

STATE OF WEST VIRGINIA

REPORT

OF

***WORKERS' COMPENSATION STUDY
DIVISION OF PERSONNEL AGENCIES***

FOR THE PERIOD

JULY 1, 1994 - AUGUST 20, 1996



OFFICE OF THE LEGISLATIVE AUDITOR

CAPITOL BUILDING

CHARLESTON, WEST VIRGINIA 25305-0610

WORKERS' COMPENSATION STUDY
DIVISION OF PERSONNEL AGENCIES
JULY 1, 1994 - AUGUST 20, 1996

WORKERS' COMPENSATION STUDY

DIVISION OF PERSONNEL AGENCIES

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WORKERS' COMPENSATION STUDY
DIVISION OF PERSONNEL AGENCIES
EXIT CONFERENCE

We held an exit conference on January 28, 1997 with the Director and Assistant Director of the Division of Personnel and the Workers' Compensation Study was reviewed and discussed. The Division of Personnel's response and recommendations are included in the appendix of this report.

WEST VIRGINIA LEGISLATURE
Joint Committee on Government and Finance



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CHARLESTON, WEST VIRGINIA 25305

The Joint Committee on Government and Finance:

The purpose of this study was to determine the extent of compliance with Chapter 23, Article 4, Section 1 of the West Virginia Code as, amended. This Statute prohibits public employees who have incurred on-the-job injuries from being paid leave benefits and Workers' Compensation Temporary Total Disability (TTD) benefits for the same period of time. In making this determination, the following objectives were established:

1. To determine if there are or have been any employees of executive agencies covered by the Division of Personnel who have been paid leave benefits and TTD benefits for the same period of time.
2. To determine if employees, who have been paid both, reimbursed the Agency and bought back the leave benefits
3. To determine if the buy back calculations were correct based on the Statue or Division of Personnel Rules in effect at the time.
4. To determine if there is an Agency person in charge to follow through in seeing that the Statue or applicable rule is complied with.

5. To determine if there were any apparent circumstances as to why employees would use their leave benefits for on-the-job injuries.

We contacted the Bureau of Employment Program's Workers' Compensation Division and obtained a report by each employer of all State employees' occupational injury claims paid during the period July 1, 1994 through August 31, 1996. This report listed by Agency the claim number, claimant, beginning and ending date of temporary total disability, and the transaction date of the first TTD benefit. The report contained 1,436 paid claims during the period. In the process of establishing a correspondence between the claims and our random numbering system, we noted that the Division of Highways and the Division Health had the most claims. Therefore, we decided to divide or "stratify" the sample into two groups and select a sample from each group to give us a more representative look at all Agencies. We randomly selected 49 paid claims from the Divisions of Highways and Health and 47 paid claims from the various other Agencies.

We contacted and visited each of the Agencies selected in the sample and obtained copies of the claimant records pertaining to their Workers' Compensation claim. Records we obtained included

the WC123 Form - Report of Occupational Injury; WC774 Form - Employers Charge Statement (This form issued by the Workers' Compensation Division to employers details all payments made to a claimant.), leave records, and payroll information.

Sincerely yours,


Theodora L. Shanklin, CPA, Director
Legislative Post Audit Division

January 28, 1997

Auditors: Nick Arvon, Supervisor
Charles Lunsford, Auditor
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WORKERS' COMPENSATION STUDY
DIVISION OF PERSONNEL AGENCIES

SUMMARY

The purpose of this study was to determine the extent that employees of the State of West Virginia, who have received a job related injury, are being paid Workers' Compensation Temporary Total Disability (TTD) benefits and sick or annual leave benefits for the same period of time. This is prohibited by law in Chapter 23, Article 4, Section 1 of the West Virginia Code, as amended, effective July 1, 1989.

This statute also gave the West Virginia Division of Personnel the authority to promulgate rules relating to the use of and buyback of leave benefits by public employees. The Division of Personnel promulgated and amended rules effective November 15, 1989, May 16, 1991, August 3, 1993 and June 1, 1995. In addition, the Division of Personnel issued a policy, effective May 1, 1993, which was used by some employers in calculating the buyback of leave. This policy was not an approved legislative rule, therefore it did not overrule the Statute or Rules in effect at the time. In conducting this study, for simplification purposes, we labeled the

various Rules and the Statute as different Methods. There were four (4) Methods in effect during the period of study. The Methods are described in the General Remarks Section of this study.

During the study, we noted the work days to process a claim ranged from a low of three (3) to a high of one thousand six hundred and eighty (1,680) or an average of one hundred twenty-nine (129) or approximately six (6) months from the date of injury to issuance of the first TTD benefit check. This wide range of time may be attributed to improper documentation of the claim form by the employee, employer or physician or employer's protest of the claim. By dropping those claims with extremely high processing periods, the average work days for processing dropped to twenty-two (22) days or four (4) weeks. We believe this may be the reason employees use their sick leave benefits while off work due to a job related injury.

We sampled ninety-nine (99) claims of a total population of one thousand four hundred and thirty-six (1,436) totalling approximately \$4,183,000 paid between July 1, 1994 and August 20, 1996. The results of our study of these claims are presented in the table below:

TOTAL CLAIMS	PERCENT	REMARKS
49 <u>1</u>	50% <u>1%</u>	In Compliance with the law and rules and regulations. Employee was paid retirement and TTD benefits for the same period.
50	51%	Total in compliance.
3	3%	Employees worked and were paid their regular salary and TTD benefits for the same period.
1	1%	Employer was unable to locate any records for this employee
<u>45</u>	<u>45%</u>	Employees used leave during all or part of the period they were paid TTD benefits.
99	100%	Total sample

The table below projects the results of our study over the total population.

Total Claims	Amounts	Remarks
718 <u>14</u>	\$2,092,000 <u>\$42,000</u>	In Compliance with the law and rules and regulations. Employees were paid retirement and TTD benefits for the same period.
732	\$2,134,000	Total in compliance.
43	\$125,000	Employees worked and were paid their regular salary and TTD benefits for the same period.
14	\$42,000	Employer was unable to locate any records for these employees.
<u>647</u>	<u>\$1,882,000</u>	Employees used leave during all or part of the period they were paid TTD benefits.
<u>704</u>	<u>\$2,049,000</u>	Subtotal
<u>1,436</u>	<u>\$4,183,000</u>	Total population.

In conclusion, we believe most of the agencies were not aware their employees had received payment from both sources or that refunds had not been made until it was brought to their attention when the information was requested for our study. We noted in some instances employers or their employees with the responsibility of enforcing the law may not have been aware of the law or had not been fully educated in its application.

We met and discussed the results of our study with the Division of Personnel and asked for their recommendations which are summarized below:

Recommendation #1: That buy back training be mandatory for all payroll clerks and financial officers.

Recommendation #2: That a leave buy back repayment system be instituted.

Recommendation #3: That the Workers' Compensation Division and the State Auditor's Office enter into a cooperative agreement to interface the TTD benefits and the State payroll.

WORKERS' COMPENSATION STUDY

DIVISION OF PERSONNEL AGENCIES

GENERAL REMARKS

The Workers' Compensation statute was amended, effective July 7, 1989, to prohibit employees of the State and its political subdivisions from simultaneously drawing Workers' Compensation benefits and sick leave benefits for the same period of time. Chapter 23, Article 4, Section 1 of the West Virginia Code, as amended, states in part:

"... Such state employees may only use sick leave for non-job related absences consistent with sick leave utilization, and may draw workers' compensation benefits only where there is a job related injury. This proviso shall not apply to permanent benefits: Provided, however, That such employees may collect sick leave benefits until receiving temporary total disability benefits. The division of personnel shall promulgate rules pursuant to chapter twenty-nine-a (§29A-1-1 et. seq.) of this code relating to use of sick leave benefits by employees receiving personal injuries in the course of and resulting from covered employment: Provided further, That in the event an employee is injured in the course of and resulting from covered employment and such injury results in the course of and resulting from covered employment and such injury results in lost time taken by him or her as a result of the compensable injury by paying to his or her employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received. Such employee shall be

restored sick leave time on a day for day basis which corresponds to temporary total disability benefits paid to the employer: And provided further, That since the intent of this paragraph is to prevent an employee of the state or any of its political subdivisions from collecting both temporary total disability benefits and sick leave benefits for the same time period, nothing herein may be construed to prevent an employee of the state or any of its political subdivisions from electing to receive either sick leave benefits or temporary total benefits but not both...." (Emphasis added)

With the amendment of the West Virginia Code and the Division of Personnel's promulgation of Rules and the issuance of a policy by the Division of Personnel, various methods for the calculation of buy back of sick leave have been established. Chapter 23, Article 4, Section 1 of the West Virginia Code, as amended, will be referred to as Method I.

In accordance with the aforementioned section of the West Virginia Code, as amended, the West Virginia Division of Personnel amended Administrative Rule Section 16.09 with an emergency rule, effective November 15, 1989, concerning sick leave usage while off work due to a job related injury. The Division of Personnel also filed a proposed rule at this time. The emergency and proposed rules followed the West Virginia Code in the amount the employee is

to pay the employer for restoration of sick leave. These rules are the same as Method I. Section 16.09 states in part:

"Injury on the Job - In the event an employee is injured in the course of and resulting from covered employment, such employee may elect to receive either temporary total disability benefits from the Worker's Compensation Fund or sick leave benefits but not both. Employees may collect sick leave benefits until receiving temporary total disability benefits. Upon receipt of such temporary total disability benefits the employee shall pay or assign to his or her employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received. Employees shall be restored sick leave time on a day for day basis which corresponds to the temporary total disability benefits paid to the employer. If the employee fails to pay or assign to the employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received, then the employer shall deduct from the employee's subsequent wage payments an amount equal to the temporary total disability benefits received. Upon payment of this amount the employer shall restore any sick leave time taken by the employee as a result of the compensable injury."

After fifteen (15) months, the emergency rule expired on February 15, 1991 as set out in Chapter 29A, Article 3, Section 15 of the West Virginia Code, as amended. This expiration had no effect on the calculation of sick leave buy back since the method set out in the Statute (Method 1) would take precedence.

The proposed rules filed on November 15, 1989 by the West Virginia Division of Personnel were passed by the West Virginia Legislature on March 9, 1991 and became effective on May 16, 1991. The proposed rules contained a minor language change in the last sentence of the Section. However, this language change did not change the calculation of buy back of sick leave, Method I is still being followed. Section 16.09 states:

"Injury on the Job - In the event an employee is injured in the course of and resulting from covered employment, such employee may elect to receive either temporary total disability benefits from the Worker's Compensation Fund or sick leave benefits but not both. Employees may collect sick leave benefits until receiving temporary total disability benefits. Upon receipt of such temporary total disability benefits the employee shall pay or assign to his or her employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received. Employees shall be restored sick leave time on a day for day basis which corresponds to the temporary total disability benefits paid to the employer. If the employee fails to pay or assign to the employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received, then the employer shall deduct from the employee's subsequent wage payments an amount equal to the temporary total disability benefits received. Upon payment of this amount the employer shall restore sick leave time which corresponds to the amount of temporary total disability received by the employee."

Effective May 1, 1993, the West Virginia Division of Personnel issued a policy with the purpose to establish procedures to ensure that employees of the State of West Virginia and its political subdivisions would not be receiving Workers' Compensation Temporary Total Disability Benefits and paid sick leave for the same period of time. This policy was not a rule, which means that it was not subjected to the Legislature's Rule Making Review Committee and ultimately by the Legislative Body itself. The policy redefined sick leave and the method of calculating the restoration of leave. **Sick leave** as defined in the West Virginia Division of Personnel's Policy is: **Paid sick leave, or annual leave when accrued sick leave is exhausted.** This policy also permitted employees the option to elect to receive sick leave and annual leave upon exhaustion of sick leave, or temporary total disability benefits for absences due to a work-related injury.

This policy also changed the method of calculating the buy back of leave from an amount equal to the Temporary Total Disability benefits received to the **net value** of the leave. **Net value** as defined in the West Virginia Division of Personnel's Policy is: **Gross wages less employee deductions for State and federal income taxes, FICA, and contributions to a State retirement**

system. For the purpose of calculating the buy back of sick and annual leave, this Policy will be referred to as Method IV. Section III(D) of the West Virginia Division of Personnel Policy states in part:

"Election to receive TTD Benefits: If an employee elects to receive TTD Benefits, sick leave may be used only until the initial Workers' Compensation benefit check is received, and the employee must then be removed from the payroll. The employee must reimburse the employer for the net value of any sick or annual leave days used after which sick leave or annual leave, if used in lieu of, shall be restored...."

This policy was in conflict with the West Virginia Code section and the Division of Personnel's Administrative Rule, previously stated, in that the policy changed the method of reimbursement to the net value of leave used and not an amount equal to Temporary Total Disability benefits. Also, the policy redefined the meaning of sick leave by allowing the use of annual leave when sick leave is exhausted. This policy caused agencies to collect the wrong amount from employees for the buy back of sick or annual leave, if such leave had been used in lieu of TTD benefits. Although the Division of Personnel's policy was not in compliance with their rule and in conflict with the West Virginia Code, we believe the policy saved the State monies by charging the employee

the actual cost of the net value of the sick/annual leave. Effective June 1, 1995, the Division of Personnel amended their Administrative Rule to effectuate the policy issued on May 1, 1993.

The West Virginia Division of Personnel amended the Administrative Rule, passed by the Legislature on May 26, 1993, effective August 3, 1993. Section 16.09 became Section 15.09 and permitted employees to use annual leave upon exhaustion of sick leave benefits for job related injuries. For the purpose of calculating the buy back of sick and annual leave, this Rule will be referred to as Method II. Section 15.09 states in part:

"Injury on the Job: In the event an employee is injured in the course of and resulting from covered employment, the employee may elect to receive either temporary total disability benefits from the Worker's Compensation Fund or sick leave benefits but not both. Employees may collect sick leave benefits and, upon exhaustion of sick leave benefits, annual leave benefits until receiving temporary total disability benefits. Upon receipt of the temporary total disability benefits the employee shall pay or assign to his or her employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received. Employees shall be restored sick leave benefits and, if used, annual leave benefits on a day for day basis which corresponds to the temporary total disability benefits paid to the employer. If the employee fails to pay or assign to the employer the temporary total disability benefits received or an amount equal to the temporary total disability

benefits received, then the employer shall deduct from the employee's subsequent wage payments an amount equal to the temporary total disability benefits received. Upon payment of this amount the employer shall restore sick leave time which corresponds to the amount of temporary total disability received by the employee...."

The West Virginia Division of Personnel amended Section 15.09 of the Administrative Rule, passed by the West Virginia Legislature on March 11, 1995, effective June 1, 1995, which changed the method of restoring to an employee sick or annual leave used while being off work due to a job related injury. This amendment parallels the Division of Personnel's Policy. For the purpose of calculation of the buy back of sick and annual leave, this Rule will be considered Method III. Amended Section 15.09 states in part:

"(a) In the event an employee is injured in the course of and resulting from covered employment, the employee may elect to receive either temporary total disability benefits from the Workers' Compensation Fund or sick leave benefits, but not both. Employees may collect sick leave benefits and, upon exhaustion of sick leave benefits, annual leave benefits until receiving temporary total disability benefits, upon receipt of the initial temporary total disability payment the employee shall pay or assign to his/her employer the net value of the sick and /or annual leave paid. Employees sick leave and, if used, annual leave shall be restored on a day-for-day basis which corresponds to the net

value of the sick and/or annual leave paid. If the employee fails to pay or assign to the employer the net value of the sick and/or annual leave paid, then the employer shall deduct from the employee's subsequent wage payments an amount equal to the net value of the sick and/or annual leave paid. Upon payment of this amount the employer shall restore sick and/or annual leave previously paid...."

For the purposes of simplifying the methods of calculations of the buy back of leave described above, the methods are summarized below:

Method III - Employees may collect sick and annual leave benefits until receiving Temporary Total Disability benefits. Sick or annual leave benefits may be restored on a day for day basis by paying to the employer the net value of the sick or annual leave paid. The effective dates of this method are June 1, 1995 through the present.

Method II - Employees may collect sick and annual leave benefits until receiving Temporary Total Disability benefits. Sick and annual leave benefits may be restored on a day for day basis by paying to the employer an amount equal to the Temporary Total Disability payment. The effective dates of this method were August 3, 1993 through May 31, 1995.

Method I - Employees may collect only sick leave benefits until receiving Temporary Total Disability benefits. Sick leave benefits may be restored on a day for day basis by paying to the employer an amount equal to the Temporary Total Disability payment. The effective dates of this method were July 7, 1989 through August 2, 1993.

Method IV - Employees may collect sick and annual leave benefits until receiving Temporary Total Disability benefits. Sick or annual leave benefits may be restored on a day for day basis by paying to the employer the net value of the sick or annual leave paid. This method is the policy issued by the West Virginia Division of Personnel which was not approved or passed by the Legislative Rule Making Review Committee or the Legislature itself. The effective date of this method was May 1, 1993.

Based on our sample of the Workers' Compensation documentation we were provided, we noted it takes an average of one hundred twenty-nine (129) work days or six (6) months before an employee would receive their first Temporary Total Disability (TTD) benefit check. However, during our study, the time period ranged from three (3) days to one thousand six hundred and eighty (1,680) days before the first payment of TTD was made. This wide range of time may be attributed to improper documentation by the employee, employer or physician or employer's protest of claims. We believe this may be the reason employees utilize their sick or annual leave benefits while off work due to a job related injury. The employees were receiving their regular paycheck and Workers' Compensation Temporary Total Disability benefits for the same period of time, however, the payments usually were not made at the same time.

Method III - Claims Paid During the Period
June 1, 1995 through August 18, 1996

Our study for the period June 1, 1995 through August 18, 1996, consisted of thirty-two (32) claims totaling \$77,117.15 in Temporary Total Disability (TTD) benefits which had been filed due to work related injuries. The work days to process a claim ranged from three (3) to two hundred eighty-seven (287) or an average of fifty-five (55) from the date of injury to receipt of first TTD benefit check. Method III was in effect during this time period. The above mentioned claims are presented in the schedule below by employers who had three (3) or more claims and other employers who had two (2) or less claims.

<u>Employer</u>	<u>Avg. Work Days To Pay Claim</u>	<u>Amount Paid Workers' Comp. TTD Benefits</u>	<u>Amount Paid Leave Time</u>	<u>Amount Should Be Refunded</u>	<u>Amount Refunded</u>	<u>Differ.</u>
Health	58	\$18,021.23	\$6,629.85	\$6,629.85	\$5,646.24	\$983.61
Highways	48	\$23,831.21	\$6,545.59	\$6,545.59	\$3,707.90	\$2,837.69
Others	58	\$35,264.71	\$10,144.33	\$10,144.33	\$10,080.83	\$63.50
Totals	55	\$77,117.15	\$23,319.77	\$23,319.77	\$19,434.97	\$3,884.80

Average Work Days to Pay Claims - The average amount of work days from the date of injury to payment of first TTD benefit check for all claims within the specified employer.

Amount Paid Workers' Comp. TTD Benefits - The total amount of Workers' Compensation TTD benefits paid during the entire period of disability for all claims in the specified employer.

Amount Paid Leave Time - The total net value employees were paid for leave used during the same period they were paid TTD benefits.

Amount Should Be Refunded - The amount that should be refunded in accordance with Method III which was in effect during the period.

Amount Refunded - The amount the employee refunded to the employer for restoration of leave.

Difference - The total amount which should be refunded less the amount that was refunded.

The Division of Health employees had nine (9) claims totaling \$18,021.23 in TTD benefits paid. The claims took an average of fifty-eight (58) work days from the date of injury before receipt of the first TTD benefit check. Three (3) employees used no leave while being paid TTD benefits. However, six (6) other employees used leave, which cost \$6,629.85, during all or part of the period they were being paid TTD benefits. Three (3) of the six (6) employees made no payments to the employer to have their leave restored. These three (3) employees were paid \$1,419.51 in leave benefits and \$1,380.64 in TTD benefits for the same period. The three (3) employees who made payments to the Division of Health actually overpaid the amount needed to buy back their leave. The amount needed to buy back the leave was \$5,210.34 and the employees refunded \$5,646.24 resulting in an overpayment of \$435.90. The overpayments were the result of employer calculating errors.

The Division of Highways had twelve (12) claims totaling \$23,831.21 in TTD benefits paid during the period that Method III was in effect. Work days to process a claim ranged from a high of one hundred eighty-one (181) days to a low of three (3) or an average of forty-eight (48) days from the date of injury to payment of the first TTD benefit check. Two (2) employees used no leave and ten (10) employees used leave while being paid TTD benefits. Of these ten (10), four (4) made payments to the employer to buy back their leave, with one (1) overpaying the employer \$34.36 and three (3) underpaying the employer \$124.76 for restoration of their leave. The overpayments and underpayments were due to calculation errors by the employer. The other six (6) employees made no payments to buy back their leave and no leave was restored. These six (6) employees were paid \$11,813.91 for the period they were receiving TTD benefits and \$2,747.29 in leave benefits for the period they were claiming leave. The employees who used leave and were paid TTD benefits owe \$2,837.69 to the Division of Highways.

Employees of the other employers, which included the Alcohol Beverage Control Commissioner (ABCC), Office of Miner's Health (OMH), Regional Jail and Prison Authority (RJPA), Bureaus of Tax and Revenue (BOTR), Workers Compensation (BWC), and Employment Programs (BEP) and the Divisions of Motor Vehicles

(DMV), Corrections (DOC), and Natural Resources (DNR) had eleven (11) claims totaling \$35,264.71 in TTD benefits paid. The employees' claims took an average of fifty-eight (58) work days from the date of injury to receipt of first TTD benefit check. We noted six (6) employees used no leave while being paid TTD benefits and (5) employees, one each from OMH, BEP, ABCC, RJPA, and DMV used leave during all or part of the period they were being paid TTD benefits. The cost (net value) of the leave to the State for these five (5) employees was \$10,144.33. The amount needed under Method III to restore this leave was \$10,144.33. One (1) employee from BEP paid the employer \$2,371.75 which was the total amount needed to have their leave restored. Two (2) other employees, one (1) from the OMH and one (1) from the ABCC paid an incorrect amount to the employer to have their leave restored. The employee from the OMH overpaid the employer \$26.93 due to the employer accepting an amount equal to the TTD benefits as set out in Method II instead of an amount equal to the net value of the sick leave set out in Method III in effect at the time. The employee from ABCC underpaid the employer \$0.24 due to a calculation error by the employer. Two (2) other employees, one (1) each from the RJPA and DMV made no payments to their employers to have their leave restored resulting in a balance due the

employer of \$90.19. These two (2) employees were paid \$64.37 in TTD benefits while they were receiving leave pay.

Method II - Claims Paid During the Period
August 3, 1993 through May 31, 1995

Our study for the period August 3, 1993 through May 31, 1995, consisted of fifty-seven (57) claims totaling \$189,798.08 in Temporary Total Disability (TTD) benefits which had been filed due to work related injuries. The work days to process claims ranged from four (4) to five hundred twenty-five (525) or an average of sixty (60). Method II was in effect during this time period. However, the Division of Personnel issued a policy (Method IV) effective May 1, 1993 which was used by some employers in calculating the buy back of leave. The policy was not an approved legislative rule, therefore, it did not overrule Method II. These above mentioned claims are presented in the schedule below by employers who had three (3) or more claims and other employers who had two (2) or less claims.

<u>Employer</u>	<u>Avg. Work Days To Pay Claim</u>	<u>Amount Paid Workers' Comp. TTD Benefits</u>	<u>Amount Paid Leave Time</u>	<u>Amount Should Be Refunded</u>	<u>Amount Refunded</u>	<u>Differ.</u>
Corrections	191	\$42,654.60	\$1,828.83	\$1,786.56	\$1,536.19	\$250.37
Health	59	\$62,999.51	\$4,028.22	\$3,576.93	\$2,088.43	\$1,488.50
Highways	28	\$53,412.47	\$9,385.04	\$9,289.90	\$3,179.34	\$6,110.56
Others	42	\$30,731.50	\$7,061.69	\$7,278.71	\$6,304.61	\$974.10
Totals	60	\$189,798.08	\$24,765.71	\$21,932.10	\$13,108.57	\$8,823.53

Employees of the Division of Corrections had six (6) claims totaling \$42,654.60 in TTD benefits paid. From the date of injury, the employee's claims took an average of one hundred ninety-one (191) work days before receipt of the first TTD benefit check. Four (4) employees used no leave while being paid TTD benefits. Two (2) employees used leave, which cost (net value) \$1,828.23, during part of the period they were receiving TTD benefits. One (1) employee whose buy back totaled \$228.80 made no payment to the employer for the buy back of leave and therefore no leave was restored. This employee was paid the same amount or \$228.80 in TTD benefits. One (1) employee paid the employer \$1,536.19, however, the amount required to restore the leave under Method II was \$1,557.76, resulting in an underpayment of \$21.57.

The underpayment was the result of the employer calculating the buy back based on Method IV instead of an amount equal to the TTD benefits paid as set out in Method II.

Employees of the Division of Health had twenty-one (21) claims totaling \$62,999.51 in TTD benefits paid. From the date of injury, the employees' claims took an average of fifty-nine (59) work days before receipt of the first TTD benefit check. Twelve (12) employees used no leave while being paid TTD benefits. Nine (9) employees used leave, which cost \$4,028.22 during all or part of the period they were being paid TTD benefits. Seven (7) of the nine (9) employees made no payments on the \$2,205.43 due the employer and, therefore, no leave was restored. These employees received the same amount or \$2,205.43 in TTD benefits. Two (2) employees bought back their leave by paying to the employer \$2,088.43. However, the amount needed to buy back the leave under Method II was \$1,822.77, therefore, the employees overpaid the Division of Health \$265.66. The overpayments were the result of the employer calculating the buy back based on Method IV instead of an amount equal to the TTD benefits paid as set out in Method II for one employee. For the other employee, the buy back was calculated on the employee's gross salary.

The Division of Health was unable to provide us with any records for one (1) employee. This employee was listed on the Workers' Compensation printout of paid claim for public employees as being employed by them. The employee was paid TTD benefits in the amount of \$1,496.00 for the period of July 21, 1994 through October 16, 1994.

The Division of Highways had sixteen (16) claims totaling \$53,412.47 in TTD benefits paid. From the date of injury, the claims took an average of twenty-eight (28) work days before receipt of the first TTD benefit check. We noted seven (7) of the employees used no leave while being paid TTD benefits and nine (9) employees used leave during all or part of the period they were paid TTD benefits. The cost (net value) of the leave for these nine (9) was \$9,385.04. The amount required under Method II to restore this leave was \$9,289.90. Two (2) of the nine (9) employees refunded to the employer \$3,179.34 of the \$3,283.79 needed under Method II to restore their leave leaving a balance due of \$82.45 which was due to incorrect calculations by the employer. The other seven (7) employees made no payments to the employer on the \$6,028.11 needed to restore their leave resulting in a total underpayment of \$6,110.56 due the Division of Highways. These seven (7) employees received the same amount or \$6,028.22 in TTD benefits.

Employees of the other employers, which included the Alcohol Beverage Control Commissioner (ABCC), Regional Jail and Prison Authority (RJPA), Public Service Commission (PSC), Bureau of Tax and Revenue (BOTR) and the Divisions of Commerce (DOC), Workers' Compensation (DWC), Forestry (DOF), Administration (DOA), Vocational Rehabilitation (DVR), and Natural Resources (DNR) had fourteen (14) claims totaling \$30,731.50 in TTD benefits paid. The employees' claims took an average of forty-two (42) work days from the date of injury to receipt of first TTD benefit check. We noted eight (8) employees used no sick leave while being paid TTD benefits and six (6) employees, one each from BOTR, ABCC, DOA, DOF, DNR, and DWC used leave during all or part of the period they were being paid TTD benefits. The cost (net value) of the leave to the State for these six (6) employees was \$7,061.69. The amount needed under Method II to restore this leave was \$7,278.71. Two (2) employees, one (1) from ABCC and one (1) from the DOF paid the employer \$1,182.41 which was the total amount needed to have their leave restored. Two (2) other employees, one (1) from the BOTR and one (1) from the DOA paid an incorrect amount to the employer to have their leave restored. The employee from the BOTR overpaid the employer \$31.79 due to the employer calculating the buy back under Method IV(Policy) instead of under Method II. The employee from the

DOA underpaid the employer \$165.48 due to the employer not including a day of leave in calculating the amount due for restoration of leave. Two (2) other employees, one (1) each from the DNR and DWC made no payments to their employers to have their leave restored resulting in an underpayment of \$840.41. These two (2) employees were paid the same amount or \$840.41 in TTD benefits while they were receiving leave pay.

We also noted during this period that three (3) employees who had received on-the-job injuries and paid TTD benefits for their periods of disability, took no time off work and received their regular pay. These employees were paid approximately \$1,378.00 in TTD benefits. This amount should be refunded to the Workers' Compensation Division. Two (2) of the employees worked for the Division of Highways and one (1) worked for the Division of Employment Security.

Method I - Claims Paid During the Period
July 7, 1989 through August 2, 1993

Our study for the period July 7, 1989 through August 2, 1993, consisted of ten (10) claims totaling \$53,527.73 in Temporary Total Disability (TTD) benefits. The work days to process a claim ranged from three hundred seventy-four (374) to one thousand six hundred eighty (1,680) or an average of seven hundred fifty-eight (758). Method I was in effect during this time period. However,

the Division of Personnel issued a policy (Method IV) effective May 1, 1993 which was used by some employers in calculating the buy back of sick leave. The policy was not an approved legislative rule, therefore, it did not overrule Method I.

An employee of the Division of Health was paid a total of \$621.96 in TTD benefits for the period November 7, 1992 through December 1, 1992. The employee's claim took 435 work days to process from the date of injury to receipt of the first TTD benefit check. According to the leave records, the employee used sick leave from November 7, 1992 through November 17, 1992. The cost (net value) of the sick leave was \$252.97. The employer charged the employee \$306.17 which represented the employee's gross pay. However, the amount required to restore the sick leave under Method I was \$273.66. The employee refunded \$306.17 to the employer resulting in an overpayment of \$32.51. The overpayment was a result of the employer's calculating the buy back based on Method IV which was the Policy issued by the Division of Personnel, instead of an amount equal to the TTD benefits paid as set out in Method I.

We noted one (1) employee was paid TTD benefits while being paid retirement benefits from the Public Employees' Retirement System. The employee retired from the Division of Highways on April 29, 1988. The employee reopened a 1987 claim for

the periods August 31, 1989 through October 7, 1990 and March 12, 1993 through June 30, 1993. The employee was paid \$9,748.57 and \$2,201.29, respectively, for a total of \$11,949.86. Although this employee was paid TTD benefits and retirement benefits for the aforementioned time periods above, we could not find anything in the law or regulations prohibiting this practice.

In conclusion, we believe most of the agencies were not aware their employees had received payment from both sources or that refunds had not been made until it was brought to their attention when the information was requested for our study. We noted in some instances employers or their employees with the responsibility of enforcing the law may not have been aware of the law or had not been fully educated in its application.



Cecil H. Underwood
Governor

STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
DIVISION OF PERSONNEL

STATE PERSONNEL
BOARD
Rev. Paul J. Gilmer
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Eugene Stump

BG (Ret) Robert L. Stephens, Jr.
Director

February 4, 1997

Theodford L. Shanklin, CPA, Director
Legislative Post Audit Division
Building 5, Room 416
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear Mr. Shanklin:

This letter is in response to the preliminary draft of your study of executive branch agency compliance with the provisions of West Virginia Code § 23-4-1, et seq. Please find below, for your review and consideration, a discussion of what I believe to be the two most significant findings of your study.

In addition, please also find my recommendations concerning what, if any, action should be taken by the Division of Personnel as a result of your findings to ensure compliance with the law.

Regarding the statement that, "the Division of Personnel's policy (DOP-P7, Workers' Compensation/Sick Leave, effective May 1, 1993) was not in compliance with their rule (Section 16.09 at that time) and in conflict with the West Virginia Code § 23-4-1."

RESPONSE: The reason that the Division's policy changed the method of calculating the buy back of leave from an amount equal to the amount of Total Temporary Disability benefits received to an amount equal to the net value of the leave used was that a literal interpretation of West Virginia Code § 23-4-1 resulted in an unreasonable conclusion, especially for such agencies as the Division of Highways whose employees routinely work numerous hours of overtime (e.g., on road construction and maintenance projects in Spring, Summer, and Fall and on snow and ice control in the Winter). When such Division of Highways employees sustained work-related injuries, they found themselves paying their employer back more than they received in such leave benefits (and annual is used in lieu thereof), thus losing money by electing to use their leave benefits until their Total Temporary Disability benefits were received. Further, Highways'

employees make-up a large segment of the state's work force and those employees account for a majority of work-related injuries. In order to avoid such a negative and disproportionate impact, the Division of Personnel thought it only fair and reasonable to calculate pay back on the net value of the leave used rather than the amount of Total Temporary Disability benefits received.

RECOMMENDATION: Retain the net value calculation method.

Regarding the finding that some state employees repaid too much; some repaid too little, and some repaid none at all.

RESPONSE: The Division of Personnel has, on several occasions, provided training to payroll clerks on calculating leave buy back, however, the training has evidently not been 100% effective. In addition, we have found that regardless of the law, rule and policy some agencies have failed to pursue leave repayment. Further, some employees have spent the TTD benefits, even though they were not entitled to them, and, upon return to work, were financially unable to repay the monies. Finally, the Division of Personnel has no mechanism for monitoring leave buy back.

RECOMMENDATION #1: That buy back training be mandatory for all payroll clerks and financial officers responsible for calculating leave buy back and that disciplinary action be taken against clerks and/or financial officers who willfully fail to pursue leave repayment.

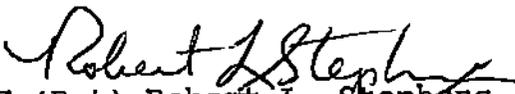
RECOMMENDATION #2: That a leave buy back repayment system be instituted similar to that found in 42 CSR 5, Title 42, Legislative Rules, Department of Labor, Series 5, Wage Payment and Collection Act (form attached).

RECOMMENDATION #3: That the Workers' Compensation Division and the State Auditor's Office enter into a cooperative agreement to interface the Total Temporary Disability and State payroll by social security number to enable the Division of Personnel to monitor leave buy back.

Thedford L. Shanklin
Page 3
February 4, 1997

If you have any questions or desire any further information regarding this letter, please feel free to contact me.

Sincerely,


BG (Ret) Robert L. Stephens, Jr.,
Director
WV Division of Personnel

BG(Ret)RLSjr:JDS:jak

Attachment

STATE OF WEST VIRGINIA

COUNTY OF _____.

I, _____ (employee), hereby assign to _____ (creditor) future wages due me from _____ (employer) in the amount of \$ _____ which amount due to _____ (creditor) together with the amounts previously assigned totals \$ _____ the total amount due to said creditor by this and previous assignments. Three-fourths of my earnings for each pay period less deductions shall be exempt from all wage assignments. All my wage assignments shall be paid in the order of the date I signed them. This assignment shall be effective for a period of one year.

_____ (employee)

Taken, sworn to and subscribed before me on this the _____ day of _____, 19_____.

Notary Public

My commission expires _____, 19_____.

Accepted by _____ (endorsement of employer) on this the _____ day of _____, 19_____.

By _____ (employee of employer), (title)

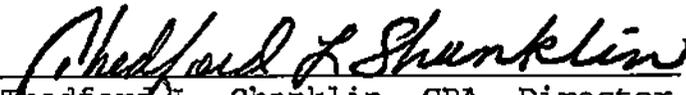
County _____

STATE OF WEST VIRGINIA

OFFICE OF LEGISLATIVE AUDITOR, TO WIT:

I, Thedford L. Shanklin, CPA, Director of the Legislative Post Audit Division, do hereby certify that the report appended hereto was made under my direction and supervision, under the provisions of the West Virginia Code, Chapter 4, Article 2, as amended, and that the same is a true and correct copy of said report.

Given under my hand this 10th day of February 1997.


Thedford L. Shanklin, CPA, Director
Legislative Post Audit Division

Copy forwarded to the Secretary of the Department of Administration to be filed as a public record. Copies forwarded to the Division of Personnel; Governor; Attorney General; and, State Auditor.