WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 1993

ENROLLED

HOUSE BILL No. 2802

(By Delegates Stotes, Rowe, Huffman,
Faircloth, J. White, and Allbey)

Passed ........................................ April 8, 1993

In Effect ...................................... Passage
AN ACT to repeal section eighteen, article one, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to repeal section one-j, article five, chapter twenty-three of said code; to amend chapter twenty-one-a of said code by adding thereto a new article, designated article three; to amend and reenact section eight, article three, chapter twenty-two-a of said code; to amend and reenact sections one, four, eleven, thirteen and sixteen, article one, chapter twenty-three of said code; to amend and reenact sections one-c, four, five, five-a, five-b, fifteen and seventeen, article two of said chapter; to further amend said article by adding thereto three new sections, designated sections one-d, five-c and five-d; to further amend said chapter by adding thereto a new article, designated article two-b; to amend and reenact sections one-e, three, three-a, three-c, six, eight-c, sixteen and nineteen, article four of said chapter; to further amend said article by adding thereto five new sections, designated sections one-f, twenty-two, twenty-three, twenty-four and twenty-five; to amend and reenact sections one, one-b, one-h and six, article five of said chapter, all relating to workers' compensation generally; creation of compensation programs performance council; purpose; appointment of members; membership; terms; chair; qualifications; selection by governor; compensation and traveling expenses; insurance; meetings; quorum; powers and
duties; special rule making authority; prohibition of surface mining without a permit; permit requirements; successor in interest; duration of permits; proof of insurance; termination of permits; permit fees; commissioner of the bureau of employment programs; compensation programs performance council; official seal; legal services; rules; office hours; records; confidentiality; exceptions; depositions; investigations; rules of procedure and evidence; persons authorized to appear in proceedings; withholding of psychiatric and psychological reports and providing summaries thereof; omission to subscribe to workers' compensation fund or perform duty required by commissioner; false testimony or certification; criminal penalties; extraterritorial coverage; approval and change of agreements; primary contractor liability; definitions; applications and exceptions; certificates of good standing; reimbursement and indemnification; termination of contracts; effective date; collections efforts; classification of industries; accounts; rate of premiums; prior notice of rate changes; exceptions; application; payment of premiums; payroll report; premiums; deposits; delinquency; default; reinstatement; payment of benefits; notice to employees; criminal provisions; penalties; collection of premiums from defaulting employers; interest and penalties; civil remedies; creation and enforcement of lien against employer and purchaser; duty of secretary of state to register liens; distraint powers; insolvency proceedings; secretary of state to withhold certificates of dissolution; injunctive relief; bond; attorney fees and costs; legislative purpose; application for settlement; reinstatement; amount of settlement; when settlement void; notification of rights; statute of limitations; effective date for new payments; previous payments due not affected; uncollectible receivables; write-offs; liabilities of successor employer; waiver of payment by commissioner; assignment of predecessor employer's premium rate to successor; employer right to hearing; content of petition; appeal; occupational safety and health activities; voluntary compliance; consultative services; mandatory programs; safety committees; requirements; rules; exceptions; premium rate credits; qualified loss manage-
ment program; loss management firms; penalties; rules; temporary total disability benefits not to be paid for periods of penitentiary or jail confinement; denial of workers' compensation benefits for injuries or disease incurred while incarcerated; certain psychiatric injuries and diseases not compensable; 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 requirements; consequences of failure to disclose; contract by employer with hospital, physician, etc., prohibited; criminal penalties for violation; payments to certain providers prohibited; medical cost and care programs; payments; interlocutory orders; wrongfully seeking payment for services or supplies; criminal penalties; restitution; suspension or termination of providers of health care; classification of and criteria for disability benefits; occupational pneumoconiosis board; reports and distribution thereof; presumption; findings required of board; objection to findings; procedure thereon; limitations on refilings; consolidation of claims; commissioner's jurisdiction over case continuous; modification of finding or order; time limitation on awards; reimbursement of claimant for expenses; reopening cases involving permanent total disability; promulgation of rules; wrongfully seeking compensation; criminal penalties; restitution; termination of compensation; permanent disability evaluations; limitations; notice; permanent total disability benefits; reduction of disability benefits; social security benefits; applications; release of information; credit or reduction of benefits; application of section; severability; permanent total disability awards; retirement age; limitations on eligibility and the introduction of evidence; effects of other types of awards; procedures; requests for awards; jurisdiction; permanent total disability benefits; reduction of disability benefits for wages earned by claimant; notice by commissioner of decision; procedures on claims; objections and hearing; mediation; refusal to
reopen claim; notice; objection; hearings on objections to commissioner's decisions by office of administrative law judges; and providing for the application of claims and cases of self-insured employers.

Be it enacted by the Legislature of West Virginia:

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

CHAPTER 21A.
UNEMPLOYMENT COMPENSATION.

ARTICLE 3. COMPENSATION PROGRAMS PERFORMANCE COUNCIL.

§21A-3-1. Creation of compensation programs performance council; purpose.

1 There is hereby created within the bureau of employment programs a "compensation programs performance council". The purpose of said council shall be to ensure
2 the effective, efficient and financially stable operation of
3 the unemployment compensation system and the
4 workers' compensation system of the state of West
5 Virginia.
§21A-3-2. Appointment of members.

The members of the council shall be appointed by the governor by and with the advice and consent of the Senate.

§21A-3-3. Membership; terms; chair.

The compensation programs performance council shall consist of nine members: Four representing the interests of employees; four representing the interests of employers; and the commissioner of the bureau of employment programs.

The term of each member except the commissioner shall be for six years. The term of the commissioner shall continue for that period in which he or she holds that office.

The terms of all the initially appointed members of the council shall begin on the first day of July, one thousand nine hundred ninety-three.

Of the persons initially appointed, four members, including two members of each of the two representative groups, shall be designated to serve for terms of two years each, two members, including one member of each of the two representative groups, shall be designated to serve for terms of four years each, and two members, including one member of each of the two representative groups shall be designated to serve for terms of six years each. As these appointments expire, subsequent appointments shall be for six-year terms.

The commissioner shall serve as chair of the council and shall be entitled to vote on all matters. The council shall elect from its members a vice-chair.

§21A-3-4. Qualifications; selection by governor.

Members of the council shall be selected with special reference to their ability and fitness to effectuate the purposes of this chapter and chapter twenty-three of this code.

In appointing members of this council to represent the interests of employees, the governor shall select
members as follows:

One member shall be appointed from a list of at least three names submitted to the governor by the United Mine Workers of America;

Two members shall be appointed from a list of at least six names submitted to the governor by the West Virginia Labor Federation, with one representing construction trades and one representing industrial workers; and

One member selected by the governor to represent the general interests of employees covered under the provisions of this chapter and chapter twenty-three of this code.

In appointing members of this council to represent the interests of employers, the governor shall select members as follows:

One member shall be appointed from a list of at least three names submitted to the governor by the West Virginia Coal Industry;

One member shall be appointed from a list of at least three names submitted to the governor by the West Virginia Manufacturers Association;

One member shall be appointed from a list of at least three names submitted to the governor by the West Virginia Chamber of Commerce; and

One member selected by the governor to represent the general interests of employers covered under the provisions of this chapter and chapter twenty-three of this code.

The governor shall ensure that employer representation includes a representative of small businesses employing fifty or less employees on a regular basis.

§21A-3-5. Compensation and traveling expenses; insurance.

Members of the council shall receive reasonable compensation for each day actually served in attendance at meetings of the council and such traveling expenses
as are incurred in the performance of his or her duties. Payment for traveling expenses shall be made consistent with state law.

Each member of this council shall be provided appropriate liability insurance, without additional premium, by the state board of risk and insurance management established pursuant to article twelve, chapter twenty-nine of this code.

§21A-3-6. Meetings; quorum.

The council shall hold meetings at any time at the call of the commissioner. The commissioner shall call a meeting whenever three of the other members of the council request the commissioner to do so. The exact date and time of each meeting shall be determined by the commissioner.

A majority of the members of the council shall constitute a quorum for the conduct of council business and, except as stated in subdivision (m) of section seven of this article, all issues shall be resolved by a majority vote of the total membership.

§21A-3-7. Powers and duties; special rule-making authority.

The council shall have the following powers and duties:

(a) Assist the governor and the commissioner in the development of overall administrative policy for the unemployment compensation and workers' compensation systems of the state.

(b) Recommend legislation and establish regulations designed to ensure the effective administration and financial viability of the unemployment compensation system and the workers' compensation system of West Virginia.

(c) Review and approve, reject or modify rules and regulations that are proposed or promulgated by the commissioner for operation of the workers' compensation system before the filing of the rules and regulations with the secretary of state. This provision is applicable
to any instance under chapter twenty-three of this code which authorizes the commissioner to promulgate rules and regulations. Notwithstanding any provision in this code to the contrary, including sections one and two, article three and section three, article seven both of chapter twenty-nine-a of this code, any rules and regulations adopted pursuant to this section which are applicable to the provisions of chapter twenty-three of this code shall not be subject to sections nine through sixteen, all of article three, chapter twenty-nine-a of this code. The commissioner and the compensation programs performance council shall follow the remaining provisions of said article, for giving notice to the public of their actions and the holding of hearings or receiving of comments on the rules. No later amendment to this code shall have precedence over this section unless such later amendment specifically provides to the contrary.

(d) In accordance with the laws and regulations of West Virginia and the United States government, establish and monitor performance measurements to ensure the timeliness and accuracy of activities performed under the unemployment compensation laws and the workers' compensation laws.

(e) Have the final right of approval of all base rates for employers covered by the workers' compensation law as recommended by the commissioner.

(f) Advocate sufficient administrative resources to effectively operate the unemployment compensation system and the workers' compensation system of West Virginia.

(g) Approve the designation of health care providers to make decisions regarding appropriateness of medical services pursuant to subsection (d), section one, article five, chapter twenty-three of this code.

(h) Ensure that the unemployment compensation system and the workers' compensation system of West Virginia develop and pursue an effective program of outreach and communication to employers, workers and others involved in these programs.
(i) Analyze opportunities to affect efficiencies and improvements for employers and workers by developing common definitions, interrelated systems and other internal operational improvements, including long-range planning for improvements.

(j) Develop programs, linkages in the public sector and the private sector, and information materials designed to promote the early return to work of individuals receiving unemployment compensation benefits or workers' compensation benefits.

(k) Examine the current design and report recommendations to the governor and the Legislature regarding the second injury reserve of the surplus fund and the financial viability of the state's workers' compensation system.

(l) Consider such other matters regarding the unemployment compensation system or the workers' compensation system as the commissioner or any appointed member of the council may desire.

(m) On or before the first day of September, one thousand nine hundred ninety-three, establish vocational standards to be considered in making decisions on permanent total disability awards under subdivision (n), section six, article four, chapter twenty-three of this code: Provided, That the compensation programs performance council is expressly authorized to establish this standard irrespective of court decisions interpreting any previous enactment of said subdivision: Provided, however, That adoption of said vocational standard shall require an affirmative vote of two thirds of the members of said compensation programs performance council.

(n) Adopt criteria for the determination and standards for the payment of attorneys' fees pursuant to subdivision (2), subsection (c), section sixteen, article four, chapter twenty-three of this code.

CHAPTER 22A. MINES AND MINERALS.

ARTICLE 3. WEST VIRGINIA SURFACE COAL MINING AND RECLAMATION ACT.
§22A-3-8. Prohibition of surface mining without a permit; permit requirements; successor in interest; duration of permits; proof of insurance; termination of permits; permit fees.

No person may engage in surface-mining operations unless such person has first obtained a permit from the commissioner in accordance with the following:

(a) Within two months after the secretary of the interior approves a permanent state program for West Virginia, all surface-mining operators shall file an application for a permit or modification of a valid existing permit or underground opening approval relating to those lands to be mined eight months after that approval.

(b) No later than eight months after the secretary's approval of a permanent state program for West Virginia, no person may engage in or carry out, on lands within this state, any surface-mining operations unless such person has first obtained a permit from the commissioner: Provided, That those persons conducting such operations under a permit or underground opening approval issued in accordance with section 502 (c) of Public Law 95-87, and in compliance therewith, may conduct such operations beyond such period if an application for a permit or modification of a valid existing permit or underground opening approval was filed within two months after the secretary's approval, and the administrative decision pertaining to the granting or denying of such permit has not been made by the commissioner.

(c) All permits issued pursuant to the requirements of this article shall be issued for a term not to exceed five years: Provided, That if the applicant demonstrates that a specified longer term is reasonably needed to allow the applicant to obtain necessary financing for equipment and the opening of the operation, and if the application is full and complete for such specified longer term, the commissioner may extend a permit for such longer term: Provided, however, That subject to the prior approval of the commissioner, with such approval being
subject to the provisions of subsection (c), section eighteen of this article, a successor in interest to a permittee who applies for a new permit, or transfer of a permit, within thirty days of succeeding to such interest, and who is able to obtain the bond coverage of the original permittee, may continue surface-mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until such successor's permit application or application for transfer is granted or denied.

(d) Proof of insurance shall be required on an annual basis.

(e) A permit shall terminate if the permittee has not commenced the surface-mining operations covered by such permit within three years of the date the permit was issued: Provided, That the commissioner may grant reasonable extensions of time upon a timely showing that such extensions are necessary by reason of litigation precluding such commencement, or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee: Provided, however, That with respect to coal to be mined for use in a synthetic fuel facility or specific major electric generating facility, the permittee shall be deemed to have commenced surface-mining operations at such time as the construction of the synthetic fuel or generating facility is initiated.

(f) Each application for a new surface-mining permit filed pursuant to this article shall be accompanied by a fee of one thousand dollars. All permit fees and renewal fees provided for in this section or elsewhere in this article shall be collected by the commissioner and deposited with the treasurer of the state of West Virginia to the credit of the operating permit fees fund and shall be used, upon requisition of the commissioner, for the administration of this article.

(g) Prior to the issuance of any permit, the commissioner of energy shall ascertain from the commissioner of labor compliance with section fourteen, article five,
chapter twenty-one of this code. Upon issuance of the permit, the commissioner of energy shall forward a copy to the commissioner of labor, who shall assure continued compliance under such permit.

(h) Prior to the issuance of any permit, the director of the division of environmental protection shall ascertain from the commissioner of the bureau of employment programs whether the applicant is in compliance with the provisions of section five, article two, chapter twenty-three of this code. If the applicant is not in compliance, then the permit shall not be issued until the applicant returns to compliance: Provided, That in all such inquiries the commissioner of the bureau of employment programs shall make response to the division of environmental protection within fifteen calendar days, otherwise failure to respond timely shall be considered to indicate the applicant is in compliance and such failure will not be used to preclude issuance of the permit.

CHAPTER 23. WORKERS' COMPENSATION.

ARTICLE 1. GENERAL ADMINISTRATIVE PROVISIONS.

§23-1-1. Commissioner of the bureau of employment programs; compensation programs performance council; official seal; legal services; rules.

The commissioner of the bureau of employment programs appointed under the provisions of section one, article two, chapter twenty-one-a of this code, has the sole responsibility for the administration of this chapter except for such matters as are entrusted to the compensation programs performance council created pursuant to section one, article three, chapter twenty-one-a of this code. In the administration of this chapter, the commissioner shall exercise all the powers and duties described in this chapter and in article two, of said chapter. The commissioner is authorized to promulgate rules and regulations to implement the provisions of articles one through five of this chapter. The commissioner shall have an official seal for the authentication of orders and proceedings, upon which seal shall be engraved the
words "West Virginia Commissioner of Employment Programs" and such other design as the commissioner may prescribe. The courts in this state shall take judicial notice of the seal of the commissioner and in all cases copies of orders, proceedings or records in the office of the West Virginia commissioner of employment programs shall be equal to the original in evidence.

The attorney general shall perform all legal services required by the commissioner under the provisions of this chapter: Provided, That in any case in which an application for review is prosecuted from any final decision of the workers' compensation appeal board to the supreme court of appeals, as provided by section four, article five of this chapter, or in any court proceeding before the workers' compensation appeal board, or in any proceedings before the office of judges, in which such representation shall appear to the commissioner to be desirable, the commissioner may designate a regular employee of this office, qualified to practice before such court to represent the commissioner upon such appeal or proceeding, and in no case shall the person so appearing for the commissioner before the court receive remuneration therefor other than such person's regular salary.

§23-1-4. Office hours; records; confidentiality; exceptions.

(a) The offices of the commissioner shall be open for the transaction of business between the hours of eight-thirty o'clock a.m., and five o'clock p.m., of each and every day, excepting Saturdays, Sundays and legal holidays, and be open upon such additional days and at such additional times as the commissioner may elect, and be in charge of his or her secretary or some other competent person.

(b) Except as expressly provided for in this subsection, information obtained from employers and claimants pursuant to this chapter for the purposes of its administration shall not be subject to the provisions of chapter twenty-nine-b of this code unless such provisions are hereafter specifically made applicable in whole or in part. Such information as may be reasonably necessary
may be released in formal orders or opinions of any tribunal or court which is presented with an issue arising under this chapter as well as in the presentations of the parties before any such tribunal or court.

Similarly, claimants or other interested parties to an issue arising under this chapter may, upon request, obtain information from the division's records to the extent necessary for the proper presentation or defense of a claim or other matter. Information may be released to any requestor if all identifying information has first been eliminated from the records. Nothing in this subsection shall prevent the release of information to another agency of the state or of the federal government for the legitimate purposes of those agencies: Provided, That any such agency shall guarantee the confidentiality of the information so provided to the fullest extent possible in keeping with its own statutory and regulatory mandates. Nothing in this section shall prevent the commissioner from complying with any subpoena duces tecum: Provided, however, That the issuing tribunal or court shall take such actions as may be proper to maintain the confidentiality of the information.

The commissioner may release, pursuant to a proper request under the provisions of chapter twenty-nine-b of this code, the following information:

(1) The base premium rate for a specific employer;

(2) Whether or not a specific employer has obtained coverage under the provisions of this chapter;

(3) Whether or not a specific employer is in good standing or is delinquent or in default according to the commissioner's records and the time periods thereof;

and

(4) If a specific employer is delinquent or in default, what the payments due the commissioner are and what the components of that payment are including the time periods affected.


(a) In an investigation into any matter arising under this chapter, the commissioner may cause depositions of
witnesses residing within or without the state to be taken in the manner prescribed by law for like deposi-
tions in the circuit court, but such depositions shall be upon reasonable notice to claimant and employer or other affected persons or their respective attorneys. The commissioner shall designate the person to represent him or her for the taking of any such deposition.

(b) The commissioner shall also have discretion to accept and consider depositions taken within or without the state by either the claimant or employer, provided due and reasonable notice of the taking of such depositions was given to the other party, claimant or employer, as the case may be, or his or her attorney: Provided, That the commissioner, upon due notice both to the employer and claimant, shall have authority to refuse or permit the taking of such depositions or to reject such depositions after the taking thereof, if in his or her opinion they were taken at such place or under such circumstances as imposed an undue burden or hardship upon the opposite party, and the commission-
er's discretion to accept, refuse to approve, or reject such depositions shall be binding in the absence of abuse of such discretion.

§23-1-13. Rules of procedure and evidence; persons authorized to appear in proceedings; withholding of psychiatric and psychological reports and providing summaries thereof.

(a) The commissioner shall adopt reasonable and proper rules of procedure, regulate and provide for the kind and character of notices, and the service thereof, in cases of accident and injury to employees, the nature and extent of the proofs and evidence, the method of taking and furnishing the same to establish the rights to benefits or compensation from the fund hereinafter provided for, or directly from employers as hereinafter provided, as the case may require, and the method of making investigations, physical examinations and inspections, and prescribe the time within which adjudications and awards shall be made.

(b) At hearings and other proceedings before the
commissioner or before the duly authorized representa-
tive of the commissioner, an employer who is a natural
person may appear, and a claimant may appear, only
as follows:
(1) By an attorney duly licensed and admitted to the
practice of law in this state;
(2) By a nonresident attorney duly licensed and
admitted to practice before a court of record of general
jurisdiction in another state or country or in the District
of Columbia who has complied with the provisions of
rule 8.0—admission pro hac vice, West Virginia su-
preme court rules for admission to the practice of law,
as amended;
(3) By a representative from a labor organization who
has been recognized by the commissioner as being
qualified to represent a claimant or who is an individual
otherwise found to be qualified by the commissioner to
act as a representative. Such representative shall
participate in the presentation of facts, figures and
factual conclusions as distinguished from the presenta-
tion of legal conclusions in respect to such facts and
figures; or
(4) Pro se.
(c) At hearings and other proceedings before the
commissioner or before the duly authorized representa-
tive of the commissioner, an employer who is not a
natural person may appear only as follows:
(1) By an attorney duly licensed and admitted to the
practice of law in this state;
(2) By a nonresident attorney duly licensed and
admitted to practice before a court of record of general
jurisdiction in another state or country or in the District
of Columbia who has complied with the provisions of
rule 8.0—admission pro hac vice, West Virginia su-
preme court rules for admission to the practice of law,
as amended;
(3) By a member of the board of directors of a
corporation or by an officer of the corporation, for
purposes of representing the interest of the corporation
in the presentation of facts, figures and factual conclu-
sions as distinguished from the presentation of legal
conclusions in respect to such facts and figures; or

(4) By a representative from an employer service
company who has been recognized by the commissioner
as being qualified to represent an employer or who is
an individual otherwise found to be qualified by the
commissioner to act as a representative. Such represent-
tative shall participate in the presentation of facts,
figures and factual conclusions as distinguished from
the presentation of legal conclusions in respect to such
facts and figures.

(d) The commissioner or his or her representative may
require an individual appearing on behalf of a natural
person or corporation to produce satisfactory evidence
that he or she is properly qualified and authorized to
so appear pursuant to this section.

(e) Subsections (b), (c) and (d) of this section shall not
be construed as being applicable to proceedings before
the office of judges pursuant to the provisions of article
five of this chapter.

(f) At the direction of a treating or evaluating
psychiatrist or clinical doctoral level psychologist, a
psychiatric or psychological report concerning a claim-
ant who is receiving treatment or is being evaluated for
psychiatric or psychological problems may be withheld
from the claimant. In that event, a summary of the
report shall be compiled by the reporting psychiatrist
or clinical doctoral level psychologist which summary
shall be provided to the claimant upon his or her
request. Any representative or attorney of the claimant
must agree to provide such a claimant with only the
summary before the full report shall be provided to the
representative or attorney for his or her use in prepar-
ing the claimant's case. Such a report shall only be
withheld from the claimant in those instances where the
treating or evaluating psychiatrist or clinical doctoral
level psychologist certifies that exposure to the contents
of the full report is likely to cause serious harm to the
§23-1-16. Omission to subscribe to workers' compensation fund or to perform duty required by commissioner; false testimony or certification; criminal penalties.

Any person, firm or corporation which is required by the provisions of this chapter to subscribe to the workers' compensation fund, and which knowingly fails to subscribe thereto, or which knowingly and willfully fails to make any report or perform any other act or duty required by the commissioner within the time specified by the commissioner, shall be guilty of a felony, and, upon conviction thereof, shall be fined not less than one thousand dollars and not more than ten thousand dollars. Any person or firm, or the officer of any corporation, who knowingly makes a false report or statement under oath, affidavit or certification respecting any information required by the commissioner, or who shall knowingly testify falsely in any proceeding before the commissioner or the office of judges, shall be considered guilty of a felony, and, upon conviction thereof, shall be fined not less than one thousand dollars and not more than ten thousand dollars or confined in the penitentiary for not more than three years, or both.

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

§23-2-1c. Extraterritorial coverage; approval and change of agreements.

(a) Whenever, with respect to an employee of an employer who is a subscriber in good standing to the workers' compensation fund or an employer who has elected to pay compensation directly, as provided in section nine of this article, there is a possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is performed or is to be performed in a state or states other than this state, the employer and the employee may agree to be bound by the laws of this state or by the
laws of such other state in which all or some portion of
the work of the employee is to be performed: Provided,
That the commissioner shall have the authority to
review and accept or reject any such agreement. Any
such review shall be conducted in keeping with the
commissioner's fiduciary obligations to the workers'
compensation fund which may include, among other
things, the nexus of the employer and the employee to
the state: Provided, however, That nothing in this section
shall be construed so as to require such an agreement
in those instances where subdivision (3), subsection (b),
section one of this article or subdivision (1), subsection
(a), section one-a of this article are applicable. Such
agreement shall be in writing and filed with the
commissioner within ten days after execution thereof
but shall not become effective until approved by the
commissioner and shall, thereafter, remain in effect
until terminated or modified by agreement of the
parties similarly filed or by order of the commissioner.
If the parties agree to be bound by the laws of this state,
an employee injured within the terms and provisions of
this chapter shall be entitled to benefits under this
chapter regardless of the situs of the injury or exposure
to occupational pneumoconiosis or other occupational
disease, and the rights of the employee and his or her
dependents under the laws of this state shall be the
exclusive remedy against the employer on account of
injury, disease or death in the course of and as a result
of the employment.

(b) If the parties agree to be bound by the laws of
another state and the employer has complied with the
laws of that state, the rights of the employee and his or
her dependents under the laws of that state shall be the
exclusive remedy against the employer on account of
injury, disease or death in the course of and as a result
of the employment without regard to the situs of the
injury or exposure to occupational pneumoconiosis or
other occupational disease.

(c) If the employee is a resident of a state other than
this state and is subject to the terms and provisions of
the workers' compensation law or similar laws of a state
other than this state, such employee and his dependents shall not be entitled to the benefits payable under this chapter on account of injury, disease or death in the course of and as a result of employment temporarily within this state, and the rights of such employee and his dependents under the laws of such other state shall be the exclusive remedy against the employer on account of such injury, disease or death.

(d) If any employee or his or her dependents be awarded workers' compensation benefits or recover damages from the employer under the laws of another state for an injury received in the course of and resulting from the employment, the amount so awarded or recovered, whether paid or to be paid in future installments, shall be credited against the amount of any benefits payable under this chapter for the same injury.

§23-2-1d. Primary contractor liability; definitions; applications and exceptions; certificates of good standing; reimbursement and indemnification; termination of contracts; effective date; collections efforts.

(a) For the exclusive purposes of this section, the term "employer" as defined in section one of this article shall include any primary contractor who regularly subcontracts with other employers for the performance of any work arising from or as a result of the primary contractor's own contract: Provided, That a subcontractor shall not include one providing goods rather than services. In the event that such a subcontracting employer defaults on its obligations to make payments to the commissioner, then such primary contractor shall be liable for such payments. Notwithstanding the foregoing, nothing contained in this section shall extend or except to such primary contractor or subcontractors the provisions of sections six, six-a or eight of this article. This section is applicable only with regards to subcontractors with whom the primary contractor has a contract. It is not applicable to the primary contractor with regard to sub-subcontractors. However, a subcontractor for the purposes of a contract with the primary contractor can itself become a primary contractor with
regard to other employers with whom it subcontracts.

(b) A primary contractor may avoid initial liability under subsection (a) of this section if it obtains from the commissioner, prior to the initial performance of any work by the subcontractor's employees, a certificate that the subcontractor is in good standing with the workers' compensation fund.

(1) Failure to obtain the certificate of good standing prior to the initial performance of any work by the subcontractor shall result in the primary contractor being equally liable with the subcontractor for all delinquent and defaulted premiums, premium deposits, interest and other penalties arising during the life of the contract or due to work performed in furtherance of the contract: Provided, That the commissioner shall be entitled to collect only once for the amount of premiums, premium deposits and interest due to the default, but the commissioner may impose other penalties on the primary contractor or on the subcontractor, or both.

(2) In order to continue avoiding liability under this section, the primary contractor shall request that the commissioner of the bureau of employment programs inform the primary contractor of any subsequent default by the subcontractor. In the event that the subcontractor does default, the commissioner shall then notify the primary contractor of the default by placing a notice in the first class United States mail, postage prepaid, and addressed to the primary contractor at the address furnished to the commissioner by the primary contractor. Such mailing shall be good and sufficient notice to the primary contractor of the subcontractor's default. However, the primary contractor shall not become liable under this section until the first day of the calendar quarter following the calendar quarter in which the notice is given and then such liability shall only be for that following calendar quarter and thereafter and only if the subcontract has not been terminated: Provided, That the commissioner shall be entitled to collect only once for the amount of premiums, premium deposits and interest due to the default, but the commissioner may impose other penalties on the primary contractor or on
the subcontractor, or both.

(c) In any situation where a subcontractor defaults with regard to its payment obligations under this chapter or fails to provide a certificate of good standing as provided for in this section, such default or failure shall be good and sufficient cause for a primary contractor to hold the subcontractor responsible and to seek reimbursement or indemnification for any amounts paid on behalf of the subcontractor to avoid or cure a workers' compensation default, plus related costs including reasonable attorneys' fees, and to terminate its subcontract with the subcontractor notwithstanding any provision to the contrary in the contract.

(d) The provisions of this section are applicable only to those contracts entered into or extended on or after the first day of January, one thousand nine hundred ninety-four.

(e) The commissioner may take any action authorized by section five-a of this article in furtherance of his or her efforts to collect amounts due from the primary contractor under this section.

§23-2-4. Classification of industries; accounts; rate of premiums; prior notice of rate changes; exceptions.

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.

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 and the
compensation programs performance council to fix and
maintain the lowest possible rates of premiums consist-
ent 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. At such times as the
commissioner elects to readjust the base rates for the
various industrial classifications, the commissioner shall
file a schedule of the readjusted base rates for each
industrial class 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. Such schedule
shall be so filed at least thirty days prior to the first day
of the quarter to which an adjustment of rates is to be
applicable. At such times as the commissioner elects to
readjust the individual merit rates for the subscribers
to the fund, the commissioner shall provide notice of
such merit rate adjustments to the affected employers
at least thirty days prior to the first day of the quarter
to which an adjustment of rates is to be applicable. The
commissioner shall not retroactively increase or de-
crease rates except in instances of fraud, mistake or
reliance upon incorrect information furnished by the employer. 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, 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 and the compensation programs performance council 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 the thirty-first day of December 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
affected thereby of that fact and of the new rate and
when the same takes effect. It shall also be the
commissioner's duty to furnish to each employer yearly,
or more often if requested by the employer, a statement
giving the name of each of the employer's employees
who were paid for injury and the amounts so paid
during the period covered by the statement.

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

(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 subscrib-
ing 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 re-
quired 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 pre-
mium 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 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 division 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 development 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 therefor if the
commissioner determines that such delinquency has
been caused by delays in the administration of the fund. The commissioner shall, in writing, within sixty days of the end of each quarter notify all delinquent employers of their failure to timely pay premiums, to timely file a payroll report, or to maintain an adequate premium deposit. The notification shall demand the filing of the delinquent payroll report and payment of delinquent premiums, and/or payment of an amount sufficient to maintain the premium deposit, before the end of the third month following the end of the preceding quarter. The notification shall also require payment of interest on the delinquent premium payment and/or premium deposit pursuant to section thirteen of this article.

(c) Whenever the commissioner notifies an employer of the delinquent status of his 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 said section shall be retroactive to twelve o'clock p.m., of the last day of the month following the end of the quarter for which the delinquency occurs. The commissioner shall notify the defaulting employer of the method by which the employer may be reinstated with the fund. The commissioner shall also notify the employees of such employer by written notice as hereinafter provided for in this section.

(e) Failure by any employer, who voluntarily elects to subscribe, to resolve his 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 said section shall be retroactive to twelve o'clock p.m., of the last day of the month following the end of the quarter for which the delinquency occurs.

(f) (1) Except as provided for in subdivision (3) 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 subscribe 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 for two consecutive quarters or who has defaulted or been terminated for two quarters out of the preceding eight consecutive quarters, then when any such employer's application for reinstatement is filed or upon any such employer's restoration to the benefits and protection of this chapter, for the next eight quarters, including the quarter in which such restoration occurs, or when any such employer's application for reinstatement is filed, 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 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 for two consecutive quarters or who has not been in default 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 agree-
ment 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 rein-
statement application or the entering into of a reinstate-
ment agreement, the commissioner is authorized to file
a lien against the employer as provided for by section
five-a of this article. In addition, entry into a repayment
agreement is discretionary with the commissioner. Such
discretion shall be exercised in keeping with the
commissioner's fiduciary obligations to the workers'
compensation fund. Should the commissioner decline to
enter into a repayment agreement and should the
employer not comply with the provisions of subdivision
(1) of this subsection, then the commissioner may
proceed with any of the collection efforts provided for
by section five-a of this article or as otherwise provided
for by this code. Applications for reinstatement shall:
(A) Be made upon forms prescribed by the commis-
sioner; (B) include a report of the gross payroll of the
employer during the entire period of delinquency and
default, which payroll information shall be certified by
the employer or its authorized agent; and (C) include a
payment equal to one half of one percent of the gross
payroll during the period of delinquency and default but
not to exceed the amount of the entire liability due and
owing for the period of delinquency and default. An
employer who applies for reinstatement shall be entitled
to the benefits and protection of this chapter on the day
the application is received by the commissioner:

Provided, That if the commissioner reinstates an
employer subject to the terms of a repayment agree-
ment, the subsequent failure of the employer to make
scheduled payments or to pay accrued or future interest
in accordance with the repayment agreement or to
timely file current premiums within the month follow-
ing the end of the quarter for which the report and
payment are due, or to otherwise maintain its account
in good standing or, if the repayment agreement does
not require earlier restoration of the premium deposit,
to restore the premium deposit to the required amount
by the end of the repayment period shall cause the
reinstatement application or the repayment agreement,
or both, to be null, void and of no effect, and the
employer shall be denied the benefits and protection of
this chapter effective from the date that such employer's
account originally became delinquent.

(3) Any employer who fails to maintain his or her
account in good standing with regard to subsequent
premiums and premium deposits prior to the final
resolution of an application for reinstatement as
provided for in subdivision (1) of this subsection shall
cause the reinstatement application to be null, void and
of no effect, and the employer shall be denied the
benefits and protection of this chapter effective from the
date that such employer's account originally became
delinquent.

(4) Following any failure of an employer to comply
with the provisions of a repayment agreement, the
commissioner may then make and continue with any of
the collection efforts provided for by this chapter or
elsewhere in this code even if the employer files another
reinstatement application.

(g) No employee of an employer required by this
chapter to subscribe to the workers' compensation fund
shall be denied benefits provided by this chapter
because the employer failed to subscribe or because the
employer's account is either delinquent or in default.
(h) (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 defaulted 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 defaulted 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, but voluntarily electing to do so as herein provided, 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 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 said employer, as hereinbefore provided for, or prior to sixty days after the posting of said notice, whichever shall first occur, remove, deface, or render illegible said notice, shall be guilty of a misdemeanor, and, upon
conviction thereof, shall be fined not to exceed five
hundred dollars, and 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.

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

(a) The commissioner in the name of the state may
commence a civil action against an employer who, after
due notice, defaults in any payment required by this
chapter. If judgment is against the employer, such
employer shall pay the costs of the action. Civil action
under this section shall be given preference on the calendar of the court over all other civil actions. Upon prevailing in any such civil action, the commissioner shall be entitled to recover his or her attorneys’ fees and costs of action from the employer.

(b) In addition to the foregoing provisions of this section, any payment, interest and penalty thereon due and unpaid under this chapter shall be a personal obligation of the employer immediately due and owning to the commissioner and shall, in addition thereto, be a lien enforceable against all the property of the employer:

Provided, That no such lien shall be enforceable as against a purchaser (including a lien creditor) of real estate or personal property for a valuable consideration without notice, unless docketed as provided in section one, article ten-c, chapter thirty-eight of this code:

Provided, however, That such lien may be enforced as other judgment liens are enforced through the provisions of chapter thirty-eight of this code and the same shall be deemed by the circuit court to be a judgment lien for this purpose.

(c) In addition to all other civil remedies prescribed herein the commissioner may in the name of the state, after giving appropriate notice as required by due process, distrain upon any personal property, including intangible property, of any employer delinquent for any payment, interest and penalty thereon. If the commissioner 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 distrain 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 compensation as is provided by law for his or her services in the levy and enforcement of executions. Upon prevailing
in any distraint action, the commissioner shall be entitled to recover his or her attorneys' fees and costs of action from the employer.

(d) 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 administration will permit, for the regular payment of such payments, interest and penalties as the same become due.

(e) 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.

(f) 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.
§23-2-5b. Legislative purpose; application for settlement; reinstatement; amount of settlement; when settlement void; notification of rights.

The Legislature hereby declares that it is the purpose of this section to provide any employer who may, as of the effective date of this section, be in default in any payment due under the provisions in this article an opportunity to settle the amount of the default in accordance with the provisions hereinafter set forth. For purposes of this section, the term "default" shall apply to any employer who has failed to subscribe or pay premiums to the workers' compensation fund in accordance with the provisions of this chapter.

(a) On or before the first day of February, one thousand nine hundred ninety-four, any employer who may qualify under this section shall apply to the commissioner for a settlement of the amount of default. Such application shall: (1) Be made on a form prescribed by the commissioner; (2) include the gross payroll of the employer during the entire period of delinquency and default, which payroll information shall be certified by the employer or its authorized agent; and (3) include a payment equal to one half of one percent of the gross payroll during the period of delinquency and default, but not to exceed the amount of the entire liability due and owing for the period of delinquency and default.

(b) Notwithstanding other provisions of this chapter to the contrary, upon timely receipt of the application prescribed in subdivision (a) of this section, the employer shall be entitled to the benefits and protections of this chapter: Provided, That such entitlement shall not affect any cause of action which has accrued against the employer as a result of an injury sustained during any period of default prior to the date of the application: Provided, however, That the subsequent failure of the employer to make scheduled payments or to pay accrued or future interest in accordance with any repayment agreement or to timely file current premiums within the month following the end of the quarter for which the report and payment are due, or to otherwise maintain its account in good standing or, if a repayment agree-
ment does not require earlier restoration of the premium deposit, to restore the premium deposit to the required amount by the end of any repayment period shall cause the application or any repayment agreement, or both, to be null, void and of no effect, and the employer shall be denied the benefits and protection of this chapter effective from the date that such employer's account originally became delinquent.

(c) After the commissioner shall have received the application of an employer as prescribed herein, the commissioner and the employer or its authorized agent shall agree, in writing, on or before the first day of July, one thousand nine hundred ninety-four, to settle the default in an amount which shall include all delinquent premium payments, plus interest, compounded monthly, at the rate of nine percent per annum. The commissioner may authorize payment of the amount set forth in the agreement on a payment schedule, which period shall not exceed three years from the date of the execution of the agreement. The agreement shall set forth that the employer shall be in default if any payment shall not be received by the commissioner within fifteen days of the due date thereof.

(d) If the employer shall fail to pay timely current premiums in accordance with the provisions of this chapter or if the employer shall default upon any payment set forth under the terms of the agreement, such application or agreement, or both, shall be null, void and of no effect and the commissioner shall have the authority to proceed in accordance with the provisions of this chapter. Current premiums shall be timely paid when they are paid within the month following the end of the quarter for which the reported payment is due.

(e) The commissioner shall notify in writing, by the first day of January, one thousand nine hundred ninety-four, all employers, who are in default as indicated by the records of the commissioner, of the employer's right to apply for a settlement in accordance with the provisions of this section. The commissioner may also take additional steps, as deemed appropriate, to notify
other employers of the rights set forth herein. The
written notice of the commissioner shall include the
form required for application and the commissioner
shall make such form available to other employers.

§23-2-5c. Statute of limitations; effective date for new
payments; previous payments due not
affected.

(1) For payments due after the effective date of this
section, every action or process to collect any premium,
premium deposit, interest or penalty due from an
employer pursuant to this article by the commissioner
shall be brought or issued within five years next after
the date on which the employer is required by the
section imposing the premium, premium deposit,
interest or penalty to file a report and pay the amount
due thereunder. The limitation provided by this section
shall likewise apply to enforcement of the lien, if any,
securing the payment of such premium, premium
deposit, interest or penalty, but shall not apply in event
of fraud or in event the employer wholly fails to file the
report required by the section imposing the premium,
premium deposit, interest or penalty. For payments that
were due prior to the effective date of this section, there
shall continue to be no limitation on when actions or
processes may be brought or issued.

§23-2-5d. Uncollectible receivables; write-offs.

The commissioner, with the approval of the attorney
general, may write-off any uncollected receivable due
under the provisions of this article which the commis-
sioner and the attorney general deem to be uncollectible.

§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 said section. 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 certified petition with the
commissioner requesting that the commissioner waive
the payment by the buyer or other recipient of premi-
ums, premium deposits, interest and imposition of the
modified rate of premiums attributable to the predeces-
sor employer, or any combination thereof. The commis-
sioner shall review the petition by considering the six
factors set forth below:

(1) The exact nature of the default;
(2) The amount owed to the commissioner;
(3) The solvency of the fund;
(4) The financial condition of the buyer or other
recipient;
(5) The equities exhibited towards the fund by the
buyer or other recipient during the acquisition process;
and
(6) The potential economic impact upon the state and
the specific geographic area in which the buyer or other
recipient is to be or is located, if the acquisition were not to occur.

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 said section, 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.

§23-2-17. Employer right to hearing; content of petition; appeal.
Notwithstanding any provision in this chapter to the contrary and notwithstanding any provision in section five, article five, chapter twenty-nine-a of this code to the contrary, in any situation where an employer objects to a decision or action of the commissioner 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 employer'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 commissioner shall schedule a hearing which shall be conducted in accordance with the provisions of article five, 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 of said chapter: Provided, That all such appeals shall be taken to the circuit court of Kanawha county.

ARTICLE 2B. OCCUPATIONAL SAFETY AND HEALTH PROGRAMS.

§23-2B-1. Occupational safety and health activities; voluntary compliance; consultative services.

In order to carry out the purposes of this chapter and to encourage voluntary compliance with occupational safety and health laws, regulations and standards and to promote more effective workplace health and safety programs, the commissioner acting in conjunction with the performance council created pursuant to section one, article three, chapter twenty-one-a of this code, shall:

(a) Develop greater knowledge and interest in the causes and prevention of industrial accidents, occupational diseases and related subjects through:
(1) Research, conferences, lectures and the use of public communications media;

(2) The collection and dissemination of accident and disease statistics; and

(3) The publication and distribution of training and accident prevention materials, including audio and visual aids;

(b) Provide consultative services for employers on safety and health matters and prescribe procedures which will permit any employer to request a special inspection or investigation, focused on specific problems or hazards in the place of employment of the employer or to request assistance in developing a plan to correct such problems or hazards, which will not directly result in a citation and civil penalty; and

(c) Place emphasis, in the research, education and consultation program, on development of a model for providing services to groups of small employers in particular industries and their employees and for all employers whose experience modification factor for rate setting purposes is in excess of the criteria established by the compensation programs performance council.

§23-2B-2. Mandatory programs; safety committees; requirements; rules; exceptions.

(a) Based upon and to the extent authorized by criteria established by the compensation programs performance council, the commissioner is authorized to conduct special inspections or investigations focused on specific problems or hazards in the work place with or without the agreement of the employer. The commissioner shall issue a report on his or her findings and shall furnish a copy of the report to the employer and to any bargaining unit representing the employees of the employer. The commissioner may share information obtained or developed pursuant to this article with other governmental agencies.

(b) For any employer whose experience modification factor exceeds the criteria established by the compensation programs performance council, the commissioner
may require the employer to establish a safety committee composed of representatives of the employer and the employees of the employer.

(c) In carrying out the provisions of this article, the commissioner and the compensation programs performance council shall promulgate rules which shall include, but are not limited to, the following provisions:

(1) Prescribing the membership of the committees, training, frequency of meetings, record keeping and compensation of employee representatives on safety committees; and

(2) Prescribing the duties and functions of safety committees which include, but are not limited to:

(A) Establishing procedures for workplace safety inspections; and for investigating job-related accidents, illnesses and deaths; and

(B) Evaluating accident and illness prevention programs.

(d) An employer that is a member of a multi-employer group operating under a collective bargaining agreement that contains provisions regulating the formation and operation of a safety committee that meets or exceeds the minimum requirements of this section shall be considered to have met the requirements of this section.

(e) It is not the purpose of this article to either supercede the federal Occupational Health and Safety Act program, federal Mine Safety and Health Act program or to create a state counterpart to this program.

§23-2B-3. Premium rate credits; qualified loss management program; loss management firms; penalties; rules.

(a) The commissioner, in conjunction with the compensation programs performance council, is authorized to establish by rule a premium credit program for certain employers. The program shall be applicable solely to regular subscribers to the workers' compensation fund
and not to self-insurers. Participation in any premium
credit program shall be voluntary and no employer shall
be required to participate.

(b) The program shall apply a prospective credit to the
premium rate of a subscribing employer who partici-
pates in a qualified loss management program. The
prospective credit shall be given for a period of up to
three years, provided that the employer remains in the
program for a corresponding period of time.

(c) The rule shall specify the requirements of a
qualified loss management program and shall include a
requirement that a recognized loss management firm
participate in the program. A loss management firm
shall be recognized if it has demonstrated an ability to
significantly reduce workers' compensation losses for its
client employers by implementing a loss control man-
age ment program. The amount of credit against
premium rates that may be allowed by the commis-
sioner shall vary from firm to firm and shall be
primarily determined by the loss reduction success
experienced by all of the subscribing employers of the
sponsoring loss management firm over a period of time
to be determined by the commissioner.

(d) A credit shall be applied to the employer's
premium rate for up to three years. The amount of the
credit applied to the first year is based on the credit
factor assigned to the loss management firm on the date
the employer subscribes to the program. The amount of
the credit applied to the second and third years shall be
based on the credit factor assigned to the loss manage-
ment firm and in effect on each first day of July of the
pertinent year: Provided, That the applicable credit is
halved in the third year.

(e) The employer may terminate participation in the
program upon three years of continuous participation in
the program without penalty. Sooner termination may
result in a penalty being applied to the employer's
premium rate.

(f) An employer who has subscribed to an existing
program of a qualified loss management firm prior to
the effective date of this section shall be subject to a reduction in credit as follows:

(1) Participation for one year or less shall result in credit for the full three years;

(2) Participation for more than one year but less than two years shall result in a credit for two years;

(3) Participation for two years or more but less than three years shall result in a credit for one year; and

(4) Participation for three years or more shall result in no credit.

(g) This section shall not become effective until the commissioner, in conjunction with the compensation programs performance council, promulgates an appropriate rule to implement the section's provisions.

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

§23-4-1e. Temporary total disability benefits not to be paid for periods of penitentiary or jail confinement; denial of workers' compensation benefits for injuries or disease incurred while incarcerated.

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

(b) Notwithstanding any provision of this code to the contrary, no person incarcerated in a penitentiary or jail who suffers injury or a disease in the course of and resulting from his or her work during such period of incarceration which work is imposed by the administra-
tion of the penitentiary or jail and is not suffered during such person's usual employment with his or her usual employer when not incarcerated shall receive benefits under the provisions of this chapter for such injury or disease.

§23-4-1f. Certain psychiatric injuries and diseases not compensable.

For the purposes of this chapter, no alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits. It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter.

§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; medical cost and care programs; payments; interlocutory orders.

(a) 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 or services 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 nine through
sixteen, 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:

(1) Such sums for medicines, medical, surgical, dental
and hospital treatment or services, crutches, artificial
limbs and such other and additional approved mechan-
ical appliances and devices as may be reasonably
required. The commissioner shall determine that which
is reasonably required within the meaning of this
section in accordance 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 implementation 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 said section may be utilized
by the commissioner until superseded by guidelines
developed by the health care advisory panel pursuant to
said section. Each health care provider who seeks to
provide services or treatment which are not within any
such guideline shall submit to the commissioner 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.

(2) Payment for such medicine, medical, surgical,
dental and hospital treatment or services, crutches,
artificial limbs and such other and additional approved
mechanical appliances and devices authorized under
this subdivision 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 or services or any mechanical appliances and devices, 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.

(b) No chiropractic physician, medical physician, osteopathic physician, podiatrist or others practicing medicine or surgery (collectively and individually referred to hereinafter as "practitioner" or "practitioners") 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 professional 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; and TENS units. For the purposes of this subsection, the term "practitioner" shall include natural persons, partnerships and professional corporations.

(1) In order to avoid the bar of this subdivision, a practitioner shall first disclose to his or her patient the ownership interest of the practitioner, or of the practitioner'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 may include in any rules promulgated to implement this section 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 prescribed 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 reimbursement 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 subsection shall cause the practitioner to forfeit his, her or its right to reimbursement 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 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.

(c) 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 subsection 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.
(d) 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.

(e) 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.

(f) 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.

(g) The commissioner is authorized to engage in and contract for medical cost containment programs, medical case management programs and utilization review programs. Payments for these programs shall be made from the supercedeas reserve of the surplus fund. Any order issued pursuant to any such program shall be interlocutory in nature until an objecting party has exhausted all review processes provided for by the commissioner.

(h) 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; restitution.
(a) If any person who is a health care provider shall:

(1) Knowingly, and with intent to defraud, secure or attempt to secure payment from the workers' compensation fund or a self-insured employer for services or supplies when such person is not entitled to such payment or is entitled to some lesser amount of payment; or

(2) Knowingly make any charge or charges against any injured employee or any other person, firm or corporation which would result in a total charge for the treatment or service rendered in excess of the maximum amount set forth therefor in the commissioner's schedule of maximum reasonable amounts to be paid for such treatment or services issued pursuant to subsection (a), section three of this article, then in either case, such person shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both fined and imprisoned. 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, a self-insured employer, injured employee or other person as the result of the violation of this section.

(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
(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.

§23-4-3c. 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:

(1) If the commissioner finds that the health care provider is regularly providing excessive, medically unreasonable or unethical care to injured employees;
(2) 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;

(3) If the commissioner determines that the health care provider has had his or her license to practice suspended or terminated by the appropriate authority in this state or in another state; or

(4) If the commissioner determines that the health care provider has been convicted of any crime in relation to his or her practice.

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 conducted 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 of
said article. The provider may be suspended or termi-
nated, 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 rules for the
purpose of implementing this section.

§23-4-6. Classification of and criteria for disability
benefits.

Where compensation is due an employee under the
provisions of this chapter for personal injury, the
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 the first day of July, one thousand nine hundred sixty-nine, forty-five percent; on or after the first day of July, one thousand nine hundred seventy, fifty percent; on or after the first day of July, one thousand nine hundred seventy-one, fifty-five percent; on or after the first day of July, one thousand nine hundred seventy-three, sixty percent; on or after the first day of July, one thousand nine hundred seventy-four, eighty percent; on or after the first day of July, 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 the first day of July, one thousand nine hundred sixty-nine; not less than thirty-five dollars per week for injuries occurring on or after the first day of July, one thousand nine hundred seventy-one; not less than forty dollars per week for injuries occurring on or after the first day of July, one thousand nine hundred seventy-three; not less than forty-five dollars per week for injuries occurring on or after the first day of July, one thousand nine hundred seventy-four; and for injuries occurring on or after the first day of July, 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) of this section 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 entitle the employee to a rebuttable presumption of 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 totaling eighty-five percent or more and has been granted a permanent total disability award: Provided, That if any 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 the permanent total disability benefit rate shall be paid from the second injury reserve created by section one, article three of this chapter. In any claim in which a claimant aggregates permanent partial disability awards in the amount of eighty-five percent or more after the effective date of this subsection, the claimant shall be entitled to a permanent total disability award unless the evidence establishes that the claimant is not permanently and totally disabled pursuant to subdivision (n) of this section.

(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 the first day of July, one thousand nine hundred sixty-nine, forty-five percent; on or after the first day of July, one thousand nine hundred seventy, fifty percent; on or after the first
day of July, one thousand nine hundred seventy-one, fifty-five percent; on or after the first day of July, one thousand nine hundred seventy-three, sixty percent; on or after the first day of July, 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 considered a twenty percent disability.
The loss of middle and ring finger shall be considered a fifteen percent disability.
The loss of ring and little finger shall be considered a ten percent disability.
The loss of thumb, index and middle finger shall be considered a forty percent disability.
The loss of index, middle and ring finger shall be considered a thirty percent disability.
The loss of middle, ring and little finger shall be considered a twenty percent disability.
The loss of four fingers shall be considered a thirty-two percent disability.

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

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

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

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

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

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

Should a claimant sustain a compensable injury which results in the total loss by severance of any of the bodily members named in this subdivision, die from sickness or noncompensable injury before the commissioner makes the proper award for such injury, the commissioner shall make such award to claimant's dependents as defined in this chapter, if any; such payment to be made in the same installments that would have been paid to claimant if living: Provided, That no payment shall be made to any 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. In addition, the vocational standards adopted pursuant to subsection (m) of section seven, article three, chapter twenty-one-a of this code shall be considered once they are effective.

§23-4-8c. Occupational pneumoconiosis board—Reports and distribution thereof; presumption; findings required of board; objection to findings; procedure thereon; limitations on refilings; consolidation of claims.

(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 pneu-
moconiosis, 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.

(d) 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.

(e) In the event that a claimant receives a final decision that he or she has no evidence of occupational pneumoconiosis, then such claimant is barred for a period of three years from the date of the occupational pneumoconiosis board's decision or until his or her employment with the employer who employed the claimant at the time designated as the claimant's last date of exposure in the denied claim has terminated, whichever is sooner, from filing a new claim or pursuing a previously filed, but unruled upon, claim for occupational pneumoconiosis or requesting a modification of any prior ruling finding him or her not to be suffering from occupational pneumoconiosis. For the purposes of this subsection, a claimant's employment shall be
deemed to be terminated if, for any reason, he or she has not worked for that employer for a period in excess of ninety days. Any previously filed, but unruled upon, claim shall be consolidated with the claim in which the board's decision is made and shall be denied together with the decided claim. The provisions of this subsection shall not be applied in any claim where doing so would, in and of itself, later cause a claimant's claim to be forever barred by the provisions of section fifteen of this article.

§23-4-16. Commissioner's jurisdiction over case continuous; modification of finding or order; time limitation on awards; reimbursement of claimant for expenses; reopening cases involving permanent total disability; promulgation of rules.

(a) The power and jurisdiction of the commissioner over each case shall be continuing and he may from time to time, after due notice to the employer, make such modifications or changes with respect to former findings or orders as may be justified: Provided, That no further award may be made in fatal cases arising after the seventh day of March, one thousand nine hundred twenty-nine, except within two years after the death of the employee, or in case of nonfatal injuries, on and after the seventh day of March, one thousand nine hundred twenty-nine, except within five years after payments for temporary disability shall have ceased or not more than two times within five years after the commissioner shall have made the last payment in the original award or any subsequent increase thereto in any permanent disability case: Provided, however, That no such modification or change may be made in any case in which no award has been made, except within five years after the date of injury: Provided further, That a further award may be made for medical benefits only at any time. In any case in which an injured employee shall make application for a further adjustment of his claim, if such application be in writing and filed within the applicable time limit as prescribed herein, the commissioner shall pass upon and determine the merits of such application within thirty
26 days after the filing thereof.

27 (b) If such application is based on a report of any
28 medical examination made of the claimant and submit-
29 ted by the claimant to the commissioner in support of
30 his application, and the claim is opened for further
31 consideration and additional award is later made, the
32 claimant shall be reimbursed for the expenses of such
33 examination. Such reimbursement shall be made by the
34 commissioner to the claimant, in addition to all other
35 benefits awarded, upon due proof of the amount thereof
36 being furnished the commissioner by the claimant, but
37 shall in no case exceed the sum fixed pursuant to the
38 commissioner's schedule of maximum reasonable fees
39 established under the provisions of section three of this
40 article.

41 (c) The commissioner shall have continuing power and
42 jurisdiction over claims in which permanent total
43 disability awards have been made after the effective
44 date of this section.

45 (1) The commissioner shall continuously monitor
46 permanent total disability awards and may from time
to time, after due notice to the claimant, reopen a claim
47 for reevaluation of the continuing nature of the disabil-
48 ity and possible modification of the award: Provided,
49 That such reopenings shall not be done sooner than
50 every two years: Provided, however, That any individual
51 claimant shall only be reevaluated a total of two times
52 after which he or she may not be again reevaluated
53 under the provisions of this subsection. The commis-
54 sioner may reopen a claim for reevaluation when, in the
55 commissioner's sole discretion, he or she concludes that
56 there exists good cause to believe that the claimant no
57 longer meets the eligibility requirements under subdi-
58 vision (n), section six of this article. The eligibility
59 requirements, including any vocational standards, shall
60 be applied as those requirements are stated at the time
61 of a claim's reopening. This section shall not be
62 applicable to any claim in which the final decision on
63 the eligibility of the claimant to a permanent total
64 disability award was made more than ten years prior
65 to the date of proposed reevaluation.
(2) Upon reopening a claim under this subsection, the commissioner may take evidence, have the claimant evaluated, make findings of fact and conclusions of law and shall vacate, modify or affirm the original permanent total disability award as the record requires. The claimant's former employer shall not be a party to the reevaluation, but shall be notified of the reevaluation and may submit such information to the commissioner as the employer may elect. In the event the claimant retains his or her award following the reevaluation, then the claimant's reasonable attorneys' fees incurred in defending the award shall be paid by the workers' compensation division from the supercedeas reserve of the surplus fund. In addition, the workers' compensation division shall reimburse a prevailing claimant for his or her costs in obtaining one evaluation on each issue during the course of the reevaluation with such reimbursement being made from the supercedeas reserve of the surplus fund. The compensation programs performance council shall adopt criteria for the determination of reasonable attorneys' fees.

(3) This subsection shall not be applied to awards made under the provisions of subdivision (m) of section six of this article. The claimant may seek review of the commissioner's final order as otherwise provided for in article five of this chapter for review of orders granting or denying permanent disability awards.

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

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 from a self-insured employer, or knowingly and with like intent secure or attempt to secure compensation from such fund or self-insured employer 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 felony, and, upon conviction thereof, shall be fined not exceeding five
thousand dollars, or imprisoned not exceeding two
years, 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
or self-insured employer, he or she shall, from and after
such conviction, cease to receive such compensation as
a result of that alleged injury or disease.

§23-4-22. Permanent disability evaluations; limitations;
notice.

Notwithstanding any provision in this chapter to the
contrary, any claim which was closed for the receipt of
temporary total disability benefits or which was closed
on a no lost time basis and which closure was more than
five years prior to the effective date of this section shall
not be considered to still be open or the subject for an
evaluation of the claimant for permanent disability
merely because such evaluation has not heretofore been
conducted and a decision on permanent disability has
not been made: Provided, That if a request for an
evaluation was made in such a claim prior to the twenty-
ninth day of March, one thousand nine hundred ninety-
three, the commissioner shall have such evaluation
performed. In every such instance, such a claim shall
be a case in which no award has been made for the
purposes of section sixteen of this article. In every claim
closed after the effective date of this section, the
commissioner shall give notice to the parties of the
claimant's right to a permanent disability evaluation.

§23-4-23. Permanent total disability benefits; reduction of
disability benefits; social security benefits;
applications; release of information; credit or
reduction of benefits; application of section;
severability.

(a) This section is applicable whenever benefits are
being paid for permanent total disability benefits
arising under subdivision (d), (m) or (n), section six of
this article or under section eight-c of this article. This
section is not applicable to the receipt of temporary total
disability benefits, the receipt of permanent partial
disability benefits, the receipt of benefits by partially or
wholly dependent persons or to the receipt of benefits
pursuant to the provisions of subsection (e), section ten
of this article. This section is not applicable to the
receipt of medical benefits or the payment therefor.

(b) Whenever applicable benefits are paid to a
beneficiary with respect to the same time period for
which old-age insurance benefit payments under the
Social Security Act, 42 U.S.C. 401 and 402, or payments
under a self-insurance plan, a wage continuation plan
or a disability insurance policy provided by an em-
ployer, are also received or being received by the
beneficiary, then such applicable benefits shall be
reduced by these amounts:

(1) Fifty percent of the amount of full old-age
insurance benefits received or being received under the
Social Security Act: Provided, That if the claimant is
receiving reduced old-age retirement benefits, then ten
percent of the amount of old-age social security insu-
rance benefits, had such benefits not been reduced, shall
be deducted from the applicable benefits: Provided,
however, That social security disability benefits shall not
be deducted from the applicable benefits when such
disability benefits are later changed to old-age insu-
rance benefits upon the claimant's attaining the age
specified for such conversion by the social security
administration;

(2) The after-tax amount of the payments received or
being received under a self-insurance plan, a wage
continuation plan, or under a disability insurance policy
provided by an employer if the employee did not
contribute directly to the plan or to the payment of
premiums regarding the disability insurance policy; or

(3) The proportional amount, based on the ratio of the
employer's contributions to the total insurance premi-
ums for the policy period involved, of the after-tax
amount of the payments received or being received by
the employee pursuant to a disability insurance policy
provided by an employer if the employee did contribute
directly to the payment of premiums regarding the
disability insurance policy: Provided, That in no event
shall applicable benefits be reduced below the minimum
weekly benefits as provided for in subdivisions (b) and
(d), section six of this article.

(c) The commissioner shall notify a claimant or self-
insured employer of possible eligibility for social
security benefits and the requirements for establishing
proof of application for those benefits. Notification shall
be promptly mailed by the commissioner or self-insured
employer to the claimant after the date on which by
reason of age the claimant may be entitled to social
security benefits. A self-insured employer shall file a
copy of any such notice of possible eligibility with the
commissioner within ten days of its mailing to the
claimant.

(1) Within thirty days after the receipt of the
notification of possible eligibility, the claimant shall:

(A) Make application for social security benefits;

(B) Provide the commissioner or a self-insured
employer with proof of that application; and

(C) Provide the commissioner or self-insured employer
with an authorization for release of information which
shall be utilized by the commissioner or self-insured
employer to obtain necessary benefit entitlement and
amount information from the social security administra-
tion. The authorization for release of information shall
be effective for one year.

(2) Failure of the claimant to provide the proof of
application or authorization for release of information
shall allow the commissioner or self-insured employer
with the approval of the commissioner to discontinue the
payment of applicable benefits until the proof of
application and the authorization for release of informa-
tion is provided. Compensation benefits withheld shall
be reimbursed to the claimant upon the providing of the
required proof of application or the authorization for
release of information, or both.
(d) If the commissioner or the self-insured employer is required to submit a new authorization for release of information to the social security administration in order to receive information necessary to comply with this section, the claimant shall provide the new authorization for release of information within thirty days of a request by the commissioner or self-insured employer. Failure of the claimant to provide the new authorization for release of information shall allow the commissioner or self-insured employer with the approval of the commissioner to discontinue the payment of applicable benefits until the authorization for release of information is provided. Compensation benefits withheld shall be reimbursed to the claimant upon the providing of the authorization for release of information.

(e) Within thirty days after either the date of first payment of benefits or after the date of application for any benefit under subsection (b) of this section, whichever is later, the claimant shall provide the commissioner or self-insured employer with a properly executed authorization for release of information which shall be utilized by the commissioner or self-insured employer to obtain necessary benefit entitlement and amount information from the appropriate source. The authorization for release of information shall be effective for one year. Failure of the claimant to provide a properly executed authorization for release of information shall allow the commissioner or self-insured employer with the approval of the commissioner to discontinue the payment of applicable benefits until the authorization for release of information is provided. Compensation benefits withheld shall be reimbursed to the claimant upon the providing of the authorization for release of information. If the commissioner or the self-insured employer is required to submit a new authorization for release of information to the appropriate source in order to receive information necessary to comply with this section, the claimant shall provide the new authorization for release of information within thirty days of a request by the commissioner or self-insured employer. Failure of the claimant to provide the new authorization for release of information shall allow the commissioner or
self-insured employer with the approval of the commis-

tioner to discontinue the payment of applicable benefits

129 until the authorization for release of information is

130 provided. Compensation benefits withheld shall be

131 reimbursed to the claimant upon the providing of the

132 authorization for release of information.

133

(f) Any benefit payments under the Social Security

135 Act, or any fund, policy or program as specified under

136 subsection (b) of this section which the claimant receives

137 after the effective date of this section and during a

138 period in which the claimant also receives unreduced

139 workers' compensation benefits shall be considered to

140 create an overpayment of benefits for that period. The

141 commissioner or self-insured employer shall calculate

142 the amount of the overpayment and send a notice of

143 overpayment and a request for reimbursement to the

144 claimant. Failure by the claimant to reimburse the

145 commissioner or self-insured employer within thirty

146 days after the mailing date of the notice of request for

147 reimbursement shall allow the commissioner or the self-

148 insured employer, with the approval of the commis-

149 sioner, to discontinue fifty percent of future benefits

150 payments. The benefit payments withheld shall be

151 credited against the amount of the overpayment.

152 Payment of the appropriate benefit shall resume when

153 the total amount of the overpayment has been withheld.

154 Any self-insured employer taking a credit or making a

155 reduction as provided for in this subsection shall

156 immediately report to the commissioner the amount of

157 the credit or reduction and, as requested by the

158 commissioner, furnish to the commissioner satisfactory

159 proof of the basis for a credit or reduction.

160 (g) Nothing in this section shall be considered to

161 compel a claimant to apply for early federal social

162 security old-age benefits or to apply for other early or

163 reduced benefits.

164 (h) This section applies to awards of permanent total

165 disability made after the effective date of this section.

166 (i) The commissioner and the compensation programs

167 performance council shall promulgate the appropriate
rules for the interpretation, processing and enforcement of this section.

(j) If any portion of this section or any application of this section is subsequently found to be unconstitutional or in violation of applicable law, it shall not affect the validity of the remainder of this section or such applications of the section as are not unconstitutional or in such violation.

§23-4-24. Permanent total disability awards; retirement age; limitations on eligibility and the introduction of evidence; effects of other types of awards; procedures; requests for awards; jurisdiction.

Notwithstanding any provision of this chapter to the contrary, from and after the effective date of this section the following provisions shall be in effect.

(a) Except as stated below, no claimant shall be awarded permanent total disability benefits arising under subdivision (d) or (n), section six or of section eight-c of this article who terminates active employment and is receiving full old-age retirement benefits under the Social Security Act, 42 U.S.C. 401 and 402. Any such claimant shall be evaluated only for the purposes of receiving a permanent partial disability award premised solely upon the claimant's impairments. This subsection shall not be applicable in any claim in which the claimant has completed the submission of his or her evidence on the issue of permanent total disability prior to the later of the following: Termination of active employment or the initial receipt of full old-age retirement benefits under the Social Security Act. Once the claimant has terminated active employment and has begun to receive full old-age social security retirement benefits, the claimant shall not be permitted to produce additional evidence of permanent total disability before the commissioner, the office of judges, the appeal board or the supreme court of appeals nor shall such a claim be remanded for the production of such evidence.

(b) For the purposes of subdivision (d), section six of this article, the award of permanent partial disability
benefits under the provisions of section six-b of this article or under that portion of section six-a of this article which awards twenty weeks of benefits to a claimant who has occupational pneumoconiosis but without measurable pulmonary impairment therefrom shall not be counted towards the eighty-five percent needed to gain the rebuttable presumption of permanent total disability when such claimant has terminated active employment and is receiving federal nondisability pension or retirement benefits, including old-age benefits under the Social Security Act. This subsection shall not affect any other awards of permanent partial disability benefits and their use in achieving the rebuttable eighty-five percent presumption.

§23-4-25. Permanent total disability benefits; reduction of disability benefits for wages earned by claimant.

(a) After the effective date of this section, a reduction in the amount of benefits as specified in subsection (b) of this section shall be made whenever benefits are being paid for a permanent total disability award regardless of when such benefits were awarded. This section is not applicable to the receipt of medical benefits or the payment therefor, the receipt of permanent partial disability benefits, the receipt of benefits by partially or wholly dependant persons, or to the receipt of benefits pursuant to the provisions of subsection (e), section ten of this article. Prior to the application of this section to any claimant, the commissioner shall give the claimant notice of the effect of this section upon a claimant's award if and when such claimant later earns
wages.

(b) Whenever applicable benefits are paid to a claimant with respect to the same time period in which the claimant has earned wages as a result of his or her employment, the following reduction in applicable benefits shall be made. The claimant's applicable monthly benefits and monthly net wages received from the current employment shall be added together. If such total exceeds by more than one hundred and twenty percent of the amount of the claimant's monthly net wages earned during his or her last employment prior to the award of permanent total disability benefits, then such excess shall be reduced by one dollar for each two dollars that the claimant's monthly net wages exceed the one hundred and twenty percent level: Provided, That in no event shall applicable benefits be reduced below the minimum weekly benefits as provided for in subdivisions (b) and (d), section six of this article.

ARTICLE 5. REVIEW.

§23-5-1. Notice by commissioner of decision; procedures on claims; objections and hearing; mediation.

(a) The commissioner shall have full power and authority to hear and determine all questions within his or her jurisdiction. In matters arising under articles three and four of this chapter, the commissioner or a designated deputy shall promptly review and investigate all claims. The parties to a claim shall file such information in support of their respective positions as they deem proper. In addition, the commissioner or a designated deputy is authorized to develop such additional information as he or she deems to be necessary in the interests of fairness to the parties and in keeping with the commissioner's fiduciary obligations to the fund. With regard to any issue which is ready for a decision, the commissioner or designated deputy shall explain the basis of his or her decisions.

(b) Except with regard to interlocutory matters, upon making any decision, 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, 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 dependant 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. Any such objection shall be filed with the office of judges with a copy served upon the commissioner and other parties in accordance with the procedures set forth in sections one-g and one-h of this article.

(c) 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.

(d) Once an objection has been filed with the office of judges, the parties to the objection shall be offered an opportunity for mediation of the disputed issue by the commissioner. If all of the parties to the objection agree to mediation, the commissioner shall designate a deputy who was not involved in the original decision to act as mediator: Provided, That on issues related solely to the medical necessity of proposed medical treatment or diagnostic services, the commissioner shall offer the parties to the objection a selection of names of medical providers in the appropriate specialty. The parties shall then either agree upon a medical provider who shall act as mediator or, in the absence of an agreement, the commissioner shall select a medical provider who shall act as mediator. In cases where issues of medical necessity are intertwined with nonmedical treatment or nondiagnostic issues, both a medical provider and a designated deputy shall act as comediators and shall consider their respective issues. Neither shall be
empowered to overturn the decision of the other.

Upon entering into mediation, the parties shall inform the office of judges of that action and the office of judges shall stay further action on the objection.

The mediator shall solicit the positions of the parties and shall review such additional information as the parties or the commissioner shall furnish. The mediator shall then issue a decision in writing with the necessary findings of fact and conclusions of law to support that decision. If any party disagrees with the decision, that party may note its objection to the office of judges, the commissioner and the other parties, and the office of judges shall lift the stay on the original protest. The decision and any information introduced during the attempted mediation shall be subject to consideration by the office of judges in making its decision on the objection. Upon acceptance by the parties of the result of the mediation, the office of judges shall dismiss the objection with prejudice.

The mediator shall conduct the mediation in an informal manner and without regard to the formal rules of evidence and procedure. Once the parties agree to mediation, then the agreement cannot be withdrawn.

(e) The panel of medical providers who shall serve as mediators shall be selected and approved by the compensation programs performance council. A medical provider serving as a mediator shall have the same protections from liability as does the commissioner with regard to his or her decisions including coverage by the board of risk management which shall be provided by the workers' compensation division.

§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 a reasonable time, 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 one-h of this article.

§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 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.

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 commis-
sioner's action. Said decision shall contain findings of
fact and conclusions of law and shall be mailed to all
interested parties.

§23-5-6. Article applies to claims arising under §23-2-9.

The provisions of this article shall also apply to all
claims arising under section nine, article two of this
chapter.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Ernest C. Moore
Chairman House Committee

Originating in the House.

Takes effect from passage.

Clerk of the Senate

Donald F. Kuykendall

Clock of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 16th day of April, 1993.

Governor