

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

**SERIES 4
ATTORNEY'S FEES**

§85-4-1. General.

1.1. Scope. -- This exempt legislative rule relates to compliance with orders of the Office of Judges directing private carriers to attorney fees and costs with regard to certain types of denials of benefits issued by a private carrier.

1.2. Authority. -- W. Va. Code §§23-1-1; 23-1-1a(j)(3) and 23-2C-21(c). Pursuant to W. Va. Code §23-1-1a(j)(3), rules adopted by the board of managers and the commission 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. -- October 28, 2005.

1.4. Effective Date. -- December 1, 2005.

1.5. Repeal of former rule. This rule repeals and replaces 85 C.S.R. 4, "Payment of Attorney's Fees by the Workers' Compensation Commissioner" filed and effective on May 23, 1985.

§85-4-2. Definitions.

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

2.1. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.

2.2. "Board" means the workers' compensation board of managers created pursuant to the provisions of W. Va. Code §23-1-1a.

2.3. "Commission" means the workers' compensation commission created pursuant to the provisions of W. Va. Code §23-1-1.

2.4. "Code", "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

2.5. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W. Va. Code §23-1-1b.

2.6. "Insurance Commissioner" means the insurance commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code.

2.7. "Office of Judges" refers to the Office of Judges, as set forth in W. Va. Code §23-5-8.

2.8. "Private Carrier" means any insurer, including the successor to the Commission, authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code, but shall not include self-insured employers.

2.9. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

§85-4-3. Denial Rulings; Types.

3.1. The Office of Judges may determine that certain denial rulings by a private carrier or self-insured employer are unreasonable and, upon reversal of the denial, award attorney's fees to the

claimant to be paid by the private carrier or self-

3.2. Denial rulings; limited types.

a. The Office of Judges may only award attorney’s fees to a claimant when the unreasonable denial ruling:

- 1. Denies the compensability of a claim;
- 2. Denies an initial award of temporary total disability; or
- 3. Denies an authorization for medical benefits.

3.3. The Office of Judges shall not award attorney’s fees to a claimant resulting from any other type of denial ruling by a private carrier or self-insured employer.

§85-4-4. Payment of Awards.

4.1. An award of reasonable attorneys’ fees and costs actually incurred in reversing an unreasonable denial decision shall be paid by a private carrier or self-insured employer.

4.2. Reasonable attorneys’ fees incurred in reversing an unreasonable denial of compensability or an initial award of temporary total disability shall be the attorney’s fees allowed pursuant to W. Va. Code §23-5-16. Attorney’s fees shall be payable only upon the conclusion of all litigation and appeals if the denial decision has been reversed and if the Office of Judges has determined that the denial decision is unreasonable.

a. Attorneys shall not be entitle to receive attorney fees under both the provisions of W. Va. Code §23-5-16 and this rule. Any amounts received in excess of the statutory amount shall be reimbursed to the claimant for incurred attorney’s fees.

4.3. Reasonable attorneys’ fees incurred in reversing an unreasonable denial of an authorization of medical benefits will be calculated at a rate of \$110 per each hour worked

insured employer.

through a final decision by the Office of Judges, up to a maximum of \$1,500. The attorney will be paid \$110 per hour worked for any appellate work at the Board of Review and West Virginia Supreme Court of Appeals, up to a maximum additional \$1,500. Attorney’s fees shall be payable only upon the conclusion of all litigation and appeals if the denial decision has been reversed and if the Office of Judges has determined that the denial decision is unreasonable. The hours worked shall begin to accrue upon the injured workers’ receipt of the denial of medical authorization.

4.4. Costs actually incurred in the process of obtaining a reversal of the unreasonable denial is limited to the following items incurred after the date of the denial decision:

- a. Court filing costs;
- b. Service of process costs;
- c. Transcription costs;
- d. Costs of preparation of medical reports; and
- e. Costs of testimony of expert witnesses.

4.5. In no event shall the costs of the preparation of a medical reports or the testimony of expert witnesses exceed the normal and customary fee schedule of the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable.

4.6. The attorney’s fees and actual costs shall be paid upon petition presented to the private carrier or self-insured employer. The fee petition shall provide the contract of representation, an itemization of all legal services provided and the amount of time (expressed in tenths of an hour) expended in providing them, and an itemized listing of the actual costs incurred in the litigation of the matter.

4.7. In no event shall attorney’s fees and costs be awarded for disputes regarding the amount

contained within the fee petition presented to the private carrier or self-insured employer.

§85-4-5. Appeals of Office of Judges' Decisions.

Determinations made by the Office of Judges to award or not award attorney's fees to the claimant shall be appealable in accordance with the provisions of W. Va. Code §23-5-10.

§85-4-6. Severability.

If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of this rule which can be given effect without the invalid provisions or application and to this end the provisions of this rule are declared to be severable.