TITLE 93

PROCEDURAL RULE

WORKERS' COMPENSATION OFFICE OF JUDGES

SERIES 1

LITIGATION OF PROTESTS

§93-1-1 GENERAL

1.1 Scope - These procedural rules shall govern the initiation and conduct of litigation in contested Workers' Compensation claims before the Workers' Compensation Office of Judges.

1.2 Authority - West Virginia Code §23-5-8(e).

1.3 Filing Date: May 30, 2008

1.4 Effective Date: July 1, 2008.

1.5 These rules supersede those promulgated with an effective date of September 1, 2005.

§93-1-2 INDEX

§93-1-3 DEFINITIONS

3.1 Claims Administrator

Where used within this rule, "claim administrator" shall mean the entity with legal authority to administer workers' compensation claims, make awards, and take any other administrative actions as authorized in Chapter Twenty-three of the W.Va. Code. In some places in the code, the term "issuing entity" is used. For purposes of this rule, "claim administrator" and "issuing entity" mean the same thing.

"Claim administrator" includes the Offices of the Insurance Commissioner, any self-administering employer who has been granted self-insured status, any authorized Third Party Administrator, or any private insurance carrier authorized to issue workers' compensation coverage in West Virginia.

3.2 Party

"Party" shall mean the injured worker (claimant), claimant's dependants, the employer, and, with respect to claims involving funds created in 23-2C-1 *et seq.* of the West Virginia Code, the Offices of Insurance Commissioner. Private carriers, insurance agents, and third party administrators are not parties to the litigation.

3.3 Expedited Hearing

"Expedited hearing", as contemplated by W.Va. Code §23-4-1c(a)(3), shall mean the final resolution of the issue. The term "hearing" is used in the sense of an opportunity for a party to offer evidence or argument and have his or her cause considered (heard), rather than used in the sense of a formalized appearance before a judge.

3.4 Most Compelling of Good Cause

"Most compelling of good cause", shall mean some extraordinary circumstance and contemplates a more compelling reason than the ordinary "good cause" required elsewhere in the Rule. A reason that might be sufficient for "good cause" may well not be sufficient for "most compelling of good cause".

3.5 Closing Argument and Case Summation

"Closing argument" or "case summation" shall mean a written discussion of the facts and controlling law of the case. Such written summary may be submitted at any time up to ten days after the expiration of the time frame. An argument that is filed later than ten days after the expiration of the time frame may be considered at the discretion of the ALJ. Such summary does not constitute argument in lieu of evidence as defined in subsection 3.6, below, for purposes of section ten [93-1-10 et seq.]

3.6 Argument in Lieu of Evidence

"Argument in lieu of evidence" shall mean a written statement explaining why the claim administrator's ruling is incorrect on its face. Such statement may be submitted instead of submitting new evidence when the party believes that additional evidence is not necessary. Such statement avoids having the claims administrator's ruling automatically affirmed for failure to prosecute under section ten [93-1-10 et seq.]. Such statement must be filed during the protesting party's time frame.

3.7 Record

The "record" upon which a protest is decided shall mean evidence timely submitted by a party to the Office of Judges and evidence taken at hearings conducted by the Office of Judges.

For protests acknowledged before April 2, 2007, any documents compelled under the former version of this Rule will remain a part of the record.

§93-1-4 PURPOSE

The purpose of the litigation process before the Office of Judges is to receive and consider, as expeditiously and as fairly as possible, evidence and information relevant to the determination of the rights of the parties and to provide a review of claims management rulings made by the claim administrator with regard to the grant or denial of any award, or the entry of any order, or the grant or denial of any modification or change with respect to former findings, orders or awards made pursuant to the West Virginia Workers' Compensation Law, W.Va. Code §23-1-1 et seq., as amended.

§93-1-5 REPRESENTATION of PARTIES

5.1 Individuals

Any claimant or employer who is a natural person, may appear at and represent himself or herself in any matter before the Office of Judges. At a hearing, the Administrative Law Judge or Hearing Examiner shall explain to any party appearing without counsel the right to employ counsel, and shall inquire as to the desire of such persons to obtain counsel. In appropriate cases the hearing may be continued to permit a party to obtain counsel; however, absent a showing of good cause, a hearing shall be continued only one time for a party to obtain counsel.

5.2 Corporations; Offices of the Insurance Commissioner

A corporate employer, or any other employer who is not a natural person**,** and the Offices of the Insurance Commissioner, must be represented by an attorney duly licensed or authorized to practice law in the State of West Virginia. However, an employee of a corporation may testify at a hearing without the presence of counsel.

5.3 Counsel

Only an attorney duly licensed or authorized to practice law in the State of West Virginia may represent a claimant or employer in a matter before the Office of Judges.

5.4 Lay representative

A party may not be represented in a matter before the Office of Judges by a spokesperson, lay representative or anyone else not admitted to practice law in the State of West Virginia.

§93-1-6 LITIGATION PROCESS

6.1 Protests

Any objection, referred to as “protest”, to a ruling of the claim administrator shall be filed with the Office of Judges in writing and a copy served on the claim administrator and all parties. The protest shall include a copy of the ruling to which the protest has been made.

6.2 Time Period for Filing a Protest

Any protest under this section shall be filed with the Office of Judges within sixty (60) days after receipt of the notice set forth in W.Va. Code §23-5-1. As provided in W.Va. Code §23-5-6, the period within which a protest must be filed may be expanded to one hundred twenty (120) days for good cause or excusable neglect.

Protests which do not meet the requirements of §6.1 will serve to meet the time limitations of §6.2 provided that any deficiency is corrected within a reasonable time after notification by the Office of Judges of the deficiency.

6.3 Acknowledgment of Filing a Protest

The Office of Judges shall determine if a protest is timely filed, acknowledge receipt of timely filed protests, and may issue Time Frame Orders in regard to the litigation of such protests. A Time Frame Order shall be interlocutory in nature and not subject to appeal.

6.4 Time Frame Orders

A Time Frame Order shall set forth the sequence in which evidence shall be presented by the parties and the time periods within which such evidence shall be presented. A Time Frame Order may include such other matters as deemed appropriate by the Chief Administrative Law Judge or his/her designee. Except for those expedited issues identified in section nine [93-1-9 et seq.], a Time Frame Order may be modified, amended or extended at the request of a party, but only for good cause shown. The Office of Judges may modify or amend a Time Frame Order without such a request for appropriate administrative purposes. A request for modification, amendment, or extension, of the Time Frame, must be in writing and must be made no later than ten (10) days prior to the expiration of the existing Time Frame Order. Any extension request filed later than ten (10) days prior to the expiration of the requesting party’s existing Time Frame Order shall be denied unless good cause is found for the untimeliness of the request. Any request, timely or otherwise, for an extension of time must set forth the reason an extension is necessary and shall include a

statement of the efforts the party has made to comply with the Time Frame Order.

6.5 Case Summations and Arguments in Lieu of Evidence

Except for purposes of section ten [93-1-10 et seq., "Failure to Prosecute Protest"] of this Rule, parties may file argument, explanation of case, or statement of authority in a case summation (sometimes referred to as a "closing argument"). Any such case summation or closing argument must be filed within ten (10) days after the expiration of the final Time Frame. Any argument, explanation of case, or statement of authority filed later than ten (10) days after the expiration of the final Time Frame may be considered at the discretion of the ALJ.

As noted in section ten [93-1-10 et seq., "Failure to Prosecute Protest"], argument submitted in lieu of evidence must be filed within the protesting party's time frame.

6.6 Order of Presentation of Evidence

Evidence in regard to a protest shall be presented either concurrently or consecutively as set forth by Time Frame Order. The protesting party shall have the burden of going forth with evidence first in those protests with consecutive time frames. In the event that the claimant and at least one employer have protested, the parties shall proceed concurrently.

6.7 Manner and Receipt of Notice

Any notice required by these rules shall be deemed adequate if served upon counsel of the other parties (or upon the party if not represented by counsel) as may be permitted as in Rule 5 of the West Virginia Rules of Civil Procedure. Filing by facsimile is permitted together with other electronic means as may be approved by the Chief Administrative Law Judge. Receipt of notice shall be presumed seven (7) calendar days after the date of notice. If service at the last known address is returned by the United States Postal Service as undeliverable, a party shall notify the Office of Judges and thereafter need not continue serving notices at that address.

It is the duty of each party to notify the office of judges and all other parties of any change of address.

6.8 Further Action

The Chief Administrative Law Judge or his/her authorized representative shall review the transcripts of the hearings, testimony, the evidence, and arguments, and take such action with regard to the issues as shall be

appropriate. The Chief Administrative Law Judge or his/her authorized representative may order further action in a protest when it appears that a legal issue has not been sufficiently addressed, or when the record appears to have been burdened with excessive submissions or designations. Any further action so ordered shall be limited to those matters specifically referenced in the order. Such further action may include additional hearings, the requirement of the filing of briefs or summations, the requirement of an explanation of the relevance and materiality of any evidence, or such other action as may promote the ends of justice and judicial economy.

§93-1-7 EVIDENCE; EXCHANGE and FILING

7.1 Introduction

Evidence submitted to the Office of Judges is generally of three types: documentary evidence (i.e., reports, affidavits, treatment records, etc.); testimony of witnesses (either obtained during Office of Judges scheduled administrative hearings or during depositions scheduled by the parties); and physical evidence (i.e., photographs, video recordings, etc.). This section of the Rule relates to the obtaining, presenting, exchanging, and identifying for the Office of Judges, of all evidence regardless of type.

7.2 Rules

A. Rules of Evidence

The Office of Judges shall not be bound by the usual common law or statutory rules of evidence, or by formal rules of procedure, except as provided by these rules. An Administrative Law Judge or Hearing Examiner shall receive the relevant testimony and other timely evidence of the parties and witnesses, as may further be limited by subsections 8.1 and 8.5 [93-1-8.1 & 93-1-8.5] of this rule, and subject to objection by any party. Provided, that the parties shall not burden the record with cumulative, redundant, or repeated filing of similar evidence. All evidence filed must be relevant, material, credible and reliable.

Evidence submitted or filed after the expiration of a time frame, and evidence which was not copied to all other parties, shall be rejected by the Office of Judges and shall not be part of the record upon which the decision is made. Untimely evidence may be accepted upon a showing of good cause.

B. Discovery

1. Generally

Amendments to the W.Va. Code in 2003 and 2005 transferred to claim administrators the authority to decide claim issues. With this control over the process, claim administrators can, and should, begin the discovery process early instead of waiting until after formal litigation has commenced. The early start of discovery is particularly important when the issue appealed is required by law to be expedited.

The entitlement of all parties to due process of law requires the Office of Judges to allow for a reasonable opportunity to discover evidence relevant to the protest. However, for those issues that the Legislature has mandated the Office of Judges to provide an expedited process, in W.Va. Code §23-4-1c(a)(3) and elsewhere, the time available for discovery must be limited. The expedited process cannot be circumvented merely by a request for discovery opportunity. All discovery and presentation of evidence must be completed during the existing time frame. An extension may only be granted as provided in the rules controlling the extension of expedited hearing Time Frames.

2. Interrogatories

(a) Written interrogatories may be utilized in the discovery process but only for those protests where the time frame exceeds sixty (60) days.

(b) Each party shall be limited to a maximum of thirty (30) written interrogatories, with each part or subpart of a numbered interrogatory being construed as a separate interrogatory.

(c) Each interrogatory shall consist of a single question, and shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The party upon whom the interrogatories have been served shall serve a copy of the answers within thirty (30) days after service of the interrogatories. A shorter or longer period of time for answering or objecting to an interrogatory may be allowed for good cause shown. If the party issuing interrogatories does not comply with the provisions and limitations of this Rule, then the responding party need not respond to any part or subpart of the proffered interrogatories. Issues regarding interrogatories not resolved between the parties may be dealt with by Motion to the Office of Judges.

(d) The Office of Judges may issue an Order to Compel completion of interrogatories upon a showing of unjustified failure to cooperate. If a party fails to comply with an Order to Compel, the Office of Judges will issue an Order to Show Cause. Absent sufficient response, the Office of Judges may, in its discretion, impose any of the following sanctions:

(1) Decide the issue against the non-cooperating party;

(2) Issue an order dismissing the protest of the non-cooperating party;

(3) Take other actions as justified.

3. Medical Authorization.

Pursuant to W.Va. Code §23-4-7(b) the claimant agrees by filing an application for benefits that any physician may release certain medical information to the claimant's employer or its representative, to the Offices of the Insurance Commissioner, and to any private carrier involved in the claim. Notwithstanding this statutory language, many hospitals and other medical providers require a signed medical authorization prior to releasing medical information to anyone other than the claimant. The claimant has a duty to sign a medical authorization that is in compliance with all applicable statutes and applicable case law in order to provide the employer with relevant medical records.

The Office of Judges may issue an Order to Compel the signing of the authorization upon a showing of unjustified failure to cooperate. If a party fails to comply with an Order to Compel, the Office of Judges will issue an Order to Show Cause. Absent sufficient response, the Office of Judges may, in its discretion, impose any of the following sanctions:

(a) Decide the issue against the non-cooperating party;

(b) Issue an order dismissing the protest of the non-cooperating party;

(c) Take other actions as justified.

C. Rebuttal Evidence

The Office of Judges recognizes that the parties may, at times, need to offer rebuttal evidence. Rebuttal evidence may, and should, be filed during any Time Frame or extension. In cases where evidence is filed at or near the end of the existing Time Frame, an extension may be granted in accordance with the rules controlling the extension of Time Frames. Rebuttal may take the form of, but not be limited to, cross-examination of witness, examination of the claimant, or filing of expert reports; provided, that additional examination of the claimant may not exceed the limit on the number of examinations that may be obtained under the provisions of subsection 7.4 [93-1-7.4] of this Rule.

7.3 Documentary Evidence

A. Filings During Litigation

All filings during litigation shall be served upon counsel of the other parties (or upon the party if not represented by counsel) and upon the Office of Judges by mail or as may be permitted as in Rule 5 of the West Virginia Rules of Civil Procedure. Filing by facsimile is permitted together with other electronic means as may be approved by the Chief Administrative Law Judge.

Members of the West Virginia Bar must provide his or her Bar membership number with any correspondence, filings, motions, objections, or other documents.

B. Exchange of Evidence

1. Documents

The report of an expert or any other documentary evidence shall be offered in evidence by delivering the original, or an accurate copy, of such report or document to the Office of Judges with copies to all counsel of the other parties (or to the party if not represented by counsel) as soon as can reasonably be accomplished following receipt of such report or document. For purposes of these rules, the term “original” shall also include certified copies or those documents produced under seal. The parties are encouraged to use the Office of Judges’ “Document Submission Form”.

2. Physical Evidence

Items not susceptible to reproduction or copying shall be brought to the attention of all other parties or their counsel and reasonable opportunity for inspection of such items shall be permitted within a reasonable time. Any evidence that cannot be scanned into the Electronic Document Management System must be accompanied by a written description of the evidence, the party submitting it, the date submitted, and the protest to which it applies. The parties are encouraged to use the Office of Judges’ “Description of Physical Evidence Form”.

3. Failure to Comply with Exchange of Evidence

If a party fails to comply with the exchange of evidence requirements of these Rules, the Chief Administrative Law Judge or his/her designee may take one or more of the following actions:

(a) Order the party to supply the material required by this section;

(b) Grant a continuance to the party who was not served with a copy;

(c) Prohibit a party from introducing the evidence if there is a finding that the failure to disclose was intentional or without good cause;

(d) Consider the protest(s) submitted for decision upon the existing record excluding the evidence not served;

(e) Take such other action as may be necessary or proper for the proper conduct of a system of administrative review.

C. Alternatives to Testimony at Hearing and Other Evidence

1. Alternatives to Testimony at Hearing

The following alternatives to testimony at hearing may be received and considered, subject to objection and the right of cross-examination where appropriate:

(a) Sworn statements or affidavits;

(b) Prior testimony under oath;

(c) Stipulations of fact or expected testimony;

(d) Depositions and;

(e) Interrogatories and responses thereto.

2. Alternatives to Other Evidence

The following alternatives may be received and considered in lieu of evidence which is unavailable:

(a) Testimony describing the evidence;

(b) An authenticated copy, photograph or reproduction of the unavailable evidence;

(c) A stipulation of fact or expected testimony concerning such unavailable evidence.

D. Stipulations

1. General

A written stipulation, or an oral stipulation on the record, may be accepted as a substitute for evidence. A stipulation may relate to a question of fact, the contents of a document, or the expected testimony of a witness.

2. Requirements

Before accepting a stipulation, the Chief Administrative Law Judge or his/her designee must be satisfied that:

(a) The stipulation is relevant to an issue in litigation;

(b) The stipulation is written or stated in clear and unambiguous terms;

(c) A factual basis exists for the stipulation, which shall be thoroughly set forth upon the record or in the preamble section of a written stipulation; and

(d) All parties to the stipulation shall indicate in writing, or orally on the record, that they understand and agree to the stipulation.

3. Effect of stipulation

A stipulation of fact that has been accepted is binding upon the parties to the stipulation and may not be contradicted by those parties. Any party not participating in the stipulation may challenge, contradict, or explain the contents of a stipulation of expected testimony or of a document's contents in the same way as if the witness had actually so testified or the document had been actually admitted. A stipulation is not binding on the Office of Judges.

7.4 Examinations and evaluations

A. Right to Examination and Evaluation During Protest

In any litigation pending before the Office of Judges, all parties are entitled to a reasonable number of relevant medical examinations or vocational evaluations. For purposes of this section, a consultation or file review report

constitutes an examination. The examination upon which the protested order is based does not count against the employer's or the claimant's limits.

A reasonable number of examinations or evaluations shall be no more than two (2) per specialty or discipline involved per protest; provided, that upon written request a party may be granted the right to further examinations or evaluations upon a showing of necessity. Such request shall set forth the reasons why such additional examination or evaluation is necessary. All other parties shall have fifteen (15) days after the date of service of said request to file a written response. Except upon motion of the Office of Judges, no hearing shall be held upon such request, and an Administrative Law Judge's Order thereon shall be interlocutory. When two or more protests have been consolidated by the Office of Judges, the examination limits shall not be cumulative. It is not the purpose of this rule to permit parties to submit more than two (2) examinations or evaluations per specialty or discipline involved when more than one protest has been consolidated by Order of the Office of Judges.

The limitations above do not overrule or replace any restrictions set forth in W.Va. Code §23-4-6(n), or elsewhere in the Code.

The Office of Judges may issue an Order to Compel attendance at an examination upon a showing of unjustified failure to cooperate. If a party fails to comply with an Order to Compel, the Office of Judges will issue an Order to Show Cause. Absent sufficient response, the Office of Judges may, in its discretion, impose any of the following sanctions:

1. Decide the issue against the non-cooperating party;

2. Issue an order dismissing the protest of the non-cooperating party;

3. Take other actions as justified.

B. Prompt Exchange of Reports

Reports of examination and evaluation shall be promptly exchanged among the parties or their counsel, upon request. Either party may submit such report to the Office of Judges without a hearing. When a report is offered to be made a part of the record by a party, it will be considered subject to the limitations set forth in subsection 7.4(A) [93-1-7.4(A)] of this rule.

C. Requests for Cross-examination

A request to cross-examine the author of a report shall be made promptly in writing to the party offering the report.

D. Production of Expert Witness for Cross-examination

When cross-examination of a reporting expert is properly requested, it shall be the responsibility of the party offering the report to arrange for the appearance of the witness for cross-examination. The expense of the expert witness shall be the responsibility of the party desiring to cross examine to the extent provided in subsection 8.4(F) [93-1-8.4(F)]. The failure of the witness to appear may be grounds for excluding the report offered or other sanctions deemed appropriate.

If the non-appearing witness prepared a report based upon an examination or consultation at the request of the claim administrator (often referred to as Independent Medical Exam, or I.M.E.), then the Office of Judges may issue an order compelling the Offices of the Insurance Commissioner, self-insured employer, or the employer through its carrier, whichever is applicable, to make the witness available. If the party is unable to or otherwise fails to make the witness available, the Office of Judges may order the report expunged from the claim record and order that another expert be procured to replace the non-cooperative witness.

7.5 Identification of Relevant Documents from Claim Files

A. Introduction

Until amended in 2007, W.Va. Code §23-5-9(c) provided that, subject to this Rule, the record upon which the matter shall be decided consists of evidence submitted by the parties, evidence taken at hearings, and "any documents in the claim files which relate to the subject matter of the objection". The 2007 amendments struck from the section the clause in quotations.

The 2007 amendments removed from the Office of Judges all authority to supplement the record considered with documents from "claim files". Furthermore, the Offices of Judges does not have access to documents contained in the claim files of private carriers, self-insured employer, and claim administrators of the Offices of the Insurance Commissioner. Therefore, the parties have the responsibility to submit to the Office of Judges any document that they wish to have considered by the judge.

B. Prior Rulings of ALJ, Board of Review, or Supreme Court

The Office of Judges may take judicial notice of any decision in the same claim by an administrative law judge, the Appeal Board or Board of Review, or the Supreme Court. The Office of Judges may not have access to Supreme Court mandates, settlement agreements, other resolutions of an issue, or claims management decisions and histories, and the parties are responsible for filing with the Office of Judges any such relevant documents. The parties should not

rely upon the Office of Judges taking such judicial notice. The parties are encouraged to identify to the judge any prior decisions or rulings thought to be relevant.

C. Documents Compelled Prior to Effective Date of Rule

For protests acknowledged before April 2, 2007, any documents already offered through the former compelled production of relevant documents process under the former version of this Rule will remain a part of the record.

D. Responsibility of the Parties for the Record

The parties are strongly admonished that the Office of Judges' lack of access to claims administration decisions and claim history makes it imperative for the parties to copy and submit all relevant orders and documents. The Office of Judges no longer has access to the claim history and failure on the part of the parties to supply relevant documents may result in decisions made upon an inadequate record.

At the same time, however, the parties are encouraged to exercise caution to avoid creating a record that is overburdened with irrelevant documents. The parties do not assist the adjudicator's task of addressing relevant documents by merely copying and submitting every document in their possession. The Office of Judges may reject irrelevant documents and may require an explanation of the relevancy of any document.

7.6 Documents Filed in Prior Protests

The parties may identify, as part of the record to be considered in a protest, any relevant documents which have been previously submitted or designated to the Office of Judges in other protests involving the same parties.

This identifying of relevant documents may be done by notice or motion during the Time Frame and does not require the actual copying and filing of a duplicate of the document previously submitted to the Office of Judges.

§93-1-8 ADMINISTRATIVE HEARING PROCEDURES; GENERALLY

8.1 Right to Administrative Hearing

Except for the expedited issues identified in W.Va. Code §23-4-1c(a)(3) and section 9 [93-1-9 et seq.] of this rule, any party to a protest shall, upon timely request, have a right to a hearing concerning any issue of fact or law upon which

the claim administrator has made a decision within the meaning of W.Va. Code §23-5-1(b), and upon the timely filing of a protest.

A hearing, if not automatically scheduled by the Office of Judges pursuant to this Rule, shall be specifically requested by a party at least thirty (30) days prior to the expiration of the requesting party's Time Frame. If requested less than thirty (30) days before the expiration of the Time Frame, the party requesting the hearing shall state good cause for the untimeliness of the request. It is not the intent of this subsection to prohibit cross-examination or rebuttal evidence.

8.2 Date, Time, and Place of Administrative Hearings

Upon a timely request for a hearing, the Office of Judges shall determine the date, time and place such hearing will be conducted. A hearing may be continued by the Office of Judges only for administrative necessity or good cause shown pursuant to subsection 8.7 [93-1-8.7] of this rule.

Hearings may be conducted at such places as determined by the Office of Judges, giving due regard to the convenience of the witnesses. The Chief Administrative Law Judge, or his/her designee, may, at his/her discretion, conduct any hearing by telephone conference call.

The parties and counsel of record shall be notified of the date, time, and place of a hearing at least ten (10) days in advance of the hearing date. For good cause or upon waiver of notice by the parties, less than ten days may be adequate notice.

8.3 Administrative Hearing Procedure

A. Testimony

All testimony shall be taken under oath or affirmation.

B. Cross-examination

All parties shall be given reasonable latitude in cross-examining witnesses. Cross-examination must take place in any time period set forth in a Time Frame Order.

C. Objections

An Administrative Law Judge or Hearing Examiner shall rule upon all objections to the evidence or testimony presented at the hearing or offered by deposition, taking into consideration the apparent reliability of evidence, and the basis of knowledge of a witness. All objections shall be noted in the transcript of

the hearing or deposition. Exceptions to a ruling on such objections shall be automatic. Oral argument and citation of authority by the parties in support of, or opposition to, objections may be required. In the event of adverse rulings the record may be preserved for appeal by written proffer or, at the discretion of the Administrative Law Judge or Hearing Examiner, by an oral vouching of the record.

D. Transcription of Hearing

All testimony, argument and rulings shall be recorded by stenographic or voice recording or by other means and shall be transcribed.

E. Conduct of Hearings

Pursuant to W.Va. Code §23-1-4(b), it is the policy of the Office of Judges that hearings will not be open to the general public. Only parties and their counsel, witnesses, family of the claimant, and agents or representatives of the employer or the Offices of the Insurance Commissioner may be present at the hearing. The Office of Judges may further restrict a hearing in the following manner:

1. If a person's conduct becomes unruly or disruptive, they may be removed from the hearing.

2. Witnesses may be removed from hearing upon the granting of a motion of a party that the witnesses be sequestered.

3. Camera/Audio coverage. Audio or video recording of any proceeding by anyone other than Office of Judges personnel is prohibited.

8.4 Witnesses; Subpoenas and Fees

A. Subpoena

Generally, a witness may appear at a hearing with, or without, a subpoena. The service of a subpoena is the responsibility of the party who desires the presence of the witness. However, when a party desires to cross-examine an expert witness who has authored a report, then arranging for the presence of that expert witness is the responsibility of the party who has offered the report.

The presence of a witness or production of evidence may be obtained by the issuance of a subpoena or subpoena duces tecum through a party's counsel as a member of the Bar and an officer of the Court. The subpoena or subpoena duces tecum shall bear a facsimile of the signature of the

Chief Administrative Law Judge but must bear the actual signature of counsel. Blank forms shall be developed for this purpose which may be reproduced by counsel as needed. A party not required to be represented by counsel may request, in writing, that the Office of Judges issue a subpoena. A subpoena for a physician or other medical provider shall also include a subpoena duces tecum for the treatment records and notes pertaining to the claimant. Service of any subpoena shall be the responsibility of the party who has requested the subpoena. The Office of Judges or a party may seek judicial enforcement of such subpoena.

It is not necessary for the Office of Judges to issue an Order to Compel when a subpoena has been properly served. At the request of the party who had the subpoena served, and upon allegation of service as defined in subsection 8.4(B) [93-1-8.4(B)], the Office of Judges will issue an Order to Show Cause to a non-appearing party. Said Order to Show Cause will notify the non-appearing party of the possible sanctions for failure to explain his or her non-appearance.

B. Service

It shall be the responsibility of the party requesting the issuance of a subpoena to serve the subpoena on a witness by personal service, certified mail, or by regular mail, with a certificate of service executed by counsel. The subpoena shall be served at least seven (7) days before the hearing. A copy of the subpoena shall be provided counsel of the other parties (or the party if not represented by counsel) at the time of service.

C. Right to Examine or Cross-Examine Witnesses

Each party is entitled to compel the attendance at a hearing of any witness whose testimony may be relevant and material, except a party is not entitled to the presence of a witness who is deemed unavailable. A witness shall be deemed unavailable in, but not limited to, the following situations:

1. The witness is not subject to compulsory process in West Virginia by reason of non-residence within, or prolonged absence from, the State of West Virginia, unless that witness is the claimant or the employer.

2. The witness refuses for good cause to testify despite an Order to do so.

3. The witness claims by sworn affidavit a lack of memory of the subject matter.

4. The witness is unable to be present or to testify at the hearing because of then existing physical or mental illness or infirmity.

5. The witness is absent from the hearing and the requesting party is not at fault, could not have prevented the unavailability, and demonstrates that all reasonable measures to secure the presence of the witness have been taken, including the timely request for and service of a subpoena.

D. Failure of a Witness to Comply

Upon failure or refusal, without good cause, of a witness to comply with a properly served subpoena, the Chief Administrative Law Judge or his/her designee may employ proper sanctions including, but not limited to:

1. a decision reversing the protested order;

2. an order dismissing the protest;

3. submission of the protest for final determination upon the existing record; or

4. when personal service of a subpoena has been obtained, institution of attachment proceedings as for contempt in Circuit Court.

Prior to imposition of one or more of the aforementioned sanctions, a written notice may be issued allowing fifteen (15) days to show good cause to the Office of Judges why such sanctions should not be imposed.

E. Exclusion of Evidence

Upon the failure or refusal of a properly subpoenaed witness to appear, produce requested evidence or testify in response to a subpoena, the Chief Administrative Law Judge or his/her designee may exclude any statement, record or report rendered by that witness from the record to be considered.

F. Witness fees

1. General

Except for expert witnesses as provided for in the next subsection [93-1-8.4(F)(2)], and except for the particular provisions relating to a claimant's lost wages as provided for in West Virginia Code, §23-5-1(c), the party

requesting to cross-examine a witness shall pay the attendance fees and mileage as provided for witnesses in civil cases in circuit court. Such fees shall be paid in advance upon a timely request by the witness. When a witness appears at the request of the Offices of the Insurance Commissioner or any other state agency, such advance payment shall not be required.

2. Expert Witness Fees

The party who requests to cross-examine an expert witness shall be responsible for payment of the appearance fee of such witness, subject to the limitations of the next subsection [93-1-8.4(F)(3)]. However, pursuant to 85 CSR 1, sections 16.1 and 16.2, the Offices of the Insurance Commissioner, self-insured employer, or private carrier, shall be responsible for payment of a witness fee when the witness is:

(a) An authorized treating physician, or

(b) An authorized consulting physician acting upon referral from an authorized treating physician.

3. Expert Witness Fee Limitations

The amount of expert witness fees shall be as agreed by the parties based upon the usual and customary rate for the profession involved. The financial obligation of the requesting party shall not exceed one hundred dollars ($100) per each quarter-hour of testimony and preparation. In addition to the time of actual testimony at hearings or depositions, the requesting party is also financially obligated for a maximum of two quarter-hours for actual time reviewing records prior to the testimony. Any amount of expert fees in excess of the limitations set forth in this section shall be the financial obligation of the party who submitted the expert's report.

The witness may require advance payment not to exceed the reasonably anticipated length of the testimony and records review; Provided, that a witness may not require advance payment from the Offices of the Insurance Commissioner, or any other state agency.

8.5 Limited Purpose of Certain Hearings

A request for hearing may not be used to submit written or physical evidence after the expiration of a party's Time Frame. Evidence, which would have been untimely under the original Time Frame Order, may not be submitted at a hearing conducted during an extension of the Time Frame when said extension was granted solely for purposes of conducting a hearing. However, evidence first discovered at such hearing may be the basis for good cause for an

untimely request for extension of the time frame**.** Furthermore, evidence that serves to rebut the testimony given at the hearing may also be introduced at the hearing.

8.6 Special Hearings

The Office of Judges may schedule a hearing on any issue in litigation to require closing argument by the parties. The purpose of this hearing may include, but not necessarily be limited to, a determination of the issues to be decided in the written decision, identification of the evidence relied upon by the parties, and a summation by each party as to why this evidence supports their position. A request by a party for such hearing may be granted upon a showing of good cause.

Failure to attend and/or participate in this hearing may result in the following:

A. dismissal of protest and affirmation of claim administrator's Orders;

B. exclusion of evidence from consideration;

C. denial of motion for reconsideration; and

D. such other sanction as the Chief Administrative Law Judge or his/her designee may deem appropriate.

8.7 Continuances

Postponement or rescheduling of hearings, known as "continuances", shall be granted only at the request of a party and only for good cause shown, except that the Office of Judges may, for appropriate administrative purposes, continue a hearing without a request by a party. After a date for a hearing has been set, any party who desires a continuance shall file a written motion with the Office of Judges, with copies to the other parties, stating in detail the reasons why such a continuance is necessary. If the motion is based on a conflict in schedule, such motion shall set forth in detail the specific nature of the conflict. Such written motion shall be filed no later that ten (10) days prior to the date of the scheduled hearing, unless by agreement of the parties or upon good cause shown, a shorter period is permitted, and shall be served on all parties at that time.

Continuances of hearings in the expedited adjudication process are governed by section 9.6 [93-1-9.6].

8.8 Absence of Parties at Hearings.

All parties to a claim are entitled to be present at a hearing; however, the absence of a party shall not prevent the taking of evidence and the final determination of the issues in litigation. A party shall be considered to have waived the right to be present if:

A. After being notified of the date, time and place of a hearing, a party does not appear, absent a showing of good cause; or

B. After being advised that disruptive conduct will cause removal from the hearing, a party persists in conduct which is such as to justify exclusion from the hearing.

§93-1-9 EXPEDITED ADJUDICATION PROCESS

9.1 Expedited Issues

In compliance with the provisions of W.Va. Code §23-4-1c(a)(3), for rulings denying the compensability of the claim, denying initial Temporary Total Disability, or denying medical authorization, the Office of Judges will make available to the claimant an expedited adjudication process.

9.2 Election of Expedited Process

The claimant must notify, in writing, the Office of Judges, and all parties, of intent to proceed with the expedited process. Notice of the election to proceed with the expedited process must be received no later than fifteen (15) days after the date the protest was acknowledged by the Office of Judges.

Once a claimant has elected to proceed with the expedited process, the matter cannot be removed from the expedited process except by agreement of the parties or for the most compelling of good cause.

9.3 Scheduling of Expedited Administrative Hearing

The Office of Judges will regularly schedule dockets for expedited issues at selected locations around the state and at regular intervals. Once notified of the election to proceed with the expedited process, the Office of Judges will schedule an administrative hearing to be conducted at the special dockets venue closest to the claimant's residence. The Office of Judges will attempt to conduct the hearing within a minimum of twenty-five (25) days, and a maximum of forty-five (45) days, from receipt of the election.

9.4 Expedited Administrative Hearing

Hearings in the expedited process will be scheduled to last no longer than sixty (60) minutes; divided at thirty (30) minutes per side including rebuttal. If the docket schedule permits, the hearing length may be extended at the discretion of the administrative law judge. If the parties anticipate requiring more lengthy testimony, then the parties should obtain that testimony at a deposition prior to the expedited hearing.

The parties are not required to appear at the expedited process hearing, unless subpoenaed, and may submit any arguments or evidence in writing prior to the hearing date.

9.5 Time Limit for Filing Evidence

Evidence from any party must be submitted to the Office of Judges before, or at, the administrative hearing. The existing Time Frame shall expire on the date of the hearing.

9.6 Continuances

Hearings shall not be continued except by agreement of the parties or upon the most compelling of good cause. Good cause determinations will be strictly resolved in view of the legislative mandate to expedite the resolution of the issue.

9.7 Expedited Decisions

The Office of Judges shall issue a decision within thirty (30) days of the date of the administrative hearing.

9.8 Exceptions

This expedited adjudication process shall not be available for occupational pneumoconiosis, hearing loss claims, or complex issues as identified at the discretion of the Office of Judges.

9.9 Failure to Prosecute in Expedited Adjudication

In protests in which no new evidence has been introduced, or no argument in lieu of evidence has been filed by the hearing date, the provisions of section 10 [93-1-10] shall apply.

§93-1-10 FAILURE TO PROSECUTE PROTEST

10.1 Introduction

The Workers' Compensation Office of Judges is provided with limited resources with which to resolve many thousands of protests filed each year. Frequently the protesting party fails to submit any evidence, offer any testimony, or provide any argument explaining the basis for the protest.

This section does not imply, or create, a presumption that the ruling of the claim administrator is correct. In fact, the Office of Judges recognizes that there may occur occasion when claim administration decision is incorrect on its face. Such an occasion should not require the party to submit new evidence or testimony in order to prevail. However, the protesting party should offer explanation as to why the ruling is believed to be incorrect.

The Office of Judges might reasonably expect the protesting party to formally withdraw its protest when no longer interested in pursuing the protest, but the history of protest litigation reveals that, in many cases, for many different reasons, the party will not always do so. An inefficient protest resolution process is created when the Office of Judges must guess why a party protested or if the party still intends to pursue the protest. The Office of Judges' must divert resources from processing contested issues in order to process the non-contested issues. Expenses are unnecessarily incurred by the non-protesting parties in defending the protested decision. If the protesting party does not submit evidence, testimony, or reason for the protest, then the resources required for resolving a protest, which the party may no longer be interested in pursuing, would better be utilized in resolving actually disputed claims.

Accordingly, this section allows for an efficient resolution of such protests where the party does not proceed, does not explain the basis for the protest, and does not withdraw the protest.

10.2 Requirements

The party protesting a decision of the claim administrator, has the burden of presenting evidence or argument in support of its position. Evidence or argument must be filed before the expiration of the protesting party's time frame. Unless the protesting party timely files evidence or argument, the claim administrator's decision will be affirmed.

The requirement of this section may be met by the filing, or receipt, during the party's Time Frame, of any of the following:

A. documentary or physical evidence in addition to that which was originally considered by the claim administrator;

B. testimony at administrative hearing scheduled by the Office of Judges;

C. argument in lieu of evidence (must be submitted during Time Frame);

D. notice or motion identifying relevant documents from other protests involving same parties.

The requirement of this section shall not be met by a party merely supplying the Office of Judges with a copy of any information already submitted to the claim administrator, or with a copy of any order of the claim administrator. The intent of the requirement is to compel the protesting party to submit new information or, in the alternative, an explanation of the basis for the protest.

10.3. Order to Show Cause

The Office of Judges will review each matter at the conclusion of the protesting party's time frame to determine whether the protesting party has submitted evidence or argument in lieu of evidence. If it appears from a review of the matter that the protesting party has not filed any evidence or argument, the Office of Judges shall issue a Show Cause Order to the protesting party for the purpose of allowing the protesting party to demonstrate that some evidence or argument had been timely filed.

10.4 Decision Affirming Order

If the protesting party fails to show that evidence or argument has been timely filed, or if there is no response to the Show Cause Order, the Office of Judges shall issue a decision affirming the claims administrator's order. Such decision issued pursuant to this rule may be appealed to the Workers' Compensation Board of Review.

§93-1-11 OCCUPATIONAL PNEUMOCONIOSIS

11.1 Non-medical Order

The order of the claim administrator determining whether the claimant has met the requirements set out in W.Va. Code §23-4-15b shall hereinafter be referred to as non-medical order. Litigation regarding such order including any issue regarding the chargeability of an employer, must be conducted by the parties during the non-medical litigation. The issue of chargeability shall not be litigated before the Occupational Pneumoconiosis Board during litigation on permanent partial disability awards for occupational pneumoconiosis, although medical questions involving the issue of causation of the claimant's occupational pneumoconiosis may be referred to the Board.

The particular provisions of West Virginia Code §23-5-15b which make the

final non-medical decision interlocutory and only appealable in conjunction with an appeal from an ALJ decision on a protest to the O.P. Board findings contradicts later amendments, to the same section, requiring a referral of the claim to the O.P. Board prior to the conclusion of non-medical litigation. It is the Office of Judges' interpretation of this conflict that the ALJ non-medical decision can be appealed even if no protest to the O.P. Board findings is currently pending at the time of the ALJ non-medical decision. It is not necessary for an employer to protest the Board's findings solely for the purpose of preserving their non-medical appeal rights.

11.2 Referrals to the Occupational Pneumoconiosis Board During Non-Medical Litigation

Referrals to the Occupational Pneumoconiosis Board during non-medical litigation shall be made at the discretion of the Chief Administrative Law Judge or his/her designee only when there is a reasonable doubt about any medical question regarding the issues determined in the non-medical Order. In making its opinion as to whether the claimant's employment with a particular employer could have caused claimant's breathing problems, the Occupational Pneumoconiosis Board shall review any other relevant medical records and such other information in the record as the Board deems relevant to the claimant's medical condition.

11.3 Hearings Before the Occupational Pneumoconiosis Board

A. Time Frames

The procedure regarding requests for extensions of time frames and continuances of hearings for claims involving permanent partial disability awards for occupational pneumoconiosis shall be the same as in all other claims.

B. Initial Hearing

Upon request of any party, the Office of Judges may set an initial hearing for the sole purpose of examining the Occupational Pneumoconiosis Board members about their findings based upon their examinations of the claimant upon which the award in litigation was based. Requests for such hearings must be made no more than ninety (90) days after the beginning of the protesting party's time frame. At such initial hearing the parties shall not ask the Board to evaluate evidence introduced in support of the respective positions unless it is agreed by all parties that the claim shall be submitted for final determination at the conclusion of that hearing. Initial hearings shall be set at the discretion of the Office of Judges with due regard to the scheduling of all occupational pneumoconiosis claims in litigation, particularly the amount of docket time available before the Occupational Pneumoconiosis Board. The setting of such hearings is discretionary and not a matter of right of any party.

C. Final Hearing

A final hearing shall be scheduled after the expiration of the time frame. However, a final hearing will be scheduled only when new evidence has been submitted to the Office of Judges or when a party has timely requested a final hearing to examine or cross-examine the members of the Occupational Pneumoconiosis Board.

D. Extensions at Hearing

Extension of time frames may be granted by the presiding Administrative Law Judge at hearings before the Occupational Pneumoconiosis Board for good cause or if the requesting party can show that they have made a request in a timely manner prior to the expiration of their time frame and that the Office of Judges has not yet acted upon this request.

E. Hearing When Responding Party Is Unrepresented

In any case in which a non-protesting party (hereinafter referred to as the responding party) is unrepresented, when new evidence has been introduced before the Office of Judges by the protesting party, or a request for hearing has been made, an Order may be issued at the end of the protesting party's time frame requiring the responding party and the Offices of the Insurance Commissioner, if a party, to show cause why the claim should not be set for hearing after which the claim shall be submitted for final determination. If no response is received or no good cause is shown by the responding party or the Offices of the Insurance Commissioner, if a party, within fifteen (15) days of the mailing of such Order, the claim shall be set for hearing before the Occupational Pneumoconiosis Board.

F. Failure to Prosecute

In protests in which no new evidence has been introduced before the Office of Judges by the protesting party, or a request for hearing has not been made, the provisions of section 10 [93-1-10 et seq.], "Failure To Prosecute Protest", shall apply.

G. Scheduling of Hearing

In protests in which evidence has been introduced by either a protesting or responding party, a hearing shall be scheduled before the Occupational Pneumoconiosis Board after the expiration of the responding party's time frame unless the parties agree that a hearing may be set earlier.

11.4 Review of Claim Files by the Occupational Pneumoconiosis Board

Prior to the Final Hearing.

In protests set before the Occupational Pneumoconiosis Board pursuant to W.Va. Code §23-4-8c(d), it may be necessary for the Board to review the records of some claims prior to the hearing. This may be due to the complexity of medical issues, the volume of medical evidence, or other appropriate reasons. Claims may be subject to such review as follows:

A. Upon the request of the Board or the majority of its members who examined the claimant in the protest in question;

B. Upon the ruling of the Administrative Law Judge presiding over the hearing of the protest in question;

C. Upon the motion of any party in the protest in question, such motion being subject to the following conditions:

(1). The moving party must state with specificity why such review is necessary, including but not limited to a list of evidence relied upon by both parties; and

(2). The moving party must certify that the introduction of all evidence by all parties is complete, that the evidence has been served upon all the parties and that the parties will submit the protest for final determination at the conclusion of the hearing for which prior Board review is requested. The Office of Judges will give consideration to circumstances arising at the hearings which could not have been reasonably foreseen by the parties, and if in the judgment of the presiding Administrative Law Judge, an additional hearing is necessary, the protest shall be set for one additional hearing.

(3). Failure to satisfy the conditions of subsections 11.4(C)(1) and (2) [93-1-11.4(C)(1) and 93-1-11.4(C)(2)] of this rule shall result in the denial of the request for the Board to review the record prior to the hearing.

(4). If a motion for such review prior to a hearing is granted by the Office of Judges, the Office of Judges may, in its discretion, order the parties to identify the record to be reviewed by the Board

(5). Any ruling by the Office of Judges regarding the granting or denying of a request for Board review of a claim prior to a hearing shall be considered interlocutory and may be appealed only in conjunction with a decision entered in the instant protest.

§93-1-12 MOTIONS, OBJECTIONS, and CORRESPONDENCE

12.1 General

A copy of all correspondence, motions, objections or other documents provided to the Office of Judges regarding any issue in litigation shall be provided to all counsel of the other parties (or to the party if not represented by counsel). Some indication that copies were provided to all other parties must accompany the documents provided to the Office of Judges.

Members of the West Virginia Bar must provide his or her Bar membership number with any correspondence, filings, motions, objections, or other documents.

12.2 Motions or Objections in Writing

Any motion or objection may be made in writing. The motion shall clearly set forth all grounds, facts, and authorities in support of the motion. Any response by an opposing party shall be filed in writing with the Office of Judges within fifteen (15) days of receipt of the motion, and shall set forth all matters in opposition to the motion.

12.3 Motions or Objections During Hearing

A motion or objection may be made on the record, orally or in writing. The motion shall clearly set forth all grounds, facts and authorities in support of the motion. The opposing party, if present, shall have the right to set forth matters in opposition to such motion on the record. The absence of a party shall not be grounds for delay in ruling upon any motion, or grounds for reconsideration of any ruling made, absent a written motion for reconsideration and an affirmative showing of good cause for such nonappearance by the opposing party.

12.4 Rulings Interlocutory in Nature

All rulings upon motions shall be interlocutory in nature and may not be appealed except in conjunction with a final decision unless specifically noted otherwise in the ruling on the motion.

§93-1-13 DEPOSITIONS

13.1 General

In order to promptly and efficiently process cases the parties are encouraged, particularly for the purpose of cross-examining expert witnesses, to use depositions to the maximum extent possible. Accordingly, depositions may be obtained and used for evidentiary purposes without prior consent of the Office of Judges. Depositions shall be conducted in accordance with section 8 [93-1-8 et seq.] of this rule, except that an Administrative Law Judge or Hearing Examiner need not be present and any person otherwise qualified and authorized to administer oaths or affirmations may do so to the deponents. Objections to questions asked in a deposition will be noted upon the record along with the grounds for the objection, and the question shall be answered with the question and answer transcribed as a part of the deposition on avowal. Motions relative to any objections made shall be submitted in writing to the Office of Judges within fifteen (15) days after either party tender the deposition to be made a part of the record. A ruling on motions as to the admissibility or inadmissibility of any questions and answers objected to will be rendered in a timely manner.

13.2 Procedure

The taking of a deposition shall be by agreement of the parties or upon reasonable notice to the deponent and all parties or, if the party is represented by counsel, their counsel of record. Notice shall be in writing and shall contain the date, time and place of the deposition as well as the name and address of each person to be deposed. The cost of court reporter services shall be borne by the party requesting the deposition, unless the Offices of the Insurance Commissioner agrees as a policy to assume the cost. The cost of witness fees and expenses shall be the obligation of a party as provided in subsection 8.4(F) [93-1-8.4(F)] of this rule. Parties are encouraged to utilize depositions to obtain testimony whenever possible.

13.3 Telephone Depositions

Depositions may be taken by telephone conference call as if taken in person. The procedure shall be the same as set forth in subsection 13.2 [93-1-13.2]. Costs incurred in the taking of telephone depositions shall be borne as provided in subsection 13.2 [93-1-13.2].

13.4 Use

Use of any deposition shall be subject to objection as in Circuit Court. The admission of any deposition into evidence may be denied if it appears that the deposition was taken at such place and under such circumstances as to impose an undue burden or hardship upon the opposing party.

§93-1-14 DISMISSALS of CLAIMS and PROTESTS

14.1 Dismissal, or Withdrawals, of Protests

Upon motion of any party, upon request of the protesting party, or as a sanction permitted the Office of Judges by these rules, any protest pending before the Office of Judges can be dismissed from litigation.

14.2 Dismissal of Claims

The Office of Judges does not have statutory authority to dismiss a claim. The office of Judges' jurisdiction is limited solely to pending protests. Any motion, or request, to dismiss a claim must be directed to the claims administrator.

§93-1-15 ADDING or DISMISSING CHARGEABLE EMPLOYERS and CARRIERS

15.1 Requirements

When it appears that another employer may have liability for some, or all, of the claim, the Office of Judges shall notify the potentially chargeable employer, and its carrier, of the right to participate in the ongoing litigation.

No employer may be added by final decision, and no employer may be dismissed by final decision, until after all other potentially chargeable employers and their carriers have been given notice and the opportunity to appear. The final decision may take the form of a remand to the proper claim administrator, or the Offices of the Insurance Commissioner, for additional investigation and entry of a new order. However, remanding the claim is not an available outcome when a dispute exists over which administrator has jurisdiction over the claim. In the latter event, the administrative law judge will determine which claim administrator has administrative authority and jurisdiction.

The burden is on the moving party to provide sufficient claim identifying information from which the Office of Judges can determine the specific identity of the other employer and/or carrier.

15.2 Tolling of Statute of Limitations for Claim Filings

Pursuant to West Virginia Code 23-5-1(b)(2)(C), the Office of Judges has authority to toll any statute of limitation by directing that:

A. An application for benefits be designated as a petition to reopen, effective as of the original date of filing; or

B. A petition to reopen be designated as an application for benefits, effective as of the original date of filing; or

C. An application for benefits or petition to reopen with any claim administrator be designated as either with any other claim administrator, effective as of the original date of fling.

§93-1-16 DECISIONS; OTHER RESOLUTIONS; and MOTIONS to RECONSIDER

16.1 Decisions

Pursuant to W.Va. Code §23-5-9(d), the Office of Judges shall issue a written decision containing findings of fact and conclusions of law for all protests submitted for decision. This decision, a copy of which will be mailed to all the parties and their counsel of record, shall be subject to appeal to the Worker's Compensation Board of Review pursuant to W.Va. Code §23-5-10.

16.2 Other Resolutions of Protests

The Office of Judges may resolve a protested issue by ruling or order where the protesting party fails to comply with a properly served subpoena, withdraws its protest, fails to prosecute its protest, or for any other reason the Chief Administrative Law Judge deems appropriate.

16.3. Motions to Reconsider

Any party may file a motion to reconsider any final resolution of a protest. Such relief should not be sought, and will not be granted, where the sole basis for the motion is disagreement with the reasoning of the decision. Motions to reconsider shall be granted only when clerical or administrative error has occurred in the decision.

Examples of the type of error correctable by this relief include, but are not limited to:

A. Mathematical or typographical errors;

B. Failure to discuss or mention relevant evidence or argument timely submitted;

C. Failure to rule upon a pending motion or other information indicating that the issue was prematurely decided.

Such motion must be filed within thirty (30) days of the date of receipt of the decision. The filing of a motion for reconsideration shall not toll the running of the jurisdictional time limits for filing an appeal with the Workers' Compensation Board of Review.

16.4. Correction of Error by Office of Judges

The Office of Judges may, without motion from any party, correct such errors covered by §16.3 as discovered provided that the ALJ decision has not been affected by appeal outcome.

§93-1-17 MEDIATION

17.1 General

The Office of Judges, upon its own motion or upon request of any party, may refer a claim, or any issue therein, to mediation.

Assignment of a protest or case to mediation does not toll or delay the adjudication process. At the conclusion of the litigation process a decision will be issued based on the evidence of record with no consideration given to the mediated negotiations.

17.2 Mediator

The parties may agree to their own choice of mediators and will be responsible for compensation of that mediator. Unless selected by agreement of the parties, the Office of Judges shall assign a mediator to conduct the mediation. The Office of Judges shall maintain a list of interested and qualified mediators as identified by the State Bar. Whenever possible, the Office of Judges will select a mediator who is willing to serve without compensation. If a volunteer mediator is not available, then the Office of Judges shall inquire of the parties whether they are willing to pay the fees of a mediator. If so, then either the parties by stipulation or the Office of Judges shall select the mediator and the parties by written agreement shall determine how the mediator will be compensated.

17.3 Conduct

The mediator will schedule and conduct any meetings with the parties and will report to the Office of Judges the results of the mediation process within a time period set by the Office of Judges.

The proceedings of any meetings, including any statements made by any party, attorney, or other participant, shall, in all respects, be confidential and not reported, recorded, placed in evidence, or otherwise made known to the adjudicator assigned the case for decision. A mediator shall maintain and preserve the confidentiality of all mediation proceedings. No party shall be bound by anything done or said at the mediation meeting unless a settlement is reached, in which event the agreement shall be reduced to writing and shall be binding upon all parties to that agreement.

17.4 Outcome

If a settlement is reached, the mediator may direct counsel to prepare the agreement and circulate it for signature by all parties to the claim. Upon completion of an executed settlement agreement the parties shall notify the Office of Judges that the matter has been resolved.

If the parties are unable to resolve their dispute at the mediation meeting, the mediator shall make note that there has been compliance with the requirements of this rule, but no settlement has been reached.

17.5 Sanctions for Failure to Participate.

Any party to a claim selected for mediation must have full authority to settle without additional consultation. Nothing in this rule shall be interpreted as to compel a party to agree against his or her interest to any settlement.

Failure to participate in the mediation process may be grounds for sanctions for non-compliance including, but not limited to:

A. a decision reversing the protested order;

B. an order dismissing the protest;

C. submission of the protest for final determination upon the existing record; or

D. such other sanctions as may be justified in the discretion of the Office of Judges.

§93-1-18 FAILURE of ADMINISTRATOR to TIMELY RULE on APPLICATION, PETITION, or MOTION

18.1 Scope

West Virginia Code §23-4-1c(a)(3) provides a remedy to the claimant when the private carrier or self-insured employer fails to timely issue a ruling, as provided by law, on any application or motion. The Offices of the Insurance Commissioner, and its third party administrators, are not specifically included in the statute and are, therefore, not subject to this process.

18.2 Initiation of Process

In order to initiate this process, the claimant must submit in writing to the Office of Judges a statement setting forth the following information:

A. The claimant's name, address, phone number, social security number, date of injury (or last exposure), employer's name and address, and insurer's name;

B. The policy number, claim number, and case number, if known;

C. The nature of the action requested of the insurer;

D. The date the action was requested of the insurer;

E. The address to which the request was mailed or delivered.

The Office of Judges will provide a form for the submission of the required information.

18.3 Notice to Employer

Upon receipt of a properly completed statement, or form, the Office of Judges will immediately transmit a copy of the statement, or form, to the employer. The notice shall order the employer to make a ruling, or take required action, within the time limits provided by the applicable statute or regulation.

The notice shall also set a deadline for submission of any statements or evidence that either employer or claimant wishes to submit for consideration by the Office of Judges.

18.4 Findings of Office of Judges

Following the deadline for submission of statements or evidence, the Office of Judges will review the matter and report findings of fact and conclusions of law to the Offices of the Insurance Commissioner. The Offices of the Insurance Commissioner may take such administrative action as it determines to be justified.

§93-1-19 UNREASONABLE DENIALS and ATTORNEY FEES

19.1 Scope

Pursuant to W.Va. Code §23-2C-21(c), if the denial of compensability, initial award of TTD, or medical authorization is determined by the Office of Judges to be unreasonable, then reasonable attorney fees and expenses will be paid to the claimant by the private carrier, or self-insured employer, which issued the unreasonable denial. The Offices of the Insurance Commissioner, and its third party administrators, are not specifically included in the statute and are, therefore, not subject to this process.

For purposes of this section, "denial of initial award of TTD" shall mean the instance where the claim is ruled compensable on a "medical only" or "no-lost-time" basis and the private carrier or self-insured employer unreasonably fails to make an initial award of temporary total disability benefits. The denial of an "initial award of TTD" does not mean the denial of any extension or reopening of TTD.

19.2 Initiation of Process

At the conclusion of all litigation and appeals, if the initial denial of the claim, initial award of TTD, or medical authorization, has been reversed, the claimant may then submit to the Office of Judges an allegation that the denial was unreasonable under the definition provided by 23-2C-21(c).

The process is initiated upon receipt by the Office of Judges of the claimant's allegation, in writing, with a copy to the employer. Notice of the allegation must be filed with the Office of Judges within ninety (90) days of the final decision of final appeal outcome.

19.3 Filing of Evidence and Argument

The Office of Judges will issue a Time Frame Order setting forth the time limits for the filing of evidence and argument by either party in support of, or opposition to, the allegation.

In as much as the statute requires a determination of the unreasonableness of the carrier's action at the time of the denial, evidence introduced by the claimant after the denial, in support of the protest to the denial, is not relevant and will not be considered on the issue of unreasonableness.

19.4 Unreasonable Denial Defined

A denial shall be unreasonable if the denial by the private carrier or self-insured employer is without a legal or factual basis. The legal basis for a denial may be based upon any of the following:

A. Statutes;

B. Rules of the Insurance Commissioner;

C. Case law; or

D. In the absence of relevant West Virginia case law, recognized legal treatises on workers' compensation.

The mere fact that an initial denial decision is eventually reversed or overturned upon appeal does not prove or imply that the denial decision was unreasonable.

19.5 Decision

Following the expiration of the Time Frame, the Office of Judges will issue a decision determining whether the denial meets the statutory definition of "unreasonable". The decision shall be subject to appeal to the Workers' Compensation Board of Review. If the Office of Judges concludes that the denial was unreasonable, then the private carrier or self-insured employer will be ordered to pay reasonable attorney fees and costs.

19.6 Fees and Expenses

The claimant shall submit a petition to the private carrier, or self-insured employer, who will determine the reasonableness of the attorney fees and costs according to applicable rule. Disputes over the amount approved may be protested to the Office of Judges as provided for by article five of chapter twenty-three.

§93-1-20 DISPUTES BETWEEN CLAIM ADMINISTRATORS: REOPENING VERSUS NEW INJURY ISSUES

20.1 Scope

W.Va. Code §23-5-1(b)(2) provides that the Office of Judges resolves disputes between claim administrators, without prejudicing the right of the injured worker to immediate workers' compensation benefits, in claim filings in which the claim is otherwise compensable but the only matter of dispute is whether the claim should have been filed as a new injury application or a application to reopen an old claim.

This process applies only to applications for benefits – either in the form of an initial application for a new injury or an application to reopen an old injury – filed with a carrier on, or after, July 1, 2008.

20.2 Initiation of Process

When a claim administrator determines to deny a request for benefits filed on, or after July 1, 2008, and the only basis for denial of benefits is the determination that the application was improperly filed as a new claim or a reopening of an old claim, the claim administrator shall issue a decision denying benefits and providing the right of the claimant to object.

If the claimant files a timely protest, then the following subsections apply. The Office of Judges shall acknowledge the protest and enter a Time Frame as provided for in any other type of protest.

20.3 Administration of Claim and Conditional Payment of Benefits

Upon receipt of notice of the filing of a protest to the denial of the claim, the claim administrator shall begin conditional payment of benefits within fifteen (15) working days. Conditional payment of benefits shall continue until affected by subsequent order or decision of the Office of Judges.

20.4 Notice to Office of Judges

Upon receipt of notice of the filing of a protest to the denial of the claim, the claim administrator shall promptly notify the Office of Judges that another identifiable person may be liable.

Pursuant to the provisions of Section 15 [93-1-15] of this Rule, the burden is on the claim administrator to provide sufficient claim identifying information in order for the Office of Judges to determine to change the responsible administrator.

20.5 Notice to Other Allegedly Liable Person; New Claim Defenses

A. Form of Notice

Upon receipt of sufficient information from the claim administrator, the Office of Judges will join the other potential claim administrator to the proceeding. The Office of Judges will notify the alleged responsible claim administrator:

1. of the existence of the claim for benefits;

2. of the existence of the protest;

3. the allegation that the claim is otherwise compensable;

4. the possibility that the claim responsibility may ultimately be assigned to the new claim administrator;

5. the possibility that conditional payments being made may ultimately be transferred to the new administrator; and

6. of any time limit for raising any claim defenses not raised by the initial claim administrator, or for filing evidence.

B. New Claim Defenses

Although the claim administrator with whom the claim was initially filed has determined that no basis exists for the denial of the claim other than that the application was filed with the wrong claim administrator, the process cannot limit the rights of the potentially responsible claim administrator to offer its own claim defenses. The Office of Judges will provide a reasonable time period for the new claim administrator to investigate the circumstances of the claim and issue a notice raising any additional reasons for denying the claim.

If the new claim administrator raises other reasons that the claim should have been denied, then the Office of Judges shall address those issues in any final decision on the protest.

20.6 Interlocutory Transfer of Claim Responsibility

Prior to the final resolution of the issue, the Office of Judges, upon sufficient proof and after opportunity for the other claim administrator to have responded, may determine to change the responsible claim administrator. In that event, conditional payment of benefits shall be paid by the other claim administrator until the final determination.

20.7 Tolling of Statute of Limitations for Claim Filings

Pursuant to West Virginia Code 23-5-1(b)(2)(C), the Office of Judges has authority to toll any statute of limitation by directing that:

A. An application for benefits be designated as a petition to reopen, effective as of the original date of filing; or

B. A petition to reopen be designated as an application for benefits, effective as of the original date of filing; or

C. An application for benefits or petition to reopen with any claim administrator be designated as either with any other claim administrator, effective as of the original date of fling.

20.8 Final Resolution and Monetary Adjustment or Reimbursement

At the conclusion of the time frame for filing of evidence and arguments, the administrative law judge will issue a final resolution of the issue of claim responsibility and will address any additional claim defenses if raised by the other claim administrator joined as a party.

In the final resolution, the administrative law judge will direct appropriate reimbursement or monetary adjustment provided that the claim has been determined to be compensable and that a change of claim administrators has been determined.

The final resolution of the administrative law judge shall be subject to appeal to the Workers' Compensation Board of Review. Claim liability, reimbursement, and other monetary adjustments rulings shall be complied with unless stayed by order of the administrative law judge or Board of Review pursuant to the provisions of CSR 85-1-17.

§93-1-21 SEVERABILITY

If any provision of these rules or the application thereof to any person or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.