



March 2009

WEST VIRGINIA INFORMATIONAL LETTER

NO. 167

**TO: All Insurance Companies Authorized to Sell Workers' Compensation Insurance in the State of West Virginia, Insurance Trade Associations, Insurance Media Publications, Employers Authorized to Self Insure Workers' Compensation Risk pursuant to W. Va. Code § 23-5-9, and Other Interested Persons.**

**RE: Workers' Compensation Non-Awarded Partial ("NAP") Benefits**

Since the privatization of the workers' compensation market on January 1, 2006, questions have arisen regarding the payment of the so-called Non-Awarded Partial ("NAP") benefits provided for by West Virginia Code § 23-4-7a. This Informational Letter is not intended to provide a comprehensive analysis of those circumstances under which NAP benefits must be paid. Rather, the purpose of this Informational Letter is to inform all interested parties of the Insurance Commissioner's interpretation and enforcement position as it relates to the issue of whether the payment of NAP benefits is mandatory, and the time frame in which the payment of NAP benefits must be commenced.

West Virginia Code § 23-4-7a provides for two circumstances under which the payment of NAP benefits is mandated. Under Subsection (c)(2), when a claimant's treating physician recommends a permanent partial disability award of greater than fifteen percent (15%), and the claimant is unable to return to work, "the claimant *shall thereupon* receive benefits which shall be at the permanent partial disability rate as provided in subdivision (e), section six of this article until the entry of a permanent disability award or until the claimant returns to work." W. Va. Code § 23-4-7a(c)(2)(2005)(emphasis added).

Subsection (e) states, in relevant part:

In the event that the medical or other evidence indicates that claimant has a permanent disability, unless he or she has returned to work, the claimant *shall thereupon* receive benefits which shall be at the permanent partial disability rate as provided in subdivision (e), section six of this article until entry of a permanent disability award, pursuant to an evaluation by a physician or physicians selected by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, or until the claimant returns to work. The amount of benefits shall be considered and determined to be payment of the permanent disability award granted, if any. In the event that benefits actually paid exceed the amount granted under the permanent disability award, the claimant is entitled to no further benefits by the order.

W. Va. Code § 23-4-7a(e)(4)(2005)(emphasis added).



The phrase “shall thereupon” as used in these two subsections of the statute is not ambiguous. “Shall” denotes mandatory action on the part of the party responsible for the payment of benefits to the claimant. “Thereupon” must be given its ordinary meaning of “immediately following that” or “in consequence of that.”<sup>1</sup> In whole, the phrase “shall thereupon” plainly means that the payment of NAP benefits is mandatory upon satisfaction of the prerequisite conditions set forth in the statute, and that such payment must commence immediately, or in consequence of, the satisfaction of such conditions. The statute, in stating, “The amount of benefits shall be considered and determined to be payment of the permanent disability award granted, if any,” plainly classifies NAP benefits as a form of permanent partial disability (“PPD”) benefits. Accordingly, the provisions regarding the time standards applicable to PPD benefits set forth at 85 C.S.R. 1 § 10.5.c. would be applicable to the payment of NAP benefits. NAP benefits should thus be commenced no more than fifteen (15) working days following the date that a claimant becomes entitled to receive such benefits.

Any questions regarding this Informational Letter should be addressed to the OIC Legal Department at 304.558.0401 or [legal@wvinsurance.gov](mailto:legal@wvinsurance.gov).

ss://Jane L. Cline  
Jane L. Cline  
Insurance Commissioner

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<sup>1</sup> thereupon. Dictionary.com. Dictionary.com Unabridged (v 1.1). Random House, Inc. <http://dictionary.reference.com/browse/thereupon> (accessed: March 05, 2009).