

HB 4636

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CECILIA S. BERNA  
SECRETARY OF STATE

**WEST VIRGINIA LEGISLATURE**  
SECOND REGULAR SESSION, 2008



**ENROLLED**

COMMITTEE SUBSTITUTE  
FOR  
**House Bill No. 4636**

(By Delegate Kominar)



Passed March 8, 2008

In Effect from Passage

# **E N R O L L E D**

COMMITTEE SUBSTITUTE

FOR

## **H. B. 4636**

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(BY DELEGATE KOMINAR)

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[Passed March 8, 2008; in effect from passage.]

AN ACT to amend and reenact §5A-3-10a of the Code of West Virginia, 1931, as amended; to amend said code by adding thereto a new section, designated §23-1-20; to amend said code by adding thereto a new section, designated §23-2-9a; to amend and reenact §23-2C-3, §23-2C-15 and §23-2C-17 of said code; to amend and reenact §23-4-7b of said code; and to amend and reenact §23-5-1 and §23-5-11 of said code, all relating generally to workers' compensation insurance; prohibiting public contracts with employers in workers' compensation default; establishing hiring preferences for employees of the Attorney General's workers' compensation litigation unit and permitting division of personnel to propose rules regarding such preferences; providing for the termination of licenses and permits to self-insured employers in workers' compensation default; requiring the proposal of rules to regulate certain third-party administrators; requiring proposal of rules relating to establishing penalties for certain defaults; eliminating requirement that private carriers maintain an office in the State; modifying certain information that must be on posted notice in work place; changing period of notice for cancellation of

policies; establishing fixed percentages for determining surcharges on covered employers and permitting recalculation of one such percentage; eliminating certain carrier reporting requirements; changing periods within which private carriers must notify the Insurance Commissioner regarding coverage status; limiting employer protests; increasing the periods in which to file objections to claims decisions; providing for conditional payment of benefits; providing that corrective orders do not nullify pending protests; providing for proposal of rules relating to establishing a trial return to work period for employees; and requiring the Governor to set salaries of members of the workers' compensation Board of Review.

*Be it enacted by the Legislature of West Virginia:*

That §5A-3-10a of the Code of West Virginia, 1931, as amended, be amended and reenacted; that said code be amended by adding thereto a new section, designated §23-1-20; that said code be amended by adding thereto a new section, designated §23-2-9a; that §23-2C-3, §23-2C-15 and §23-2C-17 of said code be amended and reenacted; that §23-4-7b of said code be amended and reenacted; and that §23-5-1 and §23-5-11 of said code be amended and reenacted, all to read as follows:

## **CHAPTER 5A. DEPARTMENT OF ADMINISTRATION.**

### **ARTICLE 3. PURCHASING DIVISION.**

#### **§5A-3-10a. Prohibition for awarding contracts to vendors which owe a debt to the state or its political subdivisions.**

1 (a) Unless the context clearly requires a different  
2 meaning, for the purposes of this section, the terms:

3 (1) "Debt" means any assessment, premium, penalty,  
4 fine, tax or other amount of money owed to the state or any

5 of its political subdivisions because of a judgment, fine,  
6 permit violation, license assessment, amounts owed to the  
7 workers' compensation funds as defined in article two-c,  
8 chapter twenty-three of this code, penalty or other assessment  
9 or surcharge presently delinquent or due and required to be  
10 paid to the state or any of its political subdivisions, including  
11 any interest or additional penalties accrued thereon.

12 (2) "Debtor" means any individual, corporation,  
13 partnership, association, limited liability company or any  
14 other form or business association owing a debt to the state  
15 or any of its political subdivisions, and includes any person  
16 or entity that is in employer default.

17 (3) "Employer default" means having an outstanding  
18 balance or liability to the old fund or to the uninsured  
19 employers' fund or being in policy default, as defined in  
20 section two, article two-c, chapter twenty-three, of this code,  
21 failure to maintain mandatory workers' compensation  
22 coverage, or failure to fully meet its obligations as a workers'  
23 compensation self-insured employer. An employer is not in  
24 employer default if it has entered into a repayment agreement  
25 with the Insurance Commissioner and remains in compliance  
26 with the obligations under the repayment agreement.

27 (4) "Political subdivision" means any county  
28 commission; municipality; county board of education; any  
29 instrumentality established by a county or municipality; any  
30 separate corporation or instrumentality established by one or  
31 more counties or municipalities, as permitted by law; or any  
32 public body charged by law with the performance of a  
33 government function and whose jurisdiction is coextensive  
34 with one or more counties or municipalities.

35 (5) "Related party" means a party, whether an individual,  
36 corporation, partnership, association, limited liability  
37 company or any other form or business association or other  
38 entity whatsoever, related to any vendor by blood, marriage,

39 ownership or contract through which the party has a  
40 relationship of ownership or other interest with the vendor so  
41 that the party will actually or by effect receive or control a  
42 portion of the benefit, profit or other consideration from  
43 performance of a vendor contract with the party receiving an  
44 amount that meets or exceeds five percent of the total  
45 contract amount.

46 (b) No contract or renewal of any contract may be  
47 awarded by the state or any of its political subdivisions to any  
48 vendor or prospective vendor when the vendor or prospective  
49 vendor or a related party to the vendor or prospective vendor  
50 is a debtor and:

51 (1) The debt owed is an amount greater than one  
52 thousand dollars in the aggregate; or

53 (2) The debtor is in employer default.

54 (c) The prohibition of this section does not apply where  
55 a vendor has contested any tax administered pursuant to  
56 chapter eleven of this code, amount owed to the workers'  
57 compensation funds as defined in article two-c, chapter  
58 twenty-three of this code, permit fee or environmental fee or  
59 assessment and the matter has not become final or where the  
60 vendor has entered into a payment plan or agreement and the  
61 vendor is not in default of any of the provisions of such plan  
62 or agreement.

63 (d) All bids, contract proposals or contracts with the state  
64 or any of its political subdivisions submitted or approved  
65 under the provisions of this code shall include an affidavit  
66 that the vendor, prospective vendor or a related party to the  
67 vendor or prospective vendor is not in employer default and  
68 does not owe any debt in an amount in excess of one  
69 thousand dollars or, if a debt is owed, that the provisions of  
70 subsection (c) of this section apply.

**CHAPTER 23. WORKERS' COMPENSATION.**

**ARTICLE 1. GENERAL ADMINISTRATIVE PROVISIONS.**

**§23-1-20. Employment preference for employees in workers' compensation litigation unit.**

1 (a) The Legislature finds that, as claims against the  
2 workers' compensation Old Fund continue to decrease,  
3 persons currently employed on a permanent basis by the  
4 Attorney General in the workers' compensation litigation unit  
5 may soon face layoffs due to the decreasing workload. The  
6 Legislature hereby declares that such employees should have  
7 certain preferences if they seek continued employment with  
8 the state.

9 (b) Notwithstanding any provision of this code to the  
10 contrary, any person, not a temporary or probationary  
11 employee, employed by the Attorney General in the workers'  
12 compensation litigation unit who is laid off as a result of a  
13 decreased workload, shall be afforded the opportunity to  
14 transfer to other state employment if he or she is an employee  
15 in good standing at the time of the layoff.

16 (c) The Attorney General shall establish and maintain, for  
17 a period of two years, a list of all employees who are eligible  
18 for employment due to a layoffs pursuant to this section, and  
19 who wish to remain eligible for employment with the state.  
20 The Attorney General shall give priority to any person on the  
21 list for employment in an available position equivalent to the  
22 position that person held in the workers' compensation  
23 litigation unit unless the Attorney General determines that the  
24 person is less qualified than other applicants for the position.

25 (d) Notwithstanding any other provision of this code to  
26 the contrary, the Division of Personnel shall maintain, for a  
27 period of two years, a list of employees who were laid off as

28 a result of the reduction in the work force occasioned by the  
29 decreasing work load of the workers' compensation litigation  
30 unit within the office of the Attorney General. Any such  
31 employee shall be given preference in hiring for any position  
32 in classified or exempt service for which he or she is  
33 qualified and applies. The Director of the Division of  
34 Personnel may propose for promulgation, in accordance with  
35 the provisions of article three, chapter twenty-nine-a of this  
36 code, a legislative rule to effectuate the requirements of this  
37 section.

**ARTICLE 2. EMPLOYERS AND EMPLOYEES SUBJECT  
T O T H I S C H A P T E R ;  
EXTRATERRITORIAL COVERAGE**

**§23-2-9a. Sanctions for default by self-insured employers;  
rulemaking authority.**

1 Whenever the authority of an employer to self-insure its  
2 obligations under this chapter is terminated and such  
3 employer is thereafter in default in the payment of any  
4 portion of surcharges or assessments required under this  
5 chapter or by rules promulgated thereunder, or in any  
6 payment required to be made as benefits provided by this  
7 chapter to the employer's injured employees or dependants of  
8 fatally injured employees, such employer shall be ineligible  
9 for government contracts to the same extent as an employer  
10 in "employer default," as provided for in section ten-a, article  
11 three, chapter five-a of this code, and shall also be subject to  
12 the license and permit revocation and termination sanctions  
13 to the same extent as employers in "employer default"  
14 pursuant to the provisions of subdivision (1), subsection (e),  
15 section nineteen, article two-c of this chapter. The Insurance  
16 Commissioner shall propose rules, as provided in section  
17 five, article two-c of this chapter, establishing administrative  
18 penalties for nonpayment of obligations under this chapter.

**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) (1) 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 to:

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

10 (B) Provide employer's liability insurance incidental to  
11 and provided in connection with the insurance specified in  
12 paragraph (A) of this subdivision, including coal-workers'  
13 pneumoconiosis coverage and employer excess liability  
14 coverage as provided in this chapter; and

15 (C) Transact other kinds of property and casualty  
16 insurance for which the company is otherwise qualified under  
17 the provisions of this code.

18 (2) The company may not sell, assign or transfer  
19 substantial assets or ownership of the company.

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

22 (1) As soon as practical, the company established  
23 pursuant to the provisions of this article shall, through a vote  
24 of a majority of its provisional board, file its corporate



25 charter and bylaws with the Insurance Commissioner and  
26 apply for a license with the Insurance Commissioner to  
27 transact insurance in this state. Notwithstanding any other  
28 provision of this code, the Insurance Commissioner shall act  
29 on the documents within fifteen days of the filing by the  
30 company.

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

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

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

64 (c) For the duration of its existence, the company is not  
65 a department, unit, agency or instrumentality of the state for  
66 any purpose. All debts, claims, obligations and liabilities of  
67 the company, whenever incurred, are the debts, claims,  
68 obligations and liabilities of the company only and not of the  
69 state or of any department, unit, agency, instrumentality,  
70 officer or employee of the state.

71 (d) The moneys of the company are not part of the  
72 General Revenue Fund of the state. The debts, claims,  
73 obligations and liabilities of the company are not a debt of  
74 the state or a pledge of the credit of the state.

75 (e) The company is not subject to provisions of article  
76 nine-a, chapter six of this code; the provisions of article two,  
77 chapter six-c of this code; the provisions of chapter  
78 twenty-nine-b of this code; the provisions of article three,  
79 chapter five-a of this code; the provisions of article six,  
80 chapter twenty-nine of this code; or the provisions of chapter  
81 twelve of this code.

82 (f) If the commission has been terminated, effective upon  
83 the termination, private carriers, including the company, are  
84 not subject to payment of premium taxes, surcharges and  
85 credits contained in article three, chapter thirty-three of this  
86 code on premiums received for coverage under this chapter.  
87 In lieu thereof, the workers' compensation insurance market  
88 is subject to the following:

89 (1) (A) Each fiscal year, the Insurance Commissioner  
90 shall calculate a percentage surcharge to be collected by each  
91 private carrier from its policyholders. The surcharge  
92 percentage shall be calculated by dividing the previous fiscal  
93 year's total premiums collected plus deductible payments by  
94 all employers into the portion of the Insurance  
95 Commissioner's budget amount attributable to regulation of  
96 the private carrier market. This resulting percentage shall be  
97 applied to each policyholder's premium payment and  
98 deductible payments as a surcharge and remitted to the  
99 Insurance Commissioner. Said surcharge shall be remitted  
100 within ninety days of receipt of premium payments;

101 (B) With respect to fiscal years beginning on and after the  
102 first day of July, two thousand eight, in lieu of the surcharge  
103 set forth in the preceding paragraph, each private carrier shall  
104 collect a surcharge in the amount of five and five-tenths  
105 percent of the premium collected plus the total of all  
106 premium discounts based on deductible provisions that were  
107 applied: *Provided*, That prior to the thirtieth day of June,  
108 two-thousand thirteen, and every five years thereafter, the  
109 commissioner shall review the percentage surcharge and  
110 determine a new percentage as he or she deems necessary.

111 (C) The amounts required to be collected under paragraph  
112 (B) of this subdivision shall be remitted to the Insurance  
113 Commissioner on or before the twenty-fifth day of the month  
114 succeeding the end of the quarter in which they are collected,  
115 except for the fourth quarter for which the surcharge shall be  
116 remitted on or before the first day of March of the succeeding  
117 year.

118 (2) Each fiscal year, the Insurance Commissioner shall  
119 calculate a percentage surcharge to be remitted on a quarterly  
120 basis by self-insured employers and said percentage shall be  
121 calculated by dividing previous year's self-insured payroll in  
122 the state into the portion of the Insurance Commissioner's

123 budget amount attributable to regulation of the self-insured  
124 employer market. This resulting percentage shall be applied  
125 to each self-insured employer's payroll and the resulting  
126 amount shall be remitted as a regulatory surcharge by each  
127 self-insured employer. The Industrial Council may  
128 promulgate a rule for implementation of this section. The  
129 company, all other private carriers and all self-insured  
130 employers shall furnish the Insurance Commissioner with all  
131 required information and cooperate in all respects necessary  
132 for the Insurance Commissioner to perform the duties set  
133 forth in this section and in other provisions of this chapter  
134 and chapter thirty-three of this code. The surcharge shall be  
135 calculated so as to only defray the costs associated with the  
136 administration of this chapter and the funds raised shall not  
137 be used for any other purpose;

138 (3) (A) Each private carrier shall collect a premiums  
139 surcharge from its policyholders as annually determined, by  
140 the first day of May of each year, by the Insurance  
141 Commissioner to produce forty-five million dollars annually,  
142 of each policyholder's periodic premium amount for workers'  
143 compensation insurance: *Provided*, That the surcharge rate on  
144 policies issued or renewed on or after the first day of July,  
145 two thousand eight shall be nine percent of the premium  
146 collected plus the total of all premium discounts based on  
147 deductible provisions that were applied.

148 (B) By the first day of May each year, the self-insured  
149 employer community shall be assessed a cumulative total of  
150 nine million dollars. The methodology for the assessment  
151 shall be fair and equitable and determined by exempt  
152 legislative rule issued by the Industrial Council. The amount  
153 collected pursuant to this subdivision shall be remitted to the  
154 Insurance Commissioner for deposit in the Workers'  
155 Compensation Debt Reduction Fund created in section five,  
156 article two-d of this chapter.

157 (g) The new premiums surcharge imposed by paragraphs  
158 (A) and (B), subdivision (3), subsection (f) of this section  
159 sunset and are not collectible with respect to workers'  
160 compensation insurance premiums paid when the policy is  
161 renewed on or after the first day of the month following the  
162 month in which the Governor certifies to the Legislature that  
163 the revenue bonds issued pursuant to article two-d of this  
164 chapter have been retired and that the unfunded liability of  
165 the Old Fund has been paid or has been provided for in its  
166 entirety, whichever occurs last.

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

15 (b) Effective the first day of July, two thousand eight, an  
16 employer may elect to: (1) Continue to purchase workers'  
17 compensation insurance from the company; (2) purchase  
18 workers' compensation insurance from another private carrier  
19 licensed and otherwise authorized to transact workers'  
20 compensation insurance in this state; or (3) self-insure its  
21 obligations if it satisfies all requirements of this code to so  
22 self-insure and is permitted to do so: *Provided*, That all state  
23 and local governmental bodies, including, but not limited to,

24 all counties and municipalities and their subdivisions and  
25 including all boards, colleges, universities and schools, shall  
26 continue to purchase workers' compensation insurance from  
27 the company through the thirtieth day of June, two thousand  
28 twelve. The company and other private carriers are permitted  
29 to sell workers' compensation insurance through licensed  
30 agents in the state. To the extent that a private carrier  
31 markets workers' compensation insurance through a licensed  
32 agent, it is subject to all applicable provisions of chapter  
33 thirty-three of this code.

34 (c) Every employer shall post a notice upon its premises  
35 in a conspicuous place identifying its workers' compensation  
36 insurer. The notice must include the name, business address  
37 and telephone number of the insurer and of the person to  
38 contact with questions about a claim. The employer shall at  
39 all times maintain the notice provided for the information of  
40 his or her employees. Release of employer policy  
41 information and status by the Industrial Council and the  
42 Insurance Commissioner shall be governed by section four,  
43 article one of this chapter.

44 (d) Any rule promulgated by the Board of Managers or  
45 Industrial Council empowering agencies of this state to  
46 revoke or refuse to grant, issue or renew any contract,  
47 license, permit, certificate or other authority to conduct a  
48 trade, profession or business to or with any employer whose  
49 account is in default with regard to any liability under this  
50 chapter shall be fully enforceable by the Insurance  
51 Commissioner against the employer.

52 (e) Effective the first day of January, two thousand nine,  
53 the company may decline to offer coverage to any applicant.  
54 Private carriers and, effective the first day of January, two  
55 thousand nine, the company, may cancel a policy upon the  
56 issuance of thirty days' written advance notice to the

57 policyholder and may refuse to renew a policy upon the  
58 issuance of sixty days' written advance notice to the  
59 policyholder: *Provided*, That cancellation of the policy by  
60 the carrier for failure of consideration to be paid by the  
61 policyholder or for refusal to comply with a premium audit  
62 is effective after ten days advance written notice of  
63 cancellation to the policyholder.

64 (f) Every private carrier shall notify the Insurance  
65 Commissioner as follows: (1) of the issuance or renewal of  
66 insurance coverage, within thirty days of (A) the effective  
67 date of coverage, or (B) the private carrier's receipt of notice  
68 of the employer's operations in this state, whichever is later;  
69 (2) of a termination of coverage by the private carrier due to  
70 refusal to renew or cancellation, at least ten days prior to the  
71 effective date of the termination; and (3) of a termination of  
72 coverage by an employer, within ten days of the private  
73 carrier's receipt of the employer's request for such  
74 termination; the notifications shall be on forms developed or  
75 in a manner prescribed by the Insurance Commissioner.

76 (g) For the purposes of subsections (e) and (f) of this  
77 section, the transfer of a policyholder between insurance  
78 companies within the same group is not considered a  
79 cancellation or refusal to renew a workers' compensation  
80 insurance policy.

**§23-2C-17. Administration of a competitive system.**

1 (a) Every policy of insurance issued by a private carrier:

2 (1) Shall be in writing;

3 (2) Shall contain the insuring agreements and exclusions;

4 and

5 (3) If it contains a provision inconsistent with this  
6 chapter, it shall be deemed to be reformed to conform with  
7 this chapter.

8 (b) The Industrial Council shall promulgate a rule which  
9 prescribes the requirements of a basic policy to be used by  
10 private carriers.

11 (c) A private carrier or self-insured employer may enter  
12 into a contract to have its plan of insurance administered by  
13 a third-party administrator if the administrator is licensed or  
14 registered with the Insurance Commissioner in accordance  
15 with article forty-six, chapter thirty-three of the code.  
16 Notwithstanding any other provision of this code to the  
17 contrary, any third-party administrator who, directly or  
18 indirectly, underwrites or collects charges or premiums from,  
19 or adjusts or settles claims on residents of this state, in  
20 connection with workers' compensation coverage offered or  
21 provided by an insurer, is subject to the provisions of article  
22 forty-six, chapter thirty-three of this code to the same extent  
23 as those persons included in the definition set forth in  
24 subsection (a), section two of said article. The Insurance  
25 Commissioner shall propose rules, as provided in section  
26 five, article two-c of this chapter, to regulate the use of third-  
27 party administrators by private carriers and self-insured  
28 employers, including rules setting forth mandatory provisions  
29 for agreements between third-party administrators and  
30 self-insured employers or private carriers.

31 (d) A self-insured employer or a private carrier may:

32 (1) Enter into a contract or contracts with one or more  
33 organizations for managed care to provide comprehensive  
34 medical and health care services to employees for injuries  
35 and diseases that are compensable pursuant to chapter  
36 twenty-three of this code. The managed care plan must be



37 approved pursuant to the provisions of section three, article  
38 four of this chapter.

39 (2) Require employees to obtain medical and health care  
40 services for their industrial injuries from those organizations  
41 and persons with whom the self-insured employer, or private  
42 carrier has contracted or as the self-insured employer or  
43 private carrier otherwise prescribes.

44 (3) Except for emergency care, require employees to  
45 obtain the approval of the self-insured employer or private  
46 carrier before obtaining medical and health care services for  
47 their industrial injuries from a provider of health care who  
48 has not been previously approved by the self-insured  
49 employer or private carrier.

50 (e) A private carrier or self-insured employer may inquire  
51 about and request medical records of an injured employee  
52 that concern a preexisting medical condition that is  
53 reasonably related to the industrial injury of that injured  
54 employee.

55 (f) An injured employee must sign all medical releases  
56 necessary for the insurer of his or her employer to obtain  
57 information and records about a preexisting medical  
58 condition that is reasonably related to the industrial injury of  
59 the employee and that will assist the insurer to determine the  
60 nature and amount of workers' compensation to which the  
61 employee is entitled.

#### **ARTICLE 4. DISABILITY AND DEATH BENEFITS.**

##### **§23-4-7b. Trial return to work; Insurance Commissioner to develop rules.**

1 (a) The Legislature hereby finds and declares that it is in  
2 the interest of employees and employers that injured

3 employees be encouraged to return to work as quickly as  
4 possible after an injury and that appropriate protections be  
5 afforded to injured employees who return to work on a trial  
6 basis.

7 (b) The Insurance Commissioner shall propose rules, as  
8 provided in section five, article two-c of this chapter,  
9 establishing criteria for providing employers the option of  
10 allowing employees, following an injury, to return to work on  
11 a trial basis and for the suspension of temporary total benefits  
12 during a period of trial return to work.

## **ARTICLE 5. REVIEW.**

### **§23-5-1. Notice by commission or self-insured employer of decision; procedures on claims; objections and hearing.**

1 (a) The Insurance Commissioner, private carriers and  
2 self-insured employers may determine all questions within  
3 their jurisdiction. In matters arising under articles three and  
4 four of this chapter, the Insurance Commissioner private  
5 carriers and self-insured employers shall promptly review  
6 and investigate all claims. The parties to a claim are the  
7 claimant and, if applicable, the claimant's dependants, and  
8 the employer, and with respect to claims involving funds  
9 created in article two-c of this chapter for which he or she has  
10 been designated the administrator, the Insurance  
11 Commissioner. In claims in which the employer had  
12 coverage on the date of the injury or last exposure, the  
13 employer's carrier has sole authority to act on the employer's  
14 behalf in all aspects related to litigation of the claim. With  
15 regard to any issue which is ready for a decision, the  
16 Insurance Commissioner, private carrier or self-insured  
17 employer, whichever is applicable, shall promptly send the  
18 decision to all parties, including the basis of its decision. As  
19 soon as practicable after receipt of the claim, but in no event

20 later than the date of the initial decision on the claim, the  
21 Insurance Commissioner, private carrier or self-insured  
22 employer, whichever is applicable, shall send the claimant a  
23 brochure approved by the Insurance Commissioner setting  
24 forth the claims process.

25 (b)(1) Except with regard to interlocutory matters, upon  
26 making any decision, upon making or refusing to make any  
27 award or upon making any modification or change with  
28 respect to former findings or orders, as provided by section  
29 sixteen, article four of this chapter, the Insurance  
30 Commissioner, private carrier or self-insured employer,  
31 whichever is applicable, shall give notice, in writing, to the  
32 parties to the claim of its action. The notice shall state the  
33 time allowed for filing a protest to the finding. The action of  
34 the Insurance Commissioner, private carrier or self-insured  
35 employer, whichever is applicable, is final unless the decision  
36 is protested within sixty days after the receipt of such  
37 decision Unless a protest is filed within the-sixty-day period,  
38 the finding or action is final. This time limitation is a  
39 condition of the right to litigate the finding or action and  
40 hence jurisdictional. Any protest shall be filed with the  
41 Office of Judges with a copy served upon the parties to the  
42 claim, and other parties in accordance with the procedures set  
43 forth in sections eight and nine of this article. An employer  
44 may protest decisions incorporating findings made by the  
45 Occupational Pneumoconiosis Board, decisions made by the  
46 Insurance Commissioner acting as administrator of claims  
47 involving funds created in article two-c of this chapter, or  
48 decisions entered pursuant to subdivision (1), subsection (c),  
49 section seven-a, article four of this chapter. (2)(A) With  
50 respect to every application for benefits filed on or after the  
51 first day of July, two thousand eight, in which a decision to  
52 deny benefits is protested and the only controversy relating  
53 to compensability is whether the application was properly  
54 filed as a new claim or a reopening of a previous claim, the  
55 party that denied the application shall begin to make

56 conditional payment of benefits and must promptly give  
57 notice to the Office of Judges that another identifiable person  
58 may be liable. The Office of Judges shall promptly order the  
59 appropriate persons be joined as parties to the proceeding:  
60 *Provided*, That at any time during a proceeding in which  
61 conditional payments are being made in accordance with the  
62 provisions of this subsection, the office of judges may,  
63 pending final determination of the person properly liable for  
64 payment of the claim, order that such conditional payments  
65 of benefits be paid by another party.

66 (B) Any conditional payment made pursuant to paragraph  
67 (A) of this subdivision shall not be deemed an admission or  
68 conclusive finding of liability of the person making such  
69 payments. When the administrative law judge has made a  
70 determination as to the party properly liable for payment of  
71 the claim, he or she shall direct any monetary adjustment or  
72 reimbursement between or among the Insurance  
73 Commissioner, private carriers and self-insured employers as  
74 is necessary.

75 (C) The Office of Judges may direct that:

76 (i) An application for benefits be designated as a petition  
77 to reopen, effective as of the original date of filing;

78 (ii) A petition to reopen be designated as an application  
79 for benefits, effective as of the original date of filing; or

80 (iii) An application for benefits or petition to reopen filed  
81 with the Insurance Commissioner, private carrier or  
82 self-insured employer be designated as an application or  
83 petition to reopen filed with another private carrier,  
84 self-insured employer or Insurance Commissioner.

85 (c) Where an employer protests a written decision entered  
86 pursuant to a finding of the Occupational Pneumoconiosis

87 Board, a decision on a claim made by the Insurance  
88 Commissioner acting as the administrator of a fund created  
89 in article two-c of this chapter, or decisions entered pursuant  
90 to subdivision (1), subsection (c), section seven-a, article four  
91 of this chapter, and the employer does not prevail in its  
92 protest, and in the event the claimant is required to attend a  
93 hearing by subpoena or agreement of counsel or at the  
94 express direction of the Office of Judges, then the claimant in  
95 addition to reasonable traveling and other expenses shall be  
96 reimbursed for loss of wages incurred by the claimant in  
97 attending the hearing.

98 (d) The Insurance Commissioner, private carrier or  
99 self-insured employer, whichever is applicable may amend,  
100 correct or set aside any order or decision on any issue entered  
101 by it which, at the time of issuance or any time after that, is  
102 discovered to be defective or clearly erroneous or the result  
103 of mistake, clerical error or fraud, or with respect to any  
104 order or decision denying benefits, otherwise not supported  
105 by the evidence, but any protest filed prior to entry of the  
106 amended decision is a protest from the amended decision  
107 unless and until the administrative law judge before whom  
108 the matter is pending enters an order dismissing the protest as  
109 moot in light of the amendment. Jurisdiction to issue an  
110 amended decision pursuant to this subsection continues until  
111 the expiration of two years from the date of a decision to  
112 which the amendment is made unless the decision is sooner  
113 affected by an action of an administrative law judge or other  
114 judicial officer or body: *Provided*, That corrective actions in  
115 the case of fraud may be taken at any time.

**§23-5-11. Workers' Compensation Board of Review generally.**

1 (a) On the thirty-first day of January, two thousand four,  
2 the Workers' Compensation Appeal Board heretofore  
3 established in this section is hereby abolished.

4 (b) There is created the “Workers' Compensation Board  
5 of Review”, which may also be referred to as “the Board of  
6 Review” or “the board”. Effective the first day of February,  
7 two thousand four, the Board of Review shall exercise  
8 exclusive jurisdiction over all appeals from the Workers'  
9 Compensation Office of Judges including any and all appeals  
10 pending with the Board of Appeals on the thirty-first day of  
11 January, two thousand four.

12 (c) The board consists of three members.

13 (d) The Governor shall appoint, from names submitted by  
14 the “Workers' Compensation Board of Review Nominating  
15 Committee”, with the advice and consent of the Senate, three  
16 qualified attorneys to serve as members of the Board of  
17 Review. If the Governor does not select a nominee for any  
18 vacant position from the names provided by the nominating  
19 committee, he shall notify the nominating committee of that  
20 circumstance and the committee shall provide additional  
21 names for consideration by the Governor. A member of the  
22 Board of Review may be removed by the Governor for  
23 official misconduct, incompetence, neglect of duty, gross  
24 immorality or malfeasance and then only after notice and  
25 opportunity to respond and present evidence. No more than  
26 two of the members of the board may be of the same political  
27 party. The members of the Board of Review shall be paid an  
28 annual salary of eighty-five thousand dollars: *Provided*, that  
29 on and after the first day of July, two thousand eight the  
30 Governor shall set the salary of the members of the Board:  
31 *Provided, however*, That the annual salary of a member of the  
32 board of review shall not exceed one hundred ten thousand  
33 dollars. Members are entitled to be reimbursed for actual and  
34 necessary travel expenses incurred in the discharge of official  
35 duties in a manner consistent with the guidelines of the  
36 Travel Management Office of the Department of  
37 Administration.

38 (e) The nominating committee consists of the following  
39 members: (1) The President of the West Virginia State Bar  
40 who serves as the chairperson of the committee; (2) an active  
41 member of the West Virginia State Bar Workers'  
42 Compensation Committee selected by the major trade  
43 association representing employers in this state; (3) an active  
44 member of the West Virginia State Bar Workers'  
45 Compensation Committee selected by the highest ranking  
46 officer of the major employee organization representing  
47 workers in this state; (4) the Dean of the West Virginia  
48 University School of Law; and (5) the Chairman of the  
49 Judicial Investigation Committee.

50 (f) The nominating committee is responsible for  
51 reviewing and evaluating candidates for possible appointment  
52 to the Board of Review by the Governor. In reviewing  
53 candidates, the nominating committee may accept comments  
54 from and request information from any person or source.

55 (g) Each member of the nominating committee may  
56 submit up to three names of qualified candidates for each  
57 position on the Board of Review: *Provided*, That the  
58 member of the nominating committee selected by the major  
59 trade organization representing employers of this state shall  
60 submit at least one name of a qualified candidate for each  
61 position on the board who either is, or who represents, small  
62 business employers of this state. After careful review of the  
63 candidates, the committee shall select a minimum of one  
64 candidate for each position on the board.

65 (h) Of the initial appointments, one member shall be  
66 appointed for a term ending the thirty-first day of December,  
67 two thousand six; one member shall be appointed for a term  
68 ending the thirty-first day of December, two thousand eight;  
69 and one member shall be appointed for a term ending the  
70 thirty-first day of December, two thousand ten. Thereafter,

71 The appointments shall be for six-year terms.

72 (i) A member of the Board of Review must, at the time he  
73 or she takes office and thereafter during his or her  
74 continuance in office, be a resident of this state, be a member  
75 in good standing of the West Virginia State Bar, have a  
76 minimum of ten years' experience as an attorney admitted to  
77 practice law in this state prior to appointment and have a  
78 minimum of five years' experience in preparing and  
79 presenting cases or hearing actions and making decisions on  
80 the basis of the record of those hearings before administrative  
81 agencies, regulatory bodies or courts of record at the federal,  
82 state or local level.

83 (j) No member of the Board of Review may hold any  
84 other office, or accept any appointment or public trust, nor  
85 may he or she become a candidate for any elective public  
86 office or nomination thereto. Violation of this subsection  
87 requires the member to vacate his or her office. No member  
88 of the Board of Review may engage in the practice of law  
89 during his or her term of office.

90 (k) A vacancy occurring on the board other than by  
91 expiration of a term shall be filled in the manner original  
92 appointments were made, for the unexpired portion of the  
93 term.

94 (l) The board shall designate one of its members in  
95 rotation to be chairman of the board for as long as the board  
96 may determine by order made and entered of record. In the  
97 absence of the chairman, any other member designated by the  
98 members present shall act as chairman.

99 (m) The Board of Review shall meet as often as  
100 necessary to hold review hearings, at such times and places  
101 as the chairman may determine. Two members shall be



102 present in order to conduct review hearings or other business.  
103 All decisions of the board shall be determined by a majority  
104 of the members of the board.

105 (n) The Board of Review shall make general rules  
106 regarding the pleading, including the form of the petition and  
107 any responsive pleadings, practice and procedure to be used  
108 by the board.

109 (o) The Board of Review may hire a clerk and other  
110 professional and clerical staff necessary to carry out the  
111 requirements of this article. It is the duty of the clerk of the  
112 Board of Review to attend in person, or by deputy, all the  
113 sessions of the board, to obey its orders and directions, to  
114 take care of and preserve in an office, kept for the purpose,  
115 all records and papers of the board and to perform other  
116 duties as prescribed by law or required of him or her by the  
117 board. All employees of the board serve at the will and  
118 pleasure of the board. The board's employees are exempt  
119 from the salary schedule or pay plan adopted by the Division  
120 of Personnel. All personnel of the Board of Review are  
121 under the supervision of the chairman of the Board of  
122 Review.

123 (p) If considered necessary by the board, the board may,  
124 through staffing or other resources, procure assistance in  
125 review of medical portions of decisions.

126 (q) Upon the conclusion of any hearing, or prior thereto  
127 with concurrence of the parties, the board shall promptly  
128 determine the matter and make an award in accordance with  
129 its determination.

130 (r) The award shall become a part of the commission file.  
131 A copy of the award shall be sent forthwith by mail to all  
132 parties in interest.

133 (s) The award is final when entered. The award shall  
134 contain a statement explaining the rights of the parties to an  
135 appeal to the Board of Review and the applicable time  
136 limitations involved.

137 (t) The board shall submit to the Insurance Commissioner  
138 a budget sufficient to adequately provide for the  
139 administrative and other operating expenses of the board.

140 (u) The board shall report monthly to the Industrial  
141 Council on the status of all claims on appeal.

142 (v) Effective upon termination of the commission, the  
143 Board of Review shall be transferred to the Insurance  
144 Commissioner which shall have the oversight and  
145 administrative authority heretofore provided to the executive  
146 director and the board of managers.

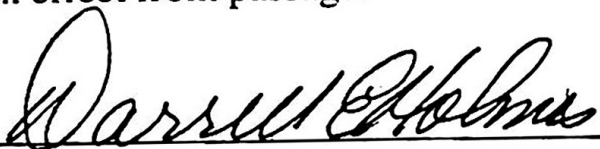
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

  
\_\_\_\_\_  
Chairman Senate Committee

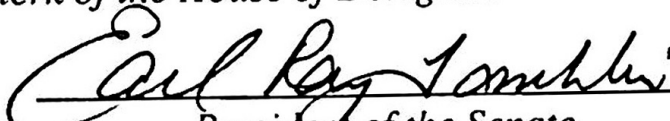
  
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Chairman House Committee

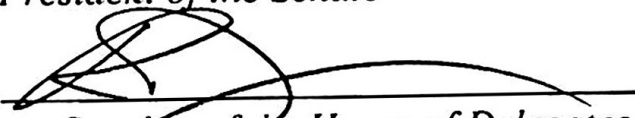
Originating in the House.

In effect from passage.

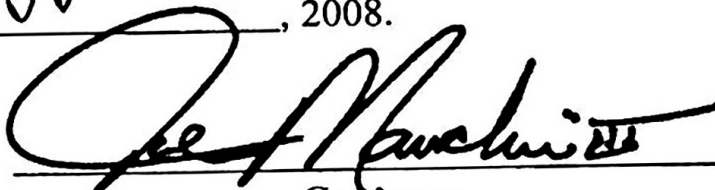
  
\_\_\_\_\_  
Clerk of the Senate

  
\_\_\_\_\_  
Clerk of the House of Delegates

  
\_\_\_\_\_  
President of the Senate

  
\_\_\_\_\_  
Speaker of the House of Delegates

The within is approved this the 1st  
day of April, 2008.

  
\_\_\_\_\_  
Governor

PRESENTED TO THE  
GOVERNOR

MAR 26 2008

Time 3:05pm