

No. 11-0113

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

ROY JUSTICE,

Petitioner,

v.

LOWES HOME CENTERS, INC.,

Respondent.

**On appeal from the West Virginia Workers' Compensation
Board of Review Appeal No.: 2044528
Claim No.: 900042126**

Response

**MEMORANDUM IN OPPOSITION ON BEHALF OF
LOWES HOME CENTERS, INC.**

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No. 11-0113

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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STATEMENT OF THE CASE

The respondent does not believe the petitioners Statement of the Case fully explains the facts of this claim. The petitioner did not provide the respondent with a copy of his appendix and thus, the respondent has provided a complete appendix of the record considered by the Office of Judges and Board of Review.

By way of history, the claimant reported he incurred a back injury on February 22, 1990. The claimant never had surgery and received only conservative treatment. In 1991, the claimant was granted a 5% award for permanent impairment associated with the compensable injury. There have been no additional awards for permanent partial impairment.

The claimant was originally granted permanent total disability benefits on December 7, 1994 with an onset date of February 22, 1990. Although the issue was litigated by the employer's prior counsel, the issue was affirmed. A review of the Office of Judges order dated May 7, 1998, which affirmed the order granting permanent total disability, reveals the administrative law judge utilized the rule of liberality to view the evidence "...in the light most favorable to the claimant". As the rule of liberality is no longer utilized, the original opinion rendered by the Office of Judges holds no precedential value in the current matter.

Pursuant to WV Code §23-4-16(d), Lowe's, a self-insured employer, has the continuing power and jurisdiction over claims in which a permanent total disability award has been made after the eighth day of April, 1993. Because the claimant's award was granted on December 7, 1994, Lowe's reopened this claim as good cause exists to believe that the claimant no longer meets the eligibility requirements for permanent total disability. By letter dated August 16, 2007, the claimant was advised of the 120 day period within which he was permitted to submit evidence that the benefits should continue.

By letter dated December 6, 2007, the claimant's attorney submitted the November 20, 2007, report of Ms. Gloria Alderson, a Certified Disability Management Specialist. Although Ms. Alderson issued an opinion that the claimant remained permanently and totally disabled, Ms. Alderson failed to take heed of the results of the functional capacity evaluation. Ms. Alderson directly states she thought it "doubtful" that the claimant could pass an examination for light or sedentary classification. However, pursuant to the examinations of Drs. Bachwitt and Mukkamala, as well as the functional capacity evaluation, it was determined that the claimant met the criteria for the sedentary classification and some of the requirements for the light classification. Thus, Ms. Alderson's report was deemed unreliable.

As previously noted, the claimant was evaluated by Drs. Bachwitt and Mukkamala, both of whom concluded the claimant is not permanently and totally disabled from an orthopedic standpoint. Likewise, Dr. Weise concluded the claimant was capable of employment from a psychological perspective. The claimant was also evaluated by two vocational specialists who concluded he is not precluded from the work force as a result of the compensable injury. Based upon these medical and vocational conclusions, Lowe's determined that the claimant was no longer eligible to receive permanent total disability benefits and terminated said benefits by order dated December 16, 2007 (See Appendix 1). The claimant protested the order and litigation ensued.

In support of his position, the claimant submitted the aforementioned vocational report of Gloria Alderson, CDMS (see Appendix 2), as well as a report from Elizabeth Davis, CRS (see Appendix 3). Within her report, Ms. Davis focuses on her belief that the claimant has not been released to return to work, yet acknowledges the claimant is capable of working in a sedentary classification.

In support of its position, the employer submitted recent independent evaluations from Drs. Mukkamala, Bachwitt, Bailey and Weise, recent vocational evaluations

from Sean Snyder, CRC, and Lori Hudak, CDMS, as well as historical records from Drs. Sakhai, Bachwitt, Loimil, and Mortada. The employer asserts all of the reliable evidence of record establishes that the claimant is capable of performing in at least the sedentary classification.

To begin, Dr. Hossein Sakhai, a neurosurgeon, evaluated the claimant at the request of Dr. Nadar, an orthopedic surgeon. In his report of April 19, 1990 (see Appendix 4), two months after the injury, Dr. Sakhai noted the claimant was 38 years old, had satisfactory range of motion, no weakness in the lower extremities, deep tendon reflexes were normal and straight leg raising was negative. Dr. Sakhai concluded the claimant had a simple lumbar strain with no radiculopathy. Three months later, the claimant had a MRI of his spine which showed “degenerative collapse of the L4-5 disc with vacuum phenomenon” (see Appendix 5). Please note the claimant had not returned to work with the employer during those three months. The claimant was evaluated by Dr. Bachwitt (1991) (see Appendix 6) at the request of the employer and Dr. Loimil (1992) (see appendix 7) at the request of the claimant’s counsel. Drs. Bachwitt and Loimil recommended 5 and 10% awards for permanent impairment, respectively. Dr. Bachwitt determined the claimant was not disabled and Dr. Loimil recommended vocational rehabilitation, suggesting he believed the claimant was not permanently and totally disabled. In 1993, the claimant was evaluated by a neurosurgeon, Dr. Mortara (see Appendix 8), who suggested the claimant’s lumbar problems were related to degenerative changes and seemed more focused on the possibility that the claimant may have carpal tunnel. Please note the claimant had been off work for three years at that point. If the claimant was developing symptoms of carpal tunnel, it was not due to his employment with Lowes. Regardless, the older evidence of record suggests the claimant was never permanently and totally disabled.

The claimant was evaluated by Dr. Bachwitt again in 2006 (see Appendix 9). Dr. Bachwitt determined the claimant incurred only a lumbar strain and should be able to do

sedentary and light work by Federal definitions. Dr. Bachwitt specifically stated the claimant was not permanently and totally disabled. Dr. Bachwitt did, however, recommend an additional 3% award for permanent impairment associated with the injury.

The claimant was evaluated by Dr. Mukkamala on June 21, 2006 (see Appendix 10). Within his report, Dr. Mukkamala noted the claimant was not performing the home exercises that were prescribed to him by his treating physician. Later within the same report, Dr. Mukkamala noted the compensable injury was limited to lumbar strain and that the claimant's degenerative disc disease was naturally occurring. Dr. Mukkamala further noted the best treatment for degenerative disc disease is the home exercise program that the claimant was neglecting. Although Dr. Mukkamala stated the claimant was not a candidate for vocational rehabilitation, it was most likely due to the claimant's self-perception of disability as Dr. Mukkamala specifically stated the claimant was not permanently and totally disabled and should be able to work in a sedentary to light category provided he could avoid frequent bending and twisting of his back. Within the only other reference to vocational potential within his report, Dr. Mukkamala noted the claimant had no intention of returning to work. Thus, it is most likely that Mukkamala's vocational statement is a reflection of the claimant's motivation rather than actual ability. Dr. Mukkamala also recommended a 3% increase in permanent partial disability.

The claimant was also evaluated by Dr. Marsha Bailey, who produced a report dated July 31, 2008 (see Appendix 11). Dr. Bailey found the claimant's perception of disability 'far outweighs' his actual impairment. Dr. Bailey determined the claimant was not permanently and totally disabled and advised the claimant could return to work in the sedentary to light category. Dr. Bailey also expressed her surprise that the claimant was ever granted a total disability award. Finally, Dr. Bailey found the claimant had been fully compensated by his prior 5% award for permanent impairment.

The claimant was also evaluated by Dr. Weise to determine if the claimant had any psychiatric impairment associated with the injury (see Appendix 12). Although Dr. Weise noted the claimant may have 5% psychiatric impairment, he also noted the claimant's self report of depression approximately three years post injury. Regardless of compensability, Dr. Weise noted the claimant's psychiatric condition would not preclude him from employment.

The claimant also participated in a functional capacity evaluation on November 14, 2006 (see Appendix 13). The results suggested some inconsistency to the reliability of the claimant's subjective reports of pain. The therapist determined the claimant tested out in the light to sedentary category. The inconsistency suggests the claimant may be capable of performing in a higher category. The claimant did stop the test complaining of fatigue and back pain. The claimant reported 'emergency room' level of pain, but stated he was not going to the hospital.

The claimant was referred to Blue Ridge Rehabilitation Services to assess the claimant's vocational potential. In his report dated March 2, 2006 (see Appendix 14), CRC Sean Snyder determined the claimant was capable of locating employment within 75 miles of his current residence and, in fact, located several open positions that were available at the time which were within the claimant's capabilities. However, the evaluator also noted the claimant's report of his intention to move into a new residence in Tennessee that was under construction at the time. The claimant reported that the foundation and footers were completed on the new house. It is not clear whether or not the claimant was performing any of the construction himself. The evaluator noted the claimant's mental perception plus the imminent move to Tennessee may prevent the claimant from taking advantage of any rehabilitation services that may be offered.

The claimant was also evaluated by Lori Hudak, CDMS, from Associates in Rehabilitation. In her report dated May 1, 2007 (see Appendix 15), Ms. Hudak located 14

available positions within 75 miles of the claimant's residence for which he was suited. During a conversation with the claimant about the security guard positions identified by Sean Snyder, the claimant reported he spoke to a friend who worked as a guard and was paid only six dollars per hour. The claimant stated a guard position would not provide comparable income and indicated he was not interested, but did not identify any physical component that he would not be able to accommodate. Ms. Hudak also referred to the Workers Compensation Division's vocational evaluator, Denise Dunlap, who had evaluated the claimant prior to the permanent total disability award and whose opinion likely led to the award. Ms. Hudak determined Ms. Dunlap erroneously relied upon the WRAT-3 in determining the claimant had low functioning intelligence and therefore, limited vocational potential. Ms. Hudak pointed out that the claimant's intelligent testing placed him in the low-average to average level of intellect and also that the claimant had been promoted to a supervisory position at Lowes, indicating he possessed the aptitude to learn and accomplish complicated tasks. Although Ms. Hudak admits vocational placement may not be successful, it ultimately depends on the claimant's motivation which is limited due to his fear of losing his permanent total and social security disability awards.

A final hearing was held on March 25, 2010 (see Appendix 16), during which the parties orally argued their positions in this matter.

The claim was subsequently submitted for decision. By order dated April 30, 2010, as well as the subsequent "corrected" order dated May 3, 2010 (see Appendix 17), the Office of Judges affirmed the Claims Administrator's order of December 16, 2007. In his conclusion, the adjudicator determined the claimant cannot be considered permanently and totally disabled.

The claimant appealed to the Board of Review. In its decision dated December 22, 2010 (see Appendix 18), the Board of Review adopted the findings of fact and

conclusions of law determined by the Office of Judges and affirmed the decision to vacate the permanent total disability award.

It is from the Board of Review's decision of December 22, 2010, that the petitioner seeks review.

SUMMARY OF ARGUMENT

The preponderance of the record establishes that the claimant is physically and psychologically capable of performing work in at least the sedentary classification. The reliable vocational experts located positions within the workforce that are within the claimant's capabilities. The only factor preventing the claimant's re-entry into the workforce is the claimant's concerns over losing his social security and permanent total disability checks.

The petitioner's argument regarding the violation of WV Code §23-4-16(d)(2), would produce an absurd result and is obviously language that was overlooked by the legislature when they last addressed the chapter. The claimant references the second sentence of the section while completely ignoring the first sentence which clearly and plainly grants authority to the self-insured employer to have the claimant evaluated and make findings of fact and conclusions of law to vacate, modify or affirm a prior award for permanent total disability.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not request oral argument.

ARGUMENT

THE BOARD OF REVIEW WAS NOT PLAINLY WRONG TO AFFIRM THE OFFICE OF JUDGES DECISION TO VACATE THE CLAIMANT'S PERMANENT TOTAL DISABILITY AWARD.

This Court has held that an order of the Appeal Board affirming the finding of the Commission will not as a general rule be set aside if there is substantial evidence and circumstances to support it. McGeary vs. State Comp. Dir., 148 W. Va. 436, 135 S.E.2d 345 (1964). More recently, this Honorable Court reiterated its position that it “will not reverse a finding of fact made by the Workers’ Compensation Board of Review unless it appears from the proof upon which the Appeal Board acted that the finding is plainly wrong.” Conley v. Workers’ Compensation Division, 199 W. Va. 196, 483 S.E.2d 542 (1997). “Moreover, the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal’s actions are valid as long as the decision is supported by substantial evidence.” Id.

The Board of Review was not plainly wrong to affirm the Office of Judges decision as the preponderance of the evidence establishes the claimant no longer meets the eligibility requirements for permanent total disability. Additionally, the petitioner’s argument regarding the statutory language lacks merit as it is based solely upon a technicality that would lead to an absurd result.

A. §23-4-16(d)(2) PROVIDES THE NECESSARY AUTHORITY FOR A SELF-INSURED EMPLOYER TO BOTH REOPEN AN EXISTING PERMANENT TOTAL DISABILITY AWARD AND PARTICIPATE IN THE EVALUATION PROCESS.

West Virginia Code §23-5-13 states, in part, that it is the policy of this chapter to prohibit the denial of just claims of injured or deceased workers or their dependents on technicalities. Although the statute does not specifically provide the same protections for the

employer, it is generally understood that technicalities shall not cause the denial or awarding of claims due to technicalities.

West Virginia Code §23-4-16(d) states that the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, has continuing power and jurisdiction over claims in which permanent total disability awards have been made after the eighth day of April, one thousand nine hundred ninety-three. The commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall continuously monitor permanent total disability awards and may, from time to time, after due notice to the claimant, reopen a claim for reevaluation of the continuing nature of the disability and possible modification of the award.

Within his brief, the claimant argues that the language of West Virginia Code §23-4-16(d)(2) does not permit a self-insured employer to reopen a permanent total disability award to determine continuing eligibility, even though the first line of the statute grants said authority to the "...commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable...". The claimant's counsel asserts that the language stating the former employer "...shall not be a party to the re-evaluation..." prohibits the actions taken by the employer in this case. The claimant's counsel seems to acknowledge that he is arguing a technicality by stating "[i]f the Self-Insured employer did not agree with this statutory change, they should have gone back to the Legislature to change it, rather than, taking it upon themselves to make the decision to violate the statute." In asserting this argument, the claimant's counsel advocates that his client continue to receive the permanent total disability award based on a technicality in language because the language was overlooked when the rest of the Code was altered pursuant to SB 2013, which allowed self-administration by self-insured employers. The employer asserts that, pursuant to West Virginia Code §23-5-13, workers compensation benefits should not be denied *or granted* based on technicalities. As there is no longer a workers compensation commission, the

employer or its agent *must* be involved in the re-evaluation of permanent total disability awards.

The Office of Judges also addressed the language conflict in its decision. The adjudicator correctly determined that to follow the claimant's argument would produce an "absurd" result. The adjudicator then states that a "...rule of construction and statutory interpretation is that where a particular interpretation would result in an absurdity, some other reasonable construction which would not produce such absurdity will be made." *Newhart v. Pennybacker*, 120 WV 774, 200 S.E. 2d 350 (1938); *State ex rel. Simpkins v. Harvey*, 172 WV 312, 305 S.E. 2d 268 (1983); *State v. Kerns*, 183 WV 130, 394 S.E. 2d 532 (1990).

The Office of Judges adjudicator then interpreted the conflict in language to indicate the employer "*may not be present*" during the evaluations. The adjudicator then noted that the employer is expressly authorized under the statute to begin the re-evaluation procedure. Finally, the adjudicator acknowledged that the employer did not directly administer the reopening as it was handled by a third party administrator, Specialty Risk Services. Accordingly, the adjudicator determined the self-insured employer had "complied with the letter and spirit of WV Code §23-4-16(d)."

Therefore, the Board of Review was not plainly wrong to affirm the decision to vacate the permanent total disability award. The claimant's statutory argument is based solely on a technicality and the efforts to administer justice to all parties should not be usurped based upon technicalities.

B. THE BOARD OF REVIEW WAS NOT PLAINLY WRONG TO AFFIRM THE OFFICE OF JUDGES DECISION TO VACATE THE CLAIMANT'S PERMANENT TOTAL DISABILITY AWARD AS THE PREPONDERANCE OF THE RECORD ESTABLISHES THE CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED.

West Virginia Code §23-4-1g states that for all awards made after July 1, 2003, the resolution of any issue shall be based on a weighing of all evidence pertaining to an issue and a finding that a preponderance of the evidence supports a chosen manner of resolution. A claim for compensation must be decided on its merit and not according to any principle that requires statutes governing workers' compensation statutes to be liberally construed.

West Virginia Code §23-4-6(n)(2) provides that for all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, disability which renders the injured employee unable to engage in substantial gainful activity requiring skills or abilities which can be acquired or which are comparable to those of any gainful activity in which he or she has previously engaged with some regularity and over a substantial period of time shall be considered in determining the issue of total disability. The comparability of pre-injury income to post-disability income will not be a factor in determining permanent total disability. Geographic availability of gainful employment within a driving distance of seventy-five miles from the residence of the employee or within the distance from the residence of the employee to his or her pre-injury employment, whichever is greater, will be a factor in determining permanent total disability. For any permanent total disability award made after the amendment and reenactment of this section in the year two thousand three, permanent total disability benefits shall cease at age seventy years.

A claimant seeking to establish continued entitlement to permanent total disability benefits must do so by a preponderance of evidence. As with any other award under the Act, a modification of a prior order requires that the challenging party establish that the order is wrong by a preponderance of evidence. Under West Virginia Code §23-4-1g, "resolution 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.” Accordingly, should a self-insured employer determine through a preponderance that an award of permanent total disability benefits should be vacated or modified, which has occurred in this case, the claimant must establish continuing entitlement to the benefits by a preponderance of evidence in order to obtain a reversal of the vacation or modification of the original award.

As for the eligibility standard, §23-4-16(d)(1) specifically states that “[t]he eligibility requirements, including any vocational standards, shall be applied as those requirements are stated at the time of a claim’s reopening. However, in *Blankenship v. Richardson*, 196 WV 726, 474 SE2d 906 (1996), the Court held that the statute governing permanent total disability awards, §23-4-6(n)(1), could not be applied retroactively with regards to thresholds. Thus, in the current matter, the aggregate award threshold as well as the whole man impairment thresholds do not apply.

Rather, the vocational standards set forth in §23-4-6(n)(2), shall be applied. Said section provides that pre-injury income is not a factor in determining employability, essentially meaning that if the claimant can perform any employment, he does not remain eligible for permanent total disability. The evidence of record contains several examples of alternative employment available to the claimant.

There does remain a question as to whether or not §23-4-16(d)(3), is applicable in situations where a previously granted award for permanent total disability has been vacated through the reopening process. West Virginia Code §23-4-16(d)(3) provides that claimant’s who have reached the 50% whole man impairment threshold but were denied a permanent total disability award are eligible for temporary partial rehabilitation benefits for a period of four years. While heretofore the legislature, Industrial Council and the Supreme Court have been silent on the issue, the employer asserts the section should apply. As previously mentioned, the Court held in *Blankenship* that thresholds are not applicable

retroactively. As such, the employer has operated under the assumption that thresholds do not apply in this reopening process – which, in effect, assumes the claimant meets the thresholds. The employer is acutely aware of this section and will provide benefits to the claimant pursuant to the section should the claimant accept employment that pays less than his pre-injury position.

The reliable evidence of record unanimously establishes the claimant is physically and psychologically capable of working in a sedentary to light position. No orthopedic evaluation on record recommends more than a 10% award for permanent partial disability. As the claimant has no other reported workers compensation claims and has only five percent in cumulative whole man impairment, the claimant would not even be considered for a permanent total disability award by today's standards. The claimant's evidence establishes the claimant has held managerial positions in the past which developed transferable skills that would be applicable in today's job market if the claimant were motivated. The claimant has not submitted any evidence showing the claimant is incapable of working for any other reason than his financial incentive to remain disabled. Lack of motivation due to a financial incentive to remain disabled is not a justified reason to continue permanent total disability benefits.

In support of his position, the claimant submitted the vocational report of Gloria Alderson, CDMS. As usual, Ms. Alderson finds the person she is evaluating to be permanently and totally disabled. However, there are several inconsistencies within her report that are not adequately explained. One minor example is the claimant reports playing the guitar, but then scored negatively in the manual dexterity portion of Ms. Alderson's testing. Further, the claimant admitted to Ms. Alderson that he actually ran a business called Phelps Department store for two to three years. Although the claimant's wife allegedly completed the paperwork, the claimant was apparently the owner/operator of a business. This position leads to the development of executive skills and most likely led to the

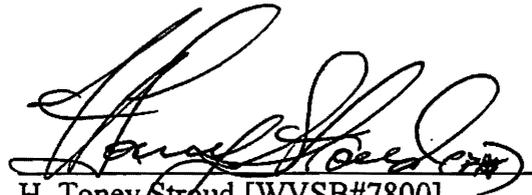
claimant's capacity to be promoted within the Lowes organization to the position of Warehouse Manager. In fact, in discussing the claimant's position with Lowes, Ms. Alderson notes the claimant was required to supervise and coordinate activities of workers in shipping and receiving and maintaining stock, labeling, training new workers, giving orders, working with the public, and expert knowledge of company policy labor laws, safety procedures, and "knowledge of disaster plans to direct workers and public". This revelation conflicts with Ms. Alderson's conclusions regarding the claimant's inability to function as a security guard. In attempts to explain her rejection of the security position, Ms. Alderson notes that current guard positions require knowledge of security measures, emergency procedures and spontaneous judgment calls. She laments that the position is 'engrained' with Homeland Security and requires recognition of authorized and unauthorized activity. Inexplicably, Ms. Alderson failed to recall her own summation of the claimant's position with Lowes which included those very same skills.

The claimant also submitted a report from Elizabeth Davis, CRC. Within her report, Ms. Davis focuses on her belief that the claimant has not been released to return to work, yet acknowledges the claimant is capable of working in a sedentary classification. Ms. Davis even locates five positions within the claimant's area for which the claimant is suited to be employed. Ms. Davis acknowledges the claimant would have been able to return to the workforce had proper vocational services been rendered in the acute post-injury phase. Ms. Davis opines the major barriers to re-employment are the claimant's personal view of his own disability and the amount of narcotic medications the claimant ingests. Rule 20 states narcotic medication should not be authorized for more than six months after the injury or significant treatment. Thus, the claimant taking narcotic medication is not a 'compensable' factor in determining current disability. Further, the claimant's self-perception of disability is largely influenced by the financial incentive to remain 'disabled' in the eyes of the law.

In conclusion, the preponderance of the record establishes that the claimant is physically and psychologically capable of performing work in at least the sedentary classification. The reliable vocational experts located positions within the workforce that are within the claimant's capabilities. As previously discussed, the claimant told Lori Hudak that he had spoken to a friend who worked as a security guard and determined he would make less than he does from his disability payments. Thus, the only factor preventing the claimant's re-entry into the workforce is the claimant's concerns over losing his social security and permanent total disability checks.

CONCLUSION

Based upon the foregoing, the employer asserts the Board of Review's decision of December 22, 2010, is not plainly wrong and respectfully requests the claimant's petition for appeal be denied.



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ROY JUSTICE,

Petitioner,

v.

LOWES HOME CENTERS, INC.,

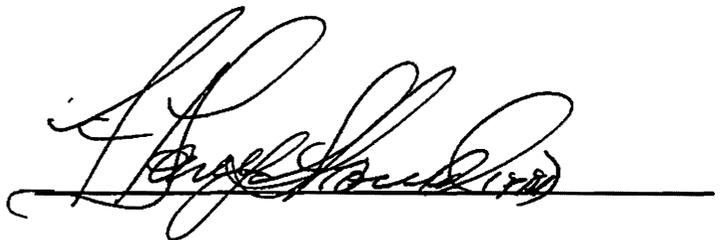
Respondent.

**On appeal from the West Virginia Workers' Compensation
Board of Review Appeal No.: 2044528
Claim No.: 900042126**

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of February, 2011, served the foregoing "**Memorandum in Opposition to Petition for Appeal on Behalf of Lowes Home Centers, Inc.**" upon all counsel of record a true copy thereof via United States mail in an envelope properly addressed and postage prepaid upon:

Otis R. Mann, Jr. Esquire
215 Hale Street
Charleston, WV 25301

A handwritten signature in black ink, appearing to read "Otis R. Mann, Jr.", is written over a horizontal line.