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MITCHELL AND ITS PROGENY: AN ANALYSIS OF RECENT DEVELOPMENTS IN THE PAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS IN WORKMEN'S COMPENSATION CASES

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The West Virginia Supreme Court of Appeals, since it achieved its present composition by virtue of the November, 1976, general election,\(^1\) has had a dramatic impact on the development of workmen's compensation law in West Virginia.\(^2\) Although it is difficult to single out the most significant decisions of the court in this area, most practitioners would probably agree that the two cases having the greatest impact upon workmen's compensation practice and related matters are Mandolidis v. Elkins Industries, Inc.\(^3\) and Mitchell v. State Workmen's Compens-
sation Commissioner. The Mandolidis decision received extensive treatment in an earlier article in this law review and has had widespread notoriety.

The Mitchell decision has received less publicity than Mandolidis, but is, perhaps, no less significant in its impact. The issues that it raised have spurred, at least in part, a significant statutory amendment and at least three major procedural changes within the Workmen’s Compensation Fund. In addition, a number of supreme court decisions have enlarged or refined the Mitchell decision.

Although the legal reasoning in the Mitchell decision is questionable, and in the short run numerous overpayments of temporary total disability benefits have resulted, the West Virginia Workmen’s Compensation Fund has since dealt with the problems created by the court’s decision in a positive way. The long term effects of Mitchell may prove, in fact, to be satisfactory and beneficial to employer and employee alike.

This article will consider the changes wrought by Mitchell and its progeny and will suggest solutions still needed by all parties for an effective resolution of problems raised by the decision and for the attainment of a fair and equitable system of processing workmen’s compensation claims.

I. TEMPORARY TOTAL DISABILITY - PRE-Mitchell PROBLEMS AND SOLUTIONS

The payment, and termination of payment, of temporary total disability benefits has always provided more than its share of problems for the employee, the employer and the West Virginia Workmen’s Compensation Commissioner. In the past decade, these problems have been magnified by greatly increasing rates.

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4 256 S.E.2d 1 (W. Va. 1979).
5 Flannery, et al., supra note 2.
7 See text accompanying notes 102-14 infra.
8 The current rate of payment of temporary total disability benefits is seventy percent of the employee’s average weekly wage at the date of the injury, not to exceed one hundred percent of the state’s average weekly wage. W. Va. Code § 23-4-6(b) (Cum. Supp. 1980). The employee’s average weekly wage is computed by
and statutory changes relating to the procedure for paying benefits. In order to understand the problems which gave birth to the Mitchell decision, a brief consideration of pre-Mitchell statutory and case law and procedure is in order.

The statutory provision governing the payment of temporary total disability benefits requires the Commissioner to make a prompt determination of whether an employee’s compensable injury is likely to disable him for a period longer than three days.

Determining the daily rate of pay at the time of the injury, and the average pay received during the two month, six month and twelve month periods preceding the date of injury. The employee is then given the benefit of the most advantageous rate. W. Va. Code § 23-4-14 (1978 Replacement Vol.). For instance, consider an employee with a daily rate of pay of $50.00 on the day of the injury. The same employee received $2,800.00, $7,500.00 and $14,000.00 for the two month, six month and twelve month periods preceding the injury, respectively. Assuming 60 days in the two month period, 180 days in the six month period and 360 days in the 12 month period, the daily rates would be $46.67, $41.67, and $38.89, respectively. Since all of these rates are lower than the daily rate on the date of injury ($50.00). that rate will apply. When multiplied by five, an average weekly rate of $250.00 is derived. Seventy percent of $250.00 is $175.00 per week. The state average weekly wage for the fiscal year 1980-81 is $262.08 per week. Since seventy percent of the employee’s average weekly wage does not exceed one hundred percent of the state average weekly wage, the benefit rate would be $175.00 per week. The state average weekly wage is calculated by the Department of Labor on a fiscal year basis and workmen’s compensation rates are adjusted accordingly each July 1. The statute also provides a minimum rate of one third of the state average weekly wage. W. Va. Code § 23-4-6(b) (Cum. Supp. 1980). As of July 1, 1980, the minimum rate is $57.36 per week.

From the standpoint of better understanding the Mitchell decision, the most significant statutory change was the 1974 amendment requiring immediate payment of benefits to an employee who has been adjudged temporarily totally disabled even though a timely objection has been filed by the employer. W. Va. Code § 23-4-1c (Cum. Supp. 1980). Although perhaps not directly related to Mitchell, two other amendments within the last decade are worthy of note. As a result of a 1971 amendment, temporary total disability benefits may not be deducted from a subsequent permanent partial disability award. W. Va. Code § 23-4-6 (Cum. Supp. 1980). Perhaps more significantly, a 1978 amendment permits reinstatement of temporary total disability benefits in claims which have been closed by prior awards of temporary total or permanent partial disability benefits. W. Va. Code § 23-4-1c (Cum. Supp. 1980). Prior to the amendment, an award of permanent partial disability benefits terminated all further claim to temporary total disability benefits arising out of the same compensable injury. Richardson v. State Workmen’s Comp. Comm’r, 153 W. Va. 454, 170 S.E.2d 221 (1969); Stewart v. State Comp. Dir., 160 W. Va. 103, 144 S.E.2d 327 (1965).

Upon making such a determination and the employee being eligible, the Commissioner is required to notify the parties and commence payment of benefits.\textsuperscript{11} Even though the employer may file a timely objection "with respect to the payment or continued payment of temporary total disability benefits,"\textsuperscript{12} the Commissioner is required to continue paying benefits while the claim is in litigation.\textsuperscript{13}

Temporary total disability benefits are payable during the continuation of the disability.\textsuperscript{14} Pre-Mitchell decisions made it relatively clear that there were two basic criteria for terminating temporary total disability. The first and most obvious criterion was that of an actual or constructive return to work. That is, a claimant who has returned to work or who has been released to return to work by his physician forfeits his right to further benefits.

However, as the Supreme Court of Appeals of West Virginia has noted, there is no specific language in the Workmen's Compensation Act "that relates return to work as affecting total temporary disability benefits."\textsuperscript{15} Therefore, the concept of termination of benefits upon one reaching a maximum degree of improvement had become firmly embedded in the case law prior to Mitchell.\textsuperscript{16}

\textsuperscript{11} Id.
\textsuperscript{12} Id. An objection to an award or finding of the Commissioner must be filed within thirty days of receipt of notice of the award or finding by the party making the objection. W. Va. Code § 23-5-1 (1978 Replacement Vol.). The thirty day objection period has long been deemed mandatory. Stewart v. State Comp. Dir., 150 W. Va. 103, 144 S.E.2d 327 (1965). However, a recent decision of the Supreme Court of Appeals has cast some doubt on the validity of that prior assumption. In Dyer v. State Workmen's Comp. Comm'r, No. 14512 (per curiam W. Va. Oct. 16, 1979), claimant filed an appeal one day beyond the thirty day appeal deadline. The court observed that since the appeal period runs from the date of the Appeal Board's order and not its receipt, and since the Rules of Civil Procedure, although not applicable to this claim, provide an extra three day period for service of notice by mailing, the appeal would not be deemed untimely. The court declined to set any outer limit for late filing.
\textsuperscript{14} W. Va. Code § 23-4-6(b) (Cum. Supp. 1980).
\textsuperscript{16} In Perry v. State Workmen's Comp. Comm'r, 152 W. Va. 602, 607, 165 S.E.2d 609, 612 (1969), the court held:
While ability to return to work and "maximum degree of improvement" from a compensable injury are often, if not usually, the same, such is not always the case. A claimant who has truly reached maximum improvement and yet is unable to return to work would presumably be entitled to a permanent total disability award.

Most significant to the Mitchell decision and subsequent developments is the provision of the Workmen's Compensation Act relating to termination of temporary total disability benefits. The provision states, in part:

[T]he commissioner shall continue to pay to the claimant such benefits and expenses during the period of such disability unless it is subsequently found by the commissioner that the claimant was not entitled to receive the temporary total disability benefits and the expenses provided for in subdivision (a), section three of this article, or any part thereof, so paid, in which event, the commissioner shall, where the employer is a subscriber to the fund, credit said employer's account with the amount of the overpayment; and, where the employer has elected to carry his own risk, the commissioner shall refund to such employer the amount of the overpayment. . . . If the final decision in any case determines that a claimant was not

It is evident from an examination of the Workmen's Compensation law of this State that it was the intention of the legislature with regard to disability that an injured workman should be paid on what is denominated total temporary disability for the period of time necessary for him to reach maximum degree of improvement when he would be examined and given a permanent partial disability or a total permanent disability award.


Inability to return to work means inability "to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he [a claimant] has previously engaged with some regularity and over a substantial period of time . . . ." W. Va. Code § 23-4-6(a) (Cum. Supp. 1980); Posey v. State Workmen's Comp. Comm'r, 157 W. Va. 285, 290, 201 S.E.2d 102, 107 (1973). Thus, the mere fact that the claimant cannot return to the employment in which he sustained the injury is not determinative of the question of permanent total disability.
lawfully entitled to benefits paid to him pursuant to a prior decision, such amount of benefits so paid shall be deemed overpaid. The commissioner may recover such amount by civil action or in any manner provided in this Code for the collection of past-due payment and shall withhold, in whole or in part, as determined by the commissioner, any future benefits payable to the individual and credit such amount against the overpayment until it is repaid in full.18

The main difficulty in the application of the foregoing provision grows out of the two separate situations in which an overpayment of benefits can occur. An employer may object to the payment of temporary total disability benefits at the outset, either in conjunction with an objection to the compensability of the injury, or on the basis that the injury, though compensable, did not render the employee totally disabled. Alternatively, there are many instances in which an injury may render an employee temporarily totally disabled in the first instance and the employer may choose to later challenge the “continued payment of temporary total disability benefits.”19 In either case, the law seems clear that upon a finding by the Commissioner that a claimant is not entitled to all or any part of temporary total disability benefits paid, the employer must be credited with the overpayment, and the employee is liable for repayment of the amount determined to have been overpaid.20

Where the overpayment resulted from the Commissioner’s final determination pursuant to protest by the employer to the continued payment of benefits, two problems arose which received considerable attention from claimants’ counsel and labor unions. The first of these resulted from an often substantial time lag between the employer’s protest and the final decision.21 Typically, an employer protested a particular pay order22 and the con-

19 Id. For example, at the time of the employer’s objection to the continued payment of temporary total disability benefits in Mitchell, the claimant had already been absent from work for over five months with a minor back strain. It was this prolonged period of recovery for a relatively insignificant injury that prompted the employer to investigate the claim.
20 Id.
22 Payments are made twice monthly. Where subscribers to the Fund are in-
continued payment of benefits and referred the claimant to a physician or physicians of his choice. The claimant was also entitled to seek an examination from a physician of his choice. Any medical evidence thus obtained would then be offered into the record at a hearing held pursuant to the employer's protest. Several months often passed before the Commissioner rendered a decision. Typically, if the Commissioner found sufficient evidence to terminate benefits, he would do so retroactively to the date of the physicians' examinations. Often, this left a claimant with a substantial amount of money to repay.

The second problem allegedly created was the question of notice. Since the original order granting temporary total disability benefits was not challenged, benefits were terminated pursuant to the employer's protest to continued payment. No specific notice and opportunity to object was given to the claimant prior to termination of benefits, although litigation of the question of entitlement to benefits often arose as a result of the employer's protest to continued awards or pay orders, which seemed to be within the contemplation of the statute. Furthermore, because of the litigation, claimants clearly had notice of potential termination of benefits. Nevertheless, claimants' counsel took the position that the Commissioner's orders granting benefits provided for termination only upon return to work, and that therefore, termination for any other reason was prohibited absent prior notice to the claimant and opportunity to object to the termination.

volved, the Commissioner pays the claimant directly, sending a copy of the pay voucher to the employer. Where a self-insured employer is involved, a pay order is issued requiring the employer to write a check to the employee. W. VA. CODE § 23-5-1 (1978 Replacement Vol.), permits an objection to any finding of the Commissioner on the making of any award. A pay order is an award of benefits, thus seeming to make an objection to continued payment of benefits appropriate. The court held otherwise in Mitchell. See discussion accompanying notes 35-47, infra.

24 WORKMEN'S COMPENSATION FUND RULES AND REGULATIONS, § 11.03 (1976).
26 W. VA. CODE § 23-4-1c (1978 Replacement Vol.).
27 The order typically utilized by the Commissioner prior to the Mitchell decision provided, in part, that "additional pay orders will be issued until the claimant has returned to work or until he/she has been released by his/her attending physician to return to work." WORKMEN'S COMPENSATION FUND FORM WC-700 (Rev. July 22, 1975).
It was in this climate that the Supreme Court of Appeals of West Virginia considered and decided the Mitchell case. The problems which led to the decision and its unique result, while not fully supportable by the language of the Workmen's Compensation Act, have led to a number of subsequent decisions, statutory amendments and procedural changes which, arguably, have begun to create a system of paying benefits which is more equitable to all concerned, although clearly inequitable to employers in the short run. The response to Mitchell is not yet complete. However, the decision has inspired new and creative methods of dealing with the concurrent problems of insuring prompt payments to deserving claimants on the one hand and protecting employers against overpayments of benefits to undeserving claimants on the other.

II. THE Mitchell DECISION AND SUBSEQUENT JUDICIAL REFINEMENTS

A. The Mitchell Decision

On May 22, 1979, the Supreme Court of Appeals of West Virginia handed down its pervasive Mitchell v. Workmen's Compensation Commissioner decision. The claimant in that case sustained a compensable injury on May 26, 1976. Temporary total disability benefits were awarded, and no objection was filed to the initial order. On November 2, 1976, the employer objected to a current pay order and the continued payment of benefits and urged termination of benefits as of August 30, 1976, relying primarily on a report from the treating physician which stated that claimant had reached his maximum degree of improvement.

The Commissioner continued to pay benefits through September 26, 1977, when a second treating physician released claimant to return to work. Subsequently, the Commissioner entered an order on February 20, 1978, terminating claimant's benefits retroactively to August 30, 1976.

The court began its analysis by affirming the generally ac-

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29 Id. at 5, 14.
30 Id. at 5.
31 Id. at 14.
32 Id. at 5.
cepted rule that "benefits should be terminated where the Commissioner finds that a claimant either has reached his maximum degree of medical improvement from the industrial accident or has been medically certified to return to work."\(^3\) From that point on the court departed radically from prior principles.\(^4\)

The court initially determined that the Commissioner erred in considering the employer's protest to the continued payment of temporary total disability benefits under article five, section one of the Act,\(^5\) since the protest was filed more than thirty days subsequent to the entry of the initial order granting temporary total disability benefits.\(^6\) In reaching this decision, the court necessarily found that the provisions of the Act allowing the filing of objections\(^7\) can be utilized by an employer only to protest the initial order granting benefits. This remedy is not available to protest the issuance of a pay order or the continued payment of benefits, despite the fact that the continued issuance of pay orders is based upon the receipt of medical information sustaining continued disability\(^8\) and evinces a conclusion by the Commissioner that the disability continues. Furthermore, the court's decision ignored the clear language of article four, section one-c of the Act, which assumes the propriety of an objection to the continued payment of benefits.\(^9\)

Nevertheless, the court concluded that the proper remedy for an employer who believes that continued payment of temporary total disability benefits is unjustified is a petition for modification of the initial award under article five, section one-c of the Act.\(^10\) In attempting to justify its decision, the court observed that a protest to the initial award under article five, section one of the

\(^3\) Id. at 7.
\(^4\) For a discussion of the court's tendency to invade the province of the legislature in order to achieve desired results, see Flannery, et al., supra note 2.
\(^6\) 256 S.E.2d at 7.
\(^8\) Workmen's Compensation Fund Form WC-219; Workmen's Compensation Fund Rules and Regulations, § 14.01 (1976).
\(^9\) "In the event that an employer files a timely objection to any finding or order of the commissioner, as provided in section one, article five of this chapter, with respect to the payment of [sic] continued payment of temporary total disability benefits. . . ." W. Va. Code § 23-4-1c (Cum. Supp. 1980). (emphasis added).
Act "goes to the jurisdictional basis of the Commissioner's right to make the award." The court determined that the issue under this section is whether the claimant is initially eligible for benefits. A protest under this section must be made within thirty days of the initial order and requires a hearing.

Under article five, section one-c of the Act, the modification provision, there is no time limit for filing a petition. Furthermore, the court held that no initial hearing is necessary. The court observed that this procedure protects the employer by granting him the right to object to continued temporary total disability payments. However, since there is no requirement of an evidentiary hearing, the Commissioner must decide whether to terminate benefits based on evidence submitted to him by the employer. Again, the court ignored the realities of workmen's compensation practice. A hearing is often the most effective and expeditious way for the employer to determine whether a claimant remains temporarily totally disable. With the right to such a hearing—unquestioned since the inception of the Act by claimants and employers alike—summarily erased by the court, employers will often be at the mercy of claimants and physicians who continue to certify disability without any substantive basis.

Aside from the denial of a right to hearing after a petition for modification of an award, the Mitchell decision has had two additional major impacts. The first deals with due process rights granted to claimants; the second concerns repayments of overpayments. Although the court concluded that a claimant's temporary total disability benefits can be terminated without a hearing, practically, the court's holding provided that a claimant's benefits will normally continue for at least one month after he is no longer

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44 256 S.E.2d at 8, citing W. Va. Code § 23-5-1 (1978 Replacement Vol.). The court's reference to the "jurisdictional basis" is vague and not particularly helpful in understanding the decision. The language suggests that a protest to the initial award is a protest to the Commissioner's jurisdiction. However, if the claimant's claim is timely, the Commissioner clearly obtains jurisdiction. The issue on objection is merely whether the Commissioner properly decided the claim.

45 256 S.E.2d at 8.


48 256 S.E.2d at 9.

49 Id.

50 Id.
entitled to receive them. The court cited the United States Supreme Court decision in *Mathews v. Eldridge* as the basis for procedural due process guarantees to workmen's compensation claimants. *Mathews*, a case dealing with termination of social security benefits, held that while a claimant need not be given a formal evidentiary hearing prior to termination of benefits, the claimant must receive written notice of the reasons why the administrative agency proposes termination of benefits. The claimant must then be given an opportunity to provide evidence to support his continued entitlement. Finally, the Supreme Court decided that a right to a prompt evidentiary hearing after the termination order was crucial.

Prior to *Mitchell*, the *Mathews* requirements seemed to have been substantially satisfied in actual practice. When the employer filed an objection, notice of that objection was given to the claimant, thus informing him that his benefits were subject to possible termination. The employer then presented evidence at subsequent hearings, and the claimant was given the opportunity to produce evidence to support his continued entitlement to benefits. Only after both sides were given a full opportunity to present evidence was a decision made to continue or terminate benefits.

While it is true that benefits were often terminated retroactively, that possibility was clear to the claimant at the time of the employer's objection. Any contention to the contrary elevates form over substance. Furthermore, if the *Mitchell* court's primary concern was with retroactive termination of benefits, that problem could have been resolved without the court propounding a complete change in procedure.

Nevertheless, in reliance on *Mathews*, the court in *Mitchell* prescribed the following essential due process guarantees:

(1)[A] prior written notice to the claimant of the reasons for the consideration of the termination of his temporary total dis-

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48 See text accompanying note 109 infra.
50 256 S.E.2d at 9.
51 424 U.S. at 338.
52 Id.
53 Id.
ability benefits; (2) the claimant's right to furnish within a reasonable period relevant countervailing information; and (3) the statutory right to an evidentiary hearing under W. Va. Code, 23-5-1, upon timely protest to an adverse order.

The court was careful to point out the interest of the employer in prompt resolution of questions of continuation of benefit payments, since premium payments in the case of subscribers to the Workmen's Compensation Fund and direct payments in the case of self-insurers are the direct result of payments made by the employer.

The court's analysis suggests an interesting dichotomy. The court was careful to grant minimum due process guarantees to claimants. Yet little or no consideration was given to granting the same rights to employers. The claimant is still granted as an essential due process requirement a prompt hearing after termination of benefits. Yet where an employer proceeding under article five, section one-c of the Act, is denied modification of the prior award, no similar right is granted. Upon notification by the Commissioner of denial of an application for modification of an award, the only remedy left to the employer is to appeal to the Workmen's Compensation Appeal Board on the record already established. Thus, the employer is never given a right to cross-

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54 No such notice is apparently required when the claimant actually returns to work. The court observed that a claimant who returns to work voluntarily terminates his entitlement to benefits. 256 S.E.2d at 10. See also Buckalew v. State Workmen's Comp. Comm'r, No. 14576 (per curiam, W. Va., Dec. 18, 1979).

55 256 S.E.2d at 10.

56 Employers of sufficient financial responsibility may elect to provide their own systems of compensation in lieu of making premium payments to the Workmen's Compensation Fund. Such election is subject to the approval of the Commissioner and is conditioned on the posting of a bond. W. Va. Code § 23-2-9 (1978 Replacement Vol.). The procedure for electing to self-insure is rigidly controlled by regulations of the Commissioner. Workmen's Compensation Fund Rules and Regulations, § 4.01 (1976).

57 256 S.E.2d at 10.

58 Id. at 8; W. Va. Code § 23-5-1c (1978 Replacement Vol).


60 W. Va. Code § 23-5-3d (1978 Replacement Vol.). The practical effect of the
examine the claimant or his physicians, a due process right apparently deemed essential to the claimant.

The final significant question considered by the Mitchell court was the question of overpayment of benefits. The court correctly observed that the Act provides for crediting the employer’s account for overpayments of temporary total disability benefits. Yet, after recognizing this point, the court chose to ignore it in reaching its decision. The court instead returned to its analysis of the difference between an initial protest to eligibility for benefits and an application for modification of an existing disability award. Since the court held that article four, section one-c of the Act applies only to an objection filed under article five, section

The court’s interpretation is to deny to the employer any remedy when a petition for modification is rejected. The average period between the filing of an appeal and a decision by the Appeal Board is six months. During this time, the claimant would continue to receive temporary total disability benefits and should the employer eventually succeed on the appeal, it would have no way of recouping the benefits already paid. Under Mitchell, the Commissioner’s only recourse in this situation is to terminate benefits prospectively. Certainly, this is a hollow victory for the employer.

*61 In the event that an employer files a timely objection to any finding or order of the commissioner, as provided in section one, article five of this chapter, with respect to the payment of [sic] continued payment of temporary total disability benefits and those expenses as outlined in subdivision (a), section three of this article, as provided herein, the commissioner shall continue to pay to the claimant such benefits and expenses during the period of such disability unless it is subsequently found by the commissioner that the claimant was not entitled to receive the temporary total disability benefits and the expenses provided for in subdivision (a), section three of this article, or any part thereof, so paid, in which event the commissioner shall, where the employer is a subscriber to the fund, credit said employer’s account with the amount of the overpayment; and, where the employer has elected to carry his own risk, the commissioner shall refund to such employer the amount of the overpayment. The amounts so credited to a subscriber or repaid to a self-insurer shall be charged by the commissioner to the surplus fund created by section one, article three of this chapter. If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him pursuant to a prior decision, such amount of benefits so paid shall be deemed overpaid. The commissioner may recover such amount by civil action or in any manner provided in this Code for the collection of past-due payment and shall withhold, in whole or in part, as determined by the commissioner, any future benefits payable to the individual and credit such amount against the overpayment until it is repaid in full.

one, and since the court had already ruled out a protest to continued payment of temporary total disability benefits under article five, section one, it followed that where benefits are terminated pursuant to an application for modification under article five, section one-c, no finding of an overpayment was permissible. As noted previously, the court's entire analysis ignored the fact that article four, section one-c also applies to objections to "continued payment" of benefits.

The court also observed that when an objection is filed to the initial order granting benefits, the claimant is given prompt notice of the protest and therefore, presumably knows that he may be found ineligible for benefits and have to refund amounts already paid. The inference that the situation is different arises when an objection is made to the continued payment of benefits after the initial order. However, in reality the notice to the claimant is the same.

Article five, section one of the Act requires certain action by the Commissioner upon making or refusing to make any award, or upon modifying former findings or orders. The basic requirement is that notice be given, "in writing, to the employer, employee, claimant or dependent, as the case may be." The use of the disjunctive or in this section and the accompanying phrase as the case may be indicates that the statute does not require that such notice be given to all parties. In fact, the supreme court has held that notice must be given only to persons adversely affected by the Commissioner's action.

In Mitchell, the Commissioner's initial order authorized the award of temporary total disability benefits. That award was paid periodically, pursuant to pay orders honored by the em-

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62 256 S.E.2d at 13.
66 Id. (emphasis added).
68 256 S.E.2d at 5.
ployer, in what might have been termed a series of awards. The periodic payment of the award is based on a continuing evaluation of the claim by the Commissioner and a finding that the disability continues.

The initial order in *Mitchell* was not adverse to the claimant. Therefore, notice and opportunity to object were required to be given only to the employer. This was done yet the employer made no objection to the initial order.69

In *Mitchell* each periodic award of temporary total disability benefits was also subject to objection by the employer. Obviously, the pay orders issued by the Commissioner were not adverse to the claimant. The pay orders constituted notice to the employer of the issuance of additional monetary awards, yet were defective in that they did not notify the employer that it had thirty days to object to the award of further benefits.70 However, that defect was not prejudicial to the claimant.

While the defect was potentially prejudicial to the employer in *Mitchell*, however, it nevertheless filed timely protests to two pay orders and registered a continuing objection to further payment of temporary total disability benefits all in accordance with article five, section one of the Act. Section one further provides that, upon objection by either party, a hearing must be held upon notice to all parties and a full opportunity for the presentation of evidence must be given.71 There is no question that such procedure was followed in *Mitchell*.

Subsequent to the hearing, the Commissioner rendered his decision which, in this instance, reversed his former decision to pay benefits for the period in question. Notice of the decision, specifying the right to appeal within thirty days, was given to the parties, and the claimant exercised his right to appeal.72 Both

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69 256 S.E.2d at 5, 13.


parties understood the procedure that was followed; it was the same procedure that had been followed without question for years in workmen’s compensation practice. Furthermore, once the claimant was notified of the employer’s protest to the continued payment of benefits, the claimant was effectively charged with notice that he might ultimately be found to have received benefits paid after that date to which he was not entitled. In such a situation, the claimant and his counsel were advised, or should have been advised, that a refund would be required if the employer ultimately prevailed. Therefore, the claimant was in the same position he would have been in had there been an objection to the initial award. That is, he proceeded to spend his award at his own risk, subject to a possible finding of overpayment.

In addition, the Mitchell court concluded that the proper date for termination of benefits pursuant to an employer’s application for modification of an award is the date of the Commissioner’s order terminating those benefits. In an effort to bolster its decision, the court noted that it is the Commissioner and not the treating physician who makes the final determination as to

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After final hear & the commissioner shall, within thirty days, render his decision affirming, reversing or modifying, his former action, which shall be final: Provided, that the claimant or the employer may apply to the appeal board herein created for a review of such decision; but no appeal or review shall lie unless application therefor be made within thirty days of receipt of notice of the commissioner’s final action, or in any event within sixty days of the date of such final action, regardless of notice.

75 W. Va. Code § 23-4-1c (1978 Replacement Vol.).
74 Id.

Although not considered by the court in Mitchell, there is a distinction between the employer’s right to be credited with any overpayment and the employee’s obligation to repay such overpayment. The language of W. Va. Code § 23-4-1c (Cum. Supp. 1980) requires that the Commissioner credit the account of a subscriber to the fund and repay a self-insurer for all amounts found to be overpaid. However, the statute merely permits, but does not require, the Commissioner to seek refunds of overpayments from the claimant. Therefore, even with the court’s construction of section one-c in Mitchell, which prevents the recovery of overpayment where there is no objection to the initial award, it is reasonable to argue that the cost of such overpayment should be spread over the Fund generally and not charged to the specific employer involved. This issue was raised in Mitchell but ignored by the court. Brief for Appellee at 14-16, Mitchell v. State Workmen’s Comp. Comm’r, 256 S.E.2d 1 (W. Va. 1979).

76 256 S.E.2d at 14.
the continuation of disability. The court observed that "[i]t is not proper for the Commissioner to adopt the date of a particular physical examination or physician's report as a date for cutting off temporary total disability benefits, since the Commissioner makes his determination based on all the medical evidence in the file."  

Relying in part on the foregoing, the court reached its conclusion that the date of the Commissioner's order is the proper date for termination of benefits. Such a conclusion avoids the overpayment problem since an overpayment will never arise. However, the court's approach is too simplistic. While it is true that the Commissioner, not the physician, has the responsibility for terminating disability, it is also the Commissioner's prerogative and responsibility to determine when the disability should terminate. The date of the Commissioner's order is an artificial standard which bears no relation to any factual determination.

Accordingly, it is obvious that the Mitchell court departed drastically from accepted practice to correct a potential, but undemonstrated, injustice to claimants. The decision appears to be another example of the court reasoning backward from a desired result to arrive at the rationale for that result. Such judicial legislation is questionable at best and often creates greater problems than the ones it attempts to avoid.

B. Post-Mitchell Judicial Refinements

Since the Mitchell decision the court has cited the case ap-

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78 256 S.E.2d at 14.

79 Even if the premise that the claimant is prejudiced by a retroactive termination of benefits is accepted, the actual harm suffered is minimal. As discussed in note 75, supra, W. Va. Code § 23-4-1c (Cum. Supp. 1980), permits but does not require the Commissioner to pursue the collection of overpayments by civil action. In practice, collection actions were seldom, if ever, filed. Thus, only those claimants who received a subsequent award from which the overpayment could be deducted were actually required to repay any part of an overpayment.

80 The court's role as a super legislature was discussed in Flannery, et al., supra note 2.
proximately a dozen times.\textsuperscript{61} Several of these subsequent decisions merit discussion.\textsuperscript{62}

In \textit{Hagy v. State Workmen's Compensation Commissioner},\textsuperscript{83} the court reaffirmed its position in \textit{Mitchell} that temporary total disability benefits are ordinarily to be terminated as of the date of the Commissioner's termination order.\textsuperscript{64} However, where a claimant receiving such benefits dies, the court held that the order should properly terminate benefits retroactive to the date of


\textsuperscript{62} One of the court's decisions relied on \textit{Mitchell} to make new law in the occupational pneumoconiosis section of the Workmen's Compensation Act. Although the decision in McDaniel v. State Workmen's Comp. Comm'r, No. 14698 (per curiam W. Va. Jan. 29, 1980), is not relevant to the subject of this article, it is significant nonetheless and merits brief examination here. In \textit{McDaniel}, claimant filed an application for benefits, and the Commissioner entered an initial order holding that claimant was an employee of King Knob Coal Co., Inc. and had been exposed to the hazards of occupational pneumoconiosis for at least ten of the fifteen years immediately preceding the date of last exposure. The employer objected to the finding that claimant was an employee. After the hearing, the Commissioner affirmed claimant's employment status, but set aside the exposure finding. The court observed that the procedural due process requirements of \textit{Mitchell} were applicable to \textit{McDaniel}. In other words, the Commissioner was required to notify claimant of the proposed modification of the exposure finding and the reason for such modification and give claimant an opportunity to supply relevant information. Presumably, the court held as it did because no evidence was introduced at the hearing on the exposure issue. However, the notice generally given by the Commissioner when an order is protested simply informs the party against whom the protest is made that the adverse party has objected to the order. It is unlikely that the notice in \textit{McDaniel} limited the objection to any particular factual question. Thus, presumably, the notice informed the claimant that the entire order of the Commissioner was under protest. Such a notice clearly satisfies the requirements of W. Va. Code § 23-5-1 (1978 Replacement Vol.). \textit{McDaniel} at least suggests that a further notice must be given if the Commissioner, after hearing, determines to change his former order. Such a result would be highly suspect. One must assume that the court was concerned about the unfairness to claimant of modifying the original order where no evidence was taken on the exposure issue.

\textsuperscript{63} 255 S.E.2d 906 (W. Va. 1979).

\textsuperscript{64} \textit{Id.} at 910.
Likewise, in *Buckalew v. State Workmen's Compensation Commissioner*, the court noted that return to work terminates benefits automatically. The claimant in *Buckalew* returned to work for one day and then retired. The court held that such a return to work will ordinarily terminate benefits.

The court considered the issue of a claimant's refusal to return to work although medically certified as able to do so in *Gratchen v. State Workmen's Compensation Commissioner.* The claimant suffered an ear injury and was awarded temporary total disability benefits. After a period his treating physician certified him as able to return to work in a non-noisy environment. He was offered such a job yet refused to accept it. The court held that benefits were properly terminated but only as of the date of the Commissioner's order.

The *Mitchell* proscription against retroactive termination of benefits was applied in *State ex rel. Armstrong v. Blizzard.* There the claimant was totally disabled until at least March 15, 1976. On that date, the Commissioner entered an order holding the claimant fully compensated for his compensable injury. The order was silent as to temporary total disability benefits. The claimant objected to the order and, after a hearing, was granted a 15% permanent partial disability award on August 26, 1977. Meanwhile on June 30, 1977, the claimant's temporary total disability benefits had been terminated. No notice of termination was given.

The Fund subsequently advised the claimant that he had been overpaid benefits for temporary total disability, and the overpayment would be offset against the permanent award. The
court held that temporary total disability benefits could not be terminated prior to the August 26, 1977, order, since no prior order terminating the temporary benefits had been entered. Therefore, there could be no offset of benefits.\textsuperscript{91} Hence, \textit{Armstrong} concluded that where the Commissioner inadvertently fails to enter an order terminating benefits, benefits cannot later be terminated retroactively.\textsuperscript{92}

One other decision, \textit{State ex rel. Wnek v. Blizzard},\textsuperscript{93} merits particular attention. In \textit{Wnek}, the court held that mandamus is an appropriate remedy to require the Commissioner to award benefits to a claimant until such time as an order terminating benefits according to the procedure set forth in \textit{Mitchell} has been entered.\textsuperscript{94} While the decision in \textit{Wnek} is a logical extension of the result in \textit{Mitchell}, it poses some potential problems for the Fund and self-insurers. If it is given retroactive effect, which has been a common practice of the court in the workmen’s compensation area, a flood of mandamus applications may ensue from claimants whose disability was terminated without due process as defined in \textit{Mitchell}, prior to the date of the \textit{Mitchell} decision. If such actions are pursued, there appears to be no question of the claimants’ entitlement to benefits. They will be entitled to payment because the Commissioner’s procedure, in retrospect, will be

\textsuperscript{91} Id. at 3.

\textsuperscript{92} The same conclusion has been reached in several other decisions. Fakourey \textit{v. State Workmen’s Comp. Comm’r}, 258 S.E.2d 526 (W. Va. 1979); \textit{State ex rel. Wnek v. Blizzard}, 256 S.E.2d 772 (W. Va. 1979); Cardwell \textit{v. State Workmen’s Comp. Comm’r}, No. 14315 (per curiam W. Va. Oct. 16, 1979); Dyer \textit{v. State Workmen’s Comp. Comm’r}, No. 14512 (per curiam W. Va. Oct. 16, 1979). In \textit{Wnek}, the court observed that the Commissioner may act on his own initiative to terminate temporary total disability benefits based on credible information that the disability no longer exists. 256 S.E.2d at 774.

\textsuperscript{93} 256 S.E.2d 772 (W. Va. 1979).

\textsuperscript{94} Id. at 774. Although not relevant to the subject of this article, \textit{Wnek} also noted that a claimant is not necessarily entitled to receive benefits up to the date a permanent award is made. The court held:

There are those cases where the claimant has reached maximum degree of improvement and the Commissioner is not able to obtain sufficient medical information to determine the percent of permanent partial disability. He may, nevertheless, terminate the temporary total disability. In this situation the claimant is not remediless as he can protest the termination on the basis that he has not reached the maximum degree of improvement.
improper.

The upshot of *Mitchell* and its progeny is that an employer who has any question about his employee's entitlement to benefits should object to the initial order. As a practical matter, this is the only way the employer can be certain of having an opportunity for a hearing. Furthermore, if no protest is filed to the initial order, it is likely that benefits will continue in most cases for a substantial period after claimant's eligibility for such benefits ceases. Increased litigation of temporary total disability claims is, thus, likely to result.

Where the employer has not objected initially, he must now follow the procedure prescribed in *Mitchell* and apply for a modification of the prior award, submitting all relevant evidence with the petition. In order to satisfy due process, the Commissioner must notify the claimant that termination of benefits is being considered and give him an opportunity to submit evidence supporting continuation of benefits. If the Commissioner then terminates benefits, he may do so only as of the date of his order, even if the evidence unequivocally shows that disability should have terminated at an earlier date. The only exceptions to this proposition are death or actual return to work of the claimant. If the Commissioner decides not to terminate benefits, the employer gets no hearing and must appeal, if at all, on the evidence submitted with his application for modification.90

It is not difficult to discover the big loser in this tortured process. It is, of course, the employer who must foot the bill. The Commissioner and the West Virginia Legislature are left to try to balance the scales.

### III. THE ADMINISTRATIVE AND LEGISLATIVE RESPONSE

The Workmen's Compensation Commissioner took immediate steps to attempt to manage and ameliorate the results of the *Mitchell* decision. Because there were pending before the Commissioner numerous pre-*Mitchell* protests to the continued payment of temporary total disability benefits, the Commissioner decided to treat all such protests filed more than thirty days after the initial order awarding benefits as petitions for modification.

90 See note 60 supra.
under article five, section one-c of the Act.96 This action by the Commissioner avoided a multitude of refilings and, in at least some cases, resulted in considerable savings in benefits paid by the Fund and self-insured employers.

However, since many pre-Mitchell protests to continued disability payments were filed without any supporting evidence,97 it is likely that most such protests treated as petitions were denied. In such a situation, an appeal, without any supporting evidence, would have been futile. Hence, the employer in such a situation would have been required to submit a new petition for modification based on whatever supporting evidence he could obtain on his own without the benefit of hearing and cross-examination.

In order to assist employers in meeting their burden, the former Commissioner indicated that he was willing to grant requests by employers that claimants be examined by physicians of the employer's choosing, despite the fact that the claim was not in litigation.98 Thus, one source of potential evidence on the question of continued disability has been kept available to employers.

Furthermore, a recent statutory amendment gained new importance subsequent to the Mitchell decision. In 1978, the Legislature added article four, section seven to the Act.99 The new section provides in part:

[A] claimant shall irrevocably agree by the filing of his application for benefits that any physician may release, to the claimant's employer or its representative, from time to time to such claimant's employer medical reports containing detailed information as to the claimant's condition, treatment, prognosis and anticipated period of disability and dates as to when the claimant will reach or has reached his maximum degree of

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96 Telephone conference with former Commissioner George D. Blizzard, II, on or about June 4, 1979. Although this procedure is probably not in strict compliance with the dictates of the Mitchell court, no question seems to have been raised about the Commissioner's procedure.
97 Prior to Mitchell, the employer was assured of a hearing following his protest. W. Va. Code § 23-5-1 (1978 Replacement Vol.). Evidence could be introduced by the employer at such hearing. Furthermore, the employer was entitled to cross-examine the claimant and any physician involved in this claim. Therefore, it was not necessary to submit evidence along with the protest letter.
98 See note 96 supra.
improvement or will be or was released to return to work.\textsuperscript{100}

The employer, thus, has a method of obtaining information which does not require the claimant's cooperation. Proper utilization of the foregoing statutory provision can serve some of the same purposes as the hearing that used to be afforded employers.

However, the above quoted statutory provision is far from perfect. Since the literal terms of the statute apply only to physicians, some hospitals have refused to release information.\textsuperscript{101} Furthermore, a number of physicians are still reluctant to release information without a release signed by the claimant. Nevertheless, utilization of the statute may help to ameliorate some of the harsher effects of Mitchell.

Another step taken by the Commissioner in response to Mitchell was to design a notice to be sent to a claimant when the employer has submitted, along with his application for modification, evidence supporting a termination of benefits. The form provided the minimum due process guarantees prescribed by Mitchell by notifying the claimant of the reasons supporting the employer's application and giving the claimant thirty days to supply information supporting a continuation of benefits. If the claimant failed to submit evidence justifying the continuation of benefits, the Commissioner then entered an order terminating further payments.

Also, several months after the Mitchell decision, the former Commissioner began utilizing a procedure of issuing subsequent orders, apparently designed to avoid the effect of Mitchell. The court, in Mitchell, observed that the order granting temporary total disability benefits "notified the parties that temporary total disability benefits will continue 'until he [the worker] has been certified for employment or until further proper order of the Commissioner.' "\textsuperscript{102} Under this procedure,\textsuperscript{103} still in effect, the

\textsuperscript{100} Id.

\textsuperscript{101} Telephone conferences with medical records personnel of various hospitals.

\textsuperscript{102} 256 S.E.2d at 6. As the court noted in Mitchell, later orders of the Commissioner contained the language "until he has returned to work or has been certified by his attending physician for employment." Id. at 6, note 1. The court has not considered the impact of this new language. However, it would appear that if any of the conditions specified in either of the orders arise, benefits should be
Commissioner awards temporary total disability benefits for a specific period of time, e.g., four weeks. When that period expires, the Commissioner determines whether the disability continues and, if so, issues a new order paying benefits for another definite period. These subsequent orders give the employer a thirty day protest period, pursuant to article five, section one of the Act. 104

Since the Commissioner makes a new finding that the claimant is temporarily totally disabled prior to issuing each order, a protest to any such order may be said to be an initial protest "to the jurisdictional basis of the award" as that term is defined in Mitchell. 105 The court, in Mitchell, noted that a protest under article five, section one of the Act is appropriate where the issue "is whether the claimant meets the statutory eligibility standards to obtain temporary total disability benefits." 106 Since the eligibility standard is merely that claimant continues to be temporarily totally disabled, and since the Commissioner must make that determination before issuing each additional order, a protest to any order paying temporary total disability benefits for an additional period would seem to involve a protest to the jurisdictional basis of the award.

If the foregoing analysis is correct, the use of orders paying benefits for a specific period would seem to soften the effects of Mitchell. However, the new orders have not yet been tested before the court. Furthermore, the new Commissioner of the Fund 107 has taken steps to further modify the post-Mitchell procedure. As of the date of this writing, the Commissioner is in the process of preparing a new order to be used in temporary total

terminated immediately without further notice. Where the Commissioner has expressly limited the period of payment of benefits, no further notice should be required when that term ends. There can be no argument of hardship or unfairness to the claimant in such a situation since he is aware of the conditions under which his benefits will terminate.

105 256 S.E.2d at 8.
106 Id.
107 On April 1, 1980, Gretchen O. Lewis was named Acting Commissioner of the Workmen's Compensation Fund, replacing George D. Blizzard, II, who resigned. She has since been appointed Commissioner by Governor John D. Rockefeller, IV.
disability cases.\textsuperscript{108} The new order, like the order now in use, will pay benefits for a specific period of time. Under present procedure, if the Commissioner receives no information supporting continued disability by the time the initial order expires, benefits continue to be paid during the thirty day notice period to claimant.\textsuperscript{109} Thus, even if no evidence is forthcoming to support continued disability, the claimant will receive at least thirty days of undeserved benefits.

Under the proposed new procedure, the order will inform the claimant that upon the expiration of the period prescribed therein, benefits will be suspended unless evidence supporting continued disability has been received.\textsuperscript{110} The suspension continues for sixty days unless the claimant, within that period, furnishes evidence of further entitlement.\textsuperscript{111} If such evidence is provided, benefits will be reinstated retroactive to the last day of payment. If no evidence is received, benefits will be terminated at the end of the sixty day period.\textsuperscript{112} The virtue of the proposed procedure is the elimination of the automatic thirty day overpayment, which occurs in many cases. However, the question again arises as to whether the procedure satisfies the due process guarantees of Mitchell.\textsuperscript{113} As stated previously, the fact that the order pays benefits for a definite period, instead of indefinitely, as was the case in Mitchell, may be determinative.\textsuperscript{114} The issue, thus, is no longer one of termination of benefits, but of a new order granting benefits. When taken together with the sixty day grace period for reinstatement, it is difficult to conclude that the new procedure is in any manner unfair or a denial of due process to the claimant.

Perhaps the greatest potential remedy for the problems created by Mitchell is the 1979 legislative action adding article four,

\begin{itemize}
  \item \textsuperscript{108} Telephone conference with Richard Lindroth, Executive Secretary of the West Virginia Workmen's Compensation Fund, on July 2, 1980.
  \item \textsuperscript{109} This is in accordance with the “reasonable notice” provision of Mitchell.
  \item \textsuperscript{110} See text accompanying notes 48-55 supra.
  \item \textsuperscript{111} See note 108 supra.
  \item \textsuperscript{112} \textit{Id}.
  \item \textsuperscript{113} \textit{Id}.
  \item \textsuperscript{114} See text accompanying notes 48-55 supra.
\end{itemize}
section seven-a\textsuperscript{115} to the Act. This new section was added to the Act several months before Mitchell was decided and became effective on July 1, 1979.\textsuperscript{118} However, the legislature anticipated and responded to the conflict between the rights of claimants and employers being considered by the court in Mitchell.

Section seven-a requires the Commissioner to consult with medical experts and establish guidelines for the expected length of disability for various types of injuries.\textsuperscript{117} In any case in which a claimant remains on temporary total disability for longer than the expected period, the Commissioner must review the file and, if necessary, refer the claimant to an independent medical examiner.\textsuperscript{116}

If such a referral is made and the examining physician recommends continued, additional or different treatment, the Commissioner is required to forward the recommendation to the treating physician, and the Commissioner may authorize the recommended treatment.\textsuperscript{118} If, on the other hand, the examining physician determines that the claimant has reached his maximum degree of improvement, the Commissioner is required to terminate benefits immediately, unless the examining physician concludes that the claimant is ready for a permanent disability evaluation.\textsuperscript{120} In such case, temporary total disability benefits must “continue for thirty days or until an order is entered granting to the claimant a permanent partial disability award, whichever shall first occur. . . .”\textsuperscript{121}

The foregoing provisions seemingly lessen potential abuses created by the Mitchell decision. However, in a situation where benefits are terminated promptly on a finding by the examining physician that the claimant has reached his maximum degree of

\textsuperscript{115} W. VA. CODE § 23-4-7a (Cum. Supp. 1980).
\textsuperscript{116} The court was aware of the pending statutory change at the time the Mitchell case was argued. Counsel for the Commissioner furnished a copy of the new legislation to the court.
\textsuperscript{117} W. VA. CODE § 23-4-7a(b) (Cum. Supp. 1980).
\textsuperscript{118} Id.
\textsuperscript{119} W. VA. CODE § 23-4-7a(c) (Cum. Supp. 1980).
\textsuperscript{120} Id.
\textsuperscript{121} Id. The statute further provides “that under no circumstances shall a claimant be entitled to receive temporary total disability benefits beyond the date he is released to return to work.”
improvement and is not yet ready for a permanent partial disability evaluation, the statutory procedure seems to run afoul of the due process requirements of Mitchell, in that no notice is given granting claimant a reasonable time to submit information to support the continued payment of benefits. However, if used in conjunction with orders paying benefits for a specified period and containing Mitchell-like notice provisions, any potential problem would seem to be ameliorated. The Commissioner would simply refuse to issue a new order extending benefits.

IV. Conclusion

It is obvious that the Mitchell decision created substantial problems for the Commissioner, employers and claimants in general. The most obvious difficulty it established for employers was the creation of automatic overpayments of benefits with no means of recoupment. Problems may also have been created for claimants. Mitchell places a greater burden on claimants in some situations to obtain updated medical data to support the continued payment of benefits. The decision, together with the cited statutory changes, has undoubtedly spurred a multitude of new administrative burdens for the Commissioner and the Fund. However, the responses of both the former Commissioner and the present Commissioner have been well-reasoned and thoughtful. A combination of the procedures developed by the Commissioners and a more effective use of article four, section seven-a of the Act, would seem likely to ameliorate the harsh results of Mitchell, while continuing to provide a more effective due process protection for claimants than was present prior to the Mitchell decision.
