

December 8

TENTATIVE AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

SUNDAY, DECEMBER 8, 1985

5:00 - 7:00 p.m.

1. Approval of Minutes - November 17, 1985
2. REVIEW OF LEGISLATIVE RULES:
 - a. Board of Examiners of Registered Professional Nurses - Proposed rule relating to requiring that, beginning in 1992, nurses obtain a baccalaureate degree as a minimum for licensure as a registered professional nurse
 - b. West Virginia Nursing Home Administrators Licensing Board - Proposed rule and regulations governing nursing home administrators
 - c. Board of Health - Proposed rules and regulations relating to the licensure of hospice care programs
 - d. West Virginia Health Department - Proposed rules and regulations governing emergency medical services
 - e. West Virginia Board of Embalmers and Funeral Directors - Regulations governing the Board of Embalmers and Funeral Directors
 - f. State Water Resources Board - Series I, Water Quality Standards, Series II, National Pollutant Discharge Elimination System Rules, Series III, Special Rules and Series IX, Underground Injection Control Rules
3. REVIEW OF EMERGENCY RULES:
 - a. Civil Service Commission - Emergency Waiver for Flood Disaster
 - b. Attorney General - Pertaining to the prevention of unfair or deceptive acts or practices in the course of flood-related recovery efforts in WV
4. OTHER

Sunday, December 8, 1985

Legislative Rule-Making Review Committee
(Code §29A-3-10)

5:00 - 7:00 p.m.

Dan Tonkovich, ex officio nonvoting member <u>Senate</u>	Joseph P. Albright, ex officio nonvoting member <u>House</u>
Williams, R., Chairman	Casey, Chairman
Boettner	Knight
Rogers (absent)	Schifano (absent)
Tomblin	Wiedebusch
Harman	Shaffer (absent)
Shaw (absent)	Springston (absent)

Also present: John G. Chernenko

The meeting was called to order by Mr. Casey, Co-Chairman.

Due to a lack of a quorum, action on the minutes and the rule proposed by the Board of Examiners for Professional Nurses, relating to requiring that, beginning in 1992, nurses obtain a baccalaureate degree as a minimum for licensure for licensed professional nurses, was delayed until a quorum is present.

Mr. Casey told members of the Committee that representatives from the West Virginia Nursing Home Administrators Licensing Board had not been able to meet with staff and that discussion on the proposed rule relating to nursing home administrators would be delayed until staff meets with the Board.

Debra Graham, Committee Counsel, reviewed her abstract of the rule proposed by the Board of Health relating to the licensure of hospice care programs. Ms. Graham told Committee members that representatives of the Board had agreed to modifications to meet counsel's objections. Action on the proposed rule was delayed due to lack of a quorum.

Ms. Graham reviewed her abstract on the rule proposed by the West Virginia Health Department governing emergency medical services. She informed the Committee that, based upon discussion with the agency, modifications would be made to the proposed rule to meet counsel's objections. Dr. Fred Cooley, Director, Office of Emergency Medical Services, answered several questions from members of the Committee.

Mike Mowery, Committee Counsel, reviewed his abstract on the rule proposed by the State Water Resources Board. He told members of the Committee that his abstract only addresses Series I, Water Quality Standards, and that, due to the fact that the abstract had just been completed, members of the Board had not yet seen the abstract nor had he discussed the contents with them. Robert Parsons, Assistant Attorney General and John C. Ailes, Chairman, Water Resources Board, answered questions from the Committee.

Mr. Casey introduced Senator Chernenko who had expressed a desire to make a comment on the proposed rule. Senator Chernenko asked Houston Wood, Director of Governmental Controls, Weirton Steel, to speak to the Committee regarding their support of Section 7.2.d.2.i.B as it relates to an exception for Harmon Creek. Mr. Williams asked Robert G. Worden, West Virginia Manufacturers Association if he had any comments on the proposed rule. Mr. Worden said that he had several written comments which he would make available to the Board and to the Committee.

Mr. Casey told members of the Committee that all items on today's agenda on which action could not be taken due to a lack of a quorum would be carried over to Tuesday's agenda.

The meeting was adjourned.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: Dec. 8, 1985

TIME: 5:00 - 7:00 p.m.

NAME	Present	Absent	Yeas	Nays
Albright, Joseph P.	✓			
Casey, James M.	✓			
Knight, Thomas A.	✓			
Schifano, Larry E.				
Wiedebusch, Larry	✓			
Shaffer, Charles R.				
Springston, Benjamin				
Tonkovich, President				
Williams, Ralph D.	✓			
Boettner, John "Si"	✓			
Rogers, J. Robert				
Tomblin, Earl Ray	✓			
Harman, C. N.	✓			
Shaw, Michael				

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: Rule-Making Review

DATE: December 8, 1985

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly			
Twyla C. Wallace, RN	P.O. Box 846 Lewisburg, W.V.		
Catherine Reihan, R.N.	Rupert Route Box 32 Lewisburg, WV 24901		
F.M. Cooley, M.D.	Chas	WV Dept of Health-EMS	
Ruth B Jones, R.N.	Huntington, W.Va.	self	
Dr. Charles J. Jones	Huntington, W.V.		
Lyle O. Hubbard	Chas.	Cal. Soc Trans.	
Barnette Thorne	3106 Konarka Bldg E	WV Bd RN	
Mary Angel	2 nd St., As Chas.	WVNA	✓
Robert D Worden	Charleston, WV	WV MANUFACTURES ASSN	✓
Kim Brown Paland	Charleston, WV	"	
Liz Howard	Charleston	Health Dept	
Catherine Kenney	Charleston	WV Dept. of Health	
John P. Dills	Rmnny	Water Res. Bd.	✓
Loy A. Jack	1310 Fairmont Ave Fairmont, WV	Monongahela Power Co	
Robert R. Winter	Fairmont	Monongahela Power Co	
Janet Feitchell	655 London Dr. Charleston	WV Bd. of Exm for R.N.'s	
Brianna B. Merton	529 9th Ave	W.V. Bd of Examiners for R.N.	

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: Rule-Making Review

DATE: Dec. 8, 1985

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly			
JOAN RUTLEDGE	Charleston	Health Dept.	
EARL C. STEWART	HURRICANE	" "	

December 10

TUESDAY, DECEMBER 10, 1985

2:00 - 3:00 p.m.

1. REVIEW OF LEGISLATIVE RULES:

- a. State Tax Department - Proposed rules and regulations governing the operation of a statewide electronic data processing system network, to facilitate administration of the ad valorem property tax on real and personal property
- b. Workers' Compensation - Proposed rules and regulations relating to the administration of the Coal-Workers' Pneumoconiosis Fund
- c. Workers' Compensation - Standards for Medical Examination in Occupational Pneumoconiosis Claims

2. OTHER

Tuesday, December 10, 1985

Legislative Rule-Making Review Committee
(Rule §29A-3-10)

5:00 - 7:00 p.m.

Dan Tonkovich,
ex officio nonvoting member
Senate

Joseph P. Albright,
ex officio nonvoting member
House

Williams, R., Chairman
Boettner
Rogers (absent)
Tomblin
Harman (absent)
Shaw (absent)

Casey, Chairman
Knight
Schifano
Wiedebusch
Shaffer (absent)
Springston (absent)

The meeting was called to order by Mr. Casey, Co-Chairman.

The minutes of the November 17 and 18, 1985, meetings were approved.

Mr. Williams moved that the rule proposed by the Board of Examiners of Registered Professional Nurses, relating to requiring that, beginning in 1992, nurses obtain a baccalaureate degree as a minimum for licensure as a registered professional nurse be rejected as against public policy. He told members of the Committee that he did not even favor studying the issue.

Mr. Wiedebusch asked that Mr. Williams withdraw his motion and that the proposed rule lay over until the next committee meeting. Without objection, Mr. Williams' motion was withdrawn and the proposed rule was laid over.

Mr. Casey told members of the Committee that there were several persons present desiring to speak to the rule proposed by the Workers' Compensation Fund relating to standards for medical examination in occupational pneumoconiosis claims. Dr. Donald R. Rasmussen, Appalachian Pulmonary Laboratory, told members of the Committee that he does not favor the proposed rule basically because of the provision relating to altitude adjustment for blood gas studies. He responded to questions by members of the Committee.

Dr. N. Leroy Lapp, West Virginia University, also expressed his objection to the proposed rule based upon the altitude adjustment provision. He told members of the Committee that the provision would not make a whole lot of difference in most cases but would have a substantial effect on those cases which were borderline and on persons over the age of sixty-five. He responded to questions by members of the Committee.

Mr. Jim Weeks, Deputy Director, Occupational Health Department, UMWA, spoke against the rule and then answered questions of the Committee.

Mr. Brent D. Benjamin spoke in favor of the proposed rule and specifically in favor of the altitude adjustment provision. He stated that the goal of the blood-gas studies is to determine the amount of OP impairment and not impairment artificially created by altitude. He answered questions by members of the Committee.

Mr. Williams suggested to the Committee that further action on the proposed rule be delayed until the next Committee meeting and that the Committee take action on the rules proposed by the State Tax Department, Board of Health and West Virginia Health Department.

Mr. Tomblin requested that the rule proposed by the State Tax Department governing the operation of a statewide electronic data processing system network, to facilitate administration of the ad valorem property tax on real and personal property, also be delayed until the Committee's next meeting so that Mr. Rogers might be present to speak to the issue.

Upon motion of Mr. Williams, properly seconded and adopted, the rule proposed by the Board of Health relating to the licensure of hospice care programs and the rule proposed by the West Virginia Health Department relating to emergency medical services were approved by the Committee.

Mr. Boettner moved that the altitude adjustment provision in the rule proposed by the Workers' Compensation Fund relating to standards for medical examination in OP claims be deleted from the proposed rule as being against public policy. Mr. Knight moved to amend Mr. Boettner's motion to have the Committee reject the proposed rule in its entirety. No action was taken on Mr. Knight's proposed motion.

Mr. Schifano moved that the proposed rule be laid over until the Committee's next meeting. The motion was rejected.

Mr. Boettner restated his original motion. Upon motion of Mr. Boettner, properly seconded and adopted, the Committee voted to amend the proposed rule by deleting the altitude adjustment provision and to delay consideration of the remainder of the proposed rule until the Committee's next meeting, in part so that representatives of the Workers' Compensation Fund can determine what effect removal of the provision would have on the proposed rule and what alternatives they may consider.

Mr. Williams requested that staff contact the OP Board and request them to appear before the Committee at the next meeting to make alternative suggestions to the altitude adjustment provision.

The meeting was adjourned.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: Dec. 10, 1985

TIME: 2:00 - 3:00 p.m.

NAME	Present	Absent	Yeas	Nays
Albright, Joseph P.				
Casey, James M.	✓			
Knight, Thomas A.	✓			
Schifano, Larry E.	✓			
Wiedebusch, Larry	✓			
Shaffer, Charles R.				
Springston, Benjamin				
Tonkovich, President				
Williams, Ralph D.	✓			
Boettner, John "Si"	✓			
Rogers, J. Robert				
Tomblin, Earl Ray	✓			
Harman, C. N.				
Shaw, Michael				

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: Leg. Rule-Making Review Committee

DATE: December 10, 1985

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly			
Guzyla Wallace	P.O. Box 246 Newburg WV.		
Valeri Huffman	308 Adc m4 B7 Char. WV 25302	LPNA WVA, Inc	
Ruth B. Jones	Martinsburg, WV		
Mary M Angel	Char.	WV Nurses Assoc	
Alec Gallo	25 N. St. Martinsburg 26505	U.M.W.A	
George Kenger	2293 Westover 26505	U.M.W.A	
David Fef	252 Oak W. 26543	U.M.W.A	
D. L. Rasmussen	App. Pulm Lab. Beckh, WV		X ✓
Jim Weeks	900 15th St. NW Wash DC	UMWA	X ✓
A. S. Burdick	1101 Lou Park Lane Princeton	UMWA	X
BRENT BENJAMIN	PO BOX 1791 Charleston WV 25326	ROBINSON & McELWEE	X ✓
H. John Taylor	5P23 Midland Dr, RAND	Black Lung Assoc/Lawyer	X
W. J. Lau	120 BRANCH RD BULL	BLACK LUNG ASSOC/Comp	
FRED ST. JOHN	PRINCETON, WV	H&F MINING, Inc.	X
Joe Stoboda	Pratt	Black Lung	
Phyllis M. Hodge	Box 99 Dunes W.V.	Black Lung Assoc. / Cabin Creek Med	
Dr. Charles V. Jones	Martinsburg, WV.		
Nelpo Drummond	Box 773 Bilypurton	U M A	

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: _____

DATE: _____

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly	Gen De	Upper Kanawha	
Jackie Barton	Smithers W.V. 25186	Black Lung Ass	
Dolores Martin	Char.	W-AMA	
Kay Howard	Charleston	Health Dept	
Catherine Kenney	"	"	
Joan Rutledge	"	"	
Dr. Fred Coker	"	"	
Charles E. Barton	Glasgow. W.V.	Black Lung Ass.	
James K. ...	Cabin ...	"	
Mike ...	Montgomery	Black Lung	
Fred ...	113 Fayette Beckley	UMWA	
Raymond Smith	P.O. Box 511, Beckley	UMWA Dist 29	
Chas ...	90 Beech LANE, MADISON	UMWA L.V. 8377 D.17	
Thomas ...	Box 34 Fairlight	UMWA LV 8377 D.17	
Freddie ...	20 Oakwood Dr. Madison, WV 25136	UMWA DIST. 17	
Aug ...	304 RIVERSIDE DR. MADISON WV	UMWA LV 8377	
Dr. N. LeRoy Lopp	West Va. Univ. Med Ctr Morgantown, WV	WVA Coal Assn.	X ✓
R.W. BILHEIMER	BETHLEHEM, PA 18016	BETHLEHEM STEEL CORP.	
Jessie ...	Box 102 ...	W.M.W.A. 29	

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: _____

DATE: _____

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly			
JANET FAIRCHILD	655 GORDON DR. CHAS. WV	W.V. Bd. of Exam. for R.N.'s	
Darnette Thorne	Charleston WV	Bd. Exam R.N.	
B M Rose	Box 363 MULLENS WV	UMWA	
Kenneth S. Cooper	Box 7 MULLENS WV	UMWA	
Floyd C. Cox	DRUMMA 1560 FERRIS	UMWA	
Robert Taylor	Box 321 Fawcetts WV	UMWA	
Donald Murphy	206 JOSEPH ST., BECKETT	UMWA - Local 1895	
EARL C. STEWART	HURRICANE	DEPT OF HEALTH	
Catherine J. Kenney	Charleston	Dept. of Health	
Rich O. Hartman	"	Sec. of State	
Robin Dennison	Martinsburg WV	West Virg. Nurses Assoc.	
Laura D. Leslie	33 Kiendale, Winfield, WV	WV Nurses Assoc.	
Jean Hill	9 Thelma	RA	
C. J. Bayler	Smith WV		
John Montgomery	Charleston	Tax Dept.	

RESUME

JAMES L. WEEKS

Home Address: 9513 Evergreen Street Born: September 3, 1942, Burbank, CA
Silver Spring, MD 20901 Health: Excellent
Tel: (301) 587-3976 Married - Two Children
Race: White

Work Address: United Mine Workers of America
900-15th Street, N.W.
Washington, DC 20005
Tel: (202) 842-7289

Education:

B.S., Industrial Engineering, University of California, Berkeley, 1965
M.A., Science, Technology & Public Policy, Case Western Reserve University, 1971
M.S., Physiology (Occupational Health), Harvard School of Public Health, 1975
Sc.D., Physiology (Occupational Health), Harvard School of Public Health, 1980

Work Experience (starting with the latest):

Deputy Director, Occupational Health Department, United Mine Workers of America. The UMWA represents approximately 160,000 underground and surface coal miners in the U.S. and Canada. Responsibilities at the UMWA include commenting on legislation and regulations affecting occupational health and safety of coal miners, monitoring government and other research into the health and safety of miners, providing services to the UMWA membership, educating miners about health and safety hazards of mining and what can be done to control them, and conducting original research into these same hazards. (1981 to date).

Coordinator, industrial hygienist, and labor educator of federally funded program of technical service and education in occupational health and safety for Local 201, International Union of Electrical Workers, Lynn, Mass. This local is the union of about 8,500 workers at General Electric plants in Lynn, West Lynn, Wilmington, and Everett, Mass. Workers at these plants manufacture jet engines, steam turbines, and aircraft instruments. With two other staff persons, tasks included conducting in-plant inspections, advising the union on the use of OSHA and other government agencies, assisting in grievances, developing and implementing an education program, responding to requests for technical assistance, and administering the federal grant. (1978-1981)

Teaching Fellow, Harvard College. Biology of cancer. (1977-1981)

Teaching Fellow, Harvard School of Public Health. Introduction to Epidemiology. (1976-1977)

RESUME

JAMES L. WEEKS

Page Two

Associate in environmental and occupational health, Urban Affairs Center, West Virginia State College, Institute, WV. I developed an off-campus educational program in occupational and environmental health working with local labor unions and community organizations. During this period, I also wrote for Mountain Life & Work, published by the Council of Southern Mountains. (1972-1974).

Research Associate, Institute for Policy Studies, Washington, DC. My primary concern at IPS was research on government science policy. (1971-1972)

After a trial year as a Rockefeller Fellow studying theology at Union Theological Seminary (New York), I joined an inner city group ministry in Washington, DC that was concerned with low-income housing. (1965-1968)

Professional Affiliations:

Certified Industrial Hygienist, American Board of Industrial Hygiene.

American Academy of Industrial Hygiene.

American Industrial Hygiene Association, Social Concerns Committee, Epidemiology Committee.

American Public Health Association, Occupational Health Section.

Society for Epidemiologic Research.

Society for Occupational and Environmental Health.

Society of Mining Engineers.

Work Relations Group.

Advisory Committee, Cancer Registry, Massachusetts Department of Public Health.

Advisory Committee, Massachusetts Coalition for Occupational Safety and Health.

Advisory Committee, Philadelphia Area Project for Occupational Safety and Health.

Research Advisory Council, Generic Technology Center on Respirable Dust, The Pennsylvania State University.

Advisory Panel, Health and Safety Control Technologies in the Workplace, Office of Technology Assessment, U.S. Congress.

Listed in Who's Who in Health Care.

Page Three

Other Professional Activities:

I have served as a consultant for the United Mine Workers of America, the Oil, Chemical and Atomic Workers International Union, the U.S. Occupational Safety and Health Administration, the Office of Technology Assessment of the U.S. Congress, Abt Associates, Cambridge, Mass., the National Cancer Institute, and the U.S. Bureau of Mines. I have lectured at Harvard College, Harvard School of Public Health, Tufts University Medical School, University of Massachusetts Medical School, University of Connecticut Medical School, and the Wentworth Institute of Technology.

General Publications:

1. "Comsat: The Technology for Controlling Global Communications," in Marvin Surkin and Alan Wolfe, eds., The End of Political Science. (The Free Press, New York, 1971).
2. Contributing author to Jeanne M. Stellman and Susan Daum, Work is Dangerous to your Health. (Random House, New York, 1973).
3. "Health Hazards of Carbon Disulphide," pamphlet, Urban Affairs Center, West Virginia State College, Institute, WV (1973).
4. "TDI: Is it Dangerous?" pamphlet, Oil, Chemical, and Atomic Workers International Union, Denver, Colorado (1976).
5. "Workers Education on Health and Safety in the Local Union," Proceedings of the Symposium for Labor Educators on Occupational Health and Safety, October, 1979, School for Workers, University of Wisconsin, Madison.
6. "Export of Hazardous Industries: The View from a Local Union," presented at a conference on the export of hazardous industries, Hunter College, New York, December, 1979. In press.
7. Kerr, Lorin E., James L. Weeks, Maier Fox, "Reckless Deregulation in the Coal Mines," Business and Society Review, No. 44. Winter, 1983.

Publications in Refereed Journals:

8. (Letter) Amer. Ind. Hyg. Assoc. J., 39:A16,20 (1978).
9. Weeks, J. L., Peters, J. M., and Monson, R. R. "Screening for Occupational Health Hazards in the Rubber Industry, Part I," Amer. J. Indus. Med., 2:125-141 (1981).

RESUME

JAMES L. WEEKS

Page Four

10. _____ . "Screening for Occupational Health Hazards in the Rubber Industry, Part II: Health Hazards in the Curing Department," Amer. J. Indus. Med., 2:143-151 (1981).
11. "Occupational Lung Disease" (Letter) Ann. Int. Med., 98:668 (1983).
12. Weeks, James L., and Maier Fox, "Fatality Rates and Regulatory Policies in Bituminous Coal Mining, 1959-1981," Amer. J. Pub. Hlth. 73:1278-1280 (1983).
13. "Occupational Stress in a High Hazard Industry" Ann. Amer. Conf. Gov. Ind. Hyg. 8: in press.
14. "Survey of Current Problems in Respirable Dust Control", Proceedings of Symposium on Control of Respirable Dust, U.S. Mine Safety & Health Administration. 81-95 (1983).
15. "Quartz Dust: New Policy for an Old Hazard?", Proceedings of Symposium on Control of Respirable Dust, U.S. Mine Safety & Health Administration. 279-282 (1983).
16. Weeks, James L. and Jordan, Mary Lu, "Chronic Hazards and Acute Enforcement: Dilemma for Occupational Health Enforcement Policy," Milbank Memorial Fund Quarterly. 63:127-140 (1985).
17. Weeks, James L. and Wagner, Gregory R., "Compensation for Occupational Disease with Multiple Causes: The Case of Coal Miners' Respiratory Diseases," Amer. J. Pub. Hlth. 76 (1985), in press.

431P/dm

COMMENTS ON PROPOSED RULES OF THE
WEST VIRGINIA WORKERS' COMPENSATION FUND

Legislative Rule 23-1
Series I, Section 20.8
Standards for Medical Examination

Submitted By:

Joseph S. Beeson
Brent D. Benjamin

ROBINSON & McELWEE
Post Office Box 1791
Charleston, West Virginia 25326

BEFORE THE LEGISLATIVE
RULE-MAKING REVIEW COMMITTEE
December 10, 1985

In reviewing the proposed occupational pneumoconiosis examination standards, questions have been raised regarding the legislative authority for such rules, and whether such rules are reasonable. Specifically, concern has been demonstrated at three places: (1) whether an apparent conflict with the Code exists regarding the procedures for ordering additional testing or studies; (2) the reasonableness of the altitude adjustments as adopted for arterial blood gas testing; and (3) the reasonableness for the impairment values proposed in the "Table 4 Impairment of Pulmonary Function."

In asserting that an apparent conflict with the Code exists with regard to the procedure in the proposed rule for ordering additional testing or studies, it would appear that some individuals rely on an overly restrictive view of the Commissioner's powers in workers' compensation matters, and further that they ignore significant statutory language providing not only specific but also inherent powers which would apparently permit such additional testing or studies to be ordered by the Commissioner. Such testing and studies are important to obtaining the most accurate fairness to all parties. It certainly is not a mechanism geared to avoiding the findings tending to indicate the highest degree of impairment.

Such obviously was not the case, as was evidenced by the medical testimony elicited during the public hearings of these

BEFORE THE LEGISLATIVE
RULE-MAKING REVIEW COMMITTEE
December 10, 1985

In reviewing the proposed occupational pneumoconiosis examination standards, questions have been raised regarding the legislative authority for such rules, and whether such rules are reasonable. Specifically, concern has been demonstrated at three places: (1) whether an apparent conflict with the Code exists regarding the procedures for ordering additional testing or studies; (2) the reasonableness of the altitude adjustments as adopted for arterial blood gas testing; and (3) the reasonableness for the impairment values proposed in the "Table 4 Impairment of Pulmonary Function."

In asserting that an apparent conflict with the Code exists with regard to the procedure in the proposed rule for ordering additional testing or studies, it would appear that some individuals rely on an overly restrictive view of the Commissioner's powers in workers' compensation matters, and further that they ignore significant statutory language providing not only specific but also inherent powers which would apparently permit such additional testing or studies to be ordered by the Commissioner. Such testing and studies are important to obtaining the most accurate fairness to all parties. It certainly is not a mechanism geared to avoiding the findings tending to indicate the highest degree of impairment.

Such obviously was not the case, as was evidenced by the medical testimony elicited during the public hearings of these

and in no way circumscribes the type of advice or recommendations which the Occupational Pneumoconiosis Board may make to the Commissioner.

When read in pari materia with W. Va. Code §§ 23-1-13 and 23-1-15, it is exceedingly clear that the Commissioner has not only a plethora of inherent powers, but also significant explicit powers to provide for such physical examinations. In that context, W. Va. Code § 23-1-15 permits the Commissioner to make investigations in such manner as in her judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of the workers' compensation statute. W. Va. Code § 23-1-13 provides that the Commissioner shall adopt reasonable and proper rules of procedure, and regulate and provide for the method of making investigations, physical examinations and inspections. These statutory sections clearly envision that the ultimate purpose of the Commissioner's powers is to ascertain the substantial rights of the parties. That purpose may be achieved by means of investigations, physical examinations, and inspections, for which the Commissioner is given explicit power to adopt reasonable and proper rules of procedure.

The provision in the proposed occupational pneumoconiosis standards providing for ordering additional testing or studies is not only explicitly provided for by § 23-1-13, when read with §§ 23-4-6a and 23-4-8, but is clearly within the inherent powers of W. Va. Code § 23-1-15, that the Commissioner make such

investigations as are best calculated to ascertain the substantial rights of the parties.

An extremely narrow view of the Commissioner's powers is also clearly at odds with caselaw in this State. The powers, duties, and responsibilities granted to the Commissioner in relation to claims of injured workmen are rather broad and comprehensive in scope. Colvin v. S.C.C., 154 W. Va. 280, 175 S.E.2d 186 (1970). Namely, the Commissioner has and may exercise certain powers which reasonably and necessarily arise by implication in order to enable her to properly carry into effective operation the powers expressly granted to her and the duties imposed upon her. Id. Therefore, the provision to permit additional testing would appear to be not in conflict with the Code and is, in fact, fully compatible with both the explicit and inherent powers of the Commissioner.

Concerns have also been raised which focus on the reasonableness of the altitudinal adjustments, and the impairment values proposed. Indeed, some would apparently assume that the altitudinal adjustment would be "detrimental" to claimants tested at higher altitudes.

The standard to which these proposed rules are to be held is one of "reasonableness." With regard to the existence of an altitudinal adjustment in arterial blood gas studies, there can be no question but that the sum total of the medical opinion garnered at the public hearings was solidly in favor of such an adjustment as an excellent and necessary method by which to standardize results obtained at different laboratories around

West Virginia. Such physicians included Dr. Donald Rasmussen, Dr. N. Leroy Lapp, and Dr. Joseph Renn.

With regard to the amount of altitudinal difference necessary, it is apparent that a variety of views were expressed during the public hearings. Most of these views were of the "lay" variety and were completely unsupported by objective scientific or medical criteria. Again, the measure to which the promulgated standards are to be held is merely one of "reasonableness." There would appear to be a lack of statutory authority for the Legislature to substitute its "policy decision" for an Administrative Agency's standard founded upon medical certainty obtained at open public meetings in the Legislature's determination of that standard's reasonableness. W. Va. Code § 29A-3-11(b). The professional opinions elicited at the public hearings clearly support the reasonableness of the standard's adjustment of 5mm Hg per 1,000 feet above Charleston. One need only refer to the comments and epistle of Dr. N. Leroy Lapp for a professional assessment of altitudinal variations in West Virginia. Indeed, Dr. Donald Rasmussen, the mentor of West Virginia miners as evidenced by the Comments of Miner Floyd Cox and Miner Bill Bailey, is on record as evidenced by the public hearings as believing there to be a more stringent altitudinal difference between Beckley and Charleston than that contained in the proposed standards; i.e., 10mm Hg versus 9mm Hg.

Omission of the proposed altitudinal adjustment would improperly burden those claimants living at altitudes below the altitude of Bluefield or Beckley -- certainly the vast majority

of miners in West Virginia. It most certainly cannot be considered "reasonable" that a claimant living in Kanawha County should have to go to Beckley to have his blood gases tested in order to get the benefit of an artificial change in his blood gas measurements. The altitudinal change correctly addresses the change which altitude, and not occupational pneumoconiosis, in fact causes. The 20±% permanent partial disability which results solely from the artificially diminished test results that the one hour drive from Charleston to Beckley causes is most certainly illogical and unreasonable to the other miners of this State and to the employers of this State.

With regard to the amount of impairment attributable to varying degrees of measured pulmonary impairment, it is obvious that the public comment resulted in a change to the initially proposed standards. Testimony from long-time practitioners in the field of workers' compensation law indicated that the initially proposed standards were essentially a composite of the unwritten standards which had long been applied in such cases. This was before the above-mentioned change was made to the standards.

As with the altitudinal adjustments, the proper standard of review is one of "reasonableness." It cannot be forgotten that the workers' compensation system is unique in that most individuals receiving workers' compensation will continue to be able to work, that claimants can easily reopen claims for more compensation if their condition worsens, and that these benefits are paid for by West Virginia's employers.

As set out in the record from the public hearings, with respect to the ventilatory studies, the promulgated standards are almost exactly the same as those used for social security cases. Two tables for blood-gas transfer impairment were set forth; one by Dr. Rasmussen, and one by Dr. Lapp. Unfortunately, as his own articles would seem to indicate, Dr. Rasmussen's criteria for determining the existence of impairment are just two easily met. One of Dr. Rasmussen's published studies admits that as many as 98% of the individuals he tests meet his standards of impairment. Rasmussen, D. L., "Patterns of physiological impairment in coal workers' pneumoconiosis." Ann NY Acad Sci 200:455; 1972. Furthermore, Dr. Rasmussen has conceded that many of those who show "abnormalities" in gas exchange were asymptomatic. Rasmussen, D.L., "Discussion." Ann NY Acad Sci 200: 464; 1972.

In conclusion, it is far too easy for some to conduct a "reasonableness" inquiry by considering only a segment of those groups affected: coal miners. This, of course, adds to West Virginia's negative business image and places an unreasonable and unjustifiable burden on the State's employers, as well as the workers' compensation system.