WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1986

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ENROLLED

HOUSE BILL No. 2179...

(By Mr. Del Chambers & Del Damon)

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Passed

March 7, 1986

In Effect

From Passage
ENROLLED

H. B. 2179

(By Delegate Chambers and Delegate Damron)

[Passed March 7, 1986; in effect from passage.]

AN ACT to amend and reenact sections one, one-a, one-b and five, article two, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections one-c, one-d, four, six, seven-a, eight-c, nine-b, fifteen, fifteen-b, article four of said chapter; and to further amend said article four by adding thereto three new sections, designated sections one-e, six-b and six-c; to amend and reenact sections one, one-b, one-d, three and four, article five of said chapter; and to further amend said article five by adding thereto a new section, designated section one-e, all relating generally to workers' compensation; specifying the employers and employees who are made subject to said chapter; providing certain rules with respect to coverage of executive officers of certain employers; the payment and assessment of premiums to the commission and prescribing certain rules with respect to the assessment of delinquent premiums; prescribing certain penalties for interest and claims losses during periods of delinquency and default with respect to such premium payments; procedures for the payment of temporary total disability benefits; requiring certain notices be given employers and employees with respect thereto; requiring certain findings to be made by the commissioner with respect to such disability benefits and medical benefits with respect to such disability; providing for periods of filing timely objec-
tions to certain orders of the commissioner with respect to the compensability of total temporary disability benefits or any new modifications of such orders; prohibiting the payment of temporary total disability benefits for periods when claimant is incarcerated in penitentiary or jail; increasing the amount of benefits paid for funeral expenses; the classification of certain disability benefits and the manner of computing the amount of permanent disability awards, either permanent or partial; prescribing the percentage of disability with respect to the total loss of hearing of one or both ears; providing certain statutory rules with respect to occupational hearing loss claims; the manner of computing the percentage of permanent disability for both monaural and binaural hearing loss and the effect of speech discrimination, if any, with respect to permanent partial disability awards in connection with binaural impairment; prescribing certain rules with respect to the application for benefits for hearing loss and procedures to be followed with respect thereto; providing an operative date for the provisions of said section six-b, article four, relating to hearing loss claims and the filing of application for benefits therefor; prescribing certain limitations upon benefits payable to certain employees of sheltered workshops; providing for the monitoring of certain temporary total disability benefits and the modification or termination of such benefits; prescribing certain rules with respect to such termination or modification; the effect of the recommendations of certain authorized treating physicians and of independent medical evaluations upon such temporary total disability benefit awards; providing for certain restrictions of the commission, the commissioner, the workers compensation appeal board and the supreme court of appeals for failure to file timely certain objections, notices and appeals; the effect of certain preexisting impairments upon subsequent compensable occupational injuries or diseases and upon claims made therefor; providing certain exceptions with respect to limiting the reopening of a claim or for objections and appeals and permitting extensions thereof in certain cases; the procedures of the workers' compensation
appeal board and its jurisdiction; and procedures for appeals to the West Virginia supreme court of appeals and the time thereof and the payment of certain costs attendant thereto.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 2. EMPLOYERS AND EMPLOYEES SUBJECT TO CHAPTER, EXTRATERRITORIAL COVERAGE.

§23-2-1. Employers subject to chapter.

1 The state of West Virginia and all governmental agencies or departments created by it, including county boards of education, political subdivisions of the state, any volunteer fire department or company and other emergency service organizations as defined by article five, chapter fifteen of this Code, and all persons, firms, associations and corporations regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state, are employers within the meaning of this chapter and are hereby required to subscribe to and pay premiums into the workers’ compensation fund for the protection of their employees and shall be subject to all requirements of this chapter and all rules and regulations prescribed by the commissioner with reference to rate, classification and premium payment: Provided, That such rates will be adjusted by the commissioner to reflect the demand on the compensation fund by the covered employer.

20 The following employers are not required to subscribe to the fund, but may elect to do so:
(1) Employers of employees in domestic services; or
(2) Employers of five or fewer full-time employees in agricultural service; or
(3) Employers of employees while said employees are employed without the State except in cases of temporary employment without the State; or
(4) Casual employers. An employer is deemed to be a casual employer when the number of his employees does not exceed three and the period of employment is temporary, intermittent and sporadic in nature and does not exceed ten calendar days in any calendar quarter;
(5) Churches;
(6) Employers engaged in organized professional sports activities, including employers of trainers and jockeys engaged in thoroughbred horse racing; or
(7) Employers of employees who are officers of and stockholders in a corporation qualifying for special tax treatment under subchapter S of the Internal Revenue Code of the United States.

If an employer is a partnership, sole proprietorship, association or corporation, such employer may elect to include as an “employee” within this chapter, any member of such partnership, the owner of the sole proprietorship, or any corporate or executive officer of the association or corporation. In the event of such election, the employer shall serve upon the commissioner written notice naming the persons to be covered and shall include such “employee’s” remuneration for premium purposes in all future payroll reports, and no such partner, proprietor or corporate or executive officer shall be deemed an employee within the meaning of this chapter until such notice has been served.

Notwithstanding any other provision of this chapter to the contrary, whenever there are churches in a circuit which employ one individual clergyman and the payments to such clergyman from such churches constitute his full salary, such circuit or group of churches may elect to be considered a single employer for the purpose
Employers who are not required to subscribe to the workers' compensation fund may voluntarily choose to subscribe to and pay premiums into the fund for the protection of their employees and in such case shall be subject to all requirements of this chapter and all rules and regulations prescribed by the commissioner with reference to rates, classifications and premium payments and shall afford to them the protection of this chapter, including section six of this article, but the failure of such employers to choose to subscribe to and to pay premiums into the fund shall not impose any liability upon them other than such liability as would exist notwithstanding the provisions of this chapter.

Any foreign corporation employer whose employment in this State is to be for a definite or limited period which could not be considered "regularly employing" within the meaning of this section may choose to pay into the workers' compensation fund the premiums herein provided for, and at the time of making application to the commissioner, such employer shall furnish a statement under oath showing the probable length of time the employment will continue in this State, the character of the work, an estimate of the monthly payroll and any other information which may be required by the commissioner. At the time of making application such employer shall deposit with the state compensation commissioner to the credit of the workers' compensation fund the amount required by section five of this article, which amount shall be returned to the employer if his application be rejected by the commissioner. Upon notice to such employer of the acceptance of his application by the commissioner, he shall be an employer within the meaning of this chapter and subject to all of its provisions.

Any foreign corporation employer choosing to comply with the provisions of this chapter and to receive the benefits hereunder shall, at the time of making application to the commissioner, in addition to other requirements of this chapter, furnish such commissioner with
a certificate from the secretary of state, where such certificate is necessary, showing that it has complied with all the requirements necessary to enable it legally to do business in this state and no application of such foreign corporation employer shall be accepted by the commissioner until such certificate is filed.

§23-2-1a. Employees subject to chapter.

Employees subject to this chapter are all persons in the service of employers and employed by them for the purpose of carrying on the industry, business, service or work in which they are engaged, including, but not limited to persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state, every person in the service of the state or of any political subdivision or agency thereof, under any contract of hire, express or implied, and every official or officer thereof, whether elected or appointed, while performing his official duties, checkweighmen employed according to law, all members of rescue teams assisting in mine accidents with the consent of the owner who, in such case, shall be deemed the employer, or at the direction of the director of the department of mines and all forest fire fighters who, under the supervision of the director of the department of natural resources or his designated representative, assist in the prevention, confinement and suppression of any forest fire.

The right to receive compensation under this chapter shall not be affected by the fact that a minor is employed or is permitted to be employed in violation of the laws of this State relating to the employment of minors, or that he obtained his employment by misrepresenting his age.

§23-2-1b. Special provisions as to premiums.

Every executive officer of an association or of a corporation, any member of a partnership or owner of a sole proprietorship which has elected coverage under this chapter for such member or owner shall pay premiums based upon the actual salary paid to such employee up to an amount sufficient to qualify such
employee to receive the maximum level of benefits, but
in no event shall the basis for premium be less than the
salary necessary to provide such employee with the
minimum level of benefits.

The premium and actual expenses in connection with
governmental agencies and departments of the state of
West Virginia shall be paid out of the state treasury
from appropriations made for such agencies and
departments, in the same manner as other disburse-
ments are made by such agencies and departments.

County commissions, municipalities, other political
subdivisions of the state, county boards of education,
emergency service organizations organized as aforesaid
and volunteer fire departments or companies shall
provide for the funds to pay their prescribed premiums
into the fund and such premiums and premiums of state
agencies and departments, including county boards of
education, shall be paid into the fund in the same
manner as herein provided for other employers subject
to this chapter.

County commissions and municipalities are hereby
authorized to pay all or any part of the premiums
prescribed for such emergency service organizations
organized as aforesaid and such duly incorporated
volunteer fire departments or companies as may provide
services within the county or municipality.

§23-2-5. Application; payment of premiums; payroll
report; premiums; deposits; delinquency;
default; reinstatement; payment of benefits;
notice to employees.

(a) For the purpose of creating a workers' compensa-
tion fund each employer who is required to subscribe to
the fund or who elects to subscribe to the fund, shall pay
premiums calculated as a percentage of the employer's
payroll at the rate determined by the commissioner and
then in effect. At the time each employer subscribes to
the fund, the application required by the commissioner
shall be filed and a premium deposit equal to the first
quarter's estimated premium payment shall be remit-
ted. The minimum quarterly premium to be paid by any
employer shall be ten dollars.

Thereafter, premiums shall be paid quarterly on or before the last day of the month following the end of the quarter, and shall be the prescribed percentage of the total earnings of all employees during the preceding quarter.

At the time each premium is paid, every subscribing employer shall make a payroll report to the commissioner for the preceding quarter. The report shall be on the form or forms prescribed by the commissioner, and shall contain all information required by the commissioner.

After subscribing to the fund, each employer shall remit with each payroll report and premium payment, an amount calculated to be sufficient to maintain a premium deposit equal to the previous quarter's premium payment: Provided, That the commissioner may reduce the amount of the premium deposit required from seasonal employers for those quarters during which employment is significantly reduced. The premium deposit shall be credited to the employer's account on the books of the commissioner and used to pay premiums and any other sums due the fund when an employer becomes delinquent.

All premiums and premium deposits required to be paid by this chapter shall be paid by the employers to the workers' compensation commissioner, who shall maintain record of all sums so received. All sums received by the commissioner shall be deposited in the state treasury to the credit of the workers' compensation fund in the manner now prescribed by law.

(b) Failure of an employer to timely pay premium, to timely file a payroll report, or to maintain an adequate premium deposit, shall cause the employer's account to become delinquent. No employer will be declared delinquent or be assessed any penalty therefor if the commissioner determines that such delinquency has been caused by delays in the administration of the fund. The commissioner shall, in writing, within sixty days of the end of each quarter notify all delinquent employers
of their failure to timely pay premiums, to timely file a payroll report, or to maintain an adequate premium deposit. The notification shall demand the filing of the delinquent payroll report and payment of delinquent premiums, and/or payment of an amount sufficient to maintain the premium deposit, before the end of the third month following the end of the preceding quarter. The notification shall also require payment of interest on the delinquent premium payment and/or premium deposit pursuant to section thirteen of this article.

(c) Whenever the commissioner notifies an employer of the delinquent status of his account, the notification shall explain the legal consequence of subsequent default by employers required to subscribe to the fund, and the effects of termination of any electing employer's account.

(d) Failure by the employer, who is required to subscribe to the fund and who fails to resolve his delinquency within the prescribed period, shall place the account in default and shall deprive such defaulting employer of the benefits and protection afforded by this chapter including section six of this article, and he shall be liable as provided in section eight of this article. The defaulting employer's liability under section eight of this article shall be retroactive to twelve o'clock p.m., of the last day of the month following the end of the quarter for which the delinquency occurs. The commissioner shall notify the defaulting employer of the method by which the employer may be reinstated with the fund. The commissioner shall also notify the employees of such employer by written notice as hereinafter provided for in this section.

(e) Failure by any employer, who voluntarily elects to subscribe, to resolve his delinquency within the prescribed period, shall automatically terminate the election of such employer to pay into the workers' compensation fund and shall deprive such delinquent employer of the benefits and protection afforded by this chapter including section six of this article, and he shall be liable as provided in section eight of this article. The defaulting employer's liability under section eight of this article
shall be retroactive to twelve o'clock p.m., of the last day of the month following the end of the quarter for which the delinquency occurs.

(f) Any employer, who is required to subscribe to the fund and subsequently defaults, or who elects to subscribe and subsequently his account is terminated, shall be restored immediately to the benefits and protection of this chapter only upon the filing of all delinquent payroll and other reports required by the commissioner and payment into the fund of all unpaid premiums, an adequate premium deposit, accrued interest and claims losses paid during the period of delinquency and default: Provided, That the penalty for interest and claims losses paid by the fund during the period of delinquency and default shall not exceed an amount equal to fifty percent of the premium otherwise due and owing for the period of delinquency and default: Provided, however, That the period for which such penalty is assessed may be limited to a period of five (5) years immediately preceding the date of the commissioner’s receipt of the employer’s application for reinstatement. The commissioner shall, upon written application for reinstatement filed by an employer, order that an administrative hearing be held prior to reinstatement to determine the terms of repayment of all delinquent premiums, premium deposits and accrued interest, and the extent to which interest and claims losses may be waived, equitably considering, (1) the exact nature of the default, (2) the amount of the claims losses, (3) the solvency of the fund, (4) the financial condition of the employer, (5) the degree of willfullness exhibited by the employer’s conduct resulting in the default, and (6) the potential economic impact upon the state and the specific geographic area in which the employer is located, if the employer should cease operations. Any such administrative hearing shall be conducted pursuant to article five, chapter twenty-nine-a of this code.

Applications for reinstatement shall: (1) Be made upon forms prescribed by the commissioner; (2) include a report of the gross payroll of the employer during the
entire period of default, which payroll information shall be verified by the employer or its authorized agent; and

(3) include a payment equal to one half of one percent of the gross payroll reported during the period of default, or one hundred dollars, whichever amount shall be greater. An employer who applies for reinstatement shall be entitled to the benefits and protection of this chapter on the day the application is received by the commissioner: Provided, That if the commissioner reinstates an employer subject to the terms of a repayment agreement, the subsequent failure of the employer to make scheduled payments in accordance with the repayment agreement, to timely file current premiums or to restore the premium deposit to the required amount by the end of the repayment period shall cause the repayment agreement to be null, void and of no effect, and the employer shall be denied the benefits and protection of this chapter effective from the date that such employer's account originally became delinquent.

(g) No employee of an employer required by this chapter to subscribe to the workers' compensation fund shall be denied benefits provided by this chapter because the employer failed to subscribe or because the employer's account is either delinquent or in default.

(h) The provisions of this section shall not deprive any individual of any cause of action which has accrued as a result of an injury or death which occurred during any period of delinquency not resolved in accordance with the provisions of this article, or subsequent failure to comply with the terms of the repayment agreement.

Upon withdrawal from the fund or termination of election of any employer, he shall be refunded the balance due him of his deposit, after deducting all amounts owed by him to the workers' compensation fund, and the commissioner shall notify the employees of such employer of said termination in such manner as he may deem best and sufficient.

Notice to employees in this section provided for shall be given by posting written notice that the employer is
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173 delinquent under the compensation law of West Vir-
174 ginia, and in the case of employers required by this
175 chapter to subscribe and pay premiums to the fund, that
176 the delinquent employer is liable to his employees for
177 injury or death, both in workers' compensation benefits
178 and in damages at common law or by statute; and, in
179 the case of employers not required by this chapter to
180 subscribe and pay premiums to the fund, but voluntarily
181 electing to do so as herein provided, that neither the
182 employer nor the employees of such employer are
183 protected by said laws as to any injury or death
184 sustained after the date specified in said notice. Such
185 notice shall be in the form prescribed by the commis-
186 sioner and shall be posted in a conspicuous place at the
187 chief works of the employer, as the same appear in
188 records of the commissioner. If the said chief works of
189 the employer cannot be found or identified, then said
190 notices shall be posted at the front door of the courthouse
191 of the county in which said chief works are located,
192 according to the records in the commissioner's office.
193 Any person who shall, prior to the reinstatement of the
194 said employer, as hereinbefore provided for, or prior to
195 sixty days after the posting of said notice whichever
196 shall first occur, remove, deface, or render illegible the
197 said notice, shall be guilty of a misdemeanor, and, upon
198 conviction thereof, shall be fined not to exceed five
199 hundred dollars, and the said notice shall state this
200 provision upon its face. The commissioner may require
201 any sheriff, deputy sheriff, constable or other official of
202 the State of West Virginia, who may be authorized to
203 serve civil process, to post such notice and to make
204 return thereof of the fact of such posting to the
205 commissioner, and any failure of such officer to post any
206 notice within ten days after he shall have received the
207 same from the commissioner, without just cause or
208 excuse, shall constitute a willful failure or refusal to
209 perform a duty required of him by law within the
210 meaning of section twenty-eight, article five chapter
211 sixty-one of this code. Any person actually injured by
212 reason of such failure shall have an action against said
213 official, and upon any official bond he may have given,
214 for such damages as such person may actually have
incurred, but not to exceed, in the case of any surety upon said bond, the amount of the penalty of said bond.

Any official posting said notice as herein required shall be entitled to the same fee as is now or may hereafter be provided for the service of process in suits instituted in courts of record in the State of West Virginia, which fee shall be paid by the commissioner out of any funds at his disposal, but shall be charged by him against the account of the employer to whose delinquency such notice relates.

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

§23-4-1c. Payment of temporary total disability benefits directly to claimant; payment of medical benefits; payments of benefits during protest; right of commissioner to collect payments improperly made.

(a) In any claim for benefits under this chapter, the commissioner shall determine whether the claimant has sustained a compensable injury within the meaning of section one of this article, and he shall enter an order giving all parties immediate notice of such decision. Any party shall have the right to protest the order of the commissioner and obtain an evidentiary hearing as provided in section one, article five of this chapter.

(b) Where it appears from the employer's report, or from proper medical evidence, that a compensable injury will result in a disability which will last longer than three days as provided in section five of this article, the commissioner may immediately enter an order commencing the payment of temporary total disability benefits to the claimant in the amounts provided for in sections six and fourteen of this article, and payment of the expenses provided for in subdivision (a), section three of this article, relating to said injury, without waiting for the expiration of the thirty-day period during which objections may be filed to such findings as provided in section one, article five of this chapter. The commissioner shall enter an order commencing the payment of temporary total disability or medical benefits within fifteen days of receipt of either the
employee's or employer's report of injury, whichever is received sooner, and also upon receipt of either a proper physician's report or any other information necessary for a determination. The commissioner shall give to the parties immediate notice of any order granting temporary total disability or medical benefits.

(c) The commissioner may enter orders granting temporary total disability benefits upon receipt of medical evidence justifying the payment of such benefits. In no claim shall the commissioner enter an order granting prospective temporary total disability benefits for a period of more than ninety days: Provided, That when the commissioner determines that the claimant remains disabled beyond the period specified in the prior order granting temporary total disability benefits, the commissioner shall enter an order continuing the payment of temporary total disability benefits for an additional period not to exceed ninety days, and shall give immediate notice to all parties of such decision.

(d) Upon receipt of the first report of injury in a claim, the commissioner shall request from the employer or employers any wage information necessary for determining the rate of benefits to which the employee is entitled. If an employer does not furnish the commissioner with this information within fifteen days from the date the commissioner received the first report of injury in the case, the employee shall be paid temporary total disability benefits for lost time at the rate the commissioner believes would be justified by the usual rate of pay for the occupation of the injured employee. The commissioner shall adjust the rate of benefits both retroactively and prospectively upon receipt of proper wage information. The commissioner shall have access to all wage information in the possession of any state agency, including wage information received by the department of employment security under chapter twenty-one-a of this code, pertinent to such determination.

(e) Upon a finding of the commissioner that a claimant who has sustained a previous compensable injury which
has been closed by any order of the commissioner, or by
the claimant's return to work, suffers further temporary
total disability or requires further medical or hospital
treatment resulting from the compensable injury, the
commissioner shall immediately enter an order com-
mening the payment of temporary total disability
benefits to the claimant in the amount provided for in
sections six and fourteen of this article, and the expenses
provided for in subdivision (a), section three of this
article, relating to said disability, without waiting for
the expiration of the thirty-day period during which
objections may be filed to such findings as provided in
section one, article five of this chapter. The commis-
sioner shall give immediate notice to the parties of his
order.

(f) Where the employer is a subscriber to the workers'
compensation fund under the provisions of article three
of this chapter, and upon the findings aforesaid, the
commissioner shall mail all workers' compensation
checks paying temporary total disability benefits
directly to the claimant and not to the employer for
delivery to the claimant.

(g) Where the employer has elected to carry his own
risk under section nine, article two of this chapter, and
upon the findings aforesaid, the commissioner shall
immediately issue a pay order directing the employer
to pay such amounts as are due the claimant for
temporary total disability benefits. A copy of the order
shall be sent to the claimant. The self-insured employer
shall commence such payments by mailing or delivering
the payments directly to the employee within ten days
of the date of the receipt of the pay order by the
employer. If the self-insured employer believes that his
employee is entitled to benefits, he may start payments
before receiving a pay order from the commissioner.

(h) In the event an employer files a timely objection
to any order of the commissioner with respect to
compensability, or any order denying an application for
modification with respect to temporary total disability
benefits, or with respect to those expenses outlined in
subdivision (a), section three of this article, the commis-
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107 ...ioner shall continue to pay to the claimant such benefits and expenses during the period of such disability. Where it is subsequently found by the commissioner that the claimant was not entitled to receive such temporary total disability benefits or expenses, or any part thereof, so paid, the commissioner shall, when the employer is a subscriber to the fund, credit said employer's account with the amount of the overpayment; and, when the employer has elected to carry its own risk, the commissioner shall refund to such employer the amount of the overpayment. The amounts so credited to a subscriber or repaid to a self-insurer shall be charged by the commissioner to the surplus fund created in section one, article three of this chapter.

121 (i) When the employer has protested the compensability or applied for modification of a temporary total disability benefit award or expenses and the final decision in such case determines that the claimant was not entitled to such benefits or expenses, the amount of such benefits or expenses shall be deemed overpaid. The commissioner may only recover the amount of such benefits or expenses by withholding, in whole or in part, as determined by the commissioner, future permanent partial disability benefits payable to the individual in the same or other claims and credit such amount against the overpayment until it is repaid in full.

133 (j) In the event that the commissioner finds that based upon the employer's report of injury, the claim is not compensable, the commissioner shall provide a copy of such employer's report in addition to the order denying the claim.

§23-4-1d. Method and time of payments for permanent disability.

1 (a) If the commissioner makes an award for permanent partial or permanent total disability, the commissioner or self-insured employer shall start payment of benefits by mailing or delivering the amount due directly to the employee within fifteen days from the date of the award.

7 (b) If a timely protest to the award is filed, as provided
in section one, article five of this chapter, the commission or self-insured employer shall continue to pay to the claimant such benefits during the period of such disability unless it is subsequently found by the commissioner that the claimant was not entitled to receive the benefits, or any part thereof, so paid, in which event the commissioner shall, where the employer is a subscriber to the fund, credit said employer's account with the amount of the overpayment; and, where the employer has elected to carry his own risk, the commissioner shall refund to such employer the amount of the overpayment. The amounts so credited to a subscriber or repaid to a self-insurer shall be charged by the commissioner to the surplus fund created by section one, article three of this chapter. If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him pursuant to a prior decision, such amount of benefits so paid shall be deemed overpaid. The commissioner may only recover such amount by withholding, in whole or in part, as determined by the commissioner, future permanent partial disability benefits payable to the individual in the same or other claims and credit such amount against the overpayment until it is repaid in full.

§23-4-1e. Temporary total disability benefits not to be paid for periods of penitentiary or jail confinement.

Notwithstanding any provision of this code to the contrary, no person shall be jurisdictionally entitled to temporary total disability benefits for that period of time in excess of three days during which such person is incarcerated in a penitentiary or jail: Provided, That incarceration shall not affect the claimant's eligibility for payment of expenses. Upon release from confinement, the payment of benefits for the remaining period of temporary total disability shall be made if justified by the evidence and authorized by order of the commissioner.

§23-4-4. Funeral expenses.

In case the personal injury causes death, reasonable
funeral expenses, not to exceed three thousand five 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.

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

Where compensation is due an employee under the provisions of this chapter for 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 seventy 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-one, fifty-five percent; on or after July one, one thousand nine hundred seventy-three, sixty percent; on or after July one, one thousand nine hundred seventy-four, eighty percent; on or after July one, one thousand nine hundred seventy-five, one hundred 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; not less than thirty-five dollars per week for injuries occurring on or after July one, one thousand nine hundred seventy-one; not less than forty
dollars per week for injuries occurring on or after July one, one thousand nine hundred seventy-three; not less than forty-five dollars per week for injuries occurring on or after July one, one thousand nine hundred seventy-four; and for injuries occurring on or after July one, one thousand nine hundred seventy-six, thirty-three and one-third percent of the average weekly wage in West Virginia.

(c) Subdivision (b) shall be limited as follows: Aggregate award for a single injury causing temporary disability shall be for a period not exceeding two hundred eight weeks.

(d) If the injury causes permanent total disability, 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. A permanent disability of eighty-five percent or more shall be deemed a permanent total disability for the purpose of this section. Under no circumstances shall the commissioner grant an additional permanent disability award to a claimant receiving a permanent total disability award, or to a claimant who has previously been granted permanent disability awards totalling eighty-five percent or more and hence is entitled to a permanent total disability award: Provided, That if any such claimant thereafter sustains another compensable injury and has permanent partial disability resulting therefrom, the total permanent disability award benefit rate shall be computed at the highest benefit rate justified by any of the compensable injuries, and the cost of any increase in such permanent total disability benefit rate shall be paid from the second injury reserve created by section one, article three of this chapter.

(e) If the injury causes permanent disability less than permanent total 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, at the following maximum or minimum benefit rates: Seventy 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; on or after July one, one
thousand nine hundred seventy-three, sixty percent; on
or after July one, one thousand nine hundred seventy-
five, sixty-six and two-thirds percent.

The minimum weekly benefit under this subdivision
shall be as provided in subdivision (b) of this section for
temporary total disability.

(f) 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 by the
commissioner, with the following table establishing the
minimum percentage of disability. In determining the
percentage of disability, the commissioner may be
guided by but shall not be limited to the disabilities
enumerated in the following table, and in no event shall
the disability be less than that specified in the following
table:

The loss of a great toe shall be considered a ten
percent disability.

The loss of a great toe (one phalanx) shall be consi-
dered 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 forepart 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 a 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 percentages 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 twenty-two and one-half percent disability. The total and irrecoverable loss of hearing of both ears shall be considered a fifty-five percent disability.

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 commissioner 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.

(g) 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 noncompensable 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, 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.

(h) For the purposes of this chapter, a finding of the occupational pneumoconiosis board shall have the force and effect of an award.

(i) 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 the same proportion and shall be computed and allowed by the commissioner.

(j) The percentage of all permanent disabilities other than those enumerated in subdivision (f) of this section shall be determined by the commissioner, and awards made in accordance with the provisions of subdivision (d) or (e) 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 (f) of this section.

(k) Compensation payable under any subdivision of this section shall not exceed the maximum nor be less than the weekly benefits specified in subdivision (b) of this section.

(1) Except as otherwise specifically provided in this
chapter, temporary total disability benefits payable under subdivision (b) of this section shall not be deductible from permanent partial disability awards payable under subdivision (e) or (f) of this section. Compensation, either temporary total 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 dependants of such injured employee if there be such dependants at the time of death.

(m) 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) or (e).

(n) 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.

§23-4-6b. Occupational hearing loss claims.

(a) In all claims for occupational hearing loss caused by either a single incident of trauma or by exposure to hazardous noise in the course of and resulting from employment, the degree of permanent partial disability, if any, shall be determined in accordance with the provisions of this section and awards made in accordance with the provisions of section six of this article.

(b) The percent of permanent partial disability for a
monaural hearing loss shall be computed in the following manner:

(1) The measured decibel loss of hearing due to injury at the sound frequencies of five hundred, one thousand, two thousand and three thousand hertz shall be determined for the injured ear and the total shall be divided by four to ascertain the average decibel loss;

(2) The percent of monaural hearing impairment for the injured ear shall be calculated by multiplying by one and six-tenths percent the difference by which the aforementioned average decibel loss exceeds twenty-seven and one-half decibels, up to a maximum of one hundred percent hearing impairment, which maximum is reached at ninety decibels; and

(3) The percent of monaural hearing impairment so obtained shall then be multiplied by twenty-two and one-half to ascertain the degree of permanent partial disability.

(c) The percent of permanent partial disability for a binaural hearing loss shall be computed in the following manner:

(1) The measured decibel loss of hearing due to injury at the sound frequencies of five hundred, one thousand, two thousand and three thousand hertz shall be determined for each ear and the total for each ear shall be divided by four to ascertain the average decibel loss for each ear;

(2) The percent of hearing impairment for each ear shall be calculated by multiplying by one and six-tenths percent the difference by which the aforementioned average decibel loss exceeds twenty-seven and one-half decibels, up to a maximum of one hundred percent hearing impairment, which maximum is reached at ninety decibels;

(3) The percent of binaural hearing impairment shall then be calculated by multiplying the smaller percentage (better ear) by five, adding this figure to the larger percentage (poorer ear), and dividing the sum by six; and
(4) The percent of binaural hearing impairment so obtained shall then be multiplied by fifty-five to ascertain the degree of permanent partial disability.

(d) No permanent partial disability benefits shall be granted for tinnitus, psychogenic hearing loss, recruitment or hearing loss above three thousand hertz.

(e) An additional amount of permanent partial disability shall be granted for impairment of speech discrimination, if any. To determine the additional amount for binaural impairment, the percentage of speech discrimination in each ear shall be added together and the result divided by two to calculate the average percentage of speech discrimination, and the permanent partial disability shall be ascertained by reference to the percentage of permanent partial disability in the table below on the line with the percentage of speech discrimination so obtained. To determine the additional amount for monaural impairment, the permanent partial disability shall be ascertained by reference to the percentage of permanent partial disability in the table below on the line with the percentage of speech discrimination in the injured ear.

<table>
<thead>
<tr>
<th>% of Speech Discrimination</th>
<th>% Of Permanent Partial Disability</th>
</tr>
</thead>
<tbody>
<tr>
<td>90%...and up to and including 100%</td>
<td>0%</td>
</tr>
<tr>
<td>80%...and up to but not including 90%</td>
<td>1%</td>
</tr>
<tr>
<td>70%...and up to but not including 80%</td>
<td>3%</td>
</tr>
<tr>
<td>60%...and up to but not including 70%</td>
<td>4%</td>
</tr>
<tr>
<td>0%...and up to but not including 60%</td>
<td>5%</td>
</tr>
</tbody>
</table>

(f) No temporary total disability benefits shall be granted for noise induced hearing loss.

(g) An application for benefits alleging a noise induced hearing loss shall set forth the name of the employer or employers and the time worked for each, and the commissioner shall allocate to and divide any charges resulting from such claim among such employers with whom the claimant sustained exposure to hazardous noise for as much as sixty days during the period of three
years immediately preceding the date of last exposure. The allocation shall be based upon the time of exposure with each employer. In determining the allocation, the commissioner shall consider all the time of employment by each employer during which the claimant was so exposed and not just the time within such three-year period, under the same allocation as is applied in occupational pneumoconiosis cases.

(h) The commissioner shall provide, consistent with current practice, for prompt referral of such claims for evaluation, for all medical reimbursement, and for prompt authorization of hearing enhancement devices.

(i) The provisions of this section and the amendments to section six of the article insofar as applicable to permanent partial disabilities for hearing loss shall be operative as to any claim filed after thirty days from the effective date of this section.

§23-4-6c. Benefits payable to certain sheltered workshop employees; limitations.

Notwithstanding the provisions of section six, six-a or six-b of this article or any other provision of this chapter, the minimum weekly benefit payments under subsection (b), section one of this article shall not apply to employees who work at nonprofit "workshops" as defined in section one, article one, chapter five-a of this code. When compensation is due any such employee, the weekly benefits payable hereunder to such employee may not exceed seventy percent of that employee's actual weekly wages, and in no event may the average weekly wage in West Virginia be the basis upon which to compute the benefits of temporary total disability to employees working for less than the minimum wage.

§23-4-7a. Monitoring of injury claims; legislative findings; review of medical evidence; recommendation of authorized treating physician; independent medical evaluations; temporary total disability benefits and the termination thereof; mandatory action; additional authority.
(a) The Legislature hereby finds and declares that injured claimants should receive the type of treatment needed as promptly as possible; that overpayments of temporary total disability benefits with the resultant hardship created by the requirement of repayment should be minimized; and that to achieve these two objectives, it is essential that the commissioner establish and operate a systematic program for the monitoring of injury claims where the disability continues longer than might ordinarily be expected.

(b) In view of the foregoing findings, the commissioner, in consultation with medical experts, shall establish guidelines as to the anticipated period of disability for the various types of injuries. Each injury claim in which temporary total disability continues beyond the anticipated period of disability so established for the injury involved shall be reviewed by the commissioner. If satisfied, after reviewing the medical evidence, that the claimant would not benefit by an independent medical evaluation, the commissioner shall mark the claim file accordingly and shall diary such claim file as to the next date for required review which shall not exceed sixty days. If the commissioner concludes that the claimant might benefit by an independent medical evaluation, he shall proceed as specified in subsections (d) and (e) of this section.

(c) When the authorized treating physician concludes that the claimant has either reached his maximum degree of improvement or is ready for disability evaluation, or when the claimant has returned to work, such authorized treating physician may recommend a permanent partial disability award for residual impairment relating to and resulting from the compensable injury, and the following provisions shall govern and control:

(1) If the authorized treating physician recommends a permanent partial disability award of fifteen percent or less, the commissioner shall enter an award of permanent partial disability benefits based upon such recommendation and all other available information, and the claimant's entitlement to temporary total
(2) If, however, the authorized treating physician recommends a permanent partial disability award in excess of fifteen percent, or recommends a permanent total disability award, the claimant's entitlement to temporary total disability benefits shall cease upon the receipt by the commissioner of such report and the commissioner shall refer the claimant to a physician or physicians of his selection for independent evaluation prior to the entry of a permanent disability award: Provided, That the claimant shall thereupon receive benefits which shall then be at the permanent partial disability rate as provided in subdivision (e), section six of this article until the entry of a permanent disability award, and which amount of such benefits paid prior to the receipt of such report shall be considered and deemed to be payment of the permanent disability award then granted, if any. In the event that benefits actually paid exceed the amount granted by the permanent partial disability award, claimant shall be entitled to no further benefits by such award but shall not be liable by offset or otherwise for the excess paid.

(d) When the commissioner concludes that an independent medical evaluation is indicated, or that a claimant may be ready for disability evaluation in accordance with other provisions of this chapter, he shall refer the claimant to a physician or physicians of his selection for examination and evaluation. If the physician or physicians so selected recommend continued, additional or different treatment, the recommendation shall be relayed to the claimant and his then treating physician and the recommended treatment may be authorized by the commissioner.

(e) Notwithstanding any provision in subsection (c) of this section, the commissioner shall enter a notice suspending the payment of temporary total disability benefits but providing a reasonable period of time during which the claimant may submit evidence justifying the continued payment of temporary total benefits.
disability benefits when:

(1) The physician or physicians selected by the commissioner conclude that the claimant has reached his maximum degree of improvement; or

(2) When the authorized treating physician shall advise the commissioner that the claimant has reached his maximum degree of improvement or that he is ready for disability evaluation and when the authorized treating physician has not made any recommendation with respect to a permanent disability award as provided in subsection (c) of this section; or

(3) When other evidence submitted to the commissioner justifies a finding that the claimant has reached his maximum degree of improvement: Provided, That in all cases a finding by the commissioner that the claimant has reached his maximum degree of improvement shall terminate the claimant's entitlement to temporary total disability benefits regardless of whether the claimant has been released to return to work: Provided, however, That under no circumstances shall a claimant be entitled to receive temporary total disability benefits either beyond the date he is released to return to work or beyond the date he actually returns to work.

In the event that the medical or other evidence indicates that claimant has a permanent disability, claimant shall thereupon receive benefits which shall then be at the permanent partial disability rate as provided in subdivision (e), section six of this article until entry of a permanent disability award, pursuant to an evaluation by a physician or physicians selected by the commissioner, and which amount of benefits shall be considered and deemed to be payment of the permanent disability award then granted, if any. In the event that benefits actually paid exceed the amount granted under the permanent disability award, claimant shall be entitled to no further benefits by such order but shall not be liable by offset or otherwise for the excess paid.

(f) Notwithstanding the anticipated period of disability established pursuant to the provisions of subsection...
(b) of this section, whenever in any claim temporary
total disability shall continue longer than one hundred
twenty days from the date of injury (or from the date
of the last preceding examination and evaluation
pursuant to the provisions of this subsection or pursuant
to the directions of the commissioner under other
provisions of this chapter), the commissioner shall refer
the claimant to a physician or physicians of his selection
for examination and evaluation in accordance with the
provisions of subsection (d) of this section and the
provisions of subsection (e) shall be fully applicable:
Provided, That the requirement of mandatory examina-
tions and evaluations pursuant to the provisions of this
subsection (f) shall not apply to any claimant who
sustained a brain stem or spinal cord injury with
resultant paralysis or an injury which resulted in an
amputation necessitating a prosthetic appliance.

(g) The provisions of this section are in addition to and
in no way in derogation of the power and authority
vested in the commissioner by other provisions of this
chapter or vested in the employer to have a claimant
examined by a physician or physicians of its selection
and at its expense, or vested in the claimant or employer
to file a protest, under other provisions of this chapter.

§23-4-8c. Occupational pneumoconiosis board reports
and distribution thereof; presumption; find-
ings required of board; objection to findings;
procedure thereon.

(a) The occupational pneumoconiosis board, as soon as
practicable, after it has completed its investigation,
shall make its written report, to the commissioner, of 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 appear
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 from receipt 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. The filing of an objection within the time specified is hereby declared to be a condition of the right to litigate such findings and hence jurisdictional. After the time has expired for the filing of objections to the findings and conclusions of the board, the commissioner shall proceed to act as provided in this chapter. If after the
time has expired for the filing of objections 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 conclusions 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 controvert 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. Preexisting impairments not considered in fixing amount of compensation.

Where an employee has a definitely ascertainable impairment resulting from an occupational or a nonoccupational injury, disease, or any other cause, whether or not disabling, 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 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 preexisting impairment. Nothing in this section shall be construed to require that the degree of such preexisting impairment be definitely ascertained or rated prior to the injury received in the course of and resulting from such employee’s employment or that benefits must have been granted or paid for such preexisting impairment. The degree of such preexisting impairment may be established at any time by competent medical or other evidence. Notwithstanding the foregoing provisions of
this section, if such definitely ascertainable preexisting
impairment resulted from an injury or disease pre-
viously held compensable and such impairment had not
been rated, benefits for such impairment shall be
payable to the claimant by or charged to the employer
in whose employ the injury or disease occurred. The
employee shall also receive from the second injury
reserve created by section one, article three of this
chapter the difference, if any, in the benefit rate
applicable in the more recent claim and the prior claim.


1 To entitle any employee or dependent of a deceased
2 employee to compensation under this chapter, other than
3 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
unless so filed within such two-year period, the right to
compensation under this chapter shall be forever
barred, such time limitation being hereby declared to
be a condition of the right and hence jurisdictional, 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.

To entitle any employee to compensation for occupa-
tional 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, and unless so filed within such three-
year period, the right to compensation under this
chapter shall be forever barred, such time limitation
being hereby declared to be a condition of the right and hence jurisdictional, or, in the case of death, the application shall be filed as aforesaid by the dependent of such employee within two years from and after such employee's death, and such time limitation is a condition of the right and hence jurisdictional.

To entitle any employee to compensation for occupational disease other than 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 day on which the employee was last exposed to the particular occupational hazard involved or within three years from and after the employee's occupational disease was made known to him by a physician or which he should reasonably have known, whichever shall last occur, and unless so filed within such three-year period, the right to compensation under this chapter shall be forever barred, such time limitation being hereby declared to be a condition of the right and hence jurisdictional, or, in case of death, the application shall be filed as aforesaid by the dependent of such employee within two years from and after such employee's death, and such time limitation is a condition of the right and hence jurisdictional.

§23-4-15b. Determination of nonmedical questions by commissioner; claims for occupational pneumoconiosis; hearing.

If a claim for occupational pneumoconiosis benefits 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 immediately preced-
ing 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 em-
ployee’s occupational pneumoconiosis was made known
to him by a physician or otherwise should have reason-
ably 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
determine such other nonmedical facts as may in his
opinion be pertinent to a decision on the validity of the
claim.

The commissioner shall enter an order with respect
to such nonmedical findings within ninety days follow-
ing receipt by the commissioner of both the claimant’s
application for occupational pneumoconiosis benefits
and the physician’s report filed in connection therewith,
and 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, and unless an
objection is filed within such fifteen-day period, such
findings shall be forever final, such time limitation
being hereby declared to be a condition of the right to
litigate such findings and hence jurisdictional. Upon
receipt of such objection, the commissioner shall set a
hearing as provided in section one, article five of this
chapter. In the event of an objection to such findings by
the employer, the claim, shall, notwithstanding the fact
that one or more hearings may be held with respect to
such objection, mature for reference to the occupational
pneumoconiosis board with like effect as if the objection
had not been filed. If the commissioner concludes after
the protest hearings that the claim should be dismissed,
a final order of dismissal shall be entered, which final
order shall be subject to appeal in accordance with the
provisions of section one, article five of this chapter. If
the commissioner concludes after such protest hearings
that the claim should be referred to the occupational
pneumoconiosis board for its review, the order entered
shall be interlocutory only and may be appealed only in
conjunction with an appeal from a final order with
respect to the findings of the occupational pneumono-
iosis board.

ARTICLE 5. REVIEW.

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

The commissioner shall have full power and authority
to hear and determine all questions within his jurisdic-
tion, but upon the making or refusing to make any
award, or upon the making of any modification or
change with respect to former findings or orders, as
provided by section sixteen, article four of this chapter,
the commissioner shall give notice, in writing, to the
employer, employee, claimant or dependent, as the case
may be, of his action, which notice shall state the time
allowed for filing an objection to such finding, and such
action of the commissioner shall be final unless the
employer, employee, claimant or dependent shall, within
thirty days after the receipt of such notice, object in
writing, to such finding, and unless an objection is filed
within such thirty-day period, such finding or action
shall be forever final, such time limitation being hereby
declared to be a condition of the right to litigate such
finding or action and hence jurisdictional. Upon receipt
of such objection the commissioner shall, within fifteen
days from receipt thereof, set a time and place for the
hearing of evidence. Any such hearing may be con-
ducted by the commissioner or his duly authorized
representative at the county 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 commissioner that the ends of
justice require the taking of evidence elsewhere, then at
such place as the commissioner may direct, having due
regard for the convenience 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 thirty 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 commissioner 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 thirty 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 thirty 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, and unless the
application for appeal or review is filed within the time
specified, no such appeal or review shall be allowed, such time limitation being hereby declared to be a condition of the right to such appeal or review and hence jurisdictional.

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.

§23-5-1b. Refusal to reopen claim; notice; objection.

If, however, in any case in which application for further adjustment of a claim is filed under the next preceding section, it shall appear to the commissioner that such application fails to disclose a progression or aggravation in the claimant's condition, or some other fact or facts which were not theretofore considered by the commissioner in his former findings, and which would entitle such claimant to greater benefits than he has already received, the commissioner shall, within sixty days from the receipt of such application, notify the claimant and the employer that such application fails to establish a prima facie cause for reopening the claim. Such notice shall be in writing stating the reasons for denial and the time allowed for objection to such decision of the commissioner. The claimant may, within thirty days after receipt of such notice, object in writing to such finding and unless the objection is filed within such thirty-day period, no such objection shall be allowed, such time limitation being hereby declared to be a condition of the right to such objection and hence jurisdictional. Upon receipt of an objection, the commissioner shall afford the claimant an evidentiary hearing as provided in section one of this article.

§23-5-1d. Refusal of modification; notice; objection.

If in any such case it shall appear to the commissioner
that such application fails to disclose some fact or facts
which were not theretofore considered by the commis-
sioner in his former findings, and which would entitle
such employer to any modification of said previous
award, the commissioner shall, within sixty days from
the receipt of such application, notify the claimant and
employer that such application fails to establish a just
cause for modification of said award. Such notice shall
be in writing stating the reasons for denial and the time
allowed for objection to such decision of the commis-
sioner. The employer may, within thirty days after
receipt of said notice, object in writing to such decision,
and unless the objection is filed within such thirty-day
period, no such objection shall be allowed. such time
limitation being hereby declared to be a condition of the
right to such objection and hence jurisdictional. Upon
receipt of such objection, the commissioner shall afford
the employer an evidentiary hearing as provided in
section one of this article.

§23-5-1e. Time periods for objections and appeals;
extensions.

Notwithstanding the fact that the time periods set
forth for objections, protests, and appeals to or from the
workers' compensation appeal board, are jurisdictional,
such periods may be extended or excused upon appli-
cation of either party within a period of time equal to
the applicable period by requesting an extension of such
time period showing good cause or excusable neglect,
accompanied by the objection, protest, or appeal
petition. In exercising such discretion the commissioner,
appeal board, or court, as the case may be, shall consider
whether the applicant was represented by counsel and
whether timely and proper notice was actually received
by the applicant or the applicant's representative.

§23-5-3. Appeal to board; procedure; remand and supple-
mental hearing.

Any employer, employee, claimant, or dependent, who
shall feel aggrieved at any final action of the commis-
sioner taken after a hearing held in accordance with the
provisions of section one of this article, shall have the
right to appeal to the board created in section two of this article for a review of such action. The aggrieved party shall file a written notice of appeal with the compensation commissioner, directed to such board, within thirty days after receipt of notice of the action complained of, or in any event, regardless of notice, within sixty days after the date of the action complained of, and unless the notice of appeal is filed within the time specified, no such appeal shall be allowed, such time limitation being hereby declared to be a condition of the right to such appeal and hence jurisdictional; and the commissioner shall notify the other party immediately upon the filing of a notice of appeal. The commissioner shall forthwith make up a transcript of the proceedings before him and certify and transmit the same to the board. In such certificate, he shall incorporate a brief recital of the proceedings therein had and recite each order entered and the date thereof. The board shall review the action of the commissioner complained of at its next meeting after the filing of notice of appeal, provided such notice of appeal shall have been filed thirty days before such meeting of the board, unless such review be postponed by agreement of parties or by the board for good cause. The board shall set a time and place for the hearing of arguments on each claim and shall notify the interested parties thereof, and briefs may be filed by the interested parties in accordance with the rules of procedure prescribed by the board. And thereupon, after a review of the case, the board shall sustain the finding of the commissioner or enter such order or make such award as the commissioner should have made, stating in writing its reasons therefor, and shall thereupon certify the same to the commissioner, who shall proceed in accordance therewith. Or, instead of affirming or reversing the commissioner as aforesaid, the board may, upon motion of either party or upon its own motion, for good cause shown, to be set forth in the order of the board, remand the case to the commissioner for the taking of such new, additional or further evidence as in the opinion of the board may be necessary for a full and complete development of the facts of the case. In the event the
board shall remand the case to the commissioner for the
taking of further evidence therein, the commissioner
shall proceed to take such new, additional or further
evidence in accordance with any instruction given by the
board, and shall take the same within thirty days after
receipt of the order remanding the case, giving to the
interested parties at least ten days' written notice of
such supplemental hearing, unless the taking of evi-
dence shall be postponed by agreement of parties, or by
the commissioner for good cause. After the completion
of such supplemental hearing, the commissioner shall,
within sixty days, render his decision affirming,
reversing or modifying his former action, which decision
shall be appealable to, and proceeded with by the appeal
board in like manner as in the first instance. The board
may remand any case as often as in its opinion is
necessary for a full development and just decision of the
case. The board may take evidence or consider ex parte
statements furnished in support of any motion to
remand the case to the commissioner. All evidence taken
by or filed with the board shall become a part of the
record. All appeals from the action of the commissioner
shall be decided by the board at the same session at
which they are heard, unless good cause for delay
thereof be shown and entered of record. In all proceed-
ings before the board, either party may be represented
by counsel.

§23-5-4. Appeals from final decisions of board to supreme
court of appeals; procedures; costs.

From any final decision of the board, including any
order of remand, an application for review may be
prosecuted by either party, or by the commissioner, to
the supreme court of appeals within thirty days from the
date thereof by the filing of a petition therefor to such
court against the board and the adverse party (claimant
or employer, as the case may be) as respondents, and
unless the petition for review is filed within such thirty-
day period, no such appeal or review shall be allowed,
such time limitation being hereby declared to be a
condition of the right to such appeal or review and hence
jurisdictional; and the clerk of such court shall notify
each of the respondents and the commissioner of the filing of such petition. The board shall, within ten days after receipt of such notice, file with the clerk of the court the record of the proceedings had before it, including all the evidence. The court or any judge thereof in vacation may thereupon determine whether or not a review shall be granted. And if granted to a nonresident of this state, he shall be required to execute and file with the clerk before such order or review shall become effective, a bond, with security to be approved by the clerk, conditioned to perform any judgment which may be awarded against him thereon. The board may certify to the court and request its decision of any question of law arising upon the record, and withhold its further proceeding in the case, pending the decision of the court on the certified question, or until notice that the court has declined to docket the same. If a review be granted or the certified question be docketed for hearing, the clerk shall notify the board and the parties litigant or their attorneys and the commissioner, of that fact by mail. If a review be granted or the certified question docketed, the case shall be heard by the court in the same manner as in other cases, except that neither the record nor briefs need be printed. Every such review granted or certified question docketed prior to thirty days before the beginning of the term, shall be placed upon the docket for such term. The attorney general shall, without extra compensation, represent the board in such cases. The court shall determine the matter so brought before it and certify its decision to the board and to the commissioner. The cost of such proceedings on petition, including a reasonable attorney's fee, not exceeding thirty dollars to the claimant's attorney, shall be taxed by the court and taxed against the employer if the latter be unsuccessful, and if the claimant, or the commissioner (in case the latter be the applicant for review) be unsuccessful, such costs, not including attorney's fees, shall be taxed against the commissioner, payable out of any funds available in his hands, or shall be taxed against the claimant, in the discretion of the court. But there shall be no cost taxed upon a certified question.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within [illegible] this the 25th day of [illegible], 1986.

Governor
PRESENTED TO THE
GOVERNOR

Date 3/24/86
Time 4:28 p.m.