

**WEST VIRGINIA
SECRETARY OF STATE**

JOE MANCHIN, III

ADMINISTRATIVE LAW DIVISION

Form #2 ☐

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Workers' Compensation Appeal Board TITLE NUMBER: 102

RULE TYPE: Procedural CITE AUTHORITY: 21A-3-7(b)&(c);23-1-1;23-5-11&-12

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

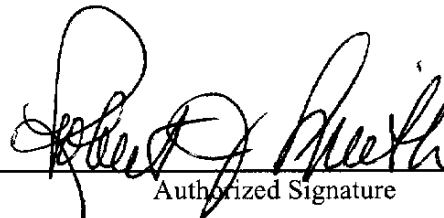
IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 1

TITLE OF RULE BEING PROPOSED: Rules of Practice and Procedure

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 March 15, 2002 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Charles Donnelly, Chair
Workers' Compensation Appeal Board
P.O. Box 2628
Charleston, WV 25329-2628

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


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Bob Wise
Governor
Robert J. Smith
Commissioner



West Virginia Bureau of Employment Programs

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

February 8, 2002

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

Re: Proposed Procedural Rule
Title 93, Series 1
"Rules of Practice and Procedure"

Dear Secretary Manchin:

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

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

Thank you very much for your assistance in this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert J. Smith", written over a horizontal line.

Robert J. Smith
Commissioner

RJS/RBS/csa

Enclosures

**Workers Compensation Division
Office of the Executive Director**

Post Office Box 3824, Charleston, West Virginia 25338-3824 • www.state.wv.us/bep
Offices located at 4700 MacCorkle Avenue SE, Charleston • Telephone 304.926.5048

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 93, Series 1: Rules of Practice and Procedure

Type of Rule: Legislative Exempt Interpretive X Procedural

Agency Bureau of Employment Programs

Address 112 California Avenue

Charleston, WV 25305

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

The primary costs associated with the administrative appeals process of the Workers' Compensation Appeal Board are related to personal services such as salary, benefits, and personnel administration. The proposed rule has no significant impact on these costs as it's primary purpose is to transcribe, in rule form, the appeal process already in place and being used by the Workers' Compensation Appeal Board. Other costs (i.e. current expense, repairs & alterations, equipment and other) would also be unaffected.

3. Objectives of this rule:

The purpose of the proposed rule is to formally clarify the appeal process that has been in existence since 1993 and to recognize and incorporate the effect of any changes in the Workers' Compensation law related to the appeal process, such as the creation of the settlement process, that have been enacted since 1993.

Rule Title: Title 93, Series 1: Rules of Practice and Procedure

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that the impact of the proposed rule will improve the efficiency of the Workers' Compensation Appeal Board appeal process by formally establishing guidelines under which the Board conducts appeals.

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

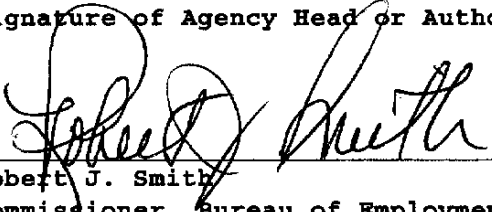
It is expected that the impact of the proposed rule will improve the efficiency of the appeal process for appellants and appellees by formally establishing guidelines under which appeals are conducted by the Workers' Compensation Appeal Board, including procedures to allow the pursuit of settlements as an alternative.

C. Economic Impact on Citizens/Public at Large.

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

Date: February 7, 2002

Signature of Agency Head or Authorized Representative



Robert J. Smith
Commissioner, Bureau of Employment Programs

**SUMMARY OF PROPOSED PROCEDURAL RULE
STATEMENT OF CIRCUMSTANCES
TITLE 93, SERIES 1
WORKERS' COMPENSATION APPEAL BOARD
RULES OF PRACTICE AND PROCEDURE**

Although the procedural rules governing the Workers' Compensation Appeal Board have not been filed previously with the Secretary of State's Office, an earlier procedural rule was approved by the West Virginia Supreme Court of Appeals and has been in effect for approximately ten years.

The proposed changes to the Workers' Compensation Appeal Board's "Rule of Practice and Procedure" involve the process by which employers and claimants appeal rulings of the Workers' Compensation Office of Judges.

During the ten years since the adoption of the earlier procedural rule, there have been significant statutory changes to the laws governing the West Virginia workers' compensation system. In addition, there have been significant changes in technology that have moved the workers' compensation system from a paper-intensive system to an electronic record-keeping system.

In accordance with these statutory and technological changes, the proposed rule reflects changes in statutory and court made law, clarifications regarding the time periods for filing briefs and appearances before the Appeal Board, and the status of *per curiam* decisions.

In accordance with additional statutory changes, the parties are encouraged to enter into stipulations and the parties are encouraged to engage in settlement discussions. Further, a process is created whereby the parties can agree to remand an issue to the Workers' Compensation Office of Judges.

TITLE 93
PROCEDURAL RULE
WORKERS' COMPENSATION APPEAL BOARD

SERIES 1
RULES OF PRACTICE AND PROCEDURE

§93-1-1. General.

1.1. Scope. This procedural rule is intended to set forth the procedures for administrative appeals that are conducted by the West Virginia Workers' Compensation Appeal Board pursuant to W. Va. Code §§23-5-10 and 23-5-12.

1.2. Authority. - W. Va. Code §§21A-2-6(1), -6(2) & -6(14); 21A-2-19; 21A-3-7(b) & -7(c); 23-1-1; 23-5-11; and 23-5-12. Pursuant to W. Va. Code §21A-3-7(c), rules adopted by the Compensation Programs Performance Council and the Commissioner are not subject to legislative approval as would otherwise be required under W. Va. Code §29A-3-1 et seq. Pursuant to the provisions of W. Va. Code §23-5-11, procedural rules of the Workers' Compensation Appeal Board are submitted first to the Compensation Programs Performance Council for its approval and, if so approved, to the Supreme Court of Appeals for approval, and if approved by the Court shall have the same force and effect as the approved rules of procedure of circuit courts.

1.3. Filing Date.--

1.4. Effective Date.--

1.5. Repeal and Replacement. --This rule repeals and replaces "The Rules of Practice and Procedure of the Workers' Compensation Appeal Board" as approved by the Supreme Court of Appeals on June 24, 1992.

§93-1-2. Purpose.

The purpose of the appeal process before the Workers' Compensation Appeal Board shall be to provide a review of any final action of the Workers' Compensation Office of Judges pursuant to the West Virginia Workers' Compensation Law, W. Va. Code §23-1-1 et seq.

93-1-3. Appeal Process; Generally.

3.1. Right to Appeal. Any employer, claimant, dependent or the Workers' Compensation Division aggrieved by a final decision by an Administrative Law Judge, shall have the right of appeal to the Appeal Board for a review of the final decision pursuant to W. Va. Code § 23-5-10 and § 23-5-12.

3.2. Representation by Attorney. Claimants, dependents, and employers who are natural persons may proceed with or without an attorney. An incorporated employer or an employer that is not a natural person may be represented only by an attorney duly licensed or authorized to practice law in the State of West Virginia.

3.3. Copies to All Parties. Copies of all documents or letters sent to the Appeal Board must be sent to all parties. If a party is represented by an attorney, the copy is sent to the attorney instead of the party. It must be noted on the document or letter that copies were sent to all parties.

§93-1-4. Initiation of the Appeal Process.

4.1. Time Period for Filing Notice of Appeal. A written notice of appeal shall be filed with the Office of Judges directed to the Appeal Board within thirty (30) days of receipt of notice of the Administrative Law Judge's final action complained of, or in any event, regardless of notice, within sixty (60) days after the date of the action complained of as set forth in W. Va. Code § 23-5-10 and § 23-5-12. A copy of this notice shall be served on all parties of record or the parties' counsel.

4.2. Action by Office of Judges. The Office of Judges shall notify the other parties immediately upon the receipt of a notice of appeal and shall transmit the appropriate documents to the Appeal Board.

4.3. Form of Notice. The Notice of Appeal to be filed with the Office of Judges directed to the Appeal Board shall be in form or effect as the "Notice of Appeal to the Workers' Compensation Appeal Board", Form AB-1, Revised September 2001, as contained in Appendix 93-1-A of this rule.

4.4. Number and Size of Notice and Attachments. One (1) copy of the Notice of Appeal shall be filed with the Office of Judges. The notice shall be written or typed on 8½" x 11" paper. A copy of the Administrative Law Judge's order that is the subject of the appeal shall be attached to the Notice of Appeal. In addition, in Occupational Pneumoconiosis claims, if the appeal involves an interlocutory order (e.g., non-medical question, presumption, compensability, etc.), a copy of the interlocutory order must also be attached to the Notice of Appeal.

§93-1-5. Briefs.

5.1. Time Period for Filing Briefs. The brief for the appellant shall be filed with the Appeal Board within sixty (60) days of the filing date of the letter of acknowledgment by the Office of Judges of the Notice of Appeal. The brief for the appellee shall be filed within thirty (30) days from the date on which the appellant's brief was filed. If the appellant is pro se and chooses not to file a brief, the appellee brief shall be filed within ninety (90) days from the date of the acknowledgment letter. If the appellant's brief is filed prior to the acknowledgment letter, the appellee's brief shall be filed within thirty (30) days from the date of the acknowledgment letter. If the due dates fall on a holiday, Saturday or Sunday, the brief will be considered timely if it is filed with the Appeal Board on the next business day following the date due.

For purposes of these rules, briefs are deemed filed on the date of mailing if they are sent by first class mail, or other class of mail which is at least as expeditious, postage prepaid and bearing a postmark showing that the brief was mailed on or before the last day of filing. If a courier or third-party commercial carrier is used, the brief is deemed timely filed if given to the carrier on or before the due date, to be delivered within three (3) calendar days.

5.2. Extension of Time Period for Filing Briefs.

The Board may grant, for good cause shown and upon written motion, an extension of time for filing a brief for a period of up to thirty (30) days. Absent extraordinary circumstances, the written motion for extension of time must be received by the Board at least seven (7) days prior to the original due date of the brief. A copy of the motion must be served upon the

opposing parties. For extensions of time, good cause shall be strictly construed as provided by W. Va. Code § 23-5-13.

5.3. Failure to File Brief.

If any appellant represented by counsel fails to file a brief within the time period prescribed by subsection 5.1 or any extension pursuant to subsection 5.2, the Board may dismiss the appeal for failure to prosecute. A party who is represented by counsel or a party that may only be represented by counsel may not present an oral argument or respond to an oral argument if the party did not file a brief.

Claimants without counsel and employers who are natural persons and who are proceeding without counsel are not required to file briefs. A party is considered to be represented by counsel for purposes of these rules if a notice of appearance has been filed before the Appeal Board, Office of Judges, and/or Workers' Compensation Division and no notice of withdrawal of counsel in the claim has been filed.

Filing of the briefs with the Board may be accomplished by mail in accordance with section 5.1 of this rule, or by personal delivery to the Board. Filing with the Division and/or the Office of Judges will not be considered filing with the Board.

5.4. Number of Briefs. An original of each brief shall be filed with the Board, and one copy shall be served upon each of the opposing parties. Faxed copies will not be accepted.

5.5. Length of Briefs. Briefs shall not exceed twenty (20) pages in length, inclusive of all sections except the certificate of service and attachments. Upon written motion, for good cause shown, the Board may permit a brief to exceed the page limitation.

5.6. Attachments. Implementation of the Electronic Document Management System and changes to the Procedural and Time Standards Rules of the Office of Judges relative to "the designated record" eliminates the need to attach medical and vocational reports or testimony relied upon.

5.7. Certificate of Service. A certificate of service reflecting service of the brief upon the opposing parties must be attached to each copy of the brief served and filed.

5.8. Form of Brief. Each brief served and filed shall be written or typed on 8½ " x 11" paper. Text shall be double spaced using no smaller than 12 point spaced type and shall produce a clear black image on white paper.

a. Appellant's brief shall include in the following order:

1. The issue(s) on appeal and requested relief;
2. A brief statement of facts including the nature and extent of the injury, causation, dates or onset of disability;
3. The rulings of the Division and Office of Judges thereon;
4. Conclusions of law including citation of authorities;
5. Argument; and
6. Conclusion.

b. Appellee's brief shall include in this order:

1. Any exceptions to the statement of fact in appellant's brief and any restatement of the facts according to the appellee's theory of the case;
2. Conclusions of law including citation of authorities;
3. Argument; and
4. Conclusion.

5.9. Reply Briefs. Unless requested by the Board, reply briefs are not necessary and will not be considered.

5.10. Failure to Comply. If an appellant or appellee represented by counsel fails to comply with the requirements of subsections 5.4, 5.5, 5.6, 5.7 or 5.8, the Board may, for good cause shown, permit an additional fifteen (15) days for compliance. Failure to comply with these rules without good cause shown may result in dismissal of the appeal.

5.11. Motions for Reinstatement After Dismissal. Any appellant, represented by counsel, whose appeal is dismissed pursuant to subsection 5.3 or 5.10, may submit a written motion for reinstatement of the appeal within thirty (30) days of the date of the dismissal order.

§93-1-6. Sessions of the Board and Argument Docket.

6.1. Times of Appeal Board Hearing Days. The Board shall meet at regular sessions designated Appeal Board Hearing Days commencing the first Tuesday, or the next regular business day, of each month of the year for a period of at least three (3) days for the purpose of conducting hearings on appeals and other related business.

6.2. Place of Meeting. Unless indicated otherwise, the regular sessions of the Board shall be held at the Appeal Board offices in the City of Charleston. The Board may meet at such other places throughout the State, as it may deem proper.

6.3. Argument Docket. After expiration of the time for filing briefs, the case shall be placed upon the next available docket. The Board shall notify each party of the date upon which the appeal will be considered. Each party who plans to present an oral argument must complete the bottom section of the hearing notice and send a copy to the Board and the other parties at least ten (10) days prior to the hearing. Any party who does not return the form indicating that the party plans to present oral argument will not be permitted to make an oral argument. However, if another party returns the form indicating that the party plans to present oral argument, other parties may appear to respond to the oral argument.

a. A party who is represented by counsel or a party that may only be represented by counsel may not present an oral argument or respond to an oral argument if the party did not file a brief.

b. The docket of cases to be heard shall be set for the first Tuesday of the session beginning at 9:00 a.m., unless advance notice that argument will begin on a different day or time is given, and continuing through the session or such portion thereof as may be necessary to complete the hearings. The Board may extend arguments and hearings at any time for cause. Each party participating in oral argument will be allotted a maximum of fifteen (15) minutes.

6.4. Continuances on Appeal Docket. No continuance will be granted except upon an affirmative showing of good cause. In accordance with W. Va. Code § 23-5-13, good cause will be strictly construed. The party requesting the continuance must confer with the other parties to determine their agreement or opposition to a continuance. The motion for a continuance must set forth the opposing parties' position.

a. Motions for continuance shall be filed at least fourteen (14) days prior to the commencement of the regular session of the Board at which time the appeal is docketed. If the motion is filed less than fourteen (14) days before the hearing and there is no agreement to a continuance, the motion must also include good cause for why the motion was filed late.

b. After one continuance has been granted, no other continuance will be granted except upon a showing of extraordinary cause.

c. Transfers of oral arguments will be granted upon a showing of good cause and agreement of the parties from one docket day to another in the same month.

§93-1-7. Motions.

7.1. Motion for Corrected Order. A motion for a corrected order may be filed with the Board by any party to correct clerical errors and inadvertences in the Appeal Board's written order if the correction(s) can be made within the thirty (30) day time period provided for an appeal of the order of the Board to the West Virginia Supreme Court of Appeals.

7.2. Miscellaneous Motions. A motion filed with the Board by any party shall state with particularity the grounds on which it is based and shall set forth the relief sought. The motion shall be served on all parties and any party may file a response in agreement or opposition thereto. The Board may, in its discretion, rule on any motion without the need for a hearing.

§93-1-8. Settlements and Stipulations.

8.1. Settlements. The parties are encouraged to pursue settlements in accordance with the provision of W. Va. Code §23-5-7. Upon joint motion of the parties, the Board may extend

the timeframes pending settlement negotiations or review by the Office of Judges of a settlement agreement.

8.2. Stipulations. The parties are requested to confer to determine whether there are any facts or stipulations upon which they can agree. The stipulations shall be provided to the Board at least ten (10) days prior to the hearing date, and counsel must set forth that he/she is authorized by the other parties to submit the stipulations. Some examples follow. If a party requests that the claim be remanded for consideration of a medical report, and the other parties agree that a remand is warranted, the parties shall notify the Board of their position. If a question has been raised regarding the timeliness of an appeal, and the parties agree that this is not an issue, the parties shall inform the Board. If the parties agree that a subsequent order has rendered the appeal moot or that a mandate from the West Virginia Supreme Court of Appeals necessitates a specific action, the parties shall notify the Board.

§93-1-9. Application of Rules.

These rules shall apply to all cases before the Board, including those cases pending at the time of approval of these rules by the Compensation Programs Performance Council and the Supreme Court of Appeals. The Board may, by order, modify the application of these rules to cases pending at the time of approval to prevent manifest injustice.

Appendix 93-1-A

AB-1

Revised 9/01

NOTICE OF APPEAL TO THE
WORKERS' COMPENSATION APPEAL BOARD

Claim No. _____

SSN No. _____

Case Style _____

vs.

Appellant: Claimant Employer Division (Please Circle)

The appellant is aggrieved by and appeals from the order
attached dated _____.

Date _____

Appellant

Address

Counsel

Address

A copy of the Administrative Law Judge order must be attached.

(NOTE: One (1) copy of this or a similar form of notice must be
filed with the Workers' Compensation Office of Judges within
thirty (30) days from RECEIPT OF NOTICE or, in any event,
regardless of notice, within sixty (60) days after the action
complained of.)