



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Virginia Workers' Compensation Commission
VAC Chapter Number:	16 VAC 30-50
Regulation Title:	Rules of the Virginia Workers' Compensation Commission
Action Title:	Promulgating Rules Governing Expedited Hearings
Date:	11/05/02

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The Rules of the Virginia Workers' Compensation Commission (16 VAC 30-50) govern practice and procedure relating to claims brought before the Commission. The Rules specify, among other things, the procedure for injured workers to follow when filing claims, and the procedure for employers to follow when filing applications related to injured workers' claims. Currently, the Rules do not provide any procedural means by which an injured worker may secure an emergency or expedited hearing on the merits of his or her claim.

The present regulatory action will result in amendments to the Rules that will provide injured workers with a procedure through which they may secure an expedited hearing in cases where an employer has denied benefits, and the injured worker is able to establish that a delay in the

proceedings will cause him or her to incur severe economic hardship. The action will, at a minimum, result in the addition of one new rule within 16 VAC 30-50.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

As a general matter, the General Assembly has empowered the Virginia Workers' Compensation Commission to "make rules and regulations for carrying out the provisions" of the Virginia Workers' Compensation Act. *See* [§ 65.2-201 \(A\) of the Code of Virginia](#).

Specifically, with regard to the present action, the Commission seeks to promulgate new procedural rules upon the express direction of the Virginia General Assembly. **Chapter 538 of the 2002 Acts of Assembly** (website link: <http://leg1.state.va.us/cgi-bin/legp504.exe?021+ful+CHAP0538>) states that the Commission "shall" promulgate rules and regulations by July 1, 2003, instituting an expedited calendar for the administration of claims meeting certain criteria. The Commission has interpreted this language as mandatory, not discretionary or permissive.

Per the advice of Counsel for Regulatory Affairs at the Department of Planning and Budget, the Commission does not have to seek certification from the Office of the Attorney General before proceeding with the present regulatory action.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The Commission made no determination as to whether the proposed regulatory action is essential to protect the health, safety or welfare of the citizens of the Commonwealth. The Commission is acting at the express direction of the General Assembly, which made its own determination that the proposed regulation was necessary.

Considering only the limited debate regarding House Bill 761 at the General Assembly, it appears that there is a perception by some in the public that the Commission's evidentiary

hearing docket does not always adjudicate disputes involving severe economic hardship in a timely manner. Proponents of the legislation asserted that delays in the adjudication of claims on the evidentiary hearing docket have resulted in severe economic hardship to some injured workers. Apparently, in response to the arguments advanced by the proponents of the legislation, the General Assembly directed the Commission to draft and promulgate rules that would create a procedure whereby injured workers could secure an expedited hearing in situations where it is proven that benefits have been denied, and a delay in the proceedings will cause the injured worker to suffer severe economic hardship.

The Commission believes that the proposed amendments to 16 VAC 30-50 will meet the General Assembly's mandate, by instituting an expedited hearing procedure, and establishing the criteria by which an injured worker may prove entitlement to having his or her claim heard in an expedited manner.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The proposed amendments to 16 VAC 30-50 will add one procedural rule with a number of subparts. The new rule will encompass the entire procedure related to expedited hearings before the Commission.

Specifically, the Commission proposes the addition of "Rule 2.3 Expedited Hearing" to the Rules of the Commission. Within Rule 2.3, the Commission proposes the following twelve subparts: (A) Scope; (B) Written Request; (C) Loss of Income; (D) Medical Expenses; (E) Employer Response; (F) Informal Conference; (G) Grant or Denial of Expedited Hearing; (H) Scheduling and Continuances; (I) Closing the Record; (J) Decision; (K) Expedited Review; and (L) Review After Expedited Hearing.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The Commission believes that the proposed rules will result in both advantages and disadvantages to the public. The primary advantage of the proposed rule is that injured workers will be given the opportunity to secure an expedited adjudication of certain types of claims, where the denial of such claims has resulted, or will result in severe economic hardship. The primary disadvantage of the new rules will fall largely on Virginia's employers and insurers.

Expedited proceedings will shorten the amount of time employers and insurers typically have to investigate injured workers' claims, retain counsel, perform discovery crucial to the defense of such claims and prepare for a hearing. As a result, financial and due process issues are implicated by the proposed rules. There is also the possibility, however, that the proposed rules will disadvantage those injured workers whose claims remain on the Commission's regular evidentiary hearing docket. Of necessity, the expedited hearing process will cause the expedited hearing claims to be given precedence over other those not expedited. This may cause adjudication of the regular claims of injured workers to be delayed more than they would otherwise have been.

The proposed rules will likely result in both advantages and disadvantages to the Commission and the Commonwealth. The advantages to the Commission and the Commonwealth are largely intangible. Providing expedited proceedings - - for injured workers who face severe economic hardship because their claims have been denied - - advances the agency's mission "to administer the Workers' Compensation Act ... in a fair, unbiased and efficient manner." Virginia's qualifying injured workers will have a new avenue for relief. The disadvantages of the new rules will impact the Commission primarily. The Commission anticipates that implementing the new rules will require the hiring of additional personnel, changes in its guidance documents, modification of computer network software, changes in form documents and statewide accommodation of a separate, expedited evidentiary hearing calendar. Incorporating the new rules into day-to-day work will impact every level of Commission operations.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

The salaries and necessary expenses of the Virginia Workers' Compensation Commission are paid from an administrative fund established by [§ 65.2-1000 of the Code of Virginia](#). The monies in this administrative fund come from taxes levied on insurers and self-insured employers. Insurers must pay taxes based on a percentage of the workers' compensation insurance premiums collected, while self-insurers pay a tax based on payroll covered. The expenses and any new salaries associated with the state's implementation of these new rules will be paid out of the Commission's administrative fund.

Implementing the new rules mandated by the General Assembly will require significant new expenditures by the Commission. The amount of these new expenditures depends largely on the structure the Commission uses to administer the expedited hearing process.

At a minimum, the Commission estimates that it will have to hire an additional Deputy Commissioner, a new Claims Examiner and a Judicial Assistant to administer the expedited

hearing request process. The Commission estimates that the one-time expenditures associated with the addition of these new staff members will include the purchase of additional furniture, computer equipment, letterhead and office supplies. These one-time expenses should not amount to more than \$25,000.00. The ongoing expenditures will be comprised largely of the salaries and benefits of the new personnel. These would amount to approximately \$200,000.00 per year.

Depending on the volume of requests for expedited hearings and the geographic dispersal between different regions in the state, however, the Commission may have to consider an alternative structure for administering the new expedited hearing request process. If the volume of the requests warrants it, and the Commission determines it is absolutely necessary, it may have to hire two Deputy Commissioners, one Claims Examiner and two Judicial Assistants to effectively administer the expedited hearing process. One Deputy Commissioner, the Claims Examiner and an Assistant would be based in the Commission's Richmond office, while the second Deputy Commissioner and Assistant may be based out of the Commission's Roanoke office. The Deputy Commissioner in Roanoke would supervise and adjudicate expedited hearing requests for the western half of the state, while the Deputy Commissioner in Richmond would do so for the eastern half of the state. The location of the Deputy Commissioner's office may depend on demand for expediting cases and geographical impact of that demand. The one-time expenditures for this structure would be similar to those of the former. The ongoing expenditures associated with staffing these positions would include salaries, benefits and the rental cost for the additional office space in Roanoke. These expenditures would amount to approximately \$325,000.00 per year.

In addition to the expenditures set out above, the Commission will incur a number of expenses that are not dependent on how the program is staffed. The Commission has already incurred one-time costs associated with promulgating the new rules. These costs include many hours of research, drafting, meeting and revision by each of the three Commissioners, the Chief Deputy Commissioner, and one of the Commission's staff attorneys. The new rules will result in one-time changes to the Commission's guidance documents, computer database and claim handling procedures.

In addition, the proposed rules include a right to seek review of the decision to grant or deny an expedited hearing. This is a new form of appeal to the full Commission, which will create additional, ongoing work for the three Commissioners and their staff. This may require the hiring of additional personnel. Adding expedited hearing dates to the Commission's existing hearing calendar will likely result in additional, ongoing expenses related to locating hearing locations, scheduling expedited hearing dates and providing personnel for the hearings.

The Commission believes that the proposed rules will have no effect on localities.

The Commission anticipates that the proposed rules will have an impact on a wide variety of individuals, businesses and other entities. These include injured workers, employers of injured workers, workers' compensation insurers, attorneys representing parties in workers' compensation matters, physicians treating or examining injured workers, and the Commission and all of its employees.

It is very difficult to estimate the number of individuals, businesses and other entities that are likely to be affected by the proposed rules. The number affected depends on several factors, including the type and complexity of the underlying dispute and the number of individuals involved in the expedited hearing. Most importantly, however, the Commission is unable to accurately estimate the number of those affected because it does not have any effective means of calculating the number of requests for expedited hearing it will have to process. In the year 2001, the Commission received reports of over 200,000 accidental work injuries in Virginia. Nearly 12,000 claims were referred to the hearing or dispute resolution dockets in 2001. Because the new rules will merely serve to expedite claims that the Commission would have expected to be filed anyway, it estimates that the number of requests for an expedited hearing will be some percentage of the approximately 12,000 claims that are annually referred to its dockets. The Commission's best estimate is that between 2,000 and 2,500 requests for expedited hearings will be made and processed annually.

For many of the reasons set out in the paragraph above, the Commission is unable to estimate the cost of the regulation for those individuals, businesses or other entities affected by it. As summarized earlier, the costs to the Commission are ascertainable. However, the costs to injured workers, employers of injured workers, workers' compensation insurers, attorneys representing parties in workers' compensation matters, physicians treating or examining injured workers are difficult to estimate in any informed manner.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

The Commission proposes to amend 16 VAC 30-50 by adding a new subpart to Section 30 – “Rule 2. Hearing Procedures.” Currently, Section 30 governs the procedure for proceedings decided on the record (Rule 2.1) and the procedure for proceedings at evidentiary hearings (Rule 2.2).

The text proposed by the Commission will add a further rule to Section 30, entitled “Rule 2.3 Expedited Hearing.” The new rule will be comprised of twelve (12) subsections.

Rule 2.3 (A) addresses the scope of the expedited hearing procedure, setting out those cases that are eligible for consideration for expedited proceedings.

Rule 2.3 (B) establishes the proper procedure for filing a request for expedited hearing and the evidentiary materials that must be submitted with the request.

Rule 2.3 (C) sets out the standard for the grant of an expedited hearing based on loss of income, and the criteria considered by the Commission before granting or denying a request.

Rule 2.3 (D) sets out the standard for the grant of an expedited hearing based on severe economic hardship caused by the denial of medical expenses, and the criteria considered by the Commission before granting or denying a request.

Rule 2.3 (E) establishes the period during which an employer or insurer may investigate the circumstances surrounding the request for expedited hearing, and the process for submitting a response thereto.

Rule 2.3 (F) provides for a mandatory, informal conference between the Commission and all the parties to the dispute.

Rule 2.3 (G) sets out the period during which the Commission must grant or deny a request for an expedited hearing.

Rule 2.3 (H) governs the scheduling of expedited hearings, and sets out specific rules regarding the grant or denial of continuances.

Rule 2.3 (I) specifies when the hearing record must be closed following an expedited evidentiary hearing.

Rule 2.3 (J) specifies the period in which the Deputy Commissioner must issue a final opinion after the record has closed.

Rule 2.3 (K) provides a procedure by which the parties may seek an expedited review of the Commission's decision to grant or deny an expedited hearing.

Rule 2.3 (L) provides the procedure by which the parties may seek review of a decision issued by a Deputy Commissioner after an expedited hearing is complete.

All of the rules described above are new to 16 VAC 30-50. There have been no comparable provisions in the Rules prior to this action. As a consequence, this regulatory action will add new procedures to the Rules that will allow certain defined individuals to qualify for expedited adjudication of their claims.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

Because the Commission is acting under the express direction of the General Assembly to promulgate rules implementing “an expedited calendar for the administration of [certain specified] claims,” it has not considered any other alternatives means of addressing the perceived problem with timely adjudication of claims.

The General Assembly did not provide guidance as to the substance of such rules. Therefore, in drafting the proposed rules, the Commission considered a number of alternative approaches to meeting the mandate of the General Assembly.

The Commission initially considered allowing expedited hearings as to all claims meeting the criteria defining severe economic hardship - - including initial claims related to the compensability of the alleged work injury. Due to concerns raised about the due process rights of employers and insurers, the Commission determined that the scope of the rules would be too broad. Determinations as to the compensability of a particular injury at work are typically more complex, and require significantly more time for discovery and hearing preparation than a claim arising after the compensability is established.

The Commission also considered limiting the scope of the new rules to situations where an injured worker's compensation benefits have been suspended because the employer has submitted an application for hearing. Ultimately, the Commission determined that this interpretation of the General Assembly's mandate was too restrictive, potentially disqualifying a wide array of claims that appear amenable to expedited proceedings.

The Commission ultimately decided to limit the scope of the new rules to claims brought by the injured worker after compensability of the claim had been determined. This alternative balances the perceived need to provide expedited proceedings to as many qualifying, injured workers as possible, against the valid due process concerns of employers and insurers.

The Commission initially envisioned the decision-making procedure as one based solely on documentary submissions. After receiving extensive comment from attorneys who practice before them, the Commission modified the original structure to include a mandatory conference. The Commission believes that the conference will lead to mediated settlements of disputes, narrowing of issues ultimately referred to the docket and scheduling of hearings with the assistance of the parties. The Commission believes that this approach will make the entire process less burdensome and will allow more input into the decision-making process.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

The Commission submitted a Notice of Intended Regulatory Action on August 19, 2002, and a request for public comment was published in the Virginia Register beginning September 9, 2002. The initial, statutory public comment period opened on September 9, 2002, and closed on October 9, 2002.

During the official public comment period, the Commission received comments and suggestions from two sources.

SUSAN E. HUDSON

The first comments were submitted by an injured worker, Susan E. Hudson, who complained about the devastating effect her work-related injury claim has had on her financial situation. Her comments were not directed specifically to the Commission's effort to promulgate rules governing expedited hearings. Primarily, her comments were related to her own claim - - then pending before the full Commission on Review.

AGENCY RESPONSE:

The Commission appreciates Ms. Hudson's comments, and sympathizes with her present financial situation. However, the Commission cannot comment on Ms. Hudson's pending claim. Since Ms. Hudson did not offer any comments addressing the proposed regulation in particular, the Commission has no further response to Ms. Hudson's letter.

VIRGINIA SELF-INSURERS ASSOCIATION, INC.:

John T. Heard, Esquire, Legislative Counsel for the Virginia Self-Insurer's Association, Inc. (VSIA) offered comments in behalf of the VSIA.

The VSIA submitted suggestions it believes will reduce or eliminate unnecessary delays in the adjudication of claims on the evidentiary hearing docket while preserving the employer and insurer's right to defend against unfounded workers' compensation claims.

Specifically, the VSIA suggested that the Commission dispense with the necessity to prove exceptional financial need, noting that potentially all claimants will assert that a delay in adjudication of their claim will cause them severe economic hardship. Instead, the VSIA argued that the Commission should assign cases to the expedited docket based on the complexity of the underlying claim. The VSIA suggested that the Commission demand that employers and insurers inform the Commission - - within 21 days of the date the claim is docketed for a hearing - - of the time that is needed for discovery. The Commission could then determine, with input from defense counsel, whether the claim is appropriate for expedited proceedings.

AGENCY RESPONSE:

The Commission greatly appreciates the suggestions offered by Mr. Heard and the VSIA. Their comments were considered and at least partially implemented in the currently proposed rules.

The Commission is constrained to strictly comply with the statute passed by the legislature and signed by the Governor. Therefore, it cannot simply disregard the General Assembly's mandate that the Commission promulgate rules "instituting an expedited calendar for the administration of [certain specified] claims" where it is proven that "delays will cause an injured employee to incur severe economic hardship." Accordingly, the Commission believes that the standard for entitlement to an expedited proceeding must be based, at least initially, on proof that delays in the proceeding will result in severe economic hardship.

However, the Commission agrees that the complexity of the issues underlying the request for expedited hearing is an important factor in considering whether to ultimately grant an expedited hearing. The Commission incorporated the VSIA suggestion into the proposed rules by requiring consultation in the form of an informal conference between the parties - - where the matter is discussed, issues are mediated or narrowed, and discovery and calendaring needs are considered prior to setting a claim for an expedited hearing. As in the VSIA's suggestion, this procedure involves consultation with the parties regarding the appropriateness of the matter for expedited proceedings.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The Commission has carefully reviewed the proposed regulation, and considered the relevant public comments. It is the Commission's determination that the proposed text is clearly written, and easily understandable by the individuals and entities affected by it.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The Commission intends to initiate a thorough review and re-evaluation of the proposed rules within two years of their effective date.

The Commission's goals are to implement these rules, consistent with its mission to administer the Act in a "fair, unbiased and efficient manner." To that end, the Commission hopes to provide qualifying injured workers with the means to have their claims adjudicated in an expedited fashion, while preserving the rights of employers and insurers to prepare and present a reasonable defense. A priority of the Commission is to provide this procedure with as little disruption as possible to the Commission's important ongoing work, with as little additional cost to the Commonwealth as possible.

The Commission intends to review these rules with these goals in mind, and will report to the General Assembly any recommendations regarding the need to continue, amend or terminate them.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The Commission is an independent state agency, administering the Virginia Workers' Compensation Act. The Commission's jurisdiction extends to disputes involving injuries or occupational diseases suffered by employees arising out of and in the course of employment. While the Commission's administration of the claims and adjudication process in Virginia has some impact on parenting, economic self-sufficiency and marital commitment, the Commission believes that such impact is remote and undeterminable. The proposed regulation, if adopted, will lead to expedited adjudication of cases where the claimant-employee is suffering severe economic hardship. This will result, in cases where the claim is found compensable, in the stabilization of the claimant-employee's economic situation faster than under present rules and adjudicatory procedure.