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

SERIES 15
VOCATIONAL AND PHYSICAL REHABILITATION

§85-15-1. General.

1.1. Scope. -- This exempt legislative rule establishes the requirements and procedures to be followed by the West Virginia Workers' Compensation Commission, Insurance Commissioner, private carriers, self-insured employers, parties to pending claims, health care providers, vocational professionals, and others involved in the delivery or proposed delivery of physical or vocational rehabilitation services to claimants pursuant to W. Va. Code §23-4-9. Other types of health care services provided or proposed to be provided to injured workers under other provisions of W. Va. Code §23-4-3, are not within the scope of these rules.

1.2. Authority. -- W. Va. Code §23-4-9(b) and (e). 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. -- August 31, 2005.

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

§85-15-2. Purpose of Rule; Cooperation.

2.1. It is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after a compensable injury. The optimal goal of the rehabilitation process should be to achieve the goals of the priority hierarchy set forth in Section 4.1. In order to assist injured workers to return to such employment and to encourage and assist employers in providing suitable gainful employment to injured employees, it shall be a priority of the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, to achieve early identification of individuals likely to need rehabilitation services and to assess/evaluate the rehabilitation needs of these injured workers. It shall be the goal of the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, and all interested parties to return injured workers to employment which shall be comparable in work and pay to that which the individual performed prior to the injury. If a return to comparable work is not possible, the goal of rehabilitation shall be to return the individual to alternative suitable gainful employment, using all possible alternatives of job modification, restructuring, reassignment and training, so that the individual will return to productivity with his or her employer or, if necessary, with another employer. It is the shared responsibility of the employer, the employee, the physical rehabilitation service provider, the qualified rehabilitation professional, the treating physician(s) and the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, to cooperate in the development of a rehabilitation process designed to promote re-employment for the injured employee.

2.2. Every injured worker and his or her employer are required pursuant to this rule to participate in rehabilitation evaluations, and the development, implementation, and completion of rehabilitation plans. Additionally, the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, the injured worker, his or her employer, his or her treating physician(s), the physical rehabilitation service provider, and the qualified rehabilitation professional are required

to share in the responsibility for the success of the individual injured worker's rehabilitation.

a. An injured worker who is fully participating in an authorized physical rehabilitation plan or in an authorized vocational rehabilitation plan for modified return to work, job search, training or other approved service, and who shows satisfactory progress toward completion of the plan is eligible to receive temporary total rehabilitation or temporary partial rehabilitation benefits. An injured worker who fails, without a showing of good cause, to participate in a rehabilitation evaluation, to participate in an authorized rehabilitation plan, or fails to show satisfactory progress toward completion of the plan, may be denied any applicable form of benefits or may have temporary rehabilitation benefits suspended effective the date the worker ended his or her participation in the rehabilitation plan, ceased to be cooperative in and/or comply with the rehabilitation plan, or ceased making satisfactory progress toward completion of the plan. The determination of whether a claimant is making satisfactory progress, within the meaning of this section, shall be within the sole discretion of the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable.

b. In determining whether an injured worker has cooperated in and/or complied with the rehabilitative effort, the following standards are to be used:

1. Whether medical, physical rehabilitation and/or and vocational opinion substantially concur that the treatment, service, or program is indicated to bring about a return to employment;

2. Whether it is reasonably safe and not attended by unusual suffering or risk for the injured worker to participate;

3. Whether it is likely that the treatment, service, or program will produce measurable physical and/or vocational improvement; and

4. Whether a person of ordinary prudence and courage would participate in the treatment, service, or program for his or her own betterment, regardless of compensation.

c. Employers who cooperate with the rehabilitation assessment/evaluation process and fully participate in authorized rehabilitation plans benefit from the rehabilitation process by minimizing the costs associated with work-related injuries. The Commission, Insurance Commissioner, or private carrier, whichever is applicable, must consider an employer's workers' compensation vocational rehabilitation record in assigning an experience rating if the employer is a subscriber to the extent allowed by legislative rules governing ratemaking and underwriting practices and Chapter 23 of the West Virginia Code. Employer's cooperation regarding rehabilitation efforts and plans includes, but is not limited to: full participation in the rehabilitation evaluation, reasonable efforts to provide reemployment opportunities to injured workers upon full release or release with restrictions, reasonable efforts to provide assistance to the injured worker returning to transitional, part time, modified or alternate employment.

d. This rule establishes the minimum standard for an employer providing assistance to an injured worker to return to employment; it is not intended to limit additional assistance an employer may provide a worker.

2.3. In making a ruling that a party has failed to cooperate or comply, the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, shall issue a protestable order. Where there are disagreements between the injured worker, the employer, or the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, so as to cause the filing of a protest, the parties are encouraged to utilize the mediation process provided for by W. Va. Code §23-5-9(b).

2.4. Physicians and other health care providers are also responsible for assisting and encouraging injured workers to return to suitable gainful employment and providing assistance to

employers in determining accommodations for each injured worker. Physician and other health care provider cooperation regarding rehabilitation efforts and plans includes, but is not limited to: the rehabilitation evaluation, full participation in providing updated medical documentation pertaining to current and anticipated treatment plans and restrictions to the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, injured worker, employer, and other treating or consulting physician or other health care provider, encouraging and participating in communications between the injured worker and his or her employer, familiarity with the injured worker's essential job functions, cooperating with and timely responding to rehabilitation providers, and provision of medical documentation to assist in returning to transitional, part-time, modified or alternate employment. Failure by a physician or other health care provider to cooperate in rehabilitation efforts may result in suspension or termination of the physician or health care provider pursuant to W. Va. Code §23-4-3c.

2.5. Providers of vocational rehabilitation services and qualified rehabilitation professionals are encouraged to assist injured workers, employers, physicians and other health care providers to fully participate and cooperate in the rehabilitation process. The providers and qualified rehabilitation professional must be knowledgeable of all applicable legislative rules, exempt legislative rules, and statutory requirements that relate, in any way, to the provision of rehabilitation services. Failure of a vendor and/or a qualified rehabilitation professional to be fully cooperative in the rehabilitation process may result in suspension or termination of the vendor and/or qualified rehabilitation provider and/or his/her employer/primary contractor pursuant to W. Va. Code §23-4-3c.

§85-15-3. Definitions.

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

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

3.2. "Commission" means the West Virginia Workers' Compensation Commission as provided for by W. Va. Code §23-1-1.

3.3. "Injury" and derivative words have the meaning ascribed to the term "injury" by W. Va. Code §23-4-1.

3.4. "Injured worker" and "claimant" mean an employee entitled to workers' compensation benefits as the result of a work-related injury, as provided under W. Va. Code §23-4-1.

3.5. "Injured worker's employer" or "employer" means an employer of the injured worker who is a chargeable employer in the claim either through its experience or through its private carrier.

3.6 "Suitable gainful employment" means employment which restores the injured worker as closely as possible to his or her pre-injury level of earnings. If this is not possible, suitable gainful employment means other work for which the employee is, or may become, suited by training, experience, or education, but not limited by his or her previous level of earnings.

3.7. "Physical rehabilitation services" means physician approved health care services, which will likely increase the injured worker's ability to return to suitable gainful employment. Physical rehabilitation services include but are not limited to work hardening and work conditioning programs or other Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, approved physical rehabilitation program.

3.8. "Physical rehabilitation services provider" means a provider of health care services, provided the provider is:

a. A medicare certified rehabilitation agency;

b. A certified outpatient rehabilitation facility;

c. A duly licensed health care practitioner;

d. A physical rehabilitation hospital;

e. A duly licensed acute care hospital.

3.9. "Physical rehabilitation hospital" means any of the following institutions or facilities:

a. A duly licensed hospital that meets the requirements for rehabilitation hospitals as described in section 2803.2 of the medicare provider reimbursement manual, part 1, as amended, or any successor provision, as published by the United States health care financing administration; and that, for its in-patient services, obtains on or before December 31, 1994, and thereafter maintains accreditation from the Joint Commission on Accreditation of Health Care Organizations and, further, on or before July 1, 1995, obtains and thereafter maintains accreditation from the Commission on the Accreditation of Rehabilitation Facilities.

b. A distinct rehabilitation unit in a duly licensed hospital which distinct part unit meets the requirements of section 2803.61 of the medicare provider reimbursement manual, part 1, as amended, or any successor provision, as published by the United States health care financing administration; or

c. A facility operated by the West Virginia Division of rehabilitation services.

3.10. "Work Conditioning" means an intensive, work-related, goal-oriented conditioning program designated specifically to restore systemic neuromusculoskeletal functions (eg strength, endurance, movement, flexibility, motor control) and cardiopulmonary functions. The objective of the work conditioning program is to restore physical capacity and function to enable the injured worker to return to work. Program will be two (2) to four (4) hours per day, five (5) days per week, and for a period not to exceed four (4) weeks in duration, however, the commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, on a case-by-case basis, may approve program extension.

3.11. "Work Hardening" means a highly structured, goal-oriented, individualized progressive and supervised treatment program designed to return the client to work. Work hardening programs, which are often interdisciplinary in nature, use real or simulated work activities designed to restore physical, behavioral, and vocational functions. Work hardening addresses issues of productivity, safety, physical tolerances, and work behaviors. Programs duration will be four (4) to eight (8) hours per day, five (5) days per week, and for a period of not to exceed four (4) weeks in duration, however, the commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, on a case-by-case basis, may approve program extension.

3.12. "Assistive devices" means physical aides, appliances or mechanical devices that will increase the injured worker's independence or provide assistance in performing an essential job task to facilitate a return to suitable gainful employment.

3.13. "Vocational rehabilitation services" means professional services available to the injured worker under W. Va. Code §23-4-9 which are reasonably necessary to enable him/her to return to suitable gainful employment as soon as practical. This may include, but is not limited to, coordination of medical services, vocational assessment, vocational evaluation, vocational counseling, vocational rehabilitation plan development, vocational rehabilitation plan monitoring, job development and job placement. Furthermore, "vocational rehabilitation service" means services covered by W. Va. Code §23-4-9, which provide new skills or modified work to enable an injured worker to return to suitable gainful employment as soon as practical. Services may include, but are not limited to, Adult Basic Education, vocational-technical training, college training, on-the-job-training, travel expenses related to training, job modifications and placement tools.

3.14. "Vocational rehabilitation service providers" means licensed professionals, public agencies, companies and corporations which provide injured workers vocational rehabilitation services as defined in section 3.13 of this rule.

3.15. "Qualified rehabilitation professional" means a person who meets the criteria set forth in 85CSR 27, Qualified Rehabilitation Professional, which includes a person who is a certified case manager, certified rehabilitation counselor, certified disability management specialist, or certified rehabilitation registered nurse.

a. “Certified rehabilitation counselor” means that earned designation as awarded by the Commissioner on Rehabilitation Counselor Certification.

b. “Certified disability management specialist” means that earned designation as awarded by the Certification of Disability Management Specialists Commission.

c. “Certified case manager” means that earned designation as awarded by the Commission for Case Manager Certification.

d. “Certified rehabilitation registered nurse” means that earned designation as awarded by the Association of Rehabilitation Nurses.

3.16. "Rehabilitation plan" means a plan or a modified plan for physical and/or vocational rehabilitation designed to facilitate the injured worker's return to work developed in accordance with this rule by a qualified rehabilitation professional and approved by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable.

3.17. "Vocational evaluation" means a systematic evaluation of the injured worker's skills, aptitudes, interests and functional ability through standardized testing and may include work samples. A vocational evaluation may be used when an injured worker has a limited work history, limited perceived interests, suspected cognitive impairment or when additional information is required regarding the injured worker's transferable skills for appropriate rehabilitation plan development.

3.18. "Job analysis" means a systematic assessment of a specific job including essential functions, the physical and/or cognitive requirements, working conditions, work site structure/layout, tools and equipment used, required skills/abilities, and/or any other characteristic that may be pertinent to performing the job.

3.19. "Job development" means the process of consultation with employers and the development of job opportunities in a comprehensive, professional manner. The intent is to establish continuing and mutually beneficial relationships with potential employers through selective placement, job modification, and adjustment counseling. Job development activities should provide clients with an opportunity to reach their employment potential.

3.20. "Job placement services" means professional activities involved in assisting individuals to seek, obtain and maintain appropriate employment. It may include guidance in vocational decision making; a transferable skills analysis, training in job-seeking skills; supportive counseling; identifying job leads; negotiating with employers, supervisors and co-workers; and providing post-employment and follow-up services.

3.21. "Job seeking skills training" means teaching the injured worker how to obtain employment. Topics to be included in job search skills training include but are not limited to development of a resume, how to use a resume, completing applications, utilizing the want ads, cold calling techniques, networking, interviewing, cover and thank you letters, appropriate attire/hygiene, and tracking and developing job leads.

3.22. "Labor market survey" means an analysis of availability of jobs within a reasonable geographic region. The conclusions are based upon accumulation of data through employer contacts, review of help wanted listings, and use of published census wage and

employment statistics. The survey is conducted considering employers within a reasonable distance of the injured worker's residence. The purpose is to determine if a proposed rehabilitation plan being considered has a reasonable likelihood of success.

3.23. "On-the-job-training" means a structured program under which an individual, over a specific vocational preparation period of time, learns a trade, business or occupation that will ultimately result in gainful alternative re-employment that is consistent with the claimant's acquirable skills and residual physical capabilities. Each training program, and the employer providing the training must be approved on a case-by-case basis by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable.

3.24. "Adult Basic Education" means a training service to assist an individual in acquiring the academic skills necessary to compete in a job or educational setting. This service may include GED preparation and testing, computer skills enhancement, or developmental skills courses. Remedial instruction must be from an accredited academic, business or vocational school. Remedial services on a part time basis are permitted so long as the injured worker's participation in plan services, in conjunction with other approved vocational rehabilitation services, are equal to full time. Return to work plan documentation is required from the qualified rehabilitation professional regarding the injured worker's current academic standing, the academic goal and the specific plan steps necessary to reach that goal.

3.25. "Vocational -Technical training"- means formal instruction to provide an individual specific mechanical or industrial skills or technical expertise to be applied to an occupation or trade. Vocational-technical schools or community colleges not already accredited by the North Central Association of Colleges and Schools Commissions on Institution of Higher Learning or approved by the State Dept. of Education must be individually approved by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable.

3.26. "College training" means academic education to prepare an individual for an occupation of a professional or technical nature through a college or university accredited by the North Central Association of Colleges and Schools Commission on Institutions of Higher Learning.

3.27. "Placement Tools" means tools and or equipment or other adaptive devices necessary to return an injured worker to employment or to enable participation in an approved program such as on the job training or formal training.

3.28. "Transferable skills analysis" means a process by which jobs are identified that are consistent with the injured worker's capabilities, skills, and residual physical abilities.

3.29. "Insurance commissioner" means the insurance commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code, or any designated third-party administrator of the Insurance Commissioner.

3.30. "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.

§85-15-4. Priorities.

4.1. Vendors of vocational rehabilitation services and qualified rehabilitation professionals must utilize the following priorities. No higher numbered priority may be utilized unless the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, has determined all lower numbered priorities are unlikely to result in placement of the injured worker into suitable gainful employment. If a lower numbered priority is clearly inappropriate for the injured worker, the next higher numbered priority must be considered. The rehabilitation plan must explicitly state the reasons and

rationale for the rejection of any lower numbered priority. The priorities are as follows:

1. Return to the same employer and pre-injury job;

2. Return to the same employer and pre-injury job with modification;

3. Return to the same employer in a different position;

4. Return to the same employer in a different position with on-the-job-training;

5. Employment by a new employer without retraining;

6. Employment by a new employer with on-the-job-training;

7. Return to work following enrollment of the injured worker in a retraining program which consists of a goal-oriented period of formal retraining designed to lead to suitable gainful employment in the labor market.

§85-15-5. Identification of Rehabilitation Candidates; the Rehabilitation Assessment/ Evaluation Process.

5.1. The Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, may, in its sole discretion, determine whether a claimant would be assisted in returning to suitable gainful employment with the provision of rehabilitation services.

5.2. The Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, may authorize a rehabilitation evaluation by a qualified rehabilitation professional of its sole choosing to determine whether physical and/or vocational rehabilitation services are appropriate for an injured worker. No provider is entitled to referrals from the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable. The Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, is in no way required to adopt any referral method or system designed to include any or all of the vocational rehabilitation service providers or qualified rehabilitation providers, and the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, has the sole discretion in the assignment of any referrals for an evaluation.

5.3. The rehabilitation evaluation process is comprised of a series of steps, as set forth in the following subsections.

a. Once referred to a vocational rehabilitation service provider or qualified rehabilitation professional, a qualified rehabilitation professional shall conduct a rehabilitation evaluation. In doing so, a qualified rehabilitation professional must: 1) conduct a personal interview of the injured worker; 2) contact, by telephone or otherwise, the injured worker's employer to ascertain return to work options and otherwise discuss the case; 3) obtain necessary input from the injured worker's attending physician and other treatment providers; and 4) analyze information about the injured worker's medical, educational, vocational, social, legal, and economic circumstances, including present physical and mental ability to participate in vocational rehabilitation services. The evaluation may also include additional vocational testing if the qualified rehabilitation professional opines that the testing is warranted in order to provide a full evaluation and the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, preauthorized the additional testing. The qualified rehabilitation professional must then decide and report in the form of a rehabilitation evaluation report, the format of which and method of transmission of which shall be approved by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, as to whether the injured worker is likely to benefit from vocational rehabilitation services based upon the rehabilitation evaluation. The qualified rehabilitation professional must also report whether or not the evaluation was complete, and if not why not, and whether the injured worker, the injured

worker's employer, or the injured worker's attending physician and other treatment providers cooperated in the process and must state the facts that form the basis of the conclusion.

b. The qualified rehabilitation professional must issue the rehabilitation evaluation report to the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, with copies to the parties within sixty (60) days of receipt of the referral. A proposed rehabilitation plan, signed by the qualified rehabilitation professional and preferably the injured worker, the injured worker's employer, may be included with the rehabilitation evaluation report. Upon receipt, the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, may approve the plan as submitted, request modifications to the plan, or request plan development. Failure to provide the rehabilitation evaluation report within sixty (60) days of receipt of the referral shall cause a 10% reduction in the agreed to fee due and owing the vocational rehabilitation service provider or the qualified rehabilitation provider. Failure to provide the rehabilitation evaluation report within ninety (90) days of receipt of the referral shall cause a 20% reduction in the original agreed to fee due and owing the vocational rehabilitation services provider and/or the qualified rehabilitation provider. Finally, failure to provide the rehabilitation evaluation report within one hundred twenty (120) days of receipt of the referral shall result in no payment for the referral and shall require the vocational rehabilitation services provider and/or the qualified rehabilitation provider to immediately return the referral to the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable,.

c. The purpose of a rehabilitation plan is to clearly identify the return to work objectives and to describe action steps to assist the injured worker in returning to suitable gainful employment. The following standards apply.

d. The injured worker is an active participant in rehabilitation plan development.

e. The plan must be signed by the injured worker and the qualified rehabilitation professional for the plan to be implemented. Failure to sign a plan the injured worker has actively participated in developing, without good cause, as determined in the sole discretion of the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, shall cause the suspension of all benefits payable to the claimant until such time as the plan is signed. The claimant is not entitled to the lost benefits upon signing the plan. The Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, shall reject the proposed plan based upon the claimant’s failure to cooperate if the claimant refuses to sign the plan and will thereafter, within fifteen (15) days of such acceptance or rejection issue a protestable order within fifteen (15) days.

f. The plan must clearly outline the specific goals and actions required to achieve the goals.

g. The plan must identify the respective responsibilities, if any, of the injured worker, the employer, the physician, the qualified rehabilitation professional, the Commission, Insurance Commissioner, private carrier or carriers, and other parties involved in the claim.

h. The time frames for completion of the plan must be specified.

i. The qualified rehabilitation professional must provide a plan justification explaining the need for rehabilitation services.

j. The qualified rehabilitation professional must provide plan rationale explaining how the goal was selected.

k. The qualified rehabilitation professional must describe placement prospects and earnings potential, if appropriate.

l. Criteria for completion and termination of the plan must be fully defined.

m. Costs associated with the services to be provided and the periods of temporary indemnity are to be listed in the plan.

n. The plan must be served upon the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, and all parties to the claim by the qualified rehabilitation professional.

o. A rehabilitation plan must require that all vocational rehabilitation services be delivered by providers who are qualified rehabilitation professionals. Except with the prior consent of the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, no other providers may deliver vocational rehabilitation services to an injured worker under an approved rehabilitation plan. To the extent it is economically and otherwise feasible, providers who are located in the injured worker's geographic area are to be given preference. In-state providers and out-of-state providers are both to be compensated pursuant to section 10 of these rules.

p. A rehabilitation plan that provides for vocational retraining must give preference to schools and training facilities located in the injured worker's geographic area, thereby reducing the need for the injured worker to travel extensively or to relocate. A plan may be denied by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, if it concludes, in its sole discretion, that the plan requires the injured worker to travel excessively or to locations unreasonably distant from his or her home.

q. Any rehabilitation plan developed and implemented under this rule is subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision there under, or to any court or administrative order applying specifically to the injured worker's employer, and will further be subject to any applicable federal statutes or regulations.

5.4. The Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, shall enter a protestable order, within twenty (20) days of receipt of the finalized rehabilitation plan signed by the qualified rehabilitation professional and the injured worker.

§85-15-6. Implementation of the Rehabilitation Plan.

6.1. Until the termination of the Commission, an employer is permitted to object to the plan pursuant to section 5.4 of this rule. However, the implementation of the plan will proceed notwithstanding the objection. In the event that the employer is successful in challenging the plan, the employer's account will be adjusted to reflect the appropriate charge associated with the rehabilitation plan. In the event the plan has not been completed at the time of the ultimate decision on the protest, the plan will be modified, if necessary, to conform with the ultimate decision.

a. Upon termination of the Commission, the private carrier, and not the employer, will register objections and adjudicate claims matters on behalf of the employer in appropriate cases.

6.2. Upon request of any party or upon a determination by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, may order the suspension, termination, or modification of a rehabilitation plan based upon a showing of good cause including, but not limited to:

a. A change in the injured worker’s physical condition which does not allow the injured worker to continue pursuing the rehabilitation plan;

b. The injured worker's lack of satisfactory progress which indicates that he or she cannot complete the plan successfully;

c. A finding that an injured worker is not cooperating with a plan;

d. A finding that the rehabilitation plan is no longer necessary for the injured worker's re-employment;

e. A finding that a change in economic conditions has caused the rehabilitation plan to be inappropriate.

f. A finding that the injured worker's employer is not cooperating and the failure to cooperate is an impediment to plan completion shall result in plan modification as necessary to accomplish the rehabilitation goal.

6.3. All physical and/or vocational rehabilitation services must be delivered in accordance with the rehabilitation plan developed under section 5 of this rule. The Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, may authorize the qualified rehabilitation professional to monitor compliance with and progress under the rehabilitation plan. Once authorized, the qualified rehabilitation professional must contact the injured worker and all other participating parties on a regular basis to monitor compliance with and progress under the plan. Report of these contacts must be submitted to the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, in thirty (30) day intervals, unless otherwise directed by the Commission, self-insured employer or private carrier, whichever is applicable. Failure to so report may result in the denial of payment for services provided during the thirty (30) days and thereafter until the required report is received.

6.4. In the event it is later determined the rehabilitation services provided will not meet the goal of the plan, the vocational rehabilitation service provider and/or the qualified rehabilitation professional must notify the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, and recommend plan modifications as appropriate.

6.5. If the injured worker is not compliant with the rehabilitation plan, or is not making satisfactory progress under the plan, the vocational rehabilitation service provider and/or the qualified rehabilitation professional must immediately notify the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable. The determination of whether satisfactory progress is being made shall be a collaborative effort involving the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, and the vocational rehabilitation services provider. Failure to notify the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, may result in a closing of the file, a mandated return of the file to the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, the finding of an overpayment to the vocational rehabilitation service provider and/or qualified rehabilitation service provider in an amount equal to the sum of all services provided to date on the file.

6.6. If, based upon reports of the qualified rehabilitation professional or other reliable evidence, the injured worker is not compliant with the rehabilitation plan, or is not making satisfactory progress under the plan, in the sole discretion of the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, all benefits payable to the injured worker may be suspended until such time as the injured worker becomes compliant or begins to make satisfactory progress under the plan.

§85-15-7. Payment of Indemnity Benefits.

7.1. In every case in which the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, authorizes physical and/or vocational rehabilitation services pursuant to a rehabilitation plan, and the implementation of that plan has begun, the injured worker shall, if

otherwise appropriate under applicable law, receive temporary total rehabilitation disability benefits or temporary partial rehabilitation benefits as provided in W. Va. Code §23-4-9.

7.2. As part of a rehabilitation plan, an injured worker may return to work at an alternate, modified or transitional work assignment on a temporary basis. The duration of the temporary work must be determined on a case-by-case basis by the qualified rehabilitation professional and be justified in the rehabilitation plan.

a. Whenever it is proposed that an injured worker return to work under section 7.2 of this rule, the employer, with the assistance of the qualified rehabilitation professional, must furnish the injured worker's treating physician, the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, and all parties to the claim a statement describing the work in terms that will enable the physician to relate the essential tasks, and other material job functions, of the job to the injured worker's functional abilities. The treating physician must then advise the qualified rehabilitation professional within fifteen (15) working days of receipt of information pertaining to the essential tasks of the job whether the injured worker is physically capable of performing the work described and/or what additional testing or information is required to make this determination. When the information is furnished to the treating physician and the employer, the qualified rehabilitation professional shall inform the treating physician that the failure to respond within the time allotted may result in the Commission’s, Insurance Commissioner’s, self-insured employer’s or private carrier’s, whichever is applicable, issuance of a functional ability opinion. The injured worker may consent to undertake the work assignment without the approval of his or her treating physician. In cases where the injured worker has no treating physician or in cases in which the treating physician has not fully cooperated in the rehabilitation process, the Commission's independent medical evaluator, including its Office of Medical Services, or the medical evaluator of the Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, may provide a functional ability opinion.

b. Upon undertaking employment under section 7.2 of this rule, the injured worker's temporary total disability benefits, if any, will be terminated and he or she may become eligible for temporary partial rehabilitation benefits, if applicable under section 7.3 of this rule. If the work impedes the injured worker's recovery to the extent that he or she cannot continue to work or if his or her compensable condition worsens due to the work being performed, the temporary total payments, if applicable, shall, if otherwise appropriate under applicable law, be resumed when objective medical documentation is presented to the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, directly relating the inability to work due to the compensable injury or results thereof. If the work ends or is no longer otherwise available, the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, shall decide whether the injured worker has sufficiently recovered to permit the injured worker to return to his or her usual job or to other available work, or if other rehabilitative services are required to return the injured worker to employment. Benefits will not be reinstated solely because of lay-off or unavailability of work. If the decision is that the injured worker cannot return to employment, temporary total rehabilitation benefits or temporary total disability benefits, whichever applicable and otherwise payable under applicable law, shall be reinstated, if otherwise appropriate, but only for the period authorized by law.

7.3. If the injured worker, pursuant to a rehabilitation plan, returns to employment with the same employer or a new employer in either a full time or part time capacity, and to either gainful employment or to a transitional, modified or alternate work assignment, pursuant to section 7.2 of this rule, and if the injured worker's average weekly wage earnings are less than the average weekly wage earnings earned by the injured worker at the time of the injury, then he or she shall, if otherwise appropriate under applicable law, be entitled to receive

temporary partial rehabilitation benefits. The injured worker's average weekly wage earnings upon return to work for the purposes of section 7.4 will be the injured worker's actual gross earnings, as reported to the state tax department and the federal internal revenue service and substantiated by payroll documentation or other information as requested by the Commission, Insurance Commissioner, or private carrier, whichever is applicable.

7.4. Temporary rehabilitation benefits are calculated, as follows:

a. The temporary partial rehabilitation benefit is seventy percent (70%) of the difference between the average weekly wage earned at the time of the injury and the average weekly wage earned at the new employment, to be calculated as provided under W. Va. Code §23-4-9(d);

b. The temporary partial rehabilitation benefits are not subject to the minimum benefit amounts required by the provisions of W. Va. Code §23-4-6(b); and

c. The temporary partial rehabilitation benefits cannot exceed the temporary total disability benefits to which the injured worker would be entitled pursuant to W. Va. Code §23-4-6, -6d, and -14, during any period of temporary total disability resulting from the injury in the claim. The temporary partial rehabilitation benefits plan must be reviewed at least every ninety (90) days to determine if continuation of such plan is appropriate.

7.5. Temporary partial rehabilitation benefits are only payable during the implementation and successful progress toward completion of a rehabilitation plan. Upon termination of the plan, as provided for under this rule, or upon expiration of the plan, payment of all temporary partial and/or total rehabilitation benefits must be stopped regardless of the injured worker's level of wages.

7.6. Payments of temporary partial rehabilitation benefits for differences of five percent (5%) or less in the pre-injury average weekly wage and the new employment average weekly wage will not be made because the benefit gives no economic incentive to the injured worker and would be too costly to administer.

7.7. The injured worker cannot receive both temporary total disability benefits and temporary partial rehabilitation benefits for the same time period.

7.8. The injured worker can receive both temporary partial disability benefits and permanent partial disability benefits for the same period of time. The limitations on rehabilitation benefits set forth in W. Va. Code §23-4-9 and the limitations on temporary total disability benefits set forth in W. Va. Code §23-4-6(c) are separate limitations and the receipt of rehabilitation benefits shall not be applied against the limitations on temporary total disability benefits. Likewise, the receipt of temporary total disability benefits shall not be applied against the limitations on rehabilitation benefits.

7.9. The aggregate award of temporary total rehabilitation or temporary partial rehabilitation benefits for a single injury shall be for a period not exceeding fifty-two (52) weeks. That is, an injured worker is entitled to 52 weeks of temporary total rehabilitation benefits and 52 weeks of temporary partial rehabilitation benefits. These limitations do not apply to rehabilitation awards made on or before July 1, 2003.

7.10. If payment of temporary total rehabilitation benefits is in conjunction with an approved vocational rehabilitation plan for retraining, the period of temporary total rehabilitation benefits may be extended for up to an additional fifty-two (52) weeks, but shall never exceed a total of one hundred four (104) weeks.

§85-15-8. Rehabilitation Closure Report.

8.1. The qualified rehabilitation professional authorized to assist the injured worker must file a rehabilitation closure report with the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, and all parties to the

claim when it is determined that their involvement in the rehabilitation services are no longer necessary unless otherwise specified by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable.

§85-15-9. Registration of Rehabilitation Providers.

9.1. Qualified rehabilitation professionals and other vocational rehabilitation vendors must register with the Commission, using forms prescribed by the Commission. Any rehabilitation provider who does not meet the requirements set forth in Rule 27 of Title 85 of the Code of State Rules cannot be accepted for registration.

a. Upon termination of the Commission, no registration is required of qualified rehabilitation professionals. Qualified rehabilitation professionals are required to verify and provide proof of their certification or qualifications to the Insurance Commissioner, self-insured employer or private carrier, whomever services are provided under this rule, or to their third party administrator or managed care provider. In turn the Insurance Commissioner, self-insured employer or private carrier, or their third party administrator or managed care provider is required to maintain this proof of certification or qualifications of the qualified rehabilitation professional.

9.2. The Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, must use only qualified rehabilitation service professionals in making rehabilitation referrals.

a. Rehabilitation services may also be provided by qualified rehabilitation professional employees of the West Virginia Division of Rehabilitation Services or qualified rehabilitation professional employees of the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable.

9.3. All rehabilitation services must be provided in accordance with rehabilitation plans implemented pursuant to these rules and must be monitored by the qualified rehabilitation professional employed by or under contract with the Commission or Insurance Commissioner or employed by the West Virginia Division of Rehabilitation Services, or under contract with a self-insured employer or private carrier, whichever is applicable. The Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, must remove or suspend from its list of vendors any provider of rehabilitation services who knowingly fails to comply with the provisions of these rules or a rehabilitation plan, or engages in other practices in violation of W. Va. Code §23-4-3c. Adherence to all applicable Codes of Ethics, including, but not limited to the Codes of Ethics associated with the certifications listed in 85 C.S.R. 27-3.3 is required and a breach of any applicable ethical provision shall be grounds for suspension and/or termination of the provider's right to receive payments from the Commission, Insurance Commissioner, self-insured employer or private carrier whichever is applicable.

§85-15-10. Payment for Physical and Vocational Rehabilitation Services.

10.1. The Commission or Insurance Commissioner, private carrier or self-insured employer whichever is applicable, will pay for physical and vocational rehabilitation services in accordance with the fee schedule in effect at the time the service is rendered, adopted by the Commission or Insurance Commissioner, whichever is applicable, pursuant to W. Va. Code §23-4-3 and otherwise as set forth in this rule. To the extent there are inconsistencies between the fee schedule and this rule, this rule shall govern. Only those physical rehabilitation services that are reasonable and necessary, in the sole discretion of the Commission, within the scope of the applicable rehabilitation plan, and otherwise meet the standards as outlined in Sections 3.7 and 2.2.b of this Rule and 85 C.S.R. 27, can be reimbursed pursuant to these rules.

10.2. Unless otherwise specified in a contractual agreement with a provider, the following services are considered overhead and the Commission or Insurance Commissioner, self-insured employer or private carrier,

whichever is applicable, will not pay for these services:

a. Administrative and supervisory salaries and related personnel expenses;

b. Office rent;

c. Depreciation;

d. Office equipment purchase and rental;

e. Telephone expense including long distance phone call charges;

f. Postage

g. Shipping;

h. Expendable supplies;

i. Printing costs;

j. Copier costs;

k. Printing of fiche and department electronic files;

l. Maintenance and repair;

m. Taxes;

n. Automobile costs, maintenance, and mileage;

o. Insurance;

p. Dues and subscriptions;

q. Vacation, sick leave, and other expenses of a similar nature;

r. Internal staffing time;

s. Filing of material in case files;

t. Setting up files;

u. Activities associated with reports other than composing or dictating complete draft of the report (e.g., editing, filing, distribution, revising, typing, mailing, and any other related time spent by the vocational rehabilitation service provider reviewing the work of a qualified rehabilitation provider shall not be paid)

v. Generating and keeping internal record keeping forms;

w. Time spent on any administrative and clerical activity, including typing, copying, mailing, distributing, filing, payroll, record keeping, delivering mail, and picking up mail. This does not prohibit reimbursement for actual time spent writing/typing reports to the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable.

x. Activities associated with counselors training, general discussions regarding office procedures, internal case file reviews by supervisors, meetings, and seminars;

y. Unanswered phone calls;

z. Any other item or service not specifically identified and separately billed;

aa. No payment will be made for reports prepared by physicians and submitted through the counselor; and

bb. No payment will be made for any activity after notification by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, of case closure or plan termination, unless a closure report is requested at which time only those charges directly related to the preparation of the closure report will be approved.

cc. Upon termination of the Commission, self-insured employers and private carriers may contract for physical and vocational rehabilitation services with providers for fees greater or less than those contained in the fee schedule.

10.3. Any bill submitted to the Commission, Insurance Commissioner, self-

insured employer or private carrier, whichever is applicable, must include the following information:

a. Claimant's name;

b. Claimant's claim number

c. Claimant's social security number;

d. Dates of service;

e. Place of service;

f. Type of service;

g. Appropriate procedure code(s);

h. Charge, which must be broken down into 1/10th of an hour (6 minute) increments;

i. Total bill charge;

j. The name and unique identification number, if the provider has been assigned a number by the Commission or the Insurance Commissioner, of the qualified rehabilitation provider rendering the service;

k. Vendor number;

l. Date of billing;

m. An itemization of bills on Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, approved forms;

10.4. The expenditure for vocational rehabilitation shall not exceed twenty thousand dollars ($20,000) for any one injured employee. All services approved by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, as part of a rehabilitation plan, or the development thereof, shall be included in the twenty thousand dollar ($20,000) limitation, including, but not limited to, the following:

a. Vocational or on the job training;

b. Counseling, including all services rendered by a vocational rehabilitation service provider and a qualified rehabilitation professional. Counseling provided by psychiatrist or psychologists shall not be included within the $20,000 limitation. QRP charges for dates of service on or before May 5, 2004, shall not be included within the $20,000 limitation;

c. Assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification;

d. Job placement services;

e. Other services approved in the sole discretion of the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable.

10.5. Temporary total disability benefits, temporary partial rehabilitation benefits, and physical rehabilitation services are not to be included in the twenty thousand ($20,000.00) dollar limitation.

10.6. The Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, cannot reimburse providers for physical rehabilitation services which require prior authorization under the provisions of W. Va. Code §23-4-3, or any rule adopted there under, unless the physical rehabilitation services provider obtains prior authorization.

10.7. In order to obtain reimbursement for services rendered, including the costs of medicines and mechanical appliances or devices, physical and vocational rehabilitation services providers must submit a verified statement on forms (including in electronic format) prescribed by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable. The forms must be filed with the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, within six (6) months after the service is provided or the medicines, mechanical appliances or devices are delivered. Failure to timely submit a reimbursement form bars the provider from any right of recovery from the Commission, Insurance Commissioner,

self-insured employer or private carrier, whichever is applicable, or any other party including, among others, the injured worker, the applicable employer, or any of their third party health care insurers.

10.8. All physical and vocational rehabilitation service providers are prohibited from making any charge against an injured worker or any other person, firm or corporation for any service rendered as a part of a rehabilitation plan or as a result of a compensable injury. Nothing in this section prevents another agency of any governmental unit, person, firm, corporation, or other entity from agreeing to reimburse a service provider for services rendered.

10.9. In the event that an injured worker insists upon the delivery of a physical and/or vocational rehabilitation service after being advised in writing by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, that the service has been determined not to be medically, physically, or vocationally necessary, the provider may charge the injured worker for the costs of such service notwithstanding the provisions of section 10.8, but only if the provider first informs the injured worker that he or she will be personally responsible for the costs of the service and informs the injured worker as to the amount of the charge. If the injured worker has other health care insurance which will pay for the service described in this section, then the provider may bill that insurer for the service and no provision of these rules prevents the provider from receiving reimbursement under the terms of the insurance policy.

10.10. "Without limiting the general nature of various statutes respecting criminal fraud, and by way of illustration and not in limitation, the following are deemed unlawful acts and practices:

a. Billing for services not actually performed;

b. Billing for expenses not actually incurred;

c. Billing with incorrect dates of service;

d. Offering consideration of any kind, including gifts, services or gratuities to Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, employees in exchange for or as a past reward for referring cases to the provider;

e. Failing to close claims for rehabilitation services at the earliest practicable date when the claimant can no longer benefit from such services. The rehabilitation professional will be consulted before the claim is closed for the purpose of determining the earliest practicable date of closure;

f. Providing false information in any statement to the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable,, or forging or falsifying any record required to be kept by these Rules or any other statute or rule governing providers; and

g. "Rolling in" unreimbursable time or expenses by adding hours to billable time or expenses.

10.11. All providers and employers shall retain for five (5) years and provide to the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, on request and without a subpoena hard copies of the source underlying any bill, invoice, report, etc. submitted to the Fund Commission, Insurance Commissioner, private carrier or self-insured employer by electronic or other means.

§85-15-11. Trial Return to Work.

11.1. The provisions of W. Va. Code §23-4-7b regarding trial return to work have been reinstated and will be implemented by the Commission, Insurance Commissioner, self-insured employer or private carrier, whichever is applicable, until such time as the statutory provisions regarding trial return to work are terminated.

§85-15-12. Employer-Preferred Vocational Rehabilitation Services.

12.1. Prior to termination of the Commission, any employer who desires to contract directly with one or more preferred vocational rehabilitation providers to provide vocational rehabilitation services to its injured workers and require its employees to use the preferred provider(s), shall notify the Commission of its contract and designation on forms prescribed by the Commission. Such selected providers must be registered with the Commission as required by Section 85-15-9. Notwithstanding the employer's ability to select a preferred provider, the Commission shall remain the sole referral authority. An employer may identify to the Commission claimants whom it wants to be considered for rehabilitation services.

a. Upon motion by the injured worker or the employer, or upon its own initiative, the Commission may, with a showing of just cause, assign or reassign the injured worker to a qualified rehabilitation provider other than the provider designated by the employer. Such cause might include, but not be limited to, past or present family or social relationships between the injured worker and the employer's preferred rehabilitation services provider, common financial interests between the injured worker and the employer's preferred rehabilitation services provider, or evidence that the rehabilitation process or provider is not in compliance with this rule.

b. All preferred vocational rehabilitation providers shall comply with this Rule and Commission's established guidelines, rules, regulations, and policies. Additionally, all preferred vocational rehabilitation providers shall utilize all reporting forms and reporting processes adopted by the Commission.

c. A vocational rehabilitation provider must be in good standing with the Commission in order to be designated an/or maintain its designation as a preferred provider. Additionally, the preferred provider shall adhere to the Commission's fee schedule for reimbursement of expenses and any expenses which exceed the fee schedule shall be the sole responsibility of the employer.

12.2. Upon termination of the Commission, private carriers, who provide workers' compensation insurance to an employer, are not obligated to accept contracts with the employer's preferred vocational rehabilitation providers.

§85-15-13. Transfer to the Insurance Commissioner.

Upon termination of the Commission, responsibility for the regulatory enforcement of this exempt legislative rule shall transfer to the Insurance Commissioner to be administered in a manner otherwise consistent with chapter twenty-three of the West Virginia Code. All other provisions of this rule which have been rendered moot by, or are otherwise in conflict with Senate Bill 1004, shall be administered by the Insurance Commissioner in a manner consistent with chapter twenty-three of the West Virginia Code.

§85-15-14. Severability.

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