

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE TENNANT**

ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

CITE AUTHORITY W. Va. Code §§23-2C-19(g) & 22; 33-2-10(b) and 33-2-21(a)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W. Va. Code §§ 23-2C-5(c)(2)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 11

TITLE OF RULE BEING AMENDED: Employer Default, Enforcement, Collections and Related
Matters

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: _____

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS May 10, 2012



Charles O. Lorensen
Cabinet Secretary
West Virginia Department of Revenue

From: Lesly Messina [mailto:leslymessina@actwv.org]
Sent: Wednesday, February 15, 2012 1:31 PM
To: Ryan Sims
Subject: OIC Rule- Employer Default, Collections & Other Matters-STAKEHOLDER COMMENTS

Hello Ryan-

I am sorry to be getting my comments/questions in so late to you. Here are a few things that concern me regarding the proposed rule.

Civil Actions section on page 7-

OIC has stricken out **sections 8.3 and 8.5** which allowed OIC settlement orders, dismissal orders or orders allowing companies to pay less than the full amount owed to no longer be public information. I am not seeing under what FOIA exemption would allow OIC to keep this information private. Further I would make the argument that when public agencies are vetting vendors/contractor for public contracts that they need to know the history and diligence of vendors regarding paying their bills. If I were a business owner in WV who plays by the rules I would want to know what special breaks non-compliant companies are receiving as well and the circumstances surrounding such an arrangement.

Injunctions From Carrying on Business on page 8

OIC has under section **9.3** provided for the requirement of a surety bond by a defaulted employer in lieu of injunctive relief. The section however isn't specific to when this would be applied and what circumstances would warrant this approach instead of a repayment plan? It would be nice to see this applied instead of repayment plans because at least in our industry the "bad apple" contractors are less likely to be able to get bonded anyway because previous bad business practices. This would be a good enforcement tool for compliance but under what circumstances will it be used?

Payment Agreements section- page 18

OIC has in section **11.8** that they may allow an employer to take more than 20 days to cure the missed payment (s). When a company isn't paying their bills, they know this and it is a symptom of a problem with that business. Unless someone can prove that something catastrophic has occurred to their business finances, this should not be offered as an option. Businesses in WV must be on an even playing field. Some businesses succeed and some do not. It is not fair to allow non-compliant businesses multiple extensions to come into compliance. I would like to see a very narrow scope of good cause reasons to allow this extension beyond 20 days.

OIC has removed section **12.10** which set finite time limits on how long a company can enter into a repayment agreement. It is important to set limits on much time and how many opportunities a default company has to pay back the debt owed to the state.

There is no language setting how many times a company may breach a repayment agreement before being denied the right to a repayment plan. Some companies will breach these agreements as often as they can get away with it, and this must be curtailed. If a company breaches a repayment agreement more than once they should be barred from the process and made to pay the debt in full before being removed from the default/EVS list. Again this is only fair to WV businesses that pay their premiums according to the law.

Uninsured Fines Section- page 22

The OIC has removed section **20.2** which eliminates the fine "an amount equal to twice the amount of premium they would have paid for coverage during the current half calendar year term had they obtained a West Virginia WC policy" if the company is found working in WV without coverage. In the construction industry we have seen on regular basis contractors that come into the state and occasionally in state contractors that do not pick up WC coverage and are able to underbid on jobs because they do not have factor in the same expense as a contractor

who is doing everything legally and following the rules. Without a fine/penalty in place there is no deterrent for this type of bad behavior. There are just some companies/contractors that will not follow the rules and secure coverage without the threat of serious hardship to their ability to do business.

As always I appreciate your time and attention to our stakeholder comments. If you have any feedback in the event I have misinterpreted any of these sections please let me know.

Thanks.

Lesly H. Messina
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Affiliated Construction Trades
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PUBLIC HEARING

FEBRUARY 16, 2012

OFFICES OF THE WEST VIRGINIA INSURANCE COMMISSIONER WORKERS' COMPENSATION INDUSTRIAL COUNCIL

Title 85, Series 11

Employer Default, Enforcement, Collections and Related Matters

Transcript of the Public Hearing held on Thursday, February 16, 2012, at 1:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:

Bill Dean, Chairman
Kent Hartsog, Vice-Chairman
James Dissen
Dan Marshall

Ryan Sims, Associate Counsel, OIC: We are here with the Public Hearing for Title 85, Series 11. If you recall we originally presented it at the December meeting. It is a rule dealing with "Employer Default, Enforcement, Collections and Related Matters," essentially the employer portion piece.

We made multiple changes to it. A lot of it was technical cleanup. There are a couple of substantive pieces if you recall. We did receive comments from the Affiliated Construction Trades. We always value their comments on these matters. They have a pretty good familiarity with what is going on in the major sector of our economy. We are certainly reviewing their comments. The one thing I would say is they comment a lot on areas where we do have a lot of discretion in dealing with default employers and when to waive amounts owed or when to enter into payment agreements with employers. I've worked with them versus when to take a more aggressive stance in pursuing an injunction or something like that. It is our position that the Legislature gave us the discretion. So we have crafted this rule in a manner which allows us to address default employers on a case-by-case basis, rather than in a very strict manner and not allowing much malleability on how to address each default employer. That would be our general response because most of the comments of ACT were focused towards, you know, that

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we needed to draw more bright lines – never allow a second payment agreement or never allow a multiple payment agreement, that type of thing.

We will be providing full written responses to every comment received, and we will provide this to you in advance of the final meeting [by email]. Mr. Chairman, I don't believe anybody else signed up to give public comment today.

Chairman Dean: We have one person. Any questions, Mr. Dissen?

Mr. Dissen: No.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: None.

Chairman Dean: Mr. Marshall?

Mr. Marshall: Not at this time. Thank you.

Chairman Dean: Mr. Bowen, would you like to speak?

Henry Bowen: Good afternoon, Mr. Chairman and ladies and gentlemen. I'm Henry Bowen, Executive Secretary of The West Virginia Self-Insurers Association. We did not file a written comment because we had just planned to make oral comment today at the Public Hearing. I've often said to many people that I could write a book about the history of West Virginia workers' compensation. I'm reminded by Mr. Dissen and Mr. Hartsog that no one would read it if I would write it. So I won't write it. But this rule was first enacted by your predecessor council at a time when the State ran the monopoly system and had an enormous problem of collection. On the part of some employers they simply didn't pay their premiums as required by law. The enforcement was one of the first actions undertaken that modernized the old workers' comp agency before it was terminated, and strong remedial response was granted to the Commissioner, and in fact required of the Commissioner. The Commissioner's hands were tied. As Mr. Sims just said, the Legislature was asked to reconsider the difficulty that tying the hands of the regulator puts the regulator in, in trying to get resolution of these kinds of issues. The systems are so different today. The problems that this agency is regulating with employer accounts are not anywhere like the kind of preceding problems the old monopolistic agency had. And while there was plenty of understanding in the old system, while people had a right to be concerned about who was paying, who wasn't, and so forth, that system is well behind us now. This rule is a modernization

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and update of the enforcement responsibilities. This agency has enormous election among the remedial choices it makes on enforcement matters. I believe that that's done purposely to give them the flexibility to apply it as they see the application is needed in a given set of circumstances.

Our Association looked at these changes. We agree with these changes. We think that the rule that you have in front of you is a good example of what needs to be done. Just bring this inline with the current kind of system we have in a fully competitive privatized market. And the kinds of concerns that some people used to have about employers not paying large premiums to the State, they simply aren't there now. Now we're talking about mandated coverage and cancellation of coverages of privatized insurance products that are mandated by law. But it's not the same as people who failed to pay hundreds and hundreds of thousands of dollars to the old Commission and then because of the lack of flexibility the old Commission had no way to reach a resolution. They had to compound interest and everything, and the bills were just astronomical. And maybe that was needed then. It is clearly not needed now. So we urge you accept the staff recommendations as they initially presented to you. And we don't think any additional changes are needed at all. Thank you very much. I'd be happy to take questions.

Chairman Dean: Any questions, Mr. Dissen?

Mr. Dissen? I do not have any.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Thank you, sir. Does anybody else from the public like to speak today on this matter? Is there any approval needed from the Council at this point?

Mr. Sims: No. The approval on the rule would come at the next meeting – for final approval. I'll get the responses to the comments out to you.

Mr. Hartsog: Mr. Sims, there wasn't any changes between the draft that we reviewed at the December meeting and what we have in front of us today, right? I think there was something I saw that said this was undergoing a review by somebody else or something. . . ?

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Mr. Sims: It was sort of held off so our parent agency could review it – just take a more careful look at it, and they did so. They said it was fine as is.

Mr. Hartsog: Thank you.

[The Public Hearing on Title 85, Series 11, closed with no further comments from the Council or the public.]

**INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND
PUBLIC COMMENTS RECEIVED ON W. VA. CODE ST. R. § 85-11-1 ET SEQ.**

Introduction

Below are the written response of the WV Offices of the Insurance Commissioner (OIC) to the stakeholder and public comments received in regard to the proposed amendment of W. Va. Code St. R. § 85-11-1 et seq. (“rule” - “Employer Default, Enforcement, Collections and Related Matters”), which was filed with the West Virginia Secretary of State for public comment on 01/17/12 and upon which a public hearing was held before the Industrial Council at the Industrial Council’s 02/16/12 meeting. Two stakeholders comments on this rule – the OIC received email comments from The West Virginia Affiliated Construction Trades Foundation (ACT) and the WV Self-Insurer’s Association (SIA) provided comment at the hearing before the Industrial Council.

Positive Feedback

The SIA commented that they agreed with all amendments being made to this Rule and thought it was a good update of the rule in order to reflect the relatively new privatized market. The OIC appreciates this positive feedback and always strives to keep rules falling under its purview up to date.

Compromise and Settlements with Employer

ACT commented that the striking of sections 8.3. and 8.5. of the rule had implications that the compromise and settlement of certain workers’ compensation debt owed was no longer public information. The OIC struck these provisions because they are obsolete and/or unnecessary. Specifically, 2009 updates made to W. Va. Code §33-2-22(e) clarify that the OIC has unilateral discretion to pursue monies owed to the Old Fund and Uninsured Fund and to compromise and settle the same. That said, the OIC understands that the striking of these provisions without replacement language indicating that any compromise and settlement regarding these funds is public record could lead one to believe such compromises and settlements are no longer public record. Therefore, a provision was added as subsection 8.3. of the amended rule to clarify that while the OIC does have discretion to unilaterally compromise and settle monies owed to these funds, such compromises and settlements are public record.

Bond as an Alternative to an Injunction

ACT commented that section 9.3. of the rule should set forth clear sets of circumstances as to when an employer should be permitted to post a surety bond in lieu of being enjoined from employment operations. ACT also suggests that the process of payment agreements be eliminated completely in favor of only the bonding process. ACT argues that if clear, more stringent guidelines are not set forth, it puts employers on an uneven playing field and provides an unfair advantage to those that do not play by the rules.

The OIC disagrees with both these comments. In addressing default employers, the Legislature granted the OIC broad discretion as to which regulatory measures to use. The OIC believes that situations must be handled on a case-by-case basis, and that eliminating certain less punitive measures such as payment agreements, or limiting them to only “bright line” circumstances being met, is not consistent with the intent of the Legislature. That said, the OIC notes that it always takes into account all circumstances when determining which measures to utilize against default employers. For example, an employer with multiple offenses, or who has been doing business for a long period of time without coverage, is treated more severely than one who is a first time offender and/or had a lesser period of default.

Discretion Regarding Payment Agreements

ACT commented that the lack of any limitation on total payment agreements allowed in section 11 (“Payment Agreements”), the amendment to section 11.8. of the rule, which will permit the OIC discretion to provide an employer more than twenty (20) days to cure a default of a payment agreement, and the elimination of section 12.10. in the current rule, which limits payment agreements to five (5) years maximum, are all problematic. In support of this position, ACT provides similar rationale to its argument on bonds stated above.

Again, the OIC disagrees with this argument. The OIC believes having appropriate flexibility and discretion when taking action against default employers is paramount, and they must be handled on a case-by-case basis.

Language Regarding Uninsured Fines

ACT commented that the removal of section 20.2. in the current rule is problematic because it eliminates a fine for employers who enter the state for a prolonged period without workers’ compensation coverage. The OIC disagrees. The OIC did restructure the fine scheme in what is section 19 of the amended rule. However, the new scheme does not eliminate a fine for employers who never had coverage in the first place. Rather, the new consolidated scheme contained in 20.1. of the amended rule, along with the new definition of “monthly base premium” in subsection 2.2. of the amended rule ensures that an employer is fined in a consistent manner, regardless as to whether their period of default was a result of defaulting on payment of an existing policy or never having had coverage in the first place. Specifically, the new language provides that an employer is fined twice the premium they would have paid for any month they are without mandatory West Virginia workers’ compensation coverage.

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 11
EMPLOYER DEFAULT, ENFORCEMENT, COLLECTIONS
AND RELATED MATTERS

Section

- 85-11-1. General.
- 85-11-2. Definitions.
- 85-11-3. Default Employer Not Permitted to Dissolve or Withdraw.
- 85-11-4. Notice to Employees of Default Employers.
- 85-11-5. Audits of Employers.
- 85-11-6. Methods of Collection of Payments and Enforcement.
- 85-11-7. Statutory Lien.
- 85-11-8. Civil Actions.
- 85-11-9. Injunctions From Carrying On Business.
- 85-11-10. Receivership and Insolvency Proceedings; Bankruptcy.
- 85-11-11. Payment Agreements.
- 85-11-12. Administrative Hearings.
- 85-11-13. Interest.
- 85-11-14. Reserved.
- 85-11-15. Criminal Penalties
- 85-11-16. Freedom of Information Act.
- 85-11-17. Placement on Workers' Compensation Default List; Due Process and Hearing.
- 85-11-18. Removal From the Default List.

85-11-~~20~~19. Uninsured Fines.

85-11-20. Employer Violator System.

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

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SERIES 11
EMPLOYER DEFAULT, ENFORCEMENT, COLLECTIONS
AND RELATED MATTERS

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§85-11-1. General.

1.1. Scope. -- This rule implements the provisions of W. Va. Code §§23-1-13; 23-2-1, 1b, 1d, 5, 5a, 5b, 5c, 5d, 8, 9, 13, 14, 15 and 17; 23-2C-19; and 33-2-22, regarding the determination of workers' compensation employer default; enforcement of compliance by employers with West Virginia's workers' compensation laws; and collection of obligations arising from those requirements and others.

1.2. Authority. -- W. Va. Code §§23-2C-19(g) and 22; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §23-2C-5(c)(2), workers' compensation rules proposed by the Commissioner and approved by the Industrial Council are not subject to legislative approval as would otherwise be required under W. Va. Code §29A-3-1, et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. --

§85-11-2. Definitions.

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

2.2. "Monthly base premium" means the product of the employer's estimated monthly payroll for each job classification and the current corresponding West Virginia National Council on Compensation Insurance, Inc. (NCCI) loss cost for each classification, without modification by any other factors such as, but not limited to, tiering, experience modification or scheduled rating.

For example, an employer's monthly payroll is \$10,000, with \$5,000 of the payroll representing job classification "A" under the current NCCI loss costs, at a rate of \$10 per \$100 of payroll, and \$5,000 of the payroll representing job classification "B" under the current NCCI loss costs, at a rate of \$5 per \$100 of payroll. The monthly base premium would be \$750 (\$10 X \$50, or \$500, for classification "A"; and \$5 X \$50, or \$250 for classification "B"). In turn, the monthly base premium would be \$750 (\$500 for classification "A" plus \$250 for classification "B").

2.3. "Default" or "default employer" means an employer that:

2.3.a. Has an outstanding balance or liability to the Old Fund;

2.3.b. Has an outstanding balance or liability to the Uninsured Employers' Fund, including owing money to the fund for benefit payments, administration costs or attorney fees as well as any fines owed to the fund for being uninsured pursuant to W. Va. Code §23-2C-8(d)(3) and this rule;

2.3.c. Fails to carry West Virginia workers' compensation coverage;

2.3.d. Is a former self-insured employer whose status has been revoked but who has remaining unsecured obligations pursuant to its previous status as a self-insured employer; or

2.3.e. Has any other outstanding obligation, balance, debt or other liability pursuant to chapter twenty-three of the West Virginia Code or rules promulgated thereunder.

2.4. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

2.5. "Employer" means either or both of the following:

2.5.a. The term "employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state, and as such is required to carry West Virginia workers' compensation coverage.

2.5.b. The term "employer" also means, for the purposes of this rule's enforcement provisions at subsection 6.1. and sections 7., 8. and 10. any owners, officers, members, partners and directors of the employer.

2.6. "Estimated monthly payroll" means:

2.6.a. If available, the estimated annual payroll for the current policy year as provided by NCCI to the Commissioner, divided by twelve;

2.6.b. If the amount described in subdivision a. of this subsection is not available, then the employer's estimated monthly payroll based on other available information, including, but not limited to, information available on wages reported through West Virginia's unemployment system.

2.7. "Commissioner" means the Insurance Commissioner of West Virginia.

2.8. "Payment" means any amount of money owed by an employer pursuant to chapter twenty-three of the West Virginia Code or any rules promulgated there under.

2.9. "Old Fund" means the fund created pursuant to W. Va. Code §23-2C-2(1).

2.10. "Self-insured" or "Self-insured employer" means an employer which is eligible and has been granted self-insured status under the provisions of W. Va. Code §23-2-9.

2.11. "Uninsured Employers' Fund" means the fund created pursuant to W. Va. Code §§23-2C-2(o) and 23-2C-8.

2.12. "West Virginia Code," "W. Va. Code" and "Code" mean the West Virginia Code of 1931, as amended.

2.13. "Workers' Compensation Default List" or "Default List," means a paper and/or electronic database maintained by the Commissioner which identifies employers who are in default. This list may be made accessible in the form of either a computerized database or other databases.

2.14. "West Virginia workers' compensation coverage" means insurance coverage an employer is required to maintain under chapter twenty-three of the West Virginia Code.

§85-11-3. Default Employer not Permitted to Dissolve or Withdraw.

3.1. The Commissioner shall not certify to the Secretary of State of West Virginia that all payments and interest due the Commissioner under chapter twenty-three of the West Virginia Code or the rules promulgated thereunder by an employer have been made until the employer cures any default or makes arrangements satisfactory to the Commissioner for that cure or until all payments due by the employer under chapter twenty-three of the West Virginia Code or the rules promulgated thereunder have been made or arranged for by agreement with the Commissioner.

3.2. Pursuant to W. Va. Code §23-2-5a, the Secretary of State shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of West Virginia or organized under the laws of any other state and admitted to do business in this state until the Secretary of State receives the subsection 3.1. certification.

§85-11-4. Notice to Employees of Default Employers.

4.1. Upon discovery that an employer is not maintaining West Virginia workers' compensation insurance, the Commissioner shall issue a written notice to the employees of that employer. The notice shall be in the form prescribed by the Commissioner.

4.2. Contents of notice. -- The notice shall inform the employees of the default of their employer and the effective date thereof. The notice shall also inform the employees of the legal consequences, as it affects the employees, of the default or termination of their employer. The notice shall also contain the following statement which shall be printed in conspicuous type: "Any person who shall, prior to the reinstatement to good standing of the said employer, as hereinbefore provided for, or prior to sixty (60) days after the posting of this notice, whichever shall first occur, remove, deface, or render illegible this notice, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined one thousand dollars (\$1,000.00)."

4.3. Posting the notice. -- The Commissioner shall arrange for the posting of the notice as described in this section in a conspicuous place at the chief works of the employer, as the same appears in the records of the Commissioner, or such other location(s) as may be deemed to provide adequate notice to employees of the employer. If the chief works of the employer cannot be found or identified, then the notice as described in this section shall be posted at the front door of the courthouse of the county in which the chief works are located, according to the Commissioner's records. A copy of the notice shall also be sent to the office of the secretary of state for publication in the State Register.

4.4. The Commissioner may require any sheriff, deputy sheriff, or other official of the state of West Virginia, who may be authorized to serve civil process, to post the notice as described in this section and to make return thereof of the fact of such posting to the Commissioner, and any failure to post any notice within ten (10) days after he or she receives the same from the Commissioner, without just cause or excuse, shall constitute a willful failure or refusal to perform a duty required of him or her by law within the meaning of W. Va. Code §61-5-28.

4.5. Fee for posting. -- Any official posting the notice as described in this section shall be entitled to the same fee as is now or may hereafter be provided for the service of process in suits instituted in courts of record in the state of West Virginia, which fee shall be paid by the Commissioner out of any funds at his or her disposal, but shall be charged by him or her against the account of the employer to whose default such notice relates.

§85-11-5. Audits of Employers.

5.1. Pursuant to W. Va. Code §§ 23-1-1b(g)(20), 23-2-2(a), and 33-2-22(a), the Commissioner has authority to perform audits of any employer in order to determine the amount of money owed to the Old Fund. The audits shall be in a manner as prescribed by the Commissioner, and employers shall be required to comply with all requirements of such audits. Any employer refusing to comply with a Commissioner audit as described in this subsection shall be deemed in default based on the estimated liability to the Old Fund as calculated by the Commissioner based on available and credible information, and shall further be subject to all enforcement provisions as contained in chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

5.2. Pursuant to W. Va. Code §§23-1-8, 23-2-2 and 33-2-22(a), the Commissioner is entitled to hold administrative hearings, conduct depositions, and issue subpoenas for production

of persons for deposition or documents for inspection in order to obtain relevant information for determination of amount owed to the Old Fund. All administrative hearings or depositions shall be convened and conducted in accordance with section 12. of this rule.

§85-11-6. Methods of Collection of Payments and Enforcement.

6.1. Following the default of an employer, in addition to the remedies described in previous sections of this rule, the Commissioner shall have available to him or her the following remedies which shall each be described more fully below:

6.1.a. Initiation of a civil action against the employer.

6.1.b. Filing of a lien or liens enforceable against all the property of the employer.

6.1.c. Initiation of an action in the Circuit Court of Kanawha County to enjoin the employer from continuing to carry on the business in which its liability was incurred or, in the alternative, to accept a bond from the employer.

6.1.d. Filing a claim in any bankruptcy proceeding or in a receivership or insolvency proceeding which involves the employer.

6.1.e. Informing the Secretary of environmental protection when an employer is in default prior to the director's issuance of a coal mining permit so that the permit may not be issued until the applicant is in compliance with chapter twenty-three of the West Virginia Code or the Rules promulgated thereunder, as provided in W. Va. Code §22-3-8.

6.1.f. Pursuant to W. Va. Code §§23-1-1b(g)(16), 23-2C-15(d), and 23-2C-19(e) and W. Va. Code of St. R. §85-32-1 et seq., informing the director, commissioner or head of any state agency when an employer is in default, so that the director may take appropriate remedial action against the employer in regard to a contract, license, permit, certificate or other authority to conduct a trade, profession or business.

6.1.g. Requesting a criminal prosecution of any person, firm, corporation or other employer whose non-compliance with chapter twenty-three of the West Virginia Code or the rules promulgated thereunder is believed to be in violation of W. Va. Code §61-3-24e and section 15. of this rule.

6.2. In addition to the other remedies set forth herein, the Commissioner may, consistent with applicable West Virginia statutory and case law, also initiate a proceeding or proceedings in the name of the state to distrain upon any personal property, including intangible property, of any default employer.

6.3. In every case noted in this section where a monetary sum is to be collected, the Commissioner shall include a demand for interest as specified in section 13. of this rule.

6.4. The remedies set forth in subsection 6.1. of this section are described in greater detail in later sections of this rule.

§85-11-7. Statutory Lien.

7.1. Pursuant to W. Va. Code §§23-2-5a(b) and 23-2C-19(f), any payment and interest thereon due and unpaid under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured constitutes a lien enforceable against all of the property of the owing employer. The property subject to the lien includes all of the employer's real estate, personal property of all types, money and combinations thereof.

7.2. In accordance with W. Va. Code §§23-2-5a and 38-10C-2, the Commissioner shall file a written notice of the lien as described in this section in the office of the clerk of the county commission of the county in which the property of the employer or lienee against whom such lien is claimed, is situate, or if the employer's or lienee's property is situated in more than one county, then in each such clerk's office in each such county. The notice shall certify the amount of money that is owed by the employer.

7.3. Pursuant to W. Va. Code §38-10C-2, the clerk or clerks of the county commission or commissions shall, upon the filing of the notice, index the notice in the judgment or tax lien docket of his or her office against the employer or lienee in favor of the state of West Virginia and the Commissioner. Upon the satisfaction of such lien, a properly acknowledged release thereof for recordation shall be delivered or mailed to the employer or lienee by the Commissioner or shall be delivered or mailed to the clerk of the county commission in the county in which the lien was filed. Such notice or notices of the lien shall be supplemented by additional notices from time to time whenever any additional liability is incurred by the employer or is determined by audit or other proceeding.

7.4. Until the lien is docketed as provided for in subsection 7.3. of this section, the lien is unenforceable against purchasers (including a lien creditor) of real estate or personal property for a valuable consideration except for such purchasers with actual notice of the Commissioner's lien. However, if a purchaser (including a lien creditor) of real estate or personal property for a valuable consideration has actual knowledge of the lien, then that lien shall be enforceable against such a purchaser even before the lien is docketed as provided for in subsection 7.3. of this section. Following the docketing pursuant to subsection 7.3. of this section, the lien is enforceable against any purchaser (including a lien creditor) with or without actual notice of the lien.

7.5. Once all amounts due from the employer are collected by the Commissioner, the Commissioner shall release the lien or liens as provided by law.

§85-11-8. Civil Actions.

8.1. The Commissioner in the name of the State may commence a civil action against a default employer to recover any payment and interest thereon due and unpaid under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured.

8.2. Pursuant to W. Va. Code §23-2-5a, if the judgment entered in a civil action as described in this section is against the defendant employer, the defendant shall pay the costs of the action. In addition, a civil action as described in this section shall be given preference on the calendar of the court over all other civil actions.

8.3. Consistent with the provisions of W. Va. Code §33-2-22 (e), the Commissioner may compromise and settle amounts due to the Old Fund or Uninsured Employer Fund if it is found to be in the best interests of the State. Any such compromise or settlement is public information.

§85-11-9. Injunctions From Carrying On Business.

9.1. Pursuant to the provisions of W. Va. Code §33-2-22(b), the Commissioner may bring an action against a default employer in the Circuit Court of Kanawha County to enjoin such default employer from continuing to carry on business.

9.2. Pursuant to the provisions of W. Va. Code §33-2-22(c), the Circuit Court of Kanawha County shall issue an injunction prohibiting the default employer from operating its business if the Commissioner proves by a preponderance of the evidence that the employer is in default status.

9.3. The Commissioner may, in the Commissioner's sole discretion, as an alternative to pursuing such an injunction as described in this section, require a default employer to file a bond in the form prescribed by the Commissioner with satisfactory surety in an amount not less than fifty percent more than the payments and interest due. The bond must be issued by a corporate surety satisfactory to the Commissioner.

§85-11-10. Receivership and Insolvency Proceedings; Bankruptcy.

10.1. In the event that a default employer owing payment and interest due thereon under chapter twenty-three of the West Virginia Code or the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, shall be operated in connection with a receivership or insolvency proceeding in any state court in this state, the court under whose direction such business is operated shall, by the entry of a proper order or decree in the cause, make provisions, so far as the assets in administration will permit, for the regular payment of such payments as the same become due.

10.2. In any such case as is described in subsection 10.1. of this section, the Commissioner may file such pleadings, motions, and other documents and take any other legal action necessary to protect the interests of West Virginia's workers' compensation market during the pendency and resolution of such case.

10.3. In the event that a default employer owing payment and interest under the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, files for or is placed in a bankruptcy proceeding under the laws of the United States, the Commissioner may become a party to such proceedings and take any and all actions needed to protect the interests of West Virginia's workers' compensation market during the pendency and resolution of the proceeding. The Commissioner may institute an involuntary proceeding against an employer in a bankruptcy court of the United States in any proper instance. All former premium tax assessments owed to the Old Fund and all surcharges and assessments owed by employers pursuant to chapter twenty-three of the West Virginia Code or the rules promulgated thereunder, including, but not limited to, the regulatory and Debt Reduction Fund surcharges and assessments pursuant to W. Va. Code §23-2C-3(f), assessments and liabilities owed to the Uninsured Employers' Fund pursuant to W. Va. Code §23-2C-8 and assessments for the Self-Insured Guaranty and Security Risk Pools as established in W. Va. Code §23-2C-1, et seq. and W. Va. Code St. R. §85-19-1, et seq., are special revenue taxes under and according to the provisions of state workers' compensation laws and are deemed to be tax claims, as priority claims or administrative expense claims according to those provisions of law provided in the United States bankruptcy code.

§85-11-11. Payment Agreements.

11.1. Any default employer may, at the discretion of the Commissioner, make application, on a form provided by the Commissioner, to enter into a payment agreement with the Commissioner which provides for payment of the debt owed to the Commissioner in installments.

11.2. As a prerequisite to entering into a payment agreement, a default employer as described in subsection 11.1. of this section may be required to make a good faith payment of ten percent (10%) of the total current outstanding liability owed or in such other amount as the Commissioner determines will ensure that the employer maintains West Virginia workers' compensation coverage and pay off its outstanding debt under the agreement.

11.3. A default employer as described in subsection 11.1. of this section who enters into a payment agreement and also provides the Commissioner with a current certificate of workers' compensation insurance shall be removed from the Default List.

11.4. The Commissioner may then delay or continue further pursuit of that remedial action if, in the Commissioner's sole discretion, delaying or continuing such action will lead to

the employer maintaining West Virginia workers' compensation coverage and paying off its debt owed under the agreement.

11.5. Permitting an employer to enter into a payment agreement is discretionary with the Commissioner. Such discretion shall be exercised with regard to the best interests of the Old Fund, Uninsured Employers' Fund and/or the self-insured community, as applicable.

11.6. The Commissioner may permit the payment of all amounts due to the Old Fund, Uninsured Employers' Fund, or owed pursuant to liabilities accrued by the employer while the employer was self-insured, or any combination thereof, upon the terms stated in a payment agreement. The Commissioner shall additionally have sole discretion in prescribing the terms and length of an agreement under this section, taking into consideration the best interests of the Old Fund, Uninsured Employers' Fund and/or the self-insured community, as applicable.

11.7. Pursuant to W. Va. Code §33-2-22(e), the Commissioner shall have authority to waive or reduce any amount owed to the Old Fund and/or Uninsured Employers' Fund. In all cases when the Commissioner agrees to waive or reduce amounts owed to the Old Fund and/or Uninsured Employers' Fund as described in this subsection, such decision shall be made consistent with the best interests of the Old Fund and/or Uninsured Employers' Fund, as applicable. Any amount waived or reduced under this section shall be noted in any payment agreement entered into pursuant to this section.

11.8. Any employer that misses a payment will be provided notice by the Commissioner of a right to cure the missed payment within twenty (20) days of the employer's receipt of such notice. If after the expiration of the right to cure period no payment is received, the payment agreement becomes null and void and the employer shall be placed on the Default List and be deemed to owe the original amount, minus any credits for amounts actually paid under the agreement prior to default on the agreement. If it is found to be consistent with the best interests of the Old Fund, Uninsured Employers' Fund and/or the self-insured community, as applicable, the Commissioner may, within his or her sole discretion, provide the employer more than twenty (20) days to cure the missed payment. Such additional notice may be provided either in the original notice of a right to cure or by way of an informal verbal agreement, to permit the employer some additional time to cure the missed payment.

11.9. The interest rate agreed to in a payment agreement shall not change over the term of the agreement.

11.10. Except as expressly provided in this section, nothing in this section shall limit the Commissioner from pursuing any other type of collection or enforcement method under chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

§85-11-12. Administrative Hearings.

All administrative hearings conducted pursuant to this rule will be held in accordance with the provisions of W. Va. Code §29A-5-1, et seq., and with the provisions of Sections 4. through 10. of 85 C.S.R. 7, "Rules for Selected Hearings."

§85-11-13. Interest.

13.1. Pursuant to W. Va. Code §23-2-13, all payments unpaid on the date on which due and payable, as prescribed by the Commissioner, shall immediately begin bearing interest. Interest shall be compounded quarterly until payment plus accrued interest is received by the Commissioner; except that future interest for payment agreements shall be calculated and provided at a simple rate of interest. Interest collected pursuant to this subsection shall be paid into the Old Fund, Uninsured Employers' Fund or Self-Insured Guaranty Risk Pool or Security Risk Pool (as established in W. Va. Code St. R. §85-19-1, et seq.), whichever is applicable.

13.2. Notwithstanding the provisions of subsection 13.1. of this section, in no event shall the rate of interest charged a political subdivision of the State or a volunteer fire department exceed ten percent per annum.

§85-11-14. Reserved.

§85-11-15. Criminal Penalties.

In addition to all other remedies available to the Commissioner, in accordance with W. Va. Code §61-3-24e, the Commissioner may elect to request prosecution of any person, firm, partnership, association, corporation or other entity who violates certain provisions of chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

§85-11-16. Freedom of Information Act.

Pursuant to the Freedom of Information Act, W. Va. Code §29B-1-1, et seq. and W. Va. Code §23-1-4(b), all of the evidence and records submitted during a hearing or proceeding under this rule, or as part of a stipulation, except insofar as those records contain confidential medical information or other information confidential to a workers' compensation claimant, employer, or other person or entity, shall be subject to public inspection and copying; except that, if under the rules of evidence certain testimony or documentary evidence may be deemed privileged or confidential and placed under seal, then upon such a ruling by the hearing officer, such testimony or documentary evidence shall not be disclosed. If the privileged or confidential information cannot be excised from a record, then the record as a whole will be deemed confidential and sealed; however, the Commissioner shall release in its place a statement explaining in detail the basis for the withholding of the record.

§85-11-17. Placement on Workers' Compensation Default List; Due Process and Hearing.

17.1. When the Commissioner is made aware that an employer is in default, the Commissioner shall send the alleged default employer a notice informing the employer of the

circumstances causing the employer to be in default and that the employer will be placed on the Default List within fifteen (15) days of the date on the letter. The notice shall also inform the employer that the employer may request an expedited administrative hearing before the Commissioner if the employer believes that the impending action by the Commissioner is factually or legally erroneous.

17.2. A request for an expedited administrative hearing, as described in subsection 17.1. of this section, shall clearly identify why the employer believes the Commissioner's impending action of placing it on the Default List is legally or factually erroneous. Upon receiving the request, the Commissioner shall, within ten (10) business days, hold a hearing which shall be conducted in accordance with the provisions of article five [§29A-5-1, et seq.], chapter twenty-nine-a of this code and W. Va. Code St. R. §85-7-4 through 10. A continuance shall only be granted upon the showing of good cause. An appeal from a final decision of the Commissioner shall be taken in accordance with the provisions of articles five and six [§29A-6-1, et seq.] of said chapter: *Provided*, That all appeals shall be taken to the Circuit Court of Kanawha County.

17.3. If an employer files a request for an expedited hearing pursuant to subsections 17.1. and 17.2. of this section, the fifteen (15) day time frame for placing the employer on the Default List shall be stayed until the Commissioner's final order upon the expedited hearing is issued, the request is withdrawn or the matter is otherwise resolved.

17.4. If the final decision of the Commissioner following the hearing upholds the original decision to place the employer on the Default List, the employer shall immediately be placed on the Default List.

17.5. The administrative appeal process described in this section does not interfere with or toll a workers' compensation carrier's right to terminate the employer's West Virginia workers' compensation coverage. The workers' compensation carrier's right to terminate an employer's West Virginia workers' compensation coverage is based upon the provisions of the insurance policy and the applicable law in chapters twenty-three and thirty-three of the West Virginia Code and the rules promulgated thereunder.

§85-11-18. Removal From the Default List.

18.1. The Commissioner shall remove the employer from the Default List if an employer has met all of its legal, fiscal or other obligations pursuant to chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, including, but not limited to, providing proof of current West Virginia workers' compensation coverage and paying all amounts owed under chapter twenty-three of the West Virginia code.

18.2. An employer on the Default List shall be permitted at any time to make a written request to the Commissioner for removal from the Default List: *Provided*, That such request is accompanied by evidence not previously submitted to the Commissioner which indicates that the employer making the request has met its obligations described in subsection 18.1. of this section and therefore is entitled to be removed from the Default List.

18.3. Employers may file a petition with the Commissioner requesting an administrative hearing before the Commissioner if they believe they should be removed from the Default List: *Provided*, That the Commissioner reserves the right to summarily deny an employer's petition for a hearing if the Commissioner determines that the employer presented no new evidence to the Commissioner in support of its written request for removal, is presenting evidence of no probative value or is otherwise making a frivolous request.

§85-11-19. Uninsured Fines.

19.1. Any employer that fails to maintain West Virginia workers' compensation coverage for any period, regardless of whether the employer has such coverage at the time the uninsured period is discovered, shall, subject to the limitations of subsection 19.2. of this section, be fined by the Commissioner an amount equal to twice the amount of monthly base premium as calculated at the beginning of the uninsured period for each month, or portion of each month, the employer is or was without West Virginia workers' compensation coverage.

19.2. Pursuant to W. Va. Code §23-2C-8(d)(3), no fine imposed in this section for a single continuous period of failing to maintain West Virginia workers' compensation coverage shall exceed ten thousand dollars (\$10,000). However, if an employer procures West Virginia workers' compensation coverage following a period of failing to maintain such coverage and then thereafter again fails to maintain such coverage, they will again be subject to a fine pursuant to subsection 19.1. of this section of up to ten thousand dollars (\$10,000).

§85-11-20. Employer Violator System.

20.1. Every employer subject to placement on the Default List shall also be placed in the Employer Violator System {W. Va. Code §23-1-1b(g)(25)}, and shall remain in the Employer Violator System until such time as the employer is removed from the Default List.

20.2. All individuals who own, are officers, members or partners of, control, have a 10% ownership interest in, or are otherwise deemed to have a substantive or active ownership interest in an employer company which is on the Default List shall be placed in the Employer Violator System, and shall remain in the Employer Violator System until such time as the employer is removed from the Default List.