

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

SERIES 9
WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

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§85-9-1. General.

1.1. Scope. -- These rules govern the administration of the Workers' Compensation Uninsured Employers' Fund pursuant to W. Va. Code §23-2C-8.

1.2. Authority. -- W. Va. Code §§23-2C-5(c)(2); 23-2C-22; 33-2-10(b) and 33-2-20(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), rules proposed by the Insurance Commissioner and adopted by the Industrial Council as related to workers' compensation under chapter twenty-three of the West Virginia Code are not subject to W. Va. Code §§29A-3-9 through 29A-3-16, inclusive.

1.3. Filing Date. -- October 9, 2009.

1.4. Effective Date. -- November 8, 2009.

§85-9-2. 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. "Commissioner" means the Insurance Commissioner of West Virginia or the Commissioner's designated third-party administrator.

2.2. "Industrial Council" means the Industrial Council created pursuant to W. Va. Code §23-2C-5.

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

2.4. "UEF" is the Workers' Compensation Uninsured Employers' Fund, as defined and established in W. Va. Code §§23-2C-2(o); 23-2C-7(a) and 23-2C-8.

2.5. "Workers' compensation coverage," as the term is used in this rule, means mandatory workers' compensation coverage pursuant to W. Va. Code §23-2C-1 *et seq.*

§85-9-3. Application for Benefits from the UEF.

3.1. If an individual believes that he or she may be entitled to benefits under the UEF, then he or she shall complete an application for benefits from the UEF on a form created by the Commissioner. The Commissioner reserves the right to change the UEF application form from time to time as deemed necessary. Completion of the application for benefits is an absolute prerequisite for any entitlement to benefits from the UEF.

3.2. Upon receipt of an application for benefits, the Commissioner shall send a letter to the employer which notifies the employer that one of its employees has made a claim against the UEF.

3.3. The Commissioner shall determine whether: (1) the claimant's employer was required to carry workers' compensation coverage on the date of the injury or last exposure; and (2) if the claimant's employer was required to carry workers' compensation coverage on the date of the injury or last exposure, whether applicable workers' compensation coverage existed on the date of injury or date of last exposure.

3.3.a. If the Commissioner determines that: (1) applicable workers' compensation coverage existed on the date of injury or date of last exposure; or (2) the employer was not required to carry workers' compensation coverage on the date of injury or last exposure, then the Commissioner shall send the claimant a letter, copied to the employer, informing the claimant of this determination, and that the claim is not eligible to receive benefits from the UEF. Additionally, in the case that the Commissioner determines that applicable workers' compensation coverage existed on the date of injury or date of last exposure, the letter described in this subdivision shall also be copied to the insurance carrier which provided such coverage.

3.3.b. If the Commissioner determines that: (1) the employer was required to carry workers' compensation coverage on the date of injury or date of last exposure; and (2) no applicable workers' compensation coverage existed on the date of injury or date of last exposure, then the Commissioner shall send the claimant a letter, copied to the employer, informing the claimant of this determination, and that the claim is eligible to receive benefits from the UEF. If the claim is deemed eligible to receive benefits from the UEF, the Commissioner shall begin to administer the claim consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

3.4. If, after rendering a determination as described in subdivisions a. and b., subsection 3.3. of this section, the Commissioner receives evidence to indicate that the determination was erroneous, the Commissioner reserves the right to enter a corrective determination remedying the previous erroneous determination.

3.5. Decisions made by the Commissioner as described in this section are protestable to the Workers' Compensation Office of Judges pursuant to the provisions of W. Va. Code §23-5-1 *et seq.*

§85-9-4. Subrogation.

4.1. Pursuant to W. Va. Code §23-2A-1, the Commissioner, on behalf of the UEF, has a

right to statutory subrogation against any claim made by a UEF claimant, his or her dependents or personal representatives, against a third-party for the injury or exposure from which the claim arose: Provided, That this statutory subrogation is only to the extent of the actual monetary benefits paid or to be paid to the claimant from the UEF.

4.2. Pursuant to W. Va. Code §23-2A-1(d), it is the duty of the claimant, his or her representatives or dependents, or any attorney representing the claimant or his or her dependents or representatives, to provide the Commissioner reasonable notice of a claim being made against a third-party, as well as reasonable notice prior to the disbursement of any recovery. Failure to provide such notice shall waive an attorney's right to be paid reasonable attorney fees out of the subrogation amount and shall further give rise to a cause of action by the Commissioner on behalf of the UEF against the claimant, his or her representatives or dependents or the attorney who failed to provide such reasonable notice.

§85-9-5. Employer Liability.

5.1. Pursuant to W. Va. Code §23-2C-8, an employer of a claimant who receives benefits from the UEF is liable to the UEF for all expenditures from the UEF on behalf of its injured employee, including, but not limited to:

5.1.a. All benefits, including all medical and indemnity payments, made from the UEF ;

5.1.b. All claims administration costs related to the administration of claim(s) against the UEF;

5.1.c. All attorney fees related to defense of claim(s) made against the UEF; and

5.1.d. Interest on the above expenditures, as calculated under W. Va. Code §23-2-13.

5.2. An employer shall remain on the Workers' Compensation Default List as defined in 85CSR11, until it pays all of its liability to the UEF, enters into a full and final settlement with the Commissioner for its liability to the UEF or enters into a repayment agreement with the Commissioner for its liability to the UEF and remains in good standing. The employer will be subject to all of the sanctions associated with being on the Default List, including, but not limited to:

5.2.a. Having a posting placed on the employer's front door informing its employees that the employer is uninsured and therefore may be sued by its employees for work related injuries;

5.2.b. A penalty of up to \$10,000; and

5.2.c. Being subject to an action in the Circuit Court of Kanawha County to enjoin the employer from continuing business operations.

5.3. If an employer incurs liability to the UEF after being removed from the Default List and the employer fails to remit payment for such liability to the UEF on a timely basis, as described in subsection 6.1. of this rule, the employer will be placed on the Default List until the liability is fully paid or otherwise resolved pursuant to section 6. of this rule.

§85-9-6. Methods for Determining and Collecting Employer Liabilities Owed to the UEF.

The Commissioner shall have discretion to utilize one or more of the following methods to determine and collect amounts owed to the UEF:

6.1. As benefit payments are made from the UEF, issue pay orders to a liable employer ordering them to reimburse the UEF, within a specific and reasonable amount of time, as selected by the Commissioner, for the amounts described in subsection 5.1. of this rule;

6.2. Enter into repayment agreements with an employer to reimburse the UEF for the amounts described in subsection 5.1. of this rule, and then enter pay orders to the employer as described in subsection 6.1. of this section;

6.3. Using generally accepted accounting and actuarial principles, reduce the estimated amount of a claim or claim(s) against the UEF, including all the amounts described in subsection 6.1. of this rule, to a present value reserve for the claim, and then deem the responsible employer to be liable for this amount. The Commissioner may then pursue this amount as a judgment against the employer, including filing a civil action in Circuit Court against the employer, seeking a judgment lien against the employer, and all other accepted methods of collection as set forth in article two, chapter twenty-three of the West Virginia Code and 85CSR11.

6.4. The Commissioner shall have discretion to enter into a full and final settlement with an employer for its liability to the UEF or waive amounts owed to the UEF as part of a repayment agreement or a full and final settlement with the employer.

§85-9-7. Methods for Determining Assessments for the UEF.

7.1. If at any time the Commissioner determines, based on generally accepted accounting and actuarial principles, despite the collection of, or projected collection of, amounts owed to the UEF, that: (1) the UEF has incurred a deficit balance; or (2) it appears imminent that it will incur a deficit balance, then, in order to maintain the solvency of the UEF, the Commissioner may, pursuant to W. Va. Code §23-2C-8, impose assessments against either private carriers, self-insured employers, or both, in the following manner:

7.1.a. Monthly or quarterly assessments against workers' compensation private carriers that reflect the relative hazard of the employments covered by the private carriers, results in an equitable distribution of costs among the private carriers and is based upon expected annual premiums to be received: Provided, this assessment may be collected by each private carrier from its policy holders in the form of a policy surcharge, and private carriers will have no liability for the amounts of this assessment which are not paid by employers defaulting on their premium payments;

7.1.b. Monthly or quarterly assessments against self-insured employers that result in an equitable distribution of costs among the self-insured employers and is based upon expected annual expenditures for claims.

7.2. Prior to imposing the assessments described in this section, the Commissioner shall provide at least sixty (60) days notice to the entities being assessed. Notice shall be provided in writing to all entities being assessed and through other means deemed appropriate by the Commissioner.