WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

FILED

JAN 7 3 2⁴ PM '97

OFFICE OF 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 Division Bureau of Employment Programs TITLE NUMBER: 85

CITE AUTHORITY: 21A-2-6(1); 21A-2-6(2); 21A-2-6(14); 21A-2-19; 21A-3-7(b); 21A-3-7(c): ~~23-2B-2; 23-2-4; & 23-1-1~~

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

~~21A-2-6(1); 21A-2-6(2); 21A-2-6(14); 21A-2-19; 21A-3-7(b); 21A-3-7(c) &~~ 23-1-1

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 NEW RULE BEING ADOPTED: 23

TITLE OF RULE BEING ADOPTED: Loss Prevention

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS February 6,1997

Andrew N. Richardson

Andrew N. Richardson
Commissioner
Bureau of Employment Programs

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

SERIES 23
LOSS PREVENTION

§85-23-1. General.

1.1. Scope. -- These rules implement the provisions of West Virginia Code, §23-2B-2, regarding mandatory safety programs.

1.2. Authority. -- West Virginia Code, §21A-2-6(1), -6(2) & -6(14); §21A-2-19; §21A-3-7(b) & -7(c); **§23-2B-2; §23-2-4;** and §23-1-1. Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.

1.3. Filing date. --

1.4. Effective date. --

§85-23-2. Purpose of rule.

The purpose of this rule is to implement the provisions of West Virginia Code, §23-2B-2, to promote workplace health and safety programs and encourage compliance with occupational safety and health laws, regulations and standards. The goal of this rule is to establish workers' compensation reforms which result in a reduction of occupational injuries and illnesses in the State of West Virginia and consequently a reduction in the workers' compensation fund deficit. **This rule does not apply to employers who have elected to self insure their workers' compensation risk pursuant to the provisions of West Virginia Code, §23-2-9.**

§85-23-3. Definitions.

As used in this rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. "Commissioner" means the commissioner of the bureau of employment programs pursuant to West Virginia Code, §21A-2-1, and West Virginia Code,

§23-1-1, and any deputies designated pursuant to West Virginia Code, §21A-2-12 & -13.

3.2. "Division" means the workers' compensation division within the bureau of employment programs as provided for by West Virginia Code, §21A-1-4, and West Virginia Code, §23-1-1 et seq.

3.3. "Evaluation criteria" means that level of performance criteria which results in a employer's designation as a focus program employer or a target program employer.

3.4. "Experience modification factor" means an actuarially determined multiplier of the premium tax base rate used to determine the premium tax rate. (Note: The experience modification factor has been historically referred to as the experience modification rate or EMR.)

3.5. "Focus program employer" means any employer, not excluded by the division under the provisions of section eight, whose combination of premium tax size, and experience modification factor meets the criteria of table 85-23A of this rule for a tier one employer. (See, Note: using table 85-23A attached to the table.)

3.6. "Injury" means compensable injuries for which costs are incurred by the division within the meaning of W. Va. Code §23-4-1 et seq.

3.7. "Joint labor and management safety committee" means a formally structured process to provide for and foster employee and employer involvement in safety reforms as provided in section two. Such structures include, but are not limited to, groups such as quality circles and self directed work teams. A tiered safety organization is permitted, if employees participate at each level of the organized committees. An employer operating under a collective bargaining agreement that contains provisions regulating the formation and operation of a safety committee that meets or exceeds the minimum requirements of this rule shall be considered to have met the requirements of this rule for safety committees.

3.7.1. A joint labor and management safety committee must exhibit the following characteristics to be considered acceptable:

a. Safety must be a priority of the group;

b. The group must have the authority to conduct safety inspections of the work area for which they are responsible and to determine and recommend corrective measures to management;

c. The group must meet regularly and minutes must be kept of the meetings;

d. Each member of the committee shall have an equal vote;

e. Members of the committee shall not experience any loss of wages **or any other retaliation** while attending safety committee meetings or performing duties at the direction of the safety committee;

f. At least fifty percent (50%) of the members of the **tiered safety organization and of each** committee **(committees)** shall be employee representatives; and

g. All members of the committee shall be trained in matters related to workplace safety, such training shall include attendance at a seminar on basic safety programs sponsored or approved by the division.

3.8. "Measurable improvement" means ~~mathematical~~ demonstrative evidence of safety improvement at the employer's workplace.

3.9. "New subscriber" means an employer that has not accumulated the necessary claims and premium tax experience to be afforded an experience modification factor by the division for purposes of ratemaking, but has accumulated sufficient claims and premium tax experience to be afforded an experience modification factor for purposes of this rule.

3.10. "Premium tax surcharge" means a percentage of the premium tax added to an employer's quarterly premium tax as a result of the employer's classification as a tier three employer.

3.11. "Performance criteria" means the measurement of an employer's safety performance **including, but not limited to, the combination of** ~~by combining~~ the premium tax size and experience modification factor as per table 85-23A of this rule.

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

3.13. "Review period" means a period of two consecutive quarters.

3.14. "Target program employer" means any employer, not excluded by the division under the provisions of section eight, whose combination of premium size and experience modification factor meets the criteria of table 85-23A of this rule for a tier two employer. (See, Note: using table 85-23A, attached to the table.)

3.15. "Tier three employer" means any employer who chooses not to participate in the focus program employer or target program employer mandates or any employer who fails to comply with the mandates of the target program employer classification.

§85-23-4. Tier one: Focus program employer.

4.1. Notification. The division shall notify all employers whose performance criteria falls within the focus program employer classification. The division shall include in such notification an analysis of the occupational injuries and diseases incurred by the employer and a list of qualified safety consultants and agencies.

4.2. Seminar. All focus program employers must attend a seminar on basic safety programs sponsored or approved by the division.

4.3. Reports. The workers' compensation division shall provide a report to each focus program employer at the conclusion of each review period. The report shall detail claims information for the review period.

4.3.1. The focus program employer shall provide a copy of each report required under this section to all bargaining units **or bargaining agents** representing the employees.

4.4. Reclassification. The division shall review the employer's performance criteria at the conclusion of each review period. Such review shall be completed within thirty (30) days following the conclusion of the review period.

4.4.1. When an employer's performance criteria is below the evaluation criteria for a focus program employer for two (2) consecutive review periods, the employer shall no longer be classified as a focus program employer and shall not be subject to further review, unless the performance criteria rises above the evaluation criteria for two consecutive review periods.

4.4.2. The focus program employer must show continued safety improvement to maintain the classification of focus program employer. The focus program employer shall be reclassified, subject to the discretion of the division under section eight, as a target program employer if, (1) measurable safety improvement is not made by the focus program employer over three review periods, or (2) the employer's experience modification factor exceeds the criteria for a focus program employer.

4.5. Notification of reclassification. The division shall notify all employers who are reclassified as a target program employer under these provisions. The notification shall include the reason for such reclassification as well as that material required under the notice provisions for a target program employer.

§85-23-5. Tier two: Target program employer.

5.1. Notification. The division shall notify all employers whose performance criteria falls within the target program employer classification. The division shall include in such notification an analysis of the occupational injuries and diseases incurred by the employer and a list of qualified safety consultants and agencies.

5.2. Seminar. All target program employers must attend a seminar on basic safety programs sponsored or approved by the division.

5.3. Joint Safety Committee. All target program employers shall establish a joint labor and management safety committee.

5.3.1. An employer that is a member of a multi-employer group operating under a collective bargaining agreement that contains provisions regulating the formation and operation of a safety committee that meets or exceeds the minimum requirements of this rule shall be considered to have met the requirements of this rule.

5.4. Plan. Within sixty (60) days of the target program employer notification of classification, all target program employers shall submit a plan to the division, detailing the manner in which they will comply with the requirements to establish a joint labor and management safety committee and improve workplace safety.

5.4.1. Within sixty (60) days of receipt, the division shall review the target program employer's plan and notify the employer of any required changes.

5.5. Reports. All target program employers shall submit quarterly reports to the division detailing the activities of the safety committee. The report shall provide the number of meetings held during the quarter, copies of the minutes of the joint labor and management safety committee, and results of facility inspections.

5.5.1. Quarterly reports shall be due on or before the last day of the month following the end of the quarter.

5.5.2. The target program employer shall provide a copy of each report required under this section to all bargaining units representing the employees and to the joint labor and management safety committee established under this section.

5.6. Inspections. All target program employers shall be subject to inspection by authorized safety representatives contracted by or employed by the division. The authorized safety representative may enter and inspect any target program employer's property, premise, or place on or at which employees are located at any reasonable time for the purpose of ascertaining the cause of employment injury trends and the remedial action necessary to reduce such injury trends. No person shall refuse entry or access to any authorized safety representative of the division who requests entry for purposes of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper, or interfere with any such inspection: Provided, that nothing contained herein eliminates any obligation to follow any process that may be required by law.

5.6.1. Within thirty (30) days following the completion of any inspection performed pursuant to this subsection, the authorized safety representative shall prepare a report regarding the findings of the inspection. The authorized safety representative shall provide a copy of each

report required under this subsection to the target program employer and to all bargaining units **or bargaining agents** representing the employees.

5.7. Reclassification. The division shall review the employer's performance criteria at the conclusion of each review period. Such review shall be completed within thirty (30) days following the receipt of the employee's quarterly report for the second quarter of each review period.

5.7.1. When an employer's performance criteria is below the evaluation criteria for a target program employer for two (2) consecutive review periods, the employer shall no longer be classified as a target program employer. If the employer's evaluation criteria meets the requirements for classification as a focus program employer, the employer shall meet the reporting requirements for a focus program employer.

5.7.2. If the employer's performance criteria is below the evaluation criteria for a focus program employer, the employer shall not be subject to further review, so long as the employer's performance criteria remains below the evaluation criteria for a focus program employer.

5.7.3. The target program employer must show measurable continued safety improvement to continue as a target program employer. If measurable safety improvement is not made over three review periods, the employer shall be reclassified subject to the discretion of the division under section eight, as a tier three employer.

5.8. Notification of reclassification. The division shall notify all employers who are reclassified as tier three employers under these provisions. The notification shall include the reason for such reclassification as well as that material required under the notice provisions for a tier three employer.

§85-23-6. Tier three employer.

6.1. Classification. The division shall classify as tier three employers all properly classified (**for ratemaking purposes under the provisions of W. Va. Code §23-2-4)** employers:

6.1.1. Who do not participate in the focus program employer program requirements;

6.1.2. Who do not participate in the target program employer program requirements; or

6.1.3. Who do not comply with the requirements of a target program employer.

6.2. Notification. The division shall notify all employers who are classified as a tier three employer. The division shall include in the notification the reason or reasons for such classification as a tier three employer. The division shall include in the notification an analysis of the

occupational injuries and diseases incurred by the employer and a list of qualified safety consultants and agencies.

6.3. Requirements. Every tier three employer shall be subject to all requirements of the target program employer group.

6.4. Premium tax surcharge. In addition to other requirements of this rule, tier three employers may, in the discretion of the division, be subject to quarterly premium tax surcharges not to exceed twenty-five percent (25%) of premium tax due on a quarterly basis. **Premium tax, for purposes of calculating the surcharge only, shall not include the penalty premium tax under West Virginia Code §23-2-5(f)(1).**

6.4.1. The premium tax surcharge shall continue for such additional quarters as may be determined by the division.

6.4.2. The division shall not be required to impose a premium tax surcharge on every tier three employer. The division shall consider, but not be limited to, the following criteria, in its determinations of (1) whether to impose a premium tax surcharge, (2) what percentage of premium tax surcharge to apply to the quarterly premium tax, and (3) how long the premium tax surcharge shall be applied to the quarterly premium tax:

a. Whether the employer has been properly classified for purposes of determining the employer's experience modification factor;

b. Whether the experience modification factor is an effective method of determining the employer's mandated status under this rule;

c. Whether the employer is engaged in a unique employment category such that there is no suitable classification for purposes of determining the employer's experience modification factor;

d. Whether the employer has experienced significant changes in the number of payroll employees so as to adversely affect the employer's experience modification factor;

e. Whether the employer has experienced a catastrophic loss or other anomalous circumstance so as to adversely affect the employer's experience modification factor; and

f. Whether the employer is in substantial compliance with the requirements of a target program employer.

6.4.3. Upon the imposition of premium tax surcharges, the division shall provide a written notification as to the reasons for such a determination. The written determination shall include such factors as the division deems appropriate, including but not limited to, the five factors outlined in the previous paragraph.

6.5. Reclassification. The division shall review the employer's performance criteria at the conclusion of each review period. Such review

shall be completed within thirty (30) days following the receipt of the employee's quarterly report for the second quarter of each review period.

6.5.1. After full participation as a tier three employer for two (2) consecutive review periods and after demonstration by the employer of measurable improvement, the tier three employer shall be reclassified. If the employer's evaluation criteria meets the requirements for classification as a target program employer, the employer shall be subject to the requirements for a target program employer. If the employer's evaluation criteria meets the requirements for classification as a focus program employer, the employer shall be subject to the requirements of a focus program employer.

6.5.2. If the employer's performance criteria is below the evaluation criteria for a focus program employer, the employer shall not be subject to further review, so long as the employer's performance criteria remains below the evaluation criteria for a focus program employer.

§85-23-7. New subscriber employers.

7.1. All employers without the requisite experience to calculate an experience modification factor shall be afforded a new subscriber experience modification factor for purposes of classification as a focus program employer or target program employer under the provisions of this rule.

7.1.1. A new subscriber experience modification factor shall be calculated for each employer at the close of the second full quarter after business start-up or after the effective date of this rule, if the employer has accumulated two (2) full quarters of claims experience, whichever is applicable.

7.1.2. The new subscriber experience modification factor shall be calculated in a similar manner as other experience modification factors.

7.2. The new subscriber employer shall be classified as a focus program employer or target program employer based upon the new subscriber experience modification factor and projected premium tax size as applied to table 85-23A.

7.3. The new subscriber employer shall be notified of its classification and subject to the same duties, responsibilities and requirements as other employers of like classification under the provisions of this rule.

§85-23-8. General provisions: classification and reclassification.

8.1. Discretion. In matters involving classification and reclassification, the division shall not be required to classify or reclassify an employer solely as a result of the measurement of performance criteria. The division shall have discretion to consider other relevant issues as contained in**, but not limited to,** the provisions of 10.4.1 of this rule.

§85-23-9. Notification

The division shall notify each employer classified or reclassified as a focus program employer, target program employer, or tier three employer under the provisions of this rule by certified mail addressed to the employer at the employer's last known residence or place of business: Provided, That, if an employer is represented by an attorney or other representative, then notice to the attorney or other representative shall be sufficient notice to the party so represented.

§85-23-10. Administrative Protests and hearings.

10.1. Protest. An employer may protest any order, decision, designation or redesignation made under the provisions of this rule.

10.2. Petition. In order to preserve its right to protest, the employer must file a written petition with the division, stating the order or decision protested and the exact nature of the issue in controversy. In the written petition, the employer must designate a person or entity to receive official notices related to the protest and the employer must provide the address of the person or entity. The written petition must be received by the division within thirty (30) days after the employer receives notice of the objectionable order or decision or within sixty (60) days of the date of the objectionable order or decision, regardless of notice. This period may not be extended or waived.

10.3. Acknowledgment. Within thirty (30) days after receiving the written protest, the division shall issue a notice acknowledging the protest and providing an opportunity for hearing. Filing of a written protest temporarily stays the order or decision protested until a decision is rendered on such protest by a hearing examiner: Provided that, such temporary stay shall not exceed ninety (90) days from the date of the order or decision protested unless the employer is not provided an opportunity for hearing within that ninety (90) day period, in which case the temporary stay shall not exceed that date which the employer is provided an opportunity for hearing. The division may grant a further stay provided that the safety of the employer's employees is not compromised.

10.4. Subsequent administrative hearing proceedings shall be in accordance with 85 C.S.R. 7 "Rules for Selected Hearings."

10.4.1. In classification and reclassification contested matters, the hearing examiner shall consider all relevant evidence relating to the totality of the circumstances surrounding the contested issue. Relevant issues for the hearing examiner's consideration shall include, but not be limited to the following:

a. Whether the employer has been properly classified for purposes of determining the employer's experience modification factor;

b. Whether the experience modification factor is an effective method of determining the employer's mandated status;

c. Whether the employer is engaged in a unique employment category such that there is a suitable classification for purposes of determining the employer's experience modification factor;

d. Whether the employer has experienced significant changes in the number of payroll employees so as to adversely affect the employer's experience modification factor; and

e. Whether the employer has experienced a catastrophic loss or other anomalous circumstance so as to adversely affect the employer's experience modification factor.

§85-23-11. Experience modification factors.

Calculations of experience modification factors for purposes of this rule shall not affect ratemaking procedures under the provisions of any other division rule, except to the extent that such other rule expressly incorporates the provisions of this rule.

§85-23-12. Forms.

The division in conjunction with the compensation programs performance council shall prepare and make available to all mandated employer standardized forms for reports required under the provisions of this rule.

§85-24-13. Retaliation complaint procedure.

13.1. A member of a joint labor and management safety committee shall not experience any loss of wages or other retaliation while attending safety committee meetings or performing duties at the direction of the safety committee.

13.2. Filing. Any member of a joint labor and management safety committee who experiences such loss of wages or retaliation may file a complaint within thirty (30) days of occurrence regarding such activity.

13.2.1. The complaint shall be filed with the president or chief executive officer of the employer, if the employer is a corporation or a limited corporation; with the managing partner if the employer is a partnership; with the general partner if the employer, parent or related business is a limited partnership; or, with all the members if the employer is a limited liability company; or with the owner if the employer is a sole proprietorship.

13.2.2. A copy of the complaint shall be filed with a division designee.

13.2.3. A copy of the complaint shall be filed with the joint labor and management safety committee and shall be made a part of the minutes of their next scheduled meeting.

13.3. The individual with whom the complaint is lodged at the employer's level shall be the responsible party to investigate the complaint and make a detailed report and response to the member of the committee who has complained. Said report will detail any remedial action taken by the employer.

13.3.1. A copy of the report and response shall be filed with a division designee.

13.3.2. A copy of the report and response shall be filed with the joint labor and management safety committee and shall be made a part of the minutes of their next scheduled meeting.

13.4. Remedies. The remedies contained herein shall not preclude any other action, either state or federal, for which the committee member is eligible.

§85-23-~~13.~~**14.** 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.

Table 85-23A

STANDARDS FOR LOSS CONTROL ACTIVITIES

Experience Modification Factors Exceeding Given Value Qualify Employer for Given Group

3-Year Premium (in dollars)		Tier One Focus Group	Tier Two Target Group
From	To		
0	4,999	1.40	1.50
5,000	12,499	1.50	1.60
12,500	24,999	1.60	1.70
25,000	49,999	1.70	1.80
50,000	& Over	1.80	1.90

Note: Non-merit-rated employers would have calculation analogous to experience modification factor calculation.
Note: Using Table 85-23A

(1) Calculate the premium tax paid over the last three full calendar years. This calculation will yield the three year premium as contained in the two columns at the left side of the table.

For example during the calendar years 1992, 1993, and 1994, XYZ, Inc., paid $32,850 in premium tax. XYZ, Inc., falls with the $25,000 to $49,999 premium range.

(2) Obtain the experience modification factor from the workers' compensation division.

For example. XYZ, Inc., has an experience modification factor of 1.73.

(3) Determined whether XYZ, Inc., falls within the focus employer or target employer groups by examining the two columns on the right side of the table.

(4) For an employer who falls within the three year premium tax range of $25,000 to $49,999:

(a) Focus program employers have experience modification factors equal to or exceeding 1.70 which do not equal or exceed 1.80 and

(b) Target program employers have experience modification factors equal to or exceeding 1.80.

(5) In the instant case, XYZ, Inc., with a premium tax range from $25,000 to $49,999 and an experience modification factor of 1.73 falls within the focus program employer group.

Bureau of Employment Programs
112 California Avenue
Charleston, West Virginia 25305-0112

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner

January 7, 1996

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, WV 25305

RE: Final Filing
Exempt Legislative Rule
Title 85, Series 23
"Loss Prevention"

To the Honorable Ken Hechler,

Please consider this letter as my written approval for the final filing of the above noted exempt legislative rule.

Pursuant to Enrolled Committee Substitute for House Bill 4030, Regular Session, 1994, the Department of Commerce, Labor and Environmental Resources was abolished. Pursuant to that same bill and to Executive Order No. 5-94 of the Governor, the Commissioner of the Bureau of Employment Programs is empowered to promulgate rules without the consent or approval of a department secretary.

Thank you very much for your assistance in this matter.

Very truly yours,

Andrew N. Richardson
Commissioner

ANR:RBS:llm

Summary of Proposed Exempt Legislative Rule
Statement of Circumstances
Loss Prevention
Title 85, Series 23

This legislative rule is a new rule to implement the provisions of West Virginia Code, §23-2B-2, regarding mandatory safety programs.

The purpose of this rule is to promote workplace health and safety programs and encourage compliance with occupational safety and health laws, regulations and standards.

This rule provides for the implementation of mandatory safety programs for certain employers who fall within certain risk categories as determined by their experience modification factor and annual premium size. This rule creates three tiers of employers who fall within the mandatory program range. The requirements for each tier are progressive.

The first two tiers are determined by an examination of the experience modification factor and annual premium size. Tier One requirements consist of a basis safety education component for the employer. Tier Two requirements consist of the basic safety education component, a safety plan, the establishment of a joint labor management safety committee, quarterly reports, and discretionary safety inspection.

Tier Three employers are determined as a result of their non-participation at the Tier One or Tier Two levels or non-compliance with Tier Two requirements. In addition to the requirements of Tier Two, Tier Three employers may be subject to premium surcharges.

This rule provides for notice, administrative hearings, treatment of new employers, and matters of classification and reclassification.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 85CSR23 - "Loss Prevention"

Type of Rule: X Legislative ___Interpretive ___Procedural

Agency Bureau of Employment Programs - Workers' Compensation Division

Address Legal Services Division

Post Office Box 3922

Charleston, WV 25339-3922

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	NET IMPACT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$846,900	($64,150,236)	($63,303,336)*	$-	$-
PERSONAL SERVICES	88,900	-	-	-	-
CURRENT EXPENSE	-	-	-	-	-
REPAIRS & ALTERNATIONS	-	-	-	-	-
EQUIPMENT	8,000	-	-	-	-
OTHER	750,000	(64,150,236)	(63,303,336)	-	-

2. Explanation of above estimates:

See attached schedules for explanation of costs and savings.

3. Objectives of these rules:

The purpose of this rule is to implement the provisions of W. Va. Code §23-2B-2, regarding mandatory safety programs for certain employers. The rule promotes workplace health and safety programs and encourages compliance with occupational safety and health laws, regulations and standards. The goal of the proposed rule is to establish Workers' Compensation reforms which result in a reduction of occupational injuries and illnesses and consequently a reduction in the Workers' Compensation Fund deficit.

*These savings will also be impacted by the forthcoming rules related to qualified loss management. These savings cannot be reasonably allocated between this rule (85CSR23) and the forthcoming one.

Rule Title: 85CSR - "Loss Prevention"

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The Workers' Compensation Division has a large deficit. The implementation of mandatory safety programs, by certain employers who experience an elevated rate of loss will reduce that employer's rate of loss by focusing the employer's attention on safety and loss prevention.

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

Certain employers with elevated rates of loss will be required to undertake steps to focus their attention on safety issues. Some expenditures by these participants will be necessary with regard to reporting and safety plan development. The loss reduction experienced as a result of the focus on safety will ultimately result in a lower premium rate for the employer and a lower loss experience rate for the risk pool.

C. Economic Impact on Citizens/Public at Large.

The goal of this rule is to draw certain employers' attention to safety matters so as to improve worksite safety and reduce claims experience. The ultimate aim of this rule is to provide for a reduction in the Workers' Compensation deficit by reducing workplace injuries and illnesses.

Date: July 31, 1995

Signature of Agency Head or Authorized Representative

Andrew N. Richardson

Andrew N. Richardson
Commissioner, Bureau of Employment Programs

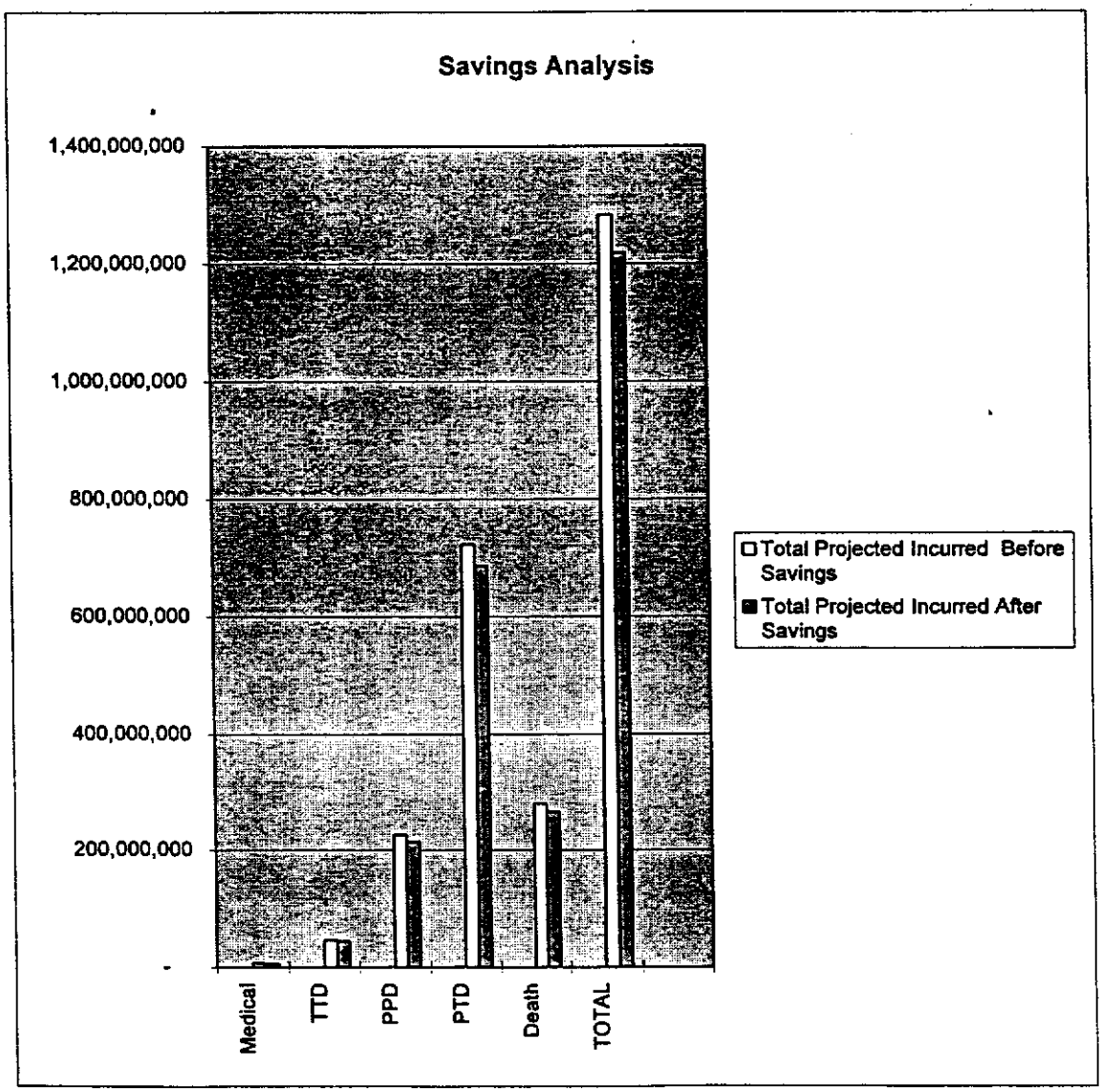
The following assumptions and estimates were made in determining the Effect of the Proposed Rule with regard to the Increase (Costs):

INCREASE (Costs)

Personal Services - Salaries for one Safety Coordinator ($50,000 and one Clerical/Support staff ($20,000) & related benefits (used a 27 % rate)	$ 88,900
Equipment - To provide the necessary office and computer equipment for this unit	8,000
Other - To provide contracted services to conduct workplace inspections for businesses which fall below established levels	
Estimate 750 companies in this category X $1,000 per inspection	750,000
ESTIMATED TOTAL COST	**$846,900**

SAVINGS ANALYSIS

Benefit Type	Projected Claim Count for FY96 net of 5% Reduction	Average Cost Per Claim Assuming All Other Things Equal	Total Projected Incurred Before Savings	Total Projected Incurred After Savings
Medical	22,969	276	6,670,442	6,336,920
TTD	23,799	1,867	46,780,628	44,441,596
PPD	16,469	13,049	226,219,727	214,908,741
PTD	2,142	320,631	723,022,161	686,871,053
Death	1,120	237,754	280,311,765	266,296,177
TOTAL	66,500		1,283,004,723	1,218,854,487



Unaudited - For management discussion purposes only.

HISTORICAL TREND DATA
SOURCE: MIRA (OPEN CLAIMS DATA)

Benefit Type	# of Claims	% of Claim Type to Total # of Claims	Total Incurred (Discounted)	Average Cost Per Claim Type
Medical	91,573	34.54%	25,263,975	276
TTD	94,882	35.79%	177,177,053	1,867
PPD	65,660	24.77%	856,805,911	13,049
PTD	8,539	3.22%	2,737,865,293	320,631
Death	4,463	1.68%	1,061,095,342	237,754
	265,117	100.00%	4,858,207,574	

PROJECTED ANNUAL SAVINGS

Benefit Type	Projected Claim Count for FY96	5% Reduction Amt of Claims by Type	Average Cost Per Claim Assuming All Other Things Equal	Projected Annual Savings by Claim Type
Medical	24,178	1,209	276	333,522
TTD	25,052	1,253	1,867	2,339,031
PPD	17,336	867	13,049	11,310,986
PTD	2,255	113	320,631	36,151,108
Death	1,179	59	237,754	14,015,588
	70,000	3,500		64,150,236

ATTENDANCE SHEET & SPEAKER'S LIST

PUBLIC HEARING SEPTEMBER 6, 1995

RE: PROPOSED RULE 85CSR23, "Loss Prevention"

NAME	REPRESENTING	CHECK IF YOU WANT TO SPEAK
C. E. Hall	Power Maintenance, Inc	
H E Knisely	ACF Industries	
Steve White	Power Maintenance, Inc	
[illegible]	Pittston WV Coal	
GARY NEWBERRY	PITTSTON COAL MGT. CO.	
MARIE E JONES	United Dairy, Inc	
Bill Lego	Jim C Hamer Co.	
Brenda Grant	CAMC	
Carol Thuckmath	Beyond Health Services	
K.O. DAMRON	WV Mining & Reclamation Assn.	
Roger Hemmack	UMWA	
WILLIAM E. BOARD	McJUNKIN CORP	
Russell H. McClain	LONG/Airdox Co.	
Steve Leach	Fairmont State College	
William V Bilheimer	Fairmont State College	
Janna Ingram	WV-American Water Co.	
Pam Jarvis	ESC	
Ron Casto	ESC	
Gerald Potts	SMC Electrical Products	

ATTENDANCE SHEET & SPEAKER'S LIST

PUBLIC HEARING SEPTEMBER 6, 1995

RE: PROPOSED RULE 85CSR23, "Loss Prevention"

NAME	REPRESENTING	CHECK IF YOU WANT TO SPEAK
Michael Zirkle	CONCORP, Inc. (Union Railroad)	
Bill Board	Safety & Loss Ad	✓
Randall Suter	BEP	✓
Joe Powell	W. Va. Labor Federation	

ATTENDANCE SHEET & SPEAKER'S LIST

PUBLIC HEARING SEPTEMBER 22, 1995

RE: PROPOSED RULE 85CSR23, "Loss Prevention"

NAME	REPRESENTING	CHECK IF YOU WANT TO SPEAK
Margaret Kelley	Allegheny Wireline Services	✓
Beverly A. Jarrett	Regulatory Training Center-Kanawha County Schools	✓
William E Board	MCJUNKIN CORP	
RANDALL SUTER	BCR	✓
Shaun McMillen	A+K Logging Hilling Lumber Co.	
Michael Brian Miller	BK & B Lumber Co.	
Tammy Gifford	Maloney + Co	
[illegible]	Maloney + Co	
BILL DIRSTOCK	Columbia Surety Corp.	
FRED LEMASTERS	American Woodmark Corp.	
Dan Weatherholt	AMERICAN WOODMARK CORP.	

ATTENDANCE SHEET & SPEAKER'S LIST

PUBLIC HEARING SEPTEMBER 22, 1995

RE: PROPOSED RULE 85CSR23, "Loss Prevention"

NAME	REPRESENTING	CHECK IF YOU WANT TO SPEAK
Dennis Klingensmith	UAR Carlson Company	?
Emily Spieler	—	yes
Ronald L. Gaskins	Communications Workers of Amer.	
Jeffrey A. Price	Beckwith Lumber Company	✓

ORIGINAL

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

RE: Bureau of Employment Programs
Workers' Compensation Division
Title Number: 85CSR23
Title of Rule Being Proposed: Loss Prevention

Transcript of proceedings had in the above-entitled matter held in Room 206, Civic Center, Charleston, West Virginia, on the 6th day of September, 1995.

KARON L. VORHOLT
COURT REPORTER
634 Pioneer Lane
Charleston, West Virginia 25312
(304) 984-1242

APPEARANCES: ANDREW N. RICHARDSON, Commissioner
Bureau of Employment Programs

RANDALL B. SUTER, Counsel
Bureau of Employment Programs
Legal Services Division
4700 MacCorkle Avenue, S.E.
Post Office Box 3922
Charleston, West Virginia 25339-3922

BOARD MEMBERS: MR. THAD EPPS
MR. DAVID HARRIS
MR. FRED TUCKER
MR. DAN SCHERDER
MR. RICHARD HUMPHRIES
PAUL E. THOMPSON

COMMISSIONER RICHARDSON: My name is Andy Richardson. I'm Commissioner of Employment Programs for the State of West Virginia, Chair of the Compensation Programs Performance Council and I suppose your Master of Ceremonies for this public hearing.

If I may, I'd like to introduce the members of the Compensation Programs Performance Council who are in attendance today. To my far left, Paul Thompson; continuing this way, Richard Humphries; Dan Scherder; Thad Epps is on the far right, appropriately enough; David Harris is the man in the middle and Fred Tucker.

I would also like to introduce Ed Staats, the Workers' Compensation Division's Chief Financial Officer, Randy Suter from our legal staff and Kimberly Elmore from our Public Information Office. I think that covers my staff that's here today.

Let me thank you for being here. We are here today to receive your comments and your thoughts regarding the proposed regulations for Title 85, Series 23 of the code of state regulations.

These proposed rules are the product of a lengthy effort, labor management cooperation effort of the

subcommittee on safety and loss prevention of the -- it's a subcommittee of the Finance Committee of the Compensation Programs Performance Council.

This labor management group has worked under the steady guidance of Bill Board, who is with us this morning, and over the past several months have worked to find consensus on the issues surrounding the implementation of law changes that were enacted by the Legislature in 1993.

For the first time in West Virginia's history we are about to make safety and accident prevention a key element of our Workers' Compensation Program. When I first came into this job in 1990, I found that we had no safety and accident prevention program in place and the obvious question is, "What's wrong with this picture," because safety and accident prevention is the key to reducing and limiting the costs of a Workers' Compensation Program but more importantly it is the key to preserving the health and welfare of West Virginia's workers.

So upon enacting significant legislation in 1993, we brought together this labor management body and they have worked very aggressively to look at a system of

both rewards and penalties in the area of safety and loss prevention.

Rewards through the concept of premium incentives with a reduced rate if you take certain actions in order to improve the safety and accident prevention efforts in your work place, penalties if you have a bad experience with Workers' Compensation and fail to address that bad experience.

Education and consultation is also a key element in the safety and loss prevention effort. I think it is important to recognize number one, that much of the problem that has occurred in West Virginia's Workers' Compensation Fund over the years could have been prevented if we had had accident prevention and loss management and safety as a part of the Workers' Compensation system of West Virginia, and I think number two, it is extremely significant in this day of debate over this subject matter that the solutions in the context of safety and accident prevention are the product of a labor management cooperative committee.

With that, I'd like to open the floor this morning. I think Mr. Board is going to make a brief

presentation about the proposed regulations, and at this time I don't have anyone else checked off on the list of attendees as wanting to speak. If you want to speak today, please inform us. Thank you.

MR. BOARD: Good morning. If I'm looking a little blurry eyed it's because my seven-year old is in the hospital and I've been with him and I'd like to just say hi to him. I know the cameras are rolling, so I'd like to wish Brian Board a very happy hi from Dad and get well up there on the Fourth Floor at Women and Children.

My name is Bill Board and I'm the Personnel Director for McJunkin Corporation. I was appointed by the Finance Committee of the Compensation Programs Performance Council to serve with seven others on the Safety and Loss Control Advisory Committee. The overhead is showing you essentially our mission statement.

To give you a summary of it, our group as given to us by the Finance Committee, we were asked to recommend how to implement West Virginia Code 23-2B-1, 2 and 3, laws that were passed by the West Virginia Legislature in 1993. All three of these code sections are included in the handout materials made available to you

today.

Before I talk about the recommendations our committee made to the Council, I would like to comment, Commissioner, upon our committee process. Several members of our eight-person committee are here with me today, two of us representing the business community, two representing labor, two being safety consultants and two being service providers in the Workers' Compensation system. Those members are Paul Becker for the Safety and Health Extension Service of West Virginia University, Mike Cavender, West Virginia, Jerry Flick of Employer Services Corporation, Chris Hamilton of the West Virginia Coal Association, Roger Hammick of the United Mine Workers, Warren Perrine of the West Virginia Safety Council and Joe Powell of the West Virginia AFL-CIO. I represented the West Virginia Manufacturers Association.

We also received valuable assistance from Ed Staats, Chief Financial Officer and Randy Suter, legal counsel for the Workers' Compensation Division, and we heard comments and gathered relevant information from over 80 other people and sources.

Initially, I was apprehensive about

chairing a group that came to the table with such different perspectives but we quickly learned that we had one common unifying goal. Each of us on the committee was committed to enhancing safety and reducing accidents and injuries on West Virginia's work sites.

I truly believe the recommendations that we have reached by consensus will have a positive impact upon the Workers' Compensation in our state if adopted by the Council.

The substance of the report we have titled FIRST stands for Funds Initiative on Research and Safety Training.

We began by studying West Virginia Code 23-2B-1 which provides in substance that the Workers' Compensation Division must integrate safety into its philosophy and its program of work.

A sub team of our committee prepared a report on our recommendations on how to implement this section that we believe is the cornerstone of the FIRST program. That report is also a part of your handout materials and outlines a plan whereby the division will allocate up to one percent of the Fund's annual budget to

recommendation and that we believe will prove a valuable part of the Division's reform effort.

As the next step in the FIRST program we looked at ways to implement West Virginia Code 23-2B-3 in which the Legislature outlined a program of incentives for employers who voluntarily participate in approved loss management programs. These programs will teach employers case management skills and more importantly will teach and document safety improvements.

The recommendations we have made to implement the code section outlined the qualifications for loss management firms so it will be certified in the future by the Division's new safety profession.

Employers who contract with these loss management firms will be eligible for a credit on their Workers' Compensation premiums as an incentive for their investment in improved safety.

The regulations related to this loss management phase of the FIRST program have been presented to the Division to submit to the Compensation Programs Performance Council.

These regulations once approved by the

Council will also be published to you for public hearing and comment and we anticipate this phase of the program to be implemented by the end of this fiscal year or before June 30, 1996.

The regulations before you today for comment are the final phase of the FIRST program. In passing West Virginia Code 23-2B-2 the Legislature mandated that after education and training are offered by the Division and after loss management programs are also made available if an employer's Workers' Compensation cost still evidence a need for safety improvements additional steps will be mandated by the Division. These mandated steps may include safety inspections, safety committees and even premium surcharges.

I won't detail the language of the regulations that you have before you for 23-2B-2 but I will briefly outline the three-tier procedure.

If an employer's Workers' Compensation cost calculate to an experience modification factor above a certain level, that employer may become a focus program employer or one upon which the Division will focus its safety initiatives.

That employer will be required to attend a safety seminar approved by the Division and the Division will send reports regularly to the employer for use in assessing safety progress.

If no improvement is shown, that employer may become a target program employer required to continue attending safety seminars, to submit a loss prevention plan for approval by the Division, to form a joint labor management safety committee and to regularly report safety progress to the Division.

The Division will continue to send progress data to the employer and the Commissioner may also require on-site safety inspections as well.

If an employer in either the focus program or the target program can document safety improvements, requirements of this code section will be dropped. However, if an employer continues a downward safety spiral and also refuses to attend seminars or to provide progress reports, the Commissioner has the discretion to levy a surcharge of up to 25 percent of the employers' Workers' Compensation premium.

We have recommended that this final phase

of the FIRST program take effect by the end of 1996, allowing employers and employees at least six months to take full advantage of the education of loss management programs before they are targeted for mandates.

However, these mandates show that the Legislature was serious about making safety an integral part of the West Virginia Workers' Compensation system and penalties will apply if employers have substandard safety records and if they fail to cooperate with efforts to achieve improvements.

I'd like to make one final point before you begin your comments. During the review of 23-2B-2, our committee became concerned that the experience modification factor as currently calculated by the Division does not fairly represent an employer's safety record. Accordingly, we strongly support the new training program and other changes under way at the Division that will effect the way the experience modification factor will be calculated for West Virginia employers.

These changes will be implemented by the Division no later than July 1, 1996 and administrative flexibility has also been incorporated into these

asking, I guess, is this, I certainly don't have any quarrel with it but my question is you commented that under the current capabilities of the Division that the experience factors may not really represent an accurate description of what's going on in a given employer and that we're going to fix that.

MR. BOARD: Right.

MR. EPPS: And I guess my question then becomes if we fix that, do the levels that you show in the table as to when someone would become a focus employer or a target employer, would those factors tend to change? Help me a little bit with that.

MR. BOARD: Yes, they would. I forget who it was that said there are three types of lies. There's a lie, a damn lie and a statistic. Certainly, with regard to looking purely at statistics or in this case our group looked at the experience modification factor, we want to try to make sure that this has a comprehensive approach, that is we want to make sure we're looking at the whole picture of what's going on with each employer, and that's what these rules contemplate, that there is much more going on than just crunching numbers.

Certainly what we've tried to do in here and our committee has paid extreme close attention to is the fact that the movement between the focus group and the various tiers is certainly generated by this calculating down or calculating up but there's also a tremendous amount of other things that we're going to look at that are going on in that employer's work sites. Are they active with safety programs, are they walking the walk, as we say in the quality business, are they just talking the talk. Certainly the numbers will be used to add some veracity to that but I don't know if I've completely answered your question but there is a movement between these tiers that's generated by the --

MR. EPPS: I probably didn't ask the question very well. Let me ask it a different way. Would you anticipate that once this rule goes into effect and we start walking the walk as far as doing what the rule contemplates and we use the experience factors and at the same time the Division is working on making that information more representative of what actually is going on in an individual employer's work place would you anticipate down the road that we might want to modify that

table a little bit so that it would represent, so that we were sure that we were including those employers that need help and need something to happen in the work place?

MR. BOARD: Absolutely.

MR. EPPS: Okay.

MR. BOARD: Absolutely. I'm sorry, I didn't catch that at first but, yes, sir. Certainly, there's going to be all kinds of fine tuning going on in this process. Again, we're kind of new when we got this assignment but positively yes, sir.

MR. EPPS: Thank you.

COMMISSIONER RICHARDSON: Other questions of the Performance Council? Yes, Paul.

MR. THOMPSON: Under 5.3 and 5.4, under your joint labor management safety program --

MR. BOARD: Yes, sir.

MR. THOMPSON: Again in 5.4, "Within 60 days of the target program," could you give us an explanation of those, 5.3 and 5.4?

MR. BOARD: If you'll just bear with me here while --

MR. THOMPSON: It's on Page 5.

MR. BOARD: Okay. 5.3, first of all, the Joint Safety Committee, we looked at obviously two arenas. There are those arenas that are -- where collective bargaining agreements exist and there are those work sites and employers where collective bargaining agreements do not exist. With regard to those that do have collective bargaining agreements, our committee felt that where they have already formed under the terms and conditions of their bargaining agreement a safety committee, that those safety committees will have met the requirements of the formation and, you know, the makeup of the committee.

MR. THOMPSON: Well, under that one my comment would be, you can be under a collective bargaining agreement and still not have a joint safety program.

MR. BOARD: I'm going to defer, if it's all right -- some of my committee members are here and if it's all right, I'd like -- Jerry, would you like to address that?

MR. FLICK: Yes, one of the Safety Committee requirements, the rule states that the Safety Committee or the provisions of the collective bargaining agreement must at least meet the requirements of this rule before they will be determined to be acceptable to the Workers'

dilute anything that was already in place.

MR. THOMPSON: Thank you.

COMMISSIONER RICHARDSON: Other members of the Council have questions for Mr. Board?

(No response.)

COMMISSIONER RICHARDSON: Thank you, Bill, very much. I really appreciate the work that you and the committee have put into this.

Our next speaker will be Randy Suter. Randy is an attorney with the Bureau of Employment Programs Legal Services Division. Randy was the technical scribe who basically wrote these regulations and provided a lot of staff support not only to this safety committee, Randy, but I believe you do a good bit of work with the Finance Committee as well, don't you.

MR. SUTER: Good morning. First of all, Mr. Board covered quite a number of areas here. I would like to get into the rule perhaps a little more of the technical aspect of it and try to get through that as quickly as we can.

It appears that as part of the continuing effort to improve the Workers' Compensation system, Safety

and Loss Control Advisory Committee was created. The purpose of the committee was to promote work place health and safety programs, long encouraging compliance with occupational safety and health laws, regulations and standards.

The committee's devoted entirely to increasing safety awareness and decreasing work place accidents which will ultimately lead to less claims filed.

This was established as a subcommittee of the Performance Council. The committee consists of eight members who represent both labor and business concerns. We've talked about the members of that committee previously and I won't go into that. The proposed safety rules implement the provisions of West Virginia Code 23-2B-2 regarding mandatory safety programs.

I would note that rules adopted by the Compensation Programs Performance Council and the Commissioner are not subject to legislative approval. However, the public notice requirements must be met and that is inclusive of what we're doing here today.

The first tier that was created is the focus program employer. This tier is derived from a

annual premium size in the same way that the focus program employer is derived.

Target program employers, like focus group employers, must attend a seminar on basic safety programs sponsored or approved by the Division. The joint labor and management safety committee must be established by all target program employers. Safety Committee requirements are as follows, and as you'll note these were the ones that were included in the definition under, I believe, 3.7 of the rule.

Safety must be a primary focus of the committee. The committee must have authority to conduct safety inspections of the work areas. The committee determines and recommends corrected measures to management. The committee meets regularly and records minutes. Each member of the committee has an equal vote. No loss of wages will result from attending safety meetings or performing designated safety duties and 50 percent of the committee must be employee representatives. Each member must attend a training in work place safety which will be sponsored by the Division.

Target program employers will submit within

60 days of the notice of their classification a plan to the Division. This plan will detail how the target program employer will meet the requirements to improve work place safety and establish a Joint Labor and Management Safety Committee. Within 60 days of receiving the plan, the Division will review the plan and notify the employer of any corrections. Once the plan is approved, the safety committee established by the target program employer will submit quarterly reports specifying the activities of the committee, the number of meetings held, the copies of the minutes and results of their facility inspections.

Target program employer inspections may be conducted by an authorized safety representative of the Division. Inspections may occur at any time or place and inspectors can never be barred from entering a facility. Within 30 days of the inspection, the inspector will present the findings to the target program employer and all bargaining units representing the employees, if such exists.

If a target program employer's performance criteria falls below the evaluation criteria for two consecutive review periods, the employer will no longer be

considered a target program employer; if the same performance criteria meets the requirements for a focus program employer, the employer will be reclassified; if the employer's performance criteria falls below that of a focus program employer, then the employer will not be subject to further review as long as the criteria remains below the focus program employer level. That ends the first two tiers.

As you'll notice, the first two are called focus and target and we couldn't come up with a worst-of-the-worst scenario here for tier three, so that's what they ended up being, tier three.

Tier Three employers are determined as a result of their non-participation in tier one or tier two levels or by not complying with tier two requirements.

Tier Three employers must meet all tier two requirements. In addition to these requirements tier three employers may also be charged a quarterly premium tax surcharge not to exceed 25 percent of the premium tax due on a quarterly basis.

The Division may impose the quarterly premium tax surcharge at its discretion. The Division's

decision can be based upon the following criteria, and Mr. Epps, I believe you were asking some questions along this line, and here are some provisions that allow the Division the discretion to back out particular employers who have certain, let's say, nominal situations. The Division's decision can be based upon the following criteria, whether the employer has been properly classified, whether the experience modification factor is an effective method of determining the employer's mandated status, whether the employer is engaged in a unique employment category, whether the employer has experienced significant changes in the number of payroll employees which might adversely affect their experience modification factor, whether the employer has experienced a catastrophic loss or other circumstance, whether the employer is in substantial compliance with the requirements of a target program employer. The Division, in turn, will notify the employer in writing of its decision to impose the premium tax surcharge.

The employer's performance criteria will be examined at the end of each review period after full participation as a tier-three employer for two consecutive

employment premiums. The Division may take into account other relevant information as I have previously outlined.

I would also note that an employer may protest its classification. In order to do so the employer must file a written petition with the Division. The petition must be filed within 30 days after the employer receives notice from the Division. A hearing will be scheduled and the protesting order will be put on hold until a decision can be reached. That's basically my presentation. Thank you for the opportunity to address the Council.

COMMISSIONER RICHARDSON: Do Council members have questions for Mr. Suter?

MR. TUCKER: Mr. Suter, when you're dealing with an employer who made an improvement to get their classification changed, does the rule specify how long they have to maintain that improvement before you consider them for modification?

MR. SUTER: I believe it's two review periods.

MR. TUCKER: Two review periods?

MR. SUTER: Yes, and constitutes two quarters.

MR. TUCKER: Six months?

MR. SUTER: No, it would be one year. It would be two review periods, each review period being two quarters.

MR. TUCKER: But if they do show an improvement they have to maintain that for two quarters; is that correct?

MR. SUTER: No, one year. It would be two review periods.

MR. TUCKER: All right. Thank you very much.

COMMISSIONER RICHARDSON: Other questions for Mr. Suter?

MR. THOMPSON: You mentioned that there would be no lost wages.

MR. SUTER: Yes, sir.

MR. THOMPSON: And on Page 3, small (e) at the top of the page there it says that the only -- who will pay the wages? I'm assuming now that we're going to have a joint safety committee?

MR. SUTER: Yes, sir. It was the committee's recommendation that the employer would be responsible for the wages of his employees while they were meeting in furtherance of the Joint Labor Management Safety Committee.

500 for Tier One, I'm sorry.

COMMISSIONER RICHARDSON: Other questions for Mr. Suter?

(No response.)

COMMISSIONER RICHARDSON: Randy, thank you very much for your work and your comments.

MR. SUTER: Thank you.

COMMISSIONER RICHARDSON: Are there other individuals wishing to speak today to the Performance Council regarding the safety and loss management proposed rules?

(No response.)

COMMISSIONER RICHARDSON: Bill Board, can I ask you one more question?

MR. BOARD: Sure.

COMMISSIONER RICHARDSON: I apologize for doing this. There is debate in Congress right now that would seriously erode health and safety programs, OSHA, MSHA, things of that nature, would arguably substantially erode. Has that factor been considered and the impact of those particular changes in the debate and discussion of the advisory committee regarding safety?

MR. BOARD: I think the short answer is no. We really focused on our charge from the Performance Council and the Finance Committee and what was already on the books since 1993, so we weren't really influenced by what was going on out there.

COMMISSIONER RICHARDSON: The only reason I mention that is that certainly an argument can be made that if those programs are curtailed, folks that are good actors now may suddenly become bad actors and we may suddenly have more people involved in the three-tier process than we've contemplated in the design of this kind of a program. It's something you-all may want to look at and you may find that there won't be any erosion in it at all, I don't know, but I think that if changes do come forward in the safety arena, that are federal programs, they need to be factored into how accident prevention in the work place is regulated in a provision like this. Mr. Powell.

MR. POWELL: I might indicate -- of course, we're only dealing with what the House of Representatives did but one of the things we have opposed, the Department of Labor is a federally funded advisory group of OSHA personnel which I think may serve this particular group very well in

its role. As I understand the legislation, although it still has a ways to go, that type of arrangement is probably going to receive more financing. We're not happy with that but that may be what happens and in essence you would have more staff at the Department of Labor that could perform the role that you're speaking of here.

COMMISSIONER RICHARDSON: That consultation, technical assistance in the work place?

MR. POWELL: I'm afraid so, yeah, that's the way it is.

COMMISSIONER RICHARDSON: Thank you.

MR. THOMPSON: There was an article in the Huntington paper this past -- two days ago and it sort of reviewed the legislation and it seems that, if it's passed and becomes a reality, that there's going to be a loss in amount of people that will be present to enforce the laws, and it also stated that it gave different accounts of how many plant inspections have not been done and it was up into the thousands of the plants nationwide and it had serious fatalities and as many as eight years had never received or never had an inspection of the plant even though they've had continuous violation reports. When I

read it, I didn't think it really pertained to this but I guess it does. So if I can, I'll get that article and send it to you.

MR. POWELL: We look on it as being very devastating for those who work for a living because -- I don't know just exactly how this works but the indications are the budget will be cut a half. It's been indicated to us by the Secretary of Labor that the OSHA inspectors -- or I'm sorry, the budget is cut by a third, that the OSHA inspectors would be cut by half and I think the projections here for West Virginia at the present time is if they inspected every site, they would get around once every six to seven years. So that's at least doubled. Of course, we're not happy with it but I just indicate that the advisory type area of OSHA is probably going to receive more money which means it really has no effect other than to be there to advise people.

COMMISSIONER RICHARDSON: They get inspected once every six, seven years whether they needed it or not.

MR. POWELL: That's right.

COMMISSIONER RICHARDSON: My point for the subcommittee isn't to ask you to replace OSHA or MSHA or

could be fed back to an employer for corrective action. So this is something that over the next several months will be put into place and will dovetail very nicely into the new safety and accident prevention program.

Is there anyone else wishing to speak to the Council today regarding the proposed regulations?

(No response.)

COMMISSIONER RICHARDSON: Randy, jog my memory, when's our next public hearing on these regulations?

MR. SUTER: September 22nd in Morgantown, West Virginia, at the Jerry West Room of the Coliseum, 10:00 a.m.

COMMISSIONER RICHARDSON: Before we adjourn, Mr. Scherder would like to make a comment.

MR. SCHERDER: I would just as a member of the Performance Council like to thank Bill and his subcommittee for what I believe is a very excellent job in putting together a program in a very difficult area. It was done on a timely basis. I think probably more timely than we on the Finance Committee had expected. They took a no-nonsense approach and really tackled the issue and put the focus where it should be, and that's on safety and accident

prevention, and I think we all need to realize that they did do an excellent job and there were a lot of compromises involved because it involved different areas involved and everybody needs to realize that. It was quite an effort but it is the first step and there are many other steps to go, but the bottom line is that safety and accident prevention is where it all starts because if there's not an accident then there's not a Workers' Compensation issue. So again, I just wanted to express how important a job these people did for us and I think we owe them a round of applause.

COMMISSIONER RICHARDSON: Thank you, Dan. Other comments from the Performance Council members?

MR. TUCKER: I've got an inquiry. Mr. Suter, how many comments have we received? Do you have any?

MR. SUTER: I have received no written comments, and my name was the name that was put on the notice to contact, so I've received no written comments.

MR. TUCKER: When does that comment period end, to refresh my memory?

MR. SUTER: The 60-day period would be the 29th day of September. They were filed on July 31st.

COMMISSIONER RICHARDSON: It would be unusual for us to have received written comment yet, usually in the last week that it's available. Other Performance Council members?

(No response.)

COMMISSIONER RICHARDSON: Anyone wish to say anything?

(No response.)

COMMISSIONER RICHARDSON: Thank you very much for your attendance and please be safe going back to your destination.

(WHEREUPON, the hearing was concluded at 11:02 a.m.)

REPORTER'S CERTIFICATE

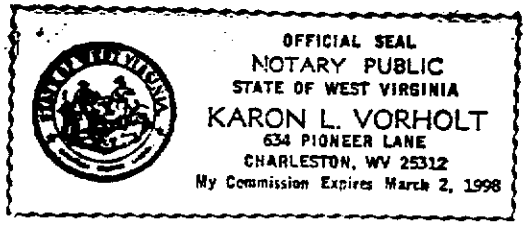
STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to wit:

I, the undersigned, Karon L. Vorholt, a Court Reporter and Notary Public within and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings had in the aforementioned matter.

Given under my hand this 24th day of September, 1995.

Karon L. Vorholt
Court Reporter



BEFORE THE WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION

IN RE: LOSS PREVENTION
TITLE NUMBER 85 CSR 23

TRANSCRIPT of PUBLIC HEARING held before the Workers' Compensation Division at West Virginia University Coliseum, Jerry West Room, Morgantown, West Virginia on September 22, 1995, commencing at 10:00 a.m.

APPEARANCES: ANDREW N. RICHARDSON, COMMISSIONER;

RANDALL B. SUTER, ESQUIRE
Legal Services Division;

THAD EPPS, Council Member;

DAVID HARRIS, Council Member;

DICK HUMPHREYS, Council Member;

EVERETT SOLOMON, Council Member;

PAUL THOMPSON, Council Member;

RICHARD ARMSTRONG, Council Member.

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MR. RICHARDSON: We're here for a public hearing regarding the Compensation Programs Performance Council regarding proposed regulations for the Workers' Compensation Division, specifically, Title 85 CSR 23 regarding safety and loss prevention.

My name is Andy Richardson, Commissioner of Employment Programs and Chair of the Compensation Programs Performance Council. We have a number of Council members here with us today.

There's a list circulating if you care to speak this morning to speak regarding these regulations just signify on the list. Randy, where is that list?

MR. SUTER: It's back here on the table with the handout material.

MR. RICHARDSON: Right back here at the entry into the room. There are also copies of the Statute that authorizes these regulations. There is a copy of the proposed regulations and a brief summary describing the regulations.

I'd like to introduce the members of the Performance Council who are in attendance at this time. To my far right is Thad Epps from Union Carbide representing the manufacturing community. David Harris represents small businesses. Dick Humphreys, a hometown boy here in

Morgantown, recently retired from West Virginia University. Everett Solomon from the Carpenters' Union. Paul Thompson from the Steel Workers' Union and the newest member of the Compensation Programs Performance Council representing the coal industry, Richard Armstrong. Richard, welcome aboard, glad to have you.

The proposed regulations today are, I believe, a giant step forward for West Virginia's Workers' Compensation system. Up to this point, other than through the traditional experience modification process, safety has not been an inherent part of the Workers' Compensation Program in West Virginia. Most insurance programs have loss control in safety and accident prevention and items like that as a key element of their means of doing business.

This particular concept comes from a Safety and Loss Control Advisory Committee that was formed by the Compensation Programs Performance Council for purposes of analyzing and developing a means of accident prevention and tying that into the Workers' Compensation premium process.

The committee was made up of representatives of both labor and management. It was a cooperative consensus undertaking that led to the product that is at issue today. It is a giant step forward in labor/management cooperation in West Virginia that will tend to lead to fewer accidents in our work place which will lead to healthier workers for

West Virginia's employers and lower costs for West Virginia's businesses.

At this time, I'd like to recognize the Chairman of the Safety and Loss Control Advisory Committee, Mr. Bill Board, from the McJunkin Corporation.

MR. BOARD: Thank you, Commissioner. My name is Bill Board and I'm the Personnel Director with McJunken Corporation.

I was appointed by the Finance Committee of the Compensation - - - Finance Committee of the Compensation Programs Performance Council to serve with seven (7) others on a Safety and Loss Control Advisory Committee.

We were going to have some overheads today, but I don't think we're going to be able to do that so - - -

First of all, to summarize our mission statement given to our group by the Finance Committee, we were asked to recommend how to implement West Virginia Code, § 23-2B-1, 2, and 3, laws that were passed by the West Virginia Legislature in 1993. All three (3) of these Codes - - - of these Code sections are included in the handout materials made available for you today.

Before I talk about the recommendations our Committee made to the Council, I would like to comment on our Committee process.

Several members of the Committee are here today with

me. Two (2) of us represent the business community. Two (2) represent labor. Two (2) are safety consultants and two (2) are providers in the Workers' Compensation system. Those people - - - I'd like to recognize all of our Committee. Paul Becker is with the Safety and Health Extension Service at - - - or Agency at W.V.U. Mike Cavender of Accordia of West Virginia. Jerry Flick of the Employer Services Corporation. Chris Hamilton of the West Virginia Coal Association. Roger Hammick of the United Mine Workers. Warren Perrine of the West Virginia Safety Council and Joe Powell of the A.F.L. - - - West Virginia A.F.L.-C.I.O. I represented the West Virginia Manufacturers' Association.

We also received valuable assistance from Ed Stats, the Chief Financial Officer of the Fund. Randy Suter, Legal Counsel for the Workers' Compensation Division and we heard comments and gathered relevant information from over eighty (80) other people and sources.

Initially, I was apprehensive about Chairing a group that came to the table with such different perspectives. We quickly learned, however, that we had one common unifying goal. Each of us was committed to enhancing safety and reducing accidents and injuries on West Virginia's work sites. I truly believe the recommendations that we reached

by consensus will have a positive impact upon the Workers' Compensation system in our State if adopted by the Council.

The substance of our report is something we've titled, First For the Funds Initiative on Research and Safety Training." We began by studying West Virginia Code, § 23-2B-1 which provides in substance that the Workers' Compensation Division must integrate safety into its philosophy and its program of work.

A sub-team of our committee prepared a report about our recommendations on how to implement this section that we believe is the cornerstone of the first (1st) program. That report is also a part of your handout materials and outlines a plan where the Division will allocate up to one percent (1%) of the Funds annual budget to be used as follows, first (1st), for safety education and information to be provided for employers and their employees.

Two (2), for voluntary consultation and training to be offered to employers and their employees.

And three (3), for research to analyze trends into benchmark safety results.

The program will be supervised by a safety professional on staff at the Workers' Compensation Division, but will primarily utilize existing safety and training programs both public and private to offer these services.

We are pleased to announce that the Compensation Programs Performance Council has already adopted this initial step of our recommendations for the first (1st) program. The job qualifications for the Division's new safety professional are currently being advertised.

The Division has earmarked One Million Dollars ($1,000.000.00) for the current fiscal year to begin implementing an educational program that we believe will improve the safety awareness and will recognize safety achievements in West Virginia's work force.

I'd like to take this opportunity to personally thank the Council for acting so quickly on this recommendation that we believe will prove a valuable part of the Division's reform efforts.

As the next step in our program, in the first (1st) program, we looked at ways to implement West Virginia Code, § 23-2B-3 in which the Legislature outlined a program of incentives for employers who voluntarily participate in approved loss management programs.

These programs will teach employers case management skills and, more importantly, will teach and document safety improvements. The recommendations we have made to implement this Code section outline the qualifications for loss management firms that will be certified in the future by the

Division's new safety professional.

Employers who contract with these loss management firms will be eligible for a credit on their Workers' Compensation premiums as an incentive for their investment in improved safety.

The regulations related to this loss management phase of the first (1st) program have been presented to the Division to submit to the Compensation Programs Performance Council. These regulations, once approved by the Council, will also be published to you for public hearing and comment and we anticipate this phase of the program to be implemented by the end of this fiscal year or June 30th, 1996.

The regulations before you today for comment are the final phase of the first (1st) program. In passing West Virginia Code, § 23-2B-2 the Legislature mandated that after education and training are offered by the Division and after loss management programs are also made available if an employer's Workers' Compensation costs still evidence a need for safety improvements, additional steps will be mandated by the Division. These mandated steps may include safety inspections; safety committees or the formation of safety committees; and even premium surcharges.

I won't detail the language of the regulations that

have before you for 23-28-2, but I will briefly outline the three (3) tiered procedure approach.

If an employer's Workers' Compensation costs calculate to an experience modification factor above a certain level, that employer may become a focus program employer or one upon which the Division will focus its safety initiatives. That employer will be required to attend a safety seminar approved by the Division and the Division will send reports regularly to the employer for use in assessing safety progress.

If no improvement is shown, that employer may become a target program employer, required to continue attending safety seminars, to submit a loss prevention plan for approval by the Division, to form a joint labor/management safety committee, and to regularly report safety progress to the Division. The Division will continue to send progress data to the employer and the Commissioner may also require on-site safety inspections as well.

If an employer in either the focus program or the target program can document safety improvements, requirements of this Code section will be dropped. However, if an employer continues a downwards safety spiral and also refuses to attend seminars or to provide progress reports, the Commissioner has the discretion to levy a surcharge of

up to twenty-five percent (25%) of the employer's Workers' Compensation premium.

We have recommended that this final phase of the first (1st) program take effect by the end of 1996 allowing employers and employees at least six (6) months to take full advantage of the education and loss management programs before they are targeted for mandates.

However, these mandates show that the Legislature was serious about making safety an integral part of West Virginia's Workers' Compensation System and penalties will apply if employers have substandard safety records and if they fail to cooperate with efforts to achieve improvements.

I'd like to make one final point before you begin your comments.

During the review of 23-2B-2 our Committee became concerned that the experience modification factor as currently calculated by the Division does not fairly represent an employer's safety record. Accordingly we strongly support the new training program and other changes underway at the Division that will affect the way the experience modification factor will be calculated for West Virginia employers. These changes will be implemented by the Division no later than July 1, 1996 and administrative flexibility has also been incorporated into these

regulations so that a system will be in place that will reflect an employer's truer safety picture in the Division's records before the requirements under this section take affect.

Mr. Richardson, on behalf of the members of my Committee I want to thank you and all the members of the Council for giving us this opportunity and certainly to help put West Virginia first in safety.

MR. RICHARDSON: Thank you, Bill. Do members of the Council have any questions?

Thank you very much.

Mr. Suter.

MR. SUTER: My name's Randall Suter. I'm an attorney with the Bureau of Employment Programs Legal Services Division. I had the pleasure to work with the Safety and Loss Advisory Committee over the course of the last number of months in assisting them to develop this particular rule.

As part of the continuing effort to improve the Workers' Compensation system this Committee was created. The Committee's purpose was to promote work place health and safety programs and encouraging compliance with occupational safety and health laws, regulations, and standards. The Committee is devoted entirely to increasing its safety

awareness and decreasing work place accidents which will ultimately lead to less claims filed.

The proposed safety rules implement, as Mr. Board indicated, the provisions of West Virginia Code, § 23-2B-2 regarding mandatory safety programs. The first (1st) tier in the tiers that were created was the focus program employer. It is derived from a calculation of the experience modification factor and annual premium size.

Focus program employers must have a basis safety education component in their requirements. The Division will notify all Tier One (1) employees of their status. Included with this notification will be an analysis of all occupational injuries and diseases incurred by the employer and a list of qualified safety consultants and agencies. Focus program employers must attend a seminar on basic safety programs sponsored by or approved by the Division.

At the end of each review period, and a review period would be two (2) consecutive quarters, a report by the Division detailing claims information will be sent to the employer. Upon review if the employer's performance criteria falls below the evaluation criteria for two (2) consecutive review periods, the employer will no longer be classified as a focus program employer and will not be subject to further review.

This leads us to Tier Two (2), the target program employer. This Tier is also derived from a calculation of the experience modification factor and annual premium size. Target program employers like focus group employers must attend a seminar on basic safety programs sponsored or approved by the Division. A joint labor and management safety committee must be established by all target program employers.

Safety committee requirements are as follows, safety must be the primary focus of the committee. The committee must have the authority to conduct safety inspections of work areas. The committee determines and recommends corrective measures to management. The committee meets regularly and records minutes. Each member of the committee has an equal vote. No loss of wages will result from attending safety meetings or performing designated safety duties. Fifty percent (50%) of the committee must be employee representatives and each member of the committee must attend training on work place safety.

Target program employers will submit within sixty (60) days of notice of their classification a plan to the Division. This plan will detail how the target program employer will meet the requirements to improve work place safety and establish a joint labor and management safety

committee. Within sixty (60) days of receiving the plan the Division will review the plan and notify the employer of any corrections.

Once the plan is approved the safety committee established by the target program employer will submit quarterly reports specifying the activities of the committee and the number of meetings held, copies of the meetings, and results of facility inspections.

Target program employer inspections may be conducted by an authorized safety representative. Inspections may occur at any time or place and inspectors can never be barred from entering a facility. Within thirty (30) days of the inspection, the inspector will present the findings to the target program employer and all bargaining units representing the employees.

If a target program employer's performance criteria falls below the evaluation criteria for two (2) consecutive review periods, the employer will no longer be considered a target program employer. If the same performance criteria meets the requirements for a focus program employer, the employer will be reclassified. If the employer's performance criteria falls below that of a focus program employer, then the employer will not be subject to further review as long as the criteria remains below the focus

program employer level. And, if you'll note, there's a chart on the back of the rule and it contains that particular criteria, the combination of experience modification factor as well as premium size.

Tier Three (3) employers are determined as a result of their nonparticipation at the Tier One (1) or Tier Two (2) levels or by not complying to Tier Two (2) requirements. Basically, the uncooperative employers.

Tier Three (3) employers must meet all Tier Two (2) requirements. In addition to these requirements Tier Three (3) employers may also be charged a quarterly premium tax surcharge not to exceed twenty-five percent (25%) of the premium tax due on a quarterly basis. The Division may impose the quarterly premium tax surcharge at its discretion.

The Division's decision can be based on the following criteria, whether the employer has been properly classified; whether the experience modification factor is an effective method of determining the employer's mandated status; whether the employer is engaged in a unique employment category; whether the employer has experienced significant changes in the number of payroll employees; whether the employer has experienced a catastrophic loss or other anomalous circumstance; and whether the employer is in

substantial compliance with the requirements of a target program employer. The Division will notify the employer in writing of its decision to impose the premium tax surcharge.

The employer's performance criteria will be examined at the end of each review period. After full participation as a Tier Three (3) employer for two (2) consecutive review periods and if the employer has demonstrated measurable improvement, the employer will be reclassified to the appropriate tier. If the performance criteria is below the evaluation criteria for a focus program employer, the employer will not be subject to further review as long as the performance evaluation remains acceptable.

With regard to new subscribers, all employers without the required components needed to calculate classifications under the calculation of the experience modification factor will be deemed new subscribers. Experience modification factors will be calculated at the end of the second (2nd) full quarter of business start-up or after the effective date of this rule if the employer has accumulated two (2) full quarters of claims experience. All new subscribers will be notified of its status.

The Division does not have to classify or reclassify an employer based solely on the experience modification factor and premium calculation. The Division may take into

account other relevant information in making such a decision; and I've outlined those to you just a moment ago. Each employer who is classified at a particular level may protest the classification. In order to do so the employer must file a written petition with the Division.

The petition must be filed within thirty (30) days after the employer receives notice from the Division. A hearing will be scheduled and the Protesting Order will be put on hold until a decision can be reached.

That, basically, wraps up my presentation. I'd like to thank you for the opportunity to address the Council and I would entertain any questions - - - although I would like to make one comment.

At our public hearing in Charleston we talked about the number of employers that may be affected by this particular rule. I had it partially right and partially wrong. I do not want to let that go uncorrected.

It appears that under the focus group, at least according to the actuary's calculations, there's approximately seven hundred and forty-seven (747) businesses that may fall into that group. Under the target group there are approximately five hundred and sixty-five (565). So we're talking roughly less than thirteen hundred (1300) - - - or somewhere around thirteen hundred (1300)

businesses in total that would be affected by these, at least according to our actuary's present calculations.

MR. RICHARDSON: Thank you, Randy. Council members, does anyone have any questions for Mr. Suter? Thank you.

Okay, our first speaker will be Margaret Kelly with Allegheny Wireline Services.

MS. KELLY: Thank you.

I have to admit that I was really surprised when these gentlemen came in dressed rather normally. I thought that they were - - - they would be wearing Santa Claus suits. No offense, but that's what I thought. I'm sorry, don't you know that a lot of people think of Workmen's Comp. as Christmas?

My name is Margaret Kelly. I'm absolutely delighted to be here today. This is the first (1st) time that our company has ever had an opportunity to say anything in public to anybody else about Workmen's Comp. and I owe this to Mr. Jerry Flick with the Employer's Service thing. I hadn't gotten anything from the Workmen's Comp. telling me that this was going to happen today, but I'm really happy to be here and present our side of it.

We have read the proposed rules and we've listened to the presentation and our company is quite impressed with

them. We think that the rules are a very fair way of addressing things and it should be very productive.

The only concern that we would have would be using the experience modification rate as the only ruler of a company. You can guess, I'm one of those companies that's going to be affected.

We have an experience modification rate of two point five (2.5) or something like that. It's really bad, so I'm going to be one of the ones that have to go through all those things, but before we do that, I would like to tell you a little more about my company.

If you look at the experience rate, you would think that we were a bunch of crackpots and that we didn't care about safety. We do. We have safety programs all the time.

We've studied; we've reviewed; we train our men; we buy them everything we can think of to buy for them. We schedule at least two (2) people for every job that is difficult trying to protect our men.

In the past five (5) years with our work force we would have had five thousand seven hundred sixty (5,760) work days available. Out of those days we have only lost sixty-six (66) days due to accident or injury. That's only one percent (1%). It doesn't seem that our problem is truly accidents. We'll see what my problem is in a few minutes.

Our company has identical branch operations in Pennsylvania, Kentucky, and Illinois. We do the exact same thing there that we do in West Virginia. The number of claims filed and the numbers of dollars spent is nothing compared to West Virginia.

I have a verbal snapshot of my most expensive case - - - or one of my cases that really is bothering me and it's a case that's inflating my E.M.R. and I wanted you all to be aware of it so you'd know how you'd get into the Tier Three (3) without really trying.

In 1988 we had an employee that suffered an injury because of a sprain/strain. He went through all the medical treatments. He went for rest and chiropractic care. He never required surgery or anything major. It was just a chiropractor. He came back to work. He only missed sixteen (16) days and he came back to work.

He had absolutely no further symptoms for three (3) years until 1993. He got mad at his boss and he quit his job. Instead of going and looking for another job, he filed to reopen his claim and somehow this man got it reopened. I have protested and protested. I paid a lawyer to protest. We haven't had any success.

He's on temporary total disability. He's racking up all sorts of expenses and even though this is a temporary

case some company - - - I see on the check statements that I get, Genex, which is a vocational specialist has come to Weston to visit him seven (7) times in eight (8) months at an approximate cost of Three Thousand Dollars ($3,000.00).

His doctor had sent the stuff to H.C.X. for a second (2nd) opinion and they've turned down every request that the doctor has put forward. When H.C.X. turns it down, I ask you, "What do you think about this case?" I'm convinced that there's no work related basis for the expenses that this man is incurring.

I have another man that's been on temporary benefits for seven (7) years. He can't come back to the regular job that we have for him, but he only has a twenty-one - - - he got a permanent award of twenty-one percent (21%) and then he got it reopened and got back on temporary. Even though he's twenty-one percent (21%) disabled, there's no program to get him back to work using that seventy-nine percent (79%). I couldn't do the job that he left. A lot of people couldn't do that particular job, but he's not disabled. There's a lot of things in our area that he could do.

Throughout these two (2) particular cases a great deal of liberty in making decisions about health care and benefits was enjoyed by the providers of the benefits. Now the Legislature has mandated that my company somehow design

a program that reduces the cost of those decisions. We very much know that the answer is to prevent accidents in the first place and we have absolutely no problem with prevention, but we are dealing with humans. They have weaknesses and they have accidents and there are people who abuse the system.

There is a question in our minds concerning how much additional control we have over our people and how much more impact we can really have on Workmen's control costs. We would ask you to look at and we would be much more optimistic about a stronger role for companies. such as H.C.X. who control the dollars spent in addition to designing more safety programs.

We're real excited about the decision to develop a panel review of the permanent total disabilities. That was actually music to our ears, and we ask you, "Are we putting any responsibility on the employees? How can we expect them to go back to work? What can we say to them to get them off of temporary?"

In conclusion, we will hope that section 10.4.1 is utilized to see a complete picture of all companies and that there is more than just asking employees to deliver dramatic improvements to a system that has entire sections out of our control. Thank you.

MR. RICHARDSON: Thank you, Ms. Kelly. I can sympathsize with you because my jokes have bombed even worse than that before.

Do the members of the Council have any questions for Ms. Kelly?

Our next presentation is Beverly Jarrett. Regulatory Training Center of Kanawha County Schools.

MS. JARRETT: I think sometimes people think that we're - - - something to do with laxatives. They get sort of hung up on that regulatory name, but I am Beverly Jarrett and my experience and education is in safety.

For the past twenty years I've been involved in the industrial side of the safety experience working in large chemical plants in the Kanawha Valley and noticed through my training and the training classes that I gave - - - one of my responsibilities were for small contractors as they came into the plant - - - well, not all small, small and large, but the problem seemed to be with the small contractors. They really had no resources for training and that's a big problem when you're faced with doing job bids and bidding on this particular work and you have lots of programs you have to have in place and the major company that you're trying to get work in is requiring that you have those programs in

place. So my supervisor and myself looked at various areas of the country so that we could help provide some of these programs for the people and we benchmarked the contractors safety training centers in the Texas area and the California areas as to how they were providing that training for people going onto plant sites.

We came back with a recommendation to Kanawha County Schools because in the Vocational Education Division there's a service to business and industry. So in that Division we came up with the plan, obviously, with the help of the school system that we would start a training center to provide those services so we've done that and we're very busy. We have a lot of those small businesses in particular that work in the chemical plants. With the cooperation of the chemical plants in the Kanawha Valley we're providing a safety orientation for them to get into the plants and do the work that they - - - the safety part of it that they have to have provided before they begin their work.

My problem with what I've seen so far is that I'm noticing some groups that are named on the - - - actually, it's the memo from the Safety and Loss Control Advisory Committee. And on section E and F several, several names are mentioned, W.V.U., West Virginia Department of Labor, Marshall University, The West Virginia Safety Council.

These names are mentioned and it's my opinion that those people would have an unfair advantage if this publication goes out to whomever happens to end up in these programs that need help.

If those names are mentioned, those are the people that they're going to contact and so I would either like to see our name on there or no names mentioned at all or else have a separate listing so that people could call in and ask for a list of the people that provide this service. There's many, many groups that provide safety training services, not only myself involved in vocational education - - - and by the way I did quit my job at the plant and took the Director's job at the Regulatory Training Center when it was up and running - - - or to get it up and running, but there's also community colleges. There's some labor based education programs that's out there and that's been there for a long time, the Lead Program, the Most Program that provides safety education for workers.

So, again, I'd just like to commend the panel on the work that's been done and we definitely need some changes in our Workers' Compensation system, but also to think about the other groups that might not be listed here so that you don't have an unfair advantage when it comes to mandating work within the State of West Virginia. Thank you.

MR RICHARDSON: Thank you, Ms. Jarrett. Your joke got, maybe, a couple of more laughs.

Does anyone on the Council have questions?

Then the next person asking to speak is Emily Spieler, former Commissioner of Workers' Compensation Division and Professor at West Virginia University College of Law. Welcome.

MS. SPIELER: Thanks. I actually have somewhat more technical comments on the rules, but - - - one might say Hallelujah on this. I certainly share Bill Board's goal that we be number one (1) in safety, but I'd probably take twenty-five (25) out of fifty (50) states.

I think that we all know - - - certainly the people who serve on the Performance Council and who served on this Committee that West Virginia's safety rate is much worse than most States, sometimes all States in the country.

In fact, the recent reports that are just - - - just came through one of my on-line research sources showed West Virginia to continue to have fatality rates in the construction and transportation industries. They're in the top three (3) or four (4) in the country.

And much as we may argue - - - and I know it's possible to argue about the actual severity of any particular claim not involving fatality, it's difficult to

argue about fatalities that occur in construction and transportation so we have a long way to go.

As part of my duties as Law Professor now I teach the Employment and Labor Law components of the Law School curriculum including our - - - only discussions about occupational health and safety and as some of you know I've written extensively on the issues of the relationship between Workers' Comp. and safety issues.

Let me ask first just a quick question which I - - - is for Randy more than anyone. There was no indication of a deadline for written comments on the rules that were put out?

MR. RICHARDSON: September 30th, is that right?

MR. SUTER: I believe, it's the 29th - - -

MS. SPIELER: Okay, because some of the stuff that I found is highly technical and might better be the subject of written comments in terms of the use of language. I must say, I regret - - - it's been almost exactly five (5) years since I left Comp. and I - - - I started to talk about safety when I was there and I know that the current Commissioner has shared that concern since he began this job and I thinks it's really too bad it's

taken us this long to get here, particularly in view of the other changes that have been made in the program in the interim.

I also think that it sounds like these rules were the result of a high level of cooperation between and among the various parties that are concerned about these issues and I think that shows and that other changes have been undertaken without that level of cooperation and they are not as easily supported.

With regard to the specific issues and the rules, I really hope, as I think does everyone here, that the implementation of the safety program will have a serious impact on the safety experience in West Virginia work places that's better for employees and it's certainly better for employers and it's a lot better for anyone sitting at Comp. where the more claims that come in, the worse it is for everyone.

I had some - - - and some of them are somewhat technical questions about exactly how the definition of the focus program and target program employers is set-up and in part, I guess, I'm going to have to ask for help from those of you on the Performance Council or others who are more familiar with the current rate making system, perhaps than I am.

It seems to me my recollection is that in the calculation of modification factors or rates the issue in reaching a one point seven (1.7) or one point eight (1.8) or one point nine (1.9) has solely to do with the relationship to the norm in the industry in which the employer is classified. Is that correct?

MR. RICHARDSON: I - - -

MS. SPIELER: So that, for example, in an industry with a low level of injuries the baseline is, to some extent, the medium or the average and if you have a - - - - say, for discussion purposes only, a two point o (2.0) mod. factor then basically you're, perhaps, double what the baseline is or some percentage above what the baseline is. Am I correct about that, Commissioner?

MR. RICHARDSON: Pretty close. The cost - - - it is more cost driven than it is incurred driven.

MS. SPIELER: Right, well, it's not solely cost driven because it's controlled for both the frequency of claims and the cost of claims and that changes based upon employer size.

MR. RICHARDSON: Right.

MS. SPIELER: Here's what my concern is, and I'm not exactly sure how it would best be answered, but this is a concern I'm raising within - - - accepting the

sort of notion that maybe we have to use these modification factors as the mechanism upon which to evaluate who should be in target programs.

Given the limited amount of resources that is going to be available - - - it sounds like a lot, but it really is limited in terms of devotion of resources to safety. You can have a say, clerical based industry where the rate that's charged is say, a dollar ($1.00) per hundred (100) and an employer with a mod. factor of significantly higher than one (1) is paying an actual rate of, maybe, Two Dollars ($2.00) per hundred (100) and the actual incidents and frequency of injuries and severities of those injuries is extremely low.

The way this rule is structured those employers are targeted exactly the same way that an employer say, in the coal industry is targeted who has a mod. factor of two (2) where the injury - - - the frequency and severity of injuries is going to be extremely high.

Both representing hugh costs to the Fund and also representing a much better - - - as a matter of industrial hygiene and safety, I think, a much better opportunity to both save lives and save costs.

I would suggest that the E.M.R. alone without attention to the actual frequency and severity of injury

based upon what the norm is in the industry doesn't make sense in terms of targeting injuries - - - industries. And I would suggest that there be a second (2nd) grid that actually looks at the frequency and severity of injuries before an employer is elevated to the highest level of scrutiny in order to better focus the resources that you have.

I don't think you really want to be focusing on an employer where there may have been a couple of injuries in the prior year and then not having enough resources to go out to the coal operator or the construction company that has what might be described as a hair-raising record so I would suggest that you revisit that issue in terms of how to focus resources.

I'm also concerned - - - you indicate in the rule that after two (2) quarters of improved behavior that an employer will then be dropped down a category or out of the program. Depending upon the frequency of injuries two (2) quarters may not give you credible experience in order to make that decision. I mean, I think any statistician can tell you that and, maybe, those issues need to be revisited with the Funds consulting actuary when you're considering

the final implementation of the rules.

That's my largest concern with regard to these rules, but I have several others that I'd like to raise and, maybe, if you have questions about them you can ask them; but I'm mostly raising them with concern that perhaps you can revisit them when you're considering the final version of the rules.

I don't quite understand the definition of measurable safety improvement, except in those situations in which employers are going to be ratcheted down out of the program. You define it as mathematically demonstrative evidence which sounds like the same thing as measurable safety improvement to me and maybe some clear - - - again, if you go back and look more carefully at the issue of frequency and severity, maybe you can come up with a better measure of what measurable safety improvement is because I think that the - - - that leaves a level of ambiguity in the rules that invites both confusion and litigation that you might want to avoid. So that's a second (2nd) concern.

Third (3rd), I have concerns particularly in non-union work places about the establishment of health and safety committees and the freedom with which employees will feel that they can participate in those committees. As an expert in Employment Law, I know that employees are at will

employees in West Virginia if they're not covered by a collective bargaining agreement. That means that the fear, potential fear of retaliations can be very high. To the extent that you find that non-union work places are represented in these target - - - among these target employers and you're really serious about having effective employee participation then I think some thought has to be given in these rules to reassuring employees that they will be protected from retaliation if they come to these committee meetings and raise some serious concerns.

A very minimalist approach to that would be to put in the rules language that says that any retaliation will be considered discriminatory practices within the meaning of 23-5A-1. For those of you who aren't familiar with it, 23-5A-1 is the provision of the law that bans discriminatory practices, but it's actually fairly narrowly drafted - - - let me find it for a minute, to say, "AN EMPLOYER SHALL NOT DISCRIMINATE BECAUSE OF THE EMPLOYEE'S RECEIPT OF OR ATTEMPT TO RECEIVE BENEFITS UNDER THIS CHAPTER." And I don't think technically the language would extend to retaliatory employer actions in situations in which employees are participating in these committees. I would go farther than that and consider whether you want to establish some - - - as you have established a fairly extensive

hearing process for employers in terms of their classification whether you want to establish and administer a hearing process for employees who suffer retaliation particularly for those who don't have the benefit of union contracts which guarantee just cause for discipline and discharge.

Fourth (4th), I have some concerns about the language on inspections that's found in five point five (5.5) and those concerns are kind of two fold and may go beyond what, I feel, is useful to do in oral comments.

I'm very dubious about the Commission's or the Fund's or the Division's right of entry in situations in which employers refuse entry to inspectors under this provision. The Federal Law has very clearly required a warrant procedure in situations where employers turn inspectors away under OSHA and the language that's being used is not artfully drawn to suggest, I think, to the Circuit Courts that that entry be allowed.

I would suggest that you go back or have your attorney go back and take a look at the search and seizure cases involving administrative searches of this nature and try to address that issue in these rules because for those employers who are not on-board and wouldn't be fully participatory in this improvement process. I think you have

to know how you're going to deal with it and you have to be able to give Circuit Court judges some mechanism for dealing with it because that's where litigation is going to show up.

Second (2nd) with regard to it, I actually think that inspections are a very important component of this program because for that very small subset of employers who are highly uncooperative inspections will give on-site understanding of what's really going on. It is that there's some claims filing behaviors which suggest previously that may underlie the high cost of this employer or are there some serious problems? And to the extent that you want to identify serious problems sometimes that can only be done on-site and sometimes it can only be done with the participation of the employee representatives as part of the inspection.

There's no provision in the rule now for allowing employees who have been employees who are parts - - - members of the Health and Safety Committee to participate in the inspection process. I think that that would be critical. I also - - - and it says that reports will be generated, but does not suggest exactly what happens to those reports. What's the consequence of the report? Is it going to be handed over to regulatory agencies? Is it going to be used as a basis for further analysis internally and if

so, what? Is it going to be used as a basis for making a decision as to whether an employer is subject to the twenty-five percent (25%) surcharge? You should say what it's about because again I think when you're in the area of unwanted inspections that the more you are clear about what the consequences are and what you intend to do with them, the more that provision is likely to hold up legally.

And lastly and perhaps - - - I mean, again, I have some very technical comments that I'll save for written comments, but lastly I would suggest that you go back and look at the - - - I've noticed there are several places where you've suggested that information should be handed over to the bargaining agent for the union and some - - - but there isn't actually any provision for allowing unions to provide the Commissioner in a formal manner with responses or additional information to what's provided by the employer and I think that that should be - - - I assume that that is an oversight given who is represented in this Committee and I think that it ought to be in there. You might find some guidance on some of those issues in the rules under MSHA and OSHA, not in terms of the regulatory piece, but in terms of the cooperation piece.

MR. RICHARDSON: Thank you, Commissioner, for your insight and your comments.

Questions?

MR. EPPS: I've got kind of a comment and a question. Bill Board commented - - - his final comment on his report was that the Committee had some concerns over the current way we calculate experience factors in terms of triggering action on this thing and Ms. Kelly said the same thing and so did you and I kind of agree with all three (3) of you.

And my question, Ms. Spieler, is - - - I think you told us, but I wanted to hear it again. Specifically, you've had a lot of experience in this area and I guess my question is, if you were going to design a measure, do you have any recommendation as to what that measure ought to be based on? You mentioned frequency and severity and I frankly concur with that. I'm not sure exactly how we might go about that, but I'd like to explore that a little bit. Do you have any thoughts on that?

MS. SPIELER: Yeah, well, I haven't - - - I quite frankly - - - this is a separate problem, but I didn't get sent a copy of these rules so I - - - I came upon them a little later than I had hoped.

The calculation of modification factors in the rate making, the insurance industry will tell you if you talk to the private insurance rating bureaus, is a method for equity

issues in insurance rates and not really a very good substitute for health and safety concerns, although it is our only one in the West Virginia system.

The problem in part when you're dealing with small employers in low hazard industries is that experiences tend to be what - - - I'm sure Bob Finger has used this word,"not credible." That it's very difficult to say that because something happened last week it's likely to happen again unless it actually is linked to work processes that are poorly designed and you don't find out whether it's a work process issue unless you're on-site and you see what's going on.

I think I would be inclined, at least initially, to use some kind of - - - even starting - - - - if you start out with the E.M.R. to also use a second (2nd) factor that looks at actual severity and frequency. The way I thought about it when I was Commissioner was, if you thought about core tiles and in any industry, you know, there's the worst employers and then there are the sort of not so bad - - - worst in terms of claims experience. I'm not using that necessarily as a - - - in a moral sense. That what you would hope to do is decrease - - - bring the top core tile down and then bring the top core tile down and then bring the top core tile down and actually in Oregon where they are

effectively doing that rates have, in fact, come down. I think that you should be looking at sort of the overall experience of the industry and how far out of line an employer is and whether that employer's experience has any credibility in order to make that determination.

Now, there are a variety of ways you can do that and I think I'd like to go back and think about it and maybe give you some written stuff on it, but the other problem always is - - - and I think if you've read my excessively long article, you know that I think that one of the reasons the Oregon system worked was that it was linked to the State OSHA plan and the enforcement activities under the State OSHA plan. I know that makes employers hysterical so I - - - but that linkage was, I think, critical for how quickly it reached effectiveness. We don't have that here.

One of the pieces that gives you is on-site information and that's why I was raising concerns about the inspection piece because I think on-site information - - - if you identify the employers that you're concerned about, on-site information both in terms of inspections and in terms of information not only from the employer, but the employees as well may give you a better cut on who you are really are worried about and who - - - where there's been truly some weird concatenation of events that has created

what appears to be a blip. So I think that you should have a mechanism for moving into that piece and have that piece be sort of - - - inform the process more than you actually have suggested in the draft rules, but I will give some more thought to the specific question and try to get back to you on that.

MR. RICHARDSON: Other questions?

Okay, thank you very much.

MS. SPIELER: Sure.

MR. RICHARDSON: We look forward to your comments.

The only other person that I have listed as wishing to speak is Jeffery Price with Beckwith Lumber Company.

Jeff?

And is there anyone else who wishes to speak today? Just raise your hand.

MR. KLINGENSMITH: Dennis Klingensmith. I'm on there with a question mark.

MR. RICHARDSON: Okay, there was a question mark under if you wanted to speak so I wasn't sure what that meant.

MR. KLINGENSMITH: I was waiting to hear the other comments.

MR. RICHARDSON: Okay.

MR. PRICE: I just have a few things here. First of all, I'm with Beckwith Lumber Company. I'm their Safety Environmental Director and we care very much about people's safety and we try very hard to do the best we can do.

First of all, I'd like to thank the Safety Committee. I feel this is a very well written program, Loss Prevention Program. There are a couple of concerns I might have and they were already mentioned.

First (1st), is paragraph three point eight (3.8), the measurable improvement. Now when I read this, I read it from the point of where I'm at and also from - - - we have logging contractors and small businesses and I also look at their side. It's on page three (3) if you want to look at it, three point eight (3.8).

I'm just very curious what the definition of measurable improvement is. For you all it might be one thing; for me it might be something else.

My industry's a very high injury industry. For example, we went ninety - - - we went about ninety (90) days without a loss time accident, had a few minor things. So if you go by the accident rate then that could be - - - that could give us a misrepresentation, you know, because we might have two (2) accidents in two (2) months, but it might

be something minor.

I encourage my people if they get hurt, you know, smashed finger or whatever - - - I'll take them to the doctor and take care of it. That's what Workers' Comp. is for, to take care of people.

So I'd be very careful about measurable improvement. That's something that we can understand especially from the small contractor or a large company and my concern here is if you start going by just claims or whatever, I'm afraid that, you know, people might not report accidents or whatever. Be very careful about how you do measurable improvement.

The second (2nd) thing is on page eight (8), seven point one (7.1). This is just a question and maybe you all can clarify it in the final provision. Seven point one (7.1), the new subscriber employer, I'm not too sure - - - it says they will be afforded a new subscriber experience modification factor for the purpose of rate or classification.

My only question here is, are all new employers going to be under the program and if so who's going to determine if they're a focus program employer or a target program? I think this might be kind of vague. I know if I was starting a new business - - - if you want everyone to be

covered by this then we - - - I feel you need to either say it's going to be a focus program employer or a target program employer.

And thirdly, the person before me mentioned that about safety committees. We're a non-union company. I just came from an employment seminar this past Wednesday. I personally see no need for anything in the provisions for employer - - - to cover employees. We are an employer - - - employment at will so we're not honored with the Court system. If someone is discharged under this provision on a Safety Committee, they can argue with the Court and get - - - I personally see no need in the safety - - - in the loss prevention to cover employees.

And again I'd like to thank you for listening to me. This is a very well written program and I think it's about time.

MR. RICHARDSON: Thank you, Mr. Price.

I've had the opportunity to review and talk with Mr. Price before regarding Beckwith Lumber Company and their commitment to safety and in an industry that is very dangerous I want to publicly compliment you and your company for the efforts that you make toward minimizing the risks to your employees. It's very commendable.

Questions for Mr. Price?

Okay, thank you very much.

Dennis Klingensmith with U-Car Carbon Company.

MR. KLINGENSMITH: Thank you, Commissioner.

First off, I put a question by my name because I did not come here to prepared to make any presentation, but listening to Ms. Kelly's break-in joke on the Santa Claus outfits our employees refer to the Fund more as a pickup truck program, file a claim, get a pickup truck. That's more - - - and I start that off in relationship to our mod. factor.

My concern comes in with utilizing the mod. factor solely as the basis for establishing an employer's performance. If you look at our mod. factor, we will fall into a target employer. However if you look at our claim experience rates, over eighty percent (80%) of our costs are associated with O.P. claims, a lot of which go back thirty (30) year time-frame. Until the rule liberality and the presumptions are reviewed in relationship to occupational pneumoconiosis it will not give a true reflect of a commitment of an employer towards their safety involvement or safety program.

We have a very extensive safety program. We have a safety committee that's comprised of eighty percent (80%) of our bargaining unit employees. We've got an empowered work

force that does a very good job with advising management and working with management on safety and health concerns and issues. We have a lot of things that this standard is proposing, but yet again, we have a mod. factor of, approximately, two (2) which makes it very difficult in the actual reflecting what your true experience rates are.

If you look at loss work day or recordable injury rates, we show improvement from year to year on that. We constantly strive for continued improvement in that area as do a lot of your employers within this State.

Our company within West Virginia makes up basically about twenty percent (20%) of our employment throughout the United States, yet our Workers' Comp. costs are equal to that of all our other facilities in Ohio, California, Connecticut, and New York combined.

That's basically all I have to present. Thank you.

MR. RICHARDSON: Questions for Mr. Klingensmith?

MR. EPPS: It's not a question, but I would respectfully suggest that you might think about the same thing that I said - - - I asked Ms. Spieler.

I have a very big concern as we've heard from a number of the speakers over how we measure safety performance and how we measure safety improvement and I

think everybody recognizes including the Committee, including Bill Board's Committee, that the only tool they had to use that currently exists that's in force is the experience modification factor - - - that's in the system is what I'm trying to say. And I think that certainly the Finance Committee will be reviewing all of these comments that are made both written and verbal and then we will again be reviewing the rule and we will be making a recommendation to the full Council.

I sure would like to get from you and from anybody in the audience - - - if somebody has a suggestion for a better way to measure that is workable and that is the kind of information that is reasonably readily available, I would suggest that you might include that in some written comments back on the rule because obviously we are going to have to look down the road at a better way of measuring this. I share your concern.

First concern is, is it the right measure? Is it fair? And the second (2nd) concern is, how do you measure improvement? Which is really what we're trying to do and everybody's got the same objective in mind. The objective here is to improve the safety of all of our work places throughout the State. That's what we all want to do with this so what's very critical is what's the yardstick? How

do you measure safety performance and how do you measure safety improvement? And I think any suggestions that anybody has - - - I think it would be very helpful if you just jot them down and send them in as part of your comments on the rule.

MR. RICHARDSON: Other comments or questions?

MS. JARRETT: I was just wondering if the Committee or any of the committees that's been formed has looked at other States? We've had Oregon mentioned. There's bound to be States these people have mentioned, programs in other States, where their Workers' Comp. was a lot lower than West Virginia. So perhaps looking at the other States and the way they have taken into consideration their figures could be of help.

MR RICHARDSON: Do you want to respond Mr. Board? I know that you have.

MR. BOARD: We have. We've looked at Massachusetts and Oregon. New Hampshire, Texas, Georgia, Florida.

MR. RICHARDSON: Let me make a comment about this whole issue of the experience modification ratio and how it's figured. I agree that is - - - that there is a serious shortcoming in that area, particularly as it relates

to the quality of indicator it provides regarding safety and other factors that have to be built into that issue.

One of the many changes underway in the West Virginia Workers' Compensation program right now involves technology. Two (2) aspects of technology that will significantly impact the quality of information as it relates to the performance of an employer and their workers or the safe work place.

One (1) will be the more effective capture of data regarding claims and charging those claims back to the employer and the projected duration of those claims and just generally greater detail about that data.

Secondly, is West Virginia's reserving for Workers' Compensation purposes has traditionally been an aggregate projection by payment category as opposed to any type of case by case reserving.

We are presently for all new claims reserving on a case by case basis with a new product that we began using several months ago and with that product we can also generate reports for employers about the individual sources of accidents, the projected costs of individual accidents, and items of that nature which over the long run, I think, will make the entire analysis better regarding injuries in the work place and how to prevent those.

MS. SPIELER: Can I just ask you a couple of questions so I can completely know Mr. Epps' questions?

You mentioned earlier that you were going to move toward a different approach to calculating the E.M.R. Is what you're talking about now what you meant by that or are you actually going to change the sort of underlying presumptions and methodology in how you do it starting this year?

MR. RICHARDSON: Certainly what I was just describing is a part of that, but - - - and the jury is still out on what the final product for the new rate making and underwriting piece will look like, but the 1995 amendments to the law permit the organization to create a variety of different insurance products instead of just the one (1) product that we have right now and it would inherently include consideration of the experience modification factor and how it's currently calculated.

MS. SPIELER: It's just that - - - I mean, in my reading about the way the NCCI does it, our general methodology - - - and there's specifics about problems with the way we've done it and we've addressed some of them, but our general methodology isn't all that different from, I think, NCCI's.

MR. RICHARDSON: No, it's not and I don't

think there's any secret formula or magic bullet on this.

MS. SPIELER: The second (2nd) thing was I was aware when the previous person talked about safety research kind of data collection off the Comp. Fund data set that - - - there are a number of what the researchers call fields that tend not to necessarily have a high degree of accuracy and - - - for example, diagnosis is good because it relates to claim or date of injury is good because it relates to claim payment issues, but the sort of questions on the claims reporting forms that ask about the nature of the job or the actual occurrence tend not to be verified information and - - -

MR. RICHARDSON: And that's a - - -

MS. SPIELER: And I was wondering if you were going to try and do more feedback on these issues. Whether the folks who are coding the claims are going to pay more attention to those issues because they used to fill them in if they were blank.

MR. RICHARDSON: Well, I couldn't have planted that question any better because it gives me an opportunity to talk about another thing that's underway and that is the case management teams. And, basically, I think all new claims are now going through the case management teams.

In the past - - - it's kind of a difference between Detroit - - - the way Detroit manufactured cars and the way Saturn builds cars. In the past we were Detroit, somebody put on the wheels and somebody put in the engine. In other words, someone handled the benefit and someone handled the medical, and different people did different pieces of the claim. No one took a - - - no one had a full picture of the claim.

Now just like Saturn, there's a team of people at that work with a particular geography in the State and when a new claim comes in, they will contact the employer and the injured worker and the health care provider before they do anything regarding the claim in order to set it up correctly to verify the kind of data that you're referring to.

It's never really been verified in the past and, in fact, was simply whatever the claim's coder chose to put down, in essence, and we've seen a higher quality of claim information as well as the management of the claim and, in fact, it's resulting in a shorter duration for Workers' Compensation for most people that are going through that system and right now I think we have about thirty thousand (30,000) claims going through that system so we're not up to full speed yet with seventy thousand (70,000) claims occurring each year, but it's where we're going in the

future and I think it's going to not only - - - not only is it going to result in better case management of the claim, but I think it will also provide researchers better data for projecting where we've been and where we're going.

Yes, Jeff?

MR. PRICE: One more thing. About a year ago I heard about this program through Employer Services through a seminar or whatever. There was some kind of mention about an employer that has a good safety record or a competent safety program somewhere down the road there would be a program for premium reduction for safety programs. Is that part of the same program - - -

MR. RICHARDSON: That's - - - that's the next set of regulations and we'll be bringing those out for public comment in the next several weeks. One step at a time.

Yes?

MS. KELLY: I really appreciate what you all are doing with case management. We had a claim a week or two (2) ago and a employee of Workmen's Comp. called me to verify the information and it's the first (1st) time in ten (10) years that that - - - well, ever, I guess, that has ever happened. And I was really pleased with that and it is going to give you better information because she was

going to code his occupation and she was going to put logging as in going out and cutting down a tree, but we do - - - we survey a gas well which is totally different from chopping down a tree so you're definitely going to get better information and I was pleased that they noticed the claim.

MR. RICHARDSON: Thank you. I'll pass that on to the staff. It's nice to get compliments on the system. Historically, they've been few and far between, but I won't read too much into that.

Okay, is there anything else for the good of the order?

Our next step from here will be to await the receipt of the other comments.

If you would like to provide written comments, you have until the end of next week. You should send them to Randall B. Suter, S-u-t-e-r, with the Bureau of Employment Programs, Legal Services Division, Post Office Box 3922, Charleston, West Virginia 25339-3922. Mr Suter can be reached at area code (304) 926-5130.

Thank you very much for your attendance and please drive safely returning to your destination.

Whereupon, the hearing was duly concluded.

STATE OF WEST VIRGINIA

COUNTY OF MONONGALIA, TO-WIT:

I, Linda L. Bachman, Certified Stenomask Reporter, do hereby certify that the foregoing is, to the best of my skill and ability a true and accurate transcript of all of the evidence introduced and proceedings had in the public hearing held before the West Virginia Workers' Compensation Division on the 22nd day of September, 1995, as reported by me by stenomask and thereafter reduced to typewriting.

Linda L. Bachman

CERTIFIED STENOMASK REPORTER

Bureau of Employment Programs
Legal Services Division
Post Office Box 3922
Charleston, West Virginia 25339-3922

Gaston Caperton
Governor

Andrew N. Richardson
Commissioner

MEMORANDUM

TO: Andrew N. Richardson, Commissioner
Thad D. Epps
David Harris
Richard Humphreys
Everett Sullivan
Paul Thompson
Fred Tucker
Richard A. Armstrong
William E. Board
George L. "Gere" Flick
Warren Perrine
Michael H. Cavender
Joseph W. Powell
Paul Becker
Chris Hamilton
Roger Lee Hammack
Edward H. Staats, CFO, Workers' Compensation Division

FROM: Randall B. Suter, Counsel RBS

DATE: October 5, 1995

RE: 85CSR23, "Loss Prevention"

Enclosed please find my October 2, 1995, inquiry to Robert Finger, the Fund's actuary, regarding the number of employers affected by the proposed rule. Also enclosed is Mr. Finger's October 4, 1995, response.

It appears that the total number of employers projected to fall within the Focus and Target Groups is 747 (which consists of 182 in the Focus Group and 565 in the Target Group).

My apologies for misreading Mr. Finger's chart.

RBS:lfs
Enclosure
cc: John Kozak, Director, Legal Services Division
Sarah Smith, Esq.

MILLIMAN & ROBERTSON, INC.

Two Venture Plaza, Suite 470
Irvine, California 92718

Office: (714) 453-1881
FAX: (714) 453-0188

FAX TRANSMITTAL SHEET

Date: October 4, 1995

To: Randy Suter

FAX: 5414

From: Bob Finger

Pages: 1

Comments: The 565 are included within the 747. Also, the footnote may not be very clear- the 4,887 employers with no payroll are in addition to the 28,954 shown in the lowest premium grouping.

Bureau of Employment Programs
Legal Services Division
Post Office Box 3922
Charleston, West Virginia 25339-3922

Gaston Caperton
Governor

Andrew N. Richardson
Commissioner

October 2, 1995

Robert J. Finger, F.C.A.S., M.A.A.A., J.D.
Milliman & Robertson, Inc.
Suite 470
Two Venture Plaza
Irvine, CA 92718

Re: 85 CSR 23 "Loss Prevention"

Dear Bob:

Enclosed please find what I believe to be your last figures regarding the number of businesses affected by the proposed loss prevention rule.

It appears that the 565 employers falling into the target group are also calculated into the focus group. In other words, the total employers affected would be approximately 182 in the focus group and 565 in the target group for a total of 747 employers. (The figures in the chart may also be read 747 focus employers and 565 target employers for a total of 1312 employers, and I do not think this was your intent.)

Would you clarify this point?

Very truly yours,

Randall B. Suter

Randall B. Suter, Counsel

RBS:mw

Enclosure

COLLEGE OF LAW
WEST VIRGINIA UNIVERSITY
Law Center Drive
Evansdale Campus
P.O. Box 6130
Morgantown, WV 26506-6130

FAX TRANSMITTAL

TO: RANDALL SUTER
LEGAL SERVICES

Fax No.: (304) 926-5441 Date: 10/11/95

FROM: Emily A. Spieler

Fax No.: (304) 293-6891 Phone No.: (304) 293-5301

MESSAGE:

Number of Pages: 6
(including cover)

Signature

COLLEGE OF LAW
WEST VIRGINIA UNIVERSITY

October 10, 1995

Randall Suter
Legal Services Division
Bureau of Employment Programs
P.O. Box 3922
Charleston, WV 25339-3922

Re: Comments on Proposed Rules: Series 23

Dear Mr. Suter:

I am sorry for the delay in getting my comments to you. Unfortunately, because of other demands on my time, I am both later and more brief than I had originally intended to be. I understand from both John Kozak and Thad Epps that these comments will be considered although they are offered after the comment deadline. It is critical that rules pursuant the safety provisions of the Act be issued as quickly as possible; there has already been an unconscionably long delay in implementation of the 1993 statutory amendments in this area. Nevertheless, I would suggest that the rule needs some "fine tuning", particularly with regard to selection of employers for the safety programs.

Please note that I am submitting the following comments *in addition* to the oral comments I offered at the public hearing on September 22, 1995 in Morgantown.

1. Selection of employers for focus and target designation

The grid (Table 85-23A) sets selection of employers for safety programs based on actual or, for non-rated employers, specially calculated EMRs. The use of EMR has some obvious problems, which were discussed at the public hearing. These problems also include: the particular view of frequency (versus severity) which is used in rate-making; and the fact that occupational disease costs, which often represent long term exposures in the past, are included in the calculation. A safety program is much more likely to be effective in addressing traumatic injuries; it should therefore be targeted in this direction. It is possible for the Division to isolate injury-based claims and exclude long latency disease claim costs from the selection of employers; the inclusion of all costs in the calculation of the EMR, and the particular methodology used in calculation of

the EMR, does not lend itself well to employer-selection for a targeted safety program.

I understand, however, that it may not be practical, at this time, to develop an alternative to the use of the EMR. Even if the EMR is to be used as the initial guidance, however, the proposed Table does not achieve what is needed.

The goal of the safety program is, I assume, to have as much impact as possible on the most unsafe workplaces in West Virginia; that is, to reduce the number and severity of injuries (and their workers' compensation costs) as much as possible. The problem with the grid is that it makes no distinction based on either size or industry. Injuries are not evenly spread across industrial classes; it is precisely for this reason that base rates are calculated by industrial class. Because of the construction of the Table, which uses the same EMR for selection of employers in all industries, you will end up targeting small employers in low risk industries whose comparative experience results in a relatively high EMR within their industry but whose actual number and severity of injuries (and total workers' compensation costs) will be relatively low. This is particularly true since the rule suggests that EMRs will be calculated for non-merit-rated employers; these employers are non-merit-rated, in general, because their payroll (and therefore their workforce) is too small to justify experience rating. This means that a very small employer with a single significant claim may, if I understand this process correctly, end up on the list of focus or target employers. This hardly seems like an appropriate use of the limited resources that the Division will have to allocate to this program.

In addition, these small employers may have very few reported injuries in a six month period; the use of six months to drop employers from the program therefore also does not make sense, in view of the lack of credibility when small numbers of events are involved.

In order to aim the available resources more effectively, you need to see which employers will be "caught" in the currently proposed standards and then fine-tune the standards in order to ensure that high injury, high cost employers predominate in the program. At the hearing in Morgantown, I inquired as to the particular mix of the approximately 1300 employers who would be part of the program as proposed; unfortunately, that information was not available. It is precisely this information that will assist you in drawing the appropriate boundaries around this program.

Without additional information, it is difficult to propose changes. I would, however, tentatively suggest that one of the following two approaches might

work:

(1) Divide the industrial classes into high and low risk groups. This can be done based upon the actuarially correct base or manual premium rate. If the current rates are not wholly accurate, these rates can be calculated by Milliman & Robertson. For example, you might consider all industrial classes with a base rate greater than $7 per $100 as high risk and all others as low risk; this is just an example. For the high risk industries, employers should be selected in one of two ways: all employers in that class with total claims costs (injuries or total) over the preceding three year period which are in the top third (or half) of the industrial class and all employers with an EMR of 1.40 (for up to 4999 three year premium) to 1.80 (for 50,000 three year premium) would be in Tier One Focus Group; all employers in the top fifth for total claims cost or with EMRs of 1.50 to 1.90 would be in the Tier Two Target Group. The specific numbers I am suggesting here are simply suggestions; I would want to know the specific effects of the choices in terms of inclusion and exclusion of employers before deciding on which industries to identify as high risk and in order to set the appropriate EMRs.

In low risk industries, I would look only for extreme "out-liers." I would do this by using the same total claims costs but would set the EMRs at a higher level.

(2) Alternatively, you could simply add an additional factor for the inclusion of an employer in the program. For example, you could say that an employer's EMR has to be on the Table and the total claims experience of a targeted employer must be in the worst quartile of the Fund (that is, in the top 25% of costs). This will inevitably pull in larger employers in more dangerous industries and exclude small employers in low risk industries. If you follow this approach, the EMR numbers should be lowered, or you will end up with substantially fewer employers in the program.

In addition, I would suggest that the current six month period for showing improvement be increased to one year. Tier One and Tier Two requirements are not particularly onerous; in fact, employers should have safety programs, training, plans, and committees. Once an employer is brought into the safety program pursuant to the established criteria, it is appropriate that the safety initiative be given time to become a real component of the employer's practices. Therefore, the rule should read that improvement must be shown with consistency over a one year period before the employer no longer needs

to participate.

2. Procedure for and use of inspections

As I mentioned at the public hearing, the section on inspections by the WCD does not make sense. It should be amended to indicate the following:

- What is basic underlying purpose of the inspections? If it is to promote the public health and safety of West Virginians, this section should say so. The failure to say this may ultimately impact the effectiveness of the Division in obtaining entry.

- What happens if an employer refuses entry? The federal courts are clear that administrative inspections are covered by 4th Amendment law; warrants may need to be obtained. The section should set out the procedures and considerations for the circuit courts. Without this assistance, circuit court judges may not feel very comfortable issuing warrants when appropriate.

- What are the consequences of an inspection which yields a report showing significant hazards? What if these hazards show non-compliance with federal or state regulations on occupational safety and health?

  First, the regulation currently only provides that the report will be provided to the employer and the employees' representatives. The current draft suggests that non-union employees, even those participating in these mandated committees, will not receive the reports. I think there will be potential legal liability for the Division if the reports are not also provided to non-union employees *and to employee members of safety and health committees established under the same section of this rule*. Similarly, these reports should be provided to regulatory agencies when there is good reason to believe that there is non-compliance with federal or state regulation. In those instances in which the Workers' Compensation Division is in possession of information which suggests serious or willful violations of standards, the Division will be contributing to the persistence of these hazards if no further use is made of the inspection report.

  Second, reports which are generated from these inspections should indicate an expectation that any identified hazards will be abated; failure to do so should constitute failure to make measurable improvement and should result in reclassification of the employer to be a Tier Three

employer and in the imposition of premium tax surcharges. Persistence of serious hazards is as important a predictor of future injuries as the fact that prior injuries occurred.

3. Protection of employees who participate in safety and health committees.

At the public hearing, several people voiced the feeling that non-union employees are already protected from retaliation under current law. This may ultimately be found to be true; but it does not explicitly state anywhere, either in the Workers' Compensation Act or elsewhere, that retaliation would be unlawful. There is no harm in making this protection explicit in this rule, by explicitly stating that it (retaliation) will be viewed as discriminatory practices within the meaning of W.Va. Code §23-5A-1.

4. Expansion of requirement for safety and health committees.

The current rule limits the development of safety and health committees to Tier two (and presumably Tier three) employers. This is a very small number of employers, if the total number of employers in both Tier One and Two is around 1300. The development of joint safety and health committees can only improve labor-management communication on this critical issue; it is a low cost, potentially high yield mechanism for improving health and safety conditions in workplaces. Therefore, the safety and health committee requirement should, at a minimum, be included in the provisions for Tier One employers.

5. Technical language change

§4.3.1 and §5.6.1.. The language currently says that copies of reports are to be provided to all bargaining units representing the employees. Technically, employees are in bargaining units and are represented by unions who are their bargaining agents. Reports should therefore be provided to any unions [or bargaining agents] representing employees of that employer.

Sincerely,

Emily A. Spieler
Professor of Law

R T C
Regulatory Training Center

September 28, 1995

Mr. Randall Suter
Counsel, Legal Services Division
P. O. Box 3922
Charleston, West Virginia 25339-3922

Dear Mr. Suter:

I addressed the panel and audience at the Public Hearing in Morgantown on September 22, 1995 but want to better define my arguments with the proposed legislative rule to implement the provisions of West Virginia Code, §§21A-2-6(2); 21A-3-7(b) & -7(c); 23-1-1; 23-2-18; 23-2B-2 concerning changes in the programs administered by the Workers Compensation Division. My comments are directly related to 23-2B-1 which includes Occupational Safety and Health Services; Occupational Safety and Health Activities; Voluntary Compliance; Consultative Services and are a direct result of the letter to the Safety and Loss Control Advisory Committee that I was given at the Public Hearing. My comments to that letter (attached) are as follows:

1. Paragraph E:

   - Do not list specific organizations that can deliver the mandatory safety education because it gives an unfair advantage to those listed. An "All Inclusive" list should be provided to the users after programs have been approved by the commissioner or his designate.

   - Confidentiality of proposed program content could be an issue. No one affiliated with an organization submitting a program should be involved in the assessment of the programs or in the awarding of the contract / approval to do the training.

2. Paragraph F:

   - The Regulatory Training Center (RTC) is an existing training organization that was implemented to provide safety training and services to businesses in West Virginia. The RTC is not listed by name in this paragraph and as I stated above, names should not be included in the publication unless all approved organizations are listed. If names are listed, the Regulatory Training Center must be included.

Please contact me at (304) 766-0624 if you have any questions, comments or need clarification on the above.

Sincerely,

Beverly A. Jarrett

Beverly A. Jarrett, Director
Regulatory Training Center

KANAWHA COUNTY SCHOOLS
320 14th Street ■ Dunbar, WV 25064-2950 ■ (304) 766-0624 ■ FAX (304) 766-0627

To: Safety and Loss Control Advisory Committee

From: Bill Board, Paul Becker, Warren Perrine

Subject: W. Va. Code 23-2B-1; Occupational Safety and Health activities; Voluntary compliance; Consultative services.

In order to accomplish the intent of W. Va. Code 23-2B-1, the Fund will provide the initiative and resources to employers to improve their safety performance by incorporating the recommendations given below. The recommendations fit into the 4 categories below, as set forth in W. VA. Code 23-2B-1.

1) Research
2) Information dissemination
3) Training
4) Consultation

Our recommendations are:

A) Research into the elements that make safety and health programs successful should be carried out under the auspices of the Fund. This research would look at the program elements that work, barriers to safe workplaces, and incentives that will create safer work places. This research should be carried out under the direction of the Safety and Loss Control Advisory Committee, with the assistance of the Safety and Loss Manager hired by the Fund.

B) Information provided to employers annually by the Fund should be expanded and in a format that enhances an understanding of injury trends. Information could include not only cost per claim and total cost for all claims, but also the type of injury, frequency of injury types, and lost days from work by type of claim both for individual employers and by industry class.

C) Changes should be made in assessing the safety records of companies before safety mandates and premium incentives are effected pursuant to W. Va. Code 23-2B-2 and 23-2B-3. The current experience modification rating (EMR) does not fairly or completely reflect an employer's safety history.

Some proposals are included in the discussions of sections 23-2B-2 and 23-2B-3 presented by other sub-teams, which we support. The intent is to draw upon the data available through "MIRA".

D) Once an employer qualifies for mandates outlined under W. Va. Code 23-2B-2, it is recommended that employers be required to undergo safety education as a first step in any mandate process. This would consist of a series of seminars approved by this sub team and presented across the state. Employers with bad injury /incident experience would be required to attend, but other interested employers would be encouraged to attend. The intent of the seminars would be to show the relationship between good safety awareness and good safety performance and the subsequent lower cost for medical expense, lost time and workers compensation payments AND premiums. (i.e. Safety does not "cost", it "pays")

DuPont External Affairs
Suite 200
7 Greenbrier Street
Charleston, WV 25311
Tel. (304) 345-7907
(304) 345-7908
Fax: (304) 345-7911

DuPont External Affairs

September 27, 1995

Randall B. Suter
Counsel, Legal Services
P. O. Box 3922
Charleston, WV 25339-3922

Re: Comments on proposed workers compensation rule 85SCR23- "loss prevention"

Dear Mr. Suter:

Regarding the above-captioned proposed rule, DuPont has two comments:

o It appears the rule will improve safety for those directly under the workers compensation insurance program. However, it does not appear to cover those who are self-insured. It seems a system to improve safety must also somehow involve the self-insured companies. Specifically, self-insured companies should pay administrative assessments based on CLAIMS, not based on payroll as is currently done. In that way, costs would be shouldered by those experiencing employee injuries, and companies protecting employees would be rewarded.

o The four DuPont plants in West Virginia now total nearly 29 years without a lost-work injury. This record is possible because we take a positive approach toward safety -- rewarding our employees and teams for good safety performance. The rule, as proposed, includes a strong "stick", but there appear to be no "carrots." We would suggest that in addition to the punishments offered by the rule as inducements for better performance, some

sort of reward for good safety performance be included. We are certain that a POSITIVE reinforcement approach will make a major difference in safety and accident prevention throughout the state.

Sincerely,

L. Craig Skaggs
External Affairs Manager

cc: Bill Board
Andy Richardson
Gene Slesicki
Dave Doering
Karen Price

WESTON, WV
(304) 269-2009

MT. VERNON, IL
(618) 242-2091

DUNBAR, WV
(304) 768-4933

LONDON, KY
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(814) 827-4034

ELDERTON, PA
(412) 354-3090

Randall B. Suter
Counsel, Legal Services Div.
Post Office Box 3922
Charleston, WV 25339-3922

Dear Mr. Suter,

Our company appreciates very much the efforts made by the West Virginia Workers Compensation Division's to provide a mechanism for employers to present their concerns with recent legislation.

Allegheny Wireline Services has always paid strict attention to matters of health and safety and will cooperate fully with the division in the efforts to reduce accidents and injuries in the workplace.

As I mentioned in my comments, we sincerely hope the commission will address the issues of "generosity in benefits". By this we mean specifically: monitoring claims more closely to avoid frivolous or excessive costs, and a more efficient way of closing cases. We have 2 active cases that illustrate how charges to our account that keeps our EMR high. when our actual occurrences are being controlled. Details on those two cases are enclosed.

Again, we commend the Workers Compensation Commission on the progress you have made.

Yours truly,
Margaret E. Kelley

Margaret E. Kelley
Allegheny Wireline Services

enclosures

Allegheny Wireline Services Inc. Enclosure # 1 of 2

John Doe # 1

May 1988, suffered injury as a result of sprain/strain he had surgery, medical treatment, went through the system of hearings, evaluations, etc. collecting TTD benefits until 1993, a determination was made, case closed,
John Doe has reached maximum improvement
he is 21% PPD. lump sum paid to him did he find a job? no, June of 1995, case re-opened, checks for TTD for previous 2 years, were sent to him - he remains on TTD. Experts say his case is done, he cannot go back to his previous employment, because of the nature of his job. John Doe is not necessarily disabled I physically could not step into his previous job There are many jobs neither John Doe or I can do, but does this mean that it's ok for John Doe to collect TTD, should there not be a program to get him a job, using his 79% abilitiy? 7 years on TTD seems excessive to us.

Alleheny Wireline Services, Inc. Enclosure # 2 of 2

John Doe # 2

This man suffered a sprain/strain in 1990, after a short period of time off to rest, and some chiropratic care, he was given a clean bill of health, and returned to work.

John Doe had no further claims for three years, until 1993.

After quitting his job because of a scheduling conflict, John Doe # 2 did not look for another job.

John Doe # 2 filed to reopen his claim.

Somehow his case got re-opened, I have protested and protested, paid a lawyer to protest. no success.

This man has received TTD since 1993, all sorts of expenses have been paid, even mileage of .50 cents a mile for him to drive from Weston to Buckhannon

In addition even though this is a TTD, for some reason, Genex, a vocational specialist has visited him 7 times in 8 months at a cost of apx. 3000.00 dollars

HCX has dis-allowed all requests, except some medication.

What does that tell you about this case?

All of this effects my Experience Modification Factor, though I am convinced there is no work-related basis for this man's claim.

BEP-LEGAL DIVISION 95 OCT 10 PM 4:41

BOWLES RICE McDAVID GRAFF & LOVE

ATTORNEYS AT LAW

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MORGANTOWN, WEST VIRGINIA 26505
TELEPHONE 304-296-2500
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MARTINSBURG, WEST VIRGINIA 25401-1419
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FACSIMILE 304-267-3822

WRITER'S DIRECT DIAL NUMBER
347-1115

October 5, 1995

Randall Suter, Esquire
Bureau of Employment Programs
Workers' Compensation Division
4700 MacCorkle Avenue, SE, 12th Floor
Charleston, West Virginia 25304

Dear Mr. Suter:

Enclosed is correspondence received from our client for your consideration on the referenced rule.

Very truly yours,

Sarah E. Smith

SES/cjt
Enclosure

8581

Royal Vendors, Inc.
Bardane Industrial Park
201 Industrial Boulevard
Kearneysville, WV 25430
(304) 728-7056
FAX: (304) 725-4728

September 20, 1995

Claudia W. Bentley
Bowles Rice McDavid Graff & Love
P. O. Drawer 1419
Martinsburg, WV 25401-1419

RE: Proposed Rule on Loss Prevention

Dear Claudia:

Kevin Wilt, Safety Director and Joan Casale, Manager of Human Resources, have reviewed your August 31, 1995 correspondence.

Royal Vendors, Inc. has the following recommendations:

1. Revise the Sec. 85-23-3.6 definition of "injury" to mean compensable injuries for which **lost time** costs are incurred by the division . . . to make the program more economically viable.

2. Provide the covered employers with some assurance that the Sec. 85-23-3.7 "Joint labor and management safety committee" as described, including powers, duties, and purpose is lawful and not in violation of the West Virginia or federal labor laws.

3. Revise the following definitions to provide enough information, or specific description, or mathematical range or standard to be practical and useful:

3.8	"measurable improvement";
4.1	"analysis of occupational injuries. . . ";
5.7.3	"measurable continued safety improvement";
6.4.2.f	"substantial compliance";
6.5.1	"measurable improvement";
10.4.1.d	"significant changes in the number of payroll employees"

10.4.1.e "anomalous circumstance"

4. Explain how, if at all, 3.8 and 3.11 are connected, or affect each other?

5. Revise 3.13 "Review period" and 4.4.1 review periods to a minimum of four consecutive quarters (one year). Two quarters is far too short to realistically measure the results of any change in a safety program. Two consecutive quarters is even less realistic if the problem is ergonomic.

Revise the 5.7.1 and 6.5.1 review period to three years. Two consecutive review periods of two quarters is far too short to realistically measure the results of any change in a safety program; even less realistic if the problem is ergonomic.

6. 4.1 Notification - how long after the employer's performance criteria falls within the focus program classification until the employer receives notification?

7. 5.5 Reports - will a form be provided? (See: Section 85-23-13.)

8. 5.6 Inspections - appears to directly conflict with or to duplicate state and federal OSHA jurisdiction and duties.

Is the jurisdiction of the West Virginia Workers Compensation "inspector" intended to be concurrent with, or subordinate to, or controlling over that of the state and/or federal OSHA inspector(s)?

Is the intent to require employers to change processes, procedures, guarding, etc. even if already OSHA inspected and approved?

In event of conflict between Workers Compensation inspector instruction and OSHA directive, which controls? Do the Section 85-23-10 provisions apply?

What is the anticipated frequency of Workers Compensation inspections?

If the employer disagrees with a "remedial action" directive, is there a period for protest and administrative review; a process for same; forms or documents for same? Do the Section 85-23-10 provisions apply?

Will there be a specified time within which the "remedial action" must be taken? Will there be a follow-up inspection to confirm compliance?

9. For the Section 85-23-10 provisions, is there a process or required standard extend the stay? ". . . provided that the safety of the employer's employees is not compromised" is a vague standard, and does not identify the party who will determine whether the safety of the employer's employees is compromised; nor does it define the standard for determination of whether an extension of the stay is established (i.e., clear and convincing evidence? preponderance of the evidence? what evidence is considered to be relevant where an extension of stay is requested?)

We hope this letter is responsive to yours of August 31, 1995. Please advise if you have any further questions.

Very truly yours,

Sheri M. Littleton

Sheri Littleton
Personnel

cc: Kevin Wilt, Safety Director
Joan Casale, Manager of Human Resources

KW.wvwcproprule

HUNTINGTON PHYSICAL THERAPY SERVICES, INC.
P. O. Box 8141
Huntington, WV 25705-8141

September 18, 1995

Randall B. Sutter
Council Legal Services Division
P. O. Box 3922
Charleston, WV 25339-3922

Dear Mr. Sutter:

I am writing regarding the new rule being proposed, which is Loss Prevention. I wish to make the below comments with the effort these will be reviewed by the appropriate individuals and the Performance Council.

Below are brief summaries regarding each of the comments:

3.7f: Delete - the phrase "at least".
Add - 25% of the members are from companies with 100 or more employees, 25% from companies with 100 or less.

Justification: The small employers of West Virginia make up more than 50% of the businesses in West Virginia. They have the least input and have the most need for inspection and assistance with information to make changes.

4.2 Seminar: All Focus Groups, CEO's, and Safety Representatives must attend a seminar on basic safety programs to include education on the specific area of analysis that injuries fall into. These meetings should be held at least four times yearly, requiring attendance to the different areas which meet the specific needs of the company. Justification of the analysis shows that injuries are across the board, basic will work. If it is light industry, such as clerical and the injuries are repetitive, then focus information is not basic.

5.2: Same As Above.

Other comments: (1) I suggest a report be given to each employer analyzing each of their injuries, showing the percentage of injuries to a certain body part and a specific work area in which the injury occurred. (2) Light duty should be implemented into the safety program and extra credit premiums given if companies maintain a structured return to work program.

I would appreciate my comments being addressed. If you have any questions, please do not hesitate to contact me.

Sincerely,

Denise Reynolds
WORC Coordinator
Huntington Physical Therapy

DR/pjl

RESPONSE TO COMMENTS
85CSR23, "LOSS PREVENTION"

Written and oral comments regarding proposed rule, 85CSR23, "Loss Prevention," and responses thereto are as follows:

1. Regulatory Training Center (RTC)
   Beverly A. Jarret, Director
   Letter dated September 28, 1995
   Public Hearing Comments - Morgantown, September 22, 1995

Ms. Jarrett expressed concern that her organization was not listed by name in a memorandum to the Safety & Loss Control Advisory Committee which was distributed at the public hearings.

Response: Ms. Jarrett's comments did not reflect on the content of the rule proposed to enact the provisions of W. Va. Code §23-28-2. Ms. Jarrett's comments were directed to a separate memorandum, provided for informational purposes at the public hearing, dealing with consultative services under the provisions of W. Va. Code, §23-2-B-1. Ms. Jarrett's organization was not referenced in the memorandum.

It is noted that the list of possible service providers is not exclusive and is used to typify those organizations capable of providing such consultative services.

2. Allegheny Wireline Services, Inc.
   Margaret E. Kelley
   Letter undated.
   Public hearing comments - Morgantown, September 22, 1995.

Comments appeared directed at general issues concerning S.B.250 and liberality in benefits payments in specific claims. No germane comments concerning the specific rule were adduced.

3. E. I. duPont deNemours and Company
   DuPont External Affairs
   L. Craig Skaggs, External Affairs Manager
   Letter dated September 27, 1995.

a). Commentor noted that the "Lost Prevention" rule does not appear to cover those who are self-insured.

Response: Self-insurer safety programs are addressed under the provisions of W. Va. Code, §23-2-9. Subsequent regulations for self-insurers should address safety issues from the self-insured perspective. A sentence was added to the provisions of section two to clarify the inapplicability of this program to self-insured employers.

b). Commentor suggests that the Division offer inducements for better performance in addition to the mandatory requirements of the "Loss Prevention" rule

Response: Inducements for improved safety are contained with the "Qualified Loss Management Programs" rule contemplated under W. Va. Code, §23-2B-3. Other reinforcements for safety performance should be contained within the underwriting and ratemaking project (See W. Va. Code, §23-2-4).

4. Huntington Physical Therapy Services, Inc.
   Denise Reynolds, WORC Coordinator

a). Commentor requests revision of 3.7.f regarding "joint labor management safety committees" to reflect increased participation by small businesses to make up 25% of the group (the other 25% to be derived from larger businesses).

Response: It appears that the commentor was addressing the issue as if the joint labor management committee was a State-wide administrative group. Such committees are required under certain provisions of the rule for specific businesses. The provision was reworded for clarification to read, "At least fifty percent (50%) of the members of the tiered safety organization and of each committee (committees) shall be employee representatives;".

b). Commentor suggests that all Focus Groups, CEOs and Safety Representatives be required to attend seminars on basic safety programs to include education in the specific area of analysis that injuries fall into. The Commentor suggests these meetings be held at least four times per year. Such comments were made with respect to the seminar requirements of 4.2 and 5.2.

Response: It appears the commentor was addressing the issue of education of employers in general. Such general education will be addressed by the Division under the provisions of W. Va. Code, §23-2B-1.

c). The Commentor suggests that a report be given to each employer analyzing each of their injuries, showing the percentage of injuries to a certain body part and a specific work area in which the injury occurred.

Response: The provisions of 4.1 and 5.1 require the Division to include in its notification of classification an analysis of the occupational injuries and diseases incurred by the employee. Such analysis will include relevant information captured by the division.

d). The Commentor suggests that light duty be implemented into the safety program and extra credit premiums be given if companies maintain a structured return to work program.

Response: Light duty is not a part of the mandate of W. Va. Code, §23-2B-2, regarding mandatory safety programs. Light duty appears to fall into the realm of claims management.

5. Royal Vendors, Inc.
Sheri Littleton, Personnel
Letter dated September 20, 1995.

a). Commentor suggests a revision of the definition of "injury" to mean compensable injuries for which lost time costs are incurred.

Response: The Commentor appears to be examining only the severity of injuries as a valid measurement of safety performance. Frequency of injuries , as well as severity, is a valid measurement of safety performance.

b). Commentor requests assurance that the "joint labor and management safety committee" is lawful and not in violation of West Virginia or federal labor laws.

Response: The formulation of the rule involved input from both labor and management. The subject matter of the rule is limited to safety. All rules are subject to challenges and judicial interpretations.

c). The Commentor requests revisions in a variety of words and phrases "to provide enough information, or specific description, or mathematical range to be practical and useful."

Response: Specific language may, in many instances, be less manageable and result in unfair applications. General language was used by agreement of both the labor and management representatives of the Safety & Loss Advisory Committee. The following changes to the proposed rule are recommended as a result of this comment.

> 3.8. "Measurable improvement" means ~~mathematical~~ demonstrative evidence of safety improvement at the employer's workplace.
>
> 3.11. "Performance criteria" means the measurement of an employer's safety performance including, but not limited to, the combination of ~~by combining~~ the premium tax size and experience modification factor as per table 85-23A of this rule.

d). The Commentor requests an explanation as to how the definitions of "measurable improvement" and "performance criteria" are connected, or affect each other.

Response: "Performance criteria" is the measure by which an employer is determined to be a Tier One or Tier Two employer. "Measurable improvement" is

necessary to maintain a rating under the provisions of 4.4.2 and 5.7.3 (subject to the criteria and references contained therein).

e). The Commentor requests a revision to definition 3.13 "Review period" and the use of the term in 4.4.1. The Commentor requests a minimum of four quarters to measure results.

Response: Under 3.13 "review period" means a period of two consecutive quarters. Thus, the reference to two review periods means four consecutive quarters.

The Commentor requests revision of the performance review in 5.7.1 and 6.5.1 from two consecutive review periods (four quarters) to three years.

Response: Measurable improvement over the course of two review periods is significant in focusing an employer on the benefits of participation in a safety program.

f). The Commentor asks how long after the employer's performance criteria falls within the focus program classification will the employer receive notification?

Response: Notification is to occur upon discovery.

g). The Commentor asks whether the Division will supply report forms under the provisions of 5.5.

Response: Section twelve requires the Division to provide such forms.

h). The Commentor asks whether the jurisdiction of the Division's inspector is intended to be concurrent with, or subordinate to, or controlling over that of the state and/or federal OSHA inspectors. The Commentor further inquires whether processes previously OSHA inspected and approved may be required to be changed by State inspectors. Whether inspector instructions are subject to the Administrative hearing provisions of section ten.

Response: W. Va. Code, §23-2B-2 (e) states: "It is not the purpose of this article to either supersede the federal Occupational Health and Safety Act program, federal Mine Safety and Health Act program or to create a state counterpart to this program." Further, the statute requires such inspections (See W. Va. Code, §23-2B-2 (c) (2) (A)). The purpose of such inspections is not to forge inroads into OSHA or MSHA but to heighten the employer's and the employee's awareness of safety factors. Frequency of inspections may vary depending on the employer.

The employer may protest any order or decision made under the provisions of the rule.

I). The Commentor inquiries whether a process exists to extend the stay of the Division's orders provided by the provisions of 10.3.

Response: The rule explains (10.3) that the stay shall extended if the employee is not provided a hearing within the stated time frame. Further, that the Division may grant additional stays in its discretion so long as employee safety is not compromised. Relevant evidence regarding additional stays is dependent upon the facts of each case.

6. Emily Spieler
College of Law
West Virginia University

Oral comments - September 22, 1995.
Follow-up written comments dated October 10, 1995.
(See the Commentor's letter for in-depth comments. Comments paraphrased herein)

a). The Commentor suggests alternative methods of including employers in the Tier One and Tier Two categories in order to focus the program on the most unsafe workplaces in West Virginia and reduce the number and severity of injuries.

Response: The Division recognizes that the experience modification factor, as it is currently calculated, may not be the best safety indicator. The Division recognizes that the calculation of the experience modification rate may change with changes to the Workers' Compensation underwriting system. At the same time, the provisions of W. Va. Code, §23-2-B-2 (b), requires the use of the experience modification factor in the criteria established for the proposed rule.

The size of the employer was figured into the matrix by the amount of payroll.

High and low risk categories were broken out in previous draft versions of the rules. Experience modification factors did not appear to significantly differ.

The period for showing improvement as contained in the proposed rule is four quarters (or two review periods) which is in agreement with the suggestion.

b). The Commentor suggests procedures for and use of inspections.

Response: The basic underlying purpose of the inspections is to promote the stated purposes of the statute and proposed rule as contained in W. Va. Code, §23-2B-2, and section two of the proposed rule.

If an employer refuses entry for inspection, the code provisions and rule appear to provide adequate grounds for obtaining an administrative warrant.

It is anticipated that the safety professional implementing the proposed rule will share such reports with appropriate agencies in the event of violations of standard.

c). The Commentor makes suggestions regarding the protection of employees who participate in safety and health committees.

The provisions of W. Va. Code, §23-5A-1, regarding discrimination do not appear to be applicable to this circumstance. The legislature would have to promulgate

statutory changes to broaden the effect of the discriminatory practice provisions. However, the point made by the Commentor is well-taken. The following change to the rule is proposed:

> 3.7.1.e. Members of the committee shall not experience any loss of wages or any other retaliation while attending safety committee meetings or performing duties at the direction of the safety committee;

Further, a new section was added to the rule to outline a procedure for use in matters involving retaliation (§13).

d). The Commentor requests expansion of the requirement of the joint labor and management safety committee to Tier One employers.

Response: The Committee's thrust is to provide the greatest requirements to the employers who have significant adverse Workers' Compensation experience. The number of employers affected (approximately 750) and the requirements thereof need to be limited to a manageable number.

e). The Commentor requests a technical language change at 4.3.1 and 5.6.1.

Response: Proposed changes to read:

> 4.3.1. The focus program employer shall provide a copy of each report required under this section to all bargaining units or bargaining agents representing the employees.

> 5.6.1. Within thirty (30) days following the completion of any inspection performed pursuant to this subsection, the authorized safety representative shall prepare a report regarding the findings of the inspection. The authorized safety representative shall provide a copy of each report required under this subsection to the target program employer and to all bargaining units or bargaining agents representing the employees.

7. Other changes.

The authority section (1.2) was clarified by the addition of two code provisions.

Section 6.1 was clarified by the additional language concerning the meaning of classification for ratemaking purposes.

Section 6.4 was clarified regarding the definition of premium tax for purposes of calculating a surcharge.

Section 8.1 was expanded to allow consideration of additional factors beyond the factors enumerated in the rule.

Note: Oral comments received at the public hearings appear to have been covered in the foregoing even though all of the speaker's individual comments were not individually addressed as covered elsewhere.