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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1994



ENROLLED

SENATE BILL NO. 410

(By Senators Burdette, Mr. President, and
Boley, By Request of the Executive)



PASSED March 10, 1994
In Effect July 1, 1994 Passage

E N R O L L E D
Senate Bill No. 410

(BY SENATORS BURDETTE, MR. PRESIDENT, AND BOLEY,
BY REQUEST OF THE EXECUTIVE)

[Passed March 10, 1994; to take effect July 1, 1994.]

AN ACT to repeal section four-b, article five, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact sections one-c, six, six-d, seven-b, nine and fourteen, article four of said chapter, all relating to workers' compensation; obtaining of wage information; correcting reference to unemployment compensation division; minimum level of temporary total disability benefits; exceptions; the information to be used in determining wages; extending the termination provisions related to trial return to work and to the vocational rehabilitation program; removing the expired time period for the adoption of legislative rules; and repealing the requirement that certain jurisdictional decisions be appealed directly to the appeal board.

Be it enacted by the Legislature of West Virginia:

That section four-b, article five, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that sections one-c, six, six-d, seven-b, nine and fourteen, article four of said chapter be amended and reenacted, all to read as follows:

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

§23-4-1c. Payment of temporary total disability benefits directly to claimant; payment of medical benefits; payments of benefits during protest; right of commissioner to collect payments improperly made.

1 (a) In any claim for benefits under this chapter, the
2 commissioner shall determine whether the claimant has
3 sustained a compensable injury within the meaning of
4 section one of this article and he shall enter an order
5 giving all parties immediate notice of such decision. Any
6 party shall have the right to protest the order of the
7 commissioner and obtain an evidentiary hearing as
8 provided in section one, article five of this chapter.

9 (b) Where it appears from the employer's report, or
10 from proper medical evidence, that a compensable injury
11 will result in a disability which will last longer than
12 three days as provided in section five of this article, the
13 commissioner may immediately enter an order commenc-
14 ing the payment of temporary total disability benefits to
15 the claimant in the amounts provided for in sections six
16 and fourteen of this article, and the payment of the
17 expenses provided for in subdivision (a), section three of
18 this article, relating to said injury, without waiting for
19 the expiration of the thirty-day period during which
20 objections may be filed to such findings as provided in
21 section one, article five of this chapter. The commis-
22 sioner shall enter an order commencing the payment of
23 temporary total disability or medical benefits within
24 fifteen days of receipt of either the employee's or
25 employer's report of injury, whichever is received sooner,

26 and also upon receipt of either a proper physician's
27 report or any other information necessary for a
28 determination. The commissioner shall give to the
29 parties immediate notice of any order granting tempo-
30 rary total disability or medical benefits.

31 (c) The commissioner may enter orders granting
32 temporary total disability benefits upon receipt of
33 medical evidence justifying the payment of such benefits.
34 In no claim shall the commissioner enter an order
35 granting prospective temporary total disability benefits
36 for a period of more than ninety days: *Provided*, That
37 when the commissioner determines that the claimant
38 remains disabled beyond the period specified in the prior
39 order granting temporary total disability benefits, the
40 commissioner shall enter an order continuing the
41 payment of temporary total disability benefits for an
42 additional period not to exceed ninety days, and shall
43 give immediate notice to all parties of such decision.

44 (d) Upon receipt of the first report of injury in claim,
45 the commissioner shall request from the employer or
46 employers any wage information necessary for determin-
47 ing the rate of benefits to which the employee is entitled.
48 If an employer does not furnish the commissioner with
49 this information within fifteen days from the date the
50 commissioner received the first report of injury in the
51 case, the employee shall be paid temporary total
52 disability benefits for lost time at the rate the commis-
53 sioner obtains from reports made to him or her pursuant
54 to section eleven, article ten, chapter twenty-one-a of
55 this code. If no such wages have been reported, then the
56 commissioner shall make such payments at the rate he or
57 she believes would be justified by the usual rate of pay
58 for the occupation of the injured employee. The
59 commissioner shall adjust the rate of benefits both
60 retroactively and prospectively upon receipt of proper
61 wage information. The commissioner shall have access to
62 all wage information in the possession of any state
63 agency, including wage information received by the
64 unemployment compensation division under said

65 chapter, pertinent to such determination.

66 (e) Upon a finding of the commissioner that a claimant
67 who has sustained a previous compensable injury which
68 has been closed by any order of the commissioner, or by
69 the claimant's return to work, suffers further temporary
70 total disability or requires further medical or hospital
71 treatment resulting from the compensable injury, the
72 commissioner shall immediately enter an order com-
73 mencing the payment of temporary total disability
74 benefits to the claimant in the amount provided for in
75 sections six and fourteen of this article, and the expenses
76 provided for in subdivision (a), section three of this
77 article, relating to said disability, without waiting for the
78 expiration of the thirty-day period during which
79 objections may be filed to such findings as provided in
80 section one, article five of this chapter. The commis-
81 sioner shall give immediate notice to the parties of his
82 order.

83 (f) Where the employer is a subscriber to the workers'
84 compensation fund under the provisions of article three
85 of this chapter, and upon the findings aforesaid, the
86 commissioner shall mail all workers' compensation
87 checks paying temporary total disability benefits
88 directly to the claimant and not to the employer for
89 delivery to the claimant.

90 (g) Where the employer has elected to carry his own
91 risk under section nine, article two of this chapter, and
92 upon the findings aforesaid, the commissioner shall
93 immediately issue a pay order directing the employer to
94 pay such amounts as are due the claimant for temporary
95 total disability benefits. A copy of the order shall be sent
96 to the claimant. The self-insured employer shall
97 commence such payments by mailing or delivering the
98 payments directly to the employee within ten days of the
99 date of the receipt of the pay order by the employer. If
100 the self-insured employer believes that his employee is
101 entitled to benefits, he may start payments before
102 receiving a pay order from the commissioner.

103 (h) In the event that an employer files a timely
104 objection to any order of the commissioner with respect
105 to compensability, or any order denying an application
106 for modification with respect to temporary total
107 disability benefits, or with respect to those expenses
108 outlined in subdivision (a), section three of this article,
109 the commissioner shall continue to pay to the claimant
110 such benefits and expenses during the period of such
111 disability. Where it is subsequently found by the
112 commissioner that the claimant was not entitled to
113 receive such temporary total disability benefits or
114 expenses, or any part thereof, so paid, the commissioner
115 shall, when the employer is a subscriber to the fund,
116 credit said employer's account with the amount of the
117 overpayment; and, when the employer has elected to
118 carry its own risk, the commissioner shall refund to such
119 employer the amount of the overpayment. The amounts
120 so credited to a subscriber or repaid to a self insurer
121 shall be charged by the commissioner to the surplus fund
122 created in section one, article three of this chapter.

123 (i) When the employer has protested the compensabil-
124 ity or applied for modification of a temporary total
125 disability benefit award or expenses and the final
126 decision in such case determines that the claimant was
127 not entitled to such benefits or expenses, the amount of
128 such benefits or expenses shall be considered overpaid.
129 The commissioner may only recover the amount of such
130 benefits or expenses by withholding, in whole or in part,
131 as determined by the commissioner, future permanent
132 partial disability benefits payable to the individual in
133 the same or other claims and credit such amount against
134 the overpayment until it is repaid in full.

135 (j) In the event that the commissioner finds that based
136 upon the employer's report of injury, the claim is not
137 compensable, the commissioner shall provide a copy of
138 such employer's report in addition to the order denying
139 the claim.

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

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

5 (a) The expressions “average weekly wage earnings,
6 wherever earned, of the injured employee, at the date of
7 injury” and “average weekly wage in West Virginia”, as
8 used in this chapter, shall have the meaning and shall be
9 computed as set forth in section fourteen of this article
10 except for the purpose of computing temporary total
11 disability benefits for part-time employees pursuant to
12 the provisions of section six-d of this article.

13 (b) If the injury causes temporary total disability, the
14 employee shall receive during the continuance thereof
15 weekly benefits as follows: A maximum weekly benefit
16 to be computed on the basis of seventy percent of the
17 average weekly wage earnings, wherever earned, of the
18 injured employee, at the date of injury, not to exceed the
19 percentage of the average weekly wage in West Virginia,
20 as follows: On or after the first day of July, one
21 thousand nine hundred sixty-nine, forty-five percent; on
22 or after the first day of July, one thousand nine hundred
23 seventy, fifty percent; on or after the first day of July,
24 one thousand nine hundred seventy-one, fifty-five
25 percent; on or after the first day of July, one thousand
26 nine hundred seventy-three, sixty percent; on or after the
27 first day of July, one thousand nine hundred seventy-
28 four, eighty percent; on or after the first day of July, one
29 thousand nine hundred seventy-five, one hundred
30 percent.

31 The minimum weekly benefits paid hereunder shall not
32 be less than twenty-six dollars per week for injuries
33 occurring on or after the first day of July, one thousand
34 nine hundred sixty-nine; not less than thirty-five dollars
35 per week for injuries occurring on or after the first day
36 of July, one thousand nine hundred seventy-one; not less
37 than forty dollars per week for injuries occurring on or

38 after the first day of July, one thousand nine hundred
39 seventy-three; not less than forty-five dollars per week
40 for injuries occurring on or after the first day of July,
41 one thousand nine hundred seventy-four; and for injuries
42 occurring on or after the first day of July, one thousand
43 nine hundred seventy-six, thirty-three and one-third
44 percent of the average weekly wage in West Virginia,
45 except as provided in section six-d of this article. In no
46 event, however, shall such minimum weekly benefits
47 exceed the level of benefits determined by use of the
48 then applicable federal minimum hourly wage:
49 *Provided*, That any claimant receiving permanent total
50 disability benefits, permanent partial disability benefits
51 or dependents' benefits prior to the first day of July, one
52 thousand nine hundred ninety-four, shall not have his or
53 her benefits reduced based upon the requirement herein
54 that the minimum weekly benefit shall not exceed the
55 applicable federal minimum hourly wage.

56 (c) Subdivision (b) of this section shall be limited as
57 follows: Aggregate award for a single injury causing
58 temporary disability shall be for a period not exceeding
59 two hundred eight weeks.

60 (d) If the injury causes permanent total disability,
61 benefits shall be payable during the remainder of life at
62 the maximum or minimum weekly benefits as provided
63 in subdivision (b) of this section for temporary total
64 disability. A permanent disability of eighty-five percent
65 or more shall entitle the employee to a rebuttable
66 presumption of a permanent total disability for the
67 purpose of this section. Under no circumstances shall the
68 commissioner grant an additional permanent disability
69 award to a claimant receiving a permanent total
70 disability award, or to a claimant who has previously
71 been granted permanent disability awards totaling
72 eighty-five percent or more and has been granted a
73 permanent total disability award: *Provided*, That if any
74 claimant thereafter sustains another compensable injury
75 and has permanent partial disability resulting therefrom,
76 the total permanent disability award benefit rate shall

77 be computed at the highest benefit rate justified by any
78 of the compensable injuries, and the cost of any increase
79 in the permanent total disability benefit rate shall be
80 paid from the second injury reserve created by section
81 one, article three of this chapter. In any claim in which
82 a claimant aggregates permanent partial disability
83 awards in the amount of eighty-five percent or more
84 after the effective date of this subsection, the claimant
85 shall be entitled to a permanent total disability award
86 unless the evidence establishes that the claimant is not
87 permanently and totally disabled pursuant to subdivi-
88 sion (n) of this section.

89 (e) If the injury causes permanent disability less than
90 permanent total disability, the percentage of disability
91 to total disability shall be determined and the award
92 computed on the basis of four weeks' compensation for
93 each percent of disability determined, at the following
94 maximum or minimum benefit rates: Seventy percent of
95 the average weekly wage earnings, wherever earned, of
96 the injured employee, at the date of injury, not to exceed
97 the percentage of the average weekly wage in West
98 Virginia, as follows: On or after the first day of July, one
99 thousand nine hundred sixty-nine, forty-five percent; on
100 or after the first day of July, one thousand nine hundred
101 seventy, fifty percent; on or after the first day of July,
102 one thousand nine hundred seventy-one, fifty-five
103 percent; on or after the first day of July, one thousand
104 nine hundred seventy-three, sixty percent; on or after the
105 first day of July, one thousand nine hundred seventy-
106 five, sixty-six and two-thirds percent.

107 The minimum weekly benefit under this subdivision
108 shall be as provided in subdivision (b) of this section for
109 temporary total disability.

110 (f) If the injury results in the total loss by severance of
111 any of the members named in this subdivision, the
112 percentage of disability shall be determined by the
113 commissioner, with the following table establishing the
114 minimum percentage of disability. In determining the

115 percentage of disability, the commissioner may be
116 guided by, but shall not be limited to, the disabilities
117 enumerated in the following table, and in no event shall
118 the disability be less than that specified in the following
119 table:

120 The loss of a great toe shall be considered a ten percent
121 disability.

122 The loss of a great toe (one phalanx) shall be consid-
123 ered a five percent disability.

124 The loss of other toes shall be considered a four
125 percent disability.

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

128 The loss of all toes shall be considered a twenty-five
129 percent disability.

130 The loss of forepart of foot shall be considered a thirty
131 percent disability.

132 The loss of a foot shall be considered a thirty-five
133 percent disability.

134 The loss of a leg shall be considered a forty-five
135 percent disability.

136 The loss of thigh shall be considered a fifty percent
137 disability.

138 The loss of thigh at hip joint shall be considered a sixty
139 percent disability.

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

142 The loss of a little or fourth finger shall be considered
143 a five percent disability.

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

146 The loss of ring or third finger shall be considered a
147 five percent disability.

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

150 The loss of middle or second finger shall be considered
151 a seven percent disability.

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

154 The loss of index or first finger shall be considered a
155 ten percent disability.

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

158 The loss of thumb shall be considered a twenty percent
159 disability.

160 The loss of thumb and index finger shall be considered
161 a thirty-two percent disability.

162 The loss of index and middle finger shall be considered
163 a twenty percent disability.

164 The loss of middle and ring finger shall be considered
165 a fifteen percent disability.

166 The loss of ring and little finger shall be considered a
167 ten percent disability.

168 The loss of thumb, index and middle finger shall be
169 considered a forty percent disability.

170 The loss of index, middle and ring finger shall be
171 considered a thirty percent disability.

172 The loss of middle, ring and little finger shall be
173 considered a twenty percent disability.

174 The loss of four fingers shall be considered a thirty-two
175 percent disability.

176 The loss of hand shall be considered a fifty percent
177 disability.

178 The loss of forearm shall be considered a fifty-five
179 percent disability.

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

182 The total and irrecoverable loss of the sight of one eye
183 shall be considered a thirty-three percent disability. For
184 the partial loss of vision in one, or both eyes, the
185 percentages of disability shall be determined by the
186 commissioner, using as a basis the total loss of one eye.

187 The total and irrecoverable loss of the hearing of one
188 ear shall be considered a twenty-two and one-half
189 percent disability. The total and irrecoverable loss of
190 hearing of both ears shall be considered a fifty-five
191 percent disability.

192 For the partial loss of hearing in one, or both ears, the
193 percentage of disability shall be determined by the
194 commissioner, using as a basis the total loss of hearing in
195 both ears.

196 Should a claimant sustain a compensable injury which
197 results in the total loss by severance of any of the bodily
198 members named in this subdivision, die from sickness or
199 noncompensable injury before the commissioner makes
200 the proper award for such injury, the commissioner shall
201 make such award to claimant's dependents as defined in
202 this chapter, if any; such payment to be made in the same
203 installments that would have been paid to claimant if
204 living: *Provided*, That no payment shall be made to any
205 surviving spouse of such claimant after his or her
206 remarriage, and that this liability shall not accrue to the
207 estate of such claimant and shall not be subject to any
208 debts of, or charges against, such estate.

209 (g) Should a claimant to whom has been made a
210 permanent partial award of from one percent to eighty-
211 four percent, both inclusive, die from sickness or
212 noncompensable injury, the unpaid balance of such
213 award shall be paid to claimant's dependents as defined
214 in this chapter, if any; such payment to be made in the
215 same installments that would have been paid to claimant
216 if living: *Provided*, That no payment shall be made to

217 any surviving spouse of such claimant after his or her
218 remarriage, and that this liability shall not accrue to the
219 estate of such claimant and shall not be subject to any
220 debts of, or charges against, such estate.

221 (h) For the purposes of this chapter, a finding of the
222 occupational pneumoconiosis board shall have the force
223 and effect of an award.

224 (i) The award for permanent disabilities intermediate
225 to those fixed by the foregoing schedule and permanent
226 disability of from one percent to eighty-four percent
227 shall be the same proportion and shall be computed and
228 allowed by the commissioner.

229 (j) The percentage of all permanent disabilities other
230 than those enumerated in subdivision (f) of this section
231 shall be determined by the commissioner, and awards
232 made in accordance with the provisions of subdivision
233 (d) or (e) of this section. Where there has been an injury
234 to a member as distinguished from total loss by sever-
235 ance of that member, the commissioner in determining
236 the percentage of disability may be guided by, but shall
237 not be limited to, the disabilities enumerated in
238 subdivision (f) of this section.

239 (k) Compensation payable under any subdivision of
240 this section shall not exceed the maximum nor be less
241 than the weekly benefits specified in subdivision (b) of
242 this section.

243 (l) Except as otherwise specifically provided in this
244 chapter, temporary total disability benefits payable
245 under subdivision (b) of this section shall not be
246 deductible from permanent partial disability awards
247 payable under subdivision (e) or (f) of this section.
248 Compensation, either temporary total or permanent
249 partial, under this section shall be payable only to the
250 injured employee and the right thereto shall not vest in
251 his or her estate, except that any unpaid compensation
252 which would have been paid or payable to the employee
253 up to the time of his or her death, if he or she had lived,

254 shall be paid to the dependents of such injured employee
255 if there be such dependents at the time of death.

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

258 Loss of both eyes or the sight thereof.

259 Loss of both hands or the use thereof.

260 Loss of both feet or the use thereof.

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

262 In all other cases permanent disability shall be
263 determined by the commissioner in accordance with the
264 facts in the case and award made in accordance with the
265 provisions of subdivision (d) or (e) of this section.

266 (n) A disability which renders the injured employee
267 unable to engage in substantial gainful activity requiring
268 skills or abilities comparable to those of any gainful
269 activity in which he or she has previously engaged with
270 some regularity and over a substantial period of time
271 shall be considered in determining the issue of total
272 disability. In addition, the vocational standards adopted
273 pursuant to subsection (m), section seven, article three,
274 chapter twenty-one-a of this code shall be considered
275 once they are effective.

§23-4-6d. Benefits payable to part-time employees.

1 (a) For purposes of this section, a part-time employee
2 means an employee who, at the date of injury, is
3 customarily employed twenty-five hours per week or less
4 on a regular basis and is classified by the employer as a
5 part-time employee: *Provided*, That the term “part-time
6 employee” shall not include an employee who regularly
7 works more than twenty-five hours per week for the
8 employer, nor shall it include an employee who regularly
9 works for more than one employer and whose regular
10 combined working hours total more than twenty-five
11 hours per week when that employee is rendered unable
12 to perform the duties of all such employment as a result

13 of the injury, nor shall it include any employee in the
14 construction industry who works less than twenty-five
15 hours per week.

16 (b) For purposes of establishing temporary total
17 disability weekly benefits pursuant to subdivision (b),
18 section six of this article for part-time employees, the
19 “average weekly wage earnings, wherever earned, of the
20 injured person, at the date of injury”, shall be computed:

21 (1) Until the first day of July, one thousand nine
22 hundred ninety-four, based upon the average gross pay,
23 wherever earned, which is received by the employee
24 during the two months, six months or twelve months
25 immediately preceding the date of the injury, whichever
26 is most favorable to the injured employee; or

27 (2) On and after the first day of July, one thousand nine
28 hundred ninety-four, based upon the best average
29 weekly gross pay, wherever earned, which is received by
30 the employee during the best quarter of wages out of the
31 preceding four quarters of wages as reported to the
32 commissioner pursuant to section eleven, article ten,
33 chapter twenty-one-a of this code: *Provided*, That for
34 part-time employees who have been employed less than
35 two months but more than one week prior to the date of
36 injury or any employee whose wages have not yet been
37 reported to the commissioner, the average weekly wage
38 earnings shall be calculated based upon the average
39 gross earnings in the weeks actually worked: *Provided*,
40 *however*, That for part-time employees who have been
41 employed one week or less, the average weekly wage
42 earnings shall be calculated based upon the average
43 weekly wage prevailing for the same or similar part-time
44 employment at the time of injury except that when an
45 employer has agreed to pay a certain hourly wage to such
46 part-time employee, the average weekly wage shall be
47 computed by multiplying such hourly wage by the
48 regular numbers of hours contracted to be worked each
49 week: *Provided further*, That notwithstanding any
50 provision of this article to the contrary, no part-time

51 employee shall receive temporary total disability
52 benefits greater than his or her average weekly wage
53 earnings as so calculated.

54 (c) Notwithstanding any other provisions of this article
55 to the contrary, benefits payable to a part-time injured
56 employee for any permanent disability shall be computed
57 and paid on the same basis as if the injured employee is
58 not a part-time employee within the meaning of this
59 section.

§23-4-7b. Trial return to work.

1 (a) The Legislature hereby finds and declares that it is
2 in the interest of employees, employers and the commis-
3 sioner that injured employees be encouraged to return to
4 work as quickly as possible after an injury and that
5 appropriate protections be afforded to injured employees
6 who return to work on a trial basis.

7 (b) Notwithstanding any other provisions of this
8 chapter to the contrary, the injured employee shall not
9 have his or her eligibility to receive temporary total
10 disability benefits terminated when he or she returns to
11 work on a trial basis as set forth herein. An employee
12 shall be eligible to return to work on a trial basis when
13 he or she is released to work on a trial basis by the
14 treating physician.

15 (c) When an injured employee returns to work on a
16 trial basis, the employer shall provide a trial return to
17 work notification to the commissioner. Upon receipt
18 thereof, the commissioner shall note the date of the first
19 day of work pursuant to the trial return and shall
20 continue the claimant's eligibility for temporary total
21 disability benefits, but shall temporarily suspend the
22 payment of temporary total disability benefits during the
23 period actually worked by the injured employee. The
24 claim shall be closed on a temporary total disability
25 basis either when the injured employee or the authorized
26 treating physician notifies the commissioner that the
27 injured employee is able to perform his or her job or

28 automatically at the end of a period of three months
29 from the date of the first day of work unless the
30 employee notifies the commissioner that he or she is
31 unable to perform the duties of the job, whichever occurs
32 first. If the injured employee is unable to continue
33 working due to the compensable injury for a three-
34 month period, the injured employee shall notify the
35 commissioner and temporary total disability benefits
36 shall be reinstated immediately and he or she shall be
37 referred for a rehabilitation evaluation as provided in
38 section nine of this article. No provision of this section
39 shall be construed to prohibit the commissioner from
40 referring the injured employee for any permanent
41 disability evaluation required or permitted by any other
42 provision of this article.

43 (d) Nothing in this section shall prevent the employee
44 from returning to work without a trial return to work
45 period.

46 (e) Nothing in this section shall be construed to require
47 an injured employee to return to work on a trial basis.

48 (f) The provisions of this section shall be terminated
49 and be of no further force and effect on the first day of
50 July, one thousand nine hundred ninety-eight.

§23-4-9. Physical and vocational rehabilitation.

1 (a) The Legislature hereby finds that it is a goal of the
2 workers' compensation program to assist workers to
3 return to suitable gainful employment after an injury. In
4 order to encourage workers to return to employment and
5 to encourage and assist employers in providing suitable
6 employment to injured employees, it shall be a priority
7 of the commissioner to achieve early identification of
8 individuals likely to need rehabilitation services and to
9 assess the rehabilitation needs of these injured employ-
10 ees. It shall be the goal of rehabilitation to return injured
11 workers to employment which shall be comparable in
12 work and pay to that which the individual performed
13 prior to the injury. If a return to comparable work is not

14 possible, the goal of rehabilitation shall be to return the
15 individual to alternative suitable employment, using all
16 possible alternatives of job modification, restructuring,
17 reassignment and training, so that the individual will
18 return to productivity with his or her employer or, if
19 necessary, with another employer. The Legislature
20 further finds that it is the shared responsibility of the
21 employer, the employee, the physician and the commis-
22 sioner to cooperate in the development of a rehabilita-
23 tion process designed to promote reemployment for the
24 injured employee.

25 (b) In cases where an employee has sustained a
26 permanent disability, or has sustained an injury likely to
27 result in temporary disability in excess of one hundred
28 twenty days, and such fact has been determined by the
29 commissioner, the commissioner shall at the earliest
30 possible time determine whether the employee would be
31 assisted in returning to remunerative employment with
32 the provision of rehabilitation services and if the
33 commissioner determines that the employee can be
34 physically and vocationally rehabilitated and returned to
35 remunerative employment by the provision of rehabilita-
36 tion services including, but not limited to, vocational or
37 on-the-job training, counseling, assistance in obtaining
38 appropriate temporary or permanent work site, work
39 duties or work hours modification, by the provision of
40 crutches, artificial limbs, or other approved mechanical
41 appliances, or medicines, medical, surgical, dental or
42 hospital treatment, the commissioner shall forthwith
43 develop a rehabilitation plan for the employee and, after
44 due notice to the employer, expend such an amount as
45 may be necessary for the aforesaid purposes: *Provided,*
46 That such expenditure for vocational rehabilitation shall
47 not exceed ten thousand dollars for any one injured
48 employee: *Provided, however,* That no payment shall be
49 made for such vocational rehabilitation purposes as
50 provided in this section unless authorized by the
51 commissioner prior to the rendering of such physical or
52 vocational rehabilitation, except that payments shall be

53 made for reasonable medical expenses without prior
54 authorization if sufficient evidence exists which would
55 relate the treatment to the injury and the attending
56 physician or physicians have requested authorization
57 prior to the rendering of such treatment: *Provided*
58 *further*, That payment for physical rehabilitation,
59 including the purchase of prosthetic devices and other
60 equipment and training in use of such devices and
61 equipment, shall be considered expenses within the
62 meaning of section three of this article and shall be
63 subject to the provisions of sections three, three-a, three-
64 b and three-c of this article. The provision of any
65 rehabilitation services shall be pursuant to a rehabilita-
66 tion plan to be developed and monitored by a rehabilita-
67 tion professional for each injured employee.

68 (c) In every case in which the commissioner shall order
69 physical or vocational rehabilitation of a claimant as
70 provided herein, the claimant shall, during the time he or
71 she is receiving any vocational rehabilitation or
72 rehabilitative treatment that renders him or her totally
73 disabled during the period thereof, be compensated on a
74 temporary total disability basis for such period.

75 (d) In every case in which the claimant returns to
76 gainful employment as part of a rehabilitation plan, and
77 the employee's average weekly wage earnings are less
78 than the average weekly wage earnings earned by the
79 injured employee at the time of the injury, he or she shall
80 receive temporary partial rehabilitation benefits
81 calculated as follows: The temporary partial rehabilita-
82 tion benefit shall be seventy percent of the difference
83 between the average weekly wage earnings earned at the
84 time of the injury and the average weekly wage earnings
85 earned at the new employment, both to be calculated as
86 provided in sections six, six-d and fourteen of this article
87 as such calculation is performed for temporary total
88 disability benefits, subject to the following limitations:
89 In no event shall such benefits be subject to the
90 minimum benefit amounts required by the provisions of
91 subdivision (b), section six of this article, nor shall such

92 benefits exceed the temporary total disability benefits to
93 which the injured employee would be entitled pursuant
94 to sections six, six-d and fourteen of this article during
95 any period of temporary total disability resulting from
96 the injury in the claim: *Provided*, That no temporary
97 total disability benefits shall be paid for any period for
98 which temporary partial rehabilitation benefits are paid.
99 The amount of temporary partial rehabilitation benefits
100 payable under this subsection shall be reviewed every
101 ninety days to determine whether the injured employee's
102 average weekly wage in the new employment has
103 changed and, if such change has occurred, the amount of
104 benefits payable hereunder shall be adjusted prospec-
105 tively. Temporary partial rehabilitation benefits shall
106 only be payable when the injured employee is receiving
107 vocational rehabilitation services in accordance with a
108 rehabilitation plan developed under this section.

109 (e) The commissioner shall promulgate rules for the
110 purpose of developing a comprehensive rehabilitation
111 program which will assist injured workers to return to
112 suitable gainful employment after an injury in a manner
113 consistent with the provisions and findings of this
114 section. Such rules shall provide definitions for rehabili-
115 tation facilities and rehabilitation services pursuant to
116 this section.

117 (f) The provisions of this section shall be terminated
118 and be of no further force or effect on the first day of
119 July, one thousand nine hundred ninety-eight.

§23-4-14. Computation of benefits.

1 (a) The average weekly wage earnings, wherever
2 earned, of the injured person at the date of injury, and
3 the average weekly wage in West Virginia as determined
4 by the commissioner, in effect at the date of injury, shall
5 be taken as the basis upon which to compute the
6 benefits.

7 (1) In cases involving occupational pneumoconiosis or
8 other occupational diseases, the "date of injury" shall be

9 the date of the last exposure to the hazards of occupa-
10 tional pneumoconiosis or other occupational diseases.

11 (2) In computing benefits payable on account of
12 occupational pneumoconiosis, the commissioner shall
13 deduct the amount of all prior workers' compensation
14 benefits paid to the same claimant on account of
15 silicosis, but a prior silicosis award shall not, in any
16 event, preclude an award for occupational pneumoconio-
17 sis otherwise payable under this article.

18 (b) (1) Until the first day of July, one thousand nine
19 hundred ninety-four, the expression "average weekly
20 wage earnings, wherever earned, of the injured person,
21 at the date of injury", within the meaning of this
22 chapter, shall be computed based upon the daily rate of
23 pay at the time of the injury or upon the average pay
24 received during the two months, six months or twelve
25 months immediately preceding the date of the injury,
26 whichever is most favorable to the injured employee,
27 except for the purpose of computing temporary total
28 disability benefits for part-time employees pursuant to
29 the provisions of section six-d of this article.

30 (2) On and after the first day of July, one thousand nine
31 hundred ninety-four, the expression "average weekly
32 wage earnings, wherever earned, of the injured person,
33 at the date of injury", within the meaning of this
34 chapter, shall be computed based upon the daily rate of
35 pay at the time of the injury or upon the weekly average
36 derived from the best quarter of wages out of the
37 preceding four quarters of wages as reported to the
38 commissioner pursuant to section eleven, article ten,
39 chapter twenty-one-a of this code, whichever is most
40 favorable to the injured employee, except for the purpose
41 of computing temporary total disability benefits for
42 part-time employees pursuant to the provisions of
43 section six-d of this article.

44 (c) The expression "average weekly wage in West
45 Virginia", within the meaning of this chapter, shall be
46 the average weekly wage in West Virginia as determined

47 by the commissioner in accordance with the provisions
48 of sections ten and eleven, article six, chapter twenty-
49 one-a of this code, and other applicable provisions of
50 said chapter.

51 (d) In any claim for injuries, including occupational
52 pneumoconiosis and other occupational diseases,
53 occurring on or after the first day of July, one thousand
54 nine hundred seventy-one, any award for temporary
55 total, permanent partial or permanent total disability
56 benefits or for dependent benefits, shall be paid at the
57 weekly rates or in the monthly amount in the case of
58 dependent benefits applicable to the claimant therein in
59 effect on the date of such injury. If during the life of such
60 award for temporary total, permanent partial or
61 permanent total disability benefits or for dependent
62 benefits, the weekly rates or the monthly amount in the
63 case of dependent benefits are increased or decreased,
64 the claimant shall receive such increased or decreased
65 benefits beginning as of the effective date of said
66 increase or decrease.

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

[Handwritten signature]
.....
Chairman Senate Committee

[Handwritten signature: Ernest C. Moore]
.....
Chairman House Committee

Originated in the Senate.

To take effect July 1, 1994.

[Handwritten signature]
.....
Clerk of the Senate

[Handwritten signature]
.....
Clerk of the House of Delegates

[Handwritten signature]
.....
President of the Senate

[Handwritten signature]
.....
Speaker House of Delegates

The within approved.....this the *30th*.....
day of *March*....., 1994.

[Handwritten signature: Gaston Caperton]
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 3-30-94

Time 4:33 p.m.