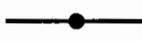


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OFFICE OF THE
SECRETARY

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1995



ENROLLED

Committee Substitute for
SENATE BILL NO. 250

(By Senators Tomblin, Mr. President, ~~and~~
and Boley, By Request of the Executive)



PASSED February 10, 1995
In Effect from Passage

ENROLLED
COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 250

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND BOLEY,
BY REQUEST OF THE EXECUTIVE)

[Passed February 10, 1995; in effect from passage.]

AN ACT to repeal sections five-b and eighteen, article two, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to repeal section two, article two-a of said chapter; to amend and reenact section eight, article three, chapter twenty-two of said code; to amend and reenact sections one, four, eleven, thirteen and sixteen, article one, chapter twenty-three of said code; to further amend said article by adding thereto a new section, designated section eighteen; to amend and reenact sections one, one-d, three, four, five, five-a, nine, fourteen and fifteen, article two of said chapter; to amend and reenact section one, article three of said chapter; to further amend said article by adding thereto two new sections, designated sections four and five; to amend and reenact sections one-a, one-c, one-d, three, four, six, six-a, six-c, seven, seven-a, ten, fifteen, fifteen-b, sixteen, eighteen, twenty-four and twenty-five, article four of said

chapter; to amend and reenact sections one and two, article four-c of said chapter; and to amend and reenact article five of said chapter, all relating generally to workers' compensation and reform thereof; proof of coverage for mining permits; representation of the commissioner; executive director of workers' compensation division; release of information; hearings; notice to parties and attorneys; felony offense for failure to subscribe, make payment or file reports and the criminal penalties therefor; venue for offenses; felony offense for making false report or statement and the criminal penalties therefor; subpoenas of division employees; coverage for volunteers; premium taxes; failure to subscribe and consequent noncoverage of partner, proprietor or officer; definitions; primary contractor liability; notice of subcontractor default; report forms; classification of industries; premium tax setting methodologies; defaulted employers; repayment agreements; penalties; wage reports; amounts of premium taxes to be filed; collections; rules; refunds of deposits; self insurance generally; security; self administration of benefits by employer; sale or transfer of business; attachment of liens; assumption of predecessor's premium tax rate; relief therefrom; surplus fund; second injury benefits determination; definitions; moneys from chapter funds not abandoned property; interest on chapter funds to be retained by said funds; electronic invoices, payments and transfers; mailing of reports of injuries; conditional order of compensability; when back payments of disability awards to be made; payments for health care services and goods; generic drugs; out-of-state health care providers; refusal to accept fee schedule payments; assumption of payments by claimant; exceptions; managed care organizations; choice of health care providers; limitations thereon; funeral expenses; fee schedules; criminal penalties; benefit rates; cessation of payments at retirement age; disability awards; medical impairment; medical panel; standards of review; limits thereon; threshold for requests for permanent total disability awards; standard of review and limits thereon of decisions by occupational pneumoconiosis board; patient-physician

privilege; exceptions; cessation of certain permanent disability benefits upon return to work; change in method of payments of certain dependents' benefits; annuities; elections for reduced benefits; time for filing claims applications and limitations thereon; reopening time limits and expiration of right to reopen; time requirements for decisions on reopening requests; consolidation of disability requests; what awards qualify for permanent total disability consideration; offset for earnings; employers' excess liability fund; sale or abolition thereof; parties to objections and appeals; office of judges generally; correction of decisions by division; processing of applications for modifications of prior awards; compromise and settlement; review and approval thereof; continuance of office of judges and chief administrative law judge; relationship thereof to compensation programs performance council; termination; salary; reports; employees; approval of rules; appeals board; duties; reports; employees; standards of review by appeals board and supreme court of appeals; and remands.

Be it enacted by the Legislature of West Virginia:

That sections five-b and eighteen, article two, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that section two, article two-a of said chapter be repealed; that section eight, article three, chapter twenty-two 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 said article be further amended by adding thereto a new section, designated section eighteen; that sections one, one-d, three, four, five, five-a, nine, fourteen and fifteen, article two of said chapter be amended and reenacted; that section one, article three of said chapter be amended and reenacted; that said article be further amended by adding thereto two new sections, designated sections four and five; that sections one-a, one-c, one-d, three, four, six, six-a, six-c, seven, seven-a, ten, fifteen, fifteen-b, sixteen, eighteen, twenty-four and twenty-five, article four of said chapter be amended and reenacted; that sections one and two, article

four-c of said chapter be amended and reenacted; and that article five of said chapter be amended and reenacted, all to read as follows:

CHAPTER 22. ENVIRONMENTAL RESOURCES.

ARTICLE 3. SURFACE COAL MINING AND RECLAMATION ACT.

§22-3-8. Prohibition of surface mining without a permit; permit requirements; successor in interest; duration of permits; proof of insurance; termination of permits; permit fees.

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

4 (1) All permits issued pursuant to the requirements of
5 this article shall be issued for a term not to exceed five
6 years: *Provided*, That if the applicant demonstrates that
7 a specified longer term is reasonably needed to allow the
8 applicant to obtain necessary financing for equipment
9 and the opening of the operation, and if the application
10 is full and complete for such specified longer term, the
11 director may extend a permit for such longer term:
12 *Provided, however*, That subject to the prior approval of
13 the director, with such approval being subject to the
14 provisions of subsection (c), section eighteen of this
15 article, a successor in interest to a permittee who applies
16 for a new permit, or transfer of a permit, within thirty
17 days of succeeding to such interest, and who is able to
18 obtain the bond coverage of the original permittee, may
19 continue surface-mining and reclamation operations
20 according to the approved mining and reclamation plan
21 of the original permittee until such successor's permit
22 application or application for transfer is granted or
23 denied.

24 (2) Proof of insurance is required on an annual basis.

25 (3) A permit terminates if the permittee has not com-
26 menced the surface-mining operations covered by such
27 permit within three years of the date the permit was

28 issued: *Provided*, That the director may grant reason-
29 able extensions of time upon a timely showing that such
30 extensions are necessary by reason of litigation preclud-
31 ing such commencement, or threatening substantial
32 economic loss to the permittee, or by reason of condi-
33 tions beyond the control and without the fault or negli-
34 gence of the permittee: *Provided, however*, That with
35 respect to coal to be mined for use in a synthetic fuel
36 facility or specific major electric generating facility, the
37 permittee shall be deemed to have commenced surface-
38 mining operations at such time as the construction of the
39 synthetic fuel or generating facility is initiated.

40 (4) Each application for a new surface-mining permit
41 filed pursuant to this article shall be accompanied by a
42 fee of one thousand dollars. All permit fees and renewal
43 fees provided for in this section or elsewhere in this
44 article shall be collected by the director and deposited
45 with the treasurer of the state of West Virginia to the
46 credit of the operating permit fees fund and shall be
47 used, upon requisition of the director, for the adminis-
48 tration of this article.

49 (5) Prior to the issuance of any permit, the director
50 shall ascertain from the commissioner of the division of
51 labor whether the applicant is in compliance with
52 section fourteen, article five, chapter twenty-one of this
53 code. Upon issuance of the permit, the director shall
54 forward a copy to the commissioner of the division of
55 labor, who shall assure continued compliance under such
56 permit.

57 (6) (A) Prior to the issuance of any permit the director
58 shall ascertain from the commissioner of the bureau of
59 employment programs whether the applicant is in
60 compliance with the provisions of section five, article
61 two, chapter twenty-three of this code with regard to
62 any required subscription to the workers' compensation
63 fund, the payment of premiums to the fund, the timely
64 filing of payroll reports and the maintenance of an
65 adequate premium deposit. If the applicant is delin-

66 quent or defaulted, or has been terminated, then the
67 permit shall not be issued until the applicant returns to
68 compliance or is restored by the workers' compensation
69 division under a reinstatement agreement: *Provided,*
70 That in all such inquiries the commissioner of the bureau
71 of employment programs shall make response to the
72 division of environmental protection within fifteen
73 calendar days, otherwise failure to respond timely shall
74 be considered to indicate the applicant is in compliance
75 and such failure will not be used to preclude issuance of
76 the permit.

77 (B) It is a requirement of this article that each operator
78 maintain continued compliance with the provisions of
79 section five, article two, chapter twenty-three of this
80 code and provide proof of compliance to the director on
81 an annual basis.

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; continuation of authority of commissioner; legal services; rules.

1 (a) The commissioner of the bureau of employment
2 programs appointed under the provisions of section one,
3 article two, chapter twenty-one-a of this code, has the
4 sole responsibility for the administration of this chapter
5 except for such matters as are entrusted to the compen-
6 sation programs performance council created pursuant
7 to section one, article three, chapter twenty-one-a of this
8 code. In the administration of this chapter, the commis-
9 sioner shall exercise all the powers and duties described
10 in this chapter and in article two, chapter twenty-one-a
11 of this code.

12 (b) The commissioner is authorized to promulgate rules
13 and regulations to implement the provisions of this
14 chapter.

15 (c) The commissioner shall have an official seal for the

16 authentication of orders and proceedings, upon which
17 seal shall be engraved the words "West Virginia Com-
18 missioner of Employment Programs" and such other
19 design as the commissioner may prescribe. The courts in
20 this state shall take judicial notice of the seal of the
21 commissioner and in all cases copies of orders, proceed-
22 ings or records in the office of the West Virginia commis-
23 sioner of employment programs shall be equal to the
24 original in evidence.

25 (d) Pursuant to the provisions of chapter four, article
26 ten of this code, the commissioner of the bureau of
27 employment programs shall continue to administer this
28 chapter until the first day of July, one thousand nine
29 hundred ninety-six, to allow the joint committee on
30 government operations to monitor compliance with
31 recommendations set forth in the full performance audit
32 of the office of the workers' compensation commissioner.

33 (e) The attorney general shall perform all legal services
34 required by the commissioner under the provisions of
35 this chapter: *Provided*, That in any case in which an
36 application for review is prosecuted from any final
37 decision of the workers' compensation appeal board to
38 the supreme court of appeals, as provided by section
39 four, article five of this chapter, or in any court proceed-
40 ing before the workers' compensation appeal board, or in
41 any proceedings before the office of judges, or in any
42 case in which a petition for an extraordinary writ is filed
43 in the supreme court of appeals or in any circuit court, in
44 which such representation shall appear to the commis-
45 sioner to be desirable, the commissioner may designate
46 a regular employee of this office, qualified to practice
47 before such court to represent the commissioner upon
48 such appeal or proceeding, and in no case shall the
49 person so appearing for the commissioner before the
50 court receive remuneration therefor other than such
51 person's regular salary.

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

1 (a) The offices of the workers' compensation division
2 shall be open for the transaction of business between the
3 hours of eight-thirty o'clock a.m., and five o'clock p.m.,
4 of each and every day, excepting Saturdays, Sundays
5 and legal holidays, and be open upon such additional
6 days and at such additional times as the division may
7 elect. As the chief executive officer of the bureau of
8 employment programs, the commissioner shall designate
9 an executive director to serve as the chief operating
10 officer for the daily operations of the workers' compen-
11 sation division: *Provided*, That in any instance in this
12 chapter which refers to the commissioner's secretary,
13 such reference shall be taken to mean the executive
14 director.

15 (b) Except as expressly provided for in this subsection,
16 information obtained regarding employers and claimants
17 pursuant to this chapter for the purposes of its adminis-
18 tration shall not be subject to the provisions of chapter
19 twenty-nine-b of this code unless such provisions are
20 hereafter specifically made applicable in whole or in
21 part. Such information as may be reasonably necessary
22 may be released in formal orders or opinions of any
23 tribunal or court which is presented with an issue arising
24 under this chapter as well as in the presentations of the
25 parties before any such tribunal or court. Similarly,
26 claimants or other interested parties to an issue arising
27 under this chapter may, upon request, obtain informa-
28 tion from the division's records to the extent necessary
29 for the proper presentation or defense of a claim or other
30 matter. Information may be released pursuant to the
31 provisions of chapter twenty-nine-b of this code only if
32 all identifying information has first been eliminated
33 from the records. Nothing in this subsection shall
34 prevent the release of information to another agency of
35 the state or of the federal government for the legitimate
36 purposes of those agencies: *Provided*, That any such
37 agency shall guarantee the confidentiality of the infor-
38 mation so provided to the fullest extent possible in
39 keeping with its own statutory and regulatory mandates.

40 Nothing in this section shall prevent the division from
41 complying with any subpoena duces tecum: *Provided*,
42 *however*, That the issuing tribunal or court shall take
43 such actions as may be proper to maintain the confiden-
44 tiality of the information.

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

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

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

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

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

§23-1-11. Depositions; investigations.

1 (a) In an investigation into any matter arising under
2 articles one through five of this chapter, the division may
3 cause depositions of witnesses residing within or without
4 the state to be taken in the manner prescribed by law for
5 like depositions in the circuit court, but such depositions
6 shall be upon reasonable notice to claimant and em-
7 ployer or other affected persons or their respective
8 attorneys. The division shall designate the person to
9 represent it for the taking of any such deposition.

10 (b) The division shall also have discretion to accept and
11 consider depositions taken within or without the state by
12 either the claimant or employer or other affected person,
13 provided due and reasonable notice of the taking of such
14 depositions was given to the other parties or their
15 attorneys, if any: *Provided*, That the division, upon due
16 notice to the parties, shall have authority to refuse or
17 permit the taking of such depositions or to reject such

18 depositions after the taking thereof, if they were taken at
19 such place or under such circumstances as imposed an
20 undue burden or hardship upon the other parties, and
21 the division's discretion to accept, refuse to approve, or
22 reject such depositions shall be binding in the absence of
23 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.

1 (a) The workers' compensation division shall adopt
2 reasonable and proper rules of procedure, regulate and
3 provide for the kind and character of notices, and the
4 service thereof, in cases of accident and injury to em-
5 ployees, the nature and extent of the proofs and evi-
6 dence, the method of taking and furnishing the same to
7 establish the rights to benefits or compensation from the
8 fund hereinafter provided for, or directly from employers
9 as hereinafter provided, as the case may require, and the
10 method of making investigations, physical examinations
11 and inspections, and prescribe the time within which
12 adjudications and awards shall be made.

13 (b) At hearings and other proceedings before the
14 division or before the duly authorized representative of
15 the division, an employer who is a natural person may
16 appear, and a claimant may appear, only as follows:

17 (1) By an attorney duly licensed and admitted to the
18 practice of law in this state;

19 (2) By a nonresident attorney duly licensed and admit-
20 ted to practice before a court of record of general
21 jurisdiction in another state or country or in the District
22 of Columbia who has complied with the provisions of
23 rule 8.0—admission pro hac vice, West Virginia supreme
24 court rules for admission to the practice of law, as
25 amended;

26 (3) By a representative from a labor organization who
27 has been recognized by the division as being qualified to

28 represent a claimant or who is an individual otherwise
29 found to be qualified by the division to act as a represen-
30 tative. Such representative shall participate in the
31 presentation of facts, figures and factual conclusions as
32 distinguished from the presentation of legal conclusions
33 in respect to such facts and figures; or

34 (4) Pro se.

35 (c) At hearings and other proceedings before the
36 division or before the duly authorized representative of
37 the division, an employer who is not a natural person
38 may appear only as follows:

39 (1) By an attorney duly licensed and admitted to the
40 practice of law in this state;

41 (2) By a nonresident attorney duly licensed and admit-
42 ted to practice before a court of record of general
43 jurisdiction in another state or country or in the District
44 of Columbia who has complied with the provisions of
45 rule 8.0—admission pro hac vice, West Virginia supreme
46 court rules for admission to the practice of law, as
47 amended;

48 (3) By a member of the board of directors of a corpora-
49 tion or by an officer of the corporation, for purposes of
50 representing the interest of the corporation in the
51 presentation of facts, figures and factual conclusions as
52 distinguished from the presentation of legal conclusions
53 in respect to such facts and figures; or

54 (4) By a representative from an employer service
55 company who has been recognized by the division as
56 being qualified to represent an employer or who is an
57 individual otherwise found to be qualified by the divi-
58 sion to act as a representative. Such representative shall
59 participate in the presentation of facts, figures and
60 factual conclusions as distinguished from the presenta-
61 tion of legal conclusions in respect to such facts and
62 figures.

63 (d) The division or its representative may require an

64 individual appearing on behalf of a natural person or
65 corporation to produce satisfactory evidence that he or
66 she is properly qualified and authorized to so appear
67 pursuant to this section.

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

72 (f) At the direction of a treating or evaluating psychia-
73 trist or clinical doctoral level psychologist, a psychiatric
74 or psychological report concerning a claimant who is
75 receiving treatment or is being evaluated for psychiatric
76 or psychological problems may be withheld from the
77 claimant. In that event, a summary of the report shall be
78 compiled by the reporting psychiatrist or clinical doc-
79 toral level psychologist which summary shall be pro-
80 vided to the claimant upon his or her request. Any
81 representative or attorney of the claimant must agree to
82 provide such a claimant with only the summary before
83 the full report shall be provided to the representative or
84 attorney for his or her use in preparing the claimant's
85 case. Such a report shall only be withheld from the
86 claimant in those instances where the treating or evalu-
87 ating psychiatrist or clinical doctoral level psychologist
88 certifies that exposure to the contents of the full report
89 is likely to cause serious harm to the claimant or is likely
90 to cause the claimant to pose a serious threat of harm to
91 a third party.

92 (g) In any matter arising under articles one through
93 five of this chapter in which the division is required to
94 give notice to a party, if a party is represented by an
95 attorney or other representative, then notice to the
96 attorney or other representative shall be sufficient notice
97 to the party so represented.

**§23-1-16. Omission to subscribe; failure to report or perform
required duty; false testimony or statements;
criminal penalties; venue.**

1 (a) Any person, firm, partnership, company, corpora-
2 tion or association who, as an employer, is required by
3 the provisions of this chapter to subscribe to the work-
4 ers' compensation fund, and who knowingly and will-
5 fully fails to subscribe thereto, or who knowingly and
6 willfully fails to make any payment or file a report as
7 required by the provisions of this chapter within the
8 time periods specified by law, is guilty of a felony, and,
9 upon conviction thereof, shall be fined not less than one
10 thousand dollars and not more than ten thousand
11 dollars. Upon any second or subsequent conviction
12 under this subsection, any person so convicted shall be
13 imprisoned in the penitentiary for a definite term of
14 imprisonment which is not less than one year nor more
15 than three years or fined not less than five thousand
16 dollars nor more than twenty-five thousand dollars:
17 *Provided*, That in the case of a person other than a
18 natural person, the amount of the fine shall be not less
19 than ten thousand dollars nor more than twenty-five
20 thousand dollars. The venue for prosecution of any
21 violation of this subsection is either the county in which
22 the defendant's principal business operations are lo-
23 cated, or in Kanawha county where the fund is located.
24 In charging a person with a second or subsequent offense
25 under the provisions of this subsection, the warrant,
26 indictment or information must set forth the date and
27 particulars of the previous offense or offenses. No
28 person may be convicted of a second or subsequent
29 offense unless the conviction for the previous offense has
30 become final, and unless a prior offense occurred within
31 the ten year period next preceding the second or subse-
32 quent offense.

33 (b) Any person or firm, or the officer of any corpora-
34 tion, who knowingly and willfully makes a false report
35 or statement under oath, affidavit or certification
36 respecting any information required to be provided
37 under this chapter, shall be guilty of a felony, and, upon
38 conviction thereof, shall be fined not less than one
39 thousand dollars nor more than ten thousand dollars or

40 confined in the penitentiary for a definite term of
41 imprisonment which is not less than one year nor more
42 than three years, or both.

**§23-1-18. Division employees not subject to subpoena for
workers' compensation hearings.**

1 No employee of the workers' compensation division
2 shall be compelled to testify as to the basis, findings or
3 reasons for any decision or order rendered by the em-
4 ployee under this chapter in any hearing conducted
5 pursuant to article five of this chapter.

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

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

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

20 (b) The following employers are not required to sub-
21 scribe to the fund, but may elect to do so:

22 (1) Employers of employees in domestic services; or

23 (2) Employers of five or fewer full-time employees in
24 agricultural service; or

25 (3) Employers of employees while said employees are
26 employed without the state except in cases of temporary
27 employment without the state; or

28 (4) Casual employers. An employer is deemed to be a
29 casual employer when the number of his or her employ-
30 ees does not exceed three and the period of employment
31 is temporary, intermittent and sporadic in nature and
32 does not exceed ten calendar days in any calendar
33 quarter; or

34 (5) Churches; or

35 (6) Employers engaged in organized professional sports
36 activities, including employers of trainers and jockeys
37 engaged in thoroughbred horse racing; or

38 (7) Any volunteer rescue squad or volunteer police
39 auxiliary unit organized under the auspices of a county
40 commission, municipality or other government entity or
41 political subdivision; volunteer organizations created or
42 sponsored by government entities, political subdivisions;
43 or, area or regional emergency medical services boards
44 of directors in furtherance of the purposes of the emer-
45 gency medical services act of article four-c, chapter
46 sixteen of this code: *Provided*, That should any of the
47 employers described in this subdivision have paid
48 employees, then to the extent of those paid employees
49 the employer must subscribe to and pay premium taxes
50 into the workers' compensation fund based upon the
51 gross wages of the paid employees; but, with regard to
52 the volunteers, such coverage remains optional.

53 (c) Notwithstanding any other provision of this chapter
54 to the contrary, whenever there are churches in a circuit
55 which employ one individual clergyman and the pay-
56 ments to such clergyman from such churches constitute
57 his or her full salary, such circuit or group of churches
58 may elect to be considered a single employer for the
59 purpose of premium payment into the workers' compen-

60 sation fund.

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

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

95 (f) Any foreign corporation employer choosing to
96 comply with the provisions of this chapter and to receive
97 the benefits hereunder shall, at the time of making

98 application to the division in addition to other require-
99 ments of this chapter, furnish the division with a certifi-
100 cate from the secretary of state, where such certificate is
101 necessary, showing that it has complied with all the
102 requirements necessary to enable it legally to do business
103 in this state and no application of such foreign corpora-
104 tion employer shall be accepted by the division until
105 such certificate is filed.

106 (g) The following employers may elect not to provide
107 coverage to certain of their employees under the provi-
108 sions of this chapter:

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

114 (2) If an employer is a partnership, sole proprietorship,
115 association or corporation, such employer may elect not
116 to include as an "employee" within this chapter, any
117 member of such partnership, the owner of the sole
118 proprietorship or any corporate officer or member of the
119 board of directors of the association or corporation. The
120 officers of a corporation or an association shall consist of
121 a president, a vice-president, a secretary and a treasurer,
122 each of whom shall be elected by the board of directors
123 at such time and in such manner as may be prescribed by
124 the bylaws. Such other officers and assistant officer as
125 may be deemed necessary may be elected or appointed
126 by the board of directors or chosen in such other manner
127 as may be prescribed by the bylaws and, if so elected,
128 appointed or chosen, such employer may elect not to
129 include any such officer or assistant officer as an
130 "employee" within the meaning of this chapter: *Pro-*
131 *vided*, That except for those persons who are members of
132 the board of directors or who are the corporation's or
133 association's president, vice-president, secretary and
134 treasurer and who may be excluded by reason of their
135 aforementioned positions from the benefits of this

136 chapter even though their duties, responsibilities,
137 activities or actions may have a dual capacity of work
138 which is ordinarily performed by an officer and also of
139 work which is ordinarily performed by a worker, an
140 administrator or an employee who is not an officer, no
141 such other officer or assistant officer who is elected or
142 appointed shall be excluded by election from coverage or
143 be denied the benefits of this chapter merely because he
144 or she is such an officer or assistant officer if, as a matter
145 of fact:

146 (A) He or she is engaged in a dual capacity of having
147 the duties and responsibilities for work ordinarily
148 performed by an officer and also having duties and work
149 ordinarily performed by a worker, administrator, or
150 employee who is not an officer;

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

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

158 (h) In the event of election under subsection (g) of this
159 section, the employer shall serve upon the division
160 written notice naming the positions not to be covered
161 and shall not include such "employee's" remuneration
162 for premium purposes in all future payroll reports, and
163 such partner, proprietor or corporate or executive officer
164 shall not be deemed an employee within the meaning of
165 this chapter after such notice has been served. Notwith-
166 standing the provisions of subsection (g), section five of
167 this article, if an employer has not subscribed to the fund
168 even though it is obligated to do so under the provisions
169 of this article, then any such partner, proprietor or
170 corporate or executive officer shall not be covered and
171 shall not receive the benefits of this chapter.

172 (i) "Regularly employing" or "regular employment"

173 shall mean employment by an employer which is not a
174 casual employer under this section.

**§23-2-1d. Primary contractor liability; definitions; applica-
tions and exceptions; certificates of good stand-
ing; reimbursement and indemnification; termi-
nation of contracts; effective date; collections
efforts.**

1 (a) For the exclusive purposes of this section, the term
2 "employer" as defined in section one of this article shall
3 include any primary contractor who regularly subcon-
4 tracts with other employers for the performance of any
5 work arising from or as a result of the primary contrac-
6 tor's own contract: *Provided*, That a subcontractor shall
7 not include one providing goods rather than services. In
8 the event that such a subcontracting employer defaults
9 on its obligations to make payments to the commissioner,
10 then such primary contractor shall be liable for such
11 payments. Notwithstanding the foregoing, nothing
12 contained in this section shall extend or except to such
13 primary contractor or subcontractors the provisions of
14 sections six, six-a or eight of this article. This section is
15 applicable only with regard to subcontractors with
16 whom the primary contractor has a contract for any
17 work or services for a period longer than thirty-days:
18 *Provided*, That this section shall also be applicable to
19 contracts for consecutive periods of work that total more
20 than thirty days. It is not applicable to the primary
21 contractor with regard to sub-subcontractors. However,
22 a subcontractor for the purposes of a contract with the
23 primary contractor can itself become a primary contrac-
24 tor with regard to other employers with whom it subcon-
25 tracts.

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

32 (1) Failure to obtain the certificate of good standing
33 prior to the initial performance of any work by the
34 subcontractor shall result in the primary contractor
35 being equally liable with the subcontractor for all
36 delinquent and defaulted premium taxes, premium
37 deposits, interest and other penalties arising during the
38 life of the contract or due to work performed in further-
39 ance of the contract: *Provided*, That the division shall be
40 entitled to collect only once for the amount of premiums,
41 premium deposits and interest due to the default, but the
42 division may impose other penalties on the primary
43 contractor or on the subcontractor, or both.

44 (2) In order to continue avoiding liability under this
45 section, the primary contractor shall request that the
46 commissioner of the bureau of employment programs
47 inform the primary contractor of any subsequent default
48 by the subcontractor. In the event that the subcontrac-
49 tor does default, the commissioner shall then notify the
50 primary contractor of the default by placing a notice in
51 the first class United States mail, postage prepaid, and
52 addressed to the primary contractor at the address
53 furnished to the commissioner by the primary contrac-
54 tor. Such mailing shall be good and sufficient notice to
55 the primary contractor of the subcontractor's default.
56 However, the primary contractor shall not become liable
57 under this section until the first day of the calendar
58 quarter following the calendar quarter in which the
59 notice is given and then such liability shall only be for
60 that following calendar quarter and thereafter and only
61 if the subcontract has not been terminated: *Provided*,
62 That the commissioner shall be entitled to collect only
63 once for the amount of premiums, premium deposits and
64 interest due to the default, but the commissioner may
65 impose other penalties on the primary contractor or on
66 the subcontractor, or both.

67 (c) In any situation where a subcontractor defaults
68 with regard to its payment obligations under this chapter

69 or fails to provide a certificate of good standing as
70 provided for in this section, such default or failure shall
71 be good and sufficient cause for a primary contractor to
72 hold the subcontractor responsible and to seek reim-
73 bursement or indemnification for any amounts paid on
74 behalf of the subcontractor to avoid or cure a workers'
75 compensation default, plus related costs including
76 reasonable attorneys' fees, and to terminate its subcon-
77 tract with the subcontractor notwithstanding any
78 provision to the contrary in the contract.

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

83 (e) The division may take any action authorized by
84 section five-a of this article in furtherance of its efforts
85 to collect amounts due from the primary contractor
86 under this section.

§23-2-3. Report forms and other forms for use of employers.

1 The division shall prepare and furnish report forms for
2 the use of employers subject to this chapter. Every
3 employer receiving from the division any form or forms
4 with direction for completion and returning to the
5 division shall return the same, within the period fixed by
6 the division, completed so as to answer fully and cor-
7 rectly all pertinent questions therein propounded, and if
8 unable to do so, shall give good and sufficient reasons for
9 such failure. Every employer subject to the provisions of
10 this chapter, shall make application to the division on
11 the forms prescribed by the division for such purpose;
12 and any employer who shall terminate his or her busi-
13 ness or for any other reason is no longer subject to this
14 chapter shall so notify the division on forms to be
15 furnished by the division for that purpose.

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

thority to adopt various systems; accounts.

1 (a) The commissioner, in conjunction with the com-
2 pensionation programs performance council, is authorized
3 to establish by rule a system for determining the classifi-
4 cation and distribution into classes of employers subject
5 to this chapter, a system for determining rates of pre-
6 mium taxes applicable to employers subject to this
7 chapter, a system of multiple policy options with criteria
8 for subscription thereto, and criteria for an annual
9 employer's statement providing both benefits liability
10 information and rate determination information.

11 (1) In addition, the rule shall provide for, but not be
12 limited to:

13 (A) Rate adjustments by industry or individual em-
14 ployer, including merit rate adjustments;

15 (B) Notification regarding rate adjustments prior to the
16 quarter in which the rate adjustments will be in effect;

17 (C) Chargeability of claims; and

18 (D) Such further matters that are necessary and
19 consistent with the goals of this chapter;

20 (2) The rule shall be consistent with the duty of the
21 commissioner and the compensation programs perfor-
22 mance council to fix and maintain the lowest possible
23 rates of premium taxes consistent with the maintenance
24 of a solvent workers' compensation fund and the reduc-
25 tion of any deficit that may exist in such fund and in
26 keeping with their fiduciary obligations to the fund;

27 (3) The rule shall be consistent with generally accepted
28 accounting principles;

29 (4) The rule shall be consistent with classification and
30 rate making methodologies found in the insurance
31 industry; and

32 (5) The rule shall be consistent with the principles of

33 promoting more effective workplace health and safety
34 programs as contained in article two-b, of this chapter.

35 (b) Notwithstanding any other provision of this chapter
36 to the contrary, the compensation programs performance
37 council may elect to premise its premium tax determina-
38 tion methodology on the aggregate number of hours
39 worked by employees of the employer rather than upon
40 the gross wages of the employer. Such an election may
41 apply to all industrial classifications or to less than all.
42 If this election is made, then in all instances in which
43 this chapter refers to gross wage reports for the purpose
44 of premium tax determination such references shall be
45 taken to mean a report of the number of hours so work-
46 ed.

47 (c) The rule authorized by subsection (a) of this section
48 shall be promulgated on or before the first day of July,
49 one thousand nine hundred ninety-six. Until the rule is
50 finally promulgated the prior provisions of this section
51 as found in chapter one hundred seventy-one of the acts
52 of the Legislature, one thousand nine hundred ninety-
53 three, shall remain in effect.

54 (d) In accordance with generally accepted accounting
55 principles, the workers' compensation division shall keep
56 an accurate accounting of all money or moneys earned,
57 due, and received by the workers' compensation fund,
58 and of the liability incurred and disbursements made
59 against the same; and an accurate account of all money
60 or moneys earned, due and received from each individual
61 subscriber, and of the liability incurred and disburse-
62 ments made against the same.

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

1 (a) For the purpose of creating a workers' compensa-
2 tion fund, each employer who is required to subscribe to
3 the fund or who elects to subscribe to the fund shall pay
4 premium taxes calculated as a percentage of the em-
5 ployer's gross wages payroll at the rate determined by
6 the workers' compensation division and then in effect.
7 At the time each employer subscribes to the fund, the
8 application required by the division shall be filed and a
9 premium deposit equal to the first quarter's estimated
10 premium tax payment shall be remitted. The minimum
11 quarterly premium to be paid by any employer shall be
12 twenty-five dollars.

13 (1) Thereafter, premium taxes shall be paid quarterly
14 on or before the last day of the month following the end
15 of the quarter, and shall be the prescribed percentage of
16 the entire gross wages of all employees, from which net
17 payroll is calculated and paid, during the preceding
18 quarter: *Provided*, That the division may permit em-
19 ployers who shall qualify under the provisions of rules to
20 be promulgated and made effective on or after the first
21 day of July, one thousand nine hundred ninety-six, by
22 the compensation programs performance council to
23 report gross wages and pay premium taxes at other
24 intervals.

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

30 (3) After subscribing to the fund, each employer shall
31 remit with each gross wages payroll report and premium
32 tax payment an amount calculated to be sufficient to
33 maintain a premium deposit equal to the previous
34 quarter's premium payment: *Provided*, That the division
35 may reduce the amount of the premium deposit required
36 from seasonal employers for those quarters during which

37 employment is significantly reduced. The premium
38 deposit shall be credited to the employer's account on
39 the books of the division and used to pay premiums and
40 any other sums due the fund when an employer becomes
41 delinquent or in default as provided in this article.

42 (4) All premium taxes and premium deposits required
43 by this article to be paid shall be paid by the employers
44 to the division, which shall maintain a record of all sums
45 so received. Any such sum mailed to the division shall
46 be deemed to be received on the date the envelope
47 transmitting it is postmarked by the United States postal
48 service. All sums received by the division shall be
49 deposited in the state treasury to the credit of the work-
50 ers' compensation division in the manner now prescribed
51 by law.

52 (5) The division may encourage employer efforts to
53 create and maintain safe workplaces, to encourage loss
54 prevention programs, and to encourage employer pro-
55 vided wellness programs, through the normal operation
56 of the experience rating formula, seminars and other
57 public presentations, the development of model safety
58 programs and other initiatives as may be determined by
59 the commissioner and the compensation programs
60 performance council.

61 (b) Failure of an employer to timely pay premium
62 taxes, to timely file a payroll report, or to maintain an
63 adequate premium deposit, shall cause the employer's
64 account to become delinquent. No employer will be
65 declared delinquent or be assessed any penalty therefor
66 if the division determines that such delinquency has
67 been caused by delays in the administration of the fund.
68 The division shall, in writing, within sixty days of the
69 end of each quarter notify all delinquent employers of
70 their failure to timely pay premiums, to timely file a
71 payroll report, or to maintain an adequate premium
72 deposit. Each employer who shall fail to timely file any

73 quarterly payroll report or timely pay the premium tax
74 due with such report, or both, for any quarter commenc-
75 ing on and after the first day of July, one thousand nine
76 hundred ninety-five, shall pay a late reporting or pay-
77 ment penalty of the greater of fifty dollars or ten percent
78 of the premium tax due, but not to exceed five hundred
79 dollars, with such report. Such late penalty shall be paid
80 with the most recent quarter's report and payment and
81 is due when that quarter's report and payment are filed.
82 If such late penalty is not paid when due, the same may
83 be charged to and collected by the division from the
84 employer's premium deposit account or otherwise as
85 provided for by law. The notification shall demand the
86 filing of the delinquent payroll report and payment of
87 delinquent premium taxes, the penalty for late reporting
88 or payment of premium taxes or premium deposit, the
89 interest penalty and an amount sufficient to maintain the
90 premium deposit, before the end of the third month
91 following the end of the preceding quarter. Interest shall
92 accrue and be charged on the delinquent premium
93 payment and premium deposit pursuant to section
94 thirteen of this article.

95 (c) Whenever the division notifies an employer of the
96 delinquent status of its account, the notification shall
97 explain the legal consequence of subsequent default by
98 an employer required to subscribe to the fund and the
99 legal consequences of termination of an electing em-
100 ployer's account.

101 (d) Failure by the employer, who is required to sub-
102 scribe to the fund and who fails to resolve the delin-
103 quency within the prescribed period, shall place the
104 account in default and shall deprive such default em-
105 ployer of the benefits and protection afforded by this
106 chapter, including section six of this article, and the
107 employer shall be liable as provided in section eight of
108 this article. The default employer's liability under said
109 sections shall be retroactive to midnight of the last day

110 of the month following the end of the quarter for which
111 the delinquency occurs. The division shall notify the
112 default employer of the method by which the employer
113 may be reinstated with the fund. The division shall also
114 notify the employees of such employer by written notice
115 as hereinafter provided for in this section.

116 (e) Failure by any employer, who voluntarily elects to
117 subscribe, to resolve the delinquency within the pre-
118 scribed period shall place the account in default and
119 shall automatically terminate the election of such
120 employer to pay into the workers' compensation fund
121 and shall deprive such employer and the employees of
122 the default elective employer of the benefits and protec-
123 tion afforded by this chapter, including section six of
124 this article, and such employer shall be liable as pro-
125 vided in section eight of this article. The default em-
126 ployer's liability under said section shall be retroactive
127 to midnight of the last day of the month following the
128 end of the quarter for which the delinquency occurs.
129 Employees who were the subject of the default em-
130 ployer's voluntary election to provide them the benefits
131 afforded by this chapter shall have such protection
132 terminated at the time of their employer's default.

133 (f) (1) Except as provided for in subdivision (3) of this
134 subsection, any employer who is required to subscribe to
135 the fund and who is in default on the effective date of
136 this section or who subsequently defaults, and any
137 employer who has elected to subscribe to the fund and
138 who defaults and whose account is terminated prior to
139 the effective date of this section or whose account is
140 subsequently terminated, shall be restored immediately
141 to the benefits and protection of this chapter only upon
142 the filing of all delinquent payroll and other reports
143 required by the division and payment into the fund of all
144 unpaid premiums, an adequate premium deposit, ac-
145 crued interest and the penalty for late reporting and
146 payment. Interest shall be calculated as provided for by

147 section thirteen of this article. In addition, for every
148 defaulted or terminated employer whose default or
149 termination lasts for two consecutive quarters or who
150 has defaulted or been terminated for two quarters out of
151 the preceding eight consecutive quarters, then when any
152 such employer's application for reinstatement is filed or
153 upon any such employer's restoration to the benefits and
154 protection of this chapter, for the next eight quarters,
155 including the quarter in which such restoration occurs,
156 or when any such employer's application for reinstatement
157 is filed, the employer shall pay premium taxes to
158 the division at a penalty rate. The applicable penalty
159 premium tax shall be determined by first calculating the
160 employer's premium under the provisions of section four
161 of this article, but including any applicable experience
162 modification, and then multiplying that premium by one
163 hundred ten percent.

164 The division shall not have the authority to waive
165 either accrued interest or the imposition of the penalty
166 premium rate. Any employer whose default or termination
167 does not last for two consecutive quarters or who
168 has not been in default two quarters out of the preceding
169 eight consecutive quarters shall not have a penalty
170 premium rate imposed. The provisions of section seven-
171 teen of this article apply to any action or decision of the
172 division under this section. For purposes of section four
173 of this article, the extra ten percent of premium consti-
174 tuting the penalty shall not be used in determining any
175 entitlement to experience modification of the employer's
176 premium tax rate for future years.

177 (2) The division shall have the authority to restore a
178 defaulted or terminated employer through a reinstatement
179 agreement. Such reinstatement agreement shall
180 require the payment in full of all premium taxes, pre-
181 mium deposits, the penalty for late reporting and pay-
182 ment, past accrued interest and future interest calcu-
183 lated pursuant to the provisions of section thirteen of

184 this article. The reinstatement agreement shall not
185 permit any modification or waiver of the penalty pre-
186 mium rate provided for in subdivision (1) of this subsec-
187 tion. Notwithstanding the filing of a reinstatement
188 application or the entering into of a reinstatement
189 agreement, the division is authorized to file a lien
190 against the employer as provided by section five-a of this
191 article. In addition, entry into a reinstatement agree-
192 ment is discretionary with the division. Such discretion
193 shall be exercised in keeping with the fiduciary obliga-
194 tions owed to the workers' compensation fund. Should
195 the division decline to enter into a reinstatement agree-
196 ment and should the employer not comply with the
197 provisions of subdivision (1) of this subsection, then the
198 division may proceed with any of the collection efforts
199 provided for by section five-a of this article or as other-
200 wise provided for by this code. Applications for rein-
201 statement shall: (A) Be made upon forms prescribed by
202 the division; (B) include a report of the gross wages
203 payroll of the employer which had not been reported to
204 the division during the entire period of delinquency and
205 default, which gross wages information shall be certified
206 by the employer or its authorized agent; and (C) include
207 a payment of a portion of the liability equal to one half
208 of one percent of the gross payroll during the period of
209 delinquency and default or equal to another portion of
210 the liability as may be determined from time to time by
211 rule but not to exceed the amount of the entire liability
212 due and owing for the period of delinquency and default.
213 An employer who applies for reinstatement shall be
214 entitled to the benefits and protection of this chapter on
215 the day a properly completed and acceptable application
216 which is accompanied by the application payment is
217 received by the division: *Provided*, That if the division
218 reinstates an employer subject to the terms of a rein-
219 statement agreement, the subsequent failure of the
220 employer to make scheduled payments or to pay accrued
221 or future interest in accordance with the reinstatement

222 agreement or to timely file current quarterly reports and
223 to pay current quarterly premiums within the month
224 following the end of the quarter for which the report and
225 payment are due, or to otherwise maintain its account in
226 good standing or, if the reinstatement agreement does
227 not require earlier restoration of the premium deposit, to
228 restore the premium deposit to the required amount by
229 the end of the repayment period shall cause the rein-
230 statement application and the reinstatement agreement
231 to be null, void and of no effect, and the employer shall
232 be denied the benefits and protection of this chapter
233 effective from the date that such employer's account
234 originally became delinquent.

235 (3) Any employer who fails to maintain its account in
236 good standing with regard to subsequent premium taxes
237 and premium deposits after filing an application for
238 reinstatement and prior to the final resolution of an
239 application for reinstatement by entering into a rein-
240 statement agreement or by payment of the liability in
241 full as provided for in subdivision (1) of this subsection
242 shall cause the reinstatement application to be null, void
243 and of no effect, and the employer shall be denied the
244 benefits and protection of this chapter effective from the
245 date that such employer's account originally became
246 delinquent.

247 (4) Following any failure of an employer to comply
248 with the provisions of a repayment agreement, the
249 division may then make and continue with any of the
250 collection efforts provided for by this chapter or else-
251 where in this code even if the employer files another
252 reinstatement application.

253 (g) With the exception noted in subsection (h) of
254 section one of this article, no employee of an employer
255 required by this chapter to subscribe to the workers'
256 compensation fund shall be denied benefits provided by
257 this chapter because the employer failed to subscribe or

258 because the employer's account is either delinquent or in
259 default.

260 (h) (1) The provisions of this section shall not deprive
261 any individual of any cause of action which has accrued
262 as a result of an injury or death which occurred during
263 any period of delinquency not resolved in accordance
264 with the provisions of this article, or subsequent failure
265 to comply with the terms of the repayment agreement.

266 (2) Upon withdrawal from the fund or termination of
267 election of any employer, the employer shall be refunded
268 the balance due the employer of its deposit, after deduct-
269 ing all amounts owed by the employer to the workers'
270 compensation fund and other agencies of this state, and
271 the division shall notify the employees of such employer
272 of said termination in such manner as the division may
273 deem best and sufficient.

274 (3) Notice to employees in this section provided for
275 shall be given by posting written notice that the em-
276 ployer is defaulted under the compensation law of West
277 Virginia, and in the case of employers required by this
278 chapter to subscribe and pay premiums to the fund, that
279 the defaulted employer is liable to its employees for
280 injury or death, both in workers' compensation benefits
281 and in damages at common law or by statute; and in the
282 case of employers not required by this chapter to sub-
283 scribe and pay premiums to the fund, but voluntarily
284 electing to do so as herein provided, that neither the
285 employer nor the employees of such employer are
286 protected by said laws as to any injury or death sus-
287 tained after the date specified in said notice. Such
288 notice shall be in the form prescribed by the division and
289 shall be posted in a conspicuous place at the chief works
290 of the employer, as the same appear in records of the
291 division. If said chief works of the employer cannot be
292 found or identified, then said notices shall be posted at
293 the front door of the courthouse of the county in which

294 said chief works are located, according to the division's
295 records. Any person who shall, prior to the reinstatement
296 of said employer, as hereinbefore provided for, or
297 prior to sixty days after the posting of said notice,
298 whichever shall first occur, remove, deface or render
299 illegible said notice, shall be guilty of a misdemeanor,
300 and, upon conviction thereof, shall be fined one thousand
301 dollars, and said notice shall state this provision upon its
302 face. The division may require any sheriff, deputy
303 sheriff, constable or other official of the state of West
304 Virginia, who may be authorized to serve civil process, to
305 post such notice and to make return thereof of the fact of
306 such posting to the division, and any failure of such
307 officer to post any notice within ten days after he or she
308 shall have received the same from the division, without
309 just cause or excuse, shall constitute a willful failure or
310 refusal to perform a duty required of him or her by law
311 within the meaning of section twenty-eight, article five,
312 chapter sixty-one of this code. Any person actually
313 injured by reason of such failure shall have an action
314 against said official, and upon any official bond he or she
315 may have given, for such damages as such person may
316 actually have incurred, but not to exceed, in the case of
317 any surety upon said bond, the amount of the penalty of
318 said bond. Any official posting said notice as herein
319 required shall be entitled to the same fee as is now or
320 may hereafter be provided for the service of process in
321 suits instituted in courts of record in the state of West
322 Virginia, which fee shall be paid by the division out of
323 any funds at its disposal, but shall be charged by the
324 division against the account of the employer to whose
325 delinquency such notice relates.

**§23-2-5a. 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;**

distrain powers; insolvency proceedings; secretary of state to withhold certificates of dissolution; injunctive relief; bond; attorney fees and costs.

1 (a) The workers' compensation division in the name of
2 the state may commence a civil action against an em-
3 ployer who, after due notice, defaults in any payment
4 required by this chapter. If judgment is against the
5 employer, such employer shall pay the costs of the
6 action. Civil action under this section shall be given
7 preference on the calendar of the court over all other
8 civil actions. Upon prevailing in any such civil action,
9 the division shall be entitled to recover its attorneys' fees
10 and costs of action from the employer.

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

27 (c) In addition to all other civil remedies prescribed
28 herein, the division may in the name of the state, after
29 giving appropriate notice as required by due process,
30 distrain upon any personal property, including intangi-
31 ble property, of any employer delinquent for any pay-
32 ment, interest and penalty thereon. If the division has

33 good reason to believe that such property or a substan-
34 tial portion thereof is about to be removed from the
35 county in which it is situated, upon giving appropriate
36 notice, either before or after the seizure, as is proper in
37 the circumstances, the division may likewise distrain in
38 the name of the state before such delinquency occurs.
39 For such purpose, the division may require the services
40 of a sheriff of any county in the state in levying such
41 distress in the county in which the sheriff is an officer
42 and in which such personal property is situated. A
43 sheriff so collecting any payment, interest and penalty
44 thereon shall be entitled to such compensation as is
45 provided by law for his or her services in the levy and
46 enforcement of executions. Upon prevailing in any
47 distraint action, the division shall be entitled to recover
48 its attorneys' fees and costs of action from the employer.

49 (d) In case a business subject to the payments, interest
50 and penalties thereon imposed under this chapter shall
51 be operated in connection with a receivership or insol-
52 vency proceeding in any state court in this state, the
53 court under whose direction such business is operated
54 shall, by the entry of a proper order or decree in the
55 cause, make provisions, so far as the assets in adminis-
56 tration will permit, for the regular payment of such
57 payments, interest and penalties as the same become
58 due.

59 (e) The secretary of state of this state shall withhold
60 the issuance of any certificate of dissolution or with-
61 drawal in the case of any corporation organized under
62 the laws of this state or organized under the laws of any
63 other state and admitted to do business in this state,
64 until notified by the division that all payments, interest
65 and penalties thereon against any such corporation
66 which is an employer under this chapter have been paid
67 or that provision satisfactory to the division has been
68 made for payment.

69 (f) In any case when an employer required to subscribe
70 to the fund defaults in payments of premium, premium
71 deposits, penalty or interest thereon, for as many as two
72 calendar quarters, which quarters need not be consecu-
73 tive, and remains in default after due notice, the division
74 may bring action in the circuit court of Kanawha county
75 to enjoin such employer from continuing to carry on the
76 business in which such liability was incurred: *Provided,*
77 That the division may as an alternative to this action
78 require such delinquent employer to file a bond in the
79 form prescribed by the commissioner with satisfactory
80 surety in an amount not less than fifty percent more than
81 the payments, interest and penalties due.

§23-2-9. Election of employer to be self-insured and to provide own system of compensation; mandatory participation in second injury reserve; exceptions; catastrophe coverage; self administration.

1 (a) Notwithstanding any provisions of this chapter to
2 the contrary, the following types of employers may apply
3 for permission to self-insure their workers' compensa-
4 tion risk including their risk of catastrophic injuries.
5 Except as provided for in subsection (e) of this section,
6 no employer may self-insure its second injury risk.

7 (1) The types of employers are:

8 (A) Any employer who is of sufficient capability and
9 financial responsibility to ensure the payment to injured
10 employees and the dependents of fatally injured employ-
11 ees of benefits provided for in this chapter at least equal
12 in value to the compensation provided for in this chap-
13 ter; or

14 (B) Any employer of such capability and financial
15 responsibility who maintains its own benefit fund or
16 system of compensation to which its employees are not
17 required or permitted to contribute and whose benefits
18 are at least equal in value to those provided for in this

19 chapter.

20 (2) In order to be approved for self-insurance status,
21 the employer must:

22 (A) Have an effective health and safety program at its
23 workplaces; and

24 (B) Provide security or bond in an amount to be
25 determined by the compensation programs performance
26 council which shall balance the employer's financial
27 condition based upon an analysis of its audited financial
28 statements and the full accrued value based upon
29 generally accepted accounting principles of the em-
30 ployer's existing and expected liability; and

31 (C) Security or bond which may be in such form as the
32 commissioner and the compensation programs perfor-
33 mance council created pursuant to section one, article
34 three, chapter twenty-one-a of this code permits.

35 (3) Any employer whose record upon the books of the
36 division shows a liability, as determined on an accrued
37 basis against the workers' compensation fund incurred
38 on account of injury to or death of any of the employer's
39 employees, in excess of premiums paid by such employer,
40 shall not be granted the right, individually and directly
41 or from such benefit funds or system of compensation, to
42 be self-insured until the employer has paid into the
43 workers' compensation fund the amount of such excess
44 of liability over premiums paid, including the employer's
45 proper proportion of the liability incurred on account of
46 catastrophes or second injuries as defined in section one,
47 article three of this chapter and charged against such
48 fund.

49 (4) Upon a finding that the employer has met all of the
50 requirements of this section, the employer may be
51 permitted self-insurance status. An annual review of
52 each self-insurer's continuing ability to meet its obliga-
53 tions and the requirements of this section shall be made

54 by the workers' compensation division. This review shall
55 include a re-determination of the amount of security or
56 bond which shall be provided by the employer. Failure
57 to provide any new amount or form of security or bond
58 may, in the division's discretion, cause the employer's
59 self-insurance status to be terminated. The security or
60 bond provided by employers prior to the second day of
61 February, one thousand nine hundred ninety-five, shall
62 continue in full force and effect until the performance of
63 the employer's annual review and the entry of any
64 appropriate decision on the amount or form of the
65 employer's security or bond.

66 (5) Whenever a self-insured employer shall furnish
67 security or bond, including replacement and amended
68 bonds and other securities, as security to ensure the
69 employer's or guarantor's payment of all obligations
70 under this chapter for which the security or bond was
71 furnished, such security or bond shall be in the most
72 current form or forms approved and authorized by the
73 division for use by the employer or its guarantors, surety
74 companies, banks, financial institutions or others in its
75 behalf for such purpose.

76 (b) Each self-insured employer shall, on or before the
77 last day of the first month of each quarter, file with the
78 division a certified statement of the total gross wages
79 and earnings of all of the employer's employees subject
80 to this chapter for the preceding quarter. Each self-
81 insured employer shall pay into the workers' compensa-
82 tion fund as portions of its self-insured premium tax:

83 (1) A sum sufficient to pay the employer's proper
84 portion of the expense of the administration of this
85 chapter;

86 (2) A sum sufficient to pay the employer's proper
87 portion of the expense of claims for those employers who
88 are in default in the payment of premium taxes or other
89 obligations;

90 (3) A sum sufficient to pay the employer's fair portion
91 of the expenses of the disabled workers' relief fund; and

92 (4) A sum sufficient to maintain as an advance deposit
93 an amount equal to the previous quarter's payment of
94 each of the foregoing three sums.

95 (c) The required payments to the employer's injured
96 employees or dependents of fatally injured employees as
97 benefits provided for by this chapter including second
98 injury benefits and catastrophic injury benefits, if
99 applicable, shall constitute the remaining portion of the
100 self-insurer's premium tax.

101 (1) If an employer defaults in the payment of any
102 portion of its self-insured premium taxes, the division
103 may, in an appropriate case, determine the full accrued
104 value based upon generally accepted accounting princi-
105 ples of the employer's liability including the costs of all
106 awarded claims and of all incurred but not reported
107 claims. The amount so determined may then, in an
108 appropriate case, be assessed against the employer and
109 the division may demand and collect the present value of
110 such defaulted tax liability. Interest shall accrue upon
111 the demanded amount as provided for in section thirteen
112 of this article until the premium tax is fully paid.
113 Payment of all amounts then due to the division and to
114 the employer's employees is a sufficient basis for rein-
115 stating the employer to good standing with the fund.

116 (2) Such premium tax assessments are special revenue
117 taxes under and according to the provisions of state
118 workers' compensation law and are deemed to be tax
119 claims, as priority claims or administrative expense
120 claims according to those provisions under the law
121 provided in the United States bankruptcy code. In
122 addition, as the same was previously intended by the
123 prior provisions of this section, this amendment and
124 reenactment is for the purpose of clarification of the
125 taxing authority of the workers' compensation division.

126 (d) Each self-insured employer shall elect whether or
127 not to self-insure its catastrophic injury risk as defined
128 in subsection (c), section one, article three of this chap-
129 ter.

130 (1) If the employer does not elect to self-insure its
131 catastrophic risk, then the employer shall pay premium
132 taxes for this coverage in the same manner as is provided
133 for in section four of this article and in rules adopted to
134 implement said section. Until such rules are adopted, the
135 employer's premium taxes shall be determined in accor-
136 dance with the provisions of chapter one hundred
137 seventy-four, acts of the Legislature, one thousand nine
138 hundred ninety-one. If the employees of such an em-
139 ployer suffer injury or death from a catastrophe, then the
140 payment of the resulting benefits shall be made from the
141 catastrophe reserve of the surplus fund provided for in
142 subsection (b), section one, article three of this chapter.
143 Such an employer's catastrophic liability shall not be
144 included in the liabilities upon which the employer's
145 security or bond is determined in subsection (a) of this
146 section.

147 (2) If an otherwise self-insured employer elects to self-
148 insure its catastrophic risk, then the security or bond
149 required in subsection (a) of this section shall include the
150 liability for the catastrophic risk.

151 (e) (1) Any self-insured employer who was, prior to the
152 second day of February, one thousand nine hundred
153 ninety-five, permitted to self-insure its second injury
154 risk as defined in subsection (d), section one, article
155 three of this chapter, may elect to continue to self-insure
156 its second injury risk for so long as it meets the require-
157 ments of this chapter. Any employer which was previ-
158 ously permitted to self-insure its second injury risk who
159 then elects to terminate that self-insurance status shall
160 not thereafter be permitted to self-insure its second
161 injury risk.

162 (2) For those employers previously permitted to self-
163 insure their second injury risks, the amount of the
164 security or bond required in subsection (a) of this section
165 shall include the liability for that risk. All benefits
166 provided for by this chapter which are awarded to the
167 employer's employees which constitute second injury life
168 awards shall then be paid by the employer and not the
169 division.

170 (3) (A) For those employers which do not self-insure
171 their second injury risk, the premium tax for second
172 injury coverage shall be determined by the rules which
173 implement section four of this article. Such rules may
174 provide for merit rate adjustments of the amount of
175 premium tax to be paid based upon the accrued costs to
176 be determined under generally accepted accounting
177 principles of second injury benefits paid and to be paid
178 to the employer's employees. Until such rules are adopt-
179 ed, the employer's premium taxes shall be determined in
180 accordance with the provisions of chapter one hundred
181 seventy-four, acts of the Legislature, one thousand nine
182 hundred ninety-one.

183 (B) In case there is a second injury to an employee of
184 any employer making such second injury premium tax
185 payments, the employer shall be liable to pay compensa-
186 tion or expenses arising from or necessitated by the
187 second injury and such compensation and expenses shall
188 be charged against the employer. After the completion of
189 these payments, the employee shall be paid the remain-
190 der of the compensation and expenses that would be due
191 for permanent total disability from the second injury
192 reserve of the surplus fund. Such additional compensa-
193 tion and expenses shall not be charged against such
194 employer.

195 (f) The compensation programs performance council
196 may create, implement, establish and administer a
197 perpetual self-insurance security risk pool of funds,

198 sureties, securities, insurance provided by private
199 insurance carriers or other states' programs, and other
200 property, of both real and personal properties, to secure
201 the payment of obligations of self-insured employers. If
202 such pool is created, the compensation programs perfor-
203 mance council shall adopt rules for the organizational
204 plan, participation, contributions and other payments
205 which may be required of self-insured employers under
206 this section. The council, in order to create and fund
207 such a risk pool, may adopt a rule authorizing the
208 division to assess each self-insured employer in propor-
209 tion according to each employer's portion of the unse-
210 cured obligation and liability or to assess according to
211 some other method provided for by rule which shall
212 properly create and fund such risk pool to serve the
213 needs of employees, employers, and the workers' com-
214 pensation fund by providing adequate security. The
215 council, in funding such security risk pool, may autho-
216 rize the division to use any assessments, premium tax
217 assessments and revenues and appropriations as may be
218 made available to the division.

219 (g) Any self-insured employer which has had a period
220 of inactivity due to the nonemployment of employees
221 which results in its reporting of no wages on quarterly
222 reports to the division for a period of four or more
223 consecutive quarters shall have its status at the division
224 inactivated and shall be required to apply for reactiva-
225 tion to status as a self-insured employer prior to its
226 reemployment of employees. Despite such inactivation,
227 the self-insured employer shall continue to make pay-
228 ments on all awards for which it is responsible. Upon
229 application for reactivation of its status as an operating
230 self-insured employer, the employer must document that
231 it meets the eligibility requirements needed to maintain
232 self-insured status under this section and any rules
233 adopted to implement it. If the employer is unable to
234 requalify and obtain approval for reactivation, the

235 employer shall, effective with the date of employment of
236 any employee, become a subscriber to the workers'
237 compensation fund, but shall continue to be a self-
238 insurer as to the prior period of active status and to
239 furnish security or bond and meet its prior self-insur-
240 ance obligations.

241 (h) In any case under the provisions of this section that
242 shall require the payment of compensation or benefits by
243 an employer in periodical payments and the nature of the
244 case makes it possible to compute the present value of all
245 future payments, then the division may, in its discretion,
246 at any time compute and permit to be paid into the
247 workers' compensation fund an amount equal to the
248 present value of all unpaid future payments on the
249 award or awards for which liability exists in trust.
250 Thereafter, such employer shall be discharged from any
251 further portion of premium tax liability upon such
252 award or awards and payment of the award or awards
253 shall be assumed by the division.

254 (i) Any employer subject to this chapter, who shall
255 elect to carry the employer's own risk by being self-
256 insured and who has complied with the requirements of
257 this section and of any applicable rules, shall not be
258 liable to respond in damages at common law or by
259 statute for the injury or death of any employee, however
260 occurring, after such election's approval and during the
261 period that the employer is allowed to carry the em-
262 ployer's own risk.

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

1 (a) If any employer shall sell or otherwise transfer
2 substantially all of the employer's assets, so as to give up
3 substantially all of the employer's capacity and ability to

4 continue in the business in which the employer has
5 previously engaged, then:

6 (1) Such employer's premium taxes, premium deposits,
7 interest and other payments owed to the division shall be
8 due and owing to the division upon the execution of the
9 agreement of sale or other transfer;

10 (2) Any repayment agreement entered into by the
11 employer with the division pursuant to section five of
12 this article shall terminate upon the execution of the
13 aforesaid agreement of sale or other transfer and all
14 amounts owed to the division but not yet paid shall
15 become due; and

16 (3) Upon execution of an agreement of sale or other
17 transfer, as aforesaid, the division shall continue to have
18 a lien, as provided for in section five-a of this article,
19 against all of the remaining property of the employer as
20 well as all of the sold or transferred assets, which lien
21 shall constitute a personal obligation of the employer.

22 (b) Notwithstanding any provisions of section five-a of
23 this article to the contrary, in the event that a new
24 employer acquires by sale or other transfer or assumes
25 all or substantially all of a predecessor employer's assets,
26 then:

27 (1) Any liens for payments owed to the division for
28 premium taxes, premium deposits, interest, penalty
29 premium rate or other payments owed to the division by
30 the predecessor employer shall be extended to the
31 successor employer;

32 (2) Any liens held by the division against the predeces-
33 sor employer's property shall be extended to all of the
34 assets of the successor employer;

35 (3) Liens acquired in the manner described in subdivi-
36 sions one and two of this subsection shall be enforceable
37 by the division to the same extent as provided for the

38 enforcement of liens against the predecessor employer in
39 section five-a of this article; and

40 (4) Unless all amounts owed by the predecessor em-
41 ployer are paid prior to or at the sale or other transfer,
42 prior defaults by a predecessor employer shall accrue to
43 the new employer for purposes of determining whether
44 the new employer is subject to the penalty premium rate
45 provisions of subdivision (1), subsection (f), section five
46 of this article.

47 (c) Notwithstanding the provisions of section five-a of
48 this article to the contrary, if any employer as described
49 in subsection (a) of this section shall sell or otherwise
50 transfer a portion of the employer's assets so as to affect
51 the employer's capacity to do business, then:

52 (1) Such employer's premium taxes, premium deposits,
53 interest, penalty premium rate and other payments owed
54 to the division shall be due and owing to the division
55 upon the execution of the agreement of sale or other
56 transfer;

57 (2) Any repayment agreement entered into by the
58 employer with the division pursuant to section five of the
59 article shall terminate upon the execution of the afore-
60 said agreement of sale or other transfer and all amounts
61 owed to the division but not yet paid shall become due;
62 and

63 (3) Upon execution of an agreement of sale or other
64 transfer, as aforesaid, the division shall continue to have
65 a lien, as provided for in section five-a of this article,
66 against all of the remaining property of the employer as
67 well as all the sold or transferred assets, which lien shall
68 constitute a personal obligation of the employer.

69 (d) If an employer subject to subsection (a), (b) or (c) of
70 this section pays to the division, prior to the execution of
71 an agreement of sale or other transfer, a sum sufficient
72 to retire all of the indebtedness that the employer would

73 owe at the time of the execution, then the division shall
74 issue a certificate to the employer stating that the em-
75 ployer's account is in good standing with the division
76 and that the assets may be sold or otherwise transferred
77 without the attachment of the division's lien. An agree-
78 ment of sale or other transfer may provide for the
79 creation of an escrow account into which the employers
80 shall pay the full amount owed to the division. The
81 subsequent timely payment of that full amount to the
82 division shall operate to place both employers in good
83 standing with the division to the extent of the predeces-
84 sor employer's liabilities retroactive to the date of sale or
85 other transfer. In the event that the employer would not
86 owe any sum to the division on the aforesaid date of
87 execution, then a certificate shall also be issued to the
88 employer upon the employer's request stating that the
89 employer's account is in good standing with the division
90 and that the assets may be sold or otherwise transferred
91 without the attachment of the division's lien.

92 (e) As used in this article, the term "assets" means all
93 property of whatever type in which the employer has an
94 interest including, but not limited to, good will, business
95 assets, customers, clients, contracts, access to leases such
96 as the right to sublease, assignment of contracts for the
97 sale of products, operations, stock of goods or inventory,
98 accounts receivable, equipment or transfer of substan-
99 tially all of its employees.

100 (f) The transfer of any assets of the employer shall be
101 presumed to be a transfer of all or substantially all of the
102 assets if the transfer affects the employer's capacity to
103 do business. The presumption can be overcome upon
104 petition presented and an administrative hearing in
105 accordance with section fifteen of this article and in
106 consideration of the factors thereunder.

107 (g) The foregoing provisions are expressly intended to
108 impose upon such successor employers the duty of

109 obtaining from the division or predecessor employer,
110 prior to the date of such acquisition, a valid "certificate
111 of good standing to transfer a business or business
112 assets" to verify that the predecessor employer's account
113 with the division is in good standing.

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

1 (a) At any time prior to or following the acquisition
2 described in subsection (a), (b) or (c), section fourteen of
3 this article, the buyer or other recipient may file a
4 certified petition with the division requesting that the
5 division waive the payment by the buyer or other recipi-
6 ent of premiums, premium deposits, interest and imposi-
7 tion of the modified rate of premiums attributable to the
8 predecessor employer or other penalty, or any combina-
9 tion thereof. The division shall review the petition by
10 considering the seven factors set forth below:

- 11 (1) The exact nature of the default;
- 12 (2) The amount owed to the division;
- 13 (3) The solvency of the fund;
- 14 (4) The financial condition of the buyer or other
15 recipient;
- 16 (5) The equities exhibited towards the fund by the
17 buyer or other recipient during the acquisition process;
- 18 (6) The potential economic impact upon the state and
19 the specific geographic area in which the buyer or other
20 recipient is to be or is located, if the acquisition were not
21 to occur; and
- 22 (7) Whether the assets are purchased in an arms-length
23 transaction.

24 Unless requested by a party or by the division, no
25 hearing need be held on the petition. However, any

26 decision made by the division on the petition shall be in
27 writing and shall include appropriate findings of fact
28 and conclusions of law. Such decision shall be effective
29 ten days following notice to the public of the decision
30 unless an objection is filed in the manner herein pro-
31 vided. Such notice shall be given by the division's filing
32 with the secretary of state, for publication in the state
33 register, of a notice of the decision. At the time of filing
34 the notice of its decision, the division shall also file with
35 the secretary of state a true copy of the decision. The
36 publication shall include a statement advising that any
37 person objecting to the decision must file, within ten
38 days after publication of the notice, a verified response
39 with the division setting forth the objection and the basis
40 therefor. If any such objection is filed, the division shall
41 hold an administrative hearing, conducted pursuant to
42 article five, chapter twenty-nine-a of this code, within
43 fifteen days of receiving the response unless the buyer or
44 other recipient consents to a later hearing. Nothing in
45 this subsection shall be construed to be applicable to the
46 seller or other transferor or to affect in any way a
47 proceeding under sections five and five-a of this article.

48 (b) In the factual situations set forth in subsection (a),
49 (b) or (c), section fourteen of this article, if the predeces-
50 sor's modified rate of premium tax, as calculated in
51 accordance with section four of this article, is greater
52 than the manual rate of premium tax, as calculated in
53 accordance with said section, for other employers in the
54 same class or group, then, if the new employer does not
55 already have a modified rate of premium, it shall also
56 assume the predecessor employer's modified rates for the
57 payment of premiums as determined under sections four
58 and five of this article until sufficient time has elapsed
59 for the new employer's experience record to be combined
60 with the experience record of the predecessor employer
61 so as to calculate the new employer's own modified rate
62 of premium tax. As provided for by subdivision (4),

63 subsection (b), section fourteen of this article, the new
64 employer may avoid this assumption of the predecessor's
65 rate of premium tax if all liabilities of the predecessor
66 are paid prior to or at the time of the sale or other
67 transfer.

ARTICLE 3. WORKERS' COMPENSATION FUND.

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

1 (a) The commissioner shall establish a workers' com-
2 pensation fund from the premiums and other funds paid
3 thereto by employers, as herein provided, for the benefit
4 of employees of employers who have paid the premiums
5 applicable to such employers and have otherwise com-
6 plied fully with the provisions of section five, article two
7 of this chapter, and for the benefit, to the extent else-
8 where in this chapter set out, of employees of employers
9 who have elected, under section nine, article two of this
10 chapter, to make payments into the surplus fund herein-
11 after provided for, and for the benefit of the dependents
12 of all such employees, and for the payment of the admin-
13 istration expenses of this chapter .

14 (b) A portion of all premiums that shall be paid into
15 the workers' compensation fund by subscribers not
16 electing to carry their own risk under section nine,
17 article two of this chapter, shall be set aside to create
18 and maintain a surplus fund to cover the catastrophe
19 hazard, the second injury hazard, and all losses not
20 otherwise specifically provided for in this chapter. The
21 percentage to be set aside shall be determined pursuant
22 to the rules adopted to implement section four, article
23 two of this chapter and shall be in an amount sufficient
24 to maintain a solvent surplus fund. All interest earned on
25 investments by the workers' compensation fund, which
26 is attributable to the surplus fund, shall be credited to
27 the surplus fund.

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

48 (d) (1) If an employee who has a definitely ascertain-
49 able physical impairment, caused by a previous occupa-
50 tional injury, occupational pneumoconiosis, or occupa-
51 tional disease, irrespective of its compensability, be-
52 comes permanently and totally disabled through the
53 combined effect of such previous injury and a second
54 injury received in the course of and as a result of his or
55 her employment, the employer shall be chargeable only
56 for the compensation payable for such second injury:
57 *Provided*, That in addition to such compensation, and
58 after the completion of the payments therefor, the
59 employee shall be paid the remainder of the compensa-
60 tion that would be due for permanent total disability out
61 of a special reserve of the surplus fund known as the
62 second injury reserve, created in the manner hereinbe-
63 fore set forth. The procedure by which the claimant's
64 request for a permanent total disability award under this

65 section is ruled upon shall require that the issue of the
66 claimant's degree of permanent disability first be
67 determined. Thereafter, by means of a separate order, a
68 decision shall be made as to whether the award shall be
69 a second injury award under this subsection or a perma-
70 nent total disability award to be charged to the em-
71 ployer's account or to be paid directly by the employer if
72 the employer has elected to be self-insured under the
73 provisions of section nine, article two of this chapter.

74 (2) If an employee of an employer, where the employer
75 has elected to carry his or her own risk under section
76 nine, article two of this chapter, and is permitted not to
77 make payments into the second injury reserve of surplus
78 fund under the provisions of that section, has a definitely
79 ascertainable physical impairment caused by a previous
80 occupational injury, occupational pneumoconiosis or
81 occupational disease, irrespective of its compensability,
82 and becomes permanently and totally disabled from the
83 combined effect of such previous injury and a second
84 injury received in the course of and as a result of his or
85 her employment, the employee shall be granted an award
86 of total permanent disability and his or her employer
87 shall, upon order of the division, compensate the said
88 employee in the same manner as if the total permanent
89 disability of the employee had resulted from a single
90 injury while in the employ of such employer.

91 (e) Employers electing, as herein provided, to compen-
92 sate individually and directly their injured employees
93 and their fatally injured employees' dependents shall do
94 so in the manner prescribed by the division, and shall
95 make all reports and execute all blanks, forms and
96 papers as directed by the division, and as provided in
97 this chapter.

**§23-3-4. Disbursements not considered as abandoned prop-
erty; interest to be retained.**

1 (a) All disbursements from the workers' compensation

2 fund and of the other funds created pursuant to this
3 chapter which might otherwise be presumed to be
4 abandoned and subject to the custody of the state as
5 unclaimed property under the provisions of article eight,
6 chapter thirty-six of this code shall be deposited by the
7 state treasurer to the credit of the workers' compensa-
8 tion fund or to such other affected fund.

9 (b) Notwithstanding any provision of law to the
10 contrary, all interest and other earnings accruing to the
11 investments and deposits of the workers' compensation
12 fund and of the other funds created pursuant to this
13 chapter shall be credited only to the account of the
14 workers' compensation fund or to such other affected
15 fund.

§23-3-5. Authorization to require the electronic invoices and transfers.

1 (a) The workers' compensation division is authorized to
2 establish a program to require the acceptance of dis-
3 bursements by electronic transfer from the workers'
4 compensation fund to employers, vendors and all others
5 lawfully entitled to receive such disbursements: *Pro-*
6 *vided*, That claimants may not be required to accept such
7 transfers but may elect to do so.

8 (b) The division is further authorized to establish a
9 program to require payments of deposits, premiums and
10 other funds into the workers' compensation fund by
11 electronic transfer of funds.

12 (c) The division is further authorized to establish a
13 program that invoices and other charges against the
14 workers' compensation fund may be submitted to the
15 division by electronic means.

16 (d) Any program authorized by this section must be
17 implemented through the issuance of a rule pursuant to
18 subdivisions (b) and (c), section seven, article three,
19 chapter twenty-one-a of this code.

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

§23-4-1a. Report of injuries by employee.

1 Every employee who sustains an injury subject to this
2 chapter, or his or her representative, shall immediately
3 on the occurrence of such injury or as soon thereafter as
4 practicable give or cause to be given to the employer or
5 any of the employer's agents a written notice of the
6 occurrence of such injury, with like notice or a copy
7 thereof to the workers' compensation division stating in
8 ordinary language the name and address of the employer,
9 the name and address of the employee, the time, place,
10 nature and cause of the injury, and whether temporary
11 total disability has resulted therefrom. Such notice shall
12 be given personally to the employer or any of the em-
13 ployer's agents, or may be sent by certified mail ad-
14 dressed to the employer at the employer's last known
15 residence or place of business. Such notice may be given
16 to the workers' compensation division by mail.

**§23-4-1c. Payment of temporary total disability benefits
directly to claimant; payment of medical bene-
fits; payments of benefits during protest; right of
division to collect payments improperly made.**

1 (a) In any claim for benefits under this chapter, the
2 workers' compensation division shall determine whether
3 the claimant has sustained a compensable injury within
4 the meaning of section one of this article and the division
5 shall enter an order giving all parties immediate notice
6 of such decision.

7 (1) The division may enter an order conditionally
8 approving the claimant's application if the division finds
9 that obtaining additional medical evidence or evalua-
10 tions or other evidence related to the issue of compensa-
11 bility would aid the division in making a correct final
12 decision. Benefits shall be paid during the period of
13 conditional approval; however, if the final decision is one
14 that rejects the claim, then any such payments shall be
15 considered an overpayment. The division may only

16 recover the amount of such an overpayment as provided
17 for in subsection (i) of this section.

18 (2) In making a determination regarding the com-
19 pensability of a newly filed claim or upon a filing for the
20 reopening of a prior claim pursuant to the provisions of
21 section sixteen of this article based upon an allegation of
22 recurrence, reinjury, aggravation or progression of the
23 previous compensable injury or in the case of a filing of
24 a request for any other benefits under the provisions of
25 this chapter, the division shall consider the date of the
26 filing of the claim for benefits for a determination of the
27 following:

28 (A) Whether the claimant had scheduled shutdown
29 beginning within one week of the date of the filing; or

30 (B) Whether the claimant received notice within sixty
31 days of the filing that his or her employment position
32 was to be eliminated, including, but not limited to, the
33 claimant's worksite, a layoff or the elimination of the
34 claimant's employment position; or

35 (C) Whether the claimant is receiving unemployment
36 compensation benefits at the time of the filing; or

37 (D) Whether the claimant has received unemployment
38 compensation benefits within sixty days of the filing.

39 In the event of an affirmative finding upon any of these
40 four factors, then such finding shall be given probative
41 weight in the overall determination of the compensabil-
42 ity of the claim or of the merits of the reopening request.

43 (3) Any party shall have the right to object to the order
44 of the division and obtain an evidentiary hearing as
45 provided in section one, article five of this chapter.

46 (b) Where it appears from the employer's report, or
47 from proper medical evidence, that a compensable injury
48 will result in a disability which will last longer than
49 three days as provided in section five of this article, the

50 division may immediately enter an order commencing
51 the payment of temporary total disability benefits to the
52 claimant in the amounts provided for in sections six and
53 fourteen of this article, and the payment of the expenses
54 provided for in subsection (a), section three of this
55 article, relating to said injury, without waiting for the
56 expiration of the thirty-day period during which objec-
57 tions may be filed to such findings as provided in section
58 one, article five of this chapter. The division shall enter
59 an order commencing the payment of temporary total
60 disability or medical benefits within fifteen days of
61 receipt of either the employee's or employer's report of
62 injury, whichever is received sooner, and also upon
63 receipt of either a proper physician's report or any other
64 information necessary for a determination. The division
65 shall give to the parties immediate notice of any order
66 granting temporary total disability or medical benefits.

67 (c) The division may enter orders granting temporary
68 total disability benefits upon receipt of medical evidence
69 justifying the payment of such benefits. In no claim shall
70 the division enter an order granting prospective tempo-
71 rary total disability benefits for a period of more than
72 ninety days: *Provided*, That when the division deter-
73 mines that the claimant remains disabled beyond the
74 period specified in the prior order granting temporary
75 total disability benefits, the division shall enter an order
76 continuing the payment of temporary total disability
77 benefits for an additional period not to exceed ninety
78 days, and shall give immediate notice to all parties of
79 such decision.

80 (d) Upon receipt of the first report of injury in claim,
81 the division shall request from the employer or employ-
82 ers any wage information necessary for determining the
83 rate of benefits to which the employee is entitled. If an
84 employer does not furnish the division with this informa-
85 tion within fifteen days from the date the division
86 received the first report of injury in the case, the em-

87 ployee shall be paid temporary total disability benefits
88 for lost time at the rate the division obtains from reports
89 made pursuant to section eleven, article ten, chapter
90 twenty-one-a of this code. If no such wages have been
91 reported, then the division shall make such payments at
92 the rate the division finds would be justified by the usual
93 rate of pay for the occupation of the injured employee.
94 The division shall adjust the rate of benefits both retro-
95 actively and prospectively upon receipt of proper wage
96 information. The division shall have access to all wage
97 information in the possession of any state agency.

98 (e) Subject to the limitations set forth in section
99 sixteen of this article, upon a finding of the division that
100 a claimant who has sustained a previous compensable
101 injury which has been closed by any order of the divi-
102 sion, or by the claimant's return to work, suffers further
103 temporary total disability or requires further medical or
104 hospital treatment resulting from the compensable
105 injury, the division shall immediately enter an order
106 commencing the payment of temporary total disability
107 benefits to the claimant in the amount provided for in
108 sections six and fourteen of this article, and the expenses
109 provided for in subsection (a), section three of this
110 article, relating to said disability, without waiting for the
111 expiration of the thirty-day period during which objec-
112 tions may be filed to such findings as provided in section
113 one, article five of this chapter. The division shall give
114 immediate notice to the parties of its order.

115 (f) Where the employer is a subscriber to the workers'
116 compensation fund under the provisions of article three
117 of this chapter, and upon the findings aforesaid, the
118 division shall mail all workers' compensation checks
119 paying temporary total disability benefits directly to the
120 claimant and not to the employer for delivery to the
121 claimant.

122 (g) Where the employer has elected to carry its own

123 risk under section nine, article two of this chapter, and
124 upon the findings aforesaid, the division shall immedi-
125 ately issue a pay order directing the employer to pay
126 such amounts as are due the claimant for temporary total
127 disability benefits. A copy of the order shall be sent to
128 the claimant. The self-insured employer shall commence
129 such payments by mailing or delivering the payments
130 directly to the employee within ten days of the date of
131 the receipt of the pay order by the employer. If the self-
132 insured employer believes that its employee is entitled to
133 benefits, the employer may start payments before
134 receiving a pay order from the division.

135 (h) In the event that an employer files a timely objec-
136 tion to any order of the division with respect to compen-
137 sability, or any order denying an application for modifi-
138 cation with respect to temporary total disability benefits,
139 or with respect to those expenses outlined in subsection
140 (a), section three of this article, the division shall con-
141 tinue to pay to the claimant such benefits and expenses
142 during the period of such disability. Where it is subse-
143 quently found by the division that the claimant was not
144 entitled to receive such temporary total disability
145 benefits or expenses, or any part thereof, so paid, the
146 division shall, when the employer is a subscriber to the
147 fund, credit said employer's account with the amount of
148 the overpayment; and, when the employer has elected to
149 carry its own risk, the division shall refund to such
150 employer the amount of the overpayment. The amounts
151 so credited to a subscriber or repaid to a self-insurer
152 shall be charged by the division to the surplus fund
153 created in section one, article three of this chapter.

154 (i) When the employer has protested the compensabil-
155 ity or applied for modification of a temporary total
156 disability benefit award or expenses and the final
157 decision in such case determines that the claimant was
158 not entitled to such benefits or expenses, the amount of
159 such benefits or expenses shall be considered overpaid.

160 The division may only recover the amount of such
161 benefits or expenses by withholding, in whole or in part,
162 as determined by the division, future permanent partial
163 disability benefits payable to the individual in the same
164 or other claims and credit such amount against the
165 overpayment until it is repaid in full.

166 (j) In the event that the division finds that based upon
167 the employer's report of injury, the claim is not compen-
168 sable, the division shall provide a copy of such em-
169 ployer's report to the claimant in addition to the order
170 denying the claim.

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

1 (a) If the division makes an award for permanent
2 partial or permanent total disability, the division or self-
3 insured employer shall start payment of benefits by
4 mailing or delivering the amount due directly to the
5 employee within fifteen days from the date of the award:
6 *Provided*, That the division may withhold payment of the
7 portion of the award that is the subject of the following
8 subsection until seventy-seven days have expired with-
9 out an objection being filed.

10 (b) On and after the first day of July, one thousand
11 nine hundred ninety-five, whenever the division, the
12 office of judges, or the workers' compensation appeal
13 board enters an order granting the claimant a permanent
14 total disability award and an objection or appeal is then
15 filed by the employer or the division, the division shall
16 begin the payment of monthly permanent total disability
17 benefits. However, any payment for a back period of
18 benefits from the onset date of total permanent disability
19 to the date of the award shall be limited to a period of
20 twelve months of benefits. If, after all litigation is
21 completed and the time for the filing of any further
22 objections or appeals to the award has expired, the
23 award of permanent total disability benefits is upheld,

24 then the claimant shall receive the remainder of benefits
25 due to him or her based upon the onset date of total
26 permanent disability that was finally determined.

27 (c) If the claimant is then owed any additional payment
28 of back permanent total disability benefits, then the
29 division shall not only pay the claimant the sum owed
30 but shall also add thereto interest at the simple rate of
31 six percent per annum from the date of the initial award
32 granting the total permanent disability to the date of the
33 final order upholding the award. In the event that an
34 intermediate order directed an earlier onset date of
35 permanent total disability than was found in the initial
36 award, the interest earning period for that additional
37 period shall begin upon the date of the intermediate
38 award. Any interest payable shall be charged to the
39 account of the employer or shall be paid by the employer
40 if it has elected to carry its own risk.

41 (d) If a timely protest to the award is filed, as provided
42 in section one or nine, article five of this chapter, the
43 division or self-insured employer shall continue to pay to
44 the claimant such benefits during the period of such
45 disability unless it is subsequently found that the
46 claimant was not entitled to receive the benefits, or any
47 part thereof, so paid, in which event the division shall,
48 where the employer is a subscriber to the fund, credit
49 said employer's account with the amount of the overpay-
50 ment; and, where the employer has elected to carry the
51 employer's own risk, the division shall refund to such
52 employer the amount of the overpayment. The amounts
53 so credited to a subscriber or repaid to a self-insurer
54 shall be charged by the division to the surplus fund
55 created by section one, article three of this chapter. If
56 the final decision in any case determines that a claimant
57 was not lawfully entitled to benefits paid to him or her
58 pursuant to a prior decision, such amount of benefits so
59 paid shall be deemed overpaid. The division may only
60 recover such amount by withholding, in whole or in part,

61 as determined by the division, future permanent partial
62 disability benefits payable to the individual in the same
63 or other claims and credit such amount against the
64 overpayment until it is repaid in full.

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

1 (a) The workers' compensation division shall establish
2 and alter from time to time as the division may deter-
3 mine to be appropriate a schedule of the maximum
4 reasonable amounts to be paid to health care providers,
5 providers of rehabilitation services, providers of durable
6 medical and other goods and providers of other supplies
7 and medically related items or other persons, firms or
8 corporations for the rendering of treatment or services to
9 injured employees under this chapter. The division also,
10 on the first day of each regular session and also from
11 time to time, as the division may consider appropriate,
12 shall submit the schedule, with any changes thereto, to
13 the Legislature. The promulgation of the schedule is not
14 subject to the legislative rule-making review procedures
15 established in sections nine through sixteen, article
16 three, chapter twenty-nine-a of this code.

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

20 (1) Such sums for health care services, rehabilitation
21 services, durable medical and other goods and other
22 supplies and medically related items as may be reason-
23 ably required. The division shall determine that which
24 is reasonably required within the meaning of this section
25 in accordance with the guidelines developed by the
26 health care advisory panel pursuant to section three-b of
27 this article: *Provided*, That nothing herein shall prevent
28 the implementation of guidelines applicable to a particu-
29 lar type of treatment or service or to a particular type of
30 injury before guidelines have been developed for other
31 types of treatment or services or injuries: *Provided*,
32 *however*, That any guidelines for utilization review
33 which are developed in addition to the guidelines
34 provided for in said section may be utilized by the
35 division until superseded by guidelines developed by the
36 health care advisory panel pursuant to said section.
37 Each health care provider who seeks to provide services
38 or treatment which are not within any such guideline
39 shall submit to the division specific justification for the
40 need for such additional services in the particular case
41 and the division shall have the justification reviewed by
42 a health care professional before authorizing any such
43 additional services. The division is authorized to enter
44 into preferred provider and managed care agreements.

45 (2) Payment for health care services, rehabilitation
46 services, durable medical and other goods and other
47 supplies and medically related items authorized under
48 this subsection may be made to the injured employee or
49 to the person, firm or corporation who or which has
50 rendered such treatment or furnished health care
51 services, rehabilitation services, durable medical or other
52 goods or other supplies and items, or who has advanced
53 payment for same, as the division may deem proper, but
54 no such payments or disbursements shall be made or
55 awarded by the division unless duly verified statements
56 on forms prescribed by the division shall be filed with

57 the division within two years after the rendering of such
58 treatment or the delivery of such goods, supplies or
59 items: *Provided*, That no payment hereunder shall be
60 made unless such verified statement shows no charge for
61 or with respect to such treatment or for or with respect
62 to any of the items specified above has been or will be
63 made against the injured employee or any other person,
64 firm or corporation, and when an employee covered
65 under the provisions of this chapter is injured in the
66 course of and as a result of his or her employment and is
67 accepted for health care services, rehabilitation services,
68 or the provision of durable medical or other goods or
69 other supplies or medically related items, the person,
70 firm or corporation rendering such treatment is hereby
71 prohibited from making any charge or charges therefor
72 or with respect thereto against the injured employee or
73 any other person, firm or corporation which would result
74 in a total charge for the treatment rendered in excess of
75 the maximum amount set forth therefor in the division's
76 schedule established as aforesaid.

77 (3) Any pharmacist filling a prescription for medica-
78 tion for a workers' compensation claimant shall dispense
79 a generic brand of the prescribed medication if a generic
80 brand exists. If a generic brand does not exist, then the
81 pharmacist may dispense the name brand. In the event
82 that a physician wishes to prescribe the use of the name
83 brand of a given prescription medication, then he or she
84 must indicate in his or her own handwriting on the
85 prescription order form that the brand name medication
86 is to be issued. In the event that a claimant wishes to
87 receive the name brand medication in lieu of the generic
88 brand and if the physician has not indicated that the
89 brand name is required, then the claimant may receive
90 the name brand medication but, in that event, the
91 claimant will be personally liable for the difference in
92 costs between the generic brand medication and the
93 brand name medication.

94 (4) In the event that a claimant elects to receive health
95 care services from a health care provider from outside of
96 the state of West Virginia and if that health care pro-
97 vider refuses to abide by and accept as full payment the
98 reimbursement made by the workers' compensation
99 division pursuant to the schedule of maximum reason-
100 able amounts of fees authorized by subsection (a) of this
101 section, then, with the exceptions noted below, the
102 claimant will be personally liable for the difference
103 between the scheduled fee and the amount demanded by
104 the out-of-state health care provider.

105 (A) In the event of an emergency where there is an
106 urgent need for immediate medical attention in order to
107 prevent the death of a claimant or to prevent serious and
108 permanent harm to the claimant, if the claimant receives
109 the emergency care from an out-of-state health care
110 provider who refuses to accept as full payment the
111 scheduled amount, then that claimant will not be person-
112 ally liable for the difference between the amount sched-
113 uled and the amount demanded by the health care
114 provider. Upon the claimant's attaining a stable medical
115 condition and being able to be transferred to either a
116 West Virginia health care provider or an out-of-state
117 health care provider who has agreed to accept the
118 scheduled amount of fees as payment in full, if such
119 claimant refuses to seek the specified alternative health
120 care providers, then he or she will be personally liable
121 for the difference in costs between the scheduled amount
122 and the amount demanded by the health care provider
123 for services provided after attaining stability and being
124 able to be transferred.

125 (B) In the event that there is no health care provider
126 reasonably near to the claimant's home who is qualified
127 to provide the claimant's needed medical services and
128 who is either located in the state of West Virginia or who
129 has agreed to accept as payment in full the scheduled
130 amounts of fees, then the division upon application by

131 the claimant may authorize the claimant to receive
132 medical services from another health care and such
133 claimant shall not be personally liable for the difference
134 in costs between the scheduled amount and the amount
135 demanded by the health care provider.

*Old
provider*

136 (b) No employer shall enter into any contracts with any
137 hospital, its physicians, officers, agents or employees to
138 render medical, dental or hospital service or to give
139 medical or surgical attention therein to any employee for
140 injury compensable within the purview of this chapter,
141 and no employer shall permit or require any employee to
142 contribute, directly or indirectly, to any fund for the
143 payment of such medical, surgical, dental or hospital
144 service within such hospital for such compensable
145 injury. Any employer violating this section shall be
146 liable in damages to the employer's employees as pro-
147 vided in section eight, article two of this chapter, and
148 any employer or hospital or agent or employee thereof
149 violating the provisions of this section shall be guilty of
150 a misdemeanor, and, upon conviction thereof, shall be
151 punished by a fine not less than one hundred dollars nor
152 more than one thousand dollars or by imprisonment not
153 exceeding one year, or both: *Provided*, That the forego-
154 ing provisions of this subsection shall not be deemed to
155 prohibit an employer from participating in a preferred
156 provider organization or program or a health mainte-
157 nance organization or managed care organization or
158 other medical cost containment relationship with the
159 providers of medical, hospital or other health care:
160 *Provided, however*, That nothing in this section shall be
161 deemed to restrict the right of a claimant to select his or
162 her initial health care provider for treatment of a com-
163 pensable injury or disease. Should such a claimant
164 thereafter wish to change his or her health care provider
165 and if his or her employer has established and maintains
166 a managed health care program consisting of a preferred
167 provider organization or program, a health maintenance

168 organization, then the claimant shall select a new health
169 care provider through such managed care program.
170 Moreover, if the division enters into an agreement which
171 has been approved by the compensation programs
172 performance council with a preferred provider organiza-
173 tion or program, a health maintenance organization or
174 other health care delivery organization or organizations,
175 then if a claimant seeks to change his or her initial
176 choice of health care provider and if the claimant's
177 employer does not provide access to such an organization
178 as part of the employer's general health insurance
179 benefit, then the claimant shall be provided with a new
180 health care provider from the division's preferred
181 provider organization or program, health maintenance
182 organization or other health care delivery organization
183 or organizations available to him or her.

184 (c) When an injury has been reported to the division by
185 the employer without protest, the division may pay, or
186 order an employer who or which made the election and
187 who or which received the permission mentioned in
188 section nine, article two of this chapter to pay, within
189 the maximum amount provided by schedule established
190 by the division as aforesaid, bills for health care services
191 without requiring the injured employee to file an appli-
192 cation for benefits.

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

203 (e) No payment shall be made to a health care provider

204 who is suspended or terminated under the terms of
205 section three-c of this article except as provided in
206 subsection (c) of said section.

207 (f) The division is authorized to engage in and contract
208 for medical cost containment programs, medical case
209 management programs and utilization review programs.
210 Payments for these programs shall be made from the
211 supersedeas reserve of the surplus fund. Any order
212 issued pursuant to any such program shall be interlocu-
213 tory in nature until an objecting party has exhausted all
214 review processes provided for by the division.

215 (g) Notwithstanding the foregoing, the division may
216 establish fee schedules, make payments and take other
217 actions required or allowed pursuant to article twenty-
218 nine-d, chapter sixteen of this code.

**§23-4-4. Funeral expenses; wrongfully seeking payment;
criminal penalties.**

1 (a) In case the personal injury causes death, reasonable
2 funeral expense, in an amount to be fixed from time to
3 time by the division, shall be paid from the fund, pay-
4 ment to be made to the persons who have furnished the
5 services and supplies, or to the persons who have ad-
6 vanced payment for same, as the division may deem
7 proper, in addition to such award as may be made to the
8 employee's dependents.

9 (b) A funeral director, or any person who furnished the
10 services and supplies associated with the funeral ex-
11 penses, or a person who has advanced payment for same,
12 is prohibited from making any charge or charges against
13 the employee's dependents for funeral expenses which
14 would result in a total charge for funeral expenses in
15 excess of the amount fixed by the division unless:

16 (1) The person seeking funeral expenses notifies, in
17 writing and prior to the rendering of any service, the
18 employee's dependent as to the exact cost of the service

19 and the exact amount the employee's dependent would
20 be responsible for paying in excess of the amount fixed
21 by the division; and

22 (2) The person seeking funeral expenses secures, in
23 writing and prior to the rendering of any service, consent
24 from the employee's dependent that he or she will be
25 responsible to make payment for the amount in excess of
26 the amount fixed by the division.

27 (c) Any person who knowingly and willfully seeks or
28 receives payment of funeral expenses in excess of the
29 amount fixed by the division without satisfying both of
30 the requirements of subsection (b) of this section is guilty
31 of a misdemeanor, and, upon conviction thereof, shall be
32 fined three thousand dollars or confined in jail for a
33 definite term of confinement of twelve months, or both.

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

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

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

12 (b) If the injury causes temporary total disability, the
13 employee shall receive during the continuance thereof a
14 maximum weekly benefit to be computed on the basis of
15 seventy percent of the average weekly wage earnings,
16 wherever earned, of the injured employee, at the date of
17 injury, not to exceed one hundred percent of the average
18 weekly wage in West Virginia: *Provided*, That in the
19 case of a claimant whose injury occurred prior to the

20 second day of February, one thousand nine hundred
21 ninety-five, the maximum benefit rate shall be the rate
22 applied under the prior enactment of this subsection
23 which was in effect at the time the injury occurred, and
24 the rate shall not be affected by the amendment and
25 reenactment of this section during the regular session of
26 the Legislature in the year one thousand nine hundred
27 ninety-five.

28 The minimum weekly benefits paid hereunder shall not
29 be less than thirty-three and one-third percent of the
30 average weekly wage in West Virginia, except as pro-
31 vided in section six-d and section nine of this article. In
32 no event, however, shall such minimum weekly benefits
33 exceed the level of benefits determined by use of the
34 then applicable federal minimum hourly wage: *Pro-*
35 *vided*, That any claimant receiving permanent total
36 disability benefits, permanent partial disability benefits
37 or dependents' benefits prior to the first day of July, one
38 thousand nine hundred ninety-four, shall not have his or
39 her benefits reduced based upon the requirement herein
40 that the minimum weekly benefit shall not exceed the
41 applicable federal minimum hourly wage.

42 (c) Subdivision (b) of this section shall be limited as
43 follows: Aggregate award for a single injury causing
44 temporary disability shall be for a period not exceeding
45 two hundred eight weeks.

46 (d) For all awards of permanent total disability bene-
47 fits that are made on or after the second day of February,
48 one thousand nine hundred ninety-five, including those
49 claims in which a request for an award was pending
50 before the division or which were in litigation but not yet
51 submitted for a decision, then benefits shall be payable
52 until the claimant attains the age necessary to receive
53 federal old age retirement benefits under the provisions
54 of the Social Security Act, 42 U.S.C. 401 and 402, in
55 effect on the effective date of this section. Such a

56 claimant shall be paid benefits so as not to exceed a
57 maximum benefit of sixty-six and two-thirds percent of
58 the claimant's average weekly wage earnings, wherever
59 earned, at the time of the date of injury not to exceed one
60 hundred percent of the average weekly wage in West
61 Virginia. The minimum weekly benefits paid hereunder
62 shall be as is provided for in subdivision (b) of this
63 section. In all claims in which an award for permanent
64 total disability benefits was made prior to the second day
65 of February, one thousand nine hundred ninety-five,
66 such awards shall continue to be paid at the rate in
67 effect prior to the such date, subject to annual adjust-
68 ments for changes in the average weekly wage in West
69 Virginia: *Provided*, That the provisions of sections one
70 through eight of article four-a of this chapter shall be
71 applied thereafter to all such prior awards that were
72 previously subject to its provisions. A single or aggre-
73 gate permanent disability of eighty-five percent or more
74 shall entitle the employee to a rebuttable presumption of
75 a permanent total disability for the purpose of paragraph
76 (2), subdivision (n) of this section: *Provided, however*,
77 That the claimant must also be at least fifty percent
78 medically impaired upon a whole body basis. The
79 presumption may be rebutted if the evidence establishes
80 that the claimant is not permanently and totally disabled
81 pursuant to subdivision (n) of this section. Under no
82 circumstances shall the division grant an additional
83 permanent disability award to a claimant receiving a
84 permanent total disability award: *Provided further*,
85 That if any claimant thereafter sustains another compen-
86 sable injury and has permanent partial disability result-
87 ing therefrom, the total permanent disability award
88 benefit rate shall be computed at the highest benefit rate
89 justified by any of the compensable injuries, and the cost
90 of any increase in the permanent total disability benefit
91 rate shall be paid from the second injury reserve created
92 by section one, article three of this chapter.

93 (e) (1) For all awards made on or after the second day
94 of February, one thousand nine hundred ninety-five, if
95 the injury causes permanent disability less than perma-
96 nent total disability, the percentage of disability to total
97 disability shall be determined and the award computed
98 on the basis of four weeks' compensation for each
99 percent of disability determined, at the maximum or
100 minimum benefit rates provided for in subdivision (d) of
101 this section: *Provided*, That in the case of a claimant
102 whose injury occurred prior to the second day of Febru-
103 ary, one thousand nine hundred ninety-five, the maxi-
104 mum benefit rate shall be the rate applied under the
105 prior enactment of this section which was in effect at the
106 time the injury occurred, and the rate shall not be
107 affected by the amendment and reenactment of this
108 section during the regular session of the Legislature in
109 the year one thousand nine hundred ninety-five.

110 (2) If a claimant is released by his or her treating
111 physician to return to work at the job he or she held
112 before the occupational injury occurred and if the
113 claimant's preinjury employer does not offer the pre-
114 injury job or a comparable job to the employee when
115 such a position is available to be offered, then the award
116 for the percentage of partial disability shall be computed
117 on the basis of six weeks of compensation for each
118 percent of disability.

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

122 (f) If the injury results in the total loss by severance of
123 any of the members named in this subdivision, the
124 percentage of disability shall be determined by the
125 percentage of disability, specified in the following table:

126 The loss of a great toe shall be considered a ten percent
127 disability.

128 The loss of a great toe (one phalanx) shall be consid-
129 ered a five percent disability.

130 The loss of other toes shall be considered a four
131 percent disability.

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

134 The loss of all toes shall be considered a twenty-five
135 percent disability.

136 The loss of forepart of foot shall be considered a thirty
137 percent disability.

138 The loss of a foot shall be considered a thirty-five
139 percent disability.

140 The loss of a leg shall be considered a forty-five
141 percent disability.

142 The loss of thigh shall be considered a fifty percent
143 disability.

144 The loss of thigh at hip joint shall be considered a sixty
145 percent disability.

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

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

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

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

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

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

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

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

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

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

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

168 The loss of index and middle finger shall be considered
169 a twenty percent disability.

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

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

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

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

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

180 The loss of four fingers shall be considered a thirty-two
181 percent disability.

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

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

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

188 The total and irrecoverable loss of the sight of one eye
189 shall be considered a thirty-three percent disability. For
190 the partial loss of vision in one, or both eyes, the per-
191 centages of disability shall be determined by the divi-
192 sion, using as a basis the total loss of one eye.

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

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

202 Should a claimant sustain a compensable injury which
203 results in the total loss by severance of any of the bodily
204 members named in this subdivision, die from sickness or
205 noncompensable injury before the division makes the
206 proper award for such injury, the division shall make
207 such award to claimant's dependents as defined in this
208 chapter, if any; such payment to be made in the same
209 installments that would have been paid to claimant if
210 living: *Provided*, That no payment shall be made to any
211 surviving spouse of such claimant after his or her
212 remarriage, and that this liability shall not accrue to the
213 estate of such claimant and shall not be subject to any
214 debts of, or charges against, such estate.

215 (g) Should a claimant to whom has been made a
216 permanent partial award die from sickness or noncom-
217 pensable injury, the unpaid balance of such award shall
218 be paid to claimant's dependents as defined in this
219 chapter, if any; such payment to be made in the same
220 installments that would have been paid to claimant if
221 living: *Provided*, That no payment shall be made to any
222 surviving spouse of such claimant after his or her
223 remarriage, and that this liability shall not accrue to the

224 estate of such claimant and shall not be subject to any
225 debts of, or charges against, such estate.

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

229 (i) For the purposes of this chapter, with the exception
230 of those injuries provided for in subdivision (f) of this
231 section and in section six-b of this article, the degree of
232 permanent disability other than permanent total disabili-
233 ty shall be determined exclusively by the degree of
234 whole body medical impairment that a claimant has
235 suffered. For those injuries provided for in subdivision
236 (f) of this section and section six-b of this article, the
237 degree of disability shall be determined exclusively by
238 the provisions of said subdivision and said section. The
239 occupational pneumoconiosis board created pursuant to
240 section eight-a of this article shall premise its decisions
241 on the degree of pulmonary function impairment that
242 claimants suffer solely upon whole body medical impair-
243 ment. The workers' compensation division shall adopt
244 standards for the evaluation of claimants and the
245 determination of a claimant's degree of whole body
246 medical impairment. Once the degree of medical impair-
247 ment has been determined, that degree of impairment
248 shall be the degree of permanent partial disability that
249 shall be awarded to the claimant. This subdivision shall
250 be applicable to all injuries incurred and diseases with
251 a date of last exposure on or after second day of Febru-
252 ary, one thousand nine hundred ninety-five, to all
253 applications for an award of permanent partial disability
254 made on and after such date, and to all applications for
255 an award of permanent partial disability that were
256 pending before the division or pending in litigation but
257 not yet submitted for decision on and after such date.
258 The prior provisions of this subdivision shall remain in
259 effect for all other claims.

260 (j) From a list of names of seven persons submitted to
261 the commissioner by the health care advisory panel, the
262 commissioner shall appoint an interdisciplinary examin-
263 ing board consisting of five members to evaluate claim-
264 ants, including by examination if the board so elects. The
265 board shall be composed of three qualified physicians
266 with specialties and expertise qualifying them to evalu-
267 ate medical impairment and two vocational rehabilita-
268 tion specialists who are qualified to evaluate the ability
269 of a claimant to perform gainful employment with or
270 without retraining. One member of the board shall be
271 designated annually as chairperson by the commissioner.
272 The term of office of each member of the board shall be
273 six years and until his or her successor has been ap-
274 pointed and has qualified: *Provided*, That two of the
275 persons initially appointed shall serve a term of six
276 years, two of the remaining persons shall serve a term of
277 four years; and the remaining member shall serve a term
278 of two years. Any member of the board may be ap-
279 pointed to any number of terms. Any two physician
280 members and one vocational rehabilitation specialist
281 member shall constitute a quorum for the transaction of
282 business. The commissioner, from time to time, shall fix
283 the per diem salary, computed on the basis of actual time
284 devoted to the discharge of their duties, to be paid to
285 each member of the board, and the members shall also be
286 entitled to reasonable and necessary traveling and other
287 expenses incurred while actually engaged in the perfor-
288 mance of their duties.

289 (1) Prior to the referral of any issue to the interdisci-
290 plinary examining board, the division shall conduct such
291 examinations of the claimant as it finds necessary and
292 obtain all pertinent records concerning the claimant's
293 medical history and reports of examinations and forward
294 them to the board at the time of the referral. The
295 division shall provide adequate notice to the employer of
296 the filing of the request for a permanent total disability

297 award and the employer shall be granted an appropriate
298 period in which to respond to the request. The claimant
299 and the employer may furnish all pertinent information
300 to the board and shall furnish to the board any informa-
301 tion requested by the board. The claimant and the
302 employer may each submit no more than one report and
303 opinion regarding each issue present in a given claim.
304 The employer shall be entitled to have the claimant
305 examined by medical specialists and vocational rehabili-
306 tation specialists: *Provided*, That the employer is entitled
307 to only one such examination on each issue present in a
308 given claim. Any additional examinations must be
309 approved by the division and shall be granted only upon
310 a showing of good cause. The reports from all employer-
311 conducted examinations must be filed with the board
312 and served upon the claimant. The board may request
313 that those persons who have furnished reports and
314 opinions regarding a claimant provide it with such
315 additional information as the board may deem necessary.
316 Both the claimant and the employer, as well as the
317 division, may submit reports from experts challenging or
318 supporting the other reports in the record regardless of
319 whether or not such an expert examined the claimant or
320 relied solely upon the evidence of record.

321 (2) If the board or a quorum thereof elects to examine
322 a claimant, the individual members shall conduct such
323 examinations as are pertinent to each of their specialties.
324 If a claim presents an issue beyond the expertise of the
325 board, the board may obtain advice or evaluations by
326 other specialists. In addition, if the compensation
327 programs performance council determines that the
328 number of applications pending before the board has
329 exceeded the level at which the board can review and
330 make recommendations within a reasonable time, then
331 the council may authorize the commissioner to appoint
332 such additional members to the board as may be neces-
333 sary to reduce the backlog of applications. Such addi-

334 tional members shall be recommended by the health care
335 advisory panel and the commissioner may make such
336 appointments as he or she chooses from the recommen-
337 dations. The additional board members shall not serve
338 a set term but shall serve until the council determines
339 that the number of pending applications has been
340 reduced to an acceptable level.

341 (3) Referrals to the board shall be limited to matters
342 related to the determination of permanent total disabil-
343 ity under the provisions of subdivision (n) of this section
344 and to questions related to medical cost containment
345 decisions, utilization review decisions, and managed care
346 decisions arising under section three of this article.

*ok
100*

347 (4) In the event the board members elect to examine a
348 claimant, the board shall prepare a report stating the
349 tests, examinations, procedures and other observations
350 that were made, the manner in which each was con-
351 ducted, and the results of each. The report shall state
352 the findings made by the board and the reasons therefor.
353 Copies of the reports of all such examinations shall be
354 served upon the parties and the division and each shall
355 be given an opportunity to respond in writing to the
356 findings and conclusions stated in the reports.

357 (5) The board shall state its initial recommendations to
358 the division in writing with an explanation for each such
359 recommendation setting forth the reasons for each. The
360 recommendations shall be served upon the parties and
361 the division and each shall be afforded a thirty-day
362 opportunity to respond in writing to the board regarding
363 the board's recommendations. The board shall then
364 review any such responses and issue its final recommen-
365 dations. The final recommendations shall then be
366 effectuated by the entry of an appropriate order by the
367 division.

368 (6) Except as noted below, objections pursuant to
369 section one, article five of this chapter to any such order

370 shall be limited in scope to matters within the record
371 developed before the workers' compensation division
372 and the board and shall further be limited to the issue of
373 whether the board properly applied the standards for
374 determining medical impairment, if applicable, and the
375 issue of whether the board's findings are clearly wrong
376 in view of the reliable, probative and substantial evi-
377 dence on the whole record. Should either party contend
378 that the claimant's condition has changed significantly
379 since the review conducted by the board, the party may
380 file a motion with the administrative law judge, together
381 with a report supporting that assertion. Upon the filing
382 of such motion, the administrative law judge shall cause
383 a copy of the report to be sent to the examining board
384 asking, the board to review the report and provide such
385 comments as the board chooses within sixty days of the
386 board's receipt of the report. The board may then either
387 supply such comments or, at the board's discretion,
388 request that the claim be remanded to the board for
389 further review by the board. If remanded, the claimant
390 is not required to submit to further examination by the
391 employer's medical specialists or vocational rehabilita-
392 tion specialists. Following any such remand, the board
393 shall file its recommendations with the administrative
394 law judge for his or her review. If the board elects to
395 respond with comments, such comments shall be filed
396 with the administrative law judge for his or her review.
397 Following the receipt of either the board's recommenda-
398 tions or comment, the administrative law judge shall
399 then issue a written decision ruling upon the asserted
400 change in the claimant's condition. No additional
401 evidence may be introduced during the review of the
402 objection before the office of judges or elsewhere on
403 appeal: *Provided*, That each party and the division may
404 submit one written opinion on each issue pertinent to a
405 given claim based upon a review of the evidence of
406 record either challenging or defending the board's
407 findings and conclusions. Thereafter, based upon the

408 evidence then of record, the administrative law judge
409 shall issue a written decision containing his or her
410 findings of fact and conclusions of law regarding each
411 issue involved in the objection.

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

416 (l) Except as otherwise specifically provided in this
417 chapter, temporary total disability benefits payable
418 under subdivision (b) of this section shall not be deduct-
419 ible from permanent partial disability awards payable
420 under subdivision (e) or (f) of this section. Compensa-
421 tion, either temporary total or permanent partial, under
422 this section shall be payable only to the injured employee
423 and the right thereto shall not vest in his or her estate,
424 except that any unpaid compensation which would have
425 been paid or payable to the employee up to the time of
426 his or her death, if he or she had lived, shall be paid to
427 the dependents of such injured employee if there be such
428 dependents at the time of death.

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

431 Loss of both eyes or the sight thereof.

432 Loss of both hands or the use thereof.

433 Loss of both feet or the use thereof.

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

435 (n) (1) Other than for those injuries specified in subdivi-
436 sion (m) of this section, in order to be eligible to apply
437 for an award of permanent total disability benefits for
438 all injuries incurred and all diseases, including occupa-
439 tional pneumoconiosis, with a date of last exposure on
440 and after the second day of February, one thousand nine
441 hundred ninety-five, and for all requests for such an

442 award pending before the division on and after the
443 second day of February, one thousand nine hundred
444 ninety-five, a claimant must have been awarded the sum
445 of fifty percent in prior permanent partial disability
446 awards or have suffered an occupational injury or
447 disease which results in a finding that the claimant has
448 suffered a medical impairment of fifty percent. Upon
449 filing such an application, the claim will be reevaluated
450 by the examining board pursuant to subdivision (j) of
451 this section to determine if he or she has suffered a
452 whole body medical impairment of fifty percent or more
453 resulting from either a single occupational injury or
454 occupational disease or a combination of occupational
455 injuries and occupational diseases. A claimant whose
456 prior permanent partial disability awards total eighty-
457 five percent or more shall also be examined by the board
458 and must be found to have suffered a whole body medi-
459 cal impairment of fifty percent in order for his or her
460 request to be eligible for further review. The examining
461 board shall review the claim as provided for in subdivi-
462 sion (j) of this section. If the claimant has not suffered
463 whole body medical impairment of at least fifty percent,
464 then the request shall be denied. Upon a finding that the
465 claimant does have a fifty percent whole body medical
466 impairment, then the review of the application shall
467 continue as provided for in the following paragraph of
468 this subdivision. Those claimants whose prior perma-
469 nent partial disability awards total eighty-five percent
470 or more and who have been found to have a whole body
471 medical impairment of at least fifty percent shall then be
472 entitled to the rebuttable presumption created pursuant
473 to subdivision (d) for the remaining issues in the request.
474 For the purposes of determining whether the claimant
475 should be awarded a permanent total disability benefits
476 under the second injury provisions of subsection (d),
477 section one, article three of this code, only a combination
478 of occupational injuries and occupational diseases,
479 including occupational pneumoconiosis, shall be consid-

480 ered.

481 (2) A disability which renders the injured employee
482 unable to engage in substantial gainful activity requiring
483 skills or abilities comparable to those of any gainful
484 activity in which he or she has previously engaged with
485 some regularity and over a substantial period of time
486 shall be considered in determining the issue of total
487 disability. In addition, the vocational standards adopted
488 pursuant to subsection (m), section seven, article three,
489 chapter twenty-one-a of this code shall be considered
490 once they are effective.

491 (3) In the event that a claimant, who has been found to
492 have at least a fifty percent whole body medical impair-
493 ment, is denied an award of permanent total disability
494 benefits pursuant to this subdivision and then accepts
495 and continues to work at a lesser paying job than he or
496 she previously held, then such a claimant shall be
497 eligible, notwithstanding the provisions of section nine
498 of this article, to receive temporary partial rehabilitation
499 benefits for a period of four years. Such benefits shall be
500 paid at the level necessary to ensure the claimant's
501 receipt of the following percentages of the average
502 weekly wage earnings of the claimant at the time of
503 injury calculated as provided in this section and sections
504 six-d and fourteen of this article:

505 (A) Eighty percent for the first year;

506 (B) Seventy percent for the second year;

507 (C) Sixty percent for the third year; and

508 (D) Fifty percent for the fourth year:

509 *Provided*, That in no event shall such benefits exceed
510 one hundred percent of the average weekly wage in West
511 Virginia. In no event shall such benefits be subject to the
512 minimum benefit amounts required by the provisions of
513 subdivision (b) of this section.

§23-4-6a. Benefits and mode of payment to employees and dependents for occupational pneumoconiosis; further adjustment of claim for occupational pneumoconiosis.

1 If an employee is found to be permanently disabled due
2 to occupational pneumoconiosis, as defined in section
3 one of this article, the percentage of permanent disabili-
4 ty shall be determined by the degree of medical impair-
5 ment that is found by the occupational pneumoconiosis
6 board. The division shall enter an order setting forth the
7 findings of the occupational pneumoconiosis board with ^{the}
8 regard to whether the claimant has occupational pneu- ^{OK}
9 moconiosis and the degree of medical impairment, if any, ^{rec}
10 resulting therefrom. That order shall be the final
11 decision of the division for purposes of section one,
12 article five of this chapter. If such a decision is objected
13 to, the office of judges shall affirm the decision of
14 occupational pneumoconiosis board made following
15 hearing unless the decision is clearly wrong in view of
16 the reliable, probative and substantial evidence on the
17 whole record. Compensation shall be paid therefor in the
18 same manner and at the same rate as is provided for
19 permanent disability under the provisions of subdivi-
20 sions (d), (e), (g), (h), (i), (j), (k), (m) and (n), section six of
21 this article: *Provided*, That if it shall be determined by
22 the division in accordance with the facts in the case and
23 with the advice and recommendation of the occupational
24 pneumoconiosis board that an employee has occupa-
25 tional pneumoconiosis, but without measurable pulmo-
26 nary impairment therefrom, such employee shall be
27 awarded and paid twenty weeks of benefits at the same
28 benefit rate as hereinabove provided.

29 If the employee dies from occupational pneumoconio-
30 sis, the benefits shall be as provided for in section ten of
31 this article; as to such benefits sections eleven to four-
32 teen, inclusive, of this article shall apply.

33 In cases of permanent disability or death due to
34 occupational pneumoconiosis, as defined in section one
35 of this article, accompanied by active tuberculosis of the
36 lungs, compensation shall be payable as for disability or
37 death due to occupational pneumoconiosis alone.

38 The provisions of section sixteen, article four and
39 sections two, three, four and five, article five of this
40 chapter providing for the further adjustment of claims
41 shall be applicable to the claim of any claimant who
42 receives a permanent partial disability award for occu-
43 pational pneumoconiosis.

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

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

**§23-4-7. Release of medical information to employer; legisla-
tive findings; effect of application for benefits;
duty of employer.**

1 (a) The Legislature hereby finds and declares that two
2 of the primary objectives of the workers' compensation
3 system established by this chapter are to provide bene-
4 fits to an injured claimant promptly and to effectuate his
5 or her return to work at the earliest possible time; that
6 the prompt dissemination of medical information to the

7 division and employer as to diagnosis, treatment and
8 recovery is essential if these two objectives are to be
9 achieved; that claimants are increasingly burdened with
10 the task of contacting their treating physicians to
11 request the furnishing of detailed medical information to
12 the division and their employers; that the division is
13 increasingly burdened with the administrative responsi-
14 bility of providing copies of medical reports to the
15 employer involved, whereas in other states the employer
16 can obtain the necessary medical information direct
17 from the treating physician; that much litigation is
18 occasioned in this state because of a lack of medical
19 information having been received by the employer as to
20 the continuing disability of a claimant; and that detailed
21 narrative reports from the treating physician are often
22 necessary in order for the division, the claimant's
23 representatives and the employer to evaluate a claim and
24 determine whether additional or different treatment is
25 indicated.

26 (b) In view of the foregoing findings, a claimant
27 irrevocably agrees by the filing of his or her application
28 for benefits that any physician may release to and orally
29 discuss with the claimant's employer, or its representa-
30 tive, or with a representative of the division from time to
31 time the claimant's medical history and any medical
32 reports pertaining to the occupational injury or disease
33 and to any prior injury or disease of the portion of the
34 claimant's body to which a medical impairment is
35 alleged containing detailed information as to the claim-
36 ant's condition, treatment, prognosis and anticipated
37 period of disability and dates as to when the claimant
38 will reach or has reached his maximum degree of im-
39 provement or will be or was released to return to work.
40 For the exclusive purposes of this chapter, the patient-
41 physician privilege of confidentiality is waived with
42 regard to the physician's providing this medical informa-
43 tion to the division, the employer, or to the employer's

44 representative. Whenever a copy of any such medical
45 report is obtained by the employer or its representative
46 and the physician has not also forwarded a copy of the
47 same to the division, the employer shall forward a copy
48 of such medical report to the division within ten days
49 from the date such employer received the same from
50 such physician.

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

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

11 (b) In view of the foregoing findings, the division, in
12 consultation with the health care advisory panel, shall
13 establish guidelines as to the anticipated period of
14 disability for the various types of injuries. Each injury
15 claim in which temporary total disability continues
16 beyond the anticipated period of disability so established
17 for the injury involved shall be reviewed by the division.
18 If satisfied, after reviewing the medical evidence, that
19 the claimant would not benefit by an independent
20 medical evaluation, the division shall mark the claim file
21 accordingly and shall diary such claim file as to the next
22 date for required review which shall not exceed sixty
23 days. If the division concludes that the claimant might

24 benefit by an independent medical evaluation, the
25 division shall proceed as specified in subsections (d) and
26 (e) of this section.

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

35 (1) If the authorized treating physician recommends a
36 permanent partial disability award of fifteen percent or
37 less, the division shall enter an award of permanent
38 partial disability benefits based upon such recommenda-
39 tion and all other available information, and the claim-
40 ant's entitlement to temporary total disability benefits
41 shall cease upon the entry of such award unless previ-
42 ously terminated under the provisions of subsection (e)
43 of this section.

44 (2) If, however, the authorized treating physician
45 recommends a permanent partial disability award in
46 excess of fifteen percent, or recommends a permanent
47 total disability award, the claimant's entitlement to
48 temporary total disability benefits shall cease upon the
49 receipt by the division of such report and the division
50 shall refer the claimant to a physician or physicians of
51 the division's selection for independent evaluation prior
52 to the entry of a permanent disability award: *Provided*,
53 That unless the claimant has returned to work, the
54 claimant shall thereupon receive benefits which shall
55 then be at the permanent partial disability rate as
56 provided in subdivision (e), section six of this article
57 until the entry of a permanent disability award or until
58 the claimant returns to work, and which amount of such
59 benefits paid prior to the receipt of such report shall be

60 considered and deemed to be payment of the permanent
61 disability award then granted, if any. In the event that
62 benefits actually paid exceed the amount granted by the
63 permanent partial disability award, claimant shall be
64 entitled to no further benefits by such award but shall
65 not be liable by offset or otherwise for the excess paid.

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

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

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

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

93 (3) When other evidence submitted to the division
94 justifies a finding that the claimant has reached his or

95 her maximum degree of improvement: *Provided*, That in
96 all cases a finding by the division that the claimant has
97 reached his or her maximum degree of improvement
98 shall terminate the claimant's entitlement to temporary
99 total disability benefits regardless of whether the
100 claimant has been released to return to work: *Provided*,
101 *however*, That under no circumstances shall a claimant
102 be entitled to receive temporary total disability benefits
103 either beyond the date the claimant is released to return
104 to work or beyond the date he or she actually returns to
105 work.

106 In the event that the medical or other evidence indi-
107 cates that claimant has a permanent disability, unless he
108 or she has returned to work, the claimant shall there-
109 upon receive benefits which shall then be at the perma-
110 nent partial disability rate as provided in subdivision (e),
111 section six of this article until entry of a permanent
112 disability award, pursuant to an evaluation by a physi-
113 cian or physicians selected by the division, or until the
114 claimant returns to work and which amount of benefits
115 shall be considered and deemed to be payment of the
116 permanent disability award then granted, if any. In the
117 event that benefits actually paid exceed the amount
118 granted under the permanent disability award, claimant
119 shall be entitled to no further benefits by such order but
120 shall not be liable by offset or otherwise for the excess
121 paid.

122 (f) Notwithstanding the anticipated period of disability
123 established pursuant to the provisions of subsection (b)
124 of this section, whenever in any claim temporary total
125 disability shall continue longer than one hundred twenty
126 days from the date of injury (or from the date of the last
127 preceding examination and evaluation pursuant to the
128 provisions of this subsection or pursuant to the direc-
129 tions of the division under other provisions of this
130 chapter), the division shall refer the claimant to a
131 physician or physicians of the division selection for

132 examination and evaluation in accordance with the
133 provisions of subsection (d) of this section and the
134 provisions of subsection (e) of this section shall be fully
135 applicable: *Provided*, That the requirement of manda-
136 tory examinations and evaluations pursuant to the
137 provisions of this subsection shall not apply to any
138 claimant who sustained a brain stem or spinal cord
139 injury with resultant paralysis or an injury which
140 resulted in an amputation necessitating a prosthetic
141 appliance.

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

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

**§23-4-10. Classification of death benefits; "dependent"
defined.**

1 In case a personal injury, other than occupational
2 pneumoconiosis or other occupational disease, suffered
3 by an employee in the course of and resulting from his or
4 her employment, causes death, and disability is continu-
5 ous from date of such injury until date of death, or if
6 death results from occupational pneumoconiosis or from
7 any other occupational disease, the benefits shall be in
8 the amounts and to the persons as follows:

9 (a) If there be no dependents, the disbursements shall

10 be limited to the expense provided for in sections three
11 and four of this article.

12 (b) If there be dependents as defined in subdivision (d)
13 of this section, such dependents shall be paid for as long
14 as their dependency shall continue in the same amount
15 as was paid or would have been paid the deceased
16 employee for total disability had he or she lived. The
17 order of preference of payment and length of dependence
18 shall be as follows:

19 (1) A dependent widow or widower until death or
20 remarriage of such widow or widower, and any child or
21 children dependent upon the decedent until each such
22 child shall reach eighteen years of age or where such
23 child after reaching eighteen years of age continues as a
24 full-time student in an accredited high school, college,
25 university, business or trade school, until such child
26 reaches the age of twenty-five years or if an invalid child
27 to continue as long as such child remains an invalid. All
28 such persons shall be jointly entitled to the amount of
29 benefits payable as a result of employee's death.

30 (2) A wholly dependent father or mother until death.

31 (3) Any other wholly dependent person for a period of
32 six years after the death of the deceased employee.

33 (c) If the deceased employee leaves no wholly depend-
34 ent person, but there are partially dependent persons at
35 the time of death, the payment shall be fifty dollars a
36 month, to continue for such portion of the period of six
37 years after the death, as the division may determine, but
38 no such partially dependent person shall receive com-
39 pensation payments as a result of the death of more than
40 one employee.

41 Compensation under subdivisions (b) and (c) hereof
42 shall, except as may be specifically provided to the
43 contrary therein, cease upon the death of the dependent,
44 and the right thereto shall not vest in his or her estate.

45 (d) "Dependent", as used in this chapter, shall mean a
46 widow, widower, child under eighteen years of age, or
47 under twenty-five years of age when a full-time student
48 as provided herein, invalid child or posthumous child,
49 who, at the time of the injury causing death, is depend-
50 ent in whole or part for his or her support upon the
51 earnings of the employee, stepchild under eighteen years
52 of age, or under twenty-five years of age when a full-
53 time student as provided herein, child under eighteen
54 years of age legally adopted prior to the injury causing
55 death, or under twenty-five years of age when a full-time
56 student as provided herein, father, mother, grandfather
57 or grandmother, who at the time of the injury causing
58 death, is dependent in whole or in part for his or her
59 support upon the earnings of the employee; and invalid
60 brother or sister wholly dependent for his or her support
61 upon the earnings of the employee at the time of the
62 injury causing death.

63 (e) (1) If a person receiving permanent total disability
64 benefits which were awarded prior to the second day of
65 February, one thousand nine hundred ninety-five, dies
66 from a cause other than a disabling injury leaving any
67 dependents as defined in subdivision (d) of this section,
68 an award shall be made to such dependents in an amount
69 equal to one hundred four times the weekly benefit the
70 worker was receiving at the time of his or her death. The
71 award shall be paid to the dependents in the same
72 interval at which the decedent had been receiving
73 benefits prior to his or her death.

74 (2) On and after the second day of February, one
75 thousand nine hundred ninety-five, when an award of
76 permanent total disability benefits is made, a claimant
77 shall make a one-time election of whether to receive the
78 full amount of payments for the award or to receive a
79 reduced payment in order to provide an annuity payment
80 to his or her dependents. The sum of twenty thousand
81 dollars shall be the initial amount of the annuity.

82 Thereafter, the compensation programs performance
83 council shall review the annuity amount at least every
84 three years. The council shall also from time to time
85 determine the amount of the reduction in benefits that
86 will be used to contribute towards the full amount
87 necessary to purchase the annuity. The council may,
88 from time to time as it deems appropriate, fix an amount
89 which the fund will contribute toward the purchase of
90 annuities. The commissioner and the council are autho-
91 rized to either fund such annuities through the invest-
92 ments of the workers' compensation fund or through the
93 use of a private provider of annuities. The selection of
94 such a private provider of annuities shall be through
95 competitive bids. If at the time of the claimant's death
96 he or she has no dependents, then the proceeds of the
97 annuity shall remain with the fund. Should such a
98 claimant's entitlement to receive the permanent total
99 disability award terminate due to his or her attaining the
100 necessary retirement age provided for by subdivision (d),
101 section six, this article or for any other reason other than
102 the death of the claimant, then the annuity shall be
103 cancelled and the proceeds thereof shall remain with the
104 fund.

§23-4-15. Application for benefits.

1 (a) To entitle any employee or dependent of a deceased
2 employee to compensation under this chapter, other than
3 for occupational pneumoconiosis or other occupational
4 disease, the application therefor must be made on the
5 form or forms prescribed by the division and filed with
6 the division within six months from and after the injury
7 or death, as the case may be, and unless so filed within
8 such six month period, the right to compensation under
9 this chapter shall be forever barred, such time limitation
10 being hereby declared to be a condition of the right and
11 hence jurisdictional, and all proofs of dependency in
12 fatal cases must likewise be filed with the division
13 within six months from and after the death. In case the

14 employee is mentally or physically incapable of filing
15 such application, it may be filed by his or her attorney or
16 by a member of his or her family.

17 (b) To entitle any employee to compensation for
18 occupational pneumoconiosis under the provisions
19 hereof, the application therefor must be made on the
20 form or forms prescribed by the division and filed with
21 the division within three years from and after the last
22 day of the last continuous period of sixty days or more
23 during which the employee was exposed to the hazards
24 of occupational pneumoconiosis or within three years
25 from and after the employee's occupational pneumoconi-
26 osis was made known to him or her by a physician or
27 which he or she should reasonably have known, which-
28 ever shall last occur, and unless so filed within such
29 three-year period, the right to compensation under this
30 chapter shall be forever barred, such time limitation
31 being hereby declared to be a condition of the right and
32 hence jurisdictional, or, in the case of death, the applica-
33 tion shall be filed as aforesaid by the dependent of such
34 employee within one year from and after such em-
35 ployee's death, and such time limitation is a condition of
36 the right and hence jurisdictional.

37 (c) To entitle any employee to compensation for occu-
38 pational disease other than occupational pneumoconiosis
39 under the provisions hereof, the application therefor
40 must be made on the form or forms prescribed by the
41 division and filed with the division within three years
42 from and after the day on which the employee was last
43 exposed to the particular occupational hazard involved
44 or within three years from and after the employee's
45 occupational disease was made known to him or her by
46 a physician or which he or she should reasonably have
47 known, whichever shall last occur, and unless so filed
48 within such three-year period, the right to compensation
49 under this chapter shall be forever barred, such time
50 limitation being hereby declared to be a condition of the

51 right and hence jurisdictional, or, in case of death, the
52 application shall be filed as aforesaid by the dependent
53 of such employee within one year from and after such
54 employee's death, and such time limitation is a condition
55 of the right and hence jurisdictional.

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

1 If a claim for occupational pneumoconiosis benefits be
2 filed by an employee within three years from and after
3 the last day of the last continuous period of sixty days
4 exposure to the hazards of occupational pneumoconiosis,
5 the division shall determine whether the claimant was
6 exposed to the hazards of occupational pneumoconiosis
7 for a continuous period of not less than sixty days while
8 in the employ of the employer within three years prior to
9 the filing of his or her claim, whether in the state of West
10 Virginia the claimant was exposed to such hazard over
11 a continuous period of not less than two years during the
12 ten years immediately preceding the date of his or her
13 last exposure thereto and whether the claimant was
14 exposed to such hazard over a period of not less than ten
15 years during the fifteen years immediately preceding the
16 date of his or her last exposure thereto. If a claim for
17 occupational pneumoconiosis benefits be filed by an
18 employee within three years from and after the em-
19 ployee's occupational pneumoconiosis was made known
20 to the employee by a physician or otherwise should have
21 reasonably been known to the employee, the division
22 shall determine whether the claimant filed his or her
23 application within said period and whether in the state
24 of West Virginia the claimant was exposed to such
25 hazard over a continuous period of not less than two
26 years during the ten years immediately preceding the
27 date of last exposure thereto and whether the claimant
28 was exposed to such hazard over a period of not less than
29 ten years during the fifteen years immediately preceding

30 the date of last exposure thereto. If a claim for occupa-
31 tional pneumoconiosis benefits be filed by a dependent
32 of a deceased employee, the division shall determine
33 whether the deceased employee was exposed to the
34 hazards of occupational pneumoconiosis for a continuous
35 period of not less than sixty days while in the employ of
36 the employer within ten years prior to the filing of the
37 claim, whether in the state of West Virginia the deceased
38 employee was exposed to such hazard over a continuous
39 period of not less than two years during the ten years
40 immediately preceding the date of his or her last expo-
41 sure thereto and whether the claimant was exposed to
42 such hazard over a period of not less than ten years
43 during the fifteen years immediately preceding the date
44 of his or her last exposure thereto. The division shall
45 also determine such other nonmedical facts as may in the
46 division's opinion be pertinent to a decision on the
47 validity of the claim.

48 The division shall enter an order with respect to such
49 nonmedical findings within ninety days following receipt
50 by the division of both the claimant's application for
51 occupational pneumoconiosis benefits and the physi-
52 cian's report filed in connection therewith, and shall give
53 each interested party notice in writing of these findings
54 with respect to all such nonmedical facts and such
55 findings and such actions of the division shall be final
56 unless the employer, employee, claimant or dependent
57 shall, within thirty days after receipt of such notice,
58 object to such findings, and unless an objection is filed
59 within such thirty-day period, such findings shall be
60 forever final, such time limitation being hereby declared
61 to be a condition of the right to litigate such findings and
62 hence jurisdictional. Upon receipt of such objection, the
63 chief administrative law judge shall set a hearing as
64 provided in section nine, article five of this chapter. In
65 the event of an objection to such findings by the em-
66 ployer, the claim shall, notwithstanding the fact that one

67 or more hearings may be held with respect to such
68 objection, mature for reference to the occupational
69 pneumoconiosis board with like effect as if the objection
70 had not been filed. If the administrative law judge
71 concludes after the protest hearings that the claim
72 should be dismissed, a final order of dismissal shall be
73 entered, which final order shall be subject to appeal in
74 accordance with the provisions of sections ten and
75 twelve, article five of this chapter. If the administrative
76 law judge concludes after such protest hearings that the
77 claim should be referred to the occupational pneumoco-
78 niosis board for its review, the order entered shall be
79 interlocutory only and may be appealed only in conjunc-
80 tion with an appeal from a final order with respect to the
81 findings of the occupational pneumoconiosis board.

**§23-4-16. Division's jurisdiction over case continuous; modi-
fication of finding or order; time limitation on
awards; reimbursement of claimant for expenses;
reopening cases involving permanent total dis-
ability; promulgation of rules.**

1 (a) The power and jurisdiction of the division over each
2 case shall be continuing and the division may, in accor-
3 dance with the following provisions and after due notice
4 to the employer, make such modifications or changes
5 with respect to former findings or orders as may be
6 justified. Upon and after the second day of February,
7 one thousand nine hundred ninety-five, the period in
8 which a claimant may request a modification, change or
9 reopening of a prior award that was entered either prior
10 to or after such date shall be determined by the follow-
11 ing paragraphs of this subsection. Any such request that
12 is made beyond such period shall be refused.

13 (1) Except as provided in section twenty-two of this
14 article, in any claim which was closed without the entry
15 of an order regarding the degree, if any, of permanent
16 disability that a claimant has suffered, or in any case in

17 which no award has been made, any such request must
18 be made within five years of the closure. During that
19 time period, only two such requests may be filed.

20 (2) Except as stated below, in any claim in which an
21 award of permanent disability was made, any such
22 request must be made within five years of the date of the
23 initial award. During that time period, only two such
24 requests may be filed. With regard to those occupational
25 diseases, including occupational pneumoconiosis, which
26 are medically recognized as progressive in nature, if any
27 such request is granted by the division, then a new five-
28 year period shall begin upon the date of the subsequent
29 award. With the advice of the health care advisory
30 panel, the commissioner and the compensation programs
31 performance council shall by rule designate those
32 progressive diseases which are customarily the subject of
33 claims.

34 (3) No further award may be made in fatal cases except
35 within two years after the death of the employee.

36 (4) With the exception of the items set forth in subsec-
37 tion (d), section three of this article, in any claim where-
38 in medical or any type of rehabilitation service has not
39 been rendered or durable medical goods or other sup-
40 plies have not been received for a period of five years,
41 then no request for additional medical or any type of
42 rehabilitation benefits shall be granted nor shall any
43 such medical or any type of rehabilitation benefits or any
44 type of goods or supplies be paid for by the division if
45 such were provided without a prior request. For the
46 exclusive purposes of this paragraph, medical services
47 and rehabilitation services shall not include any encoun-
48 ter in which significant treatment was not performed.

49 (b) In any claim in which an injured employee shall
50 make application for a further period of temporary total
51 disability, if such application be in writing and filed
52 within the applicable time limit stated above, then the

53 division shall pass upon the request within thirty days of
54 the receipt of the request. If the decision is to grant the
55 request, then the order shall provide for the receipt of
56 temporary total disability benefits. In any case in which
57 an injured employee shall make application for a further
58 award of permanent partial disability benefits or for an
59 award of permanent total disability benefits, if such
60 application be in writing and filed within the applicable
61 time limit as stated above, the division shall pass upon
62 the request within thirty days of its receipt and, if the
63 division determines that the claimant may be entitled to
64 an award, the division will then refer the claimant for
65 such further examinations as may be necessary.

66 (c) If such application is based on a report of any
67 medical examination made of the claimant and submit-
68 ted by the claimant to the division in support of his or
69 her application, and the claim is opened for further
70 consideration and additional award is later made, the
71 claimant shall be reimbursed for the expenses of such
72 examination. Such reimbursement shall be made by the
73 division to the claimant, in addition to all other benefits
74 awarded, upon due proof of the amount thereof being
75 furnished the division by the claimant, but shall in no
76 case exceed the sum fixed pursuant to the division's
77 schedule of maximum reasonable fees established under
78 the provisions of section three of this article.

79 (d) The division shall have continuing power and
80 jurisdiction over claims in which permanent total
81 disability awards have been made after the eighth day of
82 April, one thousand nine hundred ninety-three.

83 (1) The division shall continuously monitor permanent
84 total disability awards and may from time to time, after
85 due notice to the claimant, reopen a claim for reevalua-
86 tion of the continuing nature of the disability and
87 possible modification of the award: *Provided*, That such
88 reopenings shall not be done sooner than every two

89 years: *Provided, however,* That any individual claimant
90 shall only be reevaluated a total of two times after which
91 he or she may not be again reevaluated under the provi-
92 sions of this subsection. The division may reopen a claim
93 for reevaluation when, in the division's sole discretion,
94 it concludes that there exists good cause to believe that
95 the claimant no longer meets the eligibility requirements
96 under subdivision (n), section six of this article. The
97 eligibility requirements, including any vocational
98 standards, shall be applied as those requirements are
99 stated at the time of a claim's reopening: *Provided*
100 *further,* That if a permanent total disability award was
101 made on or after the eighth day of April, one thousand
102 nine hundred ninety-three, and on or before the second
103 day of February, one thousand nine hundred ninety-five,
104 the eligibility requirements for the claimant upon a
105 reopening shall be the eligibility requirements which
106 applied to his or her claim at the time the award was
107 made. This section shall not be applicable to any claim
108 in which the final decision on the eligibility of the
109 claimant to a permanent total disability award was made
110 more than ten years prior to the date of proposed reeval-
111 uation.

112 (2) Upon reopening a claim under this subsection, the
113 division may take evidence, have the claimant evaluated,
114 make findings of fact and conclusions of law and shall
115 vacate, modify or affirm the original permanent total
116 disability award as the record requires. The claimant's
117 former employer shall not be a party to the reevaluation,
118 but shall be notified of the reevaluation and may submit
119 such information to the division as the employer may
120 elect. In the event the claimant retains his or her award
121 following the reevaluation, then the claimant's reason-
122 able attorneys' fees incurred in defending the award
123 shall be paid by the workers' compensation division from
124 the supersedeas reserve of the surplus fund. In addition,
125 the workers' compensation division shall reimburse a

126 prevailing claimant for his or her costs in obtaining one
 127 evaluation on each issue during the course of the reeval-
 128 uation with such reimbursement being made from the
 129 supersedeas reserve of the surplus fund. The compensa-
 130 tion programs performance council shall adopt criteria
 131 for the determination of reasonable attorneys' fees.

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

138 (e) A claimant may have only one active request for a
 139 permanent disability award pending in a claim at any
 140 one time. Any new such request that is made while
 141 another is pending shall be consolidated into the former
 142 request.

**§23-4-18. Mode of paying benefits generally; exemptions of
 compensation from legal process.**

1 Except as provided by this section, compensation shall
 2 be paid only to such employees or their dependents, and
 3 shall be exempt from all claims of creditors and from any
 4 attachment, execution or assignment other than compen-
 5 sation to counsel for legal services, under the provisions
 6 of, and subject to the limitations contained in section
 7 sixteen, article five of this chapter, and other than for
 8 the enforcement of orders for child or spousal support
 9 entered pursuant to the provisions of chapters forty-
 10 eight and forty-eight-a of this code. Payments may be
 11 made in such periodic installments as determined by the
 12 division in each case, but in no event less frequently than
 13 semimonthly for any temporary award and monthly for
 14 any permanent award. Payments for permanent disabil-
 15 ity shall be paid on or before the third day of the month
 16 in which they are due. In all cases where compensation
 17 is awarded or increased, the amount thereof shall be

18 calculated and paid from the date of disability.

§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.

1 (a) Notwithstanding any provision of this chapter to
2 the contrary, except as stated below, no claimant shall
3 be awarded permanent total disability benefits arising
4 under subdivision (d) or (n), section six or of section
5 eight-c of this article who terminates active employment
6 and is receiving full old-age retirement benefits under
7 the Social Security Act, 42 U.S.C. 401 and 402. Any such
8 claimant shall be evaluated only for the purposes of
9 receiving a permanent partial disability award premised
10 solely upon the claimant's impairments. This subsection
11 shall not be applicable in any claim in which the claim-
12 ant has completed the submission of his or her evidence
13 on the issue of permanent total disability prior to the
14 later of the following: Termination of active employment
15 or the initial receipt of full old-age retirement benefits
16 under the Social Security Act. Once the claimant has
17 terminated active employment and has begun to receive
18 full old-age social security retirement benefits, the
19 claimant shall not be permitted to produce additional
20 evidence of permanent total disability before the division
21 or the office of judges nor shall such a claim be re-
22 manded for the production of such evidence.

23 (b) For the purposes of subdivisions (d) and (n), section
24 six of this article, the award of permanent partial
25 disability benefits under the provisions of section six-b
26 of this article or under that portion of section six-a of
27 this article which awards twenty weeks of benefits to a
28 claimant who has occupational pneumoconiosis but
29 without measurable pulmonary impairment therefrom
30 shall not be counted towards the eighty-five percent
31 needed to gain the rebuttable presumption of permanent

32 total disability or towards the fifty percent threshold of
33 paragraph (1), subdivision (n), section six of this article
34 when such claimant has terminated active employment
35 and is receiving federal nondisability pension or retire-
36 ment benefits, including old-age benefits under the
37 Social Security Act. This subsection shall not affect any
38 other awards of permanent partial disability benefits
39 and their use in achieving the rebuttable eighty-five
40 percent presumption or the fifty percent threshold.

41 (c) The workers' compensation division shall have the
42 sole and exclusive jurisdiction to initially hear and
43 decide any claim or request pertaining in whole or in
44 part to subdivision (d) or (n), section six of this article.
45 Any claim or request for permanent total disability
46 benefits arising under said subdivisions shall first be
47 presented to the division as part of the initial claim filing
48 or by way of an application for modification or adjust-
49 ment pursuant to section sixteen of this article. The
50 office of judges may consider such a claim only after the
51 division has entered an appropriate order.

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

1 (a) After the eighth day of April, one thousand nine
2 hundred ninety-three, a reduction in the amount of
3 benefits as specified in subsection (b) of this section shall
4 be made whenever benefits are being paid for a perma-
5 nent total disability award regardless of when such
6 benefits were awarded. This section is not applicable to
7 the receipt of medical benefits or the payment therefor,
8 the receipt of permanent partial disability benefits, the
9 receipt of benefits by partially or wholly dependent
10 persons, or to the receipt of benefits pursuant to the
11 provisions of subsection (e), section ten of this article.
12 Prior to the application of this section to any claimant,
13 the division shall give the claimant notice of the effect of
14 this section upon a claimant's award if and when such

15 claimant later earns wages.

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

ARTICLE 4C. EMPLOYERS' EXCESS LIABILITY FUND.

§23-4C-1. Purpose.

1 The purpose of this article is to permit the establish-
2 ment of a system to provide insurance coverage for
3 employers subject to this chapter who may be subjected
4 to liability under section two, article four of this chapter,
5 for any excess of damages over the amount received or
6 receivable under this chapter.

§23-4C-2. Employers' excess liability fund established.

1 (a) To provide insurance coverage for employers
2 subject to this chapter who may be subjected to liability
3 for any excess of damages over the amount received or
4 receivable under this chapter, the division may continue
5 the fund known as the employers' excess liability fund,
6 which fund shall be separate from the workers' compen-
7 sation fund. The employers' excess liability fund shall
8 consist of premiums paid thereto by employers who may

9 voluntarily elect to subscribe to the fund for coverage of
10 potential liability to any person who may be entitled to
11 any excess of damages over the amount received or
12 receivable under this chapter.

13 (b) The commissioner and the compensation programs
14 performance council are authorized to provide for, by
15 the promulgation of a rule pursuant to subdivisions (b)
16 and (c), section seven, article three, chapter twenty-
17 one-a of this code, the continuance, abolition, or sale of
18 the employers' excess liability fund established by
19 section one of this article. In the event that fund is to be
20 sold, the sale shall be conducted through the solicitation
21 of competitive bids. Any funds that may remain after
22 the sale or abolition of the employers' excess liability
23 fund shall be paid into and become a part of the workers'
24 compensation fund to be used for the purposes of that
25 fund. In the event that the employers' excess liability
26 fund program is abolished and the remaining liabilities
27 of that program exceed the amount retained in the
28 employers' excess liability fund, such excess liability
29 including the costs of administration shall be paid for
30 from the workers' compensation fund.

ARTICLE 5. REVIEW.

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

1 (a) The workers' compensation division shall have full
2 power and authority to hear and determine all questions
3 within its jurisdiction. In matters arising under articles
4 three and four of this chapter, the division shall prompt-
5 ly review and investigate all claims. The parties to a
6 claim shall file such information in support of their
7 respective positions as they deem proper. In addition,
8 the division is authorized to develop such additional
9 information as it deems to be necessary in the interests
10 of fairness to the parties and in keeping with the fidu-
11 ciary obligations owed to the fund. With regard to any

12 issue which is ready for a decision, the division shall
13 explain the basis of its decisions.

14 (b) Except with regard to interlocutory matters, upon
15 making any decision, upon the making or refusing to
16 make any award, or upon the making of any modification
17 or change with respect to former findings or orders, as
18 provided by section sixteen, article four of this chapter,
19 the division shall give notice, in writing, to the employer,
20 employee, claimant, as the case may be, of its action,
21 which notice shall state the time allowed for filing an
22 objection to such finding, and such action of the division
23 shall be final unless the employer, employee, claimant or
24 dependant shall, within thirty days after the receipt of
25 such notice, object in writing, to such finding, and unless
26 an objection is filed within such thirty-day period, such
27 finding or action shall be forever final, such time limita-
28 tion being hereby declared to be a condition of the right
29 to litigate such finding or action and hence jurisdic-
30 tional. Any such objection shall be filed with the office
31 of judges with a copy served upon the division and other
32 parties in accordance with the procedures set forth in
33 sections eight and nine of this article.

34 (c) Where a finding or determination of the division is
35 protested only by the employer, and the employer does
36 not prevail in its protest and, in the event the claimant is
37 required to attend a hearing by subpoena or agreement
38 of counsel or at the express direction of the division or
39 office of judges, then such claimant in addition to
40 reasonable traveling and other expenses shall be reim-
41 bursed for loss of wages incurred by the claimant in
42 attending such hearing.

43 (d) Once an objection has been filed with the office of
44 judges, the parties to the objection shall be offered an
45 opportunity for mediation of the disputed issue by the
46 division. If all of the parties to the objection agree to
47 mediation, the division shall designate a deputy who was

48 not involved in the original decision to act as mediator:
49 *Provided*, That on issues related solely to the medical
50 necessity of proposed medical treatment or diagnostic
51 services, the division shall offer the parties to the
52 objection a selection of names of medical providers in
53 the appropriate specialty. The parties shall then either
54 agree upon a medical provider who shall act as mediator
55 or, in the absence of an agreement, the division shall
56 select a medical provider who shall act as mediator. In
57 cases where issues of medical necessity are intertwined
58 with nonmedical treatment or nondiagnostic issues, both
59 a medical provider and a designated deputy shall act as
60 comediators and shall consider their respective issues.
61 Neither shall be empowered to overturn the decision of
62 the other.

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

66 The mediator shall solicit the positions of the parties
67 and shall review such additional information as the
68 parties or the division shall furnish. The mediator shall
69 then issue a decision in writing with the necessary
70 findings of fact and conclusions of law to support that
71 decision. If any party disagrees with the decision, that
72 party may note its objection to the office of judges, the
73 division and the other parties, and the office of judges
74 shall lift the stay on the original protest. The decision
75 and any information introduced during the attempted
76 mediation shall be subject to consideration by the office
77 of judges in making its decision on the objection. Upon
78 acceptance by the parties of the result of the mediation,
79 the office of judges shall dismiss the objection with
80 prejudice.

81 The mediator shall conduct the mediation in an infor-
82 mal manner and without regard to the formal rules of
83 evidence and procedure. Once the parties agree to

84 mediation, then the agreement cannot be withdrawn.

85 (e) The panel of medical providers who shall serve as
86 mediators shall be selected and approved by the compen-
87 sation programs performance council. A medical pro-
88 vider serving as a mediator shall have the same pro-
89 tections from liability as does the division's employees
90 with regard to their decisions including coverage by the
91 board of risk management which shall be provided by
92 the workers' compensation division.

93 (f) The division is expressly authorized to amend,
94 correct, or set aside any order on any issue entered by it
95 which is on its face defective or clearly erroneous or the
96 result of mistake, clerical error or fraud. Jurisdiction to
97 take this action shall continue until the expiration of one
98 hundred eighty days from the date of entry of an order
99 unless the order is sooner affected by appellate action:
100 *Provided*, That corrective actions in the case of fraud
101 may be taken at any time.

102 (g) All objections to orders of the division shall be
103 styled in the name of the workers' compensation divi-
104 sion. All appeals prosecuted from the office of judges or
105 from the appeal board shall either be in the name of the
106 workers' compensation division or shall be against the
107 workers' compensation division. In all such matters, the
108 workers' compensation division shall be the party in
109 interest.

**§23-5-2. Application by employee for further adjustment of
claim — Objection to modification; hearing.**

1 In any case where an injured employee makes applica-
2 tion in writing for a further adjustment of his or her
3 claim under the provisions of section sixteen, article four
4 of this chapter, and such application discloses cause for
5 a further adjustment thereof, the division shall, after due
6 notice to the employer, make such modifications, or
7 changes with respect to former findings or orders in such

8 claim as may be justified, and any party dissatisfied with
9 any such modification or change so made by the division
10 shall, upon proper and timely objection, be entitled to a
11 hearing, as provided in section nine of this article.

§23-5-3. Refusal to reopen claim; notice; objection.

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

**§23-5-4. Application by employer for modification of award
— Objection to modification; hearing.**

1 In any case wherein an employer makes application in
2 writing for a modification of any award previously made
3 to an employee of said employer, and such application
4 discloses cause for a further adjustment thereof, the
5 division shall, after due notice to the employee, make
6 such modifications or changes with respect to former
7 findings or orders in such form as may be justified, and

8 any party dissatisfied with any such modification or
9 change so made by the division, shall upon proper and
10 timely objection, be entitled to a hearing as provided in
11 section nine of this article.

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

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

§23-5-6. Time periods for objections and appeals; extensions.

1 Notwithstanding the fact that the time periods set
2 forth for objections, protests and appeals to or from the
3 workers' compensation appeal board, are jurisdictional,
4 such periods may be extended or excused upon applica-
5 tion of either party within a period of time equal to the
6 applicable period by requesting an extension of such
7 time period showing good cause or excusable neglect,
8 accompanied by the objection or appeal petition. In
9 exercising such discretion the administrative law judge,
10 appeal board, or court, as the case may be, shall consider

11 whether the applicant was represented by counsel and
12 whether timely and proper notice was actually received
13 by the applicant or the applicant's representative.

§23-5-7. Compromise and settlement.

1 With the exception of medical benefits, the claimant
2 and the employer, with the consent and approval of the
3 workers' compensation division, may negotiate a final
4 settlement of any and all issues in a claim wherever the
5 claim may then be in the review or appellate processes.
6 The parties seeking to settle and compromise an objec-
7 tion to a division decision shall file the written and
8 executed agreement with the division. The division shall
9 review the proposed agreement to determine if it is fair
10 and reasonable to the parties and shall ensure that each
11 of the parties are fully aware of the effects of the agree-
12 ment including what each party is giving up in exchange
13 for the agreement. If the division concludes that the
14 agreement is not fair or is not reasonable or that one of
15 the parties is not fully informed, then the division shall
16 reject the agreement. If the employer is not active in the
17 claim, then the division may negotiate a final settlement
18 of any and all issues in a claim except for medical
19 benefits with the claimant: *Provided*, That the agree-
20 ment must then be submitted to the office of judges
21 whereupon an administrative law judge shall undertake
22 the review and make the assurances provided for above
23 as in the case of an employer and claimant agreement.
24 Upon the approval of either type of agreement, the
25 agreement shall be filed with the division's records, and
26 the filing constitutes a dismissal of any objection or
27 appeal on the issues agreed to. The division will give
28 notice of the settlement and dismissal, if necessary, to
29 the office of judges, the appeal board, or the supreme
30 court of appeals. Once any such agreement is accepted
31 by the parties and the division, any issue that is the
32 subject of the agreement shall not be reopened by either
33 party or by the division. Any such agreement may

34 provide for a lump sum payment which shall not exceed
35 a percentage of the entire settlement to be determined
36 from time to time by the compensation programs perfor-
37 mance council in keeping with the necessity to protect
38 the claimant, the employer, and the solvency of the
39 workers' compensation fund. The remainder of any such
40 settlement shall be paid out over time as would have
41 been the case had an award been made. If a settlement
42 provides for future rehabilitation costs and a degree of
43 permanent partial disability, then the agreed upon
44 degree of permanent partial disability shall be stated in
45 the agreement. That degree of permanent partial dis-
46 ability shall then be entered upon the records of the
47 division as the award in the claim. In the event that an
48 employer agrees to settle an issue which settlement is to
49 be paid directly by the employer, then the amount so
50 paid or to be paid shall be a portion of the employer's
51 premium tax as that term is used in article two of this
52 chapter. If such employer later fails to make the agreed
53 upon payment, the division shall assume the obligation
54 to make the payments and shall be entitled to recover the
55 amounts paid or to be paid from the employer as pro-
56 vided for in sections five and five-a, article two of this
57 chapter.

**§23-5-8. Continuation of office of administrative law judges;
powers of chief administrative law judge and said
office.**

1 (a) The workers' compensation office of administrative
2 law judges previously created pursuant to chapter
3 twelve, acts of the Legislature, one thousand nine
4 hundred ninety, second extraordinary session, is hereby
5 continued and designated to be an integral part of the
6 workers' compensation system of this state. The office of
7 judges shall be under the supervision of a chief adminis-
8 trative law judge who shall be appointed by the gover-
9 nor, with the advice and consent of the Senate. The
10 previously appointed incumbent of that position who

11 was serving on the second day of February, one thousand
12 nine hundred ninety-five, shall continue to serve in that
13 capacity unless subsequently removed as provided for in
14 subsection (b) of this section.

15 (b) The chief administrative law judge shall be a person
16 who has been admitted to the practice of law in this state
17 and shall also have had at least four years of experience
18 as an attorney. The chief administrative law judge's
19 salary shall be set by the compensation programs perfor-
20 mance council created in section one, article three,
21 chapter twenty-one-a of this code. Said salary shall be
22 within the salary range for comparable chief administra-
23 tive law judges as determined by the state personnel
24 board created by section six, article six, chapter twenty-
25 nine of this code. The chief administrative law judge
26 may only be removed by a vote of two thirds of the
27 members of the compensation programs performance
28 council and shall not be removed except for official
29 misconduct, incompetence, neglect of duty, gross immo-
30 rality, or malfeasance and then only after he or she has
31 been presented in writing with the reasons for his or her
32 removal and is given opportunity to respond and to
33 present evidence. No other provision of this code
34 purporting to limit the term of office of any appointed
35 official or employee or affecting the removal of any
36 appointed official or employee shall be applicable to the
37 chief administrative law judge.

38 (c) By and with the consent of the commissioner, the
39 chief administrative law judge shall employ administra-
40 tive law judges and other personnel as are necessary for
41 the proper conduct of a system of administrative review
42 of orders issued by the workers' compensation division
43 which orders have been objected to by a party, and all
44 such employees shall be in the classified service of the
45 state. Qualifications, compensation and personnel
46 practice relating to the employees of the office of judges,
47 other than the chief administrative law judge, shall be

48 governed by the provisions of the statutes, rules and
49 regulations of the classified service pursuant to article
50 six, chapter twenty-nine of this code. All such addi-
51 tional administrative law judges shall be persons who
52 have been admitted to the practice of law in this state
53 and shall also have had at least two years of experience
54 as an attorney. The chief administrative law judge shall
55 supervise the other administrative law judges and other
56 personnel which collectively shall be referred to in this
57 chapter as the office of judges.

58 (d) The administrative expense of the office of judges
59 shall be included within the annual budget of the work-
60 ers' compensation division.

61 (e) Subject to the approval of the compensation pro-
62 grams performance council pursuant to subdivisions (b)
63 and (c), section seven, article three, chapter twenty-
64 one-a of this code, the office of judges shall from time to
65 time promulgate rules of practice and procedure for the
66 hearing and determination of all objections to findings or
67 orders of the workers' compensation division pursuant to
68 section one of this article. The office of judges shall not
69 have the power to initiate or to promulgate legislative
70 rules as that phrase is defined in article three, chapter
71 twenty-nine-a of this code.

72 (f) The chief administrative law judge shall continue to
73 have the power to hear and determine all disputed
74 claims in accordance with the provisions of this article,
75 establish a procedure for the hearing of disputed claims,
76 take oaths, examine witnesses, issue subpoenas, establish
77 the amount of witness fees, keep such records and make
78 such reports as are necessary for disputed claims, and
79 exercise such additional powers, including the delega-
80 tion of such powers to administrative law judges or
81 hearing examiners as may be necessary for the proper
82 conduct of a system of administrative review of disputed
83 claims. The chief administrative law judge shall make

84 such reports as may be requested of him or her by the
85 compensation programs performance council.

86 (g) Pursuant to the provisions of chapter four, article
87 ten of this code, the office of judges shall continue to
88 exist until the first day of July, one thousand nine
89 hundred ninety-six, to allow for the completion of a
90 preliminary performance review by the joint committee
91 on government operations.

**§23-5-9. Hearings on objections to division decisions by office
of administrative law judges.**

1 Objections to a workers' compensation division deci-
2 sion made pursuant to the provisions of section one of
3 this article shall be filed with the office of judges. Upon
4 receipt of an objection, the office of judges shall, within
5 fifteen days from receipt thereof, set a time and place for
6 the hearing of evidence and shall notify the division of
7 the filing of the objection. Hearings may be conducted
8 at the county seat of the county wherein the injury
9 occurred, or at any other place which may be agreed
10 upon by the interested parties, and in the event the
11 interested parties cannot agree, and it appears in the
12 opinion of the chief administrative law judge or the chief
13 administrative law judge's authorized representative
14 that the ends of justice require the taking of evidence
15 elsewhere, then at such place as the chief administrative
16 law judge or such authorized representative may direct,
17 having due regard for the convenience of witnesses. The
18 employer, the claimant and the division shall be notified
19 of such hearing at least ten days in advance, and the
20 hearing shall be held within thirty days after the filing
21 of the objection unless such hearing be postponed by
22 agreement of the parties or by the chief administrative
23 law judge or such authorized representative for good
24 cause. The division shall be a party to any proceeding
25 under this article.

26 The office of judges shall keep full and complete

27 records of all proceedings concerning a disputed claim.
28 All testimony upon a disputed claim shall be recorded
29 but need not be transcribed unless the claim is appealed
30 or in such other circumstances as, in the opinion of the
31 chief administrative law judge, may require such tran-
32 scription. Upon receipt of notice of the filing of an
33 objection, the division shall forthwith forward to the
34 chief administrative law judge all records, or copies of
35 such records, which relate to the matter objected to. All
36 such records or copies thereof and any evidence taken at
37 hearings conducted by the office of judges shall consti-
38 tute the record upon which the matter shall be decided.
39 The office of judges shall not be bound by the usual
40 common law or statutory rules of evidence. At any time
41 within thirty days after hearing, if the chief administra-
42 tive law judge or the chief administrative law judge's
43 authorized representative is of the opinion that the facts
44 have not been adequately developed at such hearing, he
45 or she may order supplemental hearings or obtain such
46 additional evidence as he or she deems warranted upon
47 due notice to the parties.

48 All hearings shall be conducted as determined by the
49 chief administrative law judge pursuant to the rules of
50 practice and procedure promulgated pursuant to section
51 eight of this article. Upon consideration of the entire
52 record, the chief administrative law judge or an adminis-
53 trative law judge within the office of judges shall, within
54 thirty days after final hearing, render a decision affirm-
55 ing, reversing or modifying the division's action. Said
56 decision shall contain findings of fact and conclusions of
57 law and shall be mailed to all interested parties.

**§23-5-10. Appeal from administrative law judge decision to
appeal board.**

1 The employer, claimant or workers' compensation
2 division may appeal to the appeal board created in
3 section eleven of this article for a review of a decision by

4 an administrative law judge. No appeal or review shall
5 lie unless application therefor be made within thirty
6 days of receipt of notice of the administrative law
7 judge's final action or in any event within sixty days of
8 the date of such final action, regardless of notice and,
9 unless the application for appeal or review is filed within
10 the time specified, no such appeal or review shall be
11 allowed, such time limitation being hereby declared to
12 be a condition of the right of such appeal or review and
13 hence jurisdictional.

§23-5-11. Workers' compensation appeal board — Generally.

1 There shall be a board to be known as the "Workers'
2 Compensation Appeal Board", which shall be referred to
3 in this article as the "board", to be composed of three
4 members. The board shall perform the duties and
5 responsibilities assigned to it by this code consistent
6 with the administrative policies developed by the
7 governor and the commissioner with the assistance of the
8 compensation programs performance council.

9 Two members of such board shall be of opposite
10 politics to the third, and all three shall be citizens of this
11 state who have resided therein for a period of at least
12 five years. All members of the board shall be appointed
13 by the governor and shall receive an annual salary in
14 accordance with the provisions of section two-a, article
15 seven, chapter six of this code. The salaries shall be
16 payable in monthly installments, and the members shall
17 also be entitled to all reasonable and necessary traveling
18 and other expenses actually incurred while engaged in
19 the performance of their duties. The governor shall
20 designate one of the members of the board as chairman
21 thereof, and the board shall meet at the capitol or at
22 such other places throughout the state as it may consider
23 proper at regular sessions designated as "Appeal Board
24 Hearing Days" commencing on the first Tuesday of every
25 month or the next regular business day, for a period of at

26 least three days, for the purpose of conducting hearings
27 on appeals, and continuing as long as may be necessary
28 for the proper and expeditious transaction of the hear-
29 ings, decisions and other business before it. All clerical
30 services required by the board shall be paid for by the
31 commissioner from any funds at his or her disposal. The
32 board shall, from time to time, compile and promulgate
33 such rules of practice and procedure as to it shall appear
34 proper for the prompt and efficient discharge of its
35 business and such rules shall be submitted first to the
36 compensation programs performance council for its
37 approval pursuant to subdivisions (b) and (c), section
38 seven, article three, chapter twenty-one-a of this code
39 and, if so approved, then to the supreme court of appeals
40 for approval, and if approved by such court shall have
41 the same force and effect as the approved rules of
42 procedure of circuit courts. By and with the consent of
43 the commissioner, the board shall employ such clerical
44 staff as may be necessary for the efficient conduct of its
45 business. Salaries of the board, and its employees, and
46 all of its necessary operating expenses shall be paid from
47 the workers' compensation fund. The board shall submit
48 its annual budget to the commissioner for inclusion as a
49 separate item in the budget estimates prepared by him or
50 her annually and within the limits of such budget, all
51 expenses of the board shall be by the requisition of the
52 commissioner. Salaries of the employees of the board
53 shall be governed by the provisions of article six, chapter
54 twenty-nine of this code.

55 The board shall report monthly to the compensation
56 programs performance council on the status of all claims
57 on appeal.

**§23-5-12. Appeal to board; procedure; remand and supple-
mental hearing.**

1 (a) Any employer, employee, claimant or dependent,
2 who shall feel aggrieved at any final action of the

3 administrative law judge taken after a hearing held in
4 accordance with the provisions of section nine of this
5 article, shall have the right to appeal to the board
6 created in section eleven of this article for a review of
7 such action. The workers' compensation division shall
8 likewise have the right to appeal to the appeal board any
9 final action taken by the administrative law judge. The
10 aggrieved party shall file a written notice of appeal with
11 the office of judges directed to such board, within thirty
12 days after receipt of notice of the action complained of,
13 or in any event, regardless of notice, within sixty days
14 after the date of the action complained of, and unless the
15 notice of appeal is filed within the time specified, no
16 such appeal shall be allowed, such time limitation being
17 hereby declared to be a condition of the right to such
18 appeal and hence jurisdictional; and the office of judges
19 shall notify the other parties immediately upon the filing
20 of a notice of appeal. The office of judges shall forthwith
21 make up a transcript of the proceedings before the office
22 of judges and certify and transmit the same to the board.
23 Such certificate shall incorporate a brief recital of the
24 proceedings therein had and recite each order entered
25 and the date thereof.

26 (b) The board shall review the action of the administra-
27 tive law judge complained of at its next meeting after the
28 filing of notice of appeal, provided such notice of appeal
29 shall have been filed thirty days before such meeting of
30 the board, unless such review be postponed by agree-
31 ment of parties or by the board for good cause. The
32 board shall set a time and place for the hearing of
33 arguments on each claim and shall notify the interested
34 parties thereof, and briefs may be filed by the interested
35 parties in accordance with the rules of procedure pre-
36 scribed by the board. The board may affirm the order or
37 decision of the administrative law judge or remand the
38 case for further proceedings. It shall reverse, vacate or
39 modify the order or decision of the administrative law

40 judge if the substantial rights of the petitioner or peti-
41 tioners have been prejudiced because the administrative
42 law judge's findings are:

43 (1) In violation of statutory provisions; or

44 (2) In excess of the statutory authority or jurisdiction
45 of the administrative law judge; or

46 (3) Made upon unlawful procedures; or

47 (4) Affected by other error of law; or

48 (5) Clearly wrong in view of the reliable, probative and
49 substantial evidence on the whole record; or

50 (6) Arbitrary or capricious or characterized by abuse of
51 discretion or clearly unwarranted exercise of discretion.

52 (c) After a review of the case, the board shall sustain
53 the finding of the administrative law judge, in which
54 case it need not make findings of fact or conclusions of
55 law, or enter such order or make such award as the
56 administrative law judge should have made, stating in
57 writing its reasons therefor, and shall thereupon certify
58 the same to the workers' compensation division and chief
59 administrative law judge, who shall proceed in accor-
60 dance therewith.

61 (d) Instead of affirming, reversing or modifying the
62 decision of the administrative law judge as aforesaid, the
63 board may, upon motion of any party or upon its own
64 motion, for good cause shown, to be set forth in the order
65 of the board, remand the case to the chief administrative
66 law judge for the taking of such new, additional or
67 further evidence as in the opinion of the board may be
68 necessary for a full and complete development of the
69 facts of the case. In the event the board shall remand the
70 case to the chief administrative law judge for the taking
71 of further evidence therein, the administrative law judge
72 shall proceed to take such new, additional or further
73 evidence in accordance with any instruction given by the

74 board, and shall take the same within thirty days after
75 receipt of the order remanding the case, giving to the
76 interested parties at least ten days' written notice of such
77 supplemental hearing, unless the taking of evidence shall
78 be postponed by agreement of parties, or by the adminis-
79 trative law judge for good cause. After the completion of
80 such supplemental hearing, the administrative law judge
81 shall, within sixty days, render his or her decision
82 affirming, reversing or modifying the former action of
83 the administrative law judge, which decision shall be
84 appealable to, and proceeded with by the appeal board
85 in like manner as in the first instance. In addition, upon
86 a finding of good cause, the board may remand the case
87 to the workers' compensation division for further
88 development. Any decision made by the division follow-
89 ing such a remand shall be subject to objection to the
90 office of judges and not to the board. The board may
91 remand any case as often as in its opinion is necessary
92 for a full development and just decision of the case. All
93 appeals from the action of the administrative law judge
94 shall be decided by the board at the same session at
95 which they are heard, unless good cause for delay thereof
96 be shown and entered of record. In all proceedings
97 before the board, any party may be represented by
98 counsel.

**§23-5-13. Continuances and supplemental hearings; claims
not to be denied on technicalities.**

1 It is the policy of this chapter that the rights of claim-
2 ants for workers' compensation be determined as speed-
3 ily and expeditiously as possible to the end that those
4 incapacitated by injuries and the dependents of deceased
5 workers may receive benefits as quickly as possible in
6 view of the severe economic hardships which immedi-
7 ately befall the families of injured or deceased workers.
8 Therefore, the criteria for continuances and supplemen-
9 tal hearings "for good cause shown" are to be strictly
10 construed by the chief administrative law judge and his

11 or her authorized representatives to prevent delay when
12 granting or denying continuances and supplemental
13 hearings. It is also the policy of this chapter to prohibit
14 the denial of just claims of injured or deceased workers
15 or their dependents on technicalities.

§23-5-14. Disqualification of board members.

1 In any appeal wherein a board member is a party, or is
2 interested in the results thereof otherwise than as a
3 general subscriber to the compensation fund, or he or she
4 is connected with a contributor therein, or is a benefi-
5 ciary therein, or is connected with a beneficiary therein,
6 he or she shall be disqualified from participating in the
7 hearing and determination of such appeal.

§23-5-15. Appeals from final decisions of board to supreme court of appeals; procedure; costs.

1 From any final decision of the board, including any
2 order of remand, an application for review may be
3 prosecuted by either party or by the workers' compensa-
4 tion division to the supreme court of appeals within
5 thirty days from the date thereof by the filing of a
6 petition therefor to such court against the board and the
7 adverse party or parties as respondents, and unless the
8 petition for review is filed within such thirty-day period,
9 no such appeal or review shall be allowed, such time
10 limitation being hereby declared to be a condition of the
11 right to such appeal or review and hence jurisdictional;
12 and the clerk of such court shall notify each of the
13 respondents and the workers' compensation division of
14 the filing of such petition. The board shall, within ten
15 days after receipt of such notice, file with the clerk of the
16 court the record of the proceedings had before it, includ-
17 ing all the evidence. The court or any judge thereof in
18 vacation may thereupon determine whether or not a
19 review shall be granted. And if granted to a nonresident
20 of this state, he or she shall be required to execute and
21 file with the clerk before such order or review shall

22 become effective, a bond, with security to be approved
23 by the clerk, conditioned to perform any judgment which
24 may be awarded against him or her thereon. The board
25 may certify to the court and request its decision of any
26 question of law arising upon the record, and withhold its
27 further proceeding in the case, pending the decision of
28 court on the certified question, or until notice that the
29 court has declined to docket the same. If a review be
30 granted or the certified question be docketed for hearing,
31 the clerk shall notify the board and the parties litigant or
32 their attorneys and the workers' compensation division,
33 of that fact by mail. If a review be granted or the
34 certified question docketed, the case shall be heard by
35 the court in the same manner as in other cases, except
36 that neither the record nor briefs need be printed. Every
37 such review granted or certified question docketed prior
38 to thirty days before the beginning of the term, shall be
39 placed upon the docket for such term. The attorney
40 general shall, without extra compensation, represent the
41 board in such cases. The court shall determine the
42 matter so brought before it and certify its decision to the
43 board and to the division. The cost of such proceedings
44 on petition, including a reasonable attorney's fee, not
45 exceeding thirty dollars to the claimant's attorney, shall
46 be fixed by the court and taxed against the employer if
47 the latter be unsuccessful, and if the claimant, or the
48 division (in case the latter be the applicant for review) be
49 unsuccessful, such costs, not including attorney's fees,
50 shall be taxed against the division, payable out of the
51 workers' compensation fund, or shall be taxed against
52 the claimant, in the discretion of the court. But there
53 shall be no cost taxed upon a certified question.

§23-5-16. Fees of attorney for claimant; unlawful charging or receiving of attorney fees.

1 No attorney's fee in excess of twenty percent of any
2 award granted shall be charged or received by an
3 attorney for a claimant or dependent. In no case shall

4 the fee received by the attorney of such claimant or
5 dependent be in excess of twenty percent of the benefits
6 to be paid during a period of two hundred eight weeks.
7 The interest on disability or dependent benefits as
8 provided for in this chapter shall not be considered as
9 part of the award in determining any such attorney's fee.
10 However, any contract entered into in excess of twenty
11 percent of the benefits to be paid during a period of two
12 hundred eight weeks, as herein provided, shall be
13 unlawful and unenforceable as contrary to the public
14 policy of this state and any fee charged or received by an
15 attorney in violation thereof shall be deemed an unlaw-
16 ful practice and render the attorney subject to disciplin-
17 ary action.

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

Randy Schoonover
.....
Chairman Senate Committee

Ernest C. Moore
.....
Chairman House Committee

Originated in the Senate.

In effect from passage.

Carroll E. Adams
.....
Clerk of the Senate

Donald L. Topp
.....
Clerk of the House of Delegates

Carl Ray Tomelkin
.....
President of the Senate

Bill Calton
.....
Speaker House of Delegates

The within *is approved* this the *16TH*
day of *February*, 1995.

Walter Pugh
.....
Governor

PRESENTED TO THE
GOVERNOR

Date 2/13/98

Time 4:21 pm