



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Workers Compensation

TITLE-SERIES: 85-12

RULE TYPE: Legislative Exempt Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: Compromise & Settlement of Workers' Compensation Issues

CITE STATUTORY AUTHORITY: W. Va. Code §§23-2C-5(c)(2); 23-2C-22; 33-2-10(b); 33-2-20(a); 23-4-1 et seq.; 23-5-1 & 23-5-7

COMMENTS LIMITED TO:

Oral and Written

DATE OF PUBLIC HEARING: 09/19/2019 1:00 PM

LOCATION OF PUBLIC HEARING:

WV Offices of the Insurance Commissioner, 900 Pennsylvania Avenue, Lottery Bldg., 9th Floor, Room 912, Charleston, WV

DATE WRITTEN COMMENT PERIOD ENDS: 09/19/2019 5:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

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PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This rule governs the compromise and settlement of workers' compensation issues pursuant to W. Va. Code §23-5-7, and establishes a consistent process to govern the settlement of these workers' compensation issues.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

Title 85, Series 12 was last amended in 2006. It currently requires amendment to reflect 2015 and 2019 statutory changes to W.Va. Code § 23-5-7 regarding the compromise and settlement of workers compensation claims. Presently, the rule states that the claimant and the insurer, self-insured employer or commission may negotiate and settle all issues in a claim, except for medical benefits for non-orthopedic occupational disease claims. This is inaccurate. In 2015, W.Va. Code § 23-5-7 was amended to permit claimants to settle medical benefits for non-orthopedic occupational disease claims if the claimant is represented by legal counsel. In 2019, Senate Bill 531 further amended W.Va. Code § 23-5-7 to state that for the purposes of compromise and settlement, the term non-orthopedic occupational disease claim does not include an occupational hearing loss or hearing impairment claim.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

This rule, along with Senate Bill 531 (2019) may result in modest administrative savings to various workers' compensation funds administered by the State, but the potential savings is impossible to predict at this time.

B. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

None

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2019 Increase/Decrease (use "-")	2020 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Allen R Prunty -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 85
EXEMPT LEGISLATIVE RULE
WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 12
COMPROMISE & SETTLEMENT OF WORKERS' COMPENSATION ISSUES

§85-12-1. General.

1.1. Scope. -- These rules shall govern the compromise and settlement of workers' compensation issues pursuant to W. Va. Code §23-5-7.

1.2. Authority. -- W. Va. Code §§23-2C-5(c)(2); 23-2C-22; 33-2-10(b); 33-2-20(a); 23-4-1 et seq.; 23-5-1; 23-5-7. Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), rules adopted by the industrial council and the Insurance Commissioner 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. -- ~~June 19, 2006.~~

1.4. Effective Date. -- ~~July 19, 2006.~~

§85-12-2. Purpose.

The purpose of this rule is to establish a consistent process to govern the settlement of workers' compensation issues.

§85-12-3. Definitions.

As used in this legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. "Insurance Commissioner" means the Insurance Commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code, or any designated third-party administrator of the Insurance Commissioner.

3.2. "Industrial Council" means the industrial council created pursuant to the provisions of W. Va. Code §23-2C-5.

3.3. "Orthopedic occupational disease" means an occupational disease that involves the musculoskeletal system as it functions for the purpose of mobility. The musculoskeletal system includes the following component parts: (1) bone(s); (2) muscle(s); (3) tendon(s); (4) ligament(s); and (5) nerve(s). An orthopedic occupational disease may affect one or more component parts of the musculoskeletal system.

3.4. "Nonorthopedic occupational disease" is an occupational disease that is not an orthopedic occupational disease. For the purposes of this rule, the term "nonorthopedic occupational disease claim" does not include an occupational hearing loss or hearing impairment claim.

3.5. "Occupational exposure injury" means a one-time, limited-duration hazardous exposure that creates an immediate acute pathophysiologic change.

3.6. "Occupational disease," as further defined in W. Va. Code §23-4-1(f), is related to prolonged hazardous exposure and creates chronic pathophysiologic changes that develop over time and that are more likely to result in prolonged sequelae and/or permanent physical impairment.

3.7. "Private carrier" means any insurer authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.8. "Self-insurer" or "self-insured employer" mean an employer who is eligible and has been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.9. "Review process" refers to the period between the identification of a potential claim and the final closure of the claim pursuant to the statute.

3.10. "An employer that 'is not active in the claim'", as described in W. Va. Code §23-5-7, means all employers other than those employers that have been granted self-insured status pursuant to W. Va. Code §23-2-9: Provided, That the role of an insured employer to participate in the settlement of a workers' compensation claim shall be controlled by the terms of the workers' compensation insurance policy.

§85-12-4. Parties.

Pursuant to the requirements of W. Va. Code §23-5-7 and the regulations herein set forth, the claimant and the Insurance Commissioner, other private insurance carriers, or self-insured employer, whichever is applicable, may negotiate a settlement of any and all issues in a claim or claims, ~~except for medical benefits for nonorthopedic occupational disease claims, pursuant to the requirements of W. Va. Code §23-5-7 and the regulations herein set forth~~ provided that in the settlement of medical benefits for nonorthopedic occupational disease claims, the claimant shall be represented by legal counsel. An insured employer is permitted to participate in the settlement of a claim only to the extent that the employer is permitted to do so under the terms of the applicable workers' compensation insurance policy.

§85-12-5. Issues Subject to Settlement.

If the claim is in the review or appellate process, all claim issues, ~~except for medical benefits for non-orthopedic occupational disease claims,~~ may be settled, even though the issues may not be currently contested. These issues include, but are not limited to, medical benefits, temporary total disability, temporary partial disability, permanent partial disability, permanent total disability, vocational rehabilitation and any other issues within the settlement provisions of W. Va. Code §23-5-7.

§85-12-6. Manner of Payment.

The parties to any settlement may arrange for any amount to be paid to the claimant or for the benefit of the claimant in a lump sum or in incremental payments or in any manner as agreed upon by the parties. If no mention is made in the settlement agreement regarding a permanent disability percentage, the claim record will not reflect a percentage for the settlement award.

§85-12-7. Dependent's Benefits.

Except in cases where the claimant has previously been granted a permanent total disability award, dependents are not entitled to one hundred four (104) weeks of benefits as set forth in W. Va. Code §23-4-10 if the agreement is silent as to the claimant's entitlement to a permanent total disability award.

§85-12-8. Settlement Not to be Considered an Admission Against Interest.

The terms of a settlement agreement shall not constitute an admission against interest by any party. All communications and correspondence between the parties during settlement negotiations are confidential and may not be used against a party if a settlement is not reached.

§85-12-9. Effective Date of Settlement.

Unless otherwise agreed upon by the parties, the effective date of a settlement shall be the date the agreement is executed by the claimant and the Insurance Commissioner, private insurance carrier, or self-insured employer, whichever is applicable.

§85-12-10. Minor Dependents and Claimants.

In any case in which a surviving dependent infant may be entitled to receive the balance of a permanent partial disability award due to the death of a claimant before such award was paid in full or in any case in which the claimant is an infant, the legal guardian of such infant may negotiate a settlement of such claim with the Insurance Commissioner, private insurance carriers, and self-insured employers, whichever is applicable. The legal guardian shall proceed as set forth in W. Va. Code §44-10-14. The appointment of said guardian shall be done as set forth in W. Va. Code §44-10-1 et seq. No bond shall be required of said guardian by the Insurance Commissioner in addition to that required by the appointment of said guardian or approval by the circuit court of any settlement pursuant to the provisions of W. Va. Code §44-10-1 et seq.

§85-12-11. Death of Claimant.

Unless otherwise agreed upon by the parties, should a claimant to whom an award has been made pursuant to a settlement die, the unpaid balance of the award shall be paid to the claimant's dependents as defined in W. Va. Code §23-4-10, if any. The payment shall be made in the same installments which would have been made to the claimant if living, but, unless otherwise specified in the settlement agreement, no payment shall be made to a surviving spouse of the claimant after his or her remarriage and such liability shall not accrue to the estate of such claimant and shall not be subject to any debts or charges against the estate.

If the claimant dies while the settlement is pending and the claimant is survived by dependents, the settlement may continue as if the death had not occurred. The payment shall be made to the dependents.

§85-12-12. Deductions From Settlement Awards.

12.1. Pursuant to W. Va. Code §23-4-18, any amounts owed for child or spousal support will be withheld from settlement payments.

12.2. Overpayments will be deducted pursuant to W. Va. Code §§23-4-1c and 23-4-1d, unless otherwise agreed upon by the parties in the agreement.

12.3. Any award of monetary benefits entered by the office of judges, the Appeal Board or the Supreme Court of Appeals of West Virginia after the date the settlement agreement was signed by the necessary parties shall be deducted from the agreed upon settlement amount: Provided, That the deduction in this subsection can only be applied for amounts of award(s) of monetary benefits which involve the same issue(s) that the settlement involved, or if the settlement was a full and final settlement of all issues involved in the claim. If the amount of any such award is greater than the agreed upon settlement amount, the claimant's recovery shall be limited to the amount specified in the settlement agreement.

§85-12-13. Settlement Terms.

Under the terms of the agreement, the claimant shall be provided five (5) business days to revoke the executed settlement agreement. In addition and in accordance with the provisions of W. Va. Code §23-5-7, each settlement agreement shall provide the toll free number of the West Virginia State Bar.

§85-12-14. Insurance Commissioner Review.

14.1. In accordance with the provisions of W. Va. Code §23-5-7, the Insurance Commissioner may review any workers' compensation settlement entered into between an unrepresented claimant and the Insurance Commissioner, private insurance carriers, or self-insured employer, and may declare any such settlement void if the Insurance Commissioner determines the settlement to be unconscionable pursuant to the criteria set forth in subsection 14.2 of this section.

14.2. A workers' compensation settlement shall be considered unconscionable, and therefore be declared void as against public policy, if it is found to constitute a gross miscarriage of justice or if the terms of the settlement shock the conscience.

Criteria to be considered by the Insurance Commissioner in determining whether a settlement is unconscionable include, but are not limited to:

14.2.a. The relative position of the parties involved in the settlement at the time the settlement was entered into;

14.2.b. The adequacy of the bargaining position of the parties at the time the settlement was entered into;

14.2.c. The meaningful alternatives available to the claimant at the time the settlement was entered into;

14.2.d. The existence of specific unfair terms in the settlement agreement;

14.2.e. The nature of the entire agreement;

14.2.f. Whether the claimant was provided ample opportunity to read and review the settlement agreement and/or whether the settlement agreement was read to the claimant;

14.2.g. Whether the claimant was not informed of his ability to obtain a lawyer to assist in the review of the agreement;

14.2.h. Whether any of the material terms of the settlement agreement were not conspicuous;

14.2.i. The percentage of total benefits provided for under the settlement terms which have actually been received by the claimant when the claimant requested the settlement be reviewed; and

14.2.j. The time that has elapsed between the time the settlement was entered into and the time the claimant requested the settlement be reviewed.

14.3. All workers' compensation settlements are presumed not to be unconscionable. The claimant shall at all times have the burden of proving that a settlement agreement is unconscionable. The facts that the terms of a workers' compensation settlement are such that the claimant may not have received the same amount of benefits which he would have received under chapter twenty-three of the West Virginia Code, that the claimant may have been able to obtain more benefits had the claimant chose to not enter into the

settlement, or that the claimant's injury or occupational disease has unexpectedly progressed or become worse since the time of the settlement was entered into are not sufficient to render a settlement unconscionable. Rather, the claimant must prove the settlement was unconscionable based on the criteria and standards set forth in subsection 14.2 of this section.

14.4. Procedure for review.

14.4.a. Any claimant who believes that a settlement entered into while the claimant was unrepresented by counsel is unconscionable may, within one hundred-eighty (180) calendar days of the date of the settlement, file with the Insurance Commissioner, on a form prescribed by the Insurance Commissioner, a request for review of settlement. The one hundred-eighty (180) day time limitation is jurisdictional, and a claimant may under no circumstances have a settlement reviewed beyond the time limitation: Provided, That a claimant may, within one hundred-eighty (180) calendar days of July 19, 2006 request a review of any settlement entered into with the former Workers' Compensation Commission, self-insured employer or a private carrier between January 29, 2005 and July 19, 2006.

14.4.b. Following the receipt of a request for settlement review, the Insurance Commissioner will then forward the request to a hearing examiner. The hearing examiner shall permit all parties involved in the disputed settlement to present, as part of the record, written argument and evidence as to each party's position regarding the settlement. Additionally, each party shall be permitted to request a hearing before the hearing examiner in regard to the settlement review, with the opportunity to present at the hearing argument and evidence regarding the settlement. The hearing examiner shall have broad discretion in regard to the scope of evidence and discovery, if any, permitted in conjunction with such hearings and the settlement review process in general. Hearings shall otherwise be in accordance with the provisions of Sections 4 through 10 of 85 CSR 7.

14.4.c. Within forty-five (45) days after the request for review is submitted, the hearing examiner shall submit to the Insurance Commissioner factual findings, legal conclusions and a proposed decision either affirming the settlement or declaring the settlement void due to it being unconscionable: Provided, That upon request of one of the involved parties, the hearing examiner may, for good cause, extend the settlement review period for a period of an additional forty-five (45) days.

14.4.d. Upon receipt of the hearing examiner's recommended decision, the Insurance Commissioner shall then either enter an order consistent with the hearing examiner's recommended decision or an order based on a rejection or modification of the hearing examiner's decision. To the extent that the Insurance Commissioner rejects or modifies the recommended decision of the hearing examiner, the Commissioner shall furnish his or her own findings of fact and conclusions of law.

14.4.e. A copy of the final order or decision of the Insurance Commissioner shall be served upon each involved party, or if a party is represented by counsel, its attorney of record. Service shall occur in person or by certified mail.

14.5. Any aggrieved party shall have the right to appeal the order of the Insurance Commissioner to Circuit Court under the provisions of W. Va. Code §29A-5-4.

§85-12-15. Severability.

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