WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Workers' Compensation Office of Judges TITLE NUMBER: 93

CITE AUTHORITY: W.Va. Code §§ 23-4-8c, 23-4-15b, 23-5-1g, 23-5-1h

RULE TYPE: PROCEDURAL XX INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____
CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

_____

AMENDMENT TO AN EXISTING RULE: YES____, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

_____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: Series 1

TITLE OF RULE BEING ADOPTED: Workers' Compensation Office of Judges, Procedural Rules - Hearings

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS May 24, 1992

Robert J. Smith
Chief Administrative Law Judge

3.70 w/o extra

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

April 23, 1992

Secretary of State Ken Hechler
West Virginia State Capitol
Charleston, WV 25305

Attention: Administrative Law Division

Dear Secretary Hechler:

Enclosed please find for filing the Notice of Agency Adoption of procedural rules for the Workers' Compensation Office of Judges, Title 93, Series 1 - Hearings. A copy of the procedural rules, letters of approval, copies of the written comments received during the comment period, and copies of the responses issued are also enclosed with this filing.

Thank you for your attention to this matter.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Enclosures

TITLE 93

PROCEDURAL RULES

WORKERS' COMPENSATION OFFICE OF JUDGES

SERIES 1

HEARINGS

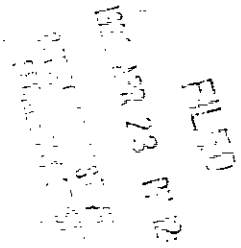
§ 93-1-1. General.

1.1. Scope - These procedural rules shall govern the initiation and conduct of hearings in contested Workers' Compensation claims before the Workers' Compensation Office of Judges.

1.2. Authority - West Virginia Code §§ 23-4-8c, 23-4-15b, 23-5-1g, 23-5-1h.

1.3. Filing Date - April 23, 1992.

1.4. Effective Date - May 24, 1992.



§ 93-1-2. Hearing Process.

2.1. Purpose.

The purpose of the hearing process shall be to receive and consider, as expeditiously and as fairly as possible, evidence and information relevant to the determination of the rights of the parties and to provide a review of the Commissioner's decisions and determinations with regard to the granting or denial of any award, or the entry of any Order, or the granting or denial of any modification or change with respect to former findings, Orders or awards made pursuant to the West Virginia Workers' Compensation Law, W.Va. Code, § 23-1-1 et seq., as amended.

2.2. Right to Hearing.

Any party to a claim shall have a right to a hearing concerning any issue of fact or law upon which the Commissioner has made a determination and entered a protestable ruling, and upon the timely filing of an objection.

2.3. Initiation of the Hearing Process.

(a) Objection. Any objection to a Commissioner's decision shall be filed with the Office of Judges in writing.

(b) Time Period for Filing an Objection. Any objection under this section shall be filed with the Office of Judges within the time allowed after receipt of the notice set forth in W.Va. Code § 23-5-1, except as provided in W.Va. Code § 23-5-1e. If an objection is not so filed the Commissioner's decision shall be final.

(c) Action by Chief Administrative Law Judge. The Chief Administrative Law Judge shall determine if an objection is timely filed, and shall notify all parties and their counsel of record of the determination. Any party may file a Motion to Reconsider on the issue of timeliness with the Chief Administrative Law Judge, supported by any necessary evidence. Hearings on such a Motion may be held as needed in the discretion of the Chief Administrative Law Judge. Any such

Motion to Reconsider itself must be timely filed. The decision of the Chief Administrative Law Judge on any Motion to Reconsider is appealable to the Appeal Board.

(d) Manner and Receipt of Notice. Any notice required by these rules shall be deemed adequate if served upon a party, or if a party is represented by counsel upon their counsel of record, by mailing such notice by regular United States mail, postage pre-paid, addressed to the party to be so notified at their last known address. Receipt of notice shall be presumed seven (7) calendar days after the date of the notice.

(e) Following receipt of a timely objection, the Commissioner shall forthwith forward to the Chief Administrative Law Judge all records, or copies of such records, in the Commissioner's office which relate to the matter objected to.

2.4. Date, Time and Place of Hearing.

(a) Following receipt of a timely objection, the Chief Administrative Law Judge shall determine the date, time and place a hearing will be held, in accordance with W.Va. Code § 23-5-1h. The parties may, by mutual agreement and pursuant to W.Va. Code § 23-5-1h, continue the first or initial hearing on a protest scheduled before an Administrative Law Judge. However, such a postponement or continuance by mutual agreement of the parties may only be utilized one time and only to the initial hearing. Additionally, the parties must notify the Office of Judges of their request for such a continuance no later than ten (10) days prior to the date of the scheduled hearing, and the parties must also agree that a new hearing date be scheduled no later than thirty (30) days from the date of the originally scheduled hearing date. Hearings may be postponed by an Administrative Law Judge for good cause shown.

(b) The parties and their counsel of record shall be notified of the date, time and place of a hearing at least ten (10) days in advance of the hearing date.

(c) Hearings may be conducted at the county seat of the county in which the injury occurred, or at any other place which may be agreed upon by the interested parties; however, if the ends of justice so dictate in the opinion of the Chief Administrative Law Judge, the hearing may be held at any other place, within or without the state, with or without the agreement of the parties. In determining a place for hearing, due regard will be given to the convenience of witnesses, but the ends of justice will control. An Administrative Law Judge may, in his or her discretion, conduct any hearing by telephone conference call.

2.5. Hearing Procedures; Generally.

(a) Rules of evidence. In the conduct of hearings, the Office of Judges shall not be bound by the usual common law or statutory rules of evidence, or by formal rules of procedure,

except as provided by these rules. An Administrative Law Judge shall receive the relevant testimony and other evidence of the parties and witnesses, subject to objection by any party.

(b) Procedure

(1) Presentation of evidence

(A) Order of presentation of evidence. The protesting party shall have the burden of going forth with evidence. In the event all parties have protested, the claimant shall go forth, except that for good cause or upon agreement of counsel, an Administrative Law Judge may permit a variance in the normal order of presentation. Ordinarily the protesting party shall present all its evidence first. The opposing party shall then go forth with its evidence. However, an Administrative Law Judge may direct that the development of evidence proceed concurrently or in such other manner as may be appropriate under the circumstances. Upon expiration of the time limits set by an Administrative Law Judge, an Order shall be issued giving the parties fifteen (15) days to show cause why the claim or protest(s) should not be submitted for decision. In the absence of a showing of good cause, the claim or protest(s) shall be submitted for decision. The claim or protest(s) may be submitted for decision prior to the expiration of the time limits set by an Administrative Law Judge if all parties agree that the presentation of evidence has been completed. If time limits have not yet been set by an Administrative Law Judge, either party may move to have the claim or protest(s) submitted for decision, and an Order shall be issued by the Office of Judges giving the parties fifteen (15) days to show cause why the claim or protest(s) should not be submitted for decision.

(B) Testimony. All testimony shall be taken under oath or affirmation.

(C) Cross-examination. All parties shall be given reasonable latitude in cross-examining witnesses. Cross-examination of expert witnesses by a party may take place prior to resting its case or after all parties have submitted the reports of their expert witnesses.

(D) Marking of exhibits. All exhibits offered into evidence shall be labeled and marked as either "Claimant's Exhibits", "Employer's Exhibits", "Commissioner's Exhibits" or "Joint Exhibits", and shall have a number assigned in sequence starting with "1". All exhibits offered into evidence, or copies thereof, shall be appended to the record of proceedings, where appropriate, and if any exhibit is not susceptible to attachment or copying, either a photograph, facsimile, or description of such exhibit may be substituted. In the case of reports by medical providers or other expert witnesses or the results of tests, the original copy of such report or test must be offered into evidence. Upon request, and in the discretion

of an Administrative Law Judge, a copy may be substituted for the original.

(2) Objections. An Administrative Law Judge shall rule upon all objections to the evidence or testimony presented at the hearing or offered by deposition. An Administrative Law Judge shall take into consideration the apparent reliability of evidence, and the basis of knowledge of a witness in ruling on objections. All objections shall be noted in the transcript of the hearing together with the rulings thereon. Exceptions to a ruling of an Administrative Law Judge shall be automatic. An Administrative Law Judge may require oral argument and citation of authority by the parties in support of or opposed to objections.

(3) Transcription of evidence. All testimony, argument and rulings of an Administrative Law Judge shall be taken down by stenographic or voice recording or by other means and shall ordinarily be transcribed, provided that the Chief Administrative Law Judge may, as provided in W.Va. Code § 23-5-1h, determine that transcription of testimony is not necessary.

(4) Public access. It is the policy of the Office of Judges that hearings will be open to the general public, subject to the following exceptions:

(A) Any person whose conduct is unruly or disruptive may be removed from a hearing.

(B) Only those persons for whom adequate seating is available shall be permitted to attend a hearing and there shall be no duty imposed to provide notice to the public of the date, time or place for hearings, or to provide more than the usual amount of seating provided at hearings. Seating shall be on a "first come, first served" basis.

(C) Upon written motion of a party in advance of hearing or upon motion made at a hearing, supported by a showing of good cause, an Administrative Law Judge may order a hearing closed to the public. When the interests of justice dictate, the public may be excluded from a hearing.

(D) An Administrative Law Judge may order that witnesses be sequestered.

(5) Representation and appearance of parties.

(A) By individuals. Any claimant or employer, who is a natural person, may appear at and represent him or herself in any hearing. The Administrative Law Judge shall explain to any party appearing without counsel the right to be represented by counsel, and shall inquire as to the desire of such persons to obtain counsel. In appropriate cases the hearing may be continued to permit a party to obtain counsel;

however, absent a showing of good cause, a hearing shall only be continued one time for a party to obtain counsel.

(B) By corporations. A corporate employer may be represented at a hearing only by counsel.

(C) By counsel. Any claimant or employer may be represented at a hearing by an attorney duly licensed or authorized to practice law in the State of West Virginia.

(D) Lay representative. A party may not be represented at a hearing by a spokesperson, lay representative or anyone else not admitted to practice law in the State of West Virginia.

(c) Presence of parties. All parties to a claim are entitled to be present and to present evidence at a hearing; however, the taking of evidence and the final determination of the issues in litigation shall not be prevented, and a party shall be considered to have waived the right to be present if:

(1) After being notified of the date, time and place of a hearing, does not appear, absent a showing of good cause; or

(2) After being advised by an Administrative Law Judge that disruptive conduct will cause removal from the hearing, persists in conduct which is such as to justify exclusion from the hearing.

(d) Chief Administrative Law Judge's action. The Chief Administrative Law Judge or his/her authorized representative shall review the transcript of the hearing, the testimony, the evidence and exhibits, and shall take such action with regard to the issues as shall be appropriate. The Chief Administrative Law Judge or his/her authorized representative may order further hearing in a claim when it appears that the record has not been sufficiently developed to permit a just resolution of any issue. Any further hearing so ordered by an Administrative Law Judge shall be limited to those matters referred for further hearing.

2.6. Discovery.

(a) Exchange of evidence prior to hearing. Any party desiring to submit the report of an expert or any other document shall do so by delivering the original of such report or document to the Chief Administrative Law Judge by mail with copies to opposing counsel or unrepresented parties as soon as can reasonably be accomplished following receipt of such report or document. For purposes of these rules, the term "original" shall also include certified copies or those documents produced under seal. Items not susceptible to reproduction or copying shall be brought to the attention of all other parties and their counsel and reasonable opportunity for inspection of such shall be permitted prior to hearing.

(b) Witnesses. All parties shall notify each other or, if a party is represented by counsel, the counsel of record, and the Chief Administrative Law Judge, whether pursuant to a Time Frame Order or otherwise, of the names and addresses of the witnesses whose testimony they intend to introduce, as soon as reasonably possible, insofar as such are known or can be reasonably ascertained or anticipated. This provision is not to be construed as limiting the right of a claimant to testify at any hearing.

(c) Failure to comply. If a party fails to comply with the disclosure requirements of these Rules, an Administrative Law Judge may take one or more of the following actions:

(1) Order the party to supply the material required by this section;

(2) Grant a continuance if good cause is shown;

(3) Prohibit a party from introducing evidence or testimony if an Administrative Law Judge finds that the failure to disclose was intentional or without good cause; or

(4) Consider the claim or protest(s) submitted for decision by the Administrative Law Judge upon the existing record.

(d) Interrogatories to parties

(1) Written interrogatories may be utilized in the discovery process and the permission of an Administrative Law Judge shall not be a prerequisite to the serving of interrogatories. Interrogatories and their answers shall be filed at the time of answer with the Chief Administrative Law Judge.

(2) Each party shall be limited to a maximum of thirty (30) written interrogatories, with each part or subpart of a numbered interrogatory being construed as a separate interrogatory.

(3) Each interrogatory shall consist of a single question, and shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The party upon whom the interrogatories have been served shall serve a copy of the answers within thirty (30) days after service of the interrogatories. An Administrative Law Judge may allow a shorter or longer time for service of such answer or objection for good cause shown. If the party issuing interrogatories does not comply with the provisions and limitations of this Rule, then the responding party need not respond to any part or subpart of the proffered interrogatories. Issues regarding interrogatories not resolved between the parties may be dealt with by Motion to the Administrative Law Judge. Failure of a party to comply with an Order issued by an Administrative Law

Judge regarding interrogatories may result in submission of the claim or protest(s) for decision, dismissal of the protest(s), or judicial enforcement of the Order.

COMMENT: The Office of Judges believes that the issue of interrogatories should be submitted to the Workers' Compensation Committee of the West Virginia State Bar for the purpose of obtaining further recommendations regarding form, procedures, and enforcement of interrogatories.

2.7. Production of Witnesses and Evidence.

(a) Right to witnesses. Each party is entitled to compel the attendance of any witness whose testimony may be relevant and material, except a party is not entitled to the presence of a witness who is deemed unavailable. A witness shall be deemed unavailable in, but not limited to, the following situations:

(1) The witness is not subject to compulsory process in West Virginia by reason of non-residence within, or prolonged absence from, the State of West Virginia, unless that witness is the claimant or the employer.

(2) The witness refuses to testify despite an Order to do so.

(3) The witness claims by sworn affidavit a lack of memory of the subject matter.

(4) The witness is unable to be present or to testify at the hearing because of then existing physical or mental illness or infirmity.

(5) The witness is absent from the hearing and the requesting party is not at fault, could not have prevented the unavailability, and demonstrates that all reasonable measures to secure the presence of the witness have been taken, including the timely request for and service of a subpoena as set forth in Section 2.9(b)(2) of these Rules.

(b) Procedures for production of witnesses and evidence

(1) Subpoena. The presence of a witness or production of evidence may be obtained by the issuance of a subpoena or subpoena duces tecum by an Administrative Law Judge. A request for a subpoena must be made in writing with as much advance notice prior to hearing as possible. A subpoena for a physician shall also include a subpoena duces tecum for the treatment records and notes pertaining to the claimant. Service of any subpoena shall be the responsibility of the party who has requested the subpoena. Upon a Motion to Compel filed by a party with the Chief Administrative Law Judge due to a witness' failure to comply with a subpoena, the Chief Administrative Law Judge may issue an Order to compel compliance with the subpoena and may seek judicial enforcement of such subpoena.

(2) Service. It shall be the responsibility of the party requesting the issuance of a subpoena to serve the subpoena on a witness by personal service by certified mail, or by regular mail with a certificate of service executed by counsel.

(3) Witness fees

(A) General. The party requesting issuance of a subpoena for a witness shall pay the attendance fees and mileage as provided for witnesses in civil cases in circuit court. Such fees shall be paid in advance upon a timely request by the witness. When the subpoena was issued on behalf of an Administrative Law Judge, or the Commissioner, such advance payment shall not be required.

(B) Expert Witness Fees. The party who introduces the report of an expert witness shall be responsible for payment of the appearance fee of such witness, except that the Commissioner shall be responsible for payment of a witness fee when the claim has not been rejected and the witness is:

(i) An authorized treating physician, or

(ii) A physician or other expert engaged by the Commissioner, or

(iii) An authorized consulting physician acting upon referral from an authorized treating physician.

(c) Exclusion of evidence. Upon the failure or refusal of a properly subpoenaed witness to appear, produce requested evidence or testify in response to a subpoena, an Administrative Law Judge may exclude any statement, record or report rendered by that witness from the record of litigation.

(d) Alternatives to testimony and other evidence

(1) An Administrative Law Judge may receive and consider, subject to objection and the right of cross-examination where appropriate:

(A) Sworn statements or affidavits;

(B) Prior testimony under oath;

(C) Stipulations of fact or expected testimony;

(D) Depositions and interrogatories

(2) An Administrative Law Judge may receive and consider in lieu of evidence which is unavailable:

(A) Testimony describing the evidence;

(B) An authenticated copy, photograph or reproduction of the unavailable evidence;

(C) A stipulation of fact or expected testimony concerning such unavailable evidence.

(e) Examinations and evaluations

(1) Right to Examination and Evaluation. All parties are entitled to a reasonable number of relevant medical examinations or vocational evaluations. A reasonable number of examinations or evaluations shall be no more than two (2) per specialty or discipline involved per claim; provided, however, that upon written request a party may be granted the right to further examinations or evaluations upon a showing of necessity. Such request must be served upon all other parties or their counsel and filed with the Chief Administrative Law Judge. The request shall set forth the reasons why such additional examination or evaluation is necessary. All other parties shall have fifteen (15) days after the date of service of said request to file a written response. No hearing shall be held upon such request, and an Administrative Law Judge's Order thereon shall be interlocutory. For purposes of this section, the term "claim" shall also mean two (2) or more claims which have been consolidated by an Order of an Administrative Law Judge. It is not the purpose of this rule to permit parties to submit more than two (2) examinations or evaluations per specialty or discipline involved when more than one claim has been consolidated by Order of an Administrative Law Judge.

(2) Prompt exchange of reports. Reports of examination and evaluation which a party intends to introduce into evidence shall be promptly exchanged among the parties or their counsel, and submitted to the Chief Administrative Law Judge without waiting for a hearing. The failure to do so shall subject the party to the action set forth in Section 2.7 (c) of these Rules.

(3) Admission of reports. Upon receipt by an Administrative Law Judge, all reports will become a part of the record, subject to objection and the right of cross-examination.

(4) Requests for cross-examination. A request for cross-examination shall be made promptly in writing to an Administrative Law Judge.

(5) Production of expert witness for cross-examination. When cross-examination of a reporting expert is properly requested, it shall be the responsibility of the party offering the report to procure the appearance of the witness for cross-examination. The failure of the witness to appear shall be grounds for excluding the report offered.

(6) Submission without hearing. Following the submission of reports, in the absence of a need for hearing, the parties shall promptly submit for decision the claim or

protest(s) by mail and provide notice to all opposing parties or their counsel.

2.8. Stipulations.

(a) General. A written stipulation, or an oral stipulation on the record, may be accepted as a substitute for evidence. A stipulation may relate to a question of fact, the contents of a document, or the expected testimony of a witness.

(b) Requirements. Before accepting a stipulation the Chief Administrative Law Judge must be satisfied that:

(1) The stipulation is relevant to an issue in litigation;

(2) The stipulation is written or stated in clear and unambiguous terms;

(3) A factual basis exists for the stipulation, which shall be thoroughly set forth upon the record or in the preamble section of a written stipulation; and

(4) All parties to the stipulation shall indicate in writing, or orally on the record, that they understand and agree to the stipulation.

(c) Effect of stipulation. A stipulation of fact that has been accepted is binding upon the parties and may not be contradicted by the parties. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or the contents of a document, unless the stipulation is one of fact, nor does a stipulation add anything to the evidentiary nature of the testimony or document.

2.9. Scheduling of Hearings.

(a) First Hearing. The first hearing shall be scheduled in accordance with W.Va. Code § 23-5-1h and Sections 2.4 and 2.5 of these Rules. Whenever possible the introduction of evidence should be completed at the first hearing and the claim should be submitted for decision. It is recognized that in most claims such a process is not possible. Accordingly, the ordinary use of the first hearing shall be for the purpose of addressing evidentiary matters, simplification of issues, discussion of settlement, where appropriate, the setting of time frames within which the claim may be timely and fairly processed and for such other matters as may aid in the disposition of the case. Any Time Frame Order issued shall be interlocutory in nature and not subject to appeal, except that any party aggrieved by such Time Frame Order may, within fifteen (15) days from the date of such Order, file with the Chief Administrative Law Judge a request

for reconsideration of any matter contained in such Order. Such requests shall set forth in detail the reasons why the party cannot meet the requirements set forth in the Order. No hearing shall be held on such requests and such requests may be granted only upon a showing of necessity. Where the only issue to be addressed at the first hearing is the entry of a Time Frame Order, the parties by agreement may file a proposed Time Frame Order with the Office of Judges no later than twenty (20) days prior to the date scheduled for such hearing. Such Time Frame Orders are subject to approval by an Administrative Law Judge.

(b) Time Frame Order. The Time Frame Order will ordinarily set forth the issues in litigation, a date by which each party must submit reports from expert witnesses, the date on which a hearing will be conducted to examine or cross-examine the claimant and other lay witnesses, a time frame within which the claimant's treating physician or the Commissioner's examining physician may be cross-examined, a date by which all motions must be made and such other matters as may be appropriate depending on the case. Any requests for extension of time, in the absence of a showing of good cause, must be made not less than thirty (30) days prior to the expiration of the time period which the moving party seeks to expand. Such requests shall set forth the reasons the expansion of time is necessary and shall include a statement of the efforts the party has made to comply with the Time Frame Order. The failure to offer evidence in compliance with any Time Frame Order or extension thereof may result in the claim being submitted insofar as that party is concerned based on the evidence in the record at that point in time.

(c) Further Hearings. Additional hearings shall be scheduled in regard to the claim as provided for in the Time Frame Order and as may be scheduled by an Administrative Law Judge.

2.10. Continuances.

Continuances shall be granted only at the request of a party for good cause shown unless otherwise provided by these rules. After a date for a hearing has been set, any party who desires a continuance shall file a written motion with the Office of Judges stating in detail the reasons why such a continuance is necessary. If the motion is based upon a conflict in schedule, such motion shall set forth in detail the specific nature of the conflict. Such written motion shall be filed at least ten (10) days prior to the date of the scheduled hearing and the party requesting the continuance shall serve said motion upon all other parties at that time. Failure to notify an opposing party of a request for a continuance prior to a scheduled hearing may result in the admission of evidence at that hearing.

In cases of hardship or for other good cause shown, a party may move for a continuance by oral motion at the time of the scheduled hearing. Such oral motion will be considered only

when the opposing party has been notified of such motion and the Administrative Law Judge is satisfied that there is not adequate time for a written motion to be filed and that the lateness of the motion was not caused by undue delay or lack of diligence on the party of the moving party.

The parties may, by mutual agreement and pursuant to W.Va. Code § 23-5-1h, continue the first or initial hearing on a protest scheduled before an Administrative Law Judge. However, such a postponement or continuance by mutual agreement of the parties may only be utilized one time and applies only to the initial hearing. Additionally, the parties must notify the Office of Judges of such a continuance no later than ten (10) days prior to the date of the scheduled hearing, and the parties must also agree that a new hearing date be scheduled no later than thirty (30) days from the date of the originally scheduled hearing date.

An Administrative Law Judge may order a continuance at any time upon his or her own motion.

2.11. Motions; Objections; and Communications.

(a) General. A copy of all correspondence, motions, objections or other writings to an Administrative Law Judge regarding any issue in litigation shall be provided to all opposing parties or their counsel and such document must indicate that such has been done.

(b) In Advance of Hearing. All motions shall be made in writing in advance of the hearing, insofar as grounds for such are then known, or can be reasonably ascertained or anticipated, or in conformance with the provisions of time frame orders. The motion shall clearly set forth all grounds, facts, and authorities in support of the motion. Any response by an opposing party shall be filed in writing with an Administrative Law Judge within fifteen (15) days of receipt of the motion, and shall set forth all matters in opposition to the motion.

(c) During Hearing. A motion may be made on the record, orally or in writing. The motion shall clearly set forth all grounds, facts and authorities in support of the motion. The opposing party, if present, shall have the right to set forth matters in opposition to such motion on the record. The absence of a party shall not be grounds for delay in ruling upon any motion, nor grounds for reconsideration of any ruling made, absent a written motion for reconsideration and an affirmative showing of good cause for such nonappearance by the moving party.

(d) Action Upon Motions. An Administrative Law Judge may, where appropriate, defer ruling upon a motion. All rulings upon motions by an Administrative Law Judge shall be interlocutory in nature.

2.12. Depositions.

(a) General. In order to promptly and efficiently process cases the parties are encouraged, particularly for the purpose of cross-examining expert witnesses, to use depositions to the maximum extent possible. Accordingly, depositions may be obtained and used for evidentiary purposes without prior consent of an Administrative Law Judge. Depositions shall be conducted in accordance with Section 2.7 of these Rules, except that an Administrative Law Judge need not be present and any person otherwise qualified and authorized to administer oaths or affirmations may do so to the deponents. Objections to questions asked in a deposition will be noted upon the record along with the grounds for the objection, and the question shall be answered with the question and answer transcribed as a part of the deposition on avowal. Motions relative to any objections made shall be submitted in writing to the Office of Judges within fifteen (15) days after either party tenders the deposition to be made part of the record. An Administrative Law Judge shall rule on motions as to the admissibility or inadmissibility of any questions and answers objected to in a timely manner.

(b) Procedure. The taking of a deposition shall be by agreement of the parties or upon reasonable notice to the deponent and all parties or, if the party is represented by counsel, their counsel of record. Notice shall be in writing and shall contain the date, time and place of the deposition as well as the name and address of each person to be deposed. The cost of court reporter services shall be borne by the Workers' Compensation Fund. The cost of witness fees and expenses shall be borne by the respective proponents of the witness, as provided in Section 2.7(b)(3) of these Rules. Parties are encouraged to utilize depositions to obtain testimony whenever possible.

(c) Telephone Depositions. Depositions may be taken by telephone conference call as if taken in person. The procedure shall be the same as set forth in Subsection (b) above. Costs incurred in the taking of telephone depositions shall be borne as provided in Subsection (b) above.

(d) Use. Use of any deposition shall be subject to objection as in Circuit Court. An Administrative Law Judge may deny the admission of any deposition into evidence if it appears that the deposition was taken at such place and under such circumstances as imposed an undue burden or hardship upon the opposite party.

2.13. Non-Appearance of Party.

(a) General. Absent proper service of a subpoena, no party is required to appear at a hearing, except that it shall be the responsibility of an objecting party to prosecute its objection. The non-appearance of a party shall not prevent an appearing party from presenting evidence at a hearing.

(b) Action when a party does not appear.

(1) Objecting party. If an objecting party does not appear at a hearing to prosecute its objection, then upon the motion of an opposing party or upon the direction of an Administrative Law Judge, the objection may be dismissed for failure to prosecute, or the claim may be submitted for decision upon the existing record; provided, before such action shall become final, the non-appearing party shall be given written notice that it has fifteen (15) days within which to show good cause to an Administrative Law Judge in writing why such action shall not become final.

(2) Non-Objecting Party.

(A) A subpoena requiring the presence of a non-objecting party at a hearing for cross-examination shall provide that such party's failure to appear, absent showing of good cause, will result in one or more of the following actions: (1) Suspension or termination of the payment of benefits, (2) Submission of the claim for final determination upon the existing record, (3) A determination that an overpayment of benefits has occurred which may be recovered as permitted by law, or (4) When personal service of a subpoena has been obtained, institution of attachment proceedings as for contempt in Circuit Court.

(B) Upon failure of a non-objecting subpoenaed party to appear, an Administrative Law Judge shall give written notice to such party that it has fifteen (15) days within which to show good cause to the Administrative Law Judge in writing why one or more of the aforementioned sanctions should not be imposed.

2.14. Dismissal of Party.

When an Administrative Law Judge determines that a party is not a proper party to the claim, such party shall be dismissed.

2.15. Severability.

If any provision of these rules or the application thereof to any person or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

M E M O R A N D U M

TO: Thomas H. Zerbe, Administrative Law Judge

FROM: Robert J. Smith, Chief Administrative Law Judge

DATE: March 24, 1992

RE: Response to Comments on Proposed Rules

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges.

In response to your specific comment regarding Rule 2.5(b)(3), I feel that a specific rule is not necessary in order to allow the parties to waive their right to have a hearing recorded. I believe each Administrative Law Judge has the discretion to allow the parties to waive such recording.

Regarding your comment on Rule 2.6(a), while I agree that you raise an interesting point, I feel this is not an issue which needs to be addressed by the proposed Rules. The issue you address is one of substantive law, and I am not prepared to decree what does and does not constitute part of the official record via a procedural rule.

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Sarah E. Smith, Esq.
Bowles, Rice, McDavid,
Graff and Love
P. O. Box 1386
Charleston, WV 25325-1386

Re: Response to Comments on
Proposed Procedural Rules

Dear Ms. Smith:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. Rule 2.3(d) has been modified pursuant to your comment and other comments received by the Office of Judges. The revised rule now reads that notice will be deemed adequate if served upon the counsel of record for a party represented by such counsel.

2. Your comment regarding Rule 2.4(b) is correct in that the statute provides that a minimum of ten days notice be given in advance of a scheduled hearing. However, the Office of Judges believes that we do and will continue in the future to provide considerably more than ten days advance notice of any scheduled hearing, and that no change in the proposed rules need be made to address this issue.

3. Rule 2.5(a) has been slightly modified to read that the Office of Judges shall not be bound by the usual common law or statutory rules of evidence or procedure, except as provided by the rules. The Office of Judges believes that merely because the rules state that Administrative Law Judges are not bound by such formal rules, this does not preclude a Judge from using those rules as a guide in conducting hearings. We feel it is not appropriate to list those things in the procedural rules which may be used merely as guides in the hearing process.

Re: Response to Comments on
Proposed Procedural Rules

4. Rule 2.5(b)(1)(A) has been substantially modified, pursuant to your comments, to reflect the use of Show Cause Orders prior to the submission of a claim for decision.

5. We believe you may have made an error in commenting on Rule 2.6(b)(1)(D), since no such section exists. However, it appears from context that you may have been referring to either Rule 2.6(a) and/or Rule 2.5(b)(1)(D). If so, the Office of Judges is currently saving those original expert reports received into evidence. It has not yet been determined the length of time such reports will be preserved in their original form.

Regarding the use of original medical reports as provided for in Rule 2.5(b)(1)(D), this Rule was necessitated by the filing of fraudulent medical reports in the past. Such fraudulent reports were created through the use of copies rather than the original of such reports. The Office of Judges does not believe this Rule presents an undue inconvenience on the parties to require the presentation and inspection of all original reports at the appropriate hearing. As provided for in the last sentence of Rule 2.5(b)(1)(D), once the original report has been inspected and admitted into evidence, the Administrative Law Judge then has discretion to substitute a copy of that report for the original and introduce that into evidence for the record.

6. Regarding the use of tape recorded transcripts as opposed to court reporters, the Office of Judges believes that the present system of tape recording hearings is adequate and will and has to date resulted in accurate transcripts being produced at a substantial cost savings to the State.

7. As to your comments on Rule 2.6(d), be advised that the rule has been modified to require that only copies of answered interrogatories need be served on the Office of Judges. As to the practice of interrogatories being served and/or answered prior to the filing of a protest, the Office of Judges believes that it is without authority to promulgate rules and to any such practice prior to the filing of a protest.

8. Rule 2.7(b)(1) has been modified as the result of numerous comments received by the Office of Judges. The revised rule recognizes that service of a subpoena is the responsibility of the party requesting such, and that enforcement of a subpoena is the responsibility of the office of Judges.

Regarding your comments on Rule 2.7(b)(1), concerning the enforcement of subpoenas, we agree with your comment that the enforcement of subpoenas should be the responsibility of the Office of Judges, rather than the responsibility of the party requesting the subpoena. Accordingly, Rule 2.7(b)(1) has been modified to provide that upon a proper Motion to Compel due to the failure of a party or witness to comply with a properly issued subpoena, the Chief Administrative Law Judge may seek judicial enforcement of such subpoena.

The Office of Judges believes that provisions to exclude evidence not made available for cross-examination are provided in Rule 2.7(e)(5).

9. The Office of Judges believes that Rule 2.7(e)(4) is adequate as drafted. The rules, as proposed, do not state that a party does not have an automatic right to cross-examination. However, a request by a party to cross-examine in order to reserve its right of cross-examination is a procedural event to inform the Office of Judges that a party intends to exercise that right.

10. Rule 2.4(b) requires that a minimum of ten days notice be provided to the parties of a scheduled hearing. However, it is expected that considerably more than ten days notice will be provided to the parties under the new Office of Judges' system. This provides the parties with sufficient time in order to meet the twenty day deadline provided for in Rule 2.9(b).

11. The Office of Judges declines to delete the thirty (30) day period required to request an extension of a Time Frame Order as provided in Rule 2.9(b). The rule has been modified, however, to state that requests for extension of time not made within the thirty (30) day period will be considered upon a showing of good cause, rather than the previously proposed showing of

extraordinary or unusual circumstances. Under Rule 2.9(b) as revised, the Office of Judges will waive the thirty (30) day required notice if a showing of good cause is made. We feel that thirty (30) days is an appropriate and necessary time period in order to receive and process such a request, rule on the motion to extend the time frame deadline, and then inform all the parties as to whether or not the motion has been granted or denied.

12. As to Rule 2.12(b), the Office of Judges believes that "reasonable" notice to take a deposition is an adequate standard which complies with the Rules of Civil Procedure being used as a guideline. With respect to the Notice of Deposition, we have stated earlier in this response that the rules have been changed to provide that notice need only be served upon counsel of record if a party is represented by counsel, rather than having one party serve notice directly upon another party.

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Hazel A. Straub, Esq.
801 Charleston National Plaza
Charleston, WV 25301

Re: Response to Comments on
Proposed Procedural Rules

Dear Ms. Straub:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. When both parties protest the same Commissioner's Order, it is clear that the claimant has the burden of proof in proceeding first with the presentation of evidence. No liberality rule can replace the premise that the claimant has the burden to go forward. Jordan v. State Workmens' Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972). The proposed Rules provide the Administrative Law Judge with discretion to change the order of the presentation of evidence. The proposed Rules do not provide that the claimant must always go first in every instance. The Administrative Law Judge has discretion under the proposed Rules to change the order of the presentation of evidence or to order that the evidence be developed concurrently.

2. The use of interrogatories is a discovery tool which has long been available to counsel in both civil and criminal practices. The Office of Judges believes that interrogatories, limited to thirty questions including all parts and sub-parts, does not constitute an unreasonable burden upon the parties and can, in fact, aid in the discovery process.

Re: Response to Comments on
Proposed Procedural Rules

The wording of proposed Rule 2.6(d)(2) has been changed in response to numerous comments received from counsel, and will now read that each party shall be limited to a maximum of thirty (30) written interrogatories, "including all parts or sub-parts of any numbered interrogatory." A further change has been made to Rule 2.6(d)(1) to require that only copies of answered interrogatories shall be filed with the Chief Administrative Law Judge, rather than copies of unanswered interrogatories being served upon the Chief Administrative Law Judge at the time of service. The Office of Judges will strictly construe these rules and definitions.

Parties are encouraged to work out among themselves any problems or difficulties which arise regarding the use of interrogatories. Any issues not resolved by the parties can be dealt with by making a Motion to Compel to the Chief Administrative Law Judge. The failure to respond to an Order Compelling the Answer of Interrogatories may result in the submission of the claim for decision, or the dismissal of the protest, or judicial enforcement of the Order.

Finally, the Office of Judges believes that the issue of interrogatories, in general, should be submitted to the Workers' Compensation Committee of the West Virginia State Bar in order to obtain recommendations regarding the use of interrogatories, e.g. form, procedures, and enforcement.

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the Proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Robert A. Taylor, Esq.
Masters and Taylor
416 Peoples Building
Charleston, WV 25301

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Taylor:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following response:

With regard to your comment concerning requests for production of documents, the Office of Judges believes that there are adequate provisions elsewhere in these proposed Procedural Rules, such as the procedures for production of evidence and procedures for the production of witnesses and evidence, which deal sufficiently with the production of any documents necessary in the litigation process.

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the Proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Larry L. Rowe, Esq.
1031 Quarrier Street, Suite 409
Charleston, WV 25301

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Rowe:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. The proposed Rules for the Office of Judges are procedural in nature, not substantive, and the Rule of Liberality to which you refer is a substantive Rule. Furthermore, it is the policy of the Workers' Compensation statute to prohibit the denial of just claims of injured or deceased workers on technicalities.

2. Regarding our seven day Presumption of Notice, the West Virginia Rules of Civil Procedure allow for a similar Presumption of Notice after three (3) days from the date of mailing. In light of the civil rule, the Office of Judges considers the proposed seven day Presumption of Notice to be reasonable.

3. Rule 2.5(b)(1)(B) applies only to evidence taken at a hearing before an Administrative Law Judge. This rule does not apply to deposition testimony. However, in light of your comment, Rule 2.12(a) has been modified to address oaths administered in a deposition setting.

4. Your suggestion regarding Rule 2.6(d) is one which can be executed by an agreement with opposing counsel, and the Office of Judges does not believe that a rule embodying your suggestion is warranted. With regard to your comment on Requests for Production and Admissions, the Office of Judges believes there are adequate provisions in the proposed Rules, such as the procedures for production of evidence and the production of witnesses and

evidence, to deal sufficiently with your concerns regarding the production of documents without placing any such procedure in the Rules themselves.

5. With regard to Rule 2.9(a), this Rule adequately describes the initial hearing process and protects all parties' procedural and substantive due process rights. The Office of Judges believes that there is no way possible to provide for "agreed Time Frame Orders" if one party is unrepresented. Additionally, the Office of Judges has never circulated to counsel any official list of specific time periods to be utilized by Administrative Law Judges in issuing Time Frame Orders and further declines to act as though it ever did. It is inappropriate to include specific time frame periods in the Rules since each and every case brought before the Office of Judges is unique in its issues and evidence.

6. Rule 2.10 deals with continuances of scheduled hearings. Your comment citing 2.10 seems to deal with the issue of time frame deadlines, which is not contained within that rule. Time Frame Orders and deadlines are dealt with in Rule 2.9(b). Requests to continue a hearing, as provided for in Rule 2.10, need only be requested ten (10) days prior to the scheduled hearing. With regard to Time Frame Orders by agreement of the parties, the Office of Judges believes that a minimum of twenty (20) days is necessary to process such Orders because, unlike a simple hearing continuance request, a Time Frame Order by agreement must be received, microfiched, reviewed and approved by a specific Administrative Law Judge, all prior to the scheduled hearing date. If the proposed Time Frame Order is rejected by the Administrative Law Judge, there must be sufficient time remaining for the Office of Judges to notify the parties and for the parties to prepare to keep the scheduled hearing date.

The Workers' Compensation Commissioner, as viewed by the Office of Judges, is merely another party involved in the litigation process, and the Commissioner will be held to the same deadlines and requirements as other parties and counsel. Automatic delays of time frame deadlines are inherently counter to the entire concept of a Time Frame Order, and any such automatic delays would render the Time Frame Order meaningless.

Re: Response to Comments on
Proposed Procedural Rules

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Jeffrey V. Mehalic, Esq.
Hostler and Segal
810 Kanawha Boulevard, East
Charleston, WV 25301

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Mehalic:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. When both parties protest the same Commissioner's Order, it is clear that the claimant has the burden of proof in proceeding first with the presentation of evidence. No liberality rule can replace the premise that the claimant has the burden to go forward. Jordan v. State Workmens' Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972). The proposed Rules provide the Administrative Law Judge with discretion to change the order of the presentation of evidence. The proposed Rules do not provide that the claimant must always go first in every instance. The Administrative Law Judge has discretion under the proposed Rules to change the order of the presentation of evidence or to order that the evidence be developed concurrently.

2. The civil rule to which you refer to in your comment pertains to the taking of a deposition in order to discover the views held by the deponent. That Rule does not pertain to the cross-examination of a witness regarding a report already received into evidence. Rule 2.7(b)(3)(B) relates to witness fees which are the responsibility of the party who offers a report into evidence. In the workers' compensation context, unlike that of a civil practice, the physician has already issued a report which a party wishes to be considered as evidence. The opposing party has a substantive and a procedural due process right to cross-examine that physician regarding his or her report, and it would be unfair to require that party to pay in order to execute its right of cross-examination.

Re: Response to Comments on
Proposed Procedural Rules

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the Proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Charles M. Moredock, Esq.
Hayes and Moredock
405 Capitol Street, Suite 703
Charleston, WV 25301

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Moredock:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following response:

When both parties protest the same Commissioner's Order, it is clear that the claimant has the burden of proof in proceeding first with the presentation of evidence. No liberality rule can replace the premise that the claimant has the burden to go forward. Jordan v. State Workmens' Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972). The proposed Rules provide the Administrative Law Judge with discretion to change the order of the presentation of evidence. The proposed Rules do not provide that the claimant must always go first in every instance. The Administrative Law Judge has discretion under the proposed Rules to change the order of the presentation of evidence or to order that the evidence be developed concurrently.

I hope that this response has addressed the concerns contained in your comments. We hope to have the final version of the Proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Timothy G. Leach, Esq.
Greene, Ketchum, Bailey and Tweel
P. O. Box 2389
Huntington, WV 25724

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Leach:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. First, I believe that your comment actually refers to both parties independently protesting the same Commissioner's Order, rather than a "joint protest" of such an Order. It is a very rare circumstance when both parties join together and jointly protest a Commissioner's Order.

When both parties protest the same Commissioner's Order, it is clear that the claimant has the burden of proof in proceeding first with the presentation of evidence. No liberality rule can replace the premise that the claimant has the burden to go forward. Jordan v. State Workmens' Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972). The proposed Rules provide the Administrative Law Judge with discretion to change the order of the presentation of evidence. The proposed Rules do not provide that the claimant must always go first in every instance. The Administrative Law Judge has discretion under the proposed Rules to change the order of the presentation of evidence or to order that the evidence be developed concurrently.

2. The proposed Rules for the Office of Judges contemplate that every protest received will be the subject of a Time Frame Order. At the present time, it is anticipated that subsequent protests (once an initial protest has been the subject of a hearing and has been time framed) will be examined on a case-by-case basis by paralegals and/or Administrative Law Judges

Re: Response to Comments on
Proposed Procedural Rules

to determine if such subsequent protests can be added to the existing Time Frame Order or if such subsequent protests require a separate Time Frame Order. Any such subsequent Time Frame Orders can be prepared and executed either by way of a hearing or by a Time Frame Order which is agreed to by the parties and approved by an Administrative Law Judge prior to a scheduled hearing, pursuant to Rule 2.9(b).

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the Proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Thomas J. Gillooly, General Counsel
West Virginia Department of Commerce,
Labor and Environmental Resources
State Capitol
Building 1, Room R151
Charleston, WV 25305

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Gillooly:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. Regarding your comment on Rule 2.3(d), we do not feel that the use of the term "party" creates an ambiguity. The Rule clearly states that a notice is to be served upon both the party and their counsel of record. However, in regard to the comments received by the Office of Judges, Rule 2.3(d) has been modified to require that if a party is represented by counsel, then any notice or document issued by one party shall need only be served upon the counsel of record for the opposing party. The issuing party need not serve notice directly upon the opposing party if the opposing party is represented by counsel. As a matter of policy, the Office of Judges will continue to issue copies of all of its notices and Orders to all parties directly as well as to all counsel of record.

2. Rule 2.4(b) has also been modified so that the Rule now reflects the statutory language regarding Notice of Hearing.

3. Regarding Rule 2.5(a), this Rule has also been modified in response to comments received. The first sentence of the Rule now reads "In the conduct of hearings, the Office of Judges shall not be bound by the usual common law or statutory rules of evidence, or by formal rules of procedure, except as provided by these Rules." Again, this modification has been made to reflect the appropriate statutory language.

Re: Response to Comments on
Proposed Procedural Rules

4. Your comment on Rule 2.5(b)(4) apparently refers to sub-section (C), regarding good cause to close a hearing to the public. The Office of Judges believes that the good cause standard is one which must be necessarily determined on a case-by-case basis. We feel it is appropriate to allow Administrative Law Judges the discretion to close a hearing to the public in those cases where good cause has been shown.

Additionally, the last sentence in your comment on Rule 2.5(b)(4) appears to refer to the prohibition against lay representation in hearings as set forth in Rule 2.5(b)(5)(D). The Office of Judges believes that this prohibition against lay representation complies with the definition of the practice of law as promulgated by the Rules of the West Virginia Supreme Court on March 28, 1947, as amended on July 1, 1961, and that this Rule further conforms with the law set forth in West Virginia State Bar vs. Earley, 144 W.Va. 504, 109 S.E.2d 420 (1959). The Earley case specifically held that lay representation in Workers' Compensation hearings constitutes the unauthorized practice of law in West Virginia.

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Gregory W. Evers, Esq.
One Valley Square, Suite 1450
Charleston, WV 25301

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Evers:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. Regarding the use of original medical reports as provided for in Rule 2.5(b)(1)(D), this Rule was necessitated by the filing of fraudulent medical reports in the past. Such fraudulent reports were created through the use of copies rather than the original of such reports. The Office of Judges does not believe this Rule presents an undue inconvenience on the parties to require the presentation and inspection of all original reports at the appropriate hearing. As provided for in the last sentence of Rule 2.5(b)(1)(D), once the original report has been inspected and admitted into evidence, the Administrative Law Judge then has discretion to substitute a copy of that report for the original and introduce that into evidence for the record.

2. Regarding telephone conferences, Rule 2.4(c) provides that an Administrative Law Judge may, in his or her discretion, conduct any hearing by a telephone conference call. The Office of Judges believes that the provisions of this Rule adequately covers the situations you have described in your comment.

3. The use of interrogatories is a discovery tool which has long been available to counsel in both civil and criminal practices. The Office of Judges believes that interrogatories, limited to thirty questions including all parts and sub-parts, does not constitute an unreasonable burden upon the parties and can, in fact, aid in the discovery process.

Re: Response to Comments on
Proposed Procedural Rules

The wording of proposed Rule 2.6(d)(2) has been changed in response to numerous comments received from counsel, and will now read that each party shall be limited to a maximum of thirty (30) written interrogatories, "including all parts or sub-parts of any numbered interrogatory." A further change has been made to Rule 2.6(d)(1) to require that only copies of answered interrogatories shall be filed with the Chief Administrative Law Judge, rather than copies of unanswered interrogatories being served upon the Chief Administrative Law Judge at the time of service. The Office of Judges will strictly construe these rules and definitions.

Parties are encouraged to work out among themselves any problems or difficulties which arise regarding the use of interrogatories. Any issues not resolved by the parties can be dealt with by making a Motion to Compel to the Chief Administrative Law Judge. The failure to respond to an Order Compelling the Answer of Interrogatories may result in the submission of the claim for decision, or the dismissal of the protest, or judicial enforcement of the Order.

Finally, the Office of Judges believes that the issue of interrogatories, in general, should be submitted to the Workers' Compensation Committee of the West Virginia State Bar in order to obtain recommendations regarding the use of interrogatories, e.g. form, procedures, and enforcement.

4. Cross-indexing is simply a notation for the file that another claim(s) exists. It does not necessarily mean that other claims are in litigation. There is no provision in the statute for cross-indexing. The Office of Judges, in its final version of the proposed Rules, has deleted all references to "cross-indexing". However, the Office of Judges will take notice of prior claims at any time. Other claims which are active and pending in the litigation system may be consolidated in the discretion of the Administrative Law Judge.

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the Proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

C. Patrick Carrick, Esq.
Manchin, Aloi and Carrick
1543 Fairmont Avenue, Suite 203
Fairmont, WV 26554-2100

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Carrick:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. Based upon comments received by the Office of Judges, the last sentence of Rule 2.3(c) has been changed to provide for reconsideration by the Chief Administrative Law Judge in certain circumstances. Under the revised Rule, a party may file a Motion to Reconsider with the Chief Administrative Law Judge, supported by the necessary evidence. Hearings on any such Motion to Reconsider may be held as needed in the discretion of the Chief Administrative Law Judge. Such Motions to Reconsider must be themselves timely filed. A decision of the Chief Administrative Law Judge on a Motion to Reconsider is then appealable to the Appeal Board.

2. Regarding the use of tape recorded transcripts as opposed to court reporters, the Office of Judges believes that the present system of tape recording hearings is adequate and will and has to date resulted in accurate transcripts being produced at a substantial cost savings to the State.

3. Rule 2.7(c) provides that an Administrative Law Judge may exclude a report or statement made by a properly subpoenaed witness who fails or refuses to appear at a hearing. The exclusion of any such report is discretionary and is not mandatory. The interests of justice would preclude an Administrative Law Judge from excluding from evidence a report from the Commissioner's evaluating or examining expert which was the basis for an award by the Commissioner.

Re: Response to Comments on
Proposed Procedural Rules

4. W.Va. Code § 23-5-1h provides that the Office of Judges shall not be bound by the usual common law or statutory rules of evidence. All rules utilized by the Office of Judges shall be construed so as to do substantial justice to the parties with consideration for due process rights.

5. The proposed Procedural Rules provide all parties with adequate mechanisms, such as subpoenas, to obtain records from examining physicians. The Office of Judges declines to bear the burden of either authorizing or denying requests for authorizations for examinations. The Rules adequately provide procedures by which parties may obtain such examinations.

6. With regard to Rule 2.9(a), this Rule adequately describes the initial hearing process and protects all parties' procedural and substantive due process rights. The Office of Judges believes that there is no way possible to provide for "agreed Time Frame Orders" if one party is unrepresented. Additionally, the Office of Judges has never circulated to counsel any official list of specific time periods to be utilized by Administrative Law Judges in issuing Time Frame Orders and further declines to act as though it ever did. It is inappropriate to include specific time frame periods in the Rules since each and every case brought before the Office of Judges is unique in its issues and evidence.

Finally, your general comments at the end of your letter do not appear to apply to the Office of Judges. I have passed these comments on to the Workers' Compensation Executive Secretary for his review.

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Robert J. Busse, Esq.
Jackson and Kelly
P. O. Box 553
Charleston, WV 25332

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Busse:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. Hearings are conducted by the Office of Judges pursuant to W.Va. Code § 23-5-1h. Proposed Procedural Rules 2.4(a) and 2.10 allow the Chief Administrative Law Judge to postpone scheduled hearings for good cause shown by a party. In addition to these Rules, there may be other rights regarding the continuance of hearings provided for by the statute which were not addressed in these Rules as initially proposed. The Office of Judges recognizes that W.Va. Code § 23-5-1h appears to permit parties to continue a hearing by agreement. However, it is the position of the Office of Judges that this statutory provision, as clearly worded, applies only to the first or initial hearing scheduled. Accordingly, the Office of Judges has modified the language in Rules 2.4(a) and 2.10 to reflect that continuances by agreement of the parties pursuant to W.Va. § 23-5-1h are to be permitted only for the initial hearing scheduled; any such postponement will only be allowed to occur one time per claim; and the parties must agree that the claim be rescheduled for a new hearing date within thirty (30) days of the originally scheduled hearing date. The Office of Judges believes that these modifications to the proposed Rules will preserve the statutory rights of the parties while preventing abuse of these same statutory provisions which would result in unnecessary delays in the prosecution of claims and the development of evidence.

Re: Respone to Comments on
Proposed Procedural Rules

2. Your comment correctly points out that proposed Rule 2.4(b) complies with W.Va. Code § 23-5-1. The Office of Judges agrees, however, that the maximum advance notice of hearings should be provided whenever possible. We believe that advance notice of thirty (30) to forty-five (45) days will be routinely provided in most claims.

3. When both parties protest the same Commissioner's Order, it is clear that the claimant has the burden of proof in proceeding first with the presentation of evidence. No liberality rule can replace the premise that the claimant has the burden to go forward. Jordan v. State Workmens' Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972). The proposed Rules provide the Administrative Law Judge with discretion to change the order of the presentation of evidence. The proposed Rules do not provide that the claimant must always go first in every instance. The Administrative Law Judge has discretion under the proposed Rules to change the order of the presentation of evidence or to order that the evidence be developed concurrently.

The Office of Judges concludes that for reasons of judicial economy, the interests of justice, and speedy resolution of claims, it is proper to allow Administrative Law Judges the discretion to order concurrent development of evidence.

4. Regarding the use of tape recorded transcripts as opposed to court reporters, the Office of Judges believes that the present system of tape recording hearings is adequate and will and has to date resulted in accurate transcripts being produced at a substantial cost savings to the State.

5. Regarding the use of original medical reports as provided for in Rule 2.5(b)(1)(D), this Rule was necessitated by the filing of fraudulent medical reports in the past. Such fraudulent reports were created through the use of copies rather than the original of such reports. The Office of Judges does not believe this Rule presents an undue inconvenience on the parties to require the presentation and inspection of all original reports at the appropriate hearing. As provided for in the last sentence of Rule 2.5(b)(1)(D), once the original report has been inspected and admitted into evidence, the Administrative Law Judge then has discretion to substitute a copy of that report for the original and introduce that into evidence for the record.

Re: Respone to Comments on
Proposed Procedural Rules

6. Please see our response to Comment Number 4 above.

7. Rule 2.6(a) provides for the exchange of reports and the submission of reports into evidence prior to hearing by mail. If a party wishes to submit an original expert report into evidence and that party does not wish to tender it by mail, the original report can still be produced for inspection by an Administrative Law Judge at a hearing, and once the original report is admitted into evidence, a copy of said report can be substituted into the record, pursuant to Rule 2.5(b)(1)(D). As in both civil and criminal practices, any party submitting any evidence into the record has the responsibility and the burden of establishing the foundation for the introduction of such evidence.

With regard to your comments regarding a possible definition of "original" to include certified copies, the Office of Judges agrees with your comment that copies produced under seal or as certified copies may be appropriately utilized in those circumstances where an original version of the records cannot be produced, e.g. hospital records or doctor office notes. Accordingly, the Office of Judges has added language to Rule 2.6(a) which defines the word "original" to include certified copies and copies produced under seal.

8. Regarding your comments on Rule 2.7(b)(1) concerning the enforcement of subpoenas, we agree with your comment that the enforcement of subpoenas should be the responsibility of the Office of Judges, rather than the responsibility of the party requesting the subpoena. Accordingly, Rule 2.7(b)(1) has been modified to provide that upon a proper Motion to Compel due to the failure of a party or witness to comply with a properly issued subpoena, the Chief Administrative Law Judge may seek judicial enforcement of such subpoena.

9. Regarding Rule 2.7(b)(3)(B)(ii), we agree that the Rule should be modified so as to also include payment for vocational or other experts engaged by the Commissioner. Accordingly, this Rule has been modified to read "A physician or other expert engaged by the Commissioner, or...".

10. Rule 2.4(b) requires that a minimum of ten days notice be provided to the parties of a scheduled hearing. However, it is expected that considerably more than ten days notice will be routinely provided to the parties under the new Office of Judges' system. This provides the parties with sufficient time in order to meet the twenty day deadline provided for in Rule 2.9(b).

Re: Respone to Comments on
Proposed Procedural Rules

11. As to your comments pertaining to Rule 2.9(b), we disagree that time limitations should be placed upon the Administrative Law Judges in which to issue Time Frame Orders. No such strict deadlines are needed since all Administrative Law Judges are required, by internal policy issued by the Chief Administrative Law Judge, to submit completed Time Frame Orders immediately following each hearing. It is anticipated that as the new Office of Judges system becomes more fully automated, the backlog of Time Frame Orders waiting to be typed and mailed will disappear, and the twenty day target which you suggest will be routinely met by our word processing section.

Regarding the requirement that Time Frame Order extensions be requested no later than thirty days prior to the scheduled deadline, all Time Frame Order dates and deadlines are discussed and imposed by the parties during the actual hearing. Parties attending these hearings are well aware of the dates and deadlines imposed upon the conclusion of the hearing. Additionally, once the Office of Judges is fully automated, it is anticipated that it will be the rare case involving a very short time frame period in which thirty days notice for an extension cannot be given. Finally, paragraph 7 of the Time Frame Order specifically provides that consideration of requests for extensions will be given by the Administrative Law Judge for emergencies and circumstances which the moving party could not have foreseen more than thirty days in advance.

12. The simple request by a party for a hearing to be scheduled, under the Administrative Law Judge system, is not in and of itself sufficient to cause such a hearing to be scheduled. A request for a hearing must be acted upon by an Administrative Law Judge. Hearings are scheduled by a Judge under this circumstance, and will not be set simply because a party requests such.

13. As previously explained in the answer to your Comment Number 1, the application of these proposed Rules is not intended to replace any other rights regarding continuances which may be provided to the parties by statute. The Office of Judges recognizes that W.Va. § 23-5-1h allows the parties, in certain circumstances, to continue a hearing by mutual agreement. However, the Office of Judges takes the position that this right to right to a continuance applies only to the first or initial Administrative Law Judge hearing. This is because the hearing referred to in that applicable statute section is the same hearing

Re: Respone to Comments on
Proposed Procedural Rules

which the statute requires to be held within thirty days after the filing of an objection.

Accordingly, the language in Rule 2.4(a) and Rule 2.10 has been modified to recognize this limited right to a continuance by agreement. However, those Rules have also been modified to clearly specify that such a continuance is only allowed for the first or initial Administrative Law Judge hearing, that such a continuance will only be allowed to occur one time, and that the parties must agree that a new hearing date be rescheduled no later than thirty days from the originally scheduled hearing date.

With regard to your comment about ten days advance notice being required for a motion for a hearing continuance, please see the prior answer to Comment Number 10.

14. With reference to 2.12(c), we certainly agree with your comment that telephone depositions will not be appropriate in every situation. That is why the authority to conduct telephone depositions is discretionary. Rule 2.12(c) provides that depositions may be taken by telephone conference call as if taken in person.

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the Proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

Henry C. Bowen, Esq.
West Virginia Self-Insurers Association
P. O. Box 1573
Charleston, WV 25326

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Bowen:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. The Office of Judges feels that the purpose of this section is adequately set forth in Rule 2.1.

2. Regarding your comment on Rule 2.2, the Office of Judges does not ever intend to issue a decision without the due process of law. Parties will always be given the opportunity to litigate protestable rulings.

3. With regard to your comment to Rule 2.3(d) concerning the presumption of notice, the Office of Judges takes the position that any presumption, unless otherwise specifically excluded, is inherently rebuttable. Nothing in the wording of Rule 2.3(d) limits or precludes rebuttal of the presumption upon a showing of evidence.

4. Your comment regarding Rule 2.4(b) is correct in that the statute provides that a minimum of ten days notice be given in advance of a scheduled hearing. However, the Office of Judges believes that we do and will continue in the future to provide considerably more than ten days advance notice of any scheduled hearing, and that no change in the proposed rules need be made to address this issue.

Re: Response to Comments on
Proposed Procedural Rules

5. The provisions of Rule 2.4(c) are clear as to jurisdiction, and conform with the appropriate statutory language. The Office of Judges believes this rule is adequate as drafted.

6. Regarding the use of original medical reports as provided for in Rule 2.5(b)(1)(D), this Rule was necessitated by the filing of fraudulent medical reports in the past. Such fraudulent reports were created through the use of copies rather than the original of such reports. The Office of Judges does not believe this Rule presents an undue inconvenience on the parties to require the presentation and inspection of all original reports at the appropriate hearing. As provided for in the last sentence of Rule 2.5(b)(1)(D), once the original report has been inspected and admitted into evidence, the Administrative Law Judge then has discretion to substitute a copy of that report for the original and introduce that into evidence for the record.

7. As to your comments on Rule 2.5(b)(2) regarding objections, we feel that the Procedural Rules need not provide for every possible scenario in the hearing process, and that the rule is adequate as drafted.

8. Modifications have been made to Rule 2.5(b)(5)(A) regarding the use of "him or herself".

9. Nothing in Rule 2.5(b)(5)(B) precludes other representatives of a corporate employer from attending a hearing along with authorized counsel. The term "represent", in this context, is a term of art which refers to legal representation. The statute is clear that a corporation must be "represented" by counsel at a hearing. Lay witnesses are not precluded by these rules from attending hearings, so long as the lay witness does not formally represent the corporation instead of counsel during the proceeding.

10. Please see our prior answer to Comment Number 9 above.

11. The Office of Judges believes that Rule 2.5(c) is adequate as drafted.

12. Regarding the use of original medical reports as provided for in Rule 2.6(a), this Rule was necessitated by the filing of fraudulent medical reports in the past. Such fraudulent reports were created through the use of copies rather than the original of such reports. The Office of Judges does not believe this Rule presents an undue inconvenience on the parties to require the

presentation and inspection of all original reports at the appropriate hearing. As provided for in the last sentence of Rule 2.5(b)(1)(D), once the original report has been inspected and admitted into evidence, the Administrative Law Judge then has discretion to substitute a copy of that report for the original and introduce that into evidence for the record.

13. The Office of Judges believes that Rule 2.7(b)(3)(A) clearly covers witness fees in general situations, that being attendance fees and mileage for any and all witnesses. Subsection (B) of this same rule provides further rules regarding fees for expert witnesses.

14. Any and all references to "cross-indexing" have been removed from the proposed rules, including Rule 2.7(e)(1). Additionally, the last sentence of that same rule makes it clear that a party is entitled to obtain no more than two reports per specialty.

15. The Office of Judges declines to delete the thirty (30) day period required to request an extension of a Time Frame Order as provided in Rule 2.9(b). The rule has been modified, however, to state that requests for extension of time not made within the thirty (30) day period will be considered upon a showing of good cause, rather than the previously proposed showing of extraordinary or unusual circumstances. Under Rule 2.9(b), the Office of Judges will waive the thirty (30) day required notice if a showing of good cause is made. We feel that thirty (30) days is an appropriate and necessary time period in order to receive and process such a request, rule on the motion to extend the time frame deadline, and then inform all the parties as to whether or not the motion has been granted or denied.

16. With regard to your comments on Rule 2.11(d), we believe this rule is adequate as drafted. The Office of Judges does not believe that parties should be allowed, by agreement, to turn an interlocutory ruling into an appealable order.

17. The Office of Judges believes that Rule 2.12(b) is adequate as drafted.

18. As to Rule 2.14, this rule provides that any time a party or a protest is dismissed from a claim by an Administrative Law Judge, such a ruling is appealable, not interlocutory in nature.

Re: Response to Comments on
Proposed Procedural Rules

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

March 24, 1992

R. Russell Alexander, Esq.
Huddleston, Bolen, Beatty, Porter
and Copen
P. O. Box 2185
Huntington, WV 25722-2185

Re: Response to Comments on
Proposed Procedural Rules

Dear Mr. Alexander:

I have received and thank you for your comments on the new proposed Procedural Rules for the Office of Judges. After reviewing your comments, the Office of Judges makes the following responses:

1. Based upon comments received by the Office of Judges, the last sentence of Rule 2.3(c) has been changed to provide for reconsideration by the Chief Administrative Law Judge in certain circumstances. Under the revised Rule, a party may file a Motion to Reconsider with the Chief Administrative Law Judge, supported by the necessary evidence. Hearings on any such Motion to Reconsider may be held as needed in the discretion of the Chief Administrative Law Judge. Such Motions to Reconsider must be themselves timely filed. A decision of the Chief Administrative Law Judge on a Motion to Reconsider is then appealable to the Appeal Board.

2. When both parties protest the same Commissioner's Order, it is clear that the claimant has the burden of proof in proceeding first with the presentation of evidence. No liberality rule can replace the premise that the claimant has the burden to go forward. Jordan v. State Workmens' Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972). The proposed Rules provide the Administrative Law Judge with discretion to change the order of the presentation of evidence. The proposed Rules do not provide that the claimant must always go first in every instance. The Administrative Law Judge has discretion under the proposed Rules to change the order of the presentation of evidence or to order that the evidence be developed concurrently.

Re: Response to Comments on
Proposed Procedural Rules

The Office of Judges believes that in the interests of judicial economy and the speedy resolution of claims, it is appropriate to allow Administrative Law Judges the discretion to order concurrent development of the evidence, where appropriate.

Finally, with regard to the last sentence of the Rule, the Office of Judges believes that if a request for an extension of a Time Frame Order deadline is timely filed as provided in these Rules, then such a request will be acted upon in a timely manner prior to the expiration of the Time Frame Order itself.

3. Regarding the use of tape recorded transcripts as opposed to court reporters, the Office of Judges believes that the present system of tape recording hearings is adequate and will and has to date resulted in accurate transcripts being produced at a substantial cost savings to the State.

4. The provisions of Rule 2.6(c)(2) apply to hearings. When referring to "continuances", the good cause standard applies in order to continue a hearing. This Rule is consistent with Rule 2.10. Time Frame Orders are not mentioned anywhere in Rule 2.6. They are addressed separately in the Rules. Time Frame Orders may be extended (as opposed to continued), pursuant to Rule 2.9(b).

5. The use of interrogatories is a discovery tool which has long been available to counsel in both civil and criminal practices. The Office of Judges believes that interrogatories, limited to thirty questions including all parts and sub-parts, does not constitute an unreasonable burden upon the parties and can, in fact, aid in the discovery process.

The wording of proposed Rule 2.6(d)(2) has been changed in response to numerous comments received from counsel, and will now read that each party shall be limited to a maximum of thirty (30) written interrogatories, "including all parts or sub-parts of any numbered interrogatory." A further change has been made to Rule 2.6(d)(1) to require that only copies of answered interrogatories shall be filed with the Chief Administrative Law Judge, rather than copies of unanswered interrogatories being served upon the Chief Administrative Law Judge at the time of service. The Office of Judges will strictly construe these rules and definitions.

Re: Response to Comments on
Proposed Procedural Rules

Parties are encouraged to work out among themselves any problems or difficulties which arise regarding the use of interrogatories. Any issues not resolved by the parties can be dealt with by making a Motion to Compel to the Chief Administrative Law Judge. The failure to respond to an Order Compelling the Answer of Interrogatories may result in the submission of the claim for decision, or the dismissal of the protest, or judicial enforcement of the Order.

Finally, the Office of Judges believes that the issue of interrogatories, in general, should be submitted to the Workers' Compensation Committee of the West Virginia State Bar in order to obtain recommendations regarding the use of interrogatories, e.g. form, procedures, and enforcement.

6. The Office of Judges believes that Rule 2.7(b)(3)(A) addresses all issues involved pertaining to witness fees, those being attendance fees and mileage costs. Any other expenses, such as fees for professional services, are dealt with in Rule 2.7(b)(3)(B).

7. The Office of Judges agrees with your comment that Rule 2.7(e)(1) applies only in those situations where a party seeks more than two examinations per specialty. If a party seeks two examinations or fewer, then no such authorization is required or necessary under this Rule.

8. Regarding your comment on Rule 2.9(a) and telephone hearings, please be advised that Rule 2.4(c) provides that an Administrative Law Judge may, in his or her discretion, conduct any hearing by telephone conference call.

9. Rule 2.4(b) requires that a minimum of ten days notice be provided to the parties of a scheduled hearing. However, it is expected that considerably more than ten days notice will be routinely provided to the parties under the new Office of Judges' system. This provides the parties with sufficient time in order to meet the twenty day deadline provided for in Rule 2.9(b).

10. See prior answer to Comment Number 9 above.

Re: Response to Comments on
Proposed Procedural Rules

I hope that these responses have addressed the concerns contained in your comments. We hope to have the final version of the proposed Rules promulgated with the Secretary of State within the next few weeks. Thank you for taking the time to comment on these Rules, and feel free to contact me if you have any questions or concerns.

Very truly yours,

Robert J. Smith
Chief Administrative Law Judge

RJS:cm

HAZEL A. STRAUB
ATTORNEY AT LAW
801 CHARLESTON NATIONAL PLAZA
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE 346-9822
AREA CODE 304

February 7, 1992

HAND-DELIVER

Honorable Robert J. Smith
Chief Administrative Law Judge
Office of Judges
Workers' Compensation Fund
P. O. Box 2233
Charleston, WV 25328

Dear Judge Smith:

I have reviewed the new proposed procedural rules and wish to make the following comments with respect thereto.

1. I object to the fact that where both parties make a protest to the same permanent partial order, the claimant must proceed first. I believe if there are mutual protests to the same order, that both parties should be required to develop their evidence concurrently and that the employer should not be given the last opportunity to submit evidence.

2. I do not like the changes in Rule 2.6(d)(1) which allows interrogatories in every claim without regard to reasonableness. This regulation could be extremely time consuming and somewhat burdensome. Computerized sets of interrogatories could easily be developed by employers and they could simply overwhelm counsel for the claimant with interrogatories that have very little to do with the actual claim and the issues in litigation. With depositions now available, it would be very easy to obtain the claimant's testimony with respect to any questions that the employer might have relative to the claim. Therefore, I object to that particular provision of the regulations.

3. One final comment I would like to make has to do with the time restrictions. The time restrictions placed upon counsel is now becoming clearly overly burdensome and impossible to meet in light of the fact that doctor's depositions and doctors evaluations are now difficult to schedule because of the fact that we have few doctors who do the examinations. Therefore, a more liberal attitude should be adopted with respect to time frames. Moreover, we had previously discussed the use of telephone deposition and I had advised you that some firms would not do telephone depositions in order to expedite cases. You advised me that this would be taken care of. I was recently informed by one of the major firms with whom I do a lot of work, while they had no objection to scheduling of telephone depositions. However, they want their lawyer to be present in the doctor's office at the time I took the telephone deposition. Clearly this attitude defeats the whole purpose. How many doctors, if any, have conference phones in their office which would make this possible. Telephone depositions should be allowed, they should be authorized and all firms should be encouraged to agree to the same.

Accordingly, these are my comments with respect to the regulations and what is currently going on with Workers' Compensation. I hope you can give them some consideration.

Very truly yours,

Hazel A. Straub

HAS/rsp

Judge Robert Smith

2/7/92

Dear Judge Smith

Re Comments on Proposed UC Rule

I was able to review the proposed rules for the surface fire, flow data

Reasoned on the proposed rules provide for interrogatories I would request that also be amended to allow for request for documents

Many times, particularly in exposure cases, documents may be necessary to be obtained before you depose any of expert witness.

The procedure would obviate the need of having to issue a subpoena duces tecum, which could further delay the development of a case

Again thank you for your consideration of this request. I remain

Yours truly

Robert Taylor

Masters & Taylor

342-3106

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

M E M O R A N D U M

TO: ROBERT J. SMITH, CHIEF ADMINISTRATIVE LAW JUDGE

FROM: THOMAS H. ZERBE, ADMINISTRATIVE LAW JUDGE TZ

DATE: JANUARY 13, 1992

SUBJECT: COMMENT ON PROPOSED RULE 93-1-2.5(b)(3)

Consideration should be given to adding a sentence or two to provide that where testimony is not taken, parties can, by agreement, waive the right to have argument and rulings recorded subject to the approval of the administrative law judge. If one or more of the parties is pro se, the hearing must be recorded. If one of the parties fails to appear, he will be deemed to have waived his right to the recording of the hearing.

I have permitted the parties to waive their right to have the time frame order hearing recorded and it does save time. Since I started this, everyone has waived their right to have the time frame order hearing recorded.

West Virginia Code, § 23-5-1h states all argument and rulings will be recorded, but I think, as a practical matter, the Court would sustain an administrative law judge who permitted the parties to waive that right. Also, the likelihood that the issue would ever come before the Court is somewhat remote.

THZ:gs

Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

Gaston Caperton, Governor
Robert J. Smith, Chief Administrative Law Judge

M E M O R A N D U M

TO: ROBERT J. SMITH, CHIEF ADMINISTRATIVE LAW JUDGE

FROM: THOMAS H. ZERBE, ADMINISTRATIVE LAW JUDGE

DATE: FEBRUARY 7, 1992

SUBJECT: COMMENT ON RULES FOR ADMISSION OF EVIDENCE, [redacted]

What is the record? Anything that manages to get on the microfiche?

It is clear that records filed with the Commissioner prior to the protest are part of the record. West Virginia Code, § 23-5-1h states:

> Upon receipt of notice of the filing of an objection, the commissioner shall forthwith forward to the chief administrative law judge all records, or copies of such records, in the commissioner's office which relate to the matter objected to. All such records or copies thereof and any evidence taken at hearings conducted by the office of judges shall constitute the record upon which the matter shall be decided.

Rule 93-1-2.5(b)(1)(D) deals with the presentation of evidence at hearing. It states, "All exhibits offered into evidence shall be labeled and marked as either 'Claimant's Exhibits', 'Employer's Exhibits', 'Commissioner's Exhibits' or 'Joint Exhibits'...".

There is a lack of clarity about what is the record. Assuming everything that is in the Commissioner's file before the protest is filed and everything that is admitted by an Administrative Law Judge's order whether it comes in at hearing or by letter is part of the record, this still does not explain what to do about fugitive documents on the microfiche.

Frequently after a protest has been filed, claimants, particularly those that are pro se, ask their doctors to write the Commissioner. These documents are microfiched. Are these reports part of the record? The employer may never see them.

Rule 93-1-2.6(a) seems to require that evidence to be submitted at hearing must be exchanged with opposing counsel and submitted to the Chief Judge as soon as reasonably possible after

party sponsoring the evidence receives it (a frequent practice is to exchange it at hearing). Surely documents submitted to the Commissioner after the filing of a protest have to be exchanged. Does an order admitting such documents have to be entered? Is everything on the microfiche received by the Commissioner after the filing of the protest not part of the record unless an order is filed entering it in? Is it part of the record for later protests since it is part of the Commissioner's file and 23-5-1h says the Commissioner's file is part of the record?

I think we need to clarify what is in the record. The rules attempt to set up a formal procedure but as you know if someone mails a grocery list to the Commissioner it will be microfiched. Rule 2.6(a) requiring that evidence be exchanged is meaningless if a document can be sent to the Commissioner and get on the microfiche and become part of the record even if it has not been exchanged.

I believe if Judges rely on documents which are on the microfiche but were submitted after the protest was filed and were not exchanged with the other party someone will appeal. I realize that normally this is not a problem because counsel obtain the microfiche, but someday an Administrative Law Judge is going to make a ruling on a document that one of the parties has never seen and very likely there will be an appeal. The problem probably never arose in the past because no one ever could tell what evidence was relied on because no findings of fact were made.

One of the most important functions of the rules is to designate clearly what is and what is not in the record. I think the rules should make clear that everything submitted at hearing or by letter to the Office of Judges or the Commissioner becomes part of the record even if it is not exchanged with the other party. The obligation is on the parties to obtain copies of the microfiche and object to anything they wish to exclude from the record. The rules should state that the microfiche is the record.

One final point - as presently written the statute and the rules do not contemplate the submission of evidence by letter. I interpret Rule 2.6(a) to require that evidence be submitted by letter which is to be sponsored for admission later at hearing. I do not interpret Rule 2.6(a) to permit evidence to be admitted by letter. This needs to be clarified. As a practical matter, this is probably not a problem particularly since the Brogan decision says evidence can be submitted by letter. I would still suggest, however, that the rules clearly state that evidence can be submitted by letter. Also, are we not going to admit evidence at hearing unless it has been previously submitted by letter? This is not the present practice.

THZ:gs

BOWLES RICE McDAVID GRAFF & LOVE

ATTORNEYS AT LAW

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WRITER'S DIRECT DIAL NUMBER
347-1115

February 7, 1992

Robert J. Smith, Chief Administrative Law Judge
Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328

Re: Proposed Rules of Practice and Procedure for the Office of Judges

Dear Judge Smith:

Thank you for providing a copy of the rules you have proposed for use in the workers' compensation hearings handled by the Office of Judges. Please consider my comments and redlined language amendments in promulgating final rules.

2.3(d) Proposed new language: Manner and Receipt of Notice. Any notice required by these rules shall be deemed adequate if served upon a party, or if a party is represented by counsel upon ~~and~~ their counsel of record, by mailing such notice by regular United States mail, postage pre-paid, addressed to the party to be so notified at their last known address. Receipt of notice shall be presumed seven (7) calendar days after the date of the notice.

Comments: Though the Office of Judges and the Commissioner serve the parties and their counsel, amending the language as we have proposed properly restricts parties from serving notices and other similar correspondence directly upon an opposing party who is represented by counsel.

2.4(b) Proposed new language: No change.

Comments: The language requiring notice to the parties and their counsel at least ten days in advance of a hearing comports with West Virginia Code §23-5-1. However, it should be noted that ten days' notice, without agreement of the parties, is not adequate. That inadequacy is highlighted by referencing:

Recvd 2-11-92 DG

(a) 2.3(d) of your proposed rules, where receipt of notices is presumed seven days after the notice of date, recognizing delay due to mailing;

(b) 2.9 of your proposed rules which allows parties to agree upon time frame orders no later than twenty days before a hearing; and,

(c) 2.10 of your proposed rules, which also requires a ten days' notice for continuance requests.

Please recognize ten days' notice as merely a statutory minimum, and provide notices at least 40 days before hearings.

2.5(a) Proposed new language: Hearing Procedures; Generally. (a) Rules of evidence. The West Virginia Rules of Evidence shall be used as a guide in conducting hearings; however, tThe hearing process shall not be conducted in accordance with usual common law or statutory rules of evidence, or by formal rules of procedures, except as provided by these rules. An Administrative Law Judge shall receive the relevant testimony and other evidence of the parties and witnesses, subject to objection by any party.

Comments: The Office of Judges can bring additional consistency and professionalism to the hearings process. The language we have proposed comports with West Virginia Code §23-1-15 by not binding Administrative Law Judges to the rules of evidence; however, the use of those rules as guidelines will assist not only the Judge, but will also provide reference to the parties in their hearing preparation.

2.5(b)(1)(A) Proposed new language: Order of presentation of evidence. The protesting party shall have the burden of going forth with evidence. In the event all parties have protested, the claimant shall go forth, except that for good cause or upon agreement of counsel, an Administrative Law Judge may permit a variance in the normal order of presentation. Ordinarily the protesting party shall present all its evidence first. The opposing party shall then go forth with its evidence. However, an Administrative Law Judge may direct that the development of evidence proceed concurrently or in such other manner as may be appropriate under the circumstances. ~~When all parties have completed the presentation of evidence or u~~Upon expiration of the time limits set by an Administrative Law Judge, an order shall be entered giving the parties 15 days to show cause why the claim

should not be decided. In the absence of extraordinary or unusual circumstances, the claim shall be submitted for decision. The claim may be submitted prior to the expiration of time limits set by an Administrative Law Judge if all parties agree that the presentation of evidence has been completed. If time limits have not been set by an Administrative Law Judge, either party may move to have the claim decided, and an order shall be issued by the office of Judges stating the claim will be submitted for decision in the absence of good cause.

Comments: The use of time frame orders is a new procedure. Counsel without sophisticated computer systems may occasionally error in tracking multiple deadlines in claims with several issues in litigation. Claimants without counsel may find their claims unexpectedly submitted for decision if time frame orders are misunderstood. Show-cause notices prior to final submission will save numerous appeals being generated over occasional excusable neglect by counsel or pro se claimants' inability to grasp a system that has become less explanatory. Our proposed amendments also continue the current system for submitting claims in which time frame orders have not been entered.

2.6(b)(1)(D) Proposed new language: No change.

Comments: We have been informed that evidence submitted is currently being destroyed once a copy is micro-fiched. If this information is accurate, we object to the procedure. Certain original reports, such as respiratory testing with tracings, cannot be accurately copied from a microfiche. If the policy of the Fund is to destroy original evidence, parties should be advised to retain originals for their files and to submit copies into evidence.

2.5(b)(3) Proposed new language: No change.

Comments: It is essential that transcripts be of good quality and that they be provided to the parties on a timely basis.

2.6(d) Proposed new language: Interrogatories to Parties.

(1) Written interrogatories may be utilized in a discovery process before or after a protest if filed, and the permission of an Administrative Law Judge or Commissioner, shall

not be a prerequisite to the serving of interrogatories. Copies of all interrogatories served and all answers thereto shall be filed with the Chief Administrative Law Judge, or with the Commissioner prior to the filing of a protest, at the time of service or at the time of answer, whichever shall be appropriate.

Comments: Interrogatories are often served when a claim is filed to speed discovery. Proposed language recognizes this procedure, while the claim is still pending before the Commissioner. Where no language change has been suggested, it should be noted that the rule as written requires interrogatories to be filed when served. Thus, the Fund's file will have a copy of the interrogatories sent, and a second copy when answered. We recommend you consider requiring the filing of interrogatories only when answered, or when objections or motions to compel are made.

2.7(b)(1) Proposed new language: Procedures for production of witnesses and evidence

(1) Subpoena. The presence of a witness or production of evidence may be obtained by the issuance of a subpoena or subpoena duces tecum by an Administrative Law Judge. A request for a subpoena must be made in writing as soon as reasonably possible prior to a hearing. A subpoena for a physician shall also include a subpoena duces tecum for the treatment records and notes pertaining to the claimant. ~~Enforcement~~ Service of any subpoena shall be the responsibility of the party ~~who has requested the subpoena.~~ presenting or desiring to present testimony or evidence by that witness. Failure to produce a witness for cross-examination may be grounds for a motion to expunge that witnesses' evidence.

Comments: Though the service of subpoenas is the responsibility of the party desiring to produce the witness, the enforcement of a subpoena is a judicial function covered by West Virginia Code §23-1-9.

2.7(e)(4) Proposed new language: Requests for cross-examination. The reservation of the right of cross-examination is automatic. A request for cross-examination shall be made promptly in writing to an Administrative Law Judge in accordance with Section 2.5(b)(1)(C).

Comments: The automatic reservation of the right to cross-examine will save an enormous amount of paper.

Reference to Section 2.5(b)(1)(C) is necessary to comply with case law allowing parties to review the reports of their own experts prior to requesting to cross-examine the opposing party's experts. Weese v. Workers' Compensation Commissioner, No. 19116 (Nov. 3, 1989) (per curiam).

2.9(a) Proposed new language: No change.

Comments: The twenty-day requirement in this rule for the stipulation of time frame orders underscores the need for greater than ten days' notice of hearings. We recommend forty days.

2.9(b) Proposed new language: Time Frame Order. The time frame order will ordinarily set forth the issues in litigation, date by which each party must submit reports from expert witnesses, the date on which a hearing will be conducted to examine or cross-examine the claimant and other lay witnesses, a time frame within which the claimant's treating physician or the Commissioner's examining physician may be cross-examined, a date by which all motions must be made and such other matters as may be appropriate depending on the case. Any requests for extension of time, in the absence of extraordinary or unusual circumstances, must be made ~~not less than thirty (30) days~~ prior to the expiration of the time period which the moving party seeks to expand. Such requests shall set forth the reasons the expansion of time is necessary and shall include a statement of the efforts the party has made to comply with the time frame order. The failure to offer evidence in compliance with any time frame order or extension thereof may result in the claim being submitted insofar as that party is concerned based on the evidence in the record at that point in time.

Comments: Why establish more deadlines? If a doctor's examination is scheduled twenty days before the expiration of an evidentiary deadline, must a party request an extension thirty days before the deadline to preserve that right should the appointment need to be rescheduled? Such arbitrary interim deadlines are not included in time frame orders, will be impossible for counsel to keep track of, and are impossible for pro se parties to be expected to recognize.

2.12(b) Proposed new language: Procedure. The taking of a deposition shall be by agreement of the parties or upon ~~reasonable~~ thirty (30) days' notice to the deponent and all

parties; ~~and their~~ however, if a party has appeared by counsel, notice shall be served upon counsel of record. Notice shall be in writing and shall contain the date, time and place of the deposition well as the name and address of each person to be deposed. The cost of court reporter services shall be borne by the Workers' Compensation Fund. The cost of witness fees and expenses shall be borne by the respective proponents of the witness, as provided in Section 2.7(b)(3) of these Rules. Parties are encouraged to utilize depositions to obtain testimony whenever possible.

Comments: Depositions are clearly encouraged by the rules, and will add efficiency to the process, However, nowhere in administrative or civil procedure are parties permitted to merely notice depositions at will, without the courtesy or clearing available dates with counsel and experts, or at least providing adequate notice. "Reasonable" notice has been given by opposing counsel the day before the deposition at times in our claims, with response by the Fund to our objections merely stating we have the right to cross-examine again at a later time if we desire. If hearings and depositions will now be scheduled to meet new shorter deadlines, either agreement as to availability or thirty days' notice to permit schedule changes are necessary.

Very truly yours,

Sarah E. Smith

SES/cjw

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February 5, 1992

HAND DELIVERED

The Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office
of Judges
P.O. Box 2233
Charleston, WV 25328

Re: Proposed Procedural Rules

Dear Judge Smith:

I have reviewed the proposed procedural rules dealing with hearings. While I am in general agreement with most of the rules, I would like to address two (2) specific rules which concern me.

Rule 2.5(b)(1)(A) discusses the presentation of evidence and the order in which parties proceed at a hearing. It provides that the protesting party presents its evidence first or, if all parties have protested, the claimant goes first. This rule addresses the presentation of evidence at a hearing, but fails to address in what order the parties must introduce evidence outside of a hearing. This is a problem in occupational pneumoconiosis claims, where several employers' counsel use the current rule as their basis for insisting that the claimant introduce his or her evidence first in an occupational pneumoconiosis claim, even though the employer also has protested the degree of disability. Additionally, while time frame orders may provide for concurrent time periods within which to develop evidence, those time periods are not applicable to the development of evidence in an occupational pneumoconiosis claim since the point when a hearing is scheduled before the Board is unknown.

I would recommend that this rule be clarified to indicate that regarding the development or submission of evidence in any claim, regardless of whether it is an occupational injury, pneumoconiosis, or occupational disease claim, a party has an independent obligation to develop its own evidence if it has filed a protest to the amount of award and should not be permitted to defer developing its own

Rec'd 2-6-92 O.O.

evidence until after the other side has done so and submitted its evidence. I believe that approach would encourage the parties to develop their own evidence and would not reward a party which did not take any action in support of its own protest until the other party had completed its own development, which is certainly the effect of the current rule.

The second rule which concerns me is rule 2.7(b)(3)(B) dealing with expert witness fees. As currently written, this rule provides that the party introducing the report of an expert is responsible for the expense of the expert's appearance at a hearing or deposition. I would suggest that this rule be changed to conform to the rule in civil litigation which is that the opposing party is responsible for paying the cost of the other side's expert.

If a party knew when it requested the other side's expert's testimony that it was responsible for paying the other side's expert's fees, the number and frequency of experts' depositions and appearances at hearings would be reduced drastically.

Currently, and under the system envisioned by this rule, a claimant is more likely to depose the employer's expert because the employer must pay its own expert's fee. Similarly, an employer is more likely to depose or cross-examine the claimant's expert at a hearing since the claimant must bear the cost of its experts appearance. If a party knows it must pay the other side's expert if it wants his or her testimony, the decision to cross examine or depose an expert will be made more judiciously by both parties.

Additionally, if a claimant's expert is deposed by the employer, there is often a request made by the claimant to depose the employer's expert, either to make the record look more balanced, or to put the employer to the expense of paying its own expert since, in this case, the employer required the testimony of the claimant's expert. Although, I use the references to the claimant and employer only for illustrative purposes, my example demonstrates the infirmity of the current rule which is that experts are deposed or cross examined oftentimes only because one party wishes to "get even" with the other party or at least put the other party to some inconvenience or trouble. Since that is not the purpose or intent of the rule, I would suggest that it be changed in the manner I have suggested.

In the event the Office of Judges is unwilling to enact on a permanent basis this change to Rule 2.7(b)(3)(B), I would suggest

that it be implemented at least temporarily so that the experience of counsel and claimants and employers could be contrasted with the current system.

I appreciate the opportunity to comment on these rules. Should you have any questions regarding my comments, please do not hesitate to contact me.

Respectfully,

HOSTLER AND SEGAL

Jeffrey V. Mehalic

JVM:kdk

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January 20, 1992

Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
P.O. Box 2233
Charleston, WV 25328

Dear Judge Smith:

I have reviewed the new Proposed Procedural Rules for hearings. Overall, I believe they are well reasoned and in many respects are an improvement over the old Rules particularly in the area of taking depositions.

However, I am alarmed and extremely concerned about the changes made in Rule 2.6 (1) (C). By allowing Interrogatories in every claim, a tremendous burden is being placed upon the claimant's bar at a time when it is attempting to adjust to new time limitations being placed on all cases that are currently in litigation.

Due to the nature of Workers' Compensation, attorneys generally devote a large portion of their practice to this area or do not enter into this area. Consequently, claimants' attorneys many times have hundreds of active claims in litigation at any one time. Interrogatories are extremely time consuming. They have been the bane of the plaintiff's bar in civil cases for as long as I can remember. The information that is obtained through Interrogatories is limited since there can be no follow-up questions if the response is not what is anticipated. It has been my experience that Interrogatories are almost always used as a prelude to taking the parties testimony.

There are particular reasons why Interrogatories would be onerous in Workers' Compensation claims. Many of the claimants are functionally illiterate. Therefore, the claimant's attorney would have to go over the questions with the claimant and trancribe the answers to make certain that they are answered properly. As stated above, many claimants' attorneys have hundreds of active claims and in over half of these claims, the employers are represented by counsel.

In civil cases, a computerized generated set of Interrogatories are delivered to the plaintiff's counsel routinely along with an Answer. Since

the employer's counsel could argue that Interrogatories do provide at least some information, they could justify this added expense in virtually every claim.

If the employer's counsel truly believes that the claimant's testimony or information that they have is necessary, due to the greatly liberalized rules on depositions, this can be easily obtained. I urge you to consider allowing Interrogatories only when the claimant is unavailable to provide this information by hearing or deposition. This can be the case when the claimant has moved out of the state or is unavailable as provided by the Rules. This is the only instance when I believe that Interrogatories serve any useful purpose.

[redacted]

At a time when the claimant's bar is frantically trying to deal with Time Frame Orders in light of the fact that it is getting more difficult to obtain examinations with physicians and at a time due to the recession, that claimant's are less able to afford these examinations, the claimant's bar cannot be expected to cope with the incredible burden that this new Rule would certainly create.

I respectfully request that this Rule be omitted and that Interrogatories only be allowed by agreement or where the claimant is unavailable.

Sincerely,

Charles M. Moredock

CMM:je

PS: Dear Bob - I did want to express my satisfaction with the competent and congenial manner in which the Administrative Law Judges as a whole have administered the new hearing proceedures.

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February 7, 1992

Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
P. O. Box 2233
Charleston, WV 25328

RE: Comments to Proposed
Procedural Rules

Your Honor:

I am writing to provide the following comments to the proposed procedural rules for the Workers' Compensation Office of Judges:

1. The rule of liberality should be stated as a preamble to the rules, and it should be applied when the procedural rules are used to defeat claims. Claimants should not forever lose their claims for the failing of counsel to meet a specific rule, especially a procedural time period.

2. Rule 2.3(d) should be modified to delete the presumption of receipt of notice in 7 days of its date.

3. Rule 2.5(b)(1)(B) should be modified to allow testimony to be taken under oath by a notary public or court reporter as well as an administrative law judge. The difference between a deposition appearance and a hearing appearance is not important.

4. Rule 2.6(d) should be revised to allow claimants to testify in lieu of answering blanket form interrogatories upon providing the inquiring party a list of the claimant's prior and current treating physicians with a medical release. Also, requests for production and admissions should be allowed, since these are needed for claimants to make inquiries to employers.

5. Rule 2.7(e)(2) should be modified to allow the claimant to discover the reports of all physicians who examine the claimant, since the rule implies that only reports to be used in evidence are to be exchanged by the parties.

6. Rule 2.9(a) should be modified to reduce the number of days needed for a hearing continuance from 20 to 10 days, as is the current practice. Hearing notices go out only 20 some days before hearings.

7. Rule 2.10 should be modified to grant either party an automatic 60 day delay in meeting any time frame so long as the delay does not work a material injustice to any party. The Commissioner responds late to all time limits in the State and it is hypocritical to impose hardship on a party for an occasional similar delay. The burden of showing hardship should be on the opposing party.

There have been few rules enforced in the workers' compensation system against the Commissioner. A rule to

allow an automatic delay will allow the counsel to organize their practices and importantly it will notify claimants and employers who it is that has caused delay in the decision of their claims.

Very truly yours,

Larry L. Rowe

Larry L. Rowe

LLR:clh

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AREA CODE (304)
343-5529-CHARLESTON

AREA CODE (304)
742-3772-CRAIGSVILLE

January 20, 1992

Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328

RE: PROPOSED PROCEDURAL RULES

Dear Judge Smith:

In reviewing the Proposed Procedural Rules for conducting hearings before the Administrative Law Judges, I have several requests. Rule 2.5(b)(1)(D) requires the offering of the original of a medical report or test results except that, on request, and in the discretion of the Administrative Law Judge, a copy may be substituted. I would like to mail a copy rather than the original of a medical report to the Office of Judges, as I am concerned about the accidental loss of the same in the mail or misfiling at the Fund and oftentimes need the original report for other proceedings such as Social Security Disability Hearings, third party personal injury claims, etc.. I understand that the procedure in your office is that these reports and documents are microfiched and the documents discarded. If this is the case there would be no reason to mail the original as the review is conducted from the micro-fiche. There are also many instances where I cannot offer the original as what I have received are copies of hospital records, treating physician's notes, test results, etc., Social Security Disability Findings, etc.. I understand that the rule states that "upon request" and "in the discretion of the Administrative Law Judge", I can offer a copy but this sounds like it may create procedural questions and problems. Upon submitting a copy into the evidence, I would have to request permission to do so which could then be objected to by the opposing party for no legitimate reason. Please consider allowing copies to be filed rather than originals.

Secondly, although you have explained that the telephone system for handling time frame conferences is not yet available, I would like to nevertheless see it allowed by the rule rather than your having to later amend the rules to permit it. I do also suggest that you allow for completion of time frame orders by telephone call to the Administrative Law Judge anytime prior to the date of conference, to be permitted at the discretion of the Administrative Law Judge. As I have explained to you previously, the present system is causing me to travel out of town approximately two to three days each week to do nothing more than to "fill in a blank" on a time frame order. This results in a total waste of my time, as well as for the Administrative Law Judge. I am not paid for my time away from the office, for these

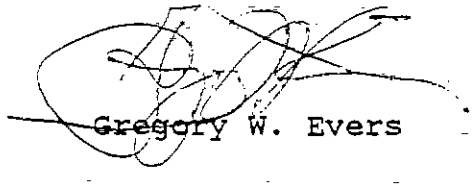
conferences and unless something productive can be done at the conference it only prevents me from getting my claims developed and limits the time I can be scheduling and attending depositions. I have less than one-half of a week then to attend to matters in my office and cannot then do the work necessary to complete pending Workers' Compensation cases in a timely fashion. I also suspect that it will seriously hamper the Judges' ability to find time to adjudicate claims before him.

As to interrogatories, while in theory it sounds as though they will be of help, I am sure that you are aware that some defense firms will use them in every case, even where totally unnecessary, merely for billing purposes. This type of abuse also requires me to spend a great deal more of my time in an individual claim in reviewing interrogatories, sending them to my client, explaining them to my client, having his or her answers typed, and having the typed answers signed and notarized. Then, more likely than not, the same employer's counsel will want to take my client's deposition. I feel that it would be much more convenient to simply take my client's deposition and not to require the answering of interrogatories. Please make the use of interrogatories permissable upon agreement by both parties.

I also note that Rule 2.7(e)(1) and (2) attempts to eliminate the abuse that is created when an attorney (typically a defense attorney) obtains a medical report in a claim which he would not normally request (such as a psychiatric evaluation in a hearing loss or other claim) in order to then have more than two specialists in one field upon cross-indexing of all claims. While this can eliminate the problem of one party obtaining indirectly, more medical reports than he could obtain in a single claim, the rule will only work where claims have been cross indexed or consolidated (see the last sentence in 2.7(e)(1). The Administrative Law Judge's are not permitting cross indexing until submission of a claim for decision. Unless cross indexing is permitted during development of claims this rule would be rendered ineffective. Please authorize earlier cross indexing of claims.

Please consider making these changes. If I have failed to make any of these points clear, please call me. I will be happy to discuss them further.

Very truly yours,



Gregory W. Evers

GWE/krs

West Virginia

DEPARTMENT OF COMMERCE,
LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY

State Capitol | Charleston, West Virginia 25305 | 304/348-3255

MEMORANDUM

TO: Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges

FROM: Thomas J. Gillooly
General Counsel

RE: Proposed Procedural Rules

DATE: December 5, 1991

==========

I enclose Secretary Ranson's letter granting consent to the proposed "Title 85 Procedural Rules, Workers' Compensation Office of Judges, Series 14, Hearings." Although I did not consider any of the comments which follow a sufficient basis for recommending that the Secretary withhold his consent, I offer them for your consideration and possible action during the rulemaking process. I have not reviewed the underlying statutes, so to the extent a rule merely reflects a statutory provision or adopts the statute's terminology, these comments may be disregarded:

2.3 (d) The use of the term "party" is confusing since it is used in two senses: party to the claim and "party to be so notified," creating ambiguity about whether both the party and the attorney are to be served. This could be avoided by requiring service, and defining service as consisting of mailing to both the party and the party's attorney, or by using the terminology "person to be served," rather than "party."

2.4 (b) The language "shall be provided" is ambiguous. Requiring "service" and defining what it means would be preferable. Reading the language of this section and 2.4 (d) as drafted, do they require mailing seventeen days before a hearing, or ten?

2.5 (a) To me, the language "shall not be conducted in accordance with etc." sounds like a command not to follow the specified rules. In fact, I would guess that some of them are followed as a matter of custom. I assume this rule's intended meaning is more along the lines of "The xxxx rules shall not be binding on [or shall not apply to] the conduct of hearings." Such

phraseology might be preferable.

2.5 (b) (4) I question granting discretion to close hearings with no stated standards as to what constitutes good cause for doing so. In addition, what is the basis for prohibiting parties from having lay representation?

C:\TJG\WC-RUL.BEP

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January 23, 1992

ROBERT J SMITH
CHIEF ADMINISTRATIVE LAW JUDGE
WORKERS COMPENSATION OFFICE OF JUDGES
P O BOX 2233
CHARLESTON WV 25328

RE: PROPOSED PROCEDURAL RULES
TITLE 93, SERIES 1 HEARINGS

Dear Sir:

I have received and reviewed a copy of the PROPOSED PROCEDURAL RULES and wish to make the following comments and observations.

First, I am concerned with the inequity created by RULE 2.5 (b)(1), where both parties have jointly protested an order. The PROPOSED RULE requires the claimant to move first and allows the employer additional time, after the claimant has produced his evidence, to develop and present its case. I fail to see why both parties should not be required to proceed simultaneously under the same time restraints. If either party must receive preferential treatment in a workers' compensation claim, it would appear that statutory and case law holdings mandate that the claimant be given the benefit, as opposed to the employer.

Second, I see no mention about what will happen when protests have been acknowledged subsequently to the initial time frame conference/order. Is it planned that the process will begin again with still another conference?

Thank you for considering these comments.

Very truly yours,

Timothy G. Leach

tgl

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January 20, 1992

Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
P.O. Box 2233
Charleston, WV 25328

RE: Proposed Procedural Rules
Written Comments

Dear Judge Smith:

Thank you for the opportunity to review the proposed Procedural Rules for the Workers' Compensation Office of Judges. I would like to submit for your consideration the following written comments:

2.3 Initiation of the Hearing Process.

(a) This section concerns an initial determination as to whether an objection is timely filed and appears to indicate that the Chief Administrative Law Judge shall make a determination of timeliness and such determination may be appealable only. This proposed section would seem to eliminate the right to a hearing on the issue of timeliness. As you know, at the present time litigants are entitled to a hearing on the issue of whether a protest is timely filed and I would suggest that the parties continue to be allowed to have a hearing concerning timeliness issues.

2.5 Hearing Procedures; Generally.

(b) Procedure

(3) Transcription of evidence. I am encouraged that the language of this section suggests that hearings may be transcribed by stenographic or voice recording or by other means. I am not hopeful that the system of tape

recorded hearings will result in adequate transcripts and I hope that at some time in the future funding will be available to return court reporters to the hearing process.

2.7 Production of Witnesses and Evidence.

(c) Exclusion of evidence. This section provides that if a properly subpoenaed witness fails to appear, produce requested evidence or testify in response to a subpoena, then the Administrative Law Judge may exclude his report. My concern here is where the properly subpoenaed witness is a physician or other expert who has conducted an evaluation at the request of the Commissioner, and whose report or findings have been the basis for an award of benefits, why should the claimant be penalized because of the Commissioner's expert's failing to appear. I would have no objection to an employer's account being credited under appropriate circumstances but I would recommend that a provision be included to the Rules to direct that any overpayment occasioned thereby would not be subject to collection under Section 23-4-1c or Section 23-4-1d or otherwise recoverable from the claimant.

(d) Alternatives to testimony and other evidence.

(2)(A) Testimony describing the evidence. I have difficulty imagining a situation where it would be appropriate to allow testimony to describe evidence and, at the same time, allow meaningful cross-examination or rebuttal of this "described" evidence. Though I appreciate that an administrative system usually allows some relaxation of evidentiary rules, I cannot imagine a situation where it would be appropriate for an Administrative Law Judge to receive and consider testimony describing evidence and I would propose that that portion of the Rules be stricken.

(e) Examinations and evaluations. The Commissioner's present policy requires the employer to submit into evidence all reports generated as a result of authorized examinations of the claimant. The Office of Judges proposed Rules do not contain a similar requirement and I would suggest that some similar requirement be contained in these Rules.

Requiring the employer to obtain authorization for examinations of the claimant and requiring the employer to submit into evidence reports generated thereby would

discourage needless or redundant examinations conducted by employer. Moreover, many of the examinations to which claimants are required to submit are quite medically invasive and sometimes painful (arterial blood gas studies, for instance) and it would certainly be unfair to require a claimant to submit to such invasive and painful procedures and then not allow the claimant to benefit from the results of any such testing.

2.9 Scheduling of Hearings.

(a) First Hearing. It is encouraging to see in the proposed Rules an opportunity for counsel to submit agreed time frame orders and therefore eliminate the need for preliminary hearings. The proposed rule only allows for such a time frame order to be submitted by agreement of the parties. This does not address the situation where the party is either unrepresented or is not participating in the litigation.

Additionally, it would be preferable to have some basic guidelines set forth in the Rules as to the presumed time periods applicable for the development of evidence in different categories of issues. Some time ago, there was circulated a list of time periods applicable to the development of evidence in different issues such as compensability, medical treatment, temporary total disability issues, rehabilitative issues, etc. and it might be helpful to litigants to have something in the proposed Rules to set guidelines so that we may have some way of predicting in advance what time periods would be routinely allowed by the Office of Judges.

General Comments

My frustration with the Workers' Compensation practice is normally not associated with the litigation process. Rather, my frustration and disappointment normally is associated with my inability to get the Commissioner to act, once an Order has been issued or a decision has been made. For instance, at the present time in numerous cases I have received an Order grating an award of benefits and yet I am unable to get the Commissioner to issue payment pursuant to such award in a timely fashion. I notice that the Commissioner routinely violates Section 23-4-1d, which requires payment of benefits within 15 days from the date of

the award. It is not uncommon for the Commissioner to take 6 or more months to issue payments or pay orders on awarded benefits. I would suggest that the proposed Rules grant to the Office of Judges some authority to enforce decisions once made. I do not know whether this would require a legislative rule making, but some enforcement powers of the Office of Judges would greatly improve the process and would tend to verify the autonomy of the Office of Judges.

Again, I appreciate the opportunity to provide written comment and I would welcome the opportunity to discuss my comments with you or participate in any other formal type of discussion regarding the proposed Rules.

Very truly yours,

C. Patrick Carrick

CPC/lm

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February 7, 1992

BY HAND

Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328

Re: Comments Regarding Proposed Procedural Rules
of the Workers' Compensation Office of Judges

Dear Judge Smith:

Attached are our Comments Regarding Proposed Procedural Rules of the Workers' Compensation Office of Judges. Consideration of the attached comments is sincerely appreciated.

Very truly yours,

ROBERT J. BUSSE

RJB/ss
Enclosure

COMMENTS REGARDING PROPOSED PROCEDURAL RULES OF THE WORKERS' COMPENSATION OFFICE OF JUDGES

General Comments

The overriding purpose of any procedural rules should be to simplify and expedite the claims litigation process while preserving the procedural due process rights of the parties to develop and introduce evidence in support of their respective positions. While the proposed rules contain many commendable ideas regarding case development and the litigation process, certain rules should be revised in order to reflect the practicalities of the litigation process and preserve the due process rights of the parties. The proposed rules should not encourage litigation over procedural or "technical" matters, but should allow the parties to concentrate their efforts toward a swift and expeditious determination of substantive rights.

Comments on Individual Proposed Rules

Rule 2.4(a)

This section provides that a hearing "may be postponed for good cause shown". It appears to conflict with the statute, specifically West Virginia Code, § 23-5-1, which provides that a hearing may be postponed not only for "good cause", but also "by agreement of the parties". This rule should be amended to comply with the statute.

Rule 2.4(b)

This section provides that notice of the date, time and place of the hearing "shall be provided to the parties and

their counsel of record at least ten days in advance of the hearing date". While this rule complies with West Virginia Code, § 23-5-1 with respect to the "10-day" notice requirement, the Office of Judges should make every attempt to notify the parties as soon as possible when a claim has been scheduled for hearing. As a practical matter, receipt of a hearing notice only ten days prior to a scheduled hearing creates major problems for practitioners. As noted in Proposed Rule 2.12, the Office of Judges is encouraging the parties "to use depositions to the maximum extent possible". These depositions require "reasonable notice to the deponent and all parties and their counsel of record". Practitioners have been actively scheduling depositions of expert witnesses. However, the scheduling of depositions often occurs two to six weeks prior to the deposition itself. A substantial amount of time and effort is devoted to obtaining a court reporter, notifying the parties, arranging a convenient time for the expert witness to be deposed, etc. Unfortunately, many depositions must be cancelled when "last minute" conflicts are created by hearing notices received only ten days or two weeks prior to the scheduled hearing. Every effort must be made to notify the litigants as far in advance as possible of a scheduled hearing.

Rule 2.5(b)(1)

This rule is generally acceptable insofar as it sets forth the manner in which evidence should be presented, with the protesting party bearing the burden of going forward with the presentation of evidence. Also, the provision allowing the

Administrative Law Judge to permit a "variance in the normal presentation" of evidence for "good cause or upon agreement of counsel" is also acceptable and should be sufficient to allow the Administrative Law Judge to take into account the procedural peculiarities of a claim in establishing the parameters of the litigation process in that claim. However, that portion of the proposed rule which allows an Administrative Law Judge to "direct that the development of evidence proceed concurrently or in such other manner as may be appropriate under the circumstances", should be deleted. Under no circumstances should an Administrative Law Judge be permitted to force a non-protesting party to develop evidence "concurrently" with a protesting party, unless all parties agree to such "concurrent" development. The concurrent development of evidence forces the non-protesting party to develop and present evidence before he has had an opportunity to see the protesting party's evidence, thus placing the non-protesting party in an unfair position since it often does not even know what <u>type of evidence</u> (orthopedic, psychiatric, vocational, etc.), or how much evidence (one report, two reports, ?), the protesting party will present before he must begin developing rebuttal evidence. The rule contains no standards which an Administrative Law Judge must follow prior to making a determination that "the development of evidence proceed concurrently". In theory (although hopefully not in practice), an Administrative Law Judge so disposed could "direct" that the development of evidence proceed

"concurrently" in all claims. Quite frankly, the concurrent development of evidence is unfair to the non-protesting party and, unless the non-protesting party explicitly agrees to the concurrent development of evidence, it should not be imposed upon the parties by the Administrative Law Judge. The other provisions of this rule give the Administrative Law Judge sufficient flexibility to expedite the litigation process when the procedural status of the claim so requires. Again, the phrase authorizing the Administrative Law Judge to direct that the development of evidence proceed "concurrently" should be deleted from this rule.

Rule 2.5(b)(1)(B)

This rule should also provide that all testimony taken at a hearing shall be transcribed with copies of the transcript forwarded to the parties within a reasonable period of time after such testimony is taken.

Rule 2.5(b)(1)(D)

This rule provides that the "original copy" of the report of a medical provider or other expert witness or the results of tests be offered into evidence. While this provision was no doubt inserted into the rule in order to discourage fraud or other abuse, it should be implemented in such way that the original of a report can be preserved. If the submission of an "original copy" of a report to the Administrative Law Judge results in the report being "microfiched" and subsequently destroyed, this rule should be

revised. If, however, the internal procedure of the Office of Judges permits the preservation of the original report in some manner without its destruction, the proposed rule is acceptable.

Rule 2.5(b)(3)

This rule should be revised to provide that all testimony shall not only be recorded, but shall also be transcribed and distributed to the parties. As a practical matter, it is impossible to practice workers' compensation law without transcripts of testimony. Currently, testimony taken two to three months ago has still not been transcribed, despite requests for its transcription. When the Administrative Law Judge or an attorney representing a party at a hearing where testimony is taken is not the same Administrative Law Judge or attorney appearing at a subsequent hearing, it is virtually impossible for the Administrative Law Judge or attorney to have an accurate description of the contents of the prior testimony. Also, when a Notice of Appeal is filed from a final order, the current rules of the Appeal Board do not allow the parties the luxury of waiting for the transcription of prior hearings by the Office of Judges. Transcripts are essential and should be prepared as quickly as possible after the actual testimony is taken.

It is recognized that testimony is currently recorded on a tape recorder by the Administrative Law Judge at a hearing. Unfortunately, few, if any, transcripts from such tapes have been prepared to date. Hence, it is impossible to comment upon the accuracy of transcripts prepared from tape

recorded testimony. However, experience in other arenas suggests that transcripts prepared from such tapes alone (without the presence of a court reporter) leave much to be desired. The interests of justice require the prompt and accurate transcription of all testimony taken at hearings. It is suggested that serious consideration be given to reinstituting the regular use of certified court reporters for the recording and transcription of all workers' compensation hearings.

Rule 2.6(a)

This rule requires that the "original" of "the report of an expert or any other document" shall be submitted to the Administrative Law Judge by mail, with copies to the opposing counsel. Although there is certainly nothing improper about requiring the parties to file the original report of an expert witness, such originals, if filed, should not be microfiched and destroyed. Some provision should be made for the retention of the original for a reasonable period of time prior to destruction. Also, this rule appears to be overly broad, insofar as it relates not only to reports of an expert witness, but also to "any other document". Presumably, a claimant's treatment records fall within the purview of this rule. As a practical matter, "originals" of such treatment records are not available. When treatment records are requested from a physician or hospital, only copies of the records and/or notes are provided to the parties. The rule should be sufficiently broad to allow the parties to file copies of records regarding

current or prior treatment. If the opposing party has any questions with respect to the validity or authenticity of the copied records, such party can satisfy such concerns by means of cross-examining the preparer of the report or the appropriate medical records custodian.

Rule 2.7(b)(1)

This rule appears virtually identical to 85 CSR 7.2.9, although the proposed rule adds the following sentence:

> Enforcement of any subpoena shall be the responsibility of the party who has requested the subpoena.

This sentence should be deleted, since the party requesting the subpoena does not have the power to "enforce" any subpoena. Enforcement authority must lie with the issuing authority (the Office of Judges) and any enforcement proceedings must be the responsibility of the issuing authority.

Rule 2.7(b)(3)(B)(ii)

This rule should provide that the Commissioner is responsible for the payment of a witness' fees when the claim has not been rejected and the witness is a "physician, vocational specialist or other expert engaged by the Commissioner, . . ."

Rule 2.9(a)

This proposed rule provides that the parties may agree to and submit proposed time frame orders to the Office of Judges no later than 20 days prior to the date of a scheduled

hearing. Unfortunately, Proposed Rule 2.4(b) requires only 10 days notice of a hearing. Either the parties should be allowed to submit the agreed upon time frame parameters "no later than 10 days" prior to the hearing, or the 10-day period required for notice of a hearing should be expanded.

Rule 2.9(b)

This rule should place some time limitations upon the Administrative Law Judge in which to issue time frame orders. It is suggested that time frame orders should be issued either within 20 days of the hearing at which such time frame orders are discussed, or within 20 days of receipt of time frame parameters agreed upon by the parties, if such parameters are acceptable to the Administrative Law Judge. This rule also requires that requests for extension of time "must be made not less than thirty (30) days prior to the expiration of the time period which the moving party seeks to expand". Unfortunately, this is often impossible because the time frame order itself is not issued until the time limitation itself has nearly expired. Further, in certain circumstances, the time frame order which eventually is issued in writing by the Office of Judges varies (and in some instances varies substantially) from the time frames agreed upon by counsel for the parties and the Administrative Law Judge at the initial hearing. Also, certain unforeseen events (such as a claimant's failure to appear for a physician's examination) often delay the development and submission of evidence at the last minute. The rule should be

amended to provide more flexibility for requesting extensions of time.

Rule 2.9(c)

This proposed rule should be amended to provide that not only will additional hearings be scheduled "as provided for in the time frame order and as may be scheduled by an Administrative Law Judge", but also upon requests of a party for such hearing.

Rule 2.10

This rule appears to conflict with West Virginia Code, § 23-5-1, insofar as it provides that continuances "shall be granted only at the request of a party for good cause shown". West Virginia Code, § 23-5-1, however, provides that a hearing may be postponed for "good cause" or "by agreement of the parties". This rule should be amended to conform to the statute. Also, this rule requires that a request for continuance shall be filed by written motion with the Office of Judges "at least ten (10) days prior to the date of the scheduled hearing". As noted, however, Proposed Rule 2.4(b) requires notice only "ten (10) days in advance of the hearing". Hence, Proposed Rule 2.10 requiring a written motion for continuance at least 10 days prior to the scheduled hearing is unworkable. Also, as a practical matter, those claims which are scheduled "at the last minute" with minimal notice to the parties are usually the claims which require a continuance,

since practitioners often are scheduled to make other appearances, take depositions, etc. many weeks in advance.

Rule 2.12(c)

This proposed rule states that depositions "may" be taken by telephone conference call. While telephone depositions can be quite helpful in reducing needless travel in certain cases, telephone depositions are not always acceptable. Telephone depositions should be permitted "by agreement of the parties only", since certain types of cases, particularly occupational disease claims, are extremely complicated and cross-examination of opposing experts by telephone is simply not an acceptable substitute for taking the deposition of the expert in person. If a party introduces a report from an out-of-State physician, such party should be required to produce such doctor in person for cross-examination by the opposing party, if the opposing party insists upon its right of cross-examination. A telephone deposition is simply not sufficient in certain cases to preserve the parties' right to effective cross-examination. Indeed, the Commissioner's current rule, 85 CSR 7.2.14(d), recognizes this fact by providing for telephone depositions only "by agreement of the parties".

WVSIA

WEST VIRGINIA SELF-INSURERS ASSOCIATION

P.O. BOX 1573 CHARLESTON, WEST VIRGINIA 25326

February 7, 1992

HAND DELIVERED

Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
Post Office Box 2233
Charleston, West Virginia 25328

Re: Comments to Proposed Procedural Rules, Series 1, Hearings

Dear Chief Judge Smith:

Pursuant to the Notice of a Comment Period on a Proposed Rule, enclosed please find for your consideration comments on the proposed Procedural Rules, Series 1, Hearings, which we hereby submit on behalf of the West Virginia Self-Insurers Association.

Thank you for your attention to this matter.

Very truly yours,

Henry C. Bowen

Henry C. Bowen

HCB/cao

Recvd. 2-11-92 OoJ

COMMENTS TO THE WORKERS' COMPENSATION OFFICE OF JUDGES'
PROPOSED PROCEDURAL RULES
TITLE 93, SERIES 1-HEARINGS

Section 93-1-2. Hearing process:

2.1 Purpose:

This section fails to adequately define the scope of review that the hearing process entails regarding orders issued by the Commissioner. The language states specifically that the hearing process may review the entry of any order made by the Commissioner. The question remains whether or not this includes interlocutory orders as well as protestable orders. This section should be more specific as to what orders are reviewable.

2.2 Right to Hearing:

The language in this section is ambiguous in light of the language found in the previous section 2.1, because it limits a party's right to hearing to protestable rulings. 2.1, however, fails to place such limitations on the orders that fall under the review power of the Administrative Law Judge system. Therefore, the two sections read together would allow the Commissioner to enter an interlocutory order on any issue. The Administrative Law Judge could then make a final decision without giving the parties an opportunity to litigate the issue.

2.3 Initiation of the Hearing Process:

(d) Manner and Receipt of Notice:

In the interest of fairness to all parties concerned, and taking into account the imperfections found in the mail system, we strongly urge that the presumption that notice of a hearing has been received seven (7) calendar days after the date of notice, should be a rebuttable presumption.

2.4 Date, Time and Place of Hearing:

(b) This provision is clearly impractical. The parties need far more than ten (10) days notice of the date, time and place of the hearing in order to adequately prepare. As such, we suggest that a minimum of thirty (30) days advance notice of the hearing date be

required. In addition, provision 2.9 requires parties who wish to utilize agreed time-frames to reach an agreement twenty (20) days prior to the scheduled date for hearing. If the Office of Judges does not have to send notices until ten (10) days before a hearing, it will not be possible to agree upon all time-frame deadlines. The idiocy that emerges when comparing these two provisions is self-evident.

(c) - Place of Hearings

This subsection gives the Administrative Law Judge the power to set a hearing outside of the State of West Virginia and further require the parties to be there. A problem arises if the claimant uses out of state witnesses because the Administrative Law Judge's jurisdiction ends at the State line. This section appears to grant the Administrative Law Judge jurisdiction that he does not have.

2.5 Hearing Procedures; General:

(b)(1)(D) - Markings of Exhibits:

This section limits the use of copies of medical reports. Under the federal rules of evidence, copies are admissible the same as an original. The same standard should apply here. Many times a party will want to keep an original in the file or may not even be in possession of an original because the physician will only send copies. The right to submit copies of medical reports should be non-discretionary.

(b)(2) - Objections:

This section needs a clarification statement that would allow a party to vouch the record if his testimony or evidence is ruled inadmissible after objection. The section as stands does not provide any comment on this issue.

(b)(5) - Representation and Appearance of Parties:

(b)(5)(A) - By Individuals:

In the interest of grammar, the first

sentence should read "represent him or herself..."

(b)(5)(B) - By Corporations:

This section should be clarified to allow other representatives of the employer to appear at a hearing with counsel. As it reads now, the corporation can only be represented by counsel.

(b)(5)(D) - Lay Representative:

This section should also be clarified to allow lay witnesses to appear.

(c) - Presence of parties

For obvious reasons, this section should provide that representatives of the party are also entitled to be present at the hearings.

2.6 (a) - Discovery - Exchange of Evidence Prior to Hearings:

Once again, parties should be allowed to submit a copy of a report. This section should provide for submission of copy as long as the party certifies that it is a true and accurate copy of the original.

2.7 Production of Witnesses and Evidence:

(b)(3)(A) - Witness Fees - General:

This section should specify that it does not apply to experts by rewording to read, "The party requesting issuance of a subpoena for a witness not an expert shall..."

(b)(3)(B) - Expert Witness Fees:

This section is unclear in that it only states which party should pay for the appearance fee. It should also state who should pay for mileage and other expenses.

(e)(1) - Right to Examination and Evaluation:

This section is unfair to employers as it allows claimants to produce two reports for

each claim after which time the claimant can cross index all of his or her pending claims, thus leaving the employer with the ability to only offer a total of two (2) reports. In the interest of fairness, this section should provide that the employer can offer as many reports as the claimant.

2.9 Scheduling of Hearings

(b) Time Frame Orders

Requiring extraordinary or unusual circumstances for an extension of time to be granted less than thirty (30) days prior to the expiration of the time period in which the moving party seeks to expand the time is impracticable as circumstances often arise, such as doctors canceling depositions, which require that an extension be granted. Therefore, we would suggest that the language"good cause" be substituted for the now current language "extraordinary or unusual circumstances."

2.10 Continuances:

Again, in light of Section 2.4, which only requires a ten (10) day notice of the date, time and place of the hearing, this provision which requires a written motion be filed at least ten (10) days prior to the date of the scheduled hearing for a continuance is impractical. Such a request would not be impractical if 2.4 was amended to require a thirty (30) day notice.

2.11 Motion; Objection; and Communications:

(d) Action Upon Motions:

In light of the fact that this provision does not give Administrative Law Judges the power to make a final ruling, we would suggest that upon agreement of the parties, the Administrative Law Judge should be permitted to issue an appealable order.

2.12 Depositions

(b) Procedure

This section should clarify whether the

Workers' Compensation Fund will pay for a copy of the deposition for each party.

2.14 Dismissal of Party:

In light of Section 2.11 (d), which states that all rulings upon motions by an Administrative Law Judge are interlocutory in nature, this provision is unfair to the party who is dismissed because it does not allow them to appeal the dismissal. As such, any time an Administrative Law Judge dismisses a party to the claim, such an order should be appealable.

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REPLY TO:
Huntington, WV
January 28, 1992

Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
P.O. Box 2233
Charleston, WV 25328-2233

Re: Written Comments Concerning
Workers' Compensation Office of Judges
Proposed Procedural Rules Title 93,
Series 1 - Hearings

Dear Judge Smith:

Pursuant to your January 3, 1992 memorandum concerning the Workers' Compensation Office of Judges Proposed Procedural Rules, on behalf of my office, I offer the following comments. First, let me state that while we all would have liked to have these rules in place somewhat earlier, I was, for the most part, very impressed with the work of your office and others in putting together these proposed procedural rules. Though I offer some suggestions concerning the same, I was indeed truly impressed by the quality of the initial proposal. With that general statement in mind, I offer the following the comments.

First, on page one, Rule 2.3(c), this rule should read that "the Chief Administrative Law Judge shall determine if an objection is timely filed, however, the Chief Judge is bound by the provisions of W.Va. Code §23-5-1 in making this determination, and shall notify all parties and their counsel of record of the determination. Any party may file an appeal to such determination." On page three of the proposed rules, specifically, 2.5(b)(1)(A), I do not feel there should be concurrent development of evidence unless agreed upon by counsel. Since I am normally a responding party in most matters, I really do not feel my client should go through the expense of major case

development until we see what evidence the opposing party develops. While I do feel there should be some variance in formulating the time frame parameters, I do not think that concurrent development of the case should proceed unless the parties agree to do so depending on the particular intricacies of the issues involved with that particular case. Additionally, on page three, there needs to also be some additional clarification with regard to the above-referenced rule. The last sentence I feel should read "when all parties have completed the presentation of evidence, or upon expiration of the time limits set forth by the Administrative Law Judge, the claim shall be submitted for a decision, unless and except where a party has filed a timely request for extension of time from a time frame order in accordance with Rule 2.9(b) which has not been ruled upon by the Administrative Law Judge."

Concerning Rule 2.5(b)(3), regarding the transcription of evidence, I feel that all testimony should be transcribed by the Office of Administrative Law Judges unless waived by both parties. Even though W.Va. Code §23-5-1h permits the option on transcription, I do not see how an Administrative Law Judge can make a fair and adequate ruling in any matter, unless he or she has before him or her, a copy of evidence which was taken during the course of the litigation. If there is no transcript in the record, this testimony, in my opinion, simply will not be reviewed and, therefore, the parties will be prejudiced by the decision due to the evidence simply not being in the record. While it may take some additional time and expense, I feel it is still advantageous to have the transcription of any testimony taken at a hearing. On page six, there should be some clarification with regard to Rule 2.6(c)(2) concerning the granting a continuance for good cause. Does this provision apply to continuance of a hearing or continuance of a case beyond the parameters of the time frame order? This ambiguity may present a problem in the future which could be remedied by some additional clarification in that sentence.

With regard to interrogatories, I am very pleased that your office has decided to place these provisions in the proposed rules, as many times, in specific cases, the testimony of the claimant can be avoided if the employer is provided an opportunity to have the claimant complete some interrogatories and a medical release to gather information needed to develop the case. However, if we are to utilize interrogatories, there needs to be placed into these provisions, specifically Section 2.6(d), both a duty of a party to supplement their responses, similar to

that found in Rule 26(e) of the West Virginia and Federal Rules of Civil Procedure and, in addition provisions concerning a motion to compel answers to the interrogatories, the waiver of objections and sanctions for the failure to answer the interrogatories properly filed by the party in accordance with the aforesaid provisions. In addition, for clarity, I assume that, through Rule 2.6(d)(2), you also meant to limit a party to thirty (30) written interrogatories, including any parts and subparts thereof. The terms any and all initial or follow up interrogatories may be somewhat confusing and lead to problems concerning these provisions and limitations. Again, there is no provision dealing with the failure of a party to answer interrogatories within the thirty (30) days after service of the same, or any period set forth by the Administrative Law Judge concerning the same.

On page seven, I foresee two particular problems with regard to Rule 2.7(b)(3)(A) concerning witness fees, in that there are no standards specified in these rules, and the Rules of Civil Procedure regarding fees in civil cases in Circuit Court do not address all the necessary expenses which can be involved in witness fees. In addition, if fees are to be paid in advance upon time of request, there should be a duty upon the party to properly document the request with evidence. On page nine, with regard to Rule 2.7(e)(1), there should be a provision put in these provisions which simply states that, either the claimant or his counsel is to be required to seek authorization to be evaluated, or the provisions requiring the employer to seek authorization for these evaluations which they are permitted to have in accordance with this rule, should be waived. I do not see why we simply cannot have a system which all parties entitled to a reasonable number of relevant medical examinations or vocational evaluations, leaving in the provisions defining what is to be reasonable, and providing circumstances when additional evaluation can be requested and ruled upon by the Administrative Law Judge, but at the same time, waiving any need by any party to have authorization for these evaluations. A simple notice provision that the employer is sending the claimant for an evaluation, with the notice sent to his counsel and the Administrative Law Judge, would seem to simplify the process. Many times, the employer's development of evidence in a case is delayed by the very fact they have to wait for authorization from the Workers' Compensation Commissioner to have the claimant evaluated and this delays the scheduling of an appointment, evaluation of the claimant, and the report generated from the same, which, in turn, simply delays the process in development of

the case. By by-passing the need for authorization, these evaluations could be scheduled quicker, the reports exchanged more expeditiously and the cases resolved in a shorter period of time.

On page eleven on the proposed procedural rules, I think that Rule 2.9(a) should already have in the same, provisions in place for telephonic status conferences. I know this is contingent upon the Administrative Law Judge system obtaining a new phone system to accommodate telephone conferences, however, there are simply no provisions in these rules addressing the same and going through another rules change process can be somewhat lengthy and time consuming. Therefore, I think it would behoove everyone involved to simply go ahead and put these provisions in place, with the proviso that it is contingent upon the Workers' Compensation Office of Judges obtaining the phone system or having the technology capable of accommodating such conferences.

Additionally, in Rule 2.9(a), the rule provide that the parties may, by agreement, file an appropriate time frame order with the Office of Judges no later than twenty (20) days prior to the date scheduled for such hearing. Because only ten (10) days notice is necessary for a hearing, many times a hearing notice will not go out until ten (10) days prior to the hearing, at which time, the opportunity for the parties to develop a time frame order twenty (20) days prior to the hearing is a moot issue. Therefore, since only ten (10) days notice is required for scheduling of a hearing, I feel this rule should be modified to state that the time frame order can be filed with the Office of the Judges no later than ten (10) days prior to the date of the hearing. Furthermore, on page eleven, Rule 2.9(c) should read that additional hearings shall be scheduled in regard to the claim as provided for in the time frame order and as may be scheduled by the Administrative Law Judge and as requested by the parties in order to develop their evidence. Simply put, I read this provision to be discretionary that the Administrative Law Judge would not be required to set any hearings whether or not they are necessary for the development of the case, other than the first hearing for the purpose of setting a time frame order. Clearly, if the parties need additional hearings to develop their evidence so this claim can be submitted to your office for a decision, the Workers' Compensation Office of Judges should accommodate that request.

With regard to Rule 2.10 concerning continuances, again, since only ten (10) days notice is required for the setting

hearing, a written motion filed ten (10) days prior to the date of the scheduled hearing may be impossible. Therefore, this provision should be changed from ten (10) days to seven (7) days prior to the date of the hearing, in order to accommodate the circumstances when only ten (10) days notice is provided for the hearing. Finally, with regard to Rule 2.12 concerning depositions as stated on page twelve and thirteen, the same problem arises with regard to depositions as interrogatories. There needs to be sanctions set forth for the failure of the party to attend a deposition duly noticed similar to sanctions set forth in the West Virginia and Federal Rules of Civil Procedure. Furthermore, it might also be beneficial to define "reasonable" as it relates to notice.

If you have any questions concerning these proposals, I would be more than happy to discuss the same. Again, I appreciate your efforts in putting the same together.

Very truly yours,

R. Russell Alexander

R. Russell Alexander

RRA:tmf

West Virginia

DEPARTMENT OF COMMERCE,
LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY

State Capitol | Charleston, West Virginia 25305 | 304/348-3255

FILED
92 APR 23 PM 12:25

April 14, 1992

The Honorable Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
P.O. Box 2233
601 Morris Street
Charleston, West Virginia 25328

RE: Title 93 Procedural Rules, Workers' Compensation Office of Judges, Series 1, Hearings

Dear Judge Smith:

I hereby consent to the filing of the final rules specified above. You may attach a copy of this letter to your filing with the Secretary of State as evidence of my consent.

Sincerely yours,

John M. Ranson
Cabinet Secretary

JMR:cjb
B:RUL-LTR1.CJB

RECEIVED
ROBERT J. SMITH
CHIEF ADMINISTRATIVE LAW JUDGE
APR 16 1992
WORKERS' COMPENSATION
OFFICE OF JUDGES

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

Gaston Caperton, Governor
Andrew N. Richardson, Commissioner
of Employment Programs

April 1, 1992

Robert J. Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
P. O. Box 2233
Charleston, WV 25328

Dear Bob,

I have reviewed the Final Proposed Procedural Rules for the Office of Judges forwarded to me March 24. These latest rules clearly show consideration of the comments and suggestions received during the past several weeks.

I am pleased to approve the rules and encourage full implementation. Please initiate the process for final filing of these rules with the Secretary of State's Office.

Thank you for your efforts in developing our new Workers' Compensation litigation system.

Very truly yours,

Andrew N. Richardson
Commissioner

Workers' Compensation Appeal Board
601 Morris Street
Charleston, West Virginia 25301-1416

Richard Thompson, Chairman
Eli Dragisich, Member
R. Joseph Zak, Member

Regular Sessions: First Tuesday, Wednesday, and Thursday of Each Month

April 8, 1992

Honorable Robert J. Smith
Chief Adminstrative Law Judge
Workers' Compensation Office of Judges
601 Morris Street
Charleston, West Virginia 25301

Re: Office of Judges Procedural Rules

Dear Judge Smith:

The Workers' Compensation Appeal Board has reviewed and hereby approves the proposed Procedural Rules for the Workers' Compensation Office of Judges, Title 93, Series 1 - Hearings.

Very truly yours,

Richard Thompson
Chairman

RT/jfh

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
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SECRETARY OF STATE

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WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

(Plus all the volunteer help we can get)

TO: Stephen Knopp

AGENCY: Worker's Comp. Off. of Judges

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: December 29, 1992

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 1 TITLE: 93 Worker's Comp. Off. of Judges

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

****

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: Steven Knopp

TITLE OF PERSON SIGNING: Deputy Chief Administrative Law Judge

DATE: 2/11/93

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.

RECEIVED
FEB 11 1993
WORKERS' COMPENSATION
OFFICE OF JUDGES