Injured Workers, Workers' Compensation, and Work: New Perspectives on the Workers' Compensation Debate in West Virginia

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INJURED WORKERS, WORKERS' COMPENSATION, AND WORK: NEW PERSPECTIVES ON THE WORKERS' COMPENSATION DEBATE IN WEST VIRGINIA

EMILY A. SPIeler*

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What I became most familiar with, however, was the realization that everyone was always criticizing workers’ comp. Everyone! Or, at least it seemed that way. It seemed that the workers’ comp system was blamed for the faltering economy, high unemployment, rising inflation rates, the birth rate, divorce rate, death rate and the rise of juvenile delinquency. The state of our workers’ comp system has also been blamed for plant closings, business leaving, new businesses locating elsewhere, workers coming into the state, and workers leaving the state. It seemed that just about anything that went wrong could be blamed, at least indirectly, on our state’s workers’ compensation system. To my knowledge, however, the system has not yet been blamed for prison overcrowding, Three Mile Island, or the Great Flood.¹

I. INTRODUCTION

Workers’ compensation is undoubtedly the most controversial—and most maligned—social insurance program in this country today.² Numbers of claims, costs per claim, and premium rates paid by employers have all increased dramatically in recent years.³ Political confronta-


tions have spread, pitting those who favor benefit reduction in order to promote economic development against those who defend the need for stable or increased benefits. Popular discourse focuses on the dangers of abuse and manipulation.

The treatment of injured workers presents a societal dilemma. On the one hand, there is increasing concern that workers' compensation simply costs too much. Economic decline has legitimized political concerns about the adverse impact on economic development of any system which provides wage replacement benefits to non-working people. On the other hand, the incidence of reported occupational injuries and illnesses remains high. Moreover, most states, including West Virginia, have been legally and socially committed to the payment of adequate benefits to disabled workers.

7%.


5. Commitment to adequacy was in large part an outgrowth of concerns about adequacy of state workers' compensation programs which surfaced in the decade before the passage of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988). Congress created the National Commission on State Workmen's Compensation Programs in response to these concerns. The Report of this Commission, issued in 1972, made nineteen essential recommendations for improving the adequacy of compensation. THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 45-52 (1972). If these changes were not made by the states, the Commission recommended federalizing the program. In response, many states increased the adequacy—and therefore the costs—of their programs, although many failed to implement all of the recommendations; by July 1, 1990, the average compliance with these nineteen recommendations was 12.5. Timothy F. Schmidle, The State of the States: A Checkup, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Sept./Oct. 1990, at 1. The states' average compliance with the nineteen recommendations rose to 12.7 in 1992. John F. Burton, Jr., Observations: The Twentieth Anniver-

https://researchrepository.wvu.edu/wvlr/vol95/iss2/6
The political debate regarding workers' compensation in West Virginia mirrors the debates elsewhere. Employers complain bitterly about the rising costs of workers' compensation in West Virginia: claims-related disbursements by the Workers' Compensation Fund rose by 280 percent from 1980 to 1990. Coal miners with work-related disabilities file large numbers of claims. At the same time, the health and safety record of our industry continues to be alarming. West Virginia is unfortunately renowned for its history of occupational disasters. According to federal statistics, this record is hardly improving:


[T]here is no doubt that state workers' compensation programs are in general better now than they were twenty years ago in terms of coverage and benefits. However, one fundamental problem remains: the considerable disparity among the states in the adequacy and equity of the program. This problem is still related to the link between the costs of the program and the generosity of benefits in a state, and as the average cost of the program has increased in the last twenty years, interstate cost differences have also widened.

Id. at 9. Despite the failure of the states to achieve full compliance with the Commission's recommendations, no effort was ever initiated to create an alternative federal workers' compensation program or to develop minimum standards for state programs.


7. In 1990, when 71,229 claims for compensation were filed, coal miners (from all industrial classifications of coal mining, A-1, A-2, A-3) filed 10,726 claims for benefits, or 15% of claims. During this same year, coal mine employment averaged 29,900 out of a total nonfarm employment of 627,800, or approximately 5% of total employment. This may, of course, be a correct reflection of the relative rate of occupational injuries and illnesses in this industry. The rate of filing does not appear to have increased over time in this industry. In 1980, when coal mine employment averaged 39,700, the FUND ANN. REP. indicated that 26,604 accidents were reported in these same industrial classifications. There is, however, no indication whether "accidents reported" equates to the report of number of claims filed in the later reports. WEST VIRGINIA DIVISION OF EMPLOYMENT SECURITY, BUREAU OF EMPLOYMENT PROGRAMS, EMPLOYMENT AND EARNINGS TRENDS ANNUAL SUMMARY 1990 (1991); FUND ANN. REP. (1980); FUND ANN REP. (1990).

8. Three particular historical disasters are mentioned often in occupational safety and health literature. The 1907 explosion at the Monongah Mine south of Fairmont, W. Va was the worst mine disaster in United States history, killing 361 men. See BRIEF HUME, DEATH AND THE MINES 4 (1971). The excavation and building of the tunnel at Hawks Nest in Fayette County in the 1930s (in order to direct water for the creation of hydroelectric power) killed over 700 workers and disabled many more as a result of acute and chronic silico-
the West Virginia rate of traumatic occupational fatalities exceeds that of every neighboring state, every state in our region, and every state with a similar economic base; the rate of fatalities in our underground coal mines is considerably higher than the national norm.

Workers' compensation programs were initially created to be the primary legal response to workplace health and safety hazards. In 1913, when West Virginia first adopted a program for the compensation of people injured at work, there was no guarantee that workers would have rights to either a safe workplace or to continued employment after an injury. Workers injured on the job received a guaranteed, but minimal, level of compensation benefits; in return, they forfeited any right to sue employers if their injury was the result of negligence.

Since 1970, the rights of workers at work have expanded substantially. Federal statutes regulate occupational safety and health extensively. In West Virginia, as in many states, the employment-at-will
doctrine, which provided substantial protection for managerial autonomy, has been eroded by both legislation and judicial decisions.\(^\text{13}\) Despite the exclusivity provisions of the workers' compensation statute,\(^\text{14}\) workers injured on the job can sometimes sue their employers in tort.\(^\text{15}\) Disabled workers are accorded rights to continued employment under the state Human Rights Act,\(^\text{16}\) federal civil rights laws,\(^\text{17}\) and specific provisions of the Workers' Compensation Act.\(^\text{18}\)

Despite this apparent expansion of rights for injured workers, however, workers' compensation has remained the dominant mechanism for addressing the problems of injury at work. Perhaps as a result, the political battles regarding injured workers continue to focus on the provision of insurance and particularly on the costs to employers of the provision of these disability benefits. As costs rise, the level of political opposition to the continued provision of benefits at current


levels likewise grows. The raging political debates regarding compensation have been over how to design the benefit structure, not how to promote safer employment.

These chronic political debates spawn irreconcilable views of the appropriate societal treatment of disabled workers. It is therefore essential that we define more clearly the current crisis facing the West Virginia workers' compensation program. Part II of this Article explores the historic political and economic roots of the current workers' compensation debates in West Virginia. Three dominant issues emerge:

—The illegal thirty percent reduction in premium rates charged to employers beginning in 1985 continues to be a primary cause for the current financial problems facing the Fund.

—The decline in coal mine and manufacturing employment created a further financial drain as the Fund is called upon to provide significant benefits to older disabled and displaced workers.

—Resulting financial problems have fueled the political opposition to the continuation of benefits and eligibility standards.

Part III of this Article looks at the current legal and administrative status of the Workers' Compensation Fund, concluding that:

—From a financial standpoint, the growth in permanent total disability benefits, primarily awarded to displaced older coal miners, is the most serious source of current pressure on the Fund.

—Occupational injury and death rates in West Virginia continue to surpass national averages and contribute to the problems facing the Fund.

—With the exception of funding the inherited deficits and permanent total disability awards, the current premium rates charged to employers are competitive and financially sound.

—Legal decisions rendered by the West Virginia Supreme Court of Appeals focus on the award of compensation benefits; judicial decisions under both the Workers' Compensation Act19 and the Human

Rights Act\(^\text{20}\) illustrate a judicial preference for awarding compensation over intervention in the employment relationship on behalf of occupationally injured workers.

—The Workers' Compensation Fund has failed administratively to focus on assisting injured workers who desire to return to work which has tended to prolong, rather than shorten, claims.

—The 1990 amendments to the Workers' Compensation Act were intended to promote the rights of injured workers to return to work\(^\text{21}\) but have met with half-hearted administrative implementation.

Part IV advances some preliminary recommendations for ways to approach the problems confronting the Workers' Compensation Fund. First, I conclude that it is essential to separate the historically rooted economic and fiscal problems from any attempts to design a prospectively appropriate program. The historical problems of accumulated deficit and growing numbers of permanent total disability awards, which are primarily the result of shrinking employment in the mining industry, must be addressed without limiting the availability of benefits for future injured workers. Second, in looking to future programmatic concerns, I propose that the focus should be on the areas that reduce costs without eliminating available compensation for legitimately injured workers. Specific programmatic redesign of benefit structure and eligibility will not result in substantial cost savings for employers, contribute to safer workplace practices, nor improve employment opportunities for injured workers.\(^\text{22}\) In order to create a program which


\(^{22}\) There are a variety of other serious problems confronting the Workers' Compensation Fund that are, admittedly, ignored by these goals and which are not addressed in this Article. For example, there are serious delays and errors in the administration and adjudication of claims. A backlog of over 30,000 "protests" (or appeals) of initial decisions made on claims has not been eliminated; the implementation of a new administrative law judge system, pursuant to the 1990 amendments to the Workers' Compensation Act, W. VA. CODE § 23-5-1g to -1l (Supp. 1992), does not appear to have improved the situation. Authorizations for medical treatment are not provided to claimants in a timely manner, thereby delaying claimants' recovery from injuries. New remand procedures for permanent total disability claims, pursuant to 1991 statutory amendments, are also creating problems. W. VA. CODE § 23-5-1j (Supp. 1992). These administrative problems cry out for aggressive solutions. In fact, the Supreme Court of Appeals has agreed to review the current procedures of the
provides adequate benefits for workers without excessive costs to industry in the future, program design must include significant reemployment and rehabilitation rights for injured workers. These recommendations are based upon the assumption, perhaps not shared by all readers, that injured workers generally prefer to return to work; at a minimum, we owe it to them, and to ourselves, to remove the barriers we have constructed which prevent them from doing so.

II. ECONOMIC AND POLITICAL ROOTS OF THE WORKERS' COMPENSATION DEBATE: THE PAST

Workers' compensation programs were established to provide medical and indemnity benefits for people who became injured or ill as a result of their work. In recent years, the total costs of these programs in the country as a whole have grown exponentially: $2.1 billion in 1960; $4.9 billion in 1970; $22.3 billion in 1980; $56 billion in 1990.23 Payroll costs from 1970 to 1989 costs grew from 1.11 percent to 2.27 percent of total payroll; there has been a steep and steady rise in payroll costs since 1984.24 Benefits as a percent of payroll have also grown steadily, from 0.66 to 1.58 percent over the same period.25 Medical costs have surged and in 1989 represented 40.5 percent of total expenditures for workers' compensation claims nationwide.26

Rising costs in West Virginia reflect these national trends. In West Virginia, compensation is paid by the single state Workers' Compensa-

26. Id. at 3.
tion Fund (Fund) or directly by self-insured employers; the system permits no private insurance of this risk. The system is funded by premium rates paid by employers. Claims are adjudicated by the


28. W. Va. Code § 23-2-9 (Supp. 1992). Employers may pay premiums for general workers’ compensation coverage to the Fund in which case all benefits are paid to claimants from the Fund. Claims against self-insured employers are adjudicated by the Fund but paid by the employer directly, with the following exceptions. First, all self-insured employers are required to contribute to the administrative costs of operating the Fund. Second, self-insured employers who have not historically self-insured for second injury life awards are now required to buy coverage from the fund to cover the costs of these permanent total disability awards. Third, self-insured employers may purchase catastrophic coverage; a catastrophe is defined as any single accident in which three or more employees are killed or receive statutorily-defined serious injuries. W. Va. Code § 23-3-1(c) (Supp. 1992).

29. Subscribing employers are divided into ninety-one industrial classifications. These classifications are grouped by type of industry and by risk. Premium rates are established for the classification as a whole (the “manual” or base rate) based upon the full costs of claims for the entire class incurred in that year divided by the total payroll in the class. Individual employers are then generally experienced-rated and their own premium rates will vary depending upon how the costs of claims arising from that employer compared with the average in the class. Self-insured employers contribute proportionally to the administrative costs of the Fund and pay premium for second injury fund coverage.

30. Claims are made for benefits which are divided into five primary categories: temporary total, permanent partial, permanent total, fatal, and medical and vocational benefits. Temporary total disability benefits for individuals who are unable to work as a result of an occupational injury or disease are paid at the rate of 70% of the injured worker’s pre-injury wage with a maximum weekly benefit of 100% of the state average weekly wage and a minimum of one-third of this average wage. Temporary total disability benefits terminate when an individual achieves “maximum degree of medical improvement,” returns to work, or exhausts the maximum statutory length of 208 weeks for these benefits. W. Va. Code §§ 23-4-1(c), -6(b), -6(c), -7(e) (Supp. 1992). Permanent partial disability benefits are paid for any permanent disability resulting from occupational injury or disease and will be paid for disabilities that do not cause any absence from work (e.g. noise-induced hearing loss). These benefits are calculated based upon the degree of “whole man impairment” and are not based on specific calculations of wage loss. Each percentage point of disability is paid at the rate of four weeks of compensation for each percent of disability determined; weekly rates for permanent partial disability are paid at the rate of 70% of the injured worker’s wage at the time of injury not to exceed two-thirds of the state average weekly wage. W. Va. Code § 23-4-6(e) (Supp. 1992). A specified level of compensation is set for certain scheduled injuries. W. Va. Code § 23-4-6(f) (Supp. 1992) (setting minimum levels for certain injuries); W. Va. Code § 23-4-6(b) (Supp. 1992) (setting levels of compensation for
Fund or, more recently, by administrative law judges. In the past decade, the claims-related cash disbursements of the Fund have risen from $133 million in 1981 to $316 million in 1991. Incurred costs have been rising steadily, reaching $446 million in 1991 according to the Fund’s Annual Report.

Permanent total disability benefits are paid to individuals who are considered totally disabled as a result of a single injury or disease, or a combination of disabilities which equal 85% or which render “the injured employee 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.” W. VA. CODE § 23-4-6(d), (n) (Supp. 1992). These benefits are paid at the same rate as temporary total disability benefits but are paid for the life of the worker. W. VA. CODE § 23-4-6(d) (Supp. 1992). A surviving dependent will also receive 104 weeks of additional benefits after the death of a permanently and totally disabled worker in a lump sum payment. W. VA. CODE § 23-4-10(e) (1985). Fatalities result in weekly benefits which are paid to surviving dependents for the period of dependency and funeral expenses for the deceased worker. W. VA. CODE §§ 23-4-4, -10 (1985 & Supp. 1992). Any occupational injury or disease also entitles the claimant to medical benefits to cover the full cost of necessary medical treatment for the injury or disease and, when necessary, to vocational rehabilitation benefits (maximum disbursement is $10,000). W. VA. CODE §§ 23-4-1(e), -3, -9 (Supp. 1992).

33. FUND ANN. REP. 2 (1991). When insurance actuaries establish the cost of a claim, they project the full future cost of a claim and charge that cost (adjusted to current value) to the insurer (in this case the Fund) in the year that the claim is incurred. This is the actuarial cost of a claim. In addition to the Annual Reports of the Fund, annual actuarial audits are prepared by consulting actuaries. The last of these reports was issued for the fiscal year ending June 30, 1990. MILLIMAN & ROBERTSON, INC., STATE OF WEST VIRGINIA, WORKERS’ COMPENSATION FUND, ESTIMATED LIABILITY FOR CLAIMS AND CLAIMS ADJUSTMENT EXPENSE AS OF JUNE 30, 1992 [hereinafter 1992 AUDIT]. The amount of incurred costs, and the amount of surplus or deficit, which has been reported in these audits reflects an independent analysis of the incurred costs of reported and incurred but not reported claims in the fiscal year. Due to differences in methodology, the numbers reported in these audits do not correspond to the reports of incurred costs (called “charges”) which appear in the Fund’s own annual reports. Notably, the Fund’s annual reports do not consider incurred but not reported claims. In addition, the current consulting actuary uses mortality and wage tables to set the incurred costs of permanent total disability and fatal claims; the Fund uses a predetermined and fixed amount which is the basically the same for every permanent total disability award. Unfortunately, the Fund changed consulting actuaries twice during the decade 1981 to 1991. Due to differences in approach of the different actuaries, the audits do not provide a reasonable basis for analysis of trends. Although the Fund’s annual reports may be somewhat less accurate in their specific assessment of incurred costs, the Fund has applied substantially the same methodologies over time and therefore the numbers in the
The West Virginia situation is not simply a reflection of national
trends, however; the problems of the West Virginia Workers’ Compen-
sation Fund have particularly troubling and idiosyncratic roots. 34 In
1985, Governor Arch Moore announced a thirty percent reduction in
employer premium rates for workers’ compensation. 35 Rates were then
frozen at this reduced level for the following four years. This reduc-
tion in premium costs was, at least publicly, justified as an attempt to
promote economic development. 36 The premium levels charged to em-
ployers during this period were comparatively low and highly competi-
tive; West Virginia’s adjusted manual premium rates ranked forty-first
lowest out of forty-four states in 1986 and forty-third in 1987 and
1988. 37 This comparative advantage in costs did not invoke business
support for the economic competitiveness of the program 38 nor, of
course, did it herald a major economic boom for the state. During the
same period, while premium rates for West Virginia employers re-

annual reports provide a better picture of trend. The numbers relating to charges which
appear in the annual reports are therefore utilized as a surrogate for actuarial data in this
Article. The trends described in this Article are confirmed by the analysis in the last actuar-
ial audit.

Total costs incurred by year, as reported in the Annual Reports of the Fund, are as
be attributable to increases in maximum and minimum benefits (reflecting increases in the
state average weekly wage), rising medical costs (which rose from $29.78 million in 1982
to $70.18 million in 1990), and increases in the number of permanent total disability
awards.

34. For a more in-depth discussion of the particular financial issues confronting the
West Virginia Workers’ Compensation Fund, see Finger & Briscoe, supra note 27; Emily A.
Spieler, Social Welfare Policy in the Context of Economic Restructuring, 30 URBAN STUDIES
35. Chris Knap, Workers’ Comp. Fund to Cut Premiums 30 Percent, CHARLESTON
GAZETTE, July 2, 1985, at 1A.
36. Id.
37. Burton & Schmidle, supra note 3, at 1, 5. Adjusted manual rates are the percentage
of payroll actually expended on workers’ compensation insurance by employers, and
take into account all of the variabilities of rating mechanisms, correcting for industrial mix
and insurance industry practices.
38. Business groups appear to have been silent regarding the remarkable savings to be
achieved by moving enterprises into West Virginia as a result of these cheap workers’ com-
pensation rates.
mained low and constant, premium rates for workers’ compensation programs in many other states rose dramatically.\(^{39}\)

The rate reduction appears to have been contrary to the explicit fiduciary responsibility of the commissioner in managing the Fund\(^{40}\) and therefore was vulnerable to legal challenge. Perhaps not surprisingly, no one brought suit. Employers benefitted from the reduction; $375 million was not collected in premium dollars.\(^{41}\) Benefits were not, however, reduced. Claimants and their representatives therefore lost nothing, at least in the short run, as a result of the decreased revenue to the Fund.

As of January 1989, when a new administration took office, the Workers’ Compensation Fund had been operating with revenue that was thirty percent below the revenue levels needed to support the 1985-1986 program costs. The reported cash and actuarial deficits were cause for serious alarm. The new administration immediately announced an overall thirty percent increase in premium rates, retroactive

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39. From 1984 to 1988, workers’ compensation insurance rates increased nationally, from 1.238 percent of payroll in 1984 to 1.905 percent of payroll in 1988. In contrast, during this same period, West Virginia’s rates dropped from 1.855 to 1.506 percent of payroll for the industrial classifications studied. John F. Burton, Jr., West Virginia’s Workers’ Compensation Program: Miracle, or Smoke and Mirrors?, JOHN BURTON’S WORKERS’ COMPENSATION MONITOR, May/June 1991, at 1-2.

40. The West Virginia Code states:

It shall be the duty of the commissioner to fix and maintain the lowest possible rates of premiums consistent with the maintenance of a solvent workers’ compensation fund and the creation and maintenance of a reasonable surplus in each group after providing for the payment to maturity of all liability incurred by reason of injury or death to employees entitled to benefits under the provisions of this chapter. A readjustment of rates shall be made yearly . . . .


41. This estimate is based upon an assumption that, instead of a reduction, rates should have been increased a modest 5% each year. Finger & Briscoe, supra note 27, at 15. Had this policy not been pursued from 1985 to 1989, premium rates for employers could have been raised gradually and nevertheless remained competitive on an interstate basis. The following are the percent increases in overall premium rate which would have been needed to maintain appropriate revenue for the Fund during the years 1985 - 1990: 1985: 17.5%; 1986: 2.4%; 1987: 10.6%; 1988: 7.9%; 1989: 2.2%; 1990: 1.9%. These increases are below those enacted or approved in many other states during this same time period. Information prepared by Robert Finger, consulting actuary to the Fund, and provided by John H. Kozak, Executive Secretary to the Fund (May 5, 1991) (on file with author).
to January 1, 1989. Notably, this rate increase not only failed to establish actuarially sound rates; it failed to restore the rates to the level that had been needed to fund the program in 1985.

As a result of the 1985 to 1989 underfinancing, the Fund entered a period of alarming financial decline, moving from a relatively stable situation into a period when the actuarial deficit grew dramatically and, for the first time, the Fund operated at a cash loss. The result of failure to collect premiums meant that reserves were not funded which would be necessary to pay the future costs of injuries which occurred during this period. Since 1989, premium rates for employers have been raised annually. Nevertheless, since 1986, reserve funds, which had been set aside to pay for the future long term costs of prior injuries, have been spent on current costs, rather than remaining as reserve available to pay the long term costs of prior injuries. Financial re-


43. The reduction in 1985 involved an overall 30% decrease in rates. At a minimum, therefore, a 42.8% increase would have been required (on an arithmetic basis only) to restore rates to their 1985 level. In fact, rates for dangerous industries were not nearly restored to sound levels at this time. For example, base premium rates charged in the coal mining industry were as follows over time: $20.42 per $100 payroll effective July 1, 1984; $12.92 effective July 1, 1985 through Dec. 31, 1988; $16.80 effective Jan. 1, 1989; $20.66 effective July 1, 1990. FUND ANN. REP. (1984-91).


45. Under traditional accounting methodology, necessary reserves for the future costs of current claims are established based on a discounting approach which brings future costs to present value based upon assumptions of future earnings. Therefore, the deficit “grows” every year at the rate that the reserves were initially discounted, irrespective of whether the current premium rates are adequate to meet the costs associated with new claims. If, for example, the reserves today are estimated at $100 million, the actual future liability (when it is paid) may be a considerably larger amount. The reserves are intended to grow through the benefit of investment income in order to meet the larger future needs. For a full discussion of the financing and actuarial issues facing the Fund, see Finger & Briscoe, supra note 27. New accounting principles (GAAP) may require that this unfunded deficit be recognized without any discounting; such a revised accounting methodology would vastly increase the apparent size of the deficit.

46. Overall increases have been: 30% effective Jan. 1, 1989; 19% effective July 1, 1990; 15% effective July 1, 1991; and 8% effective July 1, 1992.
serves are now seriously inadequate as a result. The level of actuarial debt resulting from this past underfunding is now estimated to be $1.2 billion.\textsuperscript{47}

The fiscal crisis resulting from the apparently illegal political manipulation of premium rates which occurred in 1985 could not have come at a worse time. Since 1985, while costs continued to rise, high wage employment declined.\textsuperscript{48} A decline in employment from 1980 to 1990 in general,\textsuperscript{49} and declining employment in the coal industry specifically,\textsuperscript{50} meant that the payroll base for the collection of workers’

\textsuperscript{47.} On Dec. 23, 1992, a new actuarial audit of the Workers’ Compensation Fund was provided to Commissioner Andrew N. Richardson by the Fund’s consulting actuaries. The prior audit, for FY 90, had estimated the Fund’s deficit at $910 million; no audit was performed for FY 91. The 1992 audit projects that the Fund has an estimated deficit of $1.2 billion, when future payments are discounted at a 9% annual rate of investment return. 1992 AUDIT, supra note 33. In the cover letter accompanying the audit, Robert J. Finger, consulting actuary, stated:

In order to discharge the remaining liability, the Fund would need about $2.0 billion is assets as of June 30, 1992 and it would need to earn a 9% annual investment return on these assets until the claim payments are made. Since the Fund only has about $830 million in assets (net of liabilities), the Fund has an estimated deficit, on a present value basis, of $1.2 billion.

There is an unresolved issue in financial reporting matters, whether generally accepting [sic] accounting principles ("GAAP") allow a credit for anticipated investment income, if the supporting assets are not available to earn income . . . . Thus, allowable investment income under GAAP may include only that which will be earned on the Fund’s $830 million of net assets prior to the payment of claim liabilities equaling the net assets plus investment income earned on those assets. We estimate that this will be only about $135 million.

Thus, on this basis, the Fund’s deficit is about $4.2 billion.

Letter from Robert J. Finger of Milliman & Robertson, Inc., consulting actuary to the Fund, to Hon. Andrew N. Richardson, Commissioner of Workers’ Compensation (Dec. 23, 1992) (on file with author). There is not, at this point, consensus that GAAP would require the reporting of this $4.2 billion deficit. Nevertheless, the Fund must finance this $4.2 billion in order to honor obligations that have already been incurred. Perhaps even more alarming, exhibits to the audit indicate that, at the current rate of growth, the Fund will have expended all of its remaining assets by FY 97. 1992 AUDIT, supra note 33, exhibit II.


\textsuperscript{49.} Total nonagricultural employment in West Virginia was 645,900 in 1980, 597,200 in 1985, and 627,800 in 1990. \textit{Id}.

\textsuperscript{50.} \textit{Id}.
compensation premiums was smaller and therefore less adequate to fund the resulting debt.

The decline in coal mining and manufacturing jobs during the 1980s, when combined with the deliberate underfunding, had three profound implications for the health of the Fund. First, it meant that the resulting deficit was impossible to recapture from the enterprises responsible for a substantial portion of it. Coal mining is a dangerous industry; this is particularly true in West Virginia. Coal miners file large numbers of claims and, because they are high wage workers, receive the maximum level of benefits paid by the program. Because the work is physically difficult and the injuries are often serious, claims result in longer duration and greater levels of disability than in other industries. The resulting high cost claims cannot now be funded from the enterprises which were responsible for them. The shrinking payroll in the coal industry and the loss of corporate entities responsible for the debt means that the debt must be financed by other enterprises and industries that were not responsible for it initially.

Second, the decline in the availability of high wage jobs has led to major demographic changes in the state. West Virginia led states in the rate of loss of population during the 1980s. In general, older people remained. Older workers tend to file fewer workers' compen-

51. As of Jan. 1, 1990, 46% of the deficit was attributable to coal mining. In addition, the various sectors of the construction industry were responsible for 26.1% of the debt. No other industry contributed more than 10% to the deficit. Letter from Chad C. Wischmeyer, William M. Mercer, Inc., to John Kozak, Executive Secretary to the Fund (Jan. 21, 1990) (on file with author).
52. See supra note 10.
53. See supra note 7.
54. See infra note 109.
55. For example, in FY 1989, coal miners accounted for approximately 72.5% of the costs of permanent total disability awards incurred by the program. Telephone Interview with Robert Finger of Milliman & Robertson, Inc., consulting actuary to the Fund (Oct. 1, 1992).
56. Only four states lost population in the 1980s: West Virginia, 8.0% loss; Iowa, 4.7% loss; Wyoming, 3.4% loss; and North Dakota, 2.1% loss. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990 21 (11th ed. 1991); THE WORLD ALMANAC AND BOOK OF FACTS 389 (1992) (citing the 1990 Census).
57. 1 UNITED STATES BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION 20 (1982); 1 UNITED STATES BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION 43
sation claims; their claims tend to be more costly, however, because of the combined effects of aging and injury.58 Younger workers, who are generally less costly to a compensation system, have decreased in numbers.

Third, many of these older workers were partially or totally disabled from their years in coal mining. "Second injury" awards for permanent total disability, which provide lifetime weekly benefits, have risen steadily in recent years.59 Under West Virginia law, an employee who is partially disabled by a prior injury (whether or not it was a compensable injury) who then becomes permanently and totally disabled "through the combined effect of such previous injury and a second injury received in the course of and as a result of his or her employment,"60 is entitled to a life award from the second injury fund.61

Second injury funds are traditionally the mechanism used by compensation programs to encourage the hiring or rehiring of previously injured workers by limiting the liability of an employer for subsequent on-the-job injuries.62 In West Virginia, until 1990, all employers who


61. The second injury reserve or "surplus" fund was to be created pursuant to W. VA. CODE § 23-3-1 in order to pay for the costs of compensation for permanent total disability awards resulting from the combined effects of previous and new injuries. W. VA. CODE § 23-3-1(d) (Supp. 1992).

62. The West Virginia Supreme Court of Appeals has specifically noted that the purpose of second injury funds is to encourage reemployment. Cardwell v. State Workers' Compensation Comm'r, 301 S.E.2d 790, 797 (W. Va. 1983); see also Pertee v. State Workmen's Compensation Comm'r, 255 S.E.2d 914 (W. Va. 1979); Estep v. State Workmen's Compensation Comm'r, 298 S.E.2d 142 (W. Va. 1982). For a general discussion of the purposes of second injury funds, see Lloyd W. Larson & John F. Burton, Jr., Special Funds in Workers' Compensation, in WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY, supra note 4, at 117, 122-33; THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 83-84 (1972); HUGGINS FINANCIAL
subscribed to the Fund also subscribed to the second injury fund; self-insured employers could choose whether to subscribe to the second injury fund. Self-insured employers who subscribe to the second injury fund are responsible only for the costs of the partial disability attributable to the last “second” injury; the second injury fund pays the remainder. In many cases involving active self-insured employ-
ers who subscribed to the second injury fund, the employers either did not resist or actively supported these claims. In order to ensure that the incentive provided by the second injury fund includes both employment of new employees and reemployment of previously injured employees, the court has allowed employers to charge awards to the second injury fund, even if both the initial injury and the second injury occurred when the claimant was employed by the same employer.

The critical issue in making determinations regarding eligibility for permanent total disability awards is the weight to be given factors other than the specific physical impairment of the injured worker. The availability of this reserve fund has encouraged judicial development

ond injury fund. This is a particularly significant issue for employers who are self-insured but subscribe to the second injury fund.

66. Premium rates for second injury coverage which have been charged to self-insured employers have been much too low to fund the program. Employers who were self-insured, except for second injury coverage, had a significant financial incentive for claims to be paid from the second injury fund. The result, not surprisingly, was less active employer resistance to claims made against the second injury fund than was asserted against claims which would have to be paid by the self-insured employer directly. Employers who are self-insured for general compensation claims and who subscribe to the second injury fund have supported the claims of their former employees for second injury life awards in order to shield themselves from any further direct liability to the worker. See, e.g., Spurlock v. Spieler, 395 S.E.2d 540 (W. Va. 1990) (employer and claimant jointly requested life award for claimant). This behavior was particularly noticeable among coal industry employers. As a result, 85% of permanent total disability second injury awards were awarded to employees of otherwise self-insured employers in the coal industry from 1985-1989. Telephone Interview with Robert Finger, supra note 55.

67. Estep v. State Workmen's Compensation Comm'r, 298 S.E.2d 142, 143 (W. Va. 1982). The policy for encouraging employment would be defeated if the second injury statute did not apply to cases in which the employee suffered both injuries while working for the same employer. "In such cases, the employer would have a financial incentive to dismiss the injured employee and hire a non-disabled worker. Application of the second injury statute here places all injured workers on the same footing regarding the employer's compensation liability for subsequent injury resulting in permanent total disability." Id.; see also Pettee v. Workmen's Compensation Comm'r, 255 S.E.2d 914 (W. Va. 1979). This policy also creates the somewhat bizarre effect of allowing an employer to maintain unsafe working conditions, resulting in multiple injuries to the worker, and then avoid full liability for the resulting high compensation costs through second injury fund coverage.

68. Actually, the availability of this separate surplus fund is theoretical only. In fact, a separate surplus fund has never been established nor have the necessary reserves to fund these claims ever been set aside. By 1989, it was impossible to establish appropriate ac-
of liberal standards for eligibility for awards. Most jurisdictions, including West Virginia, have made an effort to respond to the hardship of workers who have become unemployable as a result of a combination of factors, only one of which is occupationally-induced disability; courts look to factors such as the claimants' level of education, mental capacity, skills and training, prior work experience, and age to determine whether they are permanently and totally disabled. If workers have become unable to work in jobs comparable to those worked prior to an injury, they may be considered totally disabled.

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69. Age alone is not sufficient to justify a life award. "It must be shown that the claimant's injuries are disabling from causes other than the normal aging process." Hunter v. State Workers' Compensation Comm'r, 386 S.E.2d 500, 503 (W. Va. 1989).

70. Cardwell v. State Workmen's Compensation Comm'r, 301 S.E.2d 790 (W. Va. 1983); Posey v. State Workmen's Compensation Comm'r, 201 S.E.2d 102 (W. Va. 1973); see 1C ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 57.60, at 10-389 (1992). The rule expanding eligibility for life awards to those disabled by a combination of work and non-work factors is not a reflection of unusual liberalism on the part of the West Virginia court. See 1C ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 57.61(c), at 10-437 to 10-438 (1992) ("It is a well-known fact of modern economic life that the demand for unskilled and semiskilled labor has been rapidly declining with the advent of the age of mechanization and automation, and that the great bulk of the persistent hard-core unemployment of the United States is in these categories"); Judith Higgs, Permanent Total Disability and the Odd Lot Doctrine, 35 DRAKE L. REV. 689, 691-94 (1986-87). The idea of the odd lot worker—she who is displaced from work as a result of factors including age, education, skills, etc.—was articulated first by Justice Cardozo. Jordan v. Decorative Co., 130 N.E. 634, 636 (N.Y. 1921); see also Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985); Zanch v. S&K Construction Co., 307 A.2d 138 (N.J. 1971); Sterling Steel Casting Co. v. Industrial Comm'n, 384 N.E.2d 1326 (Ill. 1979); Marshall v. Industrial Comm'n, 681 P.2d 208 (Utah 1984); Nevada Indus. Comm'n v. Hildebrand, 675 P.2d 401 ( Nev. 1984); Metzger v. Chemetron Corp., 687 P.2d 1033 (Mont. 1984); Espey v. Industrial Comm'n, 589 P.2d 1321 (Ariz. 1978); Hewing v. Peter Kiewit & Sons, 586 P.2d 182 (Alaska 1978).

71. W. VA. CODE § 23-4-6(n) (Supp. 1992); see Posey v. State Workmen's Compensation Comm'r, 201 S.E.2d 102 (W. Va. 1973); Cardwell v. State Workmen's Compensation Comm'r, 301 S.E.2d 790 (W. Va. 1983). In cases of this type, West Virginia has followed the majority rule and placed the burden of proof on employers to show that some kind of suitable work is regularly and continuously available to the claimant. Cardwell, 301 S.E.2d at 795. The court in Cardwell adopted the rule proposed by Professor Larson that if the evidence of degree of impairment, coupled with other factors, places claimants prima facie in the odd-lot category, the burden of proof should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant. See 1C ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 57.61(c), at 10-405 to 10-439 (1992);
In West Virginia, the decline in the availability of coal and other manufacturing jobs and the lack of availability of comparable jobs thus became a substantial factor in the growth of applications and approvals of these awards. The justification for this flexibility in the granting of these awards flows from the concept that the individual was employed and became unemployed and unemployable, at least in part as a result of an occupational disability; that is, but for the occupational disability, the individual would not have been unemployed and would not have needed benefits.\textsuperscript{72} The rise in permanent total disability claims is a reflection, in part, of changing labor market conditions, as the number of available manual labor jobs has declined and disabled workers have been permanently displaced from employment.\textsuperscript{73} It is also a reflection of the financial incentives for self-insured employers to have the second injury fund pay for the costs of all future compensation costs for disabled, displaced workers.\textsuperscript{74}

Most of the increase in second injury life awards has been to coal miners who have been displaced from employment. Coal mining is an industry which combines frequency of serious injury with unskilled manual work. Historically, boys left school to go to work in the mines, often abandoning any hope for the individual economic mobility that comes with adequate education. The state was complicit; the educational systems in rural West Virginia have been notoriously inade-

\textsuperscript{70} Higgs, supra note 70, at 705-06. In situations in which the claimant does not meet this prima facie burden, Professor Larson indicates that the test of reasonableness does not require the claimant to work beyond the geographical area in which s/he lives. 1C ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 57.61(d), at 10-489 (1992); see also Phelps Dodge Corp. v. Industrial Comm’n, 367 P.2d 270 (Ariz. 1961); McMannis v. Mad-Ray Modulans, Inc., 289 So. 2d 715 (Fla. 1974). There is no case law on the specific need for geographical proximity of available work in West Virginia.

\textsuperscript{72} See, e.g., Spurlock v. Spieler, 395 S.E.2d 540 (W. Va. 1990) (even if claimant is retired, when retirement is caused by work-related physical impairment, permanent total disability benefits awarded); Hunter v. State Workmen’s Compensation Comm’n, 386 S.E.2d 500 (W. Va. 1989) (when retirement occurred independent of any work-related impairment, life award will not be awarded based solely upon age-related impairments).

\textsuperscript{73} It is a frequently observed phenomenon that claims for disability benefits rise during periods of economic downturn. See DEBORAH A. STONE, THE DISABLED STATE 10 (1984); RICHARD V. BURKHUSER & ROBERT HAVEMAN, DISABILITY AND WORK 47 (1982); ROBERT HAVEMAN, ET AL., PUBLIC POLICY TOWARD DISABLED WORKERS 81 (1984).

\textsuperscript{74} See supra note 66.
quate.\textsuperscript{75} This means that the Fund continues to face claims for permanent total disability benefits from older miners who are unable to work because of their combined disabilities, lack of education, age, and economic displacement.\textsuperscript{76}

One of the critical problems now facing the Fund is the cost of these permanent total disability awards which have been (and are being) granted to workers displaced from coal mining.\textsuperscript{77} Each of these claims is expensive;\textsuperscript{78} the actuarial cost of these permanent disability awards in 1991 represented about one-third of total costs to the Fund.\textsuperscript{79} Meanwhile, premium rates charged to both subscribing and self-insured employers for second injury fund coverage have been inadequate. The result for the Fund has been an enormous deficit in the funding of second injury claims. Most of this deficit is attributable to the coal industry, which now has lower aggregate payroll than it had during the period of time that the injuries resulting in these obligations occurred. Approximately one-third of these life awards have been made against the accounts of now inactive coal operators.\textsuperscript{80}

Costs of workers' compensation are not limited to the dollars paid to claimants and health care providers and the administrative expenses

\begin{itemize}
\item \textsuperscript{75} See Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984) (finding inequitable school funding created unconstitutional denial of thorough and efficient free schools; affirming lower court's finding of a positive correlation between quality of a county's educational system and its wealth of real and personal property); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).
\item \textsuperscript{76} The average age of individuals who have been awarded second injury life awards is 58 years. Telephone Interview with Robert Finger, supra note 55.
\item \textsuperscript{77} In 1989, a total of $42 million for second injury life awards was charged to the accounts of subscribers to the second injury fund who were otherwise self-insured; $36 million of this, or 86\% was attributable to the coal industry. Among subscribing employers, $60 million was charged to the second injury fund; $38 million, or 63\% was attributable to the coal industry. Premium rates for second injury coverage have been, and continue to be, inadequate to support the costs of this program. The need to increase the premium rates for second injury fund coverage, particularly in the coal industry, is acute. Id.
\item \textsuperscript{78} On an actuarial basis, they are valued at approximately $250,000 per award. Id.
\item \textsuperscript{79} For example, 544 new permanent total disability awards made to employees of employers who subscribed to the Fund "cost" the Fund, on an actuarial basis, $141 million in 1991 or approximately one-third of the total costs incurred in that year. FUND ANN. REP. (1991).
\item \textsuperscript{80} Telephone Interview with Robert Finger, supra note 55.
\end{itemize}
of the program. 81 Both employer and employee costs rise in association with the increases in these direct costs. For employers, the costs are measured in increased premium costs through experience rating, 82 increased transactional costs related to claims management and litigation, and loss of efficiency as a result of loss of experienced employees. For employees, costs are measured in loss of income, lack of complete compensation for injuries, and noneconomic, often psychological, losses related to the loss of working status. Disability results in a change of status for workers: the employee becomes a recipient of benefits instead of a worker. Often this change in status is associated with a dramatic shift in the worker's relationship with his or her pre-injury employer; some employers view workers who have filed claims for compensation benefits with a new level of suspicion and distrust. 83 The level of suspicion engendered by high costs exacerbates the confrontational nature of the system at both the individual and the political level.

The financial chaos resulting from economic change and deliberate underfunding of the program has fed the chronically acrimonious policy debates regarding workers' compensation benefits. The failure to fund past reserves has seriously jeopardized future benefits both in a financial and in a political sense. The announcement of the size of the deficits and the necessary increase in premium rates set off renewed political debate over the future of the workers' compensation program and created an unfavorable climate for the continuation of benefit levels and eligibility standards at past levels.

81. In 1991, administrative expenses for the Fund totaled $16.9 million or approximately 5% of total cash disbursements. FUND ANN. REP. (1991). This is far lower than most workers' compensation insurance programs.

82. Or, for self-insured employers, through the direct payment of the costs of claims.

83. No data are available to prove this phenomenon but illustrative anecdotal evidence is abundant. Many workers with significant longevity with a single employer have reported to me that their employers manifest a high level of distrust after they file a claim, even their first claim, for workers' compensation benefits. This is true even if they have exhibited exemplary work performance for a substantial number of years. Similarly, several employers have reported that they challenge every claim for workers' compensation benefits filed by their employees.
As costs have risen, political disputes regarding workers' compensation programs have become increasingly intense in many states. In fact, all disability benefit programs have shown increases in costs over the last fifteen years. But the controversy surrounding workers' compensation undoubtedly is more heated than debates regarding other programs. There are a number of explanations for this.

First, and perhaps most importantly, workers' compensation, unlike other social welfare or insurance programs, is enmeshed in the relationship between employers and employees. While the state mandates the insurance coverage, the source of the premium payment and the source of the disability are both derived from the workplace. The external adjudication of claims by the Fund occurs against a background of a presumably on-going employment relationship and pits injured—or allegedly injured—workers against their employers. Although designed to be a "no-fault" system, both employers and employees frequently charge the other with responsibility for work-related injuries. Political disagreements regarding social or governmental policy governing workers' compensation mirror disagreements between labor and management. Workers' compensation debates reflect deeply held views of labor relations generally, and can be particularly heated in states in which the history and articulation of labor relations problems have been divided and confrontational.

Second, the level of distrust often inherent in the employer-employee relationship is heightened by the fact that only employers contribute directly to the costs of the program. Unlike virtually all other form of social insurance, employees make no direct monetary contribution to this program. In contrast, Social Security, to which employees make required contributions, is viewed by both employers and employees as a vested program. This view ignores the indirect monetary contribution in the form of decreased wages as well as the non-monetar y payment made by workers both through their work and through loss of the general right to seek common-law remedies.

84. STONE, supra note 73, at 7-10; BURKHAUSER & HAVEMAN, supra note 73.
85. This is true despite the fact that social security has never been a fully funded program. Since it is financed on a cash basis, current beneficiaries did not, in an insurance sense, contribute the cost of their own benefits.
86. Social insurance programs are based on a link between the beneficiary and work
Third, workers' compensation programs by their very nature require employers to provide weekly benefits and medical coverage to employees when they are not working. The adjudication of these benefits by an external agency creates, in many cases, a high level of suspicion regarding the legitimacy of the claims, particularly if the underlying labor-relations climate is hostile. This is a simple phenomenon: no one wants to pay anyone for doing nothing, unless convinced of the severity of the need. Views of what constitutes "true need" vary.

Fourth, programs designed to provide benefits on the basis of disabilities are inherently flexible: both definitions and perceptions of disability vary tremendously over time and from individual to individual. Much of the legislative and regulatory energy involving disability-based social welfare programs is focused on the drawing of lines and definitions of categories; these are nevertheless subject to administrative and judicial reinterpretation. Because eligibility is not based upon a clear and easily defined characteristic, the beneficiaries of these programs are particularly subject to charges that they have forced inappropriate expansions in the program by pretending to be impaired or disabled: that is, that they seek not to work but to maximize disability, and thereby abuse the system.

Fifth, despite federalization of most social welfare and social insurance programs, workers' compensation has withstood federal challenges and remains a state-controlled and administered program.

and generally depend on past monetary contributions of the beneficiary. MARMOR ET AL., supra note 3, at 99; Jeffrey S. Lehman, To Conceptualize, To Criticize, To Defend, To Improve: Understanding American's Welfare State, 101 YALE L.J. 685, 694 n.30 (1991) (pointing out that a number of social insurance programs offer benefits to individuals who had employers pay taxes on account of their work. "If I were to stress any link between benefits and past contributions, I would prefer to define the relevant 'contribution' not as one of money, but rather as one of productive labor.").


88. The National Commission on State Workmen's Compensation Programs stopped just short of recommending federalization. See supra note 5. No major proposal to do away with state-based workers' compensation systems has surfaced since 1972.
State political battles are unquestionably less remote. These battles also draw on the inevitable interstate comparisons of state-based programs: they invariably engender claims that lower costs in some neighboring state will result in industrial decline or lack of economic growth in the home state. In view of the fact that costs vary and most states have neighbors whose costs are lower, this is an argument that maintains viability.

In West Virginia, as in many other states, these differing viewpoints and the on-going political debate about workers' compensation have resulted in almost annual amendments to the statute. The current political debates intensified after the announcement in early 1989 that employer premium rates were inadequate to support the program. Increases in these premium rates and announcements of growing deficits have provoked intense reactions from the employer community and considerable concern within the ranks of people responsible for the management of the Fund.

This political debate is fueled by apparently diametrically opposed views of injured workers. At one extreme, business organizations point to abuse within the system and communicate an image of injured workers as opportunistic abusers of the benefits systems, as unnecessarily idle or malingering. They urge that the compensation system be designed so as not to encourage the allegedly relentless desire of workers not to work. Those who are primarily concerned about escalating costs of workers' compensation systems urge reform of workers' compensation by reducing benefits and tightening eligibility standards, thereby discouraging abuse. This would, they maintain, achieve critical societal goals by reducing employers' costs, viewed by many enterprises as excessive, and create an economic development “climate” which maximizes the potential for growth. This “economic develop-

89. This is not only true in West Virginia; interstate workers' compensation cost differentials are the subject of both political debate and academic study everywhere. See, e.g., John F. Burton, Jr. & Timothy P. Schmidle, Workers' Compensation Insurance Costs: National Averages and Interstate Differences, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Nov./Dec. 1990, at 1, 13-14; H. Allan Hunt, Differences in Workers' Compensation Costs, in WORKERS' COMPENSATION: STRATEGIES FOR LOWERING COSTS AND REDUCING WORKERS' SUFFERING, supra note 1, at 107.
ment" view of workers' compensation currently seems to dominate popular discussions.

Following this model, in recent discussions in West Virginia, the business community has expressed anger over the rate increases and concern about their impact on economic development. According to business leaders and organizations, high benefits levels (set by statute) and liberal eligibility standards (set by the court) have created a noncompetitive business environment and promote "idleness." These business groups allege that the state workers' compensation system is more expensive and has a more liberal benefit structure than other states. The liberal benefit structure will, they maintain, increase the length of temporary disability of workers by encouraging them not to work. Moreover, they repeatedly point to a study which showed

90. In particular, the temporary total disability/permanent total disability weekly benefit rate of 70% of the worker's wages is attacked; most states set this rate at 66.67% of wages. Some states do, however, set the maximum benefit rate at greater than 100% of the state average weekly wage. See U.S. CHAMBER OF COMMERCE, ANALYSIS OF WORKERS COMPENSATION LAWS 18-21 (1991). The U.S. Chamber of Commerce publishes this analysis annually and provides a full state by state comparison of benefits.

91. For example, employer and business organizations have repeatedly targeted the standards for award of permanent total disability benefits as excessively liberal. See, e.g., ROBINSON & MCELWEE, WORKERS' COMPENSATION: AN OVERVIEW OF PROBLEMS & PROPOSALS 1-2 (undated) (on file with author); Sarah Smith, Esq., untitled presentation handout (1990) (labeling Posey/Cardwell standards as a "heart-of-the-problem" issue: "A worker can be found permanently and totally disabled with less than 85% [disability] if his medical impairment, when considering his age, education and prior work experience renders him unemployable in a field regularly and continuously available to him"); Minutes of the Unemployment and Workers' Compensation Committee, W. Va. Chamber of Commerce (May 2, 1990) (on file with author) (endorsing change in the definition of permanent total disability in order to achieve "meaningful reform"). The "rule of liberalism" which tends to result in the resolution of evidentiary conflicts in favor of claimants has similarly come under attack in the same sources. See cases cited infra note 149.

92. A report prepared by the Charleston law firm of Robinson & McElwee stated: The liberal interpretations afforded the Posey/Cardwell holdings over the years have idled a large portion of an able work force and cost the system a good deal of its solvency . . . when the system begins to foster and encourage a work force without any motivation to work, it is the duty of industry to demand change for the economic survival of the Fund and the state.

ROBINSON & MCELWEE, supra note 91, at 1-2.

93. Bob Geiger, Cost Cutting Through Safety to Be Stressed, CHARLESTON GAZETTE, May 9, 1989, at 1C, 3C (quoting Herschel Sims, President, Employers' Service Corporation, that lower benefit rates might induce people to return to work). The research literature is
the cost of workers' compensation per covered worker in the active workforce in West Virginia to be the second highest in the country.\textsuperscript{94} Latching onto the view that liberal benefits breed malingering and abuse, one Charleston newspaper called for decreased benefits under the title "Workers' Comp: Why not encourage employment?"\textsuperscript{95}

At the other end of the spectrum, disabled workers and labor organizations urge us to see injured workers as victims. Our attention is called to the high national rates of on-the-job morbidity and mortality.\textsuperscript{96} In labor's view, workers become disabled victims of thoughtless, sometimes malicious, employers who allow injuries to occur and then battle against adequate compensation. Therefore, proponents of


\textsuperscript{95} \textit{National Foundation for Unemployment and Workers' Compensation, Bulletin '91, Table 6} (May 28, 1991) (showing average benefit cost per employee by state; West Virginia ranks second, after Alaska). This analysis divides the current costs, being paid on present and past claims, by the number of currently active workers in each state. West Virginia's high ranking is not surprising: this comparison divides the costs associated with past claims (many of which arose out of now declining dangerous industries) by the declining number of people in the workforce. Not surprisingly, states with dangerous industries or declining workforces head this list. One consultant to the W. Va. Fund noted with regard to this study:

\textit{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.}

\textit{Huggins Report, supra} note 62, at 33. The Huggins report found this comparison "technically unsound as the measure of relative benefit levels for which it is currently being used." \textit{Id.} at 3. This comparison does, however, give a measure of the weight of the past on the current system; this is a problem because the claims currently being paid were not funded adequately in the past.

\textsuperscript{96} \textit{Editorial, Charleston Daily Mail, Mar. 22, 1989, at 4A.}

\textit{See supra} notes 4, 9-10.
this view argue, workers should suffer no, or minimal, economic loss when injured: they have already paid for these benefits by forfeiting the right to sue their employers for negligent acts; they are, after all, imbued with a strong work ethic clearly demonstrated by their pre-injury capacity and willingness to work. Most recently, labor groups in West Virginia have responded to business attacks by pointing to studies which showed that the premium rates paid by employers in West Virginia were among the lowest in the country, that business climate studies have not shown workers' compensation to be a noncompetitive factor for West Virginia; and that the injury and fatality rates in West Virginia businesses are among the highest in the country.

Many of these arguments revolve around complex numerical issues, resulting in a high level of public confusion regarding the problems of the program. Perhaps more importantly, the arguments rest upon stereotypes and fail to distinguish between the inherited problems of the system and its future programmatic needs. The polarities of perspective interfere with the development of a clear understanding of the problems currently facing the West Virginia workers' compensation program. This understanding is critical to the development of any solutions.

III. Issues Confronting the Workers' Compensation Fund: The Present

Problems confronting workers' compensation in West Virginia are not limited to those inherited from the past. This section describes, in

97. See sources cited infra note 119.
98. See, e.g., Grant Thornton, Eleventh Annual Grant Thornton Manufacturing Climates Study 145 (1990). In this study, West Virginia ranks 6th (1st being most favorable to business) in workers' compensation insurance levels and 24th for statutory average workers' compensation cost per case. Id. Questions have been raised as to whether the analysis of average cost per case is adequate to reflect the incidence of high cost claims in the West Virginia system.
99. See supra notes 9-10.
Part A, the current status of the program. Part B analyzes the judicial treatment of injured workers under the various state statutes which establish rights to either benefits or employment. In Part C, the administration of the workers' compensation program is examined, with particular emphasis on the creation of pathways for claimants to return to work. Finally, Part D looks at the process by which the Workers' Compensation Act was amended in 1990 to expand return to work opportunities for injured workers and further examines the administrative implementation of those amendments.

A. The Current Setting

Underlying problems continue to confound current attempts to develop adequate social policy regarding occupationally-injured workers. In particular, West Virginia continues to be a leader in rates of occupational morbidity and mortality. For example, West Virginia had the fifth highest aggregate rate of traumatic occupational fatalities in the country from 1980 to 1988; preliminary data for 1989 indicates that this dubious distinction is continuing. About one-third of the fatalities in the country associated with mining occurred in West Virginia in the last two years. Fatality claims compensated by the Fund have not declined, despite a decline in employment in dangerous industries; in 1990 and 1991 claims to the Fund relating to fatalities increased substantially.

101. The Bureau of Labor Statistics data regarding injury rates are not readily available on a state by state basis. Traumatic occupational fatalities, which are objective events, are, however, an indicator of the underlying rate of non-fatal injuries, which are subject to more reporting variability; that is, fatalities cannot be faked. It is these data which are reported in the text.

102. The National Traumatic Occupational Fatality studies, conducted by the National Institute for Occupational Safety and Health, show that West Virginia had the fifth highest fatality rate for each of the years in question and, in the aggregate, for the entire period. See supra note 9.

103. See supra note 9.

104. See supra note 10.

105. Number of fatality claims filed and number of awards made for fatalities by the Workers' Compensation Fund by fiscal year:
Each year, West Virginia workers file over 70,000 claims for workers' compensation benefits. About 23,000 of these claimants cease working, on either a temporary or permanent basis.\(^{106}\) The majority

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<td>1981</td>
<td>192</td>
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<td>1982</td>
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<td>1983</td>
<td>73</td>
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<td>171</td>
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<tr>
<td>1990</td>
<td>241</td>
</tr>
<tr>
<td>1991</td>
<td>344</td>
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\(^{106}\) Total number of claims filed in FY 1991 was 71,258. Of these, 22,991 were "lost time" claims, 344 were "fatal" claims, and the remaining 47,923 were "no lost time" claims involving medical or permanent partial disability benefits. In 1990, the equivalent numbers were: 71,229 (total claims), 23,006 (lost time), 241 (fatal); and 47,982 (no lost time). FUND ANN. REP. (1990-91). The number of claims filed has remained surprisingly steady in recent years, despite a decline in relatively more dangerous mining and manufacturing jobs. Total claims filed per year since 1980 are as follows: 1980—89,529; 1981—76,606; 1982—76,133; 1983—64,398; 1984—67,161; 1985—68,937; 1986—75,967; 1987—71,973; 1988—70,827; 1989—69,773; 1990—71,229; 1991—71,258. FUND ANN. REP. (1980-91). Total nonfarm payroll employment in West Virginia in 1980 was 645,900 and in 1990 was 627,800; during this same period, manufacturing and mining jobs declined from 182,900 to 122,600. DIVISION OF EMPLOYMENT SECURITY, EMPLOYMENT AND EARNINGS TRENDS ANNUAL SUMMARY OF 1990 A2 (1991).
of injured workers who receive temporary total disability benefits return to work in less than one month.\footnote{107} For a minority of workers who receive temporary total disability benefits, however, the return to work is delayed; approximately twelve percent are still collecting temporary total disability benefits after 120 days.\footnote{108} The rate at which these workers return to work does not appear to be the result of whether they receive full wage replacement while they are disabled.\footnote{109} In fact, workers in more dangerous occupations, who are

\footnote{107. According to unpublished data provided by the Workers' Compensation Fund, approximately two-thirds of workers who are injured and collect temporary total disability benefits are back at work within one month of the injury. As noted by Professor Larson, "In the usual industrial situation, there is a period of healing and complete wage loss, during which, subject to any applicable waiting period, temporary total is payable. This is followed by a recovery, or stabilization of the condition, and probably resumption of work, and no complex questions arise." \textit{1C ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 57.12(b), at 10-19 (1992), quoted with approval in Mitchell v. State Workmen's Compensation Comm'n, 256 S.E.2d 1, 6 (W. Va. 1979).}

108. Based upon unpublished data supplied by the Workers' Compensation Fund, the following picture emerges. 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. Over 97.29\% of these claims were closed within one year. Thus, the claims of only 618 workers survived on a lost time basis beyond this first year. Data from subsequent years follow this pattern closely. No comparable national data are available on this issue. It is important to note that closure of lost time benefits can occur either when a claimant returns to work or when s/he reaches maximum degree of medical improvement after an injury. \textit{W. Va. CODE § 23-4-7b(e) (Supp. 1992).} Although many of these claimants have, in fact, returned to work, it is not possible to assess this based upon these numbers.

109. Based on the unpublished data from the Workers' Compensation Fund, at 120 days (the point at which the commissioner is statutorily mandated to perform both independent medical and rehabilitation evaluations pursuant to \textit{W. Va. CODE §§ 23-4-7a(f), 23-4-9 (Supp. 1992))}, 88.82\% of claimants injured in 1988 had their cases closed on a lost time basis. \textit{See supra} note 108. When investigating the available data by industrial classification, no pattern emerges which would indicate that greater adequacy of wage replacement leads to longer disability. In 1988, the state average weekly wage, and therefore the maximum temporary total disability benefit, was $350.83. Underground coal miners, who in 1988 earned $727.77 per week on average, received a maximum benefit that averaged 48\% of their preinjury wage, but returned to work somewhat more slowly than average: 83.6\% of them returned within 120 days. Among other, nonmining workers whose benefits were capped by the maximum, and who therefore received less than 70\% of their pre-injury wage, only utilities/oil/gas pipeline operation workers returned more quickly than average. For those who actually received 70\% of their preinjury wage, some returned more slowly and some more quickly than average. For example, workers in timbering and building maintenance returned slowly; workers in sawmill operations and bottle and glassware manufactur-
likely to suffer more serious injuries, appear to return to work more slowly whether they receive considerably less than their usual wages110 or are fully compensated for their loss of income.111

The decline in employment in dangerous industries led to an initial drop in numbers of claims filed, but this decline did not continue after 1983.112 Compensation costs in all categories have continued to increase, although the costs associated with permanent total disability and fatal claims have increased at a much faster rate than those associated with other claims.113 The Fund appears to be confronted, to some extent, with increasing liabilities involving currently active workers.114 Despite cost containment efforts, medical costs have continued to rise rapidly.115 Deteriorating availability of health insurance to workers in general116 undoubtedly contributes to the motivation of

<table>
<thead>
<tr>
<th>Year</th>
<th>Fatal</th>
<th>Partial total disability</th>
<th>Permanent partial disability</th>
<th>Temporary total disability</th>
<th>Medical</th>
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<td>18.3</td>
<td>31.8</td>
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<td>54.2</td>
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<tr>
<td>1990</td>
<td>36.3</td>
<td>97.2</td>
<td>69.1</td>
<td>93.9</td>
<td>117.8</td>
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114. The steady although not dramatic rise in temporary total disability benefits is an indication of this. The rate of increase in these benefits is far lower than that for permanent total disability or fatal benefits.

115. See supra note 113.

116. The Pepper Commission, U.S. Bipartisan Commission on Comprehensive Health Care, A Call for Action 22-23 (1990); Rash Fein, Medical Care, Medical Costs 162-65 (1986).
workers to file compensation claims which, if ruled compensable, will guarantee lifetime medical coverage for the occupational impairment.\footnote{117}

Nevertheless, the financial situation of the Fund, related to \textit{prospective} liabilities, is remarkably encouraging. Current premium rates charged to subscribing employers for new claims (excluding claims for permanent total disability) are now fiscally sound on a prospective basis\footnote{118} while remaining competitive on an interstate basis.\footnote{119} Underfunding is essentially confined to second injury permanent total disability awards, which are largely granted to displaced older workers, and to the inherited deficit, which is primarily an outgrowth of prior political manipulations.

While political debates continue to focus on redesign of benefits and eligibility criteria, the workers' compensation literature would support a change in focus, in this situation, to long-term cost containment through aggressive safety and rehabilitation programs.\footnote{120} A

\footnote{117. W. Va. Code §§ 23-4-1c to -3 (Supp. 1992). One solution to this particular problem would, of course, be universal access to necessary health care that does not depend on employment or work-relatedness of an impairment.}

\footnote{118. Excluding the costs of permanent total disability awards. Telephone Interview with Robert Finger, \textit{supra} note 55.}

\footnote{119. John F. Burton, Jr. \& Timothy P. Schmidle, \textit{supra} note 3, at 1, 5. The analysis of 1989 rates shows that West Virginia's adjusted manual (base) rates ranked 38th out of 44 states analyzed. West Virginia's overall adjusted manual rate of 1.353 (dollars per $100 of payroll), effective Jan. 1, 1989 through June 30, 1990 compared to a national average of 2.225. \textit{Id.} at 3-6. Burton has not analyzed rates subsequent to 1989. However, increases in rates in West Virginia since 1990 do not exceed the increases announced in many other states; it is therefore unlikely the West Virginia has attained noncompetitive rates during the last two years.}

\footnote{120. \textit{Workers' Compensation: Strategies for Lowering Costs and Reducing Workers' Suffering,} \textit{supra} note 1; Rochelle V. Habeck \textit{et al., Disability Prevention and Management and Workers' Compensation Claims} ch. V, at 16 (1988). This is not to say that there are not some odd idiosyncrasies in the benefit and eligibility structure in West Virginia which could be addressed through careful amendment of the law. For example, despite repeated agreements between the various lobbying groups, the statute has never been amended to limit the number of times an individual can file a new claim for occupational pneumoconiosis benefits; this means that one individual can have multiple claims, which are not consolidated, pending for review simultaneously. Similarly, it is unusual that the West Virginia system allows the payment of permanent total disability benefits to individuals who, in the aggregate, have shown that they are 85% partially disabled,
careful look at the system in West Virginia reveals, however, that little has been done to promote either safety or rehabilitation. The administrative budget of the agency includes no money for assistance to employers who might want to improve their safety practices.\(^\text{121}\) While employers' premium rates are adjusted based upon their past experience, presumably creating a financial incentive to prevent injuries, this does not appear to have changed underlying industrial practices.\(^\text{122}\) A provision to allow adjustments of rates based upon aggressive safety programs,\(^\text{123}\) that was passed in 1990, has not been utilized. It is of

irrespective of the ability of the individual to work; comparatively few awards are made on this basis, however. On the other hand, benefit levels for occupational disease are still linked to the wages of the injured worker at the time of the exposure, irrespective of the latency period of disease; this can result in a seriously deficient weekly benefit for a worker who is disabled as a result of a disease like lung cancer, which may appear many years after exposure to an occupational carcinogen. These types of aberrations can be found in every state statute, however; more importantly, they do not account, in the aggregate, for serious financial deficiencies or excesses in the West Virginia program.

\(^{121}\) Mostly smaller employers might benefit from this assistance. Private insurers in other states currently expend significant resources assisting their customers in "loss control." Substantially higher proportions of premium dollars are spent by private insurers on administrative (i.e. non-claims related) expenditures such as this. The administrative budget of the West Virginia Fund is controlled by the legislature; this year, application has been made to add safety positions to the Fund's staff. It is too early to know whether these will be funded. Interview with John H. Kozak, Executive Secretary to the Fund (Sept. 21, 1992). It must, however, be noted that there are no studies which evaluate the effectiveness of these loss control efforts on the actual safety practices of the insured enterprises.

\(^{122}\) Injury rates in the aggregate simply are not declining. See supra notes 101-05. Research to date has not demonstrated a correlation between experience rating of workers' compensation rates and safety practices. See James R. Chelius & Robert S. Smith, Experience-Rating and Injury Prevention, in SAFETY IN THE WORKFORCE: INCENTIVES AND DISINCENTIVES IN WORKERS' COMPENSATION, supra note 57, at 128; James R. Chelius, The Incentive to Prevent Injuries, in SAFETY IN THE WORKFORCE: INCENTIVES AND DISINCENTIVES IN WORKERS' COMPENSATION, supra note 57, at 154; Richard B. Victor, Experience Rating and Workplace Safety, in WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY, supra note 4, at 71. One explanation for this is that the experience rating systems limit the effect of prior claims and rates, particularly for smaller employers. This is done for two reasons. First, particularly for smaller employers, the small number of prior claims may not be considered a sound basis for future predictions. Second, there is concern that full exposure to prior events will create volatility in rates which will economically disadvantage smaller enterprises. As a result, the variations in rates may not be adequate to send clear messages to employers.

course very difficult to evaluate the prospective effectiveness of any safety programs instituted by employers, particularly in view of the lack of industrial safety expertise at the Fund.

Perhaps more troubling, the courts and administration of the Fund have together designed a system which often responds affirmatively to injured workers requests for compensation benefits, but fails to support consistently the desires of individuals to return to work. As a result, rehabilitation of injured workers and return to work have not been emphasized. The following sections explore the continuing focus on the use of benefits as the sole or primary means to resolve the problems of injured workers. This can best be illustrated by judicial and administrative treatment of the claims of individual workers and by the experience, to date, with the 1990 amendments to the Workers' Compensation Act.

The continued focus on benefits has troubling future implications both for injured workers and for the provision of compensation benefits. It provides the backdrop for discussions regarding how to reform the workers' compensation system. By insisting that injured workers' only recourse is through the receipt of benefits, people who want to work are displaced from the workforce. This encourages the view that reform efforts should focus on the design of benefits alone in order to establish a financially viable compensation system.

B. Judicial Treatment of Injured Workers

Courts universally respond with sympathy to individuals' stories of disability.124 As the analysis in this section reveals, the West Virginia Supreme Court of Appeals has shown a serious concern for the social insurance needs of injured workers and approached their claims for benefits with liberality. However, the court's liberality has largely been limited to the provision of compensation benefits. Despite erosion of the employment-at-will doctrine and development of strong state antidiscrimination law, the court has been reluctant to intervene to require employment opportunities for people injured on the job.

124. STONE, supra note 73, at 74-75, 140, 154, 159.
The West Virginia court’s preference for providing benefits to injured workers is best illustrated by the stories of three West Virginians who were injured at work.

*Cardwell v. State Workers’ Compensation Commission*¹²⁵

On May 14, 1973, Jerry Cardwell was drilling a shot hole underground at the Ittman Coal Company mines in southern West Virginia when an explosion occurred. He suffered a head injury which resulted in the loss of his right eye. Although disabled from performing his pre-injury job, Cardwell repeatedly expressed a desire to return to work.¹²⁶ Ittman indicated, in response to Cardwell’s requests for work, that it no longer considered him to be an employee.¹²⁷ Unable to regain employment, Mr. Cardwell applied for a permanent total disability or “life” award from the Workers’ Compensation Fund. Ittman Coal, having refused to provide him with a job, then fought his entitlement to benefits.¹²⁸ The court held that Cardwell was entitled to the compensation award he sought. Thus, despite Cardwell’s best efforts to return to work, he was transformed from the status of working

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¹²⁵ 301 S.E.2d 790 (W. Va. 1983).

¹²⁶ In June 1975, Cardwell wrote a letter to his former employer “stating that he was incapable of returning to his previous position, but desired selective employment with Ittman Coal Company, Pocahontas Fuel Company, Consolidated Coal Company, or Continental Coal Company, even if vocational rehabilitation would be necessary to enable him to perform such employment.” *Id.* at 793. He filed a grievance because he was denied the right to bid on an alternative job while he was off work, having not been notified of the job opening. *Id.*

¹²⁷ According to the grievance form, “the employer considered Cardwell not to be one of its employees.” *Id.*

¹²⁸ Ittman Coal did not support Cardwell’s application for a life award from the second injury fund. The decision in the case notes that Ittman Coal protested the initial award of 38% permanent partial disability benefits. It was Cardwell’s application for a life award which was rejected by the commissioner. *Id.* In other words, Ittman both refused to reemploy Cardwell and fought his eligibility for compensation benefits. This approach of employers to these claims is not unusual. As Professor Larson noted in commenting on a similar Michigan case, “It is hardly necessary to labor the inconsistency of permitting an employer to fire a man for physical defects caused by his own employment conditions, and then to disclaim compensation liability by presenting medical evidence that the man is not really disabled after all.” 1C ARTHUR LARSON, WORKMEN’S COMPENSATION LAW § 57.61(b), at 10-403 (1992).
coal miner to that of unemployed beneficiary of workers' compensation benefits.

Coffman v. Board of Regents\textsuperscript{129}

Dorothy Coffman worked for West Virginia University Hospital in Morgantown when, in October 1980, she injured her back while emptying trash cans. She continued to work, although suffering pain, until the following July when she was advised by her physician that she was temporarily disabled. After collecting temporary total disability benefits for one month, she returned to work in August 1981 with light duty restrictions.\textsuperscript{130} Consistent with the recommendation that she not lift more than ten pounds, the hospital relieved her of garbage handling duties. Her back pain persisted and she was advised not to perform tasks involving bending. The hospital again amended her duties, assigning her with another custodian who would perform all work involving bending. The hospital was, however, unwilling or unable to continue this arrangement or to find her an alternative position in the hospital. Although there was no evidence that this team approach resulted in lower productivity, Coffman was discharged seven months after she returned to work.\textsuperscript{131}

Coffman did not initially seek additional compensation benefits. Instead, she filed a complaint against the hospital alleging discriminatory discharge because of her disability. The case was tried to a jury in Monongalia County which found her discharge to have violated the West Virginia Human Rights Act.\textsuperscript{132} The Supreme Court of Appeals reversed, holding that an employer has no obligation to reassign an employee to an alternative job or to create a “special job” if she could

\textsuperscript{129} 386 S.E.2d 1 (W. Va. 1988).

\textsuperscript{130} Light duty restrictions generally relate to specific physical limitations of the individual worker, most commonly restrictions on bending or lifting as a result of a back injury. The classic definition of light duty explicitly addresses lifting and bending restrictions. INTERNATIONAL ASSOCIATION OF ACCIDENT BOARDS AND COMMISSIONS, REHABILITATION COMMITTEE, JOB PLACEMENT IN WORKERS' COMPENSATION REHABILITATION: TECHNIQUES AND CONCEPTS 13-18 (1989) [hereinafter REHABILITATION TECHNIQUES AND CONCEPTS]. In the Coffman case, the plaintiff’s physician indicated that she was “okay for light work; can lift 10-15 lbs.” 386 S.E.2d at 2.

\textsuperscript{131} 386 S.E.2d at 3.

\textsuperscript{132} W. VA. CODE §§ 5-11-1 to -19 (1990 & Supp. 1992); Coffman, 386 S.E.2d at 2.
not do the one for which she was hired.\textsuperscript{133} Instead, the court encouraged her to seek workers' compensation benefits.\textsuperscript{134}

\textit{Yoho v. Triangle PWC, Inc.}\textsuperscript{135}

Elizabeth Yoho was employed as a laborer and operator with Triangle PWC Inc. On April 2, 1981, she was replenishing an acid bath when she fell and was seriously burned by spilling acid, suffering burns over thirty-five percent of her body. After she was absent for twelve months, during which time she was collecting temporary total disability benefits, she was terminated from employment pursuant to the terms of a collective bargaining agreement. Shortly thereafter, Ms. Yoho filed a complaint alleging that she was the victim of retaliatory discharge for having pursued her compensation remedies.\textsuperscript{136}

Yoho wanted to work and was, apparently, capable of working. Her absence (and thence discharge) would not have occurred but for her severe occupational injury. Nevertheless, her termination was not seen as retaliatory by the Supreme Court of Appeals. The court found no clear public policy in favor of continuing the employment of someone on workers' compensation\textsuperscript{137} and concluded that termination pursuant to a neutral absence policy\textsuperscript{138} did not violate the public policy against retaliation for filing workers' compensation claims.

Cardwell, Yoho, and Coffman brought their cases forward under three different legal theories.\textsuperscript{139} Each of them \textit{wanted to return to

\begin{enumerate}
\item \textit{Coffman}, 386 S.E.2d at 6.
\item \textit{id.} at 7 n.16.
\item 336 S.E.2d 204 (1985).
\item \textit{id.} at 206.
\item \textit{Id.} at 209.
\item An issue which is fairly debatable or controversial in nature is one for the legislature and not for this Court." \textit{Id.} at 209.
\item In this case, the neutral absence control policy was contained within the terms of a collective bargaining agreement. The court's decision is not, however, limited to individuals covered by such agreements.
\item Cardwell, having failed to obtain a job, pressed his claim for permanent total disability benefits. \textit{Coffman} attempted, at least initially, to obtain employment, asserting her claim under the disability discrimination provisions of the Human Rights Act, W. VA. CODE §§ 5-11-1 to -19 (1990 & Supp. 1992). \textit{Yoho} sought unspecified relief under the original discriminatory practices provision of the Workers' Compensation Act, W. VA. CODE § 23-
\end{enumerate}
work; litigation was the result of the refusal of their employers to reemploy them on a permanent basis following occupational injury. None were successful in negotiating or enforcing a right to continued employment despite their obviously strong desire to work. None of these workers successfully challenged the fundamental control that employers have over choice of employees. Equally significantly, none established precedent that would increase the incentive of employers to reemploy occupationally injured employees.

These three cases exemplify the court's reluctance to promote employment for occupationally injured West Virginia workers. This pattern can be seen repeatedly in reported cases involving workers' compensation entitlement, 140 disability discrimination claims under the Human Rights Act 141 and retaliatory discharge cases involving workers' compensation claims. 142

1. Entitlement to Benefits under the West Virginia Workers' Compensation Act 143

The West Virginia court responds with notable compassion to the work histories and personal narratives of individual claimants for workers' compensation benefits. 144 "Each workers' compensation claim," the court has noted "is singularly important to the claimant." 145 "In

144. It is important to remember that the court actually reviews very few of the claims that are filed for compensation benefits each year. Even in the peak year of 1987, only 403 cases were reviewed by the court, as compared to the over 70,000 claims that were filed with the agency. As a result, the claims reviewed often represent those with the most persuasive facts. Similarly, the court has reviewed only nine handicap discrimination cases under the Human Rights Act to date.

As noted above, judicial liberality in the review of disability benefit claims appears to be a universal phenomenon. STONE, supra note 73, at 73-75, 154-59. For another sympathetic account of displaced, disabled workers, see THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? 106-07 (1991).
view of the severe economic hardships which immediately befall the families of injured or deceased workers, the primary objective is to provide benefits to an injured claimant promptly.\textsuperscript{146} Case decisions note the long work histories, often involving multiple injuries, of the claimants\textsuperscript{147} and reject images of the claimant as malingering.\textsuperscript{148} Concerned for the fate of the truly injured who might be excluded by a stringent system of proof, the court has repeatedly endorsed presumptions in favor of compensation when expert or lay opinions appear to differ, developing what has become known as the "rule of liberality" to be used in the review of expert evidence in compensation claims.\textsuperscript{149}

The court is not unaware of the issues surrounding continued employment of injured workers.\textsuperscript{150} As its decisions demonstrate, the court has focused on two objectives. First, its decisions support the construction of a system which provides adequate compensation to


\textsuperscript{147} Numerous cases illustrate this point. See, e.g., Posey v. State Workmen's Compensation Comm'r, 201 S.E.2d 102 (W. Va. 1973) (claimant worked continuously for this employer from 1945 until the time of his injury in 1969, during which time he suffered prior work-related injuries); Spurlock v. Spieler, 395 S.E.2d 540 (W. Va. 1990) (claimant worked from 1953 to 1984 for her employer when she chose to retire as a result of her last injury); Linville v. State Workmen's Compensation Comm'r, 236 S.E.2d 41 (W. Va. 1977) (claimant worked in the mines from 1939 to 1972 when his final injury involving a fracture of his back led to the granting of a life award).

\textsuperscript{148} See, e.g., Sisk v. State Workmen's Compensation Comm'r, 170 S.E.2d 20,25 (W. Va. 1969) (noting "his disability is real and . . . he is not malingering").

\textsuperscript{149} This rule has been most clearly articulated in cases involving claims for benefits under the occupational pneumoconiosis provisions of the Workers' Compensation Act, W. VA. CODE § 23-4-8c (Supp. 1992). See, e.g., Javins v. Workers' Compensation Comm'r, 320 S.E.2d 119 (W. Va. 1984) (claimant's expert evidence of disability cannot be disregarded unless shown to be unreliable, incorrect, or clearly attributable to some other identifiable disease); Persiani v. State Workers' Compensation Comm'r, 248 S.E.2d 844 (W. Va. 1978) (commissioner may not disregard claimant's medical proof absent credible evidence in the record that the testimony is unreliable). This particular presumptive rule has been the focus of considerable political attack.

injured workers if they are not reemployed or if they become displaced from their usual occupation as a result of occupationally-related disability. Second, the court has sought to encourage employers to reemploy injured workers by insisting that failure to reemploy will result in approval of benefits, thereby increasing the employer's workers' compensation liability. Employers are not, however, required to provide jobs; employees are not required to obtain them. The societal obligation to these workers is met primarily through the provision of compensation benefits.

Three examples serve to illustrate the court's approach to compensation cases involving return to work issues. First, the court has made frequent use of the second injury fund in order to grant permanent total disability or life awards to claimants who are unable to return to work. As noted above, second injury funds are the traditional workers' compensation mechanism for encouraging the employment of disabled workers, by limiting the financial liability of employers who offer jobs to previously impaired individuals. Following what it has termed the "enlightened and humane rule," the West Virginia court has made these awards available to workers who were displaced from mining and manufacturing jobs. In keeping with its liberal approach to permanent total disability, it is not surprising that the failure of an employer to reemploy an injured employee may be evidence of total disability. "We think," the court noted in Cardwell,

151. The issue of financial incentives is a complicated one. It is, however, important to note that the primary reaction to increased workers' compensation costs for employers has appeared to be to fuel the political demand that the legislative design for benefits be tightened. Studies have not shown that normal increases in premium rates through experience rating result in decreases in injuries. See supra note 122. Issues relating to financial incentives for employers in West Virginia are further complicated by the fact that many coal operators are no longer operating in West Virginia and therefore cannot be assessed their share of current costs relating to past injuries.

152. See supra note 62 and accompanying text.

153. Posey v. State Workmen's Compensation Comm'r, 201 S.E.2d 102, 107 (W. Va. 1973) (rejecting the older view which "may well have been whether the workman was able to perform any kind of work").

154. See supra notes 59-71 and accompanying text.

[T]hat most employers, particularly large corporations that hire people in a variety of positions, will retain a worker in his former position or in another capacity after he has had an occupational injury. The legislature has deliberately sought to encourage this practice by creating a second-injury fund as part of our compensation system.\textsuperscript{156}

Therefore, "an employer’s refusal to reemploy an injured worker because of his medical condition, in light work that he can do, can be persuasive evidence of the worker’s inability to obtain employment."\textsuperscript{157}

The court is thus sending a message to employers: if you reemploy injured employees you will not individually be responsible for the costs if the worker becomes permanently and totally disabled. Designing the incentives in this way should, theoretically, discourage discrimination against people with previous injuries who may be more subject to serious disability.\textsuperscript{158} On the other hand, failure to reemploy injured employees will result in expanded use of the second injury fund and therefore expanded aggregate cost of the compensation program. As a practical matter, these decisions do not, at least apparently, appear to have resulted in an expanded commitment to reemployment of injured workers.

Second, the court has attempted to address issues relating to benefit entitlement in order to encourage claimants to return to work. This can be seen particularly well in the decisions holding that the commissioner may not eliminate eligibility for benefits based upon a claimant’s return, or attempt to return, to work. Claimants collecting temporary total disability benefits will have these benefits terminated when they reach their maximum degree of medical improvement, are

\textsuperscript{156} Cardwell, 301 S.E.2d at 797.

\textsuperscript{157} Id.

\textsuperscript{158} There is not, however, any empirical or strong anecdotal evidence that this incentive has, in fact, encouraged the employment of impaired workers. There is also no evidence that the availability of second injury protection actually changes employer behavior.
medically certified to return to work,\textsuperscript{159} or actually return to work.\textsuperscript{160} However, when claimants have been collecting temporary total disability benefits, resume work, and then find that they are unable to perform the work to which they have returned, the court has been adamant that they should be able to resume collecting temporary total disability benefits.\textsuperscript{161} In addressing this issue, the court noted:

Indeed, a valid social policy can be served by encouraging an injured employee on temporary total disability to attempt to return to work. If he is able to work his period of disability is diminished. He is restored to his former wage level and becomes once again a contributing member of the work force. His employer gains in diminished compensation exposure. It would run counter to such desirable end if we were to rule that the employee must bear the risk of loss of his temporary total disability benefits if he attempts return to work and then has to stop working because his medical condition has not improved to the point where he can handle his job. Such a negative rule would indicate that no injured employee would attempt to return to work unless he were absolutely certain he could do the job.\textsuperscript{162}

Similar reasoning has been extended to the cases of individuals who are receiving permanent total disability weekly benefits and who return to remunerative light duty work. The court has repeatedly held that a permanent total disability award should not be affected by the fact that

\textsuperscript{159} W. VA. CODE § 23-4-7a(e)(3) (Supp. 1992); Honaker v. State Workmen's Compensation Comm'r, 298 S.E.2d 893 (W. Va. 1982); Mitchell v. State Workmen's Compensation Comm'r, 256 S.E.2d 1 (W. Va. 1979); State ex. rel. Wnek v. Blizard, 256 S.E.2d 772 (W. Va. 1979); Fakoury v. Workmen's Compensation Comm'r, 258 S.E.2d 526 (W. Va. 1979). Alternatively, temporary total disability benefits will terminate when the claimant has exhausted the maximum duration for benefits (208 weeks) pursuant to W. VA. CODE § 23-4-6(c) (Supp. 1992); this maximum will only be extended if the claimant is receiving vocational rehabilitation benefits pursuant to W. VA. CODE § 23-4-9 (Supp. 1992).

\textsuperscript{160} W. VA. CODE § 23-4-7a(e) (Supp. 1992). In cases in which the claimant is unable to return to substantial gainful employment requiring the skills and activities comparable to those of the pre-injury employment, it is not clear that benefits will be terminated. Allen v. State Workmen's Compensation Comm'r, 314 S.E.2d 401 (W. Va. 1984).

\textsuperscript{161} Dunlap v. State Workmen's Compensation Comm'r, 232 S.E.2d 343 (W. Va. 1977). The court held that Dunlap did not lose his eligibility for temporary total disability benefits if he was unable to continue working because of the prior disability, even if there was no reinjury or aggravation of the prior injury, relying upon the statutory language in W. VA. CODE § 23-4-6(b). \textit{Id.} at 345.

\textsuperscript{162} \textit{Id.}
the claimant may have "fortuitously" found remunerative work that s/he is able to perform, unless the lighter employment would ordinarily be available to a person in the same situation.\textsuperscript{163} This creates the apparently anomalous situation that a claimant may both work and collect total disability benefits.\textsuperscript{164}

Permanent total disability benefits are often viewed as a hybrid between temporary total and permanent partial disability benefits. In general, temporary total disability benefits are viewed as replacement for an individual's earnings while s/he is recovering from an injury.\textsuperscript{165} Permanent partial benefits, on the other hand, are seen as providing compensation under a "whole man" theory of impairment or disability which may be unrelated to actual post-injury wages or work.\textsuperscript{166} The exclusivity provision of the compensation statute precludes civil recoveries in most cases; permanent partial benefits are, in a sense, a limited replacement for these civil damages. These benefits can always be collected, therefore, while a claimant is working and even if s/he is working at the same job s/he performed prior to the injury. Although collected over time, the amount of a partial award is fixed and finite. Permanent total benefits, on the other hand, appear to compensate for both specific wage loss and for disability.\textsuperscript{167} It is most likely that the ambiguous nature of these benefits results in allowing claimants to both work and collect benefits.


\textsuperscript{164} Approximately 200 workers are currently collecting permanent total disability benefits and working. Interview with John H. Kozak, Executive Secretary to the Fund (May 5, 1992).

\textsuperscript{165} W. Va. CODE § 23-4-7a(e) (Supp. 1992); see supra note 30.

\textsuperscript{166} See, e.g., Posey v. State Workmen's Compensation Comm'r, 201 S.E.2d 102, 105-06 W. Va. 1973); Cropp v. Workmen's Compensation Comm'n, 236 S.E.2d 480 (W. Va. 1977); Evans v. State Compensation Director, 144 S.E.2d 663 (W. Va. 1965); Walk v. State Compensation Comm'r, 58 S.E.2d 791 (W. Va. 1950); Burgess v. State Compensation Comm'r, 5 S.E.2d 804 (W. Va. 1939). With changes in the demographics of the workforce and growing sensitivity to issues of gender, this terminology should, and undoubtedly will, change from "whole man" to "whole person."

\textsuperscript{167} Posey, 201 S.E.2d at 105.
In making its decisions, the court is aware that claimants may sometimes lack financial incentives to return to work once they have received a life award.\textsuperscript{168} However, irrespective of the individual’s compensation status, there is a strong desire not to discourage personal efforts by the claimants to become rehabilitated by threatening them with loss of benefits.\textsuperscript{169} These decisions reflect a clear commitment to the exclusive and self-contained nature of workers’ compensation benefits. By investigating the eligibility of benefits through a theoretical inquiry into the availability of “remunerative work in a field of work for which [the claimant] is suited by experience and training,”\textsuperscript{170} the court avoids a specific, and potentially messy, inquiry into the actual employment status of the individual claimant. A rigid division is thus maintained between issues involving employment of the individual claimant (which are outside the scope of compensation inquiries) and the availability of benefits.\textsuperscript{171}

\textsuperscript{168} The assumption underlying this assertion is that claimants who receive high non-wage benefits will not return to work. Of course, beneficiaries of permanent total disability benefits are generally not receiving, or at least likely to continue to receive, benefits which are substantially equal to their pre-injury earnings. First, they are permanently locked into a maximum weekly benefit of 70\% of their pre-injury wage or 100\% of the current state average weekly wage (whichever is lower), until their benefit equals the minimum benefit of one-third of the state average weekly wage. W. VA. \textsc{Code} §§ 23-4-6(d), -14 (Supp. 1992). Long term disability inevitably results, therefore, in a progressively lower benefit in comparison to potential wages. Therefore, younger workers, those who have worked high wage jobs, or those whose wages were rising rapidly at the time of injury, will be frozen at benefit levels which are far below their potential pre-injury earning capacity. These people may in fact have a strong economic incentive to work. \textit{See} 2 \textsc{Arthur Larson, Workmen’s Compensation Law} § 61.24 (1992).

\textsuperscript{169} As Professor Larson has noted: “If after a worker is restored to some earning capacity by rehabilitation, his compensation is reduced by the amount of his earnings, his financial incentive to make the efforts required for rehabilitation is largely destroyed.” 2 \textsc{Arthur Larson, Workmen’s Compensation Law} § 61.24, at 10-1023 (1992). Therefore, in many jurisdictions possibilities of future rehabilitation or increased earning potential does not affect the amount of the permanent award. \textit{See} 1C \textsc{Arthur Larson, Workmen’s Compensation Law} § 57.51(g) (1992).

\textsuperscript{170} W. VA. \textsc{Code} § 23-4-6(n) (Supp. 1992).

\textsuperscript{171} As noted above, the primary exception to this rule is that temporary total disability benefits generally terminate when the claimant returns to work. The commissioner utilizes a special “return to work” form to insure that notification is received by the agency when the injured employee returns to remunerative employment; this termination of temporary total disability benefits occurs irrespective of whether the claimant has returned to the same or an equivalent job. The temporary partial rehabilitation benefits created by the 1990
Third, the court has only rarely addressed the provision of vocational rehabilitation benefits to injured workers. Rehabilitation, by its very nature, is designed to decrease periods of disability or increase the employability of the claimant. Provision of these benefits, therefore, raises different issues from determinations of eligibility for indemnity benefits. Few cases involving rehabilitation have reached the West Virginia court, perhaps because few lawyers pursue rehabilitation for their clients aggressively. 172 Although there is no question that a claimant who can be rehabilitated is entitled to these benefits, 173 there is no case law which develops incentives for either the claimant to undertake rehabilitation 174 or the employer to provide assistance in returning to work. 175

Thus, the court has tended to view the compensation system as a closed system which provides medical and indemnity benefits to injured workers. Although judicial decisions reflect an obvious concern for workers who have difficulty in regaining full employment status, the issues of reemployment, or other incentives to change the basic employment relationship, have generally been seen as outside the scope of any inquiry regarding the availability of benefits.

statutory amendments to W. VA. CODE § 23-4-9 were designed to address the situation in which a temporarily disabled claimant is reluctant to return to a lower wage or light duty job. See infra part III.D for a discussion of this amendment.

172. For a discussion of the role of lawyers in vocational rehabilitation, see infra notes 310-12 and accompanying text.


174. It is important to note that most commentators and experts on successful rehabilitative approaches to work injuries agree that forced rehabilitation is rarely successful. Nevertheless, in West Virginia, a claimant may, at least in theory, be required to undergo medical rehabilitation, including surgery, if s/he wants to continue to receive benefits. Shrewsbury v. State Compensation Comm'r, 32 S.E.2d 361 (W. Va. 1944); Wilson v. Lewis, 273 S.E.2d 96 (W. Va. 1980). This requirement is not imposed unless there is virtual unanimity of medical opinion that the surgery should be undertaken. Cox v. State Workmen's Compensation Comm'r, 146 S.E.2d 577 (W. Va. 1966).

175. The legislative findings accompanying the 1990 amendments to W. VA. CODE § 23-4-9 do, however, indicate that rehabilitation efforts are now to be the joint responsibility of the employer, the employee, the commissioner, and the physician. W. VA. CODE § 23-4-9(a) (Supp. 1992).
2. Entitlement to a Job under the West Virginia Human Rights Act

In 1981, the Human Rights Act was amended to prohibit employment discrimination on the basis of handicap. At that time, the West Virginia Supreme Court of Appeals had substantial experience in evaluating both claims relating to disability (under the Workers’ Compensation Act) and charges of employment discrimination (under the Human Rights Act). Somewhat remarkably, the court established wholly different standards for the evaluation of handicap under the Human Rights Act than it had previously applied to claims under either statute.

The 1981 provision defined handicap as “any physical or mental impairment which substantially limits one or more of an individual’s major life activities.” Like members of other protected groups,
handicapped people who were "able and competent to perform the services required" thus became entitled to protection under the Act. The interpretive rules adopted by the Human Rights Commission in 1982 followed previously enacted federal disability law and expanded the definition to include both individuals with actual disabilities and those with a record of, or who were regarded as having, an impairment.

The agency's interpretive rules also extended more specific protection to individuals with work-related disabilities:

Persons whose handicap arises during employment—When an individual becomes handicapped in the course of employment, the employer shall, if possible with reasonable accommodation, continue the individual in the same position or reassign the employee to a new position for which s/he is qualified or for which with training, s/he may become qualified. The re-

verifiable addiction does not constitute a 'physical or mental impairment'.

2.05 Major Life Activities - Includes communication, ambulation, self-care, socialization, learning, vocational training, employment transportation, and adapting to housing.

2.06 Substantially Limits - Means interferes with or affects over a substantial period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person's major life activities. Examples of minor temporary ailments are colds or flu, or sprains or minor injuries.


Federal rules defining these terms under the ADA can be found at 29 C.F.R. § 1630.2(h), (i), (j) (1992); under the Rehabilitation Act of 1973 at 29 C.F.R. § 1615.103 (1992); 45 C.F.R. § 707.3 (1991).


180. Discrimination in compensation, hiring, tenure, terms or conditions of employment, as well as preemployment inquiries which would elicit information regarding membership in a protected class, are prohibited. W. VA. CODE § 5-11-9(a)(1), (a)(2)(A) (Supp. 1992).

181. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1988 & Supp. II). A handicapped person is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B) (Supp. II 1990).

182. "2.07 Handicapped person - Is one who: (a) has a handicap as defined above; (b) has a record of such handicap; or (c) is regarded as having such a handicap." Series I (1982), supra note 178.
quirements of this paragraph shall be interpreted in such a way as to be consistent with W. Va. Code 23-5A-1 which prohibits employers from discriminating against employees because they have applied for or received workers’ compensation benefits.\textsuperscript{183}

It was clearly the intention of the commission to extend broad discrimination protection to people who were injured at work.

No case involving allegations of discrimination based on handicap reached the court until 1988.\textsuperscript{184} At that time, the court was confronted with questions involving the intended scope of the original statutory definition. Rejecting the broad interpretation of the statute contained in the agency’s rules, the court held that only those with actual handicaps were entitled to protection under the law.\textsuperscript{185}

The legislature responded immediately in 1989 by broadening the definition of handicap to extend statutory protection under the Human Rights Act to individuals with past record of handicaps or who were regarded as having a handicap,\textsuperscript{186} the definition of handicap in state

\textsuperscript{183} Id. § 4.07. After the decision in Coffman v. West Virginia Bd. of Regents, 386 S.E.2d 1 (W. Va. 1988), the language of this regulation was changed to say that an employer shall provide job restructuring but “may” reassign the employee to a new position. See § 4.13, Series I (1991), supra note 178.

\textsuperscript{184} The eight year delay was in part the result of the failure of the Human Rights Commission to process any handicap discrimination cases prior to the granting of the writ of mandamus against the agency in late 1984. Allen v. West Virginia Human Rights Commission, 324 S.E.2d 99 (W. Va. 1984).

\textsuperscript{185} “The decision of the West Virginia Legislature to adopt only the definition found in part (i) . . . [of] the federal definition, indicates the legislature’s clear intent to limit Human Rights Act protection to those individuals who, because of their handicap, have substantial difficulty in finding work.” Ranger Fuel Corp. v. West Virginia Human Rights Comm’n, 376 S.E.2d 154, 159 (W. Va. 1988). The court held that the Commission’s rules were improperly promulgated as interpretive rules, at least to the extent that they attempted to expand the definition, and therefore the reach, of the statute. Chico Dairy Co. v. West Virginia Human Rights Comm’n, 382 S.E.2d 75 (W. Va. 1989); see also Fourco Glass Co. v. West Virginia Human Rights Comm’n, 383 S.E.2d 64 (W. Va. 1989).

\textsuperscript{186} The 1989 statutory language defines handicap as follows:

The term “handicap” means a person who: (1) Has a mental or physical impairment which substantially limits one or more of such person’s major life activities; the term “major life activity” includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working; (2) Has a record of such impairment; or (3) Is regarded as having such an impairment.
law is now fully consistent with federal law. 187 The court has not yet decided a case which arose subsequent to this amendment. 188 As a result, the case law which is currently available for examination was all decided under the 1981 statutory language.

In contrast to prior decisions under both the Human Rights Act and the Workers’ Compensation Act, the court immediately adopted a narrow view for the analysis of handicap discrimination claims. Prior to reviewing the 1981 handicap amendment to the Human Rights Act, the court had consistently followed a clear statutory directive 189 to apply a rule of liberal statutory construction to provisions of the Act. 190 However, the court apparently perceived the statutory definition of handicap adopted in 1981 as indicative of specific legislative intent for the court to act with restraint in this area.

Under both state and federal law, a plaintiff in a disability discrimination case must be able to demonstrate that s/he is a qualified individual with a handicap which substantially limits a major life activity and that s/he was denied an employment opportunity despite the

187. Current legislative rules of the Human Rights Commission are consistent with the 1989 statutory language, which in turn is consistent with both the language of the Rehabilitation Act and the ADA. 42 U.S.C. § 12102(2) (Supp. II 1990); 29 C.F.R. §§ 1630.2(g) (1992); see supra note 181.

188. Those decisions issued recently nevertheless involved situations which arose prior to the effective date of the 1989 statute. The court may have presaged its view of this amendment, however, by having noted that “[j]urisdictions that have examined the three-part federal definition of ‘handicapped individual’ have consistently interpreted part (i) strictly according to its terms and have interpreted parts (ii) and (iii) to expand the reach of the Rehabilitation Act.” Ranger Fuel Corp., 376 S.E.2d at 159 n.2.


fact that s/he could perform the essential functions of the job in question, with or without reasonable accommodation. There are thus a series of hoops that an individual must go through in order to present a prima facie case. The court's strict interpretation of the 1981 disability provision has not been limited to the exclusion of claims which were not based upon actual handicap; instead, strict statutory interpretation was extended to each of the substantive aspects of the plaintiff's claim.

The court provides no doctrinal explanation for its failure to apply the directive to interpret the statute liberally to these handicap claims. The case law does, however, provide some insight into the court's underlying motivation for its somewhat surprising analysis of these claims. In particular, because of handicapped plaintiffs' right to demand reasonable accommodation, handicap discrimination law posed a new and difficult problem: instead of demanding the same treatment as other workers, those with disabilities could legally assert a right to different treatment based upon their disability. This right to accom-

191. "4.02 Qualified Handicapped Person Defined - As it relates to employment, a 'qualified handicapped person' is one who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question." Series I (1982), supra note 178. Alternatively stated, in order to meet the plaintiff's prima facie burden, s/he must show that s/he "(1) meets the definition of 'handicap,' (2) possesses the skills to do the desired job with reasonable accommodations and (3) applied for and was rejected for the desired job." Ranger Fuel Corp., 376 S.E.2d at 156, syl. pt. 2. Note that denial of the employment opportunity is irrelevant if the plaintiff fails to demonstrate that s/he meets the definition of "handicapped." Therefore, the more narrowly construed the definition is, the more likely that individuals can be legally excluded from jobs because of impairments.

192. The level of confusion which then emerged in Human Rights Act decisions is troubling. First, acknowledging the shift in interpretation created by the early handicap discrimination cases, the court observed, in dicta, that "this principle of liberal construction does not apply in ascertaining if an act is an unlawful discriminatory practice." West Virginia Inst. of Tech. v. West Virginia Human Rights Comm'n, 383 S.E.2d 490, 502 n.17 (W. Va. 1989). This dicta was soon explicitly rejected: "The West Virginia Human Rights Act 'shall be liberally construed to accomplish its objective and purposes.' W. VA. CODE § 5-11-15 (1967). This construction applies to both its substantive and procedural provisions . . ." Paxton v. Crabtree, 400 S.E.2d 245, 249 (W. Va. 1990). The court has continued, however, to allude (without explanation) to the strict construction standard in handicap cases. Teets v. Eastern Assoc. Coal Corp., 421 S.E.2d 46, 52 n.12. (W. Va. 1992).

193. Although the original statute failed to provide explicitly that handicapped individuals would be entitled to "reasonable accommodation," both the Human Rights Commission's interpretive rules and the court never questioned that employers would be required to pro-
mmodation for disabled individuals is more than a *de minimis* obligation for employers.194 Faced with this necessary component to protecting disability rights in the workplace, the West Virginia court immediately expressed concern for the “proper accommodation of the interests of handicapped individuals, other employees, the employer and the public.”195 The court was noticeably reluctant to place injured or handicapped workers at a competitive advantage in seeking jobs196 and therefore concluded that all aspects of the definition of handicap “must be strictly construed.”197 The court has thus displayed a reluctance to protect disabled workers with the same vigilance that it has been extended to victims of race and gender discrimination.198

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194. The only prior right to accommodation arose in cases involving discrimination on the basis of religion. In contrast to disability law, in claims involving religious discrimination the employer need not make more than *de minimis* changes in order to accommodate the religious needs of the employee. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). The disability rules, in contrast, require a substantial effort at accommodation. See § 4.03, Series I (1982), *supra* note 178; 77 W. Va. C.S.R. 1 §§ 4.4, 4.5 (1991). See *infra* note 216 for the full text of the current regulation. The employer can counter a demand for reasonable accommodation by affirmatively demonstrating that the accommodation would impose an “undue hardship” which is defined narrowly. § 4.03(2) & (3), Series I (1982), *supra* note 178; 77 W. Va. C.S.R. 1 § 4.6 (1991). For equivalent provisions under the ADA, see 29 C.F.R. § 1630.2 (1992). These rules were consistent with prior case law under the Rehabilitation Act of 1973 which rejected employers' claims that their obligation to accommodate should be interpreted as a *de minimis* obligation. Prewitt v. United States Postal Service, 662 F.2d 292, 308 n.22 (5th Cir. 1981); Harrison v. Marsh, 691 F. Supp. 1223 (W.D. Mo. 1988); American Fed'n of Gov't Employees v. Baker, 677 F. Supp. 636, 638 (N.D. Cal. 1987).


196. This same concern is explicitly stated in Yoho v. Triangle PWC, Inc., 336 S.E.2d 204, 209 (W. Va. 1985). See *infra* notes 275-76 and accompanying text.


198. In prior situations in which a federal statute has provided more protection than the state statute, the court has chosen to read the West Virginia law broadly and extend it to
(a) Defining "Handicap"

The court has adopted a narrow interpretation of each aspect of a disabled plaintiff's claim under the Human Rights Act, including the general definition of who has a qualifying handicap.\(^{199}\) The court's definition of handicap includes only those individuals "who, because of their handicap, have *substantial* difficulty in finding work."\(^{200}\) The court has displayed an unwillingness to establish broad protection for people whom the court apparently perceives as marginally disabled, even if the workers are refused employment or reemployment as a result of a physical condition.\(^{201}\) Protection under the Human Rights Act is limited to people the court considers to be seriously disabled—\(^{202}\)—but who are still able to perform the essential functions of their jobs.

Having adopted this strict statutory definition of protected individuals, it is perhaps not surprising that the court then concluded that individuals adjudged partially disabled under the Workers' Compen-
sation Act were not necessarily "handicapped" within the meaning of the Human Rights Act. There are strong similarities between the definitions of disability under the two acts. Under both statutes, there must first be a finding that the individual has a medical impairment. Under both statutes, plaintiffs must demonstrate that this medical impairment has some impact on their ability to function in work or life; that is, they must show they are "disabled." This is not purely a medical judgment. In setting the degree of permanent disability on a workers' compensation claim, the commissioner (not the physician) must therefore make a determination that the claimant's ability to work or pursue the normal tasks of everyday life has been permanently affected by the medical impairment.  

Nevertheless, in O'Dell v. Jennmar Corp. of West Virginia, the court held that a determination of permanent partial disability made by the Workers' Compensation Commissioner was not in itself adequate to show that the individual suffers from a handicap which substantially affects a major life function; this was true despite the fact that the court acknowledged that O'Dell had undergone disc surgery in an attempt to correct his back injury. Encouraged by O'Dell, employers argued that a partial disability rating under the Workers' Compensation Act foreclosed the possibility of finding that an individual


204. 400 S.E.2d 288 (W. Va. 1990).

205. Id. at 293. The circuit court had found that O'Dell's back injury constituted a handicap but that he had not shown the requisite nexus between the handicap and any adverse action taken against him. The Supreme Court instead found that he had not demonstrated that he had a handicap, thereby leaving open the possibility that adverse action could be taken against him which would not be prohibited under the Human Rights Act. Id.
was disabled. Recently, however, in Teets v. Eastern Associated Coal Corp. the court explicitly rejected this approach in favor of individualized assessment of whether the work-related disability is sufficiently severe to merit protection under the Human Rights Act.

As part of establishing that an impairment is sufficiently severe to merit protection under the disability laws, a plaintiff must show that his or her impairments substantially limit a major life activity. As under the compensation laws, this major life activity can be “working.” In order to rise to an adequate level to merit protection


207. 421 S.E.2d 46 (W. Va. 1992). Judge Fox, the circuit court judge who reviewed Teets’ claim, characterized her position in these terms: “The plaintiff is indeed ensnared in the typical ‘Catch 22’ situation: too handicapped to work and yet not handicapped enough to be ‘handicapped.’” Id. at 49. The Supreme Court, however, concluded that Teets’ back injury was sufficient to render her handicapped. Id. at 52.

208. The holding in O’Dell “merely precluded an automatic determination of ‘handicap’ based upon [a permanent partial disability rating].” Id. at 52.

209. Id. at 51-52. The court in Teets cited the length of her absence from work—2 years—and the fact that her only significant employment experience involved heavy work in the mines as evidence that she might be disabled within the meaning of the Human Rights Act.

210. See supra note 186 for the current statutory language. “Substantially limits” is further defined in the current regulations to mean “interferes with or affects over a substantial period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person’s major life activities.” § 2.5, Series I (1991). For the prior, similar regulatory language, see supra note 178. The regulatory language under the ADA is similar but specifically notes that the term “substantially limits” means “unable to perform a major life activity that the average person in the general population can perform.” 29 C.F.R. § 1630.2(j)(1)(i) (1992).

211. The term “substantially limits” when applied to the life activity of working is not specifically defined in the Human Rights Commission regulations but has received special attention under the ADA:

(3) With respect to the major life activity of working—
(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) ** * [The following factors may be considered in determining whether an individual is substantially limited in the major life activity of “working”:

(A) The geographical area to which the individual has reasonable access;
under the disability laws, the interference with the ability to work must prevent the plaintiff from performing a broad range of jobs. In finding that Silva Teets, who had suffered an occupational back injury, was substantially limited in the major life activity of working, the court used language which was remarkably reminiscent of that used in workers’ compensation cases involving applications for permanent total disability benefits:

Relevant to the inquiry are “the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual’s job expectations and training.” In this case the employee missed almost two years of work due to a back injury requiring surgery . . . [T]he fact that Mrs. Teets’ only significant employment experience involved heavy duty work in the mines shows that her back disability could have substantially limited her major life activity of employment.

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j) (1992). In its Interpretive Guidance to this rule, the EEOC notes:
For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual’s impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs.

Id. app. at 409.

212. Ranger Fuel Corp. v. West Virginia Human Rights Comm’n, 376 S.E.2d 154. But see Teets v. Eastern Assoc. Coal Corp., 421 S.E.2d 46 (W. Va. 1992). In Ranger Fuel Corp., the court apparently rejected the idea that Joyce Marcum’s inability to perform underground coal mine work substantially limited the major life activity of working. In Teets, on the other hand, the court noted that the fact that an impairment is a disadvantage in someone’s general search for satisfactory employment may be sufficient to justify a holding that the individual is disabled. Id. at 52. Marcum, on the other hand, was unable to perform coal mining work, but not other heavy manual work.

213. Id. (citations omitted). Note the similarity of the test used by the court and the regulatory definition under the ADA, supra note 211.
Although the Teets decision was issued per curiam, it appears to represent at least a tentative shift toward developing a consistent doctrinal view of potential entitlement under both the Human Rights and the Workers’ Compensation Acts. It establishes an odd parallelism however: only those claimants adjudged permanently and totally disabled under the workers’ compensation law clearly meet the test of being substantially limited in the life activity of working, thereby becoming entitled to protection in the context of employment. In other words, individuals who meet the standard for permanent life benefits from workers’ compensation may assert employment claims under the disability discrimination laws instead. On the other hand, those who are only partially disabled (from the compensation point of view)—and therefore presumably more easily employable—may not necessarily be considered disabled and entitled to employment protection under the Human Rights Act.214

(b) Defining “Reasonable Accommodation” and “Essential Job Functions”

Individuals who successfully demonstrate that they are handicapped within the meaning of the Human Rights Act must also demonstrate that they can nevertheless perform the essential functions of the job,215 with or without reasonable accommodation,216 in order to

214. This will, however, depend somewhat on the court’s interpretation of the 1989 statutory language. Arguably, such individuals will fit in the category of being regarded as being handicapped by their employers.

215. “Essential job functions” is not defined in either the Human Rights Act or in the rules promulgated thereunder. It is, however, defined in the regulations under the ADA. See 29 C.F.R. § 1630.2(n) (1992).

216. The current West Virginia Human Rights Commission Rules Regarding Discrimination Against the Handicapped, which are substantially the same as the interpretive rules adopted in 1982, define “reasonable accommodation” as follows:

4.4. “Reasonable Accommodation” means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable a handicapped employee to be hired or to remain in the position for which he was hired.

4.5. An employer shall make reasonable accommodation to the known physical or mental impairments of qualified handicapped applicants or employees where neces-
prevail. This additional burden can likewise be difficult for a disabled worker to meet. Obviously, individuals who are totally disabled from working cannot claim any protection under the laws governing disability discrimination during the period of the total disability. The distinction between being adequately handicapped (to meet the definition of handicap) but not too handicapped (rendering the plaintiff unable to perform the essential functions of the job) can be a fine line to walk.

In those cases considered by the West Virginia Supreme Court of Appeals, the plaintiffs who have ultimately been successful in walking this line have, to date, been individuals with non-job-related disabilities which did not substantially affect their ability to perform the job in question. In each of these cases, the court has identified a major life activity which was affected by the plaintiff’s handicap but which did not require the imposition of any burden on the employer or on any other employees. In cases in which the plaintiffs had an impair-

sary to enable a qualified handicapped person to perform the essential functions of the job. Reasonable accommodations includes, but are not limited to:

4.5.1. Making facilities used by handicapped employees, including common areas used by all employees such as hallways, restrooms, cafeterias and lounges, readily accessible to and usable by handicapped workers;

4.5.2. Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters; and similar actions;

4.5.3. Alteration of the amount or methods of training; and

4.5.4. The preparation of fellow workers for the handicapped employee, to obtain their understanding of the handicapping limitations and their cooperation in accepting other reasonable accommodations for the handicapped employee.


217. Anderson v. Live Plants, Inc., 419 S.E.2d 305, 307 (W. Va. 1992) (congenitally and severely deformed right hand is a handicap within meaning of Human Rights Act; “it is obvious that a deformed right hand and arm substantially limit a person’s major life activities,” even though plaintiff had no difficulty performing job); Davidson v. Shoney’s Big Boy Restaurant, 380 S.E.2d 232 (W. Va. 1989) (worker who suffered from petit mal epileptic seizures was able to perform her job in a restaurant without substantial risk to herself or others); Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814 (W. Va. 1990) (HIV-positive worker, whose major life function of “socializing” was substantially impacted by his health status, entitled to protection); Casteel v. Consolidation Coal Co., 383 S.E.2d 305 (W. Va. 1989) (coal miner with degenerative joint disease which caused him to move with pain, substantially limiting his major life activity of walking, who stoically sought to continue working without accommodation at work).
ment which did not appear to affect a major life activity, the court has refused to extend the protection of the Human Rights Act.218

Dorothy Coffman219 failed to walk the line successfully. Having found that her back injury did indeed make her a handicapped person within the meaning of the Human Rights Act, the employer asserted, and the court found, that she was nevertheless not a qualified handicapped person. She could not perform the essential functions of her custodial job: she could not lift heavy objects nor bend to clean low places.220 She was therefore not, according to the majority, entitled to any accommodation.221 In reaching this conclusion, the majority adopted both a narrow definition of essential job functions222 and a

218. In these cases, the court has noted that prior to July 1, 1989, the statute did not prohibit discrimination based on the perception of handicap. Chico Dairy Co. v. West Virginia Human Rights Comm'n, 382 S.E.2d 75 (W. Va. 1989); Foureo Glass Co. v. West Virginia Human Rights Comm'n, 383 S.E.2d 64 (W. Va. 1989) (back anomaly identifiable on X-ray but not disabling not entitled to protection); Ranger Fuel Corp. v. West Virginia Human Rights Comm'n, 376 S.E.2d 174 (W. Va. 1988). Part of the problem with these cases is that they were brought to hearing or trial before the court had determined that the definition of handicap would not encompass perceived handicaps. As a result, when the cases reached the appellate level, the plaintiffs attempted to convert cases tried under a theory of perceived handicap to ones which fit within the narrower definition; often, they failed.

220. Id. at 4-5.
221. Id. at 6.
222. In attempting to define the essential job functions, the majority in Coffman appears to have accepted the employer's job description. Justice Miller noted in his dissent that tasks may be essential for the group of employees but not for a particular individual. Id. at 11 (Miller, J., dissenting) (citing Ackerman v. Western Electric Co., 643 F. Supp. 836 (N.D. Cal. 1986) (asthmatic condition necessitating personal protective equipment and reassignment of certain job duties); Trimble v. Carlin, 633 F. Supp 367 (E.D. Pa. 1986); Gunn v. Bolger, 598 F. Supp. 196 (D.D.C. 1984); Commonwealth v. Pennsylvania Human Relations Comm'n, 480 A.2d 342 (Pa. Commw. Ct. 1984), remanded on other grounds, 508 A.2d 1187 (Pa. 1986); see also LaMott v. Apple Valley Health Care Ctr., Inc., 465 N.W.2d 585 (Minn. Ct. App. 1991) (nursing home housekeeper forced to resign from her job because of disabilities associated with stroke; court faulted employer for failing to restructure the job to permit a coworker to accompany her on her cleaning rounds). The rules under the ADA appear to endorse Justice Miller's view. 29 C.F.R. § 1630.2(n) (1992). This rule also appears to indicate that the employer's job description will be considered probative, but not necessarily dispositive, of the issue. In its Interpretive Guidance to these rules, the EEOC noted that the size of the workforce would be relevant to this inquiry:
restrictive view of what might constitute reasonable accommodation of her disability. Though citing the commission's regulations with approval, the Coffman majority nevertheless rejected notions that

223. See supra note 216 for the regulatory definition of "reasonable accommodation." It is difficult to separate the definition of "reasonable accommodation" from the definition of "essential job function." The majority in Coffman concluded that the employer had no duty to provide accommodation if Coffman could not perform the essential functions of the job, citing federal rules promulgated under the Rehabilitation Act, 29 C.F.R. § 1631.704(b) (1991). Although job restructuring which removed marginal job functions might constitute reasonable accommodation (as long as the employee could perform the essential functions of the job), reassignment to a vacant position would not be required under reasonable accommodation. Coffman, 386 S.E.2d at 5-6. This conclusion followed most existing federal case law under the Rehabilitation Act. Carter v. Tisch, 822 F.2d 463 (4th Cir. 1987); Carty v. Carlin, 623 F. Supp. 1181 (D. Md. 1985); Wimbley v. Bolger, 642 F. Supp. 481 (W.D. Tenn 1986), aff'd, 831 F.2d 298 (6th Cir. 1987); Bento v. I.T.O. Corp., 599 F. Supp. 731 (D.R.I. 1984); Johnson v. Frito Lay, Inc., 905 F.2d 1538 (6th Cir. 1990) (reasonable accommodation does not extend to new job placement); Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985); Alderson v. Postmaster General, 598 F. Supp. 49 (W.D. Okla. 1984); see also LaProte v. Jostens, 572 N.E.2d 1209 (Ill. 1991). The Coffman court joined these other courts in specifically rejecting the reasoning in Ignacio v. United States Postal Service, 30 M.S.P.R. 471 (1986) (special panel), which held job transfer to be reasonable accommodation. The Coffman majority failed to address the language of the United States Supreme Court in School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987), where the Court held that an employer "cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." Id. at 289 n.19; see also Kathryn W. Tate, The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?, 67 Tex. L. Rev. 781, 782 n.1 (1989). Under the ADA, both the definition of essential functions of the job and the definition of reasonable accommodation are more liberal. 29 C.F.R. § 1630.2(n)-(o) (1992). Reasonable accommodation under the ADA explicitly includes job restructuring, work modification, and reassignment to vacant positions. 42 U.S.C. § 12111(9)(B) (Supp. II 1990), 29 C.F.R. § 1630.2(o)(2)(ii) (1992).

the employer’s duty might vary depending upon such variables as its size and structure of workforce, at least where the accommodation would require the kind of job restructuring sought here. The opinion makes no mention of the specific provision in the commission’s rules which would have required job restructuring or reassignment for work-injured employees. Employers were not to be required to accommodate work-injured employees by reassigning them to alternative jobs they were capable of performing (even if the job was vacant), nor would they be required to make significant restructuring changes if these would remove any essential functions from the employee’s job. Dorothy Coffman was caught in a bind that might confront other workers suffering from work-related back injuries: she was suffering from a handicap that was severe enough to put her into the protected class, but too severe to be accommodated. Arguably, Coffman would have been in a stronger position in seeking a job as a new applicant with a handicap than as an injured employee: new applicants would be considered for a wide range of jobs; prior employees were not entitled to reassignment to an alternative job, even if it was vacant.

(W. Va. 1988). Although the rule interpreting the meaning of reasonable accommodation and undue hardship could be seen as interpretive only, the court did not address this in Coffman or subsequently.

225. Reasonable accommodation does not require an employer, irrespective of its size or hiring capabilities, to create a new position within the job description consisting only of those duties which the handicapped employee can perform. Coffman, 386 S.E.2d at 6 n.14. Compare the ADA treatment of these issues, supra notes 216, 222, 223.

226. See supra text accompanying note 183.

227. Silva Teets may also be caught in this bind. The court declined to rule on the employer’s contention that it was under no legal duty to accommodate her by transferring her to a light duty position. Teets v. Eastern Assoc. Coal Corp., 421 S.E.2d 46, 49 (W. Va. 1992)

228. Joyce Marcum, the plaintiff in Ranger Fuel Corp., was caught in a similar bind. The court held that Marcum’s impairment was not serious enough to be a handicap; it did not affect a major life activity. But, at the same time, the court found that she was not “able and competent to perform the job of general underground miner” noting that because of her medical condition there was no reasonable accommodation that could have made her employable. Ranger Fuel Corp. v. West Virginia Human Rights Comm’n, 376 S.E.2d 154, 159 (W. Va. 1988). The court did not accept the argument, initially advanced by Marcum, that she was simply regarded as having a handicap. According to the court, Marcum suffered from a medical impairment that was too severe to allow her employment as an underground coal miner but not severe enough to merit protection under the Act. Ranger Fuel...
(c) Employer Defenses to Charges of Handicap Discrimination

Once an individual has met the prima facie burden to show that s/he is a qualified handicapped person, the burden then shifts to the employer to present a legitimate nondiscriminatory reason for its decision.229 Affirmative defenses can include that the discrimination was based upon a bona fide occupational qualification,230 that the employee would be unable to safely and adequately perform the essential functions of the job, or that employment of the individual would impose an "undue hardship" on the employer.231 In the past, affirmative defenses to discrimination have been interpreted very narrowly.232 Again, the court has not applied its prior standards for discrimination cases to claims of disability discrimination.

The Human Rights Commission regulations, which are consistent with federal law, require that the trier of fact consider the size, profit-


231. § 4.03(2) and (3), Series I (1982), supra note 178; 77 W. Va. C.S.R. 1 § 4.15 (1991). For the equivalent language under the ADA, see 42 U.S.C. §§ 12111(3), 12111(10), 12113 (Supp. II 1990); 29 C.F.R. § 1630.2(g)-(r) (1992); 29 C.F.R. § 1630.15 (1992). Additional defenses available to employers, although not relevant to the discussion in this Article, include that the individual is currently engaging in the illegal use of drugs.

232. For example, the defenses of bona fide occupational qualification and business necessity have consistently been interpreted extremely narrowly. See 1A ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 13.00, at 4-1 to 4-3 (1992).
ability, and nature of the employer’s operation, the nature and cost of the accommodations, and the possibility that the same accommodations may be able to be used by other prospective employees before determining whether a particular accommodation would constitute undue hardship. Despite this clear direction, the court in Coffman refused to consider these factors before rejecting Coffman’s claim for a restructured job. Since she was unable to perform the essential functions of the job, her employer was not required to explore any of the options for accommodating her disability.

Similarly, an employer may refuse to hire or continue to employ an individual if employment would result in a materially enhanced risk of substantial harm to the applicant or to others. On the other

233. The Human Rights Commission Regulations state:

4.6. An employer shall not be required to make such accommodation if she/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his/her business. In determining whether or not an accommodation would constitute an unreasonable burden upon the employer, the Commission shall consider:

4.6.1. The overall size and profitability of the employer’s operation; and/or
4.6.2. The nature of the employer’s operation including composition and structure of the employer’s workforce; and/or
4.6.3 The nature and cost of the accommodations needed (taking into account alternative sources of funding, such as Division of Vocational Rehabilitation);
4.6.4. The possibility that the same accommodations may be able to be used by other prospective employees.

77 W. Va. C.S.R. 1 § 4.6 (1991). This language was adopted unchanged from the Commission’s prior interpretive rule. A similar but somewhat more extensive provision governs the defense of undue hardship under the ADA. 42 U.S.C. § 12111(10) (Supp. II 1990); 29 C.F.R. § 1630.2 (1992).

235. The Human Rights Commission Regulations state:

An employer may refuse to hire or may discharge a qualified handicapped person if, even after reasonable accommodation, the handicapped person is unable to perform the duties of the job without creating a substantial hazard to his/her health and safety or that of others. However, any such decision shall be based upon the individual handicapped person’s actual abilities, and not upon general assumptions or stereotypes about persons with particular mental or physical handicaps.

77 W. Va. C.S.R. 1 § 4.7 (1991). In order to meet the burden of this defense, an employer must be able to show that there is a “reasonable probability of a materially enhanced risk of substantial harm to the handicapped person or others.” Ranger Fuel Corp. v. West Virginia Human Rights Comm’n, 376 S.E.2d 154, 160 (W. Va. 1988) (holding increased risk of psoriatic lesions met this test); Davidson v. Shoney’s Big Boy Restaurant, 380 S.E.2d
hand, neither the possibility of future workers' compensation costs nor purely speculative future risk is an adequate justification for a refusal to hire or reemploy a worker. When addressing the needs of people who have been previously injured at work, it is unfortunately sometimes difficult, as a practical matter, to distinguish between the two. In the past, employers have been notoriously reluctant to hire or reemploy workers who pose a risk of increased workers' compensation costs, despite the availability of second injury fund protection. The


236. "An employer shall not discriminate against an applicant or employee because of a handicap or impairment which is not presently job related but which may worsen and become job related in the future." 77 W. Va. C.S.R. 1 § 4.9 (1991). "Refusal to select a handicapped individual for a position because of ... increased cost of insurance (whether actual or anticipated)" is not a defense. Id. at § 4.11.2. According to the EEOC:

[The employer must be prepared to show that there is: significant risk of substantial harm; the specific risk must be identified; it must be a current risk, not one that is speculative or remote; the assessment of risk must be based on objective medical or other factual evidence regarding a particular individual; and even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a "direct threat" by reasonable accommodation.


An employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future. However, an employer may refuse to hire, or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation.

Id. § 9.1, reprinted in 2 ADA Man. at 90:0571; see also 29 C.F.R. § 1630.2(m) app. at 410-11 (1992); State Division of Human Rights v. City of New York, 510 N.E.2d 799 (N.Y. 1987) (refusal to hire plaintiff who had spondylolisthesis but passed physical agility test as policeman violates state anti-discrimination law); Pecinovsky v. City of Lancaster, No. 90-C-296-C, 1991 WL 74140 (W.D. Wis. Feb. 14, 1991) (mere fear of future workers' compensation claim is not legitimate reason for refusing to hire). But cf. Frank v. American Freight Sys., 398 N.W.2d 797 (Iowa 1987) (refusal to hire upheld where testimony that hiring 49-year-old applicant as truck driver was 50-75% likely to result in injury).

237. See supra notes 61-62 and accompanying text for an explanation of the second injury fund. For example, in Pertee v. State Workmen's Compensation Comm'r, the prior
court has interpreted this safety defense narrowly; nevertheless, when it is applied to risk to the individual employee (as opposed to risk to other employees), it is inconsistent both with recent federal decisions which emphasize the personal autonomy of the worker in assuming such risks and with the express statutory language of the Americans with Disabilities Act (ADA).

Thus, the West Virginia court has endorsed employers’ use of defenses, particularly those involving claims of undue hardship and risk of harm to the individual, which can be used to validate decisions not to hire or reemploy people with work-related disabilities. This leaves open the question whether individuals with occupational injuries who are able to meet their prima facie burden will be excluded from employment as a result of the employer’s available defenses. Despite the strong language of both the Human Rights Act and the ADA, people with work-related disabilities may have a difficult time successfully asserting a right to employment or reemployment.

(d) Relationship of Workers’ Compensation and Disability Claims

The court’s apparent ambivalence toward aggressive enforcement of the Human Rights Act’s protection of handicapped workers has led to an unmistakable inclination toward the awarding of compensation benefits (instead of jobs) to people with work-related disabilities, even if they want to work. This can be seen in a number of ways. Indi-

employer testified that “although the claimant had been a good worker, he would not re-employ him because he did not want to jeopardize his compensation rates.” 255 S.E.2d 914, 916 (W. Va. 1979).


239. International Union v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). The court in Johnson Controls noted that “benign” motives of the employer may not justify actions which discriminatorily exclude protected individuals from jobs. Id. at 1204. The defense raised by Johnson Controls, based upon safety of pregnant women and their unborn children, received greater scrutiny than the “direct threat” defense appears to demand under current federal and state regulations promulgated under the disability discrimination laws.

240. The regulations promulgated by the EEOC recreated the risk of harm to self defense. See supra note 236. There will undoubtedly be litigation regarding the validity of the EEOC rule.

241. The court’s preference for the awarding of non-working benefits is a recurrent
individuals who are adjudged to be disabled under the liberal construction of the Workers’ Compensation Act are not necessarily considered disabled within the meaning of the Human Rights Act. Further, although stopping short of an explicit determination that disability discrimination actions are barred by the exclusivity provisions of the workers’ compensation statute, a majority of the court has articulated a distinct doctrinal preference for the granting of workers’ compensation indemnity benefits over the accommodation of injured workers at work. In Coffman, the majority made the following observation about the plaintiff:

[S]he became handicapped as a result of an injury sustained on the job during the course of her employment. In this regard, we are concerned as to why Coffman did not pursue a claim for workers’ compensation benefits beyond the 30-day period of temporary total disability. . . . We note that the intent of the legislature inherent in the enacting of the handicapped provisions of the West Virginia Human Rights Act was to assure equal opportunities for the handicapped in housing and employment. W. Va. CODE § 5-11-2. Thus, we cannot conclude that the legislature intended the handicapped provisions of the West Virginia Human Rights Act as an alternative source of compensation for injuries sustained on the job.

theme. In addition to the cases cited in this section relating to workers’ compensation benefits and claims under the Human Rights Act, the court has also held that claims for unemployment benefits are to be more liberally analyzed than those involving retaliatory discharge. “[T]he statutory standard applicable in unemployment compensation claims is more liberal in accordance with the beneficial purposes underlying unemployment security law and is not applicable in a constructive discharge case.” Slack v. Kanawha County Hous. & Redevel. Auth., 423 S.E.2d 547, 558 (W. Va. 1992).

242. See supra notes 203-09 and accompanying text.

243. W. Va. CODE § 23-2-6 (Supp. 1992); W. Va. CODE § 23-2-6a (1985). There are two exceptions to exclusivity of the workers’ compensation remedy in West Virginia. First, employer may be liable at common law when the injury is the result of “deliberate intention” as defined in W. Va. CODE § 23-4-2(c) (Supp. 1992). Second, employee injuries or illness arising from an employer’s negligence which are not within the scope of the workers’ compensation statute may lead to recovery at common law. Jones v. Rinehart & Dennis Co., 168 S.E. 482 (W. Va. 1933) (civil action can be maintained for silicosis where statute makes no provision for compensation). This latter exception has declined in importance as the scope of compensable diseases has expanded.


245. Id. at 7 n.16.
The implication is obvious: the employee should go get workers’ compensation benefits instead of insisting on a job.\(^{246}\) In a dissent, Justice Miller, joined by Justice McGraw, took issue with the majority’s refusal to extend protection under the Human Rights Act to Coffman because of the availability of a workers’ compensation remedy.\(^{247}\) As Justice Miller noted, workers’ compensation exclusivity provisions have rarely been used to bar actions under discrimination laws.\(^{248}\) Notably,}

\(^{246}\) There is a troubling historical note to be added here. Following this decision, Coffman did indeed apply for additional compensation benefits. Her attempt to increase her permanent partial benefits or to obtain a permanent total disability award failed. She received a final permanent partial disability rating of 15% from the commissioner. Her employer’s refusal to continue to employ her was based upon her physical impairment. Nonetheless, the hospital contested her claim for increased benefits. Despite the fact that Dr. Eric Radin, Chairman of the Department of Orthopedics, West Virginia University School of Medicine, recommended a permanent partial disability rating of 25%, both the commissioner and the Workers’ Compensation Appeal Board declined to increase the award or to grant her a life award. The Supreme Court of Appeals refused to grant her petition for review in her workers’ compensation case. Interview with Jacques Williams, Coffman’s attorney (July 31, 1992). Like Coffman, Teets was granted a 15% permanent partial disability award and was denied permanent total disability benefits by the commissioner and Appeal Board; the Supreme Court of Appeals declined to review. Interview with James McLaughlin, Teets’ attorney (Aug. 15, 1992).

\(^{247}\) The majority’s opinion seems to suggest that the legislature did not intend to accord handicapped workers any rights if they were injured on the job. . . . It is obvious that workers’ compensation benefits relate to the employee’s injuries and have nothing to do with his status under the handicap law. This latter provision is designed to prevent discrimination against a person who has a handicap. The potential for handicap discrimination occurs when the injured employee is well enough to return to work and has a handicap as defined in the Act. Coffman, 386 S.E.2d at 13-14 (Miller, J., dissenting) (citations omitted).

the majority's apparent preference for workers' compensation over human rights remedies appears to be limited to claims of handicap discrimination. Without any concern for the potential duality of remedies, the court had previously found sexual harassment to be actionable under both the Workers' Compensation Act and the Human Rights Act.250

Evidence that is considered probative of disability under the Workers' Compensation Act may not be relevant to proving that an individual has a handicap under the Human Rights Act. For example, Chico Dairy's failure to promote Terrah Alfred to store manager because of facial disfigurement was not discriminatory under the Human Rights Act.251 In contrast, facial disfigurement which impaired opportunity for future employment may strengthen claims for workers' compensation benefits.252 In other words, the court has adopted a far more expansive view of what contributes to disability under the Workers' Compensation Act than under the Human Rights Act.

The liberality extended to proof of disability under the Workers' Compensation Act is not applied to proof of discrimination under the Human Rights Act. In claims under the Workers' Compensation Act, barring recovery under Rehabilitation Act, noting FECA is a comprehensive scheme specifically designed to provide the exclusive and preemptive remedies for all work-related injuries for those employees it covers); Schachtner v. Department of Industry, Labor and Human Relations, 422 N.W.2d 906 (Wis. Ct. App. 1988) (holding workers' compensation statute which provided comprehensive rights to injured employees to be rehired after occupational injury is the exclusive remedy for work-injured employees); see Deborah A. Ballam, The Workers' Compensation Exclusivity Doctrine: A Threat to Workers' Rights Under State Employment Discrimination Statutes, 27 AM. BUS. L.J. 95 (1989).


250. Westmoreland Coal Co. v. West Virginia Human Rights Commission, 382 S.E.2d 562 (W. Va. 1989) (sexual harassment is actionable as gender-based discrimination under the provisions of the Human Rights Act). There was no indication that either the exclusivity doctrine or election of remedies would bar either action. Since by definition discrimination cases involve intentional acts, exclusivity would not bar these actions.


the "rule of liberality" extends to both statutory construction and to weighing of the evidence, the commissioner is not entitled to disbelieve expert medical evidence "exclusively upon subjective evaluation of credibility." The claimant's evidence in a compensation claim is to be given the "benefit of all reasonable inference" unless the employer can demonstrate that the evidence is unreliable, technically flawed, the product of intentional misrepresentation, or clearly attributable to an identified nonoccupational medical problem. The court has therefore accepted the medical opinions of claimants' physicians in order to extend the benefit of doubt to claimants when the degree of medical impairment is at issue. In contrast, in claims involving disability discrimination, the trier of fact is, like in other civil matters, free to reject credible expert evidence submitted by the plaintiff in favor of evidence submitted by the employer's physicians.

This dichotomy between the judicial approach to disability under the Workers' Compensation Act and to handicap under the Human Rights Act is the result of at least three interrelated factors. First, as Justice Miller observed in his dissent in Coffman, the two statutes are designed for different purposes. In order to meet the goals of an adequate compensation program to provide speedy and adequate benefits to injured people, presumptive rules regarding the weighing of conflicting medical evidence are essential. The difference in purpose reflects, however, our preference for the awarding of benefits outside the employment relationship to more direct intervention in the employment relationship itself.

255. Javins, 320 S.E.2d at 130.
256. Id.
257. For example, despite the fact that Joyce Marcum's doctor said that she was capable of working in the mines without significant adverse consequences, the court concluded that this opinion could be rejected in favor of the opinion of the employer's expert. Ranger Fuel Corp. v. West Virginia Human Rights Comm'n, 376 S.E.2d 154, 160 (W. Va. 1988).
Second, the remedial nature of the compensation statute is, as the court has observed, linked to the exclusivity of workers’ compensation as the method of compensating victims of workplace accidents. The “quid pro quo for the employees” is the guarantee that they will be afforded rapid “and proper restitution for injuries.”259 In other words, because of the limitation of employer liability, the employee should receive the benefit of the doubt in compensation matters. Obviously, no equivalent “quid pro quo” exists to bolster the claims of plaintiffs in disability discrimination matters.

Third, the Human Rights Act requires the court to intervene directly into the employment relationship. By doing so, the court must restrict managerial autonomy and may impact on the rights of other workers. Although willing to take this risk in situations involving other forms of discrimination, the court appears less willing to do so in claims of disability discrimination. This reluctance, which can be seen most clearly in the majority opinion in Coffman, is bolstered by the knowledge that monetary benefits will, at least in theory, be readily available for those displaced from work. The irony of Dorothy Coffman’s case is, of course, that this was not in fact true.260

(e) The West Virginia Court’s Treatment of Disabled Workers: a Summary

The court’s interpretation of the Human Rights Act can hardly be seen as assisting injured workers to return to work. In every disability discrimination case reviewed by the court, the worker has asserted both a strong desire to work261 and a capability of working.262 As a

259. Javins, 320 S.E.2d at 131.
260. See supra note 246.
261. Teets v. Eastern Assoc. Coal Corp., 421 S.E.2d 46, 49 (W. Va. 1992) (“She was not certain she could do all the requirements of her job, but was willing to try.”); Chico Dairy Co. v. West Virginia Human Rights Comm’n, 382 S.E.2d 75, 84 (W. Va. 1989) (“the complaint in the present case . . . alleges the unimpaired ability to do the work in question”); O’Dell v. Jennmar Corp. of W. Va., 400 S.E.2d 288, 293 (W. Va. 1990) (“appellant testified that his back did not prohibit him from driving trucks for a subsequent employer”) Casteel v. Consolidation Coal Corp., 383 S.E.2d 305, 307 (W. Va. 1989) (plaintiff “could work through the pain because he was a stoic”); see also Ranger Fuel Corp. v. West Virginia Human Rights Comm’n, 376 S.E.2d 154 (W. Va. 1988); Davidson v. Shoney’s Big
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practical matter, this is not surprising: individuals seeking jobs would logically try to convince potential employers that they can do the job; job applicants are, after all, seeking jobs, not potential lawsuits. However, workers who insisted that they are perfectly able to work, despite a physical impairment, were denied protection under the Human Rights Act. Ironically, the more eagerly the plaintiffs sought work—and the more effectively they argued that they could do the work because they were not seriously impaired—the less likely they were to receive protection under the Act.263 Moreover, the longer an individual stays off work as a result of a work-related injury, the more likely the court will view the handicap as sufficiently serious to merit protection under the disability laws. This, of course, has troubling implications for workers’ compensation claims.264

Boy Restaurant, 380 S.E.2d 232 (W. Va. 1989); Benjamin R. v. Orkin Exterminating Co., Inc, 390 S.E.2d 814 (W. Va. 1990). In six of these seven cases (all except O’Dell), the decision leaves little doubt that adverse employment action was taken because of the individual’s disability. In Davidson, Benjamin R., and Casteel, the court rejected the employer’s defenses and upheld the plaintiff’s claim for employment. In Teets, the matter was remanded for further development of defenses. The plaintiffs’ claims were rejected in Ranger Fuel Corp., Chico Dairy Co. and O’Dell. Coffman attempted to continue working after her occupational back injury, instead of seeking compensation benefits, but the court upheld her discharge.

262. In only Coffman and Teets did the plaintiffs seek any accommodation. Coffman’s employer ultimately prevailed in its refusal to extend continued accommodation to her. In Teets, the court only resolved the question of whether she was handicapped and remanded the case, leaving open issues relating to the employer’s defenses. 421 S.E.2d at 52.

263. In fact, the decisions in cases in which the plaintiff did not demand accommodation led employers to argue in later cases that the plaintiff could not be a qualified handicapped person unless she demanded accommodation. This view was, however, rejected. Casteel v. Consolidation Coal Corp., 383 S.E.2d 305, 308 (W. Va. 1989).

264. For example, the court in Teets specifically notes that she was absent from work for two years as evidence of the seriousness of her disability. 421 S.E.2d at 52. In contrast, the decision in Coffman encouraged her to pursue compensation benefits; she attempted to work, though in pain, and only collected temporary total disability benefits for one month. 386 S.E.2d at 2. The issue of absence is indeed a troubling one. On the one hand, inability to show up for work may not require accommodation under the discrimination laws. Wimbley v. Bolger, 642 F. Supp. 481 (W.D. Tenn. 1986), aff’d, 831 F.2d 298 (6th Cir. 1987). On the other hand, longer duration of an impairment may provide stronger proof that the individual suffers from a significant handicap, as occurred in Teets. Temporary impairments are generally not considered disabilities. 29 C.F.R. § 1630.2(j) (1992). The EEOC observed in its Interpretive Guidance to this rule: “Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken
As long as the court applies a more expansive definition of disability for purposes of qualifying for disability benefits under the Workers’ Compensation Act than the definition of handicap under the Human Rights Act, disabled workers may be encouraged to seek workers’ compensation benefits rather than work. This is unfortunate, since the plaintiffs in the West Virginia handicap discrimination cases were primarily characterized by their fierce desire to continue working. The lack of success of some of these workers can only serve to discourage others from seeking to work and therefore to increase the costs of the workers’ compensation program.

Obviously, there are many points at which a court may decide that an expansive approach to disability discrimination is not attractive. In view of the inevitable insistence that these cases be decided “on their individual facts,” there is perhaps an understandable reluctance to burden employers with ex post facto damages when they may have attempted to comply in good faith with the statute. Case-by-case analysis tends to provide little future guidance to employers.

Of course, workers’ compensation claims are also assessed on a case-by-case basis. In these cases, however, fault is not an issue; there is no need for a finding of intentional malfeasance on the part of the employer; the costs have been assessed in advance through the payment of insurance-type premiums; and, most significantly, no meddling

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leg heals improperly, the ‘impact’ of the impairment would be the resulting permanent impairment.” *Id.* app. at 407-09. This makes sense from the vantage point of disability discrimination law. Viewed in the context of workers’ compensation law, however, the implication is that the employee who returns to work earlier will not be protected under the discrimination laws if s/he needs accommodation. Finally, longer absence may result in termination under absence control policies; such a discharge involving individuals who were off work due to an occupational injury would have been upheld under Yoho v. Triangle PWC, Inc., 270 S.E.2d 178 (W. Va. 1980), and would still be legal today if undertaken pursuant to the seniority provisions of a collective bargaining agreement. W. Va. CODE § 23-5A-3 (Supp. 1992). Thus, while longer absence may be justification for discharge under the workers’ compensation laws, it will be evidence of membership in the protected class under the Human Rights Act and ADA.

is required in the employer's managerial autonomy or in the entitlement of other employees to jobs. It is perhaps not surprising that there has been a divergence between the liberality applied by the court when assessing a case for disability benefits (that do not impinge on managerial control) and the reluctance of the court to uphold a claim of disability discrimination. The result, unfortunately, may be a system which fails to support workers who want to return to work after an occupational injury.

3. Right to a Job Under Section 23-5A-1 of the West Virginia Code

Although workers' compensation benefits became available to workers injured on the job in most states before 1920, little attention was focused on employment rights of injured workers until recently. In keeping with other inroads on the employment-at-will doctrine, in the early 1970s states began to provide protection to workers who claimed that they were discharged in retaliation for seeking compensation benefits. In 1978, the West Virginia Legislature followed this trend and amended the Workers' Compensation Act to prohibit discrimination by employers against workers' compensation beneficiaries. For the first time, the compensation statute was extended to address employment issues surrounding claims for benefits arising out of occupational injuries. Soon thereafter, the Supreme Court of Appeals was asked in *Shanholtz v. Monongahela Power Co.* to address questions arising out of an employee's discharge allegedly in retaliation for pursuit of workers' compensation benefits. Although Shanholtz was terminated prior to the effective date of the new statute, the court found the new statutory provision to be a codification of broader existing state law. The court thereby extended the relatively new public policy retaliatory discharge cause of action to cases involving workers' compensation discrimination claims.

267. 270 S.E.2d 178 (W. Va. 1980).
268. Id. at 183.
Yoho v. Triangle PWC, Inc.\textsuperscript{270} was the first case arising under the new statutory provision to reach the court. It was undisputed in Yoho's case that she was discharged pursuant to a provision in the collective bargaining agreement that eliminated seniority rights for employees absent from work for longer than one year; in practice, the effect of this provision had always been to require discharge.\textsuperscript{271} The court did not question the severity of Yoho's injury or the justification for her absence. In fact, the court specifically noted that she had received a "substantial settlement"\textsuperscript{272} in a separate action against her employer in which she had claimed that the injury was the result of deliberate and intentional acts of the employer within the meaning of the Mandolidis provisions\textsuperscript{273} of the Workers' Compensation Act. In his opinion, Justice Brotherton noted that "the [c]ourt cannot help but feel sympathy for a woman who suffered a physically and emotionally painful injury which caused her to be off work for the last twelve months."\textsuperscript{274} Although "this Court has consistently fought to aid the injured employee, we will not go so far as to give an advantage to the injured employee over the other employees."\textsuperscript{275} In language echoing its discomfort in disability discrimination cases, the court concluded that, without specific legislative instructions, it "must exercise restraint"\textsuperscript{276} in expanding any rights under the discrimination provisions of the workers' compensation statute. The facially neutral provision of the collective bargaining agreement which mandated Yoho's discharge was not against public policy or violative of the statutory provision: Yoho would have been fired "just as quickly under the collective bargaining agreement if she had never applied for those benefits."\textsuperscript{277}

\begin{flushleft}
\textsuperscript{270} Virginia court had endorsed a limited common-law exception to the employment-at-will doctrine when discharges contravened a substantial public policy. Harless v. First National Bank of Fairmont, 246 S.E.2d 270 (W. Va. 1978).
\textsuperscript{272} Id. at 207.
\textsuperscript{274} Yoho, 336 S.E.2d at 209.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
\textsuperscript{277} Id. at 210.
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Again, as it did in order to correct the narrow judicial interpretation of the Human Rights Act, the legislature intervened and amended the statute to expand the protection for temporarily disabled workers.\(^{278}\) The court has not yet reviewed any cases under this new statutory language.\(^{279}\) Although the legislature clearly indicated that the court's interpretation of \textit{Yoho} was not what was intended, the case law under the 1978 statutory language is nevertheless instructive with regard to the court's general view of employment rights of work-injured individuals.

Many other states have also developed either common law or statutory protection for employees who receive, or are eligible to receive, workers' compensation benefits.\(^{280}\) In cases involving discharge for absences related to work-related injuries, most (but not all) jurisdictions have reached results similar to \textit{Yoho}.\(^{281}\) Causes of action arising

\(^{278}\) \textsc{W. Va. Code} § 23-5A-3 (Supp. 1992). The 1990 amendments to the Workers' Compensation Act are discussed at greater length in the next section of this Article.

\(^{279}\) Although it has taken note of the passage of the amendment, Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717, 723 n.10 (W. Va. 1991), and has noted that the new provision is to be applied prospectively only. Pannell v. Inco Alloys Int'l, Inc., 422 S.E.2d 643, 646-47 (W. Va. 1992).


under statutes like section 23-5A-1 of the West Virginia Code have generally been predicated upon a finding that the employer intentionally retaliated against the employee because s/he sought compensation benefits. Retaliation for filing workers’ compensation claims was endorsed as a cause of action, not to extend reemployment rights to injured workers, but rather to guarantee that they would not be intimidated and thereby denied access to monetary benefits. Therefore, employer reliance on neutral policies not specifically directed at eligibility or availability of compensation is not of concern to these courts.

Those jurisdictions which have decided that discharge for absences related to work-related injuries are inherently retaliatory have taken a broader view: that the underlying policy is to protect work-injured employees, not simply to protect their access to benefits. It was this minority view that the West Virginia court rejected in Yoho. To the injured worker, the claim that is being made is essentially that but for the occupational injury, s/he would still be employed; therefore, any discharge related to the injury is punishment for the injury itself. The existence of a neutral absence policy as justification for the discharge is persuasive only if the courts’ focus is on the intent of the employer to limit the availability of workers’ compensation benefits. The West Virginia court adopted the more narrow view, apparently to avoid establishing any precedent that would place occupationally-injured employees in a different category, as employees, from those whose absences were caused by other factors.


283. Professor Mark Rothstein characterizes this as follows: “It is ironic that an employee may not be discharged for filing a workers’ compensation claim, but the employee may be discharged, in effect, for becoming sick or injured in the first place.” Mark A. Rothstein, A Proposed Model Act for the Reinstatement of Employees Upon Recovery from Work-Related Injury or Illness, 26 HARV. J. ON LEGIS. 263, 281 (1989).
More recently, in Powell v. Wyoming Cablevision, Inc., the court clarified its view of workers’ compensation-related discharges arising under the 1978 statutory language which involved neutral absence control policies. In Powell, the policy was not reduced to writing. The employee was terminated after a four month absence, during which he collected temporary total workers’ compensation benefits. The Wyoming County jury, which heard the case, determined that Powell had been retaliated against for filing a compensation claim. Finding guidance in the proof schemes of other types of discrimination cases, the court held that the employee could rely on inferential proof to establish a prima facie case that the filing of a workers’ compensation claim was a substantial factor in the employer’s decision to discharge. Employers who engage in discriminatory practices, including retaliation for the filing of workers’ compensation claims, “may be expected to seek to avoid detection.” Since they are “vested with considerable discretion in the hiring and firing of their employees so as to maintain an efficient and productive work force,” it may be difficult for an employee to demonstrate retaliatory motive. Therefore, use of the proof mechanisms developed in race, age, and gender discrimination cases, which allow the plaintiff to rely on inferences in establishing a prima facie case of discrimination, is appropriate here as well.

284. 403 S.E.2d 717 (W. Va. 1991). This decision includes a comprehensive review of judicial decisions in West Virginia and elsewhere in which an injured worker challenged a discharge for absence associated with a period of temporary total disability resulting from an occupational injury.
285. Id. at 721.
286. Id. (quoting Axel v. Duffy-Mott Co., 389 N.E.2d 1075, 1077 (N.Y. 1979)).
287. Id.
288. Id. at 720. The West Virginia court first adopted the inferential method of proof articulated in federal race discrimination cases in cases under the Human Rights Act, W. VA. CODE § 5-11-1 to -19. (1990 & Supp. 1992). Shepherdstown Volunteer Fire Dep’t v. West Virginia Human Rights Comm’n, 309 S.E.2d 342 (W. Va. 1983). The court later developed a generic framework for the plaintiff’s prima facie case. Conoway v. Eastern Assoc. Coal Corp., 358 S.E.2d 423 (W. Va. 1986). It is this latter framework which was then adapted to require plaintiffs in workers’ compensation retaliatory discharge cases to prove that “(1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers’ Compensation Act, W. Va. CODE § 23-1-1 to -18 (1985 & Supp. 1992); and (3) the filing of a workers’ compensation claim was a significant factor in the employer’s decision to discharge or otherwise discriminate against the employee.” Powell, 403 S.E.2d at
Once a plaintiff has established a prima facie case, the employer must "prove a legitimate, nonpretextual, and nonretaliatory reason for the discharge." Legitimate reasons for discharge might include, for example, specific employee misconduct or general business conditions, such as layoffs which involved employees who had not filed compensation claims.

The court in Powell acknowledged that the more difficult cases involve discharges in which the employer alleges that the worker cannot resume employment because of his or her disability or because of a lengthy injury-related absence. Written neutral absence control policies, such as the one in Yoho, shield the employer from liability. Where the policy is not written, and may have been arbitrarily or discriminatorily directed at workers' compensation-related absences, the court will look to such factors as how quickly the employer terminated the employee after compensation benefits were sought. In essence, the decision in Powell tells us that the mere allegation of a neutral absence policy would not automatically shield an employer from liability. On the other hand, nondiscriminatory application of a neutral policy, as in Yoho, could, in the court's reasoning, still justify a discharge. As the court noted in Powell, however, the 1990 amendments to the Workers' Compensation Act may change this result.

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289. Note that the court indicates that the employer must prove, not simply articulate, a legitimate reason for its actions. Powell, 403 S.E.2d at 722; see also Pannell v. Inco Alloys Int'l, Inc., 422 S.E.2d 643 (W. Va. 1992). This is in contrast to the burden of production (not proof) which employers are generally assumed to have to meet in discrimination cases. See, e.g., Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Comm'n, 309 S.E.2d 342, 352 (W. Va. 1983); West Virginia Inst. of Tech. v. West Virginia Human Rights Comm'n, 383 S.E.2d 490, 495-96 (W. Va. 1989); 2 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 50.10, at 10-3 (1992). But see Conaway v. Eastern Assoc. Coal Corp., 358 S.E.2d 423, 430 (W. Va. 1986).


291. Powell, 403 S.E.2d at 722; see 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 68.36(d), at 13.188 (1990 & Supp. 1991).

292. Powell, 403 S.E.2d at 722 & n.10.
The court continued to struggle in Powell with the fate of employees who have been severely injured at work. "Obviously," wrote Justice Miller for the unanimous court,

[W]here the employee has suffered a severe injury that forever limits the employee's ability to perform his accustomed work, the employer should not be penalized for discharging the employee. Where the injury is less serious, further consideration must be given to what is a reasonable recovery period viewed again with the prospect of when the employee will be able to perform his accustomed work. In this regard, the employer is entitled to show that it is economically unfeasible to keep the job open or to hire a temporary substitute.²⁹³

Again, this language echoes the concerns expressed in the disability discrimination cases. Here, the injury must be not too severe to justify reemployment; if the injured worker's ability to perform his or her customary work is undermined by an injury, s/he is not protected under the statute. In disability cases the injury must result in impairment which substantially limits a major life function; extended absence may bolster claims that the individual is disabled. But the handicap must not be so severe that it would prevent the worker from performing the essential functions of the job for which s/he was hired. Unlike its approach to claims for compensation benefits, the court has not successfully developed a consistent mechanism for protecting the reemployment rights of injured workers. The judicial interpretation of section 23-5A-1 of the West Virginia Code, softened but not eliminated in Powell, is further evidence of the court's reluctance to intervene directly in the employment relationship.

C. Administration of the Workers' Compensation Fund: Erecting Barriers to Returning to Work²⁹⁴

Although the Supreme Court of Appeals must set the legal standards for both claims for compensation benefits and discrimination

²⁹³. Id. at 723.
²⁹⁴. The information in this section is drawn largely from my own personal observations while I served as Workers' Compensation Commissioner (1989-90) and from informal conversations with attorneys, employers, claimants, and members of the staff of the Workers' Compensation Fund from 1989 to the present.
charges, it is the Workers' Compensation Fund which actually makes the determinations in the vast majority of claims involving occupational injuries and disabilities.\footnote{For example, in calendar year 1986, 75,967 claims were filed; 24,877 protests (i.e., administrative appeals of some ruling on a claim) were acknowledged (i.e., filed and docketed); 2,100 appeals were filed with the Appeal Board, and 421 petitions were filed to the Supreme Court of Appeals. \textit{See Memorandum from Emily A. Spieler, Workers' Compensation Commissioner, to Richard Neely, Chief Justice, West Virginia Supreme Court of Appeals, Attachment A (Apr. 4, 1990) (on file with author).}} The commissioner\footnote{All initial orders on claims are issued over the name of the commissioner. Obviously, the commissioner herself does not make these thousands of decisions; instead, decisions are made by employees of the Fund who then add the commissioner's signature (with a rubber stamp) to the bottom of the orders. Until 1991, all post-protest orders also issued over the commissioner's name. Since 1991, post-protest decisions are made through the administrative law judge system. \textit{W. VA. CODE §§ 23-5-1 to -6 (1985 & Supp. 1992).} In view of the fact the commissioner does not personally make these administrative decisions, I have chosen to refer to them as having been made by the Fund.} must review thousands of claims each year,\footnote{\textit{See supra} note 106 for data regarding numbers of claims filed and adjudicated.} each claim involves myriads of issues regarding the allowance of wage replacement, permanent disability, and medical benefits. Both claimants and employers complain bitterly about the decisions made on claims at the administrative level. They can match each other in the telling of horror stories, piling one narrative on another. Claimants and their representatives talk of claimants who were denied benefits who should have received them under the legal precedents articulated by the Supreme Court of Appeals; often these people are destitute as the result of the apparent failure of the Fund to award benefits due and owing. Employers tell stories about claimants who have bilked the system by fakering the source, existence, or extent of disabilities.

In fact, the workers' compensation apparatus has been designed only to collect premiums from employers and pay out monetary benefits to claimants and health care providers. The administration of the Workers' Compensation Fund has displayed a reluctance to encourage or assist injured workers' claims for continued employment. Employers charge that the Fund actually discourages workers from returning to work; employees charge that it fails to help them when they are pressured inappropriately to return to work "or else."
Despite the arguments on these issues, it is important to remember that the vast majority of injured workers do return to work promptly after an injury.\footnote{298. See supra note 107.} The issue of how to approach the claims of those claimants who are off work a longer period of time is both difficult and troubling. It is, of course, these claims, which involve more serious injury or greater duration of payments, which present the largest cost to the Fund.\footnote{299. For example, 544 new permanent total disability awards made to employees of employers who subscribed to the Fund “cost” the Fund $141 million in 1991 or approximately one-third of the total charges incurred in that year. For a discussion of actuarial cost and charges, see supra note 33.} Thus, while relatively small in number, they are often the primary focus of anecdotes, administrative concerns, and litigation.\footnote{300. There are, of course, exceptions to this. There is, for example, an inexplicable amount of litigation over entitlement to benefits for occupational noise induced hearing loss, despite the fact that almost three quarters of these awards are for partial disability of less than 10%. FUND ANN. REP. 10 (1991).}

It is true that the traditional handling of claims has sometimes encouraged claimants to stay off work and has discouraged the final closure of even minor claims. The Fund has, perhaps unwittingly, erected administrative barriers which make it more, rather than less, difficult for workers who want to return to work to do so. Four examples of administrative functioning serve to illustrate this pattern.

First, the Fund has put little energy or thought into vocational rehabilitation efforts for injured workers. Despite clear statutory direction to provide a wide range of rehabilitation assistance,\footnote{301. W. VA. CODE § 23-4-9 (Supp. 1992). Prior to the 1990 amendments, this section of the code provided rehabilitation benefits to individuals who had sustained a permanent disability or sustained injuries likely to result in permanent disability, to a maximum cost of $10,000 per injured employee. See discussion infra part III.D. Temporary total disability benefits were to be paid to any individual undergoing rehabilitation, without regard to the usual 208 week maximum for such benefits. The 1990 amendments, substantially expanded the scope of rehabilitation. No major administrative change has been made in the delivery of rehabilitation services since the 1990 amendments took effect. See discussion infra notes 358-69 & 393-419 and accompanying text.} no aggressive program for rehabilitation has ever been successfully instituted. It is widely believed that early intervention in claims which may involve lengthy disability is essential to successful rehabilitation.\footnote{302. See, e.g., JOHN A. GARDNER, IMPROVING VOCATIONAL REHABILITATION OUT-
Nevertheless, few West Virginia claimants have received active assistance from the Fund in returning to work, either with their pre-injury employer or elsewhere, until they have been temporarily disabled for substantial periods of time, often years. During the period from 1985 through 1988, the limited rehabilitation efforts of the Fund were largely dismantled; no one (other than the rehabilitation specialists employed by the Fund) appears to have complained. A major interagency agreement reached in 1990 between the Fund and the Division of Vocational Rehabilitation Services\(^{303}\) has never been fully implemented.

Rehabilitation can take many forms. In its broadest sense, it is any program which assists a claimant to regain functional capacity or to return to employment, using either medical or vocational rehabilitative services.\(^{304}\) Much debate in workers' compensation circles focuses on

\(^{303}\) COMES: OPPORTUNITIES FOR EARLIER INTERVENTION xiv (1988) (this report for the Workers' Compensation Research Institute concludes: "The results suggest that encouraging employers and insurers to evaluate cases for vocational rehabilitation not later than six months after injury can yield benefits for workers, employers, and insurers. These benefits far exceed the additional costs incurred."); see also JOHN A. GARDNER, WORKERS COMPENSATION RESEARCH INSTITUTE, VOCATIONAL REHABILITATION IN WORKERS' COMPENSATION 55-57 (1985).

\(^{304}\) Rehabilitation Services Cooperative Agreement Between the Bureau of Workers' Compensation and the Division of Rehabilitation Services signed May 23, 1990 by Commissioner Emily A. Spieler and Director John M. Panza and approved by Taunja Willis Miller, Secretary, Department of Health and Human Resources on May 25, 1990. The Agreement provided: "The WCF and DRS agree that careful and aggressive case management, together with early identification of individuals needing rehabilitation services and appropriate plan design, form the core of a successful rehabilitation program. Rehabilitation staff of the WCF and DRS will therefore supervise and manage cases so that regular contact is maintained with the claimant, the employer and the injured employee's treating physician or other providers." Id. at 4. This Agreement incorporated a written agreement executed between the same parties on July 31, 1989, which provided in part that "the Division of Rehabilitation Services agrees to assign a minimum of twenty-five (25), or more if the need should be shown, rehabilitation counselors as Workers' Compensation WCF specialists. These rehabilitation counselors shall have appropriate education and/or prior work experience." Id. The agreement further set case limits for individual counselors and parameters for the provision of services. It is my understanding that additional counselors have been added to provide DRS services to workers' compensation claimants, but that they are not assigned full time to these duties.

\(^{304}\) For general discussions regarding rehabilitation in workers' compensation, see GARDNER, VOCATIONAL REHABILITATION IN WORKERS' COMPENSATION, supra note 302;
the appropriate goals for rehabilitation within the workers' compensation context. For example, employers regard individuals who are assisted in finding light duty work, even if the work is not generally available, as having been rehabilitated; that is, that their claim for on-going benefits or assistance should terminate. The worker, on the other hand, may be unemployable as a result of the injury if s/he loses the particular light duty job, which may have been provided only in order to terminate the worker's temporary total disability benefits. There is therefore a continuing tension regarding the extent to which seriously injured workers should receive more complete retraining in order make a competitive and complete reentry into the labor market.

This tension is reflected in the West Virginia rehabilitation program. There is little assistance provided to claimants to return to work at their original jobs or with their pre-injury employer; generally, these arrangements are made directly by the parties without any programmatic intervention. On the other hand, Fund employees are skeptical of attempts by other rehabilitation specialists to provide extensive retraining for claimants, particularly when that retraining would result in a significant change of status for the employee. Thus, claimants who were employed, for example, in mining or manufacturing jobs, who are no longer able to perform manual labor, and who might otherwise qualify for permanent total disability awards, encounter bureaucratic resistance to suggestions that they attend college programs that would


305. See 1C ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 57.12(d), at 10-47 (1992); Id. § 57.35, at 10-247.

306. In general, the mission of federally funded state rehabilitation programs, like the Division of Rehabilitation Services, is to provide rehabilitation services which maximize the their clients' potential. Workers' compensation programs, in contrast, focus on the return of the injured worker to a reasonably equivalent position to that which s/he had prior to the injury. This difference in mission creates a tension: rehabilitation specialists often send clients to formal educational programs in school in order to improve their entire life status; workers' compensation specialists, on the other hand, are resistant to such training programs because they are expensive and do more than is really required—they change the status of the injured worker rather than restoring him or her to pre-injury status. GARDNER, VOCATIONAL REHABILITATION IN WORKERS' COMPENSATION, supra note 302, at 26-27.
allow them to make a complete career change. In view of the negative association between poor labor market conditions and reemployment of previously injured workers, a phenomenon which is particularly evident in southern West Virginia, this resistance may actually result in increased financial liability for the Fund.307

Everyone gives lip service to rehabilitation. But significant distrust clouds rehabilitation efforts. Claimants often view the active participation of an employer (or employer’s counsel) in the rehabilitation process as proof that rehabilitation assistance is being provided only for the purpose of limiting liability for on-going compensation benefits. Employers sometimes offer limited light duty jobs and then resist any efforts to expand the employment possibilities for their injured employees, or fail to continue to comply with the employee’s physical restrictions, once s/he has accepted the job. Employers, on the other hand, see any resistance to rehabilitation as proof that the injured worker wants only to maximize eligibility for benefits, not to return to work. The end result of the Fund’s approach to rehabilitation is that workers receive monetary benefits but only rarely receive financial or logistical support from the staff of the workers’ compensation program if they want to return to work.

Second, the structure of the litigation system has provided little assistance in defining or expanding efforts which might help injured workers return to work. The adversarial nature of the system means that both employers and claimants seek the assistance of lawyers. The fee structure for the payment of lawyers encourages litigation, both because it results in increased hourly fees for defense counsel and because it often results in increased awards, and therefore increased fees, for claimants’ counsel.308 These problems are compounded by

307. In response to the enormous costs of permanent total disability awards, it seems obvious that one focus should be on significant retraining efforts. Political proposals, however, focus instead on redefining eligibility standards for life awards, in order to eliminate Posey/Cardwell awards which are made to odd lot workers—those who are displaced and unemployable as a result of a combination of factors.

308. Claimants’ attorneys fees are capped at 20% of an award to a maximum of 20% of 208 weeks of benefits. W. VA. CODE § 23-5-5 (1985). Claimants’ attorneys have been the subject of scrutiny by the Committee on Legal Ethics of the State Bar for attempting to maximize fees. E.g., Committee on Legal Ethics of the West Virginia State Bar v.
traditional legal specialization; historically, there has been a complete bifurcation between the members of the bar who provide representation on workers’ compensation claims and those who represent employees and employers in employment-related matters.

 Unlike personal injury cases, workers’ compensation claims generally involve benefits which are to be paid during the course of an ongoing employment relationship. The maximally beneficial result for the injured party may not, therefore, be in the largest cash transfer if the individual forfeits a right to return to work. However, since claimants’ attorneys’ fees rise with length of disability, there is simply no financial incentive for them to assist their clients to get back to work. Some treating physicians find their patients resistant to returning to work because of the advice of their attorneys. Attorneys, of course, charge that the physicians “don’t understand the system.” Physicians who do “understand the system” may be complicit, or forced to be complicit, in this disability maximizing behavior.309

 Attorneys for the parties show little interest in promoting rehabilitation efforts.310 The workers’ compensation bar has not generally as-

Coleman, 377 S.E.2d 485 (W. Va. 1988) (collection of fees in excess of 208 weeks by collection of 20% of accrued back award and 20% of future 208 weeks prohibited but deemed to have been done in good faith, therefore requiring restitution but not resulting in discipline); Committee on Legal Ethics of the West Virginia State Bar v. Wilson, 408 S.E.2d 350 (W. Va. 1991) (fraudulent alteration of medical reports, resulting in increased awards and, therefore, increased fees justifies annulment of law license). There is, of course, no cap on fees for employers’ attorneys. Draft rules governing fees for claimants’ counsel were in circulation as this article went to press.

309. In 1979 and 1980, a group of primary care physicians and attorneys, myself included, met on several Saturday afternoons at the Cabin Creek Medical Center in Dawes, W. Va., to discuss concerns about the tendency of the compensation system to promote disability. The physicians were particularly concerned that their patients, who told them that they wanted to return to work, were being discouraged from returning by their attorneys, the Fund, or their employers. Other patients, who were still unable to work, were under intense pressure from employers to return to work or risk losing their jobs. One physician related that he was regularly called by the company medical doctor for a major employer in the Kanawha Valley and told that a patient would lose his job if he did not return to work forthwith. Other than the sharing of concerns by the participants, nothing came of these meetings.

310. The role of attorneys is discussed at length in REHABILITATION TECHNIQUES AND CONCEPTS, supra note 130, at 31-34. The author describes a worst case scenario jurisdiction, which he hypothesizes does not exist. Although not entirely applicable to West Virginia, this
sisted in developing voluntary rehabilitation as an option. Claim-
ants' attorneys, whose financial interests do not mesh with encouraging early reemployment for their clients, often ignore rehabilitation options, regard them as outside the scope of their representation, or actually discourage rehabilitation. Employers have charged that the primary
description is nevertheless similar, in troubling ways, to what occurs here. It should be remembered that it is the injured worker him or herself who stands to lose the most:

In Jurisdiction A, attorneys regularly do everything they can to discourage the efficient and successful rehabilitation of workers. Plaintiff's lawyers take cases on the basis of a contingent percentage fee. Accordingly, they have an incentive to make the workers look as severely disabled as possible. If the worker is success-

fully rehabilitated he will appear to be less severely disabled, will receive lower benefits, and the attorney fee will be less. Moreover, plaintiff's attorneys see rehabili-
tation specialists as agents for employers and insurance companies. Any cooper-

ation with such a person might provide information to the employer or insurance carrier and accordingly is discouraged. Defense lawyers also discourage rehabilita-
tion efforts. If a rehabilitation specialist is involved, he may take control of the case away from the attorney and will probably suggest solutions to the problem which do not involve litigation or adversary proceedings where the defense attor-

ney is paid by the hour.

This is not to say that lawyers in Jurisdiction A do not "use" rehabilitation. Indeed, they frequently "use" it. Defense lawyers often hire rehabilitation counsel-
ors as part of a plan to obtain information from workers that they are not able to get through the plaintiff's attorney. They also use rehabilitation counselors to re-

quire workers to go through exhaustive but clearly fruitless job finding efforts in order to make the worker's situation more uncomfortable and to make the worker willing to take a smaller settlement. If this fails they use the rehabilitation counsel-
ors to devise "a job offer." The job offered is one in which no reasonable worker could ever hope to make a living. However, when the worker turns down this job offer this is used as evidence of his bad faith and benefits are terminated.

Plaintiff lawyers, on the other hand, "use" rehabilitation specialists as adver-
sary witnesses to help exaggerate the disability of the worker and emphasize the hopelessness of any eventual return to work. In other cases they use rehabilitation specialists to concoct a lengthy and costly rehabilitation program which they do not believe the worker will ever follow but which is likely to increase the settle-

ment value of the case.

Id. at 31-32.

311. Of course, there are exceptions on both sides of the bar.

312. I have frequently been told by claimants' attorneys that they plan to use the fail-
ure of the Fund to provide adequate rehabilitation services to their clients as evidence of their clients' entitlement to increased awards. Often, they lament the human cost in the Fund's inadequate efforts at rehabilitation. When I have asked whether they sought the rehabilitation efforts with equal zeal to the effort they have put into obtaining benefits, they sometimes react with surprise. It has simply not always occurred to them, even if they have serious concern for their client, to assist their client in obtaining rehabilitation. This may
exception to this appears to be when a rehabilitation program can be used to extend the availability of weekly benefits beyond the statutory maximum duration for temporary total disability payments. Employers’ attorneys distrust any intervention in the relationship with the pre-existing employer and ridicule a system of rehabilitation that has, or has been perceived to have, focused on expensive retraining programs rather than programs which provide fewer opportunities to claimants but might help them return them to work more quickly and more cheaply.

Third, the administrative operation of the Fund sometimes appears to discourage claimants in their efforts to return to work. Claimants receive temporary total disability benefits, generally without excessive delay and most return to work reasonably quickly after an injury. There are, however, many anecdotal reports of individuals who are afraid to return to work promptly because they might jeopardize their benefits; physicians, concerned about the ability of claimants to reinstitute benefits, delay releasing people to return to work until they are fairly certain that they will be able to perform the work without problem.

The perception that reinstituting benefits can be difficult is accurate. The administration of the program has consistently resisted the reinstatement of benefits for individuals who try to return to work and fail. Historically, the Fund simply refused to reinstate benefits if an individual tried to return to work and found s/he was unable to continue, unless the claimant could demonstrate aggravation or progression of the injury. In *Dunlap v. State Workmen’s Compensation Comm-*

explain the sparse number of reported cases involving rehabilitation benefits.

313. Partly in response to several decisions by the West Virginia Supreme Court of Appeals which required prompt adjudication of claims for temporary total disability benefits, a system was instituted which pays claims quite quickly if the submitted forms meet prima facie scrutiny.

314. *See supra* note 107. Almost 90% of claimants return to work within 120 days.

315. *See infra* text following note 335 for discussion about this point by physician members of the Workers’ Compensation Advisory Board in 1989.


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*WORKERS’ COMPENSATION*
missioner,317 the court ordered the Fund to allow claimants to reopen their cases in these situations. The agency also established a standard for reopening which required more evidence for reopening than for opening the initial claims. Again, the court intervened and ordered the adoption of a more lenient standard for evaluating reopening petitions.318 Despite the court's clear direction that encouraging an injured employee to try to return to work was "valid social policy,"319 the employees of the Fund have continued to resist reopening petitions. Although precise data are not available, both anecdotal evidence and interviews with Fund employees indicate that reopening petitions filed in these circumstances continue to be denied at a much higher rate than initial applications for temporary total disability benefits.

Fourth, the Fund is remarkably inefficient in closing claims on a permanent basis. Any delay in finality in claims has troubling implications for all parties by prolonging the life of the claim. This can be both psychologically damaging for claimants and financially damaging for the Fund or the self-insured employer. Two examples illustrate the increased financial liability of the Fund.

First, in cases involving "lost time" (temporary total) benefits, weekly benefits terminate when a worker has reached his or her maximum degree of improvement from the injury or when s/he returns to work.320 Delay in assessing a claim for permanent partial benefits after temporary total disability benefits end results in the continued payment of "non-awarded partial" (nap) benefits while claimants (who have reached their maximum degree of improvement but were unable to return to work) await final permanent partial evaluations.321 These

319. Dunlap, 232 S.E.2d at 345.
321. W. VA. CODE § 23-4-7a(e)(3) (Supp. 1992). In the past, an individual who was adjudged to have reached "maximum degree of medical improvement" (thereby terminating eligibility for temporary total disability benefits) sometimes could not return to work, either because s/he could not do the pre-injury job or because the job was no longer available. At this point, the claimant (who is entitled to receive, and should receive, vocational rehabilitation assistance, but rarely does) is left without any income at all. The closure of claims on a temporary total disability basis, combined with the delay in providing
"nap" benefits are now routinely paid, sometimes in excess of the final permanent partial disability award, but the claimants are still not provided with aggressive vocational rehabilitation services. The ability of the claimant to reenter the work force declines while the workers' compensation fund retains liability for the resulting greater disability. Attempts to increase the use of rehabilitation services and to force immediate permanent partial disability evaluations of claims are met with remarkable administrative resistance.322

Second, in "no-lost-time" claims, a claim is not considered legally closed until the worker has been evaluated for any residual permanent partial disability that may have resulted from the injury.323 The later evaluation for permanent disability can occur years after the occurrence of the injury. Moreover, such permanent partial disability awards, unrelated to a recent injury, can be used to reopen claims for the purpose of seeking permanent total disability awards.324 It is, of

permanent partial disability benefits, led the legislature to create a new benefit, known as "non-awarded partial" benefits, in order to provide a bridge for claimants between temporary total disability and permanent partial disability benefits. The amount of nap benefits paid is then deducted from the final permanent partial disability award. If the nap benefit exceeds the permanent partial disability award, then the amount is considered an overpayment, but is only collectible from future permanent partial disability awards. See UMWA v. Lewis, 309 S.E.2d 58 (W. Va. 1983).

322. For example, in 1989 I notified physicians that the Fund would accept recommendations from authorized treating physicians for permanent partial disability ratings of 15% or less when patients had reached maximum degree of medical improvement after a period of temporary disability, in keeping with W. VA. CODE § 23-4-7a(c) (Supp. 1992). Fund employees objected; the statute, they said, required consideration of "all other available information" before such an award could be entered. Obviously, my directive was not taken too seriously: employees persisted in refusing to accept recommendations from treating physicians, until, in Dalton v. Spieler, 401 S.E.2d 216 (W. Va. 1990), a mandamus action, the court ruled (after my departure from the commissioner's position) that the commissioner must accept the recommendation of treating physicians in these situations.

323. Baker v. State Workmen's Compensation Comm'r, 263 S.E.2d 883 (W. Va. 1980) (compensation claim for noise induced hearing loss was ruled compensable but no permanent partial disability award was entered; court held that three year statute of limitations for reopening claims did not apply to claims that had never been closed. It is the commissioner's duty to ensure that claims receive final awards).

324. As long as a claimant has an open claim, s/he can make a motion for a second injury life award. The usual practice for claimants' attorneys in these situations is to obtain a permanent partial disability rating, often for an old injury or a newly diagnosed occupational disability such as hearing loss. It has been estimated that as many as 10% of second
course, difficult for medical professionals or Fund employees to make clear determinations regarding the etiology of any disability at a much later date, particularly if the claimant is an older or retired worker. The continuing failure of the Fund to perform medical evaluations on these claims, while often unrelated to claimants' return to work, nevertheless creates an on-going and substantial financial liability for the Fund.

There are three primary explanations for this administrative behavior. First, the Fund is notoriously understaffed. Second, the desire by the Fund for control results in an unwillingness to trust information provided by anyone who is external to the Fund's bureaucracy. Evaluations by treating physicians, for example, are often assumed to be tainted by the physician's pro-worker bias; this is, after all, often the physician who supported the worker's claim in the first place. This even occurs when the claimant's evaluating physician is a well known and respected member of the medical community, this resistance has not been obliterated by the judicial rulings requiring liberal evaluation of claimants' medical evidence. Third, some employees of the Fund act as if they distrust workers. This may not be surprising: the

injury life awards are now "piggy-backed" onto hearing loss claims. Finger & Briscoe, supra note 27. A protest is then filed to the permanent partial disability award and the claimant then makes a motion for a second injury life award. Under current practice, the administrative law judges will remand any case in which such a motion is made to the commissioner for evaluation before ruling on the motion; the commissioner may then appear to defend the Fund in any claim which would be paid by the second injury fund (rather than a self-insured employer) or in any claim that is not otherwise defended by the employer. W. Va. Code § 23-5-1h (Supp. 1992). Thus, the failure to close claims opens the door to new, more expensive claims. For those claimants who are permanently and totally disabled, this process achieves some justice. It is, however, an odd, and perhaps inequitable, way for justice to be dispensed.

325. This problem is well illustrated by the claim of the 70-year-old retired worker in Hunter v. Workers' Compensation Comm'r, 386 S.E.2d 500 (W. Va. 1989). The physicians who examined Hunter simply could not distinguish any disability attributable to age from disability caused by his occupational pneumoconiosis. Id. at 502.

326. Although employers tend to believe that the Fund is excessively pro-claimant, claimants believe that the Fund is excessively pro-employer. The distrust of external influences in fact extends to both claimants and employers.

327. The experience of Dorothy Coffman is illustrative of this. See supra note 246.

claims requiring the most work are often the claims that are the most questionable. When much of an employee’s time is spent reviewing claims which involve potential abuse, the employee is left with the impression that the majority of claims similarly involve abuse. The result of this is often a failure to believe that individual claimants might, in fact, prefer to work than to collect benefits. Thus, there is no reason to explore mechanisms that would assist claimants to do the “right” thing; it would hardly be worthwhile to make administrative changes to respond to people who, if they exist at all, exist in such small numbers.

D. Amending the Workers’ Compensation Statute in 1990: Promoting Reemployment of Injured Workers?

Both the court and the Workers’ Compensation Fund have (albeit perhaps unintentionally) thus prolonged the life of compensation claims while failing to assist injured workers in returning to work. The efforts underlying the 1990 statutory amendments to the Workers’ Compensation Act were intended to begin to address some of these problems.

Although legislative tinkering with the workers’ compensation program has occurred almost on an annual basis, the 1990 amendments were of particular interest. Huge public outcry had greeted the announcement that employers were not paying a sufficient level of premiums to fund the existing program. Despite considerable opposition from the legal community, the legislature in 1990 attempted to address serious administrative problems in the handling of claims.

329. When I first took the position as commissioner, I met with every supervisory employee. I asked the people who served as unit managers the following question: How many claimants do you think are off work after an injury for more than six months or a year? Quite a few replied that they believed 50% or more of claimants who received temporary total disability benefits were absent from work for this long. The data does not support this conclusion, of course. See supra note 107 and accompanying text. It is, of course, possible that 50% of some employees’ time is spent dealing with these claims.

330. See discussion supra part II.

331. The 1990 amendments to the statute created a new administrative law judge system to allow adjudication of claims previously decided by the commissioner to be reviewed in a separate forum rather than being reviewed by the commissioner a second time. This meant that the commissioner could appear to defend the Fund in previously undefended
They also focused on issues of employment and reemployment of injured workers.

1. 1990 Statutory Amendments

In response to the public hue and cry regarding workers' compensation costs and abuse, Governor Gaston Caperton convened the Workers' Compensation Advisory Board in 1989. By statute, the Board consists of three representatives from the medical community, three employee or union representatives, three representatives of employers, and the commissioner, who sits by statute as ex officio chairman. The individuals named to the Board by the Governor did not include the usual spokespeople for the interested groups. Instead, the Governor primarily sought the advice of businessmen, physicians, and employee representatives who might not be bound by prior positions and statements regarding the issues. Significantly, no lawyers were named.

The Board met in monthly public meetings from August 1989 until January 1990, in order to identify the problems which beset the program and to draft recommendations to the Governor and the legislature. The physician members of the Board expressed concern from

claims and that claims, at least in theory, could be handled more expeditiously. See W. VA. CODE §§ 23-5-1g to -1h (Supp. 1992). This new system is now under attack. See supra note 22.

332. The Advisory Board was created by the legislature in 1979 and was required by statute to meet and report to the legislature on an annual basis. W. VA. CODE § 23-1-18 (Supp. 1992). In fact, the Advisory Board was not convened between 1981 and 1989 and has not been convened since 1990.

333. Employer representatives named to the board were William Goldsmith (C&P Telephone of W. Va.), Rick Abraham (Laurel Creek Mining), and Sherry Wizba (Aladdin Foods, Inc.). Employee representatives were Robert Miller (Deputy Commissioner of Labor), Steve Webber (UMWA), and Jack McComas (AFL-CIO). Physicians members were Dr. David Clayman (psychologist), Dr. Kenneth Wright (physiatrist), and Dr. Robert Walker (family practitioner and Chairman, Department of Family and Community Health, Marshall University School of Medicine).

334. In the process, a letter of solicitation was issued to obtain the advice of a national expert in workers' compensation regarding methods to improve the West Virginia program. After reviewing a number of responses to the solicitation, the Board voted unanimously to retain Arthur Cohen, a consulting actuary from the firm of Huggins Financial
the outset about their inability to assist their patients in returning to work. In particular, Dr. Kenneth Wright, M.D., a rehabilitation medicine specialist, complained that there was no system in place to enable workers to return to work on a part time or light duty basis without losing all wage replacement benefits. Since these transitional jobs paid far less than their permanent full time jobs, a return to work often meant that they would receive less from their transitional wages than they received from compensation; it was therefore difficult to advise them to attempt most transitional work. The statute made no provision for workers to collect partial weekly benefits to supplement transitional wages in order to allow people to return to work during the healing process. 335 Similarly, Dr. Robert Walker, M.D., a family practitioner, discussed his reluctance to encourage patients to return to work, for fear that their benefits would not be reinstated if they were unable to perform their jobs. Both physicians pointed repeatedly to barriers erected by the law and by the administration of the Fund which prevented them from assisting their patients in returning to work. They expressed concern that the advice their patients received from their attorneys was designed to assist the claimant in maximizing their monetary benefits, not their physical and psychological recovery from the injury; this particular concern was echoed by both the claimant and employer representatives on the Board.

Both employee and business members of the Board repeatedly discussed their frustrations with the administrative functioning of the Workers’ Compensation Fund. Comments echoed those made elsewhere: claimants who needed benefits often could not, according to the labor side, obtain them; employers who identified employees who needed assistance also could not get help for them. On the other hand,

335. Under West Virginia workers’ compensation law, there had been no partial wage replacement benefit. Once a claimant returned to work, temporary total disability benefits are terminated and the individual becomes eligible for evaluation for permanent partial disability benefits. Many claimants, with the advice or consent of their physicians, delay returning to work because of the loss of benefits, particularly if the wages in the transitional job are less than those in their pre-injury job, if they fear that they will be unable to perform the proffered job, or if they distrust the employer’s commitment to maintain them in a transitional or light duty job that they will be able to do.
individuals who were not in need of benefits often seemed to be able to obtain them, and no intervention by the employer seemed able to stop this process.

The focus of the Advisory Board shifted quickly to these administrative concerns. In part, of course, the members of the Board were reluctant to enter the eye of the storm by suggesting that benefits be modified. The Board set two priorities: "[t]o assist the [c]ommissioner in addressing the fiscal and administrative problems facing the Fund"; and "[t]o focus on three specific areas of concern: elimination of abuse by all parties in the workers' compensation program; redefining and improving the approach to rehabilitation of injured workers; and prevention of workers' compensation claims through improved workplace health and safety efforts."336

The report received from Arthur Cohen of Huggins Financial Services, who was hired to assess the need for change in the program, encouraged the Board's approach: it recommended no changes in the benefit or eligibility structure at all.337 The Huggins' report did, however, make substantial alternative recommendations for administrative and legislative changes.338 The report specifically proposed "[e]nhancement of rehabilitation programs through trial return to work programs, temporary partial disability benefits and monitoring" of claims.339 In addition, with regard to the issues raised by the business community, the consultant reviewed the various business studies and concluded that "while workers' compensation costs are not the predominant consideration in locating businesses, West Virginia would have an advantage over the majority of states if they were."340 Many of the Huggins recommendations were endorsed by the Board in its

336. REPORT OF THE WORKERS' COMPENSATION ADVISORY BOARD 3 (1990) [hereinafter ADVISORY BOARD REPORT].
337. HUGGINS REPORT, supra note 62, at 1-3.
338. Id. These recommendations included legislation to permit subrogation recoveries, enhancement of medical cost containment efforts, development of an administrative law judge system, creation of medical panels, introduction of settlement provisions, elimination of the daily rate of pay calculation and enhancement of rehabilitation and return to work programs.
339. Id. at 2.
340. Id. (emphasis added).
final report to the legislature; these were incorporated, in somewhat altered form, in the legislation amending the Workers' Compensation Act which was finally passed during a Special Session of the legislature in June 1990.\textsuperscript{341}

The Advisory Board sat at the center of a maelstrom of controversy. The most significant characteristic of the members of the Board was that they were not primarily preoccupied with issues of malingerers and abuse. All Board members viewed injured workers as on-going employees of their pre-injury employers, unless the worker became too disabled to work.\textsuperscript{342} This is not to say that they did not personally know workers who had abused the system; all of the members of the Board were familiar with abusive behavior. In fact, considerable time at meetings was devoted to discussing problems with claimants who sought to maximize benefits, lawyers who encouraged and assisted this behavior, physicians who primarily regarded the Fund as a high-paying source of income,\textsuperscript{343} and employers who used a variety of strategies to avoid paying appropriate premiums.\textsuperscript{344}

Nevertheless, from the outset the Board focused its concern on the need to make the system work for both claimants and employers, rather than on the need to create a system that would effectively discourage disability by making benefits difficult to obtain or provide less adequate economic support. The unanimously-held philosophy of the Board evolved to the following position: it is difficult or impossible to stop people who intentionally abuse any system; reduction in benefits or eligibility would have little impact, therefore, on those who were


\textsuperscript{342} One employer member of the Board expressed surprise that employers were not legally required to reemploy workers after they had recovered from an injury sufficiently to return to work.

\textsuperscript{343} Medical benefits under workers' compensation in West Virginia, as in most places, provide "first dollar" coverage without deductibles or co-payments for medical costs associated with compensable injuries and diseases. Although paid under a fee schedule since 1987, the fees, at least when they were first set, reflected reasonable and customary fees then charged and therefore did not substantially reduce the fees of most providers. See W. Va. Code § 23-4-3 (Supp. 1992).

abusers; but such reductions would exclude or punish those workers who needed benefits but did not know how to "play the system"; we therefore must find alternative mechanisms to combat abuse, through better administrative claims management\textsuperscript{345} and increased penalties for both claimants and physicians who abuse the system.\textsuperscript{346} As a result, the Board was, almost immediately, regarded as an unproductive forum by representatives of organized business groups who came to observe the Board's deliberations and to advocate for benefit reductions or eligibility restrictions.

The final report of the Advisory Report represented the unanimous opinion of the Board members and was transmitted to the governor and the legislature on January 18, 1990. The initial legislation recommended by the commissioner and introduced at the request of the Governor closely followed the Advisory Board recommendations. These recommendations contained a number of administrative and financial proposals, including three significant and interrelated legislative proposals involving the right of injured workers to return to work.\textsuperscript{347}

\textsuperscript{345} The Advisory Board reported:
It is the observation of the Board, in keeping with the conclusions in the Cohen [Huggins] report, that the Fund currently pays claims instead of managing them . . . . [T]he Board recommends that the commissioner develop a claims management system that addresses the concerns of both claimants and employers . . . . [T]he goal of claims management should be to get benefits to claimants who deserve them quickly and efficiently; to weed out undeserving claims before any substantial expenditure; and to assist claimants to return to work at their prior job or, when necessary, at an alternative job.

\textit{ADVISORY BOARD REPORT, supra} note 336, at 13.

\textsuperscript{346} In fact, the Board recommended increased penalties for claimants and physicians who abused the system. \textit{Id.} at 6-7. This recommendation was passed as part of the 1990 legislation. W. VA. CODE § 23-4-19 (Supp. 1992) (increased penalties for claimants); W. VA. CODE § 23-4-3a (Supp. 1992) (expanding penalties for medical providers who defraud compensation system); W. VA. CODE § 23-4-3c (Supp. 1992) (new provision allowing for removal of health care providers from workers' compensation payment system if they abused the system).

\textsuperscript{347} These included, in addition to those previously enumerated, recommendations for legislation for subrogation recoveries by the Fund and self-insured employers, enhanced medical cost containment through implementation of recommendations regarding diagnosis and treatment from a Medical Advisory Panel, and transfer of the actuarial surplus from the Coal Workers' Pneumoconiosis Fund to the Workers' Compensation Fund. The most important of these proposals, in the long run, was hoped to be the conversion to an administra-
First, it proposed that a mechanism be established for claimants to return to work on a trial basis with a guarantee that, if they failed, their temporary total disability benefits would be reinstated without additional review.348 Second, the Board proposed a significant expansion of vocational rehabilitation efforts, including a partial benefit to provide an incentive that would encourage claimants undergoing rehabilitation to reenter the work force in part time or other transitional jobs.349 And third, it proposed expanded protection from discharge and rights of reemployment for claimants who were absent from work due to an occupational injury and who were able to return to their pre-injury or equivalent jobs.350 All three of these proposals met with significant opposition from the organized business community and were revised substantially before enactment by the legislature during the Special Session in June 1990.

(a) Trial Return to Work351

The legislation proposed by the Administration,352 which was based upon the recommendations of the Advisory Board, provided that a claimant "shall be entitled to return to work for a three month trial period" to the position he or she held at the time of the injury or, upon mutual agreement with the employer, to a comparable position.353 If the worker found, within the three month time period, that

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tive law judge system of litigation that would speed the resolution of individual claims and allow the commissioner to defend claims, particularly those which might involve payment by the second injury fund. ADVISORY BOARD REPORT, supra note 336, at 6-18.

348. This was proposed specifically because of the continuing problem that claimants were having in reopening claims after an unsuccessful attempt at returning to work. The proposal specifically allowed the advice of the treating physician to be controlling as to whether the claimant could continue in the job or should return to temporary total disability status. Id. at 9.

349. Id. at 11.

350. Id. at 10.


353. § 23-4-7b, H.B. 4691, supra note 352. The provisions were envisioned to be limited by the provisions of the proposed revision to the discriminatory practices article of the Workers' Compensation Act, which would have allowed employers to replace injured workers and provided only a limited right for injured workers to return to work by "bump-
s/he could not perform the pre-injury work, then temporary total dis-
ability benefits were to be automatically reinstated and the claimant
referred for a rehabilitation evaluation. If, on the other hand, the trial
return to work was successful, the claim would be closed on a tempo-
rary total disability basis and the claimant would be referred, as previ-
ously required, for a permanent partial disability evaluation. \(^{354}\) Under
this proposal, the claimant, with medical concurrence, would have had
the right to decide whether to engage in a trial work period. As long
as the claimant and his or her physician said that s/he was able to try
working at the pre-injury job, the employer could not refuse to provide
the trial work; the employer could not, however, force the employee to
return on a trial basis. Business opposition to the proposal, which saw
this as an unfair lack of symmetry, led to the removal of any obliga-
tion of employers to provide a trial work period. Instead, the final trial
return to work provision requires agreement among the claimant, phy-
sician, and employer that a trial return to work period should be at-
tempted. \(^{355}\) Business, for inexplicable reasons, continued to oppose
this provision; \(^{356}\) as a result, the provision was passed but is sched-
uled, by statute, to expire in 1994 unless further legislative action is
taken. \(^{357}\)

(b) Vocational Rehabilitation

The Advisory Board’s proposal to “substantially revise and expand
rehabilitation programs” \(^{358}\) included recommendations that rehabili-

\(^{354}\) See W. VA. CODE § 23-4-7a (Supp. 1992).
\(^{355}\) W. VA. CODE § 23-4-7b (Supp. 1992).
\(^{356}\) Minutes of the Unemployment and Workers' Compensation Committee, West Vir-
ginia Chamber of Commerce (May 1, 1990) (on file with author) listed trial return to work
and rehabilitation as “unfavorable provisions.” This meeting was held after the regular ses-
sion of the legislature and before the special session in June. These provisions were final-
ized on the last day of the regular session and passed without changes in the special ses-
sion.

\(^{357}\) W. VA. CODE § 23-4-7b(f) (Supp. 1992).
\(^{358}\) The Board recommended that rehabilitation “be managed through a case manage-
ment system which allows rehabilitation counselors to monitor carefully the progress and
employability of the claimant and the availability of appropriate employment from the em-
tation programs should remain voluntary; that a new partial disability benefit be created to supplement partial or reduced wages; and that rehabilitation case management provide for continued monitoring of the progress of any claimant returned to modified job on a trial basis. The initial draft of the legislation included extensive rehabilitation language which, in addition to the specific Board recommendations, proposed regulation of private rehabilitation vendors.

Employer. Light duty programs should be encouraged. In order to encourage return to work programs, the Board recommends that the statute provide for creation of incentives for employers and employees to participate in light duty, transitional work or other modified return to work programs.” ADVISORY BOARD REPORT, supra note 336, at 11.

359. The Huggins Report had recommended voluntary participation in rehabilitation, noting, “[m]andatory rehabilitation is not recommended. Effective rehabilitation requires the cooperation and desire of the injured worker.” HUGGINS REPORT, supra note 62, at 20. The draft legislation which was introduced ultimately included some requirements for participation. H.B. 4691, supra note 352.

360. The provisions in the proposed H.B. 4691 regarding rehabilitation ran to a full eighteen pages in the proposed bill and included a provision for temporary partial rehabilitation benefits (§ 23-4-9(o)), definitions of suitable gainful employment (§ 23-4-9(b)(2)), rehabilitation services and rehabilitation professionals qualified to provide services (§ 23-4-9(b)(1), (3), (4)), established strict time limits for rehabilitation assessments (§ 23-4-9(d) to (g)), set a maximum duration of rehabilitation plans of 208 weeks (§ 23-4-9(h)), but allowed the commissioner to extend the plan beyond this period if the extension “would be likely to result in less cost to the workers’ compensation fund or self-insured employer than would denial of said petition.”§ 23-4-9(k)(7). The bill also established the following priorities for the development of rehabilitation plans for injured workers:

(1) Return of the employee to the pre-injury job with the same employer; (2) Return of the employee to the pre-injury job with the same employer and with modification of task, work structure or work hours; (3) Return to employment with the pre-injury employer in a different position; (4) Return to employment with the pre-injury employer with on-the-job training; (5) Employment with a new employer without training; (6) On-the-job training for employment with a new employer; or (7) Retraining which shall consist of a goal-oriented period of formal retraining which is designed to lead to suitable gainful employment.

§ 23-4-9(i), H.B. 4691, supra note 352. The proposal included the following provisions designed to protect injured workers from inappropriate job assignments:

As part of a rehabilitation plan, an injured employee may return to work at a transitional, light duty, restructured or modified work assignment, on either a temporary, trial or permanent basis. Such assignment may include modifications of the duties assigned or of the hours of work or any other modification which may assist the injured employee in attaining the goals of the rehabilitation program and the rehabilitation plan. Whenever the injured employee is asked to return to work under this subsection, the prospective employer, whether the original employer or a new employer, shall furnish to the injured employee’s treating physician and the
Concerted opposition from these vendors and from the business community led to a complete revision of this portion of the bill. No comments were made during the legislative process regarding the methodology for calculation of partial benefits; this subsection was therefore passed without change.\textsuperscript{362} The final version underscored the view of the Board—and the legislature—that workers should be assisted in returning to work that was comparable to their pre-injury work or “to alternative suitable employment, using all possible alternatives of job modification, restructuring, reassignment and training.”\textsuperscript{363} The findings of the legislature specifically noted the responsibility of the employer, as well as the employee, the physician, and the commissioner in securing successful return to work for the claimant.\textsuperscript{364}

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\textsuperscript{362} Assigned qualified rehabilitation professional a statement describing the available work in terms that will enable the physician to relate the physical activities of the job to the employee’s disability . . . . The physician shall then advise the assigned qualified rehabilitation professional as to whether the employee is physically capable of performing the work described. The employee may consent to undertake the job without the consent of his or her treating physician. Should the available work described, once undertaken by the employee, impede his or her recovery to the extent that he or she should not continue to work, the employee’s temporary total disability payments shall be resumed . . . . If the injured employee is released from said work and the commissioner determines that the work thereafter came to an end before the employee’s recovery is sufficient in the judgment of the commissioner to permit him or her to return to his or her usual job or to perform other available work, the employee’s temporary total disability benefits shall be resumed . . . . Once the employee returns to work under the terms of this subsection, he or she shall not be assigned by the employer to work other than the work described to the physician without the employee’s written consent, or without prior review and approval by his or her physician.

\textsuperscript{363} § 23-4-9(m), H.B. 4691, supra note 352. The proposal also included substantial incentives for the employee to participate: failure to cooperate in the initial assessment and development of a rehabilitation plan (without good cause) would result in suspension of temporary total disability benefits (§ 23-4-9(p)(1)), refusal to cooperate in the provision of rehabilitation services “shall be admissible in any proceeding involving an application for permanent total disability benefits” (§ 23-4-9(p)(2)). If the employer failed to offer the employee suitable gainful employment, “such failure to offer suitable employment” would also be admissible in these proceedings. § 23-4-9(p)(3), H.B. 4691, supra note 352.


\textsuperscript{365} W. VA. CODE § 23-4-9(a) (Supp. 1992).

\textsuperscript{366} Id.
The revised rehabilitation provisions of the statute require that workers who sustain an injury “likely to result in temporary disability in excess of one hundred twenty days” be evaluated for rehabilitation services. A personal rehabilitation plan must be developed for all claimants who might benefit from the provision of services, including “vocational or on-the-job training, counseling, assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification.” Eligibility for temporary total disability benefits continues as long as a claimant is receiving rehabilitation services and not working. But claimants who return to work, while receiving rehabilitation services, at a job in which the earnings were less than their pre-injury earnings would be eligible for a new “temporary partial rehabilitation benefit.” This new benefit would guarantee

366. Id.
367. W. VA. CODE § 23-4-9(c) (Supp. 1992). This is true even if the claimant has exceeded the limit of 208 weeks which is the usual maximum duration for temporary total benefits. W. VA. CODE § 23-4-6(o) (Supp. 1992). Note that this does not represent a change from prior law.
368. This benefit would be calculated as follows:
In every case in which the claimant returns to gainful employment as part of a rehabilitation plan, and the employee’s average weekly wage earnings are less than the average weekly wage earnings earned by the injured employee at the time of the injury, he or she shall receive temporary partial rehabilitation benefits calculated as follows: The temporary partial rehabilitation benefit shall be seventy percent of the difference between the average weekly wage earnings earned at the time of the injury and the average weekly wage earnings earned at the new employment, both to be calculated as provided in sections six, six-d and fourteen... of this article as such calculation is performed for temporary total disability benefits, subject to the following limitations: In no even shall such benefits be subject to the minimum benefit amounts required by the provisions of subdivision (b), section six... of this article, nor shall such benefit exceed the temporary total disability benefits to which the injured employee would be entitled pursuant to sections six, six-d and fourteen of this article during any period of temporary total disability resulting from the injury in the claim: Provided, That no temporary total disability benefits shall be paid for any period for which the temporary partial rehabilitation benefits are paid. The amount of temporary partial rehabilitation benefits payable under this subsection shall be reviewed every ninety days... Temporary partial rehabilitation benefits shall only be payable when the injured employee is receiving vocational rehabilitation services in accordance with a rehabilitation plan developed under this section.
that claimants in this situation would receive in total income (wages plus benefits) more than the amount of their temporary total disability benefits, but no more than their pre-injury wage. The financial disincentive for returning to a lower wage job, at least on a transitional basis as part of rehabilitation efforts, would therefore be eliminated. In lieu of the other specific provisions contained in the originally proposed bill, the final legislation required the commissioner to promulgate rules and regulations no later than July 1, 1991 “for the purpose of developing a comprehensive rehabilitation program which will assist injured workers to return to suitable gainful employment after an injury.”

(c) Expansion of Prohibitions on Discriminatory Practices

The Advisory Board also concluded that injured workers received, under then existing law, inadequate protection in terms of longitudinal guarantees for continued employment after an injury. The particular focus of concern was the injured employee who recuperated fully but still could not return to employment. The Board unanimously felt that employees should not be discharged or forced out of employment as a direct result of sustaining an injury at work.

At its meetings, the Board explicitly discussed the holding in Yoho v. Triangle PWC, Inc. To the extent that Yoho endorsed the use of neutral absence control policies in order to terminate employees who missed work as a result of work-related injuries, it was the hope of the Advisory Board to overrule the case by recommending statutory

369. W. VA. CODE § 23-4-9(e) (Supp. 1992): “Such legislative rules shall provide definitions for rehabilitation facilities and rehabilitation services pursuant to this section.” Id. As of Feb. 1, 1993, these rules had not yet been issued.

370. For a fuller discussion of discriminatory practices provisions in state workers’ compensation laws, see, Rothstein, supra note 283. Bryan Cokeley discussed the Rothstein proposal at length in comparison to West Virginia’s 1990 statutory amendments. Bryan R. Cokeley, West Virginia’s New Workers’ Compensation Anti-Discrimination Provision, 94 W. VA. L. REV. 725, 748-57 (1992) (concluding that the West Virginia statute is poorly and ambiguously drafted and arguing that Rothstein’s model act is both less ambiguous and more comprehensive in scope).

revisions. The Board also discussed, at substantial length, what should happen to employees who recover from their injuries and want to return to work. The critical question was, not surprisingly, whether the employer should be required to reinstate the injured employee if the job had been filled during his or her absence.

The Board finally proposed a two-tier approach based upon employer size. Employers with more than fifteen employees would be required to reinstate employees who were capable of returning to their pre-injury job, with two exceptions. First, if the job had been filled "and at the time the injured worker is released to return to work the replacement worker has actively worked more time in that job than the injured worker had worked prior to the injury," then the injured worker would be entitled to preference in hiring; that is, s/he could not "bump" the replacement worker out of the job. Second, if the in-

<table>
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<th>Size (by number of employees)</th>
<th>Number of Firms</th>
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<tr>
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Data for Mar. 1991 from Labor and Economic Research, Division of Employment Security, W. Va. Bureau of Employment Programs (unpublished) (on file with author). If there were an even distribution of employees working in firms with between 10 and 15 and between 16 and 19, then approximately 21% of workers (but 84% of firms) would fall in the 15 and under category. Id.

374. ADVISORY BOARD REPORT, supra note 336, at 10; § 23-5A-3(c)(1), H.B. 4691, supra note 352.
Injured employee was offered an appropriate job, including a light duty job, which s/he was capable of performing, and refused the job, "the employer's obligation to reinstate the individual shall cease."\(^{375}\)

The employees of smaller employers (with fewer than 15 employees) would also be protected from discharge while collecting temporary total disability benefits but would only be entitled to reemployment when able to return to the pre-injury job if the job had not been filled in the interim. If the job was filled, however, the injured employee would not have rights to "bump" the new employee; instead, s/he would "be given preference in hiring when a vacancy occurs."\(^{376}\)

The draft of the proposed legislation, which was developed by the commissioner's staff with assistance from claimant and management attorneys, attempted to codify the language of the Board.\(^{377}\) It went somewhat beyond the Board's proposal, however. Discussions during the drafting resulted in concerns about collisions between these new rights and those that might accrue to other employees, particularly under judicial orders involving discriminatory practices of the particular employer or under job allocation provisions contained in the seniority clauses of collective bargaining agreements. Out of these discussions came an added proviso, shielding employers when they refused employment to workers based upon the seniority provisions of collective bargaining agreements.\(^{378}\)

The Board's, and therefore the Administration's, proposal to provide job security to work-injured employees was a lightning rod for opposition after the bill was introduced in the legislature on February 19, 1990. The final compromise regarding this particular section was not struck until the last day of the regular legislative session. Discussions on that day focused on finding a compromise between the labor

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375. § 23-5A-3(d), H.B. 4691, supra note 352.
376. § 23-5A-3(c)(1), H.B. 4691, supra note 352.
377. The drafting process was undertaken with assistance from attorneys from firms which represented both employers and claimants. Unfortunately, none of these attorneys discovered the existence of Rothstein's article, supra note 283. This is a minor illustration of the disconnection between academic writing and policy makers. In fact, Rothstein's proposal has not (to my knowledge) been introduced in any jurisdiction.
378. The proposed language was slightly modified and codified at W. VA. CODE § 23-5A-3(c) (Supp. 1992).
view that all employees should be guaranteed reemployment after an injury and business' view that no additional statutory protection should be extended to workers who were off work due to occupational injuries. Business lobbyists argued that any guarantee of reemployment would merely encourage injured workers to stay off work longer; their assumption was that anyone given the opportunity to stay off work would do so.379

The final compromise on this issue fell far short of the Advisory Board's recommendation. It came even less close to meeting labor's demand for guaranteed reemployment after an occupational injury.380 The new statutory language, effective July 1, 1990, makes it a discriminatory practice to terminate an injured employee while that employee is off work due to a compensable injury and is receiving or eligible to receive temporary total disability benefits. As the initial bill (although not the Advisory Board recommendations) suggested, terminations would be subject to the seniority provisions of a collective bargaining agreement and to arbitration decisions made pursuant to those provisions.381 Thus, Elizabeth Yoho herself, who was terminated as a result of the seniority provisions in her labor agreement, would not have benefitted from the new legislation. The decision in her case had gone much farther, however, by holding that West Virginia had no public policy in favor of continued employment of work-injured individuals;

379. In the coal industry, in which on average workers receive only 48% of their wages as benefits, it seems unlikely that workers would seek to increase the length of their temporary benefits, at least for economic reasons. Nevertheless, coal operators took this position during legislative discussions.

380. Rothstein's proposal, supra note 283, came much closer to the position advanced by labor, by guaranteeing reemployment for one year and providing reemployment rights both to fully recuperated workers and to those with permanent disabilities. In conversations with me during the negotiation process which surrounded this legislation, industry representatives characterized the elimination of the "bumping" provision as a major concession from labor.

381. One suspects, upon reading the history of the bill, that this provision was initially included in the legislation to address concerns regarding job allocation that arose from the "bumping" provisions in the proposed legislation. In view of the fact that the final legislation affords replaced employees only the right to preferential reemployment, the language protecting seniority rights under collective bargaining agreements has less importance. It appears, on its face, however, to protect terminations which are made pursuant to seniority provisions.
the decision had invited wholesale development of "neutral" absence control policies outside the seniority provisions of contracts. To the extent that *Yoho* was the articulation of the public policy of the state regarding the general application of neutral absence control policies to work-injured people, it was without question the intent of the legislature to overrule it.

*Yoho* invited the development of "neutral" absence control policies by employers which would allow the discharge of employees who were injured. *Powell v. Wyoming Cablevision*\(^{382}\) rejected the discriminatory use of such policies. The new statutory language broadens the obligation of employers' to temporarily disabled workers. It states that an employee simply may not be terminated while absent, irrespective of the length of the absence and irrespective of the motive of the employer, while s/he is off work and collecting, or eligible to collect, temporary total disability benefits, unless s/he commits a "separate dischargeable offense" (an act justifying discharge which is unrelated to the occupational injury and resulting absence).\(^{383}\)

The deference to the seniority provisions in collective bargaining agreements related directly to the concern regarding rules in particular work places which govern the allocation of jobs.\(^{384}\) There was no

\(^{382}\) 403 S.E.2d 717 (W. Va. 1991).

\(^{383}\) W. Va. CODE § 23-5A-3(a) (Supp. 1992). In his commentary, Cokeley correctly characterized the intent of this provision: "[I]t would appear that the intent was to erect prophylactic barriers with respect to the workers' compensation-related absence. Evidently fearful that employers might use violation of work rules as a pretext to discrimination against those filing for workers' compensation benefits, the drafters just simply put those considerations out of bounds." Cokeley, *supra* note 370, at 781-82. The intent was to focus on absence itself as reason for discharge; therefore the statutory definition of separate offense "shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work." W. Va. CODE § 23-5A-3(a) (Supp. 1992). In refusing to apply this new provision retroactively, the Supreme Court of Appeals recently characterized this section as conferring a substantial right on an injured employee" that "is not purely procedural or remedial in nature." Pannell v. Inco Alloys Int'l, Inc., 422 S.E.2d 643, 646 (W. Va. 1992).

\(^{384}\) This concern echoed the judicially expressed concerns which emerged in *Yoho* v. Triangle PWC, Inc. 336 S.E.2d 204 (W. Va. 1985), and cases under the Human Rights Act, including Ranger Fuel Corp. v. West Virginia Human Rights Comm'n, 376 S.E.2d 154 (W. Va. 1988), and *Coffman v. West Virginia Bd. of Regents*, 386 S.E.2d 1 (W. Va. 1988), about the allocation of jobs if injured workers are placed ahead of others in the workplace.
intention expressed, by any of the legislators, to extend this deference to other provisions of labor agreements. Discussions in legislative committees specifically mentioned and acknowledged that the practice in the unionized coal industry of discharging people when off work would have to cease under this new statutory provision. As is the case under other state minimum standards legislation, the statutory rights establish a floor of protection for all workers, irrespective of their unionized status, except when seniority provisions in a collective bargaining agreement justify discharge.

The amendments also required employers to reinstate workers who had been absent due to an occupational injury to the pre-injury job if "the position is available and the employee is not disabled from performing the duties of such position." The amendments fell far short of the Advisory Board proposal, however; employees of large enterprises would not have the right to "bump" replacement workers in order to obtain reinstatement. If the job had been filled, the injured employee "shall be reinstated to another comparable position which is available and which the employee is capable of performing." If no

385. In the National Bituminous Coal Wage Agreement, the Attendance Control provision allows the employer to implement an attendance control policy. This provision is included in Article XXII (Miscellaneous Provisions) and is unrelated to seniority provisions (contained in Article XVII). Absence control plans under this agreement, although sanctioned by the collective bargaining agreement, would not allow a defense to a discharge for absence related to workers' compensation claims, irrespective of their facial neutrality, under the new statutory provision.


388. Comparable work is defined as follows:

A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions, and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return...
job is available at the time the employee seeks reinstatement, s/he is provided a right of "preferential recall" to a "comparable" position for a period of one year.\textsuperscript{389} Again, seniority provisions of a collective bargaining agreement would, if applicable, provide the employer with a defense to an action brought by an employee who was not reinstated.\textsuperscript{390}

2. 1990-1993: Implementing the 1990 Return to Work Amendments

These three "return to work" amendments to the statute had their roots in the view of the members of the Advisory Board that workers who are injured on the job would, in general, prefer to continue working. The Board specifically sought to eliminate barriers or disincentives which encourage workers to remain on compensation benefits for longer periods of time. The legislature, to a limited extent, accepted this view.

The administration of the Workers' Compensation Fund also endorsed the idea that refocusing on the employment possibilities for injured workers would promote the interests of the Fund, as well as of injured workers and employers. Had this actually occurred, it would have been a remarkable transformation for a system that had previously focused on paying claims, not managing them.\textsuperscript{391} But it has not occurred.

Elements of the 1990 amendments to the Workers' Compensation Act unrelated to these return to work provisions required extensive administrative overhaul of the agency;\textsuperscript{392} the energies of the manag-

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\textsuperscript{389} Id. The employee must provide to the employer a current mailing address during this one year period.

\textsuperscript{390} W. VA. CODE § 23-5A-3(c) (Supp. 1992).

\textsuperscript{391} ADVISORY BOARD REPORT, supra note 336, at 13.

\textsuperscript{392} In particular, under the new Administrative Law Judge system, the adjudicative functions of the agency were to be split: if an initial decision on a claim was disputed, the post-hearing decision would no longer be made by the commissioner. In addition, massive
ers of the Fund are primarily devoted to these efforts. At the same
time, the new statutory provisions for trial return to work and expand-
ed vocational rehabilitation required administrative changes for imple-
mentation. The agency has apparently been unable to make these es-
cential changes.

No communication has been sent to physicians, employers, or
claimants regarding either the trial return to work or the new partial
benefit provisions of the law. Although reforms are contemplated,
no change has been made in the administrative provision of rehabilita-
tion services: claims are not evaluated more aggressively for earlier
intervention and rehabilitation services have not been expanded in
order to ensure that claimants with potentially lengthy claims are as-
sisted in combatting their disability. In fact, as late as April 1991, the
supervisor of rehabilitation services was still unaware that partial ben-
fits had become available as of July 1, 1990, in order to encourage
claimants to engage in transitional work.

As of February 1, 1993, the commissioner had not yet issued a
final rule governing rehabilitation, despite the statutory deadline of
July 1, 1991 for the final promulgation of this rule. The proposed
rule, which was circulated in 1991, raised several highly controver-
sial issues, which undoubtedly have contributed to the delay in the
development of a final version. For example, the rule proposed that
"the failure of either the injured worker or the employer to fully par-
ticipate and fully cooperate shall be a factor to be considered in deter-
mapping the amount of any permanent partial or permanent total dis-

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393. Interview with Wilbur Yahnke, Legal Assistant to Patrick Maroney who provides
legal assistance to AFL-CIO members on workers' compensation claims (Sept. 28, 1992).
394. In reviewing the claims in which temporary partial rehabilitation benefits were
ordered, see infra note 408, I came across this notation: "Temporary partial benefits have
not been and will not be implemented until July 1, 1991 . . . . I reviewed this matter
again and discussed it with John Farley [Division Director]. I am still convinced these bene-
fits are not yet payable." Notation by Steve White, rehabilitation supervisor, claim no.
(draft rules). This proposal was circulated but has not been filed with the Office of the
Secretary of State and therefore has not been promulgated as a proposed or emergency rule.
ability to which the injured worker might otherwise be entitled."\textsuperscript{396} The use of rehabilitation as a stick, rather than a carrot has been widely litigated\textsuperscript{397} and was the target of comments submitted by both business\textsuperscript{398} and labor.\textsuperscript{399}

The proposed rule does appear to have been designed to assist in the reemployment of injured workers. In addition to threatening litigants with consideration of their level of cooperation when a claimant's application for benefits was considered, it also proposed to establish strict time limits for evaluation of injured claimants in order to promote early intervention and rehabilitation efforts in claims which were likely to result in lengthy periods or substantial permanent disability.\textsuperscript{400} Moreover, the proposed rule ventured into the rather murky

\textsuperscript{396} 85 W. Va. 13 C.S.R. § 2.3. (draft rule) This language was taken from the original legislative proposal regarding rehabilitation. § 23-4-9, H.B. 4691, supra note 352.
\textsuperscript{397} 2 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 61.24, at 10-1027 to 10-1038 (1992).
\textsuperscript{398} Comments submitted on behalf of the West Virginia Chamber of Commerce and the West Virginia Self Insurers' Association by Employers' Service Corporation, signed by Pamela M. Mowry, Director, Workers' Compensation for Employers' Service Corporation (on file with author). These comments proposed deletion of this language and insertion of alternative language:

In the event that the injured worker refuses or fails to participate in rehabilitation services in accordance with the plan, or refuses or fails to cooperate fully, such failure shall be a factor considered in determining the injured worker's entitlement to a permanent total disability award or the amount of a permanent partial disability award.

\textit{Id.} This proposal would eliminate any consideration of an employer's failure to cooperate in the assessment of the workers permanent disability claim.

\textsuperscript{399} Comments submitted on behalf of the United Mineworkers' of America by Grant Crandall, Esq. (June 7, 1991) (on file with author) also expressed concern about the possible effects of failure to cooperate: "While the [proposed] rule is styled as requiring participation on both sides, it is likely to lead much more often to reduction in awards (due to worker failure, or claimed failure, to cooperate fully) than to increase in awards (as a result of employer failure to cooperate)." \textit{Id.}

\textsuperscript{400} In every claim which was likely to result in either a permanent disability or a temporary disability of greater than 120 days, the commissioner was to have the injured worker evaluated for the delivery of rehabilitation services. 85 W. Va. C.S.R. 13 § 6.1 (draft rule). This evaluation was to be completed within 45 days of "the commissioner's receiving of evidence that an injured worker is reasonably suspected to have sustained a permanent disability or . . . of the commissioner's receiving evidence that an injured worker has sustained an injury likely to result in temporary disability in excess of 120 days" 85 W. Va. C.S.R. 13 § 6.2 (draft rule) so that rehabilitation service could begin promptly.
waters of the relationship of rehabilitation in workers' compensation programs to disability discrimination law, acknowledging the potential impact of the ADA on return to work programs. After quoting from the purposes of the ADA, the proposed rule stated:

It is the view of the commissioner that this federal act directly impacts upon these rules and the Workers' Compensation Fund's vocational rehabilitation programs. The federal act prohibits discrimination in employment against injured workers by their employers, other employers, and by the Workers' Compensation Fund itself in the administration of the laws entrusted to it. Hence, the new federal law is consistent with and adds to the obligation imposed upon employers by West Virginia Code, § 23-4-9, in accepting previously injured workers for return to work and for new employment.

This proposed, though somewhat vague, relationship between employers' obligations and claimants' rights under the ADA and in the compensation system was not welcomed by business representatives. The incorporation of ADA standards with the rehabilitation rules as proposed might, in fact, substantially change employers' incentives. The proposal would, in essence, extend ADA requirements to all cases involving on-the-job injuries, irrespective of the size of the employer or number of employees; in contrast, the ADA only governs employers with 25 employees (effective July 26, 1992) and 15 employees (effective July 26, 1994). Although this extension would obviously not affect an employer's liability under the ADA, the employer's

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These time limits mirror the language in the initially proposed legislation. H.B. 4691, supra note 352. As noted previously, almost 90% of claimants return to work within 120 days of injury. See supra note 360.

401. Two of the stated purposes of the ADA are "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)-(2) (Supp. II 1990).

402. 85 W. Va. C.S.R. 13 § 2.2 (draft rule).

403. Comments submitted on behalf of the Chamber of Commerce suggested deletion of the quoted language, suggesting that it "will place employers in a potential conflict with the federal statute and regulations." Chamber of Commerce Comments, supra note 398.

404. 42 U.S.C. § 12111(5)(A) (Supp. II 1990). Approximately 30% of employees in West Virginia would not be covered under the current ADA provision; approximately 21% will not be covered when covered employer size drops to 15 employees. See supra note 373.
willingness to comply with the ADA would be a factor in the evaluation of the claimant for workers’ compensation benefits.\textsuperscript{405}

However, despite the proposal of the new rule in April 1991, the administrative handling of rehabilitation and transitional work has apparently changed very little in the years since the 1990 amendments became effective. In practice, the administrative functioning of the Workers’ Compensation Fund continues to reflect an unwillingness to vest injured workers with any claim for continued employment. Although agency representatives say that the proposed rules are guiding their rehabilitation work until the final rules are issued, there is insufficient staff to review claims within proposed time limits.\textsuperscript{406} As a result of the failure to adopt the aggressive program contemplated in the statute, Fund employees can only recall two instances in which claimants have returned to work on a trial basis under the statutory provisions; apparently, no records at all are kept of claimants who seek or obtain trial return to work periods.\textsuperscript{407}

Only seven claimants have received temporary partial rehabilitation benefits.\textsuperscript{408} These seven cases in which claimants have returned to transitional jobs are particularly revealing of the current administrative approach to rehabilitation of injured workers. The proposed time limits for performance of rehabilitation evaluations were met in only one case in which a severe head injury necessitated medical rehabilitation efforts.\textsuperscript{409} In all of these cases, although the claimants were referred

\textsuperscript{405} Assuming of course that the proposed language making employer cooperation a factor in the granting of permanent benefits is retained. See supra note 396 and accompanying text.

\textsuperscript{406} The only clear utilization of the draft rule is in setting a maximum time limit for temporary partial rehabilitation benefits at 104 weeks, a limitation which is not included in the statute but is included in the current draft rule.

\textsuperscript{407} However, Wilbur Yahnke reports that “about 50” AFL-CIO members have returned to work on this basis. To his knowledge, all but one remained at work; the final remaining person returned to temporary disability status for a brief period and then again returned to work, this time permanently. Interview with Wilbur Yahnke, supra note 393.

\textsuperscript{408} This is the total number of claims in which benefits pursuant to W. VA. CODE § 23-4-9(d) were awarded through Sept. 1, 1992. Claim files of these seven claims were provided to me, with all identifying information deleted. The discussion of these cases is based upon review of these files.

\textsuperscript{409} In four of these cases, referral to rehabilitation services occurred over one year.
for rehabilitation services, the claimants appear to have made their own arrangements to return to work through direct discussions with their employers or, in one case, through the claimant's own successful efforts to secure a position in an apprenticeship program. The rehabilitation specialists who worked with the claimants were unfamiliar with the amendments to the statute in 1990 and had not been informed about the availability of the partial benefit to encourage the claimant to accept transitional work.410

These claim files are devoid of any indication that rehabilitation specialists are using the availability of partial benefits as a tool to encourage claimants' return to work. In fact, in every one of these cases the claimants themselves, after securing the transitional work, made a request for the benefits.411 In every case, award of the benefits occurred long after the claimants' return to work; in two cases, the claimants contacted the Governor's office for assistance after being unable to obtain the partial benefits through normal procedures.

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after the date of injury; except in the head injury case, no claimant was even referred for evaluation in less than seven months.

410. See supra note 394.

411. In one case, the employer pleaded for something to be done when an employee agreed to return to work on a part-time basis:

On October 9, 1991, Mrs. A was released by her doctor to return to work part time. The part time schedule not to exceed three hours per day.

On October 28, 1991, the doctor approved increasing the part time work schedule for Mrs. A to five hours per day, her current schedule.

It is my understanding that, according to current regulation, the disability benefit wages ceases once a person returns to work, either on a part time or full time basis.

In the case of Mrs. A, she was a full time employee at the time her disability began and, through her initiative and progress, was able to return to work, albeit on a part time basis.

In my judgement, Mrs. A should not be penalized by the Workers' Compensation Fund for returning to part time work, nor should anyone else who is not abusing their benefits.

By not permitting a person to return to part time and/or light duty as soon as medically practical, causes melingering [sic] on the part of some persons or can cause slower recovery due to inactivity.

Letter from employer's Vice-President, Human Relations (name of writer deleted from file) to Workers' Compensation Fund (Nov. 19, 1991).
Moreover, even after the benefits have been awarded, they are not used in a manner consistent with the legislative findings. In each of these cases, the order awarding partial benefits limited duration of the benefits to twenty-four months. Apparently, this limitation was drawn from the proposed rules; there is no such limitation in the statutory language. More importantly, rehabilitation counseling services were terminated while the claimants were pursuing their transitional work programs and receiving partial benefits. The intent underlying the creation of these benefits was to have them be part of a general rehabilitation effort to return the claimant to work as quickly and safely as possible. The initially proposed legislation was designed to provide continuing protection to injured workers when they returned to work under a rehabilitation plan. Unlike a full return to pre-injury work, the very nature of transitional work leaves open the possibility that the claimant will be unable to continue to perform it; when claimants return to light duty or other transitional work they often express concern that they will be assigned to duties that they are not, or not yet, capable of performing. In several of these cases, the rehabilitation specialist assigned to the claim observed that there was a concern that the claimant was not capable of performing some or all of the tasks assigned. Nevertheless, rehabilitation services were terminated by the Fund because the claimant had returned to work, while the partial benefits continued to be paid.

In an attempt to ensure that claimants obtain appropriate and cost effective medical services, the Fund has now entered into a contract with a private vendor to monitor the provision of medical and rehabilitative services. The contract calls for medical and rehabilitation management and will require the vendor to contact claimants regularly

413. The final statutory language makes no reference to time limits. The initially proposed legislation limited normal rehabilitation plans to 208 weeks. § 23-4-9, H.B. 4691, supra note 352.
414. See supra note 360.
to check on their progress.\textsuperscript{416} In the past, the failure of the Fund to maintain communication with claimants has been a source of complaints, may increase the feelings of isolation of the claimant and, according to some, has led to increased periods of disability.\textsuperscript{417} The commissioner sees this contract as an important mechanism for assisting claimants to recover from injuries and return to work.\textsuperscript{418} This approach is motivated by the need for cost and quality management of the medical services provided to claimants.\textsuperscript{419} The rehabilitation component of the contract has not yet been implemented. In fact, claimants may, as a result of increased monitoring and improved medical care, return to work earlier. There is not, however, any evidence of this yet.

This contract is not a replacement for the direct provision of rehabilitation counseling, monitoring, and services. These services require a case management approach which identifies the claimant as a worker in need of assistance. Instead, the Fund continues to treat claimants as insurance beneficiaries only. The administrative failure to implement the 1990 statutory amendments is symptomatic of this view. Critics of the amendments believe that injured workers are unlikely to want to continue working. They will undoubtedly point to the apparent lack of interest in the expanded return to work options as additional evidence of the intransigence of intentional idleness. Instead, it is more likely that the failure of the amendments is the result of a deeply rooted problem: the historical, administrative, and judicial view that injured workers are legally entitled to monetary benefits, not to work.

\begin{itemize}
\item \textsuperscript{416} Id.
\item \textsuperscript{417} In West Virginia, there is only anecdotal evidence regarding this point. This phenomenon is, however, also noted in the rehabilitation literature. \textit{See} GARDNER, VOCATIONAL REHABILITATION IN WORKERS' COMPENSATION, \textit{supra} note 302, at 57-58.
\item \textsuperscript{418} Interview with Andrew N. Richardson, Commissioner of Employment Programs (May 14, 1992).
\item \textsuperscript{419} Quality and cost control of medical treatment of claimants is sorely needed. Anecdotal stories of excessive or inappropriate treatment abound; these stories are told by both claimants and employers. The rising cost of medical care to the Fund, which reflects national trends and now exceeds $70 million per year, is also cause for some concern. \textit{See} supra note 113.
\end{itemize}
IV. DISCUSSION: FITTING SOLUTIONS TO THE PROBLEMS

There appears to be a growing consensus that the fiscal problems facing the West Virginia Workers’ Compensation Fund will necessitate significant reform of this social insurance program within the next few years. In addressing these problems, it is essential to remember the particular economic and political conditions which gave rise to them. First, from 1985 to 1990 the workers’ compensation program was seriously underfunded. The policy of reducing and freezing premium rates may have been adopted thoughtlessly, recklessly, or maliciously. In any event, it resulted in a situation in which there are now inadequate reserves to fund existing liabilities. The concurrent economic downturn, with a continuing loss of employment in the coal mining sector, leaves current workers and employers financially responsible for this previously incurred debt.

Second, the economic downturn in coal mining and manufacturing continues to haunt us in the form of new and expensive claims. Many of these awards are made against employers who are no longer in business (at least on the books of the Fund). Again, current workers and employers become financially responsible for these claims which represent debt from the past.

Third, we continue to have a system of compensation that allows the persistence of excessive rates of occupational illness and disease and which discourages workers who want to return to work. Currently, judicial decisions and administrative functioning combine to make the Workers’ Compensation Fund the preferred remedy for occupationally injured workers in West Virginia. Injured workers have historically neither been guaranteed, nor do they necessarily expect, continued employment after a serious injury.

Somewhat remarkably, despite these problems, the current costs of this system to employers who subscribe to the Fund are not greater than those in other states. Thus, the financial issues facing the Fund derive from past underfunding and the persistence of second injury life award claims; the programmatic issues derive primarily from current procedures and awards.
The West Virginia model of workers' compensation, which combines adequate benefit levels, liberal eligibility criteria, and lack of significant direct intervention in the employment relationship, solves many social dilemmas: at least in theory, it keeps the courts out of job allocation decisions and it guarantees compensation to injured workers. But current programmatic design, by focusing on the award of benefits and not on the prevention of injuries and the rehabilitation of injured workers, undoubtedly contributes to the escalation of current costs. This is, in part, an unintended consequence of the judicial choice to apply liberal rules to the availability of benefits and more restrictive rules to any intervention in the employment relationship itself. Workers' compensation is an expensive social insurance program, particularly for industries with high morbidity and mortality rates associated with occupational hazards.\footnote{This is not at all surprising: a program which focuses first on the provision of benefits, and only secondarily (if at all) on the prevention or accommodation of disabilities, is inevitably expensive. Moreover, the legal tolerance for allowing disabled workers to be displaced from their jobs, even in healthy industries, encourages workers to maximize their income-replacement opportunities from the program which was created precisely for that purpose.\footnote{The best example of this is the case of Dorothy Coffman, who only sought benefits after she was not accommodated in a job in a large health care institution. See Coffman v. West Virginia Bd. of Regents, 386 S.E.2d 1 (W. Va. 1988).}} This is not at all surprising: a program which focuses first on the provision of benefits, and only secondarily (if at all) on the prevention or accommodation of disabilities, is inevitably expensive. Moreover, the legal tolerance for allowing disabled workers to be displaced from their jobs, even in healthy industries, encourages workers to maximize their income-replacement opportunities from the program which was created precisely for that purpose.\footnote{For every $100 of payroll in FY 1991, employers classified as "underground coal mining" had to pay (on average) $20.66 for workers' compensation; those classified as "timbering" paid $26.40 per $100 of payroll. In sharp contrast, employers of predominantly clerical employees paid $0.47 per $100 of payroll for workers' compensation coverage.}

The legal rules governing the rights of injured workers are irrational and confusing. Workers who want to work are simply not rewarded for their efforts. Workers who are denied employment as a result of prior work-related injuries have often not been accorded protection under the laws outlawing discrimination against the disabled. If workers have not fully recovered from an injury, courts have been reluctant to order reassignment or significant job restructuring. Risk of reinjury provides justification for refusal to reemploy an injured workers. Until
the 1990 amendments to the Workers' Compensation Act, provisions which restricted retaliation for the filing of workers' compensation cases were not interpreted to prohibit discharge of absent workers. The 1990 amendment does not guarantee reemployment unless a job is vacant. Recovery and a desire to work are not rewarded, unless the employer voluntarily chooses to provide work for the employee. The result is a system which promotes disability rather than discouraging it.

The combination of past debt and current cost escalation which today faces the Workers' Compensation Fund contributes to a belief that workers' compensation costs are too high. There is an inevitable political backlash to increasing costs and expanding definitions of disability. The greater the political polarization and the higher the costs, the more likely that the image of the worker as abuser of a system designed to help the "truly needy" gains popular credibility. Increasingly, business representatives charge that the beneficiaries of the program seek benefits in order not to work or, at a minimum, in place of working when work is no longer available. Workers are accused of seeking to expand the definitions of disability beyond their intended reaches, of fabricating underlying injuries, of lying about the work-relatedness of their injuries, or about the extent of the resulting impairment; they are accused of wrongfully exploiting excessive judicial liberalism. There is, thus, on one hand an image of malingering workers and, on the other, a legal system which fails to support workers who want to work.

In the political debates, the condemnation of workers and the workers' compensation system often eclipses discussions about systemic change. There has been a complete failure to separate concerns about past debt from concerns about future programmatic design. The West Virginia program currently combines premium rates which appear to be both competitive (on an interstate basis) and sound (on a pro-

422. The notion of excessive cost is, of course, a subjective and value-laden one. Workers' compensation continues to be only a very small portion of the social insurance/social welfare burden which is currently provided to people in this country through their employment.

423. See supra note 91-92.
spective basis) with increasing costs and a large unfunded liability. The political and social challenge is clear: to design a program which is reasonably fair to both employers and employees and which provides sufficient financial stability to guarantee adequate benefits to future injured workers. To do this, the Fund must achieve three objectives. First, it must identify the potential mechanisms for achieving financial stability. Second, it must separate the problems of the past from programmatic design needs of the future. Third, it must design solutions which are specifically geared to solve real, not rhetorical, problems.

A. Mechanisms for Creating Financial Stability for the Workers' Compensation Fund

There are, in the end, only three ways to bring a social insurance program into financial balance. First, revenue can be increased. Increased revenue has the advantage of yielding an immediate return; unlike changes in benefits, eligibility, or general program design, there is no delay in the collection of revenue. On the other hand, increased employer premium rates can cause some marginally profitable businesses to contract or close and inevitably create a major political backlash against worker's benefits.

Second, benefit levels can be lowered or eligibility criteria tightened. The impact of benefit reductions on the financial solvency of the program is far more attenuated than that produced by revenue increases. First, it can only be recognized as claims are denied, which occurs over time rather than immediately. Second, unless the changes are draconian in nature, they rarely yield considerable savings in the short run. Decreasing eligibility for benefits may have a somewhat

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424. This is the approach often taken now by employers in redesigning health insurance packages. Since workers are not considered to have any vested right to future health insurance protection, redesign of the available benefits allows employers to control their financial commitment to provision of this benefit.

425. For example, a reduction in the cap on temporary total disability/permanent total disability benefits would yield limited savings. Some argue, however, that a decreased weekly benefit level will result in lowered demand for benefits, resulting in greater savings than simply the savings in the weekly benefit amount calculated with the same number of claim-
more significant impact on financial issues, particularly if eligibility for high cost awards, which involve lifetime benefits, is restricted. Inevitably, faced with the increasing number of permanent total disability awards, business representatives in West Virginia have been pressing for changes in eligibility standards in order to restrict the number of awards in this category and to change the liberal presumptions in favor of claimants for awards in all categories.\footnote{426}

In this context, it is however important to remember that eligibility rules always permit approval of some claims which are not meritorious and exclude some that should have been approved. No social insurance system is perfectly accurate; a certain number of claims always occur in a "gray" area. To the extent that benefits are currently paid to workers because they are, in fact, disabled as a result of occupational injuries and illnesses, restriction of eligibility criteria will exclude, at least to some extent, legitimate claimants from the system. As eligibility criteria are tightened, both the number of excluded meritorious claims and the number of properly excluded claims grows. This result can only be viewed as positive when the measure of success is only the exclusion of nonmeritorious claims. If the measure of success is the provision of benefits to workers with legitimate claims, then eligibility changes which exclude meritorious claims increase the failure rate of the system.

The third mechanism for reducing costs and creating financial stability is to modify the underlying tenets of the program, in order to reduce demand. A major empirical study of Michigan employers concluded that in-state variation in employer workers' compensation premium rates was greater than variations in rates from state to state. The intrastate variation in rates correlated most significantly with enterprise-specific management techniques. Enterprises which had workers' compensation costs that were demonstrably lower than others had the fol-

\footnote{426. In particular, they seek to eliminate the Posey/Cardwell standards for permanent total disability and to eliminate the "rule of liberality" as expressed in the Javins case. Javins v. Workers' Compensation Comm'r, 320 S.E.2d 119 (W. Va. 1984).}
lowing characteristics: they instituted aggressive safety programs, maintained good labor-management relations, and made significant efforts at rehabilitation and reemployment of injured workers. Large numbers of employers have discovered that changes in management practices yield considerable workers' compensation savings.

There is no question that this strategy works. It yields future savings, not immediate financial savings, however. It is not, then, a useful mechanism for addressing the immediate financial concerns of a program. On the other hand, it lends itself well to a long term approach to cost containment. The primary question is whether and how to institutionalize these strategies into the legal and administrative

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427. HABECK ET AL., supra note 120. This report, funded by the W.E. Upjohn Institute for Employment Research, was based upon empirical studies of Michigan employers and was conducted in part in response to charges by employers that Michigan workers' compensation costs were higher than those in neighboring states. The researchers determined that intrastate variation in costs was far greater than interstate variations and that, therefore, investigation of management practices within the state could yield guidance for greater cost savings than would be yielded from interstate program comparisons. The study therefore focused on factors which lie within the control of employers. Among its other conclusions, it noted:

Low claims employers were found to have significantly less agreement with negative workers' compensation attitude statements than high claims employers. Low claims employers report significantly less agreement with the specific attitude that one reason for the high cost of workers' compensation in Michigan is that claims are paid that would not be compensated in other states, suggesting that they may be more cognizant of the importance of other factors potentially within their control.

Id. ch. V, at 11. For further exploration of this approach to cost containment in workers' compensation, see WORKERS' COMPENSATION: STRATEGIES FOR LOWERING COSTS AND REDUCING WORKERS' SUFFERING, supra note 1.


429. Herschel Sims, President of Employer Service Corp., Charleston, West Virginia, observed that rehabilitation and safety efforts would be inadequate to turn around the serious short term funding problems facing the Fund, but may be the "long term way to solve some of the financial problems of the fund." Bob Geiger, Cost-Cutting Through Safety to Be Stressed, CHARLESTON GAZETTE, May 9, 1989, at 1C, 3C.
system in order to design a future system which limits both human misery and cost.

B. Fitting the Solution to the Problem

It is a truism that political hysteria rarely breeds reasoned solutions to social problems. The agglomeration of the problems facing the workers' compensation program into a single financial catastrophe breeds such hysteria and feeds the political views that blame injured workers for excessive costs. A more careful approach—which disaggregates the problems, seeks their sources, and then devises solutions—would better serve both employers and employees.

1. Facing the Deficit

The deficit is not the result of either excessive demands made upon the workers' compensation program by greedy workers or the result of wilful nonpayment by most employers. The first task is to segregate the deficit as an issue. This should be done both as a matter of financial bookkeeping by the Fund and as a political matter. To the extent that deficits need not be fully funded, it would be appropriate to carry this deficit forward. The current economic status of business and employment in West Virginia does not encourage the levying of additional, harsh payroll contributions. To the extent that experts feel that it must be funded, however, it should be done as a separate surcharge on payroll with a distinct revenue base.

430. It is my intention to outline an approach to the solution of these problems, not to provide a comprehensive reform proposal. As the prior administrator of the Workers' Compensation Fund who had to raise premium rates in 1989, I understand both the administrative and political complexities in instituting change.

431. Although somewhat more technical, this task must include segregation of the portion of the deficit which is the result of past inadequate funding of the second injury fund by otherwise self-insured employers. If this is not done, then smaller subscribing employers will be forced to pay the deficit resulting from larger employer “dumping” of older disabled employees.

432. The assessment of the size of the deficit that can reasonably be carried, in view of the current transitional economic situation in the state, I leave to experts in economics and actuarial sciences.
The precise mechanism for this will, of course, be a political compromise. In designing a payroll contribution surcharge, two difficult questions will have to be confronted. First, how can equity among employers be achieved? The debt was incurred primarily because of claims made against certain industries and because of large numbers of permanent total disability awards, particularly involving self-insured employers within certain industrial classifications. The repayment of the debt may be distributed among industries in a manner proportional to current payroll, to current risk, or to an industry’s contribution to the debt. A failure to make the surcharge responsive to the contribution to the debt of particular industries or self-insured employers within certain industries will mean that some, particularly smaller, employers will be asked to repay a disproportionate share of the debt.433

Second, should employees be expected to contribute through a separate payroll tax? Employers have frequently proposed that any surcharge involving debt repayment should include an employee contribution. As noted earlier in this Article, workers’ compensation programs are unusual in that they generate direct monetary revenue exclusively from employers. Most social insurance programs have been built on joint contributions from both beneficiaries and employers. A special payroll tax to fund the deficit could include both employer and employee contributions.434 In view of the fact that employees’ wages are currently not rising and that employees were not the beneficiaries of the 1985 rate reduction argues against an employee payroll tax. Nevertheless, these arguments may not, in the end, shield employees from having to contribute to refunding attempts.

The advantages of establishing a separate payroll surcharge for any essential refunding of the deficit should be obvious. First, this approach protects future beneficiaries of the program from bearing the primary burden of the previously incurred debt. Second, it isolates the

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433. Often smaller employers who subscribe to the Fund are poorly represented by business organizations in the political process. Perhaps not surprisingly, large self-insured employers tend to receive more vigorous representation.

434. A prior model for this exists: the unemployment insurance trust fund debt was repaid using just such a shared funding mechanism. W. VA. CODE § 21A-5-10a (Supp. 1992). These assessments were statutorily terminated effective Apr. 1, 1990. Id.
deficit as an economic and political issue. Third, it provides a time-limited mechanism for addressing what currently appears to be an overwhelming problem.

2. Confronting the Prevalence of Permanent Total Disability

The growing number of permanent total disability awards presents several interrelated problems. First, a large number of these awards have been made to workers who have been out of the workforce for a substantial period of time. The companies for whom they worked are often no longer in business. The prior contributions of employers, particularly self-insured employers, to the second injury fund have been inadequate. While these workers now create an enormous drain on the available workers’ compensation resources, their employers cannot contribute to the refunding of the program.

Second, these awards are most often being granted to workers who have no reasonable likelihood of reentering the workforce. These are workers who have been economically displaced by the combination of their lack of education, their age, their limited experience in hard manual labor jobs, and the loss of jobs in the coal and manufacturing industries. Business groups now argue that the eligibility criteria for these awards should be changed in order to exclude these workers from the system. In fact, the eligibility criteria established by the West Virginia Legislature and the Supreme Court of Appeals are not substantially deviant from those established in other states. The difference in West Virginia is the disturbing level of displacement and dislocation that was caused by the loss of jobs in these industries, the high level of injury and disability associated with coal mining, and the historical failure of the state to provide adequate education and training to these workers. The current problem, obviously, is that the workers’ compensation system is being asked to assume the costs of these past failures.

The solutions to this problem cannot be drawn from a future redesign of the relationships of work and injured workers. The older workers who have been receiving these awards are, for the most part, unlikely candidates for successful rehabilitation. They live in areas of the state in which little economic development is occurring. Although they clearly meet the definitions which would entitle them to protection
under the disability discrimination laws, they have limited ability to perform work of a different nature. It would be inconsistent both with preexisting law and with their life situations, including their age, to expect them to relocate.

There are therefore only two alternatives: raise revenue to cover the costs of these awards or change the structure of benefits. At a minimum, rates paid by employers for second injury fund coverage must be raised to adequate levels. Eligibility for these benefits, and the nature of the benefits themselves, calls for wider discussion: to what extent are these wages intended to be replacement for lost wages and to what extent are they intended to compensate for the loss of whole life functioning? To what extent should workers who have retired at normal retirement age, with full retirement benefits, be entitled to these benefits? To what extent should these benefits be reduced or eliminated once the disabled worker reaches retirement age, assuming that his or her pension and other retirement benefits are fully funded? Should the right to apply for these benefits hinge upon the ability of a worker who is no longer in the workforce to reopen an


436. Since 1991, employers have a financial disincentive for utilizing the second injury fund, because their rates for this coverage will be experience-based. W. VA. CODE § 23-2-9 (Supp. 1992). Aggregate disincentives for dumping older disabled workers should come from charging adequate rates for this coverage, as well. This will, unfortunately, decrease the ability of second injury fund coverage to encourage employment of disabled workers. Of course, there is some question as to whether this purpose of the fund was ever served. See supra note 62.

437. As discussed supra note 59-79 and accompanying text, permanent total disability benefits under the West Virginia system are a hybrid of wage replacement and general compensation benefits. To the extent that the benefits are intended to replace wages, they should be reduced by any wages which are earned by the worker. Moreover, any worker who has attained retirement age without loss of income would, under this analysis, not be entitled to the wage replacement component of these benefits. Adjustments to the reduction of benefits after retirement should take into account the loss of retirement income resulting from a worklife shortened by occupational disability.

438. These workers might arguably be entitled to the portion of benefits which is not based upon wage replacement.

439. This requires an analysis of the situation of workers whose work lives are shortened and their retirement benefits thereby reduced as a result of occupationally-induced disability.
old workers' compensation claim or to file a new claim based upon a newly discovered disability?\footnote{440} If not, who should be eligible to file for these benefits? Should eligibility for these benefits be guaranteed when a worker becomes eighty-five percent disabled?\footnote{441} Should the availability of rehabilitation and a suitable job affect the eligibility of a worker for permanent total disability benefits?\footnote{442} Should the failure of an employer to provide a job, despite obligations under the disability discrimination laws, be evidence that the worker is totally disabled?\footnote{443}

Consideration of these questions will assist in designing a solution to the cost of permanent disability awards that does not punish older disabled and displaced workers. Any approach that would eliminate entirely the availability of life awards to these workers would be troubling. The problem with the awarding of these benefits is not that people wrongfully seek them.\footnote{444} The problem is that we failed to charge adequate rates to cover the costs of these awards and failed to anticipate fully the costs of economic restructuring.

3. Redesigning the System for the Future

The third, and ultimately the most important challenge, is to design a system of workers' compensation that provides adequate benefits

\footnote{440. As currently functioning, workers who can reopen an occupational pneumoconiosis claim or open a new noise-induced hearing loss claim are able to then file for permanent total disability benefits; 10% of permanent total disability awards are the result of the filing of claims for compensable hearing loss. Finger & Briscoe, supra note 27. Workers who are equally disabled, but unable to find a mechanism for opening a partial claim, cannot do so. As a result, the most disabled workers are not always the ones with the most "luck" in obtaining benefits.}

\footnote{441. W. VA. CODE § 23-4-6(d) (Supp. 1992). Relatively few permanent total disability awards are in fact awarded on this basis. The beneficiaries of these awards are more often still actively in the workforce than the beneficiaries of Posey/Cardwell awards.}

\footnote{442. The 1990 proposed legislation for expanded rehabilitation, and the draft rule governing rehabilitation, would both consider the refusal of a worker to participate to be admissible evidence in a claim for permanent disability benefits.}

\footnote{443. This is, in fact, what the court held in Cardwell v. State Workmen's Compensation Comm'r, 301 S.E.2d 790 (W. Va. 1983).}

\footnote{444. Or pursue "idleness," as has been charged by at least one law firm representing business interests. See supra note 92.}
to current and future workers at reasonable cost. Obviously, views of adequacy and reasonableness may vary and there are an infinite number of ways to redesign benefit systems.\textsuperscript{445} More fundamentally, however, as this Article demonstrates, the judicial and administrative systems which govern injured workers in West Virginia are currently designed to promote compensation remedies over reemployment.\textsuperscript{446}

A fundamental reordering of judicial and administrative views may therefore be necessary. Judicial interpretation and administrative functioning can have significant impact on the effectiveness of any attempts to rehabilitate and reemploy injured workers. By expanding the definition of handicap under the Human Rights Act in 1989 and explicitly forbidding discharge and providing limited rights to reemployment for temporarily disabled workers in 1990, the West Virginia Legislature has begun to consider the issues of reemployment. In passing these amendments and overruling narrow judicial interpretations governing workers' rights, the legislature has also made clear that it intends to provide these alternative remedies to injured workers. These steps were, however, barely a beginning.

Expansion of reemployment rights and opportunities can be achieved in two ways. First, specific legal rights for workers can be more fully articulated and expanded. One possibility, advocated elsewhere, is to expand reemployment rights through a comprehensive reemployment statute.\textsuperscript{447} Such a statute should, at a minimum, guar-

\textsuperscript{445} Current debates in workers' compensation circles often focus on issues of containing health care costs and mechanisms for quantifying permanent partial disability. Current discussions in West Virginia raise both of these concerns. Other more specific issues also merit consideration. For example, West Virginia is one of only two states that make no provision for subrogation when the claimant recoups wage and medical losses from a third party. The legislature has failed to address this issue adequately. See W. VA. CODE §§ 23-2A-1 to -2 (Supp. 1992). Obviously, these more specific inquiries are not the primary focus of this Article. They are not the focus here because they do not go to what I believe to be the heart of the issues; changes regarding these issues would neither solve the inherited financial problems (relating to the deficit and the displacement of workers who qualify for second injury life awards) nor resolve any of the fundamental concerns regarding occupationally injured workers.

\textsuperscript{446} The most important single focus to reduce workers' compensation costs is undoubtedly the prevention of injury and illness. Unfortunately, workers' compensation programs themselves have had limited success in furthering this goal. Some effort is, however, being made in this direction. See supra notes 121-23 and accompanying text.

\textsuperscript{447} One such model act was proposed by Professor Mark A. Rothstein. Rothstein,
antee reemployment to workers who recover completely from occupational injuries for a specified period of time and clearly establish rights to reemployment to those who can be accommodated through job restructuring, retraining, or reassignment.

This approach has certain attractions: it establishes clear legal entitlements and ground rules which are consistent for all workers and are generally not subject to individual waiver. However, the level of political opposition to the partial protection proposed by the Workers' Compensation Advisory Board in 1990 makes the passage of a comprehensive statute in West Virginia unlikely in the immediate future.

Gradual expansion of reemployment rights can also be accomplished through more liberal judicial interpretation of existing discriminatory statutes. In particular, both the recent amendments to the Workers' Compensation Act and the Human Rights Act were intended to extend additional rights to injured workers to return to work. These statutory changes should be interpreted to discourage discharge and encourage reemployment whenever possible. This can be accomplished if the traditionally liberal rules of statutory interpretation are extended to the claims made by disabled workers under the new discriminatory practices provisions of the Workers' Compensation Act\(^\text{448}\) and the handicap discrimination provisions of the Human Rights Act.\(^\text{449}\) Em-

\(^{supra}\) note 283. Similar proposals have been advanced under the Canadian workers' compensation laws. Terence Ison, Rights to Employment Under the Workers' Compensation Acts and Other Statutes, 28 OSGOODE HALL L.J. 839 (1990).

448. In particular, discharge for absence or for any other cause that is not clearly separable from the work-related injury or absence should be prohibited, unless specifically permitted by the sections of a collective bargaining agreement governing seniority; rights to reemployment should be enforced whenever possible. W. VA. CODE § 23-5A-3 (Supp. 1992).

449. The court's assertion of the need for strict construction of this provision was, at least in part, derived from the restrictive definition of handicap adopted by the legislature in 1981. The legislative amendment expanding this definition in 1989 is evidence either that the court had misinterpreted the legislature's original intent or that the legislative view had changed. Like the 1990 amendments to the Workers' Compensation Act, these amendments signal a shift in legislative intent toward promoting rights of previously injured employees.

The court's reexamination should include an attempt to establish some consistent expectations for injured workers. The definition of handicap should be reexamined in order to extend protection to work-injured people who have been adjudged to be permanently impaired by the Workers' Compensation Commissioner and who are excluded from employ-
employer defenses under the Human Rights Act should be subject to the same strict analysis that is imposed on affirmative defenses in other civil rights discrimination matters.\textsuperscript{450}

While important, however, individual rights which protect employees are, in the end, only minimally protective.\textsuperscript{451} There is a fundamentally unequal relationship between disabled employees (who would like to retain their jobs) and employers who control the availability of work. Individual employees are therefore often reluctant (when the employment relationship is continuing) and financially unable (when the relationship has terminated) to litigate. It may therefore be the normative power of the legal directive which leads to the most significant change in behavior. Employees who work for employers who do not voluntarily comply with new statutory directions may not actually be protected.

Change in the approach to administration of claims might, in contrast, affect all claimants and employers and have greater future impact. There has been, however, little reason to think that the administration of the West Virginia Workers' Compensation Fund can effectively review and manage issues of reemployment. The failure of the

\textsuperscript{450} The defense allowing an employer to reject an applicant or terminate an employee because of probability of harm to that individual, when the safety of others is not jeopardized, should be eliminated. Although this would require amendment of the current regulations of the Human Rights Commission, this change would be consistent with the statutory language of the ADA. In evaluating claims of undue hardship, the rule of the Commission, which is consistent with federal regulatory language, should be carefully followed.

\textsuperscript{451} "Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground." MARY ANN GLEN DON, RIGHTS TALK 14 (1991).
commissioner to alert employers and physicians to the availability of expanded rehabilitation opportunities under the 1990 amendments does not bode well for expanded administrative commitment to reemployment issues. Substantial changes, as well as increases in administrative budget allowances, would have to be made in order to reorient the program toward issues of rehabilitation and reemployment of injured workers.

To accomplish this, the Workers' Compensation Fund would have to develop a comprehensive claims management system which assigns a staff member familiar with benefit entitlement, medical care standards, and rehabilitation options to every claim in which it is likely that the injured worker will be absent from work for a substantial period of time. This program should encourage and monitor employer efforts to provide rehabilitation and should aggressively utilize all available tools, including retraining and the new partial rehabilitation benefits, in order to assist workers to return to work quickly and safely.452

452. Such a program might, for example, be organized in the following manner. The staff member should follow the claim on a longitudinal basis, maintain close contact with the claimant to determine how s/he is progressing, explore the availability of alternative job placements with the employer, and maintain contact with the claimant's treating physician, in order to determine the availability of transitional or light duty work which the claimant would be capable of performing. Broader use should be made of the temporary partial benefits which provide financial incentives for claimants to return to work on a transitional basis. Employers, employees and physicians should be encouraged to utilize trial return to work procedures pursuant to W. VA. CODE § 23-4-7b (Supp. 1992). Any return to work which involves job accommodation should be monitored closely and continuously to ensure that the claimant is not assigned to work that s/he should not be performing; cases should never be closed if the claimant is performing transitional work. If it does not appear that the individual will be able to return to work for the pre-injury employer, the claim manager should make an immediate assessment as to whether rehabilitation programs, including retraining, would assist the claimant in returning to the work force. If not, administrative assessment should be made of the claimant's entitlement to permanent total disability benefits under current law.

These changes in the handling of claims would be far-reaching. They would also be perceived as dangerous by both claimants' representatives and employers. Claimants quite correctly feel that any assistance from an insurance carrier is motivated by a desire to save money, not to help them. Mishandling of a claims management system could result in claimant resistance to cooperation and thereby exacerbate the deep feelings of animosity toward the Fund shared by claimants and employers. Employers, on the other hand, will charge that this system will not work unless claimants are required to participate. Mandatory participation in vocational rehabilitation is rarely effective, however, and dramatically in-
Second, it is important that the nature of litigation—and litigiousness—which surrounds workers' compensation not be extended to issues surrounding a worker's return to work. It is time to explore alternative dispute resolution mechanisms which would serve the parties' interests in rapid resolution and the societal interest in expanding employment opportunities. Any employee who cannot return to work increases claimant resistance to cooperation.

Employers will also charge that the cost of such a program outweighs its benefits. The administrative cost of individual case management is, without question, higher than the cost of the current "pay only" system. States which have expanded rehabilitation efforts have found their costs to rise primarily as a result of excessive use of private rehabilitation vendors, who charge high hourly rates to perform these functions. The ability of health care or related specialists to expand their services, if there is payment available for them, is legendary. The conversion to this alternative system of claims management for the 12% of lost-time claims which result in temporary disability of greater than 120 days should be accomplished with the use of expanded, better trained internal staff.

Employer-sponsored rehabilitation efforts should be encouraged but must be monitored aggressively. Currently, employers also maintain that their own efforts at rehabilitation are often rebuffed by the Fund. Unfortunately, claimants perceive that many of these programs were designed to induce them to return to work prematurely in order to reduce costs; employer conversely perceive resistant employees to be malingers. Under current law, the employer has considerable leverage to pressure an injured employee: the claimant hopes for an on-going employment relationship but under current law has only inconsistent guarantees of reemployment. The unequal bargaining power between employees and their employers is made less equal by the employee's disability; whatever ability the employee had to terminate the relationship and go elsewhere is significantly reduced as a result of the injury. Premature return to work has two significant results: it increases the likelihood of reinjury and permanent disability; and it increases the hostility of other workers to the employer's rehabilitation efforts.

Nevertheless, the encouragement of appropriate rehabilitation efforts by employers is critical. It is precisely the willingness of employers' to reemploy injured workers and to provide transitional work that will increase the worker's likelihood of successful continued employment. Because of the history of distrust of these efforts, however, they can be successfully encouraged only if the agency carefully monitors them. Claimants who need rehabilitation assistance must be monitored by the agency's rehabilitation specialists, even if their employers have extensive rehabilitation programs of their own. Employers will undoubtedly charge that this is duplicative. It is, however, the commissioner's obligation to provide indemnity benefits to injured claimants when appropriate; the balancing of return to work and indemnity payment cannot be accomplished by the employer, whose interests are consistently adverse to the claimant.

453. Several models for this exist. For example, under some collective bargaining agreements, when there is a difference of opinion regarding medical fitness for duty of a returning employee, the physicians chosen by the employer and the employee agree upon a third physician to examine the worker. The third physician is informed regarding the job
would maintain eligibility for compensation benefits, including rehabilitation benefits.

Finally, despite the strong financial and policy justification for expansion of reemployment rights of injured workers, a word of caution is nevertheless appropriate. Reemployment is not a replacement for the provision of adequate monetary and rehabilitation benefits for workers who are actually displaced from the work force as a result of single or accumulated work-related disabilities; nor is it a replacement for the primary prevention of injuries and diseases in the workplace.

However, the negative consequences of continuing a system which frees employers of any obligation to injured workers (other than to provide compensation benefits and to maintain obligations under collective bargaining agreements) are most troubling. Moreover, the current lack of any serious administrative effort at rehabilitation means duties and extent of available accommodation and makes a determination regarding whether it is appropriate for the employee to return.

454. Terence Ison, a commentator with administrative experience with workers’ compensation in Canada, has argued that expansion of reemployment, if it occurs, should occur for all disabled employees and therefore should be situated in general employment standards legislation, not within a workers’ compensation statute. Ison argues that rights to continuing employment are fundamentally unenforceable. They serve, moreover, to divert workers and others from considering whether retraining or other skill developments would place them in a better position in the open labor market; if the specific job provided to accommodate the worker disappears, s/he may then be unemployable or forced to seek work for which s/he is not medically fit. Because those familiar with assessing the medical condition of workers are rarely familiar with the actual demands of jobs in the work environment, they have never done a good job of determining what constitutes suitable employment; these efforts have, therefore, always been a cause of injustice, contention, complaint and waste. Reemployment requirements may, moreover, increase the social control by employers over injured workers and decrease the likelihood that the workers’ compensation administrators will extend meaningful rehabilitation efforts. Workers’ compensation should, instead, continue to do what it does best: provide cash transfer payments to injured workers to replace their wages and compensate them for their permanent impairments. Ison’s concerns are not illegitimate. There is strong anecdotal evidence of the misuse of rehabilitation and reemployment in order to reduce costs by forcing injured workers back to work prematurely. Ison, supra note 447, at 843-46; see also Terence Ison, The Significance of Experience Rating, 24 OSGOODE HALL L.J. 723, 733 (1986) (arguing that experience rating and self insurance, both of which cause employer costs to rise as compensation costs rise, encourage employers to offer “phony” rehabilitation programs).
that injured workers are often abandoned by the current system without any mechanism for obtaining jobs.

If injured workers are consistently reemployed, the entire incentive structure of the workers' compensation system will change. To acknowledge the status of the occupationally injured as workers, we must vest them with both the ability and the right to continue to work. If we do not, we must be prepared to continue to pay the high costs of workers' compensation, to endure the suffering resulting from occupational hazards, and to fight the Sysiphean battle over benefit costs.

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455. ALBERT CAMUS, THE MYTH OF SISYPHUS (1955). For eternity, Sisyphus will struggle to roll the rock up the mountain.