

H. B. 2065

(By Delegate Ennis)

[Introduced January 12, 2011; referred to the Committee on Energy, Industry and Labor, Economic Development and Small Business then the Judiciary.]

**FISCAL
NOTE**

A BILL to amend and reenact §23-4-6 of the Code of West Virginia, 1931, as amended, relating to setting forth disability benefits for employees that receive a foreseeable injury in an inherently dangerous function required by their employer but outside scope of employment.

Be it enacted by the Legislature of West Virginia:

That §23-4-6 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

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

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

(a) The terms "average weekly wage earnings, wherever earned, of the injured employee, at the date of injury" and "average weekly

1 wage in West Virginia", as used in this chapter, have the meaning
2 and shall be computed as set forth in section fourteen of this
3 article except for the purpose of computing temporary total
4 disability benefits for part-time employees pursuant to the
5 provisions of section six-d of this article.

6 (b) For all awards made on and after the effective date of the
7 amendment and reenactment of this section during the year 2003, if
8 the injury causes temporary total disability, the employee shall
9 receive during the continuance of the disability a maximum weekly
10 benefit to be computed on the basis of sixty-six and two-thirds
11 percent of the average weekly wage earnings, wherever earned, of the
12 injured employee, at the date of injury, not to exceed one hundred
13 percent of the average weekly wage in West Virginia: *Provided*, That
14 for any employee who receives a foreseeable injury in the course of
15 performing an inherently dangerous function that he or she is
16 required by the employer to perform but is outside the normal scope
17 of employment, regularly-assigned job description and duties, and
18 standard operation and functions of the employee, the weekly benefit
19 is to be one hundred percent of the average weekly wage earnings:
20 *Provided, however*, That in no event shall an award for temporary
21 total disability be subject to annual adjustments resulting from
22 changes in the average weekly wage in West Virginia: *Provided*,
23 ~~however~~ further, in the case of a claimant whose award was granted
24 prior to the effective date of the amendment and reenactment of this

1 section during the year 2003, the maximum benefit rate shall be the
2 rate applied under the prior enactment of this subsection which was
3 in effect at the time the injury occurred. The minimum weekly
4 benefits paid under this subdivision shall not be less than thirty-
5 three and one-third percent of the average weekly wage in West
6 Virginia, except as provided in sections six-d and nine of this
7 article. In no event, however, shall the minimum weekly benefits
8 exceed the level of benefits determined by use of the applicable
9 federal minimum hourly wage: *And provided further,* That any
10 claimant receiving permanent total disability benefits, permanent
11 partial disability benefits or dependents' benefits prior to July
12 1, 1994, shall not have his or her benefits reduced based upon the
13 requirement in this subdivision that the minimum weekly benefit
14 shall not exceed the applicable federal minimum hourly wage.

15 (c) Subdivision (b) of this section is limited as follows:
16 Aggregate award for a single injury causing temporary disability
17 shall be for a period not exceeding two hundred eight weeks;
18 aggregate award for a single injury for which an award of temporary
19 total disability benefits is made on or after the effective date of
20 the amendment and reenactment of this section in the year 2003 shall
21 be for a period not exceeding one hundred four weeks.
22 Notwithstanding any other provision of this subdivision to the
23 contrary, no person may receive temporary total disability benefits
24 under an award for a single injury for a period exceeding one

1 hundred four weeks from the effective date of the amendment and
2 reenactment of this section in the year 2003.

3 (d) For all awards of permanent total disability benefits that
4 are made on or after February 2, 1995, including those claims in
5 which a request for an award was pending before the division or
6 which were in litigation but not yet submitted for a decision, then
7 benefits shall be payable until the claimant attains the age
8 necessary to receive federal old age retirement benefits under the
9 provisions of the Social Security Act, 42 U.S.C. §§401 and 402, in
10 effect on the effective date of this section. The claimant shall
11 be paid benefits so as not to exceed a maximum benefit of sixty-six
12 and two-thirds percent of the claimant's average weekly wage
13 earnings, wherever earned, at the time of the date of injury not to
14 exceed one hundred percent of the average weekly wage in West
15 Virginia: Provided, That for any employee who receives a
16 foreseeable injury in the course of performing an inherently
17 dangerous function that he or she is required by the employer to
18 perform but is outside the normal scope of employment, regularly-
19 assigned job description and duties, and standard operation and
20 functions of the employee, the weekly benefit is one hundred percent
21 of the average weekly wage earnings. The minimum weekly benefits
22 paid under this section shall be as is provided ~~for~~ in subdivision
23 (b) of this section. In all claims in which an award for permanent
24 total disability benefits was made prior to February 2, 1995, the

1 awards shall continue to be paid at the rate in effect prior to the
2 effective date of the amendment and reenactment of this section in
3 the year 2003: *Provided, however*, That the provisions of sections
4 one through eight, inclusive, article four-a of this chapter shall
5 be applied thereafter to all prior awards that were previously
6 subject to its provisions. A single or aggregate permanent
7 disability of eighty-five percent or more entitles the employee to
8 a rebuttable presumption of a permanent total disability for the
9 purpose of paragraph (2), subdivision (n) of this section: *Provided*
10 ~~*however, further*~~, That the claimant must also be at least fifty
11 percent medically impaired upon a whole body basis or has sustained
12 a thirty-five percent statutory disability pursuant to the
13 provisions of subdivision (f) of this section. The presumption may
14 be rebutted if the evidence establishes that the claimant is not
15 permanently and totally disabled pursuant to subdivision (n) of this
16 section. Under no circumstances may the commission, successor to
17 the commission, other private carrier or self-insured employer,
18 whichever is applicable, grant an additional permanent disability
19 award to a claimant receiving a permanent total disability award:
20 *And provided further*, That if any claimant thereafter sustains
21 another compensable injury and has permanent partial disability
22 resulting from the injury, the total permanent disability award
23 benefit rate shall be computed at the highest benefit rate justified
24 by any of the compensable injuries.

1 (e) (1) For all awards made on or after the effective date of
2 the amendment and reenactment of this section during the year 2003,
3 if the injury causes permanent disability less than permanent total
4 disability, the percentage of disability to total disability shall
5 be determined and the award computed on the basis of four weeks'
6 compensation for each percent of disability determined at the
7 maximum or minimum benefit rates as follows: Sixty-six and two-
8 thirds percent of the average weekly wage earnings, wherever earned,
9 of the injured employee at the date of injury, not to exceed seventy
10 percent of the average weekly wage in West Virginia: *Provided*, That
11 in no event shall an award for permanent partial disability be
12 subject to annual adjustments resulting from changes in the average
13 weekly wage in West Virginia: *Provided, however*, That in the case
14 of a claimant whose award was granted prior to the effective date
15 of the amendment and reenactment of this section during the year
16 2003, the maximum benefit rate shall be the rate applied under the
17 prior enactment of this section which was in effect at the time the
18 injury occurred.

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

1 of compensation for each percent of disability.

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

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

9 The loss of a great toe shall be considered a ten percent
10 disability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 The loss of middle or second finger shall be considered a seven
16 percent disability.

17 The loss of index or first finger (one phalanx) shall be
18 considered a six percent disability.

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

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

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

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

3 The loss of index and middle fingers shall be considered a
4 twenty percent disability.

5 The loss of middle and ring fingers shall be considered a
6 fifteen percent disability.

7 The loss of ring and little fingers shall be considered a ten
8 percent disability.

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

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

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

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

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

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

21 The loss of arm shall be considered a sixty percent disability.

22 The total and irrecoverable loss of the sight of one eye shall
23 be considered a thirty-three percent disability. For the partial
24 loss of vision in one or both eyes, the percentages of disability

1 shall be determined by the commission, using as a basis the total
2 loss of one eye.

3 The total and irrecoverable loss of the hearing of one ear
4 shall be considered a twenty-two and one-half percent disability.

5 The total and irrecoverable loss of hearing of both ears shall be
6 considered a fifty-five percent disability.

7 For the partial loss of hearing in one or both ears, the
8 percentage of disability shall be determined by the commission,
9 successor to the commission, other private carrier or self-insured
10 employer, whichever is applicable, using as a basis the total loss
11 of hearing in both ears.

12 If a claimant sustains a compensable injury which results in
13 the total loss by severance of any of the bodily members named in
14 this subdivision or dies from sickness or noncompensable injury
15 before the commission makes the proper award for the injury, the
16 commission shall make the award to the claimant's dependents as
17 defined in this chapter, if any; the payment to be made in the same
18 installments that would have been paid to claimant if living:

19 *Provided*, That no payment shall be made to any surviving spouse of
20 the claimant after his or her remarriage and that this liability
21 shall not accrue to the estate of the claimant and is not subject
22 to any debts of, or charges against, the estate.

23 (g) If a claimant to whom has been made a permanent partial
24 award dies from sickness or noncompensable injury, the unpaid

1 balance of the award shall be paid to claimant's dependents as
2 defined in this chapter, if any; the payment to be made in the same
3 installments that would have been paid to claimant if living:
4 *Provided*, That no payment shall be made to any surviving spouse of
5 the claimant after his or her remarriage, and that this liability
6 shall not accrue to the estate of the claimant and is not subject
7 to any debts of, or charges against, such estate.

8 (h) For the purposes of this chapter, a finding of the
9 occupational pneumoconiosis board has the force and effect of an
10 award.

11 (i) For the purposes of this chapter, with the exception of
12 those injuries provided for in subdivision (f) of this section and
13 in section six-b of this article, the degree of permanent disability
14 other than permanent total disability shall be determined
15 exclusively by the degree of whole body medical impairment that a
16 claimant has suffered. For those injuries provided ~~for~~ in
17 subdivision (f) of this section and section six-b of this article,
18 the degree of disability shall be determined exclusively by the
19 provisions of said subdivision and said section. The occupational
20 pneumoconiosis board created pursuant to section eight-a of this
21 article shall premise its decisions on the degree of pulmonary
22 function impairment that claimants suffer solely upon whole body
23 medical impairment. The Workers' Compensation Commission shall
24 adopt standards for the evaluation of claimants and the

1 determination of a claimant's degree of whole body medical
2 impairment. Once the degree of medical impairment has been
3 determined, that degree of impairment shall be the degree of
4 permanent partial disability that shall be awarded to the claimant.
5 This subdivision is applicable to all injuries incurred and diseases
6 with a date of last exposure on or after February 2, 1995, to all
7 applications for an award of permanent partial disability made on
8 and after that date and to all applications for an award of
9 permanent partial disability that were pending before the commission
10 or pending in litigation but not yet submitted for decision on and
11 after that date. The prior provisions of this subdivision remain in
12 effect for all other claims.

13 (j) From a list of names of seven persons submitted to the
14 executive director by the health care advisory panel, the executive
15 director shall appoint an interdisciplinary examining board
16 consisting of five members to evaluate claimants, including by
17 examination if the board elects. The interdisciplinary examining
18 board shall terminate upon termination of the commission and all
19 administrative and adjudicatory functions performed by the
20 interdisciplinary examining board shall be performed by the
21 following reviewing bodies for those claims over which they have
22 administrative jurisdiction: (1) The Insurance Commissioner or his
23 or her designated administrator of each of the funds set forth in
24 this chapter; (2) private carriers; or (3) self-insured employers.

1 The reviewing bodies shall employ or otherwise engage adequate
2 resources, including medical professionals, to perform the functions
3 of the interdisciplinary examining board. The board shall be
4 composed of three qualified physicians with specialties and
5 expertise qualifying them to evaluate medical impairment and two
6 vocational rehabilitation specialists who are qualified to evaluate
7 the ability of a claimant to perform gainful employment with or
8 without retraining. One member of the board shall be designated
9 annually as chairperson by the executive director. The term of
10 office of each member of the board shall be six years and until his
11 or her successor has been appointed and has qualified. Any member
12 of the board may be appointed to any number of terms. Any two
13 physician members and one vocational rehabilitation specialist
14 member shall constitute a quorum for the transaction of business.
15 The executive director, from time to time, shall fix the
16 compensation to be paid to each member of the board, and the members
17 are also entitled to reasonable and necessary traveling and other
18 expenses incurred while actually engaged in the performance of their
19 duties. The board shall perform the duties and responsibilities
20 assigned by the provisions of this chapter, consistent with the
21 administrative policies developed by the executive director with the
22 approval of the board of managers.

23 (1) The executive director shall establish requirements for the
24 proper completion and support for an application for permanent total

1 disability benefits within an existing or a new rule no later than
2 January 1, 2004. Upon adoption of the rule by the board of
3 managers, no issue of permanent total disability may be referred to
4 the interdisciplinary examining board, or, any other reviewing body,
5 unless a properly completed and supported application for permanent
6 total disability benefits has been first filed. Prior to the
7 referral of any issue to the interdisciplinary examining board, or,
8 upon its termination, prior to a reviewing body's adjudication of a
9 permanent total disability application, the commission, or reviewing
10 body shall conduct examinations of the claimant that it finds
11 necessary and obtain all pertinent records concerning the claimant's
12 medical history and reports of examinations and forward them to the
13 board at the time of the referral. The commission or reviewing body
14 shall provide adequate notice to the employer of the filing of the
15 request for a permanent total disability award and the employer
16 shall be granted an appropriate period in which to respond to the
17 request. The claimant and the employer may furnish all pertinent
18 information to the board or other reviewing body and shall furnish
19 to the board or other reviewing body any information requested. The
20 claimant and the employer may each submit no more than one report
21 and opinion regarding each issue present in a given claim. The
22 employer may have the claimant examined by medical specialists and
23 vocational rehabilitation specialists: *Provided*, That the employer
24 is entitled to only one examination on each issue present in a given

1 claim. Any additional examinations must be approved by the
2 commission or other reviewing body and shall be granted only upon a
3 showing of good cause. The reports from all employer-conducted
4 examinations must be filed with the board or other reviewing body
5 and served upon the claimant. The board or other reviewing body may
6 request that those persons who have furnished reports and opinions
7 regarding a claimant provide it with additional information
8 considered necessary. Both the claimant and the employer, as well
9 as the commission, or other reviewing body may submit or obtain
10 reports from experts challenging or supporting the other reports in
11 the record regardless of whether or not the expert examined the
12 claimant or relied solely upon the evidence of record.

13 (2) If the board or a quorum of the board elects to examine a
14 claimant, the individual members shall conduct any examinations that
15 are pertinent to each of their specialties. If a claim presents an
16 issue beyond the expertise of the board, the board may obtain advice
17 or evaluations by other specialists. In addition, if the board of
18 managers determines that the number of applications pending before
19 the interdisciplinary examining board has exceeded the level at
20 which the board can review and make recommendations within a
21 reasonable time, the board of managers may authorize the executive
22 director to appoint any additional members to the board that are
23 necessary to reduce the backlog of applications. The additional
24 members shall be recommended by the health care advisory panel. The

1 executive director may make any appointments he or she chooses from
2 the recommendations. The additional board members shall not serve
3 a set term but shall serve until the board of managers determines
4 that the number of pending applications has been reduced to an
5 acceptable level.

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

12 (4) In the event the board members or other reviewing body
13 elects to examine a claimant, the board or other reviewing body
14 shall prepare a report stating the tests, examinations, procedures
15 and other observations that were made, the manner in which each was
16 conducted and the results of each. The report shall state the
17 findings made by the board or other reviewing body and the reasons
18 for the findings. Copies of the reports of all examinations made by
19 the board or other reviewing body shall be served upon the parties
20 and the commission until its termination. Each shall be given an
21 opportunity to respond in writing to the findings and conclusions
22 stated in the reports.

23 (5) The board or other reviewing body shall state its initial
24 recommendations to the commission in writing with an explanation for

1 each recommendation setting forth the reasons for each. The
2 recommendations shall be served upon the parties and the commission
3 and each shall be afforded a thirty-day opportunity to respond in
4 writing to the board or other reviewing body regarding its
5 recommendations. The board or other reviewing body shall review any
6 responses and issue its final recommendations. The final
7 recommendations shall be effectuated by the entry of an appropriate
8 order by the commission, or, upon its termination, the private
9 carrier or self-insured employer. For all awards for permanent
10 total disability where the claim was filed on or after the effective
11 date of the amendment and reenactment of this section in the year
12 2003, the commission or other reviewing body shall establish the
13 date of onset of the claimant's permanent total disability as the
14 date when a properly completed and supported application for
15 permanent total disability benefits as prescribed in subdivision (1)
16 of this subsection that results in a finding of permanent total
17 disability was filed with the commission or other reviewing body:
18 *Provided,* That upon notification of the commission or other
19 reviewing body by a claimant or his or her representative that the
20 claimant seeks to be evaluated for permanent total disability, the
21 commission or other reviewing body shall send the claimant or his or
22 her representative the proper application form. The commission or
23 other reviewing body shall set time limits for the return of the
24 application. A properly completed and supported application

1 returned within the time limits set by the commission or other
2 reviewing body shall be treated as if received on the date the
3 commission or other reviewing body was notified the claimant was
4 seeking evaluation for permanent total disability: *Provided,*
5 *however,* That notwithstanding any other provision of this section to
6 the contrary, the onset date may not be sooner than the date upon
7 which the claimant meets the percentage thresholds of prior
8 permanent partial disability that are established by subsection (n)
9 of this section as a prerequisite to the claimant's qualification
10 for consideration for a permanent total disability award.

11 (6) Except as noted below, objections pursuant to section one,
12 article five of this chapter to any order shall be limited in scope
13 to matters within the record developed before the Workers'
14 Compensation Commission and the board or other reviewing body and
15 shall further be limited to the issue of whether the board or other
16 reviewing body properly applied the standards for determining
17 medical impairment, if applicable, and the issue of whether the
18 board's findings are clearly wrong in view of the reliable,
19 probative and substantial evidence on the whole record. The
20 preponderance of the evidence set forth in article one of this
21 chapter shall apply to decisions made by reviewing bodies other than
22 the commission instead of the clearly wrong standard. If either
23 party contends that the claimant's condition has changed
24 significantly since the review conducted by the board or other

1 reviewing body, the party may file a motion with the administrative
2 law judge, together with a report supporting that assertion. Upon
3 the filing of the motion, the administrative law judge shall cause
4 a copy of the report to be sent to the examining board or other
5 reviewing body asking the board to review the report and provide
6 comments if the board chooses within sixty days of the board's
7 receipt of the report. The board or other reviewing body may either
8 supply comments or, at the board's or other reviewing body's
9 discretion, request that the claim be remanded to the board for
10 further review. If remanded, the claimant is not required to submit
11 to further examination by the employer's medical specialists or
12 vocational rehabilitation specialists. Following the remand, the
13 board or other reviewing body shall file its recommendations with
14 the administrative law judge for his or her review. If the board or
15 other reviewing body elects to respond with comments, the comments
16 shall be filed with the administrative law judge for his or her
17 review. Following the receipt of either the board's or other
18 reviewing body's recommendations or comments, the administrative law
19 judge shall issue a written decision ruling upon the asserted change
20 in the claimant's condition. No additional evidence may be
21 introduced during the review of the objection before the office of
22 judges or elsewhere on appeal: *Provided*, That each party and the
23 commission may submit one written opinion on each issue pertinent to
24 a given claim based upon a review of the evidence of record either

1 challenging or defending the board's or other reviewing body's
2 findings and conclusions. Thereafter, based upon the evidence of
3 record, the administrative law judge shall issue a written decision
4 containing his or her findings of fact and conclusions of law
5 regarding each issue involved in the objection. The limitation of
6 the scope of review otherwise provided in this subsection is not
7 applicable upon termination of the commission and any objections
8 shall be subject to article five of this chapter in its entirety.

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

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

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

1 Loss of both eyes or the sight thereof.

2 Loss of both hands or the use thereof.

3 Loss of both feet or the use thereof.

4 Loss of one hand and one foot or the use thereof.

5 (n) (1) Other than for those injuries specified in subdivision
6 (m) of this section, in order to be eligible to apply for an award
7 of permanent total disability benefits for all injuries incurred and
8 all diseases, including occupational pneumoconiosis, regardless of
9 the date of last exposure, on and after the effective date of the
10 amendment and reenactment of this section during the year 2003, a
11 claimant: (A) Must have been awarded the sum of fifty percent in
12 prior permanent partial disability awards; (B) must have suffered a
13 single occupational injury or disease which results in a finding by
14 the commission that the claimant has suffered a medical impairment
15 of fifty percent; or (C) has sustained a thirty-five percent
16 statutory disability pursuant to the provisions of subdivision (f)
17 of this section. Upon filing an application, the claim will be
18 reevaluated by the examining board or other reviewing body pursuant
19 to subdivision (I) of this section to determine if the claimant has
20 suffered a whole body medical impairment of fifty percent or more
21 resulting from either a single occupational injury or occupational
22 disease or a combination of occupational injuries and occupational
23 diseases or has sustained a thirty-five percent statutory disability
24 pursuant to the provisions of subdivision (f) of this section. A

1 claimant whose prior permanent partial disability awards total
2 eighty-five percent or more shall also be examined by the board or
3 other reviewing body and must be found to have suffered a whole body
4 medical impairment of fifty percent in order for his or her request
5 to be eligible for further review. The examining board or other
6 reviewing body shall review the claim as provided for in subdivision
7 (j) of this section. If the claimant has not suffered whole body
8 medical impairment of at least fifty percent or has sustained a
9 thirty-five percent statutory disability pursuant to the provisions
10 of subdivision (f) of this section, the request shall be denied.
11 Upon a finding that the claimant has a fifty percent whole body
12 medical impairment or has sustained a thirty-five percent statutory
13 disability pursuant to the provisions of subdivision (f) of this
14 section, the review of the application continues as provided ~~for~~ in
15 the following paragraph of this subdivision. Those claimants whose
16 prior permanent partial disability awards total eighty-five percent
17 or more and who have been found to have a whole body medical
18 impairment of at least fifty percent or have sustained a thirty-five
19 percent statutory disability pursuant to the provisions of
20 subdivision (f) of this section are entitled to the rebuttable
21 presumption created pursuant to subdivision (d) of this section for
22 the remaining issues in the request.

23 (2) For all awards made on or after the effective date of the
24 amendment and reenactment of this section during the year 2003,

1 disability which renders the injured employee unable to engage in
2 substantial gainful activity requiring skills or abilities which can
3 be acquired or which are comparable to those of any gainful activity
4 in which he or she has previously engaged with some regularity and
5 over a substantial period of time shall be considered in determining
6 the issue of total disability. The comparability of preinjury
7 income to post-disability income will not be a factor in determining
8 permanent total disability. Geographic availability of gainful
9 employment within a driving distance of seventy-five miles from the
10 residence of the employee or within the distance from the residence
11 of the employee to his or her preinjury employment, whichever is
12 greater, will be a factor in determining permanent total disability.
13 For any permanent total disability award made after the amendment
14 and reenactment of this section in the year 2003, permanent total
15 disability benefits shall cease at age seventy years. In addition,
16 the vocational standards adopted pursuant to subsection (m), section
17 seven, article three of this chapter shall be considered once they
18 are effective.

19 (3) In the event that a claimant, who has been found to have at
20 least a fifty percent whole body medical impairment or has sustained
21 a thirty-five percent statutory disability pursuant to the
22 provisions of subdivision (f) of this section, is denied an award of
23 permanent total disability benefits pursuant to this subdivision and
24 accepts and continues to work at a lesser paying job than he or she

1 previously held, the claimant is eligible, notwithstanding the
2 provisions of section nine of this article, to receive temporary
3 partial rehabilitation benefits for a period of four years. The
4 benefits shall be paid at the level necessary to ensure the
5 claimant's receipt of the following percentages of the average
6 weekly wage earnings of the claimant at the time of injury
7 calculated as provided in this section and sections six-d and
8 fourteen of this article:

9 (A) Eighty percent for the first year;

10 (B) Seventy percent for the second year;

11 (C) Sixty percent for the third year; and

12 (D) Fifty percent for the fourth year: *Provided*, That in no
13 event shall the benefits exceed one hundred percent of the average
14 weekly wage in West Virginia. In no event shall the benefits be
15 subject to the minimum benefit amounts required by the provisions of
16 subdivision (b) of this section.

17 (4) Notwithstanding any provision of this subsection,
18 subsection (d) of this section or any other provision of this code
19 to the contrary, on any claim filed on or after the effective date
20 of the amendment and reenactment of this section in the year 2003:

21 (A) No percent of whole body medical impairment existing as the
22 result of carpal tunnel syndrome for which a claim has been made
23 under this chapter may be included in the aggregation of permanent
24 disability under the provisions of this subsection or subsection (d)

1 of this section; and

2 (B) No percent of whole body medical impairment existing as the
3 result of any occupational disease, the diagnosis of which is based
4 solely upon symptoms rather than specific, objective and measurable
5 medical findings, and for which a claim has been made under this
6 chapter may be included in the aggregation of permanent disability
7 under the provisions of this subsection or subsection (d) of this
8 section.

9 (o) To confirm the ongoing permanent total disability status of
10 the claimant, the commission, successor to the commission, other
11 private carrier or self-insured employer, whichever is applicable,
12 may elect to have any recipient of a permanent total disability
13 award undergo one independent medical examination during each of the
14 first five years that the permanent total disability award is paid
15 and one independent medical examination during each three-year
16 period thereafter until the claimant reaches the age of seventy
17 years: *Provided*, That the commission, successor to the commission,
18 other private carrier or self-insured employer, whichever is
19 applicable, may elect to have any recipient of a permanent total
20 disability award under the age of fifty years undergo one
21 independent medical examination during each year that the permanent
22 total disability award is paid until the recipient reaches the age
23 of fifty years, and thereafter one independent medical examination
24 during each three-year period thereafter until the claimant reaches

1 the age of seventy years.

NOTE: The purpose of this bill is to setting forth disability benefits for employees that receive a foreseeable injury in an inherently dangerous function required by their employer but outside scope of employment.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.