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OFFICE OF THE CLERK OF THE WEST VIRGINIA LEGISLATURE

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.]

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SECRETARY OF STATE

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[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.

1 (a) The Legislature finds that a deficit exists in the
2 Workers' Compensation Fund of such critical
3 proportions that it constitutes an imminent threat to the
4 immediate and long-term solvency of the fund and
5 constitutes a substantial deterrent to the economic
6 development of this state. The Legislature further finds
7 that addressing the workers' compensation crisis
8 requires the efforts of all persons and entities involved
9 and resolution of the crisis is in the best interest of the
10 public. Modification to the rate system, alteration of
11 the benefit structure, improvement of current
12 management practices and changes in perception must
13 be merged into a unified effort to make the workers'
14 compensation system viable and solvent through the
15 mutualization of the system and the opening of the
16 market to private workers' compensation insurance
17 carriers. It was and remains the intent of the
18 Legislature that the amendments to this chapter
19 enacted in the year two thousand three be applied from
20 the date upon which the enactment was made effective
21 by the Legislature. The Legislature finds that an
22 emergency exists as a result of the combined effect of
23 this deficit, other state budgetary deficits and liabilities
24 and other grave social and economic circumstances
25 currently confronting the state and that unless the
26 changes provided by the enactment of the amendments

27 to this chapter, as well as other legislation designed to
28 address the problem are made effective immediately,
29 the fiscal stability of this state will suffer irreparable
30 harm. Accordingly, the Legislature finds that the need
31 of the citizens of this state for the protection of the
32 State Treasury and the solvency of the Workers'
33 Compensation Funds requires the limitations on any
34 expectations that may have arisen from prior
35 enactments of this chapter.

36 (b) It is the further intent of the Legislature that this
37 chapter be interpreted so as to assure the quick and
38 efficient delivery of indemnity and medical benefits to
39 injured workers at a reasonable cost to the employers
40 who are subject to the provisions of this chapter. It is
41 the specific intent of the Legislature that workers'
42 compensation cases shall be decided on their merits and
43 that a rule of "liberal construction" based on any
44 "remedial" basis of workers' compensation legislation
45 shall not affect the weighing of evidence in resolving
46 such cases. The workers' compensation system in this
47 state is based on a mutual renunciation of common law
48 rights and defenses by employers and employees alike.
49 Employees' rights to sue for damages over and above
50 medical and health care benefits and wage loss benefits
51 are to a certain degree limited by the provisions of this
52 chapter and employers' rights to raise common law
53 defenses, such as lack of negligence, contributory
54 negligence on the part of the employee, and others, are
55 curtailed as well. Accordingly, the Legislature hereby
56 declares that any remedial component of the workers'
57 compensation laws is not to cause the workers'
58 compensation laws to receive liberal construction that
59 alters in any way the proper weighing of evidence as
60 required by section one-g, article four of this chapter.

61 (c) The "Workers' Compensation Division of the
62 Bureau of Employment Programs" is, on or after the
63 first day of October, two thousand three, reestablished,
64 reconstituted and continued as the Workers'
65 Compensation Commission, an agency of the state. The
66 purpose of the commission is to ensure the fair, efficient
67 and financially stable administration of the workers'
68 compensation system of the State of West Virginia. The
69 powers and duties heretofore imposed upon the
70 Workers' Compensation Division and the Commissioner
71 of the Bureau of Employment Programs as they relate to
72 workers' compensation are hereby transferred to and
73 imposed upon the Workers' Compensation Commission
74 and its executive director in the manner prescribed by
75 this chapter.

76 (d) It is the intent of the Legislature that the transfer
77 of the administration of the workers' compensation
78 system of this state from the Workers' Compensation
79 Division under the Commissioner of the Bureau of
80 Employment Programs to the Workers' Compensation
81 Commission under its executive director and the
82 workers' compensation board of managers is to become
83 effective the first day of October, two thousand three.
84 Any provisions of the enactment of Enrolled Senate Bill
85 No. 2013 in the year two thousand three relating to the
86 transfer of the administration of the workers'
87 compensation system of this state that conflict with the
88 intent of the Legislature as described in this subsection
89 shall, to that extent, become operative on the first day
90 of October, two thousand three, and until that date,
91 prior enactments of this code in effect on the effective
92 date of Enrolled Senate Bill No. 2013 relating to the
93 administration of the workers' compensation system of
94 this state, whether amended and reenacted or repealed

95 by the passage of Enrolled Senate Bill No. 2013, have
96 full force and effect. All provisions of the enactment of
97 Enrolled Senate Bill No. 2013 in the year two thousand
98 three relating to matters other than the transfer of the
99 administration of the workers' compensation system of
100 this state shall become operative on the effective date of
101 that enactment, unless otherwise specifically provided
102 in that enactment.

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

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

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

4 (1) Exempt no more than twenty positions of the
5 offices of the Insurance Commissioner from the
6 classified service of the state, the employees of which

7 positions shall serve at the will and pleasure of the
8 commissioner: *Provided*, That such exempt positions
9 shall be in addition to those positions in classified-
10 exempt service under the classification plan adopted by
11 the Division of Personnel. The Insurance Commissioner
12 shall report all exemptions made under this section to
13 the Director of the Division of Personnel no later than
14 the first day of July, two thousand seven, and thereafter
15 as the commissioner determines to be necessary; and

16 (2) Expend such sums for professional services as he
17 or she determines are necessary to perform those duties
18 transferred to the Insurance Commissioner upon the
19 termination of the commission. The provisions of article
20 three, chapter five-a of this code relating to the
21 Purchasing Division of the Department of
22 Administration shall not apply to these contracts, and
23 the Insurance Commissioner shall award the contract or
24 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.**

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

5 (1) The types of employers are:

6 (A) Any employer who is of sufficient capability and

7 financial responsibility to ensure the payment to injured
8 employees and the dependents of fatally injured
9 employees of benefits provided in this chapter at least
10 equal in value to the compensation provided for in this
11 chapter;

12 (B) Any employer or group of employers as provided
13 in paragraph (A) of this subdivision of such capability
14 and financial responsibility that maintains its own
15 benefit fund or system of compensation to which its
16 employees are not required or permitted to contribute
17 and whose benefits are at least equal in value to those
18 provided in this chapter; or

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

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

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

36 (B) Provide security or bond, in an amount and form

37 determined by the Insurance Commissioner, which shall
38 balance the employer's financial condition based upon
39 an analysis of its audited financial statements and the
40 full accrued value of current liability for future claim
41 payments based upon generally accepted actuarial and
42 accounting principles of the employer's existing and
43 expected liability;

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

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

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

51 (3) Upon a finding that the employer has met all of the
52 requirements of this section and any rules promulgated
53 thereunder, the employer may be permitted self-
54 insurance status. An annual review of each self-
55 insurer's continuing ability to meet its obligations and
56 the requirements of this section shall be made by the
57 Insurance Commissioner. At the time of such review,
58 the Insurance Commissioner may require that the self-
59 insured employer post a bond or security or obtain and
60 maintain an excess insurance policy. This review shall
61 also include a recalculation of the amount of any
62 security, bond or policy of excess insurance previously
63 required to be posted or obtained under any provision
64 of this chapter or any rules promulgated thereunder.
65 Failure to provide the required amount or form of
66 security or bond or to obtain or maintain the required
67 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

100 employer or employers' group granted permission to
101 self-insure and self-administer its obligations under this
102 chapter shall at all times be bound and shall comply
103 fully with all of the provisions of this chapter.
104 Furthermore, all of the provisions contained in article
105 four of this chapter pertaining to disability and death
106 benefits are binding on and shall be strictly adhered to
107 by the self-insured employer in its administration of
108 claims presented by employees of the self-insured
109 employer. Violations of the provisions of this chapter
110 and such rules relating to this chapter as may be
111 approved by the board of managers or industrial council
112 may constitute sufficient grounds for the termination of
113 the authority for any employer to self-insure its
114 obligations under this chapter.

115 (c) Each self-insured employer shall, on or before the
116 last day of the first month of each quarter or other
117 assigned reporting period, file with the Insurance
118 Commissioner a certified statement of the total gross
119 wages and earnings of all of the employer's employees
120 subject to this chapter for the preceding quarter or
121 other assigned reporting period.

122 (d) (1) If a self-insured employer defaults in the
123 payment of any portion of surcharges or assessments
124 required under this chapter or rules promulgated
125 thereunder, or in any payment required to be made as
126 benefits provided by this chapter to the employer's
127 injured employees or dependants of fatally injured
128 employees, the Insurance Commissioner shall, in an
129 appropriate case, determine the full accrued value
130 based upon generally accepted actuarial and accounting
131 principles of the employer's liability, including the costs
132 of all awarded claims and of all incurred but not

133 reported claims. The amount determined may, in an
134 appropriate case, be assessed against the employer. The
135 Insurance Commissioner may demand and collect the
136 present value of the defaulted liability. Interest shall
137 accrue upon the demanded amount as provided in
138 section thirteen of this article until the liability is fully
139 paid. Payment of all amounts then due to the Insurance
140 Commissioner and to the employer's employees is a
141 sufficient basis for reinstating the employer to good
142 standing with Insurance Commissioner and removing
143 the employer from default status.

144 (2) The assessments and surcharges required to be
145 paid by self-insured employers pursuant to the
146 provisions of this chapter and the rules promulgated
147 thereunder are special revenue taxes under and
148 according to the provisions of state workers'
149 compensation law and are considered to be tax claims,
150 as priority claims or administrative expense claims
151 according to those provisions under the law provided in
152 the United States bankruptcy code, Title 11 of the
153 United States Code. In addition, as the same was
154 previously intended by the prior provisions of this
155 section, this amendment and reenactment is for the
156 purpose of clarification of the taxing authority of the
157 Insurance Commissioner.

158 (e) The commission may create, implement, establish
159 and administer a perpetual self-insurance security risk
160 pool of funds, sureties, securities, insurance provided by
161 private insurance carriers or other states' programs, and
162 other property, of both real and personal properties, to
163 secure the payment of obligations of self-insured
164 employers. If a pool is created, the board of managers
165 shall adopt rules for the organizational plan,

166 participation, contributions and other payments which
167 may be required of self-insured employers under this
168 section. The board of managers may adopt a rule
169 authorizing the commission to assess each self-insured
170 employer in proportion according to each employer's
171 portion of the unsecured obligation and liability or to
172 assess according to some other method provided for by
173 rule which shall properly create and fund the risk pool
174 to serve the needs of employees, employers and the
175 Workers' Compensation Fund by providing adequate
176 security. The board of managers establishing a security
177 risk pool may authorize the executive director to use
178 any assessments, premium taxes and revenues and
179 appropriations as may be made available to the
180 commission. Effective upon termination of the
181 commission, all statutory and regulatory authority
182 provided to the commission and board of managers over
183 pools created pursuant to this section, as such pools are
184 defined in section two, article two-c of this chapter,
185 shall transfer to the Insurance Commissioner.

186 (f) Any self-insured employer which has had a period
187 of inactivity due to the nonemployment of employees
188 which results in its reporting of no wages on reports to
189 the Insurance Commissioner for a period of four or more
190 consecutive quarters may have its status inactivated
191 and shall apply for reactivation to status as a self-
192 insured employer prior to its reemployment of
193 employees. Despite the inactivation, the self-insured
194 employer shall continue to make payments on all
195 awards for which it is responsible. Upon application for
196 reactivation of its status as an operating self-insured
197 employer, the employer shall document that it meets the
198 eligibility requirements needed to maintain self-insured
199 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

233 of this section and of any applicable rules, shall not be
234 liable to respond in damages at common law or by
235 statute for the injury or death of any employee, however
236 occurring, after the election's approval and during the
237 period that the employer is allowed to carry the
238 employer's own risk.

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

251 (j) All regulatory, oversight and document-gathering
252 authority provided to the commission under this section
253 shall transfer to the Insurance Commissioner and the
254 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.**

1 (a) On or before the first day of June, two thousand
2 five, the executive director may take such actions as are
3 necessary to establish an employers' mutual insurance
4 company as a domestic, private, nonstock, corporation
5 to:

6 (1) Insure employers against liability for injuries and
7 occupational diseases for which their employees may be
8 entitled to receive compensation pursuant to chapter
9 twenty-three of this code and federal Longshore and
10 Harbor Workers' Compensation Act, 33 U. S. C. §901, *et*
11 *seq.*;

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

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

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

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

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

34 (2) In recognition of the workers' compensation

35 insurance liability insurance crisis in this state at the
36 time of enactment of this article and the critical need to
37 expedite the initial operation of the company, the
38 Legislature hereby authorizes the Insurance
39 Commissioner to review the documentation submitted
40 by the company and to determine the initial capital and
41 surplus requirements of the company, notwithstanding
42 the provisions of section five-b, article three, chapter
43 thirty-three of this code. The company shall furnish the
44 Insurance Commissioner with all information and
45 cooperate in all respects necessary for the Insurance
46 Commissioner to perform the duties set forth in this
47 section and in other provisions of this chapter and
48 chapter thirty-three of this code. The Insurance
49 Commissioner shall monitor the economic viability of
50 the company during its initial operation on not less than
51 a monthly basis, until such time as the commissioner, in
52 his or her discretion, determines that monthly reporting
53 is not necessary. In all other respects the company shall
54 be subject to comply with the applicable provisions of
55 chapter thirty-three of this code.

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

63 (4) Within forty months of the date of the issuance of
64 its license to transact insurance, the company shall
65 comply with the capital and surplus requirements set
66 forth in subsection (a), section five-b, article three,
67 chapter thirty-three of this code in effect on the

68 effective date of this enactment, unless said deadline is
69 extended by the Insurance Commissioner.

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

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

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

90 (f) If the commission has been terminated, effective
91 upon said termination, private carriers, including the
92 company, shall not be subject to payment of premium
93 taxes, surcharges and credits contained in article three,
94 chapter thirty-three of this code on premiums received
95 for coverage under this chapter. In lieu thereof, the
96 workers' compensation insurance market shall be
97 subject to the following:

98 (1) Each fiscal year, the Insurance Commissioner shall
99 calculate a percentage surcharge to be collected by each
100 private carrier from its policyholders. The surcharge
101 percentage shall be calculated by dividing the previous
102 fiscal year's total premiums collected plus deductible
103 payments by all employers into the portion of the
104 Insurance Commissioner's budget amount attributable
105 to regulation of the private carrier market. This
106 resulting percentage shall be applied to each
107 policyholder's premium payment and deductible
108 payments as a surcharge and remitted to the Insurance
109 Commissioner. Said surcharge shall be remitted within
110 ninety (90) days of receipt of premium payments;

111 (2) Each fiscal year, the Insurance Commissioner shall
112 calculate a percentage surcharge to be remitted on a
113 quarterly basis by self-insured employers and said
114 percentage shall be calculated by dividing previous
115 year's self-insured payroll in the state into the portion
116 of the Insurance Commissioner's budget amount
117 attributable to regulation of the self-insured employer
118 market. This resulting percentage shall be applied to
119 each self-insured employer's payroll and the resulting
120 amount shall be remitted as a regulatory surcharge by
121 each self-insured employer. The Workers'
122 Compensation Board of Managers or industrial council
123 may promulgate a rule for implementation of this
124 section. The company, all other private carriers and all
125 self-insured employers shall furnish the Insurance
126 Commissioner with all required information and
127 cooperate in all respects necessary for the Insurance
128 Commissioner to perform the duties set forth in this
129 section and in other provisions of this chapter and
130 chapter thirty-three of this code. The surcharge shall be
131 calculated so as to only defray the costs associated with

132 the administration of this chapter and the funds raised
133 shall not be used for any other purpose;

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

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

§23-2C-8. Workers' Compensation Uninsured Employer Fund.

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

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

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

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

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

27 (B) Self-insured employers, if assessed, that results in
28 an equitable distribution of costs among the self-
29 insured employers and is based upon expected annual
30 expenditures for claims; and

31 (C) Any other groups assessed that results in an
32 equitable distribution of costs among them and is based
33 upon expected annual expenditures for claims or
34 premium to be received.

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

40 (b) *Payments from the fund.* —

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

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

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

55 (1) If the Insurance Commissioner determines that the
56 claimant's employer maintained a policy of workers'
57 compensation insurance pursuant to this chapter on the
58 date of injury or last exposure or that the employer was
59 not required to maintain such a policy on such date,

60 then the claim shall not be accepted into the fund; if the
61 commissioner determines that the employer was
62 required to maintain such a policy but failed to do so,
63 the claim will be accepted into the fund and the
64 Insurance Commissioner may assign such a claim to the
65 third-party administrator of the fund for
66 administration.

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

77 (d) *Employer liability.* —

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

86 (2) The Insurance Commissioner:

87 (A) May bring a civil action in a court of competent
88 jurisdiction to recover from the employer the amounts
89 set forth in subdivision (1) of this subsection. In any

90 such action, the Insurance Commissioner may also
91 recover the present value of the estimated future
92 payments to be made on the employer's behalf and the
93 costs and attorney's fees attributable to such claim:
94 *Provided*, That the failure of the Insurance
95 Commissioner to include a claim for future payments
96 shall not preclude one or more subsequent actions for
97 such amounts;

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

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

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

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

§23-2C-15. Mandatory coverage; changing of coverage.

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

16 (b) Effective the first day of July, two thousand eight,
17 an employer may elect to: (1) Continue to purchase
18 workers' compensation insurance from the company; (2)
19 purchase workers' compensation insurance from
20 another private carrier licensed and otherwise
21 authorized to transact workers' compensation insurance
22 in this state; or (3) self-insure its obligations if it
23 satisfies all requirements of this code to so self-insure
24 and is permitted to do so: *Provided*, That all state and
25 local governmental bodies, including, but not limited to,
26 all counties and municipalities and their subdivisions
27 and including all boards, colleges, universities and
28 schools, shall continue to purchase workers'
29 compensation insurance from the company through the
30 thirtieth day of June, two thousand twelve. The
31 company and other private carriers shall be permitted
32 to sell workers' compensation insurance through
33 licensed agents in the state. To the extent that a private
34 carrier markets workers' compensation insurance

35 through a licensed agent, it shall be subject to all
36 applicable provisions of chapter thirty-three of this
37 code.

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

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

65 (e) Effective the first day of January, two thousand
66 nine, the company may decline to offer coverage to any

67 applicant. Effective the first day of January, two
68 thousand nine, the company and private carriers may
69 cancel a policy or decline to renew a policy upon the
70 issuance of sixty days' written advance notice to the
71 policyholder: *Provided*, That cancellation of the policy
72 by the carrier for failure of consideration to be paid by
73 the policyholder is effective after fifteen days advance
74 written notice of cancellation to the policyholder.

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

§23-2C-18. Ratemaking; Insurance Commissioner.

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

8 (2) In the event of any conflict, the provisions of this
9 article shall have paramount effect, but the provisions
10 in this chapter and chapter thirty-three of this code
11 shall be construed as complementary and harmonious
12 unless so clearly in conflict that they cannot reasonably
13 be reconciled.

14 (b) An insurer shall file its rates by filing a multiplier
15 or multipliers to be applied to prospective loss costs that
16 have been filed by the designated advisory organization
17 on behalf of the insurer in accordance with section
18 eighteen-a of this article and may also file carrier
19 specific rating plans.

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

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

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

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

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

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

40 (5) Whether price competition is a result of the
41 market or is artificial. If competition does not exist,

42 rates are excessive if they are likely to produce a long-
43 run profit that is unreasonably high in relation to the
44 risk of the class of business, or if expenses are
45 unreasonably high in relation to the services rendered.

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

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

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

1 (a) For the purposes of this section:

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

6 (2) "Experience rating" means a statistical procedure
7 utilizing past risk experience to produce a prospective
8 premium credit, debit or unity modification.

9 (3) "Prospective loss costs" means historical aggregate
10 losses and loss adjustment expenses projected through
11 development to their ultimate value and through
12 trending to a future point in time. Prospective loss costs
13 do not include provisions for profit or expenses other
14 than loss adjustment expenses.

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

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

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

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

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

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

36 (c) Each workers' compensation insurer shall:

37 (1) Record and report its workers' compensation
38 experience to the designated rating organization as set
39 forth in the uniform statistical plan approved by the
40 commissioner; and

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

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

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

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

8 (b) An employer who is required to purchase and
9 maintain workers' compensation insurance but fails to
10 do so or otherwise enters policy default shall be
11 deprived of the benefits and protection afforded by this
12 chapter, including section six, article two of this
13 chapter, and the employer is liable as provided in
14 section eight of said article. The policy defaulted

15 employer's liability under these sections is retroactive to
16 the day the policy default occurs. The private carrier
17 shall notify the policy defaulted employer of the method
18 by which the employer may be reinstated with the
19 private carrier.

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

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

46 (e) Every agency shall, upon notification of employer

47 default by the Insurance Commissioner, immediately
48 begin the process to revoke or terminate any contract,
49 license, permit, certificate or other authority to conduct
50 a trade, profession or business in this state and shall
51 refuse to issue, grant or renew any such contract,
52 license, permit, certificate or authority.

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

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

66 (f) Any amounts owed by an employer to the state as
67 a result of an employer default is a personal liability of
68 the employer, its officers, owners, partners and directors
69 and is immediately due and owing and shall, in
70 addition, be a lien enforceable against all the property
71 of the employer, its officers, owners, partners and
72 directors: *Provided*, That the lien shall not be
73 enforceable as against a purchaser, including a lien
74 creditor, of real estate or personal property for a
75 valuable consideration without notice, unless docketed
76 as provided in section one, article ten-c, chapter thirty-
77 eight of this code: *Provided, however*, That the lien may
78 be enforced as other judgment liens are enforced

79 through the provisions of said chapter and the same is
80 considered by the circuit court to be a judgment lien for
81 this purpose.

82 (g) The Insurance Commissioner shall propose rules
83 for adoption by the industrial council to effectuate the
84 purposes of this section including the conditions under
85 which agencies shall comply with the provisions of
86 subsection (e) of this section and specifying how notice
87 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.**

1 a) Objections to a decision of the Insurance
2 Commissioner, private carrier or self-insured employer,
3 whichever is applicable, made pursuant to the
4 provisions of section one of this article shall be filed
5 with the office of judges. Upon receipt of an objection,
6 the office of judges shall notify the Insurance
7 Commissioner, private carrier or self-insured employer,
8 whichever is applicable, and all other parties of the
9 filing of the objection. The office of judges shall
10 establish by rule promulgated in accordance with the
11 provisions of subsection (e), section eight of this article
12 an adjudicatory process that enables parties to present
13 evidence in support of their positions and provides an
14 expeditious resolution of the objection. The employer,
15 the claimant, the Insurance Commissioner, private
16 carrier or self-insured employer, whichever are
17 applicable, shall be notified of any hearing at least ten
18 days in advance. The office of judges shall review and
19 amend, or modify, as necessary, its procedural rules by

20 the first day of July, two thousand seven.

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

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

45 (d) All hearings shall be conducted as determined by
46 the chief administrative law judge pursuant to the rules
47 of practice and procedure promulgated pursuant to
48 section eight of this article. Upon consideration of the
49 designated record, the chief administrative law judge or
50 other authorized adjudicator within the office of judges
51 shall, based on the determination of the facts of the case

52 and applicable law, render a decision affirming,
53 reversing or modifying the action protested. The
54 decision shall contain findings of fact and conclusions
55 of law and shall be mailed to all parties.

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

67 (f) The decision of the office of judges regarding any
68 objections to a decision of the Insurance Commissioner,
69 private carrier or self-insured employer, whichever is
70 applicable, is final and benefits shall be paid or denied
71 in accordance with the decision, unless an order staying
72 the payment of benefits is specifically entered by the
73 Workers' Compensation Board of Review created in
74 section eleven of this article or by the administrative
75 law judge who granted the benefits. No stay with
76 respect to any medical treatment or rehabilitation
77 authorized by the office of judges may be granted. If the
78 decision is subsequently appealed and reversed in
79 accordance with the procedures set forth in this article,
80 and any overpayment of benefits occurs as a result of
81 such reversal, any such overpayment may be recovered
82 pursuant to the provisions of subsection (h), section
83 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 28th Day of March 2007.


.....
Governor

PRESENTED TO THE
GOVERNOR

MAR 20 2007

Time 4:19