool. Inactive self-insured employers that become inactive on or after July 1, 2004, may be required to participate in the Guaranty Pool under the provisions of section ten of this rule.

§85-19-6. Surety Requirements.

6.1. All employers who participate in the Security Pool must fully secure their liabilities as of June 30, 2004, with the exception of those that meet the following criteria:

a. Employers that have been complying, and continue to comply with a Commission approved security installment increase plan; or

b. Employers that meet the eligibility requirements and pay the alternate security surcharge as provide in section seven of this rule.

6.2. New self-insured employers who were previously regular subscribers must secure their liability up through June 30, 2004 or must pay the Commission an amount equal to the liability amount attributable to periods through June 30, 2004, including incurred but not reported liabilities.

6.3. The Commission shall perform an annual surety review based upon the Commission's actuarial calculations to determine the required surety level for periods prior to July 1, 2004.

a. Existing surety using old bond language will be credited to the employer at the estimated actual value of the bond as determined by the Commission's actuary.

6.4. Self insured employers shall not be required to provide surety, other than through Guaranty Pool assessments or alternate surety assessments, for liabilities attributable to claims with dates of injury on or after July 1, 2004.

a. The Commission may require additional surety for claims with dates of injury on or after July 1, 2004 or permit the employer to pay the alternate surety surcharge in the manner prescribed in the requirements for under-secured self-insured employers if it is determined that an employer's financial condition has deteriorated compared to the previous year's financial analysis by the Commission. The employer's financial condition will be analyzed using objective benchmarks to determine a deteriorating financial condition as provided in the rule governing self-administration of self-insurance.

§85-19-7. Under-secured self-insured employers.

7.1. Self-insured employers who are not fully secured as of June 30, 2004 may be eligible to pay an alternate surety surcharge into the Security Pool. The alternate security surcharge shall not be applicable to those employers that are successfully meeting installment increases in security, as describe in subsection 6.1.

7.2. Eligibility. To be eligible to pay the alternate surety surcharge, the under-secured self-insured employer must provide evidence that it is unable to obtain the required amount of surety. Upon receipt of the evidence provided by the self-insured employer, the Commission shall take the following steps:

a. The Commission shall secure a financial consultant knowledgeable in the surety market to verify the employer's evidence of their inability to obtain surety.

b. The consultant shall make a recommendation to the Commission as to whether the employer should be permitted to pay the alternate surety surcharge instead of providing surety.

7.3. Surcharge. The alternate surety surcharge shall be based on the individual self-insured employer's commercial cost of surety if it were commercially available to that employer.

a. The consultant engaged for the purpose of assisting the Commission in determining eligibility for this surcharge shall also make a recommendation to the Commission regarding the individual self-insured employer's commercial cost of surety, if available.

7.4. Determinations. Upon receipt of the financial consultant's recommendations, the Commission shall render a decision regarding the eligibility of the self-insured employer for the alternate surety surcharge and the amount of the surcharge.

7.5. The alternate surety surcharge is in addition to the required assessments to fund the Guaranty Pool.

§85-19-8. Security Pool Funding.

8.1. The Security Pool shall be funded by the following sources:

a. Proceeds received from the draw-down on surety documents in the event of a self-insured employer's default;

b. Proceeds from any alternate security surcharge;

c. Proceeds received from assessments pursuant to chapter twenty-three of the West Virginia Code;

d. All graduated premium tax payments made by participating self-insured employers for periods through the quarter ending June 30, 2004; and

e. Proceeds received from any alternative funds identified and made available through legislative enactment.

8.2. The initial funding for the Security Pool shall be ten million dollars ($10,000,000.00).

8.3. Should the proceeds identified in subsection 8.1 be inadequate to fully satisfy the obligations of the Security Pool, the Executive Director and the Board of Managers shall identify and pursue such alternative funding as shall be necessary.

§85-19-9. Guaranty Pool Funding.

9.1. In order to initially fund the Guaranty Pool, the Commission shall assess self-insured employers.

a. Assessments shall be equal to 2% of the self-insured employer's preceding fiscal year's annual claims indemnity payments, less settlements, or a minimum of $5,000 whichever is greater. Assessments shall continue until the initial funding level of the Guaranty Pool is met.

9.2. The initial funding level for the Guaranty Pool shall be ten million dollars ($10,000,000).

a. The initial funding level represents approximately two (2) times the payments made during calendar year 2003 for bankrupt and defaulted self-insured employers.

9.3. After the initial funding level is reached, the Guaranty Pool shall be funded at a level equal to two (2) times the previous year's payout from the Guaranty Pool.

a. The Commission shall assess self-insured employers to fund the Guaranty Pool in any fiscal year in which the aggregate proceeds for the Guaranty Pool are less than the required funding level.

b. Assessments shall be equal to 2% of the preceding year's annual claims indemnity payments, less settlements, or a minimum of $5,000 whichever is greater.

9.4. Employers who become self-insured after the establishment of the Guaranty Pool will be assessed an amount equal to 5% of the preceding year's base-rated premium, or a minimum of $5,000 whichever is greater, for a period of 3 years. Thereafter, assessments shall be made as needed in accordance with the same methodology utilized for other self-insured employers.

§85-19-10. Converting to Regular Subscriber Status.

Active self-insured employers who become regular subscribers or inactive, either voluntarily or involuntarily on or after July 1, 2004, and who do not buy out their liability shall leave all existing surety in place and shall continue to be assessed the Security Pool and Guaranty Pool assessments for a period of ten (10) years. This provision is not to be construed as excusing any obligation of a terminated self-insured employer imposed by the Act or by other rules of the Commission.

§85-19-11. Severability.

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

PUBLIC COMMENT ON THE SERIES 19 RULE
SELF INSURANCE RISK POOLS

Prepared by Acordia Employers Service
April 12, 2004

Acordia Employers Service welcomes the opportunity to offer comment on the proposed rule to establish security risk pools in accordance with 23-2-9 of the West Virginia Code. Before making comment specifically on the rule, however, we would like to offer some general observations that we hope the Board of Managers will consider in the review of this rule, as well as in future actions.

Senate Bill 2013 was passed in response to a crisis situation. Because of a combination of factors the workers' compensation fund deficit was increasing and its cash position was deteriorating at an alarming pace. The legislature put in place changes in structure, benefit level, and eligibility to allow the new Board of Managers and the Workers' Compensation Commission leadership the opportunity to reverse the inflation in cash losses and continued high level of incurred costs. At the same time, the legislature recognized the relatively high financial burden that workers' compensation represents to West Virginia employers by forbidding any increases in premium rates through FY07, after allowing a maximum 15% increase for the current fiscal year. We believe that this was prudent and necessary to keep West Virginia from further lengthening its lead as the highest cost state to employers for workers' compensation expenses.

I would like to point out to the board that while one of the objectives of SB2013 was to provide insulation to increased costs to state businesses while solutions can be studied, that self-insured employers have received less protection from cost increases than others. To begin with the legislation handed back $80 million in insured liabilities for second injury life awards to self-insured employers, as described clearly in the FY2003 audited financial statements in the Financial Highlights section on page 8. This $80 million goes directly to self insured employers' balance sheets.

Secondly, a revised security assessment formula, in combination with changes in the discount rate, is resulting in some substantial increases in security requirements. The many recent notices that we have received from the commission on our clients show average increases in excess of 30%. This is at a time when most self-insurers are having a very difficult time finding bonds. Even when bonds are available collateral approaching 100% is often required which ties up much needed capital and inhibits growth.

Finally, self-insurers face the added expenses of self-administration on July 1. While the opportunity to administer claims directly is a long sought improvement to the West Virginia system, it must be recognized that it is not a cost neutral change. The commission itself charges self-insured employers in excess of $20 million a year for the work that it will hand over on July 1. This constitutes more added expense for self-insured companies, although the Board will have the opportunity to adjust fees paid to the

Commission for administrative services when premium rate components are considered in the near future.

During the moratorium on rate increases imposed by SB2013 the Board of Managers is to do many things, including studying alternate deficit management strategies. Unsecured liabilities of defaulted self-insured employers are part of the deficit and therefore they should be included in the review of alternatives, not considered apart from them.

While Rule 19 is a reasonable approach to establishing a pool to cover self insured liabilities, we believe that it should be made clear in the rule that it is not meant to provide an alternative means of increasing charges to self insured employers that were prohibited in SB2013. The collection of funds to cover under-secured cash payments made by the Commission is a component in self-insured premium rates. These rates cannot be increased until FY2007. We therefore recommend that the language in Section 8.1, c. of the proposed rule be amended to recognize the statutory prohibition on increases.

While there will still be increases in cost imposed in the form of contributions to the Guaranty Pool, for the most part this will preserve the intent of the legislature to hold the line on aggregate costs to West Virginia employers while universal solutions to deficit problems can be considered.

STEPTOE & JOHNSON PLLC
ATTORNEYS AT LAW

Bank One Center, Seventh Floor
P.O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000 (304) 353-8180 Fax
www.steptoelaw.com

FACSIMILE TRANSMISSION

TO: T. J. Obrokta, General Counsel

COMPANY: West Virginia Workers' Compensation Commission

FAX NO: 926-5372

FROM: Henry C. Bowen, Executive Secretary

DATE: April 12, 2004

NUMBER OF PAGES (including this coversheet): 5

If you do not receive all the pages, please call back as soon as possible.
The facsimile operator's number is (304) 353-8161.

COMMENTS: ATTN: DIANE

Pursuant to our telephone conversation today, attached is the WVSIA's comment regarding Title 85 Series 19, Self Insurance Risk Pools, along with a cover letter signed by Henry C. Bowen, Executive Secretary. You advised that you would see that the attached is distributed among the Board of Managers. Thank you so much for you help in this regard. If you have any questions or difficulties in reading the attached, I can be reached at 353-8000 Ext. 241.

Valerie Sutphin – VS
Secretary to Henry C. Bowen, Esquire

NOTICE - CONTENTS ARE PRIVILEGED AND CONFIDENTIAL. This communication is intended for the sole use of the above-named addressee. It is covered by the attorney-client and/or work product privileges. Please deliver this communication to the addressee and protect it from inadvertent disclosure or dissemination. If this communication has been improperly directed or the addressee is not located at the receiving location, please notify the sender and return the communication to address shown above. Thank you.

NO. 958740.00003

CH670692.1

Member of the Worldwide Network of Independent Law Firms
TERRALEX

West Virginia Self-Insurers Association
Post Office Box 1573
Charleston, West Virginia 25326
Tax ID# 55-0654337

April 12, 2004

Via Facsimile and U.S. Mail
T. J. Obrokta, General Counsel
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

Re: Comment - Title 85 Series 19, Self Insurance Risk Pools
West Virginia Self-Insurers Association

Dear Mr. Obrokta:

Enclosed please find our written comment filed on behalf of the West Virginia Self-Insurers Association regarding Title 85 Series 19, Self Insurance Risk Pools.

Thank you for your attention and consideration regarding the enclosed.

Very truly yours,

Henry C. Bowen

Henry C. Bowen
Executive Secretary

HCB/vs

Enclosure

958740.00003

CH670682.1

MARKUP

COMMENT - TITLE 85 SERIES 19
SELF INSURANCE RISK POOLS - West Virginia Self-Insurers Association

April 12, 2004

On behalf of the Association (WVSIA), we appreciate the opportunity to address the Workers' Compensation Commission's proposed Series 19 Rule pertaining to self insurance risk pools.

The WVSIA has serious concerns about the Rule as proposed. The Rule creates two pools, Security and Guaranty, which are primarily differentiated by the claims covered and funding mechanisms. The Security Pool is to pay all claims for bankrupt and defaulted self-insured employers with dates of injuries prior to July 1, 2004. Among the sources for funding the Security Pool are proceeds received from any alternative funds identified and made available through legislative enactment and initial funding from the Workers' Compensation Commission in the amount of $10 million dollars. The funding authorized by the legislature was vetoed.

As the Board of Managers is aware, the Workers' Compensation Commission has identified that a small number of authorized self-insurers carry unsecured liabilities that approximate $150 million dollars. As we are all aware, the largest single unsecured liability is that of Weirton Steel Corporation, an employee-owned steel corporation established in the early 1980s and authorized to self-insure its claim liabilities. Since 1990, the Workers' Compensation Commission has been aware of Weirton's substantial unsecured liability. Beginning with Commissioner Richardson and continuing to Executive Director Burton, Workers' Compensation leaders have developed a number of alternatives which allowed self-insurers who were unable to secure or had financial difficulty in securing commercial surety, to meet their security obligations by increasing under secured amounts of surety over time or by payment of a graduated premium tax. Under these alternative programs, many under secured self-insurers have successfully narrowed the total of unsecured liabilities.

Clearly Governor Wise and many legislative leaders offered a bold solution to provide alternative funding for the anticipated Weirton Steel default which will result by the expected approval in federal bankruptcy court of the sale of Weirton Steel's assets which will not provide sufficient money to pay Weirton's unsecured workers' compensation claim obligations.

WVSIA believes that the legislature's failure to resolve the Weirton Steel crisis requires a review of the Rule and evaluation of its proposed scope and, indeed, assessment of the legal authority of the Board of Managers to adopt it.

In reviewing the issue of unsecured self-insured claims liabilities, is there really any difference between them and the unfunded claims liabilities that make up the unfunded deficit for subscribers? WVSIA submits it is exactly the same. The Workers' Compensation Commission today is facing a larger deficit than ever, despite reforms enacted by the legislature in 1995, 1999 and 2003.

unsecured claims liability of SIS
vs
unfunded deficit for subscribers

Under the leadership of Executive Director Burton, workers' compensation has implemented a number of important initiatives which should allow the Workers' Compensation Commission to get its claim costs under control. However, WVSIA believes that it is noteworthy that as of June 30, 2002, that the then-estimated $3.56 billion dollars in unfunded liability, 15% was attributable to second injury life claims granted to employees (or former employees) of self-insurers which were mandated by law in 1990 to buy second injury coverage (85% of the unfunded second injury liability belonged to subscribers at the close of FY 2002).

where do these numbers come from?

Even though self-insurers paid premium tax charged for mandatory second injury coverage, the premiums were wholly insufficient to fund the liberally awarded permanent total disability second injury life awards which resulted. By FY 1998, the Workers' Compensation Commission began taxing all self-insurers for these second injury claims already awarded and for those expected in the future. By the time the legislature passed its 2003 reforms, self-insurers had paid in excess of $100 million dollars in additional taxes to fund these claims when the Second Injury Fund was abolished. Self-insurers have also contributed to the overall deficit which is paid by subscribers, for the benefit of subscribers.

legally sound in Kaiser

What? How?

Why then does WVSIA seek alternative funding for the $75 million dollars of unsecured claims of the Weirton Steel default? The answer is simple, it is fair and equitable.

and required by our statutes

perspective

Just as the Workers' Compensation Commission and the Performance Council determined that it was fair and equitable for all self-insurers (including those who were completely self-insured and excused by the legislature in 1990 from the mandatory purchase of second injury coverage) to contribute to the deficit reduction, it is fair and equitable that all employers share in the default caused by unsecured self-insurers.

Inaccurate

Wow!

Self-insurers did not have any vote on allowing Weirton Steel to become self-insured and, most importantly, to remain self-insured. To the contrary, over the last 14 years WVSIA's Board of Managers has been aware that Weirton Steel presented a huge potential default. WVSIA assumes that because Weirton was once our state's largest private employer, that the Workers' Compensation Commission elected not to force Weirton Steel into the Fund as a subscriber when it was not financially able to secure by commercial means its claims liabilities. WVSIA always understood that the issue for Weirton Steel and its employees was jobs would be lost if that occurred.

SI's pay for SI defaults

From the outset, and throughout the discussion of this proposed Rule, WVSIA has consistently expressed its belief that the law does not allow the Board of Managers to find that only self-insurers have the responsibility to pay for other self-insured defaults. WVSIA acknowledges that the Workers' Compensation Commission has since fiscal year 1998, charged self-insurers for self-insured default and that self-insurers are currently paying $4.3 million dollars for such claims. However, the law does not require that, and most importantly, the law does not state that. Prior to FY 1998, self-insurers were charged a flat percentage of their base rate (approximately 1%) for the other losses indicated in W.Va. Code §23-2-9(c)(2). The Performance Council changed the rate making methodology in FY 1998 and began the process of segregating, wherever possible, charges belonging to self-insurers and subscribers beginning first with the Second Injury Fund (W.Va. Code

what about before this time

what did this flat % come out to??

§23-3-1) even though there was no such language in the Second Injury Fund which expressly required the Performance Council's action.

Now that the legislature has failed to enact alternative funding for the Security Pool, WVSIA asks the Board of Managers to abandon Rule 19 for now. WVSIA asks you to wait until the legislature acts before you adopt this Rule. If you will not agree to do that, then we ask that you not require any assessments to fund the Security Pool and that you honor the legislature's limitation in Senate Bill 2013 not to raise self-insured employer rates for FY '04, '05 and '06.

The Workers' Compensation Commission has publicly stated its conclusion that self-insurers are solely liable for defaults of other self-insurers because of its current practices of charging self-insurers. This section of law is clearly subject to the bar on rate increases just as subscribers' rates are barred from increases through FY 2006. While the authority for the Board of Mangers to establish a Security Pool (§23-2-9(i)) provides for assessments, it may be read as providing an alternative method for each self-insurer to secure its own payment obligations.

If the Board of Managers proceeds to adopt Rule 19 now, and concludes that it will authorize assessments, it should understand how truly unfair and inequitable its action will be. You will be saying that the cities of Charleston, Huntington, Fairmont, Wheeling and Parkersburg will have to contribute increased workers' compensation taxes as contribution to Weirton Steel's self-insurer default; however, not one subscriber in, or indeed, the city of Weirton itself, is required to pay for this default; not one business that benefitted by the fact that Weirton Steel was the state's largest private employer for years; not one service provider or vendor or retailer; any health care provider or, in fact, no employer in Hancock County except self-insurers, will be asked to contribute for this default.

Instead, you will turn to a small number of other self-insured employers, most of which derived no benefit from Weirton Steel or its employees, to pay for Weirton's default. Just as the Workers' Compensation Commission demands self-insurers contribute to the unfunded deficit, WVSIA asks in return that all employers contribute to the defaults of self-insurers.

If not, the potential economic consequences, as already recognized by Governor Wise and other legislative leaders, may be drastic. WVSIA urges that you do not assess the Security Pool until you know what the legislature may elect to do in dealing with the total workers' compensation deficit and we urge you to support that the unsecured claims liabilities be included within any proposed remedy.

Thank you for your consideration.

PUBLIC COMMENT ON THE SERIES 19 RULE
SELF INSURANCE RISK POOLS

Prepared by Acordia Employers Service
April 12, 2004

Acordia Employers Service welcomes the opportunity to offer comment on the proposed rule to establish security risk pools in accordance with 23-2-9 of the West Virginia Code. Before making comment specifically on the rule, however, we would like to offer some general observations that we hope the Board of Managers will consider in the review of this rule, as well as in future actions.

Senate Bill 2013 was passed in response to a crisis situation. Because of a combination of factors the workers' compensation fund deficit was increasing and its cash position was deteriorating at an alarming pace. The legislature put in place changes in structure, benefit level, and eligibility to allow the new Board of Managers and the Workers' Compensation Commission leadership the opportunity to reverse the inflation in cash losses and continued high level of incurred costs. At the same time, the legislature recognized the relatively high financial burden that workers' compensation represents to West Virginia employers by forbidding any increases in premium rates through FY07, after allowing a maximum 15% increase for the current fiscal year. We believe that this was prudent and necessary to keep West Virginia from further lengthening its lead as the highest cost state to employers for workers' compensation expenses.

I would like to point out to the board that while one of the objectives of SB2013 was to provide insulation to increased costs to state businesses while solutions can be studied, that self-insured employers have received less protection from cost increases than others. To begin with the legislation handed back $80 million in insured liabilities for second injury life awards to self-insured employers, as described clearly in the FY2003 audited financial statements in the Financial Highlights section on page 8. This $80 million goes directly to self insured employers' balance sheets.

Secondly, a revised security assessment formula, in combination with changes in the discount rate, is resulting in some substantial increases in security requirements. The many recent notices that we have received from the commission on our clients show average increases in excess of 30%. This is at a time when most self-insurers are having a very difficult time finding bonds. Even when bonds are available collateral approaching 100% is often required which ties up much needed capital and inhibits growth.

Finally, self-insurers face the added expenses of self-administration on July 1. While the opportunity to administer claims directly is a long sought improvement to the West Virginia system, it must be recognized that it is not a cost neutral change. The commission itself charges self-insured employers in excess of $20 million a year for the work that it will hand over on July 1. This constitutes more added expense for self-insured companies, although the Board will have the opportunity to adjust fees paid to the

Commission for administrative services when premium rate components are considered in the near future.

During the moratorium on rate increases imposed by SB2013 the Board of Managers is to do many things, including studying alternate deficit management strategies. Unsecured liabilities of defaulted self-insured employers are part of the deficit and therefore they should be included in the review of alternatives, not considered apart from them.

While Rule 19 is a reasonable approach to establishing a pool to cover self insured liabilities, we believe that it should be made clear in the rule that it is not meant to provide an alternative means of increasing charges to self insured employers that were prohibited in SB2013. The collection of funds to cover under-secured cash payments made by the Commission is a component in self-insured premium rates. These rates cannot be increased until FY2007. We therefore recommend that the language in Section 8.1, c. of the proposed rule be amended to recognize the statutory prohibition on increases.

While there will still be increases in cost imposed in the form of contributions to the Guaranty Pool, for the most part this will preserve the intent of the legislature to hold the line on aggregate costs to West Virginia employers while universal solutions to deficit problems can be considered.

MEMORY TRANSMISSION REPORT

TIME : APR-12-2004 01:14PM
TEL NUMBER :
NAME :

FILE NUMBER : 085

DATE : APR-12 01:13PM

TO : 95586101

DOCUMENT PAGES : 003

START TIME : APR-12 01:13PM

END TIME : APR-12 01:14PM

SENT PAGES : 003

STATUS : OK

FILE NUMBER : 085 *** SUCCESSFUL TX NOTICE ***

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

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

FAX

Date: 4-12-04
Number of pages (including cover sheet): 3

To: Margaret Rice
Telephone:
Fax: 558-6101
CC:

From: Randall B. Suter
Telephone: (304) 926-5223
Fax: (304) 926-5441

PLEASE MARK: ☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please comment

Margaret,
For your records
Please make with the Court Reporter.
Thanks,
Randy

Eastern Associated Coal Corp.
701 Market Street, Suite 770
St. Louis, Missouri 63101-1826
314.342.3400

April 5, 2004

RECEIVED
2004 APR -8 A 7:38
WORKERS' COMPENSATION COMM
EXECUTIVE OFFICE

VIA HAND DELIVERY

Gregory A. Burton
Executive Director
State of West Virginia
Workers' Compensation Commission
Bureau of Employment Programs
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304-1964

Re: Draft Rule – Self Insurance Risk Pool

Dear Mr. Burton:

Eastern Associated Coal Corporation ("Eastern") and Pine Ridge Coal Company ("Pine Ridge") submit these comments regarding draft Rule 19. Since draft Rule 19 is unchanged from the version circulated by the Workers' Compensation Commission ("Commission") on January 9, 2004, Eastern and Pine Ridge stand by our January 21, 2004 comments on the January 9, 2004 draft.

Eastern and Pine Ridge continue to strongly urge that the Commission reject the provisions of the draft Rule as to the creation of a Security Pool. In particular, Eastern and Pine Ridge urge rejection of the proposal that solvent self-insurers such as Eastern and Pine Ridge become responsible for past payment defaults by other unrelated self-insurers. As long-term West Virginia employers that have met our responsibility as worker's compensation self-insurers, Eastern and Pine Ridge should not be made responsible for the failure of other self-insurers to meet their obligations and for mismanagement of the workers' compensation program. Any attempt to assess us for deficiencies in the program caused by others would be an uncompensated taking and a violation of our substantive due process rights under the U.S. Constitution.

We appreciate your consideration of these comments.

Sincerely,

Jiri Nemec
President
Eastern Associated Coal Corp.

Jiri Nemec
President
Pine Ridge Coal Company

JN:lm
Attachment

cc: T. J. Obrokta, Esquire
General Counsel, Workers' Compensation Commission

Eastern Associated Coal Corp
202 Laidley Tower
P.O. Box 1233
Charleston, WV 25324
Phone: (304) 344-0300

January 21, 2004

VIA HAND DELIVERY

Gregory A. Burton
Executive Director
Workers' Compensation Commission
Bureau of Employment Programs
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304-1964

Re: Draft Rule - Self Insurance Risk Pool

Dear Mr. Burton:

Eastern Associated Coal Corporation ("Eastern") and Pine Ridge Coal Company ("Pine Ridge") submit these comments regarding draft Rule 19 circulated by the Workers' Compensation Commission ("Commission") on January 9, 2004. Eastern and Pine Ridge strongly urge that the Commission reject the provisions of the draft Rule as to the creation of a Security Pool. In particular, Eastern and Pine Ridge urge rejection of the proposal that solvent self-insurers such as Eastern and Pine Ridge become responsible for past payment defaults by other unrelated self-insurers.

Eastern and Pine Ridge recognize that the state faces serious underfunding in the workers' compensation program. However, the solution offered by draft Rule 19, in which solvent self-insurers would be made solely responsible for the past payment defaults of other self-insurers, makes little sense, either as a policy or legal matter.

Solvent self-insurers such as Eastern and Pine Ridge did not create this problem and should not be held financially responsible to solve it. Eastern and Pine Ridge are long-standing employers in the State of West Virginia which have met all workers' compensation claims as due and have duly paid premiums for

the administrative expenses of the workers' compensation fund as required. Eastern has also purchased second injury coverage and catastrophic coverage from the State and has duly paid premiums for such coverage, and Pine Ridge has purchased catastrophic coverage from the State and has duly paid premiums for such coverage as well. It is unfair in the extreme to punish those who have met their obligations to their workers and to the State by making them responsible for the errors and omissions of others.

It is undisputed that the Commission's predecessor mismanaged its responsibilities by failing to set aside monies, to create and maintain a surplus fund as a separate account, and to require adequate security. The Commission's predecessor admitted "[t]hat a large part of the deficit problem [faced by workers' compensation today] is the result of a failure of prior commissioners to fulfill their fiduciary responsibilities under the Workers Compensation Act." (See Proposed Findings of Fact No. 13 in the 1998 Rate-Making Challenge, 2/29/00, p. 160. Because the current financial problems of the workers' compensation system resulted from the actions and inaction of the Commission's predecessor, it should fall to the Commission to develop alternative funding sources that do not focus on solvent self-insurers.

We understand that potential funding sources do exist and are being explored, such as funding from the tobacco settlement and a possible new bond issuance. These broader based funding sources are likely to provide a more effective long-term solution to the problems in the workers' compensation program than the draft Rule 19 proposal. Because of the enormity of the unfunded liability (in the billions of dollars), looking to solvent self-insurers to provide the missing funds is not only unfair, it would be unworkable. Currently solvent companies such as Eastern and Pine Ridge do not have inexhaustible financial resources to meet the obligations of insolvent companies. By imposing potentially gigantic financial obligations on a limited set of solvent self-insurers, the Commission will ensure that fewer and fewer companies will wish to do business in West Virginia and that the financial condition of current employers will become more and more precarious. The problem of funding the past deficits will become more rather than less difficult over time.

The Commission needs to take more time to develop a more appropriate solution. Eastern and Pine Ridge first received notice of the proposed rule when it was circulated by the Commission on January 9, 2004. The Finance Committee then considered the proposal at its January 20, 2004 meeting and the proposal is scheduled to be taken to the Board of Managers on January 27, 2004. The expedition of this process does not comport with the seriousness of the issues and the need to develop a workable, long-lasting decision.

Senate Bill 2013 does not mandate a solution in which self-insurers become solely responsible for the problems of the workers' compensation fund nor does the legislation require that the Commission act with undue haste. Article 23-2-9(c) of Senate Bill 2013 does not fix a date for the establishment of regulations governing self-insurers' premiums, and it is critical that the Commission take its time and consider alternatives.

Further litigation over the validity of rules designed to address the problems in the workers' compensation fund is not in the interest of anyone. However, placing responsibility for the defaults of insolvent self-insurers on solvent self-insurers will force the solvent self-insurers to take action to protect their rights. The proposal has all the hallmarks of an unconstitutional taking: it imposes enormous and disproportionate liability on the self-insurers; self-insurers such as Eastern and Pine Ridge could not reasonably have expected that they would be made exclusively and retroactively responsible for the decades of mismanagement of the workers' compensation program; and it is a fundamentally unfair attempt to pin the blame on those employers least responsible for it. The proposal also violates the due process rights of self-insurers such as Eastern and Pine Ridge because it is arbitrary and irrational to make them responsible for problems created by others that began long ago.

In sum, we urge the Commission to reject the provisions of the draft Rule as to the creation of a Security Pool and, in particular, the proposal that solvent self-insurers such as Eastern and Pine Ridge become responsible for past payment defaults by other unrelated self-insurers. The Commission should take additional time to explore additional funding sources that hold the promise of a

more effective and long-term solution to the problems in the workers' compensation system.

Sincerely,

Jiri Nemec
President
Eastern Associated Coal Corp.

Jiri Nemec
President
Pine Ridge Coal Company

JN:mm

cc: T. J. Obrokta, Esq.
General Counsel

WORKERS' COMPENSATION COMMISSION BOARD OF MANAGERS
May 6, 2004

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

Board members present:

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

Commission staff present:

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

1. Call To Order

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

2. Approval Of Minutes

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

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

3. General Counsel Report – T. J. Obrokta

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chairman White: Thank you, Mr. Obrokta.

4. Weirton Steel Update – Greg Burton

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

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

WEST VIRGINIA WORKERS' COMPENSATION COMMISSION

BOARD OF MANAGERS

MAY 18, 2004

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

Board of Managers Members Present:

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

Staff Members Present:

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

1. Call to Order

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

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

2. Approval of Minutes

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

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

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

3. Commission Report – Executive Director Gregory A. Burton

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

Page four, again, is the listing of all statutory transfers from the Legislature under Senate Bill 2013. Page five is the Receivables Management report. Again, Dave Townsend's group continues to do a great job in collecting our receivables. At the bottom of the page for April, 91.9% is a record for us, and again they continue to monitor this a lot to make sure we get the payments. I think our Employer Violator System is starting to kick in and get some people to make some payments. Page six is the medical payments to top ten vendor specialties. In the top ten, we're down about 22% and overall we're down about 19%. Some of the larger ones are rehab at 57%, chiropractic services at 55%, claimants at 30%, decrease in physical and occupational therapists at 27%. Page seven is just a listing of the claim payments year to date by county for you to look at. Page eight is our claims performance. Again, Andy Casto and our Claims Department continue to bring these numbers down and they continue to do a great job. In particular, if you look down at the bottom of the page under the "indicators," those numbers continue to move in the direction that we want them to and they continue to monitor that to make sure those numbers go down. Percentage ruled within 30 days of receipt, we're at

94.01% versus 86.72% for March. Again, they do a great job. Page nine, Safety and Loss – Bob Bess and that group continue to have a lot of demands on their time and they've seen a lot of employers and continue to have a lot of requests. Safety videos continue to be a hit. As you know, we're under a marketing campaign now to try to get more people to utilize our Safety and Loss Control Unit. Page eleven is the investment summary. Again, remember this is always a month behind. This is for March 2004. Fiscal year to date through March 2004 is about a $12.5 million dollar gain versus about a $61 million dollar loss for the same period. And then on the last page, page fourteen, is the Office of Inspector General. Mike Jordan's group is getting geared up and I think he now has the majority of his positions filled. He is going to be revamping this report over the next couple of months to try to give you more information and we're working on that. So this may change the next time you see it. They continue to go after fraud and abuse and use the suspension method that we have available to us, and they to do a very good job. With that Mr. Chairman, I'll be happy to answer any questions you may have about the report.

Chairman White: Thank you Director Burton. Any questions? Thank you.

4. General Counsel Report – T. J. Obrokta, Jr.

T. J. Obrokta, Jr.: Mr. Chairman, members of the Board, I'm T. J. Obrokta, General Counsel, Workers' Compensation Commission. We are here today to discuss two Rules that if passed by this Board will truly be historic in the history of the Workers' Compensation Commission in West Virginia. Both of these Rules deal with the so called "self-insured community." As the members of this Board are well aware, we have about 38,000 employers in the State of West Virginia and about 130 of those are the so called "self-insured." They insure their own claims. We are here today at the end of the stakeholder process as it relates to two Rules that will regulate how the self-insured community continues to do business in West Virginia. The first Rule before you is Rule 18. This Rule is brought before you as part of the implementation plan for Senate Bill 2013 passed last summer. Senate Bill 2013, passed by the Legislature and signed by the Governor, required for the first time in West Virginia that self-insured employers not only now will they continue to insure and pay their claims, they will administer their claims as well. That is to say they will receive claim applications, they will Rule on the compensability of claims, they will approve or disapprove medical treatment, etc. They will in essence step into the shoes of the Commission. That is a policy decision made by the Legislature and we are here to implement it through Rule 18. Just so you know, Senate Bill 2013 required this concept to be implemented by July 1. We have had for several months now a Self-Insured Unit working very closely with the self-insured community headed up by Sherry Risk, Lisa Teel, Melinda Kiss and Randy Suter, and various other folks from our shop have worked very closely with the self-insured community to make sure that this transition is as seamless as possible and I think each of those individuals deserves quite a bit of credit. So with regard to Rule 18, this Rule has been through the stakeholder process that each of you are now very familiar with. I think the first draft of this Rule went out February 2 or 3. We brought it to you as a Board. You approved it for filing with the Secretary of State's Office. It went through

the public comment period. You received public comment. At your last meeting I addressed and responded to the public comments. Now we are here today hopefully for a final vote on passage of the Rule. Ultimately after my presentation I will therefore then be requesting that this Board approve for final filing Rule 18.

Each of you should have a green folder in front of you. The first document in that folder should be Rule 18. Let me describe to you its current format. At your last meeting you will recall I went through in detail our responses to the various public comments that had been received on Rule 18 and we discussed the changes that had been made in response to those comments. The Rule before you is largely as it was at your last meeting. There have been three minor changes that I want to draw your attention to and explain before I would then respectfully request a vote on the Rule or to answer, of course, any questions you may have. So again I am just going to focus on the changes that have been made in the Rule since your last meeting. These are changes that have been the product of continued discussions with the stakeholders and there are only three, and largely in my opinion cleanup.

Looking at Rule 18, if you would turn to page 14 please. In about the middle of page 14 you will see paragraph 12.3. Section 12 describes a certain calculation that takes place when a buyout occurs. Buyout is discussed in Section 11, the preceding section. By and large the Rule requires if a self-insured buys out, they have to then leave the self-insured community and go into the subscriber fund. Section 11 talks about an exception to that. If you are just buying out because you are selling a division or a unit of your company, then you can stay self-insured. That was a change I went over at your last meeting. The change I am drawing your attention to today at 12.3 simply clarifies that if you have to go through the calculation to buy out the way it was first written, 12.3 said, "You better relinquish your self-insured status." We've added the underlined phrase there, "unless it meets the exception of 11.1.b.1." All that means is we are referring back to the exception of if you are selling a unit or a division, you don't have to relinquish your self-insured status. That is all that language is intended to do. So it just clarifies that the exception we discussed last time also applies to the calculation set forth in Section 12.

The next change I would draw your attention to would be on page 21 of the Rule. On page 21 of the Rule, you will see just a little more than halfway down the page paragraph number 4. Almost all of this language was gone over with you at your last meeting. What this language is addressing are claims for OP – occupational pneumoconiosis. These types of claims are unique. Unlike most claims that can be administered by a self-insured company, OP claims can be allocated to different companies. So they're unique in nature and they have to be treated differently than other claims. If you have a workplace injury, it's easy to say, "Okay, the employing entity when that injury took place is the chargeable employer." Occupational pneumoconiosis claims are different because they can be allocated to different employers. Everyone agrees that we cannot allow the employer community to get in the business of allocating claims amongst themselves and other employers. There may be some self-interest there that should be avoided. So what we came up with, with the stakeholders, was this language setting forth special treatment for OP and occupational disease claims as well. The only change from your last meeting, if you will look at page four, you'll see starting at the end of

the second. . .I'm sorry, page 21, paragraph number 4. You will see at the end of the second line a phrase that begins, "and in occupational pneumoconiosis claims that the self-insured employer administers in accordance with the Commission's discretionary authorization under the provisions of 15.12.c.2." That language is new and it ties in obviously to 15.12.c.2., and 15.12.c.2. begins on page 22. At the bottom of page 22, paragraph number 2, four lines from the bottom, that sentence used to read, "The Commission shall administer all occupational disease claims determined to be allocable." We've added the remaining phrase. What this language does, instead of me just reading it to you, what this does is addresses a concern of the self-insured community that goes along these lines. If company "A" is a large corporation that has three subsidiaries, "B, C and D" where you have an OP or an OD claim that could be allocated, but it can only be allocated to "B, C and D" who are all owned by "A," what this language does is say, "Okay, we understand it could be allocated." So usually then we, as a Commission, would take over the claim. But since it can only be allocated to subsidiaries of the same parent company, we will go ahead and let you as a self-insured administer that claim because there is no risk of you allocating it back to another employer. This language simply allows the self-insured community to administer claims that are allocable, but only if they can be allocated only amongst subsidiaries of a parent corporation. So there is no risk we run in them allocating it to another company.

I know it is very technical and I apologize, but those are the changes that have been made to Rule 18 since you saw it last at your last meeting. Those were changes requested by the self-insured community that our team agreed with. With that I will answer any questions that the Board may have, and otherwise would request that the Rule as it is presented before you be passed for final filing.

Chairman White: Questions of Mr. Obrokta? For the benefit of the audience, Bob Phalen is also attending the meeting via telephone.

Bob Phalen [via telephone]: I can hear you real well, but it is very difficult to hear T. J. and to hear Greg. I heard T. J. a little better than I heard Greg, but I am here.

Chairman Sullivan: Mr. Chairman, if a motion is in order, I so move we as the Board of Managers approve Rule 18 as presented by Legal Counsel, Mr. Obrokta.

Chairman White: We have a motion for the approval of Rule 18. Do I have a second?

Gene Bailey: I second.

Chairman White: I have a motion and second. Discussion? I call for a vote. All those in favor please signify by saying "aye." Opposed? I declare the motion has passed that Rule 18, as presented, has been adopted.

Mr. Obrokta, Jr.: For the benefit of the Board, it will take us a couple of days to get the Rule in appropriate format and it will be filed with the Secretary of State's Office and effective 30 days thereafter thereby meeting the July 1 deadline of the Legislation.

The second Rule to be presented to the Board today for a final vote is in my opinion also historic in nature. It is somewhat unique because it is a Rule that is not implementing Senate Bill 2013, rather this is a Rule that is implementing Legislation passed in 1995. It was first recognized back in the mid 90's that there was a problem in the self-insured community with regard to bankrupt and defaulted self-insureds. Since 1995 the Commission, and what was then the Performance Council now the Board, has been authorized under that Legislation to create certain risk pools that could be used to pay the claims obligations of bankrupt and default self-insured employers. This is a particularly sensitive issue giving certain developments in the self-insured community. The time has clearly come for this very difficult problem to be addressed head on and that is what the Commission has attempted to do in Rule 19.

Again, the purpose of Rule 19 is to create two separate funds that will be used to pay the ongoing obligations of default and bankrupt self-insured companies. Since at least 1998 the self-insured community has been paying this type of expense to the tune of about $4 million dollars a year for the default and bankrupt self-insured companies. That is to say, you have defaulted and bankrupt self-insureds who can no longer meet their ongoing pay order obligations since at least 1998 and before then. Since at least 1998 the self-insured community, pursuant to West Virginia Code, has been paying those ongoing obligations of other self-insureds. So all this Rule does is create two funds that will formalize what has been taking place for several years. I went through in detail this Rule with you at your last meeting. There have been some changes to it that I would like to focus on and then take any questions you may have on this Rule. Given this Rule's complexity I will just touch on it again and what it provides without getting into too much detail, but I will touch again on it and then I'll focus on the three changes that have been made since your last meeting.

The Rule, again, sets up two pools. The first is a Security Pool. This pool is used to pay for any pay order that is going unpaid by a defaulted or bankrupt self-insured company for a claim that has a date of injury on or before July 1, 2004. That is the line of demarcation – July 1, 2004. If a claim has a date of injury before that date and the pay order is not being paid by defaulted or bankrupt self-insured, monies out of this pool will be used to pay that claim. In essence, this pool will be funded by the surety drawdown of any bankrupt or defaulted self-insured, the GPT – graduated premium tax – that has been paid into the Commission up and through June 30, 2004. And the final funding mechanism for this is the 1995 Legislation that I mentioned earlier §23-2-9(i). This allows this Board very clearly to assess self-insureds for the bankrupt or defaulted obligations of the self-insured community. This provision is not subject to the rate freeze of Senate Bill 2013 and therefore would be the third funding mechanism for the Security Pool. The Rule, as I explained at your last meeting, would require these assessments to begin January 1, 2005. Just to be blunt about it, that certainly is a point of contention with the self-insured community. That's the Security Pool. There is also in this Rule a Guaranty Pool that has a completely different funding mechanism. This pool will be used to pay for any claims

of defaulted or bankrupt self-insured companies when those claims have a date of injury on or after July 1, 2004. So these are for the claims that occur on or after July 1, 2004. The funding mechanisms are set forth in this Rule, but in essence they are based on a certain percentage of the preceding year's claims, indemnity payments or at a certain point in time it changes to a percentage of the projected claims liabilities. I went through some of those methodologies at your last meeting. I do not believe they are the subject of any debate among the stakeholders so I won't go into the great detail on those. Ultimately that Guaranty Pool will reach a level of $30 million dollars and then we will stop funding it until a time it dips below $30 million, then we'll fund it again. Those are the two pools that are set up by Rule 19. Again, I went through them in detail at your last meeting.

The changes that have taken place since your last meeting – if you will look at page three please, you will see paragraph 5.2. At the end of the first line of 5.2 you will see the word "inactive" has been stricken and the word "active" put in its place. The purpose of this was it really didn't read right before – "Inactive self-insured employers that become inactive on or after July 1, 2004. . ." Well, if they are inactive, they're not going to become inactive. So we're simply striking the word "inactive" and saying, "Active self-insured employers that become inactive. . ." It is more of a cleanup than anything else. It is a change and I want to draw it to your attention.

If you could, please turn to page eight of the Rule. You will see the second paragraph on page eight, begins with the small letter "b." We've added the last phrase to that which says, "or $5,000.00, whichever is greater." This is talking about a funding mechanism for the Guaranty Pool. It is setting a $5,000.00 minimum for the annual contribution into the fund.

Finally, the last change that I am going to draw your attention to is at the bottom of page eight. You will see some strikethroughs and underlining. What this language does is really clarify how we are going to treat the companies that are self-insured that either convert to a subscriber status or become inactive. And what the language requires is that if you become inactive on or after July 1, 2004, but you don't buy out, then the Rule sets forth how your payment obligations will be provided for, for the Security Pool and the Guaranty Pool.

Mr. Chairman and members of the Board, with that, those have been the only changes made to Rule 19 since your last meeting. It is. . .I acknowledge a complex Rule, but it is a Rule that could have been brought to you a long time ago and we are happy to do it now given the certain developments in the self-insured community. We think the time has come to protect the self-insured community in the future from future problems such as Weirton Steel and this will do it. With that I would ask the Board approve the Rule for final filing.

Chairman White: Thank you Mr. Obrokta. Do we have a motion with respect to Rule 19?

Mr. Bailey: I have a comment Mr. Chairman, if you will allow me.

Chairman White: Mr. Bailey. . .

Mr. Bailey: T. J. you definitely reviewed some of the items that this Rule provides for and I think the intent of this Rule is good. However, there are some things missing from there that do give me cause for concern. I know before. . .some time ago before some of the revisions were made there was $10 million dollars of seed money there – funding, and that has been removed. Then I think the other thing that causes a great deal of concern, of course, is the date of implementation, and then probably the third thing is just the unknowns to the self-insured community. The unknowns consisting of the formula that the Commission will use and I just think there is going to be a lot of anxiety in the employer community if this Rule is passed. So I do have some concern. I know the intent is good, but I do think we are missing a few items that should be there. Thank you.

Chairman White: Do we have a motion with respect to Rule 19?

Mr. Sullivan: I so move Mr. Chairman.

Chairman White: The Rule 19 has been moved for passage in the form presented. Do we have a second?

Richard Humphreys: Second.

Chairman White: There has been a motion on the floor to adopt Rule 19 and a second. Discussion?

Douglas Merritt: Mr. Chairman, I just have a couple of comments. I'd like to echo some of the same sentiments that Mr. Bailey presented. It seems like at the eleventh hour some of the major items in this Bill – the $10 million dollar seed money was scratched and then the changing, moving up the date about 18 months from the implementation date. That was changed. And I've had several inquiries from the self-insured community who has expressed their displeasure with this Bill. There have been a lot of items that the self-insured community lately has been assessed with. For instance, there is additional. . .there has been some changes to the security arrangement and additional security has been requested or going to be requested of numerous self-insured employers. Also we're going to have a new assessment here for the Security Pool funding. We are also going to have another assessment for this Guaranty Pool funding, and there is also another assessment that I feel is unethical. We had some administrative charges that weren't taken out of their assessments, even though a lot of the duties of the. . .additional duties are going to be placed upon the self-insured community and the Workers' Compensation Commission won't be expending these monies. So with these items I have some serious concerns and I will not be able to support this Bill.

Chairman White: Do we have further discussion? Hearing none, all those in favor of the passage of Rule 19 in the form presented, please signify by saying "aye." Opposed?

[Gene Bailey and Douglas Merritt – Opposed.]

Chairman White: Let the minutes reflect that Rule 19 has been passed. Thank you Mr. Obrokta.

Mr. Phalen: Mr. Chairman, did I understand you to say that Rule 19 passed?

Chairman White: Yes. That is correct Mr. Phalen.

Mr. Phalen: Thank you sir.

5. Finance and Administration Report – Chris Jarrett

Chris Jarrett: Thank you Mr. Chairman. The Finance Committee was held last week. We reviewed the April financial statements. In addition we reviewed the Receivables Management report. You heard comments on both of those by the Commissioner earlier in this meeting. We do have a Resolution that we want to put up for consideration at this meeting. I think each of you have a copy in front of you. This Resolution pertains to the self-insured community. It contains a list of 61 employers I believe that are being approved for self-insurance status. I'll give you a moment just look through those if you like. I have no intention in reading all of them. I don't know that I'm required to.

Chairman White: Mr. Jarrett I will, for the benefit of the audience, I believe this Resolution is in the back if anyone in the audience is interested in picking up a copy, they can do that.

Mr. Jarrett: Absolutely. This list of self-insureds was reviewed by the Finance Committee and was approved to be brought before the Board of Managers for your consideration. I would recommend approval of this Resolution.

Chairman White: We have a motion on the floor for approval of the Resolution. Is there a second?

Mr. Humphreys: Second.

Chairman White: We have a second. Discussion? All those in favor please signify by saying "aye." Opposed? Let the minutes that the Resolution as presented is passed. Is there further information?

Mr. Jarrett: No. Nothing else.

Chairman White: Thank you Mr. Jarrett.