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IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA

No. 15-0898

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL UNION NO. 132  
HEALTH AND WELFARE FUND, ET AL.

Plaintiffs Below,  
*Petitioners,*

v.

L.A. PIPELINE CONSTRUCTION COMPANY,  
INC., Defendant Below; and UNITED BANK, INC.,

Intervenor Below,  
*Respondents.*

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**BRIEF OF THE WEST VIRGINIA DIVISION OF LABOR  
AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS**

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Upon a Certified Question from the  
United States District Court for the Southern District of West Virginia  
(Civil Action No. 3:13-0537)

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Defendant and Intervenor Below, *Respondents*.

**AMICUS CURIAE BRIEF OF THE WEST VIRGINIA DIVISION OF LABOR**

**I. INTEREST OF *AMICUS CURIAE***

The West Virginia Division of Labor (the “Division” or “Labor”) is the state agency vested with the authority to administer and enforce the provisions of the Wage Payment and Collection Act (“WPCA”), W. Va. Code § 21-5-1 *et seq.* “‘The West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld.’ Syllabus, *Mullins v. Venable*, 171 W. Va. 92, 297 S.E.2d 866 (1982).” (citation omitted). *Grim v. E. Elec., LLC*, 234 W. Va. 557, 767 S.E.2d 267, 270 (2014).

The WPCA’s wage bond provisions are among its most important requirements in promoting the legislative policy of protecting working people’s wages and assisting them in collecting compensation wrongly withheld. Employers who are required to post a wage bond with the Division include those who are engaged in construction or in the severance, production or transportation of minerals (“covered employers”). W. Va. Code § 21-5-14(a). The purpose of a wage bond is to

secure the payment of employee wages and fringe benefits when a covered employer fails to meet its statutory responsibility to pay employee wages when they are due. W. Va. Code § 21-5-14(d).

The Division submits this *amicus curiae* brief pursuant to Rule 30 (a) of the W. Va. Rules of Appellate Procedure because this Court's answer to the certified question will have a significant impact on all irrevocable letters of credit it accepts as wage bonds, and may negatively affect the ability of the statute's ultimate intended beneficiaries - working people - to recover their unpaid wages and fringe benefits from a letter of credit. The Division has a strong interest in the appropriate resolution of the certified question in accordance with the WPCA's well-settled legislative policy of protecting working people's wages and in accord with the Court's holding in *Leary v. McDowell Cnty. Nat. Bank*, 210 W. Va. 44, 552 S.E.2d 420 (2001).

## II. BACKGROUND

Subject to the Commissioner of Labor's approval, the permissible types of wage bonds that the Division can accept include a surety bond, cash, check or money order, a certificate of deposit, a letter of credit, or any combination of these. W. Va. Code § 21-5-14(c). If a covered employer submits an irrevocable letter of credit as a wage bond, the Commissioner is statutorily required to accept it "in lieu of any other bonding requirement." *Id.*

The amount of a wage bond must equal a covered employer's gross payroll for four weeks plus fifteen percent. W. Va. Code § 21-5-14(a). Respondent L. A. Pipeline Construction Company, Inc. ("L. A. Pipeline") submitted an irrevocable Letter of Credit ("LOC") Number A-09-01, in the amount of Five Hundred Thousand Dollars (\$500,00.00) to the Division, with an effective date of January 13, 2009, using the Division of Labor's approved form "Perpetual Irrevocable Letter of Credit/Wage Bond" form. The LOC was issued by Respondent United Bank, Inc., and was executed

by Charles J. Mildren as the bank's authorized officer. Joint Appendix ("J. A.") at 56, 78. The Division accepted the LOC as L. A. Pipeline's compliance with the W. Va. Code § 21-5-14 wage bond requirements.

At the time that L. A. Pipeline posted Bond Number A-09-01, the amount of the LOC secured the payment of wages and fringe benefits of one hundred (100) employees who were engaged in installing a thirty-six inch gas line for Consolidated Gas near the Wallback exit of Interstate 79. The hourly wage and fringe benefit rates of L.A. Pipeline's employees were determined by the National Pipe Line Agreement, as negotiated by the Pipe Line Contractors Association and the International Union of Operating Engineers.

According to the provisions of the LOC, by correspondence dated October 1, 2013, Mr. Mildren notified the Commissioner by certified mail that "United Bank, Inc. will terminate Wage Bond Letter of Credit #A-09-01 that is expiring on January 14, 2014." In response to Mr. Mildren, the Division's wage and hour director, Larry Walker, advised him by letter mistakenly dated September 16, 2013 <sup>1</sup> that the provisions of W. Va. Code § 21-5-14 were controlling with regard to the termination of the bond. Mr. Mildren was specifically advised that L. A. Pipeline would need to request the release of the bond according to the criteria enumerated in W. Va. Code § 21-5-14(g).<sup>2</sup>

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<sup>1</sup> Since Mr. Walker's reply was a response to the October 1, 2013 letter from Mr. Mildren, the correct date of the Division's letter should have been October 16, 2013.

<sup>2</sup>

The statutory criteria are that "[t]he bond may be terminated, with the approval of the commissioner, after an employer submits a statement, under oath or affirmation lawfully administered, to the commissioner that the following has occurred: The employer has ceased doing business and all wages and fringe benefits have been paid, or the employer has been doing business in this state for at least five consecutive years and has paid all wages and fringe benefits. The approval of the commissioner will be granted only after the commissioner has determined that the wages and fringe benefits of all employees have been paid." W. Va. Code § 21-5-14(g).

The Division enclosed its affidavit forms for L. A. Pipeline to complete and return to the Commissioner in order to establish that the company had satisfied the 21-5-14(g) criteria. United Bank forwarded Mr. Walker's letter to L. A. Pipeline. J. A. at 36-38, 57-59.

L. A. Pipeline never sought the Commissioner's approval for the termination of its wage bond. In fact, L. A. Pipeline would not have been able to satisfy the W. Va. Code § 21-5-14(g) criteria for the wage bond's termination and release because the company's employees had not been paid the fringe benefits they were owed. As set forth in the Agreed Judgment Order entered on April 8, 2014 in the underlying federal district court case, L. A. Pipeline agreed that it owed the Petitioners One Hundred Twenty-nine Thousand Two Hundred Seventy-three Dollars and Ninety Cents (\$129,273.90) for unpaid employee fringe benefit contributions for work performed under the National Pipeline Agreement for the month of April, 2011. J. A. at 15-17 and 60-62.

### **III. QUESTION PRESENTED**

The United States District Court for the Southern District of West Virginia certified this question to the Court:

Does “[a] letter of credit that states that it is perpetual expire[] five years after its stated date of issuance, or if none is stated, after the date on which it is issued” as provided in the 1996 version of West Virginia Code § 46-5-106(d), or does such letter remain in effect outside the five-year time period until “terminated” by the Commissioner of the Division of Labor pursuant to West Virginia Code § 21-5-14(g)?

The Division submits that the answer to the certified question must be that a letter of credit serving as a wage bond can only be approved for termination by the Commissioner after he or she determines that a covered employer has paid all employees the wages and fringe benefits they are owed. W. Va. Code § 21-5-14 (g). By its very nature, a wage bond is intended to secure the

payment of employee wages and fringe benefits when an employer fails to meet its statutory obligations to pay employee wages when they are due. W. Va. Code § 21-5-14(d). If this Court were to decide that W. Va. Code § 46-5-106(d) exclusively controls the termination of a letter of credit serving as a wage bond, the result would be that the wage bond would terminate by operation of law without any consideration of whether a covered employer had paid employee wages and fringe benefits. Such an answer would thwart the unambiguous legislative intent of protecting working people's wages.

#### IV. ARGUMENT

- A. *The WPCA's definitive provisions concerning the termination of a wage bond are essential to fulfilling the statute's clear and unambiguous legislative purpose of protecting the wages of working people.*

It is well-settled that “[t]he West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld.” *Farley v. Zapata Coal Corp.*, 167 W. Va. 630, 281 S.E.2d 238 (1981). The WPCA's wage bond provisions are an essential tool in achieving the statute's remedial purpose of protecting working people's wages. When a covered employer posts a wage bond with the Division, employees' wages and fringe benefits are secured in the event that the employer fails for whatever reason to pay the employees their earned wages and fringe benefits. W. Va. Code § 21-5-14(d).

A covered employer must maintain its wage bond with the Division for at least five years. W. Va. Code § 21-5-14 (a, g). The WPCA states in no uncertain terms that a wage bond can only be terminated with the Commissioner's approval after he or she determines that “the wages and fringe benefits of all employees have been paid.” W. Va. Code § 21-5-14(g). In order for the Commissioner to approve the termination of a wage bond, a covered employer must be able to satisfy

one of two conditions precedent: the employer must submit a written statement to the Commissioner, “under oath or affirmation lawfully administered,” that either (1) the employer has ceased doing business and has paid all employee wages and fringe benefits; or (2) the employer has been doing business in West Virginia for at least five consecutive years and has paid all employee wages and fringe benefits. *Id.*

“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.’ Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).” *Citynet, LLC v. Toney*, 235 W. Va. 79, 772 S.E.2d 36, 38 (2015). It is well-settled that “[i]n the interpretation of a statute, the legislative intention is the controlling factor; and the intention of the legislature is ascertained from the provisions of the statute by the application of sound and well established canons of construction.” *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 144, 107 S.E.2d 353, 358 (1959) (citation omitted).

There can be no doubt that the Legislature intended W. Va. Code § 21-5-14(g) to control the termination of a wage bond, regardless of the type of bond posted by a covered employer. The Commissioner “may” approve the termination of a wage bond after receiving a sworn statement from a covered employer that one of two W. Va. Code § 21-5-14(g) conditions have been met. In addition to the covered employer’s sworn statement, the Commissioner can only approve the wage bond’s termination after determining “that the wages and fringe benefits of all employees have been paid.” W. Va. Code § 21-5-14(g).

“A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.’ Syl. pt. 3, *Meadows v. Wal-Mart*

*Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999).” *Gen. Pipeline Const., Inc. v. Hairston*, 234 W. Va. 274, 282, 765 S.E.2d 163, 171 (2014).

A careful reading of W. Va. Code § 21-5-14(g) leaves no doubt that the Legislature placed specific responsibilities on the Commissioner to determine whether a covered employer meets specific criteria, including the payment of all wages owed to employees, before approving the termination of a wage bond. This section is inextricably tied to the WPCA’s policy of protecting the wages and fringe benefits of working people.

B. *The Leary Court’s reasoning that W. Va. Code § 21-5-14(g) controls the termination of an irrevocable letter of credit serving as a wage bond remains valid despite the 1996 revisions to W. Va. Code § 46-5-106.*

*Leary v. McDowell Cnty. Nat. Bank*, the only West Virginia case to decide whether W. Va. Code § 46-5-106 or W. Va. Code § 21-5-14 controlled the termination of an irrevocable letter of credit serving as a wage bond, was decided in consideration of the 1963 provisions of § 46-5-106.

The Court held that:

[t]o the extent that W. Va. Code § 46-5-106 (1963) conflicts with W. Va. Code § 21-5-14 (1989), the provisions of the latter are controlling with regard to the termination of an irrevocable letter of credit serving as a wage bond. In other words, an irrevocable letter of credit serving as a wage bond pursuant to W. Va. Code § 21-5-14 (1989) can only be terminated with the approval of the Commissioner of the Division of Labor.

Syl. pt. 6, *Leary v. McDowell Cnty. Nat. Bank*, 210 W. Va. 44, 45, 552 S.E.2d 420, 421 (2001).

Respondents’ position is that *Leary* is no longer good law because it was decided under the 1963 provisions of W. Va. Code § 46-5-106. They argue that the 1996 revisions, which include a new subsection that states that “[a] letter of credit that states that it is perpetual expires five years

after its stated date of issuance, or if none is stated, after the date on which it is issued,” W. Va. Code § 46-5-106(d), nullify *Leary*.

In support of its holding in *Leary*, the Court declined to adopt the 46-5-106 provisions regarding the termination of a letter of credit for two reasons. First, the Court found it important that W. Va. Code § 46-5-102(3) (1963) provided that:

[t]his article deals with some but not all of the rules and concepts of letters of credit as such rules or concepts have developed prior to the effective date of this chapter [July 1, 1964] or may hereafter develop. The fact that this article states a rule does not by itself require, imply, or negate application of the same or a converse rule to a situation not provided for or to a person not specified in this article.

*Leary* at 51, 427. The 1996 revision to Article 5 incorporates the § 46-5-102(3) (1963) second sentence almost verbatim: “[t]he statement of a rule in this article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this article.” W. Va. Code § 46-5-103(b). Official Comment 2 to W. Va. Code § 46-5-103 (1996) recognizes that “[b]ecause this article is quite short and has no rules on many issues that will affect liability with respect to a letter of credit transaction, law beyond Article 5 will often determine rights and liabilities in letter of credit transactions.” W. Va. Code § 46-5-103 (1996), Official Comment No. 2. In addition, the Official Comment to W. Va. Code § 46-5-101 concerning the 1996 revisions to Article 5 continues in the same vein by observing that Article 5's objectives are “best achieved . . . by preserving flexibility through variation by agreement in order to respond to and accommodate developments in custom and usage . . .” W. Va. Code § 46-5-101, Official Comment.

The second reason that the *Leary* Court determined that W. Va. Code § 46-5-106 did not control the termination of an irrevocable letter of credit serving as a wage bond was because “such

a result would be contrary to the Wage Payment and Collection Act which was designed to protect working people and assist them in the collection of unpaid wages and benefits. *Leary*, at 52, 428.

The Court's reasoning in *Leary* is still good law in spite of the 1996 revisions, and remains consistent with the rules of statutory construction and interpretation.

C. *The letter of credit at issue expressly states that the provisions of W. Va. Code § 21-5-14(g) control its termination and should be strictly construed according to its stated terms and conditions.*

As required by W. Va. Code § 21-5-14(a), the LOC posted by L. A. Pipeline named the "State of West Virginia - Division of Labor" as the beneficiary of the wage bond. The terms and conditions set forth in the LOC document repeatedly refer to the requirements of W. Va. Code § 21-5-14, but make no mention of W. Va. Code § 46-5-106. J.A. pages 56, 78. The LOC's § 21-5-14 terms and conditions that are mentioned include the statutory authority for the wage bond, the LOC's function and purpose as a wage bond, a statement that the LOC may be drawn against for the company's failure to pay wages and fringe benefits when due, and a statement that the termination of the LOC is governed by W. Va. Code § 21-5-14(g).

The LOC states in pertinent part that:

[t]his perpetual irrevocable letter of credit is posted as a wage bond pursuant to West Virginia Code §21-5-14 and is subject to the provisions thereof. . . As a wage bond, it may be drawn against by the Division of Labor at any time for wages and/or fringe benefits which came due during the effective dates thereof, unless earlier released in writing by the Commissioner pursuant to West Virginia Code §21-5-14. This perpetual irrevocable letter of credit/wage bond may only be terminated with the approval of the Commissioner of the West Virginia Division of Labor pursuant to the terms of West Virginia Code §21-5-14(g).

J.A. at 56, 78.

The LOC additionally provides that:

[t]he issuing bank further agrees to notify the Commissioner in writing by certified mail no earlier than one hundred and twenty (120) days and no later than ninety (90) days prior to the five (5) year anniversary of the issuing date so that the Commissioner can determine if the wage bond may be terminated pursuant to West Virginia Code §21-5-14(g).

J.A. at 56, 78.

This sentence in the LOC, memorializing the bank's agreement to notify the Commissioner within a specific time frame prior to the "five (5) year anniversary of the issuing date," unequivocally binds the bank's notification to the Commissioner with the Commissioner's statutory obligation to "determine if the wage bond may be terminated pursuant to West Virginia Code §21-5-14(g)." Moreover, the "five (5) year anniversary of the issuing date" is a notice provision from the issuing bank to the Commissioner so that he or she can determine if the wage bond can be terminated according to the W. Va. Code § 21-5-14(g) criteria. The LOC clearly states that its termination is subject to the Commissioner's review. The reason the LOC specifies the "five (5) year anniversary of the issuing date" is because that is the earliest date by statute that a wage bond could be eligible for release by the Commissioner. W. Va. Code § 21-5-14(g).

The LOC does not specify a date on which the bank's obligation under the LOC expires pursuant to the terms of W. Va. Code § 46-5-106, nor does it state that it was to remain in effect perpetually or continue in perpetuity. To the contrary, every specification in the LOC refers to W. Va. Code § 21-5-14. The Ninth Circuit decision in *Golden West Refining Company v. SunTrust Bank*, 538 F.3d 1233 (9<sup>th</sup> Cir. 2008), held that "the plain language of UCC § 5-106(d) requires that a letter of credit state that it is perpetual to qualify as a perpetual letter of credit." 538 F.3d at 1237. While the court conceded that a letter of credit could be perpetual without using the exact word "perpetual" as long as synonymous words were used that "clearly declare that the letter of credit

will remain outstanding in perpetuity.” *Id.* at 1238. To be considered a perpetual, the court reasoned that it is “essential that the words of the letter of credit definitively provide that it will continue in perpetuity.” *Id.* at 1238. In other words, a letter of credit must expressly state a “perpetual” duration to be considered a perpetual letter of credit. In accord, *Michigan Commerce Bank v. TDY Industries, Inc.*, No. 1:11-cv-235, 2011 WL 6009882, at \*5 (W.D. MI, Dec. 1, 2011).

Although the Division’s LOC form is titled “Perpetual Irrevocable Letter of Credit/Wage Bond,” there are no other statements in the document that the LOC will continue in perpetuity. To the contrary, the LOC states that it would be eligible for review by the Commissioner in five years from its date of issuance according to the W. Va. Code § 21-5-14(g) requirements.

Other state and federal courts have held that letters of credit must be strictly construed according to their stated terms and conditions. The Appellate Division of the Supreme Court of the State of New York observed that “New York has ‘long adhered to the principle that letters of credit must be strictly construed and performed in compliance with their stated terms,’” a rule which “is rooted in the very purpose of a letter of credit.” *Gilday v. Suffolk County Nat. Bank*, 100 A. D.3d 690, 692 (2012) (citations omitted). “By conditioning payment solely upon the terms set forth in the letter of credit, the justifications for an issuing bank’s refusal to honor the credit are severely restricted, thereby assuring the reliability of letter of credit as a payment mechanism.” *Voest-Alpine Intl. Corp. v. Chase Manhattan Bank*, 707 F.2d 680, 682 (2<sup>nd</sup> Cir. 1983).

According to the terms and conditions of the LOC at issue, there is no question that its termination was subject to the Commissioner’s approval according to W. Va. Code § 21-5-14(g).

- D. *While W. Va. Code § 21-5-14 concerns the acceptance, duration and termination of an irrevocable letter of credit used for the specific statutory purpose of securing employee wages and fringe benefits, W. Va. Code § 46-5-106 pertains to the issuance, amendment, cancellation and duration of letters of credit used for general commercial purposes.*

The certified question before this Court is limited to the termination of an irrevocable letter of credit serving as a wage bond pursuant to W. Va. Code § 21-5-14 (g), whereas W. Va. Code § 46-5-106 concerns the duration and cancellation of letters of credit issued for general commercial purposes.

It is well-settled that “[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter[.]” Syl. pt. 1, in part, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984).

Clearly, W. Va. Code § 21 5-14(g) is the more specific statute concerning the termination of a letter of credit serving as a wage bond whereas W. Va. Code § 46-5-106 concerns the duration and cancellation of letters of credit in general commercial transactions. Even the 1996 revisions to Article 5 recognize that laws and rules beyond its reach “will often determine [the] rights and liabilities in letter of credit transactions.” W. Va. Code § 46-5-103, Official Comment 2.

## V. CONCLUSION

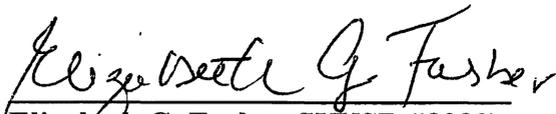
The WPCA’s wage bond termination provisions are inextricably tied to the unambiguous legislative policy of protecting the wages and fringe benefits of working people. That policy would be thwarted if W. Va. Code § 46-5-106(d) exclusively controlled the termination of a letter of credit serving as a wage bond.

The Division of Labor supports the position of the Petitioners in this matter and respectfully urges this Court to adopt its position with regard to the termination of a letter of credit serving as a wage bond.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Elizabeth G. Farber, Assistant Attorney General for the State of West Virginia, certify that I served the foregoing "Brief of the West Virginia Division of Labor as *Amicus Curiae* in Support of the Petitioners" this 23<sup>rd</sup> day of November, 2015, by placing a true and exact copy thereof in the United States Mail, postage prepaid, and addressed as follows:

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