WEST VIRGINIA LEGISLATURE
SEVENTY-EIGHTH LEGISLATURE
REGULAR SESSION, 2007

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 595

(Senator Minard, original sponsor)

[Passed March 10, 2007; in effect from passage.]
AN ACT to amend and reenact §23-1-1 and §23-1-1f of the Code of West Virginia, 1931, as amended; to amend and reenact §23-2-9 of said code; to amend and reenact §23-2C-3, §23-2C-8, §23-2C-15, §23-2C-18 and §23-2C-19 of said code; to amend said code by adding thereto a new section, designated §23-2C-18a; and to amend and reenact §23-5-9 of said code, all relating to the transition to a private workers' compensation insurance system; expressing legislative intent; permitting the Insurance
Commissioner to hire additional exempt employees; exempting the Insurance Commissioner from purchasing rules in some circumstances; changing requirements for approval of self-insured status and for reports from self-insured employers; making various technical changes necessitated by the transition to a private workers' compensation insurance system; reducing frequency of certain payments from self-insured employers and private carriers; authorizing the Insurance Commissioner to assess self-insured employers for certain funds; making certain assessments against self-insured employers discretionary with the Insurance Commissioner; clarifying how disputes related to claims against the Uninsured Employer Fund are resolved; increasing time that employers must report certain changes in coverage to the Insurance Commissioner; authorizing the Insurance Commissioner to promulgate exempt legislative rules; revising rate-making process; defining terms; providing for the designation of a single rating organization; deleting provisions regarding private carrier premium collection; requiring agencies to terminate or revoke licenses, permits or certifications of employers in default to the state; clarifying persons subject to certain liens; removing requirement that the record of proceedings before the office of judges include certain documents; requiring the implementation of any benefit or award granted by a decision of the Office of Judges, unless stayed by explicit order; placing limitations on scope of permitted stay; and regarding the handling of resulting overpayments.

Be it enacted by the Legislature of West Virginia:

That §23-1-1 and §23-1-1f of the Code of West Virginia, 1931, as amended, be amended and reenacted; that §23-2-9 of said code be amended and reenacted; that §23-2C-3, §23-2C-8, §23-
2C-15, §23-2C-18 and §23-2C-19 of said code be amended and reenacted; that said code be amended by adding thereto a new section, designated §23-2C-18a; and that §23-5-9 of said code be amended and reenacted, all to read as follows:

ARTICLE 1. GENERAL ADMINISTRATIVE PROVISIONS.

§23-1-1. Workers' Compensation Commission created; findings.

(a) The Legislature finds that a deficit exists in the Workers' Compensation Fund of such critical proportions that it constitutes an imminent threat to the immediate and long-term solvency of the fund and constitutes a substantial deterrent to the economic development of this state. The Legislature further finds that addressing the workers' compensation crisis requires the efforts of all persons and entities involved and resolution of the crisis is in the best interest of the public. Modification to the rate system, alteration of the benefit structure, improvement of current management practices and changes in perception must be merged into a unified effort to make the workers' compensation system viable and solvent through the mutualization of the system and the opening of the market to private workers' compensation insurance carriers. It was and remains the intent of the Legislature that the amendments to this chapter enacted in the year two thousand three be applied from the date upon which the enactment was made effective by the Legislature. The Legislature finds that an emergency exists as a result of the combined effect of this deficit, other state budgetary deficits and liabilities and other grave social and economic circumstances currently confronting the state and that unless the changes provided by the enactment of the amendments
to this chapter, as well as other legislation designed to
address the problem are made effective immediately,
the fiscal stability of this state will suffer irreparable
harm. Accordingly, the Legislature finds that the need
of the citizens of this state for the protection of the
State Treasury and the solvency of the Workers'
Compensation Funds requires the limitations on any
expectations that may have arisen from prior
enactments of this chapter.

(b) It is the further intent of the Legislature that this
chapter be interpreted so as to assure the quick and
efficient delivery of indemnity and medical benefits to
injured workers at a reasonable cost to the employers
who are subject to the provisions of this chapter. It is
the specific intent of the Legislature that workers'
compensation cases shall be decided on their merits and
that a rule of "liberal construction" based on any
"remedial" basis of workers' compensation legislation
shall not affect the weighing of evidence in resolving
such cases. The workers' compensation system in this
state is based on a mutual renunciation of common law
rights and defenses by employers and employees alike.
Employees' rights to sue for damages over and above
medical and health care benefits and wage loss benefits
are to a certain degree limited by the provisions of this
chapter and employers' rights to raise common law
defenses, such as lack of negligence, contributory
negligence on the part of the employee, and others, are
curtailed as well. Accordingly, the Legislature hereby
declares that any remedial component of the workers'
compensation laws is not to cause the workers'
compensation laws to receive liberal construction that
alters in any way the proper weighing of evidence as
required by section one-g, article four of this chapter.
(c) The "Workers' Compensation Division of the Bureau of Employment Programs" is, on or after the first day of October, two thousand three, reestablished, reconstituted and continued as the Workers' Compensation Commission, an agency of the state. The purpose of the commission is to ensure the fair, efficient and financially stable administration of the workers' compensation system of the State of West Virginia. The powers and duties heretofore imposed upon the Workers' Compensation Division and the Commissioner of the Bureau of Employment Programs as they relate to workers' compensation are hereby transferred to and imposed upon the Workers' Compensation Commission and its executive director in the manner prescribed by this chapter.

(d) It is the intent of the Legislature that the transfer of the administration of the workers' compensation system of this state from the Workers' Compensation Division under the Commissioner of the Bureau of Employment Programs to the Workers' Compensation Commission under its executive director and the workers' compensation board of managers is to become effective the first day of October, two thousand three. Any provisions of the enactment of Enrolled Senate Bill No. 2013 in the year two thousand three relating to the transfer of the administration of the workers' compensation system of this state that conflict with the intent of the Legislature as described in this subsection shall, to that extent, become operative on the first day of October, two thousand three, and until that date, prior enactments of this code in effect on the effective date of Enrolled Senate Bill No. 2013 relating to the administration of the workers' compensation system of this state, whether amended and reenacted or repealed
by the passage of Enrolled Senate Bill No. 2013, have
full force and effect. All provisions of the enactment of
Enrolled Senate Bill No. 2013 in the year two thousand
three relating to matters other than the transfer of the
administration of the workers' compensation system of
this state shall become operative on the effective date of
that enactment, unless otherwise specifically provided
in that enactment.

(e) It is the intent of the Legislature, expressed
through its enactment of legislation, to transfer the
regulation of the workers' compensation system to the
Insurance Commissioner. By proclamation of the
Governor, as authorized by article two-c of this chapter,
the Workers' Compensation Commission was
terminated on the thirty-first day of December, 2005.
To further the transition from the state-operated
workers' compensation system to a system of private
insurance, the duties and responsibilities of the
Workers' Compensation Commission and the board of
managers, including, but not limited to, ratemaking and
adjudication of claims now reside with the Insurance
Commissioner.

§23-1-1f. Authority of Insurance Commission to exempt
employees from classified service; exemption
from purchasing rules.

Notwithstanding any other provision of this code,
upon termination of the commission, the Insurance
Commissioner may:

(1) Exempt no more than twenty positions of the
offices of the Insurance Commissioner from the
classified service of the state, the employees of which
positions shall serve at the will and pleasure of the commissioner: Provided, That such exempt positions shall be in addition to those positions in classified-exempt service under the classification plan adopted by the Division of Personnel. The Insurance Commissioner shall report all exemptions made under this section to the Director of the Division of Personnel no later than the first day of July, two thousand seven, and thereafter as the commissioner determines to be necessary; and

(2) Expend such sums for professional services as he or she determines are necessary to perform those duties transferred to the Insurance Commissioner upon the termination of the commission. The provisions of article three, chapter five-a of this code relating to the Purchasing Division of the Department of Administration shall not apply to these contracts, and the Insurance Commissioner shall award the contract or contracts on a competitive basis.

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

§23-2-9. Election of employer or employers’ group to be self-insured and to provide own system of compensation; exceptions; self administration; rules; penalties; regulation of self-insurers.

(a) Notwithstanding any provisions of this chapter to the contrary, the following types of employers or employers’ groups may apply for permission to self-insure their workers’ compensation risk.

(1) The types of employers are:

(A) Any employer who is of sufficient capability and
(B) Any employer or group of employers as provided in paragraph (A) of this subdivision of such capability and financial responsibility that 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 in this chapter; or

(C) Any employer who is signatory to a collective bargaining agreement that allows for participation in a group workers' compensation insurance program may join with any other employer or employers that are signatory to a collective bargaining agreement or agreements that allow for participation in a group workers' compensation program and jointly apply to the Insurance Commissioner to collectively self-insure their obligations under this chapter. The employers must collectively meet the conditions set forth in paragraph (A) or (B) of this subdivision. There shall be joint and several liability for all employers who choose to jointly self-insure under the provisions of this article.

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

(A) Submit all information requested by the Insurance Commissioner;

(B) Provide security or bond, in an amount and form
determined by the Insurance Commissioner, which shall
balance the employer's financial condition based upon
an analysis of its audited financial statements and the
full accrued value of current liability for future claim
payments based upon generally accepted actuarial and
accounting principles of the employer's existing and
expected liability;

(C) Meet the financial responsibility requirements set
forth in rules promulgated by the board of managers or
industrial council;

(D) Obtain and maintain a policy of excess insurance
if required to do so by the Insurance Commissioner; and

(E) Have an effective health and safety program at its
workplaces.

(3) Upon a finding that the employer has met all of the
requirements of this section and any rules promulgated
thereunder, 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
Insurance Commissioner. At the time of such review,
the Insurance Commissioner may require that the self-
insured employer post a bond or security or obtain and
maintain an excess insurance policy. This review shall
also include a recalculation of the amount of any
security, bond or policy of excess insurance previously
required to be posted or obtained under any provision
of this chapter or any rules promulgated thereunder.
Failure to provide the required amount or form of
security or bond or to obtain or maintain the required
excess insurance policy may cause the employer's
68 self-insurance status to be terminated by the Insurance
69 Commissioner.

70 (4) Whenever a self-insured employer furnishes
71 security or bond, including replacement and amended
72 bonds and other securities, as surety to ensure the
73 employer's or guarantor's payment of all obligations
74 under this chapter for which the security or bond was
75 furnished, the security or bond shall be in the most
76 current form or forms approved and authorized by the
77 commission or Insurance Commissioner for use by the
78 employer or its guarantors, surety companies, banks,
79 financial institutions or others in its behalf for that
80 purpose.

81 (b) (1) Notwithstanding any provision in this chapter
82 to the contrary, self-insured employers shall, effective
83 the first day of July, two thousand four, administer their
84 own claims. The Insurance Commissioner shall,
85 pursuant to rules promulgated by the board of
86 managers or industrial council, regulate the
87 administration of claims by employers granted
88 permission to self-insure their obligations under this
89 chapter. A self-insured employer shall comply with
90 rules promulgated by the board of managers or
91 industrial council governing the self-administration of
92 its claims.

93 (2) An employer or employers' group that self-insures
94 its risk and self-administers its claims shall exercise all
95 authority and responsibility granted to the Insurance
96 Commissioner or private carriers in this chapter and
97 provide notices of action taken to effect the purposes of
98 this chapter to provide benefits to persons who have
99 suffered injuries or diseases covered by this chapter. An
employer or employers' group granted permission to
self-insure and self-administer its obligations under this
chapter shall at all times be bound and shall comply
fully with all of the provisions of this chapter.
Furthermore, all of the provisions contained in article
four of this chapter pertaining to disability and death
benefits are binding on and shall be strictly adhered to
by the self-insured employer in its administration of
claims presented by employees of the self-insured
employer. Violations of the provisions of this chapter
and such rules relating to this chapter as may be
approved by the board of managers or industrial council
may constitute sufficient grounds for the termination of
the authority for any employer to self-insure its
obligations under this chapter.

(c) Each self-insured employer shall, on or before the
last day of the first month of each quarter or other
assigned reporting period, file with the Insurance
Commissioner 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 or
other assigned reporting period.

(d) (1) If a self-insured employer defaults in the
payment of any portion of surcharges or assessments
required under this chapter or rules promulgated
thereunder, or in any payment required to be made as
benefits provided by this chapter to the employer's
injured employees or dependants of fatally injured
employees, the Insurance Commissioner shall, in an
appropriate case, determine the full accrued value
based upon generally accepted actuarial and accounting
principles of the employer's liability, including the costs
of all awarded claims and of all incurred but not
reported claims. The amount determined may, in an appropriate case, be assessed against the employer. The Insurance Commissioner may demand and collect the present value of the defaulted liability. Interest shall accrue upon the demanded amount as provided in section thirteen of this article until the liability is fully paid. Payment of all amounts then due to the Insurance Commissioner and to the employer's employees is a sufficient basis for reinstating the employer to good standing with Insurance Commissioner and removing the employer from default status.

(2) The assessments and surcharges required to be paid by self-insured employers pursuant to the provisions of this chapter and the rules promulgated thereunder are special revenue taxes under and according to the provisions of state workers' compensation law and are considered 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, Title 11 of the United States 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 Insurance Commissioner.

(e) The commission 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 a pool is created, the board of managers shall adopt rules for the organizational plan,
participation, contributions and other payments which may be required of self-insured employers under this section. The board of managers may adopt a rule authorizing the commission to assess each self-insured employer in proportion according to each employer's portion of the unsecured obligation and liability or to assess according to some other method provided for by rule which shall properly create and fund the risk pool to serve the needs of employees, employers and the Workers' Compensation Fund by providing adequate security. The board of managers establishing a security risk pool may authorize the executive director to use any assessments, premium taxes and revenues and appropriations as may be made available to the commission. Effective upon termination of the commission, all statutory and regulatory authority provided to the commission and board of managers over pools created pursuant to this section, as such pools are defined in section two, article two-c of this chapter, shall transfer to the Insurance Commissioner.

(f) 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 reports to the Insurance Commissioner for a period of four or more consecutive quarters may have its status inactivated and shall apply for reactivation to status as a self-insured employer prior to its reemployment of employees. Despite the inactivation, the self-insured employer shall continue to make payments on all awards for which it is responsible. Upon application for reactivation of its status as an operating self-insured employer, the employer shall document that it meets the eligibility requirements needed to maintain self-insured employer status under this section and any rules

200 adopted to implement it. If the employer is unable to
201 requalify and obtain approval for reactivation, the
202 employer shall, effective with the date of employment of
203 any employee, purchase workers' compensation
204 insurance as provided in article two-c of this chapter,
205 but shall continue to be a self-insurer as to the prior
206 period of active status and to furnish security or bond
207 and meet its prior self-insurance obligations.

208 (g) In any case under the provisions of this section that
209 requires the payment of compensation or benefits by an
210 employer in periodical payments and the nature of the
211 case makes it possible to compute the present value of
212 all future payments, the commission may, in its
213 discretion, at any time compute and permit to be paid
214 into the Workers' Compensation Fund an amount equal
215 to the present value of all unpaid future payments on
216 the award or awards for which liability exists in trust.
217 Thereafter, the employer shall be discharged from any
218 further portion of premium tax liability upon the award
219 or awards and payment of the award or awards shall be
220 assumed by the commission. Upon termination of the
221 commission, the process herein described will no longer
222 be permitted. Self-insured employers may thereafter
223 withdraw from self-insured status and purchase
224 workers' compensation insurance as provided in article
225 two-c of this chapter, but said self-insured employers
226 shall remain liable for their self-insured employer
227 claims liabilities for each claim with a date of injury or
228 last exposure prior to the effective date of insurance
229 coverage.

230 (h) Any employer subject to this chapter, who elects to
231 carry the employer's own risk by being a self-insured
232 employer and who has complied with the requirements
of this section and of any applicable rules, shall not be
liable to respond in damages at common law or by
statute for the injury or death of any employee, however
occurring, after the election's approval and during the
period that the employer is allowed to carry the
employer's own risk.

(i) An employer may not hire any person or group to
self-administer claims under this chapter as a third-
party administrator unless the person or group has been
determined to be qualified to be a third-party
administrator by the Insurance Commissioner pursuant
to rules adopted by the board of managers or industrial
council. Any person or group whose status as a
third-party administrator has been revoked, suspended
or terminated by the Insurance Commissioner shall
immediately cease administration of claims and shall
not administer claims unless subsequently authorized
by the Insurance Commissioner.

(j) All regulatory, oversight and document-gathering
authority provided to the commission under this section
shall transfer to the Insurance Commissioner and the
industrial council upon termination of the commission.

ARTICLE 2C. EMPLOYERS' MUTUAL INSURANCE COMPANY.

§23-2C-3. Creation of employer mutual as successor
organization of the West Virginia Workers' Compensation Commission.

(a) On or before the first day of June, two thousand
five, the executive director may take such actions as are
necessary to establish an employers' mutual insurance
company as a domestic, private, nonstock, corporation
to:
(1) Insure employers against liability for injuries and occupational diseases for which their employees may be entitled to receive compensation pursuant to chapter twenty-three of this code and federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq.;

(2) Provide employer's liability insurance incidental to and provided in connection with the insurance specified in subdivision (1) of this subsection, including coal-workers' pneumoconiosis coverage and employer excess liability coverage as provided in this chapter; and

(3) Transact such other kinds of property and casualty insurance for which the company is otherwise qualified under the provisions of this code.

(4) The company shall not sell, assign or transfer substantial assets or ownership of the company.

(b) If the executive director establishes a domestic mutual insurance company pursuant to subsection (a) of this section:

(1) As soon as practical, the company established pursuant to the provisions of this article shall, through a vote of a majority of its provisional board, file its corporate charter and bylaws with the Insurance Commissioner and apply for a license with the Insurance Commissioner to transact insurance in this state. Notwithstanding any other provision of this code, the Insurance Commissioner shall act on the documents within fifteen days of the filing by the company.

(2) In recognition of the workers' compensation
insurance liability insurance crisis in this state at the
time of enactment of this article and the critical need to
expedite the initial operation of the company, the
Legislature hereby authorizes the Insurance
Commissioner to review the documentation submitted
by the company and to determine the initial capital and
surplus requirements of the company, notwithstanding
the provisions of section five-b, article three, chapter
tyhree-three of this code. The company shall furnish the
Insurance Commissioner with all information and
cooperate in all respects necessary for the Insurance
Commissioner to perform the duties set forth in this
section and in other provisions of this chapter and
chapter thirty-three of this code. The Insurance
Commissioner shall monitor the economic viability of
the company during its initial operation on not less than
a monthly basis, until such time as the commissioner, in
his or her discretion, determines that monthly reporting
is not necessary. In all other respects the company shall
be subject to comply with the applicable provisions of
chapter thirty-three of this code.

(3) Subject to the provisions of subdivision (4) of this
subsection, the Insurance Commissioner may waive
other requirements imposed on mutual insurance
companies by the provisions of chapter thirty-three of
this code as the Insurance Commissioner determines is
necessary to enable the company to begin insuring
employers in this state at the earliest possible date.

(4) Within forty months of the date of the issuance of
its license to transact insurance, the company shall
comply with the capital and surplus requirements set
forth in subsection (a), section five-b, article three,
chapter thirty-three of this code in effect on the
effective date of this enactment, unless said deadline is extended by the Insurance Commissioner.

(c) For the duration of its existence, the company is not and shall not be considered a department, unit, agency or instrumentality of the state for any purpose. All debts, claims, obligations and liabilities of the company, whenever incurred, shall be the debts, claims, obligations and liabilities of the company only and not of the state or of any department, unit, agency, instrumentality, officer or employee of the state.

(d) The moneys of the company are not and shall not be considered part of the General Revenue Fund of the state. The debts, claims, obligations and liabilities of the company are not and shall not be considered a debt of the state or a pledge of the credit of the state.

(e) The company is not subject to provisions of article nine-a, chapter six of this code; the provisions of chapter twenty-nine-b of this code; the provisions of article three, chapter five-a of this code; the provisions of article six, chapter twenty-nine of this code; the provisions of article six-a of said chapter; or the provisions of chapter twelve of this code.

(f) If the commission has been terminated, effective upon said termination, private carriers, including the company, shall not be subject to payment of premium taxes, surcharges and credits contained in article three, chapter thirty-three of this code on premiums received for coverage under this chapter. In lieu thereof, the workers' compensation insurance market shall be subject to the following:
(1) Each fiscal year, the Insurance Commissioner shall calculate a percentage surcharge to be collected by each private carrier from its policyholders. The surcharge percentage shall be calculated by dividing the previous fiscal year's total premiums collected plus deductible payments by all employers into the portion of the Insurance Commissioner's budget amount attributable to regulation of the private carrier market. This resulting percentage shall be applied to each policyholder's premium payment and deductible payments as a surcharge and remitted to the Insurance Commissioner. Said surcharge shall be remitted within ninety (90) days of receipt of premium payments;

(2) Each fiscal year, the Insurance Commissioner shall calculate a percentage surcharge to be remitted on a quarterly basis by self-insured employers and said percentage shall be calculated by dividing previous year's self-insured payroll in the state into the portion of the Insurance Commissioner's budget amount attributable to regulation of the self-insured employer market. This resulting percentage shall be applied to each self-insured employer's payroll and the resulting amount shall be remitted as a regulatory surcharge by each self-insured employer. The Workers' Compensation Board of Managers or industrial council may promulgate a rule for implementation of this section. The company, all other private carriers and all self-insured employers shall furnish the Insurance Commissioner with all required information and cooperate in all respects necessary for the Insurance Commissioner to perform the duties set forth in this section and in other provisions of this chapter and chapter thirty-three of this code. The surcharge shall be calculated so as to only defray the costs associated with
the administration of this chapter and the funds raised shall not be used for any other purpose;

(3) Upon termination of the commission, the company and all other private carriers shall collect a premiums surcharge from their policyholders equal to ten percent, or such higher or lower rate as annually determined, by the first day of May of each year, by the Insurance Commissioner to produce forty-five million dollars annually, of each policyholder's periodic premium amount for workers' compensation insurance. Additionally, by the first day of May each year, the self-insured employer community shall be assessed a cumulative total of nine million dollars. The methodology for the assessment shall be fair and equitable and determined by exempt legislative rule issued by the workers' compensation board of managers or industrial council. The amount collected shall be remitted to the Insurance Commissioner for deposit in the Workers' Compensation Debt Reduction Fund created in section five, article two-d of this chapter.

(g) The new premiums surcharge imposed by subdivision 3, subsection (f) of this section shall sunset and not be collectible with respect to workers' compensation insurance premiums paid when the policy is renewed on or after the first day of the month following the month in which the Governor certifies to the Legislature that the revenue bonds issued pursuant to article two-d, chapter twenty-three of this code have been retired and that the unfunded liability of the old fund has been paid or has been provided for in its entirety, whichever occurs last.

(a) The Workers' Compensation Uninsured Employer Fund shall be governed by the following:

1. (1) All money and securities in the fund must be held by the State Treasurer as custodian thereof to be used solely as provided in this article.

2. (2) The State Treasurer may disburse money from the fund only upon written requisition of the Insurance Commissioner.

3. (3) Assessments. — The Insurance Commissioner shall assess each private carrier and may assess self-insured employers an amount to be deposited in the fund. The assessment may be collected by each private carrier from its policyholders in the form of a policy surcharge. To establish the amount of the assessment, the Insurance Commissioner shall determine the amount of money necessary to maintain an appropriate balance in the fund for each fiscal year and shall allocate a portion of that amount to be payable by each of the groups subject to the assessment. After allocating the amounts payable by each group, the Insurance Commissioner shall apply an assessment rate to:

   (A) Private carriers that reflects the relative hazard of the employments covered by the private carriers, results in an equitable distribution of costs among the private carriers and is based upon expected annual premiums to be received;

   (B) Self-insured employers, if assessed, that results in an equitable distribution of costs among the self-insured employers and is based upon expected annual expenditures for claims; and
(C) Any other groups assessed that results in an equitable distribution of costs among them and is based upon expected annual expenditures for claims or premium to be received.

(4) The Workers' Compensation Board of Managers or industrial council may adopt rules for the establishment and administration of the assessment methodologies, rates, payments and any penalties that it determines are necessary to carry out the provisions of this section.

(b) Payments from the fund. —

(1) Except as otherwise provided in this subsection, an injured employee of any employer required to be covered under this chapter who has failed to obtain coverage may receive compensation from the uninsured employers' fund if such employee meets all jurisdictional and entitlement provisions of this chapter, files a claim with the Insurance Commissioner and makes an irrevocable assignment to the Insurance Commissioner of a right to be subrogated to the rights of the injured employee.

(2) Employees who are injured while employed by a self-insured employer are ineligible for benefits from the Workers' Compensation Uninsured Employer Fund.

(c) Initial determination upon receipt of a claim. —

(1) If the Insurance Commissioner determines that the claimant's employer maintained a policy of workers' compensation insurance pursuant to this chapter on the date of injury or last exposure or that the employer was not required to maintain such a policy on such date,
then the claim shall not be accepted into the fund; if the commissioner determines that the employer was required to maintain such a policy but failed to do so, the claim will be accepted into the fund and the Insurance Commissioner may assign such a claim to the third-party administrator of the fund for administration.

(2) The Insurance Commissioner shall notify the injured employee and the named employer of the determination made pursuant to subdivision (1) of this subsection and any party aggrieved thereby shall be entitled to protest such determination in a hearing before the Insurance Commissioner: Provided, That in any such proceeding, the employer has the burden of proving that it either provided mandatory workers' compensation insurance coverage or that it was not required to maintain workers' compensation insurance.

(d) Employer liability. —

(1) Any employer who has failed to provide mandatory coverage required by the provisions of this chapter is liable for all payments made and to be made on its behalf, including any benefits, administrative costs and attorney's fees paid from the fund or incurred by the Insurance Commissioner, plus interest calculated in accordance with the provisions of section thirteen, article two of this chapter.

(2) The Insurance Commissioner:

(A) May bring a civil action in a court of competent jurisdiction to recover from the employer the amounts set forth in subdivision (1) of this subsection. In any
such action, the Insurance Commissioner may also recover the present value of the estimated future payments to be made on the employer's behalf and the costs and attorney's fees attributable to such claim: Provided, That the failure of the Insurance Commissioner to include a claim for future payments shall not preclude one or more subsequent actions for such amounts;

(B) May enter into a contract with any person, including the third-party administrator of the uninsured employer fund, to assist in the collection of any liability of an uninsured employer; and

(C) In lieu of a civil action, may enter into an agreement or settlement regarding the collection of any liability of an uninsured employer.

(3) In addition to any other liabilities provided in this section, the Insurance Commissioner may impose an administrative penalty of not more than ten thousand dollars against an employer if the employer fails to provide mandatory coverage required by this chapter. All penalties and other moneys collected pursuant to this section shall be deposited into the Workers' Compensation Uninsured Employer Fund.

(e) Protests to claims decisions. -- Any party aggrieved by a claims decision made by the Insurance Commissioner or the third-party administrator in a claim that has been accepted into the fund may object to that decision by filing a protest with the office of judges as set forth in article five of this chapter.

(a) Effective upon termination of the commission, all subscriber policies with the commission shall novate to the company and all employers otherwise shall purchase workers' compensation insurance from the company unless permitted to self-insure their obligations. The company shall assume responsibility for all new fund obligations of the subscriber policies which novate to the company or which are issued thereafter. Each subscriber whose policy novates to the company shall also have its advanced deposit credited to its account with the company. Employers purchasing workers' compensation insurance from the company shall have the right to designate a representative or agent to act on its behalf in any and all matters relevant to coverage and claims as administered by the company.

(b) Effective the first day of July, two thousand eight, an employer may elect to: (1) Continue to purchase workers' compensation insurance from the company; (2) purchase workers' compensation insurance from another private carrier licensed and otherwise authorized to transact workers' compensation insurance in this state; or (3) self-insure its obligations if it satisfies all requirements of this code to so self-insure and is permitted to do so: Provided, That all state and local governmental bodies, including, but not limited to, all counties and municipalities and their subdivisions and including all boards, colleges, universities and schools, shall continue to purchase workers' compensation insurance from the company through the thirtieth day of June, two thousand twelve. The company and other private carriers shall be permitted to sell workers' compensation insurance through licensed agents in the state. To the extent that a private carrier markets workers' compensation insurance
through a licensed agent, it shall be subject to all applicable provisions of chapter thirty-three of this code.

(c) Every employer shall post a notice upon its premises in a conspicuous place identifying its workers' compensation insurer. The notice must include the insurer's name, business address and telephone number and the name, business address and telephone number of its nearest adjuster in this state. The employer shall at all times maintain the notice provided the information of his or her employees. Release of employer policy information and status by the industrial council and the Insurance Commissioner shall be governed by section four, article one of this chapter. The Insurance Commissioner shall collect and maintain information related to officers, directors and ten percent or more owners of each carrier's policyholders, and each private carrier shall provide said information to the Insurance Commissioner within sixty days of the issuance of a policy and any changes to the information shall thereafter be reported within sixty days of such change.

(d) Any rule promulgated by the board of managers or industrial council empowering agencies of this state to revoke or refuse to grant, issue or renew any contract, license, permit, certificate or other authority to conduct a trade, profession or business to or with any employer whose account is in default with regard to any liability under this chapter shall be fully enforceable by the Insurance Commissioner against any such employer.

(e) Effective the first day of January, two thousand nine, the company may decline to offer coverage to any
applicant. Effective the first day of January, two thousand nine, the company and private carriers may cancel a policy or decline to renew a policy upon the issuance of sixty days' written advance notice to the policyholder: Provided, That cancellation of the policy by the carrier for failure of consideration to be paid by the policyholder is effective after fifteen days advance written notice of cancellation to the policyholder.

(f) Every private carrier shall notify the Insurance Commissioner or his or her designee of: (i) The issuance or renewal of insurance coverage, within ten calendar days of the effective date of coverage; and (ii) a termination of coverage due to lapse, refusal to renew or cancellation, within three business days of the effective date of the termination; such notifications shall be on forms developed by the Insurance Commissioner.


(a) (1) The rate-making provisions and premium provisions contained in article two of this chapter shall not be applicable to the company or other private carriers. Rates for workers' compensation insurance are subject to the provisions of this section, section eighteen-a of this article and article twenty, chapter thirty-three of this code.

(2) In the event of any conflict, the provisions of this article shall have paramount effect, but the provisions in this chapter and chapter thirty-three of this code shall be construed as complementary and harmonious unless so clearly in conflict that they cannot reasonably be reconciled.
(b) An insurer shall file its rates by filing a multiplier or multipliers to be applied to prospective loss costs that have been filed by the designated advisory organization on behalf of the insurer in accordance with section eighteen-a of this article and may also file carrier specific rating plans.

(c) Rates must not be excessive, inadequate or unfairly discriminatory, nor may an insurer charge any rate which if continued will have or tend to have the effect of destroying competition or creating a monopoly.

(d) The Insurance Commissioner may disapprove rates if there is not a reasonable degree of price competition at the consumer level with respect to the class of business to which they apply. In determining whether a reasonable degree of price competition exists, the Insurance Commissioner shall consider all relevant tests, including:

(1) The number of insurers actively engaged in the class of business and their shares of the market;

(2) The existence of differentials in rates in that class of business;

(3) Whether long-run profitability for private carriers generally of the class of business is unreasonably high in relation to its risk;

(4) Consumers' knowledge in regard to the market in question; and

(5) Whether price competition is a result of the market or is artificial. If competition does not exist,
rates are excessive if they are likely to produce a long-
run profit that is unreasonably high in relation to the
risk of the class of business, or if expenses are
unreasonably high in relation to the services rendered.

(d) Rates are inadequate if they are clearly insufficient, together with the income from investments attributable to them, to sustain projected losses and expenses in the class of business to which they apply.

(e) One rate is unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses. Rates are not unfairly discriminatory because different premiums result for policyholders with similar exposure to loss but different expense factors, or similar expense factors but different exposure to loss, so long as the rates reflect the differences with reasonable accuracy. Rates are not unfairly discriminatory if they are averaged broadly among persons insured under a group, franchise or blanket policy.

§23-2C-18a. Designation of rating organization.

(a) For the purposes of this section:

(1) "Classification system" or "classification" means the plan, system or arrangement for grouping risks with similar characteristics or a specified class of risk by recognizing differences in exposure to hazards.

(2) "Experience rating" means a statistical procedure utilizing past risk experience to produce a prospective premium credit, debit or unity modification.
(3) "Prospective loss costs" means historical aggregate losses and loss adjustment expenses projected through development to their ultimate value and through trending to a future point in time. Prospective loss costs do not include provisions for profit or expenses other than loss adjustment expenses.

(4) "Statistical plan" means the plan, system or arrangement used in collecting data for ratemaking or other purposes.

(b) The Insurance Commissioner shall designate one rating organization to:

(1) Assist the commissioner in gathering, compiling and reporting relevant statistical information on an aggregate basis;

(2) Develop and administer, subject to approval by the commissioner, the uniform statistical plan, uniform classification plan and uniform experience rating plan;

(3) Develop and file manual rules, subject to the approval of the commissioner, that are reasonably related to the recording and reporting of data pursuant to the uniform statistical plan, uniform experience rating plan and the uniform classification plan; and

(4) File with the commissioner for approval all prospective loss costs, provisions for special assessments, all supplementary rating information and any changes, amendments or modification of the foregoing proposed in this state.

(c) Each workers' compensation insurer shall:
(1) Record and report its workers' compensation experience to the designated rating organization as set forth in the uniform statistical plan approved by the commissioner; and

(2) Adhere to the uniform classification plan and uniform experience rating plan developed by the designated rating organization and approved by the commissioner.

(d) The commissioner may promulgate exempt legislative rules to implement the provisions of this section, including a rule providing for the equitable sharing and recovery of the expense of the designated rating organization in performing the functions set forth in subsection (b) of this section.

§23-2C-19. Premium payment; employer default; special provisions as to employer default collection.

(a) Each employer who is required to purchase and maintain workers' compensation insurance or who elects to purchase workers' compensation insurance shall pay a premium to a private carrier. Each carrier shall notify its policyholders of the mandated premium payment methodology and under what circumstances a policyholder will be found to be in policy default.

(b) An employer who is required to purchase and maintain workers' compensation insurance but fails to do so or otherwise enters policy default shall be deprived of the benefits and protection afforded by this chapter, including section six, article two of this chapter, and the employer is liable as provided in section eight of said article. The policy defaulted
employer's liability under these sections is retroactive to the day the policy default occurs. The private carrier shall notify the policy defaulted employer of the method by which the employer may be reinstated with the private carrier.

(c) In addition to any other liabilities provided in this section, the Insurance Commissioner may impose an administrative fine of not more than ten thousand dollars against an employer if the employer fails to provide mandatory coverage required by this chapter.

(d) The company and the Insurance Commissioner shall be provided extraordinary powers to collect any premium amounts payable to the workers' compensation fund or the new fund and due from the first day of July, two thousand five, through the thirtieth day of June, two thousand eight. Those powers shall include: (1) Withholding of coverage effective the first day of January, two thousand six. Employers without coverage shall immediately be deprived of the benefits and protection afforded by this chapter, including section six, article two of this chapter and the employer is liable as provided in section eight of said article; (2) the right to maintain a civil action against all officers and directors of the employer individually for collection of the premium owed; and (3) the right to immediately report the employers to the State Tax Department and other state agencies to secure suspension of any and all licenses, certificates, permits, registrations and other similar approval documents necessary for the employer to conduct business in this state.

(e) Every agency shall, upon notification of employer
default by the Insurance Commissioner, immediately
begin the process to revoke or terminate any contract,
license, permit, certificate or other authority to conduct
a trade, profession or business in this state and shall
refuse to issue, grant or renew any such contract,
license, permit, certificate or authority.

(1) The term "employer default" means having an
outstanding balance or liability to the old fund or to the
uninsured employers' fund or being in policy default, as
defined in section two of this article, or failure to
maintain mandatory workers' compensation coverage.
An employer is not in default if it has entered into a
repayment agreement with the Insurance Commissioner
and remains in compliance with the obligations under
the repayment agreement.

(2) The term "agency" includes any unit of state
government such as officers, agencies, divisions,
departments, boards, commissions, authorities or public
corporations.

(f) Any amounts owed by an employer to the state as
a result of an employer default is a personal liability of
the employer, its officers, owners, partners and directors
and is immediately due and owing and shall, in
addition, be a lien enforceable against all the property
of the employer, its officers, owners, partners and
directors: Provided, That the lien shall not 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 the lien may
be enforced as other judgment liens are enforced
through the provisions of said chapter and the same is
considered by the circuit court to be a judgment lien for
this purpose.

(g) The Insurance Commissioner shall propose rules
for adoption by the industrial council to effectuate the
purposes of this section including the conditions under
which agencies shall comply with the provisions of
subsection (e) of this section and specifying how notice'
of default shall be given by the commissioner.

ARTICLE 5. REVIEW.

§23-5-9. Hearings on objections to Insurance Commissioner;
private carrier or self-insured employer decisions;
mediation; remand.

a) Objections to a decision of the Insurance
Commissioner, private carrier or self-insured employer,
whichever is applicable, 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 notify the Insurance
Commissioner, private carrier or self-insured employer,
whichever is applicable, and all other parties of the
filing of the objection. The office of judges shall
establish by rule promulgated in accordance with the
provisions of subsection (e), section eight of this article
an adjudicatory process that enables parties to present
evidence in support of their positions and provides an
expeditious resolution of the objection. The employer,
the claimant, the Insurance Commissioner, private
carrier or self-insured employer, whichever are
applicable, shall be notified of any hearing at least ten
days in advance. The office of judges shall review and
amend, or modify, as necessary, its procedural rules by
the first day of July, two thousand seven.

(b) The office of judges shall establish a program for mediation to be conducted in accordance with the requirements of rule twenty-five of the West Virginia Trial Court Rules. The parties may agree that the result of the mediation is binding. A case may be referred to mediation by the administrative law judge on his or her own motion, on motion of a party or by agreement of the parties. Upon issuance of an order for mediation, the office of judges shall assign a mediator from a list of qualified mediators maintained by the West Virginia State Bar.

(c) The office of judges shall keep full and complete records of all proceedings concerning a disputed claim. Subject to the rules of practice and procedure promulgated pursuant to section eight of this article, the record upon which the matter shall be decided shall include any evidence submitted by a party to the office of judges and evidence taken at hearings conducted by the office of judges. The record may include evidence or documents submitted in electronic form or other appropriate medium in accordance with the rules of practice and procedure. The office of judges is not bound by the usual common law or statutory rules of evidence.

(d) 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 designated record, the chief administrative law judge or other authorized adjudicator within the office of judges shall, based on the determination of the facts of the case
52 and applicable law, render a decision affirming, reversing or modifying the action protested. The decision shall contain findings of fact and conclusions of law and shall be mailed to all parties.

56 (e) The office of judges may remand a claim to the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, for further development of the facts or administrative matters as, in the opinion of the administrative law judge, may be necessary for a full and complete disposition of the case. The administrative law judge shall establish a time within which the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, must report back to the administrative law judge.

67 (f) The decision of the office of judges regarding any objections to a decision of the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, is final and benefits shall be paid or denied in accordance with the decision, unless an order staying the payment of benefits is specifically entered by the Workers’ Compensation Board of Review created in section eleven of this article or by the administrative law judge who granted the benefits. No stay with respect to any medical treatment or rehabilitation authorized by the office of judges may be granted. If the decision is subsequently appealed and reversed in accordance with the procedures set forth in this article, and any overpayment of benefits occurs as a result of such reversal, any such overpayment may be recovered pursuant to the provisions of subsection (h), section one-c, article four of this chapter or subsection (d), section one-d of said article, as applicable.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within is approved this the ... Day of ... 2007.

Governor