Virginia Regulatory Town Hall

Final 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:	April 28, 2003

Please refer 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* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

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 formal 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 result in the addition of one new rule within 16 VAC 30-50.

After the public comment period closed, the Commission made the following substantive changes: (1) provided that a Notice of Request for Expedited Hearing be provided to the insurer or employer's designated third-party administrator, in addition to the notices provided the employer's counsel of record and the insurer; (2) added consideration of a spouse's sources of income beyond wages and salary, before granting an expedited hearing; (3) added termination of worker's compensation benefits by prior adjudication as an explicit factor to consider before granting an expedited hearing; and (4) revised the language of the continuance rule to affect both sides equally. In addition, the Commission made some minor changes to the language of the proposed rules for purposes of clarification or to bring the proposed rules into conformity with changes to the Workers' Compensation Act made by the General Assembly during the 2003 session.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

On April 22, 2003, the Virginia Workers' Compensation Commission voted to adopt the present draft of the proposed rules. The Commission expressed its intent that Rule 2.3 of the Rules of the Virginia Workers' Compensation Commission become effective on July 1, 2003, in accordance with the mandate of the General Assembly.

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, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final 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. Nevertheless, counsel for the Office of the Attorney General reviewed both the proposed and final draft of the rules, certifying that the Commission has authority to promulgate the final rules.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final 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 of the regulatory action's detail.

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 final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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.

Statement of Changes Made Since the Proposed Stage

Please highlight any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication.

After due consideration of the public comment it has received, the Commission has made both substantive and editorial changes to the proposed rules governing expedited hearings. The substantive changes include the following:

(1) The Commission changed the provision governing notice of the injured worker's request for expedited hearing. Specifically, the Commission added "designated third-party administrator" to the list of those receiving a copy of the Notice of Request for Expedited Hearing under proposed Rule 2.3 (B).

(2) The Commission amended one of the economic factors that will be considered before granting an expedited hearing. Specifically, the Commission added to proposed Rule 2.3 (C) consideration of a spouse's income, beyond mere wages or salary, before granting an expedited hearing.

(3) The Commission added a new subsection to proposed Rule 2.3 (C), specifying a particular economic factor to consider before granting an expedited hearing. Specifically, the Commission added new Rule 2.3 (C)(5), stating that the Commission will consider whether the injured worker's compensation benefits were terminated by prior adjudication, caused by other circumstance, or both.

(4) The Commission revised the language of proposed Rule 2.3 (H) to clarify that both sides have the right to seek a continuance under exceptional circumstances. The purpose of the original language was to inform injured workers of the consequences of failing to go forward with an expedited hearing, once it has been granted. The Commission never intended to deny employers and insurers the possibility of securing a continuance under exceptional circumstances.

The Commission also made some editorial changes to the proposed rules. The Commission amended proposed Rule 2.3 (D)(3), so that the language more accurately tracks the statutory standard of "reasonable and necessary" medical care under Virginia Code § 65.2-603. The Commission amended proposed Rule 2.3 (F) to clarify that that the informal conference is a mandatory step in the process, and one that the Commission will schedule as expeditiously as possible. Finally, the Commission revised a couple of the proposed subsections, so that they will conform to changes enacted by the General Assembly during the 2003 session. Specifically, because the General Assembly changed the Workers' Compensation Act to require that the Commission send opinions by Priority Mail (instead of registered or certified mail), the proposed rules were conformed to this new method of service by the Commission.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

I. Written Comment.

The Commission received written comment from a number of individuals. The comments of each individual are summarized below, with an agency response to the comments offered:

(1) Gordon J. Schenck:

Mr. Schenck's comments are best summarized by his introductory assertion that the proposed rules must "eliminate ALL avenues of obstruction and legal delay now available to the employer's insurance company." Schenck suggested that the employer not be given notice of the request for expedited hearing (Rule 2.3 (B)), and that it is unnecessary for the Commission to solicit the employer's response to the request for expedited hearing (Rule 2.3(E)). Schenck suggested that an informal conference is unnecessary because it is an "obstructive avenue" for the employer (Rule 2.3(F)).

Mr. Schenck noted that a claimant will not ordinarily be granted a continuance once the matter is set down for an expedited hearing, while there is no similar explicit restriction upon employers and insurers (Rule 2.3 (H)). Finally, Schenck observed that the expedited process would fail if there is no method for an expedited determination of issues that are not on appeal. Citing his daughter's case, Schenck maintains that an employer's appeal to the Virginia Court of Appeals should not cause all other disputed issues to be held in abeyance.

AGENCY RESPONSE:

The Commission would like to thank Mr. Schenck for his comments. In drafting the proposed rules, the Commission tried to provide injured workers with a process by which they could receive an expedited hearing without, at the same time, infringing upon the due process rights of employers and insurers in Virginia. While matters would certainly be decided quickly by the Commission without the input of employers and insurers, this would be neither fair nor just. Employers and insurers have a right to notice and a fair opportunity to defend the claims made against them. To help the parties work towards a solution that may be agreeable to both sides, however, the Commission provided for a quick conference, where the parties can narrow the issues, discuss the challenges to moving forward on an expedited basis, and possibly agree on a hearing date that is mutually agreeable.

With regard to continuances under Rule 2.3 (H), the Commission was concerned that the expedited hearing process be utilized fairly. Once a valid request for expedited hearing is received by the Commission, the employer and insurer are put in the difficult position of defending a claim on a schedule that is faster than normal. It would be unfair for an injured

worker to use this expedited procedure, only to seek a continuance shortly before the expedited hearing he/she requested. An injured worker should only choose to seek an expedited hearing if he/she is reasonably certain that the case can be heard in an expedited manner. Nevertheless, the Commission has received a number of comments about the language of this section, and has made some modifications to apply the rule equally to injured workers, employers and insurers.

(2) W. E. Marshall:

Mr. Marshall wrote to suggest that the proposed rules include language that would make payment for, and provision of prompt medical treatment a mandatory requirement under the Workers' Compensation Act. Noting the many problems he experienced while his own claim was pending before the Commission, Marshall asserted that the "Workers' Compensation system is broken."

AGENCY RESPONSE:

The Commission would like to thank Mr. Marshall for his comments. It is unclear from Mr. Marshall's letter whether it his belief that medical benefits should be provided by employers immediately (before compensability is determined), or simply that, as part of the expedited hearing process, employers should be required to provide prompt medical treatment. The proposed rules would apply only to claims arising after initial compensability has been determined. The Commission would like to point out that Virginia Code § 65.2-603 already mandates that the employer provide reasonable and necessary medical treatment, proven to be causally related to the work accident, "for as long as necessary."

(3) Michelle Lyons:

Ms. Lyons' comments can be fairly summarized as being in favor of an expedited docket for the hearing of injured workers' claims. She points out that workers' compensation benefits are not provided to injured workers automatically or immediately, and that lengthy delays occasioned by determinations of compensability can result in serious medical and financial repercussions for the injured worker. She maintains that these issues apply equally, whether the worker already has an award or when compensability is still undetermined.

AGENCY RESPONSE:

The Commission would like to thank Ms. Lyons for her comments. The Commission recognizes the need for the prompt resolution of disputes, and it endeavors to structure its procedures to meet that need.

(4) Dina Padilla, Pres., VOICES (CA), and B.E.S.T. Advocate for Injured Workers.

Ms. Padilla wrote to "applaud" the Commission's effort to provide expedited hearings for injured workers, but maintained that workers' compensations systems "no matter what state[,] is an abomination to any employee." In summary, Ms. Padilla maintains that employers across the

country do little or nothing to prevent workplace injuries, and that employers generally utilize unsafe working environments. Under these conditions, Padilla argues, failure by the employer to provide prompt medical attention following a work-related injury is "perhaps one of the worst if not the most detrimental acts to be committed to an already injured worker." She asserts that failure to offer benefits promptly exacerbates the worker's medical condition and prevents the worker from returning to employment.

AGENCY RESPONSE:

The Commission would like to thank Ms. Padilla for her comments. As noted above, the proposed rules will only provide expedited hearings in cases where initial compensability has already been determined. Therefore, while the Commission acknowledges the problem raised by Ms. Padilla, it is not one that will affected by the rules the Commission is currently proposing.

(5) Patricia A. Flanagan.

Ms. Flanagan wrote to the Commission, initially asking that it consider "reciprocity in Workers' Compensation cases between the District of Columbia and the State of Virginia." Upon further questioning by Commission staff, Flanagan explained that she is concerned about "white collar workers' compensation fraudsters" that she maintains "pose a huge financial threat to Arlington County, State of Virginia, and Federal Government programs." In summary, Ms. Flanagan asks that the Commission, or other interested parties, investigate alleged fraud perpetrated by administrators of workers' compensation claims arising in the District of Columbia.

AGENCY RESPONSE:

The Commission would like to thank Ms. Flanagan for her comments. The issues raised by Ms. Flanagan appear to involve disputes arising under District of Columbia law. The Commonwealth of Virginia has no jurisdiction to investigate the practices of another state or Federal district.

(6) James C. Dorschel, Jr., Travelers Insurance Company.

Mr. Dorschel wrote to offer three (3) primary suggestions. First, he suggested that the Commission form an advisory group of individuals with differing backgrounds and interests to provide input to the Commission. Second, he suggested that the Commission utilize the mediation process more, and refer to the hearing docket only those issues relating to original compensability and "complicated matters." Finally, Dorschel suggested that the Commission add known third-party administrators ("TPAs") to the list of parties to whom notices are sent. He noted that it takes time for notices to be routed from the primary insurer to the TPA. Presumably, failure to provide notice to the TPA directly would affect its ability to respond in the time provided to the request for expedited hearing.

AGENCY RESPONSE:

The Commission would like to thank Mr. Dorschel for his comments. At this time, the Commission does not have a standing committee of interested representatives providing input to

the Commission. However, the Commission has consulted with interested parties on an *ad hoc* basis when it feels such input is necessary. The Commission did so in this matter when it sought input from a number of experienced workers' compensation attorneys, actively representing the interests of injured workers, employers and insurers in Virginia.

The Commission is proud of the success of its Ombudsman program, and of its mediation program. Parties to litigation before the Commission are advised of the opportunity to take advantage of the services of the Ombudsman's office, and to take part in mediation. Many parties take this opportunity, and a significant number of disputes are resolved short of a hearing. However, the General Assembly has mandated that the Commission create an expedited hearing docket, and it is constrained to abide by this directive. Nevertheless, the Commission tried to encourage the narrowing of issues, or settlement, by incorporating an informal conference prior to any expedited hearing.

The Commission has received comment from more than one source, suggesting that notice of a request for an expedited hearing be provided to designated third-party administrators. The Commission has considered that recommendation and made a minor change to Rule 2.3 (B).

(7) L. Turner. Stanley Furniture Company.

Mr. Turner wrote to the Commission, expressing his company's concern that employers be given sufficient time to pursue discovery, review medical records and seek independent medical evaluations. He suggested: "a minimum of 60 days would be sufficient."

AGENCY RESPONSE:

The Commission would like to thank Mr. Turner for his comments. When the Commission set out to draft rules to meet the General Assembly's mandate, one of the prime considerations was the balance between giving employers sufficient time to prepare a defense, and the injured workers' need for an expedited hearing. It did so in a couple of ways. First, the process was designed primarily for those situations in which the employer has submitted an application for hearing, causing the injured worker's compensation benefits to be suspended until a hearing is held. The employer is required to provide probable cause for this action and, presumably, is prepared to go to hearing on its application. Therefore, an expedited hearing should not ordinarily be a problem in those cases. Second, the process as it is currently written could not result in a hearing sooner than 24 days after the employer/insurer has notice of it. Realistically, the claim may not be set for a hearing until 42 days or more after the employer is aware of it. This is faster than the average here at the Commission, but not dramatically so. The informal conference, however, allows the Commission and the parties some flexibility. If the Commission finds that the employer has raised significant issues that would prevent a fair expedited proceeding, the request will be denied. If the request is valid and the Commission decides to grant it, the parties will be encouraged to collaboratively determine a date that will reasonably meet their needs.

(8) Joseph C. Bouknight, Vice Pres., Human Resources. Dan River, Inc.
David C. Fralin, Director Workers' Compensation. Dan River, Inc.

Mr. Bouknight and Mr. Fralin wrote to the Commission, expressing their company's opposition to the rules proposed by the Commission. Mr. Bouknight explained that his company is a self-insured employer with approximately 4,500 employees. He noted that his company takes care of its employees when on-the-job accidents occur, but pointed out that there are occasional disputes "about the compensability of workers compensation claims." He stated that the proposed rules would interfere with his company's ability to defend its position in litigation, and would result in greater costs and fees because counsel will be forced to rush through discovery and preparation.

Mr. Fralin addressed some of these concerns specifically. He noted that the time allotted for preparation of a defense is "quite minimal." He pointed out that scheduling an IME, obtaining a record review and taking medical depositions can take significant amounts of time, particularly in his company's case because of the number of out-of-state physicians that may become involved in the injured workers' care.

Mr. Fralin suggested that Rule 2.3 (F) be modified to require that the Commission consider the following additional factors before granting a request for expedited hearing: (1) whether the claimant has sought treatment from new physicians whose records and opinions have not previously been made known to the employer; (2) the length of treatment and volume of records associated with treatment with new physicians; (3) whether the claimant has sought treatment from out-of-state medical providers; (4) whether the employer plans to seek an IME; and (5) whether the employer plans to seek a medical record review.

Mr. Fralin pointed out that Rule 2.3 (H) describes the situations in which an injured worker could seek a continuance, but "apparently does not provide that same privilege to an employer/insurer." He also suggested an additional factor to consider when evaluating claims related to medical treatment pursuant to Rule 2.3 (D). Mr. Fralin pointed out that many employees are covered by group medical insurance policies. Therefore, he suggested that the availability of other insurance coverage should be an explicit factor to consider before granting an expedited hearing under Rule 2.3 (D).

AGENCY RESPONSE:

The Commission would like to thank Mr. Bouknight and Mr. Fralin for their comments. As noted above, the Commission recognized the problems that employers and insurers would face by having to proceed to a hearing on an expedited basis. The Commission expects that there will be situations where it is simply impossible for the employer to secure the necessary discovery in advance of a hearing. This would be raised by the employer at the informal conference provided for in Rule 2.3 (F). If the Commission is persuaded that the case cannot be fairly expedited, the request will be denied and the matter will be processed in the regular fashion. However, the informal conference also allows for some flexibility. The parties, with the aid of the Commission, may agree to expedite some, but no all, of the outstanding issues. They may mediate the matter to a settlement during the conference. They may agree to an immediate evidentiary hearing, while leaving the record open until all medical information is submitted.

With regard to specific factors to be considered under Rules 2.3 (D) and 2.3 (F), the Commission agrees that each of the factors raised by Mr. Fralin may have some relevance to the issues before the decision maker. The rules were drafted to give the parties some idea of the types of issues to be addressed by the Commission when deciding whether to grant a request for expedited hearing. Because there are so many possible factors that could be raised as relevant, the Commission set out only the broadest examples, noting that it is "not limited to" considering those set out in the rule. It was the Commission's judgment that were it to endeavor to delineate every possible factor for the rule, there would be many more, valid factors raised later that were not even contemplated when the rules were drafted. Nevertheless, the Commission views this as an important policy decision, and it will continue to evaluate these various factors as the new program progresses.

Finally, as noted above, the Commission decided to make a change to Rule 2.3 (H), to address concerns about the employer's perceived inability to seek a continuance on the same terms as the claimant.

(9) Brett A. Vassey, Pres. and C.E.O., Virginia Manufacturers Association.

Mr. Vassey wrote to the Commission in behalf of the Virginia Manufacturer's Association (VMA), an organization representing many of Virginia's manufacturers, a significant number of which are self-insured. Noting that the proposed rules will have procedural, managerial and financial implications for its member companies, the VMA offered a number of comments and suggestions about the current draft of the proposed rules.

The VMA suggested that we clarify the language used in proposed Rule 2.3 (B). Specifically, the VWA suggested we re-write the underlined portion of following sentence: "A copy of the employee's request will be sent to the employer, insurer or counsel of record upon receipt, along with a Notice of Request For Expedited Hearing, by registered or certified mail." The VMA suggests that using the term "simultaneously" would result in greater clarity. In addition, the VMA suggested that the Commission's Notice of Request for Expedited Hearing be printed on paper that is of a unique color, thereby alerting the employer, insurer, designated third-party administrator or counsel of record of the importance of the matter. The VMA suggests that notice should be sent to each of the above.

The VMA has offered a number of suggestions regarding proposed Rule 2.3 (C). As an initial matter, the VMA argues that the type of evidence submitted, and the factors considered before granting an expedited hearing, should be set out in the rule with much greater specificity. As examples, the VMA suggests that the rule should require that the injured worker seeking an expedited hearing submit a copy of the prior year's income tax return, and in cases of eviction or foreclosure, the injured worker should be required to produce documentation evidencing these threatened actions.

The VMA suggests that the Commission consider a number of factors before granting an expedited hearing, and that these factors be set out explicitly in the rule. For instance, the VMA argues that the Commission should amend proposed Rule 2.3 (C) to add a subsection (C)(5). This subsection would explicitly require that the Commission consider "[w]hether the

employee's financial difficulties were caused by the termination of workers' compensation benefits, caused by other circumstances, or both." The VMA suggests that Rule 2.3 (C)(1) list several types of income to be considered "so claimants will not unintentionally omit relevant information." They suggest that the Commission list "alimony, child support, a spouse's income, trust funds, interest or dividends," noting that requiring production of tax returns would facilitate this process.

The VMA suggested that the Commission revise the following language found in proposed rule 2.3 (C)(2): "[w]hether the employee has dependents for whom the employee's wages or salary was their sole or primary source of financial support." The VMA believes that the Commission should consider whether the injured workers' spouse has other sources of income beyond wages and salary, and that the rule should read as follows: "[w]hether the employee has dependents for whom the employee's wages, salary and/or other income was their sole or primary source of financial support." The VMA also suggested two additional factors the Commission should consider before granting an expedited hearing. First, the VMA argues that the Commission should consider whether the injured worker's spouse removed him or herself voluntarily from the workforce - - defined by the VMA as stay-at-home parents or persons who are otherwise unemployed by choice. The VMA posits that: "[a]n employee with a healthy, unemployed spouse is not in a situation that can fairly be characterized as severe economic hardship." Second, the VMA suggests that the Commission consider whether the injured worker was in financial distress prior to the change in circumstances giving rise to the request for expedited hearing.

The VMA offered some suggestions regarding proposed Rule 2.3 (D). The VMA maintains that the rule, as currently written, does not require a showing by the injured worker that the disputed medical treatment was recommended by the approved treating physician, nor that it is reasonable and necessary medical treatment under Virginia Code § 65.2-603. The VMA argues that the injured worker should be required to satisfy this standard when the request for expedited hearing is filed, noting that failure to communicate such information to the employer or insurer is the cause of many disputes. The VMA maintains that this requirement, in many cases, would likely eliminate the need for the expedited hearing. Finally, the VMA suggests that the Commission consider as factors whether there is a disagreement among the claimant's physicians as to the appropriate care, and whether the claimant gave the employer or insurer sufficient time and medical documentation to make an informed decision prior to filing the request for expedited hearing.

Finally, the VMA offered a number of general suggestions, not tied to specific provisions of the current draft of the proposed rules. First, the VMA suggested that the Commission consider drafting a form Pre-Hearing Scheduling Order, similar to that utilized in the Circuit Courts of Virginia. This Order would govern the discovery process in all litigated claims. Second, the VMA suggested that the matters considered by the Deputy Commissioner at the expedited hearing be strictly limited to those raised by the claim that gave rise to the request for expedited hearing. Due to the time limits imposed by the rules, the defendants will have insufficient time to defend against claims raised for the first time at the evidentiary hearing. Third, The VMA argues that allowing hearsay evidence in expedited proceedings "is fundamentally unfair unless the other party is afforded the opportunity to depose the person whose out-of-court statements were

proffered." As a partial remedy, the VMA suggests that the Commission either adopt a hearsay rule, or create a procedure whereby the deposition testimony of an out-of-court declarant can be secured after the expedited hearing. Fourth, the VMA suggests that where an expedited hearing is sought, the Commission explicitly waive the requirement of 15-day written notice of willful misconduct defenses under Virginia Code § 65.2-306 and Commission Rule 1.10. Fifth, the VMA suggests that the Commission relax the after-discovered evidence rule for the non-moving party.

AGENCY RESPONSE:

The Commission would like to thank Mr. Vassey for his comments and suggestions. Addressing proposed Rule 2.3 (B), the Commission agrees that the Notice of Request for Expedited Hearing should be provided to the employer at the same time as the injured worker's Request for Expedited Hearing. Although the Commission prefers the phrase "along with," you can be certain that the documents will be sent together. The Commission plans to print the Request for Expedited Hearing and Notice of Request for Expedited Hearing on paper stock that is distinctive.

With regard to Mr. Vassey's suggestions regarding proposed Rule 2.3 (C), the Commission agrees that adding the suggested language as subsection (5) will ensure that the Rules are consistent with the legislative mandate that the severe economic hardship result from the employer's denial of workers' compensation benefits. To that end, the slightly modified language suggested by the VMA will be added as proposed Rule 2.3(C)(5). Addressing other concerns with Rule 2.3, the Commission agrees that objective evidence of economic hardship is required. The Commission prefers, however, to identify exemplars of the forms of evidence considered (such as notices of foreclosure, eviction or repossession) in the instructions to the Request for Expedited Hearing form, rather than in the rules. This allows the Commission maximum flexibility as we implement this new procedure. Likewise, while the Commission does not disagree with the notion that exemplars of income sources should be listed. However, as above, the Commission prefers to use the request form, rather than the Rules to accomplish this.

With regard to Rule 2.3 (C)(2), the Commission agrees that it is relevant and material to consider all sources of income available to the injured worker when determining whether an application meets the criteria for an expedited docket. Accordingly, the proposed rule will be amended to include the phrase, "and/or other income."

The Commission intends for the decision-maker to consider many different factors before granting or denying the request for expedited hearing. The Commission will continue to review the different factors presented by the requests as they are received, and will consider further policy determinations as this new program progresses. However, the Commission does not believe that any change in the proposed rules is necessary to ensure that these issues will be considered.

With regard to Rule 2.3 (D), the Commission agrees that it is appropriate to consider, as one among many factors, whether the medical expense/treatment underlying the Request for Expedited Hearing was recommended or prescribed by the injured worker's authorized treating

physician, and whether it was reasonable and necessary. However, consideration only of claims regarding medical treatment recommended or prescribed by the authorized treating physician is too limiting. While a particular medical expense claim may prove too complicated to be appropriate for the expedited hearing docket, the Commission believes that the decision-maker should have the ability to consider claims supported by medical recommendations issued by doctors who are not the injured worker's approved treating physician, and decide whether they can be adjudicated in an expedited fashion. Accordingly, we have made no change to the rule.

The Commission should point out that the process for obtaining an expedited hearing on medical issues already requires that the injured worker provide objective evidence in support thereof. If such evidence is not supplied, no conference can be scheduled and the process is stalled until such evidence is produced. The Commission intends for the decision-maker to consider a wide variety of factors before granting or denying expedited hearings as to medical disputes. The factors suggested by VMA will be considered by the Commission, along with others, as it continues to evaluate the significant policy issues raised by this new program. However, we do not believe it is necessary to amend the proposed rules to ensure that any particular issue be considered.

Mr. Vassey and the VMA offered a number of other suggestions that the Commission carefully considered. While the Commission agrees that use of a pre-hearing scheduling order will be appropriate in particular cases, it has not decided at this time to adopt the practice as a matter of rule or policy. The Commission will study this recommendation for future implementation. The Commission notes that mandatory use of the procedure as written by the VMA may be unworkable. For instance, the injured worker will have no basis to contest use of the "standard" procedure or form when he/she files a Request for Expedited Hearing, because the worker will have no idea as to the discovery requirements of the carrier when the form is submitted.

The Commission agrees that injured workers should not**,** as a general practice, be allowed to amend their underlying claims once an expedited hearing on the claim has been granted. Nevertheless, the Commission does not want to limit the hearing officer's discretion to allow amendment of a claim in appropriate circumstances. Therefore, the Commission has taken note of this recommendation and will continue to study whether implementation of such a policy is absolutely required. Accordingly, the proposed rules have not been amended to implement this recommendation.

The Commission recognizes the unique challenges created by this process and the liberal hearsay rules utilized by the Commission. Nevertheless, the Commission believes that the proposed rules provide the hearing officer with sufficient discretion to keep the record open in situations where the defendants demonstrate that the process will deny them due process rights if sufficient cross-examination of witnesses or out-of-court declarants is withheld. Similarly, the Commission does not believe that it is necessary to explicitly liberalize by rule the provisions of the common-law after-discovered evidence rule.

Addressing the time limits imposed by Rule 1.10 and Virginia Code § 65.2-306, the Commission does not believe that a waiver of the 15-day notice provision is necessary. Virginia Code § 65.2-306 provides affirmative defenses to the underlying compensability of workers' compensation

injuries. Since the expedited hearing process applies only to claims arising after an initial award has been issued by the Commission, the willful misconduct defenses would not arise and the notice period would not be implicated.

II. Public Hearing. February 20, 2003.

The Commission held a hearing on February 20, 2003, allowing the public the opportunity to address the Commission regarding the proposed rules governing expedited hearings. A number of individuals spoke at the public hearing, offering the following comments:

(1) Rob Frederickson.

Mr. Frederickson identified himself as an injured worker, speaking in his own behalf, and in behalf of another injured worker, Michelle Lyons. His workers' compensation claim had been denied. He described the difficulty he has gone through since his accident, including a need for multiple surgeries and financial distress. He identified a number of televised news segments addressing issues related to disability insurance and work-related accidents. Addressing the proposed rules, Mr. Frederickson express some gratitude that steps are being taken to help injured workers. However, he maintains that the rules are "only treating the symptom and not the disease." He further maintains that there is abundant insurance fraud, which is the disease he feels should be addressed. Mr. Frederickson noted that his case remained on appeal, and asked the Commission to "kind of personally look into my life."

AGENCY RESPONSE:

The Commission would like to thank Mr. Frederickson for coming to the public hearing and offering his thoughts. Mr. Frederickson did not make any particular suggestions or recommendations about the proposed rules. Therefore, we cannot offer a specific response to his testimony. The Commission cannot comment on a specific matter that is pending appeal. Therefore, it would be inappropriate for the Commission to make specific inquiries about Mr. Frederickson's case at this time.

(2) Kenneth Shuman. Virginia Self-Insurer's Association (VSIA)

Mr. Shuman identified himself as the legislative chair of the VSIA, and District Vice-President for Acordia Employer Service, a third-party administrator serving predominately large self-insured employers. Mr. Shuman expressed his opinion that the Commission had done a good job in response to the mandate handed down by the General Assembly. However, he wished to express two key points.

First, Mr. Shuman stated that prompt notice of expedited proceedings is one of the most important things for third-party administrators. He asked that the Commission consider amending proposed Rule 2.3 (B), and that notice of the request for expedited hearing be sent "to the employer, carrier, designated representative and counsel" by registered or certified mail. Alternatively, he asked that those parties not sent certified copies be mailed copies of the request by regular mail - - emphasizing the designated representative. Noting that TPAs are not

employers, nor insurers, nor counsel of record, but often responsible for coordinating with the client to notify counsel, the earliest possible notification to the TPA would be appreciated.

Second, Mr. Shuman asked that the Commission consider using a distinctive color for the forms associated with the new docket. In this manner, employers and insurers will have their attention called to the paperwork, and they will know that they have only a limited timeframe in which to respond.

AGENCY RESPONSE:

The Commission would like to thank Mr. Shuman for coming to the public hearing and offering his comments and suggestions. The Commission weighed Mr. Shuman's comments regarding notice to third-party administrators along with comments we received from others with similar interests. In response, the Commission amended proposed Rule 2.3 (B) to provide for notice of the request for expedited hearing to the employer's counsel of record, the designated third-party representative and the insurer.

Addressing Mr. Shuman's second point, the Commission plans to print all request for expedited hearings on a paper stock that is of a distinctive color.

(3) Andrew Blair, Esquire

Mr. Blair identified himself as a defense attorney who practices law in Richmond, Virginia. Mr. Blair maintains a workers' compensation practice, and practices exclusively in behalf of employers, insurers and self-insured employers. Mr. Blair shared Mr. Shuman's concerns, and reiterated them.

Mr. Blair raised a number of additional issues. First, he suggested that proposed Rule 2.3 (D)(3) be amended to conform with established Commission precedent by adding the words "reasonable and" before "necessary ongoing medical treatment." Second, Mr. Blair suggested that the time between the filing of a request for expedited hearing and the date a hearing must be held is too short. We note, however, that his comments also suggest that it was his interpretation that original claims of compensability might be heard on an expedited docket. This is not the case. *See* Rule 2.3 (A) *Scope*.

Mr. Blair expressed concern that the informal conference of Rule 2.3 (F) is not mandatory. He noted that Rule 2.3 (H) provides an express procedure whereby an employee can seek a continuance, while there is no similar provision for the employer. He also expressed concern that Rule 2.3 (K) provides both parties a right only to seek review of the Commission's decision to refer a case to the expedited docket. He noted that he might not object to an expedited hearing, but would object to the specific timeframe that is ultimately imposed his client. He suggested that there should be a separate ground for review on that basis.

Mr. Blair suggested that the person making these determinations for the Commission be someone "who understands the hearing process, understands the preparation process, [and] looks at the facts and circumstances of that specific case."

AGENCY RESPONSE:

The Commission would like to thank Mr. Blair for coming to the public hearing and offering his comments and suggestions. The Commission agrees that it would be appropriate to conform the language of proposed Rule 2.3 (D) to the term "reasonable and necessary" utilized under Virginia Code § 65.2-603. This language was amended.

Many of Mr. Blair's comments regarding the timing of expedited hearings appeared prefaced on the assumption that original claims of compensability will be considered for expedited hearings. However, the scope of expedited hearings is limited, and they only encompass issues that arise after an award has been entered for the injured worker.

It was never the Commission's intent to make the informal conference of proposed Rule 2.3 (F) anything but mandatory. The informal conference was mandatory, but it was unclear how long it would take the Commission to schedule it. Therefore, the Commission included language that would encourage expedient scheduling, without establishing an absolute deadline. However, the language in the draft rule might create some confusion. Therefore, the Commission modified the language to clarify the matter.

The Commission has modified the language of proposed Rule 2.3 (H) to clarify the parties' opportunities for a continuance. With regard to Mr. Blair's concern about Rule 2.3 (K), the Commission believes no change is necessary. If a party is aggrieved, for any reason, by the Commission's grant or denial of a request for expedited hearing, that party may seek an expedited review of the decision. As set out in the rule, the aggrieved party "must include a statement explaining the grounds for review, and must enclose all information the party believes is necessary for consideration of the request." The aggrieved party could assert any number of grounds on review, including the timing of the expedited hearing ordered by the Commission.

(4) Giovanna Ogle, Liberty Mutual Insurance.

Ms. Ogle identified herself as a representative of Liberty Mutual Insurance. She indicated that she did not have much to add after the testimony of Kenneth Shuman and Andrew Blair. She stated that the time periods set out in the proposed rule are "almost impossible" to meet. However, her comments suggest that she, like Mr. Blair before her, assumed that original claims of compensability would be determined on the expedited hearing docket. She explained that original claims for benefits go to a Richmond address, are then forwarded to Indianapolis, Indiana, and then processed there before counsel is assigned to handle the matter. This results in delays that make responding to an expedited hearing request difficult.

AGENCY RESPONSE:

The Commission would like to thank Ms. Ogle for coming to the public hearing, and offering her thoughts and suggestions. The Commission refers Ms. Ogle to the Commission's response to Mr. Blair's comments.

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 crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

The Commission proposes to the 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 Commission 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.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the 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.