WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1971

ENROLLED
Committee Substitute
for
HOUSE BILL No. 790

Originating in the Committee
(By Mr. on the Judiciary)

PASSED March 13, 1971

In Effect July 1, 1971

790
AN ACT to repeal sections eight-d, eight-e, eight-f and fifteen-c, article four, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections one, four, five, six, seven, eight, eight-b, eight-c, nine-b, ten, fourteen, fifteen, fifteen-b and sixteen of said article four; to further amend said article four, by adding thereto a new section, designated section sixteen-a; to further amend said chapter by adding thereto a new article, designated article four-a; to amend and reenact sections one, two and five, article five of said chapter; to further amend said article five by adding there-
to a new section, designated section three-a; and to further amend said chapter by adding thereto a new article, designated article six, relating generally to workmen's compensation; relating to the contraction or aggravation of occupational pneumoconiosis or other occupational disease; abolishing the occupational diseases medical board, except as to any claim in which the claimant is examined by such board before July one, one thousand nine hundred seventy-one; relating to funeral expenses in workmen's compensation claims; relating to the payment of temporary total disability benefits; relating to the classification of disability benefits; relating to the maximum and minimum workmen's compensation benefits; relating to the average weekly wage in West Virginia; relating to payment following death of claimant of statutory award for severance of a member of the body and providing limitations and qualifications with respect thereto; relating to the evaluation of disability where there is an injury to a member of the body as opposed to the severance thereof; providing that temporary total disability benefits shall not be subtracted from permanent partial disability awards, relating to
hernias; relating to physical examinations of claimants; relating to examinations for the occupational pneumoconiosis board; relating to the time during which protests may be filed to the findings of the occupational pneumoconiosis board; providing that preexisting physical impairments shall not be considered in fixing amount of compensation; relating to the classification and amounts of death benefits; relating to the computation of benefits and providing that in any claim for injuries, including occupational pneumoconiosis or other occupational diseases, occurring on or after July one, one thousand nine hundred seventy-one, any award for disability benefits or for dependent benefits shall be paid at the weekly rates or the monthly amount in effect on the date of such injury and further providing that if during the life of any such award, the weekly rates or the monthly amount are increased or decreased, the claimant shall receive such increased or decreased benefits as of the effective date of said increase or decrease; relating to the time periods within which applications for various types of workmen's compensation benefits must be filed; relating to the time
within which an employer must report an injury; relating to certain nonmedical findings to be made by the commissioner in claims for occupational pneumoconiosis; relating to the time within which such nonmedical findings may be protested; relating to the reopening of claims; providing for interest on certain benefits under certain circumstances; creating the disabled workmen's relief fund and providing for the payment of benefits from such fund; relating to the computation of benefits to be paid from such fund; relating to the mode of payment of benefits from such fund; providing for the payment of benefits from such fund to employees of self-insurers; relating to the powers of the commissioner over such fund; prohibiting the charging of any fee, compensation or gratuity for representing or assisting or pretending to represent or assist any person to receive benefits from such workmen's relief fund; relating to the employees to administer such workmen's relief fund and their salaries and expenses; providing that such workmen's relief fund shall be funded out of interest earned on the workmen's compensation fund; providing that the purpose of such work-
men's relief fund is to increase the benefits being paid under life awards or in fatal claims to the minimum amount payable in such claims under the laws in effect on July one, one thousand nine hundred sixty-one; relating to the time within which the commissioner is to order supplemental hearings and render his decision; relating to the payment of expenses and loss of wages when the claimant attends a hearing under certain circumstances; relating to the salary of the members of the workmen's compensation appeal board; relating to continuances; placing a limitation upon the fees which may be charged by an attorney for a claimant or dependent; and providing a severability clause for said chapter twenty-three.

Be it enacted by the Legislature of West Virginia:

That sections eight-d, eight-e, eight-f and fifteen-c, article four, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that sections one, four, five; six, seven, eight, eight-b, eight-c, nine-b, ten, fourteen, fifteen, fifteen-b and sixteen of said article four be amended and reenacted; that said article four
be further amended by adding thereto a new section, designated section sixteen-a; that said chapter be further amended by adding thereto a new article, designated article four-a; that sections one, two and five, article five of said chapter be amended and reenacted; that said article five be further amended by adding thereto a new section, designated section three-a; and that said chapter be further amended by adding thereto a new article, designated article six, all to read as follows:

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

§23-4-1. To whom compensation fund disbursed; occupational pneumoconiosis and other occupational diseases included in "injury" and "personal injury"; definition of occupational pneumoconiosis and other occupational diseases.

1 Subject to the provisions and limitations elsewhere in this chapter set forth, the commissioner shall disburse the workmen's compensation fund to the employees of such employers as are not delinquent in the payment of the premiums for the quarter in which the injury occurs, and in case of catastrophe, in addition to the employees next above described, to the employees of employers who have elected, under section nine, article two of this
chapter, to make payments into the surplus fund as pro-
vided in that section, and which employees shall have
received personal injuries in the course of and resulting
from their employment in this state, or in temporary
employment without the state as provided in section
one, article two of this chapter, or to the dependents, if
any, of such employees in case death has ensued, ac-
cording to the provisions hereinafter made; and also for
the expenses of the administration of this chapter, as
provided in section two, article one of this chapter.

For the purposes of this chapter the terms “injury”
and “personal injury” shall include occupational pneu-
moconiosis and any other occupational disease, as herein-
after defined, and the commissioner shall likewise dis-
burse the workmen’s compensation fund to the employees
of such employers as are not delinquent in the payment
of premiums for the last quarter in which such employees
have been exposed to the hazards of occupational pneu-
moconiosis or other occupational disease and in this
state have contracted occupational pneumoconiosis or
other occupational disease, or have suffered a perceptible
aggravation of an existing pneumoconiosis or other oc-
cupational disease, or to the dependents, if any, of such
employees, in case death has ensued, according to the
provisions hereinafter made: Provided, That compensa-
tion shall not be payable for the disease of occupational
pneumoconiosis, or death resulting therefrom, unless the
employee has been exposed to the hazards of occupational
pneumoconiosis in the state of West Virginia over a
continuous period of not less than two years during the
ten years immediately preceding the date of his last
exposure to such hazards. An application for benefits on
account of occupational pneumoconiosis shall set forth the
name of the employer or employers and the time worked
for each, and the commissioner may allocate to and divide
any charges resulting from such claim among the employ-
ers by whom the claimant was employed for as much as
sixty days during the period of three years immediately
preceding the date of last exposure to the hazards of
occupational pneumoconiosis. The allocation shall be
based upon the time and degree of exposure with each
employer.
For the purposes of this chapter disability or death resulting from occupational pneumoconiosis, as defined in the immediately succeeding sentence, shall be treated and compensated as an injury by accident.

Occupational pneumoconiosis is a disease of the lungs caused by the inhalation of minute particles of dust over a period of time due to causes and conditions arising out of and in the course of the employment. The term "occupational pneumoconiosis" shall include, but shall not be limited to, such diseases as silicosis, anthracosilicosis, coal worker's pneumoconiosis, commonly known as black lung or miner's asthma, silico-tuberculosis (silicosis accompanied by active tuberculosis of the lungs), coal worker's pneumoconiosis accompanied by active tuberculosis of the lungs, asbestosis, siderosis, anthrax and any and all other dust diseases of the lungs and conditions and diseases caused by occupational pneumoconiosis which are not specifically designated herein meeting the definition of occupational pneumoconiosis set forth in the immediately preceding sentence.
X-ray evidence shall not necessarily be held conclusive insofar as it bears upon the absence of occupational pneumoconiosis.

For the purposes of this chapter, occupational disease means a disease incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of the employment shall be compensable except when it follows as an incident of occupational disease as defined in this chapter. Except in the case of occupational pneumoconiosis, a disease shall be deemed to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances (1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease, (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, (3) that it can be fairly traced to the employment as the proximate cause, (4) that it does not come from
a hazard to which workmen would have been equally
exposed outside of the employment, (5) that it is in-
cidental to the character of the business and not inde-
pendent of the relation of employer and employee, and
(6) that it must appear to have had its origin in a risk
connected with the employment and to have flowed
from that source as a natural consequence, though it
need not have been foreseen or expected before its
contraction.
Except in the case of silicosis, no award shall be
made under the provisions of this chapter for any oc-
cupational disease contracted prior to the first day of
July, one thousand nine hundred forty-nine. An em-
ployee shall be deemed to have contracted an occu-
pritional disease within the meaning of this paragraph
if the disease or condition has developed to such an
extent that it can be diagnosed as an occupational dis-
ease.
Claims for occupational disease as hereinbefore de-
defined, except occupational pneumoconiosis, shall be pro-
cessed in like manner as claims for all other personal
Provided, That in any claim in which the occupational diseases medical board has examined the claimant prior to July one, one thousand nine hundred seventy-one, such claim shall be processed and final disposition made with respect thereto without regard to the foregoing provisions of this paragraph and with like effect as if (i) sections eight-d, eight-e, eight-f and fifteen-c of this article had not been repealed by this act, and (ii) section eight of this article had not been amended and reenacted by this act.

§23-4-4. Funeral expenses.

1 In case the personal injury causes death, and disability is continuous from the date of such injury to date of death, reasonable funeral expenses, not to exceed twelve hundred dollars, shall be paid from the fund, payment to be made to the persons who have furnished the services and supplies, or to the persons who have advanced payment for same, as the commissioner may deem proper, in addition to such award as may be made to the employee’s dependents.
§23-4-5. Benefits for first three days after injury.

1 If the period of disability does not last longer than three days from the day the employee leaves work as the result of the injury, no award shall be allowed, except the disbursements provided for in the two next preceding sections, but if the period of disability lasts longer than fourteen days from the day the employee leaves work as a result of the injury, an award shall be allowed for the first three days of such disability.

§23-4-6. Classification of disability benefits.

1 Where compensation is due an employee under the provisions of this chapter for a personal injury, such compensation shall be as provided in the following schedule:

(a) The expressions “average weekly wage earnings, wherever earned, of the injured employee, at the date of injury” and “average weekly wage in West Virginia,” as used in this chapter, shall have the meaning and shall be computed as set forth in section fourteen of this article.

(b) If the injury causes temporary total disability,
the employee shall receive during the continuance thereof weekly benefits as follows: A maximum weekly benefit to be computed on the basis of sixty-six and two-thirds percent of the average weekly earnings, wherever earned, of the injured employee, at the date of injury, not to exceed the percentage of the average weekly wage in West Virginia, as follows: On or after July one, one thousand nine hundred sixty-nine, forty-five percent; on or after July one, one thousand nine hundred seventy, fifty percent; on or after July one, one thousand nine hundred seventy-one, fifty-five percent.

The minimum weekly benefits paid hereunder shall not be less than twenty-six dollars per week for injuries occurring on or after July one, one thousand nine hundred sixty-nine and not less than thirty-five dollars per week for injuries occurring on or after July one, one thousand nine hundred seventy-one.

(c) Subdivision (b) shall be limited as follows: Aggregate award for a single injury causing temporary
(d) If the injury causes permanent disability, the percentage of disability to total disability shall be determined and the award computed on the basis of four weeks compensation for each percent of disability determined and the maximum and minimum weekly benefits as provided in subdivision (b) of this section for temporary total disability benefits shall be payable.

For a disability of eighty-five percent or more, benefits shall be payable during the remainder of life at the maximum or minimum weekly benefits as provided in subdivision (b) of this section for temporary total disability.

(e) If the injury results in the total loss by severance of any of the members named in this subdivision, the percentage of disability shall be determined in accordance with the following table, and award made as provided in subdivision (d) of this section:
The loss of a great toe shall be considered a ten percent disability.

The loss of a great toe (one phalanx) shall be considered a five percent disability.

The loss of other toes shall be considered a four percent disability.

The loss of other toes (one phalanx) shall be considered a two percent disability.

The loss of all toes shall be considered a twenty-five percent disability.

The loss of fore part of foot shall be considered a thirty percent disability.

The loss of foot shall be considered a thirty-five percent disability.

The loss of a leg shall be considered a forty-five percent disability.

The loss of thigh shall be considered a fifty percent disability.

The loss of thigh at hip joint shall be considered a sixty percent disability.
The loss of a little or fourth finger (one phalanx) shall be considered a three percent disability.

The loss of little or fourth finger shall be considered a five percent disability.

The loss of ring or third finger (one phalanx) shall be considered a three percent disability.

The loss of ring or third finger shall be considered a five percent disability.

The loss of middle or second finger (one phalanx) shall be considered a three percent disability.

The loss of middle or second finger shall be considered a seven percent disability.

The loss of index or first finger (one phalanx) shall be considered a six percent disability.

The loss of index or first finger shall be considered a ten percent disability.

The loss of thumb (one phalanx) shall be considered a twelve percent disability.

The loss of thumb shall be considered a twenty percent disability.

The loss of thumb and index finger shall be considered a thirty-two percent disability.
The loss of index and middle finger shall be considered a twenty percent disability.

The loss of middle and ring finger shall be considered a fifteen percent disability.

The loss of ring and little finger shall be considered a ten percent disability.

The loss of thumb, index and middle finger shall be considered a forty percent disability.

The loss of index, middle and ring finger shall be considered a thirty percent disability.

The loss of middle, ring and little finger shall be considered a twenty percent disability.

The loss of four fingers shall be considered a thirty-two percent disability.

The loss of hand shall be considered a fifty percent disability.

The loss of forearm shall be considered a fifty-five percent disability.

The loss of arm shall be considered a sixty percent disability.

The total and irrecoverable loss of the sight of one
eye shall be considered a thirty-three percent disability.

For the partial loss of vision in one, or both eyes, the percentage of disability shall be determined by the commissioner, using as a basis the total loss of one eye.

The total and irrecoverable loss of the hearing of one ear shall be considered a fifteen percent disability, and the injured employee shall be entitled to compensation for a period of sixty weeks. The total and irrecoverable loss of hearing of both ears shall be considered a forty-five percent disability, and the injured employee shall be entitled to compensation for a period of one hundred eighty weeks.

For the partial loss of hearing in one, or both ears, the percentage of disability shall be determined by the commissioner, using as a basis the total loss of hearing in both ears.

Should a claimant sustain a compensable injury which results in the total loss by severance of any of the bodily members named in this subdivision, die from sickness or noncompensable injury before the com-
missioner makes the proper award for such injury, the commissioner shall make such award to claimant's dependents as defined in this chapter, if any; such payment to be made in the same installments that would have been paid to claimant if living: Provided, That no payment shall be made to any widow of such claimant after her remarriage, and that this liability shall not accrue to the estate of such claimant and shall not be subject to any debts of, or charges against, such estate.

(f) Should a claimant to whom has been made a permanent partial award of from one percent to eighty-four percent, both inclusive, die from sickness or non-compensable injury, the unpaid balance of such award shall be paid to claimant's dependents as defined in this chapter, if any; such payment to be made in the same installments that would have been paid to claimant if living: Provided, however, that no payment shall be made to any widow of such claimant after her remarriage, and that this liability shall not accrue
to the estate of such claimant and shall not be subject to any debts of, or charges against, such estate.

(g) The award for permanent disabilities intermediate to those fixed by the foregoing schedule and permanent disability of from one percent to eighty-four percent shall be in the same proportion and shall be computed and allowed by the commissioner.

(h) The percentage of all permanent disabilities other than those enumerated in subdivision (e) of this section shall be determined by the commissioner, and awards made in accordance with the provisions of subdivision (d) of this section. Where there has been an injury to a member as distinguished from total loss by severance of that member, the commissioner in determining the percentage of disability may be guided by but shall not be limited to the disabilities enumerated in subdivision (e) of this section.

(i) Compensation payable under any subdivision of this section shall be limited as follows: Not to exceed the maximum nor to be less than the minimum weekly benefits specified in subdivision (b) of this section.
(j) Temporary total disability benefits payable under subdivision (b) of this section shall not be deductible from permanent partial disability awards payable under subdivisions (d) and (e) of this section.

Compensation, either total temporary or permanent partial, under this section shall be payable only to the injured employee and the right thereto shall not vest in his or her estate, except that any unpaid compensation which would have been paid or payable to the employee up to the time of his death, if he had lived, shall be paid to the dependents of such injured employee if there be such dependents at the time of death.

(k) The following permanent disabilities shall be conclusively presumed to be total in character:

- Loss of both eyes or the sight thereof.
- Loss of both hands or the use thereof.
- Loss of both feet or the use thereof.
- Loss of one hand and one foot or the use thereof.

In all other cases permanent disability shall be determined by the commissioner in accordance with the facts in the case, and award made in accordance with the provisions of subdivision (d).
(1) A disability which renders the injured employee unable to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time shall be considered in determining the issue of total disability.


1 In all claims for compensation for hernia resulting from personal injury received in the course of and resulting from the employee's employment, it must be proven by a preponderance of the evidence: First, that there was an injury resulting in hernia; second, that it was accompanied by pain; third, that the hernia followed an injury; fourth, that the hernia did not exist prior to the injury for which compensation is claimed.

All hernia, inguinal, femoral or otherwise, so proven to be the result of an injury received in the course of and resulting from the employment, shall be treated in a surgical manner by radical operation. If death results from such operation, the death shall be con-
sidered as a result of the injury, and compensation paid
in accordance with the provisions of section ten of this
article. In nonfatal cases, time loss only shall be paid,
unless it is shown by special examination that the in-
jured employee has a permanent partial disability re-
sulting after the operation. If so, compensation shall be
paid in accordance with the provisions in section six of
this article with reference to permanent partial disabil-
ity. In case the injured employee refuses to undergo
the radical operation for the cure of said hernia, no
compensation will be allowed during the time such re-
fusal continues. If, however, it is shown that the em-
ployee has some chronic disease, or is otherwise in such
physical condition that it is considered unsafe for him
to undergo such operation, he shall be paid as pro-
vided in section six.

§23-4-8. Physical examination of claimant.

The commissioner shall have authority, after due no-
tice to the employer and claimant, whenever in his opin-
ion it shall be necessary, to order a claimant of compen-
sation for a personal injury other than occupational
pneumoconiosis to appear for examination before a medical examiner or examiners selected by the commissioner;
and the claimant and employer, respectively, shall each have the right to select a physician of his or its own choosing and at his or its own expense to participate in such examination. The claimant and employer shall, respectively, be furnished with a copy of the report of examination made by the medical examiner or examiners selected by the commissioner. The respective physicians selected by the claimant and employer shall have the right to concur in any report made by the medical examiner or examiners selected by the commissioner, or each may file with the commissioner a separate report, which separate report shall be considered by the commissioner in passing upon the claim. If the compensation claimed is for occupational pneumoconiosis, the commissioner shall have the power, after due notice to the employer, and whenever in his opinion it shall be necessary, to order a claimant to appear for examination before the occupational pneumoconiosis board hereinafter provided. In any case the claimant shall be entitled to reasonable
traveling and other expenses necessarily incurred by him
in obeying such order, which shall be paid out of the
amount allowed under this chapter for medical, surgical,
dental and hospital treatment.

Where the claimant is required to undergo a medical
examination or examinations by a physician or physicians
selected by the employer, as aforesaid or in connection
with any claim which is in litigation, in addition to the
reasonable traveling and other expenses, not to exceed
the expenses paid when a claimant is examined by a
physician or physicians selected by the commissioner,
such claimant shall be reimbursed by the employer for
loss of wages necessarily incurred by him in connection
with such examination or examinations.

§23-4-8b. The occupational pneumoconiosis board; procedure;
autopsy.

1 The occupational pneumoconiosis board, upon refer-
ence to it by the commissioner of a case of occupational
pneumoconiosis, shall notify the employee, or in case he
is dead, the claimant, and the employer, to appear be-
fore such board at a time and place stated in the notice.

6 If the employee be living, he shall appear before the
board at the time and place specified and submit to such examination, including clinical and x-ray examinations, as the board may require. If a physician licensed to practice medicine in the state shall make affidavit that the employee is physically unable to appear at the time and place designated by the board, such board shall, on notice to the proper parties, change the place and time as may reasonably facilitate the hearing or examination of the employee, or may appoint a qualified specialist in the field of respiratory disease to examine the claimant on behalf of the board. The employee, or in case he is dead, the claimant, and the employer shall also produce as evidence to the board all reports of medical and x-ray examinations which may be in their respective possession or control, showing the past or present condition of the employee. If the employee be dead, the notice of the board shall further require that the claimant produce necessary consents and permits so that an autopsy may be performed, if the board shall so direct. When in the opinion of the board an autopsy is deemed necessary accurately and
28 scientifically to ascertain and determine the cause of
deach, such autopsy examination shall be ordered by
the board, which shall designate a duly licensed phy-
sician, a pathologist, or such other specialists as may be
deemed necessary by the board, to make such exami-
nation and tests to determine the cause of death and
certify his or their written findings, in triplicate, to the
board, which findings shall be public records. In the
event that a claimant for compensation for such death
refuses to consent and permit such autopsy to be made,
all rights for compensation shall thereupon be forfeited.
The employee, or if he be dead, the claimant, and
the employer, shall be entitled to be present at all
examinations conducted by the board, and to be rep-
resented by attorneys and physicians.

§23-4-8c. Same-Reports and distribution thereof; presumption;
findings required of board; objection to findings;
procedure thereon.

1 (a) The occupational pneumoconiosis board, as soon
2 as practicable, after it has completed its investigation,
3 shall make its written report, to the commissioner, of
4 its findings and conclusions on every medical question
in controversy, and the commissioner shall send one copy thereof to the employee or claimant and one copy to the employer, and the board shall also return to and file with the commissioner all the evidence as well as all statements under oath, if any, of the persons who appeared before it on behalf of the employee or claimant, or employer and also all medical reports and x-ray examinations produced by or on behalf of the employee or claimant, or employer.

(b) If it can be shown that the claimant or deceased employee has been exposed to the hazard of inhaling minute particles of dust in the course of and resulting from his employment for a period of ten years during the fifteen years immediately preceding the date of his last exposure to such hazard and that such claimant or deceased employee has sustained a chronic respiratory disability, then it shall be presumed that such claimant is suffering or such deceased employee was suffering at the time of his death from occupational pneumoconiosis which arose out of and in the course of his employment. This presumption shall not be conclusive.
(c) The findings and conclusions of the board shall set forth, among other things, the following:

(1) Whether or not the claimant or the deceased employee has contracted occupational pneumoconiosis, and, if so, the percentage of permanent disability resulting therefrom.

(2) Whether or not the exposure in the employment was sufficient to have caused the claimant’s or deceased employee’s occupational pneumoconiosis or to have perceptibly aggravated an existing occupational pneumoconiosis, or other occupational disease.

(3) What, if any, physician appeared before the board on behalf of the claimant or employer, and what, if any, medical evidence was produced by or on behalf of the claimant or employer.

If either party objects to the whole or any part of such findings and conclusions of the board, he shall file with the commissioner, within fifteen days of the mailing of such copy to him, unless for good cause shown, the commissioner extends such time, his objections thereto in writing, specifying the particular statements of the
board's findings and conclusions to which he objects.

After the time has expired for the filing of objections
to the findings and conclusions of the board, the com-
missioner shall proceed to act as provided in this chap-
ter. If after the time has expired for the filing of ob-
jections to the findings and conclusions of the board no
objections have been filed, the report of a majority of
the board of its findings and conclusions on any medical
question shall be taken to be plenary and conclusive
evidence of the findings and conclusions therein stated.

If objection has been filed to the findings and conclus-
ions of the board, notice thereof shall be given to the
board, and the members thereof joining in such findings
and conclusions shall appear at the time fixed by the
commissioner for the hearing to submit to examination
and cross-examination in respect to such findings and
conclusions. At such hearing evidence to support or con-
trovert the findings and conclusions of the board shall
be limited to examination and cross-examination of the
members of the board, and to the taking of testimony of
other qualified physicians and roentgenologists.
§23-4-9b. Pre-existing physical impairments not considered in fixing amount of compensation.

1 Where an employee has a definitely ascertainable physical impairment and such employee shall thereafter receive an injury in the course of and resulting from his employment, unless such injury results in total permanent disability within the meaning of section one, article three of this chapter, such physical impairment, and the effect thereof, and an aggravation thereof, shall not be taken into consideration in fixing the amount of compensation allowed by reason of such injury, and such compensation shall be awarded only in the amount that would have been allowable had such employee not had such pre-existing physical impairment.

§23-4-10. Classification of death benefits; “dependent” defined.

1 In case a personal injury other than occupational pneumoconiosis or other occupational disease, suffered by an employee in the course of and resulting from his employment, causes death within the period of ten years and disability is continuous from date of such
injury until date of death, or if death results from
occupational pneumoconiosis or from any other occu-
pational disease within ten years from the date of the
last exposure to the hazards of occupational pneumo-
coniosis or to the other particular occupational hazard
involved, as the case may be, the benefits shall be
in the amounts and to the persons as follows:
(a) If there be no dependents, the disbursements
shall be limited to the expense provided for in sections
three and four of this article.
(b) If the deceased employee leaves a dependent widow
or invalid widower, the payment shall be one hun-
dred sixty dollars a month until death or remarriage
of such widow or widower, and in addition fifty dol-
lars a month for each child under eighteen years of
age, to be paid until such child reaches such age, or
where such child after reaching eighteen years of age
continues as a full-time student in an accredited high
school, college, university, business or trade school,
to be paid until such child reaches the age of twenty-
two years, or if an invalid child, fifty dollars a month,
to continue as long as such child remains an invalid
to be increased to one hundred sixty dollars per month
upon the death of the surviving dependent parent:

Provided, That if such widow or invalid widower shall
remarry within ten years from the date of the death
of such employee, such widow or widower shall be
paid at the time of remarriage twenty percent of the
amount that would be due for the period remaining
between the date of such remarriage and the end of
ten years from the date of death of such employee,
and such widow or widower shall be advised in writing
by the commissioner of his or her rights under this
proviso at the time of making the original award:

Provided, however, That if upon investigation and hear-
ing, as provided in article five of this chapter, it shall
be ascertained that such widow or widower is living
with a man or woman, as the case may be, as man
and wife and not married, or that the widow is living
a life of prostitution, the commissioner shall stop pay-
ment of the benefits herein provided to such widow or
widower.
If the deceased employee be a widow or widower and leaves a child or children under the age of eighteen years, the payments shall be one hundred dollars a month to each child until he or she reaches the age of eighteen years, or where such child after reaching eighteen years of age continues as a full-time student in an accredited high school, college, university, business or trade school to be paid until such child reaches the age of twenty-two years.

In all awards of compensation to children, unless otherwise provided herein, the award shall be until they reach the age of eighteen years or until their death prior thereto.

(c) If the deceased employee leaves no dependent widow or widower and leaves a wholly dependent father or mother, he or she shall be paid the sum of eighty dollars a month, payments to continue until death, and if there be no widow or widower and both the father and mother are wholly dependent, then a joint award shall be made to the father and mother in the sum of eighty dollars a month until death.
Upon the death of either the father or mother in any case in which a joint award has been made to them, the full award of eighty dollars a month shall be paid to the survivor until his or her death.

(d) If the deceased employee leaves no dependent widow or widower or wholly dependent father or mother but there are other wholly dependent persons, as defined in subdivision (f) of this section, the payment shall be sixty-five dollars a month, to continue for six years after the death of the deceased, except as otherwise provided herein.

(e) If the deceased employee leaves no dependent widow or widower, child under eighteen years of age, or wholly dependent person, but there are partially dependent persons at the time of death, the payment shall be thirty-five dollars a month, to continue for such portion of the period of six years after the death, as the commissioner may determine, but no such partially dependent person shall receive compensation payments as a result of the death of more than one employee.
Compensation under subdivisions (b), (c), (d) and (e) hereof shall, except as may be specifically provided to the contrary therein, cease upon the death of the dependent, and the right thereto shall not vest in his or her estate.

(f) Dependent, as used in this chapter, shall mean a widow, invalid widower, child under eighteen years of age, or under twenty-two years of age when a full-time student as provided herein, invalid child or posthumous child, who, at the time of the injury causing death, is dependent in whole or in part for his or her support upon the earnings of the employee; also the following persons who are and continue to be residents of the United States or its territorial possessions: Stepchild under eighteen years of age, or under twenty-two years of age when a full-time student as provided herein, child under eighteen years of age legally adopted prior to the injury causing death, or under twenty-two years of age when a full-time student as provided herein, father, mother, grandfather or grandmother, who at the time of the injury causing death, is dependent

1 The average weekly wage earnings, wherever earned, of the injured person at the date of injury, and the average weekly wage in West Virginia as determined by the commissioner of employment security, in effect at the date of injury, shall be taken as the basis upon which to compute the benefits.

2 In cases involving occupational pneumoconiosis or other occupational diseases, the “date of injury” shall be the date of the last exposure to the hazards of occupational pneumoconiosis or other occupational diseases.

3 In computing benefits payable on account of occupational pneumoconiosis, the commissioner shall deduct the amount of all prior workmen’s compensation benefits paid to the same claimant on account of silicosis, but a prior silicosis award shall not, in any event, pre-
clude an award for occupational pneumoconiosis otherwise payable under this article.

The expression "average weekly wage earnings, wherever earned, of the injured person, at the date of injury," within the meaning of this chapter, shall be two months, six or twelve months immediately preceding the date of the injury.

The expression "average weekly wage in West Virginia," within the meaning of this chapter, shall be the average weekly wage in West Virginia as determined by the commissioner of employment security in accordance with the provisions of sections ten and eleven, article six, chapter twenty-one-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and other applicable provisions of said chapter twenty-one-a.

In any claim for injuries, including occupational pneumoconiosis and other occupational diseases, occurring on or after July one, one thousand nine hundred seventy-one, any award for temporary total, permanent partial or permanent total disability benefits or for dependent bene-
fits, shall be paid at the weekly rates or in the monthly amount in the case of dependent benefits applicable to the claimant therein in effect on the date of such injury. If during the life of such award for temporary total, permanent partial or permanent total disability benefits or for dependent benefits, the weekly rates or the monthly amount in the case of dependent benefits are increased or decreased, the claimant shall receive such increased or decreased benefits beginning as of the effective date of said increase or decrease.


1 To entitle any employee or dependent of a deceased employee to compensation under this chapter, other than for occupational pneumoconiosis or other occupational disease, the application therefor must be made on the form or forms prescribed by the commissioner and filed in the office of the commissioner within two years from and after the injury or death, as the case may be, and all proofs of dependency in fatal cases must likewise be filed with the commissioner within two years from
and after the death. In case the employee is mentally or physically incapable of filing such application, it may be filed by his attorney or by a member of his family. It shall be the duty of every employer to report to the commissioner every injury sustained by any person in his employ. Such report shall be on forms prescribed by the commissioner and shall be made within thirty days from the date the employer first receives knowledge of such injury.

To entitle any employee to compensation for occupational pneumoconiosis under the provisions hereof, the application therefor must be made on the form or forms prescribed by the commissioner and filed in the office of the commissioner within three years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed to the hazards of occupational pneumoconiosis or within three years from and after the employee's occupational pneumoconiosis was made known to him by a physician or which he should reasonably have known, whichever shall last occur, or, in the case of death, the applica-

31 tion shall be filed as aforesaid by the dependent of such
32 employee within two years from and after such em-
33 ployee's death.
34 To entitle any employee to compensation for occupa-
35 tional disease other than occupational pneumoconiosis
36 under the provisions hereof, the application therefor
37 must be made on the form or forms prescribed by the
38 commissioner and filed in the office of the commissioner
39 within three years from and after the day on which
40 the employee was last exposed to the particular occupa-
41 tional hazard involved or within three years from and
42 after the employee's occupational disease was made
43 known to him by a physician or which he should reason-
44 ably have known, whichever shall last occur, or, in case
45 of death, the application shall be filed as aforesaid by
46 the dependent of such employee within two years from
47 and after such employee's death.

§23-4-15b. Determination of nonmedical questions by commis-
1 sioner—Claims for occupational pneumoconiosis;
2 hearing.

1 If a claim for occupational pneumoconiosis benefits
2 be filed by an employee within three years from and
after the last day of the last continuous period of sixty
days exposure to the hazards of occupational pneumoconiosis, the commissioner shall determine whether the
claimant was exposed to the hazards of occupational
pneumoconiosis for a continuous period of not less than
sixty days while in the employ of the employer within
three years prior to the filing of his claim, whether in
the state of West Virginia the claimant was exposed to
such hazard over a continuous period of not less than
two years during the ten years immediately preceding
the date of his last exposure thereto and whether the
claimant was exposed to such hazard over a period of
not less than ten years during the fifteen years im-
mediately preceding the date of his last exposure thereto.
If a claim for occupational pneumoconiosis benefits be
filed by an employee within three years from and after
the employee's occupational pneumoconiosis was made
known to him by a physician or otherwise should have
reasonably been known to him, the commissioner shall
determine whether the claimant filed his application
within said period and whether in the state of West
Virginia the claimant was exposed to such hazard over a continuous period of not less than two years during the ten years immediately preceding the date of last exposure thereto and whether the claimant was exposed to such hazard over a period of not less than ten years during the fifteen years immediately preceding the date of last exposure thereto. If a claim for occupational pneumoconiosis benefits be filed by a dependent of a deceased employee, the commissioner shall determine whether the deceased employee was exposed to the hazards of occupational pneumoconiosis for a continuous period of not less than sixty days while in the employ of the employer within ten years prior to the filing of the claim, whether in the state of West Virginia the deceased employee was exposed to such hazard over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure thereto and whether the claimant was exposed to such hazard over a period of not less than ten years during the fifteen years immediately preceding the date of his last exposure thereto. The commissioner shall also de-
termine such other nonmedical facts as may in his opinion be pertinent to a decision on the validity of the claim.

The commissioner shall give each interested party notice in writing of his findings with respect to all such nonmedical facts and such findings and such action of the commissioner shall be final unless the employer, employee, claimant or dependent shall, within fifteen days after receipt of such notice, object to such findings. Upon receipt of such objection the commissioner shall set a hearing as provided in section one, article five of this chapter.

§23-4-16. Commissioner's jurisdiction over case continuous; modification of finding or order; time limitation on awards; reimbursement of claimant for expenses.

1 The power and jurisdiction of the commissioner over each case shall be continuing and he may from time to time, after due notice to the employer, make such modifications or changes with respect to former findings or orders as may be justified: Provided, That no further award may be made in fatal cases arising after March
seventh, one thousand nine hundred twenty-nine, except within two years after the death of the employee, or in case of non-fatal injuries, on and after March seventh, one thousand nine hundred twenty-nine, except within three years after payments for temporary disability shall have ceased or not more than two times within five years after the commissioner shall have made the last payment in the original award or any subsequent increase thereto in any permanent disability case:

Provided, however, That no such modification or change may be made in any case in which no award has been made, except within three years after the date of injury. In any case in which an injured employee shall make application for a further adjustment of his claim, if such application be in writing and filed within the applicable time limit as prescribed herein, the commissioner shall pass upon and determine the merits of such application within thirty days after the filing thereof.

If such application is based on a report of any medical examination made of the claimant and submitted by
the claimant to the commissioner in support of his application, and the claim is opened for further consideration and additional award is later made, the claimant shall be reimbursed for the expenses of such examination. Such reimbursement shall be made by the commissioner to the claimant, in addition to all other benefits awarded, upon due proof of the amount thereof being furnished the commissioner by the claimant, but shall in no case exceed the sum of one hundred dollars.

§23-4-16a. Interest on benefits.

1 Whenever any award of temporary total, permanent partial or permanent total disability benefits or dependent benefits is made on or after July one, one thousand nine hundred seventy-one, and a protest is filed thereto or an appeal is taken therefrom by an employer only and not by the claimant or dependent and the award is not ultimately denied or reduced following such protest or appeal, the commissioner shall add thereto interest at the simple rate of six percent per annum from the date the award would have been payable had such protest or appeal not been filed or taken, exclusive of any period for
which a continuance was granted upon motion of any
party other than the protesting or appealing employer.
Any interest payable shall be charged to the account of
the protesting or appealing employer to the extent that
the benefits upon which such interest is computed are
charged to the account of such employer.

ARTICLE 4A. DISABLED WORKMEN'S RELIEF FUND.

§23-4A-1. Disabled workmen's relief fund created.

For the relief of persons who are receiving workmen's
compensation benefits by virtue of and under the laws of
this state in amounts less than the minimum amount pay-
able under the laws in effect on July one, one thousand
nine hundred sixty-one, there is hereby created a separate
fund to be known as the "Disabled Workmen's Relief
Fund," which fund shall consist of such sums as are from
time to time made available to carry out the objects and
purposes of this article. Said fund shall be in the custody
of the state treasurer and disbursements therefrom shall
be made upon requisition signed by the commissioner to
those persons entitled to participate therein and in such
amounts to each participant as is provided in section three of this article.

§23-4A-2. To whom benefits paid.

1 In order to participate in the disabled workmen's relief fund, an individual must be receiving workmen's compensation benefits by virtue of and under the laws of this state in amounts less than the minimum amount payable under the laws in effect on July one, one thousand nine hundred sixty-one, and be receiving such benefits under a permanent total disability award or be receiving such benefits because of the death of an employee.


1 Each individual entitled to participate in the disabled workmen's relief fund shall be entitled to receive payments without application (except that an application shall be required under section five of this article) from said fund of an amount equal to the difference between the minimum amount payable under the rates in effect as of July one, one thousand nine hundred sixty-one, and the amount said individual is in fact receiving by virtue of and under the laws of this state. The first such payment
shall be made concurrently with the payment to him of workmen's compensation for the period next following the expiration of the twelfth calendar week after this article becomes effective and subsequent payments shall be made during the period thereafter in which such participant shall be entitled to workmen's compensation benefits by virtue of and under the laws of this state.


Payments to an individual entitled to participate in the disabled workmen's relief fund may be made from said fund by separate check or may be made from said fund and from the workmen's compensation fund by one check, but each such check drawn on the two funds shall be so written as to show plainly the payments made from each fund. No disbursements shall be made from the workmen's compensation fund on account of any provisions of this article.

§23-4A-5. Employers providing own system of compensation.

The commissioner shall promptly require of each employer who has elected to pay compensation direct under the provisions of section nine, article two of this chapter a
verified list of the names and addresses of all persons to whom such employer is paying workmen's compensation on account of permanent total disability or because of the death of an employee and such evidence respecting such persons as the commissioner may reasonably deem necessary to determine the eligibility of any such person to participate in the disabled workmen's relief fund. Any person claiming the right to participate in said fund under the provisions of this section may file his application therewith the commissioner and shall be accorded a hearing thereon.


In the investigation and determination of the right of persons to participate in the disabled workmen's relief fund, the commissioner shall have and exercise all the powers which he possesses under the other articles of this chapter. His powers and jurisdiction over each case shall be continuing, but there shall be no appeal from his decisions to any other body or tribunal. No attorney, representative or agent of any claimant or participant shall be entitled to charge or receive a fee or compensation or
gratuity in any form for representing or assisting or pre-
tending to represent or assist any person to become a
participant in said disabled workmen's relief fund.

§23-4A-7. Employees to administer disabled workmen's relief
fund; payment of salaries.

The commissioner shall employ such employees as may
be necessary to discharge his duties and responsibilities
under this article. The salaries and expenses of such em-
ployees shall be paid by the treasurer of the state from
the disabled workmen's relief fund upon vouchers auth-
orized and signed as provided in section two, article one
of this chapter.

§23-4A-8. Disabled workmen's relief fund; how funded.

For the purpose of carrying out the provisions of this
article, the commissioner shall transfer annually, out of
the interest earned during the previous year on invest-
ments held by the workmen's compensation fund, an
amount estimated by the commissioner to be necessary
to carry out the provisions of this article for one year.
Such money shall be deposited by the commissioner in
the disabled workmen's relief fund, as required by this
article.
ARTICLE 5. REVIEW.

§23-5-1. Notice by commissioner of decision; objections and hearing; appeal.

1 The commissioner shall have full power and authority
2 to hear and determine all questions within his jurisdic-
3 tion, but upon the making or refusing to make any
4 award, or upon the making of any modification or change
5 with respect to former findings or orders, as provided
6 by section sixteen, article four of this chapter, the com-
7 missioner shall give notice, in writing, to the employer,
8 employee, claimant, or dependent, as the case may be,
9 of his action, which notice shall state the time allowed
10 for filing an objection to such finding, and such action
11 of the commissioner shall be final unless the employer,
12 employee, claimant or dependent shall, within thirty
13 days after the receipt of such notice, object, in writ-
14 ing, to such finding. Upon receipt of such objection the
15 commissioner shall, within thirty days from receipt
16 thereof, set a time and place for the hearing of evidence.
17 Any such hearing may be conducted by the commis-
18 sioner or his duly authorized representative at the coun-
19 ty seat of the county wherein the injury occurred, or
at any other place which may be agreed upon by the
interested parties, and in the event the interested parties
cannot agree, and it appears in the opinion of the com-
missioner that the ends of justice require the taking
of evidence elsewhere, then at such place as the com-
missioner may direct, having due regard for the con-
venience of witnesses. Both the employer and claimant
shall be notified of such hearing at least ten days in
advance, and the hearing shall be held within sixty
days after the filing of objection to the commissioner's
findings as hereinabove provided, unless such hearing
be postponed by agreement of the parties or by the com-
missioner for good cause. The evidence taken at such
hearing shall be transcribed and become part of the
record of the proceedings, together with the other
records thereof in the commissioner's office. At any time
within forty-five days after hearing, if the commissioner
is of the opinion that the facts have not been adequately
developed at such hearing, he may order supplemental
hearing upon due notice to the parties. After final
hearing the commissioner shall, within forty-five days,
render his decision affirming, reversing or modifying, his former action, which shall be final: Provided, That the claimant or the employer may apply to the appeal board herein created for a review of such decision; but no appeal or review shall lie unless application therefor be made within thirty days of receipt of notice of the commissioner's final action, or in any event within sixty days of the date of such final action, regardless of notice.

After protest by the employer only to any finding or determination of the commissioner made on or after July one, one thousand nine hundred seventy-one, and the employer does not prevail in its protest and, in the event the claimant is required to attend a hearing by subpoena or agreement of counsel or at the express direction of the commissioner, then such claimant in addition to reasonable traveling and other expenses shall be reimbursed for loss of wages incurred by him in attending such hearing.


There shall be a board to be known as the "Workmen's Compensation Appeal Board", which shall be referred
to in this article as the "board", to be composed of three members, none of whom shall be a contributor to the compensation fund or in any way connected with a contributor thereto and none of whom shall be a beneficiary of the compensation fund or in any way connected with a beneficiary thereof. Two members of such board shall be of opposite politics to the third, and all three shall be citizens of this state who have resided therein for a period of at least five years. All members of the board shall be appointed by the governor for a term of six years. The governor is hereby vested with the power to remove any member of the board in accordance with the provisions of section four, article six, chapter six of this code. Notwithstanding the provisions of section two-a, article seven, chapter six of this code, they shall each receive an annual salary of seven thousand five hundred dollars, payable in monthly installments, and shall also be entitled to reasonable and necessary traveling and other expenses incurred while actually engaged in the performance of their duties. The governor shall designate one of the members of the board as
chairman thereof, and the board shall meet at the capitol or at such other places throughout the state as it may deem proper at regular sessions commencing on the first Tuesday in February, April, June, August, October and December, and continuing as long as may be necessary for the proper and expeditious transaction of the business before it. All clerical services required by the board shall be paid for by the compensation commissioner from any funds at his disposal. The board shall, from time to time, compile and promulgate such rules of practice and procedure as to it shall appear proper for the prompt and efficient discharge of its business and such rules shall be submitted to the supreme court of appeals for approval, and if approved by such court shall have the same force and effect as the approved rules of procedure of circuit courts. The board shall employ such clerical staff as may be necessary for the efficient conduct of its business but the number of such employees shall not exceed two. Salaries of the board, and its employees, and all of its necessary operating expense shall be paid from the workmen’s compensation
The board shall submit its annual budget to the state compensation commissioner for inclusion as a separate item in the budget estimates prepared by him annually and within the limits of such budget, all expenses of the board shall be by the requisition of the commissioner. Salaries of the employees of the board shall be fixed by the board.

§23-5-3a. Continuances.

It is the policy of this chapter that the rights of claimants for workmen's compensation be determined as speedily and expeditiously as possible to the end that those incapacitated by injuries and the dependents of deceased workmen may receive benefits as quickly as possible in view of the severe economic hardships which immediately befall the families of injured or deceased workmen. Therefore, the criteria for continuances and supplemental hearings "for good cause shown" are to be strictly construed by the commissioner and his authorized representatives to prevent delay, in granting or denying continuances and supplemental hearings. It is also the policy of this chapter to prohibit the denial of just claims
§23-5-5. Fees of attorney for claimant.

1 On or after July one, one thousand nine hundred seventy-one, no attorney's fee in excess of twenty-five percent of any award granted shall be charged or received by an attorney for a claimant or dependent. In the event of any award to be paid for the remainder of the life of the claimant or in the event of any award to a dependent of an employee, an attorney's fee shall not be charged or received by the attorney of such claimant or dependent in excess of twenty-five percent of the benefits to be paid during a period of two hundred eight weeks. This paragraph shall not apply to awards made prior to July one, one thousand nine hundred seventy-one: Provided, That the interest on disability or dependent benefits as provided for in this chapter shall not be considered as part of the award in determining any such attorney's fee.

ARTICLE 6. SEVERABILITY.

§23-6-1. Severability.

1 If any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional
3 or invalid, such unconstitutionality or invalidity shall not
4 affect other provisions or applications of the chapter, and
5 to this end the provisions of this chapter are declared to
6 be severable.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the House.

Takes effect July 1, 1971.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within approved this the 1st day of April, 1971.

Governor