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Assessing Fairness in Workers' Compensation Reform: A Commentary on the 1995 West Virginia Workers' Compensation Legislation

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ASSESSING FAIRNESS IN WORKERS' COMPENSATION REFORM: A COMMENTARY ON THE 1995 WEST VIRGINIA WORKERS' COMPENSATION LEGISLATION

EMILY A. SPIELER*

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* Professor of Law, West Virginia University College of Law. As a prior Commissioner of Workers' Compensation for the State of West Virginia (and now as co-chair of the standing Committee on Workers' Compensation of the Labor and Employment Law Section of the American Bar Association), I have followed the various legislative and political arguments regarding this program very closely. The genesis of this Article lies in a request from Governor Caperton that I provide him with an analysis of what might be considered "unfair" about the 1995 workers' compensation legislation. The analysis I undertook led me to believe that the continuing, animated, and contentious political discussions regarding workers' compensation might benefit from the more extensive and careful analysis of the legislation which I attempted to provide to the Governor and, in expanded form, now publish in this Article. The Article includes information which was available to me as of December 31, 1995. In view of the delay between writing and publication, and the potential for rapid change in a year in which gubernatorial primaries are on the horizon, I expect that the situation may have changed dramatically by the time this Article is read. I nevertheless hope that it contributes to the on-going discussion, in West Virginia and elsewhere, about how to achieve fairness in workers' compensation reform.

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I. INTRODUCTION

With breathtaking and uncharacteristic speed, the West Virginia Legislature passed major changes to the Workers' Compensation Act¹ in February, 1995.² The final legislation, Enrolled Committee Substitute for Senate Bill 250 (SB 250),³ was overwhelmingly endorsed by members of both houses of the Legislature on February 10, 1995.⁴ Legislative support was encouraged by political pressure from the executive branch;⁵ by the failure of the labor-management council, established by reform legislation in 1993 to address the serious and perceived problems in the program;⁶ by corporate insistence on the need

1. W. VA. CODE §§ 23-1-1 to 23-6-1 (1994 & Supp. 1995).

2. The Governor had a comprehensive 180 page bill introduced by the legislative leadership on Thursday, February 2, 1995, designated as Senate Bill 250 and House Bill 2346. Public hearings were held the following day, less than 24 hours after the Bill was introduced. The final legislation, reflecting some changes negotiated by the legislative leadership over the weekend of February 4 and 5, 1995, received final legislative approval on February 10, 1995. Telephone Interviews with Robert "Chuck" Chambers, Speaker of the West Virginia House of Delegates, (Feb. 3 and Feb. 6, 1995); Phil Kabler, *Workers' Comp Reform Bill on Way to Governor*, THE CHARLESTON GAZETTE, Feb. 11, 1995, at 1A.

3. S. 250, 72d Leg., 1st Reg. Sess. (1995).

4. The final vote in the House of Delegates was 73 in favor, 26 opposed; in the Senate, the vote was 30 to 2. Kabler, *supra* note 2, at 1A. The roll call vote for the House actually shows 72 yeas, 25 nays, 1 not voting.

5. From the outset of his Administration, Governor Caperton had defined one of his primary goals to be achieving fiscal soundness in state governmental programs. At the beginning of 1995, the primary remaining sources of fiscal problems in state programs were medicaid and workers' compensation. As described in this Article, the Caperton Administration (Administration) put its entire strength behind the Bill. Handouts were distributed to legislators, describing the savings to be achieved by each amendment to the Workers' Compensation Act; the staff of the Governor's office and the Workers' Compensation Division (Division) met with legislators repeatedly during the week the Bill was under consideration; public statements, which were summarized by Commissioner Richardson's op-ed article which is quoted in the text, all indicated that a vote against the Bill was a vote for the financial collapse of workers' compensation in West Virginia. *See also* Chris Stadelman, *Workers' Comp Bill delayed one week*, CHARLESTON DAILY MAIL, Jan. 25, 1995, at 8A (indicating Governor Caperton's concern about the imminent collapse of the workers' compensation system); Paul Nyden, *Workers' Comp problems worse than feared*, THE CHARLESTON GAZETTE, Jan. 20, 1995, at 1A (Andy Richardson quoted as predicting bankruptcy within ten years unless something is changed).

6. The Compensation Programs Performance Council (Performance Council) was created in 1993 to provide a joint labor-management forum to discuss issues confronting the Bureau of Employment Programs, including both workers' compensation and employment

to reduce the program's costs, which were claimed to be excessive, instead of continuing to raise premium rates;⁷ and by dire predictions about the imminent collapse of the Workers' Compensation Fund.⁸ Not

security. W. VA. CODE § 21A-3-1 to -7 (Supp. 1995). The Performance Council was charged with oversight and rule-making authority over workers' compensation. More specifically, it was charged with developing new vocational standards for permanent total disability no later than September 1, 1993. W. VA. CODE §§ 21A-3-7(m), 23-4-6(n) (Supp. 1995). The failure of the Performance Council to develop a comprehensive solution to the fiscal and administrative problems facing the agency was an important underlying justification for the efforts to effect quick and massive changes in the program through legislative channels in 1995. In fact, as is discussed in more detail below, the Performance Council had not been charged with achieving this kind of comprehensive change or given a deadline to do so; other problems colored the negotiations in the Performance Council as well. *See infra* notes 254-265 and accompanying text.

7. The claim from businesses that costs are excessive is not, of course, new. For a discussion of this, *see* Emily A. Spieler, *Injured Workers, Workers' Compensation, and Work: New Perspectives on the Workers' Compensation Debate in West Virginia*, 95 W. VA. L. REV. 333, 359 (1992-93) [hereinafter Spieler, *Injured Workers*]; Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 242-43 (1994) [hereinafter Spieler, *Perpetuating Risk?*]. The particular argument that was raised during the 1995 legislative session was two pronged: first, that the cost per covered worker in West Virginia was among the highest in the country, and second, that employers' premium rates had gone up about 200 percent under the Caperton Administration. For an analysis of these claims, *see infra* notes 34 and 199-202. During the 1995 legislative session, the need to contain rising premium levels was a focus of business representatives. *See, e.g.*, Phil Kabler, *Caperton plan for Workers' Compensation praised and panned*, THE CHARLESTON GAZETTE, Feb. 4, 1995, at 5D ("Business representatives, including Jim Morgan of the West Virginia Chamber of Commerce, said rising premiums were making state businesses uncompetitive [sic]. 'If left as it is, it will seriously erode West Virginia's ability to attract and retain jobs,' he said."). *See also* Paul Owens, *Comp bill zipping through*, CHARLESTON DAILY MAIL, Feb. 4, 1995, at 2A (Morgan similarly quoted).

8. The Fund's actuary indicated that the actuarially-calculated deficit had risen to \$4.95 billion (on an undiscounted basis) by the end of Fiscal Year 1994. MILLIMAN & ROBERTSON, INC., STATE OF WEST VIRGINIA, WORKERS' COMPENSATION FUND, ESTIMATED LIABILITY FOR CLAIMS AND CLAIMS ADJUSTMENT EXPENSE AS OF JUNE 30, 1994 (1994) [hereinafter 1994 ACTUARIAL REPORT] (prepared Jan. 16, 1995). Public anxiety over the growing debt was prevalent. "The Workers' Compensation Division's recurring losses and deficit raise substantial doubts about its ability to survive in the present form, independent auditors have concluded for two consecutive years," began one January article in *The Charleston Gazette*. Fanny Seiler, *Workers' Comp losses raise doubts about its ability to survive*, THE CHARLESTON GAZETTE, Jan. 18, 1995, at 5A. The headline on the top of page one of *The Charleston Gazette* on January 20 echoed this sentiment: "Workers' Comp problems worse than feared," Paul Nyden, *Workers' Comp problems worse than feared*, THE CHARLESTON GAZETTE, Jan. 20, 1995, at 1A. And then, again at the top of page one on January 21, the headline indicated: "Gov. Gaston Caperton told a Charleston business associ-

surprisingly, no one wanted to be blamed for the collapse of the program. Few legislators actually read the Bill in its entirety before they voted.⁹ Vehement opposition from organized labor, including a demon-

ation Friday that he is convinced the Legislature will pass a Workers' Compensation reform bill this session" Phil Kabler, *Caperton sees hope for rescuing Workers' Comp*, THE CHARLESTON GAZETTE, Jan. 21, 1995, at 1A. Despite this lead paragraph, the article itself focused on other issues. Later, legislative leadership echoed this concern. For example, Senate Majority Leader Truman Chafin said, referring to the need to slow the funds' slide into bankruptcy, "I want to be sure that, down the road, he [referring to the claimant] can still draw that check." *Benefits: Caperton wisely intervened to save Workers' Compensation*, CHARLESTON DAILY MAIL, Feb. 13, 1995, at 4A.

9. During the first two weeks in February, 1995, I had numerous telephone conversations with legislators regarding this Bill; few had read it. Since that time, I have had conversations with current and past legislators who have confirmed that, when they must deal with complex legislation in an area in which they lack either personal expertise or interest, they rely upon summaries provided by committee counsel or others. These summaries are often very abbreviated and inadequate to explain the impact — as opposed to the language — of the legislation.

This issue is the subject of some joking around the Legislature. One lobbyist provided me with a flyer which was passed around (anonymously, to be sure) during the 1995 legislative session. It read:

"TOP TEN RESPONSES TO THE QUESTION
'HAVE YOU READ THE BILL?'"

- I. I read the bill in its original form, but it is hard to keep track of each amendment and com. sub. that results from working the bills.
- II. I am in the process of finishing the bill and after questions to counsel on specific aspects of the legislation, I will formulate a response.
- III. I have a colleague on Judiciary (or wherever the bill came from) who shared with me their deliberations in depth, so I am very familiar with it.
- IV. We have a caucus 3 days a week to help us become aware of most of the details of this bill and others.
- V. I have a copy of the abstract used by the committee in recommending the bill for passage.
- VI. I read all about it in "The Charleston Gazette" - they're against it, so I'm for it. Or they are for it, so I am against it (Republican response). Or they are for it, so I am for it (Democrat response).
- VII. No, someone removed it from the reading shelf in the restroom.
- VIII. I can't read it, Dick Henderson ate it.
- IX. I don't have to read it, I'm friends with a lobbyist who contributes to my campaign and he tells me how to vote.
- X. I don't have to read it - I'm union - I just watch my union guy in the balcony and he sticks his thumb up or down for me.

NEVER SAY I HAVEN'T READ THE BILL"

stration by hundreds against the Bill on February 9, failed to dampen the enthusiastic and bipartisan support for the legislative changes.¹⁰ Labor representatives' refusal to show sufficient flexibility or "to come to the bargaining table" in the Performance Council,¹¹ was used to justify both support of the legislation¹² and refusals to address specific objections raised to the content of the final bill.¹³ The justification for the legislation became: "An insolvent Workers' Compensation program doesn't help the working man."¹⁴

In the months following its passage, legislative leadership and officials of the executive branch continued to champion the legislated changes. In an op-ed piece in the *Charleston Gazette*, Commissioner Andy Richardson wrote:

Gov. Caperton and the Legislature demonstrated tremendous political courage in addressing this chronic problem. Reform was long overdue; without it the system would become bankrupt within the next decade and would no longer offer the promise of providing benefits to future injured workers. . . . The new law returns Workers' Compensation to its original role of compensating workers for lost wages resulting from work-related injuries. . . . Future generations will look back on 1995 as the year political courage prevailed, Workers' Compensation reform became law, and a trou-

10. For journalistic accounts of this rally, see Carolyn Karr and Paul Owens, *Labor forces fail to alter reform bill*, CHARLESTON DAILY MAIL, Feb. 10, 1995, at 1A; Fanny Seiler, *Workers' Comp bill remains intact*, THE CHARLESTON GAZETTE, Feb. 10, 1995, at 1A; *Labor decline seen in recent battle*, SUNDAY GAZETTE-MAIL, Feb. 12, 1995, at 3A. Of course, the rally took place too late to influence the consideration of the legislation. Because the Bill was pushed through with such amazing rapidity, the final resolution of the legislative language had basically been resolved by the time labor could muster any opposition.

11. See *infra* notes 259-265 and accompanying text.

12. See Fanny Seiler, *Chambers outlines major issues*, THE CHARLESTON GAZETTE, Jan. 24, 1995, at 2A ("The administration and Legislature will step in when it becomes obvious progress is not being made, Chambers indicated.").

13. Telephone Interviews with Chuck Chambers, see *supra* note 2. There were early warnings of this in January. A *Charleston Gazette* article noted, for example, "[i]f business and labor representatives on a council formed to revamp the state's workers' compensation system can't reach consensus on key issues, Gov. Gaston Caperton said he and the Legislature might have to do it for them." Robert Woodrum, *Council may lose grip on workers' comp reform*, THE CHARLESTON GAZETTE, Jan. 12, 1995, at 2A. Interestingly, there is no indication in the workers' compensation statute that the purpose of the council was to "revamp" the system. See W. VA. CODE § 21A-3-1 to -7 (Supp. 1995).

14. *Comp fund*, CHARLESTON DAILY MAIL, Feb. 6, 1995, at 4A.

ble [sic] system began its journey back to financial preservation for West Virginia's injured workers.¹⁵

House Speaker Chuck Chambers continued to argue that the Bill was necessary because some action had to be taken.¹⁶ Senator Joe Manchin echoed Commissioner Richardson in a letter in April:

Like 30 of my 33 fellow Senators, I put my public career on the line in February and voted for Governor Caperton's package of reforms of the Workers' Compensation system. I believe you deserve a straight-forward response why we did this. Workers' Comp in West Virginia was out of control. . . . In 1995, unfunded liabilities in Workers' Comp pose a six billion dollar threat to your job. Higher Workers' Comp premiums drive up unemployment. That's bad for workers. Higher Workers' Comp premiums bankrupt businesses. That's bad for workers. And the rising deficit would have destroyed the whole Workers' Comp system, which would have been catastrophic for workers.¹⁷

After enumerating some of the changes in the bill, Senator Manchin concluded:

We still have a massive deficit and premiums will go up again. But Governor Caperton, Senator William Wooton and Delegate Rick Staton deserve the respect of every worker in this state. They steered this system clear of bankruptcy and put it back on the road toward solvency. Their leadership has helped assure that every injured worker in this state will get the compensation he or she deserves, fully and quickly. It would have been far easier politically for us to let that multi-billion-dollar liability keep growing. But I think your political leaders looked out for the real needs of

15. Andy Richardson, *State's Workers' Compensation reform took political courage*, THE CHARLESTON GAZETTE, Apr. 21, 1995, at 5A. This op-ed piece was subtitled 'Historic legislation'. *Id.*

16. Fanny Seiler, *Workers' Comp attack upsets House speaker, chamber chief*, THE CHARLESTON GAZETTE, Sept. 9, 1995, at 5A (responding to criticism of the legislation by gubernatorial candidate Charlotte Pritt). Most gubernatorial candidates have publicly indicated support for the legislation. Julie R. Cryser, *Candidates back workers' comp reforms*, THE CHARLESTON GAZETTE, Sept. 1, 1995, at 8A. Six gubernatorial candidates said that they supported the reforms while attending a panel discussion; Jim Lees criticized some aspects of the legislation, saying that age and education levels should remain as criteria for determining disability.

17. Letter from Joe Manchin, III, West Virginia Senator, to Emily A. Spieler (Apr. 6, 1995) (on file with author).

workers: we preserved the Workers' Comp system for decades to come — and we saved thousands of jobs.¹⁸

Aggressive political and legal attacks on the legislation also continued. Bumper stickers, issued by the West Virginia AFL-CIO Workers Protection Fund, said "Don't Forget Worker's Comp! in '96" — with a picture of an axe dripping blood.¹⁹ Radio, TV, and newspaper advertisements questioned the appropriateness of the bill; "West Virginia Legislators Voted to Cripple Workers' Compensation West Virginia Workers Deserve Better; Tell Them to Repair the Damage! It's An Issue of Fairness!" read one September advertisement, paid for "By the Many Contributions of Working People to the Workers' Protection Fund, West Virginia AFL-CIO."²⁰ The West Virginia Chamber of Commerce countered with an equally adamant advertising campaign: "Workers' Compensation Reform: It works for all of us. Especially for people who can't."²¹ An application for writ of mandamus, filed on

18. *Id.*

19. An example of the bumper sticker is on file with the author. Similarly, a "huge UMW banner with a bloody ax and large letters urging union members to 'remember Workers' Comp'" was hung at the annual UMWA labor day picnic. Ken Ward, Jr., *Workers' Comp bill targeted at UMW picnic*, THE CHARLESTON GAZETTE, Sept. 5, 1995, at 1A.

20. See, e.g., the advertisement in THE DOMINION POST, Sept. 10, 1995, at 6B. See also Phil Kabler, *Workers' Comp ads intended to educate*, THE CHARLESTON GAZETTE, Sept. 9, 1995, at 1A. Labor interests launched the first round of a \$125,000.00 campaign with a blitz of TV, Radio, and Newspaper advertisements. Some advertisements read "West Virginia workers and responsible businesses deserve better. Tell your legislators to repair the damage."

21. Project O.N.E. (a program of the West Virginia Chamber of Commerce), "*A Workers' Compensation Quiz*", THE CHARLESTON GAZETTE, Oct. 31, 1995, at 5A (advertisement). This advertisement, which ran in papers around the state, read in its entirety:

A Workers' Compensation Quiz. Question: Why did 104 out of 134 Legislators vote YES to reform Workers' Compensation?

- A) The Workers' Compensation Fund was going broke;
- B) Not enough emphasis was being placed on safety in the workplace;
- C) West Virginia's guidelines were so loose that the system awarded 17 times more permanent, total disability claims than the national average;
- D) The system had become so complicated that lawyers were able to profiteer at workers' expense;
- E) All of the above.

September 27, 1995, by twenty-two named individuals, challenges sections of the legislation as being violative of constitutional guarantees of equal protection and due process.²² Organized labor continues to view this legislation as a political litmus test for incumbent politicians. Despite attempts by gubernatorial and legislative candidates to turn the public debate to other — equally serious — issues, legislative veterans are constantly berated for their position in support of SB 250.

This Article is an effort to provide a more reasoned and careful analysis of this Bill which has incited such remarkable attack and defense in the political arena. Was the Workers' Compensation Fund on the verge of financial ruin? Were serious restrictions in the availability of benefits to injured workers the only way to address the financial problems? Was this particular political answer to existing problems unavoidable? Were there alternatives which should have been considered? Is it possible that concern about financial ruin — and other political considerations — overshadowed a careful consideration of what a well-designed and fair workers' compensation program should look like for employers and workers? Are there alternatives or amendments which should be considered? This Article attempts to answer these questions.²³

In order to understand the need for reform, it is essential to understand the problems that confronted the workers' compensation program

(E) was indicated as the correct answer. The advertisement went on with the language quoted in the text. It said in smaller type: "Paid for through Project O.N.E. A program of the West Virginia Chamber of Commerce."

22. *Blankenship v. Richardson*, No. 23119 (W. Va. filed Sept. 22, 1995) (pending before the Supreme Court of Appeals of West Virginia). The writ was filed by attorneys who often represent the United Mine Workers of American and the AFL-CIO. The challenge is limited in scope, focusing on the following: retroactive application of the 1995 amendments to cases which were filed and pending at the time of its passage; the establishment of the 50 percent impairment threshold for a claimant to be considered for a permanent total disability award; and procedural changes which limit the right of a claimant to have a de novo hearing on the merits of the claim. See Petition for Writ of Mandamus and Memorandum of Law in Support of Petition for Writ of Mandamus, *Blankenship* (No. 23119) [hereinafter Petition for Writ of Mandamus].

23. Please note that this Article is *not* an attempt to analyze the constitutionality of the provisions of SB 250 which will be decided by the Supreme Court of Appeals of West Virginia in the coming months.

prior to the time the legislation was proposed. Part II of this Article provides this analysis by answering some fundamental questions. In what way was the West Virginia workers' compensation program failing to function adequately prior to 1995? To what extent was it underfunded? Were employers expected to pay too much for the program? Were workers receiving too much — or too little? To what extent was the West Virginia workers' compensation program different from the programs in other states? To what extent were these differences the result of real differences in the industry and economy of West Virginia? Were prior legislative changes, enacted in 1990-1993, simply inadequate to solve persistent problems?

Part III provides a summary and explanation of the more important provisions in SB 250. Part IV attempts to explore the underlying policy questions. What were the goals of this reform legislation? What should be the goals of workers' compensation reform? How should we measure success? Goals for workers' compensation articulated by a variety of experts and industry groups seem to cluster around the following six areas: fiscal stability, benefit adequacy, quality medical care, procedural efficiency and fairness, premium rate equity, and promotion of safety and rehabilitation programs.

Part V analyzes the success with which the West Virginia workers' compensation program now meets these goals. While SB 250 clearly advanced us toward goals of procedural efficiency and fiscal stability, it is less clear that we are progressing toward the other goals. To the extent that SB 250 failed to meet all of these multi-faceted and sometimes conflicting goals, Part V also examines the critical question: was the legislation necessary in order to establish and maintain a fiscally viable program?

As a former Commissioner of the Workers' Compensation Fund, and as someone who has studied the legal, economic, and political implications of this program in West Virginia and in other states, I have tried to bring to this discussion a commitment both to fiscal responsibility and to fairness.²⁴ This Article is written in the hope that a

24. See *infra*, Part IV (discussing the issue of how we might define "fair"). I have written previously on many of the issues addressed in this Article, and I make no attempt

careful analysis of these issues, undertaken on the outskirts of the political debate, will be useful to further legislative consideration of changes in our workers' compensation program. There are those in academia and in the political world who maintain that truth is irrelevant to the political debate, particularly on highly contentious issues.²⁵ One lobbyist baldly assured me, during my tenure as Commissioner, "Perception *is* truth." I undertook this Article because I believe that the search for truth and fairness is ultimately a critically important responsibility of elected officials, particularly as they develop social policy for programs which affect large numbers of people. I therefore offer the Article to engage legislators and others in a careful search for a reasonable and fair solution to a serious problem — and with the hope that perception, when wrong, will not be allowed to parade as truth.

to summarize these prior writings here. In particular, my articles relevant to these amendments of the Workers' Compensation Act include the following: Spieler, *Injured Workers*, *supra* note 7; Spieler, *Perpetuating Risks?*, *supra* note 7; Emily Spieler, *Social Welfare Policy in the Context of Economic Restructuring: Lessons from the West Virginia Workers' Compensation Program*, 30 URB. STUDIES 351 (1993); Emily Spieler, *Legal Issues in Occupational Medicine*, in OCCUPATIONAL INJURIES: EVALUATION, MANAGEMENT, AND PREVENTION (Herington and Morse eds., Mosby Yearbook, 1995) [hereinafter Spieler, *Occupational Medicine*]. These prior articles and book chapter provide considerable information and background to a number of the issues addressed in this Article. In particular, Spieler, *Injured Workers*, provides a detailed description of the West Virginia workers' compensation program (through 1992), including issues of underfunding and administrative inefficiency. This Article is a more direct attempt to analyze the underpinnings and effects of SB 250.

25. See, e.g., Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMEN. 185 (1994). After quoting Senator Joseph Biden commenting on Lani Guinier's scholarship ("If she can come up here and explain herself, convince people that what she wrote was just a lot of *academic* musing, who knows?"), Post notes, "Biden's comment candidly questions the social significance of writing that is avowedly 'academic'. . . . Biden uses the adjective 'academic' dismissively, evoking the genial condescension with which mainstream culture regarded intellectual 'eggheads' in the 1950's: Academics are 'theoretical,' 'out-of-touch,' 'impractical.' Lost in abstraction, they cannot be entrusted with 'real world' tasks." *Id.* at 185. Post goes on: "The purpose of legal scholarship is the achievement of truth, whereas the purpose of the work of Washington officials is governance. And these two purposes . . . can be deeply oppositional. . . . Truth, from the perspective of power, can seem hopelessly naive and dangerously ingenuous." *Id.* at 186.

II. WORKERS' COMPENSATION IN WEST VIRGINIA PRIOR TO THE 1995 LEGISLATION

Workers' compensation is a lightning rod for political controversy in every state. At the extremes, injured workers are seen as economic victims of unnecessarily high risk working conditions which cause injuries and disabilities — or as malingering cheats who rely on workers' compensation benefits as an excuse not to work. Employers are seen as the victims of a high cost welfare program — or as victimizers of workers who, injured at work and unable to continue working at their old jobs, are thrown away without adequate compensation. The various proponents of these different views marshal (and sometimes bend) facts and images to support their positions. The fight becomes purely political: Who can win the battle over imagery? Who can wield more power? In West Virginia, the 1995 Legislature answered the last question definitively: labor lost the political fight.

No one really disputes the need for a workers' compensation program.²⁶ The roots of the program lie in compromise: the employer obtains tort immunity through the exclusivity provisions of the statute; the worker receives limited benefits without having to prove fault on the part of the employer; the costs of the program are insured, allowing the employer to pass them on to the buyers of its product or services.²⁷

Without a doubt, everyone has complaints about workers' compensation programs, in West Virginia and elsewhere. At the end of 1994, despite a variety of legislative and administrative efforts, the West Virginia workers' compensation program continued to face significant problems. A clear identification of what those problems were — *and were not* — is essential to an evaluation of the 1995 legislation. In providing this analysis, the following discussion also attempts to point

26. When I spoke, as Commissioner, to business groups, I heard endless complaints about the program. Interestingly, no one ever suggested that employers would be better off fighting out their tort liability for workplace injuries in the civil justice system. Similarly, workers complain bitterly about the inadequacy of the program — but never seek to eliminate the availability of no-fault benefits.

27. See Spieler, *Injured Workers*, *supra* note 7, at 342-81 (discussing the history of the program in West Virginia).

out the ways in which the West Virginia program has differed from the workers' compensation programs in other states.

At the outset, however, it is important to recognize that states' economies and compensation systems differ substantially from one another. The mix of jobs and industries, the rates of injuries and illnesses caused by those industries, and the overall economic health of the state have a substantial impact on the number of workers' compensation claims filed, the severity of those claims, and therefore the costs of a workers' compensation program. While it is clear that these external factors will help determine the costs of the program, there is no proof that the design of a workers' compensation program itself will influence these external factors; that is, the economy of a state or the safety in a state's workplaces are unlikely to be affected substantially by the design of a workers' compensation program.²⁸

Costs are obviously also affected by factors which are internal to workers' compensation programs, including statutory benefit levels, eligibility standards, administrative efficiency, effectiveness of administrative measures, and methods of resolution of disputes. Legislators tend to focus on these factors, which can be controlled directly through legislative action, when discussing workers' compensation. In the workers' compensation arena, interstate comparisons are most often used to point to some particular process or benefit which is "out of line" with other states. In a frenzied attempt to make states economically competitive, state legislators are encouraged to believe two things: first, that rectifying a particular workers' compensation problem will make the state more comparable to and economically competitive with other states; and second, that reducing workers' compensation costs will result in the attraction of more industry or the retention of current industry. There is no persuasive evidence that either of these assumptions is true, however.²⁹

28. For example, premium rates in West Virginia were without question artificially depressed and highly competitive from 1985 to 1989 (and perhaps thereafter). *See infra* notes 199-210 and accompanying text. There is absolutely no evidence that economic growth occurred as a result. Similarly, there is very little evidence that workers' compensation programs alone are successful in triggering improved workplace safety. *See Spieler, Perpetuating Risk?*, *supra* note 7, at 161-244.

29. For a fuller discussion of interstate comparative costs, see Spieler, *Perpetuating*

In assessing interstate differences in these programs, it is also important to remember that every state's compensation system has been haphazardly constructed. Legislative amendments and judicial interpretations have created a system in each state which is unique. Because of both different external economic conditions and different internal programmatic structure, interstate comparisons may have only limited value.³⁰ One must accept as a starting point, therefore, that in designing solutions for workers' compensation problems, each state must embark on a quest for fiscal responsibility and fairness which is informed, but not governed, by the experiences of others.

A. Claims and Costs

1. External Factors Affecting Costs

If you were to paint an economic scene which would inevitably lead to high workers' compensation costs, it would look much like West Virginia. The mix of industry, the industrial and mining history, the decline of employment in these industries, the poor safety record of these industries, and the demographics of the state's working population all contribute to what (at least for workers' compensation purposes) is a truly dismal picture.³¹

Risk?, *supra* note 7, at 242 n.480. See also REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 125 (1972) (reprint 1983) [hereinafter NATIONAL COMMISSION REPORT] (Noting that "legislators likely will hear claims from some employers that the increase in costs will force a business exodus. It will be virtually impossible for the legislators to know how genuine are these claims" and calling this "the specter of the vanishing employer.").

30. The most important lesson I have learned from trying to compare our workers' compensation program with other states' programs is this: generalizations about how West Virginia's workers' compensation benefit system compares with others should be held up to very careful scrutiny. The process of trying to do comparative research on these programs for this Article has been both frustrating and enlightening. Both nomenclature and eligibility standards vary. State statutes do not have uniform indexes; on-line research tools are no better; treatises often provide general statements without specific useful comparisons. Even calculations of costs are inconsistent. In the following discussion, I have noted the source of information when I have attempted to provide interstate comparisons; often, my research assistant was forced to spend laborious hours reading the statutes and case law of other jurisdictions.

31. For a fuller discussion of the contribution of these factors to the unfunded liability

Industrial mix. West Virginians are proud of the state's coal mining and industrial history. West Virginia has historically been economically dependent on coal mining jobs: that industry, more than any other, forms the fabric of our history. But it is no secret that coal mining was — and is — a dangerous industry for its workers.

Hazardous industries, like coal mining, construction, timbering, and some manufacturing, involve the most occupational injuries and illnesses³² and therefore, in any workers' compensation program, generate the most claims. Jobs in these industries tend to be physically demanding and relatively highly paid; injuries are often severe. As a result, these industries also generate the most costly workers' compensation claims.³³ In a state with a greater concentration of these jobs, the total costs of the workers' compensation system *should* be relatively high.³⁴

and problems with refunding that liability, see Spieler, *Injured Workers*, *supra* note 7, at 349-63, 450-56.

32. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR BULL. 2424, OCCUPATIONAL INJURIES AND ILLNESSES BY INDUSTRY, 1991 9-21 (1993) [hereinafter BLS 1991] (Occupational injury and illness incidence rates by industry, 1990 and 1991). *Id.* at 38 (tbl. 5, Occupational injury incidence rates for lost workday cases by industry, 1990 and 1991) (showing, as incidence rate per 100 full-time workers, that agriculture and forestry, manufacturing and mining, and construction have the highest incidence rates among industrial groups); NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, U.S. DEP'T OF HEALTH AND HUM. SERVICES, FATAL INJURIES TO WORKERS IN THE UNITED STATES, 1980-1989: A DECADE OF SURVEILLANCE, NATIONAL PROFILE 19 (1993) [hereinafter NIOSH, FATAL INJURIES] (tbl. US-4, Average Annual Rate of Traumatic Occupational Fatalities by Cause of Death and Occupation Division, US, 1980-1989) (showing that mining, construction, transportation, and agricultural industries' fatality rates far exceed those in other industries; mining has the highest fatality rate in all but one year of the study).

33. The average annual wage in West Virginia in 1994 was \$22,955. LABOR & ECONOMIC RESEARCH, W. VA. BUREAU OF EMPLOYMENT PROGRAMS, WEST VIRGINIA EMPLOYMENT AND WAGES 3 (1994). The average wage in mining in that same year was \$43,335; construction, \$25,027; manufacturing \$31,321; transportation, \$31,689; in contrast, the average wage in service jobs was \$19,820. *Id.* Annual construction wages tend to be lower than mining and manufacturing because of the seasonal nature of the work. The cost of a workers' compensation claim depends on two factors: first, the weekly benefit level (which is calculated in West Virginia for temporary total disability benefits as 70 percent of the pre-injury wage up to a maximum of 100 percent of the state average weekly wage); and second, the severity of the injury which will determine the length of temporary disability and the amount of permanent disability. Because of their wage levels, workers in these industries will almost always collect the maximum benefit rate. The incidence of injuries which result in lost time is also higher. *See* BLS 1991, *supra* note 32, at 38 (tbl. 5). The result is that costly workers' compensation claims tend to cluster in these industries.

34. One comparison of benefit costs looks at the average benefit cost per currently

It should therefore be no surprise that underground coal mining has generated a very large share of the costs, and of the unfunded liability, of the Workers' Compensation Fund (the Fund).³⁵

Industrial and Mining Decline. Mining and manufacturing jobs have been declining since the late 1970s.³⁶ The result of this decline

working employee: it divides the total current cost of workers' compensation (on a cash basis) by the number of people in the state's labor market. West Virginia consistently ranks low (shows a high comparative cost) in this comparison: our costs were estimated to be 184 percent of the national average in 1990. John F. Burton, Jr. & Timothy P. Schmidle, *Workers' Compensation Benefits: Comparing the States, in 1994 WORKERS' COMPENSATION YEAR BOOK I-58* (John F. Burton, Jr. & Timothy P. Schmidle eds., 1994) [hereinafter 1994 WORKERS' COMPENSATION YEAR BOOK] (tbl. 6, Workers' Compensation Benefits Paid in 1990). The comparison is not useful in comparing the internal aspects of the West Virginia workers' compensation program with those of other states: external factors are a primary driver of our high relative costs. Because of the high injury industries, the declining population (relative to population increases in other states), the relatively high wages in these industries, the high injury and fatality rates, and the number of large claims which are paid over a period of years, it is inevitable that West Virginia would do poorly in this comparison. It was for this reason that one consultant to the Workers' Compensation Division noted:

To compare the costs in one state with a high proportion employed in more hazardous occupations to those in a state dominated by clerical employment does not show how the two states would compensate similar employees. All the comparison would say is that one state has higher costs because more people work in dangerous occupations.

HUGGINS FINANCIAL SERVICES, ACTUARIAL ANALYSIS OF FISCAL ISSUES FOR THE WEST VIRGINIA WORKERS' COMPENSATION FUND 33 (1989).

This particular comparison is therefore of very little value in terms of evaluating the current generosity of the compensation system. What this comparison does tell us is that our failure to fund the cost of these claims at the time they were incurred has transferred a huge debt to be paid by current employers (or, through benefit reductions, by current workers); this, of course, is not news.

35. For example, until the mid-1980's, almost all self-insurer second injury claims were from coal mining; by 1990, this had declined to "only" somewhat over half. MILLIMAN & ROBERTSON, INC., STATE OF WEST VIRGINIA, WORKERS' COMPENSATION FUND, ESTIMATED LIABILITY FOR CLAIMS AND CLAIM ADJUSTMENT EXPENSE AS OF JUNE 30, 1993 11 (prepared August 31, 1993) [hereinafter 1993 ACTUARIAL REPORT]. The same pattern holds true in other benefit categories. This is why the premium rates for underground coal mining substantially exceed the rates for other industries. See WORKERS' COMPENSATION DIVISION, BUREAU OF EMPLOYMENT PROGRAMS, ANNUAL STATISTICAL TABLES 1994 01 tbl. 1 (1994) [hereinafter 1994 STATISTICAL TABLES] (as of June 30, 1994).

36. LABOR & ECONOMIC RESEARCH, W.VA. BUREAU OF EMPLOYMENT PROGRAMS, EMPLOYMENT AND EARNING TRENDS 1994 B-6 (1994) [hereinafter EMPLOYMENT AND EARNINGS TRENDS 1994].

is that the high wage base for collection of workers' compensation premiums has declined. Job growth in West Virginia, like elsewhere, has occurred primarily in service sector jobs; these jobs generally require different skills and pay lower wages.³⁷

With the decline of the availability of mining and manufacturing jobs, older workers, many of whom have been partially disabled by occupational injuries and illnesses, have been displaced from the labor market. These workers, due to disabilities, low levels of education, older age, and limited vocational experience, could not find alternative work; they became the source of large numbers of claims for permanent total disability (PTD) benefits from workers' compensation.³⁸ The majority of those receiving PTD awards during the period 1985-1993 were, in fact, injured and disabled in the 1980s or before.³⁹

WEST VIRGINIA NONFARM PAYROLL EMPLOYMENT, BY INDUSTRY
(IN THOUSANDS) ANNUAL AVERAGES

Year	Total nonfarm employment	Mining	Construction	Manufacturing	Service
1972	540.5	53.7	34.2	123.3	329.3
1977	611.6	66.7	39.0	123.8	382.0
1982	607.8	63.5	24.4	98.1	421.9
1987	599.0	36.4	24.0	86.2	452.4
1992	640.0	31.4	27.7	82.2	498.7
1994	674.8	27.8	34.6	81.8	530.6

These data illustrate:

First, all of the growth of employment has occurred in service industries; on average, these industries involve many fewer compensable injuries and occupational diseases. This can best be seen by looking at the relative premium rates charged by the Division for each industrial class, since this rate reflects the costs of injuries by industry. In Fiscal Year 1994, the base premium rate for coal mining was \$29.71 (per \$100 of payroll) and for general construction the base rate was \$14.98. In contrast, the base rate for clerical employees was \$0.57; service jobs also varied widely, but all tended to be well below \$5 per \$100. See 1994 STATISTICAL TABLES, *supra* note 35, at 01 (tbl. 1).

Second, there has been a large decline in employment in mining and manufacturing. Despite the dip and return of construction work, the percentage of workers working in the high wage, high injury "goods producing sector" has declined from 39 percent in 1972 to 21 percent in 1994.

37. See *supra* note 33.

38. See 1994 ACTUARIAL REPORT, *supra* note 8, at A-5 (app. A) (concluding that most PTD's are about retirement age when the award is made, regardless of how long it has been since the injury; for injury year 1981, the average age was 56; for 1972, 62).

39. See 1994 ACTUARIAL REPORT, *supra* note 8, at A-5 (app. A, exhibits A(I)-(III)) (showing the long lag in PTD awards from date of injury). See also MILLIMAN & ROBERT-

High Rates of Injuries and Fatalities. Not only are West Virginia's industries relatively dangerous, but the injury and fatality rates within these industries exceed national norms: *compared, industry to industry, West Virginia's safety record is worse than other states.* West Virginia has been, and continues to be, a state with alarmingly high fatality rates in hazardous industries.

The average annual rate of traumatic occupational fatalities in West Virginia, from 1980 through 1989, was 15.7 per 100,000 workers; this compares to an average U.S. rate of 7.0.⁴⁰ According to separate data from the Bureau of Labor Statistics of the U.S. Department of Labor, West Virginia's fatality rate of 10.6 per 100,000 workers in 1993 was more than double the rates in the neighboring states of Maryland, Ohio, Pennsylvania and Virginia, and was higher than in all contiguous states.⁴¹ This pattern of high injury rates in West Virginia is not new: since the turn of the century, West Virginia's rates of illness, injury and death in workplaces have exceeded national norms for most industries, including coal mining.⁴²

SON, INC., STATE OF WEST VIRGINIA, WORKERS' COMPENSATION FUND, RATE LEVEL PROJECTIONS FISCAL YEAR ENDING 1996 20 (1996) [hereinafter 1996 RATE LEVEL PROJECTION] (prepared Apr. 15, 1995) (indicating average seven year lag between injury date and date of award for second injury permanent total awards; on average, awards during the years 1990 to 1994 were for injuries during 1984 to 1986).

40. See NIOSH, FATAL INJURIES, *supra* note 32, at 82. West Virginia's fatality rate during this period ranked fifth in the country, after Alaska, Idaho, Wyoming, and Montana; in fact, West Virginia was among only these five states in having its fatality rate designated as "very high." *Id.* at 21. Our rate of 15.7 compares with the low rates reported by Connecticut (1.8), Massachusetts (2.3) and New York (2.6). In West Virginia, the largest number of these deaths were in the mining industry; the highest rate of deaths was in the transportation/public utilities industry. *Id.* at 321. The average annual rates of traumatic fatalities per 100,000 workers within industries in West Virginia for this period were: transportation/public utilities, 59.7; construction, 53.2; mining, 40.6. *Id.* at 324. In comparison, national average annual fatality rates for these industries during the same time period were: transportation/public utilities, 23.30; construction, 25.61; mining, 31.91. *Id.* at 10.

41. The rates in neighboring states were: Kentucky, 10.0 per 100,000, Maryland 4.0; Ohio, 3.9; Pennsylvania, 4.8; Virginia, 4.6. Other states in the region similarly had much lower fatality rates (e.g., Tennessee, 6.8; North Carolina, 6.7). These rates were calculated by James Ellenberger, Assistant Director of Occupational Safety and Health, AFLCIO, based upon data in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT 891, FATAL WORKPLACE INJURIES IN 1993: A COLLECTION OF DATA AND ANALYSIS (June 1995).

42. See Spieler, *Injured Workers*, *supra* note 7, at 338 nn.9-10.

Loss of Working Population. During the decade from 1980 to 1990, West Virginia lost population at a greater rate than any other state in the country.⁴³ Younger working age people left; older people remained. The working population of the state became older.⁴⁴ Older workers tend to have fewer injuries, but the permanent effects of any injury tend to be more severe, and therefore the workers' compensation costs associated with the injuries are greater.⁴⁵ Moreover, the relative loss of working population meant that the total payroll of the state did not grow at the rate that other states' payrolls grew. Our ability to fund workers' compensation costs which were incurred but not funded in earlier years declined as a direct result.

Summary. The combination of these factors — dangerous industries, relatively high injury and fatality rates within these industries, declining availability of high wage industrial and mining jobs, and an aging working population — is a guarantee that more workers' compensation claims will be filed and that they will involve greater levels of disability and, therefore, costs. If the benefits provided by the workers' compensation program in this state are equivalent to those provided in other states, the costs of the workers' compensation program should be high. Any attempt to bring costs to a level comparable with national averages inevitably means that the benefits provided to workers will have to be relatively low. It is this reality that underlies the fundamental political disagreement about workers' compensation in West Virginia.

43. Only four states lost population in the 1980s: West Virginia, 8.0 percent loss; Iowa, 4.7 percent loss; Wyoming, 3.4 percent loss; and North Dakota, 2.1 percent loss. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990 21 (111th ed. 1991); THE WORLD ALMANAC AND BOOK OF FACTS 389 (citing the 1990 census).

44. 1 U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION 20 (1982); 1 U.S. BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION 43 (1992).

45. See, e.g., Alan E. Dillingham, *Demographic and Economic Change and the Costs of Workers' Compensation*, in SAFETY IN THE WORKFORCE: INCENTIVES AND DISINCENTIVES IN WORKERS' COMPENSATION 161, 163 (John D. Worrall ed., 1983).

2. Internal Factors Affecting Costs

Workers' compensation programs in every state divide benefits into six primary categories: temporary total, permanent partial, permanent total, fatal, vocational rehabilitation, and medical. In each category there are three internal variables that are critical to assessing the program: the benefit levels which determine the amount that the claimant will receive once his/her eligibility has been accepted; the eligibility requirements which govern whether a claimant will receive the benefits; and the review procedures which are utilized in evaluating and resolving the claim. The following sections analyze the pre-1995 benefit structure, eligibility standards, and trends in West Virginia.

a. Statutory Benefit Levels

Statutory benefit levels establish the amount that is paid once a claim is approved for the payment of benefits.⁴⁶ For a worker who suffers a compensable injury or disease, the statutory benefit levels determine the amount, and thereby the adequacy, of benefits which s/he will receive. West Virginia statutory benefit levels have always been, overall, about average. There is *no* evidence that our statutory benefit structure is or has been more liberal than the level of benefits provided in other states; in a variety of studies, West Virginia consistently has fallen in about the middle of the states in the aggregate analysis of available benefits to injured workers.⁴⁷ Although specific aspects of

46. For example, until 1995, West Virginia workers received four weeks of benefits calculated at 70 percent of their pre-injury wage, to a maximum of two-thirds of the state's average weekly wage, for each percentage point of permanent partial disability they were awarded. W. VA. CODE § 23-4-6(e) (1994) (superseded by SB 250). This type of benefit is easy to compare with other states. The United States Chamber of Commerce annually publishes a summary of the various state statutory benefit provisions. See U.S. CHAMBER OF COMMERCE, ANALYSIS OF STATE WORKERS' COMPENSATION LAWS (1995) [hereinafter CHAMBER OF COMMERCE 1995].

47. See 1994 WORKER'S COMPENSATION YEAR BOOK, *supra* note 34, at I-55 (tbl. 3, Average Cash Benefits Provided by Statute for All Types of Cases, as of January 1993) (ranking West Virginia 28th from the top among 50 jurisdictions; West Virginia's benefits were 72.6 percent of the U.S. average); ACTUARIAL & TECHNICAL SOLUTIONS, INC., WORKERS COMPENSATION STATE RANKINGS: MANUFACTURING INDUSTRY RATES AND STATUTORY

the West Virginia benefit package may be viewed as more liberal,⁴⁸ other aspects have been more restrictive.⁴⁹

b. Trends and Numbers of Awarded Claims

Even if statutory benefit levels are high, a program can be relatively low in cost if few claims are filed. Alternatively, if a large number of costly awards are made, a program with the same statutory benefits may be very expensive. In a state with a high rate of injuries and illnesses, like West Virginia, more claims are likely to be filed and therefore the aggregate costs of the program may be high despite the fact that the statutorily determined benefit package may not be more generous than average. During the 1995 legislative session, concern focused on the number of permanent total disability awards in West Virginia. Many argued that the state's high rate of permanent total disability awards reflected a program that was too generous or lax in making awards and that this generosity — or laxity — caused high premium rates and funding shortfalls.

The following sections provide a more complete picture of claims activity, trends, and differences between West Virginia and elsewhere. Several important conclusions emerge which are relevant to the design of workers' compensation changes for the future. First, the frequency of claims-filing activity for *new* injuries has been declining significantly in recent years.⁵⁰ Second, not only permanent total disability awards, but also awards for fatalities, have significantly exceeded na-

BENEFIT PROVISIONS (1994 ed.) (ranking West Virginia 26th with an index of 0.845, with 1.0 being the national average). Those who argue that our benefit structure is too generous often rely on a different analysis, showing cash benefits per current population of workers. This analysis is discussed *supra* note 34.

48. For example, our wage replacement rate for temporary total disability is 70 percent of the worker's pre-injury wage. W. VA. CODE § 23-4-6(b) (Supp. 1995). Most states set the rate at 66 2/3 percent of the pre-injury wage. See CHAMBER OF COMMERCE 1995, *supra* note 46, at 23-27 (chart VI, Income Benefits for Total Disability).

49. For example, duration of temporary total disability benefits in West Virginia is capped at 208 weeks. W. VA. CODE § 23-4-6(c) (Supp. 1995). Many states do not cap the length of disability, or set the maximum length at longer than 208 weeks. See CHAMBER OF COMMERCE 1995, *supra* note 46, at 23-27 (chart VI, Income Benefits for Total Disability).

50. See *infra* Appendix A.

tional averages.⁵¹ Third, the rate of permanent total disability awards, based on the year of *injury* (instead of the more frequently reported year of award) peaked for the years 1984-1988 and appears to have declined thereafter.⁵² Fourth, neither temporary total nor permanent partial disability awards have been a primary cost to our workers' compensation program.⁵³ And fifth, the portion of total compensation costs paid for permanent disability in West Virginia (including both partial and total), has not exceeded the portion expended in other states, despite a relatively high rate of permanent total disability awards here.⁵⁴

Temporary Total Disability (TTD) Benefits. TTD benefits are paid to workers who are temporarily off work because of an injury; these claims are also, for obvious reasons, called "lost time claims." In West Virginia, workers can collect these benefits until they reach "maximum degree of improvement," but only for a maximum of 208 weeks.⁵⁵ In most claims, the injured worker receives the benefits for a period which is *much* shorter than the four year maximum; only a relatively small number of workers continue to collect TTD benefits six months or more after an injury.⁵⁶ TTD claims are almost invariably filed im-

51. *Id.*

52. *See infra* notes 113-116.

53. *See infra* notes 60-61, 77.

54. *See infra* note 77.

55. W. VA. CODE § 23-4-7a(e)(3) (Supp. 1995).

56. According to data supplied by the Division, "Of claimants who filed lost time claims during 1988, 44.2% had their cases closed on a lost time basis within 15 days of the injury, 66.72% within 30 days, 80.74% within 60 days, 85.79% within 90 days, 88.82% within 120 days." Spieler, *Injured Workers*, *supra* note 7, at 365-66 nn.106-108. Information on duration of TTD benefits is not reported in any reports by the Division, and therefore is difficult to update. It is important to note that closure of a claim on a TTD basis in fact only means that the injured worker has reached his/her maximum degree of improvement, not necessarily that s/he has returned to work. *See* W. VA. CODE § 23-4-7a(c)(3) (Supp. 1995). In calculating this information for 1988, I made the assumption (based upon anecdotal and empirical experience) that TTD claims which are closed quickly generally involve a return to work to the pre-injury employer. This rapid return to work was true despite the fact that the rate of benefits for temporary total disability was (and is) slightly higher than is available to temporarily disabled workers in other states and the fact that many of the "lost time" injuries occurred in industries and jobs which are physically challenging. *See also* DAVID DURBIN & PHILIP S. BORBA, *WORKERS' COMPENSATION INSURANCE: CLAIM COSTS, PRICES, AND REGULATION* at x (David Durbin & Philip S. Borba eds., 1993) (noting

mediately following the occurrence of an injury and, of all the types of claims, these probably best reflect *current* workplace conditions.⁵⁷

The number of lost time claims being filed by West Virginia workers declined steadily and significantly in the years preceding 1995.⁵⁸ A change in the industrial mix presumably played a major part in this drop.⁵⁹ The current fiscal problems confronting the workers' compensation program are not, therefore, a reflection of increasing utilization of the Fund by workers who are involved in new injuries.

Costs for temporary total disability are generally not a primary focus of concern in workers' compensation programs. They represent time-limited benefits for people who are clearly off from work. Although employers often complain about particular employees whom they suspect of fabricating injuries (or the work-relatedness of those injuries) or of staying off work for too long, TTD costs in the aggre-

in the book's preface that "[o]ver time, most workers fully recover from a lost worktime disability and return to work").

57. Claims involving permanent disability (both partial and total) are almost invariably filed for injuries which occurred in the past or for illnesses which developed over a period of time. This means that the awards in claims for permanent disability benefits provide a better picture of past workplace conditions than current conditions. A large number of claims are also filed for "no-lost-time" injuries, which generally involve the payment of medical benefits only. These are claims which involve minor injuries for which the worker was not absent long enough to qualify for TTD benefits; TTD benefits are not payable until an individual has been absent at least three days. *See* W. VA. CODE § 23-4-5 (1994).

58. *See infra* Appendix A. Lost time claims dropped from 25,394 (when subscribing and self-insured claims are combined) in 1988 to 20,846 in 1994; prior to 1988, the Division's data were not kept to divide lost time and no lost time claims. *See* 1994 STATISTICAL TABLES, *supra* note 35, at 18 (tbl. 11, Claims filed by year 1913-1994, self-insurers included). During this same period of time, the non-federal, non-agricultural workforce grew from 593.7 thousand in calendar year 1988 to 656.6 thousand in 1994. *See* EMPLOYMENT AND EARNINGS TRENDS 1994, *supra* note 36. Duncan Ballantyne of the Workers' Compensation Research Institute reported slightly different numbers in his presentation to the Performance Council on December 16, 1995; his data showed a total decline in claims filing, from 13.1 claims per 100 workers in 1986 to 10.7 in 1994. Duncan Ballantyne, West Virginia Workers' Compensation Performance Council, Benefit Cost Trends and PTD/SIF Use in West Virginia (Dec. 16, 1994) (unpublished presentation graphs, on file with author) (date shown on minutes of Compensation Programs Performance Council for meeting on Dec. 16, 1994). No source disputes that this decline is occurring.

59. *See supra* note 36.

gate have not been a major problem.⁶⁰ They also represent a very small component of the total outstanding liabilities of the Fund.⁶¹ Lost time claims are important for another reason, however: most other benefit costs are derived from the initial injuries involving TTD bene-

60. The workers' compensation financial picture is defined by two separate issues. The first involves current costs. In general, current costs are measured on an accrual, not a cash basis. This means that a current year's "costs" are actually the current and future costs of injuries and exposures to disease-causing agents which occurred in that current year; they therefore involve substantial predicted future costs. The second issue is the unfunded liabilities or debt which accrued in the past as a result of a failure to fully fund costs on an accrual basis. *See infra* Part II.B.

Prior to SB 250, TTD benefits represented 13 percent of newly incurred costs in 1995 (on an undiscounted basis) and 22 percent (when discounted by 7%). *See* 1996 RATE LEVEL PROJECTION, *supra* note 39, at 1-2 and exhibit II. In states on which the National Council on Compensation Insurance (NCCI) provides data, TTD costs represent from 4.4 percent (Minnesota) to 25.9 percent (Massachusetts) of annual incurred costs. In most states, TTD represents less than 10 percent of total benefit cost. NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., ANNUAL STATISTICAL BULLETIN 209 (1995) [hereinafter NCCI 1995] (exhibit X) (showing data for 1991-1992 policy year).

Although I provide these comparisons for purposes of background, it is essential to note that data are prepared differently by NCCI and the Fund. The allocation of costs among benefit types may not be fully analogous; therefore, this comparison, which I provide for other benefit components as well, must be utilized only as a possible benchmark, and always with caution.

61. These outstanding liabilities — the Fund's highly publicized deficit — are the result of a decade long mismatch between revenues and obligations which were assumed to pay benefits. Since these liabilities involve promises to pay money in the future, they can be reported on an undiscounted basis or a discounted basis. Undiscounted debt basically recognizes the full future dollar cost of promises made in the past. Discounted figures, on the other hand, recognize that if funds are allocated today to pay for the future costs, these funds will accrue interest; therefore, the future obligations are "discounted" to present dollar value, utilizing assumptions regarding the rate of growth of money over the period of time the obligation will be paid. The total amount of the debt will vary considerably based upon the interest rate assumptions which are utilized in making this calculation.

TTD benefits represent only a very small component of the deficit. On an undiscounted basis, TTD was only 2.2 percent of the total outstanding liabilities of the Fund as of June 30, 1994, or 4.3 percent on a discounted basis (using a 7% discount rate). *See* 1994 ACTUARIAL REPORT, *supra* note 8, exhibit I(B). This is consistent with past actuarial reports on the Workers' Compensation Fund. Since discounting results in recalculating liabilities based upon the present dollar value of future costs, it decreases the apparent costs of the claims that extend farthest into the future most dramatically. TTD costs primarily occur in the year that the claim is incurred; few claims last into a second year on a TTD basis. *See supra* note 56. Therefore, TTD costs are greater as a component of discounted liabilities than of undiscounted liabilities.

fits.⁶² Therefore, as claim rates for new TTD injuries decline, the future liability of the program for *all* claims should decline as well. This is a critical fact when making decisions about future costs and needed changes to the system.

Permanent Partial Disability (PPD) Benefits. "Permanent disability" involves the impairment or disability which remains after a worker has reached maximum degree of improvement after an injury. Permanent *partial* disability presumes that the worker is not completely unable to work; these benefits are actually often paid after an individual has returned to work.⁶³ In general, PPD awards are expressed as a percentage; the statute provides a conversion of the percentage to monetary benefits.⁶⁴

Historically, in most states, the compensation for permanent disability was intended to balance both impairment (the medical impact of an injury), functional impairment⁶⁵ (the impact of the injury on general ability to function in life), and disability⁶⁶ (the economic loss caused by the injury, particularly the loss of wages or wage-earning potential of the injured worker).⁶⁷ According to Professor Larson's

62. Occupational illnesses, including occupational pneumoconiosis claims, which involve the slow evolution of disabling conditions, are not begun with a claim for temporary total disability benefits. In contrast, injury claims have their genesis in traumatic events which result in an initial period of temporary total disability followed, in some cases, by a remaining permanent disability. See John D. Worrall et al., *The Transition from Temporary Total to Permanent Partial Disability: A Longitudinal Analysis*, in WORKERS' COMPENSATION INSURANCE: CLAIM COSTS, PRICES, AND REGULATION 51-56 (David Durbin & Philip S. Borba eds., 1993); Terry Thomason, *The Transition from Temporary to Permanent Disability: Evidence from New York State*, in WORKERS' COMPENSATION INSURANCE: CLAIM COSTS, PRICES, AND REGULATION 67-96 (David Durbin & Philip S. Borba eds., 1993).

63. This fact often creates a great deal of animosity. Many small employers seem to view workers' compensation benefits as wage replacement benefits only. As a result, they have difficulty understanding why an individual who has returned to work can collect weekly benefits.

64. For example, in West Virginia, one percentage point equals four weeks of weekly benefits, calculated as two-thirds of the worker's pre-injury wage to a maximum of two-thirds of the state average weekly wage (until February 1995) and capped at 100 percent of the state average weekly wage (under the 1995 legislation). W. VA. CODE § 23-4-6(d) (Supp. 1995).

65. Also referred to as nonwork disability.

66. Also referred to as work disability.

67. For a general and more complete discussion of permanent partial disability benefits

leading treatise, "The proper balancing of the medical and the wage-loss factors is . . . the essence of the 'disability' problem in workmen's compensation."⁶⁸

And, indeed, this has caused problems in many workers' compensation programs.⁶⁹ The West Virginia system before the 1995 legislation theoretically considered both disability and impairment in setting a permanent partial disability percentage. The Commissioner (and later the Office of Judges⁷⁰) clearly could consider non-medical factors in determinations of the appropriate level of benefits for both scheduled and non-scheduled injuries.⁷¹ As a matter of practice, however, the PPD amount was based upon physicians' reports which included a recommended percentage of permanent disability; physicians tended to base their assessments on medical, not economic, criteria. With the exception of hearing loss and respiratory disease claims, there was no particular guidance from the workers' compensation program to physicians to assist them in making these assessments.⁷² Under the "rule of

in workers' compensation, see MONROE BERKOWITZ & JOHN F. BURTON, JR., *PERMANENT DISABILITY BENEFITS IN WORKERS' COMPENSATION* (1987); John F. Burton, Jr., *Permanent Disability Benefits: A Conceptual Overview*, in 1995 *WORKERS' COMPENSATION YEAR BOOK I-1* (John F. Burton, Jr. & Timothy P. Schmidle eds., 1995).

68. 1C ARTHUR LARSON, *WORKMEN'S COMPENSATION LAW* § 57.11, at 10-17 (1995). [hereinafter LARSON].

69. *Id.* See also John F. Burton, Jr. & Timothy P. Schmidle, *Permanent Disability Benefits Data: Frequency and Cost Trends*, in 1995 *WORKERS' COMPENSATION YEAR BOOK I-7* (John F. Burton, Jr. & Timothy P. Schmidle eds., 1995).

70. The office of judges was created in 1990 by statute to hear administrative appeals of initial rulings in workers' compensation claims. W. VA. CODE § 23-5-1g (1994) (superseded by W. VA. CODE § 23-5-8 (Supp. 1995)).

71. Scheduled injuries, for which a minimum permanent disability is set by statute, are included in all states' workers' compensation laws. They were initially designed to set either a level of compensation for listed injuries irrespective of whether the claimant suffered any economic loss as a result of the injury. See W. VA. CODE § 23-4-6(f) (Supp. 1995) (setting minimum percentage rating for listed injuries). Administrative and adjudicative processes set compensation levels for unscheduled injuries. See *Posey v. State Workmen's Compensation Comm'r*, 201 S.E.2d 102 (W. Va. 1973). Although *Posey* was a case addressing permanent total disability, it also specifically held that, in determining the percent of disability for a workers' compensation claimant, consideration must be given to the impairment of the employee's earning capacity, to the effect of possible impairment of his efficiency at work, and the impairment to the normal pursuit of everyday living.

72. Legislative rules set the standards for hearing loss, W. Va. C.S.R. section 85-13-2 (1993) (Protocols and Procedures for Performing Audiological Examinations and Evaluations

liberality" in West Virginia, the more liberal assessment was to be accepted, unless there was some good reason to reject it;⁷³ as a matter of practice, however, the rule was not uniformly applied in all cases.⁷⁴ The reliance on physician recommendations and the nature of the administrative processing of claims, which did not include a vocational assessment component, resulted in a system which did a mediocre job of evaluating the impact of the occupational injury or disease on the individual's participation in the labor market, wages, wage-earning capacity or his/her functional limitations. The result was that PPD benefits often failed to approximate accurately the economic losses attributable to an occupational injury.

Nevertheless, relatively little political attention was focused on the methodology for computing permanent partial awards in West Virginia until recently.⁷⁵ In part, the relatively liberal permanent total disability

in Workers' Compensation Claims for Noise-Induced Hearing Loss); and occupational pneumoconiosis, W. Va. C.S.R. section 85-1-20 (1986) (Procedure in Occupational Pneumoconiosis). Occupational pneumoconiosis actually includes all occupational lung diseases caused by inhalation of particles. W. VA. CODE § 23-4-1 (Supp. 1995).

73. The statute itself is to be interpreted liberally. *See, e.g.*, *Hughes v. State Workmen's Compensation Comm'r*, 191 S.E.2d 606 (W. Va. 1972) (compensation statutes are remedial in nature and must be given a liberal interpretation in favor of the claimant); *Dunlap v. State Workmen's Compensation Comm'r*, 232 S.E.2d 343 (W. Va. 1977) (same); *Persiani v. SWCC*, 248 S.E.2d 844 (W. Va. 1978) (where there is conflicting evidence in an occupational pneumoconiosis claim, the Commissioner may not arbitrarily choose to disbelieve claimant's evidence); *Javins v. Workers' Compensation Comm'r*, 320 S.E.2d 119 (W. Va. 1984) (when conflicting medical evidence is presented to the Appeals Board, the findings supporting the highest degree of impairment must be accepted unless shown to be unreliable, incorrect, or attributable to another cause). In general, liberality in a workers' compensation system simply means that the claimant is given the benefit of the doubt when there is conflicting evidence.

74. This observation is based upon the following: anecdotal information from attorneys; claims files which I reviewed as Commissioner; and reported cases in which the agency was reversed because the rule was not followed.

75. There are, of course, exceptions to this. For example, the United Mine Workers of America and its membership successfully lobbied for a statutory 5 percent benefit for any worker with x-ray evidence of lung disease, even if the worker was neither impaired nor disabled. W. VA. CODE § 23-4-6a (Supp. 1995). After a writ of mandamus which resulted in a consent order requiring the payment of compensation for noise-induced hearing loss, a business-led lobbying effort resulted in statutory limitations on this compensation. W. VA. CODE § 23-4-6b (1994). And there has been a continuous political attack by the Chamber of Commerce and other business groups on the rule of liberality. But since 1980, when I began to pay careful attention to workers' compensation legislation, there has been no coordi-

definitions absorbed some of the most economically disadvantaged claimants.⁷⁶ More importantly, in sharp contrast to other jurisdictions, PPD costs have simply not been a very large component of total workers' compensation costs here.⁷⁷

nated attempt to change the fundamental methodology for the calculation of PPD awards in West Virginia.

76. See *infra* notes 87-123 and accompanying text for discussion of permanent disability benefits prior to 1995.

77. Before the enactment of SB 250, PPD costs in 1995 were predicted to be 11 percent of the total undiscounted incurred losses and 15 percent of the discounted losses (discounting at 7%). See 1996 RATE LEVEL PROJECTION, *supra* note 39, at 1-2 and exhibit II. In other jurisdictions, PPD costs are one of the larger components of workers' compensation claims costs: according to NCCI data, permanent partial costs averaged 41.2 percent of incurred costs. These data include 44 states, the District of Columbia, and the federal longshoreman and harborworkers program. See NCCI 1995, *supra* note 60, at 290 (exhibit X, Distribution of Incurred Losses by Injury Type by State). According to another source, permanent partial costs nationally averaged 73.14 percent of total costs. John F. Burton, Jr. & Timothy P. Schmidle, *Permanent Disability Benefits Data: Frequency and Cost Trends, in 1995 WORKERS' COMPENSATION YEAR BOOK*, *supra* note 69, at 1-16 (tbl. 5, Costs of Permanent Disability Cases, by Jurisdiction, 1988 (Ultimate Report Basis)). See also BERKOWITZ & BURTON, *supra* note 67, at vii (Noting in the book's preface that, at that time, "[a]lthough permanent partial cases account for less than 25 percent of the workers' compensation cases paying cash benefits, the cash benefits in these cases account for more than 60 percent of all such payments. . . . Permanent partial benefits not only are the most expensive part of workers' compensation, they are the most controversial and complex aspect of that program.").

Permanent partial benefits constituted 4.9 percent of the total outstanding liabilities of the Fund in Fiscal Year 1994 and 8.2 percent of discounted liabilities. 1994 ACTUARIAL REPORT, *supra* note 8, exhibit 1(B). Like temporary total benefits, these benefits are paid in a shorter time frame than permanent total or fatal benefits; they therefore show up as a larger proportion of discounted liabilities, since benefits paid in the more distant future are more heavily reduced when discounted to present dollar value. According to the Division's annual report, permanent partial benefits have constituted about 15 percent of total benefits paid (on a cash, not an incurred, basis); this has remained steady since 1985, the period for which the information is reported. See 1994 STATISTICAL TABLES, *supra* note 35, at 22 (tbl. 15, Benefits Paid 1913-1994, Self-insurers not included (cash basis)).

The permanent partial award rate in West Virginia is substantially higher than the average rate of incurred PPD claims in other states for which the NCCI reports data. See *infra* Appendix A; NCCI 1995, *supra* note 60, at 296 (exhibit XII, Frequency by Injury Type). The PPD award rate in West Virginia is below the rate of incurred claims in California (2089) but above the rates of the other states included in the NCCI comparison. Please note, however, that this comparison is not fully valid: West Virginia reports "awards" (that is, the final adjudication of claims which may have been pending for a substantial period of time); the NCCI data are based upon incurred claims (that is, claims arising from injuries which occur in that year). Awards are often not made in the year of injury. If a

The assessment of PPD has, however, caused serious administrative headaches. Physicians' reports lacked consistency and were not based on recognized standards of evaluation;⁷⁸ administrators viewed many physicians filing reports in these cases as mere "hired guns" for one side or the other. More importantly, PPD awards ultimately form the foundation for permanent total disability awards, which are without question a huge financial drain on the program.⁷⁹

On September 13, 1994, the Division filed a new rule adopting the use of the *AMA Guides to the Evaluation of Permanent Impairment*⁸⁰ (*AMA Guides*) for use in the evaluation of impairment.⁸¹ The hope,

change occurs in injury rates and the rate of claims filing falls, as has occurred in West Virginia, the rate of awards in a year will exceed the rate of incurred claims in that same year. The longer it takes for a case to mature to a final award, the more extreme the effect of this will be.

The relatively low proportion of costs attributable to permanent partial disability in West Virginia is undoubtedly in part due to the fact that other costs — particularly permanent total disability and fatal costs — represent a larger drain on workers' compensation dollars. It is therefore interesting to note the following. The combined proportion of incurred costs predicted to be paid for permanent disabilities in West Virginia in FY 1995 was 46 percent (undiscounted) and 33 percent (discounted at 7%). It was predicted to drop, after the enactment of SB 250, to 33 percent and 26 percent respectively. According to one source, this is a lower proportion of benefits than is spent on permanent disabilities nationally. John F. Burton, Jr. & Timothy P. Schmidle, *Permanent Disability Benefits Data: Frequency and Cost Trends, in 1995 WORKERS' COMPENSATION YEAR BOOK*, *supra* note 69, at I-14 (tbl. 4) (permanent partial disability cases accounted for 67.11 percent of cash benefits paid in 1988; permanent total cases, when taken to "ultimate report basis" accounted for 7.68 percent of cash benefits; permanent disability benefits therefore accounted for 74.79 percent of cash benefits in 1988). In contrast, NCCI reports that combined permanent disability benefits on average represented 44.4 percent of total benefits. *See* NCCI 1995, *supra* note 60, at 290 (exhibit X, Distribution of Incurred Losses by Injury Type by State).

78. The exceptions were assessments of noise induced hearing loss and respiratory disease which were performed pursuant to specific rules. *See supra* note 72.

79. *See infra* notes 104-106 and accompanying text.

80. AMERICAN MEDICAL ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1993) [hereinafter *AMA GUIDES*].

81. W. Va. C.S.R. sections 85-18-1 to -7 (1994) (Guidelines for Permanent Impairment Evaluations, Evidence, and Ratings). In general, the *AMA Guides* do provide a more uniform mechanism for evaluating whole body impairment; it invites criticism for a variety of other reasons, however. For a more complete discussion of the use of the *AMA Guides* in workers' compensation claims, *see infra* notes 278-282 and accompanying text and note 453. This rule was among the first adopted utilizing rule-making procedures enacted in 1993 which exempted new rules from legislative review but required rules to be adopted by the Performance Council, rather than the Commissioner. *See* W. VA. CODE § 21A-3-7(c) (1994).

apparently, was to increase the consistency of impairment evaluations by physicians and to transfer the assessment of vocational impact of the injury (i.e. disability) to someone else.⁸² The rule left open the question of how to convert the physicians' impairment assessments into disability ratings.⁸³ At least that was the understanding of the Workers' Compensation Committee of the State Bar, which set up a subcommittee to discuss various possible approaches to assessing disability in these claims.⁸⁴ No movement was made by the Division to

82. This approach is consistent with the recommendation of the American Medical Association in the *AMA Guides*:

The critical problem is that no formula is known by which knowledge about a medical condition can be combined with knowledge about other factors to calculate the percentage by which the employee's industrial use of the body is impaired. Accordingly, each commissioner or hearing official must come to a conclusion on the basis of assessment of the available medical and nonmedical information. The *Guides* may help resolve such a situation, but it cannot provide complete and definitive answers. Each administrative or legal system that uses permanent impairment as a basis for disability ratings should define its own means for translating knowledge about an impairment into an estimate of the degree to which the impairment limits the individual's capacity to meet personal, social, occupational, and other demands. **It must be emphasized and clearly understood that impairment percentages derived according to *AMA Guides* criteria should not be used to make direct financial awards or direct estimates of disabilities.**

AMA GUIDES, *supra* note 80, at 1/4-1/5 (bold in original).

83. The rule itself stated: "[T]he council intends to develop the additional standards necessary for the determination of requests for permanent disability beyond physical impairment." W. Va. C.S.R. section 85-16-1.5 (1994). And again, "This rule does not apply to the additional factors, beyond impairment, that determine the degree of disability suffered by a claimant." W. Va. C.S.R. section 85-16-2 (1994). In its concern for objectivity and consistency, the Performance Council, in this rule, essentially limited the role of primary care treating physicians, who lack specific training in the application of the *AMA Guides*, to assessments of impairment with ratings below 15 percent. W. Va. C.S.R. section 85-16-4.3 (1994) (rule "not applicable to examinations and opinions provided to the Commissioner by a claimant's treating physician pursuant to W. VA. CODE § 23-4-7(a)(c)(1)"); and W. Va. C.S.R. section 85-16-5.2 (1994) (requiring the qualifications of the expert giving the opinion be sufficient "to qualify the opinion giver as an expert in the field of impairment determination"). The duty of the Commissioner to accept ratings below 15 percent from treating physicians was mandated not only by statute, but reiterated by the Supreme Court of Appeals of West Virginia in *Dalton v. Spieler*, 401 S.E.2d 216 (W. Va. 1990). In most disability compensation programs, however, treating physicians' opinions are given greater weight than the opinions of experts who provide only consultant examinations.

84. The membership on this committee, which included prominent claimant and employer attorneys as well as two former Fund administrators (Bradley Crouser and myself), agreed that this conversion was important. The final report of the subcommittee read:

develop a system for disability evaluation after final adoption of the rule, however; perhaps there was never any intention of developing a conversion system.⁸⁵ In any event, disability assessments for PPD became unnecessary after the enactment of SB 250 which mandates an impairment-only PPD system.⁸⁶

Permanent Total Disability (PTD) Claims. During the 1995 legislative session, public concern focused on the high number of very expensive PTD awards made by the Workers' Compensation Fund and on the aggregate cost of these awards. And, in fact, a careful analysis shows that these awards have represented a serious financial drain on the Workers' Compensation Fund.

There is consensus that impairment does not equal disability. The present system of equating whole man impairment with disability may result in a claimant being under compensated or over compensated. . . . While the implementation of the AMA Guides, 4th Edition to assess medical impairment will tend to produce a more uniform result in medical impairment determination than has existed in the past, this system also reduces the flexibility that examiners may have had in factoring into disability determinations such things as job loss or impairment of activities of daily living.

Therefore, the committee recommends that the Commissioner, in the appropriate instances, take into consideration in partial disability determinations, not only medical impairment but whether or not the claimant returned to work, whether there is a demonstrable impairment of earnings capacity and whether there is a substantial impairment in the quality of life. Disability determination would thus be a two (2) step process, including not only medical impairment but also these other factors. . . .

Of practical concern to the sub-committee is the financial impact of any change in disability determination.

Memorandum from Edward G. Atkins, Chairman, to Members of the Workers' Compensation Committee, Re: Report and Recommendation of the Workers' Compensation Subcommittee on Impairment v. Disability (undated) (on file with author).

85. The legislation proposed to the Performance Council, and then to the Legislature, eliminated the need for this conversion. *See infra* Part III.A.1. Some have suggested that the Commissioner intended, when proposing to the Performance Council the use of the *AMA Guides* by rule, to eliminate the need to assess disability later.

86. *See* W. VA. CODE § 23-4-6(i) (Supp. 1995) (setting impairment as the sole basis for awarding permanent partial disability benefits). The adoption of the *AMA Guides* by the Performance Council was later viewed as an endorsement of the impairment-only rating approach. It is important to note that the adoption of a specific impairment rating system does not itself suggest that the Performance Council endorsed the adopting of an impairment-only rating system.

PTD or "life" awards were, prior to SB 250, made to workers who, due to occupationally-caused disabilities, became unable to participate effectively in the labor market. In West Virginia, "regular" PTD awards were made to workers whose occupational injury or illness effectively rendered them unable work. Second injury awards were made to individuals who, through the combined effect of prior disabilities and a subsequent occupational injury, became permanently and total disabled;⁸⁷ the prior condition did not have to be work-related. Consideration was also given to the claimant's ability to engage in employment which required the same skills or abilities s/he had used on a regular basis in the past,⁸⁸ as well as his/her level of education, intelligence, trainability and possession of transferable skills⁸⁹ which might make him/her unable to participate effectively in the labor market. In effect, the occupational disability was viewed as the ultimate contributing factor to the worker's inability to work.⁹⁰

In 1983, the Supreme Court of Appeals of West Virginia adopted the "odd lot" doctrine, clearly endorsing the granting of second injury life awards to people who were displaced from employment;⁹¹ when an employer failed to reemploy an injured employee, the court turned to the employer to show that suitable work was regularly and continuously available for the claimant in the labor market.⁹² This endorsement occurred just as the downturn in the coal industry left many poorly educated coal miners out of work.⁹³ Many of these workers suffered from permanent disabilities due to occupational injuries and

87. W. VA. CODE § 23-3-1(d)(1) (1994) (amended by SB 250, W. VA. CODE § 23-3-1(d) (Supp. 1995)). Unlike in many other states, the second injury fund is used exclusively for PTD awards.

88. W. VA. CODE § 23-4-6(n) (1994) (amended by SB 250, W. VA. CODE § 23-4-6(u) (Supp. 1995)).

89. *See, e.g.*, *Hunter v. Workers' Compensation Comm'r*, 386 S.E.2d 500 (W. Va. 1989) (citing these factors but also concluding that age alone would not suffice to justify a life award).

90. For a detailed discussion of eligibility for PTD awards in West Virginia, *see* Spieler, *Injured Workers*, *supra* note 7, at 350-55.

91. *Cardwell v. State Workmens' Compensation Comm'r*, 301 S.E.2d 790 (W. Va. 1983).

92. *Id.* at 795.

93. *See supra* note 36.

disease, reflecting prior excessive rates of injury and illness. People who, in a different economy, might have continued to work, were displaced by a combination of economic and disability factors: they became unemployed and unemployable.⁹⁴ Several procedural quirks in the West Virginia system — including the ability to keep partial disability cases open⁹⁵ — created an ever-expanding pool of displaced workers who were arguably eligible for these second injury life awards. The numbers of awards granted each year, although still not large in comparison to the total workforce, grew dramatically as a result.⁹⁶

Some aggressive claimants' attorneys used reopening procedures to obtain PTD benefits for clients who were permanently unable to participate in the transforming labor market. The notorious failure to establish a mechanism for defending the Fund against these claims contributed substantially to the growing number of awards,⁹⁷ in many cases, employers simply had no financial incentive at all to fight the worker's claim for benefits.⁹⁸ Legislative amendments to the Workers' Comp-

94. See EDWARD H. YELIN, *DISABILITY AND THE DISPLACED WORKER* 151 (1992) (commenting, based upon his study, that "persons with disabilities are the wrong kind of leading edge, being the first fired from industries shedding workers and the last hired in ascending ones"). Yelin goes on, certainly striking a note relevant to the discussions in West Virginia:

Older workers generally are vanishing from the labor market, but older workers with disabilities are vanishing faster than are those without them. Public policy toward disability is not concerned with these trends. To the extent policy initiatives reflect collective angst, we worry about work disability because we fear that a pandemic of aging-related medical need will swamp Medicare, or we worry about the impact of disability benefits on the incentive to work, or we worry about the absolute cost of disability benefit programs. Thus, public policy toward disability becomes a sideshow for other concerns about the fiscal health of the economy in general. . . . Work disability can be displaced from public view by the arbitrary decision to reduce benefit levels, but this has no effect whatsoever on the real problem of declining labor force participation among persons with disabilities.

Id.

95. For a discussion of these procedural issues, see *infra* Part II.A.2.d.

96. See *infra* Appendix A.

97. Although the Supreme Court of Appeals of West Virginia endorsed the idea that the Fund should be defended by the Commissioner or the Attorney General when second injury claims were made, *Cline v. State Workmen's Compensation Comm'r*, 196 S.E.2d 296 (W. Va. 1973), successive Commissioners failed to do so effectively. More recently, attorneys from the Office of the Attorney General have been engaged to mount a defense, at least in some of these cases.

98. When a second injury award is granted, the employer is only "charged" with the

sation Act in 1990 for the first time explicitly permitted the Commissioner to mount a defense to second injury claims which were not defended by employers;⁹⁹ this has only recently been done, however.¹⁰⁰

Due to this combination of factors, PTD awards became a very high cost component of the West Virginia compensation program. Until 1993, PTD benefits were awarded for life, irrespective of the time of retirement or alternative sources of income for the retiree;¹⁰¹ as a result, despite the fact that most PTD awards were made to individuals who were fairly old,¹⁰² each claim represented a large incurred charge to the Fund.¹⁰³ In the aggregate, PTD awards represented 37 percent

component of the award which is attributable to the last occupational injury. W. VA. CODE § 23-3-1(d) (Supp. 1995). This means, for subscribing employers, that only this portion of the award is considered when their premium rates are experience-rated. Self-insured employers who maintained second injury fund coverage were not experience-rated for this use until 1991. W. VA. CODE § 23-2-9 (Supp. 1995). For further explanation of this problem, see Spieler, *Injured Workers*, *supra* note 7, at 352 n.66.

99. W. VA. CODE § 23-5-1g (superseded by SB 250, W. VA. CODE § 23-5-8 (Supp. 1995)).

100. According to Robert Smith, Chief Administrative Law Judge of the Workers' Compensation Office of Judges, his records indicate that, in a group of 1487 claims for PTD awards which were reviewed by the Office of Judges in 1992-95, the Attorney General actively appeared for the Commissioner in 91 cases; awards of permanent total disability were made in 777 cases, many of which were undefended by either the Attorney General or employers' counsel. Telephone Interview with Robert Smith (Nov. 10, 1995).

101. W. VA. CODE § 23-4-6(d) (Supp. 1995). In 1993, the Workers' Compensation Act was amended to require an offset of old-age Social Security benefits against PTD benefits, W. VA. CODE § 23-4-23 (1994), and to eliminate the granting of PTD awards after a claimant terminated active employment and began to receive full old-age retirement benefits under the Social Security Act. W. VA. CODE § 23-4-24 (Supp. 1995). The statute was amended again by SB 250 to eliminate entirely the payment of PTD benefits after a claimant reached the age at which s/he became eligible for old-age benefits. See *infra* notes 470-473 and accompanying text.

Most states pay PTD benefits for life or for the duration of disability. See LARSON, *supra* note 68, at B-8 (app. B). A few states set specific monetary caps on these awards (e.g., Indiana, \$214,000; Kansas, \$125,000; Mississippi, \$109,687); these states are in the minority, however. *Id.* Other states, like West Virginia, provide for some offset of workers' compensation when other benefits are received. *Id.*

102. See *supra* note 38.

103. For years, the Fund's staff used the figure of about \$350,000 per award. This was intended to represent an average for the total of all benefits paid on a claim from the date of onset of total disability forward; this was not, however, an actuarially calculated figure

of predicted incurred costs to the Fund in 1995 (on an undiscounted basis) and 18 percent (on a discounted basis);¹⁰⁴ this is far higher than the allocation of workers' compensation benefits to permanent total disability in other states.¹⁰⁵ Perhaps more alarmingly, PTD obligations (including both awarded and incurred but not yet awarded claims), represented almost 60 percent of the undiscounted liabilities of the Fund as of June 30, 1994.¹⁰⁶

There is no question that individuals who would be ignored by some other workers' compensation systems became eligible to receive life awards in West Virginia. It is not true, however, that other state workers' compensation systems did not adopt the "odd-lot" or similar doctrines which allowed consideration of these displaced workers for large monetary awards; in fact, many states have recognized the need to provide workers' compensation awards to individuals who ultimately became unemployable as a result of a combination of factors which include age, education, mental capacity and the unavailability of appropriate jobs, as well as occupational and non-occupational disabilities.¹⁰⁷ Eligibility for these awards varies substantially from one state

and is open to substantial question. The Fund's actuary performs a more careful analysis based on a variety of assumptions, but does not give an average figure per award. See 1994 ACTUARIAL REPORT, *supra* note 8, app. A.

104. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 1-2 and exhibit II (7% discount rate).

105. According to NCCI data, the countrywide average percentage of incurred costs attributable to PTD awards was 3.2 percent; states ranged from 9.3 percent in Colorado to 0.6 percent in Kansas. See NCCI 1995, *supra* note 60, at 290 (exhibit X).

106. 1994 ACTUARIAL REPORT, *supra* note 8, exhibits I, I(B) (indicating that PTD costs represented, as of June 30, 1994, an undiscounted liability of \$3,526.8 million, or 59.4 percent of total undiscounted liabilities and \$1,461.9 million, or 53.5 percent, of discounted liabilities (7% discount rate)).

107. See LARSON, *supra* note 68, § 57.51(a) ("Total disability" in compensation law is not to be interpreted literally as utter and abject helplessness." *Id.* at 10-283.). Larson goes on: "Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps." *Id.* at 10-288 (emphasis added). In neighboring states, see, e.g., *Montgomery County v. Buckman*, 636

to another, however; numbers of awards are also substantially affected by procedures on claims.¹⁰⁸

According to comparisons between West Virginia and other states, our rate of approval of permanent total disability awards was, prior to the 1995 legislation, far higher. No one really disputes this.¹⁰⁹ On the other hand, the particular comparison which was used to decry high rates of approval of these claims in West Virginia — that 123 awards are made here per 100,000 workers as compared to an average of 7 in other states — is not sufficiently credible to provide a reliable comparison.¹¹⁰ It is therefore both unfortunate and troubling that this particu-

A.2d 448 (Md. 1994); *Dent v. Cahill*, 305 A.2d 233 (Md. 1973) (in Maryland, permanent total disability means the incapacity to do work of any kind for which a reasonable market exists, and not merely an incapacity to perform the work which the employee was accustomed and qualified to perform before the injury); *State ex rel. Woods v. Industrial Comm'n of Ohio*, 553 N.E.2d 665 (Ohio 1990); *State ex rel. Stephenson v. Industrial Comm'n*, 509 N.E.2d 946 (Ohio 1987) (Ohio Industrial Commission must consider age, experience, education, and other factors, in addition to impairment, in determining claimant's eligibility for permanent total disability award); *Petrone v. Moffat Coal Co.*, 233 A.2d 891 (Pa. 1987) (coal miner in Pennsylvania with occupational lung disease who could do light work was entitled to permanent total disability award where there was no evidence such work was available to him); *Yocom v. Keene*, 512 S.W.2d 27 (Ky. 1974) (coal miner in Kentucky with occupational lung disease receives permanent total disability award when there was no work available in the area which he could perform). *See also* Spieler, *Injured Workers*, *supra* note 7, at 353 nn.70-71.

108. In many other states, partial disability claims are generally permanently closed by a compromise and release process which bars reopening for additional awards based upon injury progression rather than new injuries. The available "pool" of pending claims, waiting to be reopened, simply does not exist in most jurisdictions. *See infra* Part II.A.2.d. for a discussion of dispute resolution issues.

109. In fact, in my long 1992 article on the West Virginia workers' compensation program, I noted: "The growing number of permanent total disability awards presents several interrelated problems. . . . There are . . . only two alternatives: raise revenue to cover the costs of these awards or change the structure of benefits." Spieler, *Injured Workers*, *supra* note 7, at 458-59. This is not to say that the individuals receiving these awards in West Virginia have not been needy; the issue is, rather, the extent to which we are willing to fund a workers' compensation system to provide a majority of benefits to a small number of people whose displacement from work is only partly due to occupational injuries.

110. Duncan Ballantyne, a researcher with the Workers' Compensation Research Institute, presented this figure to the Performance Council on December 16, 1994. He had been asked to look at what the "cost-drivers" were to the West Virginia system. As noted above, *supra* note 58, he had concluded that the combination of PTD eligibility criteria and second injury coverage were critical "controllable" factors in cost in West Virginia. These general conclusions appear to be true.

The particular figures cited in the text are, however, more problematic. The national rate of 7 per 100,000 was drawn directly from the annual publication of the National Council on Compensation Insurance (NCCI) which reports the number of incurred claims in a year; that is, the number of injuries and illnesses which occurred in that year that might lead to PTD awards in the future. NCCI 1995, *supra* note 60, at 290 (exhibit X). The rates varied from state to state, but none approached the West Virginia number of 123: Pennsylvania's rate was 23, Kentucky's 21, Virginia's 4; Florida was at the top of the NCCI list at 52 per 100,000 workers. *Id.* The problem is that West Virginia's rate was based on the number of *awards* made in the same year. As noted in the text, PTD awards are almost always made many years after an injury and the number awards in each year varies based upon a variety of factors, including whether backlogs are being cleared; as can be seen from Appendix A, *infra*, the rate of PTD awards in West Virginia, although always high, varies substantially from one year to the next. Any comparison between incurred and awarded claims is faulty on its face. This comparison is particularly troubling here, since the exposure of the Fund to PTD awards on an incurred basis appears to have peaked in the 1980s. *See* 1994 ACTUARIAL REPORT, *supra* note 8, app. A, exhibit A(X).

Ballantyne then noted that West Virginia's costs per current worker exceeded the costs in other states. *See supra* note 34 for an analysis of this comparison. He concluded that total benefits in West Virginia, without PTD awards, were "more like median state without PTD." This conclusion undoubtedly fueled the political discussion which led to SB 250, and therefore also requires some analysis. As noted *supra* in note 34, the cost per covered worker comparison makes no adjustment at all for industrial mix, labor market trends, or rates of injuries. While a state like West Virginia will inevitably have high costs in this comparison, it does not necessarily tell us anything about the generosity of our workers' compensation system. The acceptance of Ballantyne's analysis presupposes that, given a rational workers' compensation system, our costs should be comparable to other states in this comparison. This is simply not true: all of the external factors affecting costs mean that a rational system should produce higher costs here. If West Virginia is to become more like the median state in this comparison, it can only do so by providing much lower or fewer benefits to injured workers than are provided in other states.

Finally, Ballantyne failed to look at comparisons between our rates of other awards, including fatal awards, with NCCI data. Had he done so, he would have discovered that these "rates" exceed national norms in every category. *See infra* Appendix A. This is particularly important if one realizes that fatal claim differences are unlikely to be the result of internally controllable factors in the program. *See infra* notes 124-137 and accompanying text for discussion of fatal awards.

Troubled by the lack of scientific validity of the comparisons offered by Ballantyne, I phoned him for clarification. When I pressed him about the source and comparability of the numbers, he replied, "That's not publishable data." I took this to mean that he would not have offered it to an academic, peer-reviewed journal for publication, presumably because the analysis was not adequately rigorous. Upon further inquiry, he indicated that he did understand that the comparison was used to fuel major changes in the availability of benefits. Telephone Interview with Duncan Ballantyne, researcher, Workers' Compensation Research Institute (Sept. 29, 1995). *Thus, perpetuating the notion that truth is more important in academic pursuits than in governance, he provided misleading or flawed data for use in the political process. See supra* note 25.

lar comparison has continued to be used to justify and explain the 1995 legislation.¹¹¹

The argument against the West Virginia policy of awarding PTD benefits to displaced, disabled, poorly educated, and low skilled workers was two-fold: first, that it simply cost too much; and second, that it forced employers to pay for displacement from the labor market which is not caused directly by occupational injuries. Both of these arguments have some merit. The cost was high and detracted from the ability of the program to achieve both fiscal stability and to provide adequate benefits in other areas; in any event, PTD awards have been a primary cost-driver to the system, making them an obvious political target for anyone whose primary goal was to lower the system's costs. And, in fact, the recipients of these awards were sometimes individuals whose inability to continue to work was caused by a multitude of factors, only one of which was the specific occupational injury or disease which was used to obtain the award; the occupationally-caused component of the worker's disability did not have to predominate for an award to be granted.

On the other hand, neither of these arguments addresses the fact that many workers who qualified for PTD awards were, in fact, unable to continue to participate in the reconstructed labor market as a result of their occupational injuries and diseases, despite the fact that their PPD awards did not approach 100, or even 50, percent.¹¹² While acknowledging the legitimate concerns about the drain that PTD awards have been on the financial resources of the Workers' Compensation Fund, it is nevertheless important to put the PTD issue in context:

- The rate of permanent total awards, based on the year of injury, rather than the year the award was actually granted, peaked for the years 1984-1988, and declined in subsequent years.¹¹³ This makes sense, once one realizes that there is a substantial lag time, lasting

111. See *supra* note 21 (quoting from newspaper advertisement paid for by the Chamber of Commerce).

112. See YELIN, *supra* note 94, at 159-60 (noting the exclusion of older disabled workers with disabilities from the work force, particularly during periods when workers are being displaced from declining industries).

113. See 1994 ACTUARIAL REPORT, *supra* note 8, at A-3 (app. A, exhibit A(X)).

many years, between the last injury or diagnosis of illness for a worker and the final decision awarding PTD benefits;¹¹⁴ the date upon which the award is made tells us nothing about the actual underlying circumstances of the case. This delay reflects both the time during which the individual may have collected temporary benefits, the development of disability, and the time spent in litigation.¹¹⁵ The large number of awards in recent years is a reflection of injuries and industrial change which occurred in the 1980s, when the labor market was worse in West Virginia than anywhere in the nation; it is not a reflection of today's labor market or injuries.¹¹⁶

- Claims for permanent total disability are not evenly distributed among the different industrial classes. According to the Fund's actuary, the rate of PTD awards to underground coal miners has been five times the rate for other industries.¹¹⁷ The reason for the predominance of coal miners is clear: the rate of injuries, the physical demands of the job, and the collapse of the industry as a source of jobs combined to create this cataclysmic phenomenon for the Fund.

- The rate of approval of fatal (and other) claims also exceeds the award rates in all other states.¹¹⁸ Like PTDs, fatal awards are very costly. But fatal awards, unlike PTD awards, are not subject to the same argument regarding the application of "soft" vocational standards to the needs of an aging workforce.¹¹⁹ Nor are fatal awards contingent upon any of the procedural peculiarities of the West Virginia system.¹²⁰ The existence of a high rate of fatal awards suggests instead that the underlying morbidity and mortality of West Virginia

114. See *supra* note 39.

115. See 1994 ACTUARIAL REPORT, *supra* note 8, at A-3 (app. A). The year in which an award is made is affected by a variety of factors, including "lengthening or shortening of a back-log, the impact of a new judicial decision, or an increase in lay-offs in a given industry." *Id.*

116. The awards by date of injury peak between 1983 and 1988. *Id.* (exhibit A(X)).

117. *Id.* at A-2.

118. Fatal awards are discussed in more detail below. See *infra* notes 124-137 and accompanying text.

119. The eligibility standards for fatal awards do not vary as much as PTD eligibility from state to state. See *infra* note 125.

120. Claims by dependents are considered independent and are not foreclosed by compromise and release agreements signed by injured workers. See *infra* note 125.

workers simply exceeds national norms by a substantial margin: that is, the issue may be the nature of West Virginia's industries and the severity of injuries and illnesses suffered by West Virginia workers, not abuse (or laxity) of the system, which underlies the high number of large awards.

• Other states with lower rates of approval for PTD awards sometimes provide other benefits for people with long term disabilities. For example, some states set no limit on the period of time an individual can collect TTD benefits; in West Virginia, the limit is 208 weeks.¹²¹ Some states compensate people for wage loss or loss of earning capacity resulting from occupational injuries, which may provide longer and more adequate benefits for partial disabilities. On the other hand, in many states compromise and release settlements of serious claims are common. In these states, these claims are reported as permanent partial disability costs; it is then the PPD, not the PTD, system which is most costly and which is the focus of political concern. It is therefore significant that *the total proportion of workers' compensation resources expended on all permanent disability claims in West Virginia has not differed substantially from the proportion expended in other states.*¹²² Thus, these comparisons can be misleading.

It is nevertheless impossible to dispute that the rate of PTD awards has been relatively high in West Virginia and that this has contributed substantially to the fiscal problems of the Fund. Whether effective elimination of these benefits for totally disabled workers is a solution to this problem is, of course, a different question.¹²³

Fatalities. The number of fatal claims in West Virginia, like permanent total disability claims, substantially exceeds national norms. This should not be surprising: traumatic occupational fatality rates and serious occupational disease rates are both excessive here.¹²⁴ The stan-

121. See *supra* note 49.

122. See *supra* note 77. One must then examine whether our total costs were relatively high. This is more difficult to do than one might expect. See *infra* Part II.A.3.

123. Arguably, this is what was accomplished by SB 250, through the combined effects of eligibility standard, procedural, and offset changes. For a discussion of this, see *infra* Parts III.A.2. and III.V.A.

124. See *supra* notes 40-42.

dard for determining dependents' eligibility for these benefits is essentially similar in all states.¹²⁵ In view of this, the high rate of fatal awards is both significant and troubling: *it again tells us that the problem may be that we have had more seriously sick and injured workers in West Virginia, not that our workers' compensation system is excessively generous.*

When workers die from occupational injuries or diseases, their dependents are entitled to collect what are generally referred to as death benefits.¹²⁶ Notably, if an individual dies on the job and has no dependents, benefits are limited to funeral and medical expenses;¹²⁷ this is true irrespective of the level of contributing negligence of the employer.¹²⁸ Once a death is held to be an occupational fatality, dependents in West Virginia collect weekly benefits until they remarry,

125. See 2 ARTHUR LARSON, *THE LAW OF WORKMAN'S COMPENSATION* § 64, at 11-195 (1995). In most neighboring states, the right to these benefits is basically consistent with the statutory definitions in West Virginia. See KY. REV. STAT. ANN. §§ 342.750, 342.0011(1) (Michie/Bobbs-Merrill 1993); MD. CODE ANN., LABOR & EMPLOYMENT § 9-681 (1991); OHIO REV. CODE ANN. § 4123.59 (Anderson 1991); PA. STAT. ANN. tit. 77, § 561 (1992). Only Virginia puts more limitation on the availability of death benefits, limiting awards to cases in which "death results from the accident within nine years." VA. CODE ANN. § 65.2-12 (Michie 1995). In addition, a dependent's right to death benefits is an independent right derived from states and is therefore not affected by compromises or releases executed by the decedent. See 2 ARTHUR LARSON, *THE LAW OF WORKMAN'S COMPENSATION* § 64, at 11-195 (1995). Unlike PTD claims, therefore, the difference between the West Virginia rate and the rates in other states cannot be explained by the fact that claims were settled earlier in the development of the disability.

126. In West Virginia, dependents' benefits after an occupationally-caused death are governed by Section 23-4-10. W. VA. CODE § 23-4-10 (1994 & Supp. 1995) (stating that death benefits are due "[i]n case a personal injury, other than occupational pneumoconiosis or other occupational disease, suffered by an employee in the course of and resulting from his employment, causes death, and disability is continuous from date of such injury until date of death, or if death results from occupational pneumoconiosis or from any other occupational disease").

127. There is, thus, no "wrongful death" equivalent in workers' compensation benefits. See W. VA. CODE § 23-4-10 (1995). Until 1995, surviving dependents of individuals who died when collecting a permanent total disability award received 104 weeks of benefits at the same rate as the PTD recipient. W. VA. CODE § 23-4-10(e) (1994). This additional benefit was eliminated by SB 250. W. VA. CODE § 23-4-10(e) (1995 Supp.).

128. Unless, in West Virginia, the death is the result of intentional conduct on the employer's part, as defined by West Virginia Code Section 23-4-2(b) or (c), in which case a civil action may be brought in which all legal, but not punitive, damages may be claimed.

reach the age of majority, or an equivalent event occurs in their lives.¹²⁹ Like claims for permanent total disability, these claims can be “long-tailed” — that is, the claim is alive for payment of benefits for many years after the injury or death — and, therefore, very expensive, particularly when the worker dies at a young age or with young dependents. In 1995, fatal claims represented about 7 percent of undiscounted incurred costs, and 4 percent of discounted costs, for the Fund;¹³⁰ this too is higher than the average incurred cost for fatalities in other states.¹³¹

More importantly, the *rate* of fatal awards has significantly exceeded the national norm of 5 per 100,000 workers;¹³² in West Virginia, the rate of fatal awards per 100,000 workers over the last decade ranged from a low of 18 (in 1985 and 1991) to a high of 33 in 1988.¹³³ In other words, as noted above, the pattern of higher award rates which was identified for permanent total disability also appears, although to a somewhat lesser degree, in fatal awards. Not surprising-

129. W. VA. CODE § 23-4-10 to -14 (1994 & Supp. 1995). Most states provide the same duration of benefits as West Virginia; the percent of pre-injury wages paid to the dependents varies, however. CHAMBER OF COMMERCE 1995, *supra* note 46, at 31 (chart VIII). Some other states limit the cost of fatal claims by dependents by limiting the length of time a dependent may collect benefits. For example, Alabama, South Carolina, Montana, Indiana, Idaho and Virginia limit benefits to 500 weeks; Massachusetts to 250 weeks; Mississippi to 450 weeks. CHAMBER OF COMMERCE 1995, *supra* note 46, at 31. Maryland recently enacted a \$45,000 cap on death benefits.

130. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 1-2 and exhibit II.

131. NCCI 1995, *supra* note 60, at 290 (exhibit X, Distribution of Incurred Losses by Injury Type by State). The fatal percent of total incurred losses ranges from 0.7 percent in California to 3.4 percent in Utah; the overall countrywide average is 1.3 percent of incurred costs.

132. The countrywide average rate of incurred fatal awards was 5 per 100,000. The rate varied among states from 3 (Connecticut, Delaware, Wisconsin) to a high of 17 per 100,000 workers in Mississippi. Neighboring states for which data are reported by the NCCI reported incurred fatal rates of 6 (Kentucky), 5 (Maryland), 5 (Pennsylvania), 4 (Virginia). *Id.*

133. *See infra* Appendix A. This would mean, if this comparison were reliable, that death benefits were awarded in West Virginia four to six times as often as they occur nationwide, on average, despite the similarity in statutory definitions. The criticisms indicated above regarding any comparison of incurred to award data apply here as well, however. *See supra* note 77. I provide this comparison in order to show that, when performing this same type of comparison on fatal awards, West Virginia's rates also substantially exceed the national average for incurred claims, although not to quite the same degree.

ly, the number of fatal claims varies tremendously from one industry to another. For example, in the year ending June 30, 1994, over half of the claims came from the mining and construction industries, which comprise only about 5 percent of the workforce.¹³⁴ Again, certain industries are responsible for increasing the total costs of the Fund — and are responsible for a very substantial component of the deficit.

The high number of fatal awards reflects both past and current working conditions in West Virginia's industries. First, there is an excessively high rate of traumatic occupational fatalities today. And second, workers continue to die from occupational diseases contracted over past years.¹³⁵ In the coal industry, a sizable number of awards are made to dependents of workers who have died from occupational pneumoconiosis or other diseases;¹³⁶ in these cases, death may occur years after the initial diagnosis of a compensable condition.¹³⁷

134. Of the 425 fatal claims filed in 1994, 129 or about 30 percent came from the coal industry and 87 or 20 percent from the construction industry. 1994 STATISTICAL TABLES, *supra* note 35, at 13 (tbl. 8, Claims Filed by Class, Year Ending June 30, 1994, Self-insurers included).

135. Not surprisingly, the age of workers who die of traumatic injuries tends to be younger than that of workers who die from occupational diseases; death at a young age also means that the cost of these awards is much higher, since both children and spouses will collect benefits for a longer period of time. 1994 ACTUARIAL REPORT, *supra* note 8, at 15. "The age distribution for fatals is dramatically different depending upon whether or not the award is made close to the injury. We assumed that there were two different distributions, one applying to awards in the injury year or the year after, and a different one applying to all others. For the latter, a large percentage are occupational disease claims; the age at death is not much different than the age of the work force." *Id.* Because the workers themselves live longer, the dependents are older and the benefits tend to be less costly to the Fund in the occupational disease fatalities.

136. In a 1994 analysis of fatal claims performed by Robert Finger, the Fund's consulting actuary, Finger divided his analysis between underground coal mining and all other claims, noting, "[a] much higher percentage of coal fatals are awarded long after the injury. There are also some differences in ages and wages The longest delayed claims tend to be occupational pneumoconiosis claims." 1994 ACTUARIAL REPORT, *supra* note 8, at B-1 (app. B, Fatals).

137. According to the annual statistical report of the Division, at the end of FY 1994, the number of compensable fatal cases by year of injury declines for each year (1985, 619; 1986, 541; 1987, 527; 1988, 382; 1989, 272; 1990, 208; 1991, 119; 1992, 81; 1993, 54; 1994, 16). 1994 STATISTICAL TABLES, *supra* note 35, at 29 (tbl. 22, Charge for Permanent Total and Fatal Cases by Year of Injury). This decline does not, however, represent a decline in awards. Instead, it illustrates that the awards are being made years after the injury

Thus, like permanent total disability awards, deaths from occupational diseases in part are a mirror to our past: the severity of the illnesses which have contributed to death, and therefore successful dependent claims for benefits, are the result of a lifetime of significant exposures to disease-causing agents in the workplace. Fatal claims reflect the serious health and safety hazards and the severity of injuries and illnesses which have confronted West Virginia workers in the past, as well as the high rates of traumatic occupational fatalities in our industries today.

Medical Benefits. In West Virginia, like other states, workers are entitled to lifetime medical treatment for any occupationally-caused injury or illness.¹³⁸ Controversy surrounds the nature and adequacy of treatment offered to workers' compensation claimants; there is much anecdotal evidence of the failure of our medical care system to ensure that injured workers receive the best possible care for their injuries and illnesses.

The rate of increase in medical costs has received a great deal of attention nationally,¹³⁹ as well as in West Virginia.¹⁴⁰ These cost in-

occurs; as we move forward in time, the number of awards attributable to 1994 and other recent years will grow.

The longest delayed claims tend to be occupational pneumoconiosis claims which have been concentrated in the coal industry. 1994 ACTUARIAL REPORT, *supra* note 8, at B-1 (app. B, Fatales). Of course, with the growth of OP claims as a result of asbestos exposures in manufacturing industries, these claims may not always be as concentrated in the coal industry.

138. W. VA. CODE § 23-4-3 (1994 & Supp. 1995). All other states provide equivalent medical benefits. CHAMBER OF COMMERCE 1995, *supra* note 46, at 34-36 (chart IX, Waiting Period for Income/Medical Benefits).

139. See Spieler, *Perpetuating Risk?*, *supra* note 7, at 137-38 (discussing the focus on increasing medical costs). Many states have recently moved toward restrictions on claimants' choice of physician or implementation of managed care in workers' compensation as cost-cutting measures. See CHAMBER OF COMMERCE 1995, *supra* note 46, at 34-36. A variety of other responses have surfaced as well. The State of Washington held a major conference, Health Care Reform and Workers' Compensation: A Look to the Future, in October 1994; the Robert Wood Johnson Foundation has recently funded a major (\$6 million) study of managed health care in workers' compensation.

140. Provision for a mandated fee schedule for workers' compensation medical care was first enacted in 1986. More recently, the Division contracted for management of medical and disability claims with a private vendor in 1991. As a result, although the statute mandates provision of all "reasonably required" treatment (W. VA. CODE § 23-4-3(a)(1) (1994)), pro-

creases have, in the past, exceeded even the rate of medical inflation generally. The result has been that an increasing proportion of workers' compensation costs have been consumed by medical providers. Nevertheless, in West Virginia, the percentage of total incurred costs attributable to medical costs is somewhat below national norms.¹⁴¹

The role of physicians in workers' compensation claims is much more complex than the simple provision of direct medical treatment, however. Physicians are called upon to determine whether a condition is work-related; to certify, on an on-going basis, that a claimant receiving temporary total disability benefits is unable to return to his/her job; to assess the ability of a patient to return to work; to provide guidance regarding the limitations of the individual in performing specific work functions; and to evaluate the worker's permanent disability in order to establish the "rating" for a PPD award. Physicians perform similar gate-keeping functions in many other disability programs.¹⁴² And the obligation of physicians to perform these non-medical functions has been growing; federal law now requires physicians to assess work capabilities under both the Americans with Disabilities Act¹⁴³ and to determine the seriousness of health conditions under the Family and Medical Leave Act.¹⁴⁴

As physicians' involvement in employment-related decisions has grown together with medical costs, employers have increasingly insisted on their right both to control medical care and to have access to medical records of their employees. The Supreme Court of Appeals of West

viders must obtain advance permission for a substantial number of services. If services are performed and the bill is not paid, the claimant must pay the bill. Denial of requests for treatment or for payment have been litigated in the same manner as disputes over work-relatedness (that is, "compensability") or degrees of disability.

141. The proportion of predicted incurred liabilities in Fiscal Year 1995 for medical care was 31 percent (undiscounted) and 36 percent (on a discounted basis). 1996 RATE LEVEL PROJECTION, *supra* note 39, at 1-2 and exhibit II. This compares to a countrywide average of 47.2 percent of incurred claims (1991-92 policy year) in the NCCI data; nationally, the range is from 24.2 percent of incurred costs in Pennsylvania to 65.6 percent in Texas. NCCI 1995, *supra* note 60, at 290 (exhibit X).

142. For an interesting discussion of the role of physicians as gate-keepers to disability programs, see DEBORAH STONE, *THE DISABLED STATE* (1989).

143. 42 U.S.C. §§ 12201-12213 (1994).

144. 29 U.S.C. §§ 2601-2654 (1994).

Virginia's decision in *Morris v. Consolidation Coal Co.*,¹⁴⁵ holding that patient rights to confidentiality extended to workers' compensation claims, met, not surprisingly, with considerable animosity from the employer community.

Employers are also seeking additional control over the choice of medical provider. In West Virginia, workers' compensation claimants have traditionally retained the right to choose their own physicians for treatment and evaluation of their occupational injuries and illnesses;¹⁴⁶ employers and the Workers' Compensation Fund have been able to obtain alternative assessments when necessary.¹⁴⁷ The pressure to expand employer control over medical treatment decisions and employer access to claimants' medical records is reflected in the provisions of SB 250.

c. Impact of Administrative Costs

The Workers' Compensation Division has historically spent relatively little on administrative expenses; in sharp contrast to other states, administrative costs remained below 5 percent of incurred costs until 1994.¹⁴⁸ In other states, only about 73 percent of the cost of workers'

145. 446 S.E.2d 648 (W. Va. 1994). *Morris* involved an action against a physician who, confronted by the employer with videotapes of the patient performing tasks inconsistent with the claimed disability, changed his report to the Division without first either obtaining a release from the patient to discuss the case with the employer or discussing the changed opinion with the patient. The decision limited the application of the language of West Virginia Code Section 23-4-7 (governing release of medical information) to the release of written medical reports only. An initial decision was redrafted and reissued after a motion for reconsideration was filed by the defendant physician, but without any additional argument in the case.

146. W. VA. CODE § 23-4-3 (1994).

147. See W. VA. CODE §§ 23-4-7a(d)-(g), 23-4-8 (1994) (providing for examination by independent medical evaluators selected by the Commissioner and allowing employers to provide additional medical evaluations in contested claims).

148. Administrative expenses were: \$7.7 million in 1986; \$10.3 in 1987; \$11.4 in 1988; \$10.5 in 1989; \$10.2 in 1990; \$10.8 in 1991; \$14.9 in 1992; \$17.8 in 1993; \$34.0 in 1994. 1994 STATISTICAL TABLES, *supra* note 35, at 08 (tbl. 5, Operating Expense by Year, 1913-1994). In 1993, the \$27 million of administrative costs constituted only 1 percent of incurred costs, undiscounted, and 4.4 percent discounted (at 6%). MILLIMAN & ROBERTSON, INC., 1994 RATE LEVEL PROJECTION 1-3 (1994) [hereinafter 1994 RATE LEVEL PROJECTION] (prepared Apr. 29, 1993) (exhibit VII).

compensation premiums actually went to pay the cost of benefits in 1993 — and administrative and other costs were comparatively low in that year.¹⁴⁹ Administrative costs of the Division have shown substantial and troubling growth in the last five years: from less than \$17 million in Fiscal Year 1991¹⁵⁰ to \$38 to \$41 million projected for Fiscal Year 1996.¹⁵¹ The level of administrative costs of many private insurers in other states continues, however, to be substantially higher than the equivalent costs in the West Virginia program. State fund systems tend to exhibit lower administrative costs; a conversion to private insurance would inevitably raise the relative proportion of monies paid for administration, instead of benefits.

d. Dispute Resolution

The mechanisms for resolution of disputes have an independent effect on the longevity of claims and, as a result, on the cost of claims. The longer a claim stays alive, and the longer a worker stays off work, the more likely it is that a claim will involve high and “long-tailed” costs. Several aspects of the system in West Virginia have made it very likely that claims for benefits will persist for a long period of time.¹⁵² Ultimately, the failure of the Division to process claims

149. John F. Burton, Jr., *Workers' Compensation Benefits and Costs: Significant Developments in the Early 1990s*, in JOHN BURTON'S WORKERS' COMPENSATION MONITOR, May/June 1995, at 1, 2-3 (stating that between 1960 and 1976, the ratio of benefits to costs was around 0.60; 1977-80, benefits never exceeded 55 percent of costs; starting in 1980, benefits as a percent of costs rose, to a high of 79 percent in 1992). In West Virginia, defense on claims prior to 1995 was handled exclusively by employers as an external cost; as a result, the comparison of costs is not wholly comparable. Of course, legal costs vary substantially among employers, based upon a variety of factors, including how often an employer chooses to contest initial decisions in claims.

150. WORKERS' COMPENSATION DIVISION, BUREAU OF EMPLOYMENT PROGRAMS, 1991 ANNUAL FINANCIAL AND STATISTICAL TABLES 8 (1991) (tbl. 5, Administrative Expenses Year Ending June 30, 1991).

151. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 1-2 and exhibit II.

152. I have not included the “rule of liberality” in this list. *See supra* note 73. Business representatives argue vehemently that the liberal interpretation of evidence results in high cost and more claims in West Virginia. I do not agree that it is the liberal interpretation of evidence itself that has this effect; in fact, most compensation systems utilize a similar liberal interpretation in the evaluation of evidence. There are, however, some differences in the particular approach to processing cases which may result in compensation awards in

efficiently may be a critical cause of increased costs.¹⁵³ A review of the problems in claims processing is therefore instructive.

Claims and Litigation Processes. The resolution of disputes appeared to have been a remarkably low priority when, in 1989, I became Workers' Compensation Commissioner. Estimates of pending protests¹⁵⁴ rose to well above 30,000; there was, however, no way to know exactly how many claims were being litigated or the nature of issues under litigation.¹⁵⁵ Prior unambiguous decisions of the Supreme Court of Appeals, ordering the Commissioner to establish methods for timely resolution of disputes, were not followed consistently.¹⁵⁶

West Virginia and not elsewhere. These are discussed in the text.

153. Let me offer one caveat: some may argue that the granting of more benefits as a result of the failure to close claims quickly and with finality is proof that our workers' compensation is inherently flawed. It is, however, equally possible to argue that workers are denied benefits which they should receive, but do not, in other jurisdictions. Again, the mere fact that one jurisdiction is more "liberal" in the provision of monetary benefits — or more costly — does not necessarily mean that jurisdiction is making wrong decisions. The question should instead be whether the benefits being provided are adequate and affordable. *See infra* Parts IV and V.

154. For those unfamiliar with the Division's processes, a protest is an appeal of an initial decision (made by the Commissioner or, now, Division) on any issue in a claim. For example, decisions finding a claim to be non-compensable; decisions regarding the percentage of permanent disability; decisions denying payment for medical treatment; and decisions regarding the reopening of claims on either a TTD or PPD basis would all go into litigation as individual protests. At that time, there was no mechanism at all to combine protests on a single claim for litigation purposes. Attorneys who do not engage in a workers' compensation practice find the system odd; on the other hand, one workers' compensation attorney reacted in disbelief when I told him that in civil practice all issues are combined and that judges force parties to go to trial at a set date. In my opinion, the system of handling protests, when combined with the hearing process described below, has contributed substantially to the administrative and financial problems of the program.

155. The system was not computerized; the hand tracking of cases did not lend itself to any calculation either of the number of backlogged claims or of the age of these claims.

156. *See, e.g., Meadows v. Lewis*, 307 S.E.2d 625 (W. Va. 1983) (granting writ of mandamus against Commissioner; holding that long delays in processing claims are inconsistent with the legislative policies to determine rights speedily and expeditiously). *Meadows* led to the development of procedural rules establishing strict internal timeliness for processing of claims. W. Va. C.S.R. sections 85-6-1 to -8 (1985) (effective May 23, 1985) (Time Limits for the Administrative Processing of Adjudications and Awards). Even after the promulgation of the rules, the Commissioner often failed (and fails) to comply with the time limits. *See Scites v. Huffman*, 324 S.E.2d 152 (W. Va. 1984); *Spurlock v. Spieler*, 395 S.E.2d 540 (W. Va. 1990). Remarkably, SB 250 provides that the new substantive provisions be applied to all pending claims, irrespective of whether they were pending in viola-

Parties' attorneys had full control over the speed of resolution; hearings amounted to little more than depositions, set at the convenience of the parties.¹⁵⁷

The Commissioner was responsible for making both initial and post-hearing determinations on claims. As the Commissioner was also responsible for the fiscal integrity of the program, s/he had (and has) an inherent conflict in making these decisions — much as an insurer has an incentive to deny claims in order to minimize costs.¹⁵⁸ The system in place in 1989 left all parties without any independent review by an impartial body. The statute was amended in 1990 to create the Office of Judges to address this problem and to establish an independent review which, it was hoped, would provide a better guarantee of procedural fairness as well as being both more rational and more efficient.¹⁵⁹ Ultimately, because all pending protests were dumped into the Office of Judges process in 1992, it took litigation against the Division (and the allocation of more than \$5 million by the Governor) to begin an effective clearing of the backlog.¹⁶⁰

tion of these prior rules and court decisions. *See infra* Part III.C.3.

157. Representatives of the Commissioner's legal staff acted as *de facto* "hearing examiners" for these hearings. They did not, however, regard themselves as empowered to force submission of claims or in any other way cut off the development of evidence or set time limits on the pendency of claims. Parties arranged for the taking of testimony on protests at different times and places, primarily to accommodate experts, particularly physicians, who were interested in providing testimony on a group of cases simultaneously. The parties' attorneys seemed, in most cases, to be unperturbed by the delays. When, in August 1989, I suggested a continuing legal education program that time limits be established and procedures changed for the review of protests, both claimants' and employers' attorneys reacted with remarkable hostility.

158. In the case of the insurer, the motivation may be to maximize profit. In the case of the Commissioner, the motivation is somewhat more complex. The Commissioner has had both a fiduciary responsibility to the Fund under the statute, W. VA. CODE § 23-2-4 (1994) (superseded by SB 250, W. VA. CODE § 23-2-4 (Supp. 1995)), and a political responsibility to the Governor and the Legislature. As the pressure regarding costs grows, and business opposition to rate increases likewise grows, the Commissioner is in the position of trying to appear to be able to manage the program well; this management is, for public purposes, often measured in terms of the ability to report that claim costs are under control.

159. W. VA. CODE § 23-5-1(g)-(h) (1994) (superseded by W. VA. CODE § 23-5-8, -9 (Supp. 1995)).

160. Paul J. Nyden, *Suit clears up workers' comp backlog*, CHARLESTON GAZETTE-MAIL, Oct. 8, 1995, at 1C (reporting that a lawsuit brought on behalf of 251 clients in Kanawha County Circuit Court was dismissed on Sept. 22, 1995 after "considerable prog-

The result of the long delay in the processing of claims was to leave injured workers — and employers — in Kafka-esque limbo. Medical treatment was sometimes denied, pending review, further lengthening the period of the worker's disability. The Division's reluctance to reopen claims on a temporary basis and to provide aggressive rehabilitation programs for claimants who wanted to work¹⁶¹ contributed to the problem. The result was that nothing in the management or litigation of claims was designed to encourage appropriate closure.

ress" was made in the clearing of case backlogs). According to Nyden's article, in his affidavit, Robert J. Smith, head of the Office of Judges, said it was:

"[R]outine for even the simplest of cases to take from two to four years to work their way through the system."

Nyden continued:

About \$5 million in extra money helped Smith's office issue nearly 25,000 decisions since December 1994. . . . Delays left compensation claimants in limbo. . . . Legal papers filed by Peabody Coal Co. lawyers, on the other hand, argued the existing system of handling compensation claims and appeals was satisfactory. Employment Programs Commissioner Andy Richardson said the Office of Judges began handling all new appeals in July 1991. Six months later, in January 1992, the office took over pending appeals from older cases. "The new system inherited a tremendous backlog from the old hearing examiner process," Richardson said. "We had difficulty finding enough resources to bring it up to full operating level. It was also a monumental undertaking to put new computer technology in place."

Id.

At the time the legislation establishing the Office of Judges was passed, it was the intent to clear the existing backlog of claims without transferring them to the new Office. See Proposed Amendment Hearings, W. Va. C.S.R. sections 85-7-1 to -2 (proposed amendment filed May 1, 1990) (Noting that the "new rule is specifically designed to resolve critical problems in the litigation of protests pursuant to West Virginia Code, § 23-5-1 et. seq., and the prior series 7 rule. In particular, parties failed to comply with, and the Commissioner failed to enforce, that section of the prior rule, specifically section 2.11(b), which set time limits for the submission of protests. No consistent attempt was previously made to require parties to comply with the time limits. This created a severe administrative problem which resulted in the denial of timely and expeditious resolution of claims, as required by West Virginia Code, § 23-5-3(a), and case law developed thereunder. The rule addresses time periods for the submittal of pending claims by creating specific time periods for each pending claim"). Ultimately, this proposed rule was withdrawn. See letter from Andrew N. Richardson, Commissioner, to Secretary of State Ken Hechler (July 16, 1990) (on file in Office of the Secretary of State). A huge pending backlog was ultimately transferred to the Office of Judges on January 1, 1992. New procedural rules, setting time limits on the consideration of claims pending before the Office of Judges, became effective June 1, 1995. W. Va. C.S.R. sections 85-2-1 to -12 (effective June 1, 1995) (Rules on Time Standards for the Workers' Compensation Office of Judges).

161. See Spieler, *Injured Workers*, *supra* note 7, at 413-25.

Lack of Defense of Critical Large Claims. The largest drain on workers' compensation financial resources has been second injury "life awards."¹⁶² Somewhat remarkably, the litigation process was set up so that these claims were the least likely to be defended aggressively. The employers often lacked any incentive to mount a defense.¹⁶³ The Commissioner was not statutorily authorized, until 1990, to defend the Fund.¹⁶⁴ I cannot find another jurisdiction in which the dumping of large claims into an undefended fund was (or is) prevalent. Although the Division's employees were unlikely to be excessively generous in the granting of these awards, the process itself — in which only the claimant's evidence of total disability was submitted — contributed to a system which may have failed to exclude cases in which a life award was inappropriate.

Failure to Provide Aggressive Rehabilitation Programs for Injured Workers. Rehabilitation programs would, when well administered, serve the interests of employers and insurers (in keeping down costs) and the interests of workers (in avoiding destitution). Like other workers' compensation programs, the Division has had a difficult time implementing an effective rehabilitation program. Legislation in 1990 mandated the adoption of new rehabilitation rules by July 1, 1991, established temporary partial benefits for workers who obtained reemployment at reduced wages, and provided for trial return to work options for injured workers.¹⁶⁵ Final rules were not filed, however, until April 12,

162. See *supra* notes 103-106 and accompanying text.

163. See *supra* note 98. See also Spieler, *Injured Workers*, *supra* note 7, at 350-52 (explaining the reasons that employers lacked financial interest in defending these claims and noting that the statute was amended in 1991 to allow experience rating of self-insured employers' second injury premium rates).

164. See *supra* notes 99-100. The 1990 legislation provided that the Commissioner could appear in proceedings involving a claim chargeable against the Workers' Compensation Fund or other similar funds in which the employer failed to appear. In 1993, the language was amended to make the Commissioner party to any claim which was chargeable against a fund under the Commissioner's management or control. W. VA. CODE § 23-5-1(h) (1994). In other words, the Commissioner could defend the Fund against claims, much as insurers defend themselves in private insurance states. SB 250 explicitly made the Commissioner the party in interest in all claims, including those against self-insured employers. This becomes of critical importance in evaluating the new procedures under SB 250, which eliminate the *de novo* review of evidence by the Office of Judges. See *infra* discussion of SB 250 in Part III.C.

165. W. VA. CODE § 23-4-7b (1994) (trial return to work); W. VA. CODE § 23-4-9

1994.¹⁶⁶ In the interim, few workers were assisted in returning to work; even fewer were informed about the availability of trial return-to-work or partial benefit options.¹⁶⁷

Other states are also wrestling with rehabilitation concepts and programs. Increasingly, insurance company representatives and workers' compensation administrators point to the need for effective rehabilitation and return-to-work programs. It is indisputably difficult to design an efficient, cost-effective rehabilitation program which focuses on those workers who can, in fact, reenter the workforce. While some experts claim that workers' compensation programs have shifted from a compensation model to a "disability management" model, the success of programs in this area is, at best, spotty. West Virginia's difficulty in this area is therefore reflected elsewhere.

Failure to Close Claims. The West Virginia system has traditionally assumed that injured workers should be able to reopen claims when the effects of an injury progress.¹⁶⁸ In West Virginia, full compromise and release of claims, which would bar further benefits for the injury (irrespective of the subsequent progression), was historically prohibited.

Moreover, until 1993, every claim had to be closed by a Commissioner's order.¹⁶⁹ Historically, these orders had never been en-

(1994) (physical and vocational rehabilitation); and W. VA. CODE § 23-5A-3 (1994) (termination of injured employee prohibited; reemployment of injured employees). For an extensive discussion of the development and passage of these provisions, see Spieler, *Injured Workers*, *supra* note 7, at 426-42.

166. See W. Va. C.S.R. sections 85-15-1 to -16 (Vocational and Physical Rehabilitation) (effective July 1, 1994).

167. See Spieler, *Injured Workers*, *supra* note 7, at 442-49.

168. W. VA. CODE § 23-4-16 (1994) (amended by SB 250, W. VA. CODE § 23-4-16 (Supp. 1995)) (power of Commissioner to modify award is continuing, except that no further award may be made in the case of nonfatal injuries more than two times within five years after the Commissioner shall have made the last payment in the original award or any subsequent increase thereto in a case involving permanent disability). For judicial interpretation of this reopening section, see *Bragg v. State Workmen's Compensation Comm'r*, 166 S.E.2d 162 (W. Va. 1969); *Pugh v. Workers' Compensation Comm'r*, 424 S.E.2d 759 (W. Va. 1992). This right to reopen extended to the right to apply for a PTD award, even if this application was made many years after the original injury, as long as the reopening complied with the time limits in the section. Moreover, the time limits of the section did not apply to cases not yet closed by a final order of the Commissioner. *Id.*

169. *Baker v. State Workmen's Compensation Comm'r*, 263 S.E.2d 883 (W. Va. 1980).

tered. This meant that large numbers of claims remained in "open" status. The combination of these open claims and prior partial disability claims which could be reopened created a large number of cases which were effectively in a permanently "pending" status. When the labor market collapsed for older disabled workers, these old claims could be used to file claims for second injury permanent total disability benefits.¹⁷⁰

This commitment to keeping claims open differs from the practice in many states, where claims are closed (through compromise and release) for lump sum settlements, irrespective of whether the worker suffers additional economic loss or whether the worker becomes more impaired as the result of an injury or illness. The particular practice in West Virginia allowed claims to result in larger and longer "tails," and therefore greater per claim costs.

Under *Baker*, every claim not closed with a finding regarding permanent disability (including claims involving no disability) were deemed to be pending. Successive Commissioners never successfully entered timely orders in small claims, thereby creating a large pool of cases which were "pending" despite the worker's recovery from the injury. Faced with this administrative failure, the Commissioner successfully sought to amend the statute in 1993 so that claims would automatically be closed five years after they had been closed on a TTD basis, thereby overruling *Baker*. W. VA. CODE § 23-4-22 (1994).

170. The result of *Baker*, *supra* note 169, was that an application for a PPD rating could be made at any time, even years after the individual had reached maximum degree of improvement. In addition, any claim in which a progression of the occupationally-caused condition could be claimed could likewise be reopened, pursuant to Section 23-4-16. W. VA. CODE § 23-4-16 (1994). After the application for the initial or increased permanent disability award was made, the claimant could apply for a second injury life award, based upon his (or, much less frequently, her) total life situation, including age, education, and the availability of suitable work. The process by which this occurred was generally that the claimant would protest the PPD rating ordered by the Commissioner, and then make a motion for a second injury life award during the hearing process. Several attempts to modify this procedure were made after 1989, primarily to force initial consideration of the PTD application back down to the Commissioner level.

Notably, despite the incentive to close claims, the practice was not to accept the PPD award recommended by the claimant's treating physician, despite a specific mandate in the statute that these recommendations should be accepted when the recommendation was for 15 percent or less. W. VA. CODE § 23-4-7a(c)(1) (1994). Ultimately, the Supreme Court of Appeals of West Virginia again had to intervene to force entry of these orders. Dalton v. Spieler, 401 S.E.2d 216 (W. Va. 1990).

I suspect that this procedure was, in itself, a large contributing factor to the growth and numbers of PTD awards which were made over the past decade. No reports or studies which I have been able to obtain, however, analyze the PTD awards which have been made based upon these procedural factors. This issue becomes critical, however, to the design of a different system for awarding PTD benefits in the future.

3. Overall Trends in Costs

Concern about the rising costs of workers' compensation — and rising premium levels for insured employers — is shared nationally.¹⁷¹ In fact, however, rates of increases in workers' compensation costs have moderated both nationally and in West Virginia in the last few years.¹⁷² According to a study by the Workers' Compensation Research Institute, the total cost of benefits in West Virginia grew only moderately from 1986 to 1994, when compared to national figures.¹⁷³

171. See, e.g., Burton, *Workers' Compensation Benefits and Costs: Significant Developments in the Early 1990s*, in JOHN BURTON'S WORKERS' COMPENSATION MONITOR, *supra* note 149, at 1 (noting total costs for workers' compensation programs rose to \$57.3 billion in 1993, although increases in 1992 and 1993 appear to have been less substantial than the increases in prior years; total benefits provided to workers actually declined by 3.9 percent in 1993, representing the first decline since 1960); Michael Quint, *Crackdown on Job-Injury Costs*, N.Y. TIMES, March 16, 1995, at 1 (noting the aggressive legislative responses to expanding costs in many states). It is likely the reduction in benefit costs reflects legislative cutbacks on the availability of benefits. An alternative, more sanguine but unsubstantiated, view would suggest that the current rights of disabled workers to reenter the workforce, under federal and state legislation, is having an impact on compensation costs. Americans with Disabilities Act, 42 U.S.C. §§ 12201-12213 (1994); W. Va. Human Rights Act, W. VA. CODE § 5-11-1 to -16 (1994).

172. Burton, *Workers' Compensation Benefits and Costs: Significant Developments in the Early 1990s*, in JOHN BURTON'S WORKERS' COMPENSATION MONITOR, *supra* note 149, at 4 (showing that the rate of annual increase in workers' compensation costs declined to 2.6 percent in the years 1990-93; in the prior six years, the average rate of increase had been 13.3 percent). In fact, total costs declined as a percent of covered payroll in the period 1990-93, from 2.36 to 2.30 percent. *Id.* at 10.

173. According to a presentation by Duncan Ballantyne, *supra* note 58, growth in costs was primarily spurred by second injury fund permanent total awards. There was a 6.6 percent annual average growth (from \$348 million in Fiscal Year 1986 to \$581 million in Fiscal Year 1994). "Natural growth," the growth which is not controllable and is attributable to such external factors as payroll and workforce growth, accounted for two-thirds of this

How do West Virginia's costs compare to the costs in other states? Current cash costs per current worker are unquestionably high. These comparisons are misleading, however, particularly in a state in which the industries are excessively dangerous and the working population did not grow at the same pace as in other states.¹⁷⁴ In order to conduct a useful comparison, we would have to have data which recognize the differences in industries and injury rates in different states; this would give us a comparison which separates the external from the internal causes of workers' compensation costs. Without this, we essentially complain about the high costs of the workers' compensation system because our industrial base and labor market differ from those in other states.

Remarkably, it is impossible to obtain a useful comparison from currently existing sources. Although West Virginia's premium rates are low,¹⁷⁵ these rates have clearly been too low to fund the full costs of the program, except on a cash basis. National data, kept by private rating bureaus on the costs of current incurred claims, cannot be broken down by industry or adjusted for injury rates within those industries.¹⁷⁶ It may be appropriate to speculate that our current costs are high; high injury rates in dangerous industries should make them high. But the data which would provide us a firm basis of comparison are unavailable.

Nationally, legislative efforts have focused on rising and high costs of workers' compensation. Since 1991, 34 states have taken major steps to curtail costs through legislative action.¹⁷⁷ The desire to de-

growth. Only 2.5 percent of the growth is what he termed "controllable" (i.e. costs which were caused by internal program design); costs of second injury coverage for permanent total disability are a significant component of this controllable growth. Telephone Interview with Duncan Ballantyne (Sept. 19, 1995).

174. See *supra* note 34.

175. See *infra* Part II.B.2.

176. The NCCI acts as a private rating bureau for insurers and provides information regarding the total incurred costs of claims in jurisdictions for which they collect data for rating purposes. Since the primary interest of the NCCI is in the setting of actuarially-sound rates, they do not develop and publish the kind of data which would provide useful comparative information for West Virginia.

177. Quint, *supra* note 171, at 1. Many of these changes involve changes in benefit eligibility standards, resulting in the approval of fewer claims. Quint's article notes, "[s]ome

crease costs has dominated the political and public discussion of workers' compensation.¹⁷⁸ And, in fact, cost increases have moderated and insurance carriers have reported increasing profits in the last two years.¹⁷⁹ States have passed a variety of statutes designed to tighten eligibility standards, weed out fraud, cut benefits, and improve workplace safety.¹⁸⁰ The legislative activity in West Virginia — and the nature of the political discussion — has therefore been part of a widespread national phenomenon.

B. Funding the Costs

Workers' compensation programs rely on the collection of premiums from employers (now called premium taxes in West Virginia) in order to fund the costs of the program; that is, like insurance programs, workers' compensation is generally funded on an accrual, not a cash, basis.¹⁸¹ In a "fully funded" program, premiums should cover

people wonder whether the crackdown in workers' compensation has gone too far by denying benefits on technical grounds to workers with real injuries. Already, horror stories are emerging of disabled workers stuck with huge, unpaid medical bills." *Id.* at C1. On the other hand, Quint notes that both insurers and employers are pleased by the changes. This is certainly not surprising.

178. *Id.* The president of the NCCI, is quoted by Quint as saying that states' "economic development hinges on keeping the workers' compensation system healthy." *Id.* at C7. Similarly, most insurance industry representatives are pleased by any legislative action which is taken which decreases costs.

179. According to Best's Review and other sources, the profitability of workers' compensation insurance improved dramatically in 1993 and 1994, due to a number of factors: reduction in fraud; increased insurance control over treatment and rehabilitation; statutory changes that limit eligibility for benefits; more favorable trends in medical inflation generally. John F. Burton, Jr., *Workers' Comp Insurance Profitability Dramatically Improves*, in JOHN BURTON'S WORKERS' COMPENSATION MONITOR, March/April 1995, at 1, 2 (quoting John H. Snyder, *Auto Hauls The Industry's Burdens*, 95 BEST'S REV. (Property/Casualty Insurance Edition), January 1995, at 35). The brochure for the Fourth Annual National Workers' Compensation & Disability Conference, Nov. 15-17, 1995 (on file with author) announced that the keynote address at the conference was titled, *The Workers' Comp Turn-around: Is It Real and Will It Last?*, to be delivered by Richard W. Palczynski, CEO and Senior Vice President, Travelers Commercial Lines; and again, *The Miraculous Recovery of Workers' Comp: Is It For Real*, to be given by William H. Bolinder, Chairman and CEO of Zurich-American Insurance Group, at the same conference.

180. See Spieler, *Perpetuating Risk?*, *supra* note 7, at 246-259.

181. Workers' compensation liabilities are supposed to be funded on an "accrued" basis; "the objective of 'accrued cost funding' is to collect premiums equal to the present value

the costs incurred in the year for which the premium is paid; that is, the amount paid should cover the future costs for injuries which occur and diseases which are diagnosed in that year.¹⁸² Over the last decade, successive Commissioners have simply failed to collect adequate premiums to cover these costs in West Virginia.¹⁸³

On the other hand, current rates would have been adequate to fund workers' compensation costs on a *cash* basis, while keeping the benefits as they existed before the enactment of SB 250¹⁸⁴ — and *there*

cost of all future payments on new injuries incurred during the fiscal year." MILLIMAN & ROBERTSON, INC., STATE OF WEST VIRGINIA, WORKERS' COMPENSATION DIVISION, RALE LEVEL PROJECTIONS, FISCAL YEAR ENDING 1995 9 (Feb. 11, 1994) (on file with author) [hereinafter 1995 RATE LEVEL PROJECTION]. For example, in the current fiscal year, the Fund should collect enough in premium dollars to cover all of the future costs associated with injuries and illnesses which occur in this year. Sufficient premiums therefore should be collected to pay for the *current and future* costs of current injuries and illnesses.

Premiums are the assessments paid by employers to obtain immunity for themselves and benefits for their workers. Rates are set by industry. The base or manual rate is the starting point and should approximate the average collection of premium in that industry. The actual rates paid by individual employers may vary if they are experience-rated. The total premium collected for each industry should be sufficient to pay for the incurred claims in that industry in the premium year. For a fuller discussion of rate-making methodology in West Virginia, see Spieler, *Injured Workers*, *supra* note 7, at 343-51; Robert Finger & Robert Briscoe, *Workers' Compensation Insurance Arrangements in West Virginia*, in JOHN BURTON'S WORKERS' COMPENSATION MONITOR, May/June 1991, at 3. For a general description of rate-making methodology in other states, see Spieler, *Perpetuating Risk?*, *supra* note 7, at 185-205.

In West Virginia, as in most states, employers with sufficient means may, if they choose, self-insure their workers' compensation obligation. This means that the employer itself is responsible for payment of the full costs of claims. In West Virginia, self-insured employers are assessed premiums to cover their share of administrative costs. W. VA. CODE §23-2-9(b)(1) (Supp. 1995). In addition, most self-insured employers must participate in the Workers' Compensation Fund to cover second injury permanent total disability claims. W. VA. CODE § 23-2-9(e)(1) (Supp. 1995).

182. This idea becomes a little more complicated when looking at permanent total disability claims, which often involve a combination of injuries and diseases. See *supra* notes 87-122 and accompanying text for a discussion of PTD claims.

183. For a more extensive discussion of funding and underfunding of West Virginia workers' compensation liability, see Spieler, *Injured Workers*, *supra* note 7, at 345-57.

184. 1995 RATE LEVEL PROJECTION, *supra* note 181, at 7 (Stating:

Projected income at present rate levels is about \$470 million, or about \$20 million (4 percent) more than projected expense payments. Thus we project that current rate levels are approximately adequate to cover projected payments We do not recommend cash flow funding, but *we have shown these projections at the*

would be no deficit. The deficit is essentially a result of recognizing the future costs of promises we have made to pay benefits. The problem with a cash basis approach to funding workers' compensation liabilities is that it transfers the costs related to current injuries and claims to future employers; when there is a dramatic shift in economic base, as has occurred in West Virginia, then current employers are asked to pay for the costs associated with defunct high risk employers. This results in a significant financial drain on these new employers. It is, however, important to recognize that it is a political choice whether to fund part, or all, of our workers' compensation system on an accrual or a cash basis.¹⁸⁵ Arguably, the decision during the Moore Administration to cut rates was, *de facto*, a decision to fund on a cash basis. In fact, Professor Terence Ison, a leading expert in workers' compensation, advocates the adoption of mixed accrual and cash financing for workers' compensation.¹⁸⁶ Second injury life awards, which involve multiple causality not wholly attributable to any one

Division's request. Current rate levels for regular subscribers are about 8 percent higher than projected cash flow requirements. Current rate levels for self-insurers are far below current cash requirements. This has been caused by inadequate second injury premiums.

Id. at 7-8 (emphasis added)).

185. The fact that the Division requested a cash basis rate analysis from Milliman & Robertson in 1994, and then failed to recommend a rate increase effective July 1, 1994, illustrates this point. Other social insurance programs, most notably Social Security, are funded on a cash or "pay-as-you-go" basis. Again, the argument against this approach is precisely the one which is raised with regard to the Social Security program: that it transfers potentially high costs to future generations of individuals or corporations.

186. See TERENCE B. ISON, COMPENSATION SYSTEMS FOR INJURY AND DISEASE: THE POLICY CHOICES 195-200 (1994). Ison notes:

[I]n any system administered by insurance companies, full funding is essential. Since no insurance company has any guarantee of future revenue, it must accumulate the reserves to assure the discharge of its future obligations. A social insurance system is in a different position. The taxing authority of governments includes the power to compel future contributions to social insurance systems. There is, therefore, a choice between [full] funding and current cost financing.

Id. at 196. Ison goes on to note the following disadvantages of full funding: opportunity cost to employers of capitalizing future costs into the current year's assessment rates; propensity that it creates for actuaries to estimate the cost of future benefits on the high side, impeding a fair judgment about whether benefit changes should be made; resistance created to compensation for occupational diseases, which have long latency periods; tendency to develop unfunded liabilities during periods of high inflation. *Id.* at 198-99.

employer and a long lag time between injury and disability, might, under Ison's analysis, legitimately be funded on a modified cash basis.¹⁸⁷ Given that these awards currently represent about 60 percent of our unfunded liabilities,¹⁸⁸ a modification of the funding approach would substantially change both the level of deficit and, as a result, the entire financial picture of the West Virginia workers' compensation program.

1. Underfunding of Liabilities

If the Workers' Compensation Fund is to be funded on an accrual basis, then workers' compensation liabilities in West Virginia have undeniably been seriously underfunded since 1985. The unfunded liability of the Fund has grown annually, as income from accumulated assets has been inadequate to pay for the current costs of old claims.¹⁸⁹ As explained by Robert Finger of Milliman & Robertson,

187. *Id.* at 200. Ison concludes:

[T]here must be a cushion of reserves, even under a system of current cost financing. This could be the key to a possible compromise. Given that some reserves are required in any event, and given that most of the problems of funding relate to the estimation of future costs, a rational compromise could be to adopt current cost financing, but with a substantial reserve requirement that avoids any period estimation of total future costs, and simply requires the reserve to be maintained according to a formula.

Id.

188. *See supra* note 106.

189. Again, it is generally felt that rates should fund the full cost of injuries and illnesses which occur in the year; future costs of these injuries should be paid for by a combination of the interest and principle which was collected in the year in which the liability was incurred. As noted above, permanent disability and fatal claims have the longer "tails"; that is, they stretch most into the future from the year in which the injury occurred. This means, inevitably, that these claims will represent the largest share of remaining liabilities as time goes on. For a detailed discussion of how rate-making is done and the sources of the unfunded liability in the Fund, see Spieler, *Injured Workers*, *supra* note 7, at 342-57; Spieler, *Perpetuating Risk?*, *supra* note 7, at 185-201.

It is clear that the total unfunded liability of the Fund has grown each year. Each year, inadequate rates mean that inadequate funds are set aside to fund the future costs of the injuries which occurred in that year. It is difficult to graph the increase over time, however, because actuarial assumptions and discounting rates have changed in each actuarial audit of the Fund. For example, the audit for the fiscal year (FY) 1994, showed a total liability of \$6.07 billion, a discounted deficit of \$1.84 billion (using a 7% discount rate),

Inc., the Fund's consulting actuary:

[T]he essence of the deficit is that workers have been injured and are entitled to certain benefits; the cost of those benefits has not been collected from employers in the past. The cost must be provided from future employers or from some other source. (The exact liability could change, of course, if there are new statutes, judicial decisions, claims management activities, etc.) Not only do future employers have to pay the cost of future injuries, they must also pay the \$1.9 billion deficit (plus lost investment income). Depending upon the growth and robustness of the state's economy, this may be relatively painless or very painful.¹⁹⁰

The most recent actuarial estimate of the unfunded liability, as of June 30, 1994, was \$4.95 billion on an undiscounted basis and \$1.85 billion on a discounted basis, using a discount rate of 7 percent.¹⁹¹ This deficit was in fact substantially reduced by the 1995 legislative changes.¹⁹²

and an undiscounted liability of \$4.95 billion. 1994 ACTUARIAL REPORT, *supra* note 8, exhibit I. The equivalent report for FY 1993 showed a discounted deficit of 1.85 billion, using a 6% discount rate, and an undiscounted deficit of \$4.54 billion. MILLIMAN & ROBERTSON, INC., STATE OF WEST VIRGINIA WORKERS' COMPENSATION FUND, ESTIMATED LIABILITY FOR CLAIMS AND CLAIMS ADJUSTMENT EXPENSE AS OF JUNE 30, 1993 (1993) (prepared Aug. 31, 1993). The 1993 report, however, involved a change in methodology for valuation of some claims. *Id.* The FY 1992 report showed a \$1.2 billion deficit using a 9% discount rate. MILLIMAN & ROBERTSON, INC., STATE OF WV WORKERS' COMPENSATION FUND, ESTIMATED LIABILITY FOR CLAIMS AND CLAIMS ADJUSTMENT EXPENSE AS OF JUNE 30, 1992 (1992) (prepared Dec. 12, 1992). This report added a new \$40 million claims reserve required by Generally Accepted Accounting Principles, \$160 million for previously uncalculated second injury life award "IBNR" (incurred but not reported) claims; and \$100 million general revaluation of prior liabilities. *Id.*

190. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 2. This same language appears in each annual report.

191. 1994 ACTUARIAL REPORT, *supra* note 8, at ii. Actuaries rely on past behavior and claims experience in order to predict future costs. In reacting to statutory changes which are likely to change future claims experience, the actuary must attempt to quantify the potential cost changes. It is interesting to note that this last actuarial report does not explicitly discuss the 1993 legislative changes. In 1993, reopening of old claims was limited; this should have reduced both the incurred but not reported as well as the future claims for PTD benefits. There is no explicit evidence that this was considered in the calculation of the PTD liabilities in this actuarial report. The 1993 amendments were apparently included in the rate level projection, however. See *infra* note 406.

192. 1996 RATE LEVEL PROJECTION, *supra* note 39, exhibit I. For a discussion of the financial impact of the 1995 legislative changes, see *infra* Part V.A.

The alarming underfunding of the Fund's liabilities in West Virginia can be primarily traced to two sources: premium rates for both subscribing and self-insured employers, which have been far too low to pay for the statutory benefits due to injured workers,¹⁹³ and a relatively large outlay for claims involving workplace fatalities and permanent total disability.¹⁹⁴ Although not as significant, the deficit also grew as a result of generally poor financial management and collection practices. These included a failure to hold adequate security for self-insured employers who became inactive (or bankrupt) and transferred liabilities to the Fund and, more generally, poor collection practices, resulting in a failure to collect owed premiums from some employers.

In states which permit private insurance,¹⁹⁵ increasing costs and desire for increased profits were reflected in greater premium rate increases over the period 1985-1995,¹⁹⁶ which rose to reflect more accurately the increase in program costs. This led to one of two results: substantially higher premiums for employers who bought insurance (whether from a state-administered fund or a private insurance carrier); and, as state regulators of premium rates attempted to keep rates down, a crisis in the insurance industry resulting in large growth in the residual insurance market.¹⁹⁷ This growth of the residual market in many

193. See *infra* Part II.B.2.

194. See *supra* Part II.A.2.b.

195. West Virginia is one of six states which insure workers' compensation exclusively through a state fund. West Virginia is not the only exclusive state fund with a substantial deficit; similar problems plague Ohio, where a \$2 billion deficit led to aggressive administrative and legislative changes. Anne Hercus, *Ohio: Market Forces Lead the Way*, 13 BUSINESS & HEALTH, Sept. 1995, at 41 (5). The primary problem with exclusive state funds is the political manipulation of rate setting; no private insurer will do business by collecting inadequate funds to finance incurred claims. In this light, the failure of the Performance Council to raise rates in 1994 is particularly troubling. This is not, however, an argument in favor of private insurance. As noted above, administrative costs are substantially higher when private insurance is used; this means that for the same level of benefits, premium rates will almost always be higher in private insurance states. See *supra* Part II.A.2.c. and accompanying text. A growing profitability in private insurance workers' compensation lines has recently been noted; this suggests only that premium levels are sufficiently adequate to fund the reduced costs of benefits. See Burton, *Workers' Compensation Insurance Profitability Dramatically Improves*, in JOHN BURTON'S WORKERS' COMPENSATION MONITOR, *supra* note 179, at 1.

196. See *infra* note 199.

197. In all but two states employers must provide workers' compensation, either through

states — and the charging of surcharges on the voluntary market to fund residual market losses — indicates that the workers' compensation market has been seriously troubled elsewhere. As a secondary consequence, rising premium rates and workers' compensation costs have created a political backlash in many states, resulting in reductions in benefit eligibility and costs. While the particular nature of our fiscal crisis in workers' compensation may be different, West Virginia has clearly not been alone in facing workers' compensation funding problems.

2. Low Premium Levels for Employers

The unfunded liability of the Workers' Compensation Fund is ultimately the result of the failure to collect adequate premiums in order to fund the promises made to pay benefits to workers. Notably and *indisputably*, the premium levels charged to subscribing employers in West Virginia have been comparatively low since the mid-1980s, when compared nationally or within this region. In 1985, the Moore Administration chose to reduce premium rates by 30 percent and to freeze the premiums at this unsound — and illegal — level.¹⁹⁸ Premium rates were not adjusted until 1989. While premium levels all over the country rose dramatically from 1985 to 1990, West Virginia's premium rates were artificially suppressed. *Premium levels in West Virginia have never regained the level they should and would have attained if the reduction had not occurred.*

purchasing insurance (from a state or private insurer) or by receiving approval to self insure. In states which provide this insurance primarily through private insurers, these insurers seek to insure the low risk end of the workers' compensation market. Those employers which the insurers do not voluntarily insure fall into the residual market. This is conceptually like the automobile insurance market, in which insurance is provided to high risk drivers through a mandated or state-controlled fund. The residual market in workers' compensation has been funded through premiums and surcharges on the rates charged in the voluntary market. The growth of the residual market was largely a reflection of the insurers' assessment that allowed rates in the voluntary market were inadequate to assure adequate profit. For a more detailed discussion of this phenomenon, see Spieler, *Perpetuating Risk?*, *supra* note 7, at 201-05, and sources cited therein.

198. See Spieler, *Injured Workers*, *supra* note 7, at 345-48.

Since 1989, increases in West Virginia have *not overtaken* national average increases. Because of the rate reduction in 1985 and the subsequent failure to increase rates for over three years, West Virginia's rates continue to lag substantially behind national norms.¹⁹⁹ According to a 1994 study undertaken by the Oregon Department of Consumer and Business Services, West Virginia's premiums ranked near the bottom in premium cost (46th) in 1994 — after the rate increases in 1989-1993.²⁰⁰ Other studies consistently show similar results.²⁰¹

199. According to Robert Finger, the Funds' actuary, West Virginia has had the following overall effective rate changes: -30% (effective 7/1/85); no change in 1986 through 1988; 30% (effective 1/1/89); 19% (effective 7/1/90); 15% (effective 7/1/91); 3% (effective 7/1/92); 7% (effective 7/1/93); no change (effective 7/1/94); 12.2% (effective 7/1/95). Telephone Interview with Robert Finger (June 29, 1995). According to the NCCI Statistical Bulletin, average rate increases nationally in NCCI states over the same period were: 12.2% (1985); 8.9% (1986); 9.6% (1987); 8.9% (1988); 6.1% (1989); 12.1% (1990); 7.4% (1991); 10.0% (1992); 2.5% (1993); -1.9% (1994). NCCI 1995, *supra* note 60, at 6 (exhibit I, Countrywide Changes in Premium Level). It is important to look at the effect of this comparison over the entire period, beginning in 1985. If one were to assume that a West Virginia employer and an average national employer were both in the same industry and paying about the same rate before these increases occurred (for example, a base rate of \$10 per \$100 of payroll), then over the period 1985 through 1994, the West Virginia employer's rate would have gone from \$10 to about \$15.40; the national employer's rates would have grown from \$10 to \$20.64. Even with the recent 12.2 percent increase in West Virginia, the West Virginia employer's rate, as of right now, is still lower.

I understand that these comparisons are only hypothetical: the NCCI rate increases are national averages; rates would not have started at exactly the same level in 1985. Nevertheless, they are certainly instructive: *they tell us that West Virginia's premium rates have increased more slowly than the premiums in other states despite the post-1989 increases which were imposed.*

200. RESEARCH & ANALYSIS SECTION, OREGON DEPT. OF CONSUMER & BUSINESS SERVICES, OREGON WORKERS' COMPENSATION PREMIUM RATE RANKING, CALENDAR YEAR 1994 (Feb. 1995) [hereinafter 1994 OREGON STUDY]. This study is undertaken by actuaries who work for the Oregon Department of Consumer and Business Services and uses National Council on Compensation Insurance (NCCI) classification codes, converting state rates which do not use NCCI codes (including West Virginia). The study created premium rate indices which were generated by correcting for various rate-making differences among states. *Id.* at 2-4. The resulting premium rate indices ranged from a low of \$2.26 per \$100 of payroll in Indiana to \$6.98 in Louisiana. *Id.* at 2. West Virginia's premium rate index for rates in effect 7/1/94 to 6/30/94 was \$2.93; *this placed West Virginia in 1994 as 46th from the top; only five jurisdictions in the study had lower rates.* *Id.* at 7 (app. 1). Moreover, West Virginia's rates were substantially lower than the neighboring states of Kentucky (10th with an index of 5.46), Pennsylvania (16th, 5.02), Ohio (25th, 4.42) and similar to Maryland (45th, 3.08); only Virginia (49th, 2.76) had lower rates.

During and after the 1995 legislative session, some lobbyists pointed to high recent rate increases to argue that the only way to achieve fiscal soundness was to reduce the availability of benefits. In fact, rate increases in West Virginia have not kept up with the average

Oregon has performed this study almost annually. The Oregon studies also shed some light on the concern that West Virginia's rates were increasing too rapidly. West Virginia's rate increases have not come close to keeping up with national averages. According to the Oregon reports, West Virginia's rates were 47th from the top in 1986 and 48th in 1988. DEPARTMENT OF INSURANCE AND FINANCE, INFORMATION MANAGEMENT DIVISION, RESEARCH AND ANALYSIS SECTION, OREGON WORKERS' COMPENSATION PREMIUM RATE RANKING, CALENDAR YEAR 1988 7 (Dec. 1988) (app. 1). After the rate increases of 30 percent and 19 percent in 1989 and 1990, West Virginia's ranking rose to 43rd; but the comparative ranking again declined when substantial rate increases were not enacted thereafter: West Virginia's ranking fell to 46th in 1994. 1994 OREGON STUDY, at 7. This confirms the finding that West Virginia's premium rates have been going up at a slower rate than national increases.

The *Oregon Study* offers several caveats. Most importantly, only certain premium classes were utilized. 1994 OREGON STUDY, at 5, 8 (app. 2). Nevertheless, in virtually every industrial class used in the study, West Virginia's rates were comparatively very low. One particular class stands out: the West Virginia premium rate for trucking was 49th in the country; this is an industry in which West Virginia has a very high injury and fatality rate according to statistics generated by the U.S. Department of Labor. See *supra* note 40.

In summary, the *Oregon Study* consistently shows that West Virginia's premium rates are very low when compared to those in other states.

201. John Burton, Professor and Director of the Institute of Management and Labor Relations at Rutgers University and former Chairman of the National Commission on State Workmen's Compensation Programs in 1970-72, performs the best respected interstate rate comparisons in the workers' compensation industry. His comparisons are notable because they correct for industrial mix and other variables. In all of his studies, West Virginia's premiums have been ranked as among the least expensive in the country. According to Burton's data, national average manual rates for 44 types of employers rose from 1.928 in 1986 to 2.137 (1987); to 2.339 (1988); and to 2.542 (1989), a 32 percent increase. During this same period of time, West Virginia's equivalent manual rate for the same types of employers stayed static from 1985 through 1988; West Virginia's equivalent rate was 1.012 in 1986, 1987, 1988 and 1.315 as of 7/1/89. See John F. Burton, Jr. & Timothy P. Schmidle, *Workers' Compensation Insurance Rates: National Averages Up, Interstate Differences Widen*, in JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Jan./Feb. 1992, at 1, 3. Our rate was thus 52 percent of the national average in 1986, fell to less than 44 percent of that average in 1988 and was 52 percent of the national average as of 7/1/89. According to Burton, West Virginia ranked 44th of 47 jurisdictions in 1989 in average costs of manual rates; when certain adjustments are made, West Virginia rose (comparative costs increased) to 38th of 47. Burton has not conducted any recent rate comparison studies which would tell us where West Virginia's rates stand in comparative terms in 1995. Telephone Interview with John Burton (Sept. 9, 1995).

national rate of increase in employer premium costs. The rate increase comparisons used during the legislative session compared our rates in fiscal year 1995 with the rates which were in effect after the illegal reduction of rates by the Moore Administration in 1985;²⁰² the result, of course, was that rate increases looked outlandishly high because the beginning point of the comparison was the point at which rates were inappropriately low. Examples of rates in particular industries help to illustrate this:

Underground coal mining: The base premium rate for underground coal-mining was \$26.31 per \$100 of payroll in 1982²⁰³ and \$29.71 in 1995,²⁰⁴ an *overall* increase (not annual) of only 13 percent over this 13 year period. Of course, if one instead uses for comparison the reduced rate which was in effect during the Moore Administration (\$12.92 per \$100 of payroll for 1985-1988²⁰⁵), then the 1995 rate now appears to be 230 percent of the old rate.

202. In response to one editorial regarding the 1995 rate increase of 12.2 percent, Steve Roberts, President of the W. Va. Chamber of Commerce wrote to *The State Journal*: These taxes have increased 197 percent since 1988 and clearly hurt employers who will be paying them I was particularly surprised to read your opinion that a 30 percent decrease in the mid-1980s helps defend a 197 percent increase by the mid-1990s One of the chamber's responsibilities is to speak for the several thousand business people in our membership, most of whom are small to mid-size employers, who are paying a whopping premium for workers' compensation in our state.

Steve Roberts, *Editorial misguided: Rate hike a tax, timing bad*, THE STATE JOURNAL, June 5, 1995, at 44.

203. 1982 WEST VIRGINIA WORKMAN'S COMPENSATION FUND ANNUAL REPORT 17 (1982) (tbl. 10). The rates given are for the fiscal, not the calendar, year. This rate, therefore, was in effect from July 1, 1981 through June 30, 1982. Note that rates fluctuated somewhat in years prior to 1985.

204. 1994 STATISTICAL TABLES, *supra* note 8, at 01 (tbl. 10).

205. 1984-85 WEST VIRGINIA WORKMAN'S COMPENSATION FUND ANNUAL REPORT 15 (1985) (tbl. 10); 1986 WEST VIRGINIA WORKERS' COMPENSATION FUND ANNUAL REPORT 13 (1986) (tbl. 10); 1987 WEST VIRGINIA WORKERS' COMPENSATION FUND ANNUAL REPORT 17 (1987) (tbl. 9); 1988 WEST VIRGINIA WORKERS' COMPENSATION FUND ANNUAL REPORT 21 (1988) (tbl. 11).

Woodproduct manufacturing: Similarly, the base rate for this class was \$3.76 in 1982,²⁰⁶ \$2.70 in 1985-88,²⁰⁷ and 4.88 for 1992-1995.²⁰⁸ The increase from 1982 to 1995 was 30 percent.

The same basic analysis holds true for the other industrial classes. We therefore continue to pay for the 1985 rate reduction in both political and economic terms.

It cannot be denied that it has been politically difficult (perhaps impossible) to raise rates to levels they would (and should) have attained if the 1985-89 rate reduction had not occurred. In 1989, rates were raised, retroactive to January 1, 1989, by 30 percent; this increase failed to put the rates back to the level they would have been at in 1986.²⁰⁹ Subsequent increases have not made up the difference. The Caperton Administration has, perhaps somewhat unintentionally, therefore continued the underfunding begun by the Moore Administration.²¹⁰ In addition to the excessively low rates charged to subscribing employers, self-insured employers were not asked to pay fully for the costs of second injury life awards which were charged to the Fund;²¹¹ second injury premium rates simply did not rise to cover the costs of the rising number of second injury awards attributable to self-

206. 1982 WEST VIRGINIA WORKMEN'S COMPENSATION FUND ANNUAL REPORT 17 (1982) (tbl. 10).

207. 1984-85 WEST VIRGINIA WORKMAN'S COMPENSATION FUND ANNUAL REPORT 15 (1985) (tbl. 10); 1986 WEST VIRGINIA WORKERS' COMPENSATION FUND ANNUAL REPORT 13 (1986) (tbl. 10); 1987 WEST VIRGINIA WORKERS' COMPENSATION FUND ANNUAL REPORT 17 (1987) (tbl. 9); 1988 WEST VIRGINIA WORKERS' COMPENSATION FUND ANNUAL REPORT 21 (1988) (tbl. 11).

208. WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS, WORKERS' COMPENSATION DIVISION, 1992 ANNUAL FINANCIAL AND STATISTICAL TABLES 26 (1992) (tbl. 9); BUREAU OF EMPLOYMENT PROGRAMS, WORKERS' COMPENSATION DIVISION, STATISTICAL SUPPLEMENT TO THE 1993 ANNUAL REPORT 01 (1993) (tbl. 1); 1994 STATISTICAL TABLES, *supra* note 34, at 01 (tbl. 1).

209. For a full discussion of this, see Spieler, *Injured Workers*, *supra* note 7, at 347 n.43.

210. As a former Commissioner, I must of course take some responsibility for this.

211. Letter from Robert Finger to Commissioner Nelson Robinson (Sept. 28, 1988) (on file with author) (noting that "since 1982, self-insureds have produced \$130 million more in second injury claims than they have paid in assessments; self-insureds are currently paying \$25 million to \$30 million per year less than the cost of their second injury claims; this premium shortfall is almost entirely due to underground coal-mining"). Self-insured second injury rates were increased in 1989, but not enough to make up for the prior shortfalls.

insured employers. These employers were, at the same time, allowed to participate in the dumping of these claims into the Fund.²¹² This portion of the unfunded liability persisted as a component of the deficit: as of June 30, 1994, the prior underfunding of second injury life awards attributable to self-insured employers contributed about \$400 million (on a discounted basis) to the overall unfunded liability of the Fund.²¹³ It is now impossible to recoup this money from many of the employers responsible for the claims.²¹⁴ Self-insured second injury premium rates have not been nearly sufficient to fund the costs of this component of the unfunded liability.

More recent decisions regarding base and self-insured rate levels continue to raise some questions about the commitment to develop sound rates. The setting of sound rates became the joint responsibility of the Commissioner and the Performance Council starting in 1993.²¹⁵ The Performance Council failed to increase rates at its first opportunity, as of July 1, 1994. In fact, rates were known at that time to be inadequate to fund the costs of the program on an accrual basis for that year;²¹⁶ rates became more "competitive" on an interstate basis and the deficit grew as a result.²¹⁷ It was not until after the enactment of SB 250 — and the substantial reduction in benefits — that a rate increase was proposed and adopted, effective for July 1, 1995.

212. See *supra* notes 97-98 and accompanying text; see also Spieler, *Injured Workers*, *supra* note 7, at 350-52.

213. 1994 ACTUARIAL REPORT, *supra* note 8, app. A, exhibit A(XII).

214. Since these awards were made for injuries which occurred prior to 1989, many of the responsible employers are now inactive and unavailable to contribute to the costs. Letter from Robert Finger to Commissioner Emily Spieler (April 13, 1989) (on file with author) (stating that about half of the second injury awards attributable to underground coal mining were chargeable to companies which at that time were already defunct or had rapidly declining payrolls). In addition, the payrolls in the industries in which many recipients of second injury life awards worked have declined substantially.

215. W. VA. CODE § 21A-3-7(e) (1994).

216. Although income in 1994 was sufficient to fund costs on a cash basis, the actuarial recommendation concluded, "the overall regular subscriber rate level needs to be increased by about 22%." 1995 RATE LEVEL PROJECTION, *supra* note 181, at 10, 13.

217. In 1994, the Fund's collected premiums for 1994 were less than the cost of new 1994 injuries by about \$65 million. MILLIMAN & ROBERTSON, INC., STATE OF WEST VIRGINIA, WORKERS' COMPENSATION FUND, ESTIMATED LIABILITY FOR CLAIMS AND CLAIMS ADJUSTMENT EXPENSE AS OF JUNE 30, 1994 ii (1994) (prepared Jan. 16, 1995).

In summary, on a comparative basis, *West Virginia's premium rates are still lower and have gone up less quickly than the premiums in most other states.* The premium levels in place in 1994 were adequate to fund the program on a cash, but not on an accrual, basis. And the inadequacy of premium rate levels has been the single largest contributing factor to the serious unfunded liability faced by the Fund.

C. Attempts to "Fix" Workers' Compensation (1990-1994)

Many of the problems — poor administration, inadequate funding, inefficient adjudication of claims — had not gone unnoticed prior to 1995. The mess left by the administrative and fiscal²¹⁸ irresponsibility of the last Moore Administration cried out for solutions.²¹⁹ Administrative work focused on a variety of troubling aspects of the program: poor handling of claims and ineffective collection of premiums from employers being the most obvious of these problems.

Legislative changes were proposed by Governor Caperton — and by others — on an annual basis after 1989.²²⁰ In 1990, the statutorily

218. The failure to set adequate premium rates was the most immediate and pressing problem. See *supra* Part II.B.2. In addition, no aggressive collection policy had been developed to secure payment of premiums when employers failed to pay. Inadequate security was held from self-insured employers; when a self-insured employer closed down or filed for bankruptcy, the claims against the employer had to be paid by the Fund. Millions of dollars were spent on these claims; this money could not be recovered from the responsible employer. See Commissioner Andy Richardson, Workers' Compensation Receivables Management (undated) (unpublished data, on file with author) (noting: "What We Faced: No Collection Process . . . No Computer Software to Support Collections Efforts . . . No Trained Collection People . . . Savvy Customers . . . Statutory Limitations"). Some progress has been made in collection processes, as Commissioner Richardson's handout notes.

219. My experience, as the first Commissioner after Governor Moore left office, illustrates this. As previously noted, the number of cases in litigation was enormous. Procedures were not in place to maintain records of correspondence. Claim files were frequently lost and had to be "re-built" using the litigants' files. When correspondence was received and the claim file could not be found, it simply went unanswered and, to my utter amazement, was put in a pile — never to be touched again. The rumor in the agency was that everyone hired over the prior four years had "come through the Governor's office." My repeated assurances to people that their work would be evaluated only on the basis of its quality were, generally, disbelieved. The building in which the agency was housed was inappropriate for use as an office building; bonds had been floated to pay for a long and excessively costly lease. Protests were not computerized. The list of both financial and administrative horrors can go on and on.

220. Many of the 1990 and 1993 amendments which are described here were again

mandated Advisory Board delivered a report to the Legislature recommending a series of legislative changes, many of which were adopted.²²¹ The amendments focused on administrative processing and included the following:

*Creation of the Office of Judges.*²²² For the first time, an independent review of the evidence was to be conducted. In addition, the Commissioner was permitted to defend the Fund against second injury claims when the employer did not do so,²²³ and settlements were permitted for relatively small (under 15 percent) PPD claims.²²⁴

Redesign of rehabilitation and return to work options for injured workers. The 1990 legislation set out new goals for the vocational rehabilitation program;²²⁵ created a new temporary partial rehabilitation benefit, designed to provide economic incentives for a worker to return to work at a job which paid a lower wage than s/he earned before the injury;²²⁶ restricted the ability of employers to discharge injured employees when they were off work due to a compensable injury;²²⁷ and established a "trial return to work" program which would prevent the closure of a claim on a temporary total disability basis while an employee attempted to work.²²⁸

Changes in collection practices. Recognizing the problems in collection of premiums, the 1990 legislation began what became a series of changes in the legislation governing collection of premiums. In particular, 1990 legislation tightened the liability for premium payment of contracting²²⁹ and successor employers,²³⁰ prohibited many self-

amended by SB 250. See *infra* Part III for a summary of the provisions of SB 250.

221. For an extensive discussion of the development of these proposals and their content, see Spieler, *Injured Workers*, *supra* note 7, at 429-42.

222. See W. VA. CODE § 23-5-1(g) (1994) (superseded by W. VA. CODE § 23-5-8 (Supp. 1995)).

223. W. VA. CODE § 23-5-1(h) (1994) (superseded by W. VA. CODE § 23-5-9 (Supp. 1995)).

224. W. VA. CODE § 23-5-1(f) (1994) (superseded by W. VA. CODE § 23-5-7 (Supp. 1995)).

225. W. VA. CODE § 23-4-9 (1994).

226. W. VA. CODE § 23-4-9(d) (1994).

227. W. VA. CODE § 23-5A-3 (1994).

228. W. VA. CODE § 23-4-7(b) (1994).

229. W. VA. CODE § 23-2-5(a) (1994).

230. W. VA. CODE §§ 23-2-14 to -16 (1994) (amended by SB 250, W. VA. CODE §§

insured employers from withdrawing from second injury fund coverage,²³¹ and made some initial provision for subrogation rights for the Fund and self-insured employers when the injured worker successfully pursued third party payment for the injury.²³²

Strengthening of controls over health care providers. Problems with increasing medical costs led to legislative changes which, among other things, increased criminal penalties for medical providers who engaged in criminal practices²³³ and allowed for suspension of providers who abused the Fund,²³⁴ created the Health Care Advisory Panel and charged it with developing treatment and examination protocols for occupational injuries and illnesses and lending other expert medical advice to the Commissioner;²³⁵ and restricted the right of physicians to refer patients to facilities in which they had an ownership interest.²³⁶

More minor legislative changes were passed in 1991, but major legislation was again passed in 1993. The 1993 legislative changes included the following:

23-2-14 to -15 (Supp. 1995)).

231. W. VA. CODE § 23-2-9(b) (1994). Prior to 1990, self-insured employers could elect second injury fund coverage at will. At that time, premium rates for this coverage were excessively low. If rates had been raised to an appropriate level, self-insured employers could have unilaterally elected to withdraw from coverage, thereby eliminating any possibility of recouping the Fund's losses on self-insured second injury awards. As initially proposed, the legislation would have required all self-insured employers to maintain second injury coverage. Instead, the final Bill allowed historically self-insured employers who also self-insured the second injury risk to continue to self-insure that risk, and "locked in" the other self-insured employers so that rates could be raised and revenues increased.

232. W. VA. CODE §§ 23-2A-1, -2 (1994). Successful opposition to a broader subrogation provision, which had been endorsed by the labor-management Advisory Board, was mounted by lawyers and lawyer-legislators.

233. W. VA. CODE § 23-4-3(a) (1994) (amended by SB 250, W. VA. CODE § 23-4-3 (Supp. 1995)).

234. W. VA. CODE § 23-4-3(c) (1994) (amended by SB 250, W. VA. CODE § 23-4-3 (Supp. 1995)).

235. W. VA. CODE § 23-4-3(b) (1994) (amended by SB 250, W. VA. CODE § 23-4-3 (Supp. 1995)).

236. W. VA. CODE § 23-4-3(b) (1994) (amended by SB 250, W. VA. CODE § 23-4-3 (Supp. 1995)).

Mandatory and voluntary safety programs. For the first time, the Division was given the authority to develop safety programs for employers with excessive rates of injuries (and therefore excessive claims costs).²³⁷

Creation of the Compensation Programs Performance Council. Seeking to establish a body which would make the hard choices about workers' compensation (and relieve legislators of that task), the 1993 legislation created the new Performance Council to be composed of four labor and four business representatives; the Commissioner was to serve *ex-officio* as a voting member and as chairperson.²³⁸ The Performance Council was explicitly charged with several key roles: revising the vocational standards for PTD awards (with a statutory deadline of September 1, 1993);²³⁹ recommending legislative changes;²⁴⁰ setting premium rates for employers;²⁴¹ and promulgating rules governing workers' compensation procedure, claims, and premium collection.²⁴² This rule-making authority was explicitly exempted from the legislative review process.²⁴³

Changes in premium collection policies. Once again, the Commissioner sought and the Legislature endorsed a variety of changes designed to improve the ability of the Commissioner to collect premiums from employers. In 1993, these included a new provision establishing primary contractor liability for premiums²⁴⁴ and revised settlement procedures when premiums were owed.²⁴⁵

237. W. VA. CODE §§ 23-2B-1 to -3 (1994).

238. W. VA. CODE §§ 21A-3-1 to -4 (1994).

239. W. VA. CODE § 21A-3-7(m) (1994) (requiring a two-thirds vote of the Performance Council for adoption of new PTD vocational standards).

240. W. VA. CODE § 21A-3-7(b) (1994).

241. W. VA. CODE § 21A-3-7(e) (1994).

242. W. VA. CODE § 21A-3-7(c) (1994).

243. *Id.* The Legislature's procedure for reviewing rules has subsequently been called into question by the Supreme Court of Appeals of West Virginia. *State ex rel. Meadows v. Hechler*, 462 S.E.2d 586 (W. Va. 1995).

244. W. VA. CODE § 23-2-1d (1994) (amended by SB 250, W. VA. CODE § 23-2-1d (Supp. 1995)). Not surprisingly, this provision was the focus of a great deal of political concern.

245. W. VA. CODE § 23-2-5b (1994) (repealed by SB 250, W. VA. CODE § 23-2-5a (Supp. 1995)). In an attempt to clean up collection practices, the 1993 legislation also al-

Limitations on benefits. The 1993 legislation also directly confronted certain concerns about costs associated with benefits. Claims involving mental impairment in which no physical injury occurred (generally referred to as mental-mental claims) were made noncompensable.²⁴⁶ Claims, which were held open indefinitely by the failure of the Commissioner to issue closure orders, were now deemed automatically closed (without notice) after a five year period.²⁴⁷ Procedures governing the Commissioner's consideration of PTD claims were amended.²⁴⁸ Claimants could not be awarded PTD benefits after they retired from the workforce and collected (or were eligible to collect) old-age Social Security benefits.²⁴⁹ In addition, limitations were placed on the ability of claimants to collect both weekly PTD benefits and benefits from other programs²⁵⁰ or wages.²⁵¹

The 1990 and 1993 amendments required substantial administrative work to become integrated into the workers' compensation program. In addition, a variety of administrative initiatives and problems confronted the Commissioner: the building which housed the Division was seriously inadequate; a new claims management team approach was developed

lows the Commissioner to write off uncollectible premium, W. VA. CODE § 23-2-5d (1994), and set a statute of limitations on collection efforts. W. VA. CODE § 23-2-5c (1994).

246. W. VA. CODE § 23-4-1f (1994). The result of this provision is actually to eliminate the immunity created by workers' compensation for employers; any injury which is, by statute, non-compensable can be the subject of a civil action. This provision was primarily supported by the business community. I found their support of this provision odd. Stress or "mental-mental" claims did not make up a significant number of claims nor a significant cost to the Fund in West Virginia. In view of this, the decision to open up employers to civil liability may turn out to have been shortsighted.

247. W. VA. CODE § 23-4-22 (1994); *see also supra* note 169 and accompanying text.

248. W. VA. CODE § 23-4-24(c) (1994) (amended by SB 250, W. VA. CODE § 23-4-24(c) (Supp. 1995)). This was the culmination of an on-going problem: claimants first raised their application for PTD benefits during litigation before the Office of Judges instead of allowing the Commissioner to first review the claim. This provision was part of an on-going attempt to force claimants to raise the issue of their PTD eligibility to the Commissioner before seeking a PTD award before an administrative law judge.

249. W. VA. CODE § 23-4-24(a) (1994) (amended by SB 250, W. VA. CODE § 23-4-24(a) (Supp. 1995)).

250. W. VA. CODE § 23-4-23 (1994). This offset provision did not affect Social Security disability benefits and was not a 100 percent offset for old-age benefits.

251. W. VA. CODE § 23-4-25 (1994) (amended by SB 250, W. VA. CODE § 23-4-25 (Supp. 1995)).

and required significant amount of staff training; a new claims charging system which would keep more accurate records of claims costs — and charge those costs to employers — was also being developed; collection efforts were improved; assistant Attorneys General were engaged to begin to defend undefended second injury claims. Serious effort was put into making long term and significant administrative improvements. At the same time, legal challenges to the procedures in use for litigation of claims, which were resulting in unacceptably long delays, led both to the dedication of increased resources to clear backlogs²⁵² and to new rules governing the consideration of applications for PTD benefits.²⁵³ Implementation of many of the legislative initiatives lagged. Despite the deadline of September 1, 1993, the Performance Council failed to propose new vocational standards for permanent total disability awards.²⁵⁴ No administrative or regulatory implementation of the 1993 safety provisions was formally proposed until July 31, 1995; as of this writing, no implementing rules have yet been adopted.²⁵⁵ Nor, as noted above, were rules implementing the 1990 changes in the rehabilitation program effective until July 1, 1994²⁵⁶

252. *See supra* note 160.

253. A Policy Statement for the Handling of Requests for Permanent Total Disability Awards was filed with the Secretary of State's office on April 15, 1994, in response to a consent order entered into on July 26, 1993 in which the Supreme Court of Appeals directed the Commissioner:

[T]o adopt 'reasonable rules of procedure, establishing (a) times for completion of procedural steps, (b) the proof and evidence required for entitlement to benefits, and (c) the method and manner in which decisions are to be rendered, including protestable orders regarding a claimant's entitlement to permanent total disability awards. . . .' Consent order at page 3. This policy statement is intended to comply with that directive.

Id. at 1. This policy was subsequently filed as a proposed rule on July 9, 1994, to be codified at W. Va. C.S.R. sections 85-18-1 to -7 (1994). The rule was never finalized; it was made moot by the passage of SB 250.

254. A draft of vocational standards for permanent total disability awards was proposed in 1994, to be codified at W. Va. C.S.R. sections 85-17-1 to -10 (1994) (filed July 26, 1994).

255. W. Va. C.S.R. sections 85-23-1 to -13 (1995) (filed July 31, 1995) (Loss Prevention, implementing Section 23-2B-2). As of December 26, 1995, this rule had not been finalized. The Performance Council is also considering proposed rules to implement Section 23-2B-3 (to be codified at W. Va. C.S.R. section 85-24) (Qualified Loss Management Programs), but has not yet formally filed a proposed rule with the Office of the Secretary of State.

256. W. Va. C.S.R. sections 85-15-1 to -16 (1994) (Vocational and Physical Rehabili-

— despite the explicit statutory directive that these rules be promulgated no later than July 1, 1991.²⁵⁷ The Division thus failed to pursue aggressive enforcement of rehabilitation and safety provisions which were designed to limit workers' compensation costs in the future.

The Performance Council was not inactive during this period, of course. In addition to undertaking administrative oversight of the agency, the Performance Council discussed, put out for public comment, and finalized several complex sets of regulations.²⁵⁸ More rules are being developed as this Article is being written.

But the Performance Council nevertheless ducked its most difficult tasks. First, it failed to promulgate a rule governing vocational standards for permanent total disability.²⁵⁹ And second, the Council, apparently on the advice of the Commissioner, did not increase premium

tation) (effective July 1, 1994).

257. W. VA. CODE § 23-4-9(e) (1994).

258. These include the rules governing vocational rehabilitation, *supra* note 256, safety, *supra* note 255, and permanent total disability, *supra* note 254. In addition, the Council proposed and finalized rules governing primary contractor liability, W. Va. C.S.R. sections 85-10-1 to -10 (1995) (proposed amendment filed May 25, 1995); enforcement of reporting and payment requirements, W. Va. C.S.R. sections 85-11-1 to -19 (1993) (proposed amendment effective Sept. 10, 1995); guidelines for permanent impairment rating, W. Va. C.S.R. sections 85-16-1 to -8 (1994) (proposed amendment filed April 5, 1995); medical treatment for occupational pneumoconiosis, W. Va. C.S.R. sections 85-19-1 to -6 (1995) (proposed rule filed Jan. 10, 1995); guidelines for the treatment of workers' compensation injuries, W. Va. C.S.R. sections 85-20-1 to -28 (1995) (effective Oct. 1, 1995); guidelines for controlled substances, W. Va. C.S.R. sections 85-21-1 to -5 (1995) (effective Sept. 22, 1995); guidelines for psychiatric permanent impairment evaluations, evidence and ratings of psychiatric impairment due to workers' compensation injuries, W. Va. C.S.R. sections 85-22-1 to -7 (1995) (effective Sept. 22, 1995).

259. The proposed draft of a vocational standard rule, prepared by the Division's legal staff, represented a serious attempt at a balanced approach to defining altered vocational standards for PTD awards. W. Va. C.S.R. sections 85-17-1 to -10 (1994), *supra* note 254. After comments were received, the Performance Council was unable to reach any consensus with regard to the final form this rule should take; apparently, labor representatives, upon the advice of their attorney, refused to negotiate. To the extent that it can be argued that labor should have come to the table to discuss the high rate of PTD awards and the development of an alternative vocational standard, labor representatives clearly did in fact contribute to the final breakdown in negotiations in 1994. They — and claimants — certainly paid for this later.

rates for the 1994-95 fiscal year, *despite the fact that these rates continued to be both low and inadequate to fund the program.*²⁶⁰

Despite the failure to raise premium rates for the fiscal year beginning July 1, 1994, increasing pressure was brought on the Performance Council by the Administration in the Fall of 1994 to develop a comprehensive legislative package which would "solve" the growing fiscal problems facing the Fund.²⁶¹ Discussions within the Performance Council focused on saving costs, primarily by revising benefit eligibility standards. Experts were brought in to address the Performance Council regarding the ways in which the West Virginia program was 'out-of-line' with the programs of other states.²⁶² Estimates of savings were developed, quantifying the savings from specific proposed cutbacks in benefit availability.²⁶³ The final round of negotiations between labor and management representatives occurred, however, with-

260. See *supra* notes 215-217 and accompanying text.

261. Interview with Fred Tucker, United Mineworkers of America labor representative on the Performance Council and Chair, Performance Council Claims Committee, in Morgantown, West Virginia (Sept. 15, 1995).

262. *Id.* For example, Duncan Ballantyne addressed the Performance Council in November and December 1994; Ballantyne's presentation is discussed, *supra* note 58.

263. My attempts to obtain the actuarial analyses which were provided have failed as of this writing, however. I made a Freedom of Information request on September 11, 1995, to the Commissioner to obtain a variety of actuarial information, including the following:

Correspondence between you or any representative of the Workers' Compensation Fund and any consulting actuary regarding the deficit, claims reserves, or analyses of savings which might be achieved through various legislative proposals, administrative changes, or rule-making changes, from January 1, 1993 to the present. Please include any actuarial analysis regarding the savings achievable or achieved by legislation passed by the legislature in 1993, 1994, and/or 1995.

By letter dated October 17, 1995, I received the handouts which had been distributed to legislators regarding SB 250; with regard to the actuarial correspondence, the response from John H. Kozak, Director, Legal Services Division, Bureau of Employment Programs was as follows:

Our files do contain other documents that would fit within the parameters of your request. However, we assert that they are exempted from disclosure by the provisions of the Freedom of Information Act for correspondence and memoranda. In addition, we assert that they are exempt from disclosure on constitutional grounds of executive privilege.

Letter from John H. Kozak to Emily A. Spieler (Oct. 17, 1995) (on file with author). As far as I know, all of this information was not provided to the Performance Council or to the Legislature either.

out the benefit of a financial expert or actuary who could quantify the savings which might come from any proposal.²⁶⁴ In fact, the Administration told the labor representatives that if they did not agree to the changes, the Administration would get them without labor's support.²⁶⁵ In January, Commissioner Richardson provided the Performance Council with the Bill he intended to seek: it was, in most respects, the Bill which was introduced on February 2.

264. Interview with Fred Tucker, *supra* note 261.

265. *Id.* It appears that the Bill was drafted in order to convince labor representatives that they should "come to the bargaining table." The labor representatives concluded during the course of the negotiations that they could not give up enough to satisfy the business representatives. *Id.* The labor representatives appear to have been right: the Administration's strategy also undoubtedly had the effect of letting the business representatives know that, in the event that negotiations failed, they would get everything that was in the Bill; this was pretty much everything they wanted. As Thad Epps, a business representative on the Performance Council, commented to me in January 1995, "The problem with these negotiations is that we [business representatives] have nothing to trade." Fred Tucker, the Chairman of the Claims Committee of the Performance Council, reports, that, in the end, the only articulated goal during the late 1994 and early 1995 discussions was "how to save costs." The flavor of the "negotiations" in the Performance Council was borne out later: after the enactment of the 1995 legislation, industry continued to resist any meaningful adjustment in premium rates to be charged employers; in June 1995, three of the four management representatives on the Performance Council voted against the proposed 12.2 percent increase in rates. Rochelle Olson, *Workers' Comp premiums going up 12.2% in July*, CHARLESTON GAZETTE, June 5, 1995, at 1A. Olson's article stated:

The vote on the increases was 6-3, with business-backed member and Appalachian Power Co. Vice President Tom Rotenberry voting in favor of the increases. The four labor representatives and Employment Programs Commissioner Andy Richardson also voted for them. . . . The business representatives who voted against the measure said the fund's records were not accurate enough to determine who should take the biggest rate hikes The irony of the argument was not lost on Fred Tucker, a United Mine Workers representative on the council. 'It was good enough to use the figures to say, We gotta have Senate Bill 250,' Tucker said.

Id.

III. SUMMARY OF ENROLLED SENATE BILL 250²⁶⁶

The 1995 Legislature confronted this scenario: massive unfunded liabilities for workers' compensation; increasing financial instability caused by accrued costs, particularly large claim costs, which substantially exceeded income; a failure of the Performance Council to reach a labor-management compromise on the critical problems facing the program; and an Administration which had concluded that, without such a compromise, legislation had to be passed which would reduce the costs of the program, primarily through benefit reductions and increases in potential administrative efficiencies. Underlying these immediate issues were longer term problems: a decade-long mismatch between revenue collection and incurred liabilities, resulting in a huge unfunded liability; and a history of excessive injuries and illnesses arising from West Virginia's industries.

The Bill that the 1995 Legislature passed, after such notably brief consideration, made significant changes in four critical components of the workers' compensation system: eligibility for and payment of disability benefits; control over the provision of health care to work-injured individuals; the procedure by which benefits are determined; and the methodology for the setting and collection of premiums. Although anxiety about the unfunded liabilities of the Fund was the focus of the political discussions, it is clear that the Governor and the Legislature also addressed a variety of issues which went beyond fiscal concerns. In doing so, changes were not only made in the rules governing permanent total disability; changes were made in eligibility, procedure, and medical treatment that will affect *every* pending and future claim in the workers' compensation system. The following summarizes the statutory changes, their specific effect on the current benefit and rate structure, provides the apparent justification for the change and a brief explanation of the provisions. Part V of this Article provides a more detailed analysis of the impact and implications of these changes.

266. This summary addresses only the provisions of the final version of the Committee Substitute for SB 250, as passed by the Legislature and signed by the Governor. Some amendments which I consider to be relatively minor are not included; others, of course, may not agree with their exclusion.

A. Benefits Paid to Workers

The 1995 amendments made changes in both the eligibility standards for benefits and the calculation of the amount of payments which are made directly to injured workers.

1. Permanent Partial Disability Benefits

Impairment-Only Rating System for Partial Disability. Partial disability is now, by statute, determined solely by the degree of whole body medical impairment;²⁶⁷ this eliminates any consideration of the extent to which an individual is “disabled” — that is, economically affected — by the injury. Although the statute does not specify the method for calculation of impairment, the rules governing evaluation of partial disability require use of the *AMA Guides* in all cases except those in which the Division had developed, or the statute requires, a specific alternative to the *AMA Guides*.²⁶⁸

Calculation of Permanent Partial Disability Benefits. Prior to SB 250, claimants received four weeks of benefits for each percentage point awarded, calculated at 70 percent of the claimant’s pre-injury wage up to a maximum of two-thirds of the state average weekly wage (SAWW). Three changes were made in the calculation of PPD bene-

267. W. VA. CODE § 23-4-6(i) (Supp. 1995).

268. W. Va. C.S.R. sections 85-16-1 to -8 (1995). As of this writing, an amendment to the rule is pending which will eliminate all reference to conversion to disability in PPD awards. The amendment is fairly simple, since the Performance Council adopted the use of the *AMA Guides* in evaluating impairment in 1994. The rule explicitly excludes medical conditions which are covered by separate impairment-based evaluation systems from the use of the *AMA Guides*; these include W. Va. C.S.R. section 85-16-6.1 (1995) (occupational pneumoconiosis), W. Va. C.S.R. section 85-16-6.2 (1995) (noise-induced hearing loss), W. Va. C.S.R. section 85-16-6.3 (1995) (psychiatric conditions), W. Va. C.S.R. section 85-16-6.4 (1995) (statutorily scheduled injuries), and W. Va. C.S.R. section 85-16-6.5 (1995) (claims in which there is a statutory irrebuttable presumption of permanent total disability).

In addition, when the statute specifies the degree of impairment, the statutory schedule now sets the maximum, not the minimum, level of compensation. Since these scheduled awards were historically intended to provide a guaranteed level of impairment-based compensation, irrespective of the degree of economic loss, this change is consistent with the impairment-only approach. W. VA. CODE § 23-4-6(f) (Supp. 1995).

fits. First, the individual's weekly compensation rate is now capped at two-thirds, rather than 70 percent, of his/her pre-injury wage.²⁶⁹ Second, the maximum allowable weekly compensation was raised to 100 percent of the SAWW.²⁷⁰ Third, for claimants who are released to return to work by their treating physicians and whose employers do not offer them reemployment at their pre-injury or a comparable job, the award is to be computed on the basis of six weeks of benefits for each percent of disability, instead of four weeks of benefits.²⁷¹

Explanation of PPD Changes: During the legislative session, Administration officials estimated that use of medical impairment as the only basis for evaluating permanent disability would result in a \$7.5 million reduction in claims' costs on an annual basis.²⁷² These savings would presumably result from the elimination of the more subjective process of determining partial disability which had been used previously.²⁷³ In addition, use of a single impairment-rating scheme was designed to increase consistency among medical opinions and, therefore, reduce litigation.²⁷⁴ This provision, together with other sections

269. W. VA. CODE § 23-4-6(e) (Supp. 1995).

270. *Id.* This is done by reference to the section covering PTD benefit rates (W. VA. CODE § 23-4-6(d) (Supp. 1995)), and makes the weekly compensation levels for permanent partial and permanent total disability consistent with one another.

271. W. VA. CODE § 23-4-6(e)(2) (Supp. 1995). This provision was added to the legislation by the legislative leadership in order to address concerns regarding the gap in benefits when an individual is injured, is not significantly "impaired" within the meaning of the *AMA Guides*, but still is unable or not allowed to return to his/her prior employment. Telephone Interview with Robert Chambers, *supra* note 2. It was therefore not included in the Administration's calculation of savings and costs which are enumerated below.

272. Bureau of Employment Programs, WV Workers' Compensation Crisis, The Solutions (Feb. 6, 1995) (unpublished handout, on file with the author) [hereinafter BEP Solutions] (one of several flyers distributed during legislative session). This handout was provided by Commissioner Richardson to members of the Legislature, enumerating savings and other anticipated benefits from major changes in the Governor's bill; it did not include calculations based upon changes made in the initial bill after it was introduced and before it was passed. Note that the actuarial analysis, which did not wholly reflect this initial analysis of the impact of SB 250, is discussed and evaluated *infra* in Part V.A. Actually, there are at least two versions of benefit reduction estimates which were circulated by the Administration. Both are undated. A second flyer, entitled WV Workers' Compensation Financial Crisis (1995) (unpublished handout, on file with author) [hereinafter Financial Crisis], provides the same estimates except in one case: the estimate for savings from the use of the PTD threshold was lower. See *infra* note 301.

273. See *supra* notes 70-74 and accompanying text.

274. BEP Solutions, *supra* note 272 ("This will result in greater consistency among

of SB 250, was intended to limit the need for lawyers in resolution of workers' compensation claims. The impairment-based system would also serve to reduce the number of claimants who would meet any minimum threshold for consideration for a PTD award.²⁷⁵ Finally, a weekly compensation rate of two-thirds of the individual's pre-injury wage, instead of 70 percent, makes the state's benefits more consistent with those in most other states and would, according to the initial forecasts, result in a savings of \$4 million annually when applied to all permanent disability awards.²⁷⁶

On the other hand, because specific injuries may affect claimants differently, depending upon a variety of medical and vocational factors, the very consistency and rigidity of an impairment-only system results in a failure to provide appropriate benefits for many claimants. While a system of compensation for partial disability which focuses only on economic loss may fail to recognize significant non-economic effects of an injury, an impairment-only system excludes consideration of the vocational impact of the injury. Professor Larson notes in his treatise that the impairment-only approach "presupposes that there is an abstract and uniform measure of 'disability' that is valid and fair for all persons, apart from their activities or occupations. What, for example, does 'loss of use' of three fingers mean? Loss of use for what purpose? For typesetting or for unskilled labor?"²⁷⁷ Moreover, the adoption of a system which recognizes only impairment, and the accompanying adoption of the *AMA Guides*, runs counter to the advice of the

medical opinions and reduce litigation."). Studies are equivocal in their support of this position. See AL BAVON, FLORIDA DIV. OF WORKERS' COMPENSATION, RESEARCH & EDUCATION UNIT, THE USE OF IMPAIRMENT RATING SYSTEMS IN WORKERS' COMPENSATION 19 (Oct. 1993) (citing a variety of studies and noting "impairment-based systems can be estimated with relative ease and minimize disparity among contesting parties, thus providing reasonable certainty about payments due").

275. The estimate of savings is predicated on the fact that impairment-only ratings will tend to be lower than disability-based ratings. Therefore, claimants with prior awards totaling 50 percent PPD may not meet the new 50 percent whole body impairment threshold for PTD consideration.

276. BEP Solutions, *supra* note 272. It appears that the Division did not include the increase in the cap to 100 percent of the SAWW in these calculations; in fact, I have been told that this increase was not intentionally included in the statutory changes.

277. LARSON, *supra* note 68, § 57.14, at 10-97.

American Medical Association,²⁷⁸ to the findings of the 1972 bi-partisan National Commission on State Workmen's Compensation Laws,²⁷⁹ as well as to the recommendations of the more recent 1994 report of the National Conference of State Legislatures.²⁸⁰

Although West Virginia is not alone in adopting an "impairment-only" system,²⁸¹ the majority of states continue to compensate on the basis of economic loss or some combination of impairment and economic loss.²⁸² The provision in SB 250 which provides for increased

278. As noted previously, the *AMA Guides* specifically advise against converting impairment ratings from the *AMA Guides* directly to financial awards or estimates of disabilities, noting that "Each administrative or legal system that uses permanent impairment as a basis for disability ratings should define its own means for translating knowledge about an impairment into an estimate of the degree to which the impairment limits the individual's capacity to meet personal, social, occupational, and other demands." *AMA GUIDES*, *supra* note 80, at 1/4. See *supra* note 82 for the complete quotation from the *AMA Guides* on this issue.

279. NATIONAL COMMISSION REPORT, *supra* note 29, at 53. The report notes:

A basic objective of a modern workmen's compensation program is to provide protection to workers against loss of income from work-related injuries and diseases. . . . A basis for a rational evaluation of injury or disease is the recently published American Medical Association's *Guides to the Evaluation of Permanent Impairment* It must be stressed however that the AMA guides are relevant for evaluation of impairment, not disability; and disability should be the primary basis for awarding permanent partial benefits. Use of the AMA guides to help establish the impairment rating and then use of the impairment rating in conjunction with other information, such as the worker's age, education, and previous experience, to establish the extent of disability seems most appropriate.

Id. at 53, 69.

280. NATIONAL CONFERENCE OF STATE LEGISLATURES, THE STATE OF WORKERS' COMPENSATION 8-9 (1994) [hereinafter NCSL 1994]. NCSL notes:

Perhaps the most serious reservation about an impairment system is that it can result in a grave injustice in those limited instances where there is a very serious, if not catastrophic economic loss suffered by a person which is far out of proportion to the degree of impairment (and, therefore, the compensation).

Id.

281. Law suits have been filed in at least two states challenging the adoption of equivalent systems. The Texas Supreme Court ruled in favor of the change. *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504 (Tex. 1995). A case is still pending in New Mexico. *Deutschman v. Lerner Stores, Inc.*, No. CB 94-539-4, Eleventh Judicial District, State of New Mexico (Petition for Declaratory Judgment and Injunctive Relief, challenging the constitutionality of the New Mexico Workers' Compensation Act, enacted in 1990).

282. See *LARSON*, *supra* note 68, § 57.24(f), at 64 (noting that in 1995 West Virginia joined the minority of states with express adoption of physical-impairment theory; "West

compensation (six instead of four weeks of benefits per percent) to workers with immediate adverse economic consequences resulting from their injury was added to the Governor's bill by the Legislature precisely to soften the combined adverse economic effects of the injury and the legislation. As is discussed further in Part V of this Article, this may not be sufficient to cushion the economic consequences of injuries for some seriously injured workers; other states have adopted a variety of more flexible approaches.²⁸³

2. Permanent Total Disability Benefits

Impairment Threshold for Consideration for a PTD Award. In order to be considered for a PTD award, an employee must now have a definitely ascertainable physical impairment of at least 50 percent.²⁸⁴ Again, according to the implementing rule, this 50 percent threshold is to be measured by the standards in the *AMA Guides*; the determination of whether a claimant meets the threshold and then whether s/he should receive a PTD award is put in the hands of an expert five-member board which is described below.

The amendments preclude any consideration of a claimant for a PTD award, irrespective of whether the claimant is unemployed and unemployable, unless s/he can meet this minimum threshold. People who previously were considered for PTD awards because of a combination of factors including occupational and non-occupational impairments, age, skills, and education, are now precluded from applying for these benefits unless they have been awarded a minimum of 50 percent in prior permanent partial disability awards; they are not eligible for

Virginia seems to be heading away from the wage-loss principle and toward compensating for physical injuries only"). For further discussion of this issue, see *infra* notes 452-459 and accompanying text.

283. For a discussion of some of the alternatives which states have adopted, see *infra* notes 456-459 and accompanying text.

284. W. VA. CODE § 23-4-6(n)(1) (Supp. 1995). Claimants entitled to the rebuttable presumption of permanent and total disability (after receiving partial disability awards totaling 85 percent) must now also meet the requirement that they be at least 50 percent medically impaired before they are entitled to the presumption. W. VA. CODE § 23-4-6(n)(1) (Supp. 1995).

consideration for an award unless they also meet the "whole body medical impairment" (wbmi) standards for establishing 50 percent impairment under the *AMA Guides*. Notably, under the terms of the *AMA Guides*, this is not a simple matter of adding together prior partial disability awards. Instead, as partial impairments are added together, each additional impairment is valued at less than its stated value when added to a prior impairment.²⁸⁵ This effect is exacerbated if the PPD determinations were made prior to the effective date of SB 250; for these awards, the PPD rating is likely to have included some additional consideration of disability and will be above the impairment-only rating that the board will now consider.

Elimination of Any Consideration of Non-Occupational Impairments for Second Injury Awards. Prior to the 1995 amendments, claimants could be eligible for second injury life awards if their second (or subsequent) injury was work-related and their earlier injury or disability was not work-related. The underlying concept of second injury funds in workers' compensation has been that an employer should not be discouraged from employing a partially disabled worker (irrespective of the etiology of the disability) because of fear that the worker would generate higher workers' compensation costs in the future;²⁸⁶ therefore, a worker would be entitled to full benefits if s/he became seriously disabled as a result of a subsequent occupational injury, but the employer would only be responsible for the portion of the disability which arose from the last, work-related injury.²⁸⁷ Under the provisions of SB 250, prior non-work-related injuries and disabilities will not be considered either in determining whether the claimant meets the

285. *AMA GUIDES*, *supra* note 80, at 322-24. For example, two impairments each rated 10 percent yield a combined wbmi of 19 percent; a 40 percent and a 10 percent impairment yield a wbmi of 46 percent — not enough to meet the new threshold. This formula for addition of awards is purely arbitrary, designed to prevent any individual from reaching more than 100 percent wbmi. For further discussion of problems with the *AMA Guides*, see *infra* note 453.

286. Exclusion from the work place because of disability is now also prohibited by the Americans with Disabilities Act, 42 U.S.C. §§ 12201-12213 (1994) and the W. Va. Human Rights Act, W. VA. CODE §§ 5-11-1 to -16 (1994).

287. See *supra* notes 88-90 and accompanying text.

50 percent threshold or in deciding whether a claimant who meets the threshold is entitled to a second injury life award.²⁸⁸

Expert Board for Review of PTD Claims. An interdisciplinary expert board (IEB), consisting of three physicians and two vocational rehabilitation specialists appointed by the Commissioner, now assesses whether an applicant for PTD benefits meets the 50 percent threshold of impairment from occupational injuries and diseases and, then, whether a PTD should be awarded.²⁸⁹ An accumulation of past awards totalling 50 percent partial disability entitles a claimant to file an application with the IEB for permanent total disability benefits. The IEB will determine, as an initial matter, if the individual "has suffered a whole body medical impairment of 50 percent or more."²⁹⁰ If the claimant meets this more stringent "wbmi" threshold, the board will then determine whether the claimant is permanently and total disabled. In making this last determination, the board may consider vocational factors, including age, education, mental ability, and the availability of alternative employment, in deciding whether the individual qualifies for permanent total disability benefits.²⁹¹

Temporary Partial Rehabilitation Benefits for Disabled Workers. If the claimant meets the 50 percent threshold, is denied PTD benefits, and then continues to work at a job which pays less than his/her pre-injury job, s/he is now eligible to receive "temporary partial rehabilita-

288. W. VA. CODE § 23-4-6(n)(1) (Supp. 1995).

289. W. VA. CODE § 23-4-6(j) (Supp. 1995). Prior to referral to the IEB, the Division will collect the relevant evidence in the claim and notify the employer that a request for a PTD award was filed; the employer and claimant are each limited to the submission of one report relevant to each issue in the claim. W. VA. CODE § 23-4-6(j)(1) (Supp. 1995). Actual examinations of the claimant by the IEB are left to the board's discretion. W. VA. CODE § 23-4-6(j)(2) (Supp. 1995).

290. W. VA. CODE § 23-4-6(n)(1) (Supp. 1995).

291. W. VA. CODE § 23-4-6(n)(2) (Supp. 1995). This Section retains, for those claimants who meet the medical impairment threshold, the prior language indicating that when a claimant is "unable to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he or she has previously engaged with some regularity and over a substantial period of time," the claimant should be considered eligible for a PTD award. In addition, the panel may consider any vocational standards adopted by the Performance Council pursuant to statute. W. VA. CODE § 21A-3-7(m) (1994).

tion" (TPR) benefits in a declining amount for a period of four years.²⁹² These TPR benefits were initially created when the vocational rehabilitation section of the statute was rewritten in 1990 to help ease claimants' transition back into the workforce after an injury. They are apparently utilized here both to cushion the economic loss arising from the work-related disability and to provide an economic incentive for claimants who are denied PTD benefits, but are not necessarily undergoing rehabilitation, to remain in the workforce.

Calculation of PTD Benefits (1): Calculation of Weekly Benefit Amount. Consistent with the changes in the calculation of PPD benefits, PTD weekly payments will now be calculated on the basis of two-thirds (instead of 70 percent) of the individual's pre-injury wage to a maximum of 100 percent (no change from prior provision) of the state average weekly wage.²⁹³

Calculation of PTD Benefits (2): Elimination of PTD Benefits after a Claimant is Eligible for Social Security Old-Age Benefits. Prior to 1993, PTD awards would not be reduced if the claimant received other benefits or worked. As noted above, the statute was amended in 1993 to provide specifically for a reduction of PTD benefits in some cases if the claimant was receiving old-age Social Security payments, other disability benefits,²⁹⁴ or wages.²⁹⁵ The 1993 amendments also eliminated the right of claimants to apply for PTD awards after retiring and beginning to collect Social Security old-age benefits.²⁹⁶ The 1995 amendment went farther, providing that PTD benefits will terminate in

292. W. VA. CODE § 23-4-6(n)(3) (Supp. 1995). The claimant will receive benefits in order to guarantee total income of a set percent of the claimant's pre-injury earnings (declining from 80 percent in the first year to 50 percent in the fourth year) with the benefit component capped at 100 percent of SAWW. This benefit can therefore be used to raise the claimant's wages, for the period set out in the statute, to post-injury wages plus 100 percent of the SAWW, but no greater than 50 percent to 80 percent of the pre-injury wages.

293. W. VA. CODE § 23-4-6(d) (Supp. 1995). In addition, during the litigation of a claim, the "backpay" benefits, which accrued from the date of disability, will be limited to \$100,000. If the claimant prevails, the full amount, plus interest, will be paid. W. VA. CODE § 23-4-1d(b)-(c) (Supp. 1995).

294. W. VA. CODE § 23-4-23 (1994) (providing for a 50 percent offset for Social Security benefits and the after tax value of the other benefits).

295. W. VA. CODE § 23-4-25(b) (Supp. 1995).

296. W. VA. CODE § 23-4-24 (Supp. 1995).

all cases when claimants attain the age at which they are eligible to receive Social Security old age benefits,²⁹⁷ irrespective of when the claimant became totally disabled or the amount s/he will receive in these old age or other pension benefits.

Explanation of PTD Changes: These changes were primarily justified on the basis that PTD awards were simply too prevalent and too costly.²⁹⁸ The fact that the rate of PTD awards has exceeded national averages continued to be used as justification for limiting eligibility for these awards.²⁹⁹ Business representatives had long complained both about the consideration of non-occupational disabilities in the granting of second injury life awards and about the widespread use of the "odd lot" doctrine to provide life awards to coal miners and manufacturing workers who were permanently displaced from the labor market because of a combination of factors including occupationally-caused disabilities.

The Administration argued that use of the IEB would, like use of an impairment-only rating scheme for partial disabilities, increase the level of consistency and reduce the amount of litigation.³⁰⁰ During the legislative session, the Administration estimated that the creation of the board and imposition of a 65 percent threshold (the Governor's initial proposal) would result in reductions in benefit costs ranging from \$17.5 to \$30.5 million per year;³⁰¹ in fact, this may have been a very

297. W. VA. CODE § 23-4-6(d) (Supp. 1995).

298. See *supra* notes 103-110 and accompanying text.

299. See *supra* note 21 (quoting from newspaper advertisement paid for by the Chamber of Commerce).

300. BEP Solutions, *supra* note 272. This last argument seems disingenuous: for many years the Occupational Pneumoconiosis (OP) Board has evaluated claimants with occupational lung disease. W. VA. CODE §§ 23-4-8a to -8c (1994 & Supp. 1995). This has certainly not stopped the continuous flood of litigation over the issues which that Board considers. In fact, many of the most well-known reported permanent partial disability cases involve OP Board cases. See, e.g., *Javins v. Workers' Compensation Comm'r*, 320 S.E.2d 119 (W. Va. 1984); *Persiani v. State Workers' Compensation Comm'r*, 248 S.E.2d 844 (W. Va. 1978); *Bryant v. Workers' Compensation Comm'r*, 152 S.E.2d 549 (W. Va. 1967).

301. BEP Solutions, *supra* note 272 (estimating the savings from the expert board at \$7.1 million and the savings from a 60 percent threshold at \$23 million per year). Financial Crisis, *supra* note 272 (estimating the savings from a 65 percent threshold at \$10 million per year. This lower figure is, on its face, much too low).

serious underestimate of the potential reduction in costs which will result from these measures.³⁰² The elimination of PTD benefits when an individual reaches the age of eligibility for Social Security old-age benefits was presumably also an attempt to reduce costs, although no specific forecast of savings was provided.

At the same time, these changes will prevent many severely disabled workers from receiving PTD benefits. The problem in part lies in the meaning of "50 percent impairment." Many legislators appear to have assumed that 100 percent impairment means total disability; that is, inability to work. From this vantage point, a requirement that a worker demonstrate 50 percent impairment before consideration for a life award appears reasonable. In fact, however, from the standpoint of the *AMA Guides*, "95% to 100% whole-person impairment is considered to represent almost total impairment, *a state that is approaching death*."³⁰³ In some cases, 50 percent impairment or less may clearly involve total disability.³⁰⁴ Moreover, as is also analyzed more fully in Part V,³⁰⁵ the elimination of post-retirement age benefits will shift the economic costs of occupational injuries to workers, their families, and to other benefit programs, in direct contradiction to the recommendations of the U.S. Chamber of Commerce.³⁰⁶ Notably, the creation of the 50 percent threshold cannot be justified based upon the goal of achieving consistency with other states: No other state has a similar provision setting a threshold for eligibility for permanent total disability benefits.

3. Survivors' Benefits

Prior to 1995, surviving dependents of a claimant who died while collecting a PTD award, but of causes unrelated to the occupational

302. See fiscal analysis of the impact of SB 250, *infra* Part V.A.

303. *AMA GUIDES*, *supra* note 80, at 2/8 (emphasis added).

304. See *infra* notes 452-453 and accompanying text.

305. See *infra* notes 470-473 and accompanying text.

306. One of the six basic objectives underlying workers' compensation laws, according to the Chamber of Commerce, is to "[r]elieve public and private charities of financial drains — incident to uncompensated industrial accidents." 1995 CHAMBER OF COMMERCE, *supra* note 46, at vii.

disability, were statutorily entitled to 104 weeks of benefits.³⁰⁷ SB 250 eliminates these automatic benefits in any case in which the PTB award is made after February 2, 1995, and instead provides for an election by the claimant at the time the award is made of a survivor's annuity in return for reduced weekly benefits during his/her lifetime.³⁰⁸

Explanation of Survivor Benefit Change: In the past, criticisms of this provision focused on the fact that this benefit was simply not provided in other states. Critics called it a "life insurance policy" for non-work related deaths. The justification for its elimination was presumably that it would save an estimated \$4.7 million annually.³⁰⁹

4. Compensability Determinations

In determining the compensability of any new claim, reopening of a prior claim, or any other request for benefits, the Division must now consider whether the request is filed in close proximity to a scheduled shutdown, layoff, or receipt of unemployment compensation benefits. If so, these findings will be given "probative weight" in the overall determination of compensability.³¹⁰

Explanation: No explicit explanation or justification was offered for this provision. There have always been anecdotal claims that layoffs and shutdowns precipitate the filing of both injury and disease claims.³¹¹ This provision was obviously designed to raise a question

307. W. VA. CODE § 23-4-10(e) (Supp. 1995).

308. *Id.*

309. BEP Solutions, *supra* note 272.

310. W. VA. CODE § 23-4-1c(a)(2) (Supp. 1995). The specific provisions are: (A) Whether the claimant had scheduled shutdown beginning within one week of the date of the filing; or (B) Whether the claimant received notice within sixty days of the filing that his/her employment position was to be eliminated, including, but not limited to, the claimant's worksite, a layoff or the elimination of the claimant's employment position; or (C) Whether the claimant is receiving unemployment compensation benefits at the time of the filing; or (D) Whether the claimant has received unemployment compensation benefits within sixty days of the filing.

Id. The Governor's original version of this section would have created a presumption against compensability.

311. In the case of occupational disease cases, in which claimants rarely have a period

about the compensability of these claims; the provision as initially proposed would have put the burden on the claimant to rebut a presumption, thereby essentially eliminating the liberality rule in the determination of compensability in this subset of claims. The final version of the amendment presumably makes this evidence relevant to consideration of the claim but is more ambiguous in its impact. Again, I can find no other state with an equivalent provision.

B. Medical Benefit Changes

Significant changes were also made in the provision of medical benefits in workers' compensation cases.

1. Managed Care, Choice of Treating Physician, and Confidentiality

Managed Care and Physician Choice. The Workers' Compensation Act now firmly endorses the use of "managed care" for treatment of occupational injuries or diseases.³¹² Claimants retain an unrestricted right to choose their initial treating physician. But when claimants want (or need³¹³) to change physicians, they now may be required to

of temporary total disability, many workers have traditionally waited until they are separated from employment before filing a claim; assuming that they have had continued exposure to the disease-causing agent (such as coal dust or noise), they then can be awarded their partial disability benefits based upon their most recent, and therefore generally their highest, wage level. This is entirely appropriate.

312. "Managed care" is not defined in the statute. According to the 1994 report of the National Conference of State Legislatures, "Managed care can be loosely defined as a coordinated, systematic approach to the delivery of medicine, providing the right care cost-effectively and in a quality fashion. In essence, the goals of any managed care program are to ensure necessity of treatment and contain costs." NCSL 1994, *supra* note 280, at 24. Managed care plans range from fee-for-service health plans which perform utilization review and other cost containment assessments of claims to capitated "health maintenance organizations" (HMO) which hold the full financial risk of providing care to beneficiaries. HMOs and similar organizations, because of their risk-holding characteristics, are regulated by the Insurance Commissioner. See W. VA. CODE § 33-25A-1 to -32 (1994). Non-risk-holding, managed care organizations which are self-funded by employers are basically unregulated: the state's right to regulate them is preempted by ERISA, which provides no substantive regulation of the terms of the plans. 29 U.S.C. § 1144(a) (1994).

313. Claimants' initial treating physician may, for example, be their usual primary care

choose a provider from their employer's managed health care program or from a managed care program set up by the Division with the approval of the Performance Council.³¹⁴ The adequacy or nature of employers' managed care programs is entirely unregulated: the legislation does not contain any specifications or definitions regarding these programs; does not require them to comply with rules adopted by the Performance Council; and does not specify any particular oversight or evaluation of the implementation of these programs.

Confidentiality. The 1995 amendments explicitly eliminated any vestiges of confidentiality in the medical relationship when a worker files for workers' compensation benefits. The statute now provides that a claimant "irrevocably" agrees, by the filing of an application for benefits, that

any physician may release to and orally discuss with the claimant's employer, or its representative, or with a representative of the [workers' compensation] division . . . the claimant's medical history and any medical reports pertaining to the occupational injury or disease and to any prior injury or disease of the portion of the claimant's body to which a medical impairment is alleged containing detailed information as to the claimant's condition, treatment, prognosis and anticipated period of disability and dates as to when the claimant will reach or has reached his maximum degree of improvement or will be or was released to return to work. For the exclusive purposes of this chapter, the patient-physician privilege of confidentiality is waived with regard to the physician's providing this medical information³¹⁵

Explanation. Prior to the 1995 legislation, claimants retained the right to choose their physicians, although they were required to obtain approval from the Division when they wanted to change treating physicians. The new legislation states that if the employer or the Division has a managed care organization available, the claimant can be required to obtain medical care through this organization's panel of physicians. Adoption of managed care programs and restriction of claimant choice of physician are generally justified in terms of containment of escalat-

physician. When that physician decides that the patient needs to be under the care of a specialist, this constitutes a change of physicians under the statute.

314. W. VA. CODE § 23-4-3(b) (Supp. 1995).

315. W. VA. CODE § 23-4-7(b) (Supp. 1995).

ing costs of medical benefits.³¹⁶ As discussed in Part V, *infra*, other states which have adopted managed care in workers' compensation are monitoring the health care developments very carefully;³¹⁷ the West Virginia amendments appear to put no controls at all on employers' managed care networks.

Employers had been seeking the right to have both more control over a claimant's medical treatment and increased access to the treatment records for some time. The concern regarding access to medical information was, as noted above, heightened by the Supreme Court of Appeals' decision in *Morris v. Consolidation Coal*,³¹⁸ which had affirmed a right of injured workers to a confidential relationship with their treating physicians, even after they sought compensation. Under the decision, the statutory waiver of confidentiality was viewed, with only limited exceptions, as extending only to the release of written records.³¹⁹ The amendment in SB 250 was apparently designed to address the concerns of employers (and the Division) that they be able to obtain full disclosure about the medical condition of a claimant without first obtaining the express consent of the claimant. The amendment on its face does not appear to limit the new statutory waiver to medical history information related to the particular injury or illness which is the subject of the claim. The Division, in recent publications, has indicated that its interpretation is more narrow, limiting the medical history information to be disclosed to that pertaining to the occupational injury or disease.³²⁰

316. There is no concrete evidence that these approaches result in successful cost containment, however. For a general review of issues in medical cost containment in the workers' compensation arena, see WORKERS' COMPENSATION HEALTH CARE COST CONTAINMENT (Judith Greenwood & Alfred Taricco eds., 1992). See also NCSL 1994, *supra* note 280, at 5, 27 (noting the lack of evidence that altered choice of medical provider or managed care effectively contain cost or improve quality).

317. See *infra* notes 479-480 and accompanying text.

318. 446 S.E.2d 648 (W. Va. 1994). *Morris* closely followed the first case in West Virginia which had recognized that a breach of confidentiality in the physician-patient relationship might be actionable. *Kitzmilller v. Henning*, 437 S.E.2d 452 (W. Va. 1993).

319. See *supra* note 145 and accompanying text.

320. 1 THE PULSE OF WORKERS' COMPENSATION, No. 7 (Workers' Compensation Division, Bureau of Employment Programs), Feb./Mar. 1995, at 2 [hereinafter THE PULSE]. This publication states:

2. Closure of Claims for Medical and Rehabilitation Services

If a claimant does not obtain "significant" medical or rehabilitation services for a five year period for any occupational injury or illness, his/her right to receive medical treatment now terminates.³²¹ The statute does not define "significant."³²²

Explanation. Again, I could find no explicit justification for this provision. It is, of course, rare that claimants who have not needed medical treatment for five years have needed it later. On the other hand, individuals with occupational diseases might allow a five year lapse without seeking significant medical care; under this provision, they will now be foreclosed from having the Fund or their self-insured employer pay for the cost of care. There is only minimal cost-savings that might be associated with this change; as far as I can tell, no cost-saving analysis was provided to the Legislature. This provision was probably included in the Bill to promote the final closure of claims: that is, this provision meets an administrative, not a fiscal, need.

3. Examples of Additional Cost-Cutting Measures

Payment for Services Provided by Out-of-State Providers. Prior to 1995, no health care providers were permitted to bill a claimant for any balance of their fees which exceeded the fee schedule.³²³ The Division attempted to apply this rule to health care providers both in and

The new law allows physicians to release claimant records to the Division, the claimant's employer or its representative, with the stipulation that these records are related to the claimant's compensable injury or to a prior injury to the same portion of the body. This action clarifies the Supreme Court's *Morris* [sic] decision.

Id. The clear language of the statute certainly appears to require more than the release of records related to the injury; in fact, this is what the *prior* statutory language required.

321. W. VA. CODE § 23-4-16(a)(4) (Supp. 1995). There is an exception for replacement of prostheses and mechanical devices. W. VA. CODE § 23-4-3(d) (Supp. 1995).

322. The Division has published an interpretation which makes no reference to the issue of significant treatment. THE PULSE, *supra* note 320, at 1 ("Reopening for medical treatment: If there has been no medical or rehabilitation services within a five-year period from the last day of service, the Division will not grant requests for additional medical treatment or rehabilitation assistance.").

323. W. VA. CODE § 23-4-3(a) (Supp. 1995).

outside West Virginia; they could not, however, legally require an out-of-state health care provider to accept the fee offered.³²⁴ As a result, either the claimant or the Fund became responsible for the difference between the providers' fees and the fee schedule. Since many West Virginians routinely obtain medical care outside the state (in, for example, Roanoke and Winchester, Virginia, Pittsburgh, Pennsylvania, or Marietta, Ohio), the inability of the Division to enforce the prohibition on "balance billing" had become both an administrative and financial problem. Under the 1995 amendments, if an injured worker seeks health care from a health care provider outside of West Virginia and the provider refuses to accept the Division's fee schedule, then the claimant is personally responsible for the difference unless an exception for emergency treatment or access to services applies.³²⁵

Prescription Medicines. SB 250 also created a requirement that pharmacists dispense generic, rather than brand name, drugs if they are available, unless the physician specifically indicates a preference for the brand name drug.

Explanation. The 1995 amendments explicitly attempt to limit medical costs in several ways. The requirement of generic drugs is a pure cost-saving measure which does not impact the nature or availability of services to claimants. The predicted savings was \$1 million.³²⁶ The out-of-state provider change makes claimants responsible for any higher costs associated with out-of-state treatment when it is not necessary to obtain the services outside of West Virginia. The

324. This is relatively simple principle of conflict of laws. *See* 16 AM. JUR. 2D *Conflict of Laws* § 10 (1979) (noting that "the laws of one state do not operate in any other state *ex proprio vigore*"). Out-of-state medical providers provide services to West Virginia residents for occupational injuries and illnesses without entering into any contract directly with the Division. They therefore expect payment in full of their fees; if the Division pays only a partial amount, the providers turn to the claimants for the remainder.

325. The specific exceptions are: the Division will pay the difference in the case of an emergency which urgently requires immediate medical attention, as long as, once stabilized, the claimant agrees to transfer to a provider who accepts the fee schedule or is in West Virginia; and the Division will also pay the difference if there is no health care provider reasonably near the claimant's home who is either in West Virginia or who has agreed to accept payment under the fee schedule. W. VA. CODE § 23-4-3(a) (Supp. 1995). This latter provision will apply to situations in which claimants live out-of-state.

326. BEP Solutions, *supra* note 272.

Fund will therefore not be expected to pay higher fees to out-of-state providers. The result is that less is spent by the Fund or self-insured employers on medical care; claimants must pay for choice of most out-of-state providers; and in-state providers are not disadvantaged by the comparatively higher fees which were being paid out-of-state.

C. Procedural Issues

Procedural changes obviously affect the initial review and subsequent dispute resolution mechanism. In addition, a variety of changes require earlier closure of claims and apply substantive amendments retroactively; these changes, therefore, also affect claimants' entitlement to benefits.

1. General Procedural Changes in Evaluation of Claims

Initial Decisions in Claims. In the past, initial decisions on all issues were made by the staff of the Division³²⁷ or, for medical determinations in occupational pneumoconiosis claims, by the Occupational Pneumoconiosis (OP) Board.³²⁸ Any party could protest, or appeal, any of these decisions. Since 1991, these appeals have been heard by administrative law judges in the Office of Judges,³²⁹ and the Commissioner has been authorized to defend any claim involving benefits to be paid by the Fund.³³⁰

The 1995 legislation continued the authority of the Commissioner and the OP Board to make these initial decisions; in cases involving claims for permanent total disability or on disputes involving medical treatment issues, decisions are now made by the IEB appointed by the Commissioner.³³¹ As noted above, this board determines whether an

327. W. VA. CODE § 23-5-1 (Supp. 1995). In the past, these were referred to as Commissioner's Orders.

328. W. VA. CODE § 23-5-1 (Supp. 1995).

329. W. VA. CODE § 23-5-1g (1994) (superseded by W. VA. CODE § 23-5-8 (Supp. 1995)).

330. W. VA. CODE § 23-5-1h (1994) (superseded by W. VA. CODE § 23-5-9 (Supp. 1995)).

331. W. VA. CODE § 23-4-6(j) (Supp. 1995).

individual meets the threshold for consideration for a PTD award and then decides whether a PTD award will be granted; the right of the parties to submit evidence to the board is limited to one report per "issue." In addition, the IEB makes determinations on questions "related to medical cost containment, utilization review decisions and managed care decisions."³³²

Role of the Commissioner in Review of Initial Decisions. Under the 1995 amendments, the role of the Commissioner in proceedings which follow the initial decision is substantially expanded. First, all objections to these decisions are now styled in the name of the Division; "in all such matters, the Workers' Compensation Division shall be the party in interest."³³³ The Commissioner is now presumably obligated to defend all claims against both the Fund and self-insured employers; this obligation places him or her in much the same position as the private insurer of workers' compensation in other states. Second, the Commissioner now has sole authority to review settlements to ensure that they are fair and reasonable.³³⁴ Third, the Commissioner now has expanded (and substantial) administrative control over both the Office of Judges³³⁵ and the Appeal Board.³³⁶

Scope of Review by Administrative Law Judges. After the new expert panel issues its decisions on PTD and medical treatment, review by administrative law judges is limited to matters within the record and to whether the board properly applied the standards for determining medical impairment.³³⁷ This same scope of review applies to decisions of the OP Board.³³⁸

Scope of Review by Appeal Board. The Workers' Compensation Act now explicitly requires the Appeal Board to apply a "clearly erroneous" standard to decisions of the Office of Judges.³³⁹

332. W. VA. CODE § 23-4-6(j)(3) (Supp. 1995).

333. W. VA. CODE § 23-5-1 (Supp. 1995).

334. W. VA. CODE § 23-5-7 (Supp. 1995). This responsibility previously lay with the administrative law judges.

335. W. VA. CODE § 23-5-8 (Supp. 1995).

336. W. VA. CODE § 23-5-11 (Supp. 1995).

337. W. VA. CODE § 23-4-6(j)(6) (Supp. 1995).

338. W. VA. CODE § 23-4-6a (Supp. 1995).

339. W. VA. CODE § 23-5-12(b) (Supp. 1995).

Explanation of Procedural Changes. The Bill establishes procedures which limit adjudication and promote efficiency from the standpoint of the agency. The 1995 legislation severely limits the right of administrative law judges to hear evidence in PTD and medical treatment claims. There is, in essence, no review of the evidence which will be conducted by a fully "impartial" body; the Division, under the control of the Commissioner, and boards whose members are appointed by the Commissioner, conduct the only *de novo* review of the evidence. The parties are, therefore, both initially limited in their ability to submit evidence and thereafter unable to obtain a review of the evidence by an independent body.

The Administration sought to streamline the adjudicative system by placing more authority with the Commissioner, at both the initial and final levels of review. The provision of legal services on all claims will, if fully implemented, relieve employers from having to provide defenses (and pay lawyers) on their own.³⁴⁰ On the other hand, both the settlement and the review process are now controlled by a real party in interest; as is discussed in Part V, *infra*, this process may be inherently flawed.

The projection of savings provided to the Legislature estimated that application of a more limited appellate standard by the Appeal Board would, on its own, save the Fund \$5.7 million annually.³⁴¹ Presumably, this prediction assumed that the Appeal Board has been making fact-based decisions which overturned decisions in claims which were adverse to claimants, thereby expanding the payment obligations of the Fund; otherwise, a change in the standard of review would not result in savings.

340. In a sense, this creates some parallelism: claimants' lawyers will be discouraged from participating in the process through the implementation of more objective and rigid standards for permanent disability evaluation; employers' attorneys are theoretically discouraged from participation through the direct provision of legal services to employers. This places the Commissioner in a position directly adverse to claimants: first, in the denial of benefits previously provided; and second, in the provision of lawyers to their employers.

341. BEP Solutions, *supra* note 272. The estimate actually was for the application of a change in the appellate review standard for both the Supreme Court and the Appeals Board.

2. Closure of Claims

As noted above, the West Virginia workers' compensation program has allowed claims to stay "alive" for longer periods than is common in other jurisdictions. This has been due both to statutory provisions governing reopening and the prohibition on final compromise and release.³⁴²

Statutory Closure. Under the amendments, all claims are to be finally closed after five years if no request for permanent partial disability evaluation has been received;³⁴³ if PPD benefits were awarded, the claimant may seek reopening of the claim for additional benefits only twice within the five year period following the date of the initial award.³⁴⁴ In cases involving progressive occupational diseases, the closure rule is somewhat more lenient: if a new award is made, a new five year reopening period begins on the date of the subsequent award.³⁴⁵

Settlement of Claims. Between 1990 and 1995, settlement of claims was only allowed in cases involving 15 percent or less permanent disability;³⁴⁶ settlement of these cases did not preclude subsequent reopening if the condition progressed.³⁴⁷ The 1995 legislation endorses the use of final settlement in all claims for all purposes except medical treatment and allows, subject to restrictions imposed by the Performance Council, any cash benefits to be paid as a lump sum to the claimant. Parties can, however, limit the scope of a settlement to particular issues in a claim. The claimant can (but is not required to) relinquish any right to reopen the claim, with the exception of medical

342. See *supra* notes 168-170 and accompanying text.

343. W. VA. CODE § 23-4-16(a)(1) (Supp. 1995).

344. W. VA. CODE § 23-4-16(a)(2) (Supp. 1995). Notably, the critical date for closing off new reopening petitions prior to the 1995 amendments was the date of last *payment* of benefits. The 1995 amendments change the critical date to the date of the last *award*.

345. W. VA. CODE § 23-4-16(a)(2) (Supp. 1995).

346. W. VA. CODE § 23-5-1f (1994) (superseded by W. VA. CODE § 23-5-7 (Supp. 1995)).

347. W. VA. CODE § 23-5-1f(g) (1994) (superseded by W. VA. CODE § 23-5-7 (Supp. 1995)).

treatment. In addition, under the 1995 amendments, the Commissioner, rather than an administrative law judge, is charged with review of any settlement to determine that it is fair and reasonable.³⁴⁸

Explanation of Closure Changes. As noted previously, the failure of the workers' compensation program in West Virginia to close claims on a permanent basis created both an administrative problem and a large pool of "pending" claims which could later be used to file for PTD awards. As noted by Administration officials, early closure of claims solves this problem, decreases litigation, and increases administrative efficiency.³⁴⁹ This new authority to close claims would, according to the Division's predictions during the 1995 legislative session, result in an annual savings of \$23.9 million.³⁵⁰ The new provisions for closure of claims are likely, however, to leave a significant number of claimants uncompensated both for progression of their impairments and for economic losses which develop over time.³⁵¹ Moreover, as is discussed in Part V, *infra*, the procedure for review of settlements fails to provide careful oversight by an independent body.

348. W. VA. CODE § 23-5-7 (Supp. 1995).

349. Fanny Seiler, *Caperton to offer Workers' Comp bill*, CHARLESTON GAZETTE, Feb. 2, 1995, at 1A (quoting Commissioner Richardson, "The bill will focus on early resolution of claims so employers and injured workers don't have to spend a lot of their own money on litigation. The litigation will be reduced through settlements and limiting the reopening of claims"). *Id.* at 9A.

350. BEP Solutions, *supra* note 272. Note that the forecast of savings presumes that settlements will result in less benefits being paid to workers than would have been paid if claims were adjudicated; presumably, either claimants are disadvantaged by settlement processes or money paid in settlement (and therefore earlier) is inherently preferable to payment later. The Administration's original bill allowed for final settlement of medical treatment costs and the projected savings from this may have been included in this figure. Notably, almost no other state allows settlement of medical costs; the final version of SB 250 more closely resembles settlement provisions in many other states. States vary, however, in the amount of oversight they utilize in the approval of settlement agreements. The actual fiscal impact of settlements will depend on administrative decisions: the greater latitude in approving settlements, the more savings will be realized.

351. There is substantial difference between settlement of workers' compensation claims and settlement of tort claims. These differences tend to operate to the claimants' detriment. For example, benefits are very limited in workers' compensation; the total potential 'pot' of money does not approach that which might be available in a civil action involving the same injury. The settlements must also be negotiated between employers and current employees; this is an inherently unequal bargaining relationship, made more so by the potential desire of the employee to be reemployed despite his/her disability.

3. Retroactive Application of 1995 Provisions to Pending Claims

The 1995 amendments which govern claims eligibility and benefit levels were made applicable both to new claims and to claims pending as of February 2, 1995; the specific retroactivity provisions vary.³⁵² This retroactive application changes the substantive rules for claims filed and injuries which occurred prior to the date the Bill was introduced in the Legislature.

Explanation of Retroactive Application. These provisions change the rules for all pending claims, including claims which were pending in violation of previously established time limits.³⁵³ This application of new substantive rules to pending claims is currently being challenged as constitutionally defective.³⁵⁴ The underlying reason for applying SB 250 to pending claims is, presumably, to reduce the deficit by limiting the number and amount of "incurred but not reported

352. The exact language governing the application of substantive changes to pending claims varies from one section to another. For example, the conversion to medical impairment only for calculation of PPD awards is applicable "to all injuries incurred and diseases with a date of last exposure on or after February 1, 1995, to all applications for an award of permanent partial disability made on and after such date, and to all applications for an award of permanent partial disability that were pending before the division or pending in litigation but not yet submitted for decision on and after such date." W. VA. CODE § 23-4-6(i) (Supp. 1995) (including all pending claims, both before the division and the Office of Judges). In contrast, the language governing application of the 50 percent PTD threshold is applicable to injuries and illnesses "with a date of last exposure on and after the second day of February, one thousand nine hundred ninety-five, and for all requests for such an award pending before the division on and after the second day of February, one thousand nine hundred ninety-five W. VA. CODE § 23-4-6(n)(1) (Supp. 1995) (excluding from the reach of SB 250 claims in litigation as of Feb. 2, 1995). A third approach is found in the change in survivors' benefits: "On or after the second day of February, one thousand nine hundred ninety-five, when an award of permanent total disability benefits is made" W. VA. CODE § 23-4-10(e)(2) (Supp. 1995) (limiting the application of the change to cases in which the PTD award was made after Feb. 2, 1995, and thus presumably governing all pending claims for PTD in which an award has not been made). *See also, e.g.*, W. VA. CODE § 23-4-6(d) (Supp. 1995) (governing payment of PTD awards).

353. Time limits appear in the rules, W. Va. C.S.R. sections 85-6-1 to -8 (1985), and are reiterated in several cases. *See, e.g.*, *Meadows v. Lewis*, 307 S.E.2d 625 (W. Va. 1983) (stating that long delays inconsistent with legislative policy of speedy and expeditious resolution of claims); *Lyons v. Richardson*, 429 S.E.2d 44 (W. Va. 1992).

354. *See supra* note 22.

(IBNR)" claims.³⁵⁵ The Division's consulting actuary and accountants later estimated that the retroactive application of these provisions would reduce the undiscounted deficit by over \$1 billion.³⁵⁶

4. Statute of Limitations

The 1995 amendments changed the statute of limitations for injury claims from two years to six months³⁵⁷ and for occupational pneumoconiosis claims from three to two years.³⁵⁸

Explanation of Changes in Statute of Limitations. The new statutes of limitation are unlikely to exclude many claims. The injury limitation provision does, however, set West Virginia apart from other states, almost all of which use a two year statute of limitations for injury claims.³⁵⁹ Although no specific justification for this change was ever offered, it is presumably another attempt to shorten the life of claims and thereby decrease the amount of liability attributable to incurred but

355. These are claims in which the injury has occurred, but no award has yet been made. 1994 ACTUARIAL REPORT, *supra* note 8, at 14. About one-quarter of the total liabilities of the Fund, as of June 30, 1994, was for unawarded fatals and PTDs. *Id.*

356. At the meeting of the Performance Council on April 24, 1995, Robert Finger of Milliman & Robertson, Inc., consulting actuary to the Division, presented the *1996 Rate Level Projection*, *supra* note 39, and indicated orally that the reduction in the deficit due to SB 250 would be \$1 billion on an undiscounted basis. In December 1995, the Division released an audit for the year ending June 30, 1995. See WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS, WORKERS' COMPENSATION DIVISION, COMBINED FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION AND OTHER FINANCIAL INFORMATION FOR THE YEAR ENDED JUNE 30, 1995 (prepared by Ernst & Young, Independent Auditors, Dec. 8, 1995) [hereinafter 1995 ERNST & YOUNG AUDIT]. According to this audit, the reduction in the Fund's liabilities as of June 30, 1995, as a result of the 1995 legislation, was \$1.395 billion on an undiscounted basis. *Id.* at 12. No explanation is offered in the audit for the increase in the estimated savings. This audit was apparently based upon a Fiscal Year 1995 actuarial report, prepared by Milliman & Robertson, Inc., which was not released as of this writing. I would guess that the difference between the audit figures and those in the *1996 Rate Level Projection* are most likely due to two factors: the inclusion of the full information from the actuarial audit for the year ending June 30, 1995 in the audit; and an increased estimate of the "savings" to be achieved from SB 250, particularly in the area of PTD awards. These "savings" are more fully analyzed *infra* in Part V.A.

357. W. VA. CODE § 23-4-15(a) (Supp. 1995).

358. W. VA. CODE § 23-4-15(b) (Supp. 1995).

359. CHAMBER OF COMMERCE 1995, *supra* note 46, at 41-48 (chart XI, Administration).

not reported claims. Limiting the pool of potential injury claims ultimately limits not only the initial liability, but also ultimately forecloses more costly claims for permanent disability.

D. Collection of Employer Premiums

Setting of Premium Rates. Prior to 1995, the Performance Council and the Commissioner were bound by specific rate-making provisions in the statute; these provisions provided for classification of employers based upon industry and hazard and then, within the group, set rates based on the individual employer's own experience over a three year time period. Employers were either insured or self-insured for the general workers' compensation risk; self-insurers had certain options with regard to insuring second injury and catastrophic risks. The rate-making section of the statute made no allowance for various types of insurance coverage or for the use of underwriting techniques often used by private insurers, which allow more flexibility in the design of insurance products sold to individual employers.

The rate-making sections of the statute were entirely rewritten in 1995. Premiums are now denoted "premium taxes," explicitly giving any unpaid amounts the same priority as special revenue taxes in collection and bankruptcy proceedings.³⁶⁰ The amendments require the Performance Council to develop, by rule, an entirely new system for the setting of rates for subscribing employers³⁶¹ and for catastrophic and second injury fund coverage for self-insured employers.³⁶² As before, the new rule must be consistent with the fiduciary duties of the Commissioner (and now the Performance Council) "to fix and maintain the lowest possible rates of premium taxes consistent with the maintenance of a solvent workers' compensation fund"; the new language adds to this "and the reduction of any deficit."³⁶³ Unlike the retroac-

360. W. VA. CODE § 23-2-9(c)(2) (Supp. 1995). The language defining the premium tax assessments as special revenue taxes appears in the section of the code governing self-insured employers.

361. The rule must be adopted before July 1, 1996. W. VA. CODE § 23-2-4(c) (Supp. 1995). Until then, the statute specifically authorizes continuation of rates as authorized under the prior code section. *Id.*

362. W. VA. CODE §§ 23-2-9(d)(1), -9(e)(3)(A) (Supp. 1995).

363. W. VA. CODE § 23-2-4(a)(2) (Supp. 1995). The prior language also allowed for

tive application of changes in benefits, however, all rate-making changes are subject to the development of rules which must be promulgated by July 1, 1996.

*Subscribing Employers.*³⁶⁴ The rate-making rule adopted by the Performance Council will establish new methodologies for the calculation of subscribing employer rates. The amendments eliminate most specific requirements for rate-making, including the need to use three years of retrospective data in setting rates for industries or individual employers. The Performance Council may establish a system of multiple policy options; the rule must provide for rate adjustments by industry and individual employer and for a methodology for charging claims to employers' accounts.³⁶⁵ Employers are to be provided extensive information regarding the derivation of their rates.³⁶⁶ The new rate-making methodology is to be consistent with generally accepted principles of accounting, utilize classification and rate-making methodologies in use in the private insurance industry, and promote effective health and safety programs.³⁶⁷ For the first time, rates may be based upon numbers of work hours instead of quarterly payroll,³⁶⁸ since payroll-based premium rates tend to penalize employers who pay higher wages, this provision allows the Performance Council to change the calculation of rates in any industry in which payroll-based rates create inequities.³⁶⁹

adding to individual rates "such amount as is necessary to liquidate any deficit in the schedule." W. VA. CODE § 23-2-4 (1994). The new language includes deficit reduction in the explicit fiduciary responsibilities.

364. The rates for subscribing employers are governed by statute. W. VA. CODE § 23-2-4 (Supp. 1995).

365. W. VA. CODE § 23-2-4(a)(1) (Supp. 1995).

366. W. VA. CODE § 23-2-4(a) (Supp. 1995).

367. W. VA. CODE §§ 23-2-4(a)(3), -4(a)(4), -4(a)(5) (Supp. 1995).

368. W. VA. CODE § 23-2-4(b) (Supp. 1995).

369. For example, there are industries in which all wages are relatively high and therefore all injured employees collect the maximum level of benefits on a weekly basis. Wages may vary substantially, however, from one employer to another. Under the payroll-based rate system, which is generally used in setting workers' compensation insurance rates, the higher wage employer will pay higher premiums, even though the costs of that employer's injuries may be the same as the cost of the injuries of the employer paying lower wages. This amendment allows the Performance Council to address this inequity on an industry by industry basis. The specific differences in the number of injuries and claims among employers will still be addressed through merit-rating and other adjustments.

*Self-Insured Employers.*³⁷⁰ Self-insured employers have always been required to pay premiums to cover their share of the administrative costs of the Fund. They could also elect to purchase coverage for catastrophes (involving more than three deaths in a single event) and for second injury permanent total disability awards. Since 1990, second injury coverage has been mandatory except for employers who had historically not elected this coverage. In addition, self-insured employers have been required to provide security to the Division so that, in the event of failure, the Fund (and therefore other employers) would not be required to pick up the future costs of the claims which were incurred while that employer was still doing business.³⁷¹

The statutory provisions governing self-insured employers' security and premiums were substantially revised and made more specific in 1995. Employers eligible to self-insure are now those who are of sufficient capability and financial responsibility so that they can ensure payment of the statutorily required benefits to injured workers or who maintain their own benefit fund which provides benefits "at least equal in value" to the benefits mandated by the Workers' Compensation Act.³⁷² In addition, in order to be approved for self-insured status, these employers must have an effective health and safety program,³⁷³ must post security or bond which is adequate to guarantee the "full accrued value" of the employer's "existing and expected" liability,³⁷⁴ and must have no outstanding liabilities to the Fund.³⁷⁵ Once self-insured, the adequacy of the employer's security is to be reviewed and adjusted annually.³⁷⁶

370. The rates for self-insured employers are addressed in W. VA. CODE § 23-2-9 (Supp. 1995). The option of self-insuring has always only been extended to those employers who have financially capable of ensuring payment of compensation to injured workers. *See* W. VA. CODE § 23-2-9 (1994) (superseded by W. VA. CODE § 23-2-9 (Supp. 1995)). The 1995 amendments do not change this fundamental principle.

371. Note that the Division historically set inadequate security for self-insured employers, to the Fund's detriment.

372. W. VA. CODE §§ 23-2-9(a)(1)(A), -9(a)(1)(B) (Supp. 1995). This latter language echoes preexisting language.

373. W. VA. CODE § 23-2-9(2)(A) (Supp. 1995).

374. W. VA. CODE § 23-2-9(2)(B) (Supp. 1995).

375. W. VA. CODE § 23-2-9(a)(3) (Supp. 1995).

376. W. VA. CODE § 23-2-9(a)(4) (Supp. 1995).

Approved self-insured employers are to be assessed premiums adequate to cover their appropriate share of administrative expenses, costs attributable to employers who are in default in the payment of premiums, and their share of the costs of the disabled workers' relief fund.³⁷⁷ There is no explicit provision requiring self-insured employers to contribute to the reduction in deficit; presumably, the general fiduciary responsibilities of the Commissioner and Performance Council apply to these rates as well. The benefits paid directly by self-insured employers to workers and medical providers are to be considered premium taxes, thereby providing the same priority in collection as applies to premium payments to the Fund. The 1995 amendments retain the right of self-insured employers to elect coverage for catastrophes³⁷⁸ and continue the provisions requiring subscription for second injury coverage for those employers who did not historically self-insure this risk;³⁷⁹ as before, charges for second injury awards are to be distributed between the employer (who pays the costs of the final injury) and the second injury fund (which pays all additional costs of the award).³⁸⁰ Under an entirely new provision, the Performance Council may set up a security risk pool to secure the payment of self-insured employers' obligations.³⁸¹ The rewritten section continues the common law immunity for self-insured employers who comply with their obligations to the Fund.³⁸²

Enhancements to Division's Ability to Collect Premiums. SB 250 also amended several of the provisions governing premium collection. These changes targeted problems in collection of premiums, particularly in the coal industry:

377. W. VA. CODE § 23-2-9(b)(1)-(4) (Supp. 1995). They must also maintain a deposit equal to one calendar quarter's total premium attributable to these expenses. *Id.*

378. W. VA. CODE § 23-2-9(d) (Supp. 1995). The rate methodology is to be set by the Performance Council in its new rate-making rule.

379. W. VA. CODE § 23-2-9(e)(1) (Supp. 1995). By premium volume, about half of self-insurers subscribe to the second injury fund and 93 percent subscribe to the Catastrophe Fund. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 2.

380. W. VA. CODE § 23-2-9(e)(3)(B) (Supp. 1995). This has not actually been maintained as a separate fund. *See infra* note 422.

381. W. VA. CODE § 23-2-9(f) (Supp. 1995).

382. W. VA. CODE § 23-2-9(i) (Supp. 1995).

- Contractor liability for premium rates was amended to close some continuing holes in the ability to collect premiums.³⁸³
- Successor employer liability provisions were strengthened through clarification of lien extension to successors where there is full or partial transfer of assets.³⁸⁴
- Prior to the issuance of surface mining permits, the Director of the Division of Environmental Protection must now ascertain whether the employer is in compliance with its obligations under Workers' Compensation Act.³⁸⁵
- Criminal penalties for second violations by employers who knowingly and willfully fail to pay premium or file reports were increased. At the same time, the new statute makes it more difficult to charge and convict an employer who fails to subscribe to the Fund of a crime.³⁸⁶

Explanation of Premium Collection Changes. The 1995 amendments allow more flexibility in the setting of rates and provide some new tools to prevent employers from evading the payment of required premiums. The most significant amendment, according to the administrators of the Fund, changes the methodology for the calculation of individual subscribing employer's premium rates. Underwriting capabilities will allow the Division to make each individual employer's rates more sensitive to that employer's actual experience in the system. The changes also allow the sale of more diverse insurance products. When combined with greater employer-specific rate sensitivity, these new provisions are supposed to provide more effective tools to promote incentives for workplace safety.³⁸⁷ As of this time, the Performance

383. W. VA. CODE § 23-2-1d (Supp. 1995).

384. W. VA. CODE § 23-2-14, -15 (Supp. 1995).

385. W. VA. CODE § 22-3-8(6) (Supp. 1995).

386. W. VA. CODE § 23-1-16(a) (Supp. 1995). Under the old law, "Any person, firm or corporation which is required . . . to subscribe to the workers' compensation fund, and which knowingly fails to subscribe thereto . . . shall be guilty of a felony . . ." W. VA. CODE § 23-1-16 (1994) (superseded by W. VA. CODE § 23-1-16 (Supp. 1995)). Under the new law, "Any person, firm, partnership, company, corporation or association who, as an employer, is required . . . to subscribe to the workers' compensation fund, and who knowingly and willfully fails to subscribe thereto . . . is guilty of a felony." W. VA. CODE § 23-1-16(a) (Supp. 1995).

387. In fact, it was these provisions which were viewed as meeting the Administration's

Council has only begun to address the issues necessary to develop the new rate-setting rule.

IV. DEFINING THE GOALS: HOW SHOULD WE MEASURE SUCCESS?

Before attempting to evaluate the success of the 1995 amendments to our Workers' Compensation Act, it seems appropriate to stop for a moment. When undertaking any systemic reform of a social insurance program, it is important to know where we want to go: we must both understand current problems and define future goals. Otherwise, we can never accurately measure our success.

The Caperton Administration defined the problems of our workers' compensation system as follows: the 30 percent rate reduction during the Moore Administration, the increasing number of permanent total disability awards, and the "long-term failure to invest in solutions."³⁸⁸ The Administration then stated its objectives for this legislation:

goal of accident prevention. See *infra* note 505 and accompanying text. Some critics of these provisions charge, however, that in allowing the Commissioner and the Performance Council expanded flexibility in rate-setting, SB 250 invites abuse. In a letter to several legislators who are members of an interim committee reviewing workers' compensation, Attorney John H. Skaggs wrote: "In my view, this new law gives the Commissioner authority to set individual premiums for any reason including economic development incentive and of course political payoff. . . . After reviewing the many changes in this law and thinking about this situation, it is my opinion that what the amendment [sic] was really about was not 'saving the fund' but creating a system where by [sic] the Governor and the Commissioner could use their offices to grant political favors for friends and punish enemies in the business community. . . . While the statute does contemplate that rules and regulations governing these issues will be promulgated, there is a serious issue whether there is a sufficient protection for the fund against abuse of this authority by some future Commissioner." Letter from John H. Skaggs to Barbara Fleischauer, Gary Tillis, David Grubb, and Larry Lynch [sic] (Nov. 2, 1995) (on file with author). The rule to be promulgated by the Performance Council should be drafted with sufficient specificity to answer these concerns.

388. BEP Solutions, *supra* note 272. With regard to the rate reduction, the problem was defined as the lost premium and interest from the failure to collect revenues between 1985-88. With regard to PTD awards, the handout noted, "An increase in Permanent Total Disability awards was precipitated by a bad economy and broadened eligibility through court and legislative actions. * (As a result of these three causes, WV pays out 123 claims per 100,000 workers vs. 7 per 100,000 nationally)." *Id.* (emphasis and asterisk in original). And with regard to long-term failures, it noted, "This is characterized by delays, inconsistencies and inaccuracies in claims and accounting due to political involvement, no technology development, no development of staff and design of the law." *Id.*

- West Virginia's present and future injured workers must have a Workers' Compensation program that is financially sound and able to pay their claims.
- Our system must be fixed NOW or our workforce becomes less competitive in the world marketplace.
- Our system must resolve claims timely and accurately and it must promote effective accident prevention.³⁸⁹

The Administration's solutions to these problems and concerns were, in essence, the Bill which has just been described. Concern about cost escalation, rising rates of premiums for employers, and administrative inefficiencies seem to have obliterated concern for other, equally well-accepted, goals for workers' compensation programs.³⁹⁰

At a recent national meeting on workers' compensation policy, Steven Millikan, Vice-President of the Alliance of American Insurers, summarized the goals of workers' compensation reform this way:

To meet the needs of all the various interests in reform, I think we all would agree that the workers' compensation system should:

- Place heavy emphasis on workplace safety, loss prevention, and injury minimization.
- Provide workers injured on the job with adequate and guaranteed benefits, delivered promptly and efficiently.
- Assure that those injured workers receive immediate, effective, efficient, and necessary medical care.
- Provide appropriate medical and vocational rehabilitation programs to help speed an injured employee's return-to-work.
- Provide those benefits through a no-fault system, in the most efficient and dispute-free ways possible.

389. *Id.* Faced with vehement opposition from labor, the Administration noted, in a separate handout to legislators, that the West Virginia workers' compensation system would continue to meet objectives set out in the report of the National Commission on Workers' Compensation, including:

- “1. Broad coverage of employees and of work-related injuries and diseases
2. Substantial protection against interruption of income.”

WORKERS' COMPENSATION: A RESPONSE TO MISINFORMATION 2 (undated) (on file with author). I can find nothing further addressing these objectives, however.

390. The Bill's approach to safety and injury prevention was apparently limited to the provisions revising the rate-making methodologies.

- Assure employers of relatively stable, fair, and predictable costs that can confidently be factored into the costs of products and services.
- Recognize the inevitable increases in the costs related to the system.³⁹¹

These goals, which echo those stated by various workers' compensation experts as well as employers' organizations,³⁹² can be summarized as follows: overall fiscal soundness; benefit adequacy; quality medical care; premium rate adequacy, stability, and equity; procedural fairness and efficiency; and effective promotion of safety and rehabilitation.

This multi-variant articulation of goals is more complex than the more simple goals which apparently motivated the Governor and Legislature in enacting SB 250. This complexity is, in part, rooted in the history of workers' compensation. Workers' compensation is not simply another social insurance or welfare program designed to help the poor; it is a system which is intended to provide compensation for injuries and, at the same time, protect employers, even negligent employers, from additional liability. It compensates individuals who have been workers and are injured at work, not people who have not worked.

391. Steven D. Millikan, Stop, Look, and Listen 4 (July 17, 1995) (unpublished manuscript, on file with author) (paper presented July 17, 1995, at the National Symposium on Workers' Compensation). Millikan is Vice President of the Alliance of American Insurers.

392. The U.S. Chamber of Commerce, for example, enumerates the following objectives for workers' compensation programs:

1. Provide sure, prompt and reasonable income and medical benefits to work-accident victims, or income benefits to their dependents, regardless of fault.
2. Provide a single remedy and reduce court delays, costs and workloads arising out of personal injury litigation.
3. Relieve public and private charities of financial drains — incident to uncompensated industrial accidents.
4. Eliminate payment of fees to lawyers and witnesses as well as time-consuming trials and appeals.
5. Encourage maximum employer interest in safety and rehabilitation through appropriate experience-rating mechanisms.
6. Promote frank study of causes of accidents (rather than concealment of fault) — reducing preventable accidents and human suffering.

CHAMBER OF COMMERCE 1995, *supra* note 46, at vii.

I have chosen to set out Millikan's objectives in the text because they are more inclusive. The Chamber's goals appear to exclude, for example, compensation and prevention of occupational diseases and fairness in procedural processing, both of which are generally accepted goals.

Irrespective of one's position in the current debates regarding need-based welfare programs, it is important to remember this: workers' compensation is not a welfare program.

Part of the problem with workers' compensation legislation is the apparent confusion over this very issue. Ask any legislator to think about a hard-working person s/he knows who was injured on the job: the legislator will insist to you that the person, perhaps a neighbor, deserves our help, our trust, and adequate benefits from the workers' compensation program.³⁹³ On the other hand, the image of injured workers which often emerges in political discussions is tainted by the perception that workers' compensation is just another welfare program: that people (that is, injured workers) get something for nothing; that the system encourages idleness, fraud, and other socially unwanted and expensive behaviors. The focus then becomes how to limit benefits in order to reduce any economic incentive for workers to behave badly (at best) or fraudulently (at worst). The image of the legitimately injured worker in need of help fades from the discussion.³⁹⁴ This turns out to be politically useful, since the limitation on benefits not only discourages this apparently anti-social behavior of workers; it also results in the desired cost-savings for businesses, establishing fiscal stability without significant premium increases.

Nevertheless, the idea that workers are entitled to "adequate and guaranteed benefits" is also firmly rooted in the history of workers' compensation.³⁹⁵ Obviously, it is difficult to develop a consensus on

393. As Commissioner, I received untold numbers of calls from legislators, seeking to make sure that constituents were treated well and were awarded adequate benefits. In this context, the legislator would tell me the hard-luck story of the hard-working individual who was injured, couldn't work, and needed help.

394. For a discussion of this issue in the area of compensation generally, see Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 110-16 (1993) (noting the failure to see compensation issues from the vantage point of the disabled in the making or analysis of compensation policy).

395. Not surprisingly, I am not the first to note this. See, e.g., BERKOWITZ & BURTON, JR., *supra* note 67, at 22. Berkowitz and Burton note:

The rationale for providing *substantial* benefits, tied to the workers' loss of income, rather than an amount tied to the worker's economic needs, is that workers' compensation is an insurance program, not a welfare program (National Commis-

exactly what this means. In the past, most experts have accepted as a measure of adequacy the extent to which the compensation system replaces the wages a worker loses as the result of an occupational injury or disease.³⁹⁶ According to this view, the program should focus primarily on the economic losses suffered by a worker as a result of occupationally-caused disabilities.³⁹⁷

In 1972, the National Commission on State Workmen's Compensation Laws made benefit adequacy a primary focus of its report;³⁹⁸ the

sion 1972, pp. 36-38). The history of workers' compensation, which distinguishes that program from other forms of social insurance, supplies the justification for offsetting a substantial proportion of the loss of income in the form of benefits. In exchange for the benefits provided by workers' compensation, workers surrendered their right to sue their employers in common law for full damages including pain and suffering. One reason for limiting workers' compensation cash benefits to less than the full amount of lost income, on the other hand, is that benefits nearly equal to lost income might seriously reduce workers' incentive to return to employment.

Id. (emphasis added).

396. *See, e.g., id.* at 22-25. The issue of adequacy of benefits in this context raises both practical and theoretical issues. At least the more theoretical aspects of this are beyond the scope of this Article. It is, however, important to note that our system for the distribution of wealth is based primarily upon work; distribution based upon disability, as occurs in workers' compensation programs, and need, as occurs in welfare programs, are secondary. *See* STONE, *supra* note 142, *passim*. Workers' compensation claimants' ability to continue to work is disturbed by injuries which occur at work (many of which could have been prevented even if they were not caused by legal negligence). Principles of corrective justice would at a minimum mandate that the work responsible for the injury pay for the economic losses suffered by the worker.

397. Even those who would argue that adequacy is measured by a more narrow concept still tend to feel that economic loss should be the basis for compensation. *See* LARSON, *supra* note 68, § 2.50 (maintaining that a compensation system simply gives a claimant "a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others." *Id.* § 2.50, at 1-11). But Larson then goes on to define compensable disability as "inability, as the result of a work-connected injury, to perform or obtain work suitable to the claimant's qualifications and training. The degree of disability depends on impairment of earning capacity. . . . Total disability may be found, in spite of sporadic earnings, if the claimant's physical condition is such as to disqualify him for regular employment in the labor market. Conversely, when the claimant is unable to obtain employment because of his physical condition, medical evidence that he could perform such work if he could get it will not detract from his status of total disability. LARSON, *supra* note 68, § 57.00, at 10-1.

398. NATIONAL COMMISSION REPORT, *supra* note 29, at 53 ("Except in a few states, workman's compensation benefits are not adequate.").

Commission had found serious inadequacies in benefit levels and availability in many states. The Commission defined adequate benefits to mean benefits which would provide substantial protection against interruption of income; the Commission, like most commentators since that time, felt that impairment benefits should be of secondary importance.³⁹⁹ In 1994, this approach was again reiterated in the report of the National Conference of State Legislatures in *The State of Workers' Compensation*:

The panel accepts the principles that the benefits should be adequate and distributed equitably among benefit recipients. . . . We believe that there is widespread acceptance of the proposition that the most important justification for compensation in such cases is actual loss of income. In a limited benefit system such as workers' compensation, it is appropriate to attempt to correlate the dollars paid for permanent partial disability (PPD) with the economic loss incurred.⁴⁰⁰

In 1995, we failed in West Virginia to have any discussion regarding the effect of SB 250 on the multiple goals articulated by Millikan and others; most notably lacking was any dialog which focused on the adequacy of benefits.⁴⁰¹

And this continues to be the crux of the problem. Since the only clearly stated goals for workers' compensation legislation in 1995 were to achieve fiscal soundness, economic competitiveness, administrative efficiency and accident prevention, there was no serious analysis regarding what should, in West Virginia, constitute adequate benefits or an appropriate rehabilitation program — or whether injured workers with legitimate claims would receive an acceptable level of benefits and treatment after February 1, 1995.

399. *Id.* at 54-56. In quantifying this, the Commission recommended that total disability benefits be at least two-thirds of the worker's gross weekly wage. The Commission made no equivalent recommendation for partial disability benefits. If the same measure were used for partial benefits, however, these benefits would replace at least two-thirds of the difference between the workers' current and pre-injury earnings. *See* BERKOWITZ & BURTON, JR., *supra* note 67, at 23.

400. NCSL 1994, *supra* note 280, at 7.

401. In fact, these discussions seem to have been limited to deciding whether our benefits are more or less generous than the benefits provided in workers' compensation programs in other states.

Cost containment and fiscal stability are, without question, essential: irrespective of the interstate comparisons regarding costs and premium rates, there are always economic and political constraints on increasing the revenue available for the program. There are also, one assumes, political constraints on the ability to reduce benefits. Clearly, however, the size of the existing unfunded liability means that we could not have long maintained the *status quo ante*.

But the fact that there is a fiscal crisis does not inherently justify any change which saves money. Without balancing the goals which address our shared concern that injured workers with legitimate claims be treated equitably and respectfully, there will be no limit to legislators' willingness to cut the costs of this program, particularly if political opposition is weak. It is essential that any attempt to measure "success" also measure the extent to which reforms move us toward or away from *all* of our goals. The ability of changes to achieve cost-savings or administrative efficiency cannot be the exclusive measurement of legislative success or failure. Different methods of reducing costs may have significantly different effects on our other objectives.⁴⁰² The manner in which we measure and evaluate cost reduction strategies — and the extent to which we consider revenue increases — ultimately depend on our balancing of various, sometimes conflicting, goals.

V. ANALYSIS OF SENATE BILL 250: DOES IT MEET OUR GOALS?

The 1995 legislation was justified primarily in terms of saving money and promoting efficiency. Section A below reviews the extent to which SB 250 succeeds in creating fiscal stability. The following sections review the current status of workers' compensation with regard to five other goals: benefit adequacy; quality medical care; procedural

402. One might easily argue, for example, that the best way to achieve reduced claims costs is through improved safety and more effective rehabilitation and reemployment of injured workers. With success in safety, we would need no reductions in benefits to achieve a fiscally sound program. A really aggressive safety program would therefore provide a win-win situation for workers and employers. It is in this context that the delays in developing rules to implement the safety and rehabilitation legislation, passed in 1993 and 1990 respectively, are most troubling. See *supra* notes 255-257 and accompanying text.

efficiency and fairness; effective promotion of safety and rehabilitation; and premium rate equity and adequacy.

A. Saving Money: The Fiscal Impact of Senate Bill 250

Senate Bill 250 was designed to save a lot of money. During the Legislature's consideration of the bill, the Administration's estimate of savings to be achieved through reduction in the cost of claims was \$96.4 million per year, or 23 percent of the total cost of new injuries in the year.⁴⁰³ The Administration's intent, in advocating for this legislation, was to reduce both future liabilities and previously under-funded obligations so that the Fund's deficit could be eliminated; to ensure that any rate increases imposed on employers would not be large; and to guarantee that self-insured employers' liabilities would be reduced and future costs contained.

The Bill was unquestionably successful in achieving these objectives: the undiscounted deficit was reduced, according to Robert Finger, of Milliman & Robertson, Inc., the Division's consulting actuary, by over \$1 billion and the 12.2 percent premium rate increase for subscribing employers, effective July 1, 1995, was designated solely to begin to retire the remaining unfunded liabilities.⁴⁰⁴ The program became "sound" on both a cash and accrual basis because of the legislative changes. The Administration hailed its success: both employers and injured workers were being asked to put the Fund on the road to full recovery — and full recovery was now within reach.

Sometimes actuaries are inclined, quite properly, to rely solely on prior experience and wait for changes in observed claims experience

403. See BEP Solutions, *supra* note 272, for the enumeration of savings. This total includes the higher estimate of savings on PTD awards which was provided by the Administration during the legislative session. It includes all estimates on that flyer except the \$19 million to be generated by changing the insurance rating and collection efforts or saved through promotion of accident prevention. The flyer indicated that there would be savings from better "claims management" of \$17.2 million. This is included in the \$96.4 million total; although it may represent claims overpayments, it is nevertheless savings to be realized by reduction in payment of benefits.

404. See *supra* note 356; see also 1996 RATE LEVEL PROJECTION, *supra* note 39, exhibit I. With this 12.2 percent surcharge, the debt would be fully recouped in 40 years.

before amending their assessments of liabilities or changing their forecasts regarding either claims costs or the number of incurred but not reported claims to recognize. Thus, the rate level projection reports, prepared annually by Robert Finger, always assume that future activity will correspond to the average activity over a period of years in the past,⁴⁰⁵ except when attempting to quantify the effects of clear legislative changes.⁴⁰⁵ The 1996 report specifically recognized the impact of SB 250 on predicted claims costs.⁴⁰⁷ Consistent with the fundamental conservatism of actuarial analysis, however, the report may have *seriously* underestimated the "savings" achieved through benefit reductions.

The 1996 Rate Level Projection Report. Annual rate level projections analyze the revenue needs of the Fund based upon calculations of anticipated incurred costs in that year, assessment of the outstanding deficit, and reassessment of prior year calculations of incurred costs. Several conclusions in the 1996 study are notable:

- Recognizing the impact of SB 250, newly incurred costs for injuries (to employees of employers who subscribed to the Fund) occurring in 1996 were estimated at \$370 million.⁴⁰⁸ The report predicted that premiums (based upon the rates set in 1993 but upon the larger projected 1996 payroll) would yield collection of \$369 million in collections from subscribing employers.⁴⁰⁹ Therefore, regular subscriber premium rates were already close to adequate to fund all newly incurred liabilities, including permanent total disability awards.⁴¹⁰

405. 1994 ACTUARIAL REPORT, *supra* note 8, at A-3 (app. A); 1996 RATE LEVEL PROJECTION, *supra* note 39, at 5.

406. For example, the 1994 and 1995 rate level projections included some assessment of the impact of the 1993 legislative changes, estimating a decrease in the incurred costs of PTDs and an offsetting increase in PPD costs. 1994 RATE LEVEL PROJECTION, *supra* note 148, at 8; 1995 RATE LEVEL PROJECTION, *supra* note 181, at 11-12.

407. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 5.

408. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 7.

409. *Id.*

410. As of 1992, the premium rates were sufficient to fund all aspects of the program except second injury awards. Thereafter, rates were increased only 7 percent in 1993 and not at all in 1994. *See supra* note 199.

- Absent SB 250, the Division's unfunded liability as of June 30, 1995, would have been \$1.85 billion on a discounted basis.⁴¹¹ This is about the same as the unfunded liability as of June 30, 1994;⁴¹² that is, the accrued unfunded liability did not grow while both rates and benefits were held constant in 1994.

- As noted above, reduction of the deficit, based upon retroactive application of SB 250 provisions, was projected to be \$1 billion on an undiscounted basis and between \$350 and \$570 million on a discounted basis.⁴¹³ This decrease would occur because of the reduction in costs for incurred but not yet awarded claims (IBNR) which were pending or not yet filed. The report noted, however, "that the courts could determine that SB 250 can not be applied to injuries that have already occurred. In this case, there would be nominal savings to the unfunded liability."⁴¹⁴

- The report suggested that the reduction in the deficit resulting from SB 250 would be distributed among the different benefit categories as follows: reduction of 45 to 60 percent in unawarded permanent total disabilities involving subscribing employers;⁴¹⁵ 50 percent in second injury permanent total disability involving self-insured employ-

411. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 6 (discounted 8%).

412. *Id.* at 9.

413. *Id.* at 10 (indicating reduction of deficit attributable to regular subscribing employers as \$300 to \$ 500 million); *Id.* at 21 (indicating reduction in self-insured second injury award deficit of \$50 to \$70 million). The 1995 *Ernst & Young Audit* released in December of 1995 indicated that the deficit would be reduced by \$1.395 billion on an undiscounted basis and \$457 million on a discounted basis, using a 6.5% discount rate. 1995 ERNST & YOUNG AUDIT, *supra* note 356, at 12. Notably, the reduction in the discounted deficit predicted in this later audit falls within the range set in the *1996 Rate Level Projection*, despite the fact that the discount rate was lowered.

414. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 10. Similarly, the 1995 *Ernst & Young Audit*, *supra* note 356, indicated in its cover letter, "There is currently an action before the Supreme Court of Appeals of West Virginia challenging portions of that legislation. The State is vigorously defending against that action. The ultimate outcome of the litigation cannot presently be determined. Accordingly, no provision has been made in these financial statements for the effects of any changes which might result from the litigation." In other words, the audit included the full effects of SB 250.

415. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 10.

ers;⁴¹⁶ 5 to 10 percent in medical benefits;⁴¹⁷ and 15 to 35 percent in permanent partial disability benefits paid to employees of subscribing employers.⁴¹⁸

- SB 250 also affected the cost of newly incurred claims, again primarily through direct reductions in benefits to be paid to injured workers. Reductions were estimated as follows: medical, 5 to 10 percent; temporary total, 7 to 12 percent; permanent partial, 0 to 15 percent;⁴¹⁹ permanent total, including second injuries, 45 to 60 percent; and fatals, about 5 percent.⁴²⁰

- The largest share of the predicted decrease in both unfunded liabilities and newly incurred costs was from the imposition of restrictions in eligibility for permanent total disability awards. For example, projected incurred losses for PTD claims awarded to employees of regular subscribing employers for 1995 dropped, on an undiscounted basis, from \$258 million (pre-SB 250) to \$108 million (after SB 250) and from \$61 million to \$31 million on a discounted basis.⁴²¹

- The Self-Insurer Second Injury Fund — a “Fund” in name only — generated \$400 million, or 22 percent, of the overall unfunded (discounted) liability as of June 30, 1994.⁴²² This unfunded liability resulted mostly from earlier injury years and inactive employers.⁴²³ According to Finger’s report, SB 250 would reduce the predicted costs of not yet awarded IBNR claims in this category by \$50 to \$70 mil-

416. *Id.* at 21.

417. *Id.* at 10.

418. *Id.*

419. The reason that the PPD reduction in new claims is less than in old claims is that the increase in the permanent partial benefit level, to 100 percent of the SAWW, is only applied to accidents occurring after the legislation was passed; the cost impact for future injuries is therefore different. *Id.* at 11.

420. *Id.* at 11.

421. *Id.* exhibit II (including both ordinary and second injury PTD awards).

422. *Id.* at 21. The *1996 Rate Level Projection* refers to the second injury fund. The Workers’ Compensation Act requires the establishment of a “second injury reserve of the surplus fund” for second injury PTD awards made to employees of self-insured employers when the employers subscribe to the Fund for second injury coverage. W. VA. CODE § 23-3-1(d) (Supp. 1995). No true separate fund or reserve has ever been segregated for this purpose, however.

423. *Id.* at 23.

lion.⁴²⁴ As a result of the reduction in second injury costs for self-insured employers, the prospective assessment for second injury coverage for self-insured employers could have been reduced by 50 percent; the report discusses several alternatives for recouping the unfunded liability attributable to self-insured second injury awards.⁴²⁵ In all proposed scenarios, self-insured employers who did not contribute to the deficit because they had always self-insured for, and therefore paid the full costs of, second injury awards were to be exempted from any obligation to recoup the unfunded liability.⁴²⁶

- The report focused only on the outstanding and incurred liabilities of the Fund. Self-insured employers would, like the Fund, have both their outstanding liabilities and their newly incurred obligations reduced as a result of SB 250; these reductions are not reflected in the numbers reported since the claims are not paid by the Fund.

- The adoption of a new underwriting process was predicted to allow the identification of employers with "unduly high costs" in the past who could be expected to have unduly high costs in the future. The report estimated that \$12 million could be generated by targeting these high cost employers;⁴²⁷ this meant that revenues would be increased by raising the amount these employers pay through the application of new underwriting methodology. This underwriting process was to be developed for Fiscal Year 1997.⁴²⁸

- With the collection of this additional \$12 million, the general premium increase needed to be 12.2 percent overall; although ultimately not distributed evenly among industrial classes,⁴²⁹ this was intended

424. *Id.* at 21.

425. This is actually a fairly difficult problem. First, between one-third and 40 percent of charges for new second injury awards are for inactive self-insured employers. *Id.* at 20. Second, the self-insured second injury payroll is not steady; it represents only those employers who are financially able, and do, self insure.

426. *Id.* at 23.

427. *Id.* at 8. "For example, it may be possible to identify 10% of current employers that should pay 30% more than under the current system. This would produce an additional 3% of premium revenue, allowing the general rate increase to be about 3% less." *Id.*

428. The new process is dependent both on administrative changes and on development of the new premium-rate-setting rule.

429. 1996 premium rate changes, effective July 1, 1995, for industrial classes actually

to function as a surcharge, and was predicted to be adequate to retire the unfunded liability over forty years. Notably, the distribution of the rate surcharge does not appear to charge the coal industry with its full share of the unfunded liability; other industries will therefore subsidize the funding of this debt. Self-insured assessments were increased to ensure that self-insured employers would pay their appropriate share of rising administrative expenses; the assessments for second injury coverage were maintained at approximately their preexisting level in order to recoup the portion of the deficit attributable to self-insured second injury claims.

Assessing the Accuracy of the Projected Savings from SB 250. It is, of course, difficult to second-guess actuarial analyses, particularly without access to the underlying data. Nevertheless, the estimate of reductions in permanent total disability awards, on its face, raises substantial questions. Every other source with access to any data and familiarity with award patterns predicts that the reduction in the permanent disability award rate will actually be substantially more than the 45 to 60 percent predicted by Finger.

For example, Robert Smith, the Chief Administrative Law Judge for the Workers' Compensation Office of Judges, stated to the Performance Council that he had conducted a review of PTD claims pending before his office as of February 1995 and concluded that only about 10 percent of them involved prior partial disability awards totalling 50 percent or more.⁴³⁰ But the 50 percent threshold actually cuts much deeper. SB 250 only allows consideration of "whole body impairment" in determining whether an individual can be considered by the IEB for a PTD award.⁴³¹ The evaluation of whole body impairment contained

ranged from 0 to about 18 percent. Some industrial classes' rates, which did not increase in 1995, had not had any increase since at least July 1, 1991; these classes include coal processing, sawmills, concrete product manufacturing, bus operations, general construction (building over two stories), electrical wiring, and roofing. For numerous other classes, the rate increase imposed on July 1, 1995, was the first in several years. Bureau of Employment Programs, W. Va. Workers' Compensation Classes and Rates, Fiscal Year 1996 (Rev.) (unpublished data, on file with the author).

430. Judge Robert Smith, Presentation to Performance Council (April 24, 1995). Judge Smith has repeated this statement in continuing legal education programs and elsewhere.

431. See *supra* notes 289-291 and accompanying text.

in the *AMA Guides* requires the exclusion of all vocational considerations. In addition, although an individual may have received a series of PPD awards which, when added together, reach 50 percent, the *AMA Guides* actually requires that the value of partial impairments be reduced when they are added together.⁴³² The result is that many claimants with a total of 50 percent permanent partial disability awards will simply not meet the new threshold. This has, in fact, turned out to be the case: in the first 80 cases considered by the board, *only five, or just 6 percent, received permanent total disability awards.*⁴³³

Finger assumed that claimants will now be more motivated to maximize their permanent partial disabilities in order to reach the statutory threshold, and that PPD awards will rise as a result.⁴³⁴ He nevertheless, as noted above, predicted an overall reduction in permanent partial disability costs as a result of SB 250.⁴³⁵ Other variables may also change: it is, for example, difficult to know whether the threshold for PTD will exclude more older or younger workers from consideration; the cost of awards for younger workers is, of course, higher — they have more of their life in which to collect benefits. Nevertheless, it is safe, I think, to predict that the future PTD award rate will decline substantially more than the predicted 45 to 60 percent. As noted above, the growth in benefit costs has been largely attributable to permanent total disability awards and while lost-time claim rates have been declining for several years, reflecting the changes in employment mix.⁴³⁶ This suggests that deeper cuts in PTDs than predicted will result in very substantial savings, both immediately and over time.

432. See *supra* note 285 and accompanying text for an explanation of this process.

433. According to Robert Smith, Chief, Office of Judges, who was present when these numbers were reported by John Kozak, Legal Counsel to the Bureau of Employment Programs, to the Claims Committee of the Performance Council on November 8, 1995. By the time this Article is released, additional data regarding the award rate by the board should be available. Telephone Interview with Robert Smith, Office of Judges (Nov. 10, 1995).

434. Robert Finger, consulting actuary to Performance Council, Milliman & Robertson, Oral Presentation to the Performance Council (April 24, 1995).

435. This is undoubtedly because prior partial disability awards are likely, in general, to exceed impairment-based awards in almost every case; the addition of impairment ratings which reduces the value of each successive award will further reduce the value of partial awards, at least when a claimant is being reviewed for PTD eligibility.

436. See *supra* notes 58 and 173.

Both prior liabilities and future costs shrink as the estimates of savings grow; PTD costs have been the primary "cost-drivers" of the growing deficit and future cost growth. Although impossible for a non-actuary to quantify accurately, the conclusion that the savings will exceed the estimates is inescapable.⁴³⁷ Simple calculations suggest these savings may result in an actual reduction of both newly incurred benefit costs and unfunded liabilities of over one-third as a result of SB 250.⁴³⁸ These changes would alter the financial picture dramatical-

437. See *supra* note 173.

438. *With regard to newly incurred costs:* According to the 1996 RATE LEVEL PROJECTION, *supra* note 39, exhibit II (undiscounted losses for permanent total disability awards including second injury awards) attributable to regular subscribers in FY 1995 would have been \$258 million pre-SB 250. Finger estimated that these incurred costs would drop to \$108 million under the provisions of SB 250, a savings of \$150 million. If they instead dropped by 90 percent, they would be reduced an additional \$82 million (0.9 times 258 equals 232 million; 232 less 150 equals 82). Finger's report estimates that total incurred costs would drop from \$742 million to \$573 million for FY 1995 on an undiscounted basis, about a 23 percent drop, after SB 250 provisions are applied; this additional \$82 million would mean that the total savings would be \$251 million, or a 34 percent reduction in total incurred costs. If the reduction in PTDs awarded to employees of self-insured employers were included, the increase in savings would be even greater.

The same analysis can be performed on the discounted costs, yielding lower apparent savings. The pre-SB 250 estimate of incurred costs for subscribers for FY 1995 was \$411 million using a 7% discount rate; with SB 250, the estimate dropped to \$363 million, a savings of 12 percent. The lower apparent savings is due to the fact that a substantial amount of the savings is in permanent total disability claims, which tend to be most affected by discounting because they project farthest into the future. Included in this savings was a reduction in PTD costs of \$36 million. If SB 250 reduces PTD awards costs by 90 percent, however, the savings from PTD reductions would be \$65.7 million, resulting in total incurred costs of \$333.3 million, an overall reduction in 19 percent. Note, however, that once claims are discounted, it is impossible to apply an across-the-board percentage reduction, because the calculation requires that each future year be revalued based upon the application of the discount rate. Therefore, the exact quantification of the savings may not be accurate; nevertheless, it cannot be questioned that the impact would be very large.

With regard to the unfunded liabilities: The reduction in the deficit, through reduced payments on incurred but not awarded claims, might grow from \$400 million to over \$600 million, reducing the discounted deficit by 33 percent instead of 22 percent. The unfunded liability of the Fund as of June 30, 1994 was \$1,841.2 million, discounted at 7%. Of this, \$578.9 million represented unfunded costs for incurred but unawarded PTD claims; an additional \$883 million represented unfunded costs for previously awarded PTD claims. 1994 ACTUARIAL REPORT, *supra* note 8, exhibit I. The total savings projected from SB 250 on a discounted basis was about \$400 million. 1996 RATE LEVEL PROJECTION, *supra* note 39, at 10. Finger does not break down these savings estimates among benefit types. If one assumes that he reduced PTD costs by about 50 percent (between 45 and 60 percent, as the 1996

ly. And any argument that the “pain” has been shared equally by injured workers and employers disintegrates: employers’ rates will have gone up 12.2 percent; the total benefits paid to workers who are injured after February 1, 1995, will have been reduced by one-third.⁴³⁹

Implications of Greater Savings for Future Discussions. At the meeting at which he presented the *1996 Rate Level Projection*, Finger noted the remarkable coincidence that the savings from benefit reductions were just about enough to make current premium rates (which had been set for the fiscal year beginning July 1, 1993) correct on an accrual basis for the fiscal year beginning July 1, 1995. Truly amazing coincidences can of course happen — but they rarely do. Large numbers of variables must be quantified and predictions regarding future behaviors must be made in performing actuarial analyses. Changes in discount rates by one percentage point can change the calculation of total future liability by millions of dollars. Estimates, based on predictions of future behavior, underlie actuarial analyses. The result in this instance was, certainly, a convenient coincidence: it meant that employers, having been reassured that the unfunded liabilities would not grow as a result of new claims, would be asked to shoulder their part of the burden by funding a 12.2 percent rate increase to retire the debt. And, in fact, this continued to keep workers’ compensation premium rates in West Virginia highly competitive and well below national averages.⁴⁴⁰

It is thus quite possible that there is considerable “wobble room” in the current rate structure, if the savings attributable to SB 250 are substantially greater than predicted by Finger; actuaries have certainly

Rate Level Projection estimates), then the unawarded PTD unfunded costs would be about \$290 million of the total; if one reduced it instead by 90 percent, the deficit attributable to PTD unawarded claims would be reduced to \$58 million and the overall reduction in deficit would grow by over \$200 million.

439. With the exception of second injury life awards, the reductions in benefits to employees of self-insured employers are not included in these calculations. Since the employer pays the benefits directly, they do not become a liability for the Fund — unless the employer becomes inactive and the security is insufficient to cover the benefit costs.

440. See *supra* notes 199-201 and accompanying text. Interestingly, the *1995 Ernst & Young Audit* also concludes that the deficit will be “ultimately funded over a 40 year period.” 1995 ERNST & YOUNG AUDIT, *supra* note 356, at 13. This is true despite the fact that the Ernst & Young calculations are based on a discount rate which has been reduced to 6.5%.

been known to estimate savings too conservatively,⁴⁴¹ even in other State of West Virginia programs.⁴⁴² We can view this potential wind-fall in one of two ways: as a delightful cushion, perhaps foreclosing the necessity to make any additional rate increases for the foreseeable future or allowing rate reductions as we recognize the full amount of the savings; or as an opportunity to review the benefit reductions, which may have been deeper than was originally intended. In order to assess this, we must determine whether, after SB 250, the benefit structure provides adequate benefits to injured workers. I suggest that it does not.

B. *Adequacy of Benefits*

It is certainly arguable that workers' compensation benefits were not allocated rationally under the system of compensation which existed in West Virginia prior to the 1995 amendments. As noted in Part II, the system of awards for partial disabilities was often irrational and we may have allowed too many people to collect lifetime permanent total disability benefits. It was, of course, these policies, combined with high injury, hazardous industries and a political unwillingness to charge employers appropriate rates, which created the fiscal crisis underlying SB 250. But the combined effects of an impairment-only rating system for partial disability, a high threshold of impairment for consideration for permanent total disability, elimination of the right of PTD beneficiaries to collect benefits after reaching retirement age, and aggressive claims closure provisions will serve to leave some hard-working people impoverished; it is difficult to believe that this was the considered intent of the legislators who voted for this bill.

441. Professor Terence Ison, a noted Canadian expert on workers' compensation and other social insurance programs, notes that actuaries charged with estimating future costs for full funding purposes have a propensity "to estimate the cost of future benefits, and the cost of any proposed benefit improvements, on the high side. This can impede a fair judgment about whether benefit improvements or reductions should be made." ISON, *supra* note 186, at 199.

442. This has been a chronic problem for the Public Employees Insurance Agency, on which I serve as a member of the Finance Board.

Before assessing the extent of this problem, it is important to keep the following two points in mind. First, if workers suffer serious economic losses as a result of occupational injuries and illnesses, then the system of compensation would be viewed as inadequate by most experts. Although there certainly has been considerable debate on this issue, the majority of states — and commentators — maintain that workers' compensation should, in some way, recognize workers' economic loss by compensating for the loss of wages (or loss of earning capacity) which is caused by the permanent effects of occupational injuries and diseases.⁴⁴³ Compensation which recognizes only impairment may inflict “grave injustices” on those individuals whose loss of wages is out of proportion to their level of impairment.⁴⁴⁴

Second, irrespective of the difficulty in establishing a fair and fiscally responsible program for the compensation of permanent disabilities, it is important to remember that most injured workers do not need large amounts of permanent disability compensation: most workers who file lost time claims are off work for a short period of time and return, without incident, to their pre-injury employment. The vast majority of injured workers in West Virginia fit into this category.⁴⁴⁵ For these workers, the system has worked with a fair degree of both justice and efficiency. With the possible exceptions of the amendment allowing consideration of layoff and shutdown in the determination of

443. See *supra* notes 395-400 and accompanying text.

444. BAVON, *supra* note 274, at 19.

445. See *supra* note 56. In general, about one-third of total claims filed actually result in claims for lost time benefits; the rest involve minor injuries requiring medical treatment or claims for occupational diseases, including hearing loss and lung diseases. Spieler, *Injured Workers*, *supra* note 7, at 365-66 nn.106-08. In the lost time claims, only 10 percent of claimants collect TTD benefits for more than 120 days. *Id.* It is therefore likely that only a small percentage of claims filed each year actually result in temporary disability from work which lasts long enough to raise significant questions about future labor market participation resulting from the particular acute injury. In addition, there are workers who, because of their historical labor force participation, when combined with multiple injuries, are unable to find or sustain work; and there are workers who are sufficiently debilitated by occupational diseases, including lung disease, that they are unable to do so. This will not, in the aggregate, be an insignificant number of people; it is a considerably more finite group, however, than all claimants — who number about 70,000 per year.

compensability⁴⁴⁶ and the changes in medical benefits, SB 250 makes no change in this picture.

This experience in West Virginia is not atypical. In a series of reports studying the ability of workers to return to work after an injury, the Texas Workers' Compensation Research Center, created by the Texas workers' compensation reform legislation in 1989, reported that the most common employment pattern after an injury resulting in temporary total disability benefits was a return to steady employment.⁴⁴⁷ The likelihood of steady post-injury employment was better for employees who returned to work with the same employer or, at least, in the same industry, than for those who returned in a different industry.⁴⁴⁸

The ability to return to work seems, not surprisingly, to correlate somewhat with the degree of medical impairment resulting from an injury; a large number of Texas claimants with impairment ratings over 15 percent did not return to work after their work-related injuries.⁴⁴⁹

446. W. VA. CODE § 23-4-1c(a)(2)(A), -1c(a)(2)(B) (Supp. 1995). This provision is unique to West Virginia and is viewed by labor critics of SB 250 as being particularly mean-spirited. It will have little or no fiscal impact; if there is any remaining spirit of compromise, it, and the changes in the statute of limitations, should be repealed.

447. Texas Workers' Compensation Research Center, *Return-to-Work Patterns Studies for Claimants Reaching MMI*, 3 RESEARCH REV. No. 16, May 1995, at 2 (showing that 44 percent of claimants who were off work and collected TTD benefits returned to work in the first post-injury quarter and continued working through the fourth post-injury quarter; however, 37 percent experienced intermittent employment after the first quarter).

448. *Id.* at 3 (indicating that of those returning to work with their pre-injury employer, 61 percent experienced steady employment; for those returning in their own industry, 59 percent experienced steady employment; among those who returned to a different industry, only 36 percent experienced steady employment after an initial return to work).

449. Texas Workers' Compensation Research Center, *Analysis of Postinjury Employment Experiences of Injured Workers with Permanent Impairments*, 3 RESEARCH REV. No. 25, Aug. 1995, at 2. In a study of a randomly selected sample of injured workers, the Research Center found that more than half of the injured workers with impairment ratings below 15 percent returned to work after a single period of recovery. Among the injured workers with impairment ratings of more than 15 percent, the number who returned declined dramatically; "Sixty-three percent of the injured workers with impairment ratings of 25 percent or more have not yet returned to work after their on-the-job injury, compared to 41 percent for those with impairment ratings in the 15 to 19 percent range, and 13 percent for those with impairment ratings in the 1 to 5 percent range." *Id.* Note that the Texas system assumes that serious disability is likely to begin at 15 percent impairment; this reflects the economic

Equally troubling, in light of the 1995 amendments to the West Virginia law, is the finding in the Texas study that the likelihood of successfully remaining in the workforce declined over time, and that this problem became more severe as the degree of impairment increased.⁴⁵⁰ A variety of factors, other than injury severity, appear to affect post-injury employment patterns; those more likely to return to work successfully were younger, earned higher pre-injury work experience, and worked for employers supportive of their return to work efforts.⁴⁵¹ As workers age, and face a variety of barriers to workforce participation, including age and disability-based discrimination, their ability to return to work declines and it becomes more likely that their wages will be adversely affected by their occupational impairments.

These conclusions in the Texas study are important when thinking about aging, poorly educated West Virginia workers who have worked, prior to being injured, in industrial and mining jobs requiring heavy physical labor. SB 250 reduces the likelihood that these workers, and all workers with serious injuries, will collect adequate benefits in several ways.

First, impairment ratings are simply not a good proxy for the economic impact of occupational injuries on workers. Workers who are injured may not be able to return to their prior work or to an equivalent job — or any job — as a result of an injury which is “valued” in the impairment-only rating system at far below 50 percent.⁴⁵² The use

reality that people with impairments of 15 percent are likely to be displaced from work for a substantial period of time — or permanently — after an injury.

450. *Id.* at 6 (only 22 percent of workers with impairment ratings of 25 percent or greater were steadily employed four years after the injury).

451. Texas Workers' Compensation Research Center, *Factors Affecting Return to Work for Injured Workers with Permanent Impairments*, 3 RESEARCH REV. No. 29, Aug. 1995, at 1.

452. Some of the petitioners in the pending action for a writ of mandamus may be illustrative of this principle. One glaring example: “Paul Casto resides at Bancroft, West Virginia. He is a 50-year-old former ironworker. On August 4, 1993, he fell thirty feet onto his head and was unconscious for ten days, and suffered severe brain damage, including a compound depressed skull fracture, double vision, and post-traumatic amnesia. He received an initial 40% permanent partial disability rating with regard to the head injury on October 25, 1994. He was awarded Social Security disability benefits, effective in February 1994.” Petition for Writ of Mandamus, *supra* note 22. Casto is unable to work but did not receive

of the *AMA Guides* exacerbates this problem.⁴⁵³ The injustice to those

more than 50 percent PPD, even under the pre-SB 250 rating system. He is therefore not eligible to apply for PTD benefits under SB 250.

453. As noted previously, the *AMA Guides'* rating system for impairments is simply not focused on the effects of an injury on an individual's ability to perform work, particularly physical work. Examples in the *AMA Guides* which illustrate this include the following. A total hip replacement with poor result is rated at 30 percent whole person impairment. *AMA GUIDES*, *supra* note 80, at 3/85. For cervicothoracic spine impairments, a patient who "has a cauda equina-like syndrome with objectively documented, permanent, severe, partial loss of function of one or both lower extremities that requires use of an external ambulation device" has a 40 percent whole person impairment. *Id.* at 3/105. The following is an example given regarding back injuries in the *AMA Guides*:

A 28-year-old athlete had a C5 vertebral body fracture with almost 50% compression and had radicular pain in the left arm, which was verified as a C6 level radiculopathy by positive sharp waves in three arm muscles. The man underwent a three-level posterior fusion. After his condition became stable, he had no bladder symptoms, but he was unable to walk without braces. . . . *Impairment: 49% whole-person impairment*

Id. In fact, diagnostic related estimates (DREs), one methodology utilized for the rating of musculoskeletal impairments, presumes that an individual can be rated on the day of injury, excluding consideration of individual variation in healing and rehabilitation. *Id.* at 3/108. In rating nervous system impairments involving aphasia (lack of ability to comprehend) and communication disturbances (comprehension, language, effective interactions between individuals), the *AMA Guides* would rate "inability to comprehend language symbols; production of unintelligible or inappropriate language for daily activities" at 25-39 percent whole person impairment. *Id.* at 4/141. A mental status impairment which "requires directed care under continued supervision and confinement in home or other facility" is rated at 30-49 percent whole person impairment. *Id.* at 4/142.

Similar examples can be found in the ratings for each organ system. Two important conclusions emerge. First, while each of these impairments would result in a permanent partial disability award, many workers with these injuries would be unable to work at anything they know how to do; these impairments would therefore not be evaluated at anything close to the full economic losses associated with the injuries. And second, *not one of these injuries would meet the 50 percent threshold to allow the injured worker to be evaluated for a permanent total disability award under the provisions of SB 250.*

The *AMA Guides* pose other problems as well. As a result, a number of states, including Texas, California, and Minnesota, have attempted to develop their own guides for evaluating impairment. See Ellen Smith Pryor, Schedules in the Second Generation (July 17, 1995) (unpublished manuscript, on file with author) (presented at the 19th Annual National Symposium on Workers' Compensation, New Brunswick, NJ) (Noting further: "In the end, whatever the actuarial results of a schedule's use and whatever the rate of adjudicative disagreements under the schedule, the schedule must be fair . . . and it must deliver adequate wage replacement for workers. This question—the fairness and adequacy of benefit delivery under the Guides—forms a black hole at the center of the workers' compensation universe. What do we know about the fairness and adequacy of the *AMA Guides*-based benefit sys-

individuals who suffer serious economic loss far out of proportion to the degree of impairment can be corrected; this problem is, however, usually ignored in the pure impairment-based system, such as that adopted in SB 250.⁴⁵⁴

Recognizing this, but also recognizing the potentially high cost of full wage replacement programs, the 1994 report of the National Conference of State Legislatures endorsed use of an impairment-based system only if the door is "left ajar for those rare instances where an egregious injustice has occurred. In those instances, the worker would be paid, initially, an impairment-based benefit, and when those benefits expired, a supplemental income award based on their actual wage loss."⁴⁵⁵ Many states address this concern by making specific provision for factors other than impairment in establishing permanent partial disability awards. For example, neighboring states still include consideration of non-impairment factors such as wage-earning capacity, loss of earning power, age, experience, occupational training, and education in making determinations regarding permanent disability benefits.⁴⁵⁶

tems? Some states have at least preliminarily gathered information about the rate of contested cases and the degree of differences in impairment ratings. . . . Yet we have little information concerning how the *AMA Guides* or other impairment rating schedules correlate to lost wages or lost wage-earning capacity, either in the shorter or the longer run." *Id.* at 13). Even as a mechanism for evaluating impairment, the *AMA Guides* do not represent "pure" medical judgment. With regard to the specific application of the *AMA Guides*, see Ellen Smith Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment*, 103 HARV. L. REV. 964, 965 (1990) (noting that, like any impairment scheme, it "rests in large part on important and difficult normative judgments"). When the Performance Council adopted the use of the *AMA Guides* for use in the evaluation of impairment, there was no indication that they investigated the availability of other guides or schedules which might more closely meet the needs of a workers' compensation program.

454. BAVON, *supra* note 274, at 19 (noting further that a "hybrid approach would ensure that the economic loss is mitigated in proportion to the impairment").

455. NCSL 1994, *supra* note 280, at 9.

456. For example, in Kentucky, disability "means a decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives, taking into consideration his age, occupation, education, effect upon employee's general health of continuing in the kind of work he is customarily able to do, and impairment or disfigurement." KY. REV. STAT. ANN. § 342.0011(11) (Michie/Bobbs-Merrill 1993). *See* Commonwealth of Kentucky, Transportation Cabinet v. Blackburn, 890 S.W.2d 627 (Ky. 1994) (consideration of physical limitations, age, education, work experience and limited intelligence); Cook v. Paducah Recapping Serv., 694

States have also developed a wide variety of approaches which combine impairment ratings with some recognition of the poor correlation between impairment ratings and economic loss. In Wisconsin, Minnesota, and Colorado, for example, benefits are based on impairment unless the worker has not been able to return to his/her pre-injury level of wages; in Connecticut and Massachusetts, benefits are paid for impairment and additional amounts can be paid for earnings losses.⁴⁵⁷ Texas, whose 1989 reform legislation was, like SB 250, bitterly fought by organized labor, included a specific provision creating a safety net for partially disabled workers displaced from their jobs: claimants with 15 percent or more impairment who are unable to return to their jobs are evaluated for supplemental income benefits calculated based upon economic loss.⁴⁵⁸ Use of the *AMA Guides* is specifi-

S.W.2d 684 (Ky. 1985) (holding that the *AMA Guides* are used to assess impairment, but the Workers' Compensation Board must translate the percentage of functional impairment into occupational disability). In Maryland, the workers' compensation law provides that the percentage of permanent partial disability is to be determined in non-scheduled injuries based upon the extent of industrial injury; in making this determination, "the Commission shall consider factors including: (i) the nature of the physical disability; and (ii) the age, experience, occupation, and training of the disabled covered employee when the accidental personal injury or occupational disease occurred." MD. CODE ANN., LABOR & EMPLOYMENT § 9-627(k)(2) (1995 Supp.). In Ohio, the primary measure for partial disability awards is impairment of earning ability. Factors to be considered include: impairment of earning ability, age, sex, education, and economic and social environments. State *ex rel.* Cleveland Browns, Inc. v. Industrial Comm'n of Ohio, 550 N.E.2d 177, 553 N.E.2d 279 (Ohio 1990) (earning capacity); State *ex rel.* Chrysler v. Industrial Comm'n, 472 N.E.2d 67 (Ohio App. 1984) (other factors). In Pennsylvania, disability means loss of earning capacity. PA. STAT. ANN. tit. 77 § 512 (Purdon 1992). See Phillips v. North Am. Coal Co., 365 A.2d 453 (Pa. Commw. 1976) (in determining partial or total disability, such factors as nature of disability, mental outlook, industrial background, age, education, and availability of suitable work are considered). See also Meden v. W.C.A.B. (Bethenergy Mines, Inc.), 647 A.2d 620 (Pa. 1994); Modern Cooler Co. v. Workmen's Compensation appeal Board, 333 A.2d 811 (Pa. Commw. 1975). In Virginia, partial disability is based upon loss of earnings. VA. CODE ANN. § 65.2-502 (Michie 1995). When the Workers' Compensation Commission determines whether a partially disabled employee has made a reasonable effort to find suitable work, the omission is directed to consider the nature and extent of the disability; the employee's age, education and experience; the nature of the job search undertaken; the availability of jobs in the area suitable for the employee; and any other relevant factors. National Linen Serv. v. McGuinn, 380 S.E.2d 31 (Va. App. 1989). In Pennsylvania, Virginia, and Maryland, wage loss benefits for partial disability terminate after 500 weeks.

457. NCSL 1994, *supra* note 280, at 9.

458. TEX. LABOR CODE ANN. § 408.142 (West Pamph. 1995) ("(a) An employee is

cally modified in some states, including Maryland.⁴⁵⁹ A variant of these provisions would, at a minimum, be worth considering here. These provisions plow a middle ground between the extreme position taken in SB 250 and the more fiscally problematic adoption of an open-ended wage-loss or loss of earning capacity measure for all injuries and diseases.

Second, the negative economic impact on injured workers of the impairment-only system is exacerbated by the new settlement and closure provisions in SB 250. Fair and adequate settlements may be difficult to achieve because of a variety of factors, including the following: the limited nature of statutory benefits; the difficulty of negotiating a fair settlement when an injured worker, who may desire reemployment, lacks equal bargaining power; and the inadequate oversight of the settlement process under SB 250. In addition, recent studies show that it is difficult or impossible to assess the long range physical and economic impact of an injury immediately after it occurs.⁴⁶⁰ The result of

entitled to supplemental income benefits if on the expiration of the impairment income benefit period . . . the employee:

- (1) has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;
- (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
- (3) has not elected to commute a portion of the impairment income benefit . . . ; and
- (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.”).

Other states, including Florida and Maine, have similar threshold provisions for economic loss benefits.

With regard to the 15 percent threshold, the Texas Research Center noted the following: “The threshold should be located at a point that encourages a return to work but recognizes that the impairment can in fact limit the ability to work.” Texas Workers' Compensation Research Center, *Severity of Impairment and Subsequent Employment*, 3 RESEARCH REV. No. 35, Aug. 1995, at 3. The Center is not yet certain that the 15 percent threshold is the correct place to draw the line. *Id.* The Research Center's studies appear to indicate that many workers with less than 15 percent impairment may have serious job displacement problems as a result of occupational injuries.

459. See BAVON, *supra* note 274, at 9 (noting that “When the Maryland legislature adopted the AMA Guides, it also allowed physicians to add points to the AMA Guides component of their ratings based on five additional, more subjective factors: pain, weakness, atrophy, loss of endurance, and loss of function”).

460. See, e.g., Richard J. Butler, William G. Johnson & Marjorie L. Baldwin, *Manag-*

early lump sum settlements is to promote efficiency and certainty in the system but potentially to transfer the economic needs of injured workers to other programs. Again, other states have found a middle ground between allowing cases to remain open indefinitely and encouraging early voluntary closure through use of compromise and release settlements; SB 250 rushed us from one end of the spectrum to the other. In Massachusetts, for example, lump sum settlements are discouraged in cases in which the claimant has been found suitable for vocational rehabilitation services or in which the employee has not returned to continuous employment for a period of at least six months.⁴⁶¹ In other states, settlement agreements are carefully scrutinized by an independent agency, and rejected if they do not adequately anticipate the needs of injured workers.⁴⁶²

Third, the new permanent total disability threshold forecloses the availability of lifetime benefits to many workers who may no longer be able to work at all as a result of their injuries. Because the impairment-only rating system does not reflect the level of disability which is caused by an injury, a threshold is an arbitrary system for determining a right to apply for benefits. Professor Larson echoes this concern when addressing the new West Virginia provision:

Since the loss of a leg below the thigh qualifies as a forty-five percent medical disability (§23-4-6(f)), it is apparently now possible for a worker of limited education, limited mentality and, therefore, limited employability, to suffer a severely debilitating injury such as loss of a leg, and be disqualified from permanent total disability notwithstanding a bona fide inability to gain employment.⁴⁶³

ing Work Disability: Why First Return to Work is Not a Measure of Success, 48 INDUS. & LABOR REL. REV. 452 (1995); Texas Workers' Compensation Research Center, *Analysis of Postinjury Employment Experiences of Injured Workers with Permanent Impairments*, *supra* note 449, at 6.

461. MASS. GEN. LAWS ANN. ch. 152, § 48(3)-(5) (West Supp. 1995); described in NCSL 1994, *supra* note 280, at 55. Again, a similar provision here would dampen the negative impact of this provision without completing eliminating the improved level of closure and efficiency.

462. This has, for example, been the practice in Ohio.

463. LARSON, *supra* note 68, § 57.51(a), at 10-286 (summarizing odd lot cases). Illustrative stories of claimants in this situation now abound.

Although no data appear to be available on this issue, it is likely that many PTD claims will be excluded as a result of the new rules allowing for settlement and preventing reopening of claims.⁴⁶⁴ In view of this, and in view of the declining number of claims being filed, the PTD threshold may not actually be needed in order to reduce the number of permanent total disability awards in the future. Since no other state has adopted a similar threshold provision for PTD benefits, this is certainly an issue which is worth exploring further.⁴⁶⁵

The gap in benefits created by the 1995 legislation is extraordinarily unfair to the subset of workers whose impairments result in serious disability and whose partial disability ratings do not reflect the impact of the injury on their ability to work: these are often older workers with a long and serious commitment to participation in the workforce who become unable to work in jobs with incomes equivalent to the incomes they earned before they were injured. In other words, they are made poor as a result of the combination of their occupational injuries (or diseases) and the restrictive nature of the 1995 legislation.

As noted above, the West Virginia Legislature recognized this problem by increasing the amount of permanent partial disability bene-

464. A large, but not counted, number of second injury life awards were awarded to people who left or were excluded from the workforce who then reopened old claims and used these old claims to get second injury life awards. It would be possible to review the claims in which awards have been made, and the claims in which applications are pending, to determine the number of claims which would be excluded by the two critical statutory closure prohibitions: that which precludes reopening more than five years after an award (W. VA. CODE § 23-4-16(a)(1) (Supp. 1995)); and that which requires closure of claims after five years if no partial disability award has been made (W. VA. CODE § 23-4-16(a)(2) (Supp. 1995)). The future impact of final settlements is not possible to ascertain with any certainty.

465. The question is, in part, whether all of the legislated changes in permanent disability benefits were needed in order to achieve a fiscally stable fund. Assessment of this would require access both to the files on claims and to the Fund's consulting actuary. With this access, it would be possible to develop proposals which were fine-tuned to the particular issues. For example, if our concern is about the PTD awards made to people who had worked a full lifetime and left the workforce voluntarily at (or close to) retirement age, then the specific statutory provisions can be written to exclude these claims. The combination of provisions included in SB 250 took more of a meat-axe approach to benefits, resulting in huge savings but large inequities for disabled workers.

fits by 50 percent when a claimant cannot return to his/her prior job⁴⁶⁶ and by providing limited temporary partial rehabilitation benefits to claimants who meet the 50 percent threshold but who are denied permanent total disability awards.⁴⁶⁷ This simplified approach is not adequate to address the economic devastation facing some injured workers; the system, as is done in Texas and elsewhere, should evaluate the economic impact of the work injury on the claimant's ability to be self-supporting. A reduction in the PTD threshold will not fully address this problem.

Under the 1995 legislation, secretaries, nurses' aides, lawyers, and coal miners who lose a foot will be limited to receiving a 35 percent PPD award. Needless to say, the ability of the coal miner, or even the nurse's aide, to return to comparable work will be doubtful: the nature of the disability, level of education, and the nature of work a person is trained to do all affect his/her likelihood of achieving a successful return to work. Similarly, the coal miner and nurse's aide will not only be more likely to injure their backs, but also will be more disabled by a back injury. An impairment rating of 25 percent may accompany injuries which render people unable to do hard physical work — but able to continue to perform white collar work. Once the coal miner or nurse's aide has exhausted the limited workers' compensation benefits, however, the workers' compensation system is now done with him or her; rehabilitation services become more essential as the amount of monetary compensation decreases. The mandatory closure of the claim will foreclose any reopening for additional benefits after five years, even if the effects of the injury progress. The PTD threshold means that they cannot even file an application for permanent total disability benefits. They will have to look elsewhere for help.

Historically, workers' compensation was intended to be the primary payer for industrial injuries so that the cost of these injuries would be paid by employers and passed through to consumers of the employers' goods and services. But this is becoming less true today. In a Texas

466. W. VA. CODE § 23-4-6(e)(2) (Supp. 1995) (changing the PPD conversion from four weeks for 1 percent to six weeks for 1 percent when claimant does not return to pre-injury work).

467. W. VA. CODE § 23-4-6(n)(3) (Supp. 1995).

study, 72 percent of workers with impairments received financial assistance in addition to workers' compensation; 83 percent reported experiencing personal hardship.⁴⁶⁸ Help came from friends and relatives, Social Security disability benefits, other employer benefits, food stamps, and Supplemental Security Disability Income (SSDI).⁴⁶⁹

In West Virginia, the workers' compensation program now appears to be specifically designed to shift the cost of serious occupational injuries from the workers' compensation system to other disability programs. This is accomplished in the following ways. First, benefits are explicitly designed to be inadequate for workers whose impairments are evaluated to involve less than 50 percent impairment but whose ability to work is seriously impaired. Second, reductions are made in workers' compensation benefits when the worker collects benefits from other sources.⁴⁷⁰ Third, permanent total disability benefits are cut off when claimants reach the age at which they can collect Social Security retirement benefits.⁴⁷¹ The Social Security program in particular will fund much more of the costs associated with occupational injuries in West Virginia than previously;⁴⁷² the Division is now *assuming* that

468. Texas Workers' Compensation Research Center, *Economic Outcomes of Injured Workers with Permanent Impairments*, 3 RESEARCH REV. No. 27, Aug. 1995, at 1.

469. *Id.* at 2. Note that SSDI, food stamps, and welfare are need-based programs; eligibility is contingent on the claimant's poverty.

470. W. VA. CODE §§ 23-4-23, -25 (Supp. 1995).

471. W. VA. CODE § 23-4-6(d) (Supp. 1995).

472. See Clifford B. Hawley, Ph.D., *Estimates of the Impact of Senate Bill 250 on the Disabled Worker*, (Oct. 10, 1995) (unpublished report, on file with the author) (prepared for the Affiliated Construction Trades, AFL-CIO on Oct. 10, 1995 and presented to Legislative Interim Committee on workers' compensation on Oct. 16, 1995). Hawley's report calculates, based upon numbers provided to him by the Division, the amount of savings to the Fund and the amount of transfer of costs to the Social Security program through disability benefits which will result from SB 250. According to Hawley, a vocational expert who analyzed the PTD data concluded that 10-20 percent of previously awarded PTD claims would survive the threshold; Hawley assumed that the PTD award rate would be 20 percent of the previous rate in making his calculations. Telephone Interview with Clifford Hawley (Oct. 18, 1995). See also Fanny Seiler, *Workers' Comp Bill Shifts Burden, Legislators Told*, CHARLESTON GAZETTE, Oct. 17, 1995, at 3A. According to Seiler's account, in his presentation of the report, Stuart Calwell, a lawyer for the Affiliated Construction Trades, noted, "I call it corporate bailout' Calwell said 80 percent of the workers disabled on the job today won't qualify for permanent total disability benefits from workers' compensation But they still have to live, and they will qualify for Social Security disability benefits, Calwell

every one of these claimants will be eligible and collect Social Security Disability benefits.⁴⁷³

said. Calwell said employers who made a profit from the employee's injury will have their responsibility shifted to the taxpayers who contribute to the Social Security Retirement System [Hawley] estimated the amount shifted from employers to Social Security at \$110.7 million annually." *Id.* This shift occurs for two reasons: the amount of Social Security disability benefits is higher if the worker is not receiving workers' compensation; and the worker's old-age benefits are not reduced (to the same degree) if the worker collects disability benefits.

473. Workers' Compensation Division, Bureau of Employment Programs, Comparison of Disposable Income Scenarios (undated) (unpublished handout, on file with author) (distributed to the legislative interim committee at their September 1995 meeting). This handout is remarkable in a number of ways. In arguing that the new elimination of PTD benefits at age of eligibility for old-age Social Security benefits would not damage claimants economically, the Division made the following assumptions:

First, all successful PTD applicants will be successful applicants for Social Security Disability benefits. Historically, under West Virginia case law, it was held that, although there are similarities in eligibility criteria, Social Security benefits are, and should be, more difficult to obtain than permanent benefits from workers' compensation. *See Cardwell v. Workers' Compensation Comm'r*, 301 S.E.2d 790 (W. Va. 1983). Even with the much more stringent eligibility standards, there is certainly no guarantee that every claimant will qualify for these benefits. If a claimant does not qualify for the benefits and becomes permanently and totally disabled early in life, his/her old age benefits will be reduced considerably; this is not reflected anywhere in this "study."

Second, no consideration was given to the loss of pension benefits associated with a shorter worklife, despite the fact that, according to the study itself, 40-50 percent of claimants would have had employer-based retirement plans which would have been lessened as a result of the shortened worklife.

Third, no provision was made for the five month waiting period for SSD benefits.

Fourth, the charts show monthly average income from Social Security retirement benefits as ranging as high as \$4,956 (or \$59,472 per year); in fact, there is a maximum level of benefits available for both old-age and disability which does not appear to be reflected in the charts, even assuming that the maximum escalates in the future. Currently, according to the Social Security Administration, if someone has worked a full working life and contributed the maximum amount into the system, the maximum monthly benefit that person can collect is \$1,045 per month. In addition, the charts assume that Social Security benefits will continue to escalate at the current rate; an unlikely assumption, given the current fiscal crises facing the Social Security program in general.

Fifth, faulty assumptions were made regarding future escalation of both wages and benefits.

This is, at best, a flawed study. It raises concerns, however, about whether the Division is acting as an oversight agency, providing useful information to legislators, or in the role of insurer, providing justifications and explanations for benefit reductions.

In summary, we have saved money but we have created a system in which some people will receive workers' compensation benefits which will not even guarantee a minimally adequate level of continued income. Showing extraordinary lack of interest in this issue, the Division has not unveiled any studies which look into this problem.⁴⁷⁴ Workers' compensation was initially designed precisely to avoid economic destitution caused by occupational injuries. Given the continued and troubling record of occupational injuries and diseases in West Virginia, it hardly seems appropriate to balance the program by denying essential benefits to legitimately injured workers.

C. *Quality Medical Care*

The overall changes in the provision of medical care⁴⁷⁵ (including adoption of managed care, elimination of confidentiality rights, and the requirement that claimants pay for seeing out-of-state providers in most instances) are all directed at apparently supportable goals: increasing the efficiency of the delivery of medical care; decreasing costs; and improving the transfer of information regarding the claimant to the Division and to the employer in order to improve the ability to process the claim efficiently and encourage individuals to return to work promptly and appropriately. At the same time, these provisions will result in a significant loss of choice and autonomy for injured workers. They give employers and their representatives unrestricted oral and written access to the claimants' treating physician and what that physician knows about the claimant's medical history and status.⁴⁷⁶ They restrict the right of claimants to choose their treating physicians. Perhaps more importantly, they give to employers with "managed care" organizations the ability to select claimants' second treating physicians, who will often both treat and influence claimants' continuing eligibility for weekly benefits. The combined effects of requiring employees to seek care from a managed care network chosen (and paid) by the employer and eliminating any confidentiality in the therapeutic relationship

474. The only recent study which has been publicly released is the one on the impact of the cut-off of benefits at old-age retirement eligibility, discussed *supra* note 473.

475. These changes are summarized *supra* in Part III.B.

476. W. VA. CODE § 23-4-7 (Supp. 1995).

arguably results in a situation in which the treating physician is perceived as, and perhaps becomes, a reincarnation of the “company doctor.”

The changes made in workers’ compensation are noticeably different from the approach taken by other West Virginia state agencies in addressing issues of quality and cost containment in health care. For example, the Public Employees’ Insurance Agency (PEIA), which provides health insurance to state, county and local government employees, has chosen a different path: introduction of managed care into that plan has been carefully monitored, both through a detailed bidding and contract process and through oversight by the agency and its Finance Board. Confidentiality has been carefully protected. When beneficiaries seek out-of-state care, the agency often will pay some or all of the balance of fee not covered by the fee schedule.⁴⁷⁷

The legislated changes in workers’ compensation medical care raise interrelated and important questions regarding the delivery of health care in workers’ compensation claims. To what extent should occupationally-injured workers have different rights regarding medical treatment than others? And the corollary, should the fact that a worker seeks wage replacement benefits from workers’ compensation change his/her rights to obtain medical treatment? Do concerns about cost escalation in both medical costs and benefits justify these changes? Are there sufficient guarantees that quality will be maintained or improve and that costs will go down if workers are forced into managed care organizations? Are there alternative approaches which will meet the goals of adequate, cost-effective treatment? In pondering these questions, it is important to note the following.

First, while many states have moved in the direction of requiring claimants to receive care from managed care organizations, almost every one of these states has set very careful parameters on the operation of these new medical organizations. SB 250 authorizes the Performance Council to promulgate rules governing the development of managed care by the Division. It also permits employers to set up managed

477. I have served continuously as a member of the PEIA Finance Board since its creation in 1990, having been reappointed to a second term by Governor Caperton in 1994.

care organizations, without any specifications with regard to quality or adequacy of access; it does not appear to require that employers comply with any directives from the Division regarding managed care.⁴⁷⁸ The 1994 report of the National Conference of State Legislatures endorses both experimentation with managed care and attempts to integrate workers' compensation health care with the general health care delivery system. The report notes, however, that use of employer's health care systems raises potential for abuse.⁴⁷⁹ Other states have approached the adoption of special employer-controlled workers' compensation managed care organizations with considerable caution. This caution is evidenced by approaches which authorize only the initial development of pilot projects; which require these organizations to comply with very clear and specific guidelines; which allow claimants opt-out choices; or which provide for careful study and oversight by the state agency.⁴⁸⁰ West Virginia appears to be somewhat alone in throwing

478. W. VA. CODE § 23-4-3(b) (Supp. 1995).

479. NCSL 1994, *supra* note 280, at 9 (Noting:

The use of an employer's cost containment program in conjunction with the delivery of workers' compensation medical services will raise legitimate concerns over the potential for abuse. Because they are often designed and implemented by the employer and its insurer without the active participation of employees or their representatives, such programs may be viewed as totally responsive to employer interests. As a result, some parties fear that they may be used to deny workers proper care for their work-related injuries, through the adoption of overly stringent limitations on treatment in the guise of legitimate cost and quality controls There are at least two ways to prevent this problem from developing. The first is to require certification of the employer's program, to minimize the likelihood that it will be used inappropriately The second is a protection that must exist in any event, to meet the due process requirements that apply to every workers' compensation system).

480. Many of these approaches are described in NCSL 1994, *supra* note 280, at 24-31 (Giving the following examples: Florida and Oregon initially adopted a pilot program approach. Ohio allows claimants directed into employer's managed care program to opt out into state-run program or go outside and pay co-payments. New Hampshire's legislation authorizes employer managed care programs but they must meet strict standards for approval, including comprehensiveness with respect to range of specialties and geographical access, allowing compensable treatment outside the network if necessary services cannot be provided within the network, reasonably easy access to second medical opinions and, if employee is dissatisfied with determinations regarding compensability, degree of disability or degree of impairment, the employee is entitled to an examination by a physician of his/her choice. In Minnesota, where managed care is now mandatory, managed care organizations must be state-certified; in order to receive this certification, they must provide quality services which

caution to the wind and endorsing employer-managed care without reservation.

Second, while West Virginia is not alone in deciding that claimants should have no right to a confidential medical relationship if they apply for workers' compensation,⁴⁸¹ we may be in the minority. The apparent endorsement of oral conversations between any employer representative and an employee's treating physician has implications outside the workers' compensation claim. It is very difficult to control oral, private communications. Given the apparently clear language of the statute providing an irrevocable waiver for discussion of the claimant's medical history, physicians are unlikely to refuse to provide information regarding non-work-related medical history if the employer argues that it is relevant to the claim or the individual's future job placement. In the end, this provides employers with information which they simply ought not have. Ultimately, if the information is misused, it may provide employees with colorable claims under the disability discrimination laws as well. And there are substantial questions with regard to whether this erosion of confidentiality will impede another equally important goal: an effective therapeutic relationship. Despite the Division's insistence that the elimination of confidentiality is not serious, anecdotal reports indicate that physicians feel compelled to provide all information in the records, without limit, when contacted by employers.

Third, there is no clear evidence that any of the changes will decrease costs or improve outcomes for workers by providing more effective treatment or more rapid return to work. The Division has adopted strict treatment practice guidelines governing the provision of medical care.⁴⁸² These guidelines will have significant impact on treatment modalities, thereby accomplishing much of what can be accomplished

are geographically convenient, promote workplace health and safety consulting services, and allow workers to receive compensable treatment from a provider who is not a member of the managed care plan if the provider has an established relationship with the employee, and so on.)

481. See Spieler, *Occupational Medicine*, *supra* note 24, at 75-79 (discussing the specific issues of confidentiality in this relationship).

482. W. Va. C.S.R. sections 85-20-1 to -28 (1995) (Guidelines for the treatment of workers' compensation injuries) (effective Oct. 1, 1995).

in managed care environments. In view of this, the arguments in favor of employer-directed managed care diminish.

Fourth, the failure of the Division to assist in the development of consistent state policy and planning in the area of health care development is particularly troubling, in view of the pressing health care issues in the state. To my knowledge, no serious attempt has been made to coordinate the development of managed care with other state agencies. No attempt was made to coordinate the negotiation of discounted fees with out-of-state providers before transferring the costs to claimants. No discussion was had regarding the general erosion of medical confidentiality in managed care.

In sum, the particular amendments to the delivery of medical care to work-injured people which were contained in SB 250 are difficult to justify. Not surprisingly, injured workers themselves are particularly outraged by their loss of confidentiality and choice of provider. There is substantial question whether the gains from these changes outweigh the costs.

D. Procedural Efficiency and Fairness

Every legal system strives to meet the dual goals of efficiency and fairness. The problem is, of course, that efficiency — quick and sure resolution of claims and disputes — does not always serve the interests of fairness. Fairness requires time and resources which provide the litigants an opportunity to be heard on issues of fact and law; fairness also requires attentiveness to maintaining equal access to justice for all litigants. SB 250 effectively streamlines administrative efficiency. It does so by limiting the evidence which can be submitted in some claims; establishing clear but limited parameters for the review of disability issues in claims; eliminating hearings on the record to review factual disputes in permanent total, occupational pneumoconiosis, and medical treatment disputes; setting a limited scope of any appellate review; transferring to the Commissioner, now clearly named as the defending party, administrative control over both the initial decision-making and the appellate process; allowing this same defending party to review the fairness of settlement negotiations; and discouraging the participation of lawyers for claimants by effectively reducing the pri-

mary source of their fees.⁴⁸³ There is no question that these changes will make it easier for the Commissioner to streamline the process. But they also violate commonly accepted ideas of procedural fairness.

To the extent that the Commissioner stands in a similar position to that of an officer of an insurance company, with similar interests in guarding against payment of benefits, the procedures for review of claims and the process for reviewing settlements appear inherently inadequate; this looks too much like the 'fox guarding the chicken coop.' The problem here appears to be a real blurring of roles. The Commissioner is required by SB 250 to act in two conflicting capacities: first, as fiduciary to the Fund and as real party in interest in the defense of any claim for benefits (the insurer's role); and, second, as head of the oversight agency charged with ensuring fairness in the consideration of claims.⁴⁸⁴

Prior to 1990, the Commissioner was charged with both initial and final review of claims; the decision to create the Office of Judges was intended precisely to ensure due process in disputed claims. By assuming the responsibility as the party in interest in every claim in which there is a dispute, the Commissioner has now formally assumed the mantle of the insurer. At the same time, SB 250 gives the Commissioner an expanded role in the control over the dispute resolution pro-

483. See *supra* Part III.C. for an enumeration of the specific procedural changes in SB 250. Since claimants' attorneys work on a statutorily limited contingency basis, reduction in permanent disability awards — and limitation on the amount of increase in these awards which can be achieved through litigation — will substantially limit the willingness of attorneys to participate in the process. This may serve the interests of efficiency; it will also ensure that a higher percentage of each award will find its way into the claimants' pockets. It will not, however, necessarily ensure that claimants will get fair levels of benefits from the system; the loss of personal advocacy for claimants may, indeed, work in the other direction.

484. The oversight role is described in the National Conference of State Legislature's report:

There should be recognition that the workers' compensation agency has significant responsibilities beyond merely providing a forum for litigation. Its primary obligation is to administer the law and to see to it that appropriate benefits and services are provided promptly. . . . Formal dispute resolution should be dealt with through professional hearing officers. . . . There should be a level of administrative review of individual cases decisions.

NCSL 1994, *supra* note 280, at 11.

cess. This combination of roles renders the process inadequate on its face.⁴⁸⁵

The 1994 report of the National Conference of State Legislatures specifically noted, "In disputed cases the parties are entitled to a full and fair hearing of the factual issues involved in the dispute, on the record."⁴⁸⁶ The new procedures adopted here do not appear to comply with this recommendation.⁴⁸⁷ The same report raised serious concerns about the settlement review process in workers' compensation, calling for close scrutiny of all lump sum settlements by an independent body.⁴⁸⁸ And, in fact, other states, while passing workers' compensation reform designed to promote rapid and efficient resolution of disputes, have been careful to guarantee procedural fairness at the same time.

The fundamental procedural problems created by SB 250 can be easily remedied by legislation. Returning full hearing rights and the review of settlements to the Office of Judges and restoring administrative separation to that office would accomplish this. Both the fairness of the system and the perception of that fairness would be restored by these simple amendments.

485. These procedural changes are at least arguably also violative of constitutionally protected due process rights. This problem has been raised by the petitioners in the action currently pending before the Supreme Court of Appeals of West Virginia which challenges the constitutionality of several provisions of SB 250. *See supra* note 22.

486. NCSL 1994, *supra* note 280, at 13.

487. The recommendation in this report calls for initial resolution of claims by a hearing officer, with further appellate review on the record. The hearing officer referred to is not the equivalent of the Division's claims managers, who make the initial decision on a claim. In other states, this initial review is performed by the employees of the insurer (or state fund); the state administrative body then steps in to manage dispute resolution when there is dissatisfaction with the insurer's decision. The Division's employees stand in the same position as these insurer's employees; the hearing officer, then, would be the administrative law judge who hears disputed issues in the claim.

488. *Id.* at 12. The report suggests that "the agency" take this role, again assuming that the "agency" and the "insurer" are separate entities. To achieve the level of recommended scrutiny, someone other than a real party in interest needs to assume this role.

E. Promotion of Safety and Rehabilitation

Ultimately, the success of a workers' compensation program must be measured in the decrease not of costs, but of injuries and disabilities. The keys to this lie in the prevention of injuries and illnesses and in effective assistance to injured workers in returning to work.

Historically, the West Virginia Workers' Compensation Fund did not even attempt to promote safety or to explain to employers that experience rating responded to claims experience. Administrative efforts to promote rehabilitation after injury were also half-hearted, at best.⁴⁸⁹ The problem was compounded by the fact that judicial decisions tended to support applications for benefits but not efforts to return to work.⁴⁹⁰

Rehabilitation. As noted in Part II, the 1990 legislation rewrote the vocational rehabilitation section of the Workers' Compensation Act in order to expand administrative services, enhance return-to-work incentives for injured workers, and require employers to participate in the rehabilitation of injured workers.⁴⁹¹ The failure to promulgate rules implementing these provisions until July 1, 1994, seriously impeded the development of an effective rehabilitation program.⁴⁹² The final rules adopted cooperative,⁴⁹³ punitive,⁴⁹⁴ and reward⁴⁹⁵ measures in order

489. For a discussion of the administrative approach to vocational rehabilitation and return to work issues, see Spieler, *Injured Workers*, *supra* note 7, at 413-25.

490. *Id.* at 369-413.

491. W. VA. CODE § 23-4-9 (1994).

492. The delays in the implementation of the program are described in Spieler, *Injured Workers*, *supra* note 7, at 442-49. The final rules are codified at W. Va. C.S.R. sections 85-15-1 to -16 (1994).

493. Injured workers are promised that if they "cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans" they will "benefit from the rehabilitation services by being returned to the workforce or being awarded appropriate disability benefits." W. Va. C.S.R. section 85-15-2.2.1 (1994). Likewise, employers "who cooperate with the rehabilitation assessment process and fully participate in authorized rehabilitation plans benefit from the rehabilitation process by minimizing the costs associated with work-related injuries." W. Va. C.S.R. section 85-15-2.2.2 (1994).

494. "An injured worker's refusal to cooperate with the rehabilitation assessment process or to participate in an authorized rehabilitation plan without a showing of good cause is a factor(s) [sic] for the commissioner to consider in determining the amount of any permanent partial disability or permanent total disability award to which the injured worker might otherwise be entitled." W. Va. C.S.R. section 85-2-2.2.1 (1994). Of course, now that injured

to encourage rehabilitation efforts. Every worker who is likely to be collecting temporary total disability benefits for longer than 120 days or who has sustained, or is likely to sustain, a permanent disability is supposed to be evaluated for rehabilitation services,⁴⁹⁶ and, if found to be a suitable candidate for rehabilitation, must be offered a rehabilitation plan. As part of the plan, the worker "may return to work at a transitional, light duty, restructured or modified work assignment, on either a temporary or trial basis,"⁴⁹⁷ and is eligible to receive temporary partial rehabilitation benefits, which are added to any reduced wages to bring the claimant closer to his/her pre-injury wage.

These rules, and the 1990 legislative amendments, give the agency the necessary statutory and regulatory tools to develop an aggressive rehabilitation program. The new case management system, which allows a single person to manage all aspects of a claim, may improve the ability to design and deliver appropriate rehabilitation services. As yet, the agency has not reported on its success in this area.

Safety Promotion. Workers' compensation agencies have traditionally focused on the delivery of compensation benefits to workers; a growing focus on safety has, in large part, been a reaction to escalating costs. In the last few years, state after state has passed legislation requiring safety programs under the workers' compensation umbrella.⁴⁹⁸

workers receive impairment-based benefits only, and are unlikely to be good candidates for rehabilitation if they are 50 percent impaired on a whole body impairment basis, it is not exactly clear whether this language has any significance. Workers' motivation to participate in an effective rehabilitation program may be heightened by the diminution of benefits, however.

The language governing employers is similar: "The commissioner may consider an employer's failure to cooperate with the development or implementation of a rehabilitation plan under these rules without a showing of good cause in determining the amount of any permanent partial disability or permanent total disability award." W. Va. C.S.R. section 85-2-2.2 (1994).

495. "If the pre-injury employer cooperates in the development of a rehabilitation plan that result [sic] in the injured worker returning in an employment capacity with the pre-injury employer pursuant to a rehabilitation plan, then the pre-injury employer shall have its account adjusted so that two-thirds of the costs of the vocational rehabilitation services are charged to its account and the remaining costs are charged to the surplus fund." *Id.*

496. W. Va. C.S.R. section 85-15-5.21 (1994).

497. W. Va. C.S.R. section 85-15-8.1 (1994).

498. See Spieler, *Perpetuating Risk?*, *supra* note 7, at 251-59.

In West Virginia, in 1993, the Division was given three-pronged authority to promote health and safety. First, the Commissioner, with the assistance of the Performance Council, was to establish a consultative program to “encourage voluntary compliance with health and safety laws and to promote more effective workplace health and safety programs” through research, collection and dissemination of data and information, provision of consultative services, and development of a model for providing services to groups of small employers.⁴⁹⁹ Second, the Commissioner was to develop a mandatory program for hazardous employers including a requirement that targeted employers establish joint labor-management health and safety committees; the Commissioner was also authorized to conduct inspections of worksites (with or without agreement of the employer).⁵⁰⁰ Third, the Commissioner was allowed to establish a “premium credit program” for employers which would apply a prospective credit to the premium rate of a subscribing employer who participates in a qualified loss management program.⁵⁰¹

Implementation of this 1993 legislation — like the implementation of the 1990 rehabilitation amendments — has been inexcusably slow. As of this writing, rules have yet to be adopted which would effectuate the statutory provisions; public hearings were held on the first set of proposed rules in September 1995, two and one-half years after the legislation was passed.⁵⁰² Despite a \$21 million increase in annual administrative expenses,⁵⁰³ no safety experts have yet been hired. The development of rules has been delayed through consultation with an advisory committee which functions without the benefit of staff with expertise in the safety and health area.

In 1995, the Administration sought and obtained legislative changes in rate-making methodology in order to promote rate equity (by requiring employers causing high costs to pay even higher rates⁵⁰⁴)

499. W. VA. CODE § 23-2B-1 (1994).

500. W. VA. CODE § 23-2B-2 (1994).

501. W. VA. CODE § 23-2B-3 (1994).

502. Comments were accepted on a proposed rule, W. Va. C.S.R. sections 85-23-1 to -13 (1995) (implementing W. VA. CODE § 23-2B-2), in September 1995.

503. See *supra* notes 150-151 and accompanying text.

504. See *supra* note 427 and accompanying text (indicating that an additional \$12 million may be collected annually through underwriting).

and to provide improved incentives for health and safety activities by employers. It was this change in rate-making methodology which was viewed as promoting workplace health and safety in SB 250. Administrators of the Fund are convinced that increased flexibility in setting rates (in addition to the more specific 1993 safety legislation) will result in increased employer attention to workplace safety and, therefore, will decrease the number of injuries which occur. It is not, however, at all clear that increases in rates actually result in reduced injury rates, even in states which have always allowed private insurers to underwrite the workers' compensation risk.⁵⁰⁵ At this point, it is too early to assess the implementation of this legislation or whether it will ultimately improve the safety and health conditions in West Virginia workplaces.

F. Rate Adequacy and Equity for Employers

There are multiple goals in the setting of workers' compensation premium rates: to set the rates at an actuarially sound level; to distribute costs appropriately and equitably among employers; to set rates using a methodology designed (if this is possible) to provide incentives toward prevention; to ensure that there is sufficient predictability in rates to allow employers to do long-range planning. There is no question that none of these goals were met between 1985 and 1995: rates were too low; self-insured employers were draining the Fund by paying excessively low premiums while allowing second injury permanent total

505. For a very extensive discussion of this issue, see Spieler, *Perpetuating Risk?*, *supra* note 7, *passim*. There is a complex interrelationship of a variety of factors which make it difficult to assess whether, and to what extent, employers respond to increased workers' compensation costs by promoting safety. For example, the incentive to promote safety through rate-making is, in fact, also an incentive to suppress claims and their costs; this can be done through a variety of means other than actual prevention of injuries. Recent studies continue to equivocate. *See, e.g.*, Richard J. Butler, *Safety Incentives in Workers' Compensation*, in 1995 WORKERS' COMPENSATION YEAR BOOK I-82, I-88 (John F. Burton, Jr. & Timothy P. Schmidle eds., 1995) ("[I]t is very difficult to measure the impact of experience rating on safety . . ."). On the other hand, studies do show that when employers improve their safety programs, workers' compensation costs decline. *See, e.g.*, H. Allan Hunt & Rochelle V. Habeck, *The Michigan Disability Prevention Study: Research Highlights*, in 1995 WORKERS' COMPENSATION YEAR BOOK I-114 (John F. Burton, Jr. & Timothy P. Schmidle eds., 1995).

disability awards to be charged to the Fund; security was set at inadequate levels, allowing some self-insured employers to become inactive and transfer large costs to the Fund (and therefore to other employers); the growing deficit meant that the threat of future rate increases always loomed, while current rates were kept inappropriately low.

To what extent have these problems been solved? The large reduction in benefit costs in SB 250 provided an opportunity to address the most egregious problems of underfunding and unpredictability without adding significantly to employers' costs. The Performance Council now has authority to oversee the setting of adequate security for self-insured employers. The rate-setting provision in SB 250 means that the Commissioner and the Division have a great deal of flexibility to make available different insurance "products" and to utilize underwriting principles in order, in theory, to distribute costs more equitably and appropriately. The rate level projections for Fiscal Year 1996 assume that an additional \$12 million will be collected from employers, starting in Fiscal Year 1997, with exceptionally poor claims records.⁵⁰⁶ And finally, flexibility in rate-setting plus the requirement that more detailed information be communicated to employers means that there is at least a better chance to provide clear incentives for employers to work on prevention of occupational injuries and diseases.

These are possibilities; it is still too early to evaluate the implementation of the 1995 legislation. Rates for this year were set using the old methodologies. Subscribing employers faced a 12.2 percent rate increase, on average, but they were assured that rates were adequate to pay new claims and retire the past debt. Self-insured employers also profited from the benefit reductions in SB 250. Both the unfunded liability for second injury awards and their future costs were substantially reduced; as a result, self-insured assessment rates for second injury coverage, the most expensive component of their premium costs, did not have to rise in order to cover both future and past liabilities. Self-insured's premiums rose only to cover increasing administrative costs and because their assessment rates require them to pay a percentage of the rates charged to their industrial class.

506. See *supra* note 427 and accompanying text.

Two inequities in rates were retained, however. First, the debt attributable to the coal industry will be paid, at least in part, by non-coal employers. Second, not all self-insured employers will contribute to funding the deficit. The Performance Council adopted a premium rate structure which requires all self-insured employers who subscribe to the second injury fund, including new self-insured employers (who are required to subscribe) to pay assessments, part of which will be used to recoup the deficit attributable to self-insured employers. All new and old subscribing employers will also contribute to the reduction of the deficit through the 12.2 percent rate surcharge. Only those self-insured employers who had historically self-insured for second injury coverage, and continue to do so today, were exempted from this obligation to help retire the debt. With these exceptions, and depending upon the methodology developed by the Division and the Performance Council, rate-making holds the promise of improved equity and adequacy in the future.

On the other hand, Steven Millikan's final goal — to recognize the inevitable increases in the costs related to the system⁵⁰⁷ — seems to continue to elude West Virginia employers. As noted previously, despite the massive benefit reductions contained in SB 250, three of the four business representatives on the Performance Council voted against the 12.2 percent premium rate increases for this year.⁵⁰⁸ Without a doubt, workers' compensation is a very expensive program. But, with aggressive safety and health programs, employers can themselves limit many of these costs.⁵⁰⁹ The failure to do so, the failure to fund the costs of the resulting injuries, and then the decision to deal with the resulting debt by eliminating benefits to those who were injured (even as claims were declining), is hardly the "fairest" way to resolve a workers' compensation crisis.

507. Millikan, *supra* note 391, at 4.

508. *See supra* note 265.

509. *See* Spieler, *Perpetuating Risk?*, *supra* note 7, at 154-60.

VI. CONCLUSION

There is a constant and inevitable tension between the goals of fiscal stability and efficiency and the goals of benefit adequacy and procedural fairness in workers' compensation programs. It is no secret that legislative decisions on issues like this are as likely to be made on the basis of political expediency as social fairness. The debates over medicare, medicaid, health care reform, welfare — and workers' compensation — all reflect this reality. But, as Supreme Court of Appeals of West Virginia Justice Franklin D. Cleckley recently observed, "What good is a balanced budget if it fails to meet the needs of the struggling middle class and the desperate poor?"⁵¹⁰ The same can be said of the 1995 workers' compensation reforms.

No one can claim success in redesigning a social program without first evaluating progress toward all goals, no matter how contradictory. In 1995, the West Virginia Legislature confronted difficult problems: a decade-long underfunding of workers' compensation costs which grew out of dangerous, shrinking industries; and chronic inefficiencies in the administration of the workers' compensation program. In focusing on the crisis, it appears that legislators lost sight of another, equally critical goal: to maintain a system of adequate benefits and fair treatment for injured workers. A public dialog has not yet really begun on the question of benefit adequacy. Ultimately, "fair" workers' compensation policy requires this dialog.

510. Quoted in Jack McCarthy, *Cleckley pleads case for blacks*, THE CHARLESTON GAZETTE, Nov. 14, 1995, at 1A, 9A.

WORKERS' COMPENSATION REFORM**Appendix A****Number of claims and number of awards by West Virginia
Workers' Compensation Fund 1984-1994****Active workforce data**

Rates of lost time claims per 100,000 active workers

Rates of awards granted per 100,000 active workers

NCCI reported rates of incurred claims

	Number of new lost time claims filed; rate per 100,000	Number of fatal awards; rate per 100,000	Number of PPD awards; rate per 100,000	Number of PTD awards; rate per 100,000	Work-force total (thou- sands)
1984	n/a	120 rate: 21	6774 rate: 1165	356 rate: 61	581.3
1985	n/a	106 rate: 18	7521 rate: 1293	387 rate: 66	581.7
1986	n/a	n/a	n/a	n/a	582
1987	n/a	134 rate: 23	10,974 rate: 1882	525 rate: 90	583.2
1988	25,394 rate: 4277	197 rate: 33	11,777 rate: 1984	597 rate: 101	593.7
1989	22,697 rate: 3795	158 rate: 26	9627 rate: 1610	699 rate: 117	598.1
1990	23,006 rate: 3755	117 rate: 19	8570 rate: 1398	756 rate: 123	612.7
1991	22,991 rate: 3755	111 rate: 18	9364 rate: 1529	629 rate: 103	612.3
1992	22,190 rate: 3565	170 rate: 27	9735 rate: 1564	866 rate: 139	622.5
1993	21,255 rate: 3348	203 rate: 32	10,452 rate: 1646	477 rate: 75	634.8
1994	20,846 rate: 3175	127 rate: 19	11,347 rate: 1728	740 rate: 113	656.6

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NCCI Rates of Incurred Awards

	New lost time claims filed	Fatal awards: incurred rate per 100,000	PPD awards: incurred rate per 100,000	PTD awards: incurred rate per 100,000	popu- lation
1991-92 policy year	n/a	rate: 5 (national average) NCCI states' rates range from 17 (MI) to 2 (NH)	rate: 750 (national average) NCCI states' rates range from 2089 (CA) to 323 (VA)	rate: 7 (national average) NCCI states' rates range from 56 (MT) to 2 (CT, KS, MA, NJ, NM)	n/a

Note: West Virginia and national data reported here are *not* comparable. West Virginia data are awards made in the year noted; awards may be made years after the injury occurs and the claim is incurred. NCCI data are incurred claims; these are awards that will be made for injuries occurring in the policy year.

Sources for data:

West Virginia workers' compensation claims and awards data: BUREAU OF EMPLOYMENT PROGRAMS, WORKERS' COMPENSATION DIVISION, ANNUAL STATISTICAL TABLES 1994; STATISTICAL SUPPLEMENT TO THE 1993 ANNUAL REPORT; 1992 ANNUAL FINANCIAL AND STATISTICAL TABLES; 1991 ANNUAL FINANCIAL AND STATISTICAL TABLES; WORKERS' COMPENSATION FUND ANNUAL REPORTS for 1990, 1989, 1988, 1987, 1986, 1984-85, 1983-84. The *Annual Report* for 1986 did not report any claims data.

West Virginia workforce data: Total nonfarm payroll as reported by WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS, LABOR AND ECONOMIC RESEARCH, EMPLOYMENT & EARNING TRENDS 1994, WV Nonfarm payroll employment, by industry, Annual Averages 1939-1994. The numbers have been adjusted to deduct the federal employment, since federal employees are not covered under the WV workers' compensation system. Federal employment for the years in questions was: 18231 (1994); 17800 (1993); 17474 (1992) 16826 (1991); 17407 (1990); 16634 (1989); 16108 (1988); 15799 (1987); 15470 (1986); 15495 (1985); 15299 (1984). Telephone conversation, Tommy Wiblin, Labor & Economic Research, Bureau of Employment Programs (Oct. 2, 1995)

NCCI data: NATIONAL COUNCIL ON COMPENSATION INSURANCE, ANNUAL STATISTICAL BULLETIN (1995 ed.), Exhibit XII, Frequency by Injury Type.