

**TITLE 85
WORKERS' COMPENSATION COMMISSION
EXEMPT LEGISLATIVE RULE**

**SERIES 5
PERMANENT TOTAL DISABILITY**

§85-5-1. General.

1.1. Scope. -- This rule implements the provisions of West Virginia Code Section 23-4-6(j)(1) regarding the proper completion and support for an application for permanent total disability benefits and the provisions of West Virginia Section 23-4-16(d) regarding the continuous monitoring of permanent total disability awards.

1.2. Authority. -- W. Va. Code §§23-4-6(j)(1); §23-4-16(d). Pursuant to W. Va. Code, §23-1-1a(j)(3), rules adopted by the Workers Compensation Board of Managers are not subject to legislative approval as would otherwise be required under W. Va. Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- June 29, 2005.

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

§85-5-2. Definitions.

The following terms and words have the meanings stated, unless the context clearly indicates otherwise.

2.1. "Executive Director" means the executive director of the West Virginia Workers' Compensation Commission pursuant to W. Va. Code §23-1-1b.

2.2. "Commission" means the West Virginia Workers' Compensation Commission as provided for by W. Va. Code §23-1-1, and where appropriate, reference to the Commission shall include the self-insured employer."

2.3. "Act" means the workers' compensation laws of the State of West Virginia that are codified at chapter twenty-three of the Code of West Virginia.

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

2.5. "This rule" means the present exempt legislative rule that is designated in the caption here as title 85, series 5.

2.6. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of West Virginia Code Section 23-1-1a, et seq.

2.7. "PTD Application" shall mean an application for permanent total disability benefits provided for in West Virginia Code Section 23-4-6(d), et seq.

2.8. "PTD Recipient" shall mean any individual receiving permanent total disability benefits from the Commission or its predecessor agencies, self-insured employers or private carriers, whichever may be applicable, regardless of date of injury, date of last exposure, or date of award.

2.9. "PTD Award" shall mean an award of permanent total disability benefits, regardless of date of injury, date of last exposure, or date of award.

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

2.11. "Insurer" shall mean 1) as self-insured employer; or 2) a private carrier.

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

2.13. "Reviewing body" means the

interdisciplinary examining board or, upon termination of the Commission, the reviewing body who has jurisdiction over the claim as set forth in the provisions of W. Va. Code §23-4-6(j).

§85-5-3. Completion and Support of PTD Application.

3.1. A PTD Application will not be processed by the Commission, self-insured employer or private carrier, whichever is applicable, unless and until a Commission or insurance commissioner approved application is filed with the Commission, self-insured employer or private carrier that has been properly and fully completed, and is accompanied by all supporting information requested by the Commission, self-insured employer, or private carrier in its sole discretion. The PTD Application shall be on a form provided by the Commission or insurance commissioner which shall solicit the following information:

- a. Applicant's name;
- b. Applicant's social security number;
- c. Applicant's injuries and dates of injuries;
- d. Applicant's date of birth;
- e. Applicant's address;
- f. Applicant's phone number;
- g. Applicant's current employment status (employed, unemployed, self-employed, off due to injury);
- h. Details regarding any efforts by the Applicant to apply for and/or receive social security benefits, of any type;
- i. Details regarding any efforts by the Applicant to apply for and/or receive a retirement benefit of any type, include, but not limited to, receipt of a defined benefit or disability pension plan. The Applicant shall advise as to whether he or she contributed to the retirement plan and whether the plan benefit is being paid under the terms and conditions of a

collective bargaining agreement;

j. All workers' compensation claims indicating their claim number, the date of injury, the injured body part, the impairment rating, if any, awarded in the claim, and the name of the employer and the employer's insurer in the claim;

k. All disability claims filed with any other state or federal agencies;

l. Copies of all medical reports indicating that the claimant has a permanent impairment;

m. Information regarding any non-work related injuries or diseases suffered by the Applicant;

n. Medical history;

o. Prescription drug history;

p. Employment history, including dates on employment for each employer;

q. Military history; and

r. Education history.

3.2. The PTD Application shall contain a Fraud Warning and shall reference applicable criminal and civil penalties as set forth in Chapter 23 and Chapter 61 of the West Virginia Code and, upon termination of the Commission, shall also reference applicable penalties under Chapter 33 of the West Virginia Code.

3.3. The Commission, self-insured employer or private carrier may utilize an Application for determining whether a claim should be opened for consideration as more fully set forth in West Virginia Code Section 23-4-6(n)(1) which solicits the information set forth in 3.1 that is pertinent to such determination and may thereafter utilize an Application Addendum or Supplemental Application to solicit more detailed information if the Commission, self-insured employer or private carrier determines that the requirements of West Virginia Code Section 23-4-6(n)(1) have been met. A claim will not be re-opened for PTD consideration unless the Application has been filed within five

(5) years of the date of closure of the claim, or within five (5) years of the date of the initial PPD award, whichever is applicable, as required by West Virginia Code Section 23-4-16. Further, any request for reopening shall be subject to the limitation on the number of requests (two) as contained within the provisions of W. Va. Code §23-4-16(a)(1).

3.4. The Applicant shall submit detailed and complete information regarding any benefits being paid to the Applicant through a retirement plan, wage replacement plan, salary continuation plan or other benefit plan provided by any current or former employer. The Applicant shall supply any evidence illustrating that he or she contributed to the plan and/or that the benefits being paid under the terms and conditions of a collective bargaining agreement.

3.5. The Applicant shall execute and update any and all Releases or Authorizations required by the Commission, self-insured employer or private carrier, including, but not limited to, those Releases and Authorizations required for the Commission, self-insured employer, or private carrier to obtain state and federal tax records, financial records, affidavits, income records, social security records, employment records, military service records, medical records, education records and records held by other insurers, including self-insured employers.

3.6. All material information required in Sections 3.1-3.5 must be received by the Commission, self-insured employer, or private carrier before the PTD Application will be deemed complete and adequately supported.

3.7. No issue of permanent total disability may be referred to reviewing body unless a properly completed and supported application for permanent total disability benefits has been received by the Commission, self-insured employer, or private carrier. Prior to the referral of any issue to the reviewing body, the commission, self-insured employer or private carrier shall conduct examinations of a claimant that it finds necessary and obtain all pertinent records concerning a claimant's medical history and reports of examinations and forward them to the reviewing body at the time of the referral.

3.8. Claimants' whose applications for

permanent total disability benefits do not satisfy the re-opening requirements of West Virginia Code Section 23-4-6(n)(1), as determined in the sole discretion of the Commission, self-insured employer, or private carrier, shall not be referred to the reviewing body and said decision shall be issued as a protestable order.

3.9. For all applications received on or after June 1, 2005, a claim determined to be eligible for evaluation for a permanent total disability award shall be ruled on by the reviewing body within one (1) year from the date such eligibility was determined. Nevertheless, for good cause, this period may be extended by the Commission, self-insured employer, or private carrier at the request of the employer or injured worker

§85-5-4. Program to Update Disability Status of Those Receiving PTD Benefits as of July 1, 2003.

4.1. Upon the effective date of this Rule, the Commission will begin a program requiring each person receiving permanent total disability benefits as of July 1, 2003, who had been granted a permanent total disability award on or after April 8, 1993, to 1) submit his or her tax returns for the preceding three (3) years; and 2) an affidavit demonstrating level of income, recreational activities, and work activities. Any permanent total disability award granted prior to April 8, 1993 but reopened for a benefit level adjustment shall be eligible for this review.

4.2. Each month, the Commission shall contact, by certified mail, approximately five hundred (500) PTD Recipients in an effort to secure the information set forth in Section 4.1. The mailing shall include an appropriate Internal Revenue Service authorization which can be completed in full and returned to the Commission, a form affidavit, and a self-addressed, postage pre-paid return envelope so that the documents can be returned to the Commission at no charge to the PTD Recipient.

4.3. The mailing shall instruct the recipient that he or she has forty-five (45) days from receipt to return the requested information or otherwise fully and adequately respond to the Commission's inquiry. Failure to so respond shall result in a second notice being sent to the PTD Recipient in the manner set forth in Section

4.2. The PTD Recipient will be given another forty-five (45) days to respond to this second notice and the PTD Recipient will be advised that failure to fully and adequately respond will result in a suspension of permanent total disability benefits.

4.4. Failure of a PTD Recipient to fully and adequately respond to the second notice as described in Section 4.3 above shall result in the suspension of permanent total disability benefits. The suspension shall remain in effect until the PTD Recipient has fully complied with the Commission's request. Benefits may be reinstated prospectively if and when the PTD Recipient fully complies with the Commission's request, but the benefits lost during the suspension shall not be paid.

4.5. The Commission will identify those injured workers who appear to be working, receiving income, not reporting any medical care, or are believed to otherwise not meet the current eligibility criteria for a permanent total disability award and make these individuals a priority review. Otherwise, the PTD review shall generally begin with those most recently awarded a permanent total disability award and will work in reverse chronological order thereafter.

§85-5-5. Monitoring of PTD Recipients.

5.1. The Commission, self-insured employer, or private carrier shall continuously monitor permanent total disability awards and may reopen a claim for reevaluation of the continuing nature of the disability and possible modification of the award. In evaluating whether to reopen a claim, the Commission, self-insured employer, or private carrier may employ one (1) or more of the following methods:

a. Require the PTD Recipient to provide documents as more fully set forth in Section 4 above and other information to the Commission, self-insured employer, or private carrier, including, but not limited to, tax returns, financial records, affidavits demonstrating level of income, recreational activities, work activities, and any other information set forth in Section 3.1.a.-r. of this Rule;

b. Require the PTD Recipient to appear under oath before the Commission, self-insured employer, or private carrier or its duly authorized representative and answer questions;

c. Any claimant who willfully fails to provide the information called for in Section 5.1.a. or willfully fails to appear as required by Section 5.1.b. shall have his or her permanent total disability benefits suspended. The suspension shall remain in effect until the PTD Recipient has fully complied with the Commission's, self-insured employer's, or private carrier's request. Benefits will be reinstated prospectively if and when the PTD Recipient complies with the Commission's, self-insured employer's, or private carrier's request, but the benefits lost during the suspension shall not be paid.

5.2. If the Commission, self-insured employer, or private carrier concludes, in its sole discretion, that there exists good cause to believe that the PTD Recipient no longer meets the eligibility requirements of West Virginia Code Section 23-4-6(n), the claim may be reopened after providing the PTD Recipient 30 days written notice.

5.3. Upon reopening, the Commission, self-insured employer, or private carrier may modify the PTD award or reevaluate the continuing nature of the PTD Recipient's disability. The eligibility requirements for evaluating a PTD Recipient's permanent total disability status shall be the requirements, including any vocational standards, stated in Chapter 23 at the time of a claim's reopening, regardless of date of injury or date of award. If appropriate, the Commission, self-insured employer, or private carrier, in its sole discretion, may process the reopening through the reviewing body or through any other medical review process.

5.4. Upon reopening, the Commission, self-insured employer, or private carrier may take evidence, have the claimant evaluated, make findings of fact and conclusions of law and issue a Final Order that 1) shall vacate, modify or affirm the award; 2) require the offset of any benefits being paid to the PTD Recipient due the PTD Recipient's receipt of benefits from a retirement plan, wage replacement plan, salary continuation plan or other benefit plan provided

by any current or former employer as more fully provided for in West Virginia Code Section 23-4-1d(f), as that provision may be amended from time to time; 3) may award any rehabilitation benefits as more fully provided for in West Virginia Code Section 23-4-9, as that section may be amended from time to time; or 4) may otherwise modify the PTD Award as determined appropriate in the sole discretion of the Commission, self-insured employer, or private carrier.

a. The Commission, self-insured employer, or private carrier shall issue a proposed order setting forth its findings, which shall become effective in 120 days from the date of the order unless the injured worker submits evidence within 90 days of the proposed order establishing that the proposed action is not supported by the weight of the evidence submitted.

5.5. The PTD Recipient's former employer shall not be a party to the reevaluation, but shall be notified of the reevaluation and may submit any information to the Commission, self-insured employer, or private carrier as the employer may elect.

5.6. In the event the claimant retains his or her award following the reevaluation, the PTD Recipient shall be reimbursed his or her costs in obtaining one evaluation on each issue during the course of the reevaluation with the reimbursement being made from the workers' compensation fund.

5.7. Upon being identified as a candidate for reevaluation, an injured worker shall be entitled to legal counsel and the injured worker's attorneys' fees incurred in defending the award shall be paid by the Commission, self-insured employer, or private carrier. The attorney will be paid \$110 per each hour worked through a final decision by the Office of Judges, up to a maximum of \$3,500. 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. The fee shall be payable only upon the issuance of a decision by the West Virginia Supreme Court of Appeals, or a lower jurisdiction if an appeal is not taken. The hours worked shall begin to accrue upon the injured

workers' receipt of a Commission, self-insured employer, or private carrier notice identifying him or her for review. The maximum attorney fee allowable under this section may be waived in extraordinary cases in the sole discretion of the Commission, self-insured employer, or private carrier.

5.8 The reopening and reevaluation process shall not apply to PTD Awards granted pursuant to West Virginia Code Section 23-4-6(m).

5.9 The Commission's, self-insured employer's, or private carrier's Final Order, issued pursuant to Section 5.4 shall be a protestable Order. The Commission's, self-insured employer's, or private carrier's reopening and other actions set forth in Section 5.1-5.3 shall not be protestable.

§85-5-6. Termination of the Commission.

Upon termination of the commission, the application requirements set forth in Section 3 of this exempt legislative rule and all duties set forth in Sections 4 and 5 of this exempt legislative rule as they are to be performed in connection with Old Fund liabilities as set forth in W. Va. Code §23-2C-2(m) shall be required and performed by the insurance commissioner and/or the insurance commissioner's administrator of the Old Fund or the administrator of other various funds regulated by the insurance commissioner. The application requirements set forth in Section 3 of this exempt legislative rule and all duties set forth in Section 5 of this exempt legislative rule as they are to be performed in connection with liabilities other than those contained in the Old Fund may be required and performed by insurers as defined above.

§85-5-7. Severability.

If any provision of this rule or the application thereof to any entity or circumstance is held invalid, such invalidity does 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.