WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1995

ENROLLED
Committee Substitute for
SENATE BILL NO. 280

(By Senators Tomblin, Mr. President, 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 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 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.

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

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

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

(3) A permit terminates if the permittee has not commenced the surface-mining operations covered by such permit within three years of the date the permit was
5  [Enr. Com. Sub. for S. B. No. 250

issued: Provided, That the director may grant reasonable extensions of time upon a timely showing that such extensions are necessary by reason of litigation precluding such commencement, or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee: Provided, however, That with respect to coal to be mined for use in a synthetic fuel facility or specific major electric generating facility, the permittee shall be deemed to have commenced surface-mining operations at such time as the construction of the synthetic fuel or generating facility is initiated.

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

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

(6) (A) Prior to the issuance of any permit the director shall ascertain from the commissioner of the bureau of employment programs whether the applicant is in compliance with the provisions of section five, article two, chapter twenty-three of this code with regard to any required subscription to the workers' compensation fund, the payment of premiums to the fund, the timely filing of payroll reports and the maintenance of an adequate premium deposit. If the applicant is delin-
quent or defaulted, or has been terminated, then the permit shall not be issued until the applicant returns to compliance or is restored by the workers' compensation division under a reinstatement agreement. 

Provided, that in all such inquiries the commissioner of the bureau of employment programs shall make response to the division of environmental protection within fifteen calendar days, otherwise failure to respond timely shall be considered to indicate the applicant is in compliance and such failure will not be used to preclude issuance of the permit.

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

(a) The commissioner of the bureau of employment programs appointed under the provisions of section one, article two, chapter twenty-one-a of this code, has the sole responsibility for the administration of this chapter except for such matters as are entrusted to the compensation programs performance council created pursuant to section one, article three, chapter twenty-one-a of this code. In the administration of this chapter, the commissioner shall exercise all the powers and duties described in this chapter and in article two, chapter twenty-one-a of this code.

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

(c) The commissioner shall have an official seal for the
authentication of orders and proceedings, upon which seal shall be engraved the words "West Virginia Commissioner of Employment Programs" and such other design as the commissioner may prescribe. The courts in this state shall take judicial notice of the seal of the commissioner and in all cases copies of orders, proceedings or records in the office of the West Virginia commissioner of employment programs shall be equal to the original in evidence.

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

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

§23-1-4. Office hours; records; confidentiality; exceptions; executive director.
(a) The offices of the workers' compensation division shall be open for the transaction of business between the hours of eight-thirty o'clock a.m., and five o'clock p.m., of each and every day, excepting Saturdays, Sundays and legal holidays, and be open upon such additional days and at such additional times as the division may elect. As the chief executive officer of the bureau of employment programs, the commissioner shall designate an executive director to serve as the chief operating officer for the daily operations of the workers' compensation division: Provided, That in any instance in this chapter which refers to the commissioner's secretary, such reference shall be taken to mean the executive director.

(b) Except as expressly provided for in this subsection, information obtained regarding employers and claimants pursuant to this chapter for the purposes of its administration shall not be subject to the provisions of chapter twenty-nine-b of this code unless such provisions are hereafter specifically made applicable in whole or in part. Such information as may be reasonably necessary may be released in formal orders or opinions of any tribunal or court which is presented with an issue arising under this chapter as well as in the presentations of the parties before any such tribunal or court. Similarly, claimants or other interested parties to an issue arising under this chapter may, upon request, obtain information from the division's records to the extent necessary for the proper presentation or defense of a claim or other matter. Information may be released pursuant to the provisions of chapter twenty-nine-b of this code only if all identifying information has first been eliminated from the records. Nothing in this subsection shall prevent the release of information to another agency of the state or of the federal government for the legitimate purposes of those agencies: Provided, That any such agency shall guarantee the confidentiality of the information so provided to the fullest extent possible in keeping with its own statutory and regulatory mandates.
Nothing in this section shall prevent the division from complying with any subpoena duces tecum: Provided, however, That the issuing tribunal or court shall take such actions as may be proper to maintain the confidentiality of the information.

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

(1) The base premium tax rate for a specific employer;
(2) Whether or not a specific employer has obtained coverage under the provisions of this chapter;
(3) Whether or not a specific employer is in good standing or is delinquent or in default according to the division's records and the time periods thereof; and
(4) If a specific employer is delinquent or in default, what the payments due the division are and what the components of that payment are including the time periods affected.


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

(b) The division shall also have discretion to accept and consider depositions taken within or without the state by either the claimant or employer or other affected person, provided due and reasonable notice of the taking of such depositions was given to the other parties or their attorneys, if any: Provided, That the division, upon due notice to the parties, shall have authority to refuse or permit the taking of such depositions or to reject such
depositions after the taking thereof, if they were taken at
such place or under such circumstances as imposed an
undue burden or hardship upon the other parties, and
the division's discretion to accept, refuse to approve, or
reject such depositions shall be binding in the absence of
abuse of such discretion.

§23-1-13. Rules of procedure and evidence; persons autho-
rized to appear in proceedings; withholding of
psychiatric and psychological reports and pro-
viding summaries thereof.

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

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

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

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

(3) By a representative from a labor organization who
has been recognized by the division as being qualified to
represent a claimant or who is an individual otherwise found to be qualified by the division to act as a representative. Such representative shall participate in the presentation of facts, figures and factual conclusions as distinguished from the presentation of legal conclusions in respect to such facts and figures; or

(4) Pro se.

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

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

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

(3) By a member of the board of directors of a corporation or by an officer of the corporation, for purposes of representing the interest of the corporation in the presentation of facts, figures and factual conclusions as distinguished from the presentation of legal conclusions in respect to such facts and figures; or

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

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

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

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

92 (g) In any matter arising under articles one through
five of this chapter in which the division is required to
give notice to a party, if a party is represented by an
attorney or other representative, then notice to the
attorney or other representative shall be sufficient notice
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.
(a) Any person, firm, partnership, company, corporation or association who, as an employer, is required by the provisions of this chapter to subscribe to the workers' compensation fund, and who knowingly and willfully fails to subscribe thereto, or who knowingly and willfully fails to make any payment or file a report as required by the provisions of this chapter within the time periods specified by law, is guilty of a felony, and, upon conviction thereof, shall be fined not less than one thousand dollars and not more than ten thousand dollars. Upon any second or subsequent conviction under this subsection, any person so convicted shall be imprisoned in the penitentiary for a definite term of imprisonment which is not less than one year nor more than three years or fined not less than five thousand dollars nor more than twenty-five thousand dollars: Provided, That in the case of a person other than a natural person, the amount of the fine shall be not less than ten thousand dollars nor more than twenty-five thousand dollars. The venue for prosecution of any violation of this subsection is either the county in which the defendant's principal business operations are located, or in Kanawha county where the fund is located. In charging a person with a second or subsequent offense under the provisions of this subsection, the warrant, indictment or information must set forth the date and particulars of the previous offense or offenses. No person may be convicted of a second or subsequent offense unless the conviction for the previous offense has become final, and unless a prior offense occurred within the ten year period next preceding the second or subsequent offense.

(b) Any person or firm, or the officer of any corporation, who knowingly and willfully makes a false report or statement under oath, affidavit or certification respecting any information required to be provided under this chapter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not less than one 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
(2) Employers of five or fewer full-time employees in agricultural service; or

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

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

(5) Churches; or

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

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

(c) Notwithstanding any other provision of this chapter to the contrary, whenever there are churches in a circuit which employ one individual clergyman and the payments to such clergyman from such churches constitute his or her full salary, such circuit or group of churches may elect to be considered a single employer for the purpose of premium payment into the workers' compen-
(d) Employers who are not required to subscribe to the workers' compensation fund may voluntarily choose to subscribe to and pay premiums into the fund for the protection of their employees and in such case shall be subject to all requirements of this chapter and all rules and regulations prescribed by the division with reference to rates, classifications and premium payments and shall afford to them the protection of this chapter, including section six of this article, but the failure of such employers to choose to subscribe to and to pay premiums into the fund shall not impose any liability upon them other than such liability as would exist notwithstanding the provisions of this chapter.

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

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

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

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

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

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

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

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

(h) In the event of election under subsection (g) of this section, the employer shall serve upon the division written notice naming the positions not to be covered and shall not include such “employee’s” remuneration for premium purposes in all future payroll reports, and such partner, proprietor or corporate or executive officer shall not be deemed an employee within the meaning of this chapter after such notice has been served. Notwithstanding the provisions of subsection (g), section five of this article, if an employer has not subscribed to the fund even though it is obligated to do so under the provisions of this article, then any such partner, proprietor or corporate or executive officer shall not be covered and shall not receive the benefits of this chapter.

(i) “Regularly employing” or “regular employment”
§23-2-1d. Primary contractor liability; definitions; applications and exceptions; certificates of good standing; reimbursement and indemnification; termination of contracts; effective date; collections efforts.

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

(b) A primary contractor may avoid initial liability under subsection (a) of this section if it obtains from the commissioner, prior to the initial performance of any work by the subcontractor's employees, a certificate that the subcontractor is in good standing with the workers' compensation fund.
(1) Failure to obtain the certificate of good standing prior to the initial performance of any work by the subcontractor shall result in the primary contractor being equally liable with the subcontractor for all delinquent and defaulted premium taxes, premium deposits, interest and other penalties arising during the life of the contract or due to work performed in furtherance of the contract: Provided, That the division shall be entitled to collect only once for the amount of premiums, premium deposits and interest due to the default, but the division may impose other penalties on the primary contractor or on the subcontractor, or both.

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

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

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

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


The division shall prepare and furnish report forms for the use of employers subject to this chapter. Every employer receiving from the division any form or forms with direction for completion and returning to the division shall return the same, within the period fixed by the division, completed so as to answer fully and correctly all pertinent questions therein propounded, and if unable to do so, shall give good and sufficient reasons for such failure. Every employer subject to the provisions of this chapter, shall make application to the division on the forms prescribed by the division for such purpose; and any employer who shall terminate his or her business or for any other reason is no longer subject to this chapter shall so notify the division on forms to be furnished by the division for that purpose.

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

authority to adopt various systems; accounts.

(a) The commissioner, in conjunction with the compensation programs performance council, is authorized to establish by rule a system for determining the classification and distribution into classes of employers subject to this chapter, a system for determining rates of premium taxes applicable to employers subject to this chapter, a system of multiple policy options with criteria for subscription thereto, and criteria for an annual employer's statement providing both benefits liability information and rate determination information.

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

(A) Rate adjustments by industry or individual employer, including merit rate adjustments;

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

(C) Chargeability of claims; and

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

(2) The rule shall be consistent with the duty of the commissioner and the compensation programs performance council to fix and maintain the lowest possible rates of premium taxes consistent with the maintenance of a solvent workers' compensation fund and the reduction of any deficit that may exist in such fund and in keeping with their fiduciary obligations to the fund;

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

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

(5) The rule shall be consistent with the principles of
promoting more effective workplace health and safety programs as contained in article two-b, of this chapter.

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

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

(d) In accordance with generally accepted accounting principles, the workers' compensation division shall keep an accurate accounting of all money or moneys earned, due, and received by the workers' compensation fund, and of the liability incurred and disbursements made against the same; and an accurate account of all money or moneys earned, due and received from each individual subscriber, and of the liability incurred and disbursements 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.
(a) For the purpose of creating a workers' compensation fund, each employer who is required to subscribe to the fund or who elects to subscribe to the fund shall pay premium taxes calculated as a percentage of the employer's gross wages payroll at the rate determined by the workers' compensation division and then in effect. At the time each employer subscribes to the fund, the application required by the division shall be filed and a premium deposit equal to the first quarter's estimated premium tax payment shall be remitted. The minimum quarterly premium to be paid by any employer shall be twenty-five dollars.

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

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

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

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

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

(b) Failure of an employer to timely pay premium
taxes, to timely file a payroll report, or to maintain an
adequate premium deposit, shall cause the employer's
account to become delinquent. No employer will be
declared delinquent or be assessed any penalty therefor
if the division determines that such delinquency has
been caused by delays in the administration of the fund.
The division shall, in writing, within sixty days of the
end of each quarter notify all delinquent employers of
their failure to timely pay premiums, to timely file a
payroll report, or to maintain an adequate premium
deposit. Each employer who shall fail to timely file any
quarterly payroll report or timely pay the premium tax due with such report, or both, for any quarter commencing on and after the first day of July, one thousand nine hundred ninety-five, shall pay a late reporting or payment penalty of the greater of fifty dollars or ten percent of the premium tax due, but not to exceed five hundred dollars, with such report. Such late penalty shall be paid with the most recent quarter's report and payment and is due when that quarter's report and payment are filed. If such late penalty is not paid when due, the same may be charged to and collected by the division from the employer's premium deposit account or otherwise as provided for by law. The notification shall demand the filing of the delinquent payroll report and payment of delinquent premium taxes, the penalty for late reporting or payment of premium taxes or premium deposit, the interest penalty and an amount sufficient to maintain the premium deposit, before the end of the third month following the end of the preceding quarter. Interest shall accrue and be charged on the delinquent premium payment and premium deposit pursuant to section thirteen of this article.

(c) Whenever the division notifies an employer of the delinquent status of its account, the notification shall explain the legal consequence of subsequent default by an employer required to subscribe to the fund and the legal consequences of termination of an electing employer's account.

(d) Failure by the employer, who is required to subscribe to the fund and who fails to resolve the delinquency within the prescribed period, shall place the account in default and shall deprive such default employer of the benefits and protection afforded by this chapter, including section six of this article, and the employer shall be liable as provided in section eight of this article. The default employer's liability under said sections shall be retroactive to midnight of the last day
of the month following the end of the quarter for which
the delinquency occurs. The division shall notify the
default employer of the method by which the employer
may be reinstated with the fund. The division shall also
notify the employees of such employer by written notice
as hereinafter provided for in this section.

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

(f) (1) Except as provided for in subdivision (3) of this
subsection, any employer who is required to subscribe to
the fund and who is in default on the effective date of
this section or who subsequently defaults, and any
employer who has elected to subscribe to the fund and
who defaults and whose account is terminated prior to
the effective date of this section or whose account is
subsequently terminated, shall be restored immediately
to the benefits and protection of this chapter only upon
the filing of all delinquent payroll and other reports
required by the division and payment into the fund of all
unpaid premiums, an adequate premium deposit, ac-
crued interest and the penalty for late reporting and
payment. Interest shall be calculated as provided for by
section thirteen of this article. In addition, for every defaulted or terminated employer whose default or termination lasts for two consecutive quarters or who has defaulted or been terminated for two quarters out of the preceding eight consecutive quarters, then when any such employer’s application for reinstatement is filed or upon any such employer’s restoration to the benefits and protection of this chapter, for the next eight quarters, including the quarter in which such restoration occurs, or when any such employer’s application for reinstatement is filed, the employer shall pay premium taxes to the division at a penalty rate. The applicable penalty premium tax shall be determined by first calculating the employer’s premium under the provisions of section four of this article, but including any applicable experience modification, and then multiplying that premium by one hundred ten percent.

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

(2) The division shall have the authority to restore a defaulted or terminated employer through a reinstatement agreement. Such reinstatement agreement shall require the payment in full of all premium taxes, premium deposits, the penalty for late reporting and payment, past accrued interest and future interest calculated pursuant to the provisions of section thirteen of
this article. The reinstatement agreement shall not permit any modification or waiver of the penalty premium rate provided for in subdivision (1) of this subsection. Notwithstanding the filing of a reinstatement application or the entering into of a reinstatement agreement, the division is authorized to file a lien against the employer as provided by section five-a of this article. In addition, entry into a reinstatement agreement is discretionary with the division. Such discretion shall be exercised in keeping with the fiduciary obligations owed to the workers' compensation fund. Should the division decline to enter into a reinstatement agreement and should the employer not comply with the provisions of subdivision (1) of this subsection, then the division may proceed with any of the collection efforts provided for by section five-a of this article or as otherwise provided for by this code. Applications for reinstatement shall: (A) Be made upon forms prescribed by the division; (B) include a report of the gross wages payroll of the employer which had not been reported to the division during the entire period of delinquency and default, which gross wages information shall be certified by the employer or its authorized agent; and (C) include a payment of a portion of the liability equal to one percent of one half of the gross payroll during the period of delinquency and default or equal to another portion of the liability as may be determined from time to time by rule but not to exceed the amount of the entire liability due and owing for the period of delinquency and default. An employer who applies for reinstatement shall be entitled to the benefits and protection of this chapter on the day a properly completed and acceptable application which is accompanied by the application payment is received by the division: Provided, That if the division reinstates an employer subject to the terms of a reinstatement agreement, the subsequent failure of the employer to make scheduled payments or to pay accrued or future interest in accordance with the reinstatement
agreement or to timely file current quarterly reports and
to pay current quarterly premiums within the month
following the end of the quarter for which the report and
payment are due, or to otherwise maintain its account in
good standing or, if the reinstatement agreement does
not require earlier restoration of the premium deposit, to
restore the premium deposit to the required amount by
the end of the repayment period shall cause the rein-
statement application and the reinstatement agreement
to be null, void and of no effect, and the employer shall
be denied the benefits and protection of this chapter
effective from the date that such employer's account
originally became delinquent.

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

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

(g) With the exception noted in subsection (h) of
section one of this article, no employee of an employer
required by this chapter to subscribe to the workers'
compensation fund shall be denied benefits provided by
this chapter because the employer failed to subscribe or
because the employer's account is either delinquent or in default.

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

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

(3) Notice to employees in this section provided for shall be given by posting written notice that the employer is defaulted under the compensation law of West Virginia, and in the case of employers required by this chapter to subscribe and pay premiums to the fund, that the defaulted employer is liable to its employees for injury or death, both in workers' compensation benefits and in damages at common law or by statute; and in the case of employers not required by this chapter to subscribe and pay premiums to the fund, but voluntarily electing to do so as herein provided, that neither the employer nor the employees of such employer are protected by said laws as to any injury or death sustained after the date specified in said notice. Such notice shall be in the form prescribed by the division and shall be posted in a conspicuous place at the chief works of the employer, as the same appear in records of the division. If said chief works of the employer cannot be found or identified, then said notices shall be posted at the front door of the courthouse of the county in which
said chief works are located, according to the division’s records. Any person who shall, prior to the reinstatement of said employer, as hereinbefore provided for, or prior to sixty days after the posting of said notice, whichever shall first occur, remove, deface or render illegible said notice, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined one thousand dollars, and said notice shall state this provision upon its face. The division may require any sheriff, deputy sheriff, constable or other official of the state of West Virginia, who may be authorized to serve civil process, to post such notice and to make return thereof of the fact of such posting to the division, and any failure of such officer to post any notice within ten days after he or she shall have received the same from the division, without just cause or excuse, shall constitute a willful failure or refusal to perform a duty required of him or her by law within the meaning of section twenty-eight, article five, chapter sixty-one of this code. Any person actually injured by reason of such failure shall have an action against said official, and upon any official bond he or she may have given, for such damages as such person may actually have incurred, but not to exceed, in the case of any surety upon said bond, the amount of the penalty of said bond. Any official posting said notice as herein required shall be entitled to the same fee as is now or may hereafter be provided for the service of process in suits instituted in courts of record in the state of West Virginia, which fee shall be paid by the division out of any funds at its disposal, but shall be charged by the division against the account of the employer to whose 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;
(a) The workers' compensation division in the name of the state may commence a civil action against an employer who, after due notice, defaults in any payment required by this chapter. If judgment is against the employer, such employer shall pay the costs of the action. Civil action under this section shall be given preference on the calendar of the court over all other civil actions. Upon prevailing in any such civil action, the division shall be entitled to recover its attorneys' fees and costs of action from the employer.

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

(c) In addition to all other civil remedies prescribed herein, the division may in the name of the state, after giving appropriate notice as required by due process, restrain upon any personal property, including intangible property, of any employer delinquent for any payment, interest and penalty thereon. If the division has
good reason to believe that such property or a substantial portion thereof is about to be removed from the county in which it is situated, upon giving appropriate notice, either before or after the seizure, as is proper in the circumstances, the division may likewise restrain in the name of the state before such delinquency occurs. For such purpose, the division may require the services of a sheriff of any county in the state in levying such distress in the county in which the sheriff is an officer and in which such personal property is situated. A sheriff so collecting any payment, interest and penalty thereon shall be entitled to such compensation as is provided by law for his or her services in the levy and enforcement of executions. Upon prevailing in any distraint action, the division shall be entitled to recover its attorneys' fees and costs of action from the employer.

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

(e) The secretary of state of this state shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this state or organized under the laws of any other state and admitted to do business in this state, until notified by the division that all payments, interest and penalties thereon against any such corporation which is an employer under this chapter have been paid or that provision satisfactory to the division has been made for payment.
(f) In any case when an employer required to subscribe to the fund defaults in payments of premium, premium deposits, penalty or interest thereon, for as many as two calendar quarters, which quarters need not be consecutive, and remains in default after due notice, the division may bring action in the circuit court of Kanawha county to enjoin such employer from continuing to carry on the business in which such liability was incurred: Provided, that the division may as an alternative to this action require such delinquent employer to file a bond in the form prescribed by the commissioner with satisfactory surety in an amount not less than fifty percent more than the payments, interest and penalties due.

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

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

(1) The types of employers are:

(A) Any employer who is of sufficient capability and financial responsibility to ensure the payment to injured employees and the dependents of fatally injured employees of benefits provided for in this chapter at least equal in value to the compensation provided for in this chapter; or

(B) Any employer of such capability and financial responsibility who maintains its own benefit fund or system of compensation to which its employees are not required or permitted to contribute and whose benefits are at least equal in value to those provided for in this
(2) In order to be approved for self-insurance status, the employer must:

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

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

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

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

(4) Upon a finding that the employer has met all of the requirements of this section, the employer may be permitted self-insurance status. An annual review of each self-insurer's continuing ability to meet its obligations and the requirements of this section shall be made.
by the workers' compensation division. This review shall
include a re-determination of the amount of security or
bond which shall be provided by the employer. Failure
to provide any new amount or form of security or bond
may, in the division's discretion, cause the employer's
self-insurance status to be terminated. The security or
bond provided by employers prior to the second day of
February, one thousand nine hundred ninety-five, shall
continue in full force and effect until the performance of
the employer's annual review and the entry of any
appropriate decision on the amount or form of the
employer's security or bond.

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

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

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

(2) A sum sufficient to pay the employer's proper
portion of the expense of claims for those employers who
are in default in the payment of premium taxes or other
obligations;
(3) A sum sufficient to pay the employer's fair portion of the expenses of the disabled workers' relief fund; and

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

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

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

(2) Such premium tax assessments are special revenue taxes under and according to the provisions of state workers' compensation law and are deemed to be tax claims, as priority claims or administrative expense claims according to those provisions under the law provided in the United States bankruptcy code. In addition, as the same was previously intended by the prior provisions of this section, this amendment and reenactment is for the purpose of clarification of the taxing authority of the workers' compensation division.
(d) Each self-insured employer shall elect whether or
not to self-insure its catastrophic injury risk as defined
in subsection (c), section one, article three of this chap-
ner.

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

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

(e) (1) Any self-insured employer who was, prior to the
second day of February, one thousand nine hundred
ninety-five, permitted to self-insure its second injury
risk as defined in subsection (d), section one, article
three of this chapter, may elect to continue to self-insure
its second injury risk for so long as it meets the require-
ments of this chapter. Any employer which was previ-
ously permitted to self-insure its second injury risk who
then elects to terminate that self-insurance status shall
not thereafter be permitted to self-insure its second
injury risk.
(2) For those employers previously permitted to self-insure their second injury risks, the amount of the security or bond required in subsection (a) of this section shall include the liability for that risk. All benefits provided for by this chapter which are awarded to the employer's employees which constitute second injury life awards shall then be paid by the employer and not the division.

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

(B) In case there is a second injury to an employee of any employer making such second injury premium tax payments, the employer shall be liable to pay compensation or expenses arising from or necessitated by the second injury and such compensation and expenses shall be charged against the employer. After the completion of these payments, the employee shall be paid the remainder of the compensation and expenses that would be due for permanent total disability from the second injury reserve of the surplus fund. Such additional compensation and expenses shall not be charged against such employer.

(f) The compensation programs performance council may create, implement, establish and administer a perpetual self-insurance security risk pool of funds,
sureties, securities, insurance provided by private
insurance carriers or other states' programs, and other
property, of both real and personal properties, to secure
the payment of obligations of self-insured employers. If
such pool is created, the compensation programs perfor-
manence council shall adopt rules for the organizational
plan, participation, contributions and other payments
which may be required of self-insured employers under
this section. The council, in order to create and fund
such a risk pool, may adopt a rule authorizing the
division to assess each self-insured employer in propor-
tion according to each employer's portion of the unse-
cured obligation and liability or to assess according to
some other method provided for by rule which shall
properly create and fund such risk pool to serve the
needs of employees, employers, and the workers' com-
penation fund by providing adequate security. The
council, in funding such security risk pool, may autho-
itize the division to use any assessments, premium tax
assessments and revenues and appropriations as may be
made available to the division.

(g) Any self-insured employer which has had a period
of inactivity due to the nonemployment of employees
which results in its reporting of no wages on quarterly
reports to the division for a period of four or more
consecutive quarters shall have its status at the division
inactivated and shall be required to apply for reactiva-
tion to status as a self-insured employer prior to its
reemployment of employees. Despite such inactivation,
the self-insured employer shall continue to make pay-
ments on all awards for which it is responsible. Upon
application for reactivation of its status as an operating
self-insured employer, the employer must document that
it meets the eligibility requirements needed to maintain
self-insured status under this section and any rules
adopted to implement it. If the employer is unable to
requalify and obtain approval for reactivation, the
Enr. Com. Sub. for S. B. No. 250] 42

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

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

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

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

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

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

(2) Any liens held by the division against the predecessor employer's property shall be extended to all of the assets of the successor employer;

(3) Liens acquired in the manner described in subdivisions one and two of this subsection shall be enforceable by the division to the same extent as provided for the
enforcement of liens against the predecessor employer in 
section five-a of this article; and

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

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

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

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

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

(d) If an employer subject to subsection (a), (b) or (c) of 
this section pays to the division, prior to the execution of 
an agreement of sale or other transfer, a sum sufficient 
to retire all of the indebtedness that the employer would
owe at the time of the execution, then the division shall issue a certificate to the employer stating that the employer's account is in good standing with the division and that the assets may be sold or otherwise transferred without the attachment of the division's lien. An agreement of sale or other transfer may provide for the creation of an escrow account into which the employers shall pay the full amount owed to the division. The subsequent timely payment of that full amount to the division shall operate to place both employers in good standing with the division to the extent of the predecessor employer's liabilities retroactive to the date of sale or other transfer. In the event that the employer would not owe any sum to the division on the aforesaid date of execution, then a certificate shall also be issued to the employer upon the employer's request stating that the employer's account is in good standing with the division and that the assets may be sold or otherwise transferred without the attachment of the division's lien.

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

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

(g) The foregoing provisions are expressly intended to impose upon such successor employers the duty of
obtaining from the division or predecessor employer, prior to the date of such acquisition, a valid "certificate of good standing to transfer a business or business assets" to verify that the predecessor employer's account with the division is in good standing.

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

(a) At any time prior to or following the acquisition described in subsection (a), (b) or (c), section fourteen of this article, the buyer or other recipient may file a certified petition with the division requesting that the division waive the payment by the buyer or other recipient of premiums, premium deposits, interest and imposition of the modified rate of premiums attributable to the predecessor employer or other penalty, or any combination thereof. The division shall review the petition by considering the seven factors set forth below:

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

Unless requested by a party or by the division, no hearing need be held on the petition. However, any
decision made by the division on the petition shall be in
writing and shall include appropriate findings of fact
and conclusions of law. Such decision shall be effective
ten days following notice to the public of the decision
unless an objection is filed in the manner herein pro-
vided. Such notice shall be given by the division’s filing
with the secretary of state, for publication in the state
register, of a notice of the decision. At the time of filing
the notice of its decision, the division shall also file with
the secretary of state a true copy of the decision. The
publication shall include a statement advising that any
person objecting to the decision must file, within ten
days after publication of the notice, a verified response
with the division setting forth the objection and the basis
therefor. If any such objection is filed, the division shall
hold an administrative hearing, conducted pursuant to
article five, chapter twenty-nine-a of this code, within
fifteen days of receiving the response unless the buyer or
other recipient consents to a later hearing. Nothing in
this subsection shall be construed to be applicable to the
seller or other transferor or to affect in any way a
proceeding under sections five and five-a of this article.

(b) In the factual situations set forth in subsection (a),
(b) or (c), section fourteen of this article, if the predeces-
sor’s modified rate of premium tax, as calculated in
accordance with section four of this article, is greater
than the manual rate of premium tax, as calculated in
accordance with said section, for other employers in the
same class or group, then, if the new employer does not
already have a modified rate of premium, it shall also
assume the predecessor employer’s modified rates for the
payment of premiums as determined under sections four
and five of this article until sufficient time has elapsed
for the new employer’s experience record to be combined
with the experience record of the predecessor employer
so as to calculate the new employer’s own modified rate
of premium tax. As provided for by subdivision (4),
subsection (b), section fourteen of this article, the new employer may avoid this assumption of the predecessor's rate of premium tax if all liabilities of the predecessor are paid prior to or at the time of the sale or other 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.

(a) The commissioner shall establish a workers' compensation fund from the premiums and other funds paid thereto by employers, as herein provided, for the benefit of employees of employers who have paid the premiums applicable to such employers and have otherwise complied fully with the provisions of section five, article two of this chapter, and for the benefit, to the extent elsewhere in this chapter set out, of employees of employers who have elected, under section nine, article two of this chapter, to make payments into the surplus fund herein- after provided for, and for the benefit of the dependents of all such employees, and for the payment of the administration expenses of this chapter.

(b) A portion of all premiums that shall be paid into the workers' compensation fund by subscribers not electing to carry their own risk under section nine, article two of this chapter, shall be set aside to create and maintain a surplus fund to cover the catastrophe hazard, the second injury hazard, and all losses not otherwise specifically provided for in this chapter. The percentage to be set aside shall be determined pursuant to the rules adopted to implement section four, article two of this chapter and shall be in an amount sufficient to maintain a solvent surplus fund. All interest earned on investments by the workers' compensation fund, which is attributable to the surplus fund, shall be credited to the surplus fund.
(c) A catastrophe is hereby defined as an accident in which three or more employees are killed or receive injuries, which, in the case of each individual, consist of: Loss of both eyes or the sight thereof; or loss of both hands or the use thereof; or loss of both feet or the use thereof; or loss of one hand and one foot or the use thereof. The aggregate of all medical and hospital bills and other costs, and all benefits payable on account of a catastrophe is hereby defined as "catastrophe payment".

In case of a catastrophe to the employees of an employer who is an ordinary premium-paying subscriber to the fund, or to the employees of an employer who, having elected to carry the employer's own risk under section nine, article two of this chapter, has heretofore elected, or may hereafter elect, to pay into the catastrophe reserve of the surplus fund under the provisions of that section, then the catastrophe payment arising from such catastrophe shall not be charged against, or paid by, such employer but shall be paid from the catastrophe reserve of the surplus fund.

(d) (1) If an employee who has a definitely ascertainable physical impairment, caused by a previous occupational injury, occupational pneumoconiosis, or occupational disease, irrespective of its compensability, becomes permanently and totally disabled through the combined effect of such previous injury and a second injury received in the course of and as a result of his or her employment, the employer shall be chargeable only for the compensation payable for such second injury: Provided, That in addition to such compensation, and after the completion of the payments therefor, the employee shall be paid the remainder of the compensation that would be due for permanent total disability out of a special reserve of the surplus fund known as the second injury reserve, created in the manner hereinbefore set forth. The procedure by which the claimant's request for a permanent total disability award under this
section is ruled upon shall require that the issue of the claimant's degree of permanent disability first be determined. Thereafter, by means of a separate order, a decision shall be made as to whether the award shall be a second injury award under this subsection or a permanent total disability award to be charged to the employer's account or to be paid directly by the employer if the employer has elected to be self-insured under the provisions of section nine, article two of this chapter.

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

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

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

(a) All disbursements from the workers' compensation
fund and of the other funds created pursuant to this chapter which might otherwise be presumed to be abandoned and subject to the custody of the state as unclaimed property under the provisions of article eight, chapter thirty-six of this code shall be deposited by the state treasurer to the credit of the workers' compensation fund or to such other affected fund.

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

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

(a) The workers' compensation division is authorized to establish a program to require the acceptance of disbursements by electronic transfer from the workers' compensation fund to employers, vendors and all others lawfully entitled to receive such disbursements: Provided, That claimants may not be required to accept such transfers but may elect to do so.

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

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

(d) Any program authorized by this section must be implemented through the issuance of a rule pursuant to subdivisions (b) and (c), section seven, article three, chapter twenty-one-a of this code.
ARTICLE 4. DISABILITY AND DEATH BENEFITS.


Every employee who sustains an injury subject to this chapter, or his or her representative, shall immediately on the occurrence of such injury or as soon thereafter as practicable give or cause to be given to the employer or any of the employer's agents a written notice of the occurrence of such injury, with like notice or a copy thereof to the workers' compensation division stating in ordinary language the name and address of the employer, the name and address of the employee, the time, place, nature and cause of the injury, and whether temporary total disability has resulted therefrom. Such notice shall be given personally to the employer or any of the employer's agents, or may be sent by certified mail addressed to the employer at the employer's last known residence or place of business. Such notice may be given to the workers' compensation division by mail.

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

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

(1) The division may enter an order conditionally approving the claimant's application if the division finds that obtaining additional medical evidence or evaluations or other evidence related to the issue of compensability would aid the division in making a correct final decision. Benefits shall be paid during the period of conditional approval; however, if the final decision is one that rejects the claim, then any such payments shall be considered an overpayment. The division may only
recover the amount of such an overpayment as provided for in subsection (i) of this section.

(2) In making a determination regarding the compensability of a newly filed claim or upon a filing for the reopening of a prior claim pursuant to the provisions of section sixteen of this article based upon an allegation of recurrence, reinjury, aggravation or progression of the previous compensable injury or in the case of a filing of a request for any other benefits under the provisions of this chapter, the division shall consider the date of the filing of the claim for benefits for a determination of the following:

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

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

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

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

In the event of an affirmative finding upon any of these four factors, then such finding shall be given probative weight in the overall determination of the compensability of the claim or of the merits of the reopening request.

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

(b) Where it appears from the employer's report, or from proper medical evidence, that a compensable injury will result in a disability which will last longer than three days as provided in section five of this article, the
division may immediately enter an order commencing
the payment of temporary total disability benefits to the
claimant in the amounts provided for in sections six and
fourteen of this article, and the payment of the expenses
provided for in subsection (a), section three of this
article, relating to said injury, without waiting for the
expiration of the thirty-day period during which objec-
tions may be filed to such findings as provided in section
one, article five of this chapter. The division shall enter
an order commencing the payment of temporary total
disability or medical benefits within fifteen days of
receipt of either the employee's or employer's report of
injury, whichever is received sooner, and also upon
receipt of either a proper physician's report or any other
information necessary for a determination. The division
shall give to the parties immediate notice of any order
granting temporary total disability or medical benefits.

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

(d) Upon receipt of the first report of injury in claim,
the division shall request from the employer or employ-
ers any wage information necessary for determining the
rate of benefits to which the employee is entitled. If an
employer does not furnish the division with this informa-
tion within fifteen days from the date the division
received the first report of injury in the case, the em-
ployee shall be paid temporary total disability benefits for lost time at the rate the division obtains from reports made pursuant to section eleven, article ten, chapter twenty-one-a of this code. If no such wages have been reported, then the division shall make such payments at the rate the division finds would be justified by the usual rate of pay for the occupation of the injured employee. The division shall adjust the rate of benefits both retroactively and prospectively upon receipt of proper wage information. The division shall have access to all wage information in the possession of any state agency.

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

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

(g) Where the employer has elected to carry its own
risk under section nine, article two of this chapter, and upon the findings aforesaid, the division shall immediately issue a pay order directing the employer to pay such amounts as are due the claimant for temporary total disability benefits. A copy of the order shall be sent to the claimant. The self-insured employer shall commence such payments by mailing or delivering the payments directly to the employee within ten days of the date of the receipt of the pay order by the employer. If the self-insured employer believes that its employee is entitled to benefits, the employer may start payments before receiving a pay order from the division.

(h) In the event that an employer files a timely objection to any order of the division with respect to compensability, or any order denying an application for modification with respect to temporary total disability benefits, or with respect to those expenses outlined in subsection (a), section three of this article, the division shall continue to pay to the claimant such benefits and expenses during the period of such disability. Where it is subsequently found by the division that the claimant was not entitled to receive such temporary total disability benefits or expenses, or any part thereof, so paid, the division shall, when the employer is a subscriber to the fund, credit said employer's account with the amount of the overpayment; and, when the employer has elected to carry its own risk, the division shall refund to such employer the amount of the overpayment. The amounts so credited to a subscriber or repaid to a self-insurer shall be charged by the division to the surplus fund created in section one, article three of this chapter.

(i) When the employer has protested the compensability or applied for modification of a temporary total disability benefit award or expenses and the final decision in such case determines that the claimant was not entitled to such benefits or expenses, the amount of such benefits or expenses shall be considered overpaid.
The division may only recover the amount of such benefits or expenses by withholding, in whole or in part, as determined by the division, future permanent partial disability benefits payable to the individual in the same or other claims and credit such amount against the overpayment until it is repaid in full.

(j) In the event that the division finds that based upon the employer's report of injury, the claim is not compensable, the division shall provide a copy of such employer's report to the claimant in addition to the order denying the claim.

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

(a) If the division makes an award for permanent partial or permanent total disability, the division or self-insured employer shall start payment of benefits by mailing or delivering the amount due directly to the employee within fifteen days from the date of the award: Provided, That the division may withhold payment of the portion of the award that is the subject of the following subsection until seventy-seven days have expired without an objection being filed.

(b) On and after the first day of July, one thousand nine hundred ninety-five, whenever the division, the office of judges, or the workers' compensation appeal board enters an order granting the claimant a permanent total disability award and an objection or appeal is then filed by the employer or the division, the division shall begin the payment of monthly permanent total disability benefits. However, any payment for a back period of benefits from the onset date of total permanent disability to the date of the award shall be limited to a period of twelve months of benefits. If, after all litigation is completed and the time for the filing of any further objections or appeals to the award has expired, the award of permanent total disability benefits is upheld,
then the claimant shall receive the remainder of benefits
due to him or her based upon the onset date of total
permanent disability that was finally determined.

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

(d) If a timely protest to the award is filed, as provided
in section one or nine, article five of this chapter, the
division or self-insured employer shall continue to pay to
the claimant such benefits during the period of such
disability unless it is subsequently found that the
claimant was not entitled to receive the benefits, or any
part thereof, so paid, in which event the division shall,
where the employer is a subscriber to the fund, credit
said employer's account with the amount of the overpay-
ment; and, where the employer has elected to carry the
employer's own risk, the division shall refund to such
employer the amount of the overpayment. The amounts
so credited to a subscriber or repaid to a self-insurer
shall be charged by the division to the surplus fund
created by section one, article three of this chapter. If
the final decision in any case determines that a claimant
was not lawfully entitled to benefits paid to him or her
pursuant to a prior decision, such amount of benefits so
paid shall be deemed overpaid. The division may only
recover such amount by withholding, in whole or in part,
as determined by the division, future permanent partial
disability benefits payable to the individual in the same
or other claims and credit such amount against the
overpayment until it is repaid in full.

§23-4-3. Schedule of maximum disbursements for medical,
surgical, dental and hospital treatment; legislative
approval; guidelines; preferred provider agree-
ments; charges in excess of scheduled amounts not
to be made; required disclosure of financial inter-
est in sale or rental of medically related mechani-
cal 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 prohib-
ited; medical cost and care programs; payments;
interlocutory orders.

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

The division shall disburse and pay from the fund for
such personal injuries to such employees as may be
entitled thereto hereunder as follows:
(1) Such sums for health care services, rehabilitation services, durable medical and other goods and other supplies and medically related items as may be reasonably required. The division shall determine that which is reasonably required within the meaning of this section in accordance with the guidelines developed by the health care advisory panel pursuant to section three-b of this article: Provided, That nothing herein shall prevent the implementation of guidelines applicable to a particular type of treatment or service or to a particular type of injury before guidelines have been developed for other types of treatment or services or injuries: Provided, however, That any guidelines for utilization review which are developed in addition to the guidelines provided for in said section may be utilized by the division until superseded by guidelines developed by the health care advisory panel pursuant to said section. Each health care provider who seeks to provide services or treatment which are not within any such guideline shall submit to the division specific justification for the need for such additional services in the particular case and the division shall have the justification reviewed by a health care professional before authorizing any such additional services. The division is authorized to enter into preferred provider and managed care agreements.

(2) Payment for health care services, rehabilitation services, durable medical and other goods and other supplies and medically related items authorized under this subsection may be made to the injured employee or to the person, firm or corporation who or which has rendered such treatment or furnished health care services, rehabilitation services, durable medical or other goods or other supplies and items, or who has advanced payment for same, as the division may deem proper, but no such payments or disbursements shall be made or awarded by the division unless duly verified statements on forms prescribed by the division shall be filed with
the division within two years after the rendering of such
treatment or the delivery of such goods, supplies or
items: *Provided, That no payment hereunder shall be
made unless such verified statement shows no charge for
or with respect to such treatment or for or with respect
to any of the items specified above has been or will be
made against the injured employee or any other person,
firm or corporation, and when an employee covered
under the provisions of this chapter is injured in the
course of and as a result of his or her employment and is
accepted for health care services, rehabilitation services,
or the provision of durable medical or other goods or
other supplies or medically related items, the person,
firm or corporation rendering such treatment is hereby
prohibited from making any charge or charges therefor
or with respect thereto against the injured employee or
any other person, firm or corporation which would result
in a total charge for the treatment rendered in excess of
the maximum amount set forth therefor in the division's
schedule established as aforesaid.

(3) Any pharmacist filling a prescription for medica-
tion for a workers' compensation claimant shall dispense
a generic brand of the prescribed medication if a generic
brand exits. If a generic brand does not exist, then the
pharmacist may dispense the name brand. In the event
that a physician wishes to prescribe the use of the name
brand of a given prescription medication, then he or she
must indicate in his or her own handwriting on the
prescription order form that the brand name medication
is to be issued. In the event that a claimant wishes to
receive the name brand medication in lieu of the generic
brand and if the physician has not indicated that the
brand name is required, then the claimant may receive
the name brand medication but, in that event, the
claimant will be personally liable for the difference in
costs between the generic brand medication and the
brand name medication.
In the event that a claimant elects to receive health care services from a health care provider from outside of the state of West Virginia and if that health care provider refuses to abide by and accept as full payment the reimbursement made by the workers' compensation division pursuant to the schedule of maximum reasonable amounts of fees authorized by subsection (a) of this section, then, with the exceptions noted below, the claimant will be personably liable for the difference between the scheduled fee and the amount demanded by the out-of-state health care provider.

(A) In the event of an emergency where there is an urgent need for immediate medical attention in order to prevent the death of a claimant or to prevent serious and permanent harm to the claimant, if the claimant receives the emergency care from an out-of-state health care provider who refuses to accept as full payment the scheduled amount, then that claimant will not be personally liable for the difference between the amount scheduled and the amount demanded by the health care provider. Upon the claimant's attaining a stable medical condition and being able to be transferred to either a West Virginia health care provider or an out-of-state health care provider who has agreed to accept the scheduled amount of fees as payment in full, if such claimant refuses to seek the specified alternative health care providers, then he or she will be personally liable for the difference in costs between the scheduled amount and the amount demanded by the health care provider for services provided after attaining stability and being able to be transferred.

(B) In the event that there is no health care provider reasonably near to the claimant's home who is qualified to provide the claimant's needed medical services and who is either located in the state of West Virginia or who has agreed to accept as payment in full the scheduled amounts of fees, then the division upon application by
the claimant may authorize the claimant to receive medical services from another health care provider, and such claimant shall not be personally liable for the difference in costs between the scheduled amount and the amount demanded by the health care provider.

(b) No employer shall enter into any contracts with any hospital, its physicians, officers, agents or employees to render medical, dental or hospital service or to give medical or surgical attention therein to any employee for injury compensable within the purview of this chapter, and no employer shall permit or require any employee to contribute, directly or indirectly, to any fund for the payment of such medical, surgical, dental or hospital service within such hospital for such compensable injury. Any employer violating this section shall be liable in damages to the employer's employees as provided in section eight, article two of this chapter, and any employer or hospital or agent or employee thereof violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not less than one hundred dollars nor more than one thousand dollars or by imprisonment not exceeding one year, or both: Provided, That the foregoing provisions of this subsection shall not be deemed to prohibit an employer from participating in a preferred provider organization or program or a health maintenance organization or managed care organization or other medical cost containment relationship with the providers of medical, hospital or other health care: Provided, however, That nothing in this section shall be deemed to restrict the right of a claimant to select his or her initial health care provider for treatment of a compensable injury or disease. Should such a claimant thereafter wish to change his or her health care provider and if his or her employer has established and maintains a managed health care program consisting of a preferred provider organization or program, a health maintenance
organization, then the claimant shall select a new health care provider through such managed care program. Moreover, if the division enters into an agreement which has been approved by the compensation programs performance council with a preferred provider organization or program, a health maintenance organization or other health care delivery organization or organizations, then if a claimant seeks to change his or her initial choice of health care provider and if the claimant's employer does not provide access to such an organization as part of the employer's general health insurance benefit, then the claimant shall be provided with a new health care provider from the division's preferred provider organization or program, health maintenance organization or other health care delivery organization or organizations available to him or her.

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

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

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

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

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

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

(a) In case the personal injury causes death, reasonable funeral expense, in an amount to be fixed from time to time by the division, shall be paid from the fund, payment to be made to the persons who have furnished the services and supplies, or to the persons who have advanced payment for same, as the division may deem proper, in addition to such award as may be made to the employee's dependents.

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

(1) The person seeking funeral expenses notifies, in writing and prior to the rendering of any service, the employee's dependent as to the exact cost of the service
and the exact amount the employee's dependent would be responsible for paying in excess of the amount fixed by the division; and

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

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

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

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

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

(b) If the injury causes temporary total disability, the employee shall receive during the continuance thereof a maximum weekly benefit to be computed on the basis of seventy percent of the average weekly wage earnings, wherever earned, of the injured employee, at the date of injury, not to exceed one hundred percent of the average weekly wage in West Virginia: Provided, That in the case of a claimant whose injury occurred prior to the
second day of February, one thousand nine hundred ninety-five, the maximum benefit rate shall be the rate applied under the prior enactment of this subsection which was in effect at the time the injury occurred, and the rate shall not be affected by the amendment and reenactment of this section during the regular session of the Legislature in the year one thousand nine hundred ninety-five.

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

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

(d) For all awards of permanent total disability benefits that are made on or after the second day of February, one thousand nine hundred ninety-five, including those claims in which a request for an award was pending before the division or which were in litigation but not yet submitted for a decision, then benefits shall be payable until the claimant attains the age necessary to receive federal old age retirement benefits under the provisions of the Social Security Act, 42 U.S.C. 401 and 402, in effect on the effective date of this section. Such a
claimant shall be paid benefits so as not to exceed a
maximum benefit of sixty-six and two-thirds percent of
the claimant's average weekly wage earnings, wherever
earned, at the time of the date of injury not to exceed one
hundred percent of the average weekly wage in West
Virginia. The minimum weekly benefits paid hereunder
shall be as is provided for in subdivision (b) of this
section. In all claims in which an award for permanent
total disability benefits was made prior to the second day
of February, one thousand nine hundred ninety-five,
such awards shall continue to be paid at the rate in
effect prior to the such date, subject to annual adjust-
ments for changes in the average weekly wage in West
Virginia: Provided, That the provisions of sections one
through eight of article four-a of this chapter shall be
applied thereafter to all such prior awards that were
previously subject to its provisions. A single or aggre-
gate permanent disability of eighty-five percent or more
shall entitle the employee to a rebuttable presumption of
a permanent total disability for the purpose of paragraph
(2), subdivision (n) of this section: Provided, however,
That the claimant must also be at least fifty percent
medically impaired upon a whole body basis. The
presumption may be rebutted if the evidence establishes
that the claimant is not permanently and totally disabled
pursuant to subdivision (n) of this section. Under no
circumstances shall the division grant an additional
permanent disability award to a claimant receiving a
permanent total disability award: Provided further,
That if any claimant thereafter sustains another compen-
sable injury and has permanent partial disability result-
ing therefrom, the total permanent disability award
benefit rate shall be computed at the highest benefit rate
justified by any of the compensable injuries, and the cost
of any increase in the permanent total disability benefit
rate shall be paid from the second injury reserve created
by section one, article three of this chapter.
(e) (1) For all awards made on or after the second day of February, one thousand nine hundred ninety-five, if the injury causes permanent disability less than permanent total disability, the percentage of disability to total disability shall be determined and the award computed on the basis of four weeks' compensation for each percent of disability determined, at the maximum or minimum benefit rates provided for in subdivision (d) of this section: Provided, That in the case of a claimant whose injury occurred prior to the second day of February, one thousand nine hundred ninety-five, the maximum benefit rate shall be the rate applied under the prior enactment of this section which was in effect at the time the injury occurred, and the rate shall not be affected by the amendment and reenactment of this section during the regular session of the Legislature in the year one thousand nine hundred ninety-five.

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

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

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

The loss of a great toe shall be considered a ten percent disability.
The loss of a great toe (one phalanx) shall be considered a five percent disability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) Should a claimant to whom has been made a permanent partial award die from sickness or noncompensable injury, the unpaid balance of such award shall be paid to claimant's dependents as defined in this chapter, if any; such payment to be made in the same installments that would have been paid to claimant if living: Provided, That no payment shall be made to any surviving spouse of such claimant after his or her remarriage, and that this liability shall not accrue to the
estate of such claimant and shall not be subject to any debts of, or charges against, such estate.

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

(i) For the purposes of this chapter, with the exception of those injuries provided for in subdivision (f) of this section and in section six-b of this article, the degree of permanent disability other than permanent total disability shall be determined exclusively by the degree of whole body medical impairment that a claimant has suffered. For those injuries provided for in subdivision (f) of this section and section six-b of this article, the degree of disability shall be determined exclusively by the provisions of said subdivision and said section. The occupational pneumoconiosis board created pursuant to section eight-a of this article shall premise its decisions upon the degree of pulmonary function impairment that claimants suffer solely upon whole body medical impairment. The workers' compensation division shall adopt standards for the evaluation of claimants and the determination of a claimant's degree of whole body medical impairment. Once the degree of medical impairment has been determined, that degree of impairment shall be the degree of permanent partial disability that shall be awarded to the claimant. This subdivision shall be applicable to all injuries incurred and diseases with a date of last exposure on or after second day of February, one thousand nine hundred ninety-five, to all applications for an award of permanent partial disability made on and after such date, and to all applications for an award of permanent partial disability that were pending before the division or pending in litigation but not yet submitted for decision on and after such date. The prior provisions of this subdivision shall remain in effect for all other claims.
(j) From a list of names of seven persons submitted to
the commissioner by the health care advisory panel, the
commissioner shall appoint an interdisciplinary examin-
ing board consisting of five members to evaluate claim-
ants, including by examination if the board so elects. The
board shall be composed of three qualified physicians
with specialties and expertise qualifying them to evalu-
ate medical impairment and two vocational rehabilita-
tion specialists who are qualified to evaluate the ability
of a claimant to perform gainful employment with or
without retraining. One member of the board shall be
designated annually as chairperson by the commissioner.
The term of office of each member of the board shall be
six years and until his or her successor has been ap-
pointed and has qualified: Provided, That two of the
persons initially appointed shall serve a term of six
years, two of the remaining persons shall serve a term of
four years; and the remaining member shall serve a term
of two years. Any member of the board may be ap-
pointed to any number of terms. Any two physician
members and one vocational rehabilitation specialist
member shall constitute a quorum for the transaction of
business. The commissioner, from time to time, shall fix
the per diem salary, computed on the basis of actual time
devoted to the discharge of their duties, to be paid to
each member of the board, and the members shall also be
entitled to reasonable and necessary traveling and other
expenses incurred while actually engaged in the perfor-
ance of their duties.

(1) Prior to the referral of any issue to the interdisci-
plinary examining board, the division shall conduct such
examinations of the claimant as it finds necessary and
obtain all pertinent records concerning the claimant's
medical history and reports of examinations and forward
them to the board at the time of the referral. The
division shall provide adequate notice to the employer of
the filing of the request for a permanent total disability
award and the employer shall be granted an appropriate period in which to respond to the request. The claimant and the employer may furnish all pertinent information to the board and shall furnish to the board any information requested by the board. The claimant and the employer may each submit no more than one report and opinion regarding each issue present in a given claim. The employer shall be entitled to have the claimant examined by medical specialists and vocational rehabilitation specialists: Provided, That the employer is entitled to only one such examination on each issue present in a given claim. Any additional examinations must be approved by the division and shall be granted only upon a showing of good cause. The reports from all employer-conducted examinations must be filed with the board and served upon the claimant. The board may request that those persons who have furnished reports and opinions regarding a claimant provide it with such additional information as the board may deem necessary. Both the claimant and the employer, as well as the division, may submit reports from experts challenging or supporting the other reports in the record regardless of whether or not such an expert examined the claimant or relied solely upon the evidence of record.

(2) If the board or a quorum thereof elects to examine a claimant, the individual members shall conduct such examinations as are pertinent to each of their specialties. If a claim presents an issue beyond the expertise of the board, the board may obtain advice or evaluations by other specialists. In addition, if the compensation programs performance council determines that the number of applications pending before the board has exceeded the level at which the board can review and make recommendations within a reasonable time, then the council may authorize the commissioner to appoint such additional members to the board as may be necessary to reduce the backlog of applications. Such addi-
ional members shall be recommended by the health care advisory panel and the commissioner may make such appointments as he or she chooses from the recommendations. The additional board members shall not serve a set term but shall serve until the council determines that the number of pending applications has been reduced to an acceptable level.

(3) Referrals to the board shall be limited to matters related to the determination of permanent total disability under the provisions of subdivision (n) of this section and to questions related to medical cost containment decisions, utilization review decisions, and managed care decisions arising under section three of this article.

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

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

(6) Except as noted below, objections pursuant to section one, article five of this chapter to any such order
shall be limited in scope to matters within the record developed before the workers' compensation division and the board and shall further be limited to the issue of whether the board properly applied the standards for determining medical impairment, if applicable, and the issue of whether the board's findings are clearly wrong in view of the reliable, probative and substantial evidence on the whole record. Should either party contend that the claimant's condition has changed significantly since the review conducted by the board, the party may file a motion with the administrative law judge, together with a report supporting that assertion. Upon the filing of such motion, the administrative law judge shall cause a copy of the report to be sent to the examining board asking, the board to review the report and provide such comments as the board chooses within sixty days of the board's receipt of the report. The board may then either supply such comments or, at the board's discretion, request that the claim be remanded to the board for further review by the board. If remanded, the claimant is not required to submit to further examination by the employer's medical specialists or vocational rehabilitation specialists. Following any such remand, the board shall file its recommendations with the administrative law judge for his or her review. If the board elects to respond with comments, such comments shall be filed with the administrative law judge for his or her review. Following the receipt of either the board's recommendations or comment, the administrative law judge shall then issue a written decision ruling upon the asserted change in the claimant's condition. No additional evidence may be introduced during the review of the objection before the office of judges or elsewhere on appeal: Provided, That each party and the division may submit one written opinion on each issue pertinent to a given claim based upon a review of the evidence of record either challenging or defending the board's findings and conclusions. Thereafter, based upon the
evidence then of record, the administrative law judge shall issue a written decision containing his or her findings of fact and conclusions of law regarding each issue involved in the objection.

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

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

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

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

(n) (1) Other than for those injuries specified in subdivision (m) of this section, in order to be eligible to apply for an award of permanent total disability benefits for all injuries incurred and all diseases, including occupational pneumoconiosis, with a date of last exposure on and after the second day of February, one thousand nine hundred ninety-five, and for all requests for such an
award pending before the division on and after the second day of February, one thousand nine hundred ninety-five, a claimant must have been awarded the sum of fifty percent in prior permanent partial disability awards or have suffered an occupational injury or disease which results in a finding that the claimant has suffered a medical impairment of fifty percent. Upon filing such an application, the claim will be reevaluated by the examining board pursuant to subdivision (j) of this section to determine if he or she has suffered a whole body medical impairment of fifty percent or more resulting from either a single occupational injury or occupational disease or a combination of occupational injuries and occupational diseases. A claimant whose prior permanent partial disability awards total eighty-five percent or more shall also be examined by the board and must be found to have suffered a whole body medical impairment of fifty percent in order for his or her request to be eligible for further review. The examining board shall review the claim as provided for in subdivision (j) of this section. If the claimant has not suffered whole body medical impairment of at least fifty percent, then the request shall be denied. Upon a finding that the claimant does have a fifty percent whole body medical impairment, then the review of the application shall continue as provided for in the following paragraph of this subdivision. Those claimants whose prior permanent partial disability awards total eighty-five percent or more and who have been found to have a whole body medical impairment of at least fifty percent shall then be entitled to the rebuttable presumption created pursuant to subdivision (d) for the remaining issues in the request. For the purposes of determining whether the claimant should be awarded a permanent total disability benefits under the second injury provisions of subsection (d), section one, article three of this code, only a combination of occupational injuries and occupational diseases, including occupational pneumoconiosis, shall be consid-
A disability which renders the injured employee unable to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he or she has previously engaged with some regularity and over a substantial period of time shall be considered in determining the issue of total disability. In addition, the vocational standards adopted pursuant to subsection (m), section seven, article three, chapter twenty-one-a of this code shall be considered once they are effective.

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

- Eighty percent for the first year;
- Seventy percent for the second year;
- Sixty percent for the third year; and
- Fifty percent for the fourth year.

Provided, That in no event shall such benefits exceed one hundred percent of the average weekly wage in West Virginia. In no event shall such benefits be subject to the minimum benefit amounts required by the provisions of 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.

If an employee is found to be permanently disabled due to occupational pneumoconiosis, as defined in section one of this article, the percentage of permanent disability shall be determined by the degree of medical impairment that is found by the occupational pneumoconiosis board. The division shall enter an order setting forth the findings of the occupational pneumoconiosis board with regard to whether the claimant has occupational pneumoconiosis and the degree of medical impairment, if any, resulting therefrom. That order shall be the final decision of the division for purposes of section one, article five of this chapter. If such a decision is objected to, the office of judges shall affirm the decision of occupational pneumoconiosis board made following hearing unless the decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. Compensation shall be paid therefor in the same manner and at the same rate as is provided for permanent disability under the provisions of subdivisions (d), (e), (g), (h), (i), (j), (k), (m) and (n), section six of this article: Provided, That if it shall be determined by the division in accordance with the facts in the case and with the advice and recommendation of the occupational pneumoconiosis board that an employee has occupational pneumoconiosis, but without measurable pulmonary impairment therefrom, such employee shall be awarded and paid twenty weeks of benefits at the same benefit rate as hereinabove provided.

If the employee dies from occupational pneumoconiosis, the benefits shall be as provided for in section ten of this article; as to such benefits sections eleven to fourteen, inclusive, of this article shall apply.
In cases of permanent disability or death due to occupational pneumoconiosis, as defined in section one of this article, accompanied by active tuberculosis of the lungs, compensation shall be payable as for disability or death due to occupational pneumoconiosis alone.

The provisions of section sixteen, article four and sections two, three, four and five, article five of this chapter providing for the further adjustment of claims shall be applicable to the claim of any claimant who receives a permanent partial disability award for occupational pneumoconiosis.

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

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

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

(a) The Legislature hereby finds and declares that two of the primary objectives of the workers' compensation system established by this chapter are to provide benefits to an injured claimant promptly and to effectuate his or her return to work at the earliest possible time; that the prompt dissemination of medical information to the
division and employer as to diagnosis, treatment and recovery is essential if these two objectives are to be achieved; that claimants are increasingly burdened with the task of contacting their treating physicians to request the furnishing of detailed medical information to the division and their employers; that the division is increasingly burdened with the administrative responsibility of providing copies of medical reports to the employer involved, whereas in other states the employer can obtain the necessary medical information direct from the treating physician; that much litigation is occasioned in this state because of a lack of medical information having been received by the employer as to the continuing disability of a claimant; and that detailed narrative reports from the treating physician are often necessary in order for the division, the claimant's representatives and the employer to evaluate a claim and determine whether additional or different treatment is indicated.

(b) In view of the foregoing findings, a claimant irrevocably agrees by the filing of his or her application for benefits that any physician may release to and orally discuss with the claimant's employer, or its representative, or with a representative of the division from time to time the claimant's medical history and any medical reports pertaining to the occupational injury or disease and to any prior injury or disease of the portion of the claimant's body to which a medical impairment is alleged containing detailed information as to the claimant's condition, treatment, prognosis and anticipated period of disability and dates as to when the claimant will reach or has reached his maximum degree of improvement or will be or was released to return to work. For the exclusive purposes of this chapter, the patient-physician privilege of confidentiality is waived with regard to the physician's providing this medical information to the division, the employer, or to the employer's
Whenever a copy of any such medical report is obtained by the employer or its representative and the physician has not also forwarded a copy of the same to the division, the employer shall forward a copy of such medical report to the division within ten days from the date such employer received the same from 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.

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

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

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

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

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

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

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

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

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

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

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

(f) Notwithstanding the anticipated period of disability established pursuant to the provisions of subsection (b) of this section, whenever in any claim temporary total disability shall continue longer than one hundred twenty days from the date of injury (or from the date of the last preceding examination and evaluation pursuant to the provisions of this subsection or pursuant to the directions of the division under other provisions of this chapter), the division shall refer the claimant to a physician or physicians of the division selection for

examination and evaluation in accordance with the provisions of subsection (d) of this section and the provisions of subsection (e) of this section shall be fully applicable: Provided, That the requirement of mandatory examinations and evaluations pursuant to the provisions of this subsection shall not apply to any claimant who sustained a brain stem or spinal cord injury with resultant paralysis or an injury which resulted in an amputation necessitating a prosthetic appliance.

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

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

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

In case a personal injury, other than occupational pneumoconiosis or other occupational disease, suffered by an employee in the course of and resulting from his or her employment, causes death, and disability is continuous from date of such injury until date of death, or if death results from occupational pneumoconiosis or from any other occupational disease, the benefits shall be in the amounts and to the persons as follows:

(a) If there be no dependents, the disbursements shall
be limited to the expense provided for in sections three
and four of this article.

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

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

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

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

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

Compensation under subdivisions (b) and (c) hereof
shall, except as may be specifically provided to the
contrary therein, cease upon the death of the dependent,
and the right thereto shall not vest in his or her estate.
(d) "Dependent", as used in this chapter, shall mean a widow, widower, child under eighteen years of age, or under twenty-five years of age when a full-time student as provided herein, invalid child or posthumous child, who, at the time of the injury causing death, is dependent in whole or part for his or her support upon the earnings of the employee, stepchild under eighteen years of age, or under twenty-five years of age when a full-time student as provided herein, child under eighteen years of age legally adopted prior to the injury causing death, or under twenty-five years of age when a full-time student as provided herein, father, mother, grandfather or grandmother, who at the time of the injury causing death, is dependent in whole or in part for his or her support upon the earnings of the employee; and invalid brother or sister wholly dependent for his or her support upon the earnings of the employee at the time of the injury causing death.

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

(2) On and after the second day of February, one thousand nine hundred ninety-five, when an award of permanent total disability benefits is made, a claimant shall make a one-time election of whether to receive the full amount of payments for the award or to receive a reduced payment in order to provide an annuity payment to his or her dependents. The sum of twenty thousand dollars shall be the initial amount of the annuity.
Thereafter, the compensation programs performance council shall review the annuity amount at least every three years. The council shall also from time to time determine the amount of the reduction in benefits that will be used to contribute towards the full amount necessary to purchase the annuity. The council may, from time to time as it deems appropriate, fix an amount which the fund will contribute toward the purchase of annuities. The commissioner and the council are authorized to either fund such annuities through the investments of the workers' compensation fund or through the use of a private provider of annuities. The selection of such a private provider of annuities shall be through competitive bids. If at the time of the claimant's death he or she has no dependents, then the proceeds of the annuity shall remain with the fund. Should such a claimant's entitlement to receive the permanent total disability award terminate due to his or her attaining the necessary retirement age provided for by subdivision (d), section six, this article or for any other reason other than the death of the claimant, then the annuity shall be cancelled and the proceeds thereof shall remain with the fund.


(a) To entitle any employee or dependent of a deceased employee to compensation under this chapter, other than for occupational pneumoconiosis or other occupational disease, the application therefor must be made on the form or forms prescribed by the division and filed with the division within six months from and after the injury or death, as the case may be, and unless so filed within such six month period, the right to compensation under this chapter shall be forever barred, such time limitation being hereby declared to be a condition of the right and hence jurisdictional, and all proofs of dependency in fatal cases must likewise be filed with the division within six months from and after the death. In case the
employee is mentally or physically incapable of filing
such application, it may be filed by his or her attorney or
by a member of his or her family.

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

(c) To entitle any employee to compensation for occu-
pational disease other than occupational pneumoconiosis
under the provisions hereof, the application therefor
must be made on the form or forms prescribed by the
division and filed with the division within three years
from and after the day on which the employee was last
exposed to the particular occupational hazard involved
or within three years from and after the employee's
occupational disease was made known to him or her by
a physician or which he or she should reasonably have
known, whichever shall last occur, and unless so filed
within such three-year period, the right to compensation
under this chapter shall be forever barred, such time
limitation being hereby declared to be a condition of the
right and hence jurisdictional, or, in case of death, the
application shall be filed as aforesaid by the dependent
of such employee within one year from and after such
employee's death, and such time limitation is a condition
of the right and hence jurisdictional.

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

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

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

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

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

(1) Except as provided in section twenty-two of this article, in any claim which was closed without the entry of an order regarding the degree, if any, of permanent disability that a claimant has suffered, or in any case in
which no award has been made, any such request must be made within five years of the closure. During that time period, only two such requests may be filed.

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

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

(4) With the exception of the items set forth in subsection (d), section three of this article, in any claim where medical or any type of rehabilitation service has not been rendered or durable medical goods or other supplies have not been received for a period of five years, then no request for additional medical or any type of rehabilitation benefits shall be granted nor shall any such medical or any type of rehabilitation benefits or any type of goods or supplies be paid for by the division if such were provided without a prior request. For the exclusive purposes of this paragraph, medical services and rehabilitation services shall not include any encounter in which significant treatment was not performed.

(b) In any claim in which an injured employee shall make application for a further period of temporary total disability, if such application be in writing and filed within the applicable time limit stated above, then the
division shall pass upon the request within thirty days of the receipt of the request. If the decision is to grant the request, then the order shall provide for the receipt of temporary total disability benefits. In any case in which an injured employee shall make application for a further award of permanent partial disability benefits or for an award of permanent total disability benefits, if such application be in writing and filed within the applicable time limit as stated above, the division shall pass upon the request within thirty days of its receipt and, if the division determines that the claimant may be entitled to an award, the division will then refer the claimant for such further examinations as may be necessary.

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

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

(1) The division shall continuously monitor permanent total disability awards and may from time to time, after due notice to the claimant, reopen a claim for reevaluation of the continuing nature of the disability and possible modification of the award: Provided, That such reopenings shall not be done sooner than every two
Provided, however, That any individual claimant shall only be reevaluated a total of two times after which he or she may not be again reevaluated under the provisions of this subsection. The division may reopen a claim for reevaluation when, in the division’s sole discretion, it concludes that there exists good cause to believe that the claimant no longer meets the eligibility requirements under subdivision (n), section six of this article. The eligibility requirements, including any vocational standards, shall be applied as those requirements are stated at the time of a claim’s reopening: Provided further, That if a permanent total disability award was made on or after the eighth day of April, one thousand nine hundred ninety-three, and on or before the second day of February, one thousand nine hundred ninety-five, the eligibility requirements for the claimant upon a reopening shall be the eligibility requirements which applied to his or her claim at the time the award was made. This section shall not be applicable to any claim in which the final decision on the eligibility of the claimant to a permanent total disability award was made more than ten years prior to the date of proposed reevaluation.

(2) Upon reopening a claim under this subsection, the division may take evidence, have the claimant evaluated, make findings of fact and conclusions of law and shall vacate, modify or affirm the original permanent total disability award as the record requires. The claimant’s former employer shall not be a party to the reevaluation, but shall be notified of the reevaluation and may submit such information to the division as the employer may elect. In the event the claimant retains his or her award following the reevaluation, then the claimant’s reasonable attorneys’ fees incurred in defending the award shall be paid by the workers’ compensation division from the supersedeas reserve of the surplus fund. In addition, the workers’ compensation division shall reimburse a
prevailing claimant for his or her costs in obtaining one
evaluation on each issue during the course of the reeval-
uation with such reimbursement being made from the
supersedeas reserve of the surplus fund. The compensa-
tion programs performance council shall adopt criteria
for the determination of reasonable attorneys' fees.

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

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

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

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

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

(b) For the purposes of subdivisions (d) and (n), section six of this article, the award of permanent partial disability benefits under the provisions of section six-b of this article or under that portion of section six-a of this article which awards twenty weeks of benefits to a claimant who has occupational pneumoconiosis but without measurable pulmonary impairment therefrom shall not be counted towards the eighty-five percent needed to gain the rebuttable presumption of permanent
total disability or towards the fifty percent threshold of paragraph (1), subdivision (n), section six of this article when such claimant has terminated active employment and is receiving federal nondisability pension or retirement benefits, including old-age benefits under the Social Security Act. This subsection shall not affect any other awards of permanent partial disability benefits and their use in achieving the rebuttable eighty-five percent presumption or the fifty percent threshold.

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

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

(a) After the eighth day of April, one thousand nine hundred ninety-three, a reduction in the amount of benefits as specified in subsection (b) of this section shall be made whenever benefits are being paid for a permanent total disability award regardless of when such benefits were awarded. This section is not applicable to the receipt of medical benefits or the payment therefor, the receipt of permanent partial disability benefits, the receipt of benefits by partially or wholly dependent persons, or to the receipt of benefits pursuant to the provisions of subsection (e), section ten of this article. Prior to the application of this section to any claimant, the division shall give the claimant notice of the effect of this section upon a claimant's award if and when such...
(b) Whenever applicable benefits are paid to a claimant with respect to the same time period in which the claimant has earned wages as a result of his or her employment, the following reduction in applicable benefits shall be made. The claimant's applicable monthly benefits and monthly net wages received from the current employment shall be added together. If such total exceeds by more than one hundred twenty percent of the amount of the claimant's monthly net wages earned during his or her last employment prior to the award of permanent total disability benefits, then such excess shall be reduced by one dollar for each two dollars that the claimant's monthly benefits and monthly net wages exceed the one hundred twenty percent level: Provided, That in no event shall applicable benefits be reduced below the minimum weekly benefits as provided for in subdivisions (b) and (d), section six of this article.

ARTICLE 4C. EMPLOYERS' EXCESS LIABILITY FUND.

§23-4C-1. Purpose.

The purpose of this article is to permit the establishment of a system to provide insurance coverage for employers subject to this chapter who may be subjected to liability under section two, article four of this chapter, for any excess of damages over the amount received or receivable under this chapter.

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

(a) To provide insurance coverage for employers subject to this chapter who may be subjected to liability for any excess of damages over the amount received or receivable under this chapter, the division may continue the fund known as the employers' excess liability fund, which fund shall be separate from the workers' compensation fund. The employers' excess liability fund shall consist of premiums paid thereto by employers who may
voluntarily elect to subscribe to the fund for coverage of
potential liability to any person who may be entitled to
any excess of damages over the amount received or
receivable under this chapter.

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

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

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

(b) Except with regard to interlocutory matters, upon making any decision, upon the making or refusing to make any award, or upon the making of any modification or change with respect to former findings or orders, as provided by section sixteen, article four of this chapter, the division shall give notice, in writing, to the employer, employee, claimant, as the case may be, of its action, which notice shall state the time allowed for filing an objection to such finding, and such action of the division shall be final unless the employer, employee, claimant or dependant shall, within thirty days after the receipt of such notice, object in writing, to such finding, and unless an objection is filed within such thirty-day period, such finding or action shall be forever final, such time limitation being hereby declared to be a condition of the right to litigate such finding or action and hence jurisdictional. Any such objection shall be filed with the office of judges with a copy served upon the division and other parties in accordance with the procedures set forth in sections eight and nine of this article.

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

(d) Once an objection has been filed with the office of judges, the parties to the objection shall be offered an opportunity for mediation of the disputed issue by the division. If all of the parties to the objection agree to mediation, the division shall designate a deputy who was
not involved in the original decision to act as mediator:

Provided, That on issues related solely to the medical
necessity of proposed medical treatment or diagnostic
services, the division shall offer the parties to the
objection a selection of names of medical providers in
the appropriate specialty. The parties shall then either
agree upon a medical provider who shall act as mediator
or, in the absence of an agreement, the division shall
select a medical provider who shall act as mediator. In
cases where issues of medical necessity are intertwined
with nonmedical treatment or nondiagnostic issues, both
a medical provider and a designated deputy shall act as
comediators and shall consider their respective issues.
Neither shall be empowered to overturn the decision of
the other.

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

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

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

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

(f) The division is expressly authorized to amend, correct, or set aside any order on any issue entered by it which is on its face defective or clearly erroneous or the result of mistake, clerical error or fraud. Jurisdiction to take this action shall continue until the expiration of one hundred eighty days from the date of entry of an order unless the order is sooner affected by appellate action:

Provided, That corrective actions in the case of fraud may be taken at any time.

(g) All objections to orders of the division shall be styled in the name of the workers' compensation division. All appeals prosecuted from the office of judges or from the appeal board shall either be in the name of the workers' compensation division or shall be against the workers' compensation division. In all such matters, the workers' compensation division shall be the party in interest.

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

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

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

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

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

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

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

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

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

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


With the exception of medical benefits, the claimant and the employer, with the consent and approval of the workers' compensation division, may negotiate a final settlement of any and all issues in a claim wherever the claim may then be in the review or appellate processes. The parties seeking to settle and compromise an objection to a division decision shall file the written and executed agreement with the division. The division shall review the proposed agreement to determine if it is fair and reasonable to the parties and shall ensure that each of the parties are fully aware of the effects of the agreement including what each party is giving up in exchange for the agreement. If the division concludes that the agreement is not fair or is not reasonable or that one of the parties is not fully informed, then the division shall reject the agreement. If the employer is not active in the claim, then the division may negotiate a final settlement of any and all issues in a claim except for medical benefits with the claimant: Provided, That the agreement must then be submitted to the office of judges whereupon an administrative law judge shall undertake the review and make the assurances provided for above as in the case of an employer and claimant agreement. Upon the approval of either type of agreement, the agreement shall be filed with the division's records, and the filing constitutes a dismissal of any objection or appeal on the issues agreed to. The division will give notice of the settlement and dismissal, if necessary, to the office of judges, the appeal board, or the supreme court of appeals. Once any such agreement is accepted by the parties and the division, any issue that is the subject of the agreement shall not be reopened by either party or by the division. Any such agreement may
provide for a lump sum payment which shall not exceed
a percentage of the entire settlement to be determined
from time to time by the compensation programs perfor-
mance council in keeping with the necessity to protect
the claimant, the employer, and the solvency of the
workers’ compensation fund. The remainder of any such
settlement shall be paid out over time as would have
been the case had an award been made. If a settlement
provides for future rehabilitation costs and a degree of
permanent partial disability, then the agreed upon
degree of permanent partial disability shall be stated in
the agreement. That degree of permanent partial dis-
ability shall then be entered upon the records of the
division as the award in the claim. In the event that an
employer agrees to settle an issue which settlement is to
be paid directly by the employer, then the amount so
paid or to be paid shall be a portion of the employer’s
premium tax as that term is used in article two of this
chapter. If such employer later fails to make the agreed
upon payment, the division shall assume the obligation
to make the payments and shall be entitled to recover the
amounts paid or to be paid from the employer as pro-
vided for in sections five and five-a, article two of this
chapter.

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

(a) The workers’ compensation office of administrative
law judges previously created pursuant to chapter
twelve, acts of the Legislature, one thousand nine
hundred ninety, second extraordinary session, is hereby
continued and designated to be an integral part of the
workers’ compensation system of this state. The office of
judges shall be under the supervision of a chief adminis-
trative law judge who shall be appointed by the gover-
nor, with the advice and consent of the Senate. The
previously appointed incumbent of that position who
was serving on the second day of February, one thousand
nine hundred ninety-five, shall continue to serve in that
capacity unless subsequently removed as provided for in
subsection (b) of this section.

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

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

(d) The administrative expense of the office of judges shall be included within the annual budget of the workers' compensation division.

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

(f) The chief administrative law judge shall continue to have the power to hear and determine all disputed claims in accordance with the provisions of this article, establish a procedure for the hearing of disputed claims, take oaths, examine witnesses, issue subpoenas, establish the amount of witness fees, keep such records and make such reports as are necessary for disputed claims, and exercise such additional powers, including the delegation of such powers to administrative law judges or hearing examiners as may be necessary for the proper conduct of a system of administrative review of disputed claims. The chief administrative law judge shall make
113  [Enr. Com. Sub. for S. B. No. 250

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

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

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

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

The office of judges shall keep full and complete
records of all proceedings concerning a disputed claim.

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

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

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

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


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

Two members of such board shall be of opposite politics to the third, and all three shall be citizens of this state who have resided therein for a period of at least five years. All members of the board shall be appointed by the governor and shall receive an annual salary in accordance with the provisions of section two-a, article seven, chapter six of this code. The salaries shall be payable in monthly installments, and the members shall also be entitled to all reasonable and necessary traveling and other expenses actually incurred while engaged in the performance of their duties. The governor shall designate one of the members of the board as chairman thereof, and the board shall meet at the capitol or at such other places throughout the state as it may consider proper at regular sessions designated as "Appeal Board Hearing Days" commencing on the first Tuesday of every month or the next regular business day, for a period of at
least three days, for the purpose of conducting hearings
on appeals, and continuing as long as may be necessary
for the proper and expeditious transaction of the hear-
ings, decisions and other business before it. All clerical
services required by the board shall be paid for by the
commissioner from any funds at his or her disposal. The
board shall, from time to time, compile and promulgate
such rules of practice and procedure as to it shall appear
proper for the prompt and efficient discharge of its
business and such rules shall be submitted first to the
compensation programs performance council for its
approval pursuant to subdivisions (b) and (c), section
seven, article three, chapter twenty-one-a of this code
and, if so approved, then to the supreme court of appeals
for approval, and if approved by such court shall have
the same force and effect as the approved rules of
procedure of circuit courts. By and with the consent of
the commissioner, the board shall employ such clerical
staff as may be necessary for the efficient conduct of its
business. Salaries of the board, and its employees, and
all of its necessary operating expenses shall be paid from
the workers' compensation fund. The board shall submit
its annual budget to the commissioner for inclusion as a
separate item in the budget estimates prepared by him or
her annually and within the limits of such budget, all
expenses of the board shall be by the requisition of the
commissioner. Salaries of the employees of the board
shall be governed by the provisions of article six, chapter
twenty-nine of this code.

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

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

(a) Any employer, employee, claimant or dependent,
who shall feel aggrieved at any final action of the
administrative law judge taken after a hearing held in accordance with the provisions of section nine of this article, shall have the right to appeal to the board created in section eleven of this article for a review of such action. The workers' compensation division shall likewise have the right to appeal to the appeal board any final action taken by the administrative law judge. The aggrieved party shall file a written notice of appeal with the office of judges directed to such board, within thirty days after receipt of notice of the action complained of, or in any event, regardless of notice, within sixty days after the date of the action complained of, and unless the notice of appeal is filed within the time specified, no such appeal shall be allowed, such time limitation being hereby declared to be a condition of the right to such appeal and hence jurisdictional; and the office of judges shall notify the other parties immediately upon the filing of a notice of appeal. The office of judges shall forthwith make up a transcript of the proceedings before the office of judges and certify and transmit the same to the board. Such certificate shall incorporate a brief recital of the proceedings therein had and recite each order entered and the date thereof.

(b) The board shall review the action of the administrative law judge complained of at its next meeting after the filing of notice of appeal, provided such notice of appeal shall have been filed thirty days before such meeting of the board, unless such review be postponed by agreement of parties or by the board for good cause. The board shall set a time and place for the hearing of arguments on each claim and shall notify the interested parties thereof, and briefs may be filed by the interested parties in accordance with the rules of procedure prescribed by the board. The board may affirm the order or decision of the administrative law judge or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the administrative law
judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:

(1) In violation of statutory provisions; or

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

(3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

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

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

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

(d) Instead of affirming, reversing or modifying the decision of the administrative law judge as aforesaid, the board may, upon motion of any party or upon its own motion, for good cause shown, to be set forth in the order of the board, remand the case to the chief administrative law judge for the taking of such new, additional or further evidence as in the opinion of the board may be necessary for a full and complete development of the facts of the case. In the event the board shall remand the case to the chief administrative law judge for the taking of further evidence therein, the administrative law judge shall proceed to take such new, additional or further evidence in accordance with any instruction given by the
board, and shall take the same within thirty days after
receipt of the order remanding the case, giving to the
interested parties at least ten days' written notice of such
supplemental hearing, unless the taking of evidence shall
be postponed by agreement of parties, or by the adminis-
trative law judge for good cause. After the completion of
such supplemental hearing, the administrative law judge
shall, within sixty days, render his or her decision
affirming, reversing or modifying the former action of
the administrative law judge, which decision shall be
appealable to, and proceeded with by the appeal board
in like manner as in the first instance. In addition, upon
a finding of good cause, the board may remand the case
to the workers' compensation division for further
development. Any decision made by the division follow-
ing such a remand shall be subject to objection to the
office of judges and not to the board. The board may
remand any case as often as in its opinion is necessary
for a full development and just decision of the case. All
appeals from the action of the administrative law judge
shall be decided by the board at the same session at
which they are heard, unless good cause for delay thereof
be shown and entered of record. In all proceedings
before the board, any party may be represented by
counsel.

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

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


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

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

From any final decision of the board, including any
order of remand, an application for review may be
prosecuted by either party or by the workers' compensa-
tion division to the supreme court of appeals within
thirty days from the date thereof by the filing of a
petition therefor to such court against the board and the
adverse party or parties as respondents, and unless the
petition for review is filed within such thirty-day period,
no such appeal or review shall be allowed, such time
limitation being hereby declared to be a condition of the
right to such appeal or review and hence jurisdictional;
and the clerk of such court shall notify each of the
respondents and the workers' compensation division of
the filing of such petition. The board shall, within ten
days after receipt of such notice, file with the clerk of the
court the record of the proceedings had before it, includ-
ing all the evidence. The court or any judge thereof in
vacation may thereupon determine whether or not a
review shall be granted. And if granted to a nonresident
of this state, he or she shall be required to execute and
file with the clerk before such order or review shall
become effective, a bond, with security to be approved by the clerk, conditioned to perform any judgment which may be awarded against him or her thereon. The board may certify to the court and request its decision of any question of law arising upon the record, and withhold its further proceeding in the case, pending the decision of court on the certified question, or until notice that the court has declined to docket the same. If a review be granted or the certified question be docketed for hearing, the clerk shall notify the board and the parties litigant or their attorneys and the workers' compensation division, of that fact by mail. If a review be granted or the certified question docketed, the case shall be heard by the court in the same manner as in other cases, except that neither the record nor briefs need be printed. Every such review granted or certified question docketed prior to thirty days before the beginning of the term, shall be placed upon the docket for such term. The attorney general shall, without extra compensation, represent the board in such cases. The court shall determine the matter so brought before it and certify its decision to the board and to the division. The cost of such proceedings on petition, including a reasonable attorney's fee, not exceeding thirty dollars to the claimant's attorney, shall be fixed by the court and taxed against the employer if the latter be unsuccessful, and if the claimant, or the division (in case the latter be the applicant for review) be unsuccessful, such costs, not including attorney's fees, shall be taxed against the division, payable out of the workers' compensation fund, or shall be taxed against the claimant, in the discretion of the court. But there shall be no cost taxed upon a certified question.

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

No attorney's fee in excess of twenty percent of any award granted shall be charged or received by an attorney for a claimant or dependent. In no case shall
the fee received by the attorney of such claimant or dependent be in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks. The interest on disability or dependent benefits as provided for in this chapter shall not be considered as part of the award in determining any such attorney's fee. However, any contract entered into in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks, as herein provided, shall be unlawful and unenforceable as contrary to the public policy of this state and any fee charged or received by an attorney in violation thereof shall be deemed an unlawful practice and render the attorney subject to disciplinary 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.

Irvin J. Smith
Clerk of the Senate

Donald F. Key
Clerk of the House of Delegates

Earl Ray Tomblin
President of the Senate

Jeff Miller
Speaker House of Delegates

The within bill is approved this the 16th day of February, 1995.

Massey Capel
Governor