



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

2/23/2022 3:30:05 PM

Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Workers Compensation Board Of Review

TITLE-SERIES: 102-01

RULE TYPE: Procedural Amendment to Existing Rule: Yes Repeal of existing rule: Yes

RULE NAME: Procedural Rule - Workers' Compensation Board
of Review

CITE STATUTORY AUTHORITY: 23-5-11a(j) and (m)

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 03/25/2022 5:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Beth M Suter

ADDRESS: PO Box 2628

Charleston, WV 25329-2628

EMAIL: beth.m.suter@wv.gov

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:

These Procedural Rules shall govern the initiation and conduct of litigation in contested Workers Compensation claims before the Workers Compensation Board of Review.

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

Per legislation, as of 7/1/22, the Board of Review's functions will change, and protests from claim administrator's orders will be submitted to the BOR instead of appeals from Office of Judges' decisions. As of 10/1/22, the OOJ will cease to exist.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

N/A

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

N/A

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

N/A

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2022 Increase/Decrease (use "-")	2023 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues			

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

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

Yes

Beth M Suter -- 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 102
PROCEDURAL RULE
WORKERS' COMPENSATION BOARD OF REVIEW

SERIES 1
RULES OF PRACTICE AND PROCEDURE AND LITIGATION OF PROTESTS

§102-1-1. General.

1.1. Scope. -- These Procedural Rules shall govern the initiation and conduct of litigation in contested Workers' Compensation claims before the Workers' Compensation Board of Review.

1.2. Authority. -- W. Va. Code §23-5-11a(j) and (m).

1.3. Filing Date. --

1.4. Effective Date. --

1.5. This procedural rule repeals and replaces 102CSR1, Rules of Practice and Procedure, effective August 1, 2013.

§102-1-2. Index.

102-1-1. General

102-1-2. Index

102-1-3. Definitions

102-1-4. Purpose

102-1-5. Representation of Parties

102-1-6. Litigation Process

102-1-7. Evidence: Exchange and Filing

102-1-8. Administrative Hearings Procedures, Generally

102-1-9. Expedited Hearings

102-1-10. Failure to Prosecute Protest

102-1-11. Occupational Pneumoconiosis

102-1-12. Motions, Objections and Correspondence

102-1-13. Depositions

102-1-14. Adding or Dismissing Chargeable Employers and Carriers

102-1-15. Decisions, Other Resolutions, Orders Signed by Hearing Examiners, and Motions to Reconsider

102-1-16. Mediation

102-1-17. Failure to Timely Rule on Application, Petition, or Motion

102-1-18. Unreasonable Denials and Attorney Fees

102-1-19. Disputes Between Claim Administrators: Reopening Versus New Injury Issues

102-1-20. Denial of a Claim Based Upon W. Va. Code §23-5I-4 [not 5I] (Classification of independent contractors and employees)

102-1-21. Petition for Award of Claimant's Attorney Fees and Costs Pursuant to W. Va. Code §23-5-16a(c)

102-1-22. Stays

102-1-23. Severability

§102-1-3. Definitions.

3.1. "Board of Review" shall include Board of Review Members, Clerk, Deputy Clerks, Office of Counsel, Hearing Examiners, other staff, and any authorized representatives and designees of the Board of Review.

3.2. "Board of Review's Clerk and Office of Counsel" serve as staff counsel to the Board of Review. The Clerk and Office of Counsel provide procedural assistance and information to pro se litigants. Various motions and other matters requiring rulings in claims pending before the Board of Review are presented to the Board of Review through the Clerk/Office of Counsel. Other duties of the Clerk/Office of Counsel include, but are not limited to, reviewing protests; holding status conferences in protests; providing memoranda on legal issues; making recommendations regarding claim processing, such as the expedited hearings process, mediation, settlements, adding or dismissing chargeable employers and carriers, unreasonable denials, stays, attorney fees, failure of claim administrator to timely rule, and denial of a claim based upon W. Va. Code §21-5I-4 (classification of independent contractors and employees); and other duties as assigned by the Board of Review.

3.3. "Claim administrator" shall mean the entity with legal authority to administer workers' compensation claims, make awards, and take any other administrative actions as authorized in Chapter 23 of the W. Va. Code. In some places in the code, the term "issuing entity" is used. For purposes of this Rule, "claim administrator" and "issuing entity" mean the same thing. "Claim administrator" includes the Offices of the Insurance Commissioner, any self-administering employer who has been granted self-insured status, any authorized third-party administrator, or any private insurance carrier authorized to issue workers' compensation coverage in West Virginia.

3.4. "Closing argument" shall mean a written discussion of the facts and controlling law of the case. Such written summary may be submitted at any time up to ten days after the expiration of the time frame. An argument that is filed later than ten days after the expiration of the time frame may be considered at the discretion of the Board of Review.

3.5. "Argument in lieu of evidence" shall mean a written statement explaining why the claim administrator's ruling is incorrect on its face. Such statement may be submitted instead of submitting

evidence when the party believes that evidence is not necessary. Such statement avoids having the claim administrator's ruling automatically affirmed for failure to prosecute. Such statement must be filed during the protesting party's time frame.

3.6. "Electronic filing" includes transmitting information and documents over the internet in accordance with security guidelines. Instructions for electronic filing will be provided when electronic filing becomes available. Electronic filing includes a computer-based system for the storage, retrieval, and management of documents.

3.7. "Expedited hearing," as contemplated by W. Va. Code §23-4-1c(a)(3), shall mean the final resolution of the issue. The term "hearing" is used in the sense of an opportunity for a party to request that a hearing be scheduled, an opportunity for a party to offer written evidence or argument, or both, and to have his or her cause considered by the Board of Review.

3.8. "Mail sent to the parties by the Board of Review" means documents sent by United States Postal Service or by electronic means or by other methods.

3.9. "Hearing Examiner" shall include the Board of Review's Clerk, Deputy Clerk, Hearing Examiners, and other Board of Review attorneys.

3.10. "Party" shall mean the injured worker (claimant), claimant's dependents, the employer, and, with respect to some claims, the Offices of the Insurance Commissioner. Private carriers, insurance agents, and third-party administrators are not parties to the litigation.

3.11. "Presiding Board Member" shall mean the Board Member authorized to make the final decision in the protest. In addition to having a Presiding Board Member, each protest may, in the Board's discretion, be assigned to a Mediator. The Mediator may be an attorney on the Board of Review's staff or a Board of Review Member, who is not the Presiding Board Member.

3.12. "Protest" shall mean an objection to a ruling of the claim administrator. A protest shall be filed with the Board of Review in writing and a copy served on the claim administrator and all parties. The protest shall include a copy of the claim administrator's ruling to which the protest has been made. The protest shall include the claimant's mailing address and phone number. In some sections of Chapter 23 of the W. Va. Code, the term "objection" is used. For purposes of this Rule, "protest" and "objection" mean the same thing. For purposes of this Rule and the expedited hearing process set forth herein, the term "protest" also includes the filing of a written petition, motion, or statement alleging that a private carrier or self-insured employer, whichever is applicable, has failed to timely issue a ruling upon any application or motion as provided by law and as set forth in W. Va. Code §23-4-1c(a)(3).

3.13. "Record" shall mean evidence timely submitted by a party to the Board of Review, evidence taken at hearings conducted by the Board of Review, and prior rulings upon which the Board of Review took judicial notice.

§102-1-4. Purpose.

4.1. The purpose of the litigation process before the Board of Review is to receive and consider, as expeditiously and as fairly as possible, evidence and information relevant to the determination of the rights of the parties and to provide a review of claims management rulings made by the claim administrator with regard to the grant or denial of any award, or the entry of any order, or the grant or denial of any modification or change with respect to former findings, orders or awards made pursuant to Chapter 23 of the W. Va. Code.

4.2. In regard to W. Va. Code §23-4-1c(a)(3), the purpose of the litigation process before the Board of Review is also to provide an expedited hearing process to claimants when a private carrier or self-insured employer, whichever is applicable, fails to timely issue a ruling upon any application or motion as provided by law, or the claimant files a timely protest to the ruling of a self-insured employer or private carrier or other issuing entity denying the compensability of the claim, denying temporary total disability benefits, or denying medical authorization.

§102-1-5. Representation of Parties.

5.1. Individuals. Any claimant or employer who is a natural person may appear and represent himself or herself in any matter before the Board of Review. At the Board of Review's discretion, a claimant's relative or friend may speak on behalf of the claimant. At a hearing, the Board of Review shall explain to any party appearing without counsel the right to employ counsel, and shall inquire as to the desire of such person to obtain counsel. In appropriate cases the hearing may be continued to permit a party to obtain counsel; however, absent a showing of good cause, a hearing shall be continued only one time for a party to obtain counsel.

5.2. Employers who are not natural persons and the Offices of the Insurance Commissioner must be represented by an attorney duly licensed or authorized to practice law in the State of West Virginia.

5.3. Counsel. Only an attorney duly licensed or authorized to practice law in the State of West Virginia may represent a claimant or employer in a matter before the Board of Review. At the Board of Review's discretion, a claimant's relative or friend may speak on behalf of the claimant.

5.4. Lay Representative. A party may not be represented in a matter before the Board of Review by a spokesperson, lay representative or anyone else not admitted to practice law in the State of West Virginia. At the Board of Review's discretion, a claimant's relative or friend may speak on behalf of the claimant.

§102-1-6. Litigation Process.

6.1. Filing of protests and other documents. Electronic filing of documents may be required by the Board of Review. The Board of Review may permit a party to submit a paper document if good cause is shown.

6.2. Time period for filing a protest. Any protest under this section shall be filed with the Board of Review within sixty (60) days after receipt of the notice set forth in W. Va. Code §23-5-1a. As provided in W. Va. Code §23-5-6a, the period within which a protest must be filed may be expanded to one hundred twenty (120) days for good cause or excusable neglect. Provided, however, that a protest filed alleging that a private carrier or self-insured employer, whichever is applicable, has failed to timely issue a ruling upon any application or motion as provided by law and as set forth in W. Va. Code §23-4-1c(a)(3), is not subject to the time periods set forth herein.

6.3. Acknowledgment of filing a protest. The Board of Review shall determine if a protest is timely filed, acknowledge receipt of timely filed protests, issue Time Frame Orders in regard to the litigation of such protests, order the parties to participate in mediation, order the expedited processing of the claim, or take such other action as the Board of Review deems necessary. If a protest does not include the order (ruling) to which the protest has been made, the Board of Review shall notify the party of the deficiency and provide the party with a time period within which to correct the deficiency. If a protest does not show that a copy was served on the claim administrator and all parties, the Board of Review shall provide a copy to the claim administrator and the parties and shall inform the protesting party that copies of future submissions must be provided to the claim administrator and the parties.

6.4. Time Frame Order. A Time Frame Order shall set forth the sequence in which evidence shall be presented by the parties and the time periods within which such evidence shall be presented. A Time Frame Order may include such other matters as deemed appropriate by the Board of Review. A Time Frame Order shall be interlocutory in nature and not subject to appeal. A Time Frame Order may be modified, amended or extended at the request of a party, but only for good cause shown. The Board of Review may modify or amend a Time Frame Order without such a request for appropriate administrative purposes. A request for modification, amendment, or extension, of the time frame, must be in writing and must be made no later than ten (10) days prior to the expiration of the existing Time Frame Order. Any extension request filed later than ten (10) days prior to the expiration of the requesting party's existing Time Frame Order shall be denied unless good cause is found for the untimeliness of the request. Any request, timely or otherwise, for an extension of time must set forth the reason an extension is necessary and shall include a statement of the efforts the party has made to comply with the Time Frame Order.

6.5. Closing arguments and arguments in lieu of evidence. Except for purposes of the section on "Failure to Prosecute Protest," parties may file a closing argument within ten (10) days after the expiration of the final time frame. A closing argument filed later than ten (10) days after the expiration of the final time frame may be considered at the discretion of the Board of Review. As noted in the section on "Failure to Prosecute Protest," argument submitted in lieu of evidence must be filed within the protesting party's time frame.

6.6. Order of presentation of evidence. Evidence in regard to a protest shall be presented either concurrently or consecutively as set forth by Time Frame Order. The protesting party shall have the burden of going forth with evidence first in those protests with consecutive time frames. In the event that the claimant and at least one employer have protested, the parties shall proceed concurrently.

6.7. Manner and receipt of notice. Any notice required by these Rules shall be deemed adequate if served upon counsel of the other parties (or upon the party if not represented by counsel) as may be permitted in Rule 5 of the West Virginia Rules of Civil Procedure or by electronic means. Receipt of notice shall be presumed seven (7) calendar days after the date of notice. If service at the last known address is returned by the United States Postal Service as undeliverable, a party shall notify the Board of Review and thereafter need not continue serving notices at that address. It is the duty of each party to notify the Board of Review and all other parties of any change of address.

6.8. Further action. The Board of Review shall review the transcripts of the hearings, testimony, the evidence, and arguments, and take such action with regard to the issues as shall be appropriate. The Board of Review may order further action in a protest when it appears that a legal issue has not been sufficiently addressed, or when the record appears to have been burdened with excessive submissions or designations. Any further action so ordered shall be limited to those matters specifically referenced in the order. Such further action may include additional hearings, the requirement of the filing of briefs or closing arguments, the requirement of an explanation of the relevance and materiality of any evidence, or such other action as may promote the ends of justice and judicial economy. If the Board of Review finds that a protest relates to an application for benefits that has been mischaracterized or misclassified by the claim administrator, the Board of Review may *sua sponte*, or upon motion by either or both of the parties, remand the matter in litigation to the claim administrator for correction, without ruling upon the merits of the protest. The remand order may be in the form of either an interlocutory or an appealable decision, within the reasoned discretion of the Board of Review.

§102-1-7. Evidence: Exchange and Filing.

7.1. Evidence submitted to the Board of Review is generally of three types: documentary evidence (i.e., reports, affidavits, treatment records, etc.); testimony of witnesses (either obtained during Board of Review scheduled hearings or during depositions scheduled by the parties); and physical evidence (i.e.,

photographs, video recordings, etc.). This section of the Rule relates to the obtaining, presenting, exchanging, and identifying for the Board of Review, of all evidence.

7.2. Rules of evidence. The Board of Review shall not be bound by the usual common law or statutory rules of evidence, or by formal rules of procedure, except as provided by these Rules. The Board of Review shall receive the relevant testimony and other timely evidence of the parties and witnesses, as may further be limited in this Rule, and subject to objection by any party. The parties shall not burden the record with cumulative, redundant, or repeated filing of similar evidence. All evidence filed must be relevant, material, credible and reliable. Evidence submitted or filed after the expiration of a time frame may be accepted upon a showing of good cause. Evidence which was not copied to all other parties may be rejected by the Board of Review.

7.3. Discovery

7.3.1. Claim administrators should begin the discovery process early instead of waiting until after formal litigation has commenced. The early start of discovery is particularly important when the issue appealed is required by law to be expedited. The entitlement of all parties to due process of law requires the Board of Review to allow for a reasonable opportunity to discover evidence relevant to the protest. However, for those issues that the Legislature has mandated the Board of Review to provide an expedited process, in W. Va. Code §23-4-1c(a)(3) and elsewhere, the time available for discovery should be limited. All discovery and presentation of evidence must be completed during the existing time frame.

7.3.2. Claim administrators shall provide a complete copy of the claim file to a party requesting the file within thirty (30) days of receipt of any such request. The claim administrator may require that any request for a file copy include a subpoena duces tecum or fully executed authorization from the claimant to release the material. The claim file shall include copies of all applications for benefits, all medical documents received in relation to the claim file, all orders and notices issued by the claim administrator, and all documents, records, or other materials upon which claim decisions were based. If the party's efforts to obtain the claim file from the claim administrator are unsuccessful, the party may submit to the Board of Review a motion to require the claim administrator to provide the claim file.

7.3.3. Interrogatories

7.3.3.a Written interrogatories may be utilized in the discovery process.

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

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

7.3.3.d. The Board of Review may issue an order to compel completion of interrogatories upon a showing of unjustified failure to cooperate. If a party fails to comply with an order to compel, the Board of Review may issue an order to show cause. Absent sufficient response, the Board of Review may, in its discretion, impose any of the following sanctions: decide the issue against the non-cooperating party, issue an order dismissing the protest of the non-cooperating party, and take other actions as justified.

7.4. Medical authorization.

7.4.1. Pursuant to W. Va. Code §23-4-7(b), the claimant agrees by filing an application for benefits that any physician may release certain medical information to the claimant's employer or its representative, to the Offices of the Insurance Commissioner, and to any private carrier involved in the claim. Notwithstanding this statutory language, many hospitals and other medical providers require a signed medical authorization prior to releasing medical information to anyone other than the claimant. The claimant has a duty to sign a medical authorization that is in compliance with all applicable statutes and applicable case law in order to provide the employer with relevant medical records.

7.4.2. The Board of Review may issue an order to compel the signing of the authorization upon a showing of unjustified failure to cooperate. If a party fails to comply with an order to compel, the Board of Review may issue an order to show cause. Absent sufficient response, the Board of Review may, in its discretion, impose any of the following sanctions: decide the issue against the non-cooperating party, issue an order dismissing the protest of the non-cooperating party, and take other actions as justified.

7.5. Rebuttal evidence. The Board of Review recognizes that the parties may, at times, need to offer rebuttal evidence. Rebuttal evidence may, and should, be filed during any time frame or extension. In cases where evidence is filed at or near the end of the existing time frame, an extension may be granted in accordance with the Rules controlling the extension of time frames. Rebuttal may take the form of, but not be limited to, cross-examination of a witness, examination of the claimant, or filing of expert reports; additional examination of the claimant may not exceed the limit on the number of examinations that may be obtained under the provisions of this Rule.

7.6. Documentary evidence

7.6.1. All filings during litigation shall be served upon counsel of the other parties (or upon the party if not represented by counsel) as may be permitted in Rule 5 of the West Virginia Rules of Civil Procedure or by electronic means. A member of the West Virginia Bar must provide his or her Bar membership number with any correspondence, filings, motions, objections, or other documents.

7.6.2. Exchange of evidence

7.6.2.a. Documents. The report of an expert or any other documentary evidence shall be offered in evidence by delivering the original, or an accurate copy, of such report or document to the Board of Review with copies to counsel of the other parties (or to the party if not represented by counsel) as soon as can reasonably be accomplished following receipt of such report or document. For purposes of these Rules, the term "original" shall also include certified copies or documents produced under seal.

7.6.2.b. Physical evidence. Items not susceptible to reproduction or copying shall be brought to the attention of all other parties or their counsel and reasonable opportunity for inspection of such items shall be permitted within a reasonable time. Any evidence that cannot be scanned into the electronic filing system must be accompanied by a written description of the evidence, the party submitting it, the date submitted, and the protest to which it applies.

7.6.2.c. Failure to comply with exchange of evidence. If a party fails to comply with the exchange of evidence requirements of these Rules, the Board of Review may take one or more of the following actions: order the party to supply the material required by this section, grant a continuance to the party who was not served with a copy, prohibit a party from introducing the evidence if there is a finding that the failure to disclose was intentional or without good cause, consider the protest(s) submitted for decision upon the existing record excluding the evidence not served, and take such other action as may be necessary or appropriate for the proper conduct of a system of administrative review.

7.7. Alternatives to testimony at hearing. The following alternatives to testimony at hearing may be received and considered, subject to objection and the right of cross-examination where appropriate: sworn statements or affidavits, prior testimony under oath, stipulations of fact or expected testimony, depositions, and interrogatories and responses thereto.

7.8. Alternatives to other evidence. The following alternatives may be received and considered in lieu of evidence which is unavailable: testimony describing the evidence; an authenticated copy, photograph or reproduction of the unavailable evidence; and a stipulation of fact or expected testimony concerning such unavailable evidence.

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

7.9.1. Requirements. Before accepting a stipulation, the Board of Review must be satisfied that the stipulation is relevant to an issue in litigation; the stipulation is written or stated in clear and unambiguous terms; a factual basis exists for the stipulation, which shall be thoroughly set forth upon the record or in the preamble section of a written stipulation; and all parties to the stipulation shall indicate in writing, or orally on the record, that they understand and agree to the stipulation.

7.9.2. Effect of stipulation. A stipulation of fact that has been accepted is binding upon the parties to the stipulation and may not be contradicted by those parties. Any party not participating in the stipulation may challenge, contradict, or explain the contents of a stipulation of expected testimony or of a document's contents in the same way as if the witness had actually so testified or the document had been actually admitted. A stipulation is not binding on the Board of Review.

7.10. Examinations and evaluations. In any litigation pending before the Board of Review, all parties are entitled to a reasonable number of relevant medical examinations or vocational evaluations. For purposes of this section, a consultation or file review report constitutes an examination. The examination upon which the protested order is based does not count against the employer's or the claimant's limits.

7.10.1. A reasonable number of examinations or evaluations shall be no more than two (2) per specialty or discipline involved per protest. Upon written request, a party may be granted the right to further examinations or evaluations upon a showing of necessity. Such request shall set forth the reasons why such additional examination or evaluation is necessary. All other parties shall have fifteen (15) days after the date of service of said request to file a written response. The Board of Review's order thereon shall be interlocutory. When two or more protests have been consolidated by the Board of Review, the examination limits shall not be cumulative. It is not the purpose of this Rule to permit parties to submit more than two (2) examinations or evaluations per specialty or discipline involved when more than one protest has been consolidated by order of the Board of Review. These limitations do not overrule or replace any restrictions set forth in W. Va. Code §23-4-6(n), or elsewhere in the Code.

7.10.2. The Board of Review may issue an order to compel attendance at an examination upon a showing of unjustified failure to cooperate. If a party fails to comply with an order to compel, the Board of Review may issue an order to show cause. Absent sufficient response, the Board of Review may, in its discretion, impose any of the following sanctions: decide the issue against the non-cooperating party, issue an order dismissing the protest of the non-cooperating party, and take other actions as justified.

7.10.3. Reports of examination and evaluation shall be promptly exchanged among the parties or their counsel, upon request. Either party may submit such report to the Board of Review. When a report is offered to be made a part of the record by a party, it will be considered subject to the limitations on the number of medical examinations or vocational evaluations set forth in this Rule.

7.10.4. Requests for cross-examination of the author of a report shall be made promptly in writing to the party offering the report. When cross-examination of a reporting expert is properly requested, it shall be the responsibility of the party offering the report to arrange for the appearance of the witness for cross-examination. The expense of the expert witness shall be the responsibility of the party desiring to cross examine to the extent provided in this Rule. The failure of the witness to appear may be grounds for excluding the report offered or other sanctions deemed appropriate. If the non-appearing witness prepared a report based upon an examination or consultation at the request of the claim administrator (often referred to as Independent Medical Exam or IME), then the Board of Review may issue an order compelling the Offices of the Insurance Commissioner, self-insured employer, or the employer through its carrier, whichever is applicable, to make the witness available. If the party is unable to or otherwise fails to make the witness available, the Board of Review may order the report expunged from the claim record and order that another expert be procured to replace the non-cooperative witness.

7.11. Identification of relevant documents from claim files. The Board of Review does not have access to documents contained in the claim files of private carriers, self-insured employers, third-party administrators, and claim administrators of the Offices of the Insurance Commissioner.

7.11.1. Prior rulings. The parties are required to submit to the Board of Review all orders related to the compensable conditions in the claim. If the claim administrator has not issued orders related to the compensable conditions in the claim, the parties shall submit any other documents that reflect the diagnoses identified as compensable in the claim.

7.11.2. The Board of Review may take judicial notice of any decision in the same claim. The Board of Review may not have access to Supreme Court mandates, settlement agreements, other resolutions of an issue, or claim administrator rulings, and the parties are responsible for filing with the Board of Review any such relevant documents. The parties are encouraged to identify to the Board of Review any prior decisions or rulings thought to be relevant.

7.11.3. Documents filed in prior protests. The parties may identify in writing, as part of the record to be considered in a protest, any relevant documents that were previously submitted or designated in other protests in the same claim.

§102-1-8. Administrative Hearings Procedures, Generally.

8.1. Right to administrative hearing

8.1.1. The Board of Review will schedule a hearing upon receipt of a timely request and a showing of good cause to support the request.

8.1.2. Except for the expedited issues identified in W. Va. Code §23-4-1c(a)(3) and this Rule, a hearing shall be specifically requested by a party at least thirty (30) days prior to the expiration of the requesting party's time frame. If requested less than thirty (30) days before the expiration of the time frame, the party requesting the hearing shall state good cause for the untimeliness of the request. It is not the intent of this subsection to prohibit cross-examination or rebuttal evidence.

8.1.3. The Board of Review prefers that testimony be obtained by deposition rather than at an administrative hearing.

8.2. Date and time of administrative hearings. Upon a timely request for a hearing, the Board of Review shall determine the date and time such hearing will be conducted. Hearings shall be conducted virtually, by telephone conference call, or by other similar means. Hearings will not be conducted in person unless the Board of Review finds good cause has been established to conduct a hearing in person.

The parties and counsel of record shall be notified of the date and time of the hearing and the process for participating in the hearing at least ten (10) days in advance of the hearing date. For good cause, less than ten (10) days may be adequate notice. A hearing may be continued by agreement of the parties with the consent of the Board of Review, or upon a showing of good cause, or within the discretion of the Board of Review.

8.3. Administrative hearing procedure

8.3.1. Testimony. All testimony shall be taken under oath or affirmation.

8.3.2. Cross-examination. All parties shall be given reasonable latitude in cross-examining witnesses. Cross-examination must take place in any time period set forth in a Time Frame Order.

8.3.3. Objections. The Board of Review shall rule upon all objections to the evidence or testimony presented at the hearing or offered by deposition, taking into consideration the apparent reliability of the evidence and the basis of knowledge of a witness. All objections shall be noted in the transcript of the hearing or deposition. Exceptions to a ruling on such objections shall be automatic. Oral argument and citation of authority by the parties in support of, or opposition to, objections may be required. In the event of adverse rulings, the record may be preserved for appeal by written proffer or, at the discretion of the Board of Review, by an oral vouching of the record.

8.3.4. Transcription of hearing. All proceedings at a hearing shall be recorded by stenographic or voice recording or by other means.

8.4. Witnesses: subpoenas and fees

8.4.1. Subpoena

8.4.1.a. Generally, a witness may appear at a hearing with, or without, a subpoena. The service of a subpoena is the responsibility of the party who desires the presence of the witness. However, when a party desires to cross-examine an expert witness who has authored a report, then arranging for the presence of that expert witness is the responsibility of the party who has offered the report.

8.4.1.b. The presence of a witness or production of evidence may be obtained by the issuance of a subpoena or subpoena duces tecum through a party's counsel as a member of the Bar and an officer of the Court. The subpoena or subpoena duces tecum shall bear a facsimile of the signature of the Chairperson of the Board of Review but must bear the actual signature of counsel. Blank forms shall be developed for this purpose, which may be reproduced by counsel as needed. A party not required to be represented by counsel may request, in writing, that the Board of Review issue a subpoena. A subpoena for a physician or other medical provider shall also include a subpoena duces tecum for the treatment records and notes pertaining to the claimant. Service of any subpoena shall be the responsibility of the party who has requested the subpoena. The Board of Review or a party may seek judicial enforcement of such subpoena.

8.4.1.c. It is not necessary for the Board of Review to issue an order to compel when a subpoena has been properly served but not honored. At the request of the party who had the subpoena served, and upon allegation of service as described in this Rule, the Board of Review may issue an order to show cause to a non-appearing party. The order to show cause will notify the non-appearing party of the possible sanctions for failure to explain his or her non-appearance.

8.4.2. Service. It shall be the responsibility of the party requesting the issuance of a subpoena to serve the subpoena on a witness by personal service, certified mail, or by regular mail, with a certificate of service executed by counsel or by the party if not represented by counsel. The subpoena shall be

served at least seven (7) days before the hearing. A copy of the subpoena shall be provided to counsel of the other parties (or the party if not represented by counsel) at the time of service.

8.4.3. Right to examine or cross-examine witnesses. Each party is entitled to compel the attendance at a hearing of any witness whose testimony may be relevant and material, except a party is not entitled to the presence of a witness who is deemed unavailable. A witness shall be deemed unavailable in, but not limited to, the following situations: the witness is not subject to compulsory process in West Virginia by reason of non-residence within, or prolonged absence from, the State of West Virginia, unless that witness is the claimant or the employer; the witness refuses for good cause to testify despite an order to do so; the witness claims by sworn affidavit a lack of memory of the subject matter; the witness is unable to be present or to testify at the hearing because of then existing physical or mental illness or infirmity; the witness is absent from the hearing and the requesting party is not at fault, could not have prevented the unavailability, and demonstrates that all reasonable measures to secure the presence of the witness have been taken, including the timely request for and service of a subpoena.

8.4.4. Failure of a witness to comply. Upon failure or refusal, without good cause, of a witness to comply with a properly served subpoena, the Board of Review may employ proper sanctions including, but not limited to: a decision reversing the protested order; an order dismissing the protest; submission of the protest for final determination upon the existing record; or when personal service of a subpoena has been obtained, institution of attachment proceedings as for contempt in Circuit Court. Prior to imposition of one or more of the aforementioned sanctions, a written notice may be issued allowing fifteen (15) days to show good cause to the Board of Review why such sanctions should not be imposed.

8.4.5. Exclusion of evidence. Upon the failure or refusal of a properly subpoenaed witness to appear, produce requested evidence or testify in response to a subpoena, the Board of Review may exclude any statement, record or report rendered by that witness from the record to be considered.

8.4.6. Witness fees

8.4.6.a. Except for expert witnesses as provided for in this Rule, and except for the particular provisions relating to a claimant's lost wages as provided for in W. Va. Code §23-5-1a(d), the party requesting to cross-examine a witness shall pay the attendance fees and mileage as provided for witnesses in civil cases in Circuit Court. Such fees shall be paid in advance upon a timely request by the witness. When a witness appears at the request of the Offices of the Insurance Commissioner or any other state agency, such advance payment shall not be required.

8.4.6.b. Expert witness fees. The party who requests to cross-examine an expert witness shall be responsible for payment of the appearance fee of such witness, subject to the limitations in this Rule. However, pursuant to W. Va. Code of State Rules § 85-1-17.1 and 17.2, the Offices of the Insurance Commissioner, self-insured employer, or private carrier (whichever is administering the claim), shall be responsible for payment of a witness fee when the witness is an authorized treating physician, or an authorized consulting physician acting upon referral from an authorized treating physician.

8.4.6.c. Expert witness fee limitations. The amount of expert witness fees shall be as agreed by the parties based upon the usual and customary rate for the profession involved. The financial obligation of the requesting party shall not exceed one hundred dollars (\$100) per each quarter-hour of testimony and preparation. In addition to the time of actual testimony at hearings or depositions, the requesting party is also financially obligated for a maximum of two quarter-hours for actual time reviewing records prior to the testimony. Any amount of expert fees in excess of the limitations set forth in this section shall be the financial obligation of the party who submitted the expert's report. The witness may require advance payment not to exceed the reasonably anticipated length of the testimony and records review, but a witness may not require advance payment from the Offices of the Insurance Commissioner, or any other state agency.

8.5. Limited purpose of certain hearings. A request for hearing may not be used to submit written or physical evidence after the expiration of a party's time frame. Evidence, which would have been untimely under the original Time Frame Order, may not be submitted at a hearing conducted during an extension of the time frame when said extension was granted solely for purposes of conducting a hearing. However, evidence first discovered at such hearing may be the basis for good cause for an untimely request for extension of the time frame. Furthermore, evidence that serves to rebut the testimony given at the hearing may also be introduced at the hearing.

8.6. Special hearings. The Board of Review may schedule a hearing on any issue in litigation. One type of hearing the Board of Review may schedule is a hearing to require closing argument by the parties. The purpose of this hearing may include, but not necessarily be limited to, a determination of the issues to be decided in the written decision, identification of the evidence relied upon by the parties, and a summation by each party as to why this evidence supports their position. A request by a party for such hearing may be granted upon a showing of good cause. Failure to participate in a hearing that is scheduled on the Board of Review's own motion may result in the following: dismissal of protest and affirmation of claim administrator's orders, exclusion of evidence from consideration, denial of motion for reconsideration, and such other sanction as the Board of Review may deem appropriate.

8.7. Continuances. Postponement or rescheduling of hearings, known as "continuances," shall be granted only by agreement of the parties with the consent of the Board of Review, or upon a showing of good cause, or within the discretion of the Board of Review. After a date for a hearing has been set, any party who desires a continuance shall file a written motion with the Board of Review, with copies to the other parties, stating in detail the reasons why such a continuance is necessary. If the motion is based on a conflict in schedule, such motion shall set forth in detail the specific nature of the conflict. Such written motion shall be filed no later than ten (10) days prior to the date of the scheduled hearing, unless by agreement of the parties or upon good cause shown, a shorter period is permitted, and shall be served on all parties at that time.

8.8. Absence of parties at hearings. All parties to a claim are entitled to participate in a hearing; however, the absence of a party shall not prevent the taking of evidence and the final determination of the issues in litigation. A party shall be considered to have waived the right to be present if after being notified of the date and time of a hearing, a party does not appear, absent a showing of good cause; or after being advised that disruptive conduct will cause removal from the hearing, a party persists in conduct which is such as to justify exclusion from the hearing.

§102-1-9. Expedited Hearings.

9.1. Expedited issues. In compliance with the provisions of W. Va. Code §23-4-1c(a)(3), when a private carrier or self-insured employer, whichever is applicable, fails to timely issue a ruling upon any application or motion as provided by law, or if the claimant files a timely protest to the ruling of a self-insured employer or private carrier or other issuing entity denying the compensability of the claim, denying temporary total disability benefits, or denying medical authorization, the Board of Review shall provide to the claimant an expedited hearing as defined in this Rule.

9.2. Election of expedited hearing process. The claimant must notify, in writing, the Board of Review and all parties of intent to proceed with the expedited hearing process. Notice of the election to proceed with the expedited hearing process must be received no later than fifteen (15) days after the date the protest was acknowledged by the Board of Review. The claimant's notice must specify whether the claimant requests that a hearing be scheduled, requests an opportunity to offer written evidence or argument, or both. If the claimant requests that a hearing be scheduled, the claimant must show good cause to support the request, including but not limited to, identifying with specificity the testimony or evidence that the claimant intends to present at the hearing. If the claimant elects to proceed with the

expedited hearing process but does not request that a hearing be scheduled, the other party may submit a request for a hearing within ten (10) days of receipt of the claimant's election. If the other party requests a hearing, that party must show good cause to support the request, including but not limited to, identifying with specificity the testimony and evidence it intends to present at the hearing.

9.3. Time limit for filing evidence in expedited process when neither party requests that a hearing be scheduled. If neither party requests that a hearing be scheduled, the Board of Review will modify the Time Frame Order to require that all evidence be submitted within 45 days from receipt of the claimant's election of the expedited hearing process.

9.4. Expedited process when a party requests that a hearing be scheduled

9.4.1. If a party requests that a hearing be scheduled and good cause has been established for the request, the Board of Review will issue a notice of hearing and amended Time Frame Order. The date of the hearing will be at least fourteen (14) days after the date of the Board of Review's notice of hearing. The Time Frame Order will expire on the date of the hearing. However, other than testimony that may be presented during the expedited hearing, all evidence must be exchanged by the parties and received by the Board of Review no later than one business day prior to the expedited hearing. The Board of Review has discretion to waive this requirement.

9.4.2. Hearings in the expedited process will be scheduled to last no longer than sixty (60) minutes, divided at thirty (30) minutes per side including rebuttal. If the docket schedule permits, the hearing length may be extended at the discretion of the Board of Review. If the parties anticipate requiring more lengthy testimony, then the parties should obtain that testimony at a deposition prior to the expedited hearing.

9.4.3. The parties are not required to appear at the expedited hearing, unless subpoenaed, and may submit any arguments or evidence in writing prior to the hearing date.

9.5. Extensions/continuances. Time Frame Orders and scheduled hearings may be extended/continued by agreement of the parties with the consent of the Board of Review, or upon a showing of good cause, or within the discretion of the Board of Review.

9.6. Expedited decisions. The Board of Review will issue a decision within thirty (30) days of the date of the expiration of the Time Frame Order or, if a hearing was scheduled, within thirty (30) days of the date of the hearing, unless the Board of Review notifies the parties that additional time is needed to issue the decision.

9.7. Exceptions. The expedited hearing process shall not be available for occupational pneumoconiosis claims or hearing loss claims or complex issues, unless the Board of Review determines that expedited adjudication is necessary for the issue involved.

9.8. Failure to prosecute in expedited hearing process. In protests in which no evidence has been introduced or no argument in lieu of evidence has been filed by the claimant, by the hearing date or at the expiration of the time frame, the provisions of section on "Failure to Prosecute Protest" shall apply.

§102-1-10. Failure to Prosecute Protest.

10.1. This section provides a process for the efficient resolution of protests where the protesting party does not proceed, does not explain the basis for the protest, and does not withdraw the protest. The party protesting a decision, or the alleged failure to timely issue a decision, of the claim administrator has the burden of presenting evidence or argument in support of its position. Evidence or argument must be filed

before the expiration of the protesting party's time frame. Unless the protesting party timely files evidence or argument, the claim administrator's decision will be affirmed.

10.2. Requirements. The requirement of this section may be met by the filing, or receipt, during the party's time frame, of any of the following: documentary or physical evidence; testimony from a deposition or at a hearing scheduled by the Board of Review; argument in lieu of evidence (must be submitted during time frame); notice or motion identifying relevant documents from other protests involving the same parties.

10.3. Order to Show Cause. The Board of Review will review each matter at the conclusion of the protesting party's time frame to determine whether the protesting party has submitted evidence or argument in lieu of evidence. If it appears from a review of the matter that the protesting party has not filed any evidence or argument, the Board of Review shall issue a show cause order to the protesting party for the purpose of allowing the protesting party to demonstrate that some evidence or argument had been timely filed.

10.4. Decision affirming order. If the protesting party fails to show that evidence or argument has been timely filed, or if there is no response to the show cause order, the Board of Review shall issue a decision affirming the claim administrator's order.

§102-1-11. Occupational Pneumoconiosis.

11.1. Non-medical order. The order of the claim administrator determining whether the claimant has met the requirements set out in W. Va. Code §23-4-15b shall hereinafter be referred to as a non-medical order. Litigation regarding such order including any issue regarding the chargeability of an employer, must be conducted by the parties during the non-medical litigation. The issue of chargeability shall not be litigated before the Occupational Pneumoconiosis Board during litigation on permanent partial disability awards for occupational pneumoconiosis, although medical questions involving the issue of causation of the claimant's occupational pneumoconiosis may be referred to the Occupational Pneumoconiosis Board.

11.2. Referrals to the Occupational Pneumoconiosis Board during non-medical litigation shall be made at the discretion of the Board of Review only when there is a reasonable doubt about any medical question regarding the issues determined in the non-medical order. In making its opinion as to whether the claimant's employment with a particular employer could have caused claimant's breathing problems, the Occupational Pneumoconiosis Board shall review any other relevant medical records and such other information in the record as the Occupational Pneumoconiosis Board deems relevant to the claimant's medical condition.

11.3. Hearings before the Occupational Pneumoconiosis Board

11.3.1. Time frames. The procedure regarding requests for extensions of time frames and continuances of hearings for claims involving permanent partial disability awards for occupational pneumoconiosis shall be the same as in all other claims.

11.3.2. Initial hearing. Upon request of any party, the Board of Review may set an initial hearing for the sole purpose of examining the Occupational Pneumoconiosis Board members about their findings based upon their examinations of the claimant upon which the award in litigation was based. Requests for such hearings must be made no more than ninety (90) days after the beginning of the protesting party's time frame. At such initial hearing the parties shall not ask the Occupational Pneumoconiosis Board to evaluate evidence introduced in support of the respective positions unless it is agreed by all parties that the claim shall be submitted for final determination at the conclusion of that hearing. Initial hearings shall be set at the discretion of the Board of Review with due regard to the scheduling of all occupational pneumoconiosis claims in litigation, particularly the amount of docket time available before the

Occupational Pneumoconiosis Board. The setting of such hearings is discretionary and not a matter of right of any party.

11.3.3. Final hearing. A final hearing shall be scheduled after the expiration of the time frame. However, a final hearing will be scheduled only when new evidence has been submitted to the Board of Review or when a party has timely requested a final hearing to examine or cross-examine the members of the Occupational Pneumoconiosis Board.

11.3.4. Extensions at hearing. Extension of time frames may be granted by the Board of Review at hearings before the Occupational Pneumoconiosis Board for good cause or if the requesting party can show that they have made a request in a timely manner prior to the expiration of their time frame and that the Board of Review has not yet acted upon this request.

11.3.5. Hearing when responding party is unrepresented. In any case in which a non-protesting party (hereinafter referred to as the responding party) is unrepresented, when new evidence has been introduced before the Board of Review by the protesting party, or a request for hearing has been made, an order may be issued at the end of the protesting party's time frame requiring the responding party and the Offices of the Insurance Commissioner, if a party, to show cause why the claim should not be set for hearing after which the claim shall be submitted for final determination. If no response is received or no good cause is shown by the responding party or the Offices of the Insurance Commissioner (if it is a party) within fifteen (15) days of the mailing of such order, the claim shall be set for hearing before the Occupational Pneumoconiosis Board.

11.3.6. Failure to prosecute. In protests in which no new evidence has been introduced before the Board of Review by the protesting party, or a request for hearing has not been made, the provisions of section on "Failure To Prosecute Protest" shall apply.

11.3.7. Scheduling of hearing. In protests in which evidence has been introduced by either a protesting or responding party, a hearing shall be scheduled before the Occupational Pneumoconiosis Board after the expiration of the responding party's time frame unless the parties agree that a hearing may be set earlier.

11.4. Review of claim files by the Occupational Pneumoconiosis Board prior to the final hearing. In protests set before the Occupational Pneumoconiosis Board pursuant to W. Va. Code §23-4-8c(d), it may be necessary for the Occupational Pneumoconiosis Board to review the records of some claims prior to the hearing. This may be due to the complexity of medical issues, the volume of medical evidence, or other appropriate reasons. Claims may be subject to such review as follows:

11.4.1. Upon the request of the Occupational Pneumoconiosis Board or the majority of its members who examined the claimant in the protest in question

11.4.2. Upon the ruling of the Board of Review

11.4.3. Upon the motion of any party in the protest in question, such motion being subject to the following conditions:

11.4.3.a. The moving party must state with specificity why such review is necessary, including but not limited to a list of evidence relied upon by both parties; and

11.4.3.b. The moving party must certify that the introduction of all evidence by all parties is complete, that the evidence has been served upon all the parties and that the parties will submit the protest for final determination at the conclusion of the hearing for which prior Occupational Pneumoconiosis Board review is requested. The Board of Review will give consideration to circumstances arising at the

hearings which could not have been reasonably foreseen by the parties, and if in the judgment of the Board of Review, an additional hearing is necessary, the protest shall be set for an additional hearing.

11.4.3.c. Failure to satisfy these conditions shall result in the denial of the request for the Occupational Pneumoconiosis Board to review the record prior to the hearing.

11.4.3.d. If a motion for such review prior to a hearing is granted by the Board of Review, the Board of Review may, in its discretion, order the parties to identify the record to be reviewed by the Occupational Pneumoconiosis Board.

11.4.3.e. Any ruling by the Board of Review regarding the granting or denying of a request for Occupational Pneumoconiosis Board review of a claim prior to a hearing shall be considered interlocutory and may be appealed only in conjunction with a decision entered in the instant protest.

§102-1-12. Motions, Objections, and Correspondence.

12.1. A copy of all correspondence, motions, objections or other documents provided to the Board of Review regarding any issue in litigation shall be provided to all counsel of the other parties (or to the party if not represented by counsel). Some indication that copies were provided to all other parties must accompany the documents provided to the Board of Review. A member of the West Virginia State Bar must provide his or her Bar membership number with any correspondence, filings, motions, objections, or other documents.

12.2. Motions or objections in writing. With the exception of motions and objections that are presented orally during a hearing, all motions and objections shall be made in writing. The motion shall clearly set forth all grounds, facts, and authorities in support of the motion. Any response by an opposing party to a written motion shall be filed in writing with the Board of Review within fifteen (15) days of receipt of the motion and shall set forth all matters in opposition to the motion.

12.3. Motions or objections during hearing. A motion or objection may be made on the record, orally or in writing. The motion shall clearly set forth all grounds, facts and authorities in support of the motion. The opposing party, if present, shall have the right to set forth matters in opposition to such motion on the record. The absence of a party shall not be grounds for delay in ruling upon any motion, or grounds for reconsideration of any ruling made, absent a written motion for reconsideration and an affirmative showing of good cause for such nonappearance by the opposing party.

12.4. All rulings upon motions shall be interlocutory in nature and may not be appealed except in conjunction with a final decision unless specifically noted otherwise in the ruling on the motion.

§102-1-13. Depositions.

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

13.2. Procedure. The taking of a deposition shall be by agreement of the parties or upon reasonable notice to the deponent and all parties or, if the party is represented by counsel, their counsel of record. Notice shall be in writing and shall contain the date, time and place of the deposition as well as the name and address of each person to be deposed. The cost of court reporter services shall be borne by the party requesting the deposition unless the Offices of the Insurance Commissioner agrees as a policy to assume the cost. The cost of witness fees and expenses shall be the obligation of a party as provided in the section on "Administrative Hearings Procedures, Generally." Parties are encouraged to utilize depositions to obtain testimony whenever possible.

13.3. Telephone deposition. Depositions may be taken by telephone conference call or other electronic means as if taken in person. The same procedure applies as provided for other depositions. Costs incurred in the taking of telephone depositions shall be borne as provided for other depositions.

13.4. Use of any deposition shall be subject to objection as in Circuit Court. The admission of any deposition into evidence may be denied if it appears that the deposition was taken at such place and under such circumstances as to impose an undue burden or hardship upon the opposing party.

§102-1-14. Adding or Dismissing Chargeable Employers and Carriers.

14.1. Requirements. When it appears that another employer may have liability for the claim, the Board of Review shall notify the potentially chargeable employer, and its carrier, of the right to participate in the ongoing litigation. No employer may be added by final decision, and no employer may be dismissed by final decision, until after all other potentially chargeable employers and their carriers have been given notice and the opportunity to appear. The final decision may take the form of a remand to the proper claim administrator, or the Offices of the Insurance Commissioner, for additional investigation and entry of a new order. However, remanding the claim is not an available outcome when a dispute exists over which administrator has jurisdiction over the claim. In the latter event, the Board of Review will determine which claim administrator has administrative authority and jurisdiction. The burden is on the moving party to provide sufficient claim identifying information from which the Board of Review can determine the specific identity of the other employer and/or carrier.

14.2. Tolling of statute of limitations for claim filings. Pursuant to W. Va. Code §23-5-1a(c), the Board of Review has authority to toll any statute of limitation by directing that:

14.2.1. An application for benefits be designated as a petition to reopen, effective as of the original date of filing; or

14.2.2. A petition to reopen be designated as an application for benefits, effective as of the original date of filing; or

14.2.3. An application for benefits or petition to reopen with any claim administrator be designated as either with any other claim administrator, effective as of the original date of filing.

§102-1-15. Decisions, Other Resolutions, Orders signed by Hearing Examiners, and Motions to Reconsider.

15.1. Decisions. Pursuant to W. Va. Code §23-5-9a(e), the Board of Review shall issue a written decision containing findings of fact and conclusions of law for all protests submitted for decision. This decision, a copy of which will be sent or made available to all parties and their counsel of record, shall be subject to appeal pursuant to W. Va. Code §23-5-12a.

15.2. Other resolutions of protests

15.2.1. Upon motion of any party, upon request of the protesting party, or as a sanction permitted by these Rules, any protest pending before the Board of Review can be dismissed from litigation.

15.2.2. The Board of Review may resolve a protested issue by ruling or order where the protesting party fails to comply with a properly served subpoena, withdraws its protest, fails to prosecute its protest, or for any other reason the Board of Review deems appropriate.

15.3. Orders signed by hearing examiners. Pursuant to W. Va. Code §23-5-9a(b), a Time Frame Order, continuance order, show cause order, failure to prosecute order, or other interlocutory order as determined by the Board of Review may be issued and signed by a Hearing Examiner.

15.4. Motions to reconsider. Any party may file a motion to reconsider any final resolution of a protest. Such relief should not be sought, and will not be granted, where the sole basis for the motion is disagreement with the reasoning of the decision. Motions to reconsider shall be granted only when clerical or administrative error has occurred in the decision. Examples of the type of error correctable by this relief include, but are not limited to: mathematical or typographical errors; failure to discuss or mention relevant evidence or argument timely submitted; failure to rule upon a pending motion or other information indicating that the issue was prematurely decided. Such motion must be filed within thirty (30) days of the date of receipt of the decision. The filing of a motion for reconsideration shall not toll the running of the jurisdictional time limit for filing an appeal.

15.5. Correction of error by Board of Review. The Board of Review may, without motion from any party, correct such errors covered by the subsection on "Motions to reconsider," provided that the Board of Review's decision has not been affected by appeal outcome.

§102-1-16. Mediation.

16.1. Mediation is a process in which a neutral third person assists the parties to reach their own mutually acceptable resolution.

16.2. The Mediator will schedule and conduct any meetings with the parties and will report to the Board of Review the results of the mediation process within a time period set by the Board of Review.

16.3. The proceedings of any meetings, including any statements made by any party, attorney, or other participant, shall, in all respects, be confidential and not reported, recorded, placed in evidence, or otherwise made known. A Mediator shall maintain and preserve the confidentiality of all mediation proceedings. No party shall be bound by anything done or said at the mediation meeting unless a settlement is reached, in which event the agreement shall be reduced to writing and shall be binding upon all parties to that agreement.

16.4. If a settlement is reached, the Mediator may direct counsel to prepare the agreement and circulate it for signature by all parties to the claim. Upon completion of an executed settlement agreement the parties shall notify the Board of Review that the matter has been resolved. If the parties are unable to resolve their dispute at the mediation meeting, the Mediator shall make note that there has been compliance with the requirements of this Rule, but no settlement has been reached.

16.5. Sanctions for failure to participate. Any party to a claim selected for mediation must have full authority to settle without additional consultation. Nothing in this Rule shall be interpreted as to compel a party to agree against his or her interest to any settlement. Failure to participate in the mediation process may be grounds for sanctions for non-compliance including, but not limited to: a decision reversing the protested order, an order dismissing the protest, submission of the protest for final determination upon the existing record, or such other sanctions as may be justified in the discretion of the Board of Review.

§102-1-17. Failure to Timely Rule on Application, Petition, or Motion.

17.1. Scope. W. Va. Code §23-4-1c(a)(3) provides a remedy to the claimant when the private carrier or self-insured employer fails to timely issue a ruling, as provided by law, on any application or motion. The Offices of the Insurance Commissioner, and its third-party administrators, are not specifically included in the statute and are, therefore, not subject to this process.

17.2. Initiation of process. In order to initiate this process, the claimant must submit in writing to the Board of Review a statement setting forth the following information:

17.2.1. The claimant's name, address, phone number, date of injury (or last exposure), employer's name and address, and insurer's name;

17.2.2. The policy number, claim number, and case number, if known;

17.2.3. The nature of the action requested of the insurer or self-insured employer, whichever is applicable;

17.2.4. The date the action was requested of the insurer or self-insured employer, whichever is applicable;

17.2.5. The address to which the request was mailed or delivered.

17.3. The written submission or statement shall be provided by the claimant to the employer and the employer's private carrier or the employer's claim administrator, whichever is applicable.

17.4. Upon receipt of a properly completed written submission or statement, the Board of Review will immediately provide notice to the employer and the employer's private carrier or employer's claim administrator, whichever is applicable, setting forth a deadline for submission of any statements or evidence that any party wishes to submit for consideration by the Board of Review.

17.5. Reports to the Offices of the Insurance Commissioner. Upon entry of an expedited decision, if the Board of Review has made a finding that a private carrier or self-insured employer has failed to timely issue a ruling on any application or motion, the Board of Review shall transmit a copy of the decision to the Offices of the Insurance Commissioner. Upon receipt thereof, the Offices of the Insurance Commissioner will review the decision and may undertake any further investigation, initiate a regulatory or administrative action, or initiate a civil enforcement action, or undertake any combination thereof, against the applicable private carrier or self-insured employer as is determined to be necessary and appropriate by the Offices of the Insurance Commissioner.

§102-1-18. Unreasonable Denials and Attorney Fees.

18.1. Scope. Pursuant to W. Va. Code §23-2C-21(c), if a denial of compensability, a denial of an award of temporary total disability, or a denial of an authorization for medical benefits is determined by the Board of Review to be unreasonable, then reasonable attorney fees and costs actually incurred in the process of obtaining a reversal of the denial shall be awarded to the claimant and paid by the private carrier or self-insured employer, whichever issued the unreasonable denial. The Offices of the Insurance Commissioner, and its third-party administrators, are not specifically included in the statute and are, therefore, not subject to this process.

18.2. Initiation of Process

18.2.1. If a denial of compensability, a denial of an award of temporary total disability, or a denial of an authorization for medical benefits has been reversed, the claimant may then submit to the Board of Review an allegation that the denial was unreasonable under the definition provided by W. Va. Code §23-2C-21(c).

18.2.2. The process is initiated upon receipt by the Board of Review of the claimant's allegation, in writing, with a copy to the employer and the employer's private carrier or the employer's claim administrator, whichever is applicable. Notice of the allegation must be filed with the Board of Review within ninety (90) days of the final decision that is issued at the conclusion of all appeals regarding the claimant's protest of the specific, relevant denial.

18.3. Filing of evidence and argument. The Board of Review will issue a Time Frame Order setting forth the time limits for the filing of evidence and argument by either party in support of, or opposition to, the allegation. In as much as the statute requires a determination of the unreasonableness of the carrier's action at the time of the denial, evidence introduced by the claimant after the denial, in support of the protest to the denial, is not relevant and will not be considered on the issue of unreasonableness.

18.4. Unreasonable denial defined. A denial shall be unreasonable if the denial by the private carrier or self-insured employer is without a legal or factual basis. The legal basis for a denial may be based upon any of the following: statutes; rules of the Insurance Commissioner; case law; or in the absence of relevant West Virginia case law, recognized legal treatises on workers' compensation. The mere fact that a denial decision is eventually reversed or overturned upon appeal does not prove or imply that the denial decision was unreasonable.

18.5. Decision. Following the expiration of the time frame, the Board of Review will issue a decision determining whether the denial meets the statutory definition of "unreasonable." If the Board of Review concludes that the denial was unreasonable, then the private carrier or self-insured employer will be ordered to pay reasonable attorney fees and costs.

18.6. Fees and expenses. The claimant shall submit a petition to the private carrier, or self-insured employer, who will determine the reasonableness of the attorney fees and costs according to applicable rule. Disputes over the amount approved may be protested to the Board of Review as provided for by article five of Chapter 23.

§102-1-19. Disputes Between Claim Administrators: Reopening Versus New Injury Issues.

19.1. Scope. W. Va. Code §23-5-1a(b)(2)(A) provides that the Board of Review resolves disputes between claim administrators, without prejudicing the right of the injured worker to immediate workers' compensation benefits, in claim filings in which the claim is otherwise compensable but the only matter of dispute is whether the claim should have been filed as a new injury application or an application to reopen an old claim.

19.2. Initiation of process. When a claim administrator determines to deny a request for benefits and the only basis for denial of benefits is the determination that the application was improperly filed as a new claim or a reopening of an old claim, the claim administrator shall issue a decision denying benefits and providing the right of the claimant to object. If the claimant files a timely protest, then the following subsections apply. The Board of Review shall acknowledge the protest and enter a time frame as provided for in any other type of protest.

19.3. Administration of claim and conditional payment of benefits. Upon receipt of notice of the filing of a protest to the denial of the claim, the claim administrator shall begin conditional payment of benefits within fifteen (15) working days. Conditional payment of benefits shall continue until affected by subsequent order or decision of the Board of Review.

19.4. Notice to Board of Review. Upon receipt of notice of the filing of a protest to the denial of the claim, the claim administrator shall promptly notify the Board of Review that another identifiable person may be liable. The burden is on the claim administrator to provide sufficient claim identifying information in order for the Board of Review to determine to change the responsible administrator.

19.5. Notice to other allegedly liable person; new claim defenses

19.5.1. Form of notice. Upon receipt of sufficient information from the claim administrator, the Board of Review will join the other potential claim administrator to the proceeding. The Board of Review will notify the alleged responsible claim administrator of the existence of the claim for benefits, of the existence of the protest, the allegation that the claim is otherwise compensable, the possibility that the claim responsibility may ultimately be assigned to the new claim administrator, the possibility that conditional payments being made may ultimately be transferred to the new administrator, and of any time limit for raising any claim defenses not raised by the initial claim administrator, or for filing evidence.

19.5.2. New claim defenses. Although the claim administrator with whom the claim was initially filed has determined that no basis exists for the denial of the claim other than that the application was filed with the wrong claim administrator, the process cannot limit the rights of the potentially responsible claim administrator to offer its own claim defenses. The Board of Review will provide a reasonable time period for the new claim administrator to investigate the circumstances of the claim and issue a notice raising any additional reasons for denying the claim. If the new claim administrator raises other reasons that the claim should have been denied, then the Board of Review shall address those issues in any final decision on the protest.

19.6. Interlocutory transfer of claim responsibility. Prior to the final resolution of the issue, the Board of Review, upon sufficient proof and after opportunity for the other claim administrator to have responded, may determine to change the responsible claim administrator. In that event, conditional payment of benefits shall be paid by the other claim administrator until the final determination.

19.7. Tolling of statute of limitations for claim filings. Pursuant to W. Va. Code §23-5-1a(c), the Board of Review has authority to toll any statute of limitation by directing that:

19.7.1. An application for benefits be designated as a petition to reopen, effective as of the original date of filing; or

19.7.2. A petition to reopen be designated as an application for benefits, effective as of the original date of filing; or

19.7.3. An application for benefits or petition to reopen with any claim administrator be designated as either with any other claim administrator, effective as of the original date of filing.

19.8. Final resolution and monetary adjustment or reimbursement. At the conclusion of the time frame for filing of evidence and arguments, the Board of Review will issue a final resolution of the issue of claim responsibility and will address any additional claim defenses if raised by the other claim administrator joined as a party. In the final resolution, the Board of Review will direct appropriate reimbursement or monetary adjustment provided that the claim has been determined to be compensable and that a change of claim administrators has been determined. Claim liability, reimbursement, and other monetary adjustments rulings shall be complied with unless stayed by order of the Board of Review or appellate court.

§102-1-20. Denial of a Claim Based upon W. Va. Code §21-5I-4 (Classification of independent contractors and employees).

20.1. Initiation of process. This process is initiated upon receipt by the Board of Review of the claimant's protest to a ruling denying the compensability of the claim because the claim administrator found the claimant is an independent contractor.

20.2. Filing of evidence and argument. The Board of Review will issue a Time Frame Order setting forth the time limits for the filing of evidence and argument by the parties.

20.3. Decision. Following the expiration of the time frame, the Board of Review will issue a decision determining whether the criteria set forth in W. Va. Code §21-5I-4 to establish that the claimant is an independent contractor has been met.

§102-1-21. Petition for Award of Claimant's Attorney Fees and Costs pursuant to W. Va. Code §23-5-16a(c).

21.1. Scope. W. Va. Code §23-5-16a(c) provides for an award of attorney fees and costs to the claimant's counsel after a final decision in which the claimant successfully prevails in a proceeding relating to a denial of medical benefits.

21.2. Initiation of process. If the Board's decision granting medical benefits is not appealed, then the claimant's counsel may submit a "Petition for Award of Claimant's Attorney Fees and Costs" within thirty (30) days following the expiration of the appeal period. Claimant's counsel shall serve copies of the Petition on the claimant, employer, claim administrator, and employer's counsel. Employer's counsel may submit a Response to the Petition within ten (10) days of receipt of the Petition.

21.3. Decision. The Board of Review will consider the Petition and the Response, if any is timely submitted, and will enter an order within thirty (30) days of receipt of the Petition.

§102-1-22. Stays

22.1. Scope. Pursuant to W. Va. Code §23-5-9a(g) and W. Va. Code of State Rules § 85-1-18, the Board of Review's decisions are final, and benefits shall be paid or denied in accordance with the decision, unless an order staying the payment of benefits is entered by the Board of Review or an appellate court. The responsible party may move for stay of any order entered by the Board of Review for the payment of indemnity benefits, or which will necessarily require or result in the payment of such benefits, including, but not limited to, an order which finds a claim to be compensable, by filing a motion with either the Board of Review or the appellate court. A stay with respect to any medical, rehabilitation, or permanent total disability benefits may not be granted.

22.2. Initiation of process with Board of Review. If the responsible party files a motion for stay with the Board of Review, the motion must be filed within ten (10) days of the date of entry of the Board of Review's underlying order. Any motion that is not timely filed shall be dismissed with prejudice. The motion must include the following minimum content: a statement of the reasons the stay is being sought, and a statement of the grounds for the appeal of the underlying order. Failure to include the minimum content is grounds for summary denial of the motion. The claimant may file a response to the motion within ten (10) days of the date on which the motion was filed. The Board of Review shall enter an order granting or denying the motion within ten (10) days from the end of the response period.

22.3. Limitations in any order granting a motion for stay. Any order granting a motion for stay shall expressly limit the stay to temporary total or permanent partial indemnity benefits to be paid in the claim as a result of the underlying order. Any order granting a motion for stay shall expressly limit the duration of the stay to the expiration of the jurisdictional time limit for the filing of an appeal of the underlying order, or to the entry of a decision by the appellate court if an appeal is filed. If the appellate court enters

a decision remanding a case to the Board of Review for further proceedings, any stay granted by the Board of Review or appellate court shall remain in effect until the Board of Review enters a new order on the issue which was remanded, at which time the stay will be lifted.

§102-1-23. Severability.

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