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Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform

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WORKERS’ COMPENSATION LITIGATION IN WEST VIRGINIA: ASSESSING THE IMPACT OF THE RULE OF LIBERALITY AND THE NEED FOR FISCAL REFORM

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Louis J. Palmer, Jr.**

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"The present workers’ compensation system is in very deep trouble. Nobody really knows the exact amount of the system’s unfunded liability. Estimates range anywhere from 1.8 billion dollars to more than two billion dollars."¹

I. INTRODUCTION

The workers’ compensation system is a statutory creature that was designed “to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, . . . recognizing that the . . . system . . . is based on a mutual renunciation of common law rights and defenses by employers and employees alike.”² The national legislative impetus for creating workers’ compensation schemes was fueled by the fiery realization that “[t]he common law system governing the remedy of workers against employers for injuries received in employment [was] inconsistent with modern industrial conditions.”³ In the final analysis, the inadequacy of common law remedies for employment injuries necessitated legislative intervention and inno-


² COLO. REV. STAT. § 8-40-102(1) (2003). See ARK. CODE ANN. § 11-9-101(b) (LexisNexis 2002) (“The primary purposes of the workers’ compensation laws are to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force; to improve workplace safety through safety programs; to improve health care delivery through use of managed care concepts; [and] to encourage the return to work of injured workers . . . .”).

³ WASH. REV. CODE ANN. § 51.04.010 (West 2002).
vation, which culminated in the creation of a workers' compensation system in all jurisdictions.\(^4\)

The creative spirit that carved out the workers' compensation system did not envision the eventual abuse that would plague the system. This unfortunate oversight proved to be detrimental to the economic health of every workers' compensation system in the nation. Wholesale abuse of workers' compensation systems in all jurisdictions has nearly bankrupted entitlements for future generations.\(^5\) As one state legislature put it, "abuse and misuse of the workers' compensation system has brought discredit on the system and its participants ... and has endangered the stability and fiscal health of the system ...\(^6\)


\(^6\) R.I. GEN. LAWS § 28-29-1.2(a)(4) (2003). See also ARK. CODE ANN. § 11-9-101(b) (Michie 2002) ("[T]he workers' compensation system in this state must be returned to a state of economic viability.").
Meaningful efforts to halt unbridled abuse of the workers' compensation system did not take hold until the start of the 1990's. As if struck by the same bolt of fiscal enlightenment, states all across the nation simultaneously began implementing prudent initiatives in the 1990's "to bring the system into balance and eliminate waste and unnecessary costs." West Virginia was not immune from the fiscal crisis that threatened workers' compensation schemes throughout the nation. Indeed, major changes to the state's workers' compensation laws were enacted by the legislature during the 1990's. Those changes were designed to assure that present and future workers would have adequate remedies for work-related injuries and diseases. However, unlike a growing minority of states, during the 1990's reform the West Virginia legislature did not specifically address the expansive and abusive use of the rule of liberality in workers' compensation litigation.


10 See infra note 276.

11 It was correctly pointed out in McCoy v. Jones & Laughlin Steel Co., 119 A. 484, 485 (Pa. 1923), that "[b]oth the courts and administrative authorities have ... been most liberal in construing the Workmen's Compensation Law. . . ." (quoting, Fink v. Sheldon Axle & Spring Co., 113 A. 666, 667 (Pa. 1921)).
The state legislature's sweeping changes in the 1990's failed. The workers' compensation system has continued its steady course toward bankruptcy. As a result of the bleak fiscal future of the system, in 2003 the legislature returned to the drawing board in an attempt to salvage the near-bankrupt system. One of the critical changes attempted by the legislature in 2003 was that of abolishing the use of the rule of liberality in workers' compensation litigation.

The intent of this article is twofold: (1) to provide an assessment of the impact of expansive and abusive use of the rule of liberality in workers' compensation litigation in West Virginia and (2) to assess the legal effectiveness of the legislature's attempt to abolish the rule of liberality in 2003. In the final analysis, this article will show that abusive use of the rule of liberality played a major role in gutting the reform measures of the 1990's. The article will also show that in abolishing the rule of liberality in 2003 the legislature, through an apparent lack of understanding of the rule, has actually again codified the rule of liberality in workers' compensation litigation.

In Part II of this article a brief summary of the international origin of workers' compensation is provided. The creation of workers' compensation in West Virginia is examined in Part III. In Part IV a discussion of the current workers' compensation litigation scheme is provided. The article next examines, in Part V, the key players in the state workers' compensation system and the reform measures of the 1990's that were designed to curtail abuse of the system by those players. The development of the rule of liberality in the state is discussed in Part VI. In Part VII an assessment is provided of the impact of abusive application of the rule of liberality in workers' compensation litigation. Efforts by the legislature in 2003 to abolish the rule of liberality are addressed in Part VIII.

II. INTERNATIONAL ORIGIN OF WORKERS' COMPENSATION

Workers' compensation is not an American creation, nor is its roots embedded in the common law. This part of the article provides a summary of the international beginnings of workers' compensation laws.

12 In fact, workers' compensation is a "derogation of the doctrine of the common law that negligence or wrongful acts proximately causing . . . injuries were [sic.] the only just foundation of legal liability for such injuries." Tenn. Coal, Iron & R.R. Co. v. King, 164 So. 760, 761 (Ala. 1935).

13 It was said appropriately by two commentators that "the establishment of [workers'] compensation schemes in America can be viewed as a case of cross-cultural influence." Lawrence M. Friedman & Jack Ladinsky, Social Change and the Law of Industrial Accidents, 67 COLUM. L. REV. 50, 72 (1967).
A. Industrial Revolution Spawned Compensation Laws

The court in Mosley v. Figliuzzi observed in passing that “as the industrial revolution accelerated through the 19th century . . . [workers] were being pushed out of family farms and other family enterprises into the factories.”

Mechanization, assembly lines, and mass production fueled what has become known as the industrial revolution.

Prior to the industrial revolution, the livelihood of the vast majority of the world’s population was dependent upon agrarian economies. One of the positive intangibles derived from agrarian economies was the minimalization of injuries to workers. As a result of the extremely low injury rate associated with farm work, there was never a need to create a specific system to address the consequences of injuries to workers. In developed societies, courts took care of any complaints derived from worker injuries.

The industrial revolution transformed the employment injury landscape. “[T]he industrial revolution spawned so many workplace accidents and lawsuits,” that it became imperative to create a specific mechanism to address the massive problems attributed to worker injuries. The solution to industrial accidents was “a system of compensation for employees injured on the job.”

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14 930 P.2d 1110 (Nev. 1997).
15 Id. at 1117.
16 See Friedman & Ladinsky, supra note 13, at 52, where the authors note that “[d]uring the industrial revolution, the size of the factory labor force increased, [and] the use of machinery in the production of goods became more widespread . . . .”
18 Id. at 222 (“So far as law on the subject of master’s liability to his injured servant is concerned, the period from 1000-1837 A.D. seems to be a complete blank.”).
19 Id.
20 Id. at 222-28.
22 Bell, 541 N.W.2d at 835. See Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 911 (W. Va. 1978) (“The [Workers’] Compensation Act was designed to remove negligently caused industrial accidents from the common law tort system.”).
B. The Iron Chancellor's Gift to Workers of the World

Otto von Bismarck, the Iron Chancellor, unified and ruled the German empire from 1871 to 1890. During Bismarck's reign, Germany, like other developed nations, was in the midst of the industrial revolution. Thousands of farm laborers were turning into factory laborers. The irreversible trek from farmlands to city factories carried with it a theretofore unthinkable consequence: If a worker suffered a job injury that prevented temporary or permanent employment, the worker and his/her family were literally subject to starvation. This brutal realization was rarely, if ever, a consequence for the farm worker.

Bismarck's Germany (and all industrialized nations) felt the harsh backlash of the industrial revolution, which resulted in injuries to many factory workers. The nation's legal system provided relief for only a fraction of those who were injured during the course of their employment. Moreover, the pro-employer stance of the legal system resulted in whole families being thrown into abject poverty.

One irony embedded in the dismal plight of injured German workers was that employers were being ecstatically drowned in excess profits that resulted from "the blood of the working man." Fortunately, through compassion, foresight or political pressure, Bismarck understood the desperate existence of injured workers and proposed a solution that would be heard and replicated around the world. In 1884, Bismarck convinced the German Reichstag

24 Id. at 290.
25 See Friedman & Ladinsky, supra note 13, at 51-54.
26 "[T]he pre-compensation loss-adjustment system for industrial accidents was a complete failure and in most cases left the worker's family destitute." Larson, supra note 17, at 228; See also Deborah Ballam, Assessing the Extent of the Quid Pro Quo in Workers' Compensation: The Ohio Experience, 45 LAB. L.J. 131, 131 (1995) ("Because few workers could overcome the barriers to recovery presented by the common law, many received no compensation for their injuries, and oftentimes their families were relegated to poverty.").
27 See Larson, supra note 17, at 222.
28 See Friedman & Ladinsky, supra note 13, at 60 (noting that by the start of the 1900's in the United States alone there were annually 35,000 deaths and 2,000,000 injuries related to employment).
29 See Larson, supra note 17, at 224-25.
30 See Friedman & Ladinsky, supra note 13, at 65-66 (detailing the futile efforts of workers who sought to recover from employers in litigation).
32 See Gurtler, supra note 23, at 290 (where it is argued that Bismarck was forced to initiate a workers' compensation system in order to prevent socialists from taking over Germany).
to pass "the world's first workers' compensation law." \(^{33}\) Like all compensation schemes that would eventually follow, Bismarck's compensation system was "an effort on the part of the [government] to insure the workman to a limited extent against loss from accidents in his employment, to give him a speedy and expeditious remedy for his injury, and to place upon industry the burden of losses incident to its conduct." \(^{34}\)

The workers' compensation system in Germany has been described as a mutual association between employer and employee. \(^{35}\) Under the German system both the employer and employee contributed funds. \(^{36}\) The German government supervised the system, but its administration was entrusted to representatives of employers and employees. \(^{37}\) The system was divided into three types of designated funds: (1) a sickness fund which paid benefits to employees during the first thirteen weeks of a work disability (the employer contributed only one-third of the cost of operating this fund); (2) an accident fund which provided benefits after the expiration of the first thirteen weeks of a work disability (the employer paid all of the operating costs of this fund); and (3) a disability fund which paid benefits for disabilities attributed to old age (the employer paid one-half the operating costs of this fund). \(^{38}\)

C. Other International Compensation Laws

Bismarck's workers' compensation precedent did not go unnoticed on the world stage. While workers' compensation systems did not settle on the American continent until the twentieth century, \(^{39}\) Bismarck's precedent landed in other nations during the nineteenth century. \(^{40}\) Nations that enacted workers' compensation schemes in the nineteenth century included Austria (1887), Norway (1894), Finland (1895), England (1897), Denmark, France and Italy (1898). \(^{41}\)

\(^{33}\) Id. at 288.

\(^{34}\) Bristol Builders Supply Co. v. McReynolds, 162 S.E. 8, 9 (1932), (quoting Gobble v. Clinch Valley Lumber Co., 127 S.E. 175, 176 (1925)).

\(^{35}\) Larson, supra note 17, at 230.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) See infra note 75.

England's Workmen's Compensation Act of 1897\(^42\) "in many ways served as the model for the subsequent American statutes."\(^43\) A principal feature of the English scheme that is found in American compensation laws is its liability formula: "personal injury by accident arising out of and in the course of the employment."\(^44\) England's compensation system was funded by employers.\(^45\)

All workers' compensation systems in America are funded exclusively by employers.\(^46\)

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\(^43\) Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 797 (1982). It should be noted that prior to the Act of 1897, England had created the Employers' Liability Act of 1880. This Act was a crude and unworkable form of subsequent workers' compensation laws. *Id.* at 787-97.

\(^44\) *Id.* at 797 (quoting Workmen's Compensation Act, 1897, 60 & 61 VICT., ch. 37, §1(1) (Eng.)).

\(^45\) See Ford and Abernathy, *supra* note 42, at 50.

\(^46\) This point is significant because, as discussed in part VI, West Virginia's initial workers' compensation system required both the employer and employee contribute monetarily to the system. Workers' compensation systems today are generally funded by employers in one of three ways: (1) self-insure (including an employer pool), (2) pay premiums directly to a state fund, or (3) insure through a private entity.


III. CREATION OF WORKERS' COMPENSATION IN WEST VIRGINIA

Today all workers and employers are familiar with West Virginia's workers' compensation system. It is generally understood that matters arising from a negligently caused, work-related injury are resolved through the state's workers' compensation system. Of course, this situation was not always the case. This part of the article will initially provide a review of how work-related injuries were resolved prior to the state's adoption of a workers' compensation system. Additionally, this part of the article will present some discussion on the initial enactment of the state's workers' compensation system. Finally, some comments will be provided concerning coverage exceptions and the types of benefits provided.

A. Pre-Workers' Compensation Employee-Employer Litigation

Prior to the year 1913, workers' compensation laws did not exist in West Virginia. Remedies for employees injured during the course of employment were provided in civil court, under common law principles. Employers were able to defend themselves from employee work-related injury lawsuits through the use of common law defenses that, if proven, absolved employers of liability to their employees. Some comments regarding the rights of employees and employers will be provided separately.

1. Employee Rights Under the Common Law

The issue of an employer's liability to an employee for a negligently caused employment injury was succinctly set out in *Madden v. C. & O. Railway Co.* In that case the supreme court held that "under the common law . . . a master is liable to his servant for any neglect of the master's duty, whether committed by the master himself or by one to whom he had delegated his authority." In a later case the supreme court pointed out that "it is not enough


28 W. Va. 610 (1886).

47 *Id.* at 616-17. The Supreme Court, in Daniel v. C. & O. Ry. Co., 15 S.E. 162 (W. Va. 1892), restated *Madden's* summation of the duties owed by employers to employees:

(1) To provide safe and suitable machinery and appliances for the business (including a safe place to work). This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and making proper inspections and tests. (2) To exercise like care in
simply that an accident occurred[,] it must be attributable to the [employer’s] negligence . . . . If an employee successfully established the liability of an employer for an injury sustained during the course of employment, the employee could recover "the expense of his cure, the value of the time lost by him during his cure, and a fair compensation for his physical and mental suffering caused by the injury as well as for any permanent reduction of his power to earn money." |

In the case of Cooper v. Pittsburgh, Cincinnatti & St. Louis Railroad Co., the supreme court indicated that an employee, injured by faulty equipment of an employer, could maintain an action against the employer even though the employer gave absolute control of the business to an agent. The issue of defective equipment was also addressed in Berns v. Gaston Gas Coal Co., in the context of an employee’s knowledge of the defect. It was said in Berns that "if the servant knows the defect and has reasonable ground[s] to believe, that the master has cured or will immediately cure the defect, he . . . may recover for injury caused by such negligence of the master."

providing and retaining sufficient and suitable servants for the business (and instructing those who, from newness or age, evidently need it). (3) To establish proper rules and regulations for the service, and, having adopted such, to conform to them.


24 W. Va. 37 (1884).

"Where a master places the entire charge of his business, or a distinct department of it, in the hands of an agent, exercising no discretion and no oversight of his own, it is manifest that the neglect of the agent, of ordinary care in supplying and maintaining suitable instrumentalities for the work required to be done is a breach of duty for which the master should be held liable. In such a case the negligence of the agent is the negligence of the principal." Cooper, 24 W. Va. at 51 (citations omitted). See also Gregory v. Ohio River R.R. Co., 16 S.E. 819, 821 (W. Va. 1893) ("[T]he test of liability of the principal is not whether the agent was authorized to do the particular act which constitutes the negligence or causes the injury, or whether it was done in violation of the principal's orders, but whether it was done while he was engaged in his principal's business, within the scope of his authority.").


Id. at 300. See Madden v. C. & O. Ry. Co., 28 W. Va. 610, 621 (1886), 28 W. Va. at 612 ("The law is well settled . . . that the company is bound not only to provide safe and suitable ma-
From a practical standpoint, the common law right of an employee to sue an employer for a negligently caused work injury was a hollow right. This right did not carry with it a guarantee of a positive litigation outcome for the employee. In the final analysis, the vast majority of injured employees in the state did not obtain legal redress against employers. The dismal legal plight of injured employees was attributed, in large measure, to the common law defenses employers had at their disposal.

2. Employer Defenses Under the Common Law

As a general proposition, it was held in Berns that “[t]he measure of care, which a master must take to avoid responsibility for injury to his servant, is that, which a person of ordinary prudence and caution would use, if his own interests were to be affected . . . .” An extension of the latter principle was stated in Hoffman v. Dickinson. In Hoffman, the supreme court held:

A servant can not recover for an injury suffered in the course of his employment, for a defect in the machinery or appliances used by the master, unless the master knew, or ought to have known, of the defect, and the servant was ignorant of such defect, or had not equal means of knowledge.

Although statistical data of the success rate of injured employees in actions against employers are not available, other evidence exists which suggest that employees did not frequently prevail against employers. For example, Chapter 57 of the Acts of 1899 created three hospitals specifically for injured workers. It was provided in W. VA. CODE § 471, that the three hospitals had “to treat free of charge persons accidentally injured, in this State, while engaged in their usual employment or occupation. . . .” Presumptively free medical care would not have to be provided by the state, if injured employees routinely prevailed against employers. See Friedman & Ladinsky, supra note 13, at 65-66 (“Relatively few injured workers received compensation. . . . When an employee did recover, the amount was usually small. . . . Litigation costs consumed much of whatever was recovered.”).
It was further held in a later case that "[a] servant can not recover if his injury was the direct result of his own disobedience of orders."\(^{59}\) The supreme court also ruled that "[a]n employe[e] cannot recover from his employer for injuries received by reason of an accident which could have been averted by the employe[e]'s proper and prudent discharge of his duties . . . . "\(^{60}\)

Employers in the state usually prevailed in litigation brought by injured employees.\(^{61}\) The devastatingly overwhelming litigation success of employers was primarily the result of three defenses: (1) assumption of the risk, (2) contributory negligence, and (3) the fellow-servant doctrine.\(^{62}\)

\textit{a. Assumption of the Risk}

The doctrine of assumption of the risk was one of the defenses that an employer had, in an action brought by an injured employee. The general contours of this defense were established in \textit{Cooper}. In \textit{Cooper}, the supreme court held that "[t]he ordinary risks and perils incident to the employment which the servant can foresee, or shun, or avoid, or guard against by prudence, skill and forecast are assumed by him, and they are supposed to enter into the consideration to be received by him for his services."\(^{63}\) Moreover, it was said in \textit{Hoffman} that "[i]f a servant wilfully encounters dangers which are known to him, or are notorious, the master is not responsible for any injury occasioned thereby."

\(^{59}\) Syl. Pt. 6, Knight v. Cooper, 14 S.E. 999 (W. Va. 1892).


\(^{61}\) See supra note 55.

\(^{62}\) "These three common law doctrines were coined the 'unholy trinity' defenses." Gurtler, \textit{supra} note 23, at 287.

\(^{63}\) Cooper v. Pitt., Cinn., & St. Louis R.R. Co., 24 W. Va. 37, 51 (1884). See Riley v. W. Va. Cent. & Pac. Ry. Co., 27 W. Va. 145, 158 (1885) ("The implied contract of service is that when the servant enters into the employment he assumes all the risks ordinarily incident to the business. The servant is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment; consequently he can not recover for injuries resulting to him therefrom.") (citation omitted); Berns v. Gaston Gas Coal Co., 27 W. Va. 285, 299-300 (1885) ("When a servant enters into the employment of a master, he assumes all the ordinary risks incident to the employment, whether the employment is dangerous or otherwise."); Syl. Pt. 5, \textit{Knight}, ("A servant having knowledge of danger about him must use diligence and care in protecting himself from harm."); Woodell v. W. Va. Improvement Co., 17 S.E. 386, 396 (W. Va. 1893) ("[T]he general rule is well settled that if the servant continues in the employment . . . after the risk of such danger comes to his knowledge, he is deemed to assume such risk, and to waive any claim upon his employer for damages in case of injury.").

b. Contributory Negligence

The essence of the doctrine of contributory negligence holds that "if the negligence be mutual on the part of the [employee] and [employer], there can be no recovery." In *Criswell v. Pittsburgh, Cincinnatti, and St. Louis Railway Co.*, the supreme court summarized the defense of contributory negligence as follows: "[T]he employee himself is bound to exercise all reasonable care and prudence[,] and if an injury results through his want of care, or through his own negligence, combined with that of his employer, he has no right of action against the [employer]."

The supreme court extended the contributory negligence defense in a later case, by holding that when an employee "does not avail himself of the rules and regulations which the master has provided to avoid and avert . . . dangers, the master is not responsible for an injury occasioned thereby."

c. Fellow-Servant Doctrine

While addressing the fellow-servant doctrine in *Beuhring v. C. & O. Railway Co.*, the supreme court stated that "[t]he master can not answer for the negligence of all his servants hurting one another. This would be an embargo


6 S.E. 31 (W. Va. 1888).


Syl. Pt. 1, Davis v. Nuttallsburg Coal & Coke Co., 12 S.E. 539 (W. Va. 1890). See Syl. Pt. 3 Overby, 16 S.E. at 813 ("Where an employee . . . receives an injury which is caused by his acting in direct violation of a reasonable rule made by [a] company for the safety of its servants, of which rule he has notice, and has promised to obey, he must be deemed guilty of contributory negligence, and can not recover damages from the company for such injury.").

16 S.E. 435 (W. Va. 1892).
on business. It would destroy any employer in any calling.\textsuperscript{70} The observation made in \textit{Beuhring} summarized the justification for the fellow-servant doctrine. Under this doctrine "[a] master is not liable to his servant for negligence of his fellow-servant while engaged in the same common employment . . . ."\textsuperscript{71} The fellow-servant doctrine was defined in \textit{Unfried v. B. & O. Railroad Co.}\textsuperscript{72} in the following manner:

Any person in the employment of the same master, and under his control, whether his position is equal, inferior, or superior to that of the injured servant, so long as he is not intrusted with a power of control over that servant, is a fellow servant with him. No extent of difference in their wages, social position, or work affects the relation of servants of the same master so long as they are employed in one general business . . . .\textsuperscript{73}

In the final analysis, the three major common law employer defenses, (1) assumption of the risk, (2) contributory negligence, and (3) the fellow-servant doctrine, nullified the legal efforts of injured workers. This situation cried out for change. The state legislature eventually responded to the plight of injured employees in 1913.

\section*{B. Statutory Creation of Workers' Compensation System}

Pursuant to Chapter Ten of the Acts of 1913 ("\textit{Acts}\textsuperscript{74}"),\textsuperscript{74} the state legislature created a workers' compensation system.\textsuperscript{75} The preamble to the Acts

\textsuperscript{70} \textit{Id.} at 435.


\textsuperscript{72} 12 S.E. 512 (W.Va. 1890).

\textsuperscript{73} \textit{Id.} at 516, (quoting \textbf{THOMAS G. SHERMAN & AMASA A. REDFIELD, LAW OF NEGLIGENCE, § 224} (6th ed. 1913) (internal quotation marks omitted)). \textit{But see} Madden v. C. & O. Ry. Co., 28 W.Va. 610, 618 ("[T]wo servants of the same master are not fellow-servants when one acts in a superior capacity to the other in regard to some duty due from the master, and the master is liable for any injuries to the subordinate caused by the carelessness or negligence of the superior."); Flannegan v. C. & O Ry. Co., 21 S.E. 1028 (W.Va. 1895) (brakeman and telegraph operator not fellow-servants).

\textsuperscript{74} 1913 W. VA. ACTS ch. 10 (codified as amended at W. VA. CODE §§ 23-1-1 TO 23-6-3) (2002
stated that its purpose was "to provide a method of compensation for employe[e]s that may be injured, or the dependents of those killed in the course of their employment . . . and to define and fix the rights of employe[e]s and employers . . . ."76 In an early interpretation of the Acts in *Archibald v. Ott*,77 the supreme court held that "[r]ight of compensation under the statute does not depend upon negligence or fault of the employer and is not precluded by mere negligence on the part of the employe [sic] causing the injury. It gives compensation for injuries received 'in the course of and resulting from' the employment."78

The decision in *Archibald* succinctly stated the essence of the nature of the workers' compensation system, i.e., it is a no-fault system of compensability for work-related injuries.79 So long as an employee's injury is received *in the course of and resulting from* his/her employment, the workers' compensation system provides the employee with appropriate medical and monetary benefits.80 The remedy provided for injured employees by the state's workers' compensation statute is an exclusive remedy. Except for a few narrow exceptions,

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75 It will be noted that "[t]he first workers' compensation law passed in the United States was the precursor of the Federal Employ[ees] Compensation Act of 1908, which applied to certain federal employees engaged in hazardous work." Kilgour, *supra* note 8, at 85. See Keaney, *supra* note 7, at 283 ("In 1908, Congress adopted a workmen's compensation law for federal employees limited in scope of coverage and benefits . . . .") New York was the first state to enact a compulsory workers' compensation statute. It did so in 1910. However, the statute was found unconstitutional by the state's highest court in *Ives v. S. Buffalo Ry. Co.*, 201 N.Y. 271 (1911). In rendering the decision in *Ives*, the court held that the statute imposed a "liability unknown to the common law and . . . constitutes a deprivation of liberty and property under the Federal and State Constitutions . . . ." *Id.* at 294. Subsequent to the decision in *Ives*, New York created another system, in 1914, which was ultimately found constitutional by the United States Supreme Court in *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917). The decision in *White* had a snowball effect, so that by 1949 all jurisdictions had a workers' compensation system. See DONALD T. DECARLO & MARTIN MINKOWITZ, WORKERS COMPENSATION INSURANCE AND LAW PRACTICE: THE NEXT GENERATION, 1-7 (1st ed. 1989).

76 1913 W. Va. Acts ch. 10. It will be noted that, as originally enacted, the state's workers' compensation system was called "workmen's" compensation. The legislature, pursuant to the Acts of 1983, Chapter 189, abolished the term "workmen's" and inserted the term "workers'" in its place. It will also be noted here that a narrow group of employers are not required to subscribe to the workers' compensation system. See W. VA. CODE ANN. § 23-2-1(b) (LexisNexis Supp. 2004).

77 87 S.E. 791 (W. Va. 1916).

78 *Id.* at 792. The supreme court also noted in *Archibald* that the state's workers' compensation system was "based upon the principles of the English Compensation Act . . . ." *Id.*

79 Under the Acts an injury is defined so as to include occupational diseases. See W. VA. CODE ANN. § 23-4-1 (LexisNexis Supp. 2004).

80 See Damron v. State Comp. Comm'r, 155 S.E. 119, 122 (W. Va. 1930) ("An injury to be compensable must be received 'in the course of and resulting from' the employment.") (citations omitted).
discussed infra, injured employees generally may not file a common law action
against employers. Additionally, employers are not permitted to raise their
common law "unholy trinity" defenses against employees seeking benefits
under the workers' compensation statute.


That is, assumption of the risk, contributory negligence and the fellow-servant doctrine. See Deller v. Naymick, 342 S.E.2d 73, 80 (W. Va. 1985) ("[T]he purpose of coemployee (and employer) immunity under the Workers' Compensation Act is to replace the common-law tort claims and defenses between or among employers and employees with the no-fault, exclusive remedy of workers' compensation.").

83 Although the exclusivity provisions of the state's workers' compensation statute implicitly abrogates employer common law defenses in administrative proceedings, the legislature explicitly abolished employer common law defenses in civil actions brought by injured employees against employers who fail to provide workers' compensation coverage. See 1913 W. Va. Acts ch. 10, § 26, codified as amended, W. VA. CODE ANN. §§ 23-2-8 (LexisNexis 2002); Syl. Pt. 8, Roberts v. Consolidation Coal Co., 539 S.E.2d 478 (W. Va. 2000) ("When an employee asserts a deliberate intention cause of action against his/her employer, ... the employer may not assert the employee's contributory negligence as a defense to such action."); Syl. Pt. 2, Jenkins v. Sal Chem. Co., 280 S.E.2d 243 (W. Va. 1981) ("An employer subject to the West Virginia Workmen's Compensation Act who does not participate in it, waives all common law defenses to a work-related personal injury suit by an employee."); Syl. Pt. 1, Estep v. Price, 115 S.E. 861 (W. Va. 1923) ("[The employer] cannot interpose the common-law defenses of fellow servant rule, assumption of risk, or contributory negligence as a defense.").
C. Exceptions to the No-Fault System

The Acts carved out exceptions to employee coverage and employer liability under the state's workers' compensation system.

1. Employee Exceptions

The Acts created circumstances precluding an employee from receiving workers' compensation benefits for an injury sustained in the course of and resulting from his/her employment. In section 28, chapter 10 of the Acts of 1913, the legislature set out three circumstances which would prevent an injured employee from receiving workers' compensation benefits: self-inflicted injury, employee intoxication at time of injury, or willful misconduct by employee.


For examples of other jurisdictions that deny benefits for a self-inflicted injury, see FLA. STAT. ANN. § 440.09(3) (West Supp. 2004); GA. CODE ANN. § 34-9-17(a) (LexisNexis 2004); HAW. REV. STAT. § 386-3(b) (Supp. 2003); IDAHO CODE ANN. § 22-3-2-8 (Michie 1997); KAN. STAT. ANN. § 44-501(d)(1) (2000); ME. REV. STAT. ANN. tit. 39-A, § 202 (West 2001); MD. CODE ANN., LAB. & EMPL. § 9-506(a) (Supp. 2003); MASS. GEN. LAWS ANN. ch. 152, § 27 (LexisNexis 2000); MICH. COMP. LAWS ANN. § 418.305.
2. Employer Exceptions

The Acts and decisions by the supreme court have created circumstances which will allow an employee to sue an employer for an injury sustained in the course of, and resulting from his/her employment. Under the Acts an employer is liable to an employee in a common law tort action for a *deliberate intention* injury. Under the Acts, an injured employee may bring a civil action


In 1983, the supreme court was asked to decide whether suicide by an employee, who was injured in the course of and resulting from his employment, fell within the self-inflicted injury exception of the Acts so as to preclude benefits to his widow. The issue was raised in *Hall v. Workmen's Compensation Commissioner*, 303 S.E.2d 726 (W. Va. 1983). The supreme court resolved the matter by carving out an exception to the Act's self-inflicted injury exception. The following was said in *Hall*:

> [An employee's suicide which arises in the course of and results from covered employment is compensable . . . , provided, (1) the employee sustained an injury which itself arose in the course of and resulted from covered employment, and (2) without that injury the employee would not have developed a mental disorder of such degree as to impair the employee's normal and rational judgment, and (3) without that mental disorder the employee would not have committed suicide.


For examples of other jurisdictions that deny benefits for an injury sustained while intoxicated or under the influence of illegal drugs, see GA. CODE ANN. § 34-9-17(b) (LexisNexis 2004); HAW. REV. STAT. § 386-3(b) (Supp. 2003); IOWA CODE ANN. § 85.16(2) (West 1996); KAN. STAT. ANN. § 44-501(d)(2) (2000); LA. REV. STAT. ANN. § 23:1081(1)(b) (West Supp. 2004); NEV. REV. STAT. 616C.230(1)(d) (2003); N.H. REV. STAT. ANN. § 281-A:14 (West 1999); N.M. STAT. ANN. § 52-1-12 (Michie 1995); N.C. GEN. STAT. § 97-12 (LexisNexis 2003); S.D. CODIFIED LAWS § 62-4-37 (Michie 1993); TENN. CODE ANN. § 50-6-110 (LexisNexis 1999); TEX. LAB. CODE ANN. § 406.032(1)(A) (Vernon 1996); UTAH CODE ANN. § 34A-2-302(3)(b) (LexisNexis 2001); VA. CODE ANN. § 65.2-306(A)(3) (West Supp. 2004).

Pursuant to subsequent amendments to the Acts the "willful misconduct" disqualifier was repealed. See W. VA. CODE ANN. §§ 23-4-2(a) (LexisNexis Supp. 2004). Prior to the repeal of the provision, the supreme court interpreted willful misconduct to include a violation of an employer's safety rules. See *Ex parte Mitchell*, 14 S.E.2d 771 (W. Va. 1941); *Thompson v. State Comp. Comm'r*, 54 S.E.2d 13 (W. Va. 1949). For examples of other jurisdictions that deny or reduce benefits for an injury sustained through willful misconduct, see COLO. REV. STAT. § 8-42-112 (LexisNexis 2003); FLA. STAT. ANN. § 440.09(5) (West Supp. 2004); KY. REV. STAT. ANN. § 342.165(1) (Michie 1997); N.M. STAT. ANN. § 52-1-10 (Michie 1995); UTAH CODE ANN. § 34A-2-302(3)(a) (LexisNexis 2001); WIS. STAT. ANN. § 102.58 (West 2004).

against an employer who failed to provide workers’ compensation coverage. An employee may also maintain a cause of action against an employer for discriminatory action taken against the employee for receiving workers’ compensation benefits. Finally, in a decision by the supreme court, employees have been given the right to bring a private cause of action against employers who fraudulently attempt to prevent an employee from obtaining workers’ compensation benefits.

D. Types of Compensation Benefits

The benefits provided to injured employees under the Acts may be divided generally into six categories: (1) temporary total disability benefits, (2) temporary partial rehabilitation benefits, (3) permanent partial disability benefits, (4) permanent total disability benefits, (5) death benefits, and (6) medical benefits.

I. Temporary Total Disability Benefits

A worker sustaining a compensable injury, temporary and total in nature, is entitled to receive monetary benefits. The workers’ compensation statute provides for such compensation as follows:

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If the injury causes temporary total disability, the employee shall receive during the continuance of the disability a maximum weekly benefit to be computed on the basis of sixty-six and two-thirds percent of the average weekly wage earnings, wherever earned, of the injured employee, at the date of injury, not to exceed one hundred percent of the average weekly wage in West Virginia. The minimum weekly benefits paid under this subdivision shall not be less than thirty-three and one-third percent of the average weekly wage in West Virginia.98

It is also provided by statute that the "aggregate award for a single injury for which an award of temporary total disability benefits is made . . . shall be for a period not exceeding one hundred four weeks."99


99 W. VA. CODE ANN. § 23-4-6(c) (LexisNexis Supp. 2004). Prior to an amendment in 2003, the aggregate award for temporary total disability benefits was for a period not exceeding two hundred eight weeks.
2. Temporary Partial Rehabilitation Benefits

Under the state's workers' compensation statute an injured worker who returns to work may be entitled to temporary partial rehabilitation benefits. The workers' compensation statute provides that when an injured employee "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 . . ."100 Under the statute temporary partial rehabilitation benefits are intended, essentially, to compensate for any decrease in wages incurred by a rehabilitating employee who has returned to work.

Temporary partial rehabilitation benefits are based upon "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 . . ."101 The statute requires such benefits be "reviewed every ninety days to determine whether the injured employee's average weekly wage in the new employment has changed . . ."102


3. Permanent Partial Disability Benefits

An employee who sustains a permanent partial disability is entitled to a monetary "award [that is] computed on the basis of four weeks' compensation for each percent of disability . . . ."\(^{103}\) The weekly income that is used in the formula cannot exceed a maximum of "sixty-six and two-thirds percent of [the employee's] average weekly wage earnings . . . at the time of the date of injury . . . ."\(^{104}\) The minimum weekly income used for the formula is "thirty-three and one-third percent of the average weekly wage in West Virginia . . . ."\(^{105}\) Disability percentages for the loss of specific body parts are set out in the workers' compensation statute.\(^{106}\) Where the loss of a body part is not involved, the de-


104 W. VA. CODE ANN. § 23-4-6(d) (LexisNexis Supp. 2004).

105 W. VA. CODE ANN. § 23-4-6(b) (LexisNexis Supp. 2004).

106 Benefits for the loss of specific body parts are set out in W. VA. CODE ANN. § 23-4-6(f) (LexisNexis Supp. 2004).
gree of permanent partial disability is "determined exclusively by the degree of whole body medical impairment that a [worker] has suffered."\textsuperscript{107}

4. Permanent Total Disability Benefits

A worker determined to be permanently and totally disabled is entitled to receive a monetary award "not to exceed a maximum benefit of sixty-six and two-thirds percent of [the employee's] average weekly earnings . . . at the time of the date of injury . . . ."\textsuperscript{108} The minimum weekly benefits paid to a permanently and totally disabled worker cannot "be less than thirty-three and one-third percent of the average weekly wage in West Virginia . . . ."\textsuperscript{109} As a general matter, in order for a worker to be eligible to apply for permanent total disability benefits he/she "(A) [m]ust have been awarded the sum of fifty percent in prior permanent partial disability awards; (B) must have suffered a single occupational injury or disease which results in a finding by the commission that the

\textsuperscript{107} W. VA. CODE ANN. § 23-4-6(i) (LexisNexis Supp. 2004). See also W. VA. CODE ANN. § 23-4-6b(e) (LexisNexis Supp. 2004) (setting out table for hearing disability rating).


\textsuperscript{109} W. VA. CODE ANN. § 23-4-6(b) (LexisNexis Supp. 2004).
[worker] has suffered a medical impairment of fifty percent; or (C) has sustained a thirty-five percent statutory disability [for loss of body parts].”

5. Death Benefits

The state workers’ compensation statute provides that “[i]n case a personal injury . . . suffered by an employee in the course of and resulting from his or her employment, causes death,” benefits are to “be paid to such one or more dependents of the decedent . . . .” A widow or widower who “abandons” the deceased employee, before the death causing injury occurred, is

110 W. VA. CODE ANN. § 23-4-6(n)(1) (LexisNexis Supp. 2004). The percentage impairment eligibility requirement is qualified by W. VA. CODE ANN. § 23-4-6(m) (LexisNexis Supp. 2004), which provides:

(m) The following permanent disabilities shall be conclusively presumed to be total in character:
   - Loss of both eyes or the sight thereof.
   - Loss of both hands or the use thereof.
   - Loss of both feet or the use thereof.
   - Loss of one hand and one foot or the use thereof.


barred from receiving death benefits. However, a widow or widower may receive death benefits if he/she "was abandoned within a period of two years by the employee for any reason except a reason that would have entitled the deceased employee to an annulment or a divorce . . . ."  

6. Medical Benefits

In addition to the benefits previously described, the workers' compensation system also provides separate medical benefits for workers injured in the course of and resulting from employment. Medical benefits include payment "for health care services, rehabilitation services, durable medical and other goods and other supplies and medically related items as may be reasonably required."


114 W. VA. CODE ANN. § 23-4-13 (LexisNexis 2002).


IV. WORKERS’ COMPENSATION LITIGATION SCHEME

One of the initiating themes under girding the creation of workers’ compensation generally was the idea of putting an end to litigation between injured employees and their employers. Workers’ compensation was intended to be a nonadversarial disbursement of benefits to injured employees. The Acts of 1913 echoed this point, insofar as it provided that the Public Service Commission rendered decisions on employee benefit claims and only the supreme court had authority to review a denial of such claims. The Acts envisioned de minimis disputes arising from administrative decisions on employee claims for workers’ compensation benefits. However, time quickly proved the Acts to be wrong. Workers’ compensation has exploded into a costly and unwieldy adversarial litigation nightmare.

The tentacled adversarial posture employees and employers brought to workers’ compensation necessitated legislative action that has resulted in the creation of a full-blown litigation scheme. This part of the article summarizes the litigation scheme employees and employers forced upon the workers’ compensation system.

A. Workers’ Compensation Commission

In West Virginia the workers’ compensation litigation scheme is triggered at the administrative level when an employee files a claim for benefits

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117 See supra note 2 and text in main body.

118 See 1913 W. Va. Acts ch. 10, § 43 (“The commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions thereon shall be final.”) (emphasis added). The workers’ compensation system was removed from the Public Service Commission pursuant to the Acts of 1915, Chapter 9.

119 See 1913 W. Va. Acts ch. 10, § 43 (“[I]n case the final action of said commission denies the right of the claimant to participate at all in such fund . . . then the claimant may . . . apply for an appeal to the supreme court of appeals.”).

120 The discussion in this part does not address the few circumstances that permit an employer to bring an appeal in circuit court. See W. VA. CODE ANN. §§ 23-2-17 & 23-4-3c(b) (LexisNexis Supp. 2004).

121 The state of Alabama is the only jurisdiction that does not provide for an initial administrative determination of a worker’s claim for benefits. In that jurisdiction if an employee and employer cannot agree on the employee’s claim for benefits, the matter proceeds to a trial court of general jurisdiction. See ALA. CODE §§ 25-5-81(a)(1) & 25-5-88 (Michie 2000). A trial is held before the judge, but a jury is permitted under narrow circumstances. See ALA. CODE § 25-5-81(a)(2) (Michie 2000).

A minority of jurisdictions utilize trial courts of general jurisdiction and juries, but only after administrative forums have been exhausted. See MD. CODE ANN., LAB. & EMPL. §§ 9-737 (Supp. 2004) & 9-745(d) (1999); OHIO REV. CODE ANN. §§ 4123.51.2(A) & 4123.51.2(D) (Page 2001); TEX. LAB. CODE ANN. §§ 410.302 & 410.304 (Vernon 1996); VT. STAT. ANN. tit. 21, § 670 (Equity 1987); WASH. REV. CODE ANN. §§ 51.52.110 & 51.52.115 (West 2002).
with the Workers’ Compensation Commission (hereinafter the “Commission”). The Commission, through its Executive Director, has exclusive jurisdiction to render an initial decision on an employee’s claim for benefits.

A minority of jurisdictions utilize trial courts of general jurisdiction, but not juries, after the parties exhaust administrative proceedings. See ARIZ. REV. STAT. ANN. § 23-946 (West 1995); DEL. CODE ANN. tit. 19, § 2350 (Michie 1995); GA. CODE ANN. § 34-9-105(b) (LexisNexis 2004); ILL. Comp. STAT. ANN. 305/19(f)(1) (West 1993); IOWA CODE ANN. § 86.26 (West 1996); MISS. CODE ANN. § 71-3-51 (1995); NEV. REV. STAT 616C.370 (2003); N.J. STAT. ANN. § 34:15-66 (West 2000); N.D. CENT. CODE § 65-10-01 (LexisNexis 2003); S.C. CODE ANN. § 42-17-60 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 62-7-19 (Michie 1993); TENN. CODE ANN. § 50-6-225(b) (LexisNexis Supp 2003); WIS. STAT. ANN. § 102.23 (West 2004); WYO. STAT. ANN. § 27-14-612 (LexisNexis 2003).


A minority of jurisdictions utilize boards or commissions to administer their workers’ compensation systems. See ALASKA STAT. § 23.30.005 (LexisNexis 2002) (board); ARIZ. REV. STAT. ANN. § 23-921 (West 1995) (commission); ARK. CODE ANN. § 11-9-201 (LexisNexis 2002) (commission); CONN. GEN. STAT. ANN. § 31-276 (West 2003) (commission); DEL. CODE ANN. tit. 19, §
In its review of benefit claims by workers, the Commission is empowered to hold proceedings and "to administer oaths, certify official acts, take depositions, issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents and testimony." At proceedings before the Commission, employees and employers are permitted to be represented by attorneys, qualified representatives, or they may proceed pro se. Moreover, both parties are permitted to file such "information in support of their respective positions as they consider proper." The Commission is required to render its decision on a claim in writing.

B. Office of Judges

If an employee or employer is not satisfied by the written decision of the Commission on any claim matter, either party may "object" and appeal the decision to the Workers' Compensation Office of Judges (hereinafter the "OOJ"). The OOJ is composed of a chief administrative law judge and a staff.


124 See W. VA. CODE ANN. § 23-5-1(a) (LexisNexis Supp. 2004); Ferguson v. State Workmen's Comp. Comm'r, 163 S.E.2d 465 (W. Va. 1968) (holding that no one except the Executive Director is authorized to make an initial compensation award). It will be noted that in a claim for occupational pneumoconiosis, medical questions are determined by the Occupational Pneumoconiosis Board (OP Board), pursuant to W. VA. CODE ANN. §§ 23-4-8a to 23-4-8c (LexisNexis Supp. 2004). However, the OP Board's decision on medical questions is not conclusive on whether an employee will receive benefits for an occupational pneumoconiosis claim. See Hamrick v. State Workmen's Comp. Comm'r, 228 S.E.2d 702 (W. Va. 1976) (where it was held that the findings and conclusions of the OP Board merely constitute evidence for consideration by the Executive Director).

125 W. VA. CODE ANN. § 23-1-8 (LexisNexis Supp. 2004). Although the Commission is authorized to actually hold hearings, in practice this does not occur. As a general matter evidence is gathered by the Commission and cases are decided on the record produced.


of administrative law judges who are authorized to preside over objections\textsuperscript{130} to Commission decisions.\textsuperscript{131}

The proceedings conducted before the OOJ are de novo.\textsuperscript{132} Pursuant to its statutory authority the OOJ is empowered to "establish a procedure for the hearing of disputed claims, take oaths, examine witnesses, issue subpoenas, . . . and make reports that are necessary for disputed claims . . . .\textsuperscript{133} The OOJ can affirm, reverse or modify the Commission's action.\textsuperscript{134} The decision of the OOJ must be in writing and "contain findings of fact and conclusions of law and . . . be mailed to all parties."\textsuperscript{135}

\textbf{C. Workers' Compensation Board of Review}

The decision rendered by the OOJ may be appealed to the Workers' Compensation Board of Review (hereinafter the "Board of Review"),\textsuperscript{136} by an

\textsuperscript{130} The administrative law judges hear cases and rule upon the same as individual judges, not as a collective body.


\textsuperscript{132} See \textit{W. VA. CODE ANN. § 23-5-9(c)} (LexisNexis Supp. 2004).

\textsuperscript{133} \textit{W. VA. CODE ANN. § 23-5-8(f)} (LexisNexis Supp. 2004).

\textsuperscript{134} See \textit{W. VA. CODE ANN. § 23-5-9(d)} (LexisNexis Supp. 2004).

\textsuperscript{135} \textit{W. VA. CODE ANN. § 23-5-9(d)} (LexisNexis Supp. 2004).

\textsuperscript{136} The present Board of Review was established in 2003. See \textit{W. VA. CODE ANN. § 23-5-11(b)} (LexisNexis Supp. 2004). Prior to the creation of the Board of Review, the workers' compensation system utilized an Appeal Board that was established by the Acts of 1935, Chapter 78. Further, pursuant to Section 57, Chapter 68, of the Acts of 1925, the legislature had created a commission that was referred to as the "Workmen's Compensation Appeal Board." This commission was composed of the governor, the commissioner of labor, and the commissioner of health. The com-
employee, employer or the Commission. The Board of Review consists of three members who are appointed by the governor. The proceeding before the Board of Review is based upon the record that was developed at the OOJ level and is not de novo.

The Board of Review "may affirm, reverse, modify or supplement the decision of the administrative law judge and make such disposition of the case as it determines to be appropriate." Board of Review decisions must "be made by a majority vote . . . ." Further, "[a]ll decisions, findings of fact and conclusions of law of the board of review [must] be in writing and state with specificity the laws and facts relied upon to sustain, reverse or modify the administrative law judge's decision."

mission was empowered to hear appeals from decisions by the workers' compensation commissioner. "Appeals from the decision of the commission [were taken to] the supreme court of appeals." See W. VA. CODE ANN. § 56 (1925). The commission was abolished by the Acts of 1929. For a case discussing the commission see Gore v. Hudson, 137 S.E. 229 (W. Va. 1927).


See W. VA. CODE ANN. § 23-5-12(b) (LexisNexis Supp. 2004). Prior to the creation of the OOJ, proceedings before the former Appeal Board were de novo. See Dillon v. State Workmen's Comp. Comm'r, 39 S.E.2d 837 (W. Va. 1946).

W. VA. CODE ANN. § 23-5-12(b) (LexisNexis Supp. 2004). The standard of review by the Board of Review is also provided in W. VA. CODE ANN. § 23-5-12(b). See Conley v. Workers' Comp. Div., 483 S.E.2d 542, 549 (W. Va. 1997) ([W]hen the Appeal Board reviews a ruling from the OOJ it must do so under the standard of review set out in W. Va. Code § 23-5-12(b), and that failure to do so will be reversible error."


W. VA. CODE ANN. § 23-5-12(c)(1) (LexisNexis Supp. 2004). See Conley v. Workers' Comp. Div., 483 S.E.2d 542, 549 (W. Va. 1997) ([W]hen the Appeal Board issues an order that is not an affirmation of a ruling by the OOJ, it must set out adequate findings that support its decision."

W. VA. CODE ANN. § 23-5-12(c)(1) (LexisNexis Supp. 2004). See Conley v. Workers' Comp. Div., 483 S.E.2d 542, 549 (W. Va. 1997) ([W]hen the Appeal Board issues an order that is not an affirmation of a ruling by the OOJ, it must set out adequate findings that support its decision."

D. Supreme Court

The final arbiter of workers' compensation disputes is the state supreme court. It is provided by statute that "[r]eview of any final decision of the board . . . may be prosecuted by either party or by the workers' compensation commission to the supreme court of appeals within thirty days from the date of the final order by filing a petition . . .".

Review of a decision by the Board of Review is discretionary with the supreme court. Should an application for review of a Board of Review decision be accepted, the supreme court "will not reverse a finding of fact made by the . . . Board unless it appears from the proof upon which the . . . board acted that the finding is plainly wrong." The supreme court has indicated that the "clearly wrong" standard of review is a deferential one, "which presumes an

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143 All states permit their judicial appellate courts to review workers' compensation decisions rendered by lower tribunals. See ALA. CODE § 25-5-81(c) (Michie 2000); ALASKA STAT. § 23.30.125(c) (LexisNexis 2002); ARIZ. REV. STAT. ANN. §§ 23-948 & 23-951 (West 1995); ARK. CODE. ANN. § 11-9-711(b) (LexisNexis Supp. 2003); CAL. LAB. CODE § 5950 (Decering 1991); COLO. REV. STAT. §§ 8-43-307 & 8-43-313 (LexisNexis 2003); CONN. GEN. STAT. ANN. § 31-301b (West 2003); DEL. CODE. ANN. tit. 19, § 2350(f) (Michie 1995); D.C. CODE ANN. § 32-1522(b)(3) (West 2001); FLA. STAT. ANN. § 440.25(5) (West Supp. 2004); GA. CODE ANN. § 34-9-105(e) (LexisNexis 2004); HAW. REV. STAT. § 386-88 (1993); IDAHO CODE § 72-724 (LexisNexis 1999); 820 ILL. COMP. STAT. ANN. 305/19(2) (West 1993); IND. CODE ANN. § 22-3-4-8 (Michie 1997); IOWA CODE ANN. § 86.26 (West Supp. 2004); KAN. STAT. ANN. § 44-556 (Supp. 2003); KY. REV. STAT. ANN. § 342.290 (Michie 1997); LA. REV. STAT. ANN. § 23:1310.5(B) (West Supp. 2004); ME. REV. STAT. ANN. tit. 39-A, § 322 (West 2001); MD. CODE ANN., LAB. & EMPL. § 9-750 (1999); MASS. GEN. LAWS ANN ch. 152, § 12 (LexisNexis 2000); MICH. COMP. LAWS ANN. § 418.861a(14) (LexisNexis 2001); MINN. STAT. ANN. § 176.471 (West 1993); MISS. CODE ANN. § 71-3-51 (1995); MO. ANN. STAT. § 287.495 (West Supp. 2004); MONT. CODE ANN. § 39-71-2904 (2003); NEB. REV. STAT. § 48-185 (Supp. 2002); NEV. REV. STAT. 616C.370 (2003); N.H. REV. STAT. ANN. § 281-A:43,J(c) (West 1999); N.J. STAT. ANN. § 34:15-66 (West 2000); N.M. STAT. ANN. § 52-5-8 (Michie 1995); N.Y. WORKERS' COMP. LAW § 23 (McKinney Supp. 2004); N.C. GEN. STAT. § 97-86 (LexisNexis 2003); N.D. CENT. CODE § 65-10-01 (LexisNexis 2003); OHIO REV. CODE ANN. § 4123.51.1(J)(4) (Page 2001); OKLA STAT. ANN. tit. 85, § 3.6(C) (West Supp. 2004); OR. REV. STAT. § 656.298 (2002); PA. STAT. ANN. tit. 77, § 871 (West 2002); R.I. GEN. LAWS § 28-35-29 (LexisNexis 2003); S.C. CODE ANN. § 42-17-60 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 62-7-17 (Michie 1993); TENN. CODE ANN. § 50-6-225(c)(1) (LexisNexis Supp. 2003); TEX. LAB. CODE ANN. § 410.251 (Vernon 1996); UTAH CODE ANN. § 34A-2-801B (LexisNexis Supp. 2004); VT. STAT. ANN. tit. 21, § 672 (Equity 1987); VA. CODE ANN. § 65.2-706 (West Supp. 2004); WASH. REV. CODE ANN. § 51.52.140 (West 2002); WIS. STAT. ANN. § 102.25 (West 2004); WYO. STAT. ANN. § 27-14-612 (LexisNexis 2003).

It will be noted that Congress has barred federal judicial review of administrative decisions under the Federal Employees' Compensation Act. See 5 U.S.C.A. § 8128(b) (West 1996). But see Benton v. United States, 960 F.2d 19 (5th Cir. 1992) (holding that judicial review of constitutional issues not barred).

144 W. VA. CODE ANN. § 23-5-15(a) (Michie Supp. 2004). The statutory provision also permits the Board of Review to certify a question of law to the supreme court.

administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." On the other hand, "[w]here the issue on an appeal is clearly a question of law or involving an interpretation of a statute, [the court will] apply a de novo standard of review."  

V. WORKERS' COMPENSATION REFORM MEASURES OF THE 1990'S

The workers' compensation fiscal reform measures carved out by the state legislature during the 1990's, targeted three of the primary participants in the system: employees, employers and health care providers. This part of the article will touch upon the salient features of some of the reform measures implemented in the 1990's that were designed to curtail abuse of the workers' compensation system by the latter participants.  

A. Employee Reform Measures

1. Wrongfully Seeking Benefits

In 1999 the legislature enacted West Virginia Code section 61-3-24f to curtail the fraudulent receipt of workers' compensation benefits. This statute provides criminal penalties for anyone who "knowingly and with fraudulent intent secure or attempt to secure compensation from the workers' compensation fund or from a self-insured employer." Under this statute, if the amount involved is one thousand dollars or more, the offense is a felony punishable by up to ten years in prison. The statute provides for a misdemeanor if the amount involved is less than one thousand dollars, and permits punishment of up to one year in jail. Additionally, a person can be sentenced up to three years confinement, if he/she "knowingly and willfully make[s] a false report or statement

148 Any amendments made in 2003 to the statutes that are discussed will be pointed out in footnotes.
150 The provisions of the statute were actually created in 1994, and codified at W. VA. CODE ANN. § 23-4-19 (1994). However, the legislature repealed W. VA. CODE ANN. § 23-4-19 in 1999, and reenacted the provisions of the statute in W. VA. CODE ANN. § 61-3-24f (Michie 2000).
under oath, affidavit, certification or by any other means respecting any information required to be provided under [the workers’ compensation statutes]."  

Finally, the statute provides that "[i]f the person so convicted is receiving compensation from such fund or employer, he or she, from and after such conviction, cease to receive such compensation . . . ."  

2. Creation of Threshold for PTD  

In 1995 the legislature sought to preclude disbursement of permanent total disability (PTD) benefits for employees with minor injuries. To do this, the legislature amended West Virginia Code section 23-4-6 and added the following provision:  

[I]n order to be eligible to apply for an award of permanent total disability benefits for all injuries incurred and all diseases . . . a claimant must have been awarded the sum of fifty percent in prior permanent partial disability awards or have suffered an occupational injury or disease which results in a finding that the claimant has suffered a medical impairment of fifty percent.  

Under the amendment to the statute, an injured employee generally must have received a prior permanent partial disability award of fifty-percent or more. The statute was challenged as violative of equal protection, but the supreme court upheld the amendment in Blankenship v. Richardson. In doing so, however, Blankenship prohibited the statute from being effective from the date of passage.  

Subsequent to the decision in Blankenship, the supreme court further restricted the retro-application of the amendment to West Virginia Code section 23-4-6 in State ex rel. ACF Industries, Inc. v. Vieweg. It was held in ACF that when an employee, who has been injured in the course of and as a result of his/her employment, applies for workers’ compensation benefits in the form of a permanent total disability award (PTD), the employee’s application for such compensation is governed by the statutory, regulatory, and common law as it ex-
isted on the date of the employee’s injury or last exposure when there is no definite expression of legislative intent defining the law by which the employee’s application should be governed.”

As a result of the ACF decision, the statutory fifty-percent threshold for PTD consideration was only applicable for injuries initially sustained after the enactment of the amendment to West Virginia Code section 23-4-6.

3. Limitation on Reopening Claim

In an effort to prevent closed and evidentiary stale claims from being litigated, the legislature, in 1993, enacted West Virginia Code section 23-4-22. This statute reads in part as follows:

[161] Any claim which was closed for the receipt of temporary total disability benefits or which was closed on a no-lost-time basis and which closure was more than five years prior to the effective date of this section shall not be considered to still be open or the subject for an evaluation of the claimant for permanent disability merely because such evaluation has not previously been conducted and a decision on permanent disability has not been made . . . .

In Hardy v. Richardson the supreme court restricted the reach of West Virginia Code section 23-4-22. Hardy held that the statute “is applicable only to cases described in the section for which an order closing the case has been made by the Workers’ Compensation Commissioner.”

4. Allowing Subrogation When a Claimant Sues a Third Party

In some instances when an employee sustains a compensable injury by a third party while working, the employee will file a law suit against the third party. If the employee recovers a monetary sum from a third party, the employee will have obtained a double recovery. That is, in addition to benefits received from the workers’ compensation system, the employee may also pocket a

160 Id. at 190.


164 Id. at 311. The decision in Hardy permitted a claimant to have his case reopened, though the statute barred reopening, because an order had not been entered officially closing the case.
large sum from the third party. The legislature responded to this double recovery scenario in 1990, by enacting West Virginia Code section 23-2A-1. Under this statute if an injured employee "makes a claim against said third party and recovers any sum thereby, the Commission or a self-insured employer shall be allowed statutory subrogation with regard to medical benefits paid..." In Bush v. Richardson\(^{166}\) the supreme court upheld the validity of the subrogation provision.\(^{168}\)

5. Limitation on State Benefits for Claimant Receiving Federal Benefits

In 1993 the legislature enacted West Virginia Code section 23-4-23\(^{169}\) for the purpose of limiting a claimant's ability to receive workers' compensation benefits and federal old age insurance benefits. One provision in the statute, West Virginia Code section 23-4-23(b), reduced the amount of permanent total disability benefits a claimant received to that of fifty percent of federal benefits received. However, in Boan v. Richardson\(^{170}\) the supreme court ruled the provision violated equal protection principles and was therefore unconstitutional.

Also in 1993, the legislature enacted West Virginia Code section 23-4-24.\(^{171}\) This statute prevents claimants from applying for permanent total disability benefits if they are receiving federal old age retirement benefits.\(^{172}\) Under this statute "[a]ny claimant shall be evaluated only for the purposes of receiving a permanent partial disability award..."\(^{173}\)

6. Barring Mental-Mental Claims

In the case of Breeden v. Workmen's Compensation Comm'r,\(^{174}\) the supreme court created a workers' compensation compensable injury called a mental-mental injury.

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\(^{166}\) W. VA. CODE ANN. § 23-2A-1(b) (Michie Supp. 2004). The statute restricts the amount of subrogation to not more than fifty percent of the amount recovered.

\(^{167}\) 484 S.E.2d 490 (W. Va. 1997).


\(^{169}\) The statute was amended in 2003. See W. VA. CODE ANN. § 23-4-23 (Michie Supp. 2004).

\(^{170}\) 482 S.E.2d 162 (W.Va. 1996).


\(^{172}\) The supreme court has not been called upon to examine this statute.

\(^{173}\) W. VA. CODE ANN. § 23-4-24(a) (Michie 2002).

“mental-mental” claim. In Breeden, the employee filed a workers’ compensation claim for a mental disability which she suffered after being subjected to harassment from her immediate supervisor. The Commission determined the claim was not compensable. In its reversal of the Commission’s decision, the supreme court held in Breeden that “an employee who sustains mental or emotional injury which occurs as a result of continuous and intentional harassment and humiliation from her supervisor extending over a period of time has suffered a personal injury as required by [the workers’ compensation statute].”

It was not until 1993 that the legislature responded to the decision in Breeden by enacting West Virginia Code section 23-4-1f. This statute overturned Breeden and stated explicitly “that so-called mental-mental claims are not compensable. . . .”

B. Employer Reform Measures

1. Failing to Subscribe or Pay Premiums

In 1999 the legislature enacted West Virginia Code section 61-3-24e to curtail the practice of some employers to fail to subscribe to the workers’ compensation system, or fail to pay premiums. The legislature responded to this conduct by making it a felony offense for any employer to willfully and knowingly fail to subscribe to the system or fail to pay premiums. The statute provides “criminal penalties for both the business and its owners. . . .”

175 Id. at 399.

176 W. VA. CODE ANN. § 23-4-1f (Michie 2002). See Conley v. Workers’ Comp. Div., 483 S.E.2d 542 (W. Va. 1997) (holding that the statute was not retroactively applicable to workers’ compensation mental-mental claims that were filed prior to the effective date of the statute); Marlin v. Bill Rich Const., Inc., 482 S.E.2d 620 (W. Va. 1996) (declining to find that fear of contracting an occupational disease or occupational pneumoconiosis was a compensable injury).


179 See W. VA. CODE ANN. § 61-3-24e(1)(A) (Michie 2002).

180 See W. VA. CODE ANN. § 61-3-24e(2) (Michie 2002).

2. Default on Premiums by Subcontractor

Primary contractors and subcontractors have posed special problems for the workers' compensation system. Experience has shown that some subcontractors have a tendency to default on premium payments. In 1993 the legislature responded to this problem by enacting West Virginia Code section 23-2-1d.\(^\text{182}\) This statute provides that "[i]n the event that such a subcontracting employer defaults on its obligations to make payments to the commissioner, then such primary contractor shall be liable for such payments."\(^\text{183}\) The statute provides circumstances in which a primary contractor can avoid having to pay the defaulted premiums of a subcontractor.\(^\text{184}\)

3. Maintaining Safe Working Environments

In 1993 the legislature crafted a statute, West Virginia Code section 23-2B-2,\(^\text{185}\) designed to help prevent workplace injuries. Under the statute the Commissioner had authority "to conduct special inspections or investigations focused on specific problems or hazards in the workplace with or without the agreement of the employer."\(^\text{186}\) In conjunction with such preventive measures, under certain circumstances the Commissioner could "require the employer to establish a safety committee composed of representatives of the employer and the employees of the employer."\(^\text{187}\)

C. Health Care Provider Reform Measures

1. Wrongfully Seeking Payment

In 1999 the legislature enacted West Virginia Code section 61-3-24g\(^\text{188}\) to curtail financial abuse of the workers' compensation system by health care providers.\(^\text{189}\) The statute sets out three separate felony offenses involving the

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\(^{183}\) See W. VA. CODE ANN. § 23-2-1d(a) (Michie 2002).

\(^{184}\) See W. VA. CODE ANN. § 23-2-1d(b) (Michie 2002).


\(^{186}\) See W. VA. CODE ANN. § 23-2B-2(a) (Michie 2002).

\(^{187}\) See W. VA. CODE ANN. § 23-2B-2(b) (Michie 2002).

\(^{188}\) The statute was amended in 2003. See W. VA. CODE ANN. § 61-3-24g (Michie Supp. 2004).

\(^{189}\) The provisions of the statute were actually created in 1993, and codified at W. VA. CODE ANN. § 23-4-3a (Michie 1994). However, the legislature repealed W. VA. CODE ANN. § 23-4-3a in 1999, and reenacted the provisions of the statute in W. VA. CODE ANN. § 61-3-24g (Michie 2000).
wrongful receipt of workers' compensation funds by health care providers.\textsuperscript{190} Moreover, a health care provider convicted under the statute is "barred from providing future services or supplies to injured employees for the purposes of workers' compensation and shall cease to receive payment for such services or supplies."\textsuperscript{191}

2. Monitoring Health Care Providers

In 1990 the legislature created a health care advisory panel, under West Virginia Code section 23-4-3b,\textsuperscript{192} to assist the Commission in monitoring and establishing guidelines for health care providers and the services they render. The advisory panel was specifically empowered to:

(a) Establish guidelines for the health care which is reasonably required for the treatment of the various types of injuries and occupational diseases . . . . (b) Establish protocols and procedures for the performance of examinations or evaluations performed by physicians or medical examiners . . . . (c) Assist the commissioner in establishing guidelines for the evaluation of the care provided by health care providers to injured employees . . . . (d) Assist the commissioner in establishing guidelines as to the anticipated period of disability for the various types of injuries . . . . (e) Assist the commissioner in establishing appropriate professional review of requests by health care providers to exceed the guidelines for treatment of injuries and occupational diseases established pursuant to subsection (a) of this section.\textsuperscript{193}

3. Suspending or Terminating Health Care Providers

In 1990 the legislature enacted West Virginia Code section 23-4-3c\textsuperscript{194} to empower the Commissioner, under certain circumstances, to "suspend for up to one year or terminate the right of any health care provider . . . to obtain payment for services rendered to injured employees."\textsuperscript{195} The circumstances under which the Commissioner may exercise this authority include (a) providing ex-

\textsuperscript{190} See W. VA. CODE ANN. § 61-3-24g(1) to (3) (Michie 2002).

\textsuperscript{191} W. VA. CODE ANN. § 61-3-24g(5) (Michie 2002).

\textsuperscript{192} The statute was amended in 2003. See W. VA. CODE ANN. § 23-4-3b (Michie Supp. 2004).

\textsuperscript{193} W. VA. CODE ANN. § 23-4-3b (Michie 2002).

\textsuperscript{194} The statute was amended in 2003. See W. VA. CODE ANN. § 23-4-3c (Michie Supp. 2004).

\textsuperscript{195} W. VA. CODE ANN. § 23-4-3c(a) (Michie 2002).
cessive or medically unreasonable care to employees, charging fees in excess of the maximum amount established by the Commissioner, prior suspension or termination of provider’s license, and prior conviction of a crime related to the provider’s practice.

VI. DEVELOPMENT OF THE RULE OF LIBERALITY

As a fundamental point of law, the rule of liberality generally cannot be used in workers’ compensation litigation, absent legislative authority. This is true because workers’ compensation statutes are in derogation of common law rights. It has long been the rule that statutes which deny or infringe upon rights provided by the common law are to be strictly construed—not liberally construed. With these points in mind, this part of the article will examine the statutory creation and legislative repeal of the rule of liberality in the state workers’ compensation system.

A. Statutory Creation of the Rule of Liberality

In construing the workers’ compensation statute in Poccardi v. Ott, the state supreme court made the following observations:

The statute itself relaxes the common law and statutory rules of evidence and abolishes the technical and formal rules of procedure other than those expressly retained, and requires each

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196 See W. VA. CODE ANN. § 23-4-3c(a)(1) (Michie 2002).
197 See W. VA. CODE ANN. § 23-4-3c(a)(2) (Michie 2002).
198 See W. VA. CODE ANN. § 23-4-3c(a)(3) (Michie 2002).
199 See W. VA. CODE ANN. § 23-4-3c(a)(4) (Michie 2002).
200 This is to say that under the common law, a worker negligently injured on the job had a right to sue the employer. Further, the common law permitted an employer to raise certain affirmative defenses in litigation brought by an employee. The workers’ compensation laws strip an employee of the right to sue an employer for a negligent injury (with some exceptions), and an employer cannot use affirmative defenses in workers’ compensation litigation. See Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 911 (W. Va. 1978) (“The Workmen’s Compensation Act was designed to remove negligently caused industrial accidents from the common law tort system.”).
201 See State ex rel. Keller v. Grymes, 64 S.E. 728, 730 (W. Va. 1909) (“Statutes changing the common law are strictly construed, and it is not further abrogated than the language of the statute clearly and necessarily requires.”). See also Woodrum v. Johnson, 559 S.E.2d 908, 921 n. 10 (W. Va. 2001) (“It must also be acknowledged that a statute in derogation of common law must be strictly construed.”); City of Fairmont v. Retail, Wholesale, and Dep’t Store Union, AFL-CIO, 283 S.E.2d 589, 597 (W. Va. 1980) (“Statutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise than by necessary implication arising from such terms.”).
202 96 S.E. 790 (W. Va. 1918).
claim to be investigated in such a manner as may best be calculated to ascertain the substantial rights of the parties and \emph{justly and liberally effectuate the spirit and purpose of its provisions}. Its object is beneficent and bountiful; its provisions broad and generous. . . . Strict rules are not to obtain to the detriment of a claimant in violation of these wholesome purposes.\textsuperscript{203}

The above passage from \textit{Poccardi} represents the first comprehensive statement by the supreme court that indicated the workers' compensation laws were to be liberally construed in favor of the employee.\textsuperscript{204}

The supreme court's determination in \textit{Poccard} that the workers' compensation laws were to be liberally construed in favor of employees was due to the following provision found in the Acts of 1913, which created the workers' compensation system:

[The] commission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than herein provided, but may make investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to \textit{carry out justly and liberally the spirit of this act}.\textsuperscript{205}

The above provision explicitly authorized a liberal construction of workers' compensation laws and evidentiary facts.\textsuperscript{206}

The statutory authority to permit administrative and judicial tribunals to apply the rule of liberality in workers' compensation litigation represented a sound public policy statement for one reason: \textit{when the workers' compensation system was created, the legislature required both, the employer and employee, to contribute funds to the system.} This fact was established by the Acts of 1913, wherein the legislature provided that "[t]he commission shall establish a workmen's compensation fund from premiums paid thereto by employers and employee[e]s"\textsuperscript{207} and that "premiums provided for in this act shall . . . be contrib-

\textsuperscript{203} \textit{Id.} at 791 (emphasis added).

\textsuperscript{204} Using terms that were less precise and clear than those used in \textit{Poccardi}, the Supreme Court indicated in \textit{Culurides v. Ott}, 90 S.E. 270 (W. Va. 1916) that workers' compensation laws were to be liberally construed.

\textsuperscript{205} 1913 W. Va. Acts ch. 10, § 44. (emphasis added).

\textsuperscript{206} In the case of \textit{Machala v. Comp. Comm'r}, 155 S.E. 169 (W. Va. 1930), the supreme court announced that the rule of liberality was to be applied so as to construe evidentiary facts in favor of employees.

\textsuperscript{207} 1913 W.Va. Acts ch. 10, § 19.
uted in proportion of ninety per cent by the employers and ten per cent by the employees."\(^\text{208}\)

Requiring employees to pay part of their wages into the workers' compensation system demanded that the system's laws be liberally construed in favor of them. This is so because employers were able to recoup the money they paid into the system by proportionately raising the price of their products.\(^\text{209}\) However, employees had no way of recovering the wages that were withheld from their pay. In the final analysis, only the general consuming public and employees funded the system, not the employers.

### B. Repeal of Statutory Authority to Use the Rule of Liberality in 1919

It was noted by Justice Browning, in dicta, in the case of *Whitt v. Workmen's Compensation Comm'r*,\(^\text{210}\) that:

> Today, there is no provision in the workmen's compensation law requiring the commissioner, the appeal board, or this Court to apply the rule of 'liberality' either in construing the workmen's compensation law or appraising the evidence in a workmen's compensation case . . . . This Court has apparently ex-


\(^{209}\) It is generally understood and acknowledged that the underlying monetary principle of workers' compensation "is to shift the economic cost of work-injuries to the employer and ultimately the consumer." Harding v. Sheridan D. Smith, 647 A.2d 1193, 1194 (Me. 1994), (citing Scott's Case, 104 A. 794, 797 (Me. 1918)).

A new theory has been propounded to challenge the traditional notion that consumers ultimately pay the cost of workers' compensation through higher prices for goods and services. Under this new theory employees pay the cost of workers' compensation through artificially reduced wages. *See* Steven Scott Stephens, *Consequences of Expansionary Workers' Compensation Policy*, 46 LAB. L.J. 17 (1995). Two fundamental problems plague this new theory. First, it is based upon a theoretical model of the economy which assumes that there is a known optimum wage for every endeavor, and that employers knowingly pay employees at an ever decreasing level from the optimum wage. The flaw in this theoretical model is the assumption that there is a known optimum wage for every endeavor. In the real world employers are not looking for, nor are they aware of any optimum wage from which they can reduce employee wages for the purpose of paying for workers' compensation costs. Second, and most importantly, workers' compensation statutes either explicitly or implicitly prohibit employers from deducting the cost of workers' compensation from employee wages. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 23-967, 23-1025 (West 1997) (criminal sanctions for deducting premiums from employee wages); *See also* ARK. CODE ANN. § 11-9-109 (Michie 2002); D.C. CODE ANN. § 32-1516(a) (2001; HAW. REV. STAT. § 386-129 (Michie 1993); IOWA CODE ANN. § 85.54 (West 1996); LA. REV. STAT. ANN. § 23:1163 (West 1991); MINN. STAT. ANN. § 176.185(3) (West 1993); MISS. CODE ANN. § 71-3-41 (1995); MONT. CODE ANN. § 39-71-406 (2001); N.C. GEN. STAT. § 97-21 (2003); N.D. CENT. CODE § 65-01-10 (1995); OKLA. STAT. ANN. tit. 85, § 46 (West 1992); UTAH CODE ANN. § 34A-2-108(3) (2001).

tended that rule of liberality to the consideration of evidence in contested workmen's compensation cases.\textsuperscript{211}

The latter observation by Justice Browning acknowledges that there is no statutory authority for applying the rule of liberality in workers' compensation litigation. In spite of this acknowledgment, the rule of liberality was still applied at the administrative level and by the supreme court.

1. Rule of Liberality Repealed in 1919

Within a year of the decision in \textit{Poccardi}, which held that the legislature expressly required the rule of liberality be applied in workers' compensation litigation, the legislature promptly amended the workers' compensation statutes in 1919 removing the word "liberal."\textsuperscript{212}

It is not difficult to discern why the legislature repealed the rule of liberality. This is because, in addition to repealing the rule of liberality, the Acts of 1919 also removed the requirement that employees had to pay a portion of their wages into the system.\textsuperscript{213} It is clear that by not obligating employees to pay wages into the system, the legislature felt that there was no need to have workers' compensation laws and evidence interpreted liberally in favor of employees.

In spite of the legislative intent that the rule of liberality should not be applied in workers' compensation litigation, three years after the Acts of 1919 were passed the supreme court held in \textit{Sole v. Kindelberger}\textsuperscript{214} that "[c]ompensation acts . . . should be liberally and broadly construed to effect

\textsuperscript{211} \textit{Id.} at 377.

\textsuperscript{212} The Acts of 1913 set out the rule of liberality as follows:

\textit{[T]he] commission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than herein provided, but may make investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly and liberally the spirit of this act.}

1913 W. Va. Acts ch. 10, § 44. (emphasis added.)

The Acts of 1919 omitted the requirement of applying the rule of liberality by using the following language:

The commissioner shall not be bound by the usual common law or statutory rules of evidence, but shall adopt formal rules of practice and procedure as herein provided, and may make investigations in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of this act.

1919 W. Va. Acts ch. 131, § 44.

\textsuperscript{213} See 1919 W. Va. Acts ch. 131, §§ 19, 24 (obligating employers to fund the system exclusively).

\textsuperscript{214} 114 S.E. 151 (W.Va. 1922).
their beneficent purpose." The decision in Sole set precedent for the supreme court to continue to require application of the rule of liberality in workers' compensation litigation, in spite of the removal of statutory authority to do so.

2. Constitutional Problem Posed by Judicial Imposition of the Rule of Liberality in Workers' Compensation Litigation

Unquestionably, the lack of statutory authority to apply the rule of liberality in workers' compensation litigation presents a state constitutional problem. The supreme court recognized that the workers' compensation statute is "in derogation of the common law . . . " This point is significant because of the common law rule that "[a] statute in derogation of the common law must be strictly construed . . . " The common law rule requiring strict construction of statutes in derogation of the common law is set aside only "where the plain meaning of the words of the statute indicate the Legislature is changing the common law."

The supreme court noted in Seagraves v. Legg, that "[t]he common law, if not repugnant of the Constitution of this State, continues as the law of this State unless it is altered or changed by the Legislature." The common law rule, requiring strict construction of statutes in derogation of the common law, is operative and valid law in this state.

The Acts of 1913 explicitly evidenced the legislature's intent to change the common law rule of strict construction in order to permit the rule of liberality to be applied in workers' compensation litigation. However, the Acts of 1919 expressly removed authority to apply the rule of liberality in workers' compensation litigation. Consequently, Sole and its progeny are constitutionally suspect as legal authority for imposing the rule of liberality in workers' compensation litigation. The common law rule of strict construction should have been applied

215 Id. at 153. See also Caldwell v. State Comp. Comm'r, 144 S.E. 568 (W.Va. 1928).


217 Sole, 114 S.E. at 153.


219 Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 340 (W. Va. 1978) (citation omitted).


221 Id. at Syl. Pt. 3.

222 See Teter v. Old Colony Co., 441 S.E.2d 728, 741 (W. Va. 1994) ("We have traditionally held that statutes in derogation of the common law are to be strictly construed.").
in workers' compensation litigation after the 1919 amendments to the workers' compensation statutes.\textsuperscript{223}

VII. \textbf{ASSESSING THE IMPACT OF AN ABUSIVE USE OF THE RULE OF LIBERALITY}

The workers' compensation system is a necessary mechanism that helps to assure the growth and stability of the state's economy by providing health benefits for injured workers. The destruction of the system, through fiscal bankruptcy, would unsettle the foundation of the state's economy. At the start of the 1990's the legislature read the handwriting on the wall: \textit{The workers' compensation system was running blindly into the arms of bankruptcy.}

In response to the mathematically determined bleak future of the workers' compensation system, the legislature moved with blinding speed in the 1990's in an attempt to correct longstanding fiscal loopholes in the system.\textsuperscript{224} However, as previously discussed, the fiscal reform measures of the 1990's failed. This fact is evident because the legislature returned to the drawing board in 2003, to institute additional changes in the system. A key factor in the failure of the reform measures of the 1990's was the expansive and abusive application of the judicially imposed rule of liberality.

To be clear, the rule of liberality is not inherently destructive. The rule becomes a fiscal nightmare when it is applied unnecessarily and abusively. This part of the article focuses upon three issues: (1) how the rule of liberality works, (2) who relies upon the rule, and (3) the abusive application of the rule in two recent cases.

\textbf{A. Understanding How the Rule of Liberality Generally Works}

In theory, an employee seeking workers' compensation benefits has the burden of persuasion.\textsuperscript{225} An employee's burden of proof has been stated in different ways by the supreme court. In \textit{Machala v. State Compensation Commissioner},\textsuperscript{226} it was held that an employee had to establish his/her claim by "a satisfactory and convincing showing . . ."\textsuperscript{227} However, in \textit{Morris v. State Compen-
sation Commissioner,"\(^{228}\) the supreme court indicated that "it is incumbent upon the claimant to establish her claim by a preponderance of the evidence . . . ".\(^{229}\)

Finally, in *Hayes v. State Compensation Director*,\(^{230}\) it was held that "[a]n award of a claim cannot be made in a workmen's compensation case unless it is supported by satisfactory proof . . . ",\(^{231}\)

For the purposes here, "[i]t is not necessary to determine . . . whether 'satisfactory,' 'convincing,' and 'preponderance,' . . . are synonymous."\(^{232}\)

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\(^{228}\) 64 S.E.2d 496 (W. Va. 1951).

\(^{229}\) *Id.* at 498.

\(^{230}\) 140 S.E.2d 443 (W. Va. 1965).

\(^{231}\) *Id.* at Syl. Pt. 3.

\(^{232}\) Whitt, 172 S.E.2d at 378.
What is necessary to understand is that in practice, application of the rule of liberality in workers' compensation litigation shifts the employee's burden of persuasion onto the employer. However, decisions by the supreme court have repeatedly denied that this in fact occurs. Under the rule of liberality whenever there is any ambiguity in a workers' compensation statute or evidentiary uncertainty, doubt is resolved in favor of the employee. In the final analysis, what this means is that an employer must always "persuade" the fact finder that there is no ambiguity in a statute or there is no evidentiary uncertainty in a case. Shifting the burden this way is tantamount to a criminal defendant having the burden of proving his/her innocence. Simply put, it is fundamentally unfair.

The conclusion is consistent with the decision by the United States Supreme Court in Director, OWCP v. Greenwich Collieries. The decision in Director, OWCP involved two cases from the United States Court of Appeals for the Third Circuit that were consolidated. In both cases the Third Circuit reversed administratively granted employee compensation awards, concluding that application of the "true doubt" rule in both cases unfairly shifted the burden.
of persuasion to the employers. The question presented to the Supreme Court in Director, OWCP, was "whether the [true doubt rule] is consistent with § 7(c) of the Administrative Procedure Act (APA), which states that '[e]xcept as otherwise provided by statute, the proponent of a [claim] has the burden of proof.'"

Much of the opinion in Director, OWCP was devoted to explaining how the phrase "burden of proof" was synonymous with "burden of persuasion." Eventually, the Supreme Court concluded in a rather terse manner: "Under the . . . true doubt rule, when the evidence is evenly balanced the claimant wins. Under § 7(c), however, when the evidence is evenly balanced, the benefits claimant must lose. Accordingly, we hold that the true doubt rule violates § 7(c) of the APA."240

The Supreme Court's decision to reject the true doubt rule in Director, OWCP represents a departure and rebuke of the fictitious legal perception by some federal courts that the true doubt rule did not shift the ultimate burden of persuasion to employers.241 An equally fictitious legal notion that must be discarded is the alleged placebo affect of the rule of liberality on the burden of proof in workers' compensation litigation. The rule of liberality shifts the burden of persuasion to employers in the exact same manner as the true doubt rule.

B. Reliance on the Rule of Liberality by Malingering Employees

The purpose of the workers' compensation reform measures of the 1990's was not that of denying benefits to employees who were legitimately entitled to such benefits. Reform measures were intended, in part, to cut off avenues of access to benefits by employees who were not entitled to benefits outright or to the level of benefits they sought. This point is crucial to understand in the context of the rule of liberality, because as shown, the rule unquestionably shifts the burden of persuasion to the employer.

Employees who are legitimately entitled to workers' compensation benefits rarely need the rule of liberality to obtain such benefits, and therefore do not engage in protracted litigation.242 The rule of liberality is, and always has

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238 The claims were filed respectively under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act.

239 Dir., Office of Workers' Comp. Programs, 114 S.Ct. at 2253, (quoting 5 U.S.C. § 556(d)).

240 Id. at 2259.

241 See Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88 (5th Cir. 1990); Parsons Corp. of Cal. v. Dir., Office of Workers' Comp. Programs, 619 F.2d 38 (9th Cir. 1980); Bath Iron Works Corp. v. White, 584 F.2d 569 (1st Cir. 1978).

242 Somewhere along the workers' compensation time-line one of the system's building blocks was lost. A major theme heralding the creation of workers' compensation was that it was not
been, the tool of employees who are not legitimately entitled to the workers’ compensation benefits they seek. It is the never ending pool of malingering employees who drain untold millions of dollars out of the workers’ compensation system while seeking endless medical treatment for phantom injuries.243 And, too, it is this pool of employees who cause good employers to resort to any means necessary to evade ever rising workers’ compensation premiums.244

By maintaining an abuse application of the rule of liberality in workers’ compensation litigation, the reform measures of the 1990’s simply could not fulfill their purpose of saving the system from fiscal bankruptcy. This is because unbridled application of the rule of liberality kept malingering employees standing tall in front of the benefits trough.245 They would not go away so long as the rule of liberality doled out unearned benefits to them.246

One commentator has postured that the allure of workers’ compensation monetary benefits has created a moral hazard for employees.247 The lure of benefits cause employees to engage in conduct that is morally (not to mention fiscally) hazardous. According to this commentator the theory of “moral hazard is most likely to be reflected in exaggerated severity and duration of disability supposed to be litigious. This theme has been destroyed. One commentary politely noted “that employees have been increasingly litigious in the workers’ compensation area.” Nancy Kubasek & Andrea Giampetro-Meyer, California’s Radical Proposal: A Model for the Fifty States? 42 LAB. L.J. 173, 174 (1991). See Cecily Raibom & Dinah Payne, The Big Dark Cloud of Workers’ Compensation: Does It Have a Silver Lining? 44 LAB. L.J. 554, 557 (1993) (“A . . . basic problem with workers’ compensation is the intense barrage of workers’ compensation litigation.”). In West Virginia, as in all jurisdictions that still cling to the rule of liberality, the only reason unmanageable litigation stifles the workers’ compensation system is because of the rule of liberality. The rule promotes litigation because its ultimate purpose is to award unearned benefits.

For example, a “study by the Workers’ Compensation Research Institute disclosed that the medical costs of workers’ compensation claims are increasing 5% faster annually than are general health care costs.” Barry D. Whelchel, Deformation of Workers’ Compensation: The California Experience, 41 LAB. L.J. 831 (1990). See H. Douglas Jones & Cathy Jackson, Cumulative Trauma Disorders: A Repetitive Strain on the Workers’ Compensation System, 20 N. KY. L. REV. 765 (1993), reprinted in 17 WORKERS COMP. L. REV. 319, 333 (1994) (discussing a study which indicated that “patients covered by workers’ compensation had slower initial improvement and remained off work for longer periods of time than non-compensation patients with the same or similar symptoms.”).

“The state establishes the obligation and its amount without the employer’s consent and the employer must pay, on pain of substantial civil and even criminal, sanctions.” James B. Haines, Jr., Employers’ Workmens’s Compensation Obligations and the Bankruptcy Tax Priority, 85 W. VA. L. REV. 97, 111 (1982).

“While some workers do not return to work when they could, a more distressing problem is that some workers’ compensation claims are originally fraudulent.” Raibom & Payne, supra note 242, at 558. The rule of liberality will unabashedly compensate the malingering and defrauder, because they are the only persons who need it in order to obtain benefits.


and in claiming . . . benefits for non-work injuries or physical problems."\textsuperscript{248} The net effect of moral hazard conduct was stated as follows:

The result of the prevalence of moral hazard is that increases in benefit levels reduce the efficiency of the system, because individuals not entitled to receive benefits take them nevertheless . . . \textsuperscript{249} In order to achieve a set level of increased benefit to legitimate workers, premiums must be increased by significantly more than the additional amount the injured workers receive.

In the final analysis, conduct coming within the framework of the moral hazard theory is supported and made morally correct through the abusive application of the rule of liberality.\textsuperscript{250}

C. McKenzie and Repass Illustrate Abusive Use of the Rule of Liberality

Two recent opinions by the supreme court illustrate the harsh economic downside of abusive and unbridled application of the rule of liberality.\textsuperscript{251} The two cases are State ex rel. McKenzie v. Smith\textsuperscript{252} and Repass v. Workers' Compensation Division.\textsuperscript{253}

1. The McKenzie Decision

The claimant in McKenzie strained his back at work and filed a claim for workers' compensation benefits. The claimant was eventually awarded fifteen percent permanent partial disability benefits.\textsuperscript{254} The claimant requested on three occasions that the Commission authorize him to receive rehabilitation services.\textsuperscript{255} Under a rule promulgated by the Commission, employers selected rehabilitation service providers for employees.\textsuperscript{256} The claimant in the case was

\begin{itemize}
  \item \textsuperscript{248} Id. at 23.
  \item \textsuperscript{249} Id. at 24.
  \item \textsuperscript{250} Moral hazard injuries, clothed in the armor of the rule of liberality, have brought about "a proliferation of the number of 'acceptable' work-related injuries, many of which are difficult to . . . disprove--especially in the more 'liberal' jurisdictions." Raiborn & Payne, supra note 242, at 557.
  \item \textsuperscript{251} Then Chief Justice Davis and Justice Maynard dissented in both cases.
  \item \textsuperscript{252} 569 S.E.2d 809 (W. Va. 2002).
  \item \textsuperscript{253} 569 S.E.2d 162 (W. Va. 2002).
  \item \textsuperscript{254} McKenzie, 569 S.E.2d at 813-14.
  \item \textsuperscript{255} Id. at 814.
  \item \textsuperscript{256} Id. at 813.
\end{itemize}
denied rehabilitation services by a service provider after each request. The claimant subsequently filed a petition for a writ of mandamus with the supreme court challenging the authority of employers to select rehabilitation service providers.

While the case was pending before the supreme court, the claimant was granted rehabilitation services. In spite of this fact, the supreme court chose not to dismiss the case as moot. Instead, the supreme court decided to address the issue of whether the Commission had authority to allow employers to submit names of rehabilitation service providers that employees had to utilize.

Justice Starcher, writing for the majority, held that there was no statutory authority for the Commission to utilize a list of employer preferred rehabilitation service providers. The majority opinion found that under W.Va. Code section 23-4-3(b), an employer is prohibited from entering into any contract with a health care provider for purposes of providing rehabilitation services for an employee. The majority ultimately concluded that under W.Va. Code section 23-4-3(b), a claimant has a right to select his/her rehabilitation service provider.

Chief Justice Davis dissented from the decision in McKenzie on several grounds. First, the Chief Justice argued that the majority opinion failed to make a distinction between physical and vocational rehabilitation services. The dissent contended that the Commission could not use an employer’s preferred list for physical rehabilitation, but that nothing in the statutes prevented the Commission from using an employer’s preferred list for vocational rehabilitation. The dissent’s position was summarized on this point as follows:

While the majority correctly notes that W. Va. Code § 23-4-3(b) grants a claimant the right “to select his or her initial health care provider for treatment of a compensable injury or disease” (emphasis added), it proceeds to then misapply this provision to conclude that it grants a claimant the exclusive right to select a vocational rehabilitation service provider. It is plainly evident that a vocational rehabilitation service provider, under its statutory definition as well as common nomenclature, is not a health care provider. Vocational rehabilitation services are limited to “vocational or on-the-job training, counseling, assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification[.]” W. Va. Code § 23-4-9(b).

257 Id. at 814-16.
258 Id. at 813.
259 Id. at 817-18.
260 Id. at 822.
261 McKenzie, 569 S.E.2d at 828-29 (Davis, C.J., dissenting).
Nothing in this description refers to health care, thus there is absolutely no statutory support for granting a claimant the right to select a vocational counselor under the guise of selecting an initial health care provider under W. Va. Code § 23-4-3(b).\textsuperscript{262}

The Chief Justice next argued that the writ of mandamus issued by the majority opinion, was not appropriate when dealing with discretionary conduct by a state official. The dissent addressed the point as follows:

Because the actions of the Commissioner were discretionary, it was improper for the majority to grant the writ of mandamus to impose its own judgment over that of the Commissioner. This Court has "characterized the purpose of the writ [of mandamus] as the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law." Syl. pt. 1, State ex rel. Ball v. Cummings, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999) (citing State ex rel. Bronaugh v. City of Parkersburg, 148 W. Va. 568, 136 S.E.2d 783 (1964)).. The majority's holding in this case merely corrected a perceived error committed by the Commissioner in exercising his discretionary authority. In the absence of a finding that the Commissioner's actions were arbitrary or capricious, it was simply wrong to use the extraordinary remedy of mandamus in this manner. The ultimate result of the majority decision in this case is to overrule a long line of precedent prohibiting the use of a writ of mandamus to dictate the manner in which a government agency should exercise its discretionary authority. The majority has mandated the precise manner in which the Commissioner may exercise his discretion to develop a method for selecting vocational rehabilitation service providers, by permitting only claimants to make the selection. The majority's decision has made the writ of mandamus a tool to be used by the Court [sic] to control any and every government action it desires. This new extension of the writ of mandamus has no constitutional basis, and is a real and dangerous threat to the separation of powers doctrine embodied in this state's constitution.\textsuperscript{263}

The last issue taken up by the Chief Justice was that the majority inappropriately used the rule of liberality to engage in legislative law making. The dissent addressed the issue as follows:

\textsuperscript{262} Id. at 829.

\textsuperscript{263} Id. at 830-31.
Finally, and most troubling, is the majority’s reliance on the rule of liberality as justification to rewrite statutes in this case. In this and other workers’ compensation cases recently decided by this Court [sic], a majority of its members have demonstrated a disturbing trend of touting the liberality rule to rationalize overstepping this Court’s authority in order to achieve desired goals. See, e.g., Martin v. Workers’ Comp. Div., 210 W. Va. 270, 285, 557 S.E.2d 324, 339 (2001) (Maynard, J., dissenting) (observing that this Court [sic] “routinely cites the liberality rule and uses it to justify its decisions in workers’ compensation appeals.”). Contrary to this unabashed exploitation, the rule of liberality has historically been used in workers’ compensation cases in a manner that did not sacrifice basic legal principles and trample upon the authority of the legislative and executive branches of government . . . . I am at a loss as to what it will take for the majority to realize that there is a future generation of workers who will need the services of a healthy and viable workers’ compensation system. The decision in this case is simply another step by the majority in a journey leading ultimately to a workers’ compensation system so afflicted by unreasonable laws that it will become utterly incapable of providing legitimate claimants with the benefits and services they so desperately need.264

2. The Repass Decision

In the Repass opinion two claimants suffered back injuries. The Commission granted five percent permanent partial disability (“PPD”) benefits to both claimants, based upon medical results using the Diagnostic-Related Estimate (“DRE”) model. The Commission had promulgated a rule which required use of the DRE model, because the American Medical Association’s, Guides to the Evaluation of Permanent Impairment, (4th Ed. 1993) found the DRE model to be more objective and accurate than the Range of Motion (“ROM”) model. In each case, the Office of Judges (“OOJ”) found that examinations conducted under the DRE model were unreliable. The OOJ determined that, based upon its own internal rule, the ROM model should be used when performing back injury ratings and not the DRE model. The OOJ granted one claimant nine percent PPD and the other claimant sixteen percent PPD, based upon the ROM model. The employer in each case appealed, and the Appeal Board found the DRE

264 Id. at 831-32.
method of examination to be valid, and reinstated the original awards granted by
the Commission. The claimants appealed to the supreme court.\textsuperscript{265}

Justice McGraw, writing for the majority, found that the Commission
could not promulgate a rule requiring the use of the DRE model as recom-
\emph{mended} by the American Medical Association. Instead, the majority opinion
concluded that an administrative decision issued by the OOJ, requiring exclu-
sive use of the ROM model, was to be enforced.\textsuperscript{266}

Chief Justice Davis dissented from the majority decision on several
grounds.\textsuperscript{267} The Chief Justice believed that the decision reached by the majority
opinion was done inconsistently with the judicial powers of the Court. The dis-
sent wrote:

\begin{quote}
[T]he Court completely ignores the directives of the workers’
compensation legislation, which it claims to uphold, and pro-
ceeds to substitute its own judgment in its stead as to the most
reliable indicator of an injured claimant’s compensable disabil-
ity. Not only has the majority successfully turned the rule of
liberality into a rule of laissez-faire, but it also has failed to rec-
\begin{quote}
acknowledge that the very result of this ruling will hurt, rather than
help, the injured workers of this State.\textsuperscript{268}

The dissenting opinion outlined the laws which gave the Commission
the authority to promulgate the rule requiring the use of the DRE model.\textsuperscript{269} The
Chief Justice then concluded that “[r]ather than according deference to the Leg-
islature and its attendant entities charged with administering the West Virginia
workers’ compensation system, the Court takes it upon itself to impermissibly
sit as a superlegislature and replace the Commissioner’s well-informed guide-
lines with its preferred method of impairment evaluation for spinal injury
claims.”\textsuperscript{270}

Chief Justice Davis also argued that the majority opinion was wrong in
relying upon the OOJ’s rule that barred use of the DRE model. The dissent
wrote:

Moreover, the majority has erred not only by refusing to defer
to the Commissioner but by further imbuing the [OOJ] with
rule-making powers which the Legislature never intended it to

\textsuperscript{265} Repass, 569 S.E.2d at 167-68.
\textsuperscript{266} Id. at 179.
\textsuperscript{267} See Repass, 569 S.E.2d at 181 (Davis, C.J., dissenting).
\textsuperscript{268} Id.
\textsuperscript{269} Id. at 181-82.
\textsuperscript{270} Id. at 182-83.
possess. Throughout its Opinion, the Court references the now infamous Cottrell decision wherein the Chief Administrative Law Judge determined the DRE model of impairment evaluation to be unreliable and announced his intention to disregard such evidence in future claims. My colleagues then laud this position as being the surest course to achieving the legislative objective of providing relief to ailing claimants. Ironically, though, the Legislature never intended to accord decisions of the OOJ such deference as it specifically prohibits that entity from formulating, establishing, or otherwise adopting any rule or regulation: "The office of judges shall not have the power to initiate or to promulgate legislative rules." W. Va. Code § 23-5-8(e) (2001) (Supp. 2001) (emphasis added). As the OOJ is not, and never has been, imbued with such rule-making authority, the majority's decision to rely upon and embrace the Cottrell ruling is just plain wrong.271

The dissent went further in arguing that "[I]t is apparent that, insofar as the majority of the Court is concerned, accuracy and reliability have no place in rating back impairments if the evaluation criteria leading thereto does not consistently award the injured claimant the highest disability rating and, consequently, the biggest workers' compensation benefits check."272

3. Implications of McKenzie and Repass

In Justice Maynard's brief dissenting opinion in McKenzie and Repass (he filed one dissent for both cases), he summarized his position on the effects of both cases as follows:

Over the past several years, the Legislature has taken steps to place the workers' compensation system back on solid financial footing. This Court [sic], by issuing opinions like McKenzie and Repass, has done the opposite. In the midst of this hot, dry summer, one easily imagines the Legislature furiously fighting to subdue the wildfires of workers' compensation unfunded liability while, at the same time, a majority of this Court [sic] pours gasoline on the fire.273

*McKenzie* and *Repass* are dangerous opinions for two reasons. First, both cases will result in significant and unnecessary long-term expenditures

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271 *Id.* at 183-84.
272 *Id.* at 185.
273 *McKenzie*, 569 S.E.2d at 828 (Maynard, J., dissenting).
from the workers’ compensation fund. The decision in Repass demands that back injury impairment ratings be used, with a method that the medical profession has expressly found to grossly over-inflate actual impairment. Consequently, in the long-term Repass will dispense millions upon millions of dollars to claimants for inflated back impairment. McKenzie will cause permanent total disability awards to increase ten-fold. This will occur because claimants, who can be vocationally rehabilitated, will invariably choose vocational rehabilitation service providers who will routinely find that the claimants cannot be re-trained and must, therefore, receive permanent total disability benefits.

The second reason that McKenzie and Repass are institutionally threatening precedents, involves the manner in which the majority reached their decisions. No law supported the decision in McKenzie or Repass. To reach the result in both cases, the majority had to impose the rule of liberality in manner that has never been done in the history of the court. In short, McKenzie and Repass used the rule of liberality to not only write legislation, but to write legislation that undermines all legislative fiscal reform measures. This point is not trivial. McKenzie and Repass represent the belief that no limitations are imposed on the rule of liberality. With this abusive view of the rule of liberality, the majority on the court has empowered itself to “sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.” However, historically recognized constitutional principles dictate that the “Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic, or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation.”

VIII. ABOLISHING THE JUDICIALLY IMPOSED RULE OF LIBERALITY IN 2003

It was pointed out in Part VI of this article that the legislature abolished the rule of liberality in 1919, but the supreme court continued to require application of the rule. In this part of the article two issues are discussed. First, a brief review is provided of how a growing minority of jurisdictions have effectively abolished the rule of liberality. Second, a discussion will be provided on the

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attempt by the state legislature in 2003, to abolish the judicially imposed rule of liberality.

A. Precedents For Abolishing the Rule of Liberality

In the 1990’s a growing minority of legislatures around the country responded to judicial and administrative abuse of the rule of liberality. In doing so, they affirmatively abolished the rule of liberality in workers’ compensation litigation. The statutory precedents for abolishing the rule of liberality in workers’ compensation litigation vary in their choice of words. However, ultimately all of the statutes convey the message found in the workers’ compensation statute of Maine:

In interpreting this Act, the board shall construe it so as to ensure the efficient delivery of compensation to injured employees at a reasonable cost to employers. All workers’ compensation cases must be decided on their merits and the rule of liberal construction does not apply. Accordingly, this Act is not to be given a construction in favor of the employee, nor are the rights and interests of the employer to be favored over those of the employee.

A critical factor in the determination of legislatures to abolish the rule of liberality, involved a rejection of the time-worn false assumption that workers’ compensation laws are remedial. As a general rule “[r]emedial statutes are liberally construed . . . .” However, legislatures around the country have challenged the time-worn notion that workers’ compensation laws are remedial. The Minnesota legislature disposed of this legal myth as follows:

The workers’ compensation system . . . is based on a mutual renunciation of common law rights and defenses by employers

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277 The United States Supreme Court’s decision to abolish the true doubt rule in Dir., Office of Workers’ Comp. Programs, discussed supra, represents the first judicial abolishment of a rule that permitted employees to prevail in workers’ compensation litigation, even though they failed to carry their burden of proof.


279 Norman J. Singer, Statutes and Statutory Construction, § 60.01 (6th Ed. 2001).
and employees alike. Employees rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by [law] . . . and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. Accordingly, the legislature hereby declares that the workers' compensation laws are not remedial in any sense . . . .

The position taken by the Minnesota legislature has been implicitly acknowledged by all jurisdictions that have abolished the rule of liberality in workers' compensation litigation.

B. The Legislature's Attempt to Bar Use of a Judicially Imposed Rule of Liberality

In 2003 the legislature enacted two provisions which purport to abolish the use of the rule of liberality in workers' compensation litigation. First, in West Virginia Code section 23-1-1(b) the following was enacted:

It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits and that a rule of "liberal construction" based on any "remedial" basis of workers' compensation legislation shall not affect the weighing of evidence in resolving such cases. . . . Accordingly, the Legislature hereby declares that any remedial component of the workers' compensation laws is not to cause the workers' compensation laws to receive liberal construction that alters in any way the proper weighing of evidence . . . .

Second, the legislature provided the following in West Virginia Code section 23-4-1g(b):

[A] claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

At first blush, both of the above provisions would appear to have effectively abolished the use of the judicially imposed rule of liberality. However, as

will be shown, West Virginia Code sections 23-1-1(b) & 23-4-1g(b) abolish the rule of liberality in form only, not in substance.

In its attempt to abolish the rule of liberality, the legislature failed to understand how the rule operates. This point is made clear from a review of the 2003 enactment of West Virginia Code section 23-4-1g(a). This provision states in relevant part:

[R]esolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. . . . If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

A plain reading of West Virginia Code section 23-4-1g(a) unquestionably shows that it embodies the substance of the rule of liberality. The first part of the statute shifts the burden of persuasion onto the employer in every claim filed by an employee. This is true because, instead of stating that an employee must prove his/her claim by a preponderance of the evidence, the provision requires the "chosen manner of resolution" of a case be established by a preponderance of the evidence. Thus, in order for the "chosen manner of resolution" to be in favor of the employer, the employer must always produce a preponderance of the evidence. This shifting of the burden of persuasion is exactly what the rule of liberality does.\textsuperscript{281}

The second part of the statute demands that the employee prevail whenever evidence is equally balanced, i.e., conflicting. This requirement is the essence of the rule of liberality. That is, the rule of liberality "dictates that the claimant be given the benefit of all reasonable inferences the record will allow; and any conflicts must be resolved in favor of the claimant."\textsuperscript{282}

In the final analysis, West Virginia Code sections 23-1-1(b) & 23-4-1g(b) abolished the rule of liberality in form, while West Virginia Code section 23-4-1g(a) resurrected the substance of the rule of liberality.

\textsuperscript{281} See the discussion on burden shifting in Part VII, supra.

IX. CONCLUSION

The West Virginia legislature displayed commendable political courage in the 1990's, when it enacted necessary sweeping fiscal reform measures designed to extend workers' compensation to future generations. The reforms of the 1990's failed primarily because the legislature left the judicially imposed rule of liberality intact. In 2003 the legislature again summoned the political will to enact legislation to keep the system operating for future generations. In doing so, the legislature expressly abolished the use of the rule of liberality in workers' compensation litigation. Unfortunately, the legislature also expressly mandated the use of the essence of the rule of liberality in resolving disputes. Undoubtedly the legislature did not understand how the rule of liberality operates and, as a result, we believe that the 2003 fiscal reform measures will suffer the same fate as the reform measures of the 1990's.