

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

Form #2

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2003 JAN 16 P 3:46

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Workers' Compensation Division, BEP TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: 21A-2-6;21A-3-7;23-1-1;23-4-3,-3c

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 28

TITLE OF RULE BEING PROPOSED: Rules for Health Care Vendor Hearings

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON February 28, 2003 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Randall B. Suter, Senior Counsel
Legal Services Division-BEP

Workers' Compensation Executive
Offices

Post Office Box 3824

Charleston, WV 25338-3824

THE ISSUES TO BE HEARD SHALL BE
LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Bob Wise
Governor
Robert J. Smith
Commissioner



West Virginia Bureau of Employment Programs

• Job Service • Labor Market Information
• Unemployment Compensation • Workers Compensation
an equal opportunity/affirmative action employer

January 16, 2003

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

Re: Proposed Rule
Title 85, Series 28
"Rules for Health Care Vendor Hearings"

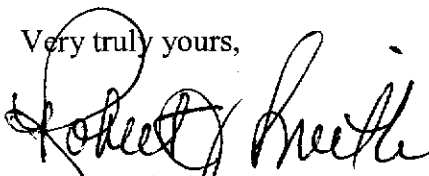
Dear Secretary Manchin:

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



Robert J. Smith
Commissioner

Enclosure

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 85, Series 28: Rules for Health Care Vendor Hearings

Type of Rule: Legislative Exempt Interpretive X Procedural

Agency Bureau of Employment Programs

Address 112 California Avenue

Charleston, WV 25305

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	Unknown	Unknown	Unknown	Unknown	Unknown
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER:					
Provider payments	0	Unknown	Unknown	Unknown	Unknown
Professional services	Unknown	0	Unknown	Unknown	Unknown

2. Explanation of above estimates:

An undeterminable amount of additional costs would result from reviewing each health care provider's reconsideration request of a notification of overpayment. Other additional costs incurred would be related to the Division's expenses involved with each hearing petition and final decision such as attorney fees, service fees, fees for attendance at hearings, travel, etc. Primarily the number and the complexity of the reconsiderations and petitions for hearings that are filed would affect the total additional amount of costs associated with implementing the proposed rule. Provider payments would decrease by an undeterminable amount from the recoveries made on any excessive billings previously paid to health care vendors suspended or terminated.

3. Objectives of this rule:

The purpose of the proposed rule is to define and describe the procedures for administrative hearings for disputed issues between the Workers' Compensation Division and health care providers.

Rule Title: Title 85, Series 28: Rules for Health Care Vendor Hearings

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that this rule should contribute toward more efficient health care treatment by qualified health care vendors utilized by the Workers' Compensation Division, and will result in savings in total medical and rehabilitation costs.

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

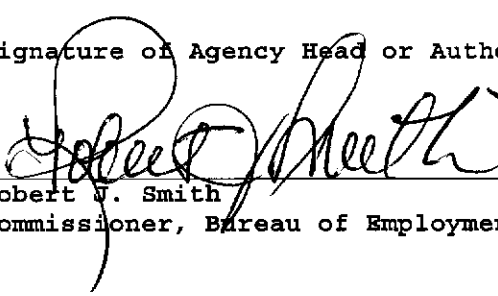
It is expected that the proposed rule will improve and maintain the overall quality of health care treatment provided to injured workers.

C. Economic Impact on Citizens/Public at Large.

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

Date: January 17, 2003

Signature of Agency Head or Authorized Representative


Robert V. Smith
Commissioner, Bureau of Employment Programs

**SUMMARY OF PROPOSED PROCEDURAL RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 28
WORKERS' COMPENSATION DIVISION
RULES FOR HEALTH CARE VENDOR HEARINGS**

This rule sets forth the procedures for administrative hearings for disputed issues between the Workers' Compensation Division and health care providers.

This is a new rule that provides a hearing process for health care vendors. The rule is focused on disputed circumstances involving allegations by the Division that a health care provider has incorrectly billed the Division for services rendered. In addition, the rule provides a process whereby a health care provider may dispute a determination related to the suspension or termination of a health care provider under the provisions of W. Va. Code §23-4-3c.

It is anticipated that the Bureau of Employment Programs will utilize hearing officers from the Bureau's Office of Judges in billing dispute matters. It is anticipated that matters involving suspensions and terminations of health care providers will be heard by contract hearing officers.

Title 85

FILED

Procedural Rule

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Workers' Compensation Division

Series 28

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Rules for Health Care Vendor Hearings

§85-28-1. General.

1.1. Scope. - This rule sets forth the procedures for administrative hearings for disputed issues between the workers' compensation division and health care providers.

1.2. Authority. - W.Va. Code §21A-2-6(1), -6(2) & -6(14); §21A-2-19; 21A-3-7(b) & -7(c) §23-1-1; §23-4-3; §23-4-3c. Pursuant to W. Va. 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 W. Va. 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, 1999 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. --

§85-28-2. Definitions.

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

2.1 "Agent" means a private company retained by the division to audit, identify and collect medical vendor overpayments.

2.2. "Act" means the workers' compensation laws of the State of West Virginia that are codified at chapter twenty-three of the Code of West Virginia.

2.3. "Hearing officer" refers to an objective trier of fact who will be conducting a *de novo* administrative hearing in a health care vendor issues arising between the workers' compensation division and a registered health care vendors.

2.4. "Code of West Virginia" and "West Virginia Code" means the West Virginia Code of 1931 as amended.

2.5. "Commissioner" means the commissioner of the bureau of employment programs pursuant to W.Va. Code §21A-2-1 and 21A-2-12 & -13.

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

2.7. "Health Care Vendor" or "Health Care Provider" refers to health care providers, including providers of rehabilitation services within the meaning of W. Va. Code §23-4-9, both in- and out-of-state who have signed provider agreements with West Virginia workers' compensation division to provide health care to injured workers.

2.8. "Office of Judges" refers to the bureau of employment programs office of judges, as set forth in W. Va. Code §23-5-8.

2.9. "This rule" means the present procedural rule that is designated in the caption here as title 85, series 28.

§85-28-3. Overpayments: Notification and Reconsideration.

3.1. Notification of decision. The division shall notify each health care vendor of any alleged overpayment by United States mail, first class, postage pre-paid.

3.1.a. In overpayment matters the notification shall detail and provide an itemized statement of the alleged overpayment and the audit reason.

3.1.b. The notification shall include language to inform the health care provider that it is afforded the right to file a request for reconsideration of the decision and provide an address where the request for reconsideration shall be filed.

3.1.c. The notification may be sent by the division's agent. The notification may require that the request for reconsideration be filed with the division's agent.

3.2. Undisputed amounts. If the findings of overpayment contained within the notification are not disputed by the health care vendor. The health care vendor is required to remit payment in full within sixty (60) calendar days of the notification date.

3.2.a. Upon receipt of a request from the health care vendor and a showing of undue hardship, the division may enter into a repayment agreement with the health care provider. The repayment agreement shall not extend for a period in excess of twelve (12) months and shall provide for the payment of principal and interest. Interest shall be calculated in the same manner as provided in the provisions of W. Va. Code §23-2-13.

3.3. Request for reconsideration. Each health care provider who desires to dispute an overpayment decision is required to file a complete and timely request for reconsideration as a condition precedent to filing a petition for hearing.

3.3. Time limits. A request for reconsideration shall be filed with the division within thirty (30) days of the health care provider's receipt of notice of the disputed division's decision or action or, in the absence of such a receipt, within sixty (60) days of the date of the division's making such disputed decision or taking such disputed action. Such time limitations are a condition of the right to litigate the decision or action and are jurisdictional.

3.4. Contents of the request for reconsideration. In its request for reconsideration, the health care provider shall clearly identify the decision or action disputed. The health care provider shall also clearly identify the bases upon which the health care provider disputes the decision or action.

3.5. Review. Upon the filing of a health care provider's request for reconsideration, the division or its agent shall review the bases for the request. Such a review may include a meeting with the health care provider, a review of the health care provider's records, or any other process calculated to provide the division with the relevant information necessary to perform its review. After reviewing the request, the division shall enter its final decision.

3.5.a. The division is required to enter a final decision or enter into an extension agreement with the health care provider within one hundred-twenty (120) days from the date the employer's request for reconsideration is filed.

3.5.b. The division and the health care provider may enter into a written extension agreement to provide no more than an additional sixty (60) days for the division to enter a final decision.

3.5.c. The division's failure to enter a final decision within the initial time period or extended time period, where applicable, triggers a health care provider's right to file a petition for hearing.

3.6. Effect of filing. The filing of a timely and complete request for reconsideration of a written decision or action of the division stays the tolling of the time limitations for filing a petition for hearing until the final decision is issued.

3.7. Example. The health care provider receives a decision from the division. The health care provider desires to dispute the decision or action. The health care provider must file a request for reconsideration of the decision or action and await the division's final decision in the matter, the expiration of the one hundred-twenty (120) day period for the division to issue a final decision, or the expiration of such additional written time extension agreement as limited by this rule. The final

decision may be contested by filing a petition for hearing. Should the health care provider fail to file a timely and complete request for reconsideration, then the division's decision or action becomes final.

§85-28-4. Suspension or Termination.

4.1. Notification. When the division determines that there is probable cause to believe that a health care provider should be suspended or terminated under the provisions of W. Va. Code §23-4-3c, the division shall provide written notice to the health care provider by United States mail, first class, postage pre-paid.

4.1.a. The written notice shall state the nature of the charges against the health care provider and the action to be taken by the division.

4.1.b. The written notice shall state a time and place at which the health care provider shall appear to show cause why its right to receive payment from the workers' compensation division for treatment of injured workers under W. Va. Code §23-1-1 et seq. should not be suspended or terminated.

4.1.c. The written notice shall inform the health care provider that it is afforded the opportunity to review the commissioner's evidence, to cross-examine the commissioner's witnesses, and to present testimony and evidence in support of its position.

4.2. Final decision. Each notification of suspension or termination shall be considered a final decision of the division.

§85-28-5. Final decision; Petition for Hearing.

5.1. Notice of final decision. The division shall notify each health care vendor of its final decision by United States mail, first class, postage pre-paid.

5.1.a. The notice of final decision shall include language to inform the health care provider that it is afforded the right to file a petition for hearing of the decision and provide an address where the request for reconsideration shall be filed.

5.2. Time limits. A petition for hearing shall be filed with the division within thirty (30) days of the health care provider's receipt of notice of the disputed decision or action or, in the absence of such a receipt, within sixty (60) days of the date of the division's making such disputed decision or taking such disputed action. Such time limitations are a condition of the right to litigate the decision or action and are jurisdictional.

5.3. Contents of the petition for hearing. In its petition for hearing, the health care provider shall:

(1) clearly identify the decision or action disputed;

(2) clearly identify the bases upon which the health care provider disputes the decision or action; and

(3) provide a summary of documentation supporting the health care provider's position.

5.4. Collection of an alleged overpayment shall remain in abeyance until such time as the matter becomes final under these provisions.

§85-28-6. Hearings; General Provisions.

6.1. All administrative hearings conducted pursuant to this rule will be held in accordance with the provisions of W. Va. Code §29A-5-1 et seq. and the provisions of this rule.

6.2. Representation. Corporations and the division may only be represented by an attorney duly licensed to practice law in the state of West Virginia.

6.3. Notice of hearing. Unless waived by all the parties, hearings shall be preceded by at least ten (10) calendar days written notice.

6.4. Counsel for the health care provider shall file a notice of appearance with the hearing officer, the division, and with the designee from the legal services division along with the request for a hearing, or as soon thereafter as the attorney assumes representation of the health care provider.

6.5. The hearing shall be held in Kanawha County, West Virginia, telephonically, or in the county designated by

the division. The decision to hold the hearing in person or telephonically shall vest in the discretion of the hearing officer. The hearing shall be held within forty (40) calendar days from the receipt of protest, no longer than sixty (60) calendar days at the request of any party.

§85-28-7. Parties and Conduct of Hearings.

7.1. At the time of the hearing, an opportunity shall be afforded to all parties to present relevant evidence. Testimony may be restricted if it appears that it is cumulative in nature, or if it is not relevant to the issues in dispute. Character evidence will not be admissible, as it does not pertain to the relevant issues at hand. Closing arguments shall be restricted to a brief presentation in written form. All of the testimony and evidence at the hearing shall be reported by stenographic notes and characters or by mechanical means. All rulings on the admissibility of testimony and evidence shall also be reported. All reported testimony and evidence at a hearing shall be transcribed, and a copy thereof furnished to the party upon its request.

7.2. All hearings shall be conducted in an informal and impartial manner. The hearing officer shall have the power to administer oaths and affirmations, certify official acts, take depositions, rule upon offers of proof, and receive relevant evidence, regulate the course of the hearing, hold conferences for the settlement or simplification of the issues, dispose of procedural requests, motions or similar matters, and take other such actions as are authorized by this rule.

7.3. Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence.

7.4. All witnesses who testify during a hearing shall first be subject to oath or affirmation, and any testimony submitted by deposition shall show on the face thereof that the witness was so qualified. Any transcript shall become part of the official record and relied upon for final decision.

7.5. The hearing officer may take notice of judicially cognizable facts. All parties shall be notified either

before or during the hearing, or by reference on preliminary reports or otherwise, or the material to be noticed, and they shall be afforded an opportunity to contest the facts so noticed.

§85-28-8. Burden of Proof.

There is a presumption that the division's decisions or actions are valid. The party contesting the division's decisions or actions has the burden of overcoming this presumption by satisfactory proof.

§85-28-9. Correction of the Record.

Correction of the record shall be made by the hearing officer upon his or her own motion, or upon the written motion of either of the parties to the hearing.

§85-28-10. Subpoenas.

10.1. All subpoenas and subpoenas duces tecum shall be issued in the name of the hearing officer and bear a facsimile of his or her signature, but the party requesting their issuance must sign the actual subpoenas and see that they are properly served. The subpoenas and subpoenas duces tecum must be issued through a party's counsel as a member of the Bar and an officer of the Court. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing, and shall contain a statement acknowledging that the requesting party agrees to pay service fees, fees for attendance, and travel for witnesses.

10.2. Every subpoena or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person over eighteen (18) years of age, or by registered or certified mail. If service is by mail, then the five (5) day notice period shall not begin to run until the date the subpoena or subpoena duces tecum is received by the person or entity subject thereto as shown by the date on the return receipt.

10.3. Any person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses shall be the same as for witnesses before the

circuit courts of this state. All such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued.

10.4. In case of failure or refusal of any person to comply with any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the commissioner, or any division employee designated by the commissioner, or hearing officer, shall compel obedience by attachment proceedings as for contempt of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein.

10.5. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is being held, or the circuit court in which the subpoena duces tecum was served, or the judge if either such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such court, under the West Virginia Rules of Civil Procedure for Trial Courts of Record, could grant, and for any of the same reasons, with respect to a subpoena duces tecum issued from either such court.

10.6. The issuance of a subpoena duces tecum will be refused only in an instance where there is good reason to believe that the subpoena power is being abused. All subpoenas and subpoenas duces tecum will state on their face the name of the party who requested it.

§85-28-11. Hearing Officers.

11.1. Every hearing officer appointed by the commissioner to conduct a hearing under this rule shall be an attorney licensed to practice law in this state.

11.1.a. The commissioner may delegate the authority necessary for the conduct of certain proceedings under this rule to the chief administrative law judge of the office of judges. The chief administrative law judge is authorized

to assign attorneys from the office of judges as hearing officers.

11.1.b. The commissioner retains the right to appoint other attorneys as hearing officers for purposes of conducting specific hearings or types of hearings under this rule.

11.2. The hearing officers are authorized to receive and rule upon any procedural matter arising before, during and after a hearing.

11.3. Requests for continuances by a party shall not be granted as a matter of course, but only upon a showing of good cause.

§85-28-12. Conclusion of Hearing.

12.1. At the conclusion of the hearing, the parties shall be permitted to file closing arguments, proposed findings of fact, conclusions of law, and such legal briefs or memoranda as they wish. The parties shall be permitted ten (10) calendar days to file such items which filings shall be concurrent.

12.2. The parties shall be permitted five (5) calendar days to respond to the filing of the other party, if desired. No further argument shall be permitted.

12.3. Thereafter, the hearing officer shall prepare a report and recommendation that shall contain proposed findings of fact and conclusions of law as suggested by the hearing officer for the commissioner's approval.

12.4. The parties to the hearing shall then be permitted ten (10) days to file objections or comments upon the report and recommendations and five (5) more days to respond to each other's objections and comments.

12.5. Thereafter, the commissioner shall decide whether to accept the report and recommendation, to reject it, to modify it, or to remand the matter back to the hearing officer for further proceedings or upon other instructions.

12.6. The commissioner retains the right to review any and all proposed findings of fact against the record

and to disagree therewith provided that the commissioner states the basis for the disagreement in the final order.

12.7. The commissioner shall render either a final order or an interlocutory order as the decision may require in which the commissioner accepts in whole or in part the proposed findings of fact and conclusions of law submitted by the hearing officer and, to the extent that the commissioner rejects or modifies the report or recommendation of the hearing officer, the commissioner shall furnish his or her own findings of fact and conclusions of law.

12.8. A copy of the final order or decision of the commissioner shall be served upon each party and the parties' attorneys of record, if any, either in person or by certified mail.

12.9. All appeals from the final order or decision of the commissioner shall be taken pursuant to W. Va. Code §29A-5-4, in the circuit court of Kanawha County.

12.10. Upon appeal from the commissioner's final decision, hearing officer shall transmit the entire record to the circuit court of Kanawha County, by either paper copy or any other electronic media that can be accommodated by the court in which relief is sought.

§85-28-13. Pending Petitions

All petitions for hearings filed pursuant to recovery letters generated or other administrative actions taken by the division or its agent or filed by health care providers pursuant to the provisions of 85 CSR 7, "Rules for Selected Hearings", prior to the effective date of this rule, for which no hearing has been held shall be transferred to hearing officers designated by the commissioner under this rule.

§85-28-14. Notices.

14.1. General. Except as hereinafter provided, the name and address given by the health care vendor on the vendor application shall be used by the division for giving any notice required by the statute or by this rule, unless a formal request for a change of name or address is made by the health care vendor as hereinafter provided.

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

14.3. Effect of failure to request change of name or address. In the absence of a written request for a change of name or address by the health care vendor, any notice given by the division to the health care vendor at the address and in the name shown on the division's records shall constitute constructive notice to the health care vendor of any action taken.

14.4. Legal notice to attorney or agent. In any matter arising under this rule in which the division is required to give notice to a party, if a party is represented by an attorney or other representative, then notice to the attorney or other representative shall be sufficient notice to the party so represented.

§85-28-15. Severability.

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