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

Form #5

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FILED

2004 JAN 29 P 3:00

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

CITE AUTHORITY: W. Va. Code §§ 23-1-1a(j); 23-1-1b(g)(16)

RULE TYPE: PROCEDURAL ______ INTERPRETIVE ______

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W. Va. Code § 23-1-1a(j)(3)

AMENDMENT TO AN EXISTING RULE: YES ____ NO X*

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ______

TITLE OF RULE BEING AMENDED: *Partial repeal and replacement of 96CSR1, a joint Unemployment and Workers' Compensation Divisions' rule, insofar as the rule relates to workers' compensation matters

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 32

TITLE OF RULE BEING PROPOSED: State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession or Business To or With an Employing Unit in Default of Its Workers' Compensation Obligations

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

Authorized Signature

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

Form #1

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NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: Code §§23-1-1a(j)(3) & 23-1-1b(g)(16)

AMENDMENT TO AN EXISTING RULE: YES___NO X*

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ________

TITLE OF RULE BEING AMENDED: *Partial repeal and replacement of 96CSR1, a joint Unemployment and Workers' Compensation Divisions' rule, insofar as the rule relates to Workers' Compensation matters.

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 32

TITLE OF RULE BEING PROPOSED: State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession, or Business To or With an Employing Unit in Default of its Workers' Compensation Obligations

DATE OF PUBLIC HEARING: December 17, 2003 TIME: 11:00 a.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia
**This public hearing is an extension and continuance of the previous comment period for this proposed rule.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

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

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Randall B. Vieter

Authorized Signature

WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN III
ADMINISTRATIVE LAW DIVISION

Form #2

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2003 OCT -6 P 4: 17

WEST VIRGINIA SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission **TITLE NUMBER: 85**

RULE TYPE: Exempt Legislative **CITE AUTHORITY: W. Va. Code §§ 23-1-1a & 23-1-1b(g)(16)**

AMENDMENT TO AN EXISTING RULE: YES NO X*

IF YES, SERIES NUMBER OF RULE BEING AMENDED:

TITLE OF RULE BEING AMENDED: * Partial repeal and replacement of 96 CSR 1, a joint Unemployment and former Workers' Compensation Divisions' rule, insofar as the rule relates to workers' compensation matters.

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 32

TITLE OF RULE BEING PROPOSED: State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession, or Business To or With an Employing Unit in Default of Its Workers' Compensation Obligations

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 November 6, 2003 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

T.J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission

4700 MacCorkle Avenue, S.E.
Charleston, WV 25304
Fax # 304-926-5372

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

Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

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

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

October 6, 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 32
"State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession or Business To or With an Employing Unit in Default of Its Workers' Compensation Obligations"

Dear Secretary Manchin:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission have approved the enclosed 85 C.S.R. 32 for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

G. A. Burton

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 85, Series 32: State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession or Business to or with an Employing Unit in Default of Its Workers' Compensation Obligations.

Type of Rule: ____Legislative Exempt ____Interpretive X Procedural

Agency Workers' Compensation Commission

Address 4700 MacCorkle Avenue, S.E.

Charleston, WV 25304

---

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	Undetermined	Undetermined	Undetermined	Undetermined	Undetermined
PERSONAL SERVICES	Undetermined	Undetermined	Undetermined	Undetermined	Undetermined
CURRENT EXPENSE	Undetermined	Undetermined	Undetermined	Undetermined	Undetermined
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

The primary costs associated with providing a list of accounts that are in default with the Workers' Compensation Commission (the Commission) to other state agencies are related to personal services such as time spent on correspondence with other state agencies, coordination of required information within the Commission, and creating and maintaining the list. Additional direct costs would be incurred in providing and maintaining the list. These are costs that cannot be reasonably estimated such as postage, supplies, computer use, and phone use. Also, an estimate of these costs cannot be determined currently because there is no available analysis of relevant historical records on which to base an estimate.

3. Objectives of this rule:

The purpose of this rule is for the Commission to provide a list to other state agencies regarding any account that is in default with the Commission. As a result, any agency shall not grant, issue, or renew any approval document to, or enter into an approval document with, any applicant whose account is in default with the Commission.

Rule Title: Title 85, Series 32: State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession or Business to or with an Employing Unit in Default of Its Workers' Compensation Obligations.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Although it will require some additional communication and coordination of efforts between certain state agencies, it is expected that there will be no significant economic impact on state government from this rule.

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

It is expected that there will be no impact from this rule.

C. Economic Impact on Citizens/Public at Large.

This rule is intended to increases the Commission's ability to collect the premiums related to a company's workers' compensation obligations. This will reduce the financial burden placed on other businesses and the citizens of West Virginia, who ultimately pay for the obligations associated with unpaid premiums.

Date: **October 6, 2003**

Signature of Agency Head or Authorized Representative

G. A. B

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 32

State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession or Business To or With an Employing Unit in Default of Its Workers' Compensation Obligations

This rule is a new rule of the Workers' Compensation Commission that partially repeals the provisions of 96 C.S.R. 1, a joint rule of the former Workers' Compensation and Unemployment Compensation Divisions of the Bureau of Employment Programs, insofar as that rule applies to matters concerning workers' compensation obligations.

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission was created, effective October 1, 2003, as a stand-alone agency of State government. The Commission is required to establish rules under which agencies of the State shall revoke or refuse to grant, issue or renew any contract , license, permit, certificate or other authority to conduct a trade, profession or business to or with any employing unit whose account is in default with the commission with regard to its workers' compensation obligations. W. Va. Code § 23-1-1b(g)(16).

This proposal incorporates much of the former Workers' Compensation and current Unemployment Compensation Divisions' joint rule, 96 C.S.R. 1, which originally became effective January 14, 2000.

The proposal changes the former joint rule to include revocations of approval documents in addition to refusals to grant or non-renewal of approval documents. This change was necessitated by the new legislation. In addition, the rule provides that the executive director of the Workers' Compensation Commission may issue stays of enforcement in the proper circumstances.

~~[TO BE FILED WITH THE SECRETARY OF STATE]~~

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 32
STATE AGENCY REVOCATION OR REFUSAL TO GRANT, ISSUE OR RENEW CONTRACTS, LICENSES, PERMITS, CERTIFICATES OR OTHER AUTHORITY TO CONDUCT A TRADE, PROFESSION OR BUSINESS TO OR WITH AN EMPLOYING UNIT IN DEFAULT OF ITS WORKERS' COMPENSATION OBLIGATIONS.

§85-32-1. General.

1.1. Scope. -- This legislative exempt rule is intended to set forth the procedures enabling the implementation of the provisions of W.Va. Code §23-1-1b(g)(16) that requires agencies to revoke and prohibits agencies from granting, issuing, or renewing any contract, license, permit, certificate, or other authority to conduct a trade, profession, or business to or with any employing unit whose account is in default with the Workers' Compensation Commission with regard to the administration of chapter twenty-three of the West Virginia Code.

1.2. Authority. -- W.Va. Code §§23-1-1a and 23-1-1b(g)(16). Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission are not subject to legislative approval as would otherwise be required under West Virginia Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal and Replacement. -- This rule repeals and replaces 96 C.S.R. 1, a joint rule of the former Workers' Compensation Division and the Unemployment Compensation Division of the Bureau of Employment Programs insofar as the provisions apply to workers' compensation matters.

§85-32-2. Definitions.

The following terms and words have the meanings stated, unless the context clearly indicates otherwise.

2.1. "Agency" includes any unit of state government such as officers, agencies, divisions, departments, boards, commissions, authorities, or public corporations.

2.2. "Applicant" means an employing unit that is seeking the issuance, granting or renewal of an approval document.

2.3. "Application" means a completed form or other document, including a proposed contract, seeking the issuance, granting or renewal of an approval document regardless of the name assigned to it.

2.4. "Approval document" means any contract, license, permit, certificate, or other authority to conduct a trade, profession, or business.

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

2.6. "Code" means the West Virginia Code of 1931, as amended.

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

2.8. "Default", for purposes of the administration of chapter twenty-three of the Code, means being in default as provided in W.Va. Code §23-2-5(d).

2.9. "Employing unit" means an employer subject to chapter twenty-three of the Code of West Virginia, as defined in the provisions of W.Va. Code §23-2-1. The Commission shall gather individual and other ownership information concerning the employing units in default for examination under the Commission's Employer Violator System.

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

2.11. "Grant" and "issue" include not only the original issuance or granting of an approval document but also any renewal, transfer, assignment or sale of the document, if otherwise, allowed.

2.12. "List" means a paper or database identification of an employing unit that is in default with the Workers' Compensation Commission. The list, which will be created by the Commission, may be provided to the agency in the form of either a computerized database or other databases that the agency can access.

2.13. "Person" means any public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or county; any governmental agency; political subdivision; county commission; municipality; industry; public service district; partnership; trust; estate; person or individual; and group of persons or individuals acting individually or as a group or any other legal entity whatever.

2.14. "Repayment agreement" means a written agreement to pay in full all delinquent amounts owed to the Commission, including interest and penalties, under the provisions of chapter twenty-three of the Code.

2.15. "Review" means either to query a computerized database or list to determine if the applicant's name is included as in default by the Commission.

§85-32-3. General Prohibition.

Pursuant to the provisions of W.Va. Code §23-1-1b(g)(16), an agency shall not grant, issue, or renew any approval document to, or enter into an approval document with, any applicant whose account is in default with the Commission with regard to the administration of chapter twenty-three of the Code.

§85-32-4. Timing of Review.

4.1. After an application is complete and no further changes may be made to it prior to its final approval and before it is issued, an agency shall review the list. This does not prevent a review prior to that time and notifying the applicant of the results.

4.2. If the applicant's name appears as being in default, an agency shall notify the applicant in writing, as in their normal course of business, that the agency has been informed that the applicant is in default with the Commission with regard to the administration of chapter twenty-three of the Code and that the approval document can not be issued until the applicant is no longer in default. A copy of the notice shall be sent to the Commission addressed as follows:

Workers' Compensation Commission
Attention: Director, Receivables Management Unit
Post Office Box 153
Charleston, West Virginia 25321

4.3. If the approval document is not issued, granted or renewed within fourteen calendar days of the review that caused notice to be given to the applicant under subsection 4.2 of this section, a new review shall be conducted.

§85-32-5. Revocation.

5.1. Pursuant to the provisions of W.Va. Code §23-1-1b(g)(16), an agency shall revoke any approval document of any employing unit whose account is in default with the Commission.

5.2. If the Commission has reason to believe that an employing unit that is in default is conducting its business pursuant to an approval document with an agency, the Commission shall notify the agency of its duty to revoke the approval document.

5.3. If the agency determines that the employing unit, that is subject of the notification in subsection 5.2., is conducting its business pursuant to an approval document issued by the agency, the agency shall notify the employing unit in writing, as in their normal course of business, that the agency has been notified that the employing unit is in default with the Commission under the provisions of chapter twenty-three of the Code and that the approval document must be revoked until the employing unit is no longer in default. A copy of the notice shall be sent to the Commission addressed as follows:

Workers' Compensation Commission
Attention: Director, Receivables Management Unit
Post Office Box 153
Charleston, West Virginia 25321

§85-32-6. Conditional Issue or Conditional Restoration.

An approval document shall be conditionally issued or conditionally restored if revoked, if the applicant has entered into repayment agreement with the Commission for payment in full of all payments, interest and penalties owed. If the applicant does not maintain continued compliance with the repayment agreement, the Commission shall notify the agency that the applicant is in noncompliance. Upon receiving the notice, an agency shall rescind or revoke the approval document, as appropriate.

§85-32-7. Request for Reconsideration; Petition for Hearing.

7.1. When an employing unit's contract, license, permit, certificate or other authority is revoked or not issued or renewed due to its workers' compensation account being in default with the Commission and its name appearing on the list, the employing unit who is in default may request a reconsideration of the decision from the Commission at the address as follows:

Workers' Compensation Commission
Attention: Director, Receivables Management Unit
Post Office Box 153
Charleston, West Virginia 25321

7.2. Requests for Reconsideration; Petitions for Hearing. All requests for reconsideration and petitions for hearing filed with the Commission as a result of decisions made under the provisions of this rule shall be in accordance with the provisions of 85 C.S.R. 7, "Rules for Selected Hearings". The Commission ~~may~~ shall deny a request for reconsideration if the request is made without a deposit of assets in an amount and in the form set forth in Section 7.5.a.

7.3. Executive director may stay enforcement. If the employing unit files a request for reconsideration, the executive director may stay the enforcement of the non-renewal or revocation of the approval document pending reconsideration, as long as the following conditions are met.

a. The executive director may only issue the stay of the enforcement of the non-renewal or revocation of the approval document if there are significant factual or legal issues regarding the placement of the employing unit on the default list.

~~b.~~ If the Commission has properly issued a delinquency notice to which the employing unit has failed to timely request reconsideration or file a petition for hearing under W. Va. Code § 23-~~1~~2-17, then the enforcement of the non-renewal or revocation of the approval document shall not be stayed.

~~c.~~ The executive director shall not stay enforcement of the non-renewal or revocation of the approval document if the employing unit fails to meet its ongoing obligations as may be established by orders of the Commission in matters including, but not limited to, changes in classification or methods of reporting payroll.

7.4. Administrative Hearings. All administrative hearings conducted as a result of Commission decisions made under the provisions of this rule shall be held in accordance with W.Va. Code §§23-2-17, 29A-5-1, et seq., and 85 C.S.R. 7, "Rules for Selected Hearings". The Commission shall deny a petition for hearing if the request is made without a deposit of assets in an amount and in the form set forth in Section 7.5.a.

7.5. Appeal to circuit court. The executive director may stay enforcement of the non-renewal or revocation of the approval document pending appeal of the Commission's final order to circuit court, as long as the following conditions are met.

a. The employing unit must deposit sufficient assets to the Commission to guarantee payment of the amount determined to be due and owing by the Commission. The deposit of assets shall be required in the following form(s):

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

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

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

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

§85-32-8. Procedure for Petitioning for Exemption.

8.1. After being subject to this rule for at least twelve months an agency, or any other interested person, may petition the Board of Managers to be exempt from the provisions of this rule.

8.2. If the agency petitions to be exempt, it must clearly demonstrate to the Board of Managers that the provisions of the rule are unduly burdensome and that its efforts in complying with the rule do not result in an incentive for any significant number of employers to comply with the payment provisions of chapter twenty-three of the Code.

8.3. If a person other than the agency petitions to be exempt, the person must clearly demonstrate that the rule is unreasonably burdensome, that the rule is not a significant incentive for the person's compliance with the payment provisions of chapter twenty-three of the Code and that the person has an exemplary record of payment of amounts due under the provisions of chapter twenty-three of the Code.

§85-32-9. Procedures for Implementation.

Notwithstanding other provisions of this rule, the Executive Director and the Tax Commissioner shall adopt mutually agreed procedures for automated review and matching of Tax Department databases with databases of the Commission for implementation of this rule.

§85-32-10. Severability.

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

PUBLIC COMMENT: RULE 32

THOMAS P. MARONEY
GENERAL COUNSEL

ROBERT M. WILLIAMS, ATTORNEY
J. ROBERT WEAVER, ATTORNEY
EDWIN H. PANCAKE, ATTORNEY
PATRICK K. MARONEY, ATTORNEY

OFFICE ADDRESS
608 VIRGINIA STREET, EAST
CHARLESTON, WV 25301

THOMAS P. MARONEY, L.C.

OFFICE OF
GENERAL COUNSEL
AND
WORKERS' COMPENSATION SERVICES
WEST VIRGINIA AFL-CIO
BENEFIT SERVICES
DISTRICT 17 UMWA

WILBUR YAHNKE
DIRECTOR COMPENSATION SERVICES

MAILING ADDRESS
POST OFFICE BOX 3709
CHARLESTON, WV 25337

TELEPHONE (304) 346-9629
TELECOPIER (304) 346-3325

November 6, 2003

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

Re: Proposed Rule Title 85, Series 32
State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession or Business To or With an Employing Unit in Default of Its Workers' Compensation Obligations

Dear Executive Director Burton:

This letter is in response to the above-proposed rule filed on October 6, 2003, in the Office of the Secretary of State. While the filing document indicates only written comments are to be accepted, due to the extreme importance of this rule I am requesting on behalf of the West Virginia AFL-CIO that a full public hearing be scheduled.

The following change is suggested:

1. 85-32-7.3.d should be added as follows:

(d) The employing unit must deposit sufficient assets with the Commission as provided in 85-32-7.5.a.1-4.

I would be happy to sit down with any members of your staff to further review these comments.

Sincerely yours,

Thomas P. Maroney

TPM/cls

THOMAS P. MARONEY
GENERAL COUNSEL

ROBERT M. WILLIAMS, ATTORNEY
J. ROBERT WEAVER, ATTORNEY
EDWIN H. PANCAKE, ATTORNEY
PATRICK K. MARONEY, ATTORNEY

OFFICE ADDRESS
608 VIRGINIA STREET, EAST
CHARLESTON, WV 25301

THOMAS P. MARONEY, L.C.

OFFICE OF
GENERAL COUNSEL
AND
WORKERS' COMPENSATION SERVICES
WEST VIRGINIA AFL-CIO
BENEFIT SERVICES
DISTRICT 17 UMWA

WILBUR YANNKE
DIRECTOR COMPENSATION SERVICES

MAILING ADDRESS
POST OFFICE BOX 3709
CHARLESTON, WV 25337

TELEPHONE (304) 346-9629
TELECOPIER (304) 346-3325

TELECOPIER TRANSMITTAL SHEET

DATE: November 6, 2003

TO: T.J. Obrokta
General Counsel
West Virginia Workers' Compensation Commission

FAX NO.: 304/926-5372

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

RE: Proposed Rule Title 85, Series 32
State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession or Business To or With an Employing Unit in Default of Its Workers' Compensation Obligations

TOTAL NUMBER OF PAGES, INCLUDING THIS SHEET: 2

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

JACKSON KELLY
ATTORNEYS AT LAW PLLC
1600 LAIDLEY TOWER • P.O. BOX 553 • CHARLESTON, WEST VIRGINIA 25322 • TELEPHONE: 304-340-1000 • TELECOPIER: 304-340-1130
www.jacksonkelly.com

(304) 340-1301

Writer's Fax No. (304) 340-1044

Writer's E-Mail Address: tehuffman@jacksonkelly.com

November 6, 2003

VIA FACSIMILE AND U. S. MAIL

T. J. Obrokta, Esquire
General Counsel
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

Re: Comments to Proposed Rule 32: State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession, or Business To or With an Employing Unit in Default of Its Workers' Compensation Obligations

Dear Mr. Obrokta:

I offer the following comments with regard to the above-captioned proposed Rule.

1. Section 7.3.b provides that the Commission has properly issued a "delinquency notice" to which the employing unit has failed to timely request reconsideration or file a petition for hearing. "Delinquency notice" will be replaced with "notice of default".

2. Section 7.3.b makes reference to a hearing under West Virginia Code Section 23-1-17. This Code Section reference should be West Virginia Code Section 23-2-17.

3. Section 7.5 contains provisions requiring the employer to pay the full amount due up front, enter into a repayment agreement or post appropriate surety while the matter is pending on appeal. These same provisions should be applicable during the Article 2 hearing process so that the employer has an opportunity to post adequate surety in lieu of full payment.

I ask that these comments be accepted and communicated to the Board of Managers at the appropriate time.

Very truly yours,

TIMOTHY E. HUFFMAN

TEH/cm
C0778990.1

October 27, 2003

Thomas "T.J" Obrokta, Jr.
General Counsel
Bureau of Employment Programs
Workers' Compensation Division
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

Re: ACT Foundation's Comments on WC Draft Rules (Series 32-Permitting, Series 15- Rehab and Series 10-Primary Contractor Liability)

Dear Mr. Obrokta:

I am writing again on behalf of Steve White and the Affiliated Construction Trades Foundation. ACT again appreciates this opportunity to provide these comments to the draft WC rules, but reserves the right to file additional comments if and when the Board of Managers proposes these or similar regulations in three above-referenced areas.

If you need clarification of any of the issues and/or questions raised by ACT, please do not hesitate to contact myself or Mr. White at our office. I thank you for your attention to this matter.

Sincerely,

Lesly H. Messina
Research Director

ACT Foundation Comments/Suggestions Re:

Series 32- State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or other Authority to Conduct a Trade, Profession or Business to or with an Employing Unit in Default of its Workers' Compensation Obligations

§85-32-2 Definitions

2.1. "Agency" includes any unit of state government such as officers, agencies, divisions, departments, boards, commissions, authorities or public corporations.

Add after "state government" the words ***"and subdivisions thereof"*** to encompass counties and municipalities, etc.

2.9. "Employing Unit" means an employer subject to Chapter twenty-three of the Code of West Virginia, as defined in the provisions of W.Va. Code §23-2-1b.

This definition is the most important to the ACT Foundation in this Rule. As this definition stands, it creates a loophole big enough for a coal truck to drive through. The definition in its current form is too narrowly defined and will not capture repeat offenders. ACT suggests that Workers' Compensation look to the AVS model and Federal List of Parties model for ideas of how to track the *individuals* behind these offender companies.

2.11. "Grant" and "issue" include not only the original issuance or granting of an approval document but also any transfer, assignment or sale of the document, if otherwise, allowed.

Add *"renewal"* after the word *any* and before the word *transfer.*

§85-32-4. Timing of Review

4.3. If the approval document is not issued, granted or renewed within fourteen calendar days of the review that caused notice to be given to the applicant under subsection 4.2. of this section, a new review shall be conducted.

ACT's question on this one is, "Why a new review?" It is seems to be redundant.

§85-32-7 Request for Reconsideration; Petition for Hearing.

7.3. Executive Director may stay enforcement. If the employing unit files a request for reconsideration, the executive director may stay the enforcement of the non-renewal or revocation of the approval document pending reconsideration, as long as the following conditions are met.

a. The executive director may only issue the stay of the enforcement of the non-renewal or revocation of the approval document if there are significant factual or legal issues regarding the placement of the employing unit on the default list.
b. If the Commission has properly issued a delinquency notice to which the employing unit has failed to timely request reconsideration or file a petition for hearing under W.Va. Code § 23-1-17, then the enforcement of the non-renewal or revocation of the approval document shall not be stayed.
c. The executive director shall not stay enforcement of the non-renewal or revocation of the approval document if the employing unit fails to meet its ongoing obligations as may be established by orders of the Commission in matters including, but not limited to, changes in classification or methods of reporting payroll.

Why have section b & c? Wouldn't it make more sense as a subpart of Section a?

7.5. (3) A cash or corporate surety bond or a letter of credit in the full amount claimed due by the Commission;

Add to this statement *"bank"* after the letter *a* and before the word *letter*.

Series 15- Vocational and Physical Rehabilitation

§85-15-3. Definitions

3.6. "Suitable gainful employment" means employment which restores the injured worker as closely as possible to his or her level of earnings at the time of injury, or other work for which the employee is, or may become, suited by training, experience or education, regardless of his or her previous level of earnings.

ACT objects to this definition for obvious reasons. If WC will expect an injured worker to take a $6.00 per hour job in place of one that paid $25.00 an hour, the worker will always lose, and there will be zero incentive on behalf of Workers' Compensation to see that a claimant receives proper, appropriate rehabilitation services. An injured worker should never be forced into a position where they have to take a low wage job just because it is available.

Delete "*or other work*" and "*regardless of his or her previous level of earnings*".

BEFORE THE WEST VIRGINIA WORKERS' COMPENSATION COMMISSION
BOARD OF MANAGERS

IN RE: RULE 85 CSR 32

ORIGINAL

TRANSCRIPT OF PROCEEDINGS had at the public hearing in the above referenced matter, held on December 17, 2003, at 11:00 a.m., before the West Virginia Workers' Compensation Commission Board of Managers, at the Charleston Civic Center, Charleston, West Virginia, pursuant to notice duly given to all interested parties.

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

ATTENDING REPORTER: JENNIFER L. JIMISON, CCR

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

MEMBERS OF THE BOARD OF MANAGERS:

STEVE WHITE, Chairman
CRAIG SLAUGHTER
RICHARD HUMPHREYS
GENE F. BAILEY
JOHN JOHNSON
EVERETTE SULLIVAN
BOB PHALEN
DOUG MERRITT (via telephone)

(Call to order, 11:05 a.m.)

CHAIRMAN WHITE: Pursuant to the provisions of West Virginia Code 23-1-1A(j)30, the Board of Managers is responsible for approving the rules of the Workers' Compensation Commission.

The Board has determined that a public hearing be held with regard to this Rule 32 to solicit public comment.

The sign-in sheet for public comment has been provided to me and the first individual signing up to address this rule is Steve White.

MR. S. WHITE: Thank you, Mr. Chairman. Steve White with the Affiliated Construction Trades Foundation.

We've provided comments previously on a number of points that have been incorporated and I appreciate that, but there's one specific area that is, I think, a tremendous opportunity for this Board and it might be overlooked here.

Now, I'm going to speak briefly about another rule that's not before you but that will be coming and that's this employer violator system.

That will be a very important and perhaps a complex rule about tracking as is done in other sectors like in coal mining, not only the companies, but the individuals who control those companies, and in making sure that they are held responsible.

In that context, Rule 32 is a very important tool of the Division and as it's currently written, it only applies, as I see it, and I'm not an attorney and I need some help in this regard, but it only applies to the employer unit. I think it's 2.9 is the section for the definition.

And my concern is that we will have what we've been plagued with, a company goes into default, the individual behind that company just starts another company, and another company, and another company.

Those who control that company can

continue, they've learned this pattern. It's a small portion of the employer community, but a portion that has created, I think, a tremendous amount of debt.

And I think we need to use Rule 32 to shut that down. And I'm afraid we have not created that possibility in Rule 32 the way it is currently drafted.

And we would suggest some language in that 2.9 to make sure that you leave the door open to say that we will include the individuals as worked out in this later rule, this employer violator system rule that someone called for, I guess, in the bill, so that those Rule 32 provisions can be used against, not just the company, which in most cases you're going to revoke a permit or stop a permit, well, that company, you're never going to see them again, because they've run up their Workers' Comp. debt and they are not in business any more. They start another company.

You've got to be able to go after that next company and shut that down. And so that's what I urge you to reconsider. Keep the door open and I think the harder part will be in how we define that rule on the employer violator system, but at least the door will be left open. Thank you.

CHAIRMAN WHITE: Ed Pancake?

MR. PANCAKE: Thank you. This will be the last time I'm up here today.

We have also previously submitted written comments, some of which were adopted, some of which we think need to be revisited by the Board. Primarily having to do with just a couple of small words in the language in the Rule.

In 7.2 the Commission may deny a request for reconsideration if the request is made without a deposit of assets in the amount -- in the form set forth in prior section -- or later section.

We think the word "may" ought to be replaced with the word "shall."

By the time an employer would get to this point, they would have had numerous opportunities to correct any default in their account and this would give them an opportunity to appeal that without essentially a full bond. And we think that it must be a requirement for their reconsideration request.

Likewise, in 7.5A, we think that "must" should be changed to "shall" for the same reason. We think that that would protect the financial obligation of the fund and would give added protection to the employees and other fairer companies by having those who wish to appeal to pay up if they are going to. Thank you.

CHAIRMAN WHITE: Thank you, Mr. Pancake.

Any other individuals wish to comment on Rule 32?

(No response.)

CHAIRMAN WHITE: Hearing none, I declare that the public comment period with respect to Rule 32 is closed.

(Whereupon, the public hearing was adjourned.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

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

Jennifer L. Jimison
Certified Court Reporter

OFFICIAL SEAL
Notary Public, State of West Virginia
JENNIFER L. JIMISON
P.O. Box 724
Barboursville, WV 25504

RULE 32: STATE AGENCY REVOCATION OR REFUSAL TO GRANT, ISSUE OR RENEW CONTRACTS, LICENSES, PERMITS, CERTIFICATES OR OTHER AUTHORITY TO CONDUCT A TRADE, PROFESSION OR BUSINESS TO OR WITH AN EMPLOYING UNIT IN DEFAULT OF ITS WORKERS' COMPENSATION OBLIGATIONS.

I. Thomas P. Maroney

1. Add a provision requiring security for a disputed amount to be proffered by an employer during the reconsideration process.

   Recommendation: No change recommended. This inserts an onerous and time consuming step in a pre-litigation reconsideration process that is meant to be cost-effective and efficient. If the employer desires to litigate the matter, appropriate steps are then taken to protect the Commission's claim. There is no reason to insert this step into the pre-litigation dispute resolution process.

II. Timothy E. Huffman

1. Replace "delinquency notice" with "default notice" in Section 7.3.b.

   Recommendation: No change recommended. The intent of this language is to make it clear that if an employer fails to respond to a delinquency notice, then a revocation will not be stayed. There is no reason to stay the enforcement of a revocation if the employer has not responded to the properly issued delinquency notice. This is a proper usage of the phrase "delinquency notice."

2. Change West Virginia Code Section 23-1-17 to West Virginia Code Section 23-2-17 in Section 7.3.b.

   Recommendation: Accept. This is technical clean-up on the original Rule.

3. Amend Section 7.4 to allow the employer to pay the full amount due up front, enter into a repayment agreement or post appropriate surety (as more fully set forth in Section 7.5) while the matter is pending at the Article 2 stage.

   Recommendation: Accept. This proposal protects the Commission's interest during the Article 2 process while at the same time providing employers with reasonable flexibility. In essence, the provisions of Section 7.5.a.1-4. would be copied and inserted as a new Section 7.4.a.1-4.

III. Steve White/Affiliated Construction Trades Foundation

1. Add "and subdivisions thereof" to the between the words "government" and "such" in the definition of "agency" on the first line of Section 2.1.

   Recommendation: No change recommended. The definition of "agency" comes directly from West Virginia Code Section 23-1-1b(g)(16). The suggested change would impermissibly expand the scope of the rule beyond the statutory framework of West Virginia Code Section 23-1-1b(g)(16).

2. Expand the definition of "employing unit" to include "individuals."

   Recommendation: No change recommended because the concerns that led to this comment will be addressed in the Commission's Employer Violator System which is being created.

The Affiliated Construction Trades Foundation and other stakeholders have been and will continue to be included in the creation of the Employer Violator System.

3. Insert the word "renewal" between the word "any" and "transfer" on the 1st line of Section 2.11.

   Recommendation: Accept. This suggestion clarifies and strengthens the Rule and is consistent with the statutory framework and intent.

4. Query: Is the new review in Section 4.3 redundant?

   Answer: No. The new review makes sense because the agency issuing the "approval document" checks with the Commission's default list to make sure that the employer has not cured their default.

5. Re-arrange Section 7.3.a-c. so that subsections b. and c. are included within subsection a.

   Recommendation: Accept. This suggestion makes organizational sense.

6. Insert the word "bank" between the words "a" and "letter" on the 1st line of Section 7.5.a.3.

   Recommendation: Accept. This suggestion provides more security to the Commission in that it requires the letter of credit to be issued by a bank, as opposed to a non-banking entity.

FINANCE AND ADMINISTRATION COMMITTEE

WEST VIRGINIA WORKER'S COMPENSATION BOARD OF MANAGERS

NOVEMBER 19, 2003

Minutes of the meeting of the Finance and Administration Committee held on Wednesday, November 19, 2003, at 1:00 p.m., at the Charleston Civic Center, Room 105, Charleston, West Virginia.

Claims Committee Members Present:
Steve White, Chairman
Chris E. Jarrett

Other Board of Managers Members Present:
Bob Phalen

Staff Members Present:
Cindy Grinstead
Chris Howat
Janet Howard
Melinda Ashworth Kiss
Phil Lynch
T. J. Obrokta, Jr.
Randall B. Suter
Lisa Teel
David Townsend

1. Call To Order

Chairman Steve White called the meeting to order at 1:10 a.m.

Chairman White: The first order of business. . . let me call on the staff of the Division to present the reports. . .Ms. Kiss.

Melinda Ashworth Kiss: Good afternoon Mr. Chairman, members of the Committee and members of the public. We would like to present today to the Finance and Administration Committee the monthly financial report for the month ended October 31, 2003. Some of the pages of this report. . .this is in the comprehensive standard monthly report that the Division is seeking to prepare and supply the Board with. Beginning with the table of contents it will kind of walk you through it and after I finish, of course, will answer any questions that you may have.

doing this and we are looking at ways we can improve and perhaps make a better impression upon the employer community how serious the Commission is to pursue these defaulted accounts. Any other questions?

Mr. Jarrett: Yeah, do you collect money at the door?

Mr. Townsend: We are not allowed to collect money there, but we'll take them and give them an envelope and ask them to mail it in to us.

Mr. Jarrett: Self addressed stamped envelope? You carry the mail, can't you?

Ms. Kiss: One other thing I think that the Board of Managers would like to hear about. This came to light actually in our town hall meetings with regard to regional defaults and it is something that Director Burton just asked us to do and while Dave and his unit were working on the county by county default thing we are seriously considering doing advertisements in local newspapers letting them know who in their area is in default with the workers' compensation system. This is particularly with those that are active default employers – people who are still in business. They're still operating and they are in default with the worker's compensation system. One lady at the Beckley town hall meeting advised us that on no uncertain terms that if she knew an employer – she was an employer – she says she pays her premium on time every single month and if she knew an employer who was in default, she would not patronize that company. So, that is something Director Burton had asked us to look into so when . .

Chairman White: Thank you.

Mr. Jarrett: I think it's great – do it.

Mr. Townsend: Any other questions?

Chairman White: Thank you very much. Any other reports from the staff? The next item that we will discuss will be the two rules that are pending. I'd like for T. J. to address the rules and to walk the Committee through the differences in positions on that for our benefit.

Mr. Obrokta, Jr.: Yes sir, Mr. White. T. J. Obrokta, General Counsel, Workers' Compensation. We are now at a point in the rule preparation process where it is about time to vote on the final approval of some of these rules. Two of the rules are before you here today and just to briefly go over how they have gotten to you, way back in August we identified over now thirty-some stakeholders, told them we wanted to start working on a few rules, sent them a draft I believe in late August. We've worked with them. We ultimately presented three rules to you at your very first meeting in October 2nd or 3rd. Those three rules were Rule 10, which addresses contractor sub-contractor liability issues; Rule 14, which was a procedural rule governing your meetings; and, Rule 32, which for the first time enables us to revoke business licenses from individuals who are in default. You gave us permission in early October to file those three rules with the West Virginia Secretary of State's office. That initiated a thirty-day public comment period. That public comment period ended on November 6. At your most recent Board of Managers meeting you indicated that you wanted two of the rules referred to the subcommittee for a discussion of any comments we had received from the public during the thirty-day public comment period. That is the purpose I think that we are here to address today. Let me just say briefly that, given all the work we did on the front end involving the thirty-plus stakeholders, sending drafts to them long before we brought the rules to you, that has in my opinion, greatly minimized the topics we need to discuss here today. In fact, I will provide you, and I've already sent you a document – I'll give you another copy today – of the summary of all the public comments that we have received and our responses to them. There are roughly twenty comments on the two rules that we are going to discuss here today. I will be shocked if any more than five of those twenty are in any way controversial. So I think that is a reflection of the process that we've gone through to date and obviously as with any process we will continue to refine it with input from the stakeholders, but I do think we've gone a long way to being able to bring new rules that are. . .that have the least amount of controversy as possible. So with that, I'm going to give you – in case you don't have your copies – what I've given you is a document entitled, "Workers' Compensation Commission's Response to Public Comments Received on Rules 10, 14 and 32."

The first three pages address Rule 10, which is not before this subcommittee, so if you would just skip to rule . . to Page Four. Beginning on Page Four, I addressed the public comments we received on Rule 14. We received comments from two individuals in the public on this rule and the Commission has some additional comments as well.

The first five comments are from the Will Brotherton the Law Firm of Spilman and Thomas. His first comment is simply technical clean up. I have a problem with my printer sometimes that puts two words together when it is trying to format the pages. He identified that we needed to put a space between "shall" and "be" and a space between "members" and "and." We agree with that and we recommend that the Committee accept that suggestion.

Second change Mr. Brotherton recommends and we agree with addresses in Section 4.9 of the rule – this is when it's discussing the terms of your officers – Chair, Vice-Chair and Secretary. It talks about an October 1 through September 30 term but uses the phrase "calendar year." He suggests that is really not a calendar year, that's a one-year term. A calendar year is January through December. We agree with that and again that's more stylistic than anything else. We would agree with that change and accept that.

Third comment we received from Mr. Brotherton is a substantive comment that we would need direction from you as the Board. He suggests that if a member is attending by telephone, attending a Board of Managers meeting by telephone that that member not be allowed to vote. As the rule is currently written, a member may participate by telephone and may vote. This is purely a procedural issue for you as a Board and we take no position on it although it does seem to me that it may be reasonable to allow people to attend by phone and vote, but again that is up to you.

The fourth suggestion from Mr. Brotherton is changing the word "as" to the word "an" on line one of Section 5.1. That again is a technical clean up and we agree with it.

The final comment from Mr. Brotherton is really a two-fold comment. He sees no need for an Audit Subcommittee. We disagree with that. And he also does see the need for the creation of an Executive Committee, which was not in the original rule. I think we agree with the creation of an Executive Committee and I think the Chair has already made those appointments. We would suggest that the Board not adopt his comment regarding elimination of the Audit Committee. We would recommend to the Board – do accept his suggestion that an Executive Committee be created. Those are our comments. Again, three out of those five are clearly technical clean up. The other two – one is whether or not you folks want to vote by telephone. The final one is on your subcommittees.

Mr. Jarrett: T. J. if we do nothing, we still get to vote by phone, do we not?

Mr. Obrokta, Jr.: That's correct. You can vote by telephone.

Mr. Jarrett: Right. We don't have to have an agenda item and vote "yes" or "no." That is the rule today?

Mr. Obrokta, Jr.: I just need direction from you. . .

Chairman White: That is in the rule that has been posted with the Secretary of State's Office?

Mr. Obrokta, Jr.: Yes sir. His comment was that, I guess, he disagrees with the idea of voting by telephone.

Mr. Jarrett: The size of these committees nowadays. . .that's going to be very difficult. I mean. . .if we had something to vote on today with this subcommittee – I know it would never happen, but we could have a "yea" and a "nay" here or something and the guy on the phone would be setting there and couldn't vote. That's just my comments.

Chairman White: I intend to agree. I think the members certainly will make every attempt to be at meetings but sometimes that's not possible. They should be able to participate by telephone.

Mr. Obrokta, Jr.: My suggestion is you keep your Audit Committee. I don't think it should be abolished.

Chairman White: Procedurally, we posted this rule with the Secretary of State's Office. There are several changes that the Division has accepted and now it's before this. . .before the Board of Managers – so we will have to at some point in time at the next meeting adopt –

depending upon our discussions – adopt a revised rule in response to the public comments, correct?

Mr. Obrokta, Jr.: Yes sir.

Chairman White: Okay.

Mr. Obrokta, Jr.: I would envision making our suggestions as a package deal. Hopefully there's agreement. . .vote yes or no. . .

Chairman White: I would envision that we would take this up at the next meeting of this subcommittee and make a recommendation to the full Board.

Mr. Jarrett: That's December?

Chairman White: Yes.

Mr. Obrokta, Jr.: Moving on. . .the second individual comment on Rule 14 was Sally Smith from Bowles, Rice. . .She had one comment. It simply has to do with what we refer to you as. The rule refers to you, as drafted, as the Board of Managers of the Workers' Compensation Commission. She suggests, and I agree, that the more proper term is "Workers' Compensation Board of Managers." The idea there is that we are a Board of Managers over top of the Commission, but you are also over the Office of Judges, the Appeal Board, etc. So it is misleading to use the word "Commission" in your title. So again, I would recommend that you be called the "Workers' Compensation Board of Managers" and leave the word "Commission" out. I think that's a well-taken suggestion.

The final category of comments really came from the Commission. After we make these suggestions, we extended the public comment period so people could comment on the Commission's suggestions. The two suggestions from the Commission deal with how you will allow the public hearings to be called for the public to comment on the rules that are pending before you. The first suggestion we make is – it would require a member of the Board – if a member of the Board wants to have a public hearing on a proposed rule, that's fine. But the member should make that request whenever we present the rule to you to file at the Secretary of State's Office. At that point the member should request a public hearing be held. That will eliminate the problems when the thirty days go by at the Secretary of State's Office – we bring you a rule for a final vote and all of a sudden someone wants a public hearing. We would suggest the language of 5.1.a that would require Board of Managers members to request a public hearing with the same meeting where the rule is proposed for filing with the Secretary of State's Office. That facilitates the process.

Chairman White: Would the thirty-day public comment period then be extended to encompass the date of the public hearing?

Mr. Obrokta, Jr.: The thirty-day would run concurrently.

Chairman White: Well, I'm saying if the public hearing is outside the thirty days, I think we would want the public comment period to extend out to. . .

Mr. Obrokta, Jr.: Exactly. Technically, the public. . .when we file at the Secretary of State's Office, we have to give a thirty-day – at least thirty, no more than 60-day window for public comments, we always actually set by thirty-two or thirty-three days to make sure we don't miscount. So we would just always make sure that that day would be. . .that the public hearing would happen within the public comment. . .

Chairman White: So if we need comments. . .the public hearing. . .take into consideration?

Mr. Obrokta, Jr.: Yes. The second suggestion is very similar. It governs. . .members of the public can come before you and request a public hearing. Same rules would apply. The members of the public who want to have a public hearing on a rule would have to request that when we present the rule to you for filing with the Secretary of State's Office. Again, we think that's a fair way to do it so things are not unreasonably delayed. Those are the changes with regard to Rule 14 and those are our positions on those changes.

Beginning on Page Six Rule 32 as you may recall, for the first time gives the Commission the power to revoke business licenses for those companies that go into default. We, again, back in late August began this drafting process on this rule. You approved it for filing with the Secretary of State's Office early October. That public comment period expired November 6 and now have a few comments from the public. Again, three people commented out of a whole host of people who have seen this. So, again, I think that's a positive reflection of the process. Mr. Maroney has the first comment on this rule. If I just could just take a step back and explain how this works. Whenever we determine an amount that's due, if we do an audit and we determine that an amount is due, the employer can come to us. This is not. . .delinquency or default – this is when we go back and audit someone and say, "Hey, you owed us some money back then." There is an informal rate consideration process that has to be conducted within 60 days. The employer can come to us and say, "No, no. Your audit is incorrect and this is why. Would you please reconsider?" We have to do that within 60 days. If we say, "No, we stand by our audit," then the matter must be appealed into what's called the "Article II process," which is an administrative process to litigate the matter. Certain bonds and sureties must be posted once you get to the litigation stage to match up with the amount they owe us, if they want to litigate it. . .various financial instruments to secure the debt. Mr. Maroney suggests that we apply those same requirements to the reconsideration stage. Make them post a bond or post surety, etc., get a letter of credit and what have you at this initial reconsideration stage. We disagree with that. The purpose of the reconsideration stage is to get quick efficient process to correct clerical errors and things of this nature. We think that would inject an erroneous and time consuming step in what is suppose to be an efficient, expedited reconsideration process before we start litigating the matter. So that was Mr. Maroney's comment and we would disagree with that suggestion.

I sent this document to everyone who has commented to me that I'm going over today – Mr. Maroney, Mr. Huffman, etc. No one has called me and said they disagree with my comments, but again he is here today and if he disagrees, maybe we can sit down and work something out.

The second comment we received was from Timothy Huffman of the law firm of Jackson and Kelly. He recommends a change. I've not had a chance to discuss it with Mr. Huffman, but I think he just misread the rule. He wants to change the phrase "delinquency notice" to "default notice" in Section 7.3.b. We disagree with that. The intent of this language – to make it clear – that if an employer fails to respond to a delinquency notice, then a revocation will not be stayed. There is no reason to stay the enforcement of a revocation if the employer has not responded to the properly issued delinquency notice. We think we've got. . .we disagree with his suggestion and he has not contacted me to register his disagreement with our position. I will pledge to this committee and I will contact him before your December 10 meeting and hopefully I'll be able to represent to you that he's okay with our explanation. Thank you.

Mr. Huffman's second comment is technical clean up. The original rule had a bad cite in it. It cited Section 23-1-17 of the Code. The proper cite is 23-2-17 of the Code.

Mr. Huffman's third comment, in my opinion, is really a technical clean up or it's an omission from the first rule that is drafted. It again has to do with the type of surety that can be posted and when it can be posted during the process. He pointed out that we allowed it early on in the process and we should allow it later and we agree. Again, I'll discuss that one with him. I'll discuss it with Mr. Maroney and see if either parties have any real disagreement with that. If they do, I will try to bring you compromise language.

The final individual comment on Rule 32 is Mr. Steve White of the ACT Foundation. His first comment – he wants to expand the definition of "agency" in Section 2.1. I met with Mr. White and explained to him that we think that would be a violation of the Code. I'll let him speak to you as to whether or not he agrees. The Code already. . .and his suggestion would expand that definition.

The second comment involves a definition of "employing unit." We think his concerns will be addressed in a future undertaking of the Commission, which is when we created the Employer Violator System. Mr. White met with me earlier today before this began and I'll let him comment on that, but I think he and I can come up with some language to put in. . .that will address his concerns. I hope I will be able to represent to you on the tenth. . .he and I will iron that out.

His third suggestion is to insert the word "renewal" between the word "any" and "transfer" on Line One. We agree and think this clarifies and strengthens the rule. One of his comments just kind of makes me question as to whether a section is redundant. We don't think it's redundant and given our explanation, hopefully that's sufficient for him. It's this suggestion he wants to rearrange one of the sections – reorganize it. We think it's a good suggestion and makes it clearer. . .so we would agree with accepting that.

Finally, his suggestion to insert the word "bank" between the words "a and "letter" on the first line. This makes it clearer that when they're posting surety it has to be a "bank letter of credit" as opposed to other types of letters of credit. We agree with that and we think it probably makes it a tighter letter of credit and better protects the Commission's interest, so we agree with that change.

Chairman White: Are there any other requirements in the letter of credit other than a banking institution? Are there any ways to monitor the letter of credit to determine the type of bank and if there is sufficient ability to issue a letter of credit?

Mr. Obrokta, Jr.: I am not aware of it. I do know that we have forms that we require. . .that we draft forms and they meet with our legal section's approval and they've been used over the years.

Chairman White: The form that the letter of credit. . .is something that is prescribed by the Division?

Mr. Obrokta, Jr.: Yes sir. . .(inaudible). . .Our folks have a very strong sense of ownership over them, but I'm not aware of any other specific requirements.

Chairman White: Is it an irrevocable letter of credit? Is it provided on the letter of credit to revocable?

Mr. Obrokta, Jr.: One the ones I've seen, yes. I'd be happy to. . .

Chairman White: I deal with those all the time.

Mr. Obrokta, Jr.: Okay. Those are the suggestions on. . .or the comments that we've made on the public comments we've received on Rules 14 and 32.

Chairman White: Thank you very much.

Mr. Phalen: I have a question, if you don't mind. T. J., may I inquire in regards to Rule 14 on the Commission's recommendation? And I believe this question was asked and responded to at the Board of Managers meeting I believe, but I just want to make sure. With the Commission's recommendation on the changes on. . .under paragraph. . .well actually under Paragraph One and Two. These recommendations came after it was submitted. . .after the rule was submitted originally to the Secretary of State's Office, correct?

Mr. Obrokta, Jr.: That's correct.

Mr. Phalen: Okay. Was that thirty-day public comment period extended from the time that these were submitted?

Mr. Obrokta, Jr.: Yes sir. It expired yesterday.

Mr. Phalen: It did expire yesterday?

Mr. Obrokta, Jr.: Yes.

Mr. Phalen: Okay. Now a couple other follow-up questions. In regards to your proposed changes under two, the first question is – on the public hearing request it would have to be as a result of the majority of the Board of Managers' request for a public hearing? Right? At six. . .I believe that is the majority?

Mr. Obrokta, Jr.: Yes.

Mr. Phalen: Okay. Is the Chairperson included in that six or is that. . .?

Mr. Obrokta, Jr.: It can be called in the sole discretion of the Chairperson. . ..

Mr. Phalen: Right.

Mr. Obrokta, Jr.: Or upon a vote of six individuals.

Mr. Phalen: Okay. The Chair only votes in the event of a tie. The Chair would be considered part of those six members.

Mr. Obrokta, Jr.: He could call it on his own.

Mr. Phalen: I know he could.

Mr. Obrokta, Jr.: Okay.

Mr. Phalen: But if he doesn't call it on his own?

Chairman White: Well to clarify that, I believe the Chair votes on everything, correct?

Mr. Obrokta, Jr.: He would have a vote. Not just be a tiebreaker.

Mr. Phalen: I mean he could be one of those six members?

Mr. Obrokta, Jr.: Absolutely.

Mr. Phalen: Okay. Secondly, in regards to the. . .if a member or the six members does not request that at the time that it is submitted to the Board of Managers, then it goes on to the Secretary of State's Office and then we can't at a later date request a public hearing?

Mr. Obrokta, Jr.: That's correct. It's our suggestion.

Mr. Phalen: Okay. Are these rule changes going to be submitted or placed in the hands of the Board of Managers prior to them coming to the Board of Managers at a regular meeting?

Mr. Obrokta, Jr.: Yes. I will give you copies of them before we bring them to you and ask for permission to file them with the Secretary of State's Office.

Mr. Phalen: Right.

Mr. Obrokta, Jr.: Absolutely.

Mr. Phalen: Okay, my next question is – how much of an advance notice are we going to have in regards to reviewing or receiving these proposed rules?

Mr. Obrokta, Jr.: Our goal is to give them to you a week in advance. . .back up from that. . .we are going to get them into the stakeholders' hands hopefully three weeks before and then we will try to get some of their comments in, incorporate what we can and give them to you a week before. And just so. . .if it's not being clear, you can at the end of the public comment period, if you're not pleased that there's been enough time, the Board can vote to extend for another thirty-day public comment period. I don't think we will ever be in a position where you're pushing time.

Mr. Phalen: Okay. In regards to the second part of that where the members of the public. . .request a public hearing, and you said the stakeholders will be notified prior to those meetings as well. Does this encompass the public being notified that a proposed rule change is about to be submitted to the Board of Managers?

Mr. Obrokta, Jr.: I don't think so for the following reasons. First of all, we are including the stakeholders that represent I would think the bulk of employers and employees in this state well beforehand. Also, when we file a notice of a public hearing, the agenda is attached to that notice and then we'll list whatever rules are going to be discussed that day. I think through those two steps the public is being informed.

Mr. Phalen: The public is being informed that there will be a proposed rule change or a. . .?

Mr. Obrokta, Jr.: Yes. Through first of all, including all the stakeholders – the AFL-CIO, etc. – including all of them in the process well before we bring it to you and tell them when we're going to bring it to you. I think it informs a great deal of the public. And when we file the notice with the Secretary of State's Office setting the meeting, it will have an agenda attached setting forth what rules will be discussed as well.

Mr. Phalen: But that request from the public has to occur at the. . .when the rule is presented to the Board of Managers?

Mr. Obrokta, Jr.: Yes sir, if I could just give a little follow-up. On your one questions with regard to our suggestions on this, you asked if the public comment period had been expanded and I said, "yes." We also noticed that rule along with the two other rules for a public hearing on December 17, 2003. So I think it's more than sufficient time for everyone to comment on that.

Mr. Phalen: Right.

Chairman White: Thank you very much. Do you want to discuss these differences or would you rather wait until the next meeting?

Mr. Phalen: Well, it would have to be a discussion between you and Chris. I mean. . .

Chairman White: Did anybody sign up for public comments?

Thomas P. Maroney: Steve and I did.

Chairman White: Mr. Maroney, would you like to address these rules?

Mr. Maroney: In addition to these rules I would like to make another comment, Mr. Chairman. Number one, I was here for the earlier meeting. . .one of the committees. And just generally speaking this has to do with perhaps Rule 14 also. Because of the burden which has been placed upon the Board of Managers to be financially responsible for $6 to $700 million dollars worth of business a year, that in meetings which address rules and regulations, which is what is going to govern this body and all of the affected parties to it, that in your proposed Rule 14 – and this is a comment or a thought that came up after seeing the first meeting today; since this is the first meeting of the subcommittees of the Board of Managers, that you have no defined perimeters for each of the subcommittees as to what is to be referred to each subcommittee, that that should be defined so that the affected parties know what will take place at each of the subcommittee meetings.

Number two, that when there are proposed rules that they go before the appropriate subcommittee and that subcommittee, at a bare minimum, hold a public hearing on the proposed rule. Knowing that at that time they may still be in a "draft" form, but at least that's the first opportunity to members of the public to address those rules. In addition to that, there should be an agenda formed for each of the subcommittee rules, which is distributed to the public and to the affected parties so that they know what will take place at each of the subcommittee meetings and to address the rules specifically. The comment period for Series

14 was extended until yesterday and I did fax – and maybe you haven't seen this – yesterday evening our suggestion at. . .that the public hearing rule should be changed to allow members of the public to request a public hearing at any time before final approval of the rule. And I've heard the comments of the general counsel and I can appreciate his position on this. But I think that the real purpose of the publication of the rule with the Secretary of State is to give those members of the public who have not seen the rule, may not even be familiar with it, an opportunity to appear before this body to express their concerns about the rule. And to deny the public that opportunity is in direct conflict with the approving of the statute having to do with the promulgation of rules and regulations and particularly this body, which is going to be responsible for some $6 to $7 to $800 million dollars annually and that that should not be taken lightly that these folks be denied that opportunity.

As to Rule or Series 32, I had made the suggestion that the employing unit – even in the reconsideration process – post the appropriate bond as is also required in the litigation process. And the reason for that is, and again, it's the overlap of all of these committees I think needs to be addressed because some of the subcommittees address one portion and some address another. But in this particular situation. . .in this particular situation, and I think you have to look at Rule 10 a little bit on this – proposed Rule 10, which has to do with the delinquency and default provisions as to when a primary contractor, when a subcontractor or when just a general employer who becomes delinquent – first they could become delinquent, then they have a long period of time before they go in default. It could be as high as seven to eight months, depending upon when the proper notice is given to the employer by the Division – that at first they are delinquent and then giving them the opportunity to correct the delinquent status because that is not given until after the quarter. They then have 60 days and during that 60-day period the Commission – I'm having a hard time with the language since we've changed the name of it so frequently here in the last several years – that the Commission gives notice to the employer. If they're late in giving notice to the employer, the delinquent status could be as high 90 days as opposed to 60 days. Then they have a period of time in which to correct the delinquency status before they go into default status. In proposed Rule 32, we're talking about people who are already in default status. Not delinquent statues, but default status. They have already been notified that they are delinquent and yet they are now coming back in and saying, "This may have been a clerical error. This may have been something else and we need a little more time. We want this to refute and we don't want to post a bond." Those are the very people that we need to make sure are paying their premiums or money that puts forth in some type of letter of credit, financial deposits to make sure that that is paid. If this was just a delinquent account, that would be one thing. But the way Rule 32 is written it talks about defaulted employers, which is way down the line from delinquency and that's why I suggest that the financial responsibility be added to those reviews at the very beginning of the review process that is asked for by the employer. Thank you very much.

Chairman White: Thank you Mr. Maroney. Steve White from ACT.

Steve White (ACT Foundation): I am here to speak specifically to the Series 32 and I think Mr. Obrokta did a fair job of going over the comments and I don't have a problem with anything he said. What I want to focus on specifically is 2.9 and that is the definition of "employing unit." What I handed to you was a copy of the recent article in the *Charleston Gazette* about a particular company. I think this is a good example. Maybe not a perfect example, but an example of the problem that the Division or Commission has. I don't fault the Commission. I think chasing after these companies. . .the issue I guess before you is the repeat violators, the people who are racking up the big amounts of debt and start another company. It's a problem we all know about. I think it is responsible for a large portion of our debt and the problems we have today.

I think you have a great opportunity here with this Series 32. You folks have a big job before you. You need to clamp down everywhere you can. Series 32 is going to be very important for you in order to accomplish that. But I'm afraid in the definition of 2.9 "employing unit" that we haven't quite narrowed it down or been as tight as we need to be to focus specifically on the repeat violator and that is the individuals behind the companies. I'll use a couple of examples. . .they started out as a company called North American. . .racked up a big debt. Two of three principles started another called IPI Division. . .went after them and that was good. . .but that was I think 2001. Here is 2003 and we're still going after them. . .that company, and they just filed bankruptcy and that creates a whole bunch of other problems and issues. But we all can see and appreciate how hard it is going after that. I think what we have in the bill that was passed is some clarification language which talks about this employer violator system and being able to track the individuals behind the company who were ten percent or more owners. And here we're picking up on what's being done in the federal government. The Department of Interior does this. To help. . .I'm hoping to expedite this process of going after the successor. . .stopping that person from. . .starting another company. . .clearly help is needed. IPI is a good example of that. I think in this definition of "employing unit" – what I'm afraid is we could say, "That North American we'll never let down to do another thing again. We'll revoke your license. . ." But who cares? They're not in business anymore. IPI is. Another example I'd like to use. . .should be of interest to you, Mr. Jarrett, because they were caught polluting the water. . .wanting to hire that company for your business. Another one that I know Mr. Phalen is well aware of. . .Island Fork. Again, a company that. . .we could say, "Island Fork. . .we will shut them down and they can't do another thing." Who cares? You are never going to see Island Fork again because they are going to move from active to inactive to non-collectible. We can predict that. . .individuals behind Island Fork have already had a host of other companies they could shift their business to. They've learned this method of doing business and can start all over again. I know the controls are a lot tighter now. It still happens. As Mr. Obrokta mentioned, we talked briefly before. . .in the comments that the Commission made you're not opposed to my wanting to do something about this employing unit. . .this is a great opportunity. We don't want it to get past us. We know those people out there. . .this is a chance to do something. I think we need to include something to make sure that the individual is prevented from. . .who is associated with that company. . .ten percent or more ownership. . .as they go forward, can't do it again. They may have something that's currently just waiting out there. They'll just start a company. . .So that's my comments in regard to 32. The only other comment I would to add is the process of the rules. I appreciate the stakeholder process. I would suggest – and I mentioned this also earlier to Mr. Obrokta – that proposed rules come with an abstract because we know that it might entitle administrative or something else. . .well, I'm not interested in that. . .abstract would help us all. . .existing rules being modified, strikethroughs, underscored for changes in language. . .just a suggestion. That's my comments. Thank you very much.

Chairman White: Thank you everybody for attending the subcommittee meeting. With that I entertain a motion to adjourn.

Mr. Jarrett made a motion to adjourn. The motion was seconded by Chairman White and passed unanimously.

There being no further business, the meeting was adjourned at 3:00 p.m.

BOARD OF MANAGERS

December 18, 2003 - 10:00 a.m.
Charleston Civic Center Rms. 207-209

AGENDA

1. Call to Order....................Steve White
2. Approval of Minutes....................Steve White
3. Commission Report....................Greg Burton
4. Office of Judges Report ....Timothy Leach
5. Claims Committee Report....................Everette Sullivan
6. Audit Committee Report....................Bob Phalen
7. Finance & Administration Report....................Chris Jarrett
8. Risk Management Report....................Doug Merritt
9. General Counsel's Report....................T.J. Obrokta
    a. Primary Contractor Liability — 85CSR10
    b. Board of Managers Procedural Rule — 85CSR14
    c. License Non-Renewal and Revocation Rule — 85CSR32
    d. Treatment Refusal and Mileage Rule — 85CSR1
    e. Health Care Vendor Hearings Rule — 85CSR28
    f. Request to File Rules
10. Old Business....................Steve White
11. New Business....................Steve White
12. Comments from the Public....................Steve White
13. Next Meeting....................Steve White
14. Executive Session....................Steve White
15. Adjourn....................Steve White

WORKERS' COMPENSATION COMMISSION BOARD OF MANAGERS

DECEMBER 18, 2003

Minutes of the meeting of the Board of Managers held on Thursday, December 18, 2003, at 10:00 a.m. in the Charleston Civic Center, Rooms 207-209, Charleston, West Virginia.

Board members present:

Steve White, Chairman
Gene F. Bailey
Richard W. Humphreys
Chris E. Jarrett
John L. Johnson
Matt Jones (representing Craig Slaughter)
Brooks McCabe
Douglas W. Merritt
Bob Phalen
David Satterfield (by phone)
Everette E. Sullivan

Commission staff present:

Gregory A. Burton
Melinda Ashworth Kiss
Timothy G. Leach
T. J. Obrokta
Randall B. Suter
Lisa Teel

1. Call To Order

Chairman White called the meeting to order at 10:10 a.m.

2. Approval Of Minutes

Mr. Sullivan moved to approve the minutes of the meeting held on October 28, 2003. The motion was seconded by Mr. Merritt and passed unanimously.

3. Commission Report – Gregory A. Burton

Gregory A. Burton: Thank you, Mr. Chairman. You have in your hand-out the November statement. This was gone over at the last F&A Committee meeting, but we wanted to take a minute to go over it with the full Board. This is a new format. I want to make sure everyone is comfortable with it and you're getting the information that you want to receive.

9. General Counsel's Report – T. J. Obrokta

T. J. Obrokta: Mr. Chairman, members of the Committee, T. J. Obrokta, General Counsel, Workers' Compensation Commission. You have on the agenda before you here today eight rules that we will be discussing that are at various stages in the rule development process. Before I discuss the specific rules, let me just say you've been handed a packet that has the eight rules that we're going to discuss today in the order in which we will discuss them. I'll go through them one-by-one.

If I could make a preliminary comment or two, we're pretty excited about today. This Commission – more importantly, this Board of Managers has been in existence for only two-and-a-half months, and yet today you stand poised to vote on up to five rules that will go a long way to implementing Senate Bill 2013. We think that pace has been expeditious but a deliberate pace, and certainly congratulate the Board of Managers on the process. I will finally say that given the very limited comments we had yesterday at the public hearing, it's very clear that the process we've established, as authorized by Mr. Burton, has given everyone a seat at the table in the development of these rules. I believe everyone who came up and commented yesterday indicated that they had made comments during the process and that we had accepted a lot of them. So, people are given a seat at the table, we take their comments seriously, and have tried to adopt as many as we possibly could. With that, I'll go right to the rules.

The first rule in your packet is Rule 10. This is a rule up for final vote today. Just a very general – very brief background because you've seen most of these rules several times before. Historically, primary contractors have been liable for the unpaid premiums of their sub-contractors. Senate Bill 2013 expanded that concept to include what it called the Natural Resources Extraction Business. That is to say, we're going to take this concept and we're going to apply it in the coal, timber and natural gas businesses. Primary contractors will be liable for the unpaid premiums of their subs.

We took the then existing Rule 10 and modified it to accommodate this legislative change. That is what's before you here today. This rule has been through several drafts with the stakeholders – everyone from the Coal Association to the United Mine Workers, the Chamber, and the AFL-CIO. I think we're very comfortable with the way it is now.

The changes I would like to highlight and make the Board aware of today are the changes that were suggested yesterday at the public hearing. The comments, I believe, came from Mr. Maroney's office. They're four small comments – small in terms of the least number of words – that I will briefly discuss with you.

On page 2 of Rule 10, paragraph 2.3, you will see some underlined language on the fourth line. It says within ninety days. This issue addresses when an out-of-state company comes into West Virginia and when they are required to get coverage from our Workers' Comp Commission and when their coverage from the other State will apply. This ninety days is provided for in Rule 9 of our rules. Rule 9 covers all types of coverage issues, classification issues – it covers really all of the "employer" issues. I believe the suggestion from the comment was to take that ninety days to thirty. The reason I would disagree with that suggestion is because that ninety days is provided for in Rule 9. Rule 9 takes a global approach to this whole issue, and I think we should reserve the right to address this issue when Rule 9 is before the Board, which I would expect to be in the next few months. So, I'm not suggesting that I disagree with the comment. I'm simply suggesting that this is an issue that if we changed it now, it would be inconsistent with Rule 9, and I just think it's an issue better addressed once the Board is looking at Rule 9 in total. So, I would suggest not adopting that recommendation.

Paragraph 3.2 on the bottom of this page – the fourth line. Mr. Maroney wanted to insert the word "transportation" to make it clear that this rule covered those who also transported natural resources. I think the rule covered them anyway, but to accommodate his request, I inserted the word "transportation" there on the fourth line.

Page 3 – you'll see the first full paragraph, 3.2.b. You'll see a reference there to thirty days. The concept of primary contractors only being liable for the unpaid sub's premiums – that only applies per *Code* if the contractor/sub-contractor contract is longer than thirty days. That's in *Code*. That's why we have thirty days here. If you adopted the public comment suggestion that that thirty days go, I believe, to ten days, that would be in violation of the *Code*. So, I'm not suggesting that I disagree with the concept – I may even agree with the concept – but I don't think you can do it here in this rule. I think that would require a legislative change.

Finally, on page 6 of the document, you will see paragraph 5.6. The essence of this paragraph is as follows. Under the *Code*, a primary contractor can protect itself from being liable for the unpaid premiums of its subs if that primary contractor comes to us before the contract and gets a certificate from us saying the sub's in good standing with us. There's a whole process set forth in the *Code* that enables the primary contractor to insulate itself from this liability. Paragraph 5.6 is in here to adopt those provisions of the *Code*. It was suggested that this come out in the public comment period. I would disagree with that suggestion because, again, I think this is just implementing what's in the *Code* and to be changed, it would have to be changed in the *Code*.

Those are the four comments we received yesterday, according to my notes, on Rule 10. I think it's fair to say that, given the scope of the rule and its complexity, we were pleased to be down to these very few issues.

I would respectfully request from this Board that it entertain a motion to adopt the recommendations we propose be adopted from the public comments and have those amended into the rule. Then I would request a second motion to approve the rule – the final filing with the Secretary of State's office.

Chairman White: Thank you, Mr. Obrokta. Do we have a motion to amend the rule as suggested?

Mr. Merritt: I would like to make that motion – as Mr. Obrokta indicated, actually two motions – one to make the amendments/changes and then to ....

Chairman White: The first motion would be to make the amendments that have been suggested by the Division reflecting public comments. We have a motion. Do we have a second?

Mr. Sullivan: Second. I have a question. Mr. Obrokta, on the ninety days to thirty days request, you said that would be in Rule 9?

Mr. Obrokta: Yes, sir.

Mr. Sullivan: What would be the position of the Commission on bringing it back to thirty days if we did change it in Rule 9?

Mr. Obrokta: Without consulting with Mr. Burton or the rest of the Commission, I would say it is my personal belief that conceptually, it makes sense to reduce the ninety days. My personal belief is it would make sense to sit down and try to lower that figure.

Mr. Sullivan: Back to thirty days or ten days or...?

Mr. Obrokta: I would want to give it further thought before I would commit to a number but, again, conceptually, I agree with the idea.

Mr. Phalen: I just want to follow up on that. I appreciate your response, T.J., however, once we got to Rule 9, we have Rule 10 and Rule 10 has ninety days. Then if we were to change Rule 9 to thirty days, would there not be a conflict there?

Mr. Obrokta: At that point, we could certainly just do an amendment to this section. We could amend that one word. We could come back and do that very easily.

Mr. Phalen: Okay. Thank you.

Chairman White: Good question. Any further discussion? Hearing none, all those in favor, please signify by saying "Aye." Opposed?

The motion was passed unanimously.

Chairman White: It is clear that the amendment has passed. The rule before you is the revised Primary Contractor Liability Rule 10. Do I hear a motion?

Mr. Merritt: So moved.

Mr. Sullivan: Second. Mr. Obrokta, you said that even though we pass this rule that we can come back and amend it if we amend Rule 9?

Mr. Obrokta: Yes, sir. We can put language in Rule 9 that says this supercedes the ninety days in this rule. We can easily address that.

Mr. Sullivan: Thank you.

Chairman White: Further discussion? Hearing none, all those in favor of passing the revised rule, signify by saying "Aye." Opposed?

The motion was passed unanimously.

Chairman White: It is clear that revised Rule 10, the Primary Contractor Liability Rule, has passed. The next rule on the agenda is Rule 14. Mr. Obrokta.

Mr. Obrokta: Rule 14 is the procedural rule that sets forth how this Board of Managers will operate. This rule was subject to public hearing yesterday. There was one comment received on the rule that I have tried to accommodate. I believe the comment was either from Mr. White or Mr. Maroney's office.

If you will look on page 7 of the document, you will see the second full paragraph, number 10.8. There was an interest expressed yesterday during the public hearing discussion that members of the public be able to come to this Board and request a public hearing on a rule.

After discussions with some of the Board members afterwards, I have tried to come up with language that accommodates that request. Essentially, what it reads is, any member of the public may request a public hearing – may request one – at any point until after the rule has been filed with the Secretary of State's office and then fifteen days have expired. After the expiration of those fifteen days – it's been out there in the public for fifteen days – then that right to request a public hearing would expire.

But, again, during the entire drafting process, during the entire deliberation process when you're considering filing with the Secretary of State's office, and after we file with the Secretary of State's office for the next fifteen days, all that time is open for members of the public to come to you or come to us as a Commission if you're not having a meeting, and request a public hearing. I think that's a reasonable balance. We don't want to unnecessarily delay the process but, again, we want to accommodate the request. That was the only comment made at yesterday's public hearing.

The Commission would request two similar motions that were made for Rule 10.

Mr. Sullivan: Mr. Chairman, I move the amendments be approved.

Mr. Phalen: Second

Chairman White: Discussion? All those in favor, signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: It is clear the amendment has passed. The rule has been amended to reflect the comments made in the public comment period. Do we have a motion to adopt the amended rule?

Mr. Jarrett: So moved.

Mr. Bailey: Second.

Chairman White: We have a motion and a second. Discussion? All those in favor, please signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: We have declared that revised Rule 14 as before this Committee has passed. The next item on the agenda is Rule 32.

Mr. Obrokta: Mr. Chairman, members of the Board, Rule 32 is a critical rule that we see as a great new tool given to us by the Legislature to enforce premium collections. Specifically, it has been the law on the books for quite a while that if an employer goes into default, the next time that employer goes to get a new business license or any other license that's necessary to do business – the next time they go to renew that, that request will be rejected because they're in default with Workers' Comp.

The Legislature greatly strengthened that provision. What the Legislature said in Senate Bill 2013 is, you no longer have to wait until it's renewal time. You can go out now and when they go into default, you can go out and you can revoke a business license or any other type of license that's necessary to do business in the State of West Virginia – a very proactive step. We took Rule 32 and modified it to reflect this legislative change.

Again, this rule's been all through the drafting stages with the stakeholders. It's been through the Sub-Committees. It was the subject of yesterday's public hearing. I believe we received two comments yesterday and I'm trying to adopt them both.

If you will turn to page 2 of the document, you will see paragraph 2.9. If I could just take a step back and explain what this is trying to get at, it may be helpful. Rule 32 says you can go out and revoke business licenses or what-have-you if they go into default. There's a separate concept in the legislation – another new concept – called an Employer Violator System. What that says is, if you're a ten percent or more shareholder in a company that goes into default, you're going to be put on a violator list and, you, as an individual, if you go try to form another company – go around the hill and start another operation – you will be denied. You will be blocked. That Employer Violator System deals with the individual owners of the companies.

The trick is to make sure Rule 32, which, again, involves the revoking of business licenses, must work in tandem with the Employer Violator System so that when you revoke the license, then you get the ownership information on the folks who own that company who are in default, and you put those individuals on the Employer Violator System. So, the next time they go out and try to start a new company, they won't be allowed to do so. So, these two concepts have to work in tandem. We fully agree with that concept.

Steve White with the ACT Foundation wanted to make it clearer in Rule 32 that it has to work with the Employer Violator System. I agree with that. The language I've come up with is in 2.9, the last sentence has been added. It reads as follows: The Commission shall gather individual and other ownership information concerning the employing units in default for examination under the Commission's Employer Violator System.

That's the language I've tried to come up with to make the point that these two endeavors must work in tandem together. I spoke with Mr. White before the meeting – I don't want to put words in his mouth, but I think he thinks we're almost there. I'm not sure he's completely signed on, but that's the best I think we can do to try to accommodate the request.

The other request yesterday at the public hearing made, I believe, by Mr. Maroney's office – if you turn to page 4 of the document, what this paragraph is addressing – paragraph 7.2. Let me take a step back and kind of give you the factual scenario of how this would evolve. An employer goes delinquent – they don't pay their premiums. Then they go into default because they still haven't paid their premiums. Several months have gone by now. So, then they go into default. At that point, we're going to revoke the business license. The rule provides for an administrative review before we pull the license because governments do make mistakes and we don't want to pull someone's business license until we're sure. Mr. Maroney suggested that you need to make them put up a bond at that point before you reconsider to at least secure the debt. We agreed with that and put that in. But I said the Commission "may" require the bond, etc., and he thought "may" should be "shall." So I made it "shall." 7.2. Okay.

That covers the comments that I have from my notes on the hearing yesterday. So, with that, I would ask that the Board adopt the various modifications to Rule 32 that have evolved through the public hearing process. Then, I would ask for a second motion approving Rule 32 for final filing.

Mr. Sullivan: So moved, Mr. Chairman.

Mr. Satterfield: Second.

Chairman White: We have before us a motion to adopt the amendments that have been explained by Mr. Obrokta to Rule 32. Discussion?

John L. Johnson: Yes, I have a question, T. J. In regard to 7.2, changing the "may" to "shall" gives the Division absolutely no leeway going forward. If an employer happens to be in default, it's quite possible that they're defaulting for good reasons – economic reasons – and, consequently, cannot afford at that time to put up assets for reconsideration which means that then you have no choice but to go out of business which may not work in the best interest of Workers' Comp and may not work in the best interest of the State as a whole. So, for that reason, I object to changing that from "may" to "shall."

As a matter of fact, I'm pretty sure if we change that – in the past, we would have been in hot water with a lot of different companies and entities that we are even currently dealing with. So, I would oppose changing that to "shall."

Mr. Obrokta: Mr. Johnson, I share some of your apprehension on this change, but the way I reconciled it in my own mind is that we are so far down the process at this point – they've been in delinquency, they've been in default and they still haven't paid. So, I'm very sensitive to your issue and I think you raise a very good point, but they're so far down the line at this point, I could see the point that we want to be firm with them, and I would ultimately suggest that this Board do that.

The other point I would suggest is, all they have to do – of course, well, they can pay up – they can also just enter into a repayment agreement. That's sufficient, or they can get a cash or surety bond or a bank letter of credit. So, they have several methods available to them that will hopefully safeguard against the issue you're raising.

Chairman White: Any further discussion?

Mr. Phalen: T. J., in regard to the employing unit under 2.9 – and I appreciate you adding the additional language – one question that I have. It says, the Commission shall gather individual or other ownership information – does this go towards if, say we have three owners with an employer or a board of directors. Let's just put it that way. Does this prohibit (a) the CEO or the president of the company or the employer from obtaining another license or whatever? Would his license be revoked or (b) a secretary/treasurer of an employer or that he or she may be able, to use your words, go around the hill and open up another operation? Does that go to that extent?

Mr. Obrokta: It does not go to that extent. But, when we do the Employer Violator System and they work together, we will accomplish the concepts you're describing. But, again, Rule 32 is not designed to do that. It's just a rule limited to the revoking of business licenses. But, again, to put this language in there, I'm trying to make the point that it's got to talk with the Employer Violator System and, working together, they should accomplish what you've outlined.

Mr. Phalen: Okay. Just to make sure I understand it, in conjunction with the Employer Violator System, this change that you've made should take care of that particular problem.

Mr. Obrokta: That's correct.

Chairman White: Any further discussion? The question before us is the adoption of the amendment to Rule 32 which reflects the comments made in the public comment period. We have a motion and a second. All those in favor, please signify by saying "Aye."

Ayes: Humphreys, Jarrett, McCabe, Phalen, Satterfield, Sullivan, White

Chairman White: Opposed?

Nays: Bailey, Johnson, Merritt

Chairman White: The "Ayes" have it. The motion is passed.

We have an amended Rule 32 before us. Do I have a motion for the adoption of amended Rule 32?

Mr. Phalen: So moved, Mr. Chairman.

Mr. Satterfield: Second.

Chairman White: We have a motion and a second to adopt revised Rule 32. Discussion? Hearing no discussion, we have before us the revised Rule 32. All those in favor, please signify by saying "Aye."

Ayes: Humphreys, Jarrett, McCabe, Phalen, Satterfield, Sullivan, White

Chairman White: Opposed?

Nays: Bailey, Johnson, Merritt

Chairman White: The "Ayes" have it. I declare the motion is passed. The revised rule has been adopted.

Mr. Obrokta: The next rule is Rule 28. Senate Bill 2013 did several things in an effort to get a hold of and to get under control the various medical expenses being incurred by the Commission. A couple things Senate Bill 2013 did – first of all, it gave the Executive Director power to suspend for up to three years or terminate any medical provider who's abusing the system. The old law used to require, however, that the Executive Director go through a very onerous administrative process before he could get to that point.

The second thing Senate Bill 2013 did was say, he doesn't have to go through that onerous administrative process any more. He can immediately suspend or terminate a medical provider after he's consulted with a medical expert of his own. He can immediately suspend or terminate, and then there will be an administrative process to see whether he was right or not, essentially.

Those rules have been modified and put into Rule 28. The only public comment – there were no comments yesterday on this rule. This rule, again, has gone through the stakeholder process. The only comment I received – and it's well taken. If you'll turn to page 8 of the document – the statute states that the Executive Director can suspend or terminate if the provider is basically engaging in medically-unsupportable treatment. Paragraph 9.6 is a series of definitions of what that means. What we wrote was, "treatment which is controversial, obsolete, investigational or experimental will be subject to strict scrutiny by the Commission." It was suggested that we add the words, "and must be pre-authorized by the Commission." I think it's a good point, although I do think it's taken care of in other rules. But, again, I would propose amending Rule 28 by adding that phrase – "and must be pre-authorized by the Commission." That's the only public comment and change that I'm aware of.

So, I would request a vote to adopt that minor change, and I would request a vote to file the rule with the Secretary of State's office.

Mr. Bailey: I move that we adopt the change.

Mr. Humphreys: Second.

Chairman White: I have a motion that we adopt the amendment and a second. Discussion?

Mr. Humphreys: T. J., at 9.6, it may not be of any consequence, but I guess I'm a little uneasy about the idea that the Commission might pre-authorize controversial or obsolete treatment.

Mr. Obrokta: I would be concerned if we pre-authorized obsolete treatment as well and, if we do that, I hope someone brings it to your attention. I agree that language might not quite – I'm sensitive to your point. I would simply – I guess I would suggest that our Medical Director, Jim Becker, and his staff will be the ones responsible for ensuring that we don't run afoul of the concern you're expressing. I have full faith that they will do that.

As soon as we take out obsolete, which we can do if you'd like, there's going to be a treating physician who's going to say this is not obsolete, so there's going to be a debate as to what's obsolete. That's why we're saying it's subject to strict scrutiny and that we pre-authorize before we ever do it.

Chairman White: Any further discussion? The question before us is passage of the Rule 28, as amended, pursuant to the recommendations of the Division. All of those in favor, please signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: I declare the motion has passed. The rule has been adopted. It has been pointed out to me that the amendment has not been passed. We'll do it again. All those in favor, please signify by saying "Aye." Opposed?

The motion on the amendment to the rule passed unanimously.

Chairman White: We have before us the revised rule. Do I have a motion for its passage?

Mr. Humphreys: I so move.

Mr. Bailey: Second.

Chairman White: We have a motion and a second. Discussion? Hearing none, all those in favor, please signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: I declare the motion has passed. The revised rule has passed – for the second time.

Mr. Obrokta: The next rule on the agenda is the final rule we'll discuss today that you've already seen. This is Rule 1. It's twenty-nine pages long, but we only made a few isolated changes to it.

They are as follows. First and foremost, Senate Bill 2013 states that a claimant can have his benefits suspended if he refuses to seek necessary medical treatment. We put the language into the rule which adopts that. I have not received – I don't recall receiving a single comment from anybody as to the language we put in here. I'm not aware of anyone who objects to how we've set it out. No comments were made on this Rule yesterday at the public hearing.

The second substantive change in Rule 1 is on page 15 of your document. Just to go back over an issue, this is an idea that we presented to the Board awhile back and let me just briefly remind you. Claimants are entitled to mileage reimbursement at 36¢ a mile every time they go to a doctor, chiropractor, etc. We made a proposal, as outlined in the document before you, to eliminate that mileage reimbursement. We would still maintain reimbursing claimants if they were mandated by the Commission to go to a doctor or mandated by an employer to go to the doctor. So, we would still have reimbursement under those circumstances. But the routine daily trips to secure treatment, we were proposing eliminating the mileage reimbursement. We viewed as somewhere north of a $6 million savings and there are three FTEs (full-time employees) that do this work. That was the reason behind the suggestion at the time.

I believe there have been some discussions on maybe a better way to address this issue. Those are my comments and I would leave it to the Board to instruct me on – if there are any questions or if anyone has a suggested better way to do this.

Mr. Phalen: As I spoke before, I was adamantly opposed to the reduction of the 36¢ per mile when an injured worker had to seek medical attention, understanding full well if the employer or the Commission gives that injured worker direction, then that 36¢ per mile would still be paid. That's my understanding, right, T. J.?

Mr. Obrokta: That's correct. As proposed.

Mr. Phalen: And the elimination of the mileage is if the injured worker has a doctor's appointment to be treated for the injury that he has sustained and he goes on his own where the doctor sets up that appointment. That's correct, right?

Mr. Obrokta: Yes, sir.

Mr. Phalen: And, again, I stand today still in opposition of the elimination of that 36¢ per mile, understanding full well that has been the practice of the Division for a number of years and understanding full well as to what the Division has said in regard to the estimated savings that may be derived from the elimination of that 36¢ per mile. Again, that is estimated savings. I have not seen anything concrete as to what that savings would constitute, other than what you folks have told us in the past, and that's somewhere around $5 million, I believe.

Again, I'm still adamantly opposed to the reduction or the elimination of the 36¢ per mile. These people did not ask to be injured. They do not ask the doctor to set up their appointment, in most situations.

Don't anybody misunderstand. I recognize that there's abuse in anything, and some people can take full advantage of anything. But, I can point out several situations where the people do have to go to the doctors on a regular basis and they're not sent by the employer or they're not sent by the Division.

You know, again, these folks did not injure themselves intentionally or whatever the case may be. When they are injured, naturally their monies are eliminated as to their wages and things as to what they're actually used to making. It's reduced. Thank God we do have workers' compensation to provide for on-the-job injuries. However, that's part of the injury, and I can't for the life of me understand, you know, if someone's injured and they have to go to the attending physician for medical treatment as to why they're going to be penalized further out of their pocket to pay for their mileage expense, their gas expense, and things when they've already sustained loss in regard to the injury itself.

So, again, I would still stand opposed to the reduction of the 36¢ per mile on the injured worker. However, I do have an open mind in regard as to how this is done on another level. Through Medicare, I believe it is, that rate is around 13¢ or 15¢ per mile, and I would have an open mind in regard to trying to reach some type of settlement in regard to this particular situation. And even at 15¢ per mile, that's still a 21¢ per mile reduction on an injured worker. However, it's still 15¢ better than zero. So, again, I'm opposed to the elimination of mileage on injured workers.

Mr. Jarrett: There has been, as I understand it, some in-depth discussion between the Commission as well as all the stakeholders regarding this issue. It's been a very divisive issue. In an effort for conciliation and a compromise, I'd like to propose the following as an amendment for this section, 15.1. We would strike it in its entirety and insert the following:

> Claimants are entitled to reasonable travel, meals and lodging expenses actually incurred in connection with medical examinations or treatment. In making a determination of the reasonableness of such expenses, the Commission shall utilize the travel regulations for State employees as a guide, unless specific provisions to the contrary are otherwise contained herein. Claimants may be reimbursed for mileage in connection with medical examination or treatment at a rate of 15¢ per mile.

> This rate shall not apply to mileage reimbursement requests involving treatment provided when the Commission requires the claimant to undergo the medical examination and has selected the physician, or when an employer is required to reimburse reasonable travel and other expenses, as provided for in the *West Virginia Code* §23-4-a. The rate provided for in the travel regulations for State employees shall apply to these latter reimbursement requests.
>
> I offer this as an amendment up for consideration before this Board.

Mr. Sullivan: I would second that amendment, Mr. Chairman.

Chairman White: We have an amendment that's been proposed to Rule 1 and we have a second. Do we have discussion?

Mr. Phalen: Yes, Mr. Chairman. For clarification, Chris, it only applies – the 15¢ only applies to the claimant going to a doctor other than him being directed by the Commission or by the employer, is that correct?

Mr. Jarrett: That's correct.

Mr. Phalen: And the regular amount that's provided by the State *Code*, if the Commission or the employer directs a claimant to a doctor, would still apply in that situation?

Mr. Jarrett: That kick in. That's correct.

Chairman White: Thank you, Mr. Jarrett and Mr. Phalen. Further discussion?

Mr. Bailey: I have a concern or a thought that that 15¢ should be across-the-board. It should be in all the categories whether the employer requests the exam or whether it's an IME. I know that's not what the motion says here at this point in time. I'm even concerned that paying at all – well, I'm not concerned with us paying 15¢ or whatever. I have supported that to some degree. But, I understand that Mr. Obrokta has said here that it takes three full-time employees just to process those invoices. I don't know what we can do about that. I don't know how many invoices that entails – many thousands, I assume, if it takes three full-time employees two hundred and twenty days a year or however many days they work to process those. I, at this point in time, have a problem with the motion if it does not cover all of those categories or all areas.

Chairman White: Mr. Obrokta, in the public hearing process, were there any comments directed to including these other categories into the reduction in the mileage reimbursement?

Mr. Obrokta: Mr. Chairman, normally, we receive very little, if any, written comment on this issue. I got one letter from one attorney suggesting it was unfair. But, I do believe that through the give-and-take of the public discourse, there has been discussion that the concept offered by Mr. Bailey was one alternative people were discussing, as was, of course, the amendment described by Mr. Jarrett. Both have been ideas I have heard floated by one side or the other.

Mr. Jarrett: It's subject to check, but I think, as an employer, if I send my employee to use his personal transportation to go to a doctor at my request, I think I'm required by Federal law to subject him to the Federal levels of transportation. Someone can check that for me. I mean, if I have an employee and I tell him to use his car to go over and pick up a box of paper clips, I've got to pay him mileage, by Federal law. So, I don't know that we can even do that, Gene. That's subject to check.

Mr. Bailey: I mean all I'm asking is that you pay everybody 15¢ a mile. But, you're saying that according to Federal ...

Mr. Jarrett: I would ask for clarification on that if anybody knows that particular piece of the law but, to my knowledge, we pay whatever the guidelines are. An employer is told, here's what you've got to pay if an employee uses his personal car on company business. And, if I direct an employee to go for a second opinion or to a doctor, I typically reimburse him at that 36¢ – unless someone tells me different. That's my understanding.

So, you couldn't change that piece of it. The only piece you could be talking about, in my judgment, would be the part – maybe – and I don't know the law on that one either – when the Commission directs someone to go.

Mr. Humphreys: T. J., awhile back, you gave us an example of a claimant employed by a chiropractor who was charging mileage to go to work. Would this amendment mean that this claimant would be able to charge 15¢ instead of 36¢?

Mr. Obrokta: Yes. Obviously, we're not going to let that person charge anything because they're abusing the system and we'll take the appropriate steps. But, conceptionally, yes.

Mr. Merritt: I personally oppose paying claimants going for the routine doctor visits. I think if you look around at the other surrounding States, they do not pay claimants going for routine office visits. I could live with a change of maybe for these routine visits if there's a mileage of, say, anything over twenty-five miles, then we could consider reimbursing the claimant. That's my suggestion.

Mr. Sullivan: I think we're losing sight of the fact that these are injured workers that we're talking about. These are employees of the employer and it wasn't – as Mr. Phalen has stated, it wasn't their doing that they got injured and they have to go to the doctor, and I don't see why that we'd want to penalize them further. I would support the amendment as it was suggested by Mr. Jarrett.

Mr. McCabe: I would just suggest that perhaps the Board does support the amendment as presented, given the different perspectives that are really fairly broad as I am listening to this. I would suggest that we take this amendment and the Board accept it and pass it and ask that Mr. Obrokta perhaps, at some point in the future, take another look at this. But at least we are taking a step today that we can implement something and create some savings. My fear is that if we don't do that, we may create some unnecessary divisiveness. I sense that there perhaps is not a clear, broad-based consensus on this as we sit here. Maybe what we do is do the best we can today, pass the amendment as presented by Mr. Jarrett and, as we work through some of these other rules, ask Mr. Obrokta to maybe convene a working group to take another look at it further down the path a bit.

Chairman White: Thank you, Mr. McCabe. Are there further discussions? Hearing none, all those in favor of passing the amendment as proposed, signify by saying "Aye."

Ayes: Humphreys, Jarrett, McCabe, Phalen, Satterfield, Sullivan, White

Chairman White: Opposed?

Nays: Bailey, Johnson, Merritt

Chairman White: It is clear that the motion has passed. The rule before the Committee, as revised by Mr. Jarrett's motion.... Now, as a point of clarification, T. J., were there other amendments that had to be addressed or that you have suggested?

Mr. Obrokta: No, sir.

Chairman White: Is there a motion to adopt the Rule that has been amended, pursuant to the amendment just passed? Do we have a motion?

Mr. Jarrett: So moved.

Mr. Sullivan: Second.

Chairman White: We have a motion and a second to adopt the revised Rule 1. Discussion? Hearing none, all those in favor, please signify by saying "Aye."

Ayes: Humphreys, Jarrett, McCabe, Phalen, Satterfield, Sullivan, White

Chairman White: Opposed?

Nays: Bailey, Johnson, Merritt

Chairman White: I declare the motion has passed. Rule 1, as revised, has been adopted by this Committee.

The next item on the agenda is Old Business.

Mr. Obrokta: There should be another item on the agenda regarding rules.

Chairman White: Oh, pardon me. Request to file rules. It's your floor.

Mr. Obrokta: We are now bringing before you three new rules. I am going to request that at least two of those be filed with the Secretary of State's office for the initial public comment period. The same work has gone into these rules that went into the other rules. These rules have gone through the stakeholder process. We've tried to adopt as many suggestions as possible. I am not here to tell you that these rules are perfect yet, but I do think they are far enough along that we can file them. I do think each of these three rules will be very important, and my suggestion would be that each have their own public hearing because they are very substantive rules. I agree that the continued dialogue with all the stakeholders is still necessary on these rules, but I think we're far enough along that they can be filed with the Secretary of State's office.

The first rule in your packet should be Rule 15. This is the Vocational and Rehabilitation Provider Rule. Senate Bill 2013 did a few things on rehab. First of all, it increased from $10,000 to $20,000 – double – the amount we'll pay for rehab plans.

This rule adopts that doubling. Senate Bill 2013 allowed employers to contract with preferred providers for those rehab services. This rule accomplishes that. Finally, Senate Bill 2013 put a two-year limit on rehab indemnity benefits. This rule adopts that as well.

The evolution of this rule is as follows. I did a first draft, as usual, sent it out to everybody and got a whole host of comments. It was important to me and I tried to accommodate as many comments as possible and, then, unlike the other rules, I sent it back out for a second round of comments. I then met with the head of the Rehab Association. I will represent to the Board that I think -- not all -- but the overwhelming majority of issues have now been worked out with them. I would pledge also to continue to work with them if there are any outstanding issues.

A couple of other changes in the rule or a couple of things the rule accomplishes -- there was a $10,000, now a $20,000 cap on rehab plans. The rule never said, well, what goes against that $20,000? It was very hard to police. So I went to the State of Washington, I believe, and they have a rule on rehab. I got a lot of ideas from them. So, the rule sets forth actually what should be charged against the $20,000 so that limit can have some meaning. That's in the rule.

This is a major rewrite -- there's no doubt about it -- on Rule 15. But, again, we have involved the stakeholders and two drafts have gone out to them and a sit-down meeting. I'm not here to tell you that they agree with everything, but I am here to say that we have narrowed the gap so that I think the filing with the Secretary of State's office, and then a public hearing on this rule, is an appropriate step at this time.

So, with that, I would request permission to file this with the Secretary of State's Office.

Mr. Jarrett: So moved.

Mr. Phalen: Second.

Chairman White: We have a motion and a second. Discussion? All those in favor, please signify by saying "Aye." Opposed?

The motion passed unanimously.

Chairman White: The motion has passed. It will be filed with the Secretary of State's office.

Mr. Obrokta: We will also work with the Chair and the other members of the Board to set up a public hearing on this rule.

Chairman White: A public hearing is hereby requested on this rule.

Mr. Phalen: For clarification. T. J., I thought you stated in the beginning that you would suggest a public hearing on all three?

Mr. Obrokta: That's correct.

The second rule before you, I e-mailed this to everyone on the Board or mailed it to them a couple of weeks ago. Excuse me. Permit me one second.

Chairman White: Just for clarification, Mr. Obrokta, it's my understanding that we will be – when we set the rules for public hearing, that will – if, in fact, a public hearing is beyond the thirty-day time period, the public comment period will be expanded to include the public hearing.

Mr. Obrokta: As a matter of fact, we'll set a forty-five day public comment period just to accommodate that issue. If you need to, we can extend it.

Senate Bill 2013 required us to come up what I generically will call a Medical Management of Claims Rule. This is a very comprehensive rule. If I could just read to you out of Senate Bill 2013 – just very briefly. We have to bring to you what the statute calls a Medical Management of Claims Rule and Awards of Disabilities Rule. This requires three things. Three things must be in this rule. First, we have to establish standardized guidelines and parameters for the appropriate medical treatment of claimants. Second, we have to establish expected periods of time to reach maximum medical improvement. Third, under the statute, we have to come up with ranges of permanent partial disability awards for common injuries and diseases. The statute gives us the flexibility to come up with our own to meet any of these three, or we can reference in our rule a nationally-standardized set of guidelines or what-have-you. So, that's the statutory background for why I'm bringing this rule to you today.

What we've done is, you have a 102 page rule in front of you. The first three pages, which are not included in the 102, are basically a table of contents which breaks down what this rule is trying to do. You'll see roman numeral I, then there's an introduction – those are introductory provisions. Roman numeral II addresses providers – who can be providers of workers' comp. Roman numeral III gets into provision of services – the role of the treating physician – how do they bill us, things of this nature. Roman numeral IV are those specific guidelines I just mentioned to you regarding treatment – treatment guidelines. Roman numeral V – we have some special rules for drugs and medications. Roman numeral VI gets into the expected period of time off. When you are injured, what do we expect? How long do we expect you to be off? The Board members may know awhile back, the Commission adopted the Pressley-Reed guidelines on this issue and this provision of this rule references Pressley-Reed. That's how we handled that. Roman numeral VII gives the ranges for permanent partial disability awards for common injuries and diseases.

The evolution of this rule is as follows. There was – some of this had been in rules, but very little of it. The Commission had treatment guidelines on the Internet. We had other documents that governed medical care scattered through different rules. It was not well organized. What we did – we took this chance that the Legislature gave us to bring everything in that we could think of that has to do with how we manage medical claims – we spend $220-some million a year on medical claims – and brought everything into one rule – let's sit down and work it out and see how this should all operate.

Jim Becker, our Director of the Office of Medical Services – who's from Marshall, I will mention – he's worked with the WVU lawyers so we have diversity there – worked closely with them. They've had a lot of input. This rule, obviously, the State Medical, the State Hospital – all of those folks who are on our stakeholders list, they got the first draft that you received a couple weeks ago. We've gotten very limited comments on the rule. I think people are still trying to digest it. I do think, however, we are at a point, and we are required by Senate Bill 2013, to get this filed with the Secretary of State's office.

I recognize this is a very voluminous document – that no one can sit down and go through all this at one sitting. This is really the reason I preface my remarks on these rules. I think we need at least a forty-five day public comment period on this. We need a hearing. We need continued involvement with the stakeholders.

I'm not here to tell you this is all agreed to. There will be parts in here that are controversial, I'm sure. But, nevertheless, we are trying to satisfy our legislative mandate to bring this rule to you, and it does need to be filed with the Secretary of State's office before December 31st. So, I present it to you, as a second step in a process I recognize will be a longer process.

I'll be happy to answer any specific questions. Dr. Becker is here to talk about it as well.

But I would respectfully request that we be given permission to file this with the Secretary of State's office and initiate the public comment period and, again, get the stakeholders involved in a public hearing and also as many sit-arounds as we need to, and hammer out any differences. So, with that, I'll request that we file this with the Secretary of State's office.

Chairman White: Thank you, Mr. Obrokta. We have a request to file the rule with the Secretary of State's office. Do I have a motion to that effect?

Mr. Bailey: So moved.

Mr. Jarrett: Second.

Chairman White: All those in favor, please signify by saying "Aye." Opposed?

The motion was passed unanimously.

Chairman White: The rule will be filed with the Secretary of State's office.

Mr. Obrokta: The last rule here before you today – under Senate Bill 2013, we are required to come up with .... Let me back up. This rule deals with permanent total disability awards. Under Senate Bill 2013, we have to come up – by the end of this year – we being the Commission – have to present to you, the Board, by the end of this year the contents of a new permanent total disability application. We also have to come up with a plan – under the *Code*, we're required to go back and anyone who was awarded a permanent total disability since 1993, we are required to take another look at those recipients and see if they do still meet the definition of permanently and totally disabled.

The last document in your folder is our attempt to do this. It is our plan to again address a new application and a plan to evaluate all claimants who have received PTDs since 1993. As we put this together, we realized there may be some ancillary issues – we realized this over the last few days – there may be some ancillary issues that could be impacted by the requirements of Senate Bill 2013 – issues such as chargeability and things of this nature.

I would request that you accept this rule as our plan, but I would also request that we hold off until the January meeting before filing with the Secretary of State's office so we can have just one more month to think through these ancillary issues that may be impacted by this that may or may not have been contemplated by the legislation. Again, the plan certainly meets everything that's required by the legislation, but I think we need to do it right and make sure we address these by-products or these other ancillary issues. So, I would request that you accept this as our plan, but allow us to possibly present an amended plan at the January meeting.

Chairman White: Then you are not asking us to file the rule at this time?

Mr. Obrokta: Not at this point. I would wait to request that in January.

Chairman White: Then, there is no action requested of the Committee?

Mr. Obrokta: I am simply asking you – we are mandated by *Code* to give you this – just to give it to you – by the end of the year. We're doing that. We're clearly satisfying that duty. But, I'm not going to ask you to file it with the Secretary of State's office until the January meeting because there are some other issues that have come up in our deliberative process.

Chairman White: So, you're not asking us to take any action at this time?

Mr. Obrokta: No, sir. Just read it and comment, if you would.

Mr. Phalen: A point of clarification. Are you asking us to accept this plan or just accept that you have given it to us prior to the end of the year?

Mr. Obrokta: Exactly that – the latter. With that, Mr. Chairman, that's all I have.

Chairman White: Thank you very much.

10. Old Business

Chairman White: Do we have old business?

11. New Business

Chairman White: New business?