

WEST VIRGINIA LEGISLATURE

SECOND EXTRAORDINARY SESSION, 1990

— ● —

ENROLLED

Com. Sub. for
HOUSE BILL No. 213

(By Mr. Speaker, Mr. Chambers, & Del. R. Bink)
[By Request of the Executive]

— ● —

Passed June 27, 1990

In Effect July 1, 1990 ~~Passage~~

ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 213

(By MR. SPEAKER, MR. CHAMBERS, AND DELEGATE R. BURK)
[By Request of the Executive]

[Passed June 27, 1990; in effect July 1, 1990.]

AN ACT to amend and reenact sections four, five-a and nine, article two, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article two by adding thereto five new sections, designated sections fourteen through eighteen; to amend said chapter twenty-three by adding thereto a new article, designated article two-a; to amend and reenact section one, article three of said chapter; to amend and reenact sections one-d, three, three-a, six, seven-a, eight, eight-c, nine, fourteen, fifteen-b and nineteen, article four of said chapter; to further amend said article four by adding thereto four new sections, designated sections three-b, three-c, six-d and seven-b; to amend and reenact section eight, article four-b of said chapter; to amend and reenact sections one, one-a, one-b, one-c, one-d, one-e, three, three-a and four-b, article five of said chapter; to further amend said article five by adding thereto four new sections, designated sections one-f, one-g, one-h and one-i; and to amend article five-a of said chapter by adding thereto a new section, designated section three, all relating to prospective and retroactive adjustment of premium rates; liens for payments, interest and penalties due and

not paid; enforcement of liens; notice provisions for commissioner's exercise of distraint powers; mandatory employer payment into second injury reserve of surplus fund and exceptions; criteria for exceptions; establishment of classes for employers and computation of payments to be made into said second injury reserve by said employers; continuation of existing bond for employers exempted from mandatory participation in said second injury reserve; election of self-insured employer to pay into catastrophe reserve of surplus fund; employer indebtedness to commissioner becoming due and owing upon sale or transfer of business; lien for indebtedness being a personal obligation of employer; commissioner's certificate of good standing; lien against assets purchased by successor employer for indebtedness of predecessor employer to commissioner upon sale or transfer of business; duty of successor employer to verify predecessor employer's good standing with commissioner; waiver by commissioner of successor employer's payment of predecessor employer's indebtedness; publication of notice before waiver issued; hearing upon objection to waiver; circumstances under which successor employer to assume predecessor employer's premium rates; premium rates to be assigned to new corporate employer when new corporate employer is created by officers or shareholders of preexisting corporate employer; required payment of deficiency in payments to commissioner for failure of new corporate employer to make disclosure of relationship with preexisting corporate employer; employer right to object to commissioner's decisions relating to employer's obligations to the commissioner; hearings thereon and appeals; commissioner authority to promulgate rules; subrogation right of commissioner or self-insured employer to recover workers' compensation medical benefits paid from proceeds of recovery from third party tort-feasor; limitations thereon; legislative committee study of applicability of expanded subrogation; employer payment of second injury awards; employer being credited for overpayments determined by administrative law judge; commissioner's determination in accordance with guidelines of medical services which are

reasonably required; review of requests to exceed guidelines; commissioner being authorized to enter into preferred provider agreements; required disclosure of financial interest in sale or rental of medical appliances or devices by referring medical providers; commissioner being authorized to promulgate rules for enforcement of required disclosure; consequences of failure to disclose; criminal penalties for employer who contracts with hospital for treatment of compensable injuries or who requires employee to pay for services rendered by such hospital; criminal penalties for health care providers who, having had the right to receive payment for services related to work-related injuries suspended or terminated by the commissioner, fail to post notice of the suspension or termination or attempt to collect money for such services; establishment of health care advisory panel; compensation for services and expenses; liability insurance for members; duties thereof; development and utilization of guidelines for services, treatment, care and review; suspension or termination of right of certain health care providers to obtain payment for services to injured employees; exception for rendering medical services under emergency circumstances; consultation by commissioner with health care advisory panel being required prior to suspension or termination; procedures for suspension or termination; hearings; appeal; notice to injured employees by suspended or terminated medical provider; circumstances under which injured employee may pay suspended or terminated medical provider directly; commissioner's notification of injured employee of suspension or termination and assistance in obtaining new medical provider; reinstatement of suspended or terminated medical provider; commissioner being required to promulgate rules; exceptions to definitions relating to weekly wages; exception to minimum weekly benefits paid for temporary total disability; definition of part-time employee; computation of benefits for part-time employees; performance of medical examinations and evaluations in accordance with procedures established by health care advisory panel and exceptions; suspension of temporary total disability benefits during trial return to work; eligibility

for said benefits to continue; medical certification of ability to perform work or successful completion of three month trial return to work period resulting in termination of eligibility for said benefits; unsuccessful trial return to work resulting in immediate reinstatement of said benefits; rehabilitation and permanent disability evaluations; employee not otherwise being prevented from returning to work; employee not being required to return to work; provisions relating to trial return to work to terminate on the first day of July, one thousand nine hundred ninety-four; medical examinations being required to follow procedures established by health care advisory panel and exceptions; the filing of objections to findings of occupational pneumoconiosis board with office of judges beginning on the first day of July, one thousand nine hundred ninety-one; administrative law judge being required to rule thereon; physical and vocational rehabilitation; legislative findings; determination of eligibility of injured employee for rehabilitation services; development, payment for and monitoring of rehabilitation plan; computation and payment of temporary partial rehabilitation benefits when employee returns to work under rehabilitation program; commissioner being required to promulgate rules to develop comprehensive rehabilitation program; provisions relating to rehabilitation to terminate on the first day of July, one thousand nine hundred ninety-four; exception for computation of "average weekly wage earnings, wherever earned, of the injured person, at the date of injury"; chief administrative law judge being required to set hearing for and rule upon objections to commissioner's non-medical findings relating to applications for occupational pneumoconiosis benefits; appeals therefrom; increased criminal penalties for fraudulently obtaining workers' compensation benefits; restitution; legislative findings regarding surplus in coal-workers' pneumoconiosis fund; commissioner being directed to conduct audit of said fund and transfer up to two hundred fifty million dollars to workers' compensation fund; expenditures of principal amount transferred being prohibited until all other assets of workers' compensation fund expended; expenditure of interest

earned on amount transferred being permitted to satisfy obligations of workers' compensation fund; retention of adequate reserves in coal-workers' pneumoconiosis fund to guarantee payment of all claims; inclusion of all moneys previously transferred from and still due and owing to the coal-workers' pneumoconiosis fund as part of said amount transferred; commissioner being required to transfer such portion of said amount back to coal-workers' pneumoconiosis fund as will meet required standards of federal law for reserves if such standards change; required filing of objections made to decisions of commissioner on and after the first day of July, one thousand nine hundred ninety-one with office of judges; transfer of all objections pending before the commissioner on or before the thirty-first day of December, one thousand nine hundred ninety-one, to office of judges for final resolution; rulings of administrative law judges upon applications for modification of prior orders and for reopening of claims; factors administrative law judges are to consider when determining whether objections and appeals have been timely filed; settlement of protests to certain permanent partial disability awards; notice to commissioner of intended settlement; participation by commissioner in settlement proceedings; the required filing of joint written memorandum of settlement; the required approval of settlement by administrative law judge; failure to approve settlement being appealable; limitations on amounts of settlement; payment of settlement; settlements being set aside upon finding of fraud, undue influence or coercion; petition to vacate settlement and hearing thereon; final order on petition and appeal therefrom; settlement not affecting future right to benefits; commissioner being permitted to approve settlements of such disputed awards which are pending for resolution before the commissioner; creation of workers' compensation office of administrative law judges within workers' compensation appeal board; appointment of chief administrative law judge; qualifications therefor; salary for and removal of chief administrative law judge; employment of administrative law judges and other personnel; qualifications for

administrative law judges; budget of office of judges being included in budget of appeal board; appeal board being required to promulgate rules of practice and procedure by the first day of May, one thousand nine hundred ninety-one; powers of chief administrative law judge and delegation of powers; filing of objections to commissioner's decisions with office of judges being required after the first day of July, one thousand nine hundred ninety-one; office of judges being required to schedule hearings; notice; commissioner being a party in certain proceedings; commissioner being permitted to appear under certain circumstances; office of judges being required to keep records and make decisions thereon; commissioner being required to provide records to chief administrative law judge; rules of evidence; supplemental hearings; chief administrative law judge being required to conduct hearings and render final rulings on evidence of record; taking appeals therefrom to appeal board; appeal board being required to rule upon appeal; commissioner's right to appeal; filing of notice of appeal with office of judges; notice to other parties; duties of appeal board and administrative law judges; administrative law judge being required to act to prevent delay in determination of disputes; decisions of chief administrative law judge as to jurisdiction to hear dispute being a final, appealable order; inclusion of the termination by an employer of an injured employee off work due to a compensable injury who is receiving or eligible for temporary total disability benefits within the meaning of a discriminatory practice; exceptions; inclusion of the failure to reinstate an employee who has sustained a compensable injury to the employee's former or comparable position of employment, if available, within the meaning of a discriminatory practice; exceptions; medical certification of ability to perform duties; employee right to preferential recall where no position available; duty of employee; civil action being subject to provisions of collective bargaining agreement, arbitrator's decision, administrative or court order, or federal statute; and employee eligibility for benefits not being affected.

Be it enacted by the Legislature of West Virginia:

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

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

§23-2-4. Classification of industries; accounts; rate of premiums.

1 The commissioner shall distribute into groups or
 2 classes the employments subject to this chapter, in
 3 accordance with the nature of the business and the
 4 degree of hazard incident thereto. And the commis-
 5 sioner shall have power, in like manner, to reclassify
 6 such industries into groups or classes at any time, and
 7 to create additional groups or classes. The commissioner
 8 may make necessary expenditures to obtain statistical
 9 and other information to establish the classes provided
 10 for in this section.

11 The commissioner shall keep an accurate account of
 12 all money or moneys paid or credited to the compensa-
 13 tion fund, and of the liability incurred and disburse-
 14 ments made against same; and an accurate account of
 15 all money or moneys received from each individual
 16 subscriber, and of the liability incurred and disburse-

17 ments made on account of injuries and death of the
18 employees of each subscriber, and of the receipts and
19 incurred liability of each group or class.

20 In compensable fatal and total permanent disability
21 cases, other than occupational pneumoconiosis, the
22 amount charged against the employer's account shall be
23 such sum as is estimated to be the average incurred loss
24 of such cases to the fund. The amount charged against
25 the employer's account in compensable occupational
26 pneumoconiosis claims for total permanent disability or
27 for death shall be such sum as is estimated to be the
28 average incurred loss of such occupational pneumoconi-
29 osis cases to the fund.

30 It shall be the duty of the commissioner to fix and
31 maintain the lowest possible rates of premiums consist-
32 ent with the maintenance of a solvent workers' compen-
33 sation fund and the creation and maintenance of a
34 reasonable surplus in each group after providing for the
35 payment to maturity of all liability incurred by reason
36 of injury or death to employees entitled to benefits under
37 the provisions of this chapter. A readjustment of rates
38 shall be made yearly on the first day of July, or at any
39 time the same may be necessary: *Provided*, That on and
40 after the first day of July, one thousand nine hundred
41 ninety-one, the commissioner shall at least thirty days
42 prior to the first day of the quarter to which an
43 adjustment of rates is to be applicable, file a schedule
44 of the readjusted rates with the office of the secretary
45 of state for publication in the state register pursuant to
46 article two, chapter twenty-nine-a of this code: *Provided*,
47 *however*, That from the effective date of this section to
48 the thirtieth day of June, one thousand nine hundred
49 ninety-one, the commissioner shall be permitted to
50 retroactively readjust rates to the first day of the
51 quarter within which notice of the readjustment is
52 given. The determination of the lowest possible rates of
53 premiums within the meaning hereof and of the
54 existence of any surplus or deficit in the fund, shall be
55 predicated solely upon the experience and statistical
56 data compiled from the records and files in the
57 commissioner's office under this and prior workers'

58 compensation laws of this state for the period from the
59 first day of June, one thousand nine hundred thirteen,
60 to the nearest practicable date prior to such adjustment:
61 *Provided further*, That any expected future return, in
62 the nature of interest or income from invested funds
63 shall be predicated upon the average realization from
64 investments to the credit of the compensation fund for
65 the two years next preceding. Any reserves set up for
66 future liabilities and any commutation of benefits shall
67 likewise be predicated solely upon prior experience
68 under this and preceding workers' compensation laws
69 and upon expected realization from investments deter-
70 mined by the respective past periods, as aforesaid.

71 The commissioner may fix a rate of premiums
72 applicable alike to all subscribers forming a group or
73 class, and such rates shall be determined from the
74 record of such group or class shown upon the books of
75 the commissioner: *Provided*, That if any group has a
76 sufficient number of employers with considerable
77 difference in their degrees of hazard, the commissioner
78 may fix a rate for each subscriber of such group, such
79 rate to be based upon the subscriber's record on the
80 books of the commissioner for a period not to exceed
81 three years ending December thirty-first of the year
82 preceding the year in which the rate is to be effective;
83 and the liability part of such record shall include such
84 cases as have been acted upon by the commissioner
85 during such three-year period, irrespective of the date
86 the injury was received; and any subscriber in a group
87 so rated, whose record for such period cannot be
88 obtained, shall be given a rate based upon the subscrib-
89 er's record for any part of such period as may be deemed
90 just and equitable by the commissioner; and the
91 commissioner shall have authority to fix a reasonable
92 minimum and maximum for any group to which this
93 individual method of rating is applied, and to add to the
94 rate determined from the subscriber's record such
95 amount as is necessary to liquidate any deficit in the
96 schedule as to create a reasonable surplus.

97 It shall be the duty of the commissioner, when the
98 commissioner changes any rate, to notify every employer

99 affected thereby of that fact and of the new rate and
100 when the same takes effect. It shall also be the
101 commissioner's duty to furnish to each employer yearly,
102 or more often if requested by the employer, a statement
103 giving the name of each of the employer's employees
104 who were paid for injury and the amounts so paid
105 during the period covered by the statement.

**§23-2-5a. Collection of premiums from defaulting em-
ployers; interest and penalties; civil reme-
dies; creation and enforcement of lien
against employer and purchaser; duty of
secretary of state to register liens; distraint
powers; insolvency proceedings; secretary of
state to withhold certificates of dissolution;
injunctive relief; bond.**

1 The commissioner in the name of the state may
2 commence a civil action against an employer who, after
3 due notice, defaults in any payment required by this
4 chapter. If judgment is against the employer, such
5 employer shall pay the costs of the action. Civil action
6 under this section shall be given preference on the
7 calendar of the court over all other civil actions.

8 In addition to the foregoing provisions of this section,
9 any payment, interest and penalty thereon due and
10 unpaid under this chapter shall be a personal obligation
11 of the employer immediately due and owing to the
12 commissioner and shall, in addition thereto, be a lien
13 enforceable against all the property of the employer:
14 *Provided*, That no such lien shall be enforceable as
15 against a purchaser (including a lien creditor) of real
16 estate or personal property for a valuable consideration
17 without notice, unless docketed as provided in section
18 one, article ten-c, chapter thirty-eight of this code:
19 *Provided, however*, That such lien may be enforced as
20 other judgment liens are enforced through the provi-
21 sions of chapter thirty-eight of this code and the same
22 shall be deemed by the circuit court to be a judgment
23 lien for this purpose.

24 In addition to all other civil remedies prescribed
25 herein the commissioner may in the name of the state,

26 after giving appropriate notice as required by due
27 process, distrain upon any personal property, including
28 intangible property, of any employer delinquent for any
29 payment, interest and penalty thereon. If the commis-
30 sioner has good reason to believe that such property or
31 a substantial portion thereof is about to be removed
32 from the county in which it is situated, upon giving
33 appropriate notice, either before or after the seizure, as
34 is proper in the circumstances, he or she may likewise
35 distrain in the name of the state before such delinquency
36 occurs. For such purpose, the commissioner may require
37 the services of a sheriff of any county in the state in
38 levying such distress in the county in which the sheriff
39 is an officer and in which such personal property is
40 situated. A sheriff so collecting any payment, interest
41 and penalty thereon shall be entitled to such compen-
42 sation as is provided by law for his or her services in
43 the levy and enforcement of executions.

44 In case a business subject to the payments, interest,
45 and penalties thereon imposed under this chapter shall
46 be operated in connection with a receivership or
47 insolvency proceeding in any state court in this state, the
48 court under whose direction such business is operated
49 shall, by the entry of a proper order or decree in the
50 cause, make provisions, so far as the assets in admin-
51 istration will permit, for the regular payment of such
52 payments, interest and penalties as the same become
53 due.

54 The secretary of state of this state shall withhold the
55 issuance of any certificate of dissolution or withdrawal
56 in the case of any corporation organized under the laws
57 of this state or organized under the laws of any other
58 state and admitted to do business in this state, until
59 notified by the commissioner that all payments, interest
60 and penalties thereon against any such corporation
61 which is an employer under this chapter have been paid
62 or that provision satisfactory to the commissioner has
63 been made for payment.

64 In any case when an employer required to subscribe
65 to the fund defaults in payments of premium, premium
66 deposits, or interest thereon, for as many as two

67 calendar quarters, which quarters need not be consec-
68 utive, and remains in default after due notice, and the
69 commissioner has been unable to collect such payments
70 by any of the other civil remedies prescribed herein, the
71 commissioner may bring action in the circuit court of
72 Kanawha County to enjoin such employer from contin-
73 uing to carry on the business in which such liability was
74 incurred: *Provided*, That the commissioner may as an
75 alternative to this action require such delinquent
76 employer to file a bond in the form prescribed by the
77 commissioner with satisfactory surety in an amount not
78 less than fifty percent more than the payments, interest
79 and penalties due.

**§23-2-9. Election of employer to provide own system of
compensation; mandatory participation in
second injury reserve of surplus fund and
exceptions; election to provide catastrophe
coverage.**

1 (a) (1) Notwithstanding anything contained in this
2 chapter, employers subject to this chapter who are of
3 sufficient financial responsibility to insure the payment
4 of compensation to injured employees and the depend-
5 ents of fatally injured employees, whether in the form
6 of pecuniary compensation or medical attention, funeral
7 expenses or otherwise as herein provided, of the value
8 at least equal to the compensation provided in this
9 chapter, or employers of such financial responsibility
10 who maintain their own benefit funds, or system of
11 compensation to which their employees are not required
12 or permitted to contribute, or such employers as shall
13 furnish bond or other security to insure such payments,
14 may, upon a finding of such facts by the compensation
15 commissioner, elect to pay individually and directly, or
16 from such benefit funds, department or association, such
17 compensation and expenses to injured employees or
18 fatally injured employees' dependents. The compensa-
19 tion commissioner shall require security or bond from
20 such employer, to be approved by the commissioner, and
21 of such amount as is by the commissioner considered
22 adequate and sufficient to compel or secure to such
23 employees, or their dependents, payment of the compen-

24 sation and expenses herein provided for, which shall in
25 no event be less than the compensation paid or furnished
26 out of the state workers' compensation fund in similar
27 cases to injured employees or the dependents of fatally
28 injured employees whose employers contribute to such
29 fund.

30 (2) Any employer electing under this section to insure
31 payment of compensation to injured employees and the
32 dependents of fatally injured employees shall on or
33 before the last day of the first month of each quarter,
34 for the preceding quarter, file with the commissioner a
35 sworn statement of the total earnings of all the employ-
36 er's employees subject to this chapter for such preceding
37 quarter, and shall pay into the workers' compensation
38 fund:

39 (A) A sum sufficient to pay the employer's proper
40 proportion of the expenses of the administration of this
41 chapter; and

42 (B) A sum sufficient to pay the employer's proper
43 portion of the expenses for claims for those employers
44 who are delinquent in the payment of premiums; and

45 (C) A sum sufficient to pay the employer's fair portion
46 of the expenses of the disabled workers' relief fund, as
47 may be determined by the commissioner.

48 (3) The commissioner shall make and promulgate
49 legislative rules in accordance with chapter twenty-
50 nine-a of this code governing the mode and manner of
51 making application, and the nature and extent of the
52 proof required to justify the finding of facts by the
53 commissioner, to consider and pass upon such election
54 by employers subject to this chapter, which rules shall
55 be general in their application.

56 (4) Any employer whose record upon the books of the
57 compensation commissioner shows a liability against the
58 workers' compensation fund incurred on account of
59 injury to or death of any of the employer's employees,
60 in excess of premiums paid by such employer, shall not
61 be granted the right, individually and directly or from
62 such benefit funds, department or association, to

63 compensate the employer's injured employees and the
64 dependents of the employer's fatally injured employees
65 until the employer has paid into the workers' compen-
66 sation fund the amount of such excess of liability over
67 premiums paid, including the employer's proper propor-
68 tion of the liability incurred on account of explosions,
69 catastrophes or second injuries as defined in section one,
70 article three of this chapter, occurring within the state
71 and charged against such fund.

72 (b) (1) Subject to any limitations set forth herein, all
73 employers who have heretofore elected, or shall hereaf-
74 ter elect, to pay compensation and expenses directly as
75 provided in subsection (a) of this section, shall, unless
76 they be permitted under the provisions of this subsection
77 hereinafter set forth to give the second injury security
78 or bond hereinafter provided for, pay into the second
79 injury reserve of the surplus fund referred to in section
80 one, article three of this chapter, upon the basis set forth
81 herein, such payments to be made at the same time as
82 provided in this section for the payment of proportion
83 of expenses of administration.

84 (2) To determine the contribution for second injury
85 coverage for self-insured employers, the commissioner
86 shall first establish, based upon actuarial advice, the
87 projected funding cost for incurred losses for the second
88 injury reserve of the surplus fund for the prospective
89 year for each industrial group or class, so that industrial
90 groups or classes with significantly different experience
91 in use of the second injury reserve shall pay their proper
92 share based upon the record of that industrial group or
93 class: *Provided*, That the commissioner shall establish
94 industrial groups or classes as permitted by section four
95 of this article but need not establish the same number
96 of industrial groups or classes as the number established
97 for purposes of section four of this article. The commis-
98 sioner shall further allocate such cost within the
99 industrial group or class to individual employers based
100 upon the ratio of the individual employer's record of
101 actual paid losses for claims chargeable to that employer
102 to the total actual paid losses for claims chargeable to
103 all employers in that industrial group or class. Actual

104 paid losses shall mean cash payments made under this
105 chapter as reflected on the books of the commissioner
106 for a period not to exceed three years ending the thirty-
107 first day of December of the year preceding the year in
108 which the rate is to be effective but shall not include
109 any payments or losses charged to any portion of the
110 surplus fund: *Provided, however,* That any employer
111 whose record for such period cannot be obtained shall
112 be given a rate based upon the employer's record for any
113 part of such period as may be deemed just and equitable
114 by the commissioner.

115 (3) In case there be a second injury, as defined in
116 section one, article three of this chapter, to an employee
117 of any employer making such second injury reserve
118 payments, the employer shall not be liable to pay
119 compensation or expenses arising from or necessitated
120 by the second injury, and such compensation and
121 expenses shall not be charged against such employer,
122 but such compensation and expenses shall be paid from
123 the second injury reserve of the surplus fund in the same
124 manner and to the same extent as in the case of
125 premium-paying subscribers.

126 (4) (A) Any employer who has heretofore elected to
127 pay compensation and expenses directly under the
128 provisions of subsection (a) of this section, and who:

129 (i) elected prior to the first day of January, one
130 thousand nine hundred eighty-nine, not to make pay-
131 ments into the second injury reserve of the surplus fund,
132 and

133 (ii) continuously without interruption, from the first
134 day of January, one thousand nine hundred eighty-nine,
135 to the effective date of this section, elected not to make
136 payments into the second injury reserve of the surplus
137 fund, may elect to continue not to make payments into
138 the second injury reserve of the surplus fund.

139 (B) Any employer who has heretofore elected to pay
140 compensation and expenses directly under the provi-
141 sions of subsection (a) of this section, and who:

142 (i) was making payments into the second injury

143 reserve of the surplus fund on the first day of January,
144 one thousand nine hundred eighty-nine, and

145 (ii) elected not to make such payments during ca-
146 lendar year one thousand nine hundred eighty-nine, and

147 (iii) has not thereafter, to the effective date of this
148 section, recommenced making such payments, shall
149 elect one of the two following options:

150 (I) Begin payments into the second injury reserve of
151 the surplus fund as of the first day of July, one thousand
152 nine hundred ninety, in which event such employer shall
153 not thereafter be permitted to elect not to make such
154 payments; or,

155 (II) Elect to continue not making such payments in
156 which event the commissioner shall examine the
157 employer's record with regard to the second injury
158 reserve of the surplus fund upon the books of the
159 commissioner and if such record shows a liability
160 against the surplus fund incurred on account of injury
161 to any of the employer's employees, in excess of
162 premiums paid by such employer to the second injury
163 reserve of the surplus fund, then such employer shall
164 pay to the commissioner the present value of that
165 liability.

166 (C) Any employer who is permitted by paragraphs
167 (A) and (B) of this subdivision not to make payments
168 into the second injury reserve of the surplus fund shall,
169 in addition to bond or security required by subsection
170 (a) of this section, furnish second injury security or
171 bond, approved by the commissioner, in such amount
172 and form as the commissioner shall consider adequate
173 and sufficient to compel or secure payment of all
174 compensation and expenses arising from, or necessitated
175 by, any second injury that is or remains to be paid by
176 the employer: *Provided*, That any second injury security
177 or bond given by any such employer pursuant to rules
178 promulgated by the commissioner and with the approval
179 of the commissioner prior to the effective date of this
180 section shall remain valid upon the effective date of this
181 section until such time thereafter as the commissioner
182 notifies such employer to the contrary.

183 (D) Any employer permitted by paragraphs (A) and
184 (B) of this subdivision not to make payments into the
185 second injury reserve of the surplus fund who on or after
186 the effective date of this section elects to make payments
187 into the second injury reserve of the surplus fund shall
188 not thereafter be permitted to elect not to make such
189 payments.

190 (5) Except as provided in paragraphs (A) and (B),
191 subdivision (4) of this subsection, all other employers
192 who have heretofore elected or who henceforth elect to
193 pay compensation and expenses directly under the
194 provisions of subsection (a) of this section shall pay into
195 the second injury reserve of the surplus fund such
196 amounts as are determined by the commissioner
197 pursuant to subdivision (2), subsection (b) of this section:
198 *Provided*, That all such other employers who, as of the
199 date immediately preceding the effective date of this
200 section, have been permitted by the commissioner not to
201 make such payments are not required to commence
202 making such payments until the first day of July, one
203 thousand nine hundred ninety.

204 (c)(1) All employers who have heretofore elected, or
205 shall hereafter elect, to pay compensation and expenses
206 directly as provided in subsection (a) of this section
207 shall, unless they give the catastrophe security or bond
208 hereinafter provided for, pay into the catastrophe
209 reserve of the surplus fund referred to in section one,
210 article three of this chapter, upon the same basis and
211 in the same percentages, subject to the limitations
212 herein set forth, as funds are set aside for the mainte-
213 nance of the catastrophe reserve of the surplus fund out
214 of payments made by premium-paying subscribers, such
215 payments to be made at the same time as hereinbefore
216 provided with respect to payment of proportion of
217 expenses of administration.

218 (2) In case there be a catastrophe, as defined in
219 section one, article three of this chapter, to the em-
220 ployees of any employer making such payments, the
221 employer shall not be liable to pay compensation or
222 expenses arising from or necessitated by the catas-
223 trophe, and such compensation and expenses shall not

224 be charged against such employer, but such compensa-
225 tion and expenses shall be paid from the catastrophe
226 reserve of the surplus fund in the same manner and to
227 the same extent as in the case of premium-paying
228 subscribers.

229 (3) If an employer elects to make payments into the
230 catastrophe reserve of the surplus fund as aforesaid,
231 then the bond or other security required by this section
232 shall be of such amount as the commissioner considers
233 adequate and sufficient to compel or secure to the
234 employees or their dependents payments of compensa-
235 tion and expenses, except any compensation and
236 expenses that may arise from, or be necessitated by, any
237 catastrophe as defined in section one, article three of this
238 chapter, which last are secured by and shall be paid
239 from the catastrophe reserve of the surplus fund as
240 hereinbefore provided.

241 (4) If any employer elects not to make payments into
242 the catastrophe reserve of the surplus fund, as herein-
243 before provided, then, in addition to bond or security in
244 the amount hereinbefore set forth, such employer shall
245 furnish catastrophe security or bond, approved by the
246 commissioner, in such additional amount as the commis-
247 sioner shall consider adequate and sufficient to compel
248 or secure payment of all compensation and expenses
249 arising from, or necessitated by, any catastrophe that
250 might thereafter ensue.

251 (5) All employers hereafter making application to
252 carry their own risk under the provisions of this
253 subsection, shall, with such application, make a written
254 statement as to whether such employer elects to make
255 payments as aforesaid into the catastrophe reserve of the
256 surplus fund or not to make such payments and to give
257 catastrophe security or bond hereinbefore in such case
258 provided for.

259 (d) In any case under the provisions of this section
260 that shall require the payment of compensation or
261 benefits by an employer in periodical payments, and the
262 nature of the case makes it possible to compute the
263 present value of all future payments, the commissioner

264 may, in his or her discretion, at any time compute and
 265 permit or require to be paid into the workers' compen-
 266 sation fund an amount equal to the present value of all
 267 unpaid compensation for which liability exists, in trust;
 268 and thereupon such employer shall be discharged from
 269 any further liability upon such award, and payment of
 270 the same shall be assumed by the workers' compensation
 271 fund.

272 (e) Any employer subject to this chapter who shall
 273 elect to carry the employer's own risk and who has
 274 complied with the requirements of this section and the
 275 rules of the compensation commissioner shall not be
 276 liable to respond in damages at common law or by
 277 statute for the injury or death of any employee, however
 278 occurring, after such election and during the period that
 279 the employer is allowed by the commissioner to carry
 280 the employer's own risk.

**§23-2-14. Sale or transfer of business; attachment of lien
 for premium, etc., payments due; criminal
 penalties for failure to pay; creation and
 avoidance or elimination of lien; enforcement
 of lien.**

1 (a) If any employer is required to subscribe to the
 2 workers' compensation fund pursuant to section one of
 3 this article and does not elect to provide the employer's
 4 own system of compensation pursuant to section nine of
 5 this article, and shall sell or otherwise transfer substan-
 6 tially all of the employer's assets, so as to give up
 7 substantially all of the employer's capacity and ability
 8 to continue in the business in which the employer has
 9 previously engaged, then such employer's premiums,
 10 premium deposits, interest, and claims losses shall
 11 become due and owing to the commissioner upon the
 12 execution of the agreement of sale or other transfer. In
 13 addition, any repayment agreement entered into by the
 14 employer with the commissioner pursuant to section five
 15 of this article shall terminate upon the execution of the
 16 aforesaid agreement of sale or other transfer and all
 17 amounts owed to the commissioner but not yet paid shall
 18 become due. Upon execution of an agreement of sale or
 19 other transfer, as aforesaid, the commissioner shall

20 continue to have a lien, as provided for in section five-
21 a of this article, against all of the other property of the
22 employer and which lien shall constitute a personal
23 obligation of the employer. As used in this section, the
24 term "assets" means all property of whatever type in
25 which the employer has an interest including, but not
26 limited to, good will, access to leases such as the right
27 to sublease, assignment of contracts for the sale of
28 products, inventory or stock of goods in bulk, or accounts
29 receivable.

30 (b) If an employer subject to subsection (a) of this
31 section pays to the commissioner, prior to the execution
32 of an agreement of sale or other transfer, a sum
33 sufficient to retire all of the indebtedness that the
34 employer would owe at the time of the execution, then
35 the commissioner shall issue a certificate to the
36 employer stating that the employer's account is in good
37 standing with the commissioner and that the assets may
38 be sold or otherwise transferred without the attachment
39 of the commissioner's lien. In the event that the
40 employer would not owe any sum to the commissioner
41 on the aforesaid date of execution, then a certificate
42 shall also be issued to the employer upon the employer's
43 request stating that the employer's account is in good
44 standing with the commissioner and that the assets may
45 be sold or otherwise transferred without the attachment
46 of the commissioner's lien.

**§23-2-15. Liabilities of successor employer; waiver of
payment by commissioner; assignment of
predecessor employer's premium rate to
successor.**

1 (a) Notwithstanding any provisions of section five-a of
2 this article to the contrary, in the event that a new
3 employer acquires by sale or other transfer or assumes
4 all or substantially all of a predecessor employer's actual
5 business, business assets, customers, clients, contracts,
6 operations, stock of goods, equipment, or substantially
7 all of its employees, then any liens for payments owed
8 to the commissioner for premiums, premium deposits,
9 interest, or claims losses by the predecessor employer or
10 any liens held by the commissioner against the prede-

cessor employer's property shall be extended to the assets acquired as the result of the sale or transfer by the new employer and shall be enforceable against such assets by the commissioner to the same extent as provided for the enforcement of liens against the predecessor employer pursuant to section five-a of this article. As used in this section, the term "assets" is defined as provided in section fourteen of this article. The foregoing provisions are expressly intended to impose upon such new employers the duty of obtaining, prior to the date of such acquisition, verification from the commissioner that the predecessor employer's account with the commissioner is in good standing.

(b) At any time prior to or following the acquisition described in subsection (a) of this section, the buyer or other recipient may file a verified petition with the commissioner requesting that the commissioner waive the payment by the buyer or other recipient of premiums, premium deposits, interest, and claims losses, or any combination thereof. The commissioner shall review the petition by considering the six factors set forth in subsection (f) of section five of this article. Unless requested by a party or by the commissioner, no hearing need be held on the petition. However, any decision made by the commissioner on the petition shall be in writing and shall include appropriate findings of fact and conclusions of law. Such decision shall be effective ten days following notice to the public of the decision unless an objection is filed in the manner herein provided. Such notice shall be given by the commissioner's publication of a Class I legal advertisement which complies with the provisions of article three, chapter fifty-nine of this code. The publication shall include a summary of the decision and a statement advising that any person objecting to the decision must file, within ten days after publication of the notice, a verified response with the commissioner setting forth the objection and the basis therefor. The publication area shall be Kanawha County, West Virginia. If any such objection is filed, the commissioner shall hold an administrative hearing, conducted pursuant to article five, chapter twenty-nine-a of this code, within fifteen days of

53 receiving the response unless the buyer or other
54 recipient consents to a later hearing. Nothing in this
55 subsection shall be construed to be applicable to the
56 seller or other transferor or to affect in any way a
57 proceeding under sections five and five-a of this article.

58 (c) In the factual situations set forth in subsection
59 (a) of this section, if the predecessor's modified rate of
60 premium, as calculated in accordance with section four
61 of this article, is greater than the manual rate of
62 premium, as calculated in accordance with section four
63 of this article, for other employers in the same class or
64 group, then the new employer shall also assume the
65 predecessor employer's modified rates for the payment
66 of premiums as determined under sections four and five
67 of this article until sufficient time has elapsed for the
68 new employer's experience record to be combined with
69 the experience record of the predecessor employer.

§23-2-16. Acceptance or assignment of premium rate.

1 (a) If a new corporate employer which is not subject
2 to the provisions of section fifteen of this article, is
3 created by the officers or shareholders of a preexisting
4 corporate employer and if the new corporate employer
5 and the preexisting corporate employer are
6 (1) managed by the same, or substantially the same,
7 management personnel, and (2) have a common owner-
8 ship by at least forty percent of each corporation's
9 shareholders, and (3) is in the same class or group as
10 determined by the commissioner under the provisions of
11 section four of this article, and (4) if the preexisting
12 corporate employer's account is in good standing with
13 the commissioner, then, at the time the new corporate
14 employer registers with the commissioner, the new
15 corporate employer may request that the commissioner
16 assign to it the same rate of payment of premiums as
17 that assigned to the preexisting corporate employer. If
18 the commissioner decides that the granting of such a
19 request is in keeping with his or her fiduciary obliga-
20 tions to the workers' compensation fund, then the
21 commissioner may grant the request of the employer.

22 (b) If a new corporate employer which is not subject

23 to the provisions of section fifteen of this article, is
 24 created by the officers or shareholders of a preexisting
 25 corporate employer and if the new corporate employer
 26 and the preexisting corporate employer are
 27 (1) managed by the same, or substantially the same,
 28 management personnel, and (2) have a common owner-
 29 ship by at least forty percent of each corporation's
 30 shareholders, and (3) is in the same class or group as
 31 determined by the commissioner under the provisions of
 32 section four of this article, then, at any time within one
 33 year of the new corporate employer's registration with
 34 the commissioner, the commissioner may decide that, in
 35 keeping with his or her fiduciary obligations to the
 36 workers' compensation fund, the new corporate em-
 37 ployer shall be assigned the same rate of payment of
 38 premiums as that assigned to the preexisting corporate
 39 employer at any time within the aforesaid one year
 40 period: *Provided*, That if the new corporate employer
 41 fails to reveal to the commissioner on the forms provided
 42 by the commissioner that its situation meets the factual
 43 requirements of this section, then the commissioner may
 44 demand payment from the new corporate employer in
 45 an amount sufficient to eliminate the deficiency in
 46 payments by the new corporate employer from the date
 47 of registration to the date of discovery plus interest
 48 thereon as provided for by section thirteen of this
 49 article. The commissioner may utilize the powers given
 50 to the commissioner in section five-a of this article to
 51 collect the amount due.

§23-2-17. Employer right to hearing; content of petition; appeal.

1 Notwithstanding any provision in this chapter to the
 2 contrary other than the provisions of section six, article
 3 five of this chapter, and notwithstanding any provision
 4 in section five of article five of chapter twenty-nine-a of
 5 this code to the contrary, in any situation where an
 6 employer objects to a decision or action of the commis-
 7 sioner made under the provisions of this article, then
 8 such employer shall be entitled to file a petition
 9 demanding a hearing upon such decision or action which
 10 petition must be filed within thirty days of the employ-

11 er's receipt of notice of the disputed commissioner's
12 decision or action or, in the absence of such receipt,
13 within sixty days of the date of the commissioner's
14 making such disputed decision or taking such disputed
15 action, such time limitations being hereby declared to
16 be a condition of the right to litigate such decision or
17 action and hence jurisdictional. The employer's petition
18 shall clearly identify the decision or action disputed and
19 the bases upon which the employer disputes the decision
20 or action. Upon receipt of such a petition, the commis-
21 sioner shall schedule a hearing which shall be conducted
22 in accordance with the provisions of article five of
23 chapter twenty-nine-a of this code. An appeal from a
24 final decision of the commissioner shall be taken in
25 accord with the provisions of articles five and six,
26 chapter twenty-nine-a of this code: *Provided*, That all
27 such appeals shall be taken to the circuit court of
28 Kanawha County.

§23-2-18. Rules.

1 The commissioner is authorized to promulgate legis-
2 lative rules pursuant to the provisions of article three
3 of chapter twenty-nine-a of this code for the implemen-
4 tation of this article: *Provided*, That no such legislative
5 rule may prohibit the right of an employer to perform
6 any function not constituting the practice of law and to
7 represent itself at any hearing to which the employer
8 may be entitled pursuant to section seventeen of this
9 article other than appellate proceedings and upon its
10 election to do so without benefit of counsel or other legal
11 representation. Such election shall be in writing upon
12 a form prescribed by the commissioner which desig-
13 nates its duly authorized representative in the perfor-
14 mance of such functions.

ARTICLE 2A. SUBROGATION.

§23-2A-1. Subrogation; limitations; effective date.

1 (a) Where a compensable injury or death is caused, in
2 whole or in part, by the act or omission of a third party,
3 the injured worker, or if he or she is deceased or
4 physically or mentally incompetent, his dependents or
5 personal representative shall be entitled to compensa-

6 tion under the provisions of this chapter and shall not
 7 by having received same be precluded from making
 8 claim against said third party.

9 (b) Notwithstanding the provisions of subsection
 10 (a) of this section, if an injured worker, his or her
 11 dependents or his or her personal representative makes
 12 a claim against said third party and recovers any sum
 13 thereby, the commissioner or a self-insured employer
 14 shall be allowed subrogation with regard to medical
 15 benefits paid as of the date of the recovery: *Provided,*
 16 That under no circumstances shall any moneys received
 17 by the commissioner or self-insured employer as
 18 subrogation to medical benefits expended on behalf of
 19 the injured or deceased worker exceed fifty percent of
 20 the amount received from the third party as a result of
 21 the claim made by the injured worker, his or her
 22 dependents or personal representative, after payment of
 23 attorney's fees and costs, if such exist.

24 (c) In the event that an injured worker, his or her
 25 dependents or personal representative makes a claim
 26 against a third party, there shall be, and there is hereby
 27 created a statutory subrogation lien upon such moneys
 28 received which shall exist in favor of the commissioner
 29 or self-insured employer. Any injured worker, his or her
 30 dependents or personal representative who receives
 31 moneys in settlement in any manner of a claim against
 32 a third party shall remain subject to the subrogation
 33 lien until payment in full of the amount permitted to be
 34 subrogated under subsection (b) of this section is paid.

35 (d) The right of subrogation granted by the provisions
 36 of this section shall not attach to any claim arising from
 37 a right of action which arose or accrued, in whole or in
 38 part, prior to the effective date of this article.

§23-2A-2. Study of subrogation.

1 The legislative joint committee on government and
 2 finance is hereby instructed to undertake a review of the
 3 applicability of expanded subrogation policies with
 4 regard to the workers' compensation fund including, but
 5 not limited to, an analysis of the cost incurred by the
 6 fund or other governmental agencies, the effect of such

7 subrogation at various levels upon the generation of
8 revenues for the fund, and the equity or fairness of the
9 withholding of moneys, services or things of value from
10 injured workers as the result of such subrogation. Such
11 study shall be reflective of the views not only of the
12 commissioner, but also of claimants, claimants' counsel,
13 employers, and actuaries or others with unique or
14 special knowledge of subrogation programs in the area
15 of workers' compensation.

ARTICLE 3. WORKERS' COMPENSATION FUND.

**§23-3-1. Compensation fund; surplus fund; catastrophe
and catastrophe payment defined; second
injury and second injury reserve; compensa-
tion by employers.**

1 (a) The commissioner shall establish a workers'
2 compensation fund from the premiums and other funds
3 paid thereto by employers, as herein provided, for the
4 benefit of employees of employers who have paid the
5 premiums applicable to such employers and have
6 otherwise complied fully with the provisions of section
7 five, article two of this chapter, and for the benefit, to
8 the extent elsewhere in this chapter set out, of employees
9 of employers who have elected, under section nine,
10 article two of this chapter, to make payments into the
11 surplus fund hereinafter provided for, and for the
12 benefit of the dependents of all such employees, and for
13 the payment of the administration expenses of this
14 chapter and shall promulgate legislative rules pursuant
15 to chapter twenty-nine-a of this code with respect to the
16 collection, maintenance and disbursement of such fund
17 not in conflict with the provisions of this chapter.

18 (b) A portion of all premiums that shall be paid into
19 the workers' compensation fund by subscribers not
20 electing to carry their own risk under section nine,
21 article two of this chapter, shall be set aside to create
22 and maintain a surplus fund to cover the catastrophe
23 hazard, the second injury hazard, and all losses not
24 otherwise specifically provided for in this chapter. The
25 percentage to be set aside shall be determined by the
26 commissioner as necessary to maintain a solvent surplus

27 fund. All interest earned on investments by the workers'
28 compensation fund, which is attributable to the surplus
29 fund, shall be credited to the surplus fund.

30 (c) A catastrophe is hereby defined as an accident in
31 which three or more employees are killed or receive
32 injuries, which, in the case of each individual, consist of:
33 Loss of both eyes or the sight thereof; or loss of both
34 hands or the use thereof; or loss of both feet or the use
35 thereof; or loss of one hand and one foot or the use
36 thereof. The aggregate of all medical and hospital bills
37 and other costs, and all benefits payable on account of
38 a catastrophe is hereby defined as "catastrophe pay-
39 ment". In case of a catastrophe to the employees of an
40 employer who is an ordinary premium-paying sub-
41 scriber to the fund, or to the employees of an employer
42 who, having elected to carry the employer's own risk
43 under section nine, article two of this chapter, has
44 heretofore elected, or may hereafter elect, to pay into the
45 catastrophe reserve of the surplus fund under the
46 provisions of that section, then the catastrophe payment
47 arising from such catastrophe shall not be charged
48 against, or paid by, such employer but shall be paid
49 from the catastrophe reserve of the surplus fund.

50 (d)(1) If an employee who has a definitely ascertainable
51 physical impairment, caused by a previous injury,
52 irrespective of its compensability, becomes permanently
53 and totally disabled through the combined effect of such
54 previous injury and a second injury received in the
55 course of and as a result of his or her employment, the
56 employer shall be chargeable only for the compensation
57 payable for such second injury: *Provided*, That in
58 addition to such compensation, and after the completion
59 of the payments therefor, the employee shall be paid the
60 remainder of the compensation that would be due for
61 permanent total disability out of a special reserve of the
62 surplus fund known as the second injury reserve,
63 created in the manner hereinbefore set forth.

64 (2) If an employee of an employer, where the em-
65 ployer has elected to carry his own risk under section
66 nine, of article two of this chapter, and is permitted not
67 to make payments into the second injury reserve of

68 surplus fund under the provisions of that section, has a
69 definitely ascertainable physical impairment caused by
70 a previous injury, irrespective of its compensability, and
71 becomes permanently and totally disabled from the
72 combined effect of such previous injury and a second
73 injury received in the course of and as a result of his
74 or her employment, the employee shall be granted an
75 award of total permanent disability and his or her
76 employer shall, upon order of the commissioner,
77 compensate the said employee in the same manner as
78 if the total permanent disability of the employee had
79 resulted from a single injury while in the employ of such
80 employer.

81 (e) Employers electing, as herein provided, to com-
82 pensate individually and directly their injured em-
83 ployees and their fatally injured employees' dependents
84 shall do so in the manner prescribed by the commis-
85 sioner, and shall make all reports and execute all
86 blanks, forms and papers as directed by the commis-
87 sioner, and as provided in this chapter.

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

§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
8 provided in section one or section one-h of article five
9 of this chapter, the commissioner or self-insured
10 employer shall continue to pay to the claimant such
11 benefits during the period of such disability unless it is
12 subsequently found by the commissioner or administra-
13 tive law judge that the claimant was not entitled to
14 receive the benefits, or any part thereof, so paid, in
15 which event the commissioner shall, where the employer
16 is a subscriber to the fund, credit said employer's
17 account with the amount of the overpayment; and,

18 where the employer has elected to carry the employer's
 19 own risk, the commissioner shall refund to such
 20 employer the amount of the overpayment. The amounts
 21 so credited to a subscriber or repaid to a self-insurer
 22 shall be charged by the commissioner to the surplus
 23 fund created by section one, article three of this chapter.
 24 If the final decision in any case determines that a
 25 claimant was not lawfully entitled to benefits paid to
 26 him or her pursuant to a prior decision, such amount
 27 of benefits so paid shall be deemed overpaid. The
 28 commissioner may only recover such amount by with-
 29 holding, in whole or in part, as determined by the
 30 commissioner, future permanent partial disability
 31 benefits payable to the individual in the same or other
 32 claims and credit such amount against the overpayment
 33 until it is repaid in full.

**§23-4-3. Schedule of maximum disbursements for medi-
 cal, surgical, dental and hospital treatment;
 legislative approval; guidelines; preferred
 provider agreements; charges in excess of
 scheduled amounts not to be made; required
 disclosure of financial interest in sale or rental
 of medically related mechanical appliances or
 devices; promulgation of rules to enforce
 requirement; consequences of failure to dis-
 close; contract by employer with hospital,
 physician, etc., prohibited; criminal penalties
 for violation; payments to certain providers
 prohibited.**

1 The commissioner shall establish and alter from time
 2 to time as he or she may determine to be appropriate
 3 a schedule of the maximum reasonable amounts to be
 4 paid to chiropractic physicians, medical physicians,
 5 osteopathic physicians, podiatrists, optometrists, voca-
 6 tional rehabilitation specialists, pharmacists, ophthal-
 7 mologists, and others practicing medicine and surgery,
 8 surgeons, hospitals or other persons, firms or corpora-
 9 tions for the rendering of treatment to injured em-
 10 ployees under this chapter. The commissioner also, on
 11 the first day of each regular session, and also from time
 12 to time, as the commissioner may consider appropriate,

13 shall submit the schedule, with any changes thereto, to
14 the Legislature. The promulgation of the schedule is not
15 subject to the legislative rule-making review procedures
16 established in sections eleven through fifteen, article
17 three, chapter twenty-nine-a of this code.

18 The commissioner shall disburse and pay from the
19 fund for such personal injuries to such employees as may
20 be entitled thereto hereunder as follows:

21 (a) Such sums for medicines, medical, surgical, dental
22 and hospital treatment, crutches, artificial limbs and
23 such other and additional approved mechanical applian-
24 ces and devices as may be reasonably required. The
25 commissioner shall determine that which is reasonably
26 required within the meaning of this section in accor-
27 dance with the guidelines developed by the health care
28 advisory panel pursuant to section three-b of this article:
29 *Provided*, That nothing herein shall prevent the imple-
30 mentation of guidelines applicable to a particular type
31 of treatment or service or to a particular type of injury
32 before guidelines have been developed for other types of
33 treatment or services or injuries: *Provided, however*,
34 That any guidelines for utilization review which are
35 developed in addition to the guidelines provided for in
36 section three-b of this article may be utilized by the
37 commissioner until superseded by guidelines developed
38 by the health care advisory panel pursuant to section
39 three-b of this article. Each health care provider who
40 seeks to provide services or treatment which are not
41 within any such guideline shall submit to the commis-
42 sioner specific justification for the need for such
43 additional services in the particular case and the
44 commissioner shall have the justification reviewed by a
45 health care professional before authorizing any such
46 additional services. The commissioner is authorized to
47 enter into preferred provider agreements.

48 (b) Payment for such medicine, medical, surgical,
49 dental and hospital treatment, crutches, artificial limbs
50 and such other and additional approved mechanical
51 appliances and devices authorized under subdivision
52 (a) hereof may be made to the injured employee, or to
53 the person, firm or corporation who or which has

54 rendered such treatment or furnished any of the items
55 specified above, or who has advanced payment for same,
56 as the commissioner may deem proper, but no such
57 payments or disbursements shall be made or awarded
58 by the commissioner unless duly verified statements on
59 forms prescribed by the commissioner shall be filed
60 with the commissioner within two years after the
61 cessation of such treatment or the delivery of such
62 appliances: *Provided*, That no payment hereunder shall
63 be made unless such verified statement shows no charge
64 for or with respect to such treatment or for or with
65 respect to any of the items specified above has been or
66 will be made against the injured employee or any other
67 person, firm or corporation, and when an employee
68 covered under the provisions of this chapter is injured
69 in the course of and as a result of his or her employment
70 and is accepted for medical, surgical, dental or hospital
71 treatment, the person, firm or corporation rendering
72 such treatment is hereby prohibited from making any
73 charge or charges therefor or with respect thereto
74 against the injured employee or any other person, firm
75 or corporation which would result in a total charge for
76 the treatment rendered in excess of the maximum
77 amount set forth therefor in the commissioner's schedule
78 established as aforesaid.

79 (c) No chiropractic physician, medical physician,
80 osteopathic physician, podiatrist, or others practicing
81 medicine or surgery (collectively and individually
82 referred to hereinafter as "practitioner" or "practition-
83 ers") shall refer his or her patients to the practitioner
84 himself or herself or to a supplier of mechanical
85 appliances or devices owned in whole or in part by the
86 practitioner, the practitioner's partnership or profes-
87 sional corporation, or a member of the practitioner's
88 immediate family for the purchase or rental of any
89 mechanical appliances or devices which the practitioner
90 has prescribed or recommended to such patient except
91 upon the terms prescribed by this section. Examples of
92 mechanical appliances or devices are described as
93 follows, but these examples are described for illustrative
94 purposes only and are not intended to limit the range
95 of items included by this phrase: hearing aids; crutches;

96 artificial limbs; oxygen concentrators; TENS units. For
97 the purposes of this subsection, the term "practitioner"
98 shall include natural persons, partnerships, and profes-
99 sional corporations.

100 (1) In order to avoid the bar of this subdivision (c), a
101 practitioner shall first disclose to his or her patient the
102 ownership interest of the practitioner, or of the practi-
103 tioner's partnership or professional corporation, or of a
104 member of the practitioner's immediate family in the
105 entity which would sell or rent the mechanical appliance
106 or device to the patient. If the practitioner would sell
107 or rent the mechanical appliance or device as part of his
108 or her practice and not as a separate legal entity, the
109 practitioner shall disclose this fact to the patient. These
110 disclosures must be delivered in writing to the patient.

111 (2) The commissioner is authorized to promulgate
112 legislative rules pursuant to chapter twenty-nine-a of
113 this code for the enforcement and implementation of this
114 subdivision (c). The commissioner may include in those
115 rules a requirement that the written notice disclose to
116 the patient that he or she is free to use any lawful
117 supplier of the mechanical appliance or device pres-
118 cribed or recommended and that other suppliers may
119 offer the mechanical appliance or device for less cost but
120 of equal or better quality elsewhere and that the patient
121 is encouraged to comparison shop. The commissioner's
122 rule may also provide for a differing level of reimbur-
123 sement to the supplier if the supplier is the practitioner
124 himself or herself or if the supplier is owned in whole
125 or in part by the practitioner, the practitioner's
126 partnership or professional corporation, or a member of
127 the practitioner's immediate family as compared to the
128 reimbursement of a supplier who is wholly independent
129 from the practitioner.

130 (3) Failure by a practitioner to comply with the
131 provisions of this subdivision (c) shall cause the
132 practitioner to forfeit his, her, or its right to reimbur-
133 sement for the services rendered by the practitioner to
134 the patient and, if any such services have previously
135 been reimbursed, the commissioner shall either seek
136 recovery of such funds by any lawful means or by

137 deducting such amounts from future payments to the
138 practitioner on account of services rendered to the same
139 patient or to other claimants of the workers' compensa-
140 tion fund. In addition, failure by a practitioner to
141 comply with the provisions of this subsection (c) shall
142 also result in the denial of payment to the supplier of
143 the mechanical appliance or device if that supplier is
144 one which is owned in whole or in part by the practi-
145 tioner, the practitioner's partnership or professional
146 corporation, or a member of the practitioner's imme-
147 diate family. If such supplier has already been reim-
148 bursed for the cost of the pertinent mechanical ap-
149 pliance or device, then the commissioner shall either
150 seek recovery of such funds by any lawful means or by
151 deducting such amounts from future payments to the
152 supplier on account of goods delivered to the same
153 patient or to other claimants of the workers' compensa-
154 tion fund.

155 (d) No employer shall enter into any contracts with
156 any hospital, its physicians, officers, agents or employees
157 to render medical, dental or hospital service or to give
158 medical or surgical attention therein to any employee
159 for injury compensable within the purview of this
160 chapter, and no employer shall permit or require any
161 employee to contribute, directly or indirectly, to any
162 fund for the payment of such medical, surgical, dental
163 or hospital service within such hospital for such
164 compensable injury. Any employer violating this section
165 shall be liable in damages to the employer's employees
166 as provided in section eight, article two of this chapter,
167 and any employer or hospital or agent or employee
168 thereof violating the provisions of this section shall be
169 guilty of a misdemeanor, and, upon conviction thereof,
170 shall be punished by a fine not less than one hundred
171 dollars nor more than one thousand dollars or by
172 imprisonment not exceeding one year, or both: *Provided,*
173 That the foregoing provisions of this subdivision (d) shall
174 not be deemed to prohibit an employer from participat-
175 ing in a preferred provider organization or program or
176 a health maintenance organization or other medical cost
177 containment relationship with the providers of medical,
178 hospital or other health care: *Provided, however,* That

179 nothing in this section shall be deemed to restrict the
180 right of a claimant to select a health care provider for
181 treatment of a compensable injury or disease.

182 (e) When an injury has been reported to the commis-
183 sioner by the employer without protest, the commis-
184 sioner may pay, or order an employer who or which
185 made the election and who or which received the
186 permission mentioned in section nine, article two of this
187 chapter to pay, within the maximum amount provided
188 by schedule established by the commissioner as afore-
189 said, bills for medical or hospital services without
190 requiring the injured employee to file an application for
191 benefits.

192 (f) The commissioner shall provide for the replace-
193 ment of artificial limbs, crutches, hearing aids, eye-
194 glasses and all other mechanical appliances provided in
195 accordance with this section which later wear out, or
196 which later need to be refitted because of the progres-
197 sion of the injury which caused the same to be originally
198 furnished, or which are broken in the course of and as
199 a result of the employee's employment. The fund or self-
200 insured employer shall pay for these devices, when
201 needed, notwithstanding any time limits provided by
202 law.

203 (g) No payment shall be made to a health care
204 provider who is suspended or terminated under the
205 terms of section three-c of this article except as provided
206 in subsection (c) of said section.

207 Notwithstanding the foregoing, the commissioner may
208 establish fee schedules, make payments and take other
209 actions required or allowed pursuant to article twenty-
210 nine-d, chapter sixteen of this code.

**§23-4-3a. Wrongfully seeking payment for services or
supplies; criminal penalties.**

1 (a) If any person who is a health care provider shall
2 knowingly, and with intent to defraud, secure or
3 attempt to secure payment from the workers' compen-
4 sation fund for services or supplies when such person is
5 not entitled to such payment or is entitled to some lesser

6 amount of payment, such person shall be guilty of a
7 misdemeanor, and, upon conviction thereof, shall be
8 fined not more than ten thousand dollars, or imprisoned
9 in the county jail not more than twelve months, or both
10 fined and imprisoned.

11 (b) Any person who is a health care provider who
12 fails, in violation of subsection (e), section three-c of this
13 article, to post a notice, in the form required by the
14 commissioner, in the provider's public waiting area that
15 the provider cannot accept any patient whose treatment
16 or other services or supplies would ordinarily be paid
17 for from the workers' compensation fund unless such
18 patient consents, in writing, prior to the provision of
19 such treatment or other services or supplies, to make
20 payment for that treatment or other services or supplies
21 himself or herself, shall be guilty of a misdemeanor,
22 and, upon conviction thereof, shall be fined one thousand
23 dollars.

24 (c) Any person who is a health care provider, who is
25 suspended or terminated under section three-c of this
26 article and, who intentionally attempts to collect any
27 sum of money from an injured employee who was not,
28 prior to the provision of any treatment or other services
29 or supplies, provided with the notice required by
30 subsection (c), section three-c of this article, shall be
31 guilty of a misdemeanor and, upon conviction thereof,
32 shall be fined not more than ten thousand dollars, or
33 imprisoned in the county jail not more than twelve
34 months, or both fined and imprisoned.

35 (d) For the purposes of this section, the term "person
36 who is a health care provider" shall mean any person
37 who has rendered, or who represents that he has
38 rendered, any treatment to an injured employee under
39 this chapter, or any person who has supplied, or who
40 represents that he has supplied, any medication or any
41 crutches, artificial limbs and other mechanical applian-
42 ces and devices for such injured employee. The term
43 shall include, but not be limited to, persons practicing
44 medicine and surgery, podiatry, dentistry, nursing,
45 pharmacy, optometry, osteopathic medicine and
46 surgery, chiropractic, physical therapy, psychology,

47 radiologic technology, occupational therapy or voca-
48 tional rehabilitation, and shall also include hospitals,
49 professional corporations, and other corporations, firms
50 and business entities.

51 (e) Any person convicted under the provisions of this
52 section shall, from and after such conviction, be barred
53 from providing future services or supplies to injured
54 employees under this chapter and shall cease to receive
55 payment for such services or supplies.

§23-4-3b. Creation of health care advisory panel.

1 The commissioner shall establish a health care
2 advisory panel consisting of representatives of the
3 various branches and specialties among health care
4 providers in this state. There shall be a minimum of five
5 members of the health care advisory panel who shall
6 receive reasonable compensation for their services and
7 reimbursement for reasonable actual expenses. Each
8 member of this panel shall be provided appropriate
9 professional or other liability insurance, without
10 additional premium, by the state board of risk and
11 insurance management created pursuant to article
12 twelve, chapter twenty-nine of this code. The panel shall:

13 (a) Establish guidelines for the health care which is
14 reasonably required for the treatment of the various
15 types of injuries and occupational diseases within the
16 meaning of section three of this article.

17 (b) Establish protocols and procedures for the perfor-
18 mance of examinations or evaluations performed by
19 physicians or medical examiners pursuant to sections
20 seven-a and eight of this article.

21 (c) Assist the commissioner in establishing guidelines
22 for the evaluation of the care provided by health care
23 providers to injured employees for purposes of section
24 three-c of this article.

25 (d) Assist the commissioner in establishing guidelines
26 as to the anticipated period of disability for the various
27 types of injuries pursuant to subsection (b), section
28 seven-a of this article.

29 (e) Assist the commissioner in establishing appropriate professional review of requests by health care
30 providers to exceed the guidelines for treatment of
31 injuries and occupational diseases established pursuant
32 to subsection (a) of this section.

§23-4-3c. Suspension or termination of providers of health care.

1 (a) The commissioner may suspend for up to one year
2 or terminate the right of any health care provider,
3 including a provider of rehabilitation services within the
4 meaning of section nine of this article, to obtain payment
5 for services rendered to injured employees if the
6 commissioner finds that the health care provider is
7 regularly providing excessive, medically unreasonable
8 or unethical care to injured employees or if the
9 commissioner finds that a health care provider is
10 attempting to make any charge or charges against the
11 injured employee or any other person, firm or corporation
12 which would result in a total charge for any
13 treatment rendered in excess of the maximum amount
14 set by the commissioner, in violation of section three of
15 this article. The commissioner shall consult with
16 medical experts, including the health care advisory
17 panel established pursuant to section three-b of this
18 article, for purposes of determining whether a health
19 care provider should be suspended or terminated
20 pursuant to this section.

21 (b) Upon the commissioner determining that there is
22 probable cause to believe that a health care provider
23 should be suspended or terminated pursuant to this
24 section, the commissioner shall provide such health care
25 provider with written notice which shall state the nature
26 of the charges against the health care provider and the
27 time and place at which such health care provider shall
28 appear to show cause why the health care provider's
29 right to receive payment under this chapter should not
30 be suspended or terminated, at which time and place
31 such health care provider shall be afforded an opportunity
32 to review the commissioner's evidence and to cross-examine
33 the commissioner's witnesses and also afforded
34 the opportunity to present testimony and enter evidence

35 in support of its position. The hearing shall be conducted
36 in accordance with the provisions of article five, chapter
37 twenty-nine-a of this code. The hearing may be con-
38 ducted by the commissioner or a hearing officer
39 appointed by the commissioner. The commissioner or
40 hearing officer shall have the power to subpoena
41 witnesses, papers, records, documents and other data
42 and things in connection with the proceeding hereunder
43 and to administer oaths or affirmations in any such
44 hearing. If, after reviewing the record of such hearing,
45 the commissioner determines that the right of such
46 health care provider to obtain payment under this
47 article should be suspended for a specified period of
48 time or should be terminated, the commissioner shall
49 issue a final order suspending or terminating the right
50 of such health care provider to obtain payment for
51 services under this article. Any health care provider so
52 suspended or terminated shall be notified in writing and
53 the notice shall specify the reasons for the action so
54 taken. Any appeal by the health care provider shall be
55 brought in the circuit court of Kanawha County or in
56 the county in which the provider's principal place of
57 business is located. The scope of the court's review of
58 such an appeal shall be as provided in section four,
59 article five, chapter twenty-nine-a of this code. The
60 provider may be suspended or terminated, based upon
61 the final order of the commissioner, pending final
62 disposition of any appeal. Such final order may be
63 stayed by the circuit court after hearing, but shall not
64 be stayed in or as a result of any ex parte proceeding.
65 If the health care provider does not appeal the final
66 order of the commissioner within thirty days, it shall be
67 final.

68 (c) No payment shall be made to a health care
69 provider or to an injured employee for services provided
70 by a health care provider after the effective date of a
71 commissioner's final order terminating or suspending
72 the health care provider: *Provided*, That nothing herein
73 shall prohibit payment by the commissioner or self
74 insured employer to a suspended or terminated health
75 care provider for medical services rendered where the
76 medical services were rendered to an injured employee

77 in an emergency situation. The suspended or terminated
78 provider is prohibited from making any charge or
79 charges for any services so provided against the injured
80 employee unless the injured employee, before any
81 services are rendered, is given notice by the provider in
82 writing that the provider does not participate in the
83 workers' compensation program and that the injured
84 employee will be solely responsible for all payments to
85 the provider, and unless the injured employee also signs
86 a written consent, before any services are rendered, to
87 make payment directly and to waive any right to
88 reimbursement from the commissioner or the self-
89 insured employer. The written consent and waiver
90 signed by the injured employee shall be filed by the
91 provider with the commissioner and shall be made a
92 part of the claim file.

93 (d) The commissioner shall notify each claimant,
94 whose duly authorized treating physician or other health
95 care provider has been suspended or terminated
96 pursuant to this section, of the suspension or termination
97 of the provider's rights to obtain payment under this
98 chapter and shall assist the claimant in arranging for
99 transfer of his or her care to another physician or
100 provider.

101 (e) Each suspended or terminated provider shall post
102 in the provider's public waiting area or areas a written
103 notice, in the form required by the commissioner, of the
104 suspension or termination of the provider's rights to
105 obtain payment under this chapter.

106 (f) A suspended or terminated provider may apply for
107 reinstatement at the end of the term of suspension or,
108 if terminated, after one year from the effective date of
109 termination.

110 (g) The commissioner shall promulgate legislative
111 rules pursuant to chapter twenty-nine-a of this code for
112 the purpose of implementing this section.

§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 except for the purpose of computing temporary
11 total disability benefits for part-time employees pursu-
12 ant to the provisions of section six-d of this article.

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

29 The minimum weekly benefits paid hereunder shall
30 not be less than twenty-six dollars per week for injuries
31 occurring on or after July one, one thousand nine
32 hundred sixty-nine; not less than thirty-five dollars per
33 week for injuries occurring on or after July one, one
34 thousand nine hundred seventy-one; not less than forty
35 dollars per week for injuries occurring on or after July
36 one, one thousand nine hundred seventy-three; not less
37 than forty-five dollars per week for injuries occurring
38 on or after July one, one thousand nine hundred seventy-
39 four; and for injuries occurring on or after July one, one
40 thousand nine hundred seventy-six, thirty-three and one-
41 third percent of the average weekly wage in West
42 Virginia, except as provided in section six-d of this
43 article.

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

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

70 (e) If the injury causes permanent disability less than
71 permanent total disability, the percentage of disability
72 to total disability shall be determined and the award
73 computed on the basis of four weeks' compensation for
74 each percent of disability determined, at the following
75 maximum or minimum benefit rates: Seventy percent
76 of the average weekly wage earnings, wherever earned,
77 of the injured employee, at the date of injury, not to
78 exceed the percentage of the average weekly wage in
79 West Virginia, as follows: On or after July one, one
80 thousand nine hundred sixty-nine, forty-five percent; on
81 or after July one, one thousand nine hundred seventy,
82 fifty percent; on or after July one, one thousand nine
83 hundred seventy-one, fifty-five percent; on or after July
84 one, one thousand nine hundred seventy-three, sixty

85 percent; on or after July one, one thousand nine hundred
86 seventy-five, sixty-six and two-thirds percent.

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

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

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

102 The loss of a great toe (one phalanx) shall be consi-
103 dered a five percent disability.

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

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

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

110 The loss of forepart of foot shall be considered a thirty
111 percent disability.

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

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

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

118 The loss of thigh at hip joint shall be considered a
119 sixty percent disability.

120 The loss of a little or fourth finger (one phalanx) shall

121 be considered a three percent disability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

154 The loss of four fingers shall be considered a thirty-

155 two percent disability.

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

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

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

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

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

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

176 Should a claimant sustain a compensable injury which
177 results in the total loss by severance of any of the bodily
178 members named in this subdivision, die from sickness
179 or noncompensable injury before the commissioner
180 makes the proper award for such injury, the commis-
181 sioner shall make such award to claimant's dependents
182 as defined in this chapter, if any; such payment to be
183 made in the same installments that would have been
184 paid to claimant if living: *Provided*, That no payment
185 shall be made to any surviving spouse of such claimant
186 after his or her remarriage, and that this liability shall
187 not accrue to the estate of such claimant and shall not
188 be subject to any debts of, or charges against, such
189 estate.

190 (g) Should a claimant to whom has been made a
191 permanent partial award of from one percent to eighty-
192 four percent, both inclusive, die from sickness or

193 noncompensable injury, the unpaid balance of such
194 award shall be paid to claimant's dependents as defined
195 in this chapter, if any; such payment to be made in the
196 same installments that would have been paid to claimant
197 if living: *Provided*, That no payment shall be made
198 to any surviving spouse of such claimant after his or her
199 remarriage, and that this liability shall not accrue to the
200 estate of such claimant and shall not be subject to any
201 debts of, or charges against, such estate.

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

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

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

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

224 (l) Except as otherwise specifically provided in this
225 chapter, temporary total disability benefits payable
226 under subdivision (b) of this section shall not be
227 deductible from permanent partial disability awards
228 payable under subdivision (e) or (f) of this section.
229 Compensation, either temporary total or permanent
230 partial, under this section shall be payable only to the
231 injured employee and the right thereto shall not vest in
232 his or her estate, except that any unpaid compensation

233 which would have been paid or payable to the employee
234 up to the time of his or her death, if he or she had lived,
235 shall be paid to the dependents of such injured employee
236 if there be such dependents at the time of death.

237 (m) The following permanent disabilities shall be
238 conclusively presumed to be total in character:

239 Loss of both eyes or the sight thereof.

240 Loss of both hands or the use thereof.

241 Loss of both feet or the use thereof.

242 Loss of one hand and one foot or the use thereof.

243 In all other cases permanent disability shall be
244 determined by the commissioner in accordance with the
245 facts in the case, and award made in accordance with
246 the provisions of subdivision (d) or (e).

247 (n) A disability which renders the injured employee
248 unable to engage in substantial gainful activity requir-
249 ing skills or abilities comparable to those of any gainful
250 activity in which he or she has previously engaged with
251 some regularity and over a substantial period of time
252 shall be considered in determining the issue of total
253 disability.

§23-4-6d. Benefits payable to part-time employees.

1 (a) For purposes of this section, a part-time employee
2 means an employee who, at the date of injury, is
3 customarily employed twenty-five hours per week or less
4 on a regular basis and is classified by the employer as
5 a part-time employee: *Provided*, That the term "part-
6 time employee" shall not include an employee who
7 regularly works more than twenty-five hours per week
8 for the employer, nor shall it include an employee who
9 regularly works for more than one employer and whose
10 regular combined working hours total more than
11 twenty-five hours per week when that employee is
12 rendered unable to perform the duties of all such
13 employment as a result of the injury, nor shall it include
14 any employee in the construction industry who works
15 less than twenty-five hours per week.

16 (b) For purposes of establishing temporary total
17 disability weekly benefits pursuant to subdivision (b),
18 section six of this article for part-time employees, the
19 "average weekly wage earnings, wherever earned, of the
20 injured person, at the date of injury", shall be computed
21 based upon the average gross pay, wherever earned,
22 which is received by the employee during the two
23 months, six months or twelve months immediately
24 preceding the date of the injury, whichever is most
25 favorable to the injured employee: *Provided*, That for
26 part-time employees who have been employed less than
27 two months but more than one week prior to the date
28 of injury, the average weekly wage earnings shall be
29 calculated based upon the average gross earnings in the
30 weeks actually worked: *Provided, however*, That for
31 part-time employees who have been employed one week
32 or less the average weekly wage earnings shall be
33 calculated based upon the average weekly wage prevail-
34 ing for the same or similar part-time employment at the
35 time of injury except that when an employer has agreed
36 to pay a certain hourly wage to such part-time employee,
37 the average weekly wage shall be computed by multi-
38 plying such hourly wage by the regular numbers of hours
39 contracted to be worked each week: *Provided further*,
40 That notwithstanding any provision of this article to the
41 contrary, no part-time employee shall receive temporary
42 total disability benefits greater than his or her average
43 weekly wage earnings as so calculated.

44 (c) Notwithstanding any other provisions of this
45 article to the contrary, benefits payable to a part-time
46 injured employee for any permanent disability shall be
47 computed and paid on the same basis as if the injured
48 employee is not a part-time employee within the
49 meaning of this section.

**§23-4-7a. Monitoring of injury claims; legislative find-
ings; review of medical evidence; recom-
mendation 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 or she shall proceed
26 as 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 or her maxi-
29 mum 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 the commissioner's selection for independ-
53 ent evaluation prior to the entry of a permanent
54 disability award: *Provided*, That the claimant shall
55 thereupon receive benefits which shall then be at the
56 permanent partial disability rate as provided in
57 subdivision (e), section six of this article until the entry
58 of a permanent disability award, and which amount of
59 such benefits paid prior to the receipt of such report
60 shall be considered and deemed to be payment of the
61 permanent disability award then granted, if any. In the
62 event that benefits actually paid exceed the amount
63 granted by the permanent partial disability award,
64 claimant shall be entitled to no further benefits by such
65 award but shall not be liable by offset or otherwise for
66 the excess paid.

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

79 (e) Notwithstanding any provision in subsection (c) of
80 this section, the commissioner shall enter a notice
81 suspending the payment of temporary total disability
82 benefits but providing a reasonable period of time

83 during which the claimant may submit evidence
84 justifying the continued payment of temporary total
85 disability benefits when:

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

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

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

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

123 the excess paid.

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

144 (g) The provisions of this section are in addition to and
145 in no way in derogation of the power and authority
146 vested in the commissioner by other provisions of this
147 chapter or vested in the employer to have a claimant
148 examined by a physician or physicians of the employer's
149 selection and at the employer's expense, or vested in the
150 claimant or employer to file a protest, under other
151 provisions of this chapter.

152 (h) All evaluations and examinations performed by
153 physicians shall be performed in accordance with the
154 protocols and procedures established by the health care
155 advisory panel pursuant to section three-b of this article:
156 *Provided*, That the physician may exceed these protocols
157 when additional evaluation is medically necessary.

§23-4-7b. Trial return to work.

1 (a) The Legislature hereby finds and declares that it
2 is in the interest of employees, employers and the
3 commissioner that injured employees be encouraged to
4 return to work as quickly as possible after an injury and

5 that appropriate protections be afforded to injured
6 employees who return to work on a trial basis.

7 (b) Notwithstanding any other provisions of this
8 chapter to the contrary, the injured employee shall not
9 have his or her eligibility to receive temporary total
10 disability benefits terminated when he or she returns to
11 work on a trial basis as set forth herein. An employee
12 shall be eligible to return to work on a trial basis when
13 he or she is released to work on a trial basis by the
14 treating physician.

15 (c) When an injured employee returns to work on a
16 trial basis, the employer shall provide a trial return to
17 work notification to the commissioner. Upon receipt
18 thereof, the commissioner shall note the date of the first
19 day of work pursuant to the trial return and shall
20 continue the claimant's eligibility for temporary total
21 disability benefits, but shall temporarily suspend the
22 payment of temporary total disability benefits during
23 the period actually worked by the injured employee. The
24 claim shall be closed on a temporary total disability
25 basis either when the injured employee or the autho-
26 rized treating physician notifies the commissioner that
27 the injured employee is able to perform his or her job
28 or automatically at the end of a period of three months
29 from the date of the first day of work unless the
30 employee notifies the commissioner that he or she is
31 unable to perform the duties of the job, whichever
32 occurs first. If the injured employee is unable to
33 continue working due to the compensable injury for a
34 three month period, the injured employee shall notify
35 the commissioner and temporary total disability benefits
36 shall be reinstated immediately and he or she shall be
37 referred for a rehabilitation evaluation as provided in
38 section nine of this article. No provision of this section
39 shall be construed to prohibit the commissioner from
40 referring the injured employee for any permanent
41 disability evaluation required or permitted by any other
42 provision of this article.

43 (d) Nothing in this section shall prevent the employee
44 from returning to work without a trial return to work
45 period.

46 (e) Nothing in this section shall be construed to
47 require an injured employee to return to work on a trial
48 basis.

49 (f) The provisions of this section shall be terminated
50 and be of no further force and effect on the first day
51 of July, one thousand nine hundred ninety-four.

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

1 The commissioner shall have authority, after due
2 notice to the employer and claimant, whenever in the
3 commissioner's opinion it shall be necessary, to order a
4 claimant of compensation for a personal injury other
5 than occupational pneumoconiosis to appear for exam-
6 ination before a medical examiner or examiners selected
7 by the commissioner; and the claimant and employer,
8 respectively, shall each have the right to select a
9 physician of the claimant's or the employer's own
10 choosing and at the claimant's or the employer's own
11 expense to participate in such examination. All such
12 examinations shall be performed in accordance with the
13 protocols and procedures established by the health care
14 advisory panel pursuant to section three-b of this article:
15 *Provided*, That the physician may exceed these protocols
16 when additional evaluation is medically necessary. The
17 claimant and employer shall, respectively, be furnished
18 with a copy of the report of examination made by the
19 medical examiner or examiners selected by the commis-
20 sioner. The respective physicians selected by the
21 claimant and employer shall have the right to concur in
22 any report made by the medical examiner or examiners
23 selected by the commissioner, or each may file with the
24 commissioner a separate report, which separate report
25 shall be considered by the commissioner in passing upon
26 the claim. If the compensation claimed is for occupa-
27 tional pneumoconiosis, the commissioner shall have the
28 power, after due notice to the employer, and whenever
29 in the commissioner's opinion it shall be necessary, to
30 order a claimant to appear for examination before the
31 occupational pneumoconiosis board hereinafter pro-
32 vided. In any case the claimant shall be entitled to
33 reimbursement for loss of wages, and to reasonable
34 traveling and other expenses necessarily incurred by

35 him or her in obeying such order.

36 Where the claimant is required to undergo a medical
37 examination or examinations by a physician or physi-
38 cians selected by the employer, as aforesaid or in
39 connection with any claim which is in litigation, the
40 employer shall reimburse the claimant for loss of wages,
41 and reasonable traveling and other expenses in connec-
42 tion with such examination or examinations, not to
43 exceed the expenses paid when a claimant is examined
44 by a physician or physicians selected by the commis-
45 sioner.

**§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 or her employment for a period of ten years
18 during the fifteen years immediately preceding the date
19 of his or her last exposure to such hazard and that such
20 claimant or deceased employee has sustained a chronic
21 respiratory disability, then it shall be presumed that
22 such claimant is suffering or such deceased employee
23 was suffering at the time of his or her death from
24 occupational pneumoconiosis which arose out of and in
25 the course of his or her employment. This presumption

26 shall not be conclusive.

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

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

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

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

42 If either party objects to the whole or any part of such
43 findings and conclusions of the board, such party shall
44 file with the commissioner or, on or after the first day
45 of July, one thousand nine hundred ninety-one, with the
46 office of judges, within thirty days from receipt of such
47 copy to such party, unless for good cause shown, the
48 commissioner or chief administrative law judge extends
49 such time, such party's objections thereto in writing,
50 specifying the particular statements of the board's
51 findings and conclusions to which such party objects.
52 The filing of an objection within the time specified is
53 hereby declared to be a condition of the right to litigate
54 such findings and hence jurisdictional. After the time
55 has expired for the filing of objections to the findings
56 and conclusions of the board, the commissioner or
57 administrative law judge shall proceed to act as
58 provided in this chapter. If after the time has expired
59 for the filing of objections to the findings and conclu-
60 sions of the board no objections have been filed, the
61 report of a majority of the board of its findings and
62 conclusions on any medical question shall be taken to be
63 plenary and conclusive evidence of the findings and
64 conclusions therein stated. If objection has been filed to
65 the findings and conclusions of the board, notice thereof

66 shall be given to the board, and the members thereof
67 joining in such findings and conclusions shall appear at
68 the time fixed by the commissioner or office of judges
69 for the hearing to submit to examination and cross-
70 examination in respect to such findings and conclusions.
71 At such hearing, evidence to support or controvert the
72 findings and conclusions of the board shall be limited
73 to examination and cross-examination of the members
74 of the board, and to the taking of testimony of other
75 qualified physicians and roentgenologists.

§23-4-9. Physical and vocational rehabilitation.

1 (a) The Legislature hereby finds that it is a goal of
2 the workers' compensation program to assist workers to
3 return to suitable gainful employment after an injury.
4 In order to encourage workers to return to employment
5 and to encourage and assist employers in providing
6 suitable employment to injured employees, it shall be a
7 priority of the commissioner to achieve early identifica-
8 tion of individuals likely to need rehabilitation services
9 and to assess the rehabilitation needs of these injured
10 employees. It shall be the goal of rehabilitation to return
11 injured workers to employment which shall be compar-
12 able in work and pay to that which the individual
13 performed prior to the injury. If a return to comparable
14 work is not possible, the goal of rehabilitation shall be
15 to return the individual to alternative suitable employ-
16 ment, using all possible alternatives of job modification,
17 restructuring, reassignment and training, so that the
18 individual will return to productivity with his or her
19 employer or, if necessary, with another employer. The
20 Legislature further finds that it is the shared respon-
21 sibility of the employer, the employee, the physician and
22 the commissioner to cooperate in the development of a
23 rehabilitation process designed to promote re-employ-
24 ment for the injured employee.

25 (b) In cases where an employee has sustained a
26 permanent disability, or has sustained an injury likely
27 to result in temporary disability in excess of one
28 hundred and twenty days, and such fact has been
29 determined by the commissioner, the commissioner shall
30 at the earliest possible time determine whether the

31 employee would be assisted in returning to remunera-
32 tive employment with the provision of rehabilitation
33 services and if the commissioner determines that the
34 employee can be physically and vocationally rehabili-
35 tated and returned to remunerative employment by the
36 provision of rehabilitation services including but not
37 limited to vocational or on-the-job training, counseling,
38 assistance in obtaining appropriate temporary or
39 permanent work site, work duties or work hours
40 modification, by the provision of crutches, artificial
41 limbs, or other approved mechanical appliances, or
42 medicines, medical, surgical, dental or hospital treat-
43 ment, the commissioner shall forthwith develop a
44 rehabilitation plan for the employee and, after due
45 notice to the employer, expend such an amount as may
46 be necessary for the aforesaid purposes: *Provided*, That
47 such expenditure for vocational rehabilitation shall not
48 exceed ten thousand dollars for any one injured em-
49 ployee: *Provided, however*, That no payment shall be
50 made for such vocational rehabilitation purposes as
51 provided in this section unless authorized by the
52 commissioner prior to the rendering of such physical or
53 vocational rehabilitation, except that payments shall be
54 made for reasonable medical expenses without prior
55 authorization if sufficient evidence exists which would
56 relate the treatment to the injury and the attending
57 physician or physicians have requested authorization
58 prior to the rendering of such treatment: *Provided*
59 *further*, That payment for physical rehabilitation,
60 including the purchase of prosthetic devices and other
61 equipment and training in use of such devices and
62 equipment, shall be considered expenses within the
63 meaning of section three of this article and shall be
64 subject to the provisions of sections three, three-a, three-
65 b, and three-c of this article. The provision of any
66 rehabilitation services shall be pursuant to a rehabili-
67 tation plan to be developed and monitored by a rehabil-
68 itation professional for each injured employee.

69 (c) In every case in which the commissioner shall
70 order physical or vocational rehabilitation of a claimant
71 as provided herein, the claimant shall, during the time
72 he or she is receiving any vocational rehabilitation or

73 rehabilitative treatment that renders him or her totally
74 disabled during the period thereof, be compensated on
75 a temporary total disability basis for such period.

76 (d) In every case in which the claimant returns to
77 gainful employment as part of a rehabilitation plan, and
78 the employee's average weekly wage earnings are less
79 than the average weekly wage earnings earned by the
80 injured employee at the time of the injury, he or she
81 shall receive temporary partial rehabilitation benefits
82 calculated as follows: The temporary partial rehabilita-
83 tion benefit shall be seventy percent of the difference
84 between the average weekly wage earnings earned at
85 the time of the injury and the average weekly wage
86 earnings earned at the new employment, both to be
87 calculated as provided in sections six, six-d and fourteen
88 of this article as such calculation is performed for
89 temporary total disability benefits, subject to the
90 following limitations: In no event shall such benefits be
91 subject to the minimum benefit amounts required by the
92 provisions of subdivision (b), section six of this article,
93 nor shall such benefits exceed the temporary total
94 disability benefits to which the injured employee would
95 be entitled pursuant to sections six, six-d and fourteen
96 of this article during any period of temporary total
97 disability resulting from the injury in the claim:
98 *Provided*, That no temporary total disability benefits
99 shall be paid for any period for which temporary partial
100 rehabilitation benefits are paid. The amount of tempor-
101 ary partial rehabilitation benefits payable under this
102 subsection shall be reviewed every ninety days to
103 determine whether the injured employee's average
104 weekly wage in the new employment has changed and,
105 if such change has occurred, the amount of benefits
106 payable hereunder shall be adjusted prospectively.
107 Temporary partial rehabilitation benefits shall only be
108 payable when the injured employee is receiving voca-
109 tional rehabilitation services in accordance with a
110 rehabilitation plan developed under this section.

111 (e) The commissioner shall promulgate legislative
112 rules on or before the first day of July, one thousand
113 nine hundred ninety-one, pursuant to the provisions of

114 article three of chapter twenty-nine-a of this code for the
115 purpose of developing a comprehensive rehabilitation
116 program which will assist injured workers to return to
117 suitable gainful employment after an injury in a manner
118 consistent with the provisions and findings of this
119 section. Such legislative rules shall provide definitions
120 for rehabilitation facilities and rehabilitation services
121 pursuant to this section.

122 (f) The provisions of this section shall be terminated
123 and be of no further force or effect on the first day of
124 July, one thousand nine hundred ninety-four.

§23-4-14. Computation of benefits.

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

7 In cases involving occupational pneumoconiosis or
8 other occupational diseases, the "date of injury" shall be
9 the date of the last exposure to the hazards of occupa-
10 tional pneumoconiosis or other occupational diseases.

11 In computing benefits payable on account of occupa-
12 tional pneumoconiosis, the commissioner shall deduct
13 the amount of all prior workers' compensation benefits
14 paid to the same claimant on account of silicosis, but a
15 prior silicosis award shall not, in any event, preclude an
16 award for occupational pneumoconiosis otherwise
17 payable under this article.

18 The expression "average weekly wage earnings,
19 wherever earned, of the injured person, at the date of
20 injury", within the meaning of this chapter, shall be
21 computed based upon the daily rate of pay at the time
22 of the injury or upon the average pay received during
23 the two months, six months or twelve months imme-
24 diately preceding the date of the injury, whichever is
25 most favorable to the injured employee, except for the
26 purpose of computing temporary total disability benefits
27 for part-time employees pursuant to the provisions of

28 section six-d of this article.

29 The expression "average weekly wage in West Virgi-
30 nia", within the meaning of this chapter, shall be the
31 average weekly wage in West Virginia as determined
32 by the commissioner of employment security in accor-
33 dance with the provisions of sections ten and eleven,
34 article six, chapter twenty-one-a of this code, and other
35 applicable provisions of said chapter twenty-one-a.

36 In any claim for injuries, including occupational
37 pneumoconiosis and other occupational diseases, occur-
38 ring on or after July one, one thousand nine hundred
39 seventy-one, any award for temporary total, permanent
40 partial or permanent total disability benefits or for
41 dependent benefits, shall be paid at the weekly rates or
42 in the monthly amount in the case of dependent benefits
43 applicable to the claimant therein in effect on the date
44 of such injury. If during the life of such award for
45 temporary total, permanent partial or permanent total
46 disability benefits or for dependent benefits, the weekly
47 rates or the monthly amount in the case of dependent
48 benefits are increased or decreased, the claimant shall
49 receive such increased or decreased benefits beginning
50 as of the effective date of said increase or decrease.

**§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 or her claim, whether in the
10 state of West Virginia the claimant was exposed to such
11 hazard over a continuous period of not less than two
12 years during the ten years immediately preceding the
13 date of his or her last exposure thereto and whether the
14 claimant was exposed to such hazard over a period of

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

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

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

§23-4-19. Wrongfully seeking compensation; criminal penalties; restitution.

1 Any person who shall knowingly and with fraudulent
 2 intent secure or attempt to secure larger compensation,
 3 or compensation for a longer term than he or she is
 4 entitled to, from the workers' compensation fund, or
 5 knowingly and with like intent secure or attempt to
 6 secure compensation from such fund when he or she is
 7 not entitled thereto, or shall knowingly and with like
 8 intent aid and abet anyone in the commission of the
 9 offenses herein set forth, shall be guilty of a misdemea-
 10 nor, and, upon conviction thereof, shall be fined not

11 exceeding five thousand dollars, or imprisoned not
 12 exceeding twelve months, or both, and in addition to any
 13 other penalty imposed, the court shall order any person
 14 convicted under this section to make full restitution of
 15 all moneys paid by the commissioner or self-insured
 16 employer as the result of the violation of this section. If
 17 the person so convicted is receiving compensation from
 18 such fund, he or she shall, from and after such
 19 conviction, cease to receive such compensation.

ARTICLE 4B. COAL-WORKERS' PNEUMOCONIOSIS FUND.

§23-4B-8. Separable from workers' compensation fund.

1 (a) No disbursements shall be made from the workers'
 2 compensation fund on account of any provision of this
 3 article: *Provided*, That the Legislature may at any time
 4 merge, consolidate, alter or liquidate this fund as it may
 5 determine and in no instance shall the operation of this
 6 article be construed as creating any contract which
 7 would deprive any injured employee of future benefits
 8 or increases awarded by an act of Congress, nor shall
 9 this section operate to create any liability upon the state
 10 of West Virginia.

11 (b) The Legislature hereby finds and declares that
 12 there is a substantial actuarial surplus in the coal-
 13 workers' pneumoconiosis fund in excess of two hundred
 14 million dollars. The Legislature further finds and
 15 declares that there is a substantial actuarial deficit in
 16 the workers' compensation fund in excess of four
 17 hundred million dollars, and that this deficit is in large
 18 part attributable to claims arising out of the coal
 19 industry. The commissioner is hereby directed to
 20 conduct an actuarial audit to determine the amount,
 21 computed at book value, of the actuarial surplus in the
 22 coal-workers' pneumoconiosis fund as of the thirtieth
 23 day of June, one thousand nine hundred ninety, and to
 24 certify such amount, as of that date, in a written order
 25 which together with the results of said audit shall be a
 26 public record. Notwithstanding the provisions of
 27 subsection (a) of this section or any other provision of
 28 this article to the contrary, the commissioner shall, by
 29 written order, transfer the assets underlying said

30 surplus to the workers' compensation fund, which assets
31 shall thereupon become merged into and consolidated
32 with the workers' compensation fund: *Provided*, That
33 the value of the assets so transferred, when computed
34 according to the book value of said assets on the date
35 of transfer, shall not exceed two hundred fifty million
36 dollars: *Provided, however*, That such assets so trans-
37 ferred shall be held in a separate account and shall not
38 be used for the satisfaction of obligations of the workers'
39 compensation fund until all other assets of the workers'
40 compensation fund have been expended: *Provided*
41 *further*, That the income earned, from time to time, on
42 the assets so transferred may be used to satisfy
43 obligations of the workers' compensation fund: *And*
44 *provided further*, That a sufficient reserve shall be
45 retained in the coal-workers' pneumoconiosis fund to
46 guarantee the payment of all claims incurred, including
47 claims which were incurred but not reported, on or
48 before the thirtieth day of June, one thousand nine
49 hundred ninety: *And provided further*, That any moneys
50 due and owing to the coal-workers' pneumoconiosis fund
51 as a result of any transfer of moneys pursuant to section
52 eight-a of this article shall be construed as an asset of
53 the coal-workers' pneumoconiosis fund and shall be
54 included as an asset transferred to the workers'
55 compensation fund under the provisions of this section.
56 If at any time subsequent to the transfer of the aforesaid
57 assets to the workers' compensation fund, the standards
58 for obtaining benefits under Title IV of the Federal Coal
59 Mine Health and Safety Act of 1969, as amended and
60 as subsequently amended, are changed such that the
61 actuarial audit performed hereunder may no longer
62 accurately reflect the liabilities of the coal-workers'
63 pneumoconiosis fund for claims arising prior to the first
64 day of July, one thousand nine hundred ninety, the
65 commissioner shall promptly conduct a new audit to
66 determine whether any portion of the foregoing separate
67 account should be returned to the coal-workers' pneumo-
68 coniosis fund in order to provide adequate reserves for
69 claims arising prior to the first day of July, one
70 thousand nine hundred ninety, and, if the results of such
71 new audit determine that said reserves are inadequate,

72 the commissioner shall transfer back to the coal-
73 workers' pneumoconiosis fund that portion of the assets
74 in the separate account necessary to provide adequate
75 reserves for such claims.

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 or her
3 jurisdiction, but upon the making or refusing to make
4 any 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 or her action, which notice shall state the
10 time allowed for filing an objection to such finding, and
11 such 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 the commissioner's duly
23 authorized representative at the county seat of the
24 county wherein the injury occurred, or at any other
25 place which may be agreed upon by the interested
26 parties, and in the event the interested parties cannot
27 agree, and it appears in the opinion of the commissioner
28 that the ends of justice require the taking of evidence
29 elsewhere, then at such place as the commissioner may
30 direct, having due regard for the convenience of
31 witnesses. Both the employer and claimant shall be
32 notified of such hearing at least ten days in advance, and
33 the hearing shall be held within thirty days after the
34 filing of objection to the commissioner's findings as

35 hereinabove provided, unless such hearing be postponed
36 by agreement of the parties or by the commissioner for
37 good cause. The evidence taken at such hearing shall be
38 transcribed and become part of the record of the
39 proceedings, together with the other records thereof in
40 the commissioner's office. At any time within thirty days
41 after hearing, if the commissioner is of the opinion that
42 the facts have not been adequately developed at such
43 hearing, he or she may order supplemental hearings
44 upon due notice to the parties. After final hearing the
45 commissioner shall, within thirty days, render his or her
46 decision affirming, reversing or modifying, his or her
47 former action, which shall be final: *Provided*, That the
48 claimant or the employer may apply to the appeal board
49 herein created for a review of such decision; but no
50 appeal or review shall lie unless application therefor be
51 made within thirty days of receipt of notice of the
52 commissioner's final action, or in any event within sixty
53 days of the date of such final action, regardless of notice,
54 and unless the application for appeal or review is filed
55 within the time specified, no such appeal or review shall
56 be allowed, such time limitation being hereby declared
57 to be a condition of the right to such appeal or review
58 and hence jurisdictional.

59 All objections to commissioner's decisions filed prior
60 to the first day of July, one thousand nine hundred
61 ninety-one, shall be handled in accordance with the
62 foregoing procedures set forth in this section. All
63 objections to commissioner's decisions which are not
64 appealable to the appeal board and which are filed on
65 or after the first day of July, one thousand nine hundred
66 ninety-one, shall be filed with the office of judges in
67 accordance with the procedures set forth in section one-
68 g and section one-h of this article.

69 Any proceeding on an objection in which the commis-
70 sioner has not concluded hearings and issued a final
71 order appealable to the appeal board on or before the
72 thirty-first day of December, one thousand nine hundred
73 ninety-one, shall be transferred to the office of judges
74 for final resolution. If additional evidentiary hearings
75 are necessary in any matter so transferred, such

76 hearings shall be conducted in accordance with section
77 one-h of this article. Decisions on transferred cases shall
78 likewise be rendered in accordance with section one-h
79 of this article.

80 Where a finding or determination of the commissioner
81 is protested only by the employer, and the employer does
82 not prevail in its protest and, in the event the claimant
83 is required to attend a hearing by subpoena or agree-
84 ment of counsel or at the express direction of the
85 commissioner, then such claimant in addition to reason-
86 able traveling and other expenses shall be reimbursed
87 for loss of wages incurred by the claimant in attending
88 such hearing.

§23-5-1a. Application by employee for further adjustment of claim—Objection to modification; hearing.

1 In any case where an injured employee makes
2 application in writing for a further adjustment of his or
3 her claim under the provisions of section sixteen, article
4 four of this chapter, and such application discloses cause
5 for a further adjustment thereof, the commissioner
6 shall, after due notice to the employer, make such
7 modifications or changes with respect to former findings
8 or orders in such claim as may be justified, and any
9 party dissatisfied with any such modification or change
10 so made by the commissioner shall, upon proper and
11 timely objection, be entitled to a hearing, as provided
12 in section one or section one-h of this article.

§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 or her former findings, and
8 which would entitle such claimant to greater benefits
9 than the claimant has already received, the commis-
10 sioner shall, within sixty days from the receipt of such
11 application, notify the claimant and the employer that

12 such application fails to establish a prima facie cause
13 for reopening the claim. Such notice shall be in writing
14 stating the reasons for denial and the time allowed for
15 objection to such decision of the commissioner. The
16 claimant may, within thirty days after receipt of such
17 notice, object in writing to such finding and unless the
18 objection is filed within such thirty-day period, no such
19 objection shall be allowed, such time limitation being
20 hereby declared to be a condition of the right to such
21 objection and hence jurisdictional. Upon receipt of an
22 objection, the commissioner or office of judges shall
23 afford the claimant an evidentiary hearing as provided
24 in section one or section one-h of this article.

**§23-5-1c. Application by employer for modification of
award—Objection to modification; hearing.**

1 In any case wherein an employer makes application
2 in writing for a modification of any award previously
3 made to an employee of said employer, and such
4 application discloses cause for a further adjustment
5 thereof, the commissioner shall, after due notice to the
6 employee, make such modifications or changes with
7 respect to former findings or orders in such form as may
8 be justified, and any party dissatisfied with any such
9 modification or change so made by the commissioner,
10 shall upon proper and timely objection, be entitled to a
11 hearing as provided in section one or section one-h of
12 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 or her former findings, and which would
5 entitle such employer to any modification of said
6 previous award, the commissioner shall, within sixty
7 days from the receipt of such application, notify the
8 claimant and employer that such application fails to
9 establish a just cause for modification of said award.
10 Such notice shall be in writing stating the reasons for
11 denial and the time allowed for objection to such
12 decision of the commissioner. The employer may, within

13 thirty days after receipt of said notice, object in writing
 14 to such decision, and unless the objection is filed within
 15 such thirty-day period, no such objection shall be
 16 allowed, such time limitation being hereby declared to
 17 be a condition of the right to such objection and hence
 18 jurisdictional. Upon receipt of such objection, the
 19 commissioner or office of judges shall afford the
 20 employer an evidentiary hearing as provided in section
 21 one or section one-h 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 administrative law judge, appeal board, or court, as the
 11 case may be, shall consider whether the applicant was
 12 represented by counsel and whether timely and proper
 13 notice was actually received by the applicant or the
 14 applicant's representative.

**§23-5-1f. Compromise and settlement of permanent
 partial disability awards.**

1 (a) After an objection is filed to a commissioner's
 2 decision either granting a permanent partial disability
 3 award of fifteen percent or less, or making no award
 4 upon a finding that no permanent partial disability was
 5 suffered as the result of the injury received, the parties
 6 may agree to compromise and settle the award in
 7 controversy under the conditions and limitations set out
 8 in this section. In addition, a reopening petition
 9 resulting in an increased permanent partial disability
 10 award of fifteen percent or less may similarly be
 11 compromised and settled. No other types of settlements
 12 shall be permitted. The terms of such settlement shall
 13 be reviewed by the administrative law judge as herein

14 provided.

15 (b) In any claim involving an employer not electing
16 to carry its own risk within the meaning of section nine,
17 article two of this chapter, the parties shall notify the
18 commissioner of their intent to settle a claim and the
19 commissioner may participate, at his or her discretion,
20 as a party in interest in any settlement proceeding
21 under this section.

22 (c) The parties seeking to settle and compromise an
23 objection to a commissioner's decision described in
24 subsection (a) of this section shall jointly file with the
25 chief administrative law judge a written memorandum
26 of settlement, signed by all parties in interest. An
27 administrative law judge shall review the written
28 memorandum to determine if it is reasonable and fair,
29 after giving due consideration to the interests of all
30 parties, and if it is in conformity with the provisions of
31 this chapter. The administrative law judge, in his or her
32 discretion, may hear testimony relating to any proposed
33 settlement. If the administrative law judge finds the
34 settlement to be fair and reasonable, he or she shall issue
35 an order so finding which shall, for all purposes,
36 constitute an order appealable to the appeal board as
37 provided under sections one and three of this article. If
38 the settlement is not approved by the administrative law
39 judge, the settlement agreement between the parties
40 shall be null and void, and the administrative law judge
41 shall issue an order so finding which shall be appealable
42 to the appeal board.

43 (d) A settlement may provide for a final award of
44 greater than fifteen percent permanent partial disabili-
45 ty: *Provided*, That no settlement shall be approved
46 which provides for or would result in a permanent total
47 disability or second injury life award.

48 (e) The amounts of compensation payable under a
49 settlement may be commuted to one or more lump sum
50 payments by agreement of the parties.

51 (f) A party seeking to vacate an order approving a
52 settlement on the grounds that a settlement was
53 obtained by fraud, undue influence or coercion shall file

54 a petition therefor with the office of judges within six
 55 months after the date of the order approving the
 56 settlement. The petition shall set forth in particular the
 57 facts upon which the grounds alleged therein are based
 58 and shall be served upon all other parties to the
 59 settlement. Upon request by any party to the settlement,
 60 the chief administrative law judge shall set the matter
 61 down for hearing. At the conclusion thereof, the chief
 62 administrative law judge shall enter an order setting
 63 forth his or her findings of fact and conclusions of law,
 64 which order shall be appealable to the appeal board.
 65 Upon a finding, by clear and convincing evidence, that
 66 the settlement was obtained by fraud, undue influence
 67 or coercion, the chief administrative law judge shall
 68 vacate and set aside the order approving the settlement.

69 (g) A settlement approved by the administrative law
 70 judge shall be final and binding as to the particular
 71 award in controversy but shall not affect any right
 72 under article four of this chapter to future medical
 73 benefits, to physical and vocational rehabilitation, or the
 74 right to seek a reopening of the claim pursuant to
 75 section sixteen of article four of this chapter and section
 76 one-a of this article.

77 (h) For matters pending before the commissioner on
 78 the first day of July, one thousand nine hundred ninety,
 79 or thereafter, the foregoing procedures for settlement
 80 shall apply except the commissioner shall act in the
 81 place of the administrative law judge or chief adminis-
 82 trative law judge.

**§23-5-1g. Creation of office of administrative law judges;
 powers of chief administrative law judge
 and said office.**

1 (a) There is hereby created within the workers'
 2 compensation appeal board the workers' compensation
 3 office of administrative law judges which shall be
 4 referred to as the office of judges. The office of judges
 5 shall be under the supervision of a chief administrative
 6 law judge who shall be appointed by the Governor, with
 7 the advice and consent of the Senate.

8 (b) The chief administrative law judge shall be a

9 person who has been admitted to the practice of law in
10 this state and shall also have had at least four years of
11 experience as an attorney. The chief administrative law
12 judge's salary shall be set by the appeal board created
13 in section two of this article. Said salary shall be within
14 the salary range for comparable chief administrative
15 law judges as determined by the state personnel board
16 created by section six of article six of chapter twenty-
17 nine of this code. The chief administrative law judge
18 may only be removed by the appeal board and shall not
19 be removed except for official misconduct, incompe-
20 tence, neglect of duty, gross immorality, or malfeasance
21 and then only after he or she has been presented in
22 writing with the reasons for his or her removal and then
23 only in the manner prescribed in article six-a of chapter
24 twenty-nine of this code. No other provision of this code
25 purporting to limit the term of office of any appointed
26 official or employee or affecting the removal of any
27 appointed official or employee shall be applicable to the
28 chief administrative law judge.

29 (c) By and with the consent of the commissioner, the
30 chief administrative law judge shall employ such
31 additional administrative law judges and other person-
32 nel as are necessary for the proper conduct of a system
33 of administrative review of orders issued by the
34 commissioner which orders have been objected to by a
35 party, and all such employees shall be in the classified
36 service of the state. Qualifications, compensation and
37 personnel practice relating to the employees of the office
38 of judges, other than the chief administrative law judge,
39 shall be governed by the provisions of the statutes, rules
40 and regulations of the classified service pursuant to
41 article six, chapter twenty-nine of this code. All such
42 additional administrative law judges shall be persons
43 who have been admitted to the practice of law in this
44 state and shall also have had at least two years of
45 experience as an attorney. The chief administrative law
46 judge shall supervise the other administrative law
47 judges and other personnel which collectively shall be
48 referred to in this chapter as the office of judges.

49 (d) The administrative expense of the office of judges

50 shall be included by the appeal board in its annual
51 budget when it submits that budget to the commissioner
52 pursuant to section two of this article.

53 (e) With the advice and consent of the commissioner,
54 on or before the first day of May, one thousand nine
55 hundred ninety-one, the appeal board shall promulgate
56 rules of practice and procedure for the hearing and
57 determination of all objections to findings or orders of
58 the commissioner pursuant to section one of this article
59 and for the settlement of claims pursuant to section one-
60 f of this article. Such rules of practice and procedure
61 shall be promulgated in accordance with the provisions
62 of article three of chapter twenty-nine-a of this code. The
63 appeal board shall not have the power to promulgate
64 legislative rules as that phrase is defined in article three
65 of chapter twenty-nine-a of this code.

66 (f) On and after the first day of July, one thousand
67 nine hundred ninety-one, the chief administrative law
68 judge shall have the power, which shall be delegated by
69 the appeal board, to hear and determine all disputed
70 claims in accordance with the provisions of this article,
71 establish a procedure for the hearing of disputed claims,
72 take oaths, examine witnesses, issue subpoenas, estab-
73 lish the amount of witness fees, keep such records and
74 make such reports as are necessary for disputed claims,
75 review and approve agreements to compromise and
76 settle claims involving permanent partial disability
77 awards permitted by the provisions of section one-f,
78 article five of this chapter, and exercise such additional
79 powers, including the delegation of such powers to
80 administrative law judges or hearing examiners as may
81 be necessary for the proper conduct of a system of
82 administrative review of disputed claims.

**§23-5-1h. Hearings on objections to commissioner's
decisions by office of administrative law
judges.**

1 On or after the first day of July, one thousand nine
2 hundred ninety-one, objections to a commissioner's
3 decision made pursuant to the provisions of section one
4 of this article shall be filed with the office of judges.

5 Upon receipt of an objection, the office of judges shall,
6 within fifteen days from receipt thereof, set a time and
7 place for the hearing of evidence and shall notify the
8 commissioner of the filing of the objection. Hearings
9 may be conducted at the county seat of the county
10 wherein the injury occurred, or at any other place which
11 may be agreed upon by the interested parties, and in
12 the event the interested parties cannot agree, and it
13 appears in the opinion of the chief administrative law
14 judge or the chief administrative law judge's authorized
15 representative that the ends of justice require the taking
16 of evidence elsewhere, then at such place as the chief
17 administrative law judge or such authorized represen-
18 tative may direct, having due regard for the convenience
19 of witnesses. The employer, the claimant and the
20 commissioner shall be notified of such hearing at least
21 ten days in advance, and the hearing shall be held
22 within thirty days after the filing of the objection unless
23 such hearing be postponed by agreement of the parties
24 or by the chief administrative law judge or such
25 authorized representative for good cause. The commis-
26 sioner shall be considered a party to any proceeding
27 under this article which involves a claim chargeable
28 against the workers' compensation fund, the disabled
29 workers' relief fund or such other fund as may then be
30 under the commissioner's management and control, and
31 may appear only in any proceedings involving a claim
32 that is or may be asserted against any portion of the
33 surplus fund or any claim in which the employer fails
34 to appear.

35 The office of judges shall keep full and complete
36 records of all proceedings concerning a disputed claim.
37 All testimony upon a disputed claim shall be recorded
38 but need not be transcribed unless the claim is appealed
39 or in such other circumstances as, in the opinion of the
40 chief administrative law judge, may require such
41 transcription. Upon receipt of notice of the filing of an
42 objection, the commissioner shall forthwith forward to
43 the chief administrative law judge all records, or copies
44 of such records, in the commissioner's office which
45 relate to the matter objected to. All such records or
46 copies thereof and any evidence taken at hearings

47 conducted by the office of judges shall constitute the
48 record upon which the matter shall be decided. The
49 office of judges shall not be bound by the usual common
50 law or statutory rules of evidence. At any time within
51 thirty days after hearing, if the chief administrative law
52 judge or the chief administrative law judge's authorized
53 representative is of the opinion that the facts have not
54 been adequately developed at such hearing, he or she
55 may order supplemental hearings or obtain such
56 additional evidence as he or she deems warranted upon
57 due notice to the parties.

58 All hearings shall be conducted as determined by the
59 chief administrative law judge pursuant to the rules of
60 practice and procedure promulgated pursuant to section
61 one-g of this article. Upon consideration of the entire
62 record, the chief administrative law judge or an
63 administrative law judge within the office of judges
64 shall, within thirty days after final hearing, render a
65 decision affirming, reversing or modifying the commis-
66 sioner's action. Said decision shall contain findings of
67 fact and conclusions of law and shall be mailed to all
68 interested parties.

**§23-5-1i. Appeal from administrative law judge decision
to appeal board.**

1 The employer, claimant or commissioner may appeal
2 to the appeal board created in section two of this article
3 for a review of a decision by an administrative law
4 judge. No appeal or review shall lie unless application
5 therefore be made within thirty days of receipt of notice
6 of the administrative law judge's final action or in any
7 event within sixty days of the date of such final action,
8 regardless of notice and, unless the application for
9 appeal or review is filed within the time specified, no
10 such appeal or review shall be allowed, such time
11 limitation being hereby declared to be a condition of the
12 right of such appeal or review and hence jurisdictional.

**§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 or administrative law judge taken after a hearing
4 held in accordance with the provisions of section one or
5 section one-h of this article, shall have the right to
6 appeal to the board created in section two of this article
7 for a review of such action. The commissioner shall
8 likewise have the right to appeal to the appeal board any
9 final action taken in a proceeding in which he or she
10 is a party. The aggrieved party shall file a written notice
11 of appeal with the compensation commissioner or, after
12 the first day of July, one thousand nine hundred ninety-
13 one, with the office of judges directed to such board,
14 within thirty days after receipt of notice of the action
15 complained of, or in any event, regardless of notice,
16 within sixty days after the date of the action complained
17 of, and unless the notice of appeal is filed within the
18 time specified, no such appeal shall be allowed, such
19 time limitation being hereby declared to be a condition
20 of the right to such appeal and hence jurisdictional; and
21 the commissioner or the office of judges shall notify the
22 other parties immediately upon the filing of a notice of
23 appeal. The commissioner or the office of judges shall
24 forthwith make up a transcript of the proceedings
25 before the commissioner or the office of judges and
26 certify and transmit the same to the board. Such
27 certificate shall incorporate a brief recital of the
28 proceedings therein had and recite each order entered
29 and the date thereof. The board shall review the action
30 of the commissioner or administrative law judge
31 complained of at its next meeting after the filing of
32 notice of appeal, provided such notice of appeal shall
33 have been filed thirty days before such meeting of the
34 board, unless such review be postponed by agreement
35 of parties or by the board for good cause. The board
36 shall set a time and place for the hearing of arguments
37 on each claim and shall notify the interested parties
38 thereof, and briefs may be filed by the interested parties
39 in accordance with the rules of procedure prescribed by
40 the board. And thereupon, after a review of the case, the
41 board shall sustain the finding of the commissioner or
42 administrative law judge or enter such order or make
43 such award as the commissioner or administrative law
44 judge should have made, stating in writing its reasons

45 therefor, and shall thereupon certify the same to the
46 commissioner, or chief administrative law judge, who
47 shall proceed in accordance therewith. Or, instead of
48 affirming or reversing the commissioner or administra-
49 tive law judge as aforesaid, the board may, upon motion
50 of either party or upon its own motion, for good cause
51 shown, to be set forth in the order of the board, remand
52 the case to the commissioner or chief administrative law
53 judge for the taking of such new, additional or further
54 evidence as in the opinion of the board may be necessary
55 for a full and complete development of the facts of the
56 case. In the event the board shall remand the case to
57 the commissioner or chief administrative law judge for
58 the taking of further evidence therein, the commissioner
59 or administrative law judge shall proceed to take such
60 new, additional or further evidence in accordance with
61 any instruction given by the board, and shall take the
62 same within thirty days after receipt of the order
63 remanding the case, giving to the interested parties at
64 least ten days' written notice of such supplemental
65 hearing, unless the taking of evidence shall be postponed
66 by agreement of parties, or by the commissioner or
67 administrative law judge for good cause. After the
68 completion of such supplemental hearing, the commis-
69 sioner or administrative law judge shall, within sixty
70 days, render his or her decision affirming, reversing or
71 modifying the former action of the commissioner or
72 administrative law judge, which decision shall be
73 appealable to, and proceeded with by the appeal board
74 in like manner as in the first instance. The board may
75 remand any case as often as in its opinion is necessary
76 for a full development and just decision of the case. The
77 board may take evidence or consider ex parte state-
78 ments furnished in support of any motion to remand the
79 case to the commissioner or chief administrative law
80 judge. All evidence taken by or filed with the board
81 shall become a part of the record. All appeals from the
82 action of the commissioner or administrative law judge
83 shall be decided by the board at the same session at
84 which they are heard, unless good cause for delay
85 thereof be shown and entered of record. In all proceed-
86 ings before the board, any party may be represented by

87 counsel.

§23-5-3a. Continuances and supplemental hearings; claims not to be denied on technicalities.

1 It is the policy of this chapter that the rights of
2 claimants for workers' compensation be determined as
3 speedily and expeditiously as possible to the end that
4 those incapacitated by injuries and the dependents of
5 deceased workers may receive benefits as quickly as
6 possible in view of the severe economic hardships which
7 immediately befall the families of injured or deceased
8 workers. Therefore, the criteria for continuances and
9 supplemental hearings "for good cause shown" are to be
10 strictly construed by the commissioner and chief
11 administrative law judge and their authorized represen-
12 tatives to prevent delay when granting or denying
13 continuances and supplemental hearings. It is also the
14 policy of this chapter to prohibit the denial of just claims
15 of injured or deceased workers or their dependents on
16 technicalities.

§23-5-4b. Jurisdictional findings and decisions appealable.

1 In any case where the jurisdiction of the commissioner
2 or chief administrative law judge is contested, the order
3 of the commissioner or chief administrative law judge
4 in respect thereto shall be deemed final for the purpose
5 of appeal to the board and any decision of the board in
6 respect to such questions of jurisdiction shall be deemed
7 final for the purpose of appeal to the supreme court of
8 appeals.

ARTICLE 5A. DISCRIMINATORY PRACTICES.

§23-5A-3. Termination of injured employee prohibited; re-employment of injured employees.

1 (a) It shall be a discriminatory practice within the
2 meaning of section one of this article to terminate an
3 injured employee while the injured employee is off work
4 due to a compensable injury within the meaning of
5 article four of this chapter and is receiving or is eligible
6 to receive temporary total disability benefits, unless the
7 injured employee has committed a separate discharge-

8 able offense. A separate dischargeable offense shall
9 mean misconduct by the injured employee wholly
10 unrelated to the injury or the absence from work
11 resulting from the injury. A separate dischargeable
12 offense shall not include absence resulting from the
13 injury or from the inclusion or aggregation of absence
14 due to the injury with any other absence from work.

15 (b) It shall be a discriminatory practice within the
16 meaning of section one of this article for an employer
17 to fail to reinstate an employee who has sustained a
18 compensable injury to the employee's former position of
19 employment upon demand for such reinstatement
20 provided that the position is available and the employee
21 is not disabled from performing the duties of such
22 position. If the former position is not available, the
23 employee shall be reinstated to another comparable
24 position which is available and which the employee is
25 capable of performing. A comparable position for the
26 purposes of this section shall mean a position which is
27 comparable as to wages, working conditions and, to the
28 extent reasonably practicable, duties to the position held
29 at the time of injury. A written statement from a duly
30 licensed physician that the physician approves the
31 injured employee's return to his or her regular employ-
32 ment shall be prima facie evidence that the worker is
33 able to perform such duties. In the event that neither
34 the former position nor a comparable position is
35 available, the employee shall have a right to preferential
36 recall to any job which the injured employee is capable
37 of performing which becomes open after the injured
38 employee notifies the employer that he or she desired
39 reinstatement. Said right of preferential recall shall be
40 in effect for one year from the day the injured employee
41 notifies the employer that he or she desires reinstate-
42 ment: *Provided*, That the employee provides to the
43 employer a current mailing address during this one year
44 period.

45 (c) Any civil action brought under this section shall
46 be subject to the seniority provisions of a valid and
47 applicable collective bargaining agreement, or arbitra-
48 tor's decision thereunder, or to any court or administra-

49 tive order applying specifically to the injured employee's
50 employer, and shall further be subject to any applicable
51 federal statute or regulation.

52 d) Nothing in this section shall affect the eligibility
53 of the injured employee to workers' compensation
54 benefits under this chapter.

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

Frederick Z. Fork
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect July 1, 1990.

Harold E. Palmer
Clerk of the Senate

Donald G. Kopp
Clerk of the House of Delegates

Kath Hendette
President of the Senate

Paul Rubin
Speaker of the House of Delegates

The within *is approved* this the *12th*
day of *July*, 1990.

Gaston Caperton
Governor

PRESENTED TO THE

GOVERNOR

Date 7/3/90

Time 4:15 pm

RECEIVED

1990 JUL 12 PM 4:14

OFFICE OF NECA VOUCHER
SECRETARY OF STATE