

1 **H. B. 4578**

2
3 (By Delegate Diserio)

4 [Introduced February 17, 2014; referred to the
5 Committee on the Judiciary then Finance.]
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10 A BILL to amend and reenact §23-4-6 of the Code of West Virginia,
11 1931, as amended, relating to the classification and criteria
12 for disability benefits.

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

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

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

17 **§23-4-6. Classification of and criteria for disability benefits.**

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

21 (a) The terms "average weekly wage earnings, wherever earned,
22 of the injured employee, at the date of injury" and "average weekly
23 wage in West Virginia", as used in this chapter, have the meaning

1 and shall be computed as set forth in section fourteen of this
2 article except for the purpose of computing temporary total
3 disability benefits for part-time employees pursuant to the
4 provisions of section six-d of this article.

5 (b) For all awards made on and after the effective date of the
6 amendment and reenactment of this section during the year 2003, if
7 the injury causes temporary total disability, the employee shall
8 receive during the continuance of the disability a maximum weekly
9 benefit to be computed on the basis of sixty-six and two-thirds
10 percent of the average weekly wage earnings, wherever earned, of
11 the injured employee, at the date of injury, not to exceed one
12 hundred percent of the average weekly wage in West Virginia:
13 *Provided*, That in no event shall an award for temporary total
14 disability be subject to annual adjustments resulting from changes
15 in the average weekly wage in West Virginia: *Provided, however*, in
16 the case of a claimant whose award was granted prior to the
17 effective date of the amendment and reenactment of this section
18 during the year 2003, the maximum benefit rate shall be the rate
19 applied under the prior enactment of this subsection which was in
20 effect at the time the injury occurred. The minimum weekly benefits
21 paid under this subdivision shall not be less than thirty-three and
22 one-third percent of the average weekly wage in West Virginia,
23 except as provided in sections six-d and nine of this article. In
24 no event, however, shall the minimum weekly benefits exceed the

1 level of benefits determined by use of the applicable federal
2 minimum hourly wage: *Provided further*, That any claimant receiving
3 permanent total disability benefits, permanent partial disability
4 benefits or dependents' benefits prior to July 1, 1994, shall not
5 have his or her benefits reduced based upon the requirement in this
6 subdivision that the minimum weekly benefit shall not exceed the
7 applicable federal minimum hourly wage.

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

20 (d) For all awards of permanent total disability benefits that
21 are made on or after February 2, 1995, including those claims in
22 which a request for an award was pending before the division or
23 which were in litigation but not yet submitted for a decision, then
24 benefits shall be payable until the claimant attains the age

1 necessary to receive federal old age retirement benefits under the
2 provisions of the Social Security Act, 42 U.S.C. §§401 and 402, in
3 effect on the effective date of this section. The claimant shall be
4 paid benefits so as not to exceed a maximum benefit of sixty-six
5 and two-thirds percent of the claimant's average weekly wage
6 earnings, wherever earned, at the time of the date of injury not to
7 exceed one hundred percent of the average weekly wage in West
8 Virginia. The minimum weekly benefits paid under this section shall
9 be as is provided for in subdivision (b) of this section. In all
10 claims in which an award for permanent total disability benefits
11 was made prior to February 2, 1995, the awards shall continue to be
12 paid at the rate in effect prior to the effective date of the
13 amendment and reenactment of this section in the year 2003:
14 *Provided*, That the provisions of sections one through eight,
15 inclusive, article four-a of this chapter shall be applied
16 thereafter to all prior awards that were previously subject to its
17 provisions. A single or aggregate permanent disability of
18 eighty-five percent or more entitles the employee to a rebuttable
19 presumption of a permanent total disability for the purpose of
20 paragraph (2), subdivision (n) of this section: *Provided, however*,
21 That the claimant must also be at least fifty percent medically
22 impaired upon a whole body basis or has sustained a thirty-five
23 percent statutory disability pursuant to the provisions of
24 subdivision (f) of this section. The presumption may be rebutted if

1 the evidence establishes that the claimant is not permanently and
2 totally disabled pursuant to subdivision (n) of this section. Under
3 no circumstances may the commission, successor to the commission,
4 other private carrier or self-insured employer, whichever is
5 applicable, grant an additional permanent disability award to a
6 claimant receiving a permanent total disability award: *Provided*
7 *further*, That if any claimant thereafter sustains another
8 compensable injury and has permanent partial disability resulting
9 from the injury, the total permanent disability award benefit rate
10 shall be computed at the highest benefit rate justified by any of
11 the compensable injuries.

12 (e) (1) For all awards made on or after the effective date of
13 the amendment and reenactment of this section during the year 2003,
14 if the injury causes permanent disability less than permanent total
15 disability, the percentage of disability to total disability shall
16 be determined and the award computed on the basis of four weeks'
17 compensation for each percent of disability determined at the
18 maximum or minimum benefit rates as follows: Sixty-six and
19 two-thirds percent of the average weekly wage earnings, wherever
20 earned, of the injured employee at the date of injury, not to
21 exceed seventy percent of the average weekly wage in West Virginia:
22 *Provided*, That in no event shall an award for permanent partial
23 disability be subject to annual adjustments resulting from changes
24 in the average weekly wage in West Virginia: *Provided, however*,

1 That in the case of a claimant whose award was granted prior to the
2 effective date of the amendment and reenactment of this section
3 during the year 2003, the maximum benefit rate shall be the rate
4 applied under the prior enactment of this section which was in
5 effect at the time the injury occurred.

6 (2) If a claimant is released by his or her treating physician
7 to return to work at the job he or she held before the occupational
8 injury occurred and if the claimant's preinjury employer does not
9 offer the preinjury job or a comparable job to the employee when a
10 position is available to be offered, the award for the percentage
11 of partial disability shall be computed on the basis of six weeks
12 of compensation for each percent of disability.

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

16 (f) If the injury results in the total loss by severance of
17 any of the members named in this subdivision, the percentage of
18 disability shall be determined by the percentage of disability,
19 specified in the following table:

20 The loss of a great toe shall be considered a ten percent
21 disability.

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

24 The loss of other toes shall be considered a four percent

1 disability.

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

4 The loss of all toes shall be considered a twenty-five percent
5 disability.

6 The loss of forepart of foot shall be considered a thirty
7 percent disability.

8 The loss of a foot shall be considered a thirty-five percent
9 disability.

10 The loss of a leg shall be considered a forty-five percent
11 disability.

12 The loss of thigh shall be considered a fifty percent
13 disability.

14 The loss of thigh at hip joint shall be considered a sixty
15 percent disability.

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

18 The loss of a little or fourth finger shall be considered a
19 five percent disability.

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

22 The loss of ring or third finger shall be considered a five
23 percent disability.

24 The loss of middle or second finger (one phalanx) shall be

1 considered a three percent disability.

2 The loss of middle or second finger shall be considered a
3 seven percent disability.

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

6 The loss of index or first finger shall be considered a ten
7 percent disability.

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

10 The loss of thumb shall be considered a twenty percent
11 disability.

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

14 The loss of index and middle fingers shall be considered a
15 twenty percent disability.

16 The loss of middle and ring fingers shall be considered a
17 fifteen percent disability.

18 The loss of ring and little fingers shall be considered a ten
19 percent disability.

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

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

24 The loss of middle, ring and little fingers shall be

1 considered a twenty percent disability.

2 The loss of four fingers shall be considered a thirty-two
3 percent disability.

4 The loss of hand shall be considered a fifty percent
5 disability.

6 The loss of forearm shall be considered a fifty-five percent
7 disability.

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

10 The total and irrecoverable loss of the sight of one eye shall
11 be considered a thirty-three percent disability. For the partial
12 loss of vision in one or both eyes, the percentages of disability
13 shall be determined by the commission, using as a basis the total
14 loss of one eye.

15 The total and irrecoverable loss of the hearing of one ear
16 shall be considered a twenty-two and one-half percent disability.
17 The total and irrecoverable loss of hearing of both ears shall be
18 considered a fifty-five percent disability.

19 For the partial loss of hearing in one or both ears, the
20 percentage of disability shall be determined by the commission,
21 successor to the commission, other private carrier or self-insured
22 employer, whichever is applicable, using as a basis the total loss
23 of hearing in both ears.

24 If a claimant sustains a compensable injury which results in

1 the total loss by severance of any of the bodily members named in
2 this subdivision or dies from sickness or noncompensable injury
3 before the commission makes the proper award for the injury, the
4 commission shall make the award to the claimant's dependents as
5 defined in this chapter, if any; the payment to be made in the same
6 installments that would have been paid to claimant if living:
7 *Provided*, That no payment shall be made to any surviving spouse of
8 the claimant after his or her remarriage and that this liability
9 shall not accrue to the estate of the claimant and is not subject
10 to any debts of, or charges against, the estate.

11 (g) If a claimant to whom has been made a permanent partial
12 award dies from sickness or noncompensable injury, the unpaid
13 balance of the award shall be paid to claimant's dependents as
14 defined in this chapter, if any; the payment to be made in the same
15 installments that would have been paid to claimant if living:
16 *Provided*, That no payment shall be made to any surviving spouse of
17 the claimant after his or her remarriage, and that this liability
18 shall not accrue to the estate of the claimant and is not subject
19 to any debts of, or charges against, such estate.

20 (h) For the purposes of this chapter, a finding of the
21 occupational pneumoconiosis board has the force and effect of an
22 award.

23 (i) For the purposes of this chapter, with the exception of
24 those injuries provided for in subdivision (f) of this section and

1 in section six-b of this article, the degree of permanent
2 disability other than permanent total disability shall be
3 determined exclusively by the degree of whole body medical
4 impairment that a claimant has suffered. For those injuries
5 provided for in subdivision (f) of this section and section six-b
6 of this article, the degree of disability shall be determined
7 exclusively by the provisions of said subdivision and said section.
8 The occupational pneumoconiosis board created pursuant to section
9 eight-a of this article shall premise its decisions on the degree
10 of pulmonary function impairment that claimants suffer solely upon
11 whole body medical impairment. The Workers' Compensation Commission
12 shall adopt standards for the evaluation of claimants and the
13 determination of a claimant's degree of whole body medical
14 impairment. Once the degree of medical impairment has been
15 determined, that degree of impairment shall be the degree of
16 permanent partial disability that shall be awarded to the claimant.
17 This subdivision is applicable to all injuries incurred and
18 diseases with a date of last exposure on or after February 2, 1995,
19 to all applications for an award of permanent partial disability
20 made on and after that date and to all applications for an award of
21 permanent partial disability that were pending before the
22 commission or pending in litigation but not yet submitted for
23 decision on and after that date. The prior provisions of this
24 subdivision remain in effect for all other claims.

1 (j) From a list of names of seven persons submitted to the
2 executive director by the health care advisory panel, the executive
3 director shall appoint an interdisciplinary examining board
4 consisting of five members to evaluate claimants, including by
5 examination if the board elects. The interdisciplinary examining
6 board shall terminate upon termination of the commission and all
7 administrative and adjudicatory functions performed by the
8 interdisciplinary examining board shall be performed by the
9 following reviewing bodies for those claims over which they have
10 administrative jurisdiction: (1) The Insurance Commissioner or his
11 or her designated administrator of each of the funds set forth in
12 this chapter; (2) private carriers; or (3) self-insured employers.
13 The reviewing bodies shall employ or otherwise engage adequate
14 resources, including medical professionals, to perform the
15 functions of the interdisciplinary examining board. The board shall
16 be composed of three qualified physicians with specialties and
17 expertise qualifying them to evaluate medical impairment and two
18 vocational rehabilitation specialists who are qualified to evaluate
19 the ability of a claimant to perform gainful employment with or
20 without retraining. One member of the board shall be designated
21 annually as chairperson by the executive director. The term of
22 office of each member of the board shall be six years and until his
23 or her successor has been appointed and has qualified. Any member
24 of the board may be appointed to any number of terms. Any two

1 physician members and one vocational rehabilitation specialist
2 member shall constitute a quorum for the transaction of business.
3 The executive director, from time to time, shall fix the
4 compensation to be paid to each member of the board, and the
5 members are also entitled to reasonable and necessary traveling and
6 other expenses incurred while actually engaged in the performance
7 of their duties. The board shall perform the duties and
8 responsibilities assigned by the provisions of this chapter,
9 consistent with the administrative policies developed by the
10 executive director with the approval of the board of managers.

11 (1) The executive director shall establish requirements for
12 the proper completion and support for an application for permanent
13 total disability benefits within an existing or a new rule no later
14 than January 1, 2004. Upon adoption of the rule by the board of
15 managers, no issue of permanent total disability may be referred to
16 the interdisciplinary examining board, or, any other reviewing
17 body, unless a properly completed and supported application for
18 permanent total disability benefits has been first filed. Prior to
19 the referral of any issue to the interdisciplinary examining board,
20 or, upon its termination, prior to a reviewing body's adjudication
21 of a permanent total disability application, the commission, or
22 reviewing body shall conduct examinations of the claimant that it
23 finds necessary and obtain all pertinent records concerning the
24 claimant's medical history and reports of examinations and forward

1 them to the board at the time of the referral. The commission or
2 reviewing body shall provide adequate notice to the employer of the
3 filing of the request for a permanent total disability award and
4 the employer shall be granted an appropriate period in which to
5 respond to the request. The claimant and the employer may furnish
6 all pertinent information to the board or other reviewing body and
7 shall furnish to the board or other reviewing body any information
8 requested. The claimant and the employer may each submit no more
9 than one report and opinion regarding each issue present in a given
10 claim. The employer may have the claimant examined by medical
11 specialists and vocational rehabilitation specialists: *Provided,*
12 That the employer is entitled to only one examination on each issue
13 present in a given claim. Any additional examinations must be
14 approved by the commission or other reviewing body and shall be
15 granted only upon a showing of good cause. The reports from all
16 employer-conducted examinations must be filed with the board or
17 other reviewing body and served upon the claimant. The board or
18 other reviewing body may request that those persons who have
19 furnished reports and opinions regarding a claimant provide it with
20 additional information considered necessary. Both the claimant and
21 the employer, as well as the commission, or other reviewing body
22 may submit or obtain reports from experts challenging or supporting
23 the other reports in the record regardless of whether or not the
24 expert examined the claimant or relied solely upon the evidence of

1 record.

2 (2) If the board or a quorum of the board elects to examine a
3 claimant, the individual members shall conduct any examinations
4 that are pertinent to each of their specialties. If a claim
5 presents an issue beyond the expertise of the board, the board may
6 obtain advice or evaluations by other specialists. In addition, if
7 the board of managers determines that the number of applications
8 pending before the interdisciplinary examining board has exceeded
9 the level at which the board can review and make recommendations
10 within a reasonable time, the board of managers may authorize the
11 executive director to appoint any additional members to the board
12 that are necessary to reduce the backlog of applications. The
13 additional members shall be recommended by the health care advisory
14 panel. The executive director may make any appointments he or she
15 chooses from the recommendations. The additional board members
16 shall not serve a set term but shall serve until the board of
17 managers determines that the number of pending applications has
18 been reduced to an acceptable level.

19 (3) Referrals to the board shall be limited to matters related
20 to the determination of permanent total disability under the
21 provisions of subdivision (n) of this section and to questions
22 related to medical cost containment, utilization review decisions
23 and managed care decisions arising under section three of this
24 article.

1 (4) In the event the board members or other reviewing body
2 elects to examine a claimant, the board or other reviewing body
3 shall prepare a report stating the tests, examinations, procedures
4 and other observations that were made, the manner in which each was
5 conducted and the results of each. The report shall state the
6 findings made by the board or other reviewing body and the reasons
7 for the findings. Copies of the reports of all examinations made by
8 the board or other reviewing body shall be served upon the parties
9 and the commission until its termination. Each shall be given an
10 opportunity to respond in writing to the findings and conclusions
11 stated in the reports.

12 (5) The board or other reviewing body shall state its initial
13 recommendations to the commission in writing with an explanation
14 for each recommendation setting forth the reasons for each. The
15 recommendations shall be served upon the parties and the commission
16 and each shall be afforded a thirty-day opportunity to respond in
17 writing to the board or other reviewing body regarding its
18 recommendations. The board or other reviewing body shall review any
19 responses and issue its final recommendations. The final
20 recommendations shall be effectuated by the entry of an appropriate
21 order by the commission, or, upon its termination, the private
22 carrier or self-insured employer. For all awards for permanent
23 total disability where the claim was filed on or after the
24 effective date of the amendment and reenactment of this section in

1 the year 2003, the commission or other reviewing body shall
2 establish the date of onset of the claimant's permanent total
3 disability as the date when a properly completed and supported
4 application for permanent total disability benefits as prescribed
5 in subdivision (1) of this subsection that results in a finding of
6 permanent total disability was filed with the commission or other
7 reviewing body: *Provided*, That upon notification of the commission
8 or other reviewing body by a claimant or his or her representative
9 that the claimant seeks to be evaluated for permanent total
10 disability, the commission or other reviewing body shall send the
11 claimant or his or her representative the proper application form.
12 The commission or other reviewing body shall set time limits for
13 the return of the application. A properly completed and supported
14 application returned within the time limits set by the commission
15 or other reviewing body shall be treated as if received on the date
16 the commission or other reviewing body was notified the claimant
17 was seeking evaluation for permanent total disability: *Provided*,
18 *however*, That notwithstanding any other provision of this section
19 to the contrary, the onset date may not be sooner than the date
20 upon which the claimant meets the percentage thresholds of prior
21 permanent partial disability that are established by subsection (n)
22 of this section as a prerequisite to the claimant's qualification
23 for consideration for a permanent total disability award.

24 (6) ~~Except as noted below, objections pursuant to section one,~~

1 ~~article five of this chapter to any order shall be limited in scope~~
2 ~~to matters within the record developed before the Workers'~~
3 ~~Compensation Commission and the board or other reviewing body and~~
4 ~~shall further be limited to the issue of whether the board or other~~
5 ~~reviewing body properly applied the standards for determining~~
6 ~~medical impairment, if applicable, and the issue of whether the~~
7 ~~board's findings are clearly wrong in view of the reliable,~~
8 ~~probative and substantial evidence on the whole record. The~~
9 ~~preponderance of the evidence set forth in article one of this~~
10 ~~chapter shall apply to decisions made by reviewing bodies other~~
11 ~~than the commission instead of the clearly wrong standard. If~~
12 either party contends that the claimant's condition has changed
13 significantly since the review conducted by the board or other
14 reviewing body, the party may file a motion with the administrative
15 law judge, together with a report supporting that assertion. Upon
16 the filing of the motion, the administrative law judge shall cause
17 a copy of the report to be sent to the examining board or other
18 reviewing body asking the board to review the report and provide
19 comments if the board chooses within sixty days of the board's
20 receipt of the report. The board or other reviewing body may either
21 supply comments or, at the board's or other reviewing body's
22 discretion, request that the claim be remanded to the board for
23 further review. If remanded, the claimant is not required to submit
24 to further examination by the employer's medical specialists or

1 vocational rehabilitation specialists. Following the remand, the
2 board or other reviewing body shall file its recommendations with
3 the administrative law judge for his or her review. If the board or
4 other reviewing body elects to respond with comments, the comments
5 shall be filed with the administrative law judge for his or her
6 review. Following the receipt of either the board's or other
7 reviewing body's recommendations or comments, the administrative
8 law judge shall issue a written decision ruling upon the asserted
9 change in the claimant's condition. ~~No additional evidence may be
10 introduced during the review of the objection before the office of
11 judges or elsewhere on appeal: *Provided*, That each party and the
12 commission may submit one written opinion on each issue pertinent
13 to a given claim based upon a review of the evidence of record
14 either challenging or defending the board's or other reviewing
15 body's findings and conclusions. Thereafter, based upon the
16 evidence of record, the administrative law judge shall issue a
17 written decision containing his or her findings of fact and
18 conclusions of law regarding each issue involved in the objection.
19 The limitation of the scope of review otherwise provided in this
20 subsection is not applicable upon termination of the commission and
21 any objections shall be subject to article five of this chapter in
22 its entirety.~~

23 (k) Compensation payable under any subdivision of this section
24 shall not exceed the maximum nor be less than the weekly benefits

1 specified in subdivision (b) of this section.

2 (1) Except as otherwise specifically provided in this chapter,
3 temporary total disability benefits payable under subdivision (b)
4 of this section shall not be deductible from permanent partial
5 disability awards payable under subdivision (e) or (f) of this
6 section. Compensation, either temporary total or permanent partial,
7 under this section shall be payable only to the injured employee
8 and the right to the compensation shall not vest in his or her
9 estate, except that any unpaid compensation which would have been
10 paid or payable to the employee up to the time of his or her death,
11 if he or she had lived, shall be paid to the dependents of the
12 injured employee if there are any dependents at the time of death.

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

15 Loss of both eyes or the sight thereof.

16 Loss of both hands or the use thereof.

17 Loss of both feet or the use thereof.

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

19 (n) (1) Other than for those injuries specified in subdivision
20 (m) of this section, in order to be eligible to apply for an award
21 of permanent total disability benefits for all injuries incurred
22 and all diseases, including occupational pneumoconiosis, regardless
23 of the date of last exposure, on and after the effective date of
24 the amendment and reenactment of this section during the year 2003,

1 a claimant: (A) Must have been awarded the sum of ~~fifty~~ forty
2 percent in prior permanent partial disability awards; (B) must have
3 suffered a single occupational injury or disease which results in
4 a finding by the commission that the claimant has suffered a
5 medical impairment of ~~fifty~~ forty percent; or (C) has sustained a
6 thirty-five percent statutory disability pursuant to the provisions
7 of subdivision (f) of this section. Upon filing an application, the
8 claim will be reevaluated by the examining board or other reviewing
9 body pursuant to subdivision (i) of this section to determine if
10 the claimant has suffered a whole body medical impairment of ~~fifty~~
11 forty percent or more resulting from either a single occupational
12 injury or occupational disease or a combination of occupational
13 injuries and occupational diseases or has sustained a thirty-five
14 percent statutory disability pursuant to the provisions of
15 subdivision (f) of this section. A claimant whose prior permanent
16 partial disability awards total eighty-five percent or more shall
17 also be examined by the board or other reviewing body and must be
18 found to have suffered a whole body medical impairment of fifty
19 percent in order for his or her request to be eligible for further
20 review. The examining board or other reviewing body shall review
21 the claim as provided for in subdivision (j) of this section. If
22 the claimant has not suffered whole body medical impairment of at
23 least fifty percent or has sustained a thirty-five percent
24 statutory disability pursuant to the provisions of subdivision (f)

1 of this section, the request shall be denied. Upon a finding that
2 the claimant has a fifty percent whole body medical impairment or
3 has sustained a thirty-five percent statutory disability pursuant
4 to the provisions of subdivision (f) of this section, the review of
5 the application continues as provided for in the following
6 paragraph of this subdivision. Those claimants whose prior
7 permanent partial disability awards total eighty-five percent or
8 more and who have been found to have a whole body medical
9 impairment of at least fifty percent or have sustained a
10 thirty-five percent statutory disability pursuant to the provisions
11 of subdivision (f) of this section are entitled to the rebuttable
12 presumption created pursuant to subdivision (d) of this section for
13 the remaining issues in the request.

14 (2) For all awards made on or after the effective date of the
15 amendment and reenactment of this section during the year 2003,
16 disability which renders the injured employee unable to engage in
17 substantial gainful activity requiring skills or abilities which
18 can be acquired or which are comparable to those of any gainful
19 activity in which he or she has previously engaged with some
20 regularity and over a substantial period of time shall be
21 considered in determining the issue of total disability. The
22 comparability of preinjury income to post-disability income will
23 not be a factor in determining permanent total disability.
24 Geographic availability of gainful employment within a driving

1 distance of ~~seventy-five~~ thirty miles from the residence of the
2 employee or within the distance from the residence of the employee
3 to his or her preinjury employment, whichever is greater, will be
4 a factor in determining permanent total disability. ~~For any~~
5 ~~permanent total disability award made after the amendment and~~
6 ~~reenactment of this section in the year 2003, permanent total~~
7 ~~disability benefits shall cease at age seventy years. In addition,~~
8 ~~the vocational standards adopted pursuant to subsection (m),~~
9 ~~section seven, article three of this chapter shall be considered~~
10 ~~once they are effective.~~

11 (3) In the event that a claimant, who has been found to have
12 at least a ~~fifty~~ forty percent whole body medical impairment or has
13 sustained a thirty-five percent statutory disability pursuant to
14 the provisions of subdivision (f) of this section, is denied an
15 award of permanent total disability benefits pursuant to this
16 subdivision and accepts and continues to work at a lesser paying
17 job than he or she previously held, the claimant is eligible,
18 notwithstanding the provisions of section nine of this article, to
19 receive temporary partial rehabilitation benefits for a period of
20 four years. The benefits shall be paid at the level necessary to
21 ensure the claimant's receipt of the following percentages of the
22 average weekly wage earnings of the claimant at the time of injury
23 calculated as provided in this section and sections six-d and
24 fourteen of this article:

1 (A) Eighty percent for the first year;
2 (B) Seventy percent for the second year;
3 (C) Sixty percent for the third year; and
4 (D) Fifty percent for the fourth year: *Provided*, That in no
5 event shall the benefits exceed one hundred percent of the average
6 weekly wage in West Virginia. In no event shall the benefits be
7 subject to the minimum benefit amounts required by the provisions
8 of subdivision (b) of this section.

9 ~~(4) Notwithstanding any provision of this subsection,~~
10 ~~subsection (d) of this section or any other provision of this code~~
11 ~~to the contrary, on any claim filed on or after the effective date~~
12 ~~of the amendment and reenactment of this section in the year 2003:~~

13 ~~(A) No percent of whole body medical impairment existing as~~
14 ~~the result of carpal tunnel syndrome for which a claim has been~~
15 ~~made under this chapter may be included in the aggregation of~~
16 ~~permanent disability under the provisions of this subsection or~~
17 ~~subsection (d) of this section; and~~

18 ~~(B) No percent of whole body medical impairment existing as~~
19 ~~the result of any occupational disease, the diagnosis of which is~~
20 ~~based solely upon symptoms rather than specific, objective and~~
21 ~~measurable medical findings, and for which a claim has been made~~
22 ~~under this chapter may be included in the aggregation of permanent~~
23 ~~disability under the provisions of this subsection or subsection~~
24 ~~(d) of this section.~~

1 (o) To confirm the ongoing permanent total disability status
2 of the claimant, the commission, successor to the commission, other
3 private carrier or self-insured employer, whichever is applicable,
4 may elect to have any recipient of a permanent total disability
5 award undergo one independent medical examination during each of
6 the first five years that the permanent total disability award is
7 paid and one independent medical examination during each three-year
8 period thereafter until the claimant reaches the age of seventy
9 years: *Provided*, That the commission, successor to the commission,
10 other private carrier or self-insured employer, whichever is
11 applicable, may elect to have any recipient of a permanent total
12 disability award under the age of fifty years undergo one
13 independent medical examination during each year that the permanent
14 total disability award is paid until the recipient reaches the age
15 of fifty years, and thereafter one independent medical examination
16 during each three-year period thereafter until the claimant reaches
17 the age of ~~seventy~~ sixty years.

NOTE: The purpose of this bill is to make the weighing of workers' compensation evidence a liberal interpretation; to allow parties to submit evidence after the Permanent Total Reviewing body has made its initial determination; to change the application standard to file for a permanent total disability to forty percent; to allow permanent total disability benefits until death; to allow for carpel tunnel and occupational disease to be included in the aggregation of permanent disability under the provisions of this subsection; and to require that reviews of permanent total disability stop after the age of sixty; and to limit vocational rehabilitation job searches to thirty miles.

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