

70: 2179

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1986



## ENROLLED

HOUSE BILL No. 2179

(By Mr. Del Chambers & Del Dameron)



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  
2     agencies or departments created by it, including county  
3     boards of education, political subdivisions of the state,  
4     any volunteer fire department or company and other  
5     emergency service organizations as defined by article  
6     five, chapter fifteen of this Code, and all persons, firms,  
7     associations and corporations regularly employing  
8     another person or persons for the purpose of carrying  
9     on any form of industry, service or business in this state,  
10    are employers within the meaning of this chapter and  
11    are hereby required to subscribe to and pay premiums  
12    into the workers' compensation fund for the protection  
13    of their employees and shall be subject to all require-  
14    ments of this chapter and all rules and regulations  
15    prescribed by the commissioner with reference to rate,  
16    classification and premium payment: *Provided*, That  
17    such rates will be adjusted by the commissioner to  
18    reflect the demand on the compensation fund by the  
19    covered employer.

20    The following employers are not required to subscribe  
21    to the fund, but may elect to do so:

- 22 (1) Employers of employees in domestic services; or
- 23 (2) Employers of five or fewer full-time employees in  
24 agricultural service; or
- 25 (3) Employers of employees while said employees are  
26 employed without the State except in cases of temporary  
27 employment without the State; or
- 28 (4) Casual employers. An employer is deemed to be a  
29 casual employer when the number of his employees does  
30 not exceed three and the period of employment is  
31 temporary, intermittent and sporadic in nature and does  
32 not exceed ten calendar days in any calendar quarter;
- 33 (5) Churches;
- 34 (6) Employers engaged in organized professional  
35 sports activities, including employers of trainers and  
36 jockeys engaged in thoroughbred horse racing; or
- 37 (7) Employers of employees who are officers of and  
38 stockholders in a corporation qualifying for special tax  
39 treatment under subchapter S of the Internal Revenue  
40 Code of the United States.
- 41 If an employer is a partnership, sole proprietorship,  
42 association or corporation, such employer may elect to  
43 include as an "employee" within this chapter, any  
44 member of such partnership, the owner of the sole  
45 proprietorship, or any corporate or executive officer of  
46 the association or corporation. In the event of such  
47 election, the employer shall serve upon the commissioner  
48 written notice naming the persons to be covered and  
49 shall include such "employee's" remuneration for  
50 premium purposes in all future payroll reports, and no  
51 such partner, proprietor or corporate or executive  
52 officer shall be deemed an employee within the meaning  
53 of this chapter until such notice has been served.
- 54 Notwithstanding any other provision of this chapter  
55 to the contrary, whenever there are churches in a circuit  
56 which employ one individual clergyman and the pay-  
57 ments to such clergyman from such churches constitute  
58 his full salary, such circuit or group of churches may  
59 elect to be considered a single employer for the purpose

60 of premium payment into the workers' compensation  
61 fund.

62 Employers who are not required to subscribe to the  
63 workers' compensation fund may voluntarily choose to  
64 subscribe to and pay premiums into the fund for the  
65 protection of their employees and in such case shall be  
66 subject to all requirements of this chapter and all rules  
67 and regulations prescribed by the commissioner with  
68 reference to rates, classifications and premium pay-  
69 ments and shall afford to them the protection of this  
70 chapter, including section six of this article, but the  
71 failure of such employers to choose to subscribe to and  
72 to pay premiums into the fund shall not impose any  
73 liability upon them other than such liability as would  
74 exist notwithstanding the provisions of this chapter.

75 Any foreign corporation employer whose employment  
76 in this State is to be for a definite or limited period  
77 which could not be considered "regularly employing"  
78 within the meaning of this section may choose to pay  
79 into the workers' compensation fund the premiums  
80 herein provided for, and at the time of making  
81 application to the commissioner, such employer shall  
82 furnish a statement under oath showing the probable  
83 length of time the employment will continue in this  
84 State, the character of the work, an estimate of the  
85 monthly payroll and any other information which may  
86 be required by the commissioner. At the time of making  
87 application such employer shall deposit with the state  
88 compensation commissioner to the credit of the workers'  
89 compensation fund the amount required by section five  
90 of this article, which amount shall be returned to the  
91 employer if his application be rejected by the commis-  
92 sioner. Upon notice to such employer of the acceptance  
93 of his application by the commissioner, he shall be an  
94 employer within the meaning of this chapter and subject  
95 to all of its provisions.

96 Any foreign corporation employer choosing to comply  
97 with the provisions of this chapter and to receive the  
98 benefits hereunder shall, at the time of making appli-  
99 cation to the commissioner, in addition to other require-  
100 ments of this chapter, furnish such commissioner with

101 a certificate from the secretary of state, where such  
102 certificate is necessary, showing that it has complied  
103 with all the requirements necessary to enable it legally  
104 to do business in this state and no application of such  
105 foreign corporation employer shall be accepted by the  
106 commissioner until such certificate is filed.

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

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

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

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

1 Every executive officer of an association or of a  
2 corporation, any member of a partnership or owner of  
3 a sole proprietorship which has elected coverage under  
4 this chapter for such member or owner shall pay  
5 premiums based upon the actual salary paid to such  
6 employee up to an amount sufficient to qualify such

7 employee to receive the maximum level of benefits, but  
8 in no event shall the basis for premium be less than the  
9 salary necessary to provide such employee with the  
10 minimum level of benefits.

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

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

27 County commissions and municipalities are hereby  
28 authorized to pay all or any part of the premiums  
29 prescribed for such emergency service organizations  
30 organized as aforesaid and such duly incorporated  
31 volunteer fire departments or companies as may provide  
32 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.**

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



11 employer shall be ten dollars.

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

17       At the time each premium is paid, every subscribing  
18 employer shall make a payroll report to the commis-  
19 sioner for the preceding quarter. The report shall be on  
20 the form or forms prescribed by the commissioner, and  
21 shall contain all information required by the  
22 commissioner.

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

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

42       (b) Failure of an employer to timely pay premium, to  
43 timely file a payroll report, or to maintain an adequate  
44 premium deposit, shall cause the employer's account to  
45 become delinquent. No employer will be declared  
46 delinquent or be assessed any penalty therefor if the  
47 commissioner determines that such delinquency has  
48 been caused by delays in the administration of the fund.  
49 The commissioner shall, in writing, within sixty days of  
50 the end of each quarter notify all delinquent employers

51 of their failure to timely pay premiums, to timely file  
52 a payroll report, or to maintain an adequate premium  
53 deposit. The notification shall demand the filing of the  
54 delinquent payroll report and payment of delinquent  
55 premiums, and/or payment of an amount sufficient to  
56 maintain the premium deposit, before the end of the  
57 third month following the end of the preceding quarter.  
58 The notification shall also require payment of interest  
59 on the delinquent premium payment and/or premium  
60 deposit pursuant to section thirteen of this article.

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

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

83 (e) Failure by any employer, who voluntarily elects to  
84 subscribe, to resolve his delinquency within the pres-  
85 cribed period, shall automatically terminate the election  
86 of such employer to pay into the workers' compensation  
87 fund and shall deprive such delinquent employer of the  
88 benefits and protection afforded by this chapter includ-  
89 ing section six of this article, and he shall be liable as  
90 provided in section eight of this article. The defaulting  
91 employer's liability under section eight of this article

92 shall be retroactive to twelve o'clock p.m., of the last day  
93 of the month following the end of the quarter for which  
94 the delinquency occurs.

95 (f) Any employer, who is required to subscribe to the  
96 fund and subsequently defaults, or who elects to  
97 subscribe and subsequently his account is terminated,  
98 shall be restored immediately to the benefits and  
99 protection of this chapter only upon the filing of all  
100 delinquent payroll and other reports required by the  
101 commissioner and payment into the fund of all unpaid  
102 premiums, an adequate premium deposit, accrued  
103 interest and claims losses paid during the period of  
104 delinquency and default: *Provided*, That the penalty for  
105 interest and claims losses paid by the fund during the  
106 period of delinquency and default shall not exceed an  
107 amount equal to fifty percent of the premium otherwise  
108 due and owing for the period of delinquency and default:  
109 *Provided, however*, That the period for which such  
110 penalty is assessed may be limited to a period of five  
111 (5) years immediately preceding the date of the commis-  
112 sioner's receipt of the employer's application for  
113 reinstatement. The commissioner shall, upon written  
114 application for reinstatement filed by an employer,  
115 order that an administrative hearing be held prior to  
116 reinstatement to determine the terms of repayment of  
117 all delinquent premiums, premium deposits and accrued  
118 interest, and the extent to which interest and claims  
119 losses may be waived, equitably considering, (1) the  
120 exact nature of the default, (2) the amount of the claims  
121 losses, (3) the solvency of the fund, (4) the financial  
122 condition of the employer, (5) the degree of willfulness  
123 exhibited by the employer's conduct resulting in the  
124 default, and (6) the potential economic impact upon the  
125 state and the specific geographic area in which the  
126 employer is located, if the employer should cease  
127 operations. Any such administrative hearing shall be  
128 conducted pursuant to article five, chapter twenty-nine-  
129 a of this code.

130 Applications for reinstatement shall: (1) Be made  
131 upon forms prescribed by the commissioner; (2) include  
132 a report of the gross payroll of the employer during the

133 entire period of default, which payroll information shall  
134 be verified by the employer or its authorized agent; and  
135 (3) include a payment equal to one half of one percent  
136 of the gross payroll reported during the period of  
137 default, or one hundred dollars, whichever amount shall  
138 be greater. An employer who applies for reinstatement  
139 shall be entitled to the benefits and protection of this  
140 chapter on the day the application is received by the  
141 commissioner: *Provided*, That if the commissioner  
142 reinstates an employer subject to the terms of a  
143 repayment agreement, the subsequent failure of the  
144 employer to make scheduled payments in accordance  
145 with the repayment agreement, to timely file current  
146 premiums or to restore the premium deposit to the  
147 required amount by the end of the repayment period  
148 shall cause the repayment agreement to be null, void  
149 and of no effect, and the employer shall be denied the  
150 benefits and protection of this chapter effective from the  
151 date that such employer's account originally became  
152 delinquent.

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

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

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

171 Notice to employees in this section provided for shall  
172 be given by posting written notice that the employer is

173 delinquent under the compensation law of West Virgi-  
174 nia, 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

215 incurred, but not to exceed, in the case of any surety  
216 upon said bond, the amount of the penalty of said bond.  
217 Any official posting said notice as herein required shall  
218 be entitled to the same fee as is now or may hereafter  
219 be provided for the service of process in suits instituted  
220 in courts of record in the State of West Virginia, which  
221 fee shall be paid by the commissioner out of any funds  
222 at his disposal, but shall be charged by him against the  
223 account of the employer to whose delinquency such  
224 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 pro-  
test; right of commissioner to collect pay-  
ments improperly made.**

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

9 (b) Where it appears from the employer's report, or  
10 from proper medical evidence, that a compensable  
11 injury will result in a disability which will last longer  
12 than three days as provided in section five of this article,  
13 the commissioner may immediately enter an order  
14 commencing the payment of temporary total disability  
15 benefits to the claimant in the amounts provided for in  
16 sections six and fourteen of this article, and payment of  
17 the expenses provided for in subdivision (a), section  
18 three of this article, relating to said injury, without  
19 waiting for the expiration of the thirty-day period  
20 during which objections may be filed to such findings  
21 as provided in section one, article five of this chapter.  
22 The commissioner shall enter an order commencing the  
23 payment of temporary total disability or medical  
24 benefits within fifteen days of receipt of either the

25 employee's or employer's report of injury, whichever is  
26 received sooner, and also upon receipt of either a proper  
27 physician's report or any other information necessary  
28 for a determination. The commissioner shall give to the  
29 parties immediate notice of any order granting temporary  
30 total disability or medical benefits.

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

45 (d) Upon receipt of the first report of injury in a claim,  
46 the commissioner shall request from the employer or  
47 employers any wage information necessary for determining  
48 the rate of benefits to which the employee is entitled.  
49 If an employer does not furnish the commissioner with this  
50 information within fifteen days from the date the commissioner  
51 received the first report of injury in the case, the employee  
52 shall be paid temporary total disability benefits for lost time  
53 at the rate the commissioner believes would be justified by the  
54 usual rate of pay for the occupation of the injured employee.  
55 The commissioner shall adjust the rate of benefits both  
56 retroactively and prospectively upon receipt of proper wage  
57 information. The commissioner shall have access to all wage  
58 information in the possession of any state agency, including  
59 wage information received by the department of employment  
60 security under chapter twenty-one-a of this code, pertinent to  
61 such determination.  
62  
63

64 (e) Upon a finding of the commissioner that a claimant  
65 who has sustained a previous compensable injury which

66 has been closed by any order of the commissioner, or by  
67 the claimant's return to work, suffers further temporary  
68 total disability or requires further medical or hospital  
69 treatment resulting from the compensable injury, the  
70 commissioner shall immediately enter an order com-  
71 mencing the payment of temporary total disability  
72 benefits to the claimant in the amount provided for in  
73 sections six and fourteen of this article, and the expenses  
74 provided for in subdivision (a), section three of this  
75 article, relating to said disability, without waiting for  
76 the expiration of the thirty-day period during which  
77 objections may be filed to such findings as provided in  
78 section one, article five of this chapter. The commis-  
79 sioner shall give immediate notice to the parties of his  
80 order.

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

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

101 (h) In the event an employer files a timely objection  
102 to any order of the commissioner with respect to  
103 compensability, or any order denying an application for  
104 modification with respect to temporary total disability  
105 benefits, or with respect to those expenses outlined in  
106 subdivision (a), section three of this article, the commis-



107 sioner shall continue to pay to the claimant such benefits  
108 and expenses during the period of such disability.  
109 Where it is subsequently found by the commissioner that  
110 the claimant was not entitled to receive such temporary  
111 total disability benefits or expenses, or any part thereof,  
112 so paid, the commissioner shall, when the employer is  
113 a subscriber to the fund, credit said employer's account  
114 with the amount of the overpayment; and, when the  
115 employer has elected to carry its own risk, the commis-  
116 sioner shall refund to such employer the amount of the  
117 overpayment. The amounts so credited to a subscriber  
118 or repaid to a self-insurer shall be charged by the  
119 commissioner to the surplus fund created in section one,  
120 article three of this chapter.

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

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

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

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

7 (b) If a timely protest to the award is filed, as provided

8 in section one, article five of this chapter, the commis-  
9 sioner or self-insured employer shall continue to pay to  
10 the claimant such benefits during the period of such  
11 disability unless it is subsequently found by the  
12 commissioner that the claimant was not entitled to  
13 receive the benefits, or any part thereof, so paid, in  
14 which event the commissioner shall, where the employer  
15 is a subscriber to the fund, credit said employer's  
16 account with the amount of the overpayment; and,  
17 where the employer has elected to carry his own risk,  
18 the commissioner shall refund to such employer the  
19 amount of the overpayment. The amounts so credited to  
20 a subscriber or repaid to a self-insurer shall be charged  
21 by the commissioner to the surplus fund created by  
22 section one, article three of this chapter. If the final  
23 decision in any case determines that a claimant was not  
24 lawfully entitled to benefits paid to him pursuant to a  
25 prior decision, such amount of benefits so paid shall be  
26 deemed overpaid. The commissioner may only recover  
27 such amount by withholding, in whole or in part, as  
28 determined by the commissioner, future permanent  
29 partial disability benefits payable to the individual in  
30 the same or other claims and credit such amount against  
31 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.**

1 Notwithstanding any provision of this code to the  
2 contrary, no person shall be jurisdictionally entitled to  
3 temporary total disability benefits for that period of  
4 time in excess of three days during which such person  
5 is incarcerated in a penitentiary or jail: *Provided*, That  
6 incarceration shall not affect the claimant's eligibility  
7 for payment of expenses. Upon release from confine-  
8 ment, the payment of benefits for the remaining period  
9 of temporary total disability shall be made if justified  
10 by the evidence and authorized by order of the commis-  
11 sioner.

**§23-4-4. Funeral expenses.**

1 In case the personal injury causes death, reasonable

2 funeral expenses, not to exceed three thousand five  
3 hundred dollars, shall be paid from the fund, payment  
4 to be made to the persons who have furnished the  
5 services and supplies, or to the persons who have  
6 advanced payment for same, as the commissioner may  
7 deem proper, in addition to such award as may be made  
8 to the employee's dependents.

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

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

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

11 (b) If the injury causes temporary total disability, the  
12 employee shall receive during the continuance thereof  
13 weekly benefits as follows: A maximum weekly benefit  
14 to be computed on the basis of seventy percent of the  
15 average weekly earnings, wherever earned, of the  
16 injured employee, at the date of injury, not to exceed the  
17 percentage of the average weekly wage in West  
18 Virginia, as follows: On or after July one, one thousand  
19 nine hundred sixty-nine, forty-five percent; on or after  
20 July one, one thousand nine hundred seventy, fifty  
21 percent; on or after July one, one thousand nine hundred  
22 seventy-one, fifty-five percent; on or after July one, one  
23 thousand nine hundred seventy-three, sixty percent; on  
24 or after July one, one thousand nine hundred seventy-  
25 four, eighty percent; on or after July one, one thousand  
26 nine hundred seventy-five, one hundred percent.

27 The minimum weekly benefits paid hereunder shall  
28 not be less than twenty-six dollars per week for injuries  
29 occurring on or after July one, one thousand nine  
30 hundred sixty-nine; not less than thirty-five dollars per  
31 week for injuries occurring on or after July one, one  
32 thousand nine hundred seventy-one; not less than forty

33 dollars per week for injuries occurring on or after July  
34 one, one thousand nine hundred seventy-three; not less  
35 than forty-five dollars per week for injuries occurring  
36 on or after July one, one thousand nine hundred seventy-  
37 four; and for injuries occurring on or after July one, one  
38 thousand nine hundred seventy-six, thirty-three and one-  
39 third percent of the average weekly wage in West  
40 Virginia.

41 (c) Subdivision (b) shall be limited as follows: Aggre-  
42 gate award for a single injury causing temporary  
43 disability shall be for a period not exceeding two  
44 hundred eight weeks.

45 (d) If the injury causes permanent total disability,  
46 benefits shall be payable during the remainder of life  
47 at the maximum or minimum weekly benefits as  
48 provided in subdivision (b) of this section for temporary  
49 total disability. A permanent disability of eighty-five  
50 percent or more shall be deemed a permanent total  
51 disability for the purpose of this section. Under no  
52 circumstances shall the commissioner grant an  
53 additional permanent disability award to a claimant  
54 receiving a permanent total disability award, or to a  
55 claimant who has previously been granted permanent  
56 disability awards totalling eighty-five percent or more  
57 and hence is entitled to a permanent total disability  
58 award: *Provided*, That if any such claimant thereafter  
59 sustains another compensable injury and has permanent  
60 partial disability resulting therefrom, the total perman-  
61 ent disability award benefit rate shall be computed at  
62 the highest benefit rate justified by any of the compen-  
63 sable injuries, and the cost of any increase in such  
64 permanent total disability benefit rate shall be paid  
65 from the second injury reserve created by section one,  
66 article three of this chapter.

67 (e) If the injury causes permanent disability less than  
68 permanent total disability, the percentage of disability  
69 to total disability shall be determined and the award  
70 computed on the basis of four weeks' compensation for  
71 each percent of disability determined, at the following  
72 maximum or minimum benefit rates: Seventy percent  
73 of the average weekly earnings, wherever earned, of the

74 injured employee, at the date of injury, not to exceed the  
75 percentage of the average weekly wage in West  
76 Virginia, as follows: On or after July one, one thousand  
77 nine hundred sixty-nine, forty-five percent; on or after  
78 July one, one thousand nine hundred seventy, fifty  
79 percent; on or after July one, one thousand nine hundred  
80 seventy-one, fifty-five percent; on or after July one, one  
81 thousand nine hundred seventy-three, sixty percent; on  
82 or after July one, one thousand nine hundred seventy-  
83 five, sixty-six and two-thirds percent.

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

87 (f) If the injury results in the total loss by severance  
88 of any of the members named in this subdivision, the  
89 percentage of disability shall be determined by the  
90 commissioner, with the following table establishing the  
91 minimum percentage of disability. In determining the  
92 percentage of disability, the commissioner may be  
93 guided by but shall not be limited to the disabilities  
94 enumerated in the following table, and in no event shall  
95 the disability be less than that specified in the following  
96 table:

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

99 The loss of a great toe (one phalanx) shall be con-  
100 sidered a five percent disability.

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

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

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

107 The loss of forepart of foot shall be considered a thirty  
108 percent disability.

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

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

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

115 The loss of thigh at hip joint shall be considered a  
116 sixty percent disability.

117 The loss of a little or fourth finger (one phalanx) shall  
118 be considered a three percent disability.

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

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

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

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

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

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

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

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

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

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

139 The loss of index and middle finger shall be consi-  
140 dered a twenty percent disability.

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

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

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

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

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

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

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

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

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

159       The total and irrecoverable loss of the sight of one eye  
160       shall be considered a thirty-three percent disability. For  
161       the partial loss of vision in one, or both eyes, the  
162       percentages of disability shall be determined by the  
163       commissioner, using as a basis the total loss of one eye.

164       The total and irrecoverable loss of the hearing of one  
165       ear shall be considered a twenty-two and one-half  
166       percent disability. The total and irrecoverable loss of  
167       hearing of both ears shall be considered a fifty-five  
168       percent disability.

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

173       Should a claimant sustain a compensable injury which  
174       results in the total loss by severance of any of the bodily  
175       members named in this subdivision, die from sickness  
176       or noncompensable injury before the commissioner  
177       makes the proper award for such injury, the commis-  
178       sioner shall make such award to claimant's dependents  
179       as defined in this chapter, if any; such payment to be  
180       made in the same installments that would have been  
181       paid to claimant if living: *Provided*, That no payment

182 shall be made to any widow of such claimant after her  
183 remarriage, and that this liability shall not accrue to the  
184 estate of such claimant and shall not be subject to any  
185 debts of, or charges against, such estate.

186 (g) Should a claimant to whom has been made a  
187 permanent partial award of from one percent to eighty-  
188 four percent, both inclusive, die from sickness or  
189 noncompensable injury, the unpaid balance of such  
190 award shall be paid to claimant's dependents as defined  
191 in this chapter, if any; such payment to be made in the  
192 same installments that would have been paid to  
193 claimant if living: *Provided*, That no payment shall be  
194 made to any widow of such claimant after her remar-  
195 riage, and that this liability shall not accrue to the estate  
196 of such claimant and shall not be subject to any debts  
197 of, or charges against, such estate.

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

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

206 (j) The percentage of all permanent disabilities other  
207 than those enumerated in subdivision (f) of this section  
208 shall be determined by the commissioner, and awards  
209 made in accordance with the provisions of subdivision  
210 (d) or (e) of this section. Where there has been an injury  
211 to a member as distinguished from total loss by  
212 severance of that member, the commissioner in  
213 determining the percentage of disability may be guided  
214 by but shall not be limited to the disabilities enumerated  
215 in subdivision (f) of this section.

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

220 (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

9 monaural hearing loss shall be computed in the follow-  
10 ing manner:

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

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

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

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

30 (1) The measured decibel loss of hearing due to injury  
31 at the sound frequencies of five hundred, one thousand,  
32 two thousand and three thousand hertz shall be deter-  
33 mined for each ear and the total for each ear shall be  
34 divided by four to ascertain the average decibel loss for  
35 each ear;

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

43 (3) The percent of binaural hearing impairment shall  
44 then be calculated by multiplying the smaller percen-  
45 tage (better ear) by five, adding this figure to the larger  
46 percentage (poorer ear), and dividing the sum by six;  
47 and

48 (4) The percent of binaural hearing impairment so  
 49 obtained shall then be multiplied by fifty-five to  
 50 ascertain the degree of permanent partial disability.

51 (d) No permanent partial disability benefits shall be  
 52 granted for tinnitus, psychogenic hearing loss, recruit-  
 53 ment or hearing loss above three thousand hertz.

54 (e) An additional amount of permanent partial  
 55 disability shall be granted for impairment of speech  
 56 discrimination, if any. To determine the additional  
 57 amount for binaural impairment, the percentage of  
 58 speech discrimination in each ear shall be added  
 59 together and the result divided by two to calculate the  
 60 average percentage of speech discrimination, and the  
 61 permanent partial disability shall be ascertained by  
 62 reference to the percentage of permanent partial  
 63 disability in the table below on the line with the  
 64 percentage of speech discrimination so obtained. To  
 65 determine the additional amount for monaural impair-  
 66 ment, the permanent partial disability shall be ascer-  
 67 tained by reference to the percentage of permanent  
 68 partial disability in the table below on the line with the  
 69 percentage of speech discrimination in the injured ear.

70 **TABLE**

71 72 73 74		% Of Permanent Partial Disability
	% of Speech Discrimination	
75	90%...and up to and including .....100%	0%
76	80%...and up to but not including .... 90%	1%
77	70%...and up to but not including .... 80%	3%
78	60%...and up to but not including .... 70%	4%
79	0%...and up to but not including .... 60%	5%

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

82 (g) An application for benefits alleging a noise induced  
 83 hearing loss shall set forth the name of the employer or  
 84 employers and the time worked for each, and the  
 85 commissioner shall allocate to and divide any charges  
 86 resulting from such claim among such employers with  
 87 whom the claimant sustained exposure to hazardous  
 88 noise for as much as sixty days during the period of three

89 years immediately preceding the date of last exposure.  
90 The allocation shall be based upon the time of exposure  
91 with each employer. In determining the allocation, the  
92 commissioner shall consider all the time of employment  
93 by each employer during which the claimant was so  
94 exposed and not just the time within such three-year  
95 period, under the same allocation as is applied in  
96 occupational pneumoconiosis cases.

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

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

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

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

**§23-4-7a. Monitoring of injury claims; legislative find-  
ings; review of medical evidence; recommen-  
dation of authorized treating physician;  
independent medical evaluations; temporary  
total disability benefits and the termination  
thereof; mandatory action; additional  
authority.**

1 (a) The Legislature hereby finds and declares that  
2 injured claimants should receive the type of treatment  
3 needed as promptly as possible; that overpayments of  
4 temporary total disability benefits with the resultant  
5 hardship created by the requirement of repayment  
6 should be minimized; and that to achieve these two  
7 objectives, it is essential that the commissioner establish  
8 and operate a systematic program for the monitoring of  
9 injury claims where the disability continues longer than  
10 might ordinarily be expected.

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

27 (c) When the authorized treating physician concludes  
28 that the claimant has either reached his maximum  
29 degree of improvement or is ready for disability  
30 evaluation, or when the claimant has returned to work,  
31 such authorized treating physician may recommend a  
32 permanent partial disability award for residual impair-  
33 ment relating to and resulting from the compensable  
34 injury, and the following provisions shall govern and  
35 control:

36 (1) If the authorized treating physician recommends  
37 a permanent partial disability award of fifteen percent  
38 or less, the commissioner shall enter an award of  
39 permanent partial disability benefits based upon such  
40 recommendation and all other available information,  
41 and the claimant's entitlement to temporary total

42 disability benefits shall cease upon the entry of such  
43 award unless previously terminated under the provi-  
44 sions of subsection (e) of this section.

45 (2) If, however, the authorized treating physician  
46 recommends a permanent partial disability award in  
47 excess of fifteen percent, or recommends a permanent  
48 total disability award, the claimant's entitlement to  
49 temporary total disability benefits shall cease upon the  
50 receipt by the commissioner of such report and the  
51 commissioner shall refer the claimant to a physician or  
52 physicians of his selection for independent evaluation  
53 prior to the entry of a permanent disability award:  
54 *Provided*, That the claimant shall thereupon receive  
55 benefits which shall then be at the permanent partial  
56 disability rate as provided in subdivision (e), section six  
57 of this article until the entry of a permanent disability  
58 award, and which amount of such benefits paid prior to  
59 the receipt of such report shall be considered and  
60 deemed to be payment of the permanent disability  
61 award then granted, if any. In the event that benefits  
62 actually paid exceed the amount granted by the  
63 permanent partial disability award, claimant shall be  
64 entitled to no further benefits by such award but shall  
65 not be liable by offset or otherwise for the excess paid.

66 (d) When the commissioner concludes that an inde-  
67 pendent medical evaluation is indicated, or that a  
68 claimant may be ready for disability evaluation in  
69 accordance with other provisions of this chapter, he  
70 shall refer the claimant to a physician or physicians of  
71 his selection for examination and evaluation. If the  
72 physician or physicians so selected recommend con-  
73 tinued, additional or different treatment, the recommen-  
74 dation shall be relayed to the claimant and his then  
75 treating physician and the recommended treatment may  
76 be authorized by the commissioner.

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

83 disability benefits when:

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

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

94 (3) When other evidence submitted to the commis-  
95 sioner justifies a finding that the claimant has reached  
96 his maximum degree of improvement: *Provided*, That in  
97 all cases a finding by the commissioner that the  
98 claimant has reached his maximum degree of improve-  
99 ment shall terminate the claimant's entitlement to  
100 temporary total disability benefits regardless of whether  
101 the claimant has been released to return to work:  
102 *Provided, however*, That under no circumstances shall a  
103 claimant be entitled to receive temporary total disability  
104 benefits either beyond the date he is released to return  
105 to work or beyond the date he actually returns to work.

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

121 (f) Notwithstanding the anticipated period of disabil-  
122 ity established pursuant to the provisions of subsection

123 (b) of this section, whenever in any claim temporary  
124 total disability shall continue longer than one hundred  
125 twenty days from the date of injury (or from the date  
126 of the last preceding examination and evaluation  
127 pursuant to the provisions of this subsection or pursuant  
128 to the directions of the commissioner under other  
129 provisions of this chapter), the commissioner shall refer  
130 the claimant to a physician or physicians of his selection  
131 for examination and evaluation in accordance with the  
132 provisions of subsection (d) of this section and the  
133 provisions of subsection (e) shall be fully applicable:  
134 *Provided*, That the requirement of mandatory examina-  
135 tions and evaluations pursuant to the provisions of this  
136 subsection (f) shall not apply to any claimant who  
137 sustained a brain stem or spinal cord injury with  
138 resultant paralysis or an injury which resulted in an  
139 amputation necessitating a prosthetic appliance.

140 (g) The provisions of this section are in addition to and  
141 in no way in derogation of the power and authority  
142 vested in the commissioner by other provisions of this  
143 chapter or vested in the employer to have a claimant  
144 examined by a physician or physicians of its selection  
145 and at its expense, or vested in the claimant or employer  
146 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.**

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



14 (b) If it can be shown that the claimant or deceased  
15 employee has been exposed to the hazard of inhaling  
16 minute particles of dust in the course of and resulting  
17 from his employment for a period of ten years during  
18 the fifteen years immediately preceding the date of his  
19 last exposure to such hazard and that such claimant or  
20 deceased employee has sustained a chronic respiratory  
21 disability, then it shall be presumed that such claimant  
22 is suffering or such deceased employee was suffering at  
23 the time of his death from occupational pneumoconiosis  
24 which arose out of and in the course of his employment.  
25 This presumption shall not be conclusive.

26 (c) The findings and conclusions of the board shall set  
27 forth, among other things, the following:

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

32 (2) Whether or not the exposure in the employment  
33 was sufficient to have caused the claimant's or deceased  
34 employee's occupational pneumoconiosis or to have  
35 perceptibly aggravated an existing occupational pneu-  
36 moconiosis, or other occupational disease.

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

41 If either party objects to the whole or any part of such  
42 findings and conclusions of the board, he shall file with  
43 the commissioner, within fifteen days from receipt of  
44 such copy to him, unless for good cause shown, the  
45 commissioner extends such time, his objections thereto  
46 in writing, specifying the particular statements of the  
47 board's findings and conclusions to which he objects.  
48 The filing of an objection within the time specified is  
49 hereby declared to be a condition of the right to litigate  
50 such findings and hence jurisdictional. After the time  
51 has expired for the filing of objections to the findings  
52 and conclusions of the board, the commissioner shall  
53 proceed to act as provided in this chapter. If after the

54 time has expired for the filing of objections to the  
55 findings and conclusions of the board no objections have  
56 been filed, the report of a majority of the board of its  
57 findings and conclusions on any medical question shall  
58 be taken to be plenary and conclusive evidence of the  
59 findings and conclusions therein stated. If objection has  
60 been filed to the findings and conclusions of the board,  
61 notice thereof shall be given to the board, and the  
62 members thereof joining in such findings and conclusions  
63 shall appear at the time fixed by the commissioner  
64 for the hearing to submit to examination and cross-  
65 examination in respect to such findings and conclusions.  
66 At such hearing, evidence to support or controvert the  
67 findings and conclusions of the board shall be limited  
68 to examination and cross-examination of the members  
69 of the board, and to the taking of testimony of other  
70 qualified physicians and roentgenologists.

**§23-4-9b. Preexisting impairments not considered in  
fixing amount of compensation.**

1 Where an employee has a definitely ascertainable  
2 impairment resulting from an occupational or a nonoc-  
3 cupational injury, disease, or any other cause, whether  
4 or not disabling, and such employee shall thereafter  
5 receive an injury in the course of and resulting from his  
6 employment, unless such injury results in total perman-  
7 ent disability within the meaning of section one, article  
8 three of this chapter, such impairment, and the effect  
9 thereof, and an aggravation thereof, shall not be taken  
10 into consideration in fixing the amount of compensation  
11 allowed by reason of such injury, and such compensation  
12 shall be awarded only in the amount that would have  
13 been allowable had such employee not had such preex-  
14 isting impairment. Nothing in this section shall be  
15 construed to require that the degree of such preexisting  
16 impairment be definitely ascertained or rated prior to  
17 the injury received in the course of and resulting from  
18 such employee's employment or that benefits must have  
19 been granted or paid for such preexisting impairment.  
20 The degree of such preexisting impairment may be  
21 established at any time by competent medical or other  
22 evidence. Notwithstanding the foregoing provisions of

23 this section, if such definitely ascertainable preexisting  
24 impairment resulted from an injury or disease pre-  
25 viously held compensable and such impairment had not  
26 been rated, benefits for such impairment shall be  
27 payable to the claimant by or charged to the employer  
28 in whose employ the injury or disease occurred. The  
29 employee shall also receive from the second injury  
30 reserve created by section one, article three of this  
31 chapter the difference, if any, in the benefit rate  
32 applicable in the more recent claim and the prior claim.

**§23-4-15. Application for benefits.**

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  
4 disease, the application therefor must be made on the  
5 form or forms prescribed by the commissioner and filed  
6 in the office of the commissioner within two years from  
7 and after the injury or death, as the case may be, and  
8 unless so filed within such two-year period, the right to  
9 compensation under this chapter shall be forever  
10 barred, such time limitation being hereby declared to  
11 be a condition of the right and hence jurisdictional, and  
12 all proofs of dependency in fatal cases must likewise be  
13 filed with the commissioner within two years from and  
14 after the death. In case the employee is mentally or  
15 physically incapable of filing such application, it may be  
16 filed by his attorney or by a member of his family.

17 To entitle any employee to compensation for occupa-  
18 tional pneumoconiosis under the provisions hereof, the  
19 application therefor must be made on the form or forms  
20 prescribed by the commissioner and filed in the office  
21 of the commissioner within three years from and after  
22 the last day of the last continuous period of sixty days  
23 or more during which the employee was exposed to the  
24 hazards of occupational pneumoconiosis or within three  
25 years from and after the employee's occupational  
26 pneumoconiosis was made known to him by a physician  
27 or which he should reasonably have known, whichever  
28 shall last occur, and unless so filed within such three-  
29 year period, the right to compensation under this  
30 chapter shall be forever barred, such time limitation

31 being hereby declared to be a condition of the right and  
32 hence jurisdictional, or, in the case of death, the  
33 application shall be filed as aforesaid by the dependent  
34 of such employee within two years from and after such  
35 employee's death, and such time limitation is a condition  
36 of the right and hence jurisdictional.

37 To entitle any employee to compensation for occupa-  
38 tional disease other than occupational pneumoconiosis  
39 under the provisions hereof, the application therefor  
40 must be made on the form or forms prescribed by the  
41 commissioner and filed in the office of the commissioner  
42 within three years from and after the day on which the  
43 employee was last exposed to the particular occupational  
44 hazard involved or within three years from and after the  
45 employee's occupational disease was made known to him  
46 by a physician or which he should reasonably have  
47 known, whichever shall last occur, and unless so filed  
48 within such three-year period, the right to compensation  
49 under this chapter shall be forever barred, such time  
50 limitation being hereby declared to be a condition of the  
51 right and hence jurisdictional, or, in case of death, the  
52 application shall be filed as aforesaid by the dependent  
53 of such employee within two years from and after such  
54 employee's death, and such time limitation is a condition  
55 of the right and hence jurisdictional.

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

1 If a claim for occupational pneumoconiosis benefits be  
2 filed by an employee within three years from and after  
3 the last day of the last continuous period of sixty days  
4 exposure to the hazards of occupational pneumoconiosis,  
5 the commissioner shall determine whether the claimant  
6 was exposed to the hazards of occupational pneumoco-  
7 niosis for a continuous period of not less than sixty days  
8 while in the employ of the employer within three years  
9 prior to the filing of his claim, whether in the state of  
10 West Virginia the claimant was exposed to such hazard  
11 over a continuous period of not less than two years  
12 during the ten years immediately preceding the date of  
13 his last exposure thereto and whether the claimant was

14 exposed to such hazard over a period of not less than  
15 ten years during the fifteen years immediately preced-  
16 ing the date of his last exposure thereto. If a claim for  
17 occupational pneumoconiosis benefits be filed by an  
18 employee within three years from and after the em-  
19 ployee's occupational pneumoconiosis was made known  
20 to him by a physician or otherwise should have reason-  
21 ably been known to him, the commissioner shall  
22 determine whether the claimant filed his application  
23 within said period and whether in the state of West  
24 Virginia the claimant was exposed to such hazard over  
25 a continuous period of not less than two years during  
26 the ten years immediately preceding the date of last  
27 exposure thereto and whether the claimant was exposed  
28 to such hazard over a period of not less than ten years  
29 during the fifteen years immediately preceding the date  
30 of last exposure thereto. If a claim for occupational  
31 pneumoconiosis benefits be filed by a dependent of a  
32 deceased employee, the commissioner shall determine  
33 whether the deceased employee was exposed to the  
34 hazards of occupational pneumoconiosis for a continuous  
35 period of not less than sixty days while in the employ  
36 of the employer within ten years prior to the filing of  
37 the claim, whether in the state of West Virginia the  
38 deceased employee was exposed to such hazard over a  
39 continuous period of not less than two years during the  
40 ten years immediately preceding the date of his last  
41 exposure thereto and whether the claimant was exposed  
42 to such hazard over a period of not less than ten years  
43 during the fifteen years immediately preceding the date  
44 of his last exposure thereto. The commissioner shall also  
45 determine such other nonmedical facts as may in his  
46 opinion be pertinent to a decision on the validity of the  
47 claim.

48 The commissioner shall enter an order with respect  
49 to such nonmedical findings within ninety days follow-  
50 ing receipt by the commissioner of both the claimant's  
51 application for occupational pneumoconiosis benefits  
52 and the physician's report filed in connection therewith,  
53 and shall give each interested party notice in writing of  
54 his findings with respect to all such nonmedical facts  
55 and such findings and such action of the commissioner

56 shall be final unless the employer, employee, claimant  
57 or dependent shall, within fifteen days after receipt of  
58 such notice, object to such findings, and unless an  
59 objection is filed within such fifteen-day period, such  
60 findings shall be forever final, such time limitation  
61 being hereby declared to be a condition of the right to  
62 litigate such findings and hence jurisdictional. Upon  
63 receipt of such objection, the commissioner shall set a  
64 hearing as provided in section one, article five of this  
65 chapter. In the event of an objection to such findings by  
66 the employer, the claim, shall, notwithstanding the fact  
67 that one or more hearings may be held with respect to  
68 such objection, mature for reference to the occupational  
69 pneumoconiosis board with like effect as if the objection  
70 had not been filed. If the commissioner concludes after  
71 the protest hearings that the claim should be dismissed,  
72 a final order of dismissal shall be entered, which final  
73 order shall be subject to appeal in accordance with the  
74 provisions of section one, article five of this chapter. If  
75 the commissioner concludes after such protest hearings  
76 that the claim should be referred to the occupational  
77 pneumoconiosis board for its review, the order entered  
78 shall be interlocutory only and may be appealed only in  
79 conjunction with an appeal from a final order with  
80 respect to the findings of the occupational pneumoconi-  
81 osis board.

#### 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  
5 change with respect to former findings or orders, as  
6 provided by section sixteen, article four of this chapter,  
7 the commissioner shall give notice, in writing, to the  
8 employer, employee, claimant or dependent, as the case  
9 may be, of his action, which notice shall state the time  
10 allowed for filing an objection to such finding, and such  
11 action of the commissioner shall be final unless the  
12 employer, employee, claimant or dependent shall, within

13 thirty days after the receipt of such notice, object in  
14 writing, to such finding, and unless an objection is filed  
15 within such thirty-day period, such finding or action  
16 shall be forever final, such time limitation being hereby  
17 declared to be a condition of the right to litigate such  
18 finding or action and hence jurisdictional. Upon receipt  
19 of such objection the commissioner shall, within fifteen  
20 days from receipt thereof, set a time and place for the  
21 hearing of evidence. Any such hearing may be con-  
22 ducted by the commissioner or his duly authorized  
23 representative at the county seat of the county wherein  
24 the injury occurred, or at any other place which may  
25 be agreed upon by the interested parties, and in the  
26 event the interested parties cannot agree, and it appears  
27 in the opinion of the commissioner that the ends of  
28 justice require the taking of evidence elsewhere, then at  
29 such place as the commissioner may direct, having due  
30 regard for the convenience of witnesses. Both the  
31 employer and claimant shall be notified of such hearing  
32 at least ten days in advance, and the hearing shall be  
33 held within thirty days after the filing of objection to  
34 the commissioner's findings as hereinabove provided,  
35 unless such hearing be postponed by agreement of the  
36 parties or by the commissioner for good cause. The  
37 evidence taken at such hearing shall be transcribed and  
38 become part of the record of the proceedings, together  
39 with the other records thereof in the commissioner's  
40 office. At any time within thirty days after hearing, if  
41 the commissioner is of the opinion that the facts have  
42 not been adequately developed at such hearing, he may  
43 order supplemental hearing upon due notice to the  
44 parties. After final hearing the commissioner shall,  
45 within thirty days, render his decision affirming,  
46 reversing or modifying, his former action, which shall  
47 be final: *Provided*, That the claimant or the employer  
48 may apply to the appeal board herein created for a  
49 review of such decision; but no appeal or review shall  
50 lie unless application therefor be made within thirty  
51 days of receipt of notice of the commissioner's final  
52 action, or in any event within sixty days of the date of  
53 such final action, regardless of notice, and unless the  
54 application for appeal or review is filed within the time

55 specified, no such appeal or review shall be allowed,  
56 such time limitation being hereby declared to be a  
57 condition of the right to such appeal or review and hence  
58 jurisdictional.

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

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

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

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

1 If in any such case it shall appear to the commissioner



2 that such application fails to disclose some fact or facts  
3 which were not theretofore considered by the commis-  
4 sioner in his former findings, and which would entitle  
5 such employer to any modification of said previous  
6 award, the commissioner shall, within sixty days from  
7 the receipt of such application, notify the claimant and  
8 employer that such application fails to establish a just  
9 cause for modification of said award. Such notice shall  
10 be in writing stating the reasons for denial and the time  
11 allowed for objection to such decision of the commis-  
12 sioner. The employer may, within thirty days after  
13 receipt of said notice, object in writing to such decision,  
14 and unless the objection is filed within such thirty-day  
15 period, no such objection shall be allowed, such time  
16 limitation being hereby declared to be a condition of the  
17 right to such objection and hence jurisdictional. Upon  
18 receipt of such objection, the commissioner shall afford  
19 the employer an evidentiary hearing as provided in  
20 section one of this article.

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

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

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

1 Any employer, employee, claimant, or dependent, who  
2 shall feel aggrieved at any final action of the commis-  
3 sioner taken after a hearing held in accordance with the  
4 provisions of section one of this article, shall have the

5 right to appeal to the board created in section two of  
6 this article for a review of such action. The aggrieved  
7 party shall file a written notice of appeal with the  
8 compensation commissioner, directed to such board,  
9 within thirty days after receipt of notice of the action  
10 complained of, or in any event, regardless of notice,  
11 within sixty days after the date of the action complained  
12 of, and unless the notice of appeal is filed within the  
13 time specified, no such appeal shall be allowed, such  
14 time limitation being hereby declared to be a condition  
15 of the right to such appeal and hence jurisdictional; and  
16 the commissioner shall notify the other party immediately upon the filing of a notice of appeal. The  
17 commissioner shall forthwith make up a transcript of  
18 the proceedings before him and certify and transmit the  
19 same to the board. In such certificate, he shall incorporate a brief recital of the proceedings therein had and  
20 recite each order entered and the date thereof. The  
21 board shall review the action of the commissioner  
22 complained of at its next meeting after the filing of  
23 notice of appeal, provided such notice of appeal shall  
24 have been filed thirty days before such meeting of the  
25 board, unless such review be postponed by agreement  
26 of parties or by the board for good cause. The board  
27 shall set a time and place for the hearing of arguments  
28 on each claim and shall notify the interested parties  
29 thereof, and briefs may be filed by the interested parties  
30 in accordance with the rules of procedure prescribed by  
31 the board. And thereupon, after a review of the case, the  
32 board shall sustain the finding of the commissioner or  
33 enter such order or make such award as the commissioner should have made, stating in writing its reasons  
34 therefor, and shall thereupon certify the same to the  
35 commissioner, who shall proceed in accordance therewith. Or, instead of affirming or reversing the commissioner as aforesaid, the board may, upon motion of either  
36 party or upon its own motion, for good cause shown, to  
37 be set forth in the order of the board, remand the case  
38 to the commissioner for the taking of such new,  
39 additional or further evidence as in the opinion of the  
40 board may be necessary for a full and complete  
41 development of the facts of the case. In the event the  
42  
43  
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46

47 board shall remand the case to the commissioner for the  
48 taking of further evidence therein, the commissioner  
49 shall proceed to take such new, additional or further  
50 evidence in accordance with any instruction given by the  
51 board, and shall take the same within thirty days after  
52 receipt of the order remanding the case, giving to the  
53 interested parties at least ten days' written notice of  
54 such supplemental hearing, unless the taking of evi-  
55 dence shall be postponed by agreement of parties, or by  
56 the commissioner for good cause. After the completion  
57 of such supplemental hearing, the commissioner shall,  
58 within sixty days, render his decision affirming,  
59 reversing or modifying his former action, which decision  
60 shall be appealable to, and proceeded with by the appeal  
61 board in like manner as in the first instance. The board  
62 may remand any case as often as in its opinion is  
63 necessary for a full development and just decision of the  
64 case. The board may take evidence or consider ex parte  
65 statements furnished in support of any motion to  
66 remand the case to the commissioner. All evidence taken  
67 by or filed with the board shall become a part of the  
68 record. All appeals from the action of the commissioner  
69 shall be decided by the board at the same session at  
70 which they are heard, unless good cause for delay  
71 thereof be shown and entered of record. In all proceed-  
72 ings before the board, either party may be represented  
73 by counsel.

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

1 From any final decision of the board, including any  
2 order of remand, an application for review may be  
3 prosecuted by either party, or by the commissioner, to  
4 the supreme court of appeals within thirty days from the  
5 date thereof by the filing of a petition therefor to such  
6 court against the board and the adverse party (claimant  
7 or employer, as the case may be) as respondents, and  
8 unless the petition for review is filed within such thirty-  
9 day period, no such appeal or review shall be allowed,  
10 such time limitation being hereby declared to be a  
11 condition of the right to such appeal or review and hence  
12 jurisdictional; and the clerk of such court shall notify

13 each of the respondents and the commissioner of the  
14 filing of such petition. The board shall, within ten days  
15 after receipt of such notice, file with the clerk of the  
16 court the record of the proceedings had before it,  
17 including all the evidence. The court or any judge  
18 thereof in vacation may thereupon determine whether  
19 or not a review shall be granted. And if granted to a  
20 nonresident of this state, he shall be required to execute  
21 and file with the clerk before such order or review shall  
22 become effective, a bond, with security to be approved  
23 by the clerk, conditioned to perform any judgment  
24 which may be awarded against him thereon. The board  
25 may certify to the court and request its decision of any  
26 question of law arising upon the record, and withhold  
27 its further proceeding in the case, pending the decision  
28 of the court on the certified question, or until notice that  
29 the court has declined to docket the same. If a review  
30 be granted or the certified question be docketed for  
31 hearing, the clerk shall notify the board and the parties  
32 litigant or their attorneys and the commissioner, of that  
33 fact by mail. If a review be granted or the certified  
34 question docketed, the case shall be heard by the court  
35 in the same manner as in other cases, except that  
36 neither the record nor briefs need be printed. Every  
37 such review granted or certified question docketed prior  
38 to thirty days before the beginning of the term, shall be  
39 placed upon the docket for such term. The attorney  
40 general shall, without extra compensation, represent the  
41 board in such cases. The court shall determine the  
42 matter so brought before it and certify its decision to  
43 the board and to the commissioner. The cost of such  
44 proceedings on petition, including a reasonable attor-  
45 ney's fee, not exceeding thirty dollars to the claimant's  
46 attorney, shall be fixed by the court and taxed against  
47 the employer if the latter be unsuccessful, and if the  
48 claimant, or the commissioner (in case the latter be the  
49 applicant for review) be unsuccessful, such costs, not  
50 including attorney's fees, shall be taxed against the  
51 commissioner, payable out of any funds available in his  
52 hands, or shall be taxed against the claimant, in the  
53 discretion of the court. But there shall be no cost taxed  
54 upon a certified question.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Bruce O. Williams  
Chairman Senate Committee

Floyd Fuller  
Chairman House Committee

Originating in the House.

Takes effect from passage.

Isidore C. Strick  
Clerk of the Senate

Donald D. Kopp  
Clerk of the House of Delegates

Don Tolson  
President of the Senate

Joseph P. Albright  
Speaker of the House of Delegates

The within approved this the 25th  
March  
day of \_\_\_\_\_, 1986.

Arch A. Moore Jr.  
Governor

PRESENTED TO THE  
GOVERNOR

Date 3/24/86

Time 4:28 p.m.

FILED IN THE OFFICE OF  
SECRETARY OF STATE OF  
WEST VIRGINIA

FILED DATE 3/24/86 EC

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SECRETARY OF STATE