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
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.

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

(1) "Debt" means any assessment, premium, penalty, fine, tax or other amount of money owed to the state or any
of its political subdivisions because of a judgment, fine, 
permit violation, license assessment, amounts owed to the 
workers' compensation funds as defined in article two-c, 
chapter twenty-three of this code, penalty or other assessment 
or surcharge presently delinquent or due and required to be 
paid to the state or any of its political subdivisions, including 
any interest or additional penalties accrued thereon.

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

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

(4) “Political subdivision” means any county 
commission; municipality; county board of education; any 
instrumentality established by a county or municipality; any 
separate corporation or instrumentality established by one or 
more counties or municipalities, as permitted by law; or any 
public body charged by law with the performance of a 
government function and whose jurisdiction is coextensive 
with one or more counties or municipalities.

(5) “Related party” means a party, whether an individual, 
corporation, partnership, association, limited liability 
company or any other form or business association or other 
entity whatsoever, related to any vendor by blood, marriage,
ownership or contract through which the party has a relationship of ownership or other interest with the vendor so that the party will actually or by effect receive or control a portion of the benefit, profit or other consideration from performance of a vendor contract with the party receiving an amount that meets or exceeds five percent of the total contract amount.

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

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

(2) The debtor is in employer default.

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

d) All bids, contract proposals or contracts with the state or any of its political subdivisions submitted or approved under the provisions of this code shall include an affidavit that the vendor, prospective vendor or a related party to the vendor or prospective vendor is not in employer default and does not owe any debt in an amount in excess of one thousand dollars or, if a debt is owed, that the provisions of subsection (c) of this section apply.
CHAPTER 23. WORKERS' COMPENSATION.

ARTICLE 1. GENERAL ADMINISTRATIVE PROVISIONS.


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

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

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

(d) Notwithstanding any other provision of this code to the contrary, the Division of Personnel shall maintain, for a period of two years, a list of employees who were laid off as
a result of the reduction in the work force occasioned by the
decreasing work load of the workers' compensation litigation
unit within the office of the Attorney General. Any such
employee shall be given preference in hiring for any position
in classified or exempt service for which he or she is
qualified and applies. The Director of the Division of
Personnel may propose for promulgation, in accordance with
the provisions of article three, chapter twenty-nine-a of this
code, a legislative rule to effectuate the requirements of this
section.

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

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

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

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

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

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

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

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

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

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

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

(3) Subject to the provisions of subdivision (4) of this subsection, the Insurance Commissioner may waive other requirements imposed on mutual insurance companies by the provisions of chapter thirty-three of this code the Insurance Commissioner determines are necessary to enable the company to begin insuring employers in this state at the earliest possible date.
Within forty months of the date of the issuance of its license to transact insurance, the company shall comply with the capital and surplus requirements set forth in subsection (a), section five-b, article three, chapter thirty-three of this code in effect on the effective date of this enactment, unless the deadline is extended by the Insurance Commissioner.

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

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

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

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

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

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

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

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

(B) By the first day of May each year, the self-insured employer community shall be assessed a cumulative total of nine million dollars. The methodology for the assessment shall be fair and equitable and determined by exempt legislative rule issued by the Industrial Council. The amount collected pursuant to this subdivision shall be remitted to the Insurance Commissioner for deposit in the Workers' Compensation Debt Reduction Fund created in section five, article two-d of this chapter.
(g) The new premiums surcharge imposed by paragraphs (A) and (B), subdivision (3), subsection (f) of this section sunset and are not collectible with respect to workers' compensation insurance premiums paid when the policy is renewed on or after the first day of the month following the month in which the Governor certifies to the Legislature that the revenue bonds issued pursuant to article two-d of this chapter have been retired and that the unfunded liability of the Old Fund has been paid or has been provided for in its entirety, whichever occurs last.


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

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

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

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

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

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

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

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

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

(1) Shall be in writing;

(2) Shall contain the insuring agreements and exclusions; and
(3) If it contains a provision inconsistent with this chapter, it shall be deemed to be reformed to conform with this chapter.

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

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

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

(1) Enter into a contract or contracts with one or more organizations for managed care to provide comprehensive medical and health care services to employees for injuries and diseases that are compensable pursuant to chapter twenty-three of this code. The managed care plan must be
approved pursuant to the provisions of section three, article four of this chapter.

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

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

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

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

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

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

(a) The Legislature hereby finds and declares that it is in the interest of employees and employers that injured
employees be encouraged to return to work as quickly as possible after an injury and that appropriate protections be afforded to injured employees who return to work on a trial basis.

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

(a) The Insurance Commissioner, private carriers and self-insured employers may determine all questions within their jurisdiction. In matters arising under articles three and four of this chapter, the Insurance Commissioner private carriers and self-insured employers shall promptly review and investigate all claims. The parties to a claim are the claimant and, if applicable, the claimant’s dependants, and the employer, and with respect to claims involving funds created in article two-c of this chapter for which he or she has been designated the administrator, the Insurance Commissioner. In claims in which the employer had coverage on the date of the injury or last exposure, the employer’s carrier has sole authority to act on the employer’s behalf in all aspects related to litigation of the claim. With regard to any issue which is ready for a decision, the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, shall promptly send the decision to all parties, including the basis of its decision. As soon as practicable after receipt of the claim, but in no event...
later than the date of the initial decision on the claim, the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, shall send the claimant a brochure approved by the Insurance Commissioner setting forth the claims process.

(b)(1) Except with regard to interlocutory matters, upon making any decision, upon making or refusing to make any award or upon making any modification or change with respect to former findings or orders, as provided by section sixteen, article four of this chapter, the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, shall give notice, in writing, to the parties to the claim of its action. The notice shall state the time allowed for filing a protest to the finding. The action of the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, is final unless the decision is protested within sixty days after the receipt of such decision. Unless a protest is filed within the sixty-day period, the finding or action is final. This time limitation is a condition of the right to litigate the finding or action and hence jurisdictional. Any protest shall be filed with the Office of Judges with a copy served upon the parties to the claim, and other parties in accordance with the procedures set forth in sections eight and nine of this article. An employer may protest decisions incorporating findings made by the Occupational Pneumoconiosis Board, decisions made by the Insurance Commissioner acting as administrator of claims involving funds created in article two-c of this chapter, or decisions entered pursuant to subdivision (1), subsection (c), section seven-a. article four of this chapter. (2)(A) With respect to every application for benefits filed on or after the first day of July, two thousand eight, in which a decision to deny benefits is protested and the only controversy relating to compensability is whether the application was properly filed as a new claim or a reopening of a previous claim, the party that denied the application shall begin to make
conditional payment of benefits and must promptly give notice to the Office of Judges that another identifiable person may be liable. The Office of Judges shall promptly order the appropriate persons be joined as parties to the proceeding: Provided, That at any time during a proceeding in which conditional payments are being made in accordance with the provisions of this subsection, the office of judges may, pending final determination of the person properly liable for payment of the claim, order that such conditional payments of benefits be paid by another party.

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

(C) The Office of Judges may direct that:

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

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

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

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

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


(a) On the thirty-first day of January, two thousand four, the Workers' Compensation Appeal Board heretofore established in this section is hereby abolished.
(b) There is created the "Workers' Compensation Board of Review", which may also be referred to as "the Board of Review" or "the board". Effective the first day of February, two thousand four, the Board of Review shall exercise exclusive jurisdiction over all appeals from the Workers' Compensation Office of Judges including any and all appeals pending with the Board of Appeals on the thirty-first day of January, two thousand four.

(c) The board consists of three members.

(d) The Governor shall appoint, from names submitted by the "Workers' Compensation Board of Review Nominating Committee", with the advice and consent of the Senate, three qualified attorneys to serve as members of the Board of Review. If the Governor does not select a nominee for any vacant position from the names provided by the nominating committee, he shall notify the nominating committee of that circumstance and the committee shall provide additional names for consideration by the Governor. A member of the Board of Review may be removed by the Governor for official misconduct, incompetence, neglect of duty, gross immorality or malfeasance and then only after notice and opportunity to respond and present evidence. No more than two of the members of the board may be of the same political party. The members of the Board of Review shall be paid an annual salary of eighty-five thousand dollars: Provided, that on and after the first day of July, two thousand eight the Governor shall set the salary of the members of the Board: Provided, however, That the annual salary of a member of the board of review shall not exceed one hundred ten thousand dollars. Members are entitled to be reimbursed for actual and necessary travel expenses incurred in the discharge of official duties in a manner consistent with the guidelines of the Travel Management Office of the Department of Administration.
(e) The nominating committee consists of the following members: (1) The President of the West Virginia State Bar who serves as the chairperson of the committee; (2) an active member of the West Virginia State Bar Workers' Compensation Committee selected by the major trade association representing employers in this state; (3) an active member of the West Virginia State Bar Workers' Compensation Committee selected by the highest ranking officer of the major employee organization representing workers in this state; (4) the Dean of the West Virginia University School of Law; and (5) the Chairman of the Judicial Investigation Committee.

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

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

(h) Of the initial appointments, one member shall be appointed for a term ending the thirty-first day of December, two thousand six; one member shall be appointed for a term ending the thirty-first day of December, two thousand eight; and one member shall be appointed for a term ending the thirty-first day of December, two thousand ten. Thereafter,
The appointments shall be for six-year terms.

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

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

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

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

(m) The Board of Review shall meet as often as necessary to hold review hearings, at such times and places as the chairman may determine. Two members shall be
present in order to conduct review hearings or other business. All decisions of the board shall be determined by a majority of the members of the board.

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

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

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

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

(r) The award shall become a part of the commission file. A copy of the award shall be sent forthwith by mail to all parties in interest.
(s) The award is final when entered. The award shall contain a statement explaining the rights of the parties to an appeal to the Board of Review and the applicable time limitations involved.

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

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

(v) Effective upon termination of the commission, the Board of Review shall be transferred to the Insurance Commissioner which shall have the oversight and administrative authority heretofore provided to the executive director and the board of managers.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

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 bill approved this the 1st day of April, 2008.

Governor