

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

2013 APR 25 AM 10:00

STATE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Workers' Compensation Board of Review TITLE NUMBER: 102

RULE TYPE: Procedural CITE AUTHORITY: West Virginia Code § 23-5-11(n)

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Rules of Practice and Procedure

IF NO, SERIES NUMBER OF RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON June 7, 2013 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Workers' Compensation Board of Review

P. O. Box 2628

Charleston, WV 25329-2628

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


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Earl Ray Tomblin
Governor

W. Jack Stevens
Chairperson

Rita Hedrick-Helmick
Member

James D. Gray
Member

Workers' Compensation Board of Review

Offices located at 1207 Quarrier Street, Suite 304, Charleston
All communications should be addressed to the Board of Review
at the address shown at the bottom of this page.
an equal opportunity/affirmative action employer

April 24, 2013

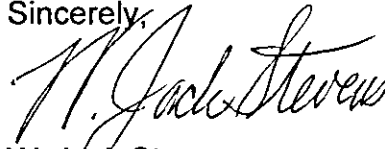
The Honorable Natalie Tennant
West Virginia Secretary of State
Bldg. 1, Suite 157-K
1900 Kanawha Blvd. East
Charleston, WV 25305-0770

Re: Approval of Filing

Dear Secretary Tennant:

Enclosed is the Workers' Compensation Board of Review's proposed procedural rule and necessary documents, which have been prepared pursuant to the authority set forth in West Virginia Code § 23-5-11(n). As Chairman of the Board of Review, I give my consent and approval to the filing of this procedural rule.

Sincerely,



W. Jack Stevens
Chairman

WJS:bms
Enclosures

Earl Ray Tomblin
Governor

W. Jack Stevens
Chairperson

Rita Hedrick-Helmick
Member

James D. Gray
Member

Workers' Compensation Board of Review

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MEMO

WJS

FROM: Workers' Compensation Board of Review
W. Jack Stevens, Chairperson

TO: The Honorable Natalie Tennant, Secretary of State

DATE: April 24, 2013

SUBJECT: Summary of proposed changes to the Workers' Compensation Board of Review's Procedural Rule, 102 CRS 1

The Workers' Compensation Board of Review's Procedural Rule, 102 CSR 1, was effective on December 31, 2004. Since that time, changes have been made to the West Virginia Workers' Compensation statutes (W. Va. Code Chapter 23), which necessitate changes in the Board's Rule. Also, some current procedures, which were not in existence in 2004, need to be included in the Board's Rule. Previously, appeals were filed with the Office of Judges, but the current statute specifies that appeals are filed with the Board of Review. W. Va. Code §23-5-9(f) was added, which provides for a motion for stay of an order from the Office of Judges. The procedure for requesting a stay is set forth in the Insurance Commissioner's Rules (85 CSR 1 §18). When the Board grants a motion for stay, the Board modifies the briefing schedule in order to shorten the appeal time and reduce the risk of harm to the claimant.

As a result of the electronic document management system, the Board of Review has access to the same documents that were submitted to the Office of Judges; therefore, parties do not need to send evidence to the Board. The Board is a reviewing body and may not consider evidence that was not considered by the Office of Judges except in support of a motion to remand.

The Board currently sends documents to the Workers' Compensation Litigation Division by interdepartmental mail. The Board will permit the WC Litigation Division to submit briefs on behalf of the Offices of the Insurance Commissioner to the Board by interdepartmental mail.

The Board encourages parties to pursue settlements. When the parties enter into settlement negotiations while an appeal is pending, the Board dismisses the appeal without prejudice for 180 days to allow the parties to finalize the settlement agreement. If a settlement is not reached, the appellant submits a motion to reinstate the appeal.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules of Practice and Procedure

Type of Rule: ☐ Legislative ☐ Interpretive ☒ Procedural

Agency: Workers' Compensation Board of Review

Address: P. O. Box 2628
Charleston, WV 25329-2628

Phone Number: 304-558-5230 Email: beth.suter@wvinsurance.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure
will have on costs and revenues of state government.

None

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of
Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: Rules of Practice and Procedure

Rule Title:

Rules of Practice and Procedure

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

None

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

None

Date:

4/24/13

Signature of Agency Head or Authorized Representative

W. Jack Stevens

TITLE 102
PROCEDURAL RULE
WORKERS' COMPENSATION BOARD OF REVIEW

SERIES 1
RULES OF PRACTICE AND PROCEDURE

2013 APR 25 AM 10:00

STATE

§102-1-1. General.

1.1. Scope. -- This procedural rule is intended to set forth the procedures for administrative appeals that are conducted by the West Virginia Workers' Compensation Board of Review pursuant to W. Va. Code §§23-5-10, 23-5-11 and 23-5-12.

1.2. Authority. -- W. Va. Code §23-5-11.

1.3. Filing Date. -- ~~December 1, 2004.~~

1.4. Effective Date. -- ~~December 31, 2004.~~

1.5. ~~Repeal and Replacement.~~ ~~This rule repeals and replaces "The Rules of Practice and Procedure of the Workers' Compensation Appeal Board." This rule supersedes the rule promulgated with an effective date of December 31, 2004.~~

§102-1-2. Purpose.

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

§102-1-3. Appeal Process; Generally.

3.1. Right to Appeal. Any employer, claimant, dependent, ~~or the Workers' Compensation Commission~~ private insurance carrier, or the Offices of the Insurance Commissioner who feels aggrieved by a final decision by an Administrative Law Judge, shall have the right of appeal to the Board of Review for a review of the final decision pursuant to W. Va. Code § 23-5-10 and § 23-5-12.

3.2. Representation by Attorney. Claimants, dependents, and employers who are

natural persons may proceed with or without an attorney. An incorporated employer or an employer that is not a natural person may be represented only by an attorney duly licensed or authorized to practice law in the State of West Virginia.

3.3. Copies to All Parties. Copies of all documents or letters sent to the Board of Review must be sent to all parties. If a party is represented by an attorney, the copy is sent to the attorney instead of the party. It must be noted on the document or letter that copies were sent to all parties. Do not send copies of these documents to the Office of Judges. Parties do not need to serve the Board of Review with copies of documents that are submitted to the Supreme Court.

3.4. Office of Judges' Interlocutory Rulings. Office of Judges' rulings that are interlocutory, such as rulings on motions, are not appealable. Those issues may be raised in an appeal from the final order issued by the Office of Judges.

§102-1-4. Initiation of the Appeal Process.

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

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

4.3. 2. Form of Notice. The Notice of

~~Appeal to be filed with the Office of Judges directed to the Board of Review~~ shall be in form or effect as the "Notice of Appeal to the Workers' Compensation Board of Review", Form BOR-1, as contained in Appendix 102-1-A of this rule and as found on the Board's website (<http://www.wvinsurance.gov/bor/BoardofReview.aspx>).

~~a. The notice of appeal shall state the ground of review and whether oral argument is requested.~~

4.4. 3. Number and Size of Notice and Attachments of Appeal. One (1) copy of the Notice of Appeal shall be filed with the ~~Office of Judges~~ Board of Review. The notice shall be written or typed on 8½" x 11" paper. A copy of the Administrative Law Judge's order that is the subject of the appeal shall be ~~attached to~~ enclosed with (not stapled) the Notice of Appeal. In addition, in Occupational Pneumoconiosis claims, if the appeal involves an interlocutory order (e.g., non-medical question, presumption, compensability, etc.), a copy of the interlocutory order must be ~~attached to~~ enclosed with the Notice of Appeal, along with a copy of the final order. No other documents shall be submitted with the Notice of Appeal. The Board has access to the same documents that are in the record before the Office of Judges. The Board may not consider evidence that was not considered by the Office of Judges except in support of a motion to remand.

§102-1-5. Briefs.

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

be considered timely if it is filed with the Board of Review on the next business day following the date due. The timeframes set forth herein may be modified by the Board.

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

5.2. Extension of Time Period for Filing Briefs.

a. The Board may grant, for good cause shown and upon written motion, an extension of time for filing a brief for a period of up to thirty (30) days. Absent extraordinary circumstances, the written motion for extension of time must be received by the Board at least seven (7) days prior to the original due date of the brief. A copy of the motion must be served upon the ~~opposing other~~ parties. For extensions of time, good cause shall be strictly construed as provided by W. Va. Code § 23-5-13.

b. If the appellant seeks an extension of time for filing a brief pending settlement negotiations, the Board may dismiss the appeal without prejudice while settlement negotiations are pending. If settlement is not reached, the appellant may submit a motion to reinstate the appeal and submit the brief within the time set forth in the Board's order of dismissal without prejudice.

5.3. Failure to File Brief.

If any appellant represented by counsel fails to file a brief within the time period prescribed

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

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

Filing of the briefs with the Board may be accomplished by mail and interdepartmental mail in accordance with subsection 5.1 of this rule, or by personal delivery to the Board. ~~Filing with the Commission and/or the Office of Judges will not be considered filing with the Board. Faxed copies will not be accepted.~~

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

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

5.6. ~~Attachments. Implementation of the Electronic Document Management System and changes to the Procedural and Time Standards Rules of the Office of Judges relative to "the designated record" eliminates the need to attach medical and vocational reports or testimony relied upon. Evidence and other Documents. Evidence and other documents shall not be enclosed with or attached to the brief. The Board has access to the same evidence and other documents that are in the record before the Office of Judges. The Board may not consider evidence that was not considered by the Office of Judges except in support of a motion to remand.~~

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

5.8. Form of Brief. Each brief served and filed shall be written or typed on 8½" x 11" paper. Text shall be double spaced using no smaller than ~~12 point spaced type and shall produce a clear black image on white paper. 12-point proportionally spaced or 11-point non-proportionally spaced type, producing a clear back image on white paper.~~ The brief shall not be stapled.

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

1. The date of the decision of the Office of Judges, which is the subject of the appeal, and the ruling made by the Office of Judges;

2. The issues on appeal and requested relief;

3. A brief statement of facts including the nature and extent of the injury, causation, date of onset of disability, procedural history, etc.;

4. Conclusions of law including citation of authorities;

5. Argument; and

6. Conclusion.

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

1. Any exceptions to the statement of fact in appellant's brief and any restatement of the facts according to the appellee's theory of the case;

2. Conclusions of law including citation of authorities;

3. Argument; and

4. Conclusion.

5.9. Reply Briefs. Unless requested by the Board, or unless leave of a party is granted by the Board, reply briefs are not necessary and will not be considered.

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

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

§102-1-6. Hearings and Decisions.

6.1. Review by the Board. The Board shall meet as often as necessary to hold hearings and decide appeals, at such times and places as the ~~chairman~~ chairperson may determine. Two members shall be present in order to conduct hearings or other business. All decisions of the Board of Review shall be determined by a majority of the members of the Board.

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

6.3. Request for Oral Argument. After expiration of the time for filing briefs, the Board shall notify each party that the appeal is ready for decision by the Board. The notice shall inform the parties that each party who plans to present an oral argument must complete the bottom section of the notice and send a copy to the Board and the other parties. The request for

oral argument must be received by the Board within ten (10) days from the date of the Board's notice. The appeal will be decided by the Board without an oral argument unless this request is timely received. ~~This form must be submitted by the party who is requesting oral argument even if the party requested oral argument on the Notice of Appeal.~~ If one party returns the form indicating that the party plans to present oral argument, other parties may appear to respond to the oral argument. A party who is represented by counsel or a party that may only be represented by counsel may not present an oral argument or respond to an oral argument if the party did not file a brief.

a. If the request for oral argument is timely received, the Board shall schedule the appeal for oral argument and shall notify the parties of the date and time for the hearing. At the Board's discretion, the oral argument may be scheduled as a telephone conference call.

b. Each party participating in oral argument will be allotted a maximum of fifteen (15) minutes.

c. Notice of oral argument will be sent by the Board to all parties and counsel of record.

d. If the party who requested oral argument decides that oral argument is no longer needed, that party must contact the Board in writing or by telephone at least 48 hours before the hearing. The hearing will not be cancelled unless the Board verifies that all parties are in agreement that a hearing is not necessary.

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

a. Motions for continuance shall be filed at least fourteen (14) days prior to the commencement of the oral argument. If the motion is filed less than fourteen (14) days

before the hearing and there is no agreement to a continuance, the motion must also include good cause for why the motion was filed late.

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

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

§102-1-7. Motions.

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

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

~~7.3. Motion to Dismiss Based on Office of Judges Granting Reconsideration. When an appeal is filed with the Board of Review pending receipt of a decision by the Office of Judges on a motion for reconsideration, and the Office of Judges grants the motion for reconsideration by vacating or reversing its initial decision or otherwise, the appellant shall notify the Board in writing. The Board will dismiss the appeal as moot. Any objection by a responding party to the action of the Office of Judges in reconsidering its decision may be presented to the Board by appeal to the final decision of the Office of Judges.~~

7.3. Motion to Dismiss Appeal Based on Office of Judges' Order that Grants Reconsideration, Vacates, Sets Aside, or Corrects the Prior Decision. When an appeal is filed with the Board of Review and then the Office of Judges reconsiders, vacates, sets aside,

or corrects the initial decision, the appellant shall notify the Board in writing. The Board will dismiss the appeal as moot.

§102-1-8. Stay of Orders from the Office of Judges.

a. Procedures regarding stays are set forth in the Workers' Compensation Rules of the West Virginia Insurance Commissioner, 85 CSR 1 §18.

b. Documents shall not be attached to the motion for stay. The Board has access to the same documents that are in the record before the Office of Judges. The Board may not consider evidence that was not considered by the Office of Judges except in support of a motion to remand.

c. If the Board grants a motion for stay, the Board may modify the briefing schedule as provided in § 5.1.

§102-1-8. 9. Settlements and Stipulations.

~~8.1. 9.1. Settlements. The parties are encouraged to pursue settlements in accordance with the provision of W. Va. Code §23-5-7. Upon joint motion of the parties, the Board may extend the timeframes pending settlement negotiations or review by the Office of Judges of a settlement agreement.~~

9.2. If a settlement is reached, the parties shall notify the Board in writing, and the Board will dismiss the appeal.

8.2. 9.3. Stipulations. The parties are requested to confer to determine whether there are any facts or stipulations upon which they can agree. The stipulations shall be provided to the Board within the timeframe for filing the briefs. Counsel must set forth that he/she is authorized by the other parties to submit the stipulations. Some examples follow. If a party requests that the claim be remanded for consideration of a medical report, and the other parties agree that a remand is warranted, the parties shall notify the Board of their position. If a question has been raised regarding the timeliness of an appeal, and the parties agree that this is not an issue, the parties shall inform the Board. If the parties

agree that a subsequent order has rendered the appeal moot or that a mandate from the West Virginia Supreme Court of Appeals necessitates a specific action, the parties shall notify the Board.

§102-1-9, 10. Application of Rules.

These rules shall apply to all cases before the Board, including those cases pending before the Board as of the effective date of this rule. The Board may, by order, modify the application of these rules to cases pending at the time of approval to prevent manifest injustice.

Appendix 102-1-A

BoR-1

NOTICE OF APPEAL TO THE
WORKERS' COMPENSATION BOARD OF REVIEW

Claim No. _____

Case Style _____

_____ vs. _____

Appellant: _____ Claimant _____ Employer _____ Commission _____ (Please circle)

The appellant is aggrieved by and appeals from the decision of Administrative Law Judge attached dated _____

Ground for review: _____

Oral argument requested: _____ Yes _____ No _____ (Please circle)

Date _____

_____ Appellant

_____ Address

_____ Counsel

_____ Address

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

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

Appendix 102-1-A

BOR-1

NOTICE OF APPEAL TO THE
WORKERS' COMPENSATION BOARD OF REVIEW

JCN: _____

Case Style _____

vs. _____

Appellant (Party submitting the appeal): Claimant Employer Offices of the Insurance Commissioner
(Please circle)

The appellant is aggrieved by and appeals from the decision of Administrative Law Judge enclosed dated
_____.

For OP claims in which the appeal relates to the non-medical issue, an appeal may be filed if the claim was rejected or if the permanent partial disability issue was made final by claims administrator's order that was not protested, or by ALJ Decision. In that case, enclose the final permanent partial disability order, also.

Date _____

Signature of Appellant/Counsel for Appellant

Print Name of Signature Above

Address of Signature Above

A copy of the relevant order(s) must be enclosed (not stapled).

NOTE: One (1) copy of this or a similar form of notice must be filed with the Workers' Compensation Board of Review within thirty (30) days after receipt of notice of the Administrative Law Judge's final action complained of or, in any event, regardless of notice, within sixty (60) days after the date of the action complained of as set forth in W. Va. Code § 23-5-10 and § 23-5-12. Copies must be sent to all parties/attorneys.

Mail to: Workers' Compensation Board of Review
P. O. Box 2628
Charleston, WV 25329-2628

Copies were sent to: _____

