WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1991

ENROLLED

SENATE BILL NO. 187

(By Senator Chafin)

PASSED March 9, 1991
In Effect from Passage
ENROLLED

Senate Bill No. 187

(BY SENATOR CHAFIN)

[Passed March 9, 1991; in effect from passage.]

AN ACT to amend and reenact sections one, one-a, one-b, two, five, nine and thirteen, article two, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section three, article five of said chapter; and to further amend said article by adding thereto a new section, designated section one-j, relating to providing workers’ compensation coverage for certain corporate or associational officers, partners, and owners of sole proprietorships as employees; eliminating the restriction to only corporate employers who wish to temporarily come into the state but who choose to subscribe to the workers’ compensation fund; elections to forgo such coverages; exemptions to such elections for certain officers engaged in dual capacities for the employer; notices to be given to the commissioner of such elections; providing elective workers’ compensation coverage for elected officials; methods of calculation of premiums for executive officers, partners, and sole owners both for for-profit entities and for not-for-profit entities; methods of calculation of premiums for elected officials; definitions; furnishing of confidential information to the division of workers’ compensation by the state tax commissioner and by the division of unemployment compensation; specifying the types of infor-
mation that may be so furnished; authorizing the commissioner to encourage employers to engage in loss prevention programs, programs for maintaining a safe workplace, and wellness programs; changing the types of penalties that may be imposed upon defaulted or terminated employers; forbidding the waiver of penalties and interest on delinquent premiums and premium deposits; establishing a system and method for penalty premium rate of one hundred ten percent of base or modified premiums, whichever is higher, under certain circumstances of default and termination; providing for reinstatement agreements and conditions thereon; providing for requirements on employers entering into reinstatement agreements to abide by the conditions thereof and to maintain their accounts in good standing; clarifying that the commissioner may file a lien against an employer despite the filing of an application for reinstatement or the entering into of a reinstatement agreement; providing for requirements that employers filing applications for reinstatement keep their accounts in good standing and the consequences for failures to do so; providing for the method of determining the premium rates for subscribers to the second injury fund and the factors to be used in doing so; clarifying that the commissioner may require a premium deposit from self-insured employers; allowing the commissioner to limit the modifications of such second injury fund premiums based upon the employer's experience in using the second injury fund; making clear the intention of the Legislature regarding the respective responsibilities of the employer and the second injury fund for the payment of charges related to the last injury leading to a second injury life award; relating to the application of a rate of interest of eighteen percent upon past due premium and premium deposit; compounding of such rate of interest except for interest to be charged under a reinstatement agreement; relating to procedures before the office of chief administrative law judge with regard to certain requests for permanent total disability awards or for second injury life awards including remands to the commissioner for initial decisions, staying the protests then under
consideration, continuing in effect the decision pro-
tested during the remand proceedings, and for resump-
tion of action by the office of chief administrative law
judge following the commissioner's decision on remand;
removing the requirement that the appeal board make
findings of fact and conclusions of law in certain cases;
and making other reconciling changes.

Be it enacted by the Legislature of West Virginia:

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

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

§23-2-1. Employers subject to chapter; elections not to
provide certain coverages; notices; filing of
business registration certificates.

(a) The state of West Virginia and all governmental
agencies or departments created by it, including
county boards of education, political subdivisions of
the state, any volunteer fire department or company
and other emergency service organizations as defined
by article five, chapter fifteen of this Code, and all
persons, firms, associations and corporations regularly
employing another person or persons for the purpose
of carrying on any form of industry, service or
business in this state, are employers within the
meaning of this chapter and are hereby required to
subscribe to and pay premiums into the workers'
compensation fund for the protection of their
employees and shall be subject to all requirements of
this chapter and all rules and regulations prescribed
by the commissioner with reference to rate, classifica-
tion and premium payment: Provided, That such rates
will be adjusted by the commissioner to reflect the
demand on the compensation fund by the covered
employer.
(b) The following employers are not required to subscribe to the fund, but may elect to do so:

1. Employers of employees in domestic services; or
2. Employers of five or fewer full-time employees in agricultural service; or
3. Employers of employees while said employees are employed without the state except in cases of temporary employment without the state; or
4. Casual employers. An employer is deemed to be a casual employer when the number of his employees does not exceed three and the period of employment is temporary, intermittent and sporadic in nature and does not exceed ten calendar days in any calendar quarter; or
5. Churches; or
6. Employers engaged in organized professional sports activities, including employers of trainers and jockeys engaged in thoroughbred horse racing.

(c) Notwithstanding any other provision of this chapter to the contrary, whenever there are churches in a circuit which employ one individual clergyman and the payments to such clergyman from such churches constitute his full salary, such circuit or group of churches may elect to be considered a single employer for the purpose of premium payment into the workers' compensation fund.

(d) Employers who are not required to subscribe to the workers' compensation fund may voluntarily choose to subscribe to and pay premiums into the fund for the protection of their employees and in such case shall be subject to all requirements of this chapter and all rules and regulations prescribed by the commissioner with reference to rates, classifications and premium payments and shall afford to them the protection of this chapter, including section six of this article, but the failure of such employers to choose to subscribe to and to pay premiums into the fund shall not impose any liability upon them other than such
liability as would exist notwithstanding the provisions of this chapter.

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

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

(g) The following employers may elect not to provide coverage to certain of their employees under the provisions of this chapter:

(1) Employers of employees who are officers of and
stockholders in a corporation qualifying for special tax treatment under subchapter S of the Internal Revenue Code of the United States may elect not to provide coverage to such employees; or

(2) If an employer is a partnership, sole proprietorship, association, or corporation, such employer may elect not to include as an “employee” within this chapter, any member of such partnership, the owner of the sole proprietorship, or any corporate officer or member of the board of directors of the association or corporation. The officers of a corporation or an association shall consist of a president, a vice-president, a secretary, and a treasurer, each of whom shall be elected by the board of directors at such time and in such manner as may be prescribed by the bylaws. Such other officers and assistant officer as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws and, if so elected, appointed, or chosen, such employer may elect not to include any such officer or assistant officer as an “employee” within the meaning of this chapter: Provided, That except for those persons who are members of the board of directors or who are the corporation’s or association’s president, vice-president, secretary, and treasurer and who may be excluded by reason of their aforementioned positions from the benefits of this chapter even though their duties, responsibilities, activities, or actions may have a dual capacity of work which is ordinarily performed by an officer and also of work which is ordinarily performed by a worker, an administrator, or an employee who is not an officer, no such other officer or assistant officer who is elected or appointed shall be excluded by election from coverage or be denied the benefits of this chapter merely because he or she is such an officer or assistant officer if, as a matter of fact:

(A) He or she is engaged in a dual capacity of having the duties and responsibilities for work ordinarily performed by an officer and also having duties and work ordinarily performed by a worker, administra-
tor, or employee who is not an officer;

(B) He or she is engaged ordinarily in performing
the duties of a worker, an administrator, or an
employee who is not an officer and receives pay
therefore in the capacity of an employee; or

(C) If he or she is engaged in an employment
palpably separate and distinct from his or her official
duties as an officer of the association or corporation.

(h) In the event of election under subsection (g) of
this section, the employer shall serve upon the com-
missioner written notice naming the positions not to
be covered and shall not include such “employee’s”
remuneration for premium purposes in all future
payroll reports, and such partner, proprietor or
corporate or executive officer shall not be deemed an
employee within the meaning of this chapter after
such notice has been served.

§23-2-la. Employees subject to chapter.

1. (a) Employees subject to this chapter are all persons
in the service of employers and employed by them for
the purpose of carrying on the industry, business,
service or work in which they are engaged, including,
but not limited to:

(1) Persons regularly employed in the state whose
duties necessitate employment of a temporary or
transitory nature by the same employer without the
state;

(2) Every person in the service of the state or of any
political subdivision or agency thereof, under any
contract of hire, express or implied, and every
appointed official or officer thereof while performing
his or her official duties;

(3) Checkweighmen employed according to law;

(4) All members of rescue teams assisting in mine
accidents with the consent of the owner who, in such
case, shall be deemed the employer, or at the direction
of the director of the department of mines; and
(5) All forest fire fighters who, under the supervision of the director of the department of natural resources or his or her designated representative, assist in the prevention, confinement and suppression of any forest fire.

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

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

(a) Except as provided for in subsection (b) of this section, every executive officer of an association or of a corporation, any member of a partnership or owner of a sole proprietorship which has not elected to forgo coverage under this chapter for such officer, member or owner shall pay premiums based upon the actual salary paid to such employee up to an amount sufficient to qualify such employee to receive the maximum level of benefits, but in no event shall the basis for premium be less than the salary necessary to provide such employee with the minimum level of benefits.

(b) Every executive officer of a not-for-profit association or of a not-for-profit corporation which has not elected to forgo coverage under this chapter for such officer, member or owner shall pay premiums based upon the actual salary paid to such employee up to an amount sufficient to qualify such employee to receive the maximum level of benefits, but in no event shall the basis for premium be less than one hundred dollars.

(c) Every elected official or officer, whether full time or part time and including members of the Legislature, whose governmental entity elects coverage under this chapter for such elected official or officer, shall pay or have paid for him or her premiums based upon the actual salary paid to such elected official or officer up to an amount sufficient to qualify
such elected official or officer to receive the maximum
level of benefits, but in no event shall the basis for
premium be less than the salary necessary to provide
such elected official or officer with the minimum level
of benefits. For the purposes of this subsection, an
elected official or officer shall include a person
appointed to an elected position to complete a term for
that elected position.

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

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

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

§23-2-2. Commissioner to be furnished information by
employers, state tax commissioner and divi-
sion of unemployment compensation; secrecy
of information; examination of employers,
e tc.; violation a misdemeanor.

(a) Every employer shall furnish the commissioner,
upon request, all information required by him or her
to carry out the purposes of this chapter. The commis-
sioner, or any person employed by the commissioner
for that purpose, shall have the right to examine under oath any employer or officer, agent or employee of any employer.

(b) Notwithstanding the provisions of any other statute, specifically, but not exclusively, section five and five-b, article ten, chapter eleven of this code, and section eleven, article ten, chapter twenty-one-a of this code the commissioner of the bureau of employment programs may receive the following information:

(1) Upon written request to the state tax commissioner: The names, addresses, places of business and other identifying information of all businesses receiving a business franchise registration certificate and the dates thereof; and, the names and social security numbers or other tax identification numbers of the businesses and of the businesses' workers and employees, if otherwise collected, and the quarterly and annual gross wages or other compensation paid to the workers and employees of such businesses reported pursuant to the requirement of withholding of tax on income.

(2) Upon written application to the division of unemployment compensation: In addition to the information that may be released to the division of workers' compensation for the purposes of this chapter under the provisions of chapter twenty-one-a of this code, the names, addresses and other identifying information of all employing units filing reports and information pursuant to section eleven, article ten, chapter twenty-one-a of this code as well as information contained in those reports regarding the number and names, addresses, and social security numbers of employees employed and the gross quarterly wages paid by each employing unit to each identified employee.

(c) All information acquired by the division of workers' compensation pursuant to subsection (b) of this section shall be used only for auditing premium payments and registering businesses under the single point of registration program as defined in section two,
article one, chapter eleven of this code. The division of
workers’ compensation, upon receiving the business
franchise registration certificate information made
available pursuant to subsection (b) of this section,
shall contact all businesses receiving a business
franchise registration certificate and provide all
necessary forms to register the business under the
provisions of this article. Any officer or employee of
this state who uses the aforementioned information in
any manner other than the one stated herein or
elsewhere authorized in this code, or who divulges or
makes known in any manner any of the aforemen-
toned information shall be guilty of a misdemeanor,
and, upon conviction thereof, shall be fined not more
than one thousand dollars or imprisoned in the county
jail for not more than one year, or both, together with
cost of prosecution.

(d) Reasonable costs of compilation and production
of any information made available pursuant to subsec-
tion (b) of this section shall be charged to the division
of workers’ compensation.

(e) Information acquired by the commissioner
pursuant to subsection (b) of this section shall not be
subject to disclosure under the provisions of chapter
twenty-nine-b of this code.

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

(a) For the purpose of creating a workers’ compen-
sation fund each employer who is required to sub-
scribe to the fund or who elects to subscribe to the
fund, shall pay premiums calculated as a percentage of
the employer’s payroll at the rate determined by the
commissioner and then in effect. At the time each
employer subscribes to the fund, the application
required by the commissioner shall be filed and a
premium deposit equal to the first quarter’s estimated
premium payment shall be remitted. The minimum
quarterly premium to be paid by any employers shall
(1) Thereafter, premiums shall be paid quarterly on or before the last day of the month following the end of the quarter, and shall be the prescribed percentage of the total earnings of all employees during the preceding quarter.

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

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

(4) All premiums and premium deposits required to be paid by this chapter shall be paid by the employers to the workers’ compensation commissioner, who shall maintain record of all sums so received. On and after the first day of October, one thousand nine hundred ninety-one, any such sum mailed to the commissioner shall be deemed to be received on the date the envelope transmitting it is postmarked by the United States postal service. All sums received by the commissioner shall be deposited in the state treasury to the credit of the workers’ compensation fund in the manner now prescribed by law.

(5) The commissioner may encourage employer efforts to create and maintain safe workplaces, to encourage loss prevention programs, and to encourage employer provided wellness programs, through the
normal operation of the experience rating formula,
seminars and other public presentations, the develop-
ment of model safety programs and other initiatives as
may be determined by the commissioner.

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

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

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

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

112 (f) (1) Except as provided for in subdivision three of
this subsection, any employer who is required to
subscribe to the fund and who is in default on the
effective date of this section or who subsequently
defaults, and any employer who has elected to sub-
scribe to the fund and whose account is terminated
prior to the effective date of this section or whose
account is subsequently terminated, shall be restored
immediately to the benefits and protection of this
chapter only upon the filing of all delinquent payroll
and other reports required by the commissioner and
payment into the fund of all unpaid premiums, an
adequate premium deposit, and accrued interest.
Interest shall be calculated as provided for by section
thirteen of this article. In addition, for every defaulted
or terminated employer whose default or termination
lasts longer than two quarters or who has defaulted or
been terminated for more than two quarters out of the
preceding eight consecutive quarters, then upon any
such employer’s restoration to the benefits and protec-
tion of this chapter, for the next eight quarters,
including the quarter in which such restoration
occurs, the employer shall pay premiums to the commissioner at a penalty rate. The applicable penalty premium rate shall be determined by first calculating the employer’s premium under the provisions of section four of this article, but including any applicable experience modification, and then multiplying that premium by one hundred and ten percent.

The commissioner shall not have the authority to waive either accrued interest or the imposition of the penalty premium rate. Any employer whose default or termination does not last longer than two quarters or who has not defaulted in more than two quarters out of the preceding eight consecutive quarters shall not have a penalty premium rate imposed. The provisions of section seventeen of this article apply to any action or decision of the commissioner under this section. For purposes of section four of this article, the extra ten percent of premium constituting the penalty shall not be used in determining any entitlement to experience modification of the employer’s premium rate for future years.

(2) The commissioner shall have the authority to restore a defaulted or terminated employer under a reinstatement agreement. Such reinstatement agreement shall require the payment in full of all premiums, premium deposits, past accrued interest, and future interest calculated pursuant to the provisions of section thirteen of this article. The reinstatement agreement shall not permit any modification or waiver of the penalty premium rate provided for in subdivision (1) of this subsection. Notwithstanding the filing of a reinstatement application or the entering into of a reinstatement agreement, the commissioner is authorized to file a lien against the employer as provided for by section five-a of this article. Applications for reinstatement shall: (A) Be made upon forms prescribed by the commissioner; (B) include a report of the gross payroll of the employer during the entire period of delinquency and default, which payroll information shall be verified by the employer or its authorized agent; and (C) include a payment equal to
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175 one half of one percent of the gross payroll during the
176 period of delinquency and default but not to exceed
177 the amount of the entire liability due and owing for
178 the period of delinquency and default, or one hundred
179 dollars, whichever amount shall be greater. An
180 employer who applies for reinstatement shall be
181 entitled to the benefits and protection of this chapter
182 on the day the application is received by the commis-
183 sioner: Provided, That if the commissioner reinstates
184 an employer subject to the terms of a repayment
185 agreement, the subsequent failure of the employer to
186 make scheduled payments or to pay accrued or future
187 interest in accordance with the repayment agreement
188 or to timely file current premiums or to otherwise
189 maintain its account in good standing or, if the
190 repayment agreement does not require earlier restora-
191 tion of the premium deposit, to restore the premium
192 deposit to the required amount by the end of the
193 repayment period shall cause the repayment agree-
194 ment to be null, void and of no effect, and the
195 employer shall be denied the benefits and protection
196 of this chapter effective from the date that such
197 employer's account originally became delinquent.

198 (3) Any employer who fails to maintain his or her
199 account in good standing with regard to subsequent
200 premiums and premium deposits prior to the final
201 resolution of an application for reinstatement as
202 provided for in division one of this subsection shall
203 cause the reinstatement application to be null, void
204 and of no effect, and the employer shall be denied the
205 benefits and protection of this chapter effective from
206 the date that such employer's account originally
207 became delinquent. The commissioner may then make
208 and continue with any of the collection efforts pro-
209 vided for by section five-a of this article even if the
210 employer files another reinstatement application.

211 (g) No employee of an employer required by this
212 chapter to subscribe to the workers' compensation
213 fund shall be denied benefits provided by this chapter
214 because the employer failed to subscribe or because
215 the employer's account is either delinquent or in
(h) (1) The provisions of this section shall not deprive any individual of any cause of action which has accrued as a result of an injury or death which occurred during any period of delinquency not resolved in accordance with the provisions of this article, or subsequent failure to comply with the terms of the repayment agreement.

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

(3) Notice to employees in this section provided for shall be given by posting written notice that the employer is delinquent under the compensation law of West Virginia, and in the case of employers required by this chapter to subscribe and pay premiums to the fund, that the delinquent employer is liable to his or her employees for injury or death, both in workers' compensation benefits and in damages at common law or by statute; and, in the case of employers not required by this chapter to subscribe and pay premiums to the fund, that neither the employer nor the employees of such employer are protected by said laws as to any injury or death sustained after the date specified in said notice. Such notice shall be in the form prescribed by the commissioner and shall be posted in a conspicuous place at the chief works of the employer, as the same appear in records of the commissioner. If the said chief works of the employer cannot be found or identified, then said notices shall be posted at the front door of the courthouse of the county in which said chief works are located, according to the records in the commissioner's office. Any person who shall, prior to the reinstatement of the said employer, as hereinbefore provided for, or prior

default.
to sixty days after the posting of said notice whichever shall first occur, remove, deface, or render illegible the said notice, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not to exceed five hundred dollars, and the said notice shall state this provision upon its face. The commissioner may require any sheriff, deputy sheriff, constable or other official of the state of West Virginia, who may be authorized to serve civil process, to post such notice and to make return thereof of the fact of such posting to the commissioner, and any failure of such officer to post any notice within ten days after he or she shall have received the same from the commissioner, without just cause or excuse, shall constitute a willful failure or refusal to perform a duty required of him or her by law within the meaning of section twenty-eight, article five, chapter sixty-one of this code. Any person actually injured by reason of such failure shall have an action against said official, and upon any official bond he or she may have given, for such damages as such person may actually have incurred, but not to exceed, in the case of any surety upon said bond, the amount of the penalty of said bond. Any official posting said notice as herein required shall be entitled to the same fee as is now or may hereafter be provided for the service of process in suits instituted in courts of record in the state of West Virginia, which fee shall be paid by the commissioner out of any funds at his or her disposal, but shall be charged by him or her against the account of the employer to whose delinquency such notice relates.

§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) (1) 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 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 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 compensation 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 as self insurance premium contributions:

(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;
(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.

(D) A sum sufficient to maintain as an advance deposit an amount equal to the previous quarter's payment of each of the foregoing three factors.

(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 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' compensation fund the amount of such excess of liability over premiums paid, including the employer's proper proportion 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 establish a rate for each industrial group
or class based upon the total expected second injury
fund base rate premium for that industrial group or
class and shall further modify such rate for individual
employers based upon the ratio of the individual
employer’s record of actual second injury awards to
the average cost of second injury awards for all
employers in that industrial group or class. The
commissioner may limit such modifications. Actual
second injury awards shall mean awards made under
this chapter on and after the first day of January, one
thousand nine hundred ninety-one, 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: 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: Provided further, That
for the period from the first day of January, one
thousand nine hundred ninety-one through the thir-
tieth day of June, one thousand nine hundred ninety-
two, inclusive, the commissioner shall consider second
injury premium based on a percentage of the base
rates assigned to each industrial group or class.

(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 be liable to pay
compensation or expenses arising from or necessitated
by the second injury, and such compensation and
d shall be charged against such employer:

Provided, That in addition to such compensation and
d expenses, and after the completion of the payments
therefor, the employee shall be paid the remainder of
do the compensation and expenses that would be due for
d permanent total disability from the second injury
reserve of the surplus fund. Such additional compen-
sation and expenses shall be paid from the second
injury reserve of the surplus fund in the same manner
d and to the same extent as in the case of premium-
paying subscribers and such additional compensation
d expenses shall not be charged against such
employer.

(4) (A) Any employer who has heretofore elected to
d 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
d thousand nine hundred eighty-nine, not to make
d payments into the second injury reserve of the surplus
d fund; and

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

(B) Any employer who has heretofore elected to pay
d compensation and expenses directly under the provi-
sions 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 
compensation 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 
compensation 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- 
before 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 
commissioner shall consider adequate and sufficient to 
compel or secure payment of all compensation and 
expenses arising from, or necessitated by, any catastro- 
phe 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 commis-
sioner 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 commissioner shall not be liable to
respond in damages at common law or by statute for
the injury or death of any employee, however occur-
ing, after such election and during the period that the
employer is allowed by the commissioner to carry the
employer's own risk.

§23-2-13. Interest on past due payments; reinstatement
agreements.

1 Payments unpaid on the date on which due and
2 payable, as prescribed by the commissioner, shall
3 immediately begin bearing interest at the rate of
4 eighteen percent per annum. This same rate of inter-
5 est shall be applicable to all reinstatement agreements
6 entered into by the commissioner pursuant to section
7 five of this article on and after the effective date of
8 this section. Interest shall be compounded quarterly
9 until payment plus accrued interest is received by the
10 commissioner: Provided, That on and after the date of
11 execution of a reinstatement agreement, for determin-
12 ing future interest on any past due premium, pre-
13 vium deposit, and past compounded interest thereon,
14 any reinstatement agreement entered into by the
15 commissioner shall provide for a simple rate of
16 interest for the future interest. Interest collected
17 pursuant to this section shall be paid into the workers'
18 compensation fund: Provided, however, That in no
event shall the rate of interest charged a political
subdivision of the state or a volunteer fire department
pursuant to this section exceed ten percent per
annum.

ARTICLE 5. REVIEW.

§23-5-1j. Requests for permanent total disability awards and
second injury life awards following objections to decisions by the commissioner; remands to the commissioner; development of the record.

(a) If, following an objection to any decision of the commissioner, any party to a claim pending before the office of judges requests that a claimant be awarded a permanent total disability award or a second injury life award or if the administrative law judge on his or her own motion believes that the record is incomplete on the issue of whether a claimant should be issued a permanent total disability award or a second injury life award, then the administrative law judge shall enter an order remanding the claim to the commissioner. An order directing that a claim be remanded shall be interlocutory in nature and shall not be appealable under section three of this article to the appeals board created pursuant to section two of this article. Upon remand, the commissioner may exercise the authority granted to him or her by this chapter to determine whether or not the claimant is entitled to a permanent total disability award or a second injury life award. The commissioner shall act upon any matter remanded to him or her pursuant to this section in a speedy and timely manner and in no event longer than one hundred twenty days. Following the commissioner's decision, any party to the claim may file an objection to the decision pursuant to the other provisions of this article.

(b) During the pendency of the remand proceedings before the commissioner, the original decision from which the objection was taken shall remain in effect and action on the protest held in abeyance pending the commissioner's action on the remand order. Upon the
entry of a decision on the issue of whether a permanent total disability award or a second injury life award is to be made, the claim shall be returned to the office of judges for such further proceedings as may be required on that first objection. If a further objection is made pursuant to subsection (a) of this section to the commissioner’s decision on the issue of whether a permanent total disability award or a second injury life award is to be made, then such proceedings on such objection shall be made part of the proceedings on the first objection.

§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 commissioner 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, in which case it need not make findings of fact or conclusions of law, 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 administrative 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 commissioner 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 statements 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 proceedings before the board, any party may be represented by counsel.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
Chairman Senate Committee

[Signature]
Chairman House Committee

Originated in the Senate.

In effect from passage.

[Signature]
Clerk of the Senate

[Signature]
Clerk of the House of Delegates

[Signature]
President of the Senate

[Signature]
Speaker House of Delegates

The within bill was presented this the ......... day of ......... 1991.

[Signature]
Governor