WEST VIRGINIA LEGISLATURE
SECOND EXTRAORDINARY SESSION, 1990

ENROLLED

HOUSE BILL No. 213

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; 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 classes the employments subject to this chapter, in accordance with the nature of the business and the degree of hazard incident thereto. And the commissioner shall have power, in like manner, to reclassify such industries into groups or classes at any time, and to create additional groups or classes. The commissioner may make necessary expenditures to obtain statistical and other information to establish the classes provided for in this section.

11 The commissioner shall keep an accurate account of all money or moneys paid or credited to the compensation fund, and of the liability incurred and disbursements made against same; and an accurate account of all money or moneys received from each individual subscriber, and of the liability incurred and disburse-
ments made on account of injuries and death of the
employees of each subscriber, and of the receipts and
incurred liability of each group or class.

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

It shall be the duty of the commissioner to fix and
maintain the lowest possible rates of premiums consist-
et with the maintenance of a solvent workers' compen-
sation fund and the creation and maintenance of a
reasonable surplus in each group after providing for the
payment to maturity of all liability incurred by reason
of injury or death to employees entitled to benefits under
the provisions of this chapter. A readjustment of rates
shall be made yearly on the first day of July, or at any
time the same may be necessary: Provided, That on and
after the first day of July, one thousand nine hundred
ninety-one, the commissioner shall at least thirty days
prior to the first day of the quarter to which an
adjustment of rates is to be applicable, file a schedule
of the readjusted rates with the office of the secretary
of state for publication in the state register pursuant to
article two, chapter twenty-nine-a of this code: Provided,
however, That from the effective date of this section to
the thirtieth day of June, one thousand nine hundred
ninety-one, the commissioner shall be permitted to
retroactively readjust rates to the first day of the
quarter within which notice of the readjustment is
given. The determination of the lowest possible rates of
premiums within the meaning hereof and of the
existence of any surplus or deficit in the fund, shall be
predicated solely upon the experience and statistical
data compiled from the records and files in the
commissioner's office under this and prior workers'
compensation laws of this state for the period from the first day of June, one thousand nine hundred thirteen, to the nearest practicable date prior to such adjustment: Provided further, That any expected future return, in the nature of interest or income from invested funds shall be predicated upon the average realization from investments to the credit of the compensation fund for the two years next preceding. Any reserves set up for future liabilities and any commutation of benefits shall likewise be predicated solely upon prior experience under this and preceding workers' compensation laws and upon expected realization from investments determined by the respective past periods, as aforesaid.

The commissioner may fix a rate of premiums applicable alike to all subscribers forming a group or class, and such rates shall be determined from the record of such group or class shown upon the books of the commissioner: Provided, That if any group has a sufficient number of employers with considerable difference in their degrees of hazard, the commissioner may fix a rate for each subscriber of such group, such rate to be based upon the subscriber's record on the books of the commissioner for a period not to exceed three years ending December thirty-first of the year preceding the year in which the rate is to be effective; and the liability part of such record shall include such cases as have been acted upon by the commissioner during such three-year period, irrespective of the date the injury was received; and any subscriber in a group so rated, whose record for such period cannot be obtained, shall be given a rate based upon the subscriber's record for any part of such period as may be deemed just and equitable by the commissioner; and the commissioner shall have authority to fix a reasonable minimum and maximum for any group to which this individual method of rating is applied, and to add to the rate determined from the subscriber's record such amount as is necessary to liquidate any deficit in the schedule as to create a reasonable surplus.

It shall be the duty of the commissioner, when the 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
178 ployers; interest and penalties; civil reme­
179 dies; creation and enforcement of lien
179 against employer and purchaser; duty of
179 secretary of state to register liens; distraint
179 powers; insolvency proceedings; secretary of
179 state to withhold certificates of dissolution;
179 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,
after giving appropriate notice as required by due
process, distraint upon any personal property, including
intangible property, of any employer delinquent for any
payment, interest and penalty thereon. If the commis-
sioner has good reason to believe that such property or
a substantial portion thereof is about to be removed
from the county in which it is situated, upon giving
appropriate notice, either before or after the seizure, as
is proper in the circumstances, he or she may likewise
distraint in the name of the state before such delinquency
occurs. For such purpose, the commissioner may require
the services of a sheriff of any county in the state in
levying such distress in the county in which the sheriff
is an officer and in which such personal property is
situated. A sheriff so collecting any payment, interest
and penalty thereon shall be entitled to such compen-
sation as is provided by law for his or her services in
the levy and enforcement of executions.

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

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

In any case when an employer required to subscribe
to the fund defaults in payments of premium, premium
deposits, or interest thereon, for as many as two
calendar quarters, which quarters need not be consecutive, and remains in default after due notice, and the commissioner has been unable to collect such payments by any of the other civil remedies prescribed herein, the commissioner may bring action in the circuit court of Kanawha County to enjoin such employer from continuing to carry on the business in which such liability was incurred: Provided, That the commissioner may as an alternative to this action require such delinquent employer to file a bond in the form prescribed by the commissioner with satisfactory surety in an amount not less than fifty percent more than the payments, interest 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.

(a) (I) Notwithstanding anything contained in this chapter, employers subject to this chapter who are of sufficient financial responsibility to insure the payment of compensation to injured employees and the dependents of fatally injured employees, whether in the form of pecuniary compensation or medical attention, funeral expenses or otherwise as herein provided, of the value at least equal to the compensation provided in this chapter, or employers of such financial responsibility who maintain their own benefit funds, or system of compensation to which their employees are not required or permitted to contribute, or such employers as shall furnish bond or other security to insure such payments, may, upon a finding of such facts by the compensation commissioner, elect to pay individually and directly, or from such benefit funds, department or association, such compensation and expenses to injured employees or fatally injured employees' dependents. The compensation commissioner shall require security or bond from such employer, to be approved by the commissioner, and of such amount as is by the commissioner considered adequate and sufficient to compel or secure to such employees, or their dependents, payment of the compen-
sation and expenses herein provided for, which shall in no event be less than the compensation paid or furnished out of the state workers' compensation fund in similar cases to injured employees or the dependents of fatally injured employees whose employers contribute to such fund.

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

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

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

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

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

(4) Any employer whose record upon the books of the compensation commissioner shows a liability against the workers' compensation fund incurred on account of injury to or death of any of the employer's employees, in excess of premiums paid by such employer, shall not be granted the right, individually and directly or from such benefit funds, department or association, to
compensate the employer's injured employees and the
dependents of the employer's fatally injured employees
until the employer has paid into the workers' compensa-
sation fund the amount of such excess of liability over
premiums paid, including the employer's proper propor-
tion of the liability incurred on account of explosions,
catastrophes or second injuries as defined in section one,
article three of this chapter, occurring within the state
and charged against such fund.

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

(2) To determine the contribution for second injury
coverage for self-insured employers, the commissioner
shall first establish, based upon actuarial advice, the
projected funding cost for incurred losses for the second
injury reserve of the surplus fund for the prospective
year for each industrial group or class, so that industrial
groups or classes with significantly different experience
in use of the second injury reserve shall pay their proper
share based upon the record of that industrial group or
class: Provided, That the commissioner shall establish
industrial groups or classes as permitted by section four
of this article but need not establish the same number
of industrial groups or classes as the number established
for purposes of section four of this article. The commis-
sioner shall further allocate such cost within the
industrial group or class to individual employers based
upon the ratio of the individual employer's record of
actual paid losses for claims chargeable to that employer
to the total actual paid losses for claims chargeable to
all employers in that industrial group or class. Actual
paid losses shall mean cash payments made under this chapter as reflected on the books of the commissioner for a period not to exceed three years ending the thirty-first day of December of the year preceding the year in which the rate is to be effective but shall not include any payments or losses charged to any portion of the surplus fund: Provided, however, That any employer whose record for such period cannot be obtained shall be given a rate based upon the employer's record for any part of such period as may be deemed just and equitable by the commissioner.

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

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

(i) elected prior to the first day of January, one thousand nine hundred eighty-nine, not to make payments into the second injury reserve of the surplus fund, and

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

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

(i) was making payments into the second injury
reserve of the surplus fund on the first day of January, one thousand nine hundred eighty-nine, and

(ii) elected not to make such payments during calendar year one thousand nine hundred eighty-nine, and

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

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

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

(C) Any employer who is permitted by paragraphs (A) and (B) of this subdivision not to make payments into the second injury reserve of the surplus fund shall, in addition to bond or security required by subsection (a) of this section, furnish second injury security or bond, approved by the commissioner, in such amount and form as the commissioner shall consider adequate and sufficient to compel or secure payment of all compensation and expenses arising from, or necessitated by, any second injury that is or remains to be paid by the employer: Provided, That any second injury security or bond given by any such employer pursuant to rules promulgated by the commissioner and with the approval of the commissioner prior to the effective date of this section shall remain valid upon the effective date of this section until such time thereafter as the commissioner notifies such employer to the contrary.
(D) Any employer permitted by paragraphs (A) and (B) of this subdivision not to make payments into the second injury reserve of the surplus fund who on or after the effective date of this section elects to make payments into the second injury reserve of the surplus fund shall not thereafter be permitted to elect not to make such payments.

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

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

(2) In case there be a catastrophe, as defined in section one, article three of this chapter, to the employees of any employer making such payments, the employer shall not be liable to pay compensation or expenses arising from or necessitated by the catastrophe, and such compensation and expenses shall not
be charged against such employer, but such compensa-
tion and expenses shall be paid from the catastrophe
reserve of the surplus fund in the same manner and to
the same extent as in the case of premium-paying
subscribers.

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

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

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

(d) In any case under the provisions of this section
that shall require the payment of compensation or
benefits by an employer in periodical payments, and the
nature of the case makes it possible to compute the
present value of all future payments, the commissioner
may, in his or her discretion, at any time compute and permit or require to be paid into the workers' compensation fund an amount equal to the present value of all unpaid compensation for which liability exists, in trust; and thereupon such employer shall be discharged from any further liability upon such award, and payment of the same shall be assumed by the workers' compensation fund.

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

(a) If any employer is required to subscribe to the workers' compensation fund pursuant to section one of this article and does not elect to provide the employer's own system of compensation pursuant to section nine of this article, and shall sell or otherwise transfer substantially all of the employer's assets, so as to give up substantially all of the employer's capacity and ability to continue in the business in which the employer has previously engaged, then such employer's premiums, premium deposits, interest, and claims losses shall become due and owing to the commissioner upon the execution of the agreement of sale or other transfer. In addition, any repayment agreement entered into by the employer with the commissioner pursuant to section five of this article shall terminate upon the execution of the aforesaid agreement of sale or other transfer and all amounts owed to the commissioner but not yet paid shall become due. Upon execution of an agreement of sale or other transfer, as aforesaid, the commissioner shall
continue to have a lien, as provided for in section five-
a of this article, against all of the other property of the
employer and which lien shall constitute a personal
obligation of the employer. As used in this section, the
term “assets” means all property of whatever type in
which the employer has an interest including, but not
limited to, good will, access to leases such as the right
to sublease, assignment of contracts for the sale of
products, inventory or stock of goods in bulk, or accounts
receivable.

(b) If an employer subject to subsection (a) of this
section pays to the commissioner, prior to the execution
of an agreement of sale or other transfer, a sum
sufficient to retire all of the indebtedness that the
employer would owe at the time of the execution, then
the commissioner shall issue a certificate to the
employer stating that the employer’s account is in good
standing with the commissioner and that the assets may
be sold or otherwise transferred without the attachment
of the commissioner’s lien. In the event that the
employer would not owe any sum to the commissioner
on the aforesaid date of execution, then a certificate
shall also be issued to the employer upon the employer’s
request stating that the employer’s account is in good
standing with the commissioner and that the assets may
be sold or otherwise transferred without the attachment
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.

(a) Notwithstanding any provisions of section five-a of
this article to the contrary, in the event that a new
employer acquires by sale or other transfer or assumes
all or substantially all of a predecessor employer’s actual
business, business assets, customers, clients, contracts,
operations, stock of goods, equipment, or substantially
all of its employees, then any liens for payments owed
to the commissioner for premiums, premium deposits,
interest, or claims losses by the predecessor employer or
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
receiving the response unless the buyer or other recipient consents to a later hearing. Nothing in this subsection shall be construed to be applicable to the seller or other transferor or to affect in any way a proceeding under sections five and five-a of this article.

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

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

(a) If a new corporate employer which is not subject to the provisions of section fifteen of this article, is created by the officers or shareholders of a preexisting corporate employer and if the new corporate employer and the preexisting corporate employer are (1) managed by the same, or substantially the same, management personnel, and (2) have a common ownership by at least forty percent of each corporation's shareholders, and (3) is in the same class or group as determined by the commissioner under the provisions of section four of this article, and (4) if the preexisting corporate employer's account is in good standing with the commissioner, then, at the time the new corporate employer registers with the commissioner, the new corporate employer may request that the commissioner assign to it the same rate of payment of premiums as that assigned to the preexisting corporate employer. If the commissioner decides that the granting of such a request is in keeping with his or her fiduciary obligations to the workers' compensation fund, then the commissioner may grant the request of the employer.

(b) If a new corporate employer which is not subject
to the provisions of section fifteen of this article, is
created by the officers or shareholders of a preexisting
corporate employer and if the new corporate employer
and the preexisting corporate employer are
(1) managed by the same, or substantially the same,
management personnel, and (2) have a common owner-
ship by at least forty percent of each corporation's
shareholders, and (3) is in the same class or group as
determined by the commissioner under the provisions of
section four of this article, then, at any time within one
year of the new corporate employer's registration with
the commissioner, the commissioner may decide that, in
keeping with his or her fiduciary obligations to the
workers' compensation fund, the new corporate em-
ployer shall be assigned the same rate of payment of
premiums as that assigned to the preexisting corporate
employer at any time within the aforesaid one year
period: Provided, That if the new corporate employer
fails to reveal to the commissioner on the forms provided
by the commissioner that its situation meets the factual
requirements of this section, then the commissioner may
demand payment from the new corporate employer in
an amount sufficient to eliminate the deficiency in
payments by the new corporate employer from the date
of registration to the date of discovery plus interest
thereon as provided for by section thirteen of this
article. The commissioner may utilize the powers given
to the commissioner in section five-a of this article to
collect the amount due.

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

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

11 en's receipt of notice of the disputed commissioner's
decision or action or, in the absence of such receipt,
within sixty days of the date of the commissioner’s
making such disputed decision or taking such disputed
action, such time limitations being hereby declared to
be a condition of the right to litigate such decision or
action and hence jurisdictional. The employer's petition
shall clearly identify the decision or action disputed and
the bases upon which the employer disputes the decision
or action. Upon receipt of such a petition, the commis-
sioner shall schedule a hearing which shall be conducted
in accordance with the provisions of article five of
chapter twenty-nine-a of this code. An appeal from a
final decision of the commissioner shall be taken in
accord with the provisions of articles five and six,
chapter twenty-nine-a of this code: Provided, That all
such appeals shall be taken to the circuit court of
Kanawha County.


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-
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
election to do so without benefit of counsel or other legal
representation. Such election shall be in writing upon
12 a form prescribed by the commissioner which design-
iates 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-
tion under the provisions of this chapter and shall not
by having received same be precluded from making
claim against said third party.

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

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

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


The legislative joint committee on government and
finance is hereby instructed to undertake a review of the
applicability of expanded subrogation policies with
regard to the workers' compensation fund including, but
not limited to, an analysis of the cost incurred by the
fund or other governmental agencies, the effect of such
subrogation at various levels upon the generation of revenues for the fund, and the equity or fairness of the withholding of moneys, services or things of value from injured workers as the result of such subrogation. Such study shall be reflective of the views not only of the commissioner, but also of claimants, claimants' counsel, employers, and actuaries or others with unique or special knowledge of subrogation programs in the area 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; compensation by employers.

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

(b) A portion of all premiums that shall be paid into the workers' compensation fund by subscribers not electing to carry their own risk under section nine, article two of this chapter, shall be set aside to create and maintain a surplus fund to cover the catastrophe hazard, the second injury hazard, and all losses not otherwise specifically provided for in this chapter. The percentage to be set aside shall be determined by the commissioner as necessary to maintain a solvent surplus.
fund. All interest earned on investments by the workers’ compensation fund, which is attributable to the surplus fund, shall be credited to the surplus fund.

(c) A catastrophe is hereby defined as an accident in which three or more employees are killed or receive injuries, which, in the case of each individual, consist of: Loss of both eyes or the sight thereof; or loss of both hands or the use thereof; or loss of both feet or the use thereof; or loss of one hand and one foot or the use thereof. The aggregate of all medical and hospital bills and other costs, and all benefits payable on account of a catastrophe is hereby defined as “catastrophe payment”. In case of a catastrophe to the employees of an employer who is an ordinary premium-paying subscriber to the fund, or to the employees of an employer who, having elected to carry the employer’s own risk under section nine, article two of this chapter, has heretofore elected, or may hereafter elect, to pay into the catastrophe reserve of the surplus fund under the provisions of that section, then the catastrophe payment arising from such catastrophe shall not be charged against, or paid by, such employer but shall be paid from the catastrophe reserve of the surplus fund.

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

(2) If an employee of an employer, where the employer has elected to carry his own risk under section nine, of article two of this chapter, and is permitted not to make payments into the second injury reserve of
surplus fund under the provisions of that section, has a
definitely ascertainable physical impairment caused by
a previous injury, irrespective of its compensability, and
becomes permanently and totally disabled from the
combined effect of such previous injury and a second
injury received in the course of and as a result of his
or her employment, the employee shall be granted an
award of total permanent disability and his or her
employer shall, upon order of the commissioner,
compensate the said employee in the same manner as
if the total permanent disability of the employee had
resulted from a single injury while in the employ of such
employer.

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

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

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

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

(b) If a timely protest to the award is filed, as
provided in section one or section one-h of article five
of this chapter, the commissioner or self-insured
employer shall continue to pay to the claimant such
benefits during the period of such disability unless it is
subsequently found by the commissioner or administra-
tive law judge that the claimant was not entitled to
receive the benefits, or any part thereof, so paid, in
which event the commissioner shall, where the employer
is a subscriber to the fund, credit said employer's
account with the amount of the overpayment; and,
where the employer has elected to carry the employer's own risk, the commissioner shall refund to such employer the amount of the overpayment. The amounts so credited to a subscriber or repaid to a self-insurer shall be charged by the commissioner to the surplus fund created by section one, article three of this chapter.

If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him or her pursuant to a prior decision, such amount of benefits so paid shall be deemed overpaid. The commissioner may only recover such amount by withholding, in whole or in part, as determined by the commissioner, future permanent partial disability benefits payable to the individual in the same or other claims and credit such amount against the overpayment until it is repaid in full.

§23-4-3. Schedule of maximum disbursements for medical, 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 disclose; contract by employer with hospital, physician, etc., prohibited; criminal penalties for violation; payments to certain providers prohibited.

The commissioner shall establish and alter from time to time as he or she may determine to be appropriate a schedule of the maximum reasonable amounts to be paid to chiropractic physicians, medical physicians, osteopathic physicians, podiatrists, optometrists, vocational rehabilitation specialists, pharmacists, ophthalmologists, and others practicing medicine and surgery, surgeons, hospitals or other persons, firms or corporations for the rendering of treatment to injured employees under this chapter. The commissioner also, on the first day of each regular session, and also from time to time, as the commissioner may consider appropriate,
shall submit the schedule, with any changes thereto, to
the Legislature. The promulgation of the schedule is not
subject to the legislative rule-making review procedures
established in sections eleven through fifteen, article
three, chapter twenty-nine-a of this code.

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

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

(b) Payment for such medicine, medical, surgical,
dental and hospital treatment, crutches, artificial limbs
and such other and additional approved mechanical
appliances and devices authorized under subdivision
(a) hereof may be made to the injured employee, or to
the person, firm or corporation who or which has
rendered such treatment or furnished any of the items
specified above, or who has advanced payment for same,
as the commissioner may deem proper, but no such
payments or disbursements shall be made or awarded
by the commissioner unless duly verified statements on
forms prescribed by the commissioner shall be filed
with the commissioner within two years after the
cessation of such treatment or the delivery of such
appliances: Provided, That no payment hereunder shall
be made unless such verified statement shows no charge
for or with respect to such treatment or for or with
respect to any of the items specified above has been or
will be made against the injured employee or any other
person, firm or corporation, and when an employee
covered under the provisions of this chapter is injured
in the course of and as a result of his or her employment
and is accepted for medical, surgical, dental or hospital
treatment, the person, firm or corporation rendering
such treatment is hereby prohibited from making any
charge or charges therefor or with respect thereto
against the injured employee or any other person, firm
or corporation which would result in a total charge for
the treatment rendered in excess of the maximum
amount set forth therefor in the commissioner's schedule
established as aforesaid.

(c) No chiropractic physician, medical physician,
osteopathic physician, podiatrist, or others practicing
medicine or surgery (collectively and individually
referred to hereinafter as "practitioner" or "practition-
ers") shall refer his or her patients to the practitioner
himself or herself or to a supplier of mechanical
appliances or devices owned in whole or in part by the
practitioner, the practitioner's partnership or profes-
sional corporation, or a member of the practitioner's
immediate family for the purchase or rental of any
mechanical appliances or devices which the practitioner
has prescribed or recommended to such patient except
upon the terms prescribed by this section. Examples of
mechanical appliances or devices are described as
follows, but these examples are described for illustrative
purposes only and are not intended to limit the range
of items included by this phrase: hearing aids; crutches;
artificial limbs; oxygen concentrators; TENS units. For
the purposes of this subsection, the term "practitioner"
shall include natural persons, partnerships, and profes-
sional corporations.

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

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

(3) Failure by a practitioner to comply with the
provisions of this subdivision (c) shall cause the
practitioner to forfeit his, her, or its right to reimbur-
sement for the services rendered by the practitioner to
the patient and, if any such services have previously
been reimbursed, the commissioner shall either seek
recovery of such funds by any lawful means or by
deducting such amounts from future payments to the practitioner on account of services rendered to the same patient or to other claimants of the workers' compensation fund. In addition, failure by a practitioner to comply with the provisions of this subsection (c) shall also result in the denial of payment to the supplier of the mechanical appliance or device if that supplier is one which is owned in whole or in part by the practitioner, the practitioner's partnership or professional corporation, or a member of the practitioner's immediate family. If such supplier has already been reimbursed for the cost of the pertinent mechanical appliance or device, then the commissioner shall either seek recovery of such funds by any lawful means or by deducting such amounts from future payments to the supplier on account of goods delivered to the same patient or to other claimants of the workers' compensation fund.

(d) No employer shall enter into any contracts with any hospital, its physicians, officers, agents or employees to render medical, dental or hospital service or to give medical or surgical attention therein to any employee for injury compensable within the purview of this chapter, and no employer shall permit or require any employee to contribute, directly or indirectly, to any fund for the payment of such medical, surgical, dental or hospital service within such hospital for such compensable injury. Any employer violating this section shall be liable in damages to the employer's employees as provided in section eight, article two of this chapter, and any employer or hospital or agent or employee thereof violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not less than one hundred dollars nor more than one thousand dollars or by imprisonment not exceeding one year, or both: Provided, That the foregoing provisions of this subdivision (d) shall not be deemed to prohibit an employer from participating in a preferred provider organization or program or a health maintenance organization or other medical cost containment relationship with the providers of medical, hospital or other health care: Provided, however, That
nothing in this section shall be deemed to restrict the right of a claimant to select a health care provider for treatment of a compensable injury or disease.

(e) When an injury has been reported to the commissioner by the employer without protest, the commissioner may pay, or order an employer who or which made the election and who or which received the permission mentioned in section nine, article two of this chapter to pay, within the maximum amount provided by schedule established by the commissioner as aforesaid, bills for medical or hospital services without requiring the injured employee to file an application for benefits.

(f) The commissioner shall provide for the replacement of artificial limbs, crutches, hearing aids, eyeglasses and all other mechanical appliances provided in accordance with this section which later wear out, or which later need to be refitted because of the progression of the injury which caused the same to be originally furnished, or which are broken in the course of and as a result of the employee's employment. The fund or self-insured employer shall pay for these devices, when needed, notwithstanding any time limits provided by law.

(g) No payment shall be made to a health care provider who is suspended or terminated under the terms of section three-c of this article except as provided in subsection (c) of said section. Notwithstanding the foregoing, the commissioner may establish fee schedules, make payments and take other actions required or allowed pursuant to article twenty-nine-d, chapter sixteen of this code.

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

(a) If any person who is a health care provider shall knowingly, and with intent to defraud, secure or attempt to secure payment from the workers' compensation fund for services or supplies when such person is not entitled to such payment or is entitled to some lesser
amount of payment, such person shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than ten thousand dollars, or imprisoned in the county jail not more than twelve months, or both fined and imprisoned.

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

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

(d) For the purposes of this section, the term "person who is a health care provider" shall mean any person who has rendered, or who represents that he has rendered, any treatment to an injured employee under this chapter, or any person who has supplied, or who represents that he has supplied, any medication or any crutches, artificial limbs and other mechanical appliances and devices for such injured employee. The term shall include, but not be limited to, persons practicing medicine and surgery, podiatry, dentistry, nursing, pharmacy, optometry, osteopathic medicine and surgery, chiropractic, physical therapy, psychology,
radiologic technology, occupational therapy or vocational rehabilitation, and shall also include hospitals, professional corporations, and other corporations, firms and business entities.

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

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

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

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

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

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

(d) Assist the commissioner in establishing guidelines as to the anticipated period of disability for the various types of injuries pursuant to subsection (b), section seven-a of this article.
(e) Assist the commissioner in establishing appropriate professional review of requests by health care providers to exceed the guidelines for treatment of injuries and occupational diseases established pursuant to subsection (a) of this section.

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

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

(b) Upon the commissioner determining that there is probable cause to believe that a health care provider should be suspended or terminated pursuant to this section, the commissioner shall provide such health care provider with written notice which shall state the nature of the charges against the health care provider and the time and place at which such health care provider shall appear to show cause why the health care provider's right to receive payment under this chapter should not be suspended or terminated, at which time and place such health care provider shall be afforded an opportunity to review the commissioner's evidence and to cross-examine the commissioner's witnesses and also afforded the opportunity to present testimony and enter evidence.
in support of its position. The hearing shall be conducted
in accordance with the provisions of article five, chapter
twenty-nine-a of this code. The hearing may be con-
ducted by the commissioner or a hearing officer
appointed by the commissioner. The commissioner or
hearing officer shall have the power to subpoena
witnesses, papers, records, documents and other data
and things in connection with the proceeding hereunder
and to administer oaths or affirmations in any such
hearing. If, after reviewing the record of such hearing,
the commissioner determines that the right of such
health care provider to obtain payment under this
article should be suspended for a specified period of
time or should be terminated, the commissioner shall
issue a final order suspending or terminating the right
of such health care provider to obtain payment for
services under this article. Any health care provider so
suspended or terminated shall be notified in writing and
the notice shall specify the reasons for the action so
taken. Any appeal by the health care provider shall be
brought in the circuit court of Kanawha County or in
the county in which the provider's principal place of
business is located. The scope of the court's review of
such an appeal shall be as provided in section four,
article five, chapter twenty-nine-a of this code. The
provider may be suspended or terminated, based upon
the final order of the commissioner, pending final
disposition of any appeal. Such final order may be
stayed by the circuit court after hearing, but shall not
be stayed in or as a result of any ex parte proceeding.
If the health care provider does not appeal the final
order of the commissioner within thirty days, it shall be
final.

(c) No payment shall be made to a health care
provider or to an injured employee for services provided
by a health care provider after the effective date of a
commissioner's final order terminating or suspending
the health care provider: Provided, That nothing herein
shall prohibit payment by the commissioner or self
insured employer to a suspended or terminated health
care provider for medical services rendered where the
medical services were rendered to an injured employee
in an emergency situation. The suspended or terminated
provider is prohibited from making any charge or
charges for any services so provided against the injured
employee unless the injured employee, before any
services are rendered, is given notice by the provider in
writing that the provider does not participate in the
workers' compensation program and that the injured
employee will be solely responsible for all payments to
the provider, and unless the injured employee also signs
a written consent, before any services are rendered, to
make payment directly and to waive any right to
reimbursement from the commissioner or the self-
insured employer. The written consent and waiver
signed by the injured employee shall be filed by the
provider with the commissioner and shall be made a
part of the claim file.

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

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

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

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

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

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

(a) The expressions "average weekly wage earnings, wherever earned, of the injured employee, at the date of injury" and "average weekly wage in West Virginia", as used in this chapter, shall have the meaning and shall be computed as set forth in section fourteen of this article except for the purpose of computing temporary total disability benefits for part-time employees pursuant to the provisions of section six-d of this article.

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

The minimum weekly benefits paid hereunder shall not be less than twenty-six dollars per week for injuries occurring on or after July one, one thousand nine hundred sixty-nine; not less than thirty-five dollars per week for injuries occurring on or after July one, one thousand nine hundred seventy-one; not less than forty dollars per week for injuries occurring on or after July one, one thousand nine hundred seventy-three; not less than forty-five dollars per week for injuries occurring on or after July one, one thousand nine hundred seventy-four; and for injuries occurring on or after July one, one thousand nine hundred seventy-six, thirty-three and one-third percent of the average weekly wage in West Virginia, except as provided in section six-d of this article.
(c) Subdivision (b) shall be limited as follows: Aggregate award for a single injury causing temporary disability shall be for a period not exceeding two hundred eight weeks.

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

(e) If the injury causes permanent disability less than permanent total disability, the percentage of disability to total disability shall be determined and the award computed on the basis of four weeks' compensation for each percent of disability determined, at the following maximum or minimum benefit rates: Seventy percent of the average weekly wage earnings, wherever earned, of the injured employee, at the date of injury, not to exceed the percentage of the average weekly wage in West Virginia, as follows: On or after July one, one thousand nine hundred sixty-nine, forty-five percent; on or after July one, one thousand nine hundred seventy, fifty percent; on or after July one, one thousand nine hundred seventy-one, fifty-five percent; on or after July one, one thousand nine hundred seventy-three, sixty
percent; on or after July one, one thousand nine hundred seventy-five, sixty-six and two-thirds percent.

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

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

- The loss of a great toe shall be considered a ten percent disability.
- The loss of a great toe (one phalanx) shall be considered a five percent disability.
- The loss of other toes shall be considered a four percent disability.
- The loss of other toes (one phalanx) shall be considered a two percent disability.
- The loss of all toes shall be considered a twenty-five percent disability.
- The loss of forepart of foot shall be considered a thirty percent disability.
- The loss of a foot shall be considered a thirty-five percent disability.
- The loss of a leg shall be considered a forty-five percent disability.
- The loss of thigh shall be considered a fifty percent disability.
- The loss of thigh at hip joint shall be considered a sixty percent disability.
- The loss of a little or fourth finger (one phalanx) shall
be considered a three percent disability.

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

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

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

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

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

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

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

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

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

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

The loss of index and middle finger shall be consid-
ered a twenty percent disability.

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

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

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

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

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

The loss of four fingers shall be considered a thirty-
two percent disability.
The loss of hand shall be considered a fifty percent disability.
The loss of forearm shall be considered a fifty-five percent disability.
The loss of arm shall be considered a sixty percent disability.
The total and irrecoverable loss of the sight of one eye shall be considered a thirty-three percent disability. For the partial loss of vision in one, or both eyes, the percentages of disability shall be determined by the commissioner, using as a basis the total loss of one eye.
The total and irrecoverable loss of the hearing of one ear shall be considered a twenty-two and one-half percent disability. The total and irrecoverable loss of hearing of both ears shall be considered a fifty-five percent disability.
For the partial loss of hearing in one, or both ears, the percentage of disability shall be determined by the commissioner, using as a basis the total loss of hearing in both ears.
Should a claimant sustain a compensable injury which results in the total loss by severance of any of the bodily members named in this subdivision, die from sickness or noncompensable injury before the commissioner makes the proper award for such injury, the commissioner shall make such award to claimant’s dependents as defined in this chapter, if any; such payment to be made in the same installments that would have been paid to claimant if living: Provided, That no payment shall be made to any surviving spouse of such claimant after his or her remarriage, and that this liability shall not accrue to the estate of such claimant and shall not be subject to any debts of, or charges against, such estate.
(g) Should a claimant to whom has been made a permanent partial award of from one percent to eighty-four percent, both inclusive, die from sickness or
noncompensable injury, the unpaid balance of such award shall be paid to claimant's dependents as defined in this chapter, if any; such payment to be made in the same installments that would have been paid to claimant if living: Provided, That no payment shall be made to any surviving spouse of such claimant after his or her remarriage, and that this liability shall not accrue to the estate of such claimant and shall not be subject to any debts of, or charges against, such estate.

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

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

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

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

(l) Except as otherwise specifically provided in this chapter, temporary total disability benefits payable under subdivision (b) of this section shall not be deductible from permanent partial disability awards payable under subdivision (e) or (f) of this section. Compensation, either temporary total or permanent partial, under this section shall be payable only to the injured employee and the right thereto shall not vest in his or her estate, except that any unpaid compensation
which would have been paid or payable to the employee up to the time of his or her death, if he or she had lived, shall be paid to the dependents of such injured employee if there be such dependents at the time of death.

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

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

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

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

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

(a) For purposes of this section, a part-time employee means an employee who, at the date of injury, is customarily employed twenty-five hours per week or less on a regular basis and is classified by the employer as a part-time employee: Provided, That the term “part-time employee” shall not include an employee who regularly works more than twenty-five hours per week for the employer, nor shall it include an employee who regularly works for more than one employer and whose regular combined working hours total more than twenty-five hours per week when that employee is rendered unable to perform the duties of all such employment as a result of the injury, nor shall it include any employee in the construction industry who works less than twenty-five hours per week.
(b) For purposes of establishing temporary total disability weekly benefits pursuant to subdivision (b), section six of this article for part-time employees, the “average weekly wage earnings, wherever earned, of the injured person, at the date of injury”, shall be computed based upon the average gross pay, wherever earned, which is received by the employee during the two months, six months or twelve months immediately preceding the date of the injury, whichever is most favorable to the injured employee: Provided, That for part-time employees who have been employed less than two months but more than one week prior to the date of injury, the average weekly wage earnings shall be calculated based upon the average gross earnings in the weeks actually worked: Provided, however, That for part-time employees who have been employed one week or less the average weekly wage earnings shall be calculated based upon the average weekly wage prevailing for the same or similar part-time employment at the time of injury except that when an employer has agreed to pay a certain hourly wage to such part-time employee, the average weekly wage shall be computed by multiplying such hourly wage by the regular numbers of hours contracted to be worked each week: Provided further, That notwithstanding any provision of this article to the contrary, no part-time employee shall receive temporary total disability benefits greater than his or her average weekly wage earnings as so calculated.

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

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

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

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

(1) If the authorized treating physician recommends a permanent partial disability award of fifteen percent or less, the commissioner shall enter an award of permanent partial disability benefits based upon such recommendation and all other available information, and the claimant's entitlement to temporary total
disability benefits shall cease upon the entry of such award unless previously terminated under the provisions of subsection (e) of this section.

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

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

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

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

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

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

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

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

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

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

§23-4-7b. Trial return to work.

(a) The Legislature hereby finds and declares that it is in the interest of employees, employers and the commissioner that injured employees be encouraged to return to work as quickly as possible after an injury and
that appropriate protections be afforded to injured employees who return to work on a trial basis.

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

(c) When an injured employee returns to work on a trial basis, the employer shall provide a trial return to work notification to the commissioner. Upon receipt thereof, the commissioner shall note the date of the first day of work pursuant to the trial return and shall continue the claimant’s eligibility for temporary total disability benefits, but shall temporarily suspend the payment of temporary total disability benefits during the period actually worked by the injured employee. The claim shall be closed on a temporary total disability basis either when the injured employee or the authorized treating physician notifies the commissioner that the injured employee is able to perform his or her job or automatically at the end of a period of three months from the date of the first day of work unless the employee notifies the commissioner that he or she is unable to perform the duties of the job, whichever occurs first. If the injured employee is unable to continue working due to the compensable injury for a three month period, the injured employee shall notify the commissioner and temporary total disability benefits shall be reinstated immediately and he or she shall be referred for a rehabilitation evaluation as provided in section nine of this article. No provision of this section shall be construed to prohibit the commissioner from referring the injured employee for any permanent disability evaluation required or permitted by any other provision of this article.

(d) Nothing in this section shall prevent the employee from returning to work without a trial return to work period.
(e) Nothing in this section shall be construed to require an injured employee to return to work on a trial basis.

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

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

The commissioner shall have authority, after due notice to the employer and claimant, whenever in the commissioner's opinion it shall be necessary, to order a claimant of compensation for a personal injury other than occupational pneumoconiosis to appear for examination before a medical examiner or examiners selected by the commissioner; and the claimant and employer, respectively, shall each have the right to select a physician of the claimant's or the employer's own choosing and at the claimant's or the employer's own expense to participate in such examination. All such examinations shall be performed in accordance with the protocols and procedures established by the health care advisory panel pursuant to section three-b of this article: Provided, That the physician may exceed these protocols when additional evaluation is medically necessary. The claimant and employer shall, respectively, be furnished with a copy of the report of examination made by the medical examiner or examiners selected by the commissioner. The respective physicians selected by the claimant and employer shall have the right to concur in any report made by the medical examiner or examiners selected by the commissioner, or each may file with the commissioner a separate report, which separate report shall be considered by the commissioner in passing upon the claim. If the compensation claimed is for occupational pneumoconiosis, the commissioner shall have the power, after due notice to the employer, and whenever in the commissioner's opinion it shall be necessary, to order a claimant to appear for examination before the occupational pneumoconiosis board hereinafter provided. In any case the claimant shall be entitled to reimbursement for loss of wages, and to reasonable traveling and other expenses necessarily incurred by
him or her in obeying such order.

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

§23-4-Sc. Occupational pneumoconiosis board—Reports and distribution thereof; presumption; findings required of board; objection to findings; procedure thereon.

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

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

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

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

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

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

If either party objects to the whole or any part of such findings and conclusions of the board, such party shall file with the commissioner or, on or after the first day of July, one thousand nine hundred ninety-one, with the office of judges, within thirty days from receipt of such copy to such party, unless for good cause shown, the commissioner or chief administrative law judge extends such time, such party's objections thereto in writing, specifying the particular statements of the board's findings and conclusions to which such party objects. The filing of an objection within the time specified is hereby declared to be a condition of the right to litigate such findings and hence jurisdictional. After the time has expired for the filing of objections to the findings and conclusions of the board, the commissioner or administrative law judge shall proceed to act as provided in this chapter. If after the time has expired for the filing of objections to the findings and conclusions of the board no objections have been filed, the report of a majority of the board of its findings and conclusions on any medical question shall be taken to be plenary and conclusive evidence of the findings and conclusions therein stated. If objection has been filed to the findings and conclusions of the board, notice thereof
shall be given to the board, and the members thereof joining in such findings and conclusions shall appear at the time fixed by the commissioner or office of judges for the hearing to submit to examination and cross-examination in respect to such findings and conclusions. At such hearing, evidence to support or controvert the findings and conclusions of the board shall be limited to examination and cross-examination of the members of the board, and to the taking of testimony of other qualified physicians and roentgenologists.

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

(a) The Legislature hereby finds that it is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after an injury. In order to encourage workers to return to employment and to encourage and assist employers in providing suitable employment to injured employees, it shall be a priority of the commissioner to achieve early identification of individuals likely to need rehabilitation services and to assess the rehabilitation needs of these injured employees. It shall be the goal of rehabilitation to return injured workers to employment which shall be comparable in work and pay to that which the individual performed prior to the injury. If a return to comparable work is not possible, the goal of rehabilitation shall be to return the individual to alternative suitable employment, using all possible alternatives of job modification, restructuring, reassignment and training, so that the individual will return to productivity with his or her employer or, if necessary, with another employer. The Legislature further finds that it is the shared responsibility of the employer, the employee, the physician and the commissioner to cooperate in the development of a rehabilitation process designed to promote re-employment for the injured employee.

(b) In cases where an employee has sustained a permanent disability, or has sustained an injury likely to result in temporary disability in excess of one hundred and twenty days, and such fact has been determined by the commissioner, the commissioner shall at the earliest possible time determine whether the
employee would be assisted in returning to remunerative employment with the provision of rehabilitation services and if the commissioner determines that the employee can be physically and vocationally rehabilitated and returned to remunerative employment by the provision of rehabilitation services including but not limited to vocational or on-the-job training, counseling, assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification, by the provision of crutches, artificial limbs, or other approved mechanical appliances, or medicines, medical, surgical, dental or hospital treatment, the commissioner shall forthwith develop a rehabilitation plan for the employee and, after due notice to the employer, expend such an amount as may be necessary for the aforesaid purposes: Provided, That such expenditure for vocational rehabilitation shall not exceed ten thousand dollars for any one injured employee: Provided, however, That no payment shall be made for such vocational rehabilitation purposes as provided in this section unless authorized by the commissioner prior to the rendering of such physical or vocational rehabilitation, except that payments shall be made for reasonable medical expenses without prior authorization if sufficient evidence exists which would relate the treatment to the injury and the attending physician or physicians have requested authorization prior to the rendering of such treatment: Provided further, That payment for physical rehabilitation, including the purchase of prosthetic devices and other equipment and training in use of such devices and equipment, shall be considered expenses within the meaning of section three of this article and shall be subject to the provisions of sections three, three-a, three-b, and three-c of this article. The provision of any rehabilitation services shall be pursuant to a rehabilitation plan to be developed and monitored by a rehabilitation professional for each injured employee.

(c) In every case in which the commissioner shall order physical or vocational rehabilitation of a claimant as provided herein, the claimant shall, during the time 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
77 (d) In every case in which the claimant returns to
78 gainful employment as part of a rehabilitation plan, and
79 the employee's average weekly wage earnings are less
80 than the average weekly wage earnings earned by the
81 injured employee at the time of the injury, he or she
82 shall receive temporary partial rehabilitation benefits
83 calculated as follows: The temporary partial rehabilita-
84 tion benefit shall be seventy percent of the difference
85 between the average weekly wage earnings earned at
86 the time of the injury and the average weekly wage
87 earnings earned at the new employment, both to be
88 calculated as provided in sections six, six-d and fourteen
89 of this article as such calculation is performed for
90 temporary total disability benefits, subject to the
91 following limitations: In no event shall such benefits be
92 subject to the minimum benefit amounts required by the
93 provisions of subdivision (b), section six of this article,
94 nor shall such benefits exceed the temporary total
95 disability benefits to which the injured employee would
96 be entitled pursuant to sections six, six-d and fourteen
97 of this article during any period of temporary total
98 disability resulting from the injury in the claim:  
99 Provided, That no temporary total disability benefits
100 shall be paid for any period for which temporary partial
101 rehabilitation benefits are paid. The amount of tempor-
102 ary partial rehabilitation benefits payable under this
103 subsection shall be reviewed every ninety days to
104 determine whether the injured employee's average
105 weekly wage in the new employment has changed and,
106 if such change has occurred, the amount of benefits
107 payable hereunder shall be adjusted prospectively.
108 Temporary partial rehabilitation benefits shall only be
109 payable when the injured employee is receiving voca-
110 tional rehabilitation services in accordance with a
111 rehabilitation plan developed under this section.
112
113 (e) The commissioner shall promulgate legislative
114 rules on or before the first day of July, one thousand
115 nine hundred ninety-one, pursuant to the provisions of
Article three of chapter twenty-nine-a of this code for the purpose of developing a comprehensive rehabilitation program which will assist injured workers to return to suitable gainful employment after an injury in a manner consistent with the provisions and findings of this section. Such legislative rules shall provide definitions for rehabilitation facilities and rehabilitation services pursuant to this section.

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


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

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

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

The expression "average weekly wage earnings, wherever earned, of the injured person, at the date of injury", within the meaning of this chapter, shall be computed based upon the daily rate of pay at the time of the injury or upon the average pay received during the two months, six months or twelve months immediately preceding the date of the injury, whichever is most favorable to the injured employee, except for the purpose of computing temporary total disability benefits for part-time employees pursuant to the provisions of
The expression "average weekly wage in West Virginia", within the meaning of this chapter, shall be the average weekly wage in West Virginia as determined by the commissioner of employment security in accordance with the provisions of sections ten and eleven, article six, chapter twenty-one-a of this code, and other applicable provisions of said chapter twenty-one-a.

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

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

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

The commissioner shall enter an order with respect
to such nonmedical findings within ninety days follow-
ing receipt by the commissioner of both the claimant's
application for occupational pneumoconiosis benefits
and the physician's report filed in connection therewith,
and shall give each interested party notice in writing of
these findings with respect to all such nonmedical facts
and such findings and such actions of the commissioner
shall be final unless the employer, employee, claimant
or dependent shall, within thirty days after receipt of
such notice, object to such findings, and unless an
objection is filed within such thirty-day period, such
findings shall be forever final, such time limitation
being hereby declared to be a condition of the right to
litigate such findings and hence jurisdictional. Upon
receipt of such objection, the commissioner shall set a
hearing as provided in section one, article five of this
chapter or the chief administrative law judge shall set
a hearing as provided in section one-h, article five of this
chapter. In the event of an objection to such findings by
the employer, the claim, shall, notwithstanding the fact
that one or more hearings may be held with respect to
such objection, mature for reference to the occupational
pneumoconiosis board with like effect as if the objection
had not been filed. If the commissioner or administra-
tive law judge concludes after the protest hearings that
the claim should be dismissed, a final order of dismissal
shall be entered, which final order shall be subject to
appeal in accordance with the provisions of section one
or section one-i and section three of article five of this
chapter. If the commissioner or administrative law
judge concludes after such protest hearings that the
claim should be referred to the occupational pneumoco-
niosis board for its review, the order entered shall be
interlocutory only and may be appealed only in conjunc-
tion with an appeal from a final order with respect to
the findings of the occupational pneumoconiosis board.

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

Any person who shall knowingly and with fraudulent
intent secure or attempt to secure larger compensation,
or compensation for a longer term than he or she is
entitled to, from the workers' compensation fund, or
knowingly and with like intent secure or attempt to
secure compensation from such fund when he or she is
not entitled thereto, or shall knowingly and with like
intent aid and abet anyone in the commission of the
offenses herein set forth, shall be guilty of a misdemea-
nor, and, upon conviction thereof, shall be fined not
exceeding five thousand dollars, or imprisoned not exceeding twelve months, or both, and in addition to any other penalty imposed, the court shall order any person convicted under this section to make full restitution of all moneys paid by the commissioner or self-insured employer as the result of the violation of this section. If the person so convicted is receiving compensation from such fund, he or she shall, from and after such conviction, cease to receive such compensation.

ARTICLE 4B. COAL-WORKERS' PNEUMOCONIOSIS FUND.


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

(b) The Legislature hereby finds and declares that there is a substantial actuarial surplus in the coal-workers' pneumoconiosis fund in excess of two hundred million dollars. The Legislature further finds and declares that there is a substantial actuarial deficit in the workers' compensation fund in excess of four hundred million dollars, and that this deficit is in large part attributable to claims arising out of the coal industry. The commissioner is hereby directed to conduct an actuarial audit to determine the amount, computed at book value, of the actuarial surplus in the coal-workers' pneumoconiosis fund as of the thirtieth day of June, one thousand nine hundred ninety, and to certify such amount, as of that date, in a written order which together with the results of said audit shall be a public record. Notwithstanding the provisions of subsection (a) of this section or any other provision of this article to the contrary, the commissioner shall, by written order, transfer the assets underlying said
surplus to the workers' compensation fund, which assets shall thereupon become merged into and consolidated with the workers' compensation fund: Provided, That the value of the assets so transferred, when computed according to the book value of said assets on the date of transfer, shall not exceed two hundred fifty million dollars: Provided, however, That such assets so transferred shall be held in a separate account and shall not be used for the satisfaction of obligations of the workers' compensation fund until all other assets of the workers' compensation fund have been expended: Provided further, That the income earned, from time to time, on the assets so transferred may be used to satisfy obligations of the workers' compensation fund: And provided further, That a sufficient reserve shall be retained in the coal-workers' pneumoconiosis fund to guarantee the payment of all claims incurred, including claims which were incurred but not reported, on or before the thirtieth day of June, one thousand nine hundred ninety: And provided further, That any moneys due and owing to the coal-workers' pneumoconiosis fund as a result of any transfer of moneys pursuant to section eight-a of this article shall be construed as an asset of the coal-workers' pneumoconiosis fund and shall be included as an asset transferred to the workers' compensation fund under the provisions of this section. If at any time subsequent to the transfer of the aforesaid assets to the workers' compensation fund, the standards for obtaining benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended and as subsequently amended, are changed such that the actuarial audit performed hereunder may no longer accurately reflect the liabilities of the coal-workers' pneumoconiosis fund for claims arising prior to the first day of July, one thousand nine hundred ninety, the commissioner shall promptly conduct a new audit to determine whether any portion of the foregoing separate account should be returned to the coal-workers' pneumoconiosis fund in order to provide adequate reserves for claims arising prior to the first day of July, one thousand nine hundred ninety, and, if the results of such new audit determine that said reserves are inadequate,
the commissioner shall transfer back to the coal-workers' pneumoconiosis fund that portion of the assets in the separate account necessary to provide adequate reserves for such claims.

ARTICLE 5. REVIEW.

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

The commissioner shall have full power and authority to hear and determine all questions within his or her jurisdiction, but upon the making or refusing to make any award, or upon the making of any modification or change with respect to former findings or orders, as provided by section sixteen, article four of this chapter, the commissioner shall give notice, in writing, to the employer, employee, claimant or dependent, as the case may be, of his or her action, which notice shall state the time allowed for filing an objection to such finding, and such action of the commissioner shall be final unless the employer, employee, claimant or dependent shall, within thirty days after the receipt of such notice, object in writing, to such finding, and unless an objection is filed within such thirty-day period, such finding or action shall be forever final, such time limitation being hereby declared to be a condition of the right to litigate such finding or action and hence jurisdictional. Upon receipt of such objection the commissioner shall, within fifteen days from receipt thereof, set a time and place for the hearing of evidence. Any such hearing may be conducted by the commissioner or the commissioner's duly authorized representative at the county seat of the county wherein the injury occurred, or at any other place which may be agreed upon by the interested parties, and in the event the interested parties cannot agree, and it appears in the opinion of the commissioner that the ends of justice require the taking of evidence elsewhere, then at such place as the commissioner may direct, having due regard for the convenience of witnesses. Both the employer and claimant shall be notified of such hearing at least ten days in advance, and the hearing shall be held within thirty days after the filing of objection to the commissioner's findings as
hereinafore provided, unless such hearing be postponed by agreement of the parties or by the commissioner for good cause. The evidence taken at such hearing shall be transcribed and become part of the record of the proceedings, together with the other records thereof in the commissioner's office. At any time within thirty days after hearing, if the commissioner is of the opinion that the facts have not been adequately developed at such hearing, he or she may order supplemental hearings upon due notice to the parties. After final hearing the commissioner shall, within thirty days, render his or her decision affirming, reversing or modifying, his or her former action, which shall be final: Provided, That the claimant or the employer may apply to the appeal board herein created for a review of such decision; but no appeal or review shall lie unless application therefor be made within thirty days of receipt of notice of the commissioner's final action, or in any event within sixty days of the date of such final action, regardless of notice, and unless the application for appeal or review is filed within the time specified, no such appeal or review shall be allowed, such time limitation being hereby declared to be a condition of the right to such appeal or review and hence jurisdictional.

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

Any proceeding on an objection in which the commis-
sioner has not concluded hearings and issued a final order appealable to the appeal board on or before the thirty-first day of December, one thousand nine hundred ninety-one, shall be transferred to the office of judges for final resolution. If additional evidentiary hearings are necessary in any matter so transferred, such
hearings shall be conducted in accordance with section one-h of this article. Decisions on transferred cases shall likewise be rendered in accordance with section one-h of this article.

Where a finding or determination of the commissioner is protested only by the employer, and the employer does not prevail in its protest and, in the event the claimant is required to attend a hearing by subpoena or agreement of counsel or at the express direction of the commissioner, then such claimant in addition to reasonable traveling and other expenses shall be reimbursed for loss of wages incurred by the claimant in attending such hearing.

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

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

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

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

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

In any case wherein an employer makes application in writing for a modification of any award previously made to an employee of said employer, and such application discloses cause for a further adjustment thereof, the commissioner shall, after due notice to the employee, make such modifications or changes with respect to former findings or orders in such form as may be justified, and any party dissatisfied with any such modification or change so made by the commissioner, shall upon proper and timely objection, be entitled to a hearing as provided in section one or section one-h of this article.

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

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

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

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

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

(a) After an objection is filed to a commissioner's
decision either granting a permanent partial disability
award of fifteen percent or less, or making no award
upon a finding that no permanent partial disability was
suffered as the result of the injury received, the parties
may agree to compromise and settle the award in
controversy under the conditions and limitations set out
in this section. In addition, a reopening petition
resulting in an increased permanent partial disability
award of fifteen percent or less may similarly be
compromised and settled. No other types of settlements
shall be permitted. The terms of such settlement shall
be reviewed by the administrative law judge as herein
(b) In any claim involving an employer not electing to carry its own risk within the meaning of section nine, article two of this chapter, the parties shall notify the commissioner of their intent to settle a claim and the commissioner may participate, at his or her discretion, as a party in interest in any settlement proceeding under this section.

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

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

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

(f) A party seeking to vacate an order approving a settlement on the grounds that a settlement was obtained by fraud, undue influence or coercion shall file
a petition therefor with the office of judges within six
months after the date of the order approving the
settlement. The petition shall set forth in particular the
facts upon which the grounds alleged therein are based
and shall be served upon all other parties to the
settlement. Upon request by any party to the settlement,
the chief administrative law judge shall set the matter
down for hearing. At the conclusion thereof, the chief
administrative law judge shall enter an order setting
forth his or her findings of fact and conclusions of law,
which order shall be appealable to the appeal board.
Upon a finding, by clear and convincing evidence, that
the settlement was obtained by fraud, undue influence
or coercion, the chief administrative law judge shall
vacate and set aside the order approving the settlement.

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

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

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

(a) There is hereby created within the workers'
compensation appeal board the workers' compensation
office of administrative law judges which shall be
referred to as the office of judges. The office of judges
shall be under the supervision of a chief administrative
law judge who shall be appointed by the Governor, with
the advice and consent of the Senate.
(b) The chief administrative law judge shall be a
person who has been admitted to the practice of law in this state and shall also have had at least four years of experience as an attorney. The chief administrative law judge's salary shall be set by the appeal board created in section two of this article. Said salary shall be within the salary range for comparable chief administrative law judges as determined by the state personnel board created by section six of article six of chapter twenty-nine of this code. The chief administrative law judge may only be removed by the appeal board and shall not be removed except for official misconduct, incompetence, neglect of duty, gross immorality, or malfeasance and then only after he or she has been presented in writing with the reasons for his or her removal and then only in the manner prescribed in article six-a of chapter twenty-nine of this code. No other provision of this code purporting to limit the term of office of any appointed official or employee or affecting the removal of any appointed official or employee shall be applicable to the chief administrative law judge.

(c) By and with the consent of the commissioner, the chief administrative law judge shall employ such additional administrative law judges and other personnel as are necessary for the proper conduct of a system of administrative review of orders issued by the commissioner which orders have been objected to by a party, and all such employees shall be in the classified service of the state. Qualifications, compensation and personnel practice relating to the employees of the office of judges, other than the chief administrative law judge, shall be governed by the provisions of the statutes, rules and regulations of the classified service pursuant to article six, chapter twenty-nine of this code. All such additional administrative law judges shall be persons who have been admitted to the practice of law in this state and shall also have had at least two years of experience as an attorney. The chief administrative law judge shall supervise the other administrative law judges and other personnel which collectively shall be referred to in this chapter as the office of judges.

(d) The administrative expense of the office of judges
shall be included by the appeal board in its annual budget when it submits that budget to the commissioner pursuant to section two of this article.

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

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

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

On or after the first day of July, one thousand nine hundred ninety-one, objections to a commissioner's decision made pursuant to the provisions of section one of this article shall be filed with the office of judges.
Upon receipt of an objection, the office of judges shall, within fifteen days from receipt thereof, set a time and place for the hearing of evidence and shall notify the commissioner of the filing of the objection. Hearings may be conducted at the county seat of the county wherein the injury occurred, or at any other place which may be agreed upon by the interested parties, and in the event the interested parties cannot agree, and it appears in the opinion of the chief administrative law judge or the chief administrative law judge's authorized representative that the ends of justice require the taking of evidence elsewhere, then at such place as the chief administrative law judge or such authorized representative may direct, having due regard for the convenience of witnesses. The employer, the claimant and the commissioner shall be notified of such hearing at least ten days in advance, and the hearing shall be held within thirty days after the filing of the objection unless such hearing be postponed by agreement of the parties or by the chief administrative law judge or such authorized representative for good cause. The commissioner shall be considered a party to any proceeding under this article which involves a claim chargeable against the workers' compensation fund, the disabled workers' relief fund or such other fund as may then be under the commissioner's management and control, and may appear only in any proceedings involving a claim that is or may be asserted against any portion of the surplus fund or any claim in which the employer fails to appear.

The office of judges shall keep full and complete records of all proceedings concerning a disputed claim. All testimony upon a disputed claim shall be recorded but need not be transcribed unless the claim is appealed or in such other circumstances as, in the opinion of the chief administrative law judge, may require such transcription. Upon receipt of notice of the filing of an objection, the commissioner shall forthwith forward to the chief administrative law judge all records, or copies of such records, in the commissioner's office which relate to the matter objected to. All such records or copies thereof and any evidence taken at hearings...
conducted by the office of judges shall constitute the record upon which the matter shall be decided. The office of judges shall not be bound by the usual common law or statutory rules of evidence. At any time within thirty days after hearing, if the chief administrative law judge or the chief administrative law judge's authorized representative is of the opinion that the facts have not been adequately developed at such hearing, he or she may order supplemental hearings or obtain such additional evidence as he or she deems warranted upon due notice to the parties.

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

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

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

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

Any employer, employee, claimant, or dependent, who shall feel aggrieved at any final action of the commis-

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ior or administrative law judge taken after a hearing held in accordance with the provisions of section one or section one-h of this article, shall have the right to appeal to the board created in section two of this article for a review of such action. The commissioner shall likewise have the right to appeal to the appeal board any final action taken in a proceeding in which he or she is a party. The aggrieved party shall file a written notice of appeal with the compensation commissioner or, after the first day of July, one thousand nine hundred ninety-one, with the office of judges directed to such board, within thirty days after receipt of notice of the action complained of, or in any event, regardless of notice, within sixty days after the date of the action complained of, and unless the notice of appeal is filed within the time specified, no such appeal shall be allowed, such time limitation being hereby declared to be a condition of the right to such appeal and hence jurisdictional; and the commissioner or the office of judges shall notify the other parties immediately upon the filing of a notice of appeal. The commissioner or the office of judges shall forthwith make up a transcript of the proceedings before the commissioner or the office of judges and certify and transmit the same to the board. Such certificate shall incorporate a brief recital of the proceedings therein had and recite each order entered and the date thereof. The board shall review the action of the commissioner or administrative law judge complained of at its next meeting after the filing of notice of appeal, provided such notice of appeal shall have been filed thirty days before such meeting of the board, unless such review be postponed by agreement of parties or by the board for good cause. The board shall set a time and place for the hearing of arguments on each claim and shall notify the interested parties thereof, and briefs may be filed by the interested parties in accordance with the rules of procedure prescribed by the board. And thereupon, after a review of the case, the board shall sustain the finding of the commissioner or administrative law judge or enter such order or make such award as the commissioner or administrative law judge should have made, stating in writing its reasons...
therefor, and shall thereupon certify the same to the
commissioner, or chief administrative law judge, who
shall proceed in accordance therewith. Or, instead of
affirming or reversing the commissioner or administra-
tive law judge as aforesaid, the board may, upon motion
of either party or upon its own motion, for good cause
shown, to be set forth in the order of the board, remand
the case to the commissioner or chief administrative law
judge for the taking of such new, additional or further
evidence as in the opinion of the board may be necessary
for a full and complete development of the facts of the
case. In the event the board shall remand the case to
the commissioner or chief administrative law judge for
the taking of further evidence therein, the commissioner
or administrative law judge shall proceed to take such
new, additional or further evidence in accordance with
any instruction given by the board, and shall take the
same within thirty days after receipt of the order
remanding the case, giving to the interested parties at
least ten days’ written notice of such supplemental
hearing, unless the taking of evidence shall be postponed
by agreement of parties, or by the commissioner or
administrative law judge for good cause. After the
completion of such supplemental hearing, the commis-
sioner or administrative law judge shall, within sixty
days, render his or her decision affirming, reversing or
modifying the former action of the commissioner or
administrative law judge, which decision shall be
appealable to, and proceeded with by the appeal board
in like manner as in the first instance. The board may
remand any case as often as in its opinion is necessary
for a full development and just decision of the case. The
board may take evidence or consider ex parte state-
ments furnished in support of any motion to remand the
case to the commissioner or chief administrative law
judge. All evidence taken by or filed with the board
shall become a part of the record. All appeals from the
action of the commissioner or administrative law judge
shall be decided by the board at the same session at
which they are heard, unless good cause for delay
thereof be shown and entered of record. In all proceed-
ings before the board, any party may be represented by
§23-5-3a. Continuances and supplemental hearings; claims not to be denied on technicalities.

It is the policy of this chapter that the rights of claimants for workers' compensation be determined as speedily and expeditiously as possible to the end that those incapacitated by injuries and the dependents of deceased workers may receive benefits as quickly as possible in view of the severe economic hardships which immediately befall the families of injured or deceased workers. Therefore, the criteria for continuances and supplemental hearings "for good cause shown" are to be strictly construed by the commissioner and chief administrative law judge and their authorized representatives to prevent delay when granting or denying continuances and supplemental hearings. It is also the policy of this chapter to prohibit the denial of just claims of injured or deceased workers or their dependents on technicalities.

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

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

ARTICLE 5A. DISCRIMINATORY PRACTICES.

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

(a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate discharge-
able offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

(b) It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties. In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desires reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement: Provided, That the employee provides to the employer a current mailing address during this one year period.

(c) Any civil action brought under this section shall be subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision thereunder, or to any court or administra-
tive order applying specifically to the injured employee's employer, and shall further be subject to any applicable federal statute or regulation.

d) Nothing in this section shall affect the eligibility of the injured employee to workers' compensation benefits under this chapter.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Frederick Ford
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect July 1, 1990.

Jerrell E. Clark
Clerk of the Senate

Donald J. Kopp
Clerk of the House of Delegates

Keith Fandette
President of the Senate

Henry E. Bledsoe
Speaker of the House of Delegates

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

Governor