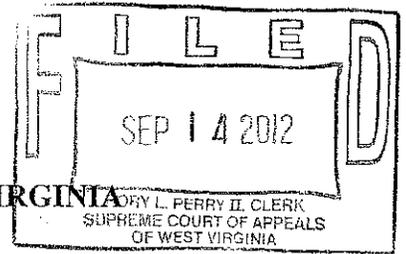


Nos. 11-1689 and 11-1722  
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CYNTHIA S. LEWIS, CLAIMANT,  
PETITIONER,

No. 11-1689  
BOR APPEAL NO.: 2045770  
JCN: 960022062  
D.O.I.: 11/21/1995

v.

TRINITY MEDICAL CENTER WEST, INC.,  
EMPLOYER,

and

WEST VIRGINIA OFFICE OF INSURANCE COMMISSION,  
IN ITS CAPACITY AS ADMINISTRATOR OF  
WORKERS' COMPENSATION OLD FUND,  
RESPONDENTS,

\* \* \* \* \*

WEST VIRGINIA OFFICE OF INSURANCE COMMISSION,  
IN ITS CAPACITY AS ADMINISTRATOR OF  
WORKERS' COMPENSATION OLD FUND,  
PETITIONER,

No. 11-1722  
BOR APPEAL NO.: 2045919  
JCN: 960022062  
D.O.I.: 11/21/1995

v.

CYNTHIA S. LEWIS, CLAIMANT,  
PETITIONER,

and

TRINITY MEDICAL CENTER WEST, INC.,  
EMPLOYER,

RESPONDENTS.

CONSOLIDATED SUPPLEMENTAL BRIEF OF OLD FUND

Richard M. Crynock, Esquire  
WV State Bar #4578

A handwritten signature in black ink, appearing to read "David L. Stuart".

David L. Stuart, Esquire  
WV State Bar #3642

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TRINITY MEDICAL CENTER WEST, INC.,  
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RESPONDENTS.

**CONSOLIDATED SUPPLEMENTAL BRIEF OF OLD FUND**

Pending before this Court is the Old Fund's appeal petition from a final order of the Workers' Compensation Board of Review (hereinafter "BOR") dated November 14, 2011, and assigned Supreme Court Appeal No. 11-1722. Also pending before this Court is the appeal

petition of Cynthia S. Lewis (hereinafter “claimant”) from a separate final order of the BOR dated November 14, 2011, and assigned Supreme Court Appeal No. 11-1689. Each party, by counsel, has filed its/her respective response brief.

Thereafter, by order of this Court dated June 19, 2012, the aforesaid appeals were consolidated for later argument and decision. Additionally, this Court consolidated the appeals for supplemental briefing to address the following questions posed by this Court:

1. Whether a claimant must reopen his or her claim in order to be given a permanent partial disability evaluation?
2. What constitutes an initial award?
3. Can a claimant, who suffers from the subsequent residual effects of a compensable injury, seek a permanent partial disability award once five years has elapsed since the initial award?
4. Which occupational diseases are recognized as progressive in nature as stated in W.Va. Code §23-4-16(a)(2)?
5. Can a closed case be reopened for the inclusion of an additional component for medical treatment only, outside the five-year window as discussed in W.Va. Code §23-4-16(a)(2)?

The Old Fund, by counsel, hereby responds to the questions presented by this Court. In doing so, a preliminary discussion laying the foundation for the questions presented seems appropriate.

## I.

### INTRODUCTION

Modern day workers’ compensation statutes have their genesis in reform legislation identified as Senate Bill (“S.B.”) 250.<sup>1</sup> Indeed, as stated by this Court in State ex rel. ACF Industries v. Vieweg, 204 W.Va. 525, 514 S.E.2d 176 (1999) “[o]n February 10, 1995, the West

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<sup>1</sup> Senate Bill 250 became effective on May 12, 1995 as established by this Court’s opinion in State ex rel. Blankenship v. Richardson, 196 W.Va. 726, 474 S.E.2d 906 (1996).

Virginia Legislature passed and enacted Committee Substitute for S. B. 250, which comprehensively revised numerous aspects of West Virginia workers' compensation law." Id. at 180. However, the financial instability of the workers' compensation system progressed, and as a result, our Legislature enacted Senate Bill 2013, effective July 1, 2003, which now provides the corner stone for today's workers' compensation system in West Virginia.<sup>2</sup> In its landmark decision of Wampler Foods, Inc. v. Workers' Compensation Division, 216 W.Va. 129, 602 S.E.2d 805 (2004) this Court upheld and affirmed the constitutionality of Senate Bill 2013 and approved the revisions, modifications and changes to prior workers' compensation law.<sup>3</sup>

In order to facilitate discernment of the law, and the underlying social policy, with respect to the issues before this Court, it may be instructive to revisit the historical foundations of the West Virginia workers' compensation system. This was best set out in ACF Industries, supra, as follows:

Prior to 1913, employees injured as a result of and in the course of their employment enjoyed the right to seek recompense for their occupational injuries by prosecuting a private cause of action for damages directly against their employers. Taylor v. State Compensation Comm'r, 140 W.Va. 572, 580, 86 S.E.2d 114, 119 (1955). With the enactment of the West Virginia Code of 1913 came the establishment of a statutory system of workers' compensation whereby employees' private remedies were replaced with a state-administered scheme of distinct, and frequently pre-determined, compensation benefits. Sec. 1, Chap. 15P, W.Va. Code, et. seq. (Code 1913, sec. 657, et. seq.) (Main Vol. 1914); Deller v. Naymick, 176 W.Va. 108, 110-11, 342 S.E.2d 73, 75-76 (1985); Mains v. J. E. Harris Co., 119 W.Va. 730, 732-33, 197 S.E. 10, 11 (1938). As a result of this legislative action, the source of an employee's remedies for a work-related injury changed from judicial constructions of common law tort doctrines to specifically enumerated statutory rights. Sec. 22 Chap. 15P, W.Va. Code (Code 1913), sec. 678) (Main Vol. 1914). Accord W.Va. Code §23-2-6 (1991) (Repl. Vol. 1998);

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<sup>2</sup> A major change to the structure of our workers' compensation system took place in 2005 when the Legislature passed Senate bill 1003 which paved the way for privatization of workers' compensation in West Virginia, but the statutes relating to claims and claims processing remained essentially unchanged.

<sup>3</sup> Senate Bill 250 was passed by our Legislature in response to ominous warnings of financial instability in the State's workers' compensation system. See, State ex rel. Blankenship v. Richardson, 196 W.Va. 726, 729-31, 474 S.E.2d 906, 909-11 (1996). Senate Bill 2013 was passed by our Legislature in response to the increased financial instability and imminent insolvency of the State's workers' compensation system. Wampler Foods, Inc. v. Workers' Compensation Division, 216 W.Va. 129, 602 S.E.2d 805, 819 and 823 (2004).

Deller, 176 W.Va. at 110-11, 342 S.E.2d at 75-76; Lester v. State Workmen's Compensation Comm'r., 161 W.Va. 299, 308-09, 242 S.E.2d 443, 448 (1978) (quoting Rhodes v. J.B.B. Coal Co., 79 W.Va. 71, 81, 90 S.E. 796, 799-800 (1916); Mains, 119 W.Va. at 732-33, 197 S.E. at 11. In other words, "[t]he right to workmen's compensation benefits is wholly statutory. Under the workmen's compensation statutes of this state, a claimant has a right to receive benefits and the director of workmen's compensation is authorized to pay benefits to a claimant in no greater amount than is expressly authorized by statute." Syl. Pt. 2, Dunlap v. State Compensation Director, 149 W.Va. 266, 140 S.E.2d 448 (1965). Accord Boyd v. Merritt, 177 W.Va. 472, 474, 354 S.E.2d 106, 108 (1986); Bragg v. State Workmen's Compensation Comm'r., 152 W.Va. 706, 710, 166 S.E.2d 162, 165 (1969).

ACF Industries, 514 S.E.2d, at 188.

In addition, this Court has acknowledged that:

"[i]t has been held repeatedly by this Court that the right to workmen's compensation benefits is based wholly on statutes, in no sense based on the common law; that such statutes are sui generis and controlling; that the rights, remedies and procedures thereby provided are exclusive; that the commissioner is authorized to award and pay benefits and that a claimant is authorized to demand payment of benefits only in such a manner and in such amounts as are authorized by applicable statutes." Roberts v. Consolidation Coal Co., 208 W.Va. 218, 234, 539 S.E.2d 478, 494 (2000) (quoting Bounds v. State Workmen's Comp. Comm'r., 153 W.Va. 670, 675, 172 S.E.2d 379, 282-83 (1970) [Citations omitted.] [Additional citations omitted.]

Repass v. Workers' Compensation Division, 212 W.Va. 86, 569 S.E.2d 162, 181 (2002) (Dissenting opinion of Davis, C. J.).

Furthermore, in Dunlap v. State Compensation Director, 149 W.Va. 266, 140 S.E.2d 448, 451 (1965), this Court favorably cited to 99 C.J.S. Workmen's Compensation §6, p. 49, and stated:

The right to workmen's compensation is wholly statutory and in no way based on the common law; the statutes are sui generis and controlling, and the rights, remedies, and procedure provided thereby are exclusive.

Additionally, in Bailes v. State Workmen's Compensation Commissioner, 152 W.Va. 210, 161 S.E.2d 261 (1968), this Court determined:

The workmen's compensation system of this State is created by and based upon statute. The right to workmen's compensation is wholly statutory and is not in any way based on the common law. The statutes are controlling and the rights, remedies and procedure provided by them are exclusive. [Citations omitted.]

The fact that: (a) workers' compensation law is sui generis; (b) the rights, duties, obligations and remedies are wholly controlled by the workers' compensation statutes; (c) the procedures provided by the workers' compensation statutes are exclusive; and (d) the payment of benefits and the concomitant entitlement to benefits only in such manner and in which amounts as are authorized by the workers' compensation statutes; is more accurate today than ever before. The reason is that, contrary to this Court's observation in ACF Industries, supra, that "a review of our workers' compensation jurisprudence demonstrates that the Legislature frequently has declined to provide guidance as to which law should govern a particular request for compensation benefits. Absent such legislative direction, this Court has repeatedly adopted the common law view that '[t]he statutes governing the rights and duties of the employer and claimant and the powers and responsibilities of the Commissioner are those that were in effect on the date on the injury.[,]' [Citations omitted]" the parties, and this Court, in Wampler, supra, agreed that the Legislature, in enacting S.B. 2013, followed the statutory construction rules set forth in ACF Industries, supra, and gave a "definite expression of legislative intent" that the claimant's cases should be governed by S.B. 2013." Thus, contrary to the situation existing at the time of ACF Industries, supra, there is now a specific and "definite expression of Legislative intent" set out in the workers' compensation statutes.

At the present time, and consistent with legislation passed in 2005, West Virginia has a hybrid private/public workers' compensation system. First, the Office of Insurance Commissioner, as administrator of the Old Fund, administers all "Old Fund liability" claims, which includes all claims with a date of injury or date of last exposure prior to July 1, 2005.<sup>4</sup> Secondly, all self-insured employers began the administration of claims of their employees on July 1, 2004, and continue to administer said claims. Payment of claims by employees of self-

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<sup>4</sup> The State of West Virginia is responsible for payment of benefits in these claims.

insured employers is the responsibility of those employers. Third, all employers in West Virginia subject to the Workers' Compensation laws are required to obtain private workers' compensation insurance to provide coverage for claims with a date of injury or date of last exposure on and after July 1, 2005. Finally, and in accordance with W.Va. Code §23-8C-1 et seq., there are a number of different types of "uninsured" claims which are administered by the Insurance Commissioner and, arguably, an assessment upon all employers in West Virginia provides the funds to pay for these claims.

The aforesaid 1995 and 2003 amendments to the workers' compensation law in West Virginia were many and varied. Moreover, the specific statutes at issue here, and this court's consolidation orders herein, also have to do with the Legislature's intent to bring about finality to workers' compensation claims and ensure a finite life time for each claim. Likewise, this Court has acknowledged in the past that a workers' compensation claim must, at some point, have an end. State ex rel. ACF Industries v. Industries v. Vieweg, 204 W.V. 525, 514 S.E.2d 176, 190-191 (1999). (This Court emphasized "that we do not intend to permit injured employees a limitless and unrestricted period within which they may request an award of PTD benefits. Rather, such a request must be filed during the pendency of the occupational claim to which it relates or within five years of the final order therein. See, W.Va. Code §23-4-16 (1995). (Repl. Vol. 1998) defining time periods for reopening." (additional citations omitted.); Bowers v. West Virginia Office of Insurance Commissioner, 224 W.Va. 398 n.4 at 404, 686 S.E.2d 49, n.4 at 55 (2009) ("That is not to say, however, that a claimant's workers' compensation claim remains open indefinitely. W.Va. Code §23-4-16(a)(2)(2005) (Repl. Vol. 2005) very explicitly requires that requests for modification be made within five years of a claimant's award of permanent disability benefits: 'Except as stated below, in any claim in which an award of permanent disability was made, any request [to modify, change, or reopen a prior award] must be made

within five years of the date of the initial award. During that time period, only two requests may be filed.' However, such time limits apply only to claims in which an order has been entered closing the claim.")

With the foregoing principles in mind, the questions posed by this Court will be examined, discussed and answered. Consistent with petitioner's consolidated brief, this Court's question 2 will be addressed first.

1. What Constitutes an Initial Award?

The issues before this Court in the consolidated appeals, and the questions posed by this Court in its consolidation order, specifically relate to W.Va. Code §23-4-16(a)(2) which provides, in pertinent part, as follows:

**§23-4-16. Jurisdiction over case continuous; modification of finding or order; time limitation on awards; reimbursement of claimant for expenses; reopening cases involving permanent total disability; promulgation of rules.**

(a) The power and jurisdiction of the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, over each case is continuing and the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, may, in accordance with the provisions of this section and after due notice to the employer, make modifications or changes with respect to former findings or orders that are justified. Upon and after the second day of February, one thousand nine hundred ninety-five, the period in which a claimant may request a modification, change or reopening of a prior award that was entered either prior to or after that date shall be determined by the following subdivisions of this subsection. Any request that is made beyond that period shall be refused.

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(2) Except as stated below, in any claim in which an award of permanent disability was made, any request must be made within five years of the date of the initial award. During that time period, only two requests may be filed. With regard to those occupational diseases, including occupational pneumoconiosis, which are medically recognized as progressive in nature, if any such request is granted by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, a new five year period begins upon the date of the subsequent award.

In Wampler, 602 S.E.2d at 819, the Workers' Compensation Division "asserted that an 'award' is any action taken on an issue." Wampler, 602 S.E.2d at 819. This being the case, the Division interpreted S.B. 2013 to mean that the law in effect on the date of an 'award' controls the adjudication of that particular issue within a claim, not the law in effect on the date of injury. To carry out this interpretation, the Division classified all claims on July 1, 2003, using three categories: (1) 'future' cases that had not been filed by July 1, 2003; (2) 'present' cases or 'application pipeline' cases, where the claimant had filed an application for benefits and/or sought relief on an issue, but no ruling-that is, no 'award'-had been issued by the Division by July 1, 2003; and (3) 'litigation pipeline' cases, where the Division had issued a ruling on a particular question prior to July 1, 2003. The Division asserts that only cases in the third, 'litigation pipeline' category can be processed under the pre-July 2003 law, because in these cases the Division had issued an 'award' on the issue being litigated. The Division asserts that cases encompassed by the first two categories would be processed under S.B. 2013." Wampler, 602 S.E.2d, at 19.

The Division's definition of the term "award" was adopted by this Court, as follows:

The Division's interpretation also has great bureaucratic appeal, as it is a "bright-line," easy-to-apply interpretation. Lastly, we also note that none of the parties have challenged the Division's interpretation of the word "award," or offered an alternate interpretation. We therefore support the Division's definition of the term "award" to mean any decision upon an issue submitted for resolution.

Wampler, 602 S.E.2d, at 820.

This Court then turned to the Division's interpretation of S.B. 2013, "that decisions made by the Division prior to July 1, 2003, are resolved under the 'old' law, and that decisions made by the Division on or after July 1, 2003, are resolved under S.B. 2013-is legitimate and comports with the concepts of due process contained in our *Constitution*." Wampler, 602 S.E.2d, at 820.

After a thorough analysis of the Division's interpretation of S.B. 2013, this Court adopted, agreed and affirmed the Division's interpretation of S.B. 2013 by stating:

The Court agrees with the positions taken by the Workers' Compensation Division-now reconstituted as the Workers' Compensation Commission-with respect to all of the issues in these cases. We trust that now the Commission can administer the workers' compensation laws, as modified by the 2003 Legislative changes, in a fiscally responsible and sound manner.

Wampler, 602 S.E.2d, at 824.

With respect to the term "initial" as set out in this Court's question and as contained in W.Va. Code §23-4-16(a)(2) (2003, as amended), it has always been construed to mean "the first" award. This also comports with usage of the term "initial" as a modifier (adjective) in Black's Law Dictionary [8th Ed. 2004]: "initial appearance" is defined as a criminal defendant's first appearance in court to hear the charges read, to be advised of his or her rights, and to have bail determined. Additionally, the word "initial" is defined in the American Heritage Dictionary [2d College Ed. 1985] as "occurring at the very beginning; first."<sup>5</sup>

Given the above, and also acknowledging the manner in which the term "initial award" is construed and used in everyday workers' compensation litigation by all parties, an "initial award" is the first decision (order, etc.) taking action on an issue submitted for resolution. In this manner, the first decision entered by the Claim Administrator on the issue of permanent disability is the "initial award" as contained in W.Va. Code §23-4-16(a)(2). This also comports with this Court's memorandum decision in Fisher v. West Virginia Office of Insurance Commissioner, No. 11-0031, Claim No. 2001-002431 (W.Va. Supreme Court, July 6, 2012) (Memorandum Decision) wherein this Court stated:

Under West Virginia Code §23-4-16(a)(2), to reopen "in any claim in which an award of permanent disability was made, any request must be made within five years of the date of the initial award." A decision on impairment was made more

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<sup>5</sup> Other dictionaries, including Dictionary.com, were consulted and initial, as an adjective, was defined as "of, pertaining to, or occurring at the beginning; first: *the initial step in the process.*"

than five years prior to the date of the application to reopen, September 8, 2009, qualifying as an initial award. See Wampler Foods, Inc. v. Workers Compensation Div., 216 W.Va. 129, 602 S.E.2d 805 (2004).

Fisher, at 2. In addition, at the time the initial award is entered, the award order closes the claimant's claim.<sup>6</sup>

2. Whether a Claimant Must Reopen His/Her Claim in Order to be Given a Permanent Partial Disability Award.<sup>7</sup>

A formal reopening petition or request is never required for an initial award of permanent partial disability ("PPD"). However, after an initial award on the issue of PPD is entered and the claim closed, any subsequent modification, adjustment or change in a claim may only be made upon a successful application/petition to reopen the claim for any such adjustment or modification.

Once a claim for workers' compensation benefits has been ruled compensable for the determined compensable components of the injury, claims typically evolve into one of three (3) different types. The first type consists of claims which involve loss of time from work with payment of temporary total disability ("TTD") benefits. The second type is "no lost work" claims where TTD benefits are not paid. The third type consists of occupational disease claims which can also fit within the second type of claim. In addition, in the universe of workers' compensation claims, there is also the galaxy consisting of claims which were not closed or not legally closed.

Type I – Lost Time Claims.

A "lost time" claim is one where the period of disability lasts longer than three (3) days from the day the employee leaves work as a result of his injury, W.Va. Code §23-4-5 (2003).<sup>8</sup>

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<sup>6</sup> This closure of the claim does not include medical treatment as this Court held, in Lovas v. Consolidation Coal Co. 222 W.Va. 91, 662 S.E.2d 645 (2008), that a workers' compensation claim may not be closed for medical treatment except pursuant to W.Va. Code §23-4-16(a)(4).

<sup>7</sup> The short answer is: No.

<sup>8</sup> Pursuant to W. Va. Code §23-4-5, where the period of disability lasts longer than seven (7) days from the date the claimant leaves work, the claimant receives TTD benefits for the first three (3) days also.

This means the claimant will begin to receive temporary total disability (“TTD”) indemnity benefits. W.Va. Code §23-4-7a addresses action to thereafter be taken with respect to transitioning from TTD benefits through entry of an initial award for PPD benefits. Long story short, when a claimant on TTD benefits is determined to have attained maximum medical improvement (“MMI”), either by determination of the treating physician or an Independent Medical Evaluation/Examination (“IME”), or if the claimant has been released to return to work, or the claimant has actually returned to work, a determination is made with respect to the amount, if any, the claimant has suffered in whole person medical impairment (“WPMI”) as a result of the compensable injury. Once determined, an initial award on the issue of PPD benefits is entered by the Claim Administrator, and the claimant’s claim is closed.

If the claimant thereafter wishes to have his claim modified, adjusted or changed, the claimant must seek and obtain a reopening of the claim consistent with W.Va. Code §23-5-2 and/or W.Va. Code §23-5-3.

Type II – No Lost Time Claims.

These workers’ compensation claims are those where the claimant suffers traumatic injury (non-occupational disease) but the claimant does not miss sufficient work days to be eligible for TTD benefits. In these types of claims, the claimant receives medically related and reasonably required medical treatment, but otherwise does not miss sufficient work to be eligible for TTD benefits. Thereafter, an order closing the claim is typically entered. This order also informs the claimant of his right to request a permanent disability evaluation within five (5) years. This notice/order is in accordance with W. Va. Code §23-4-16(a)(1), which provides the five (5) year limit from date of closure, and with W. Va. Code §23-4-22, which directs that

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notice shall be given to the parties of the claimant's right to a permanent disability evaluation in every claim closed after the effective date of said section.

Where a claimant timely requests evaluation for PPD benefits, arrangement is made for an IME, and following receipt of the IME report, an award order is entered on the issue of PPD benefits. The entry of this initial award order then triggers the running of the five (5) year period set out in W.Va. Code §23-4-16(a)(2).

Type III – Occupational Disease Claims.

Typically, occupational disease claims do not result in a claimant initially suffering lost time from work. Occupational Pneumoconiosis (“OP”) claims, after ruled compensable in a non-medical order, are referred to the Occupational Pneumoconiosis Board (“OP Board”) for a determination of the extent, if any, of WPMI caused by OP. Once the amount of WPMI from OP, if any, is determined, the Claim Administrator thereafter enters the initial award order on the issue of PPD. Thereafter, in accordance with W.Va. Code §23-4-16(a)(2), the claimant has five (5) years to seek a reopening. If a claimant thereafter, and within the five (5) year period, successfully obtains reopening and an award order granting additional PPD benefits is entered, W.Va. Code §23-4-16(a)(2) provides that the five (5) year period for reopening begins anew.

Hearing loss claims, after filed and ruled compensable, are referred to experts to determine hearing loss caused by the hazards of occupational noise and, when determined, an initial award on the issue of PPD is entered.

Carpel Tunnel Syndrome (“CTS”) claims, after filed and ruled compensable, typically do not result in an immediate determination of WPMI. Rather, the main issue is what type of treatment, if any, is required. If CTS release surgery is authorized, and a claimant wants it, this can then trigger payment of TTD benefits during surgery and recovery therefrom and, upon

certification or release to return to work, the claimant is typically referred for an IME to determine the amount, if any, of WPML.

Once an initial award order is entered on the issue of PPD, that triggers the time periods set out in W.Va. Code §23-4-16(a)(2) for CTS and hearing loss claims, the same as for all traumatic injuries, as they have not been determined to be medically progressive in nature. In fact, once a claimant diagnosed with occupationally caused CTS and/or hearing loss leaves the occupational hazards resulting in the disease, the conditions should not progress. On the other hand, by virtue of W.Va. Code §23-4-16(a)(2), as it relates to OP, the entry of each award of PPD may be deemed the initial award for purposes of the five (5) year period as a subsequent award of increased benefits after the initial award starts the five (5) year time period for reopening to begin all over again.

Actually, when it comes to occupational disease claims, including those of CTS and hearing loss, the question of whether any are medically recognized as progressive in nature such that each subsequent award of PPD begins the five (5) year period anew, is of no real consequence, and appears to be of no prejudicial consequence, to the issues presented by this case. This is because this Court, in Ford v. Workers' Compensation Commission, 160 W.Va. 629, 237 S.E.2d 234 (1977), held that any subsequent exposure to the hazards of occupational disease results in a new injury. Thus, if a previous workers' compensation claim is time barred for reopening pursuant to W.Va. Code §23-4-16(a)(2), the claimant may file a new claim where exposure to the occupational hazard has continued. And, where the claimant is no longer exposed to the hazards of the particular occupational disease (excepting OP), there should not be any progression of the disease.<sup>9</sup>

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<sup>9</sup> Although not developed in evidence in this claim at the Office of Judges, expert opinion in hearing loss claims and carpal tunnel syndrome claims are unanimous that these "diseases" do not progress when the claimant is removed from the hazardous occupational causes.

Type IV – Claims Not Closed or Not Legally Closed.

This category takes into account all the claims which were not closed or not legally closed. These type of claims are described and discussed by this Court in syllabus points 1 of Craft v. State Comp. Director, 149 W.Va. 28, 138 S.E.2d 422 (1964), and Baker v. State Workmen’s Compensation Commission, 164 W.Va. 389, 263 S.E.2d 883 (“The time limitations contained in Code §23-4-16, as amended, are applicable only to the reopening of a claim for workmen’s compensation benefits previously closed by final order of the director.”).

Based upon all of the above, there is no requirement of a formal reopening of a claimant’s claim, which has not been closed or not legally closed, in order to receive an initial award of PPD benefits. However, after entry of the initial award on the issue of PPD benefits, the claimant must thereafter subsequently reopen his or her claim for any modification, adjustment or change pursuant to W.Va. Code §§23-5-2 and/or 23-5-3, and within the time periods contained in W.Va. Code §23-4-16(a)(2).

3. Can a Claimant, Who Suffers from the Subsequent Residual Effects of a Compensable Injury, Seek a Permanent Partial Disability Award Once Five Years has Elapsed Since the Initial Award?<sup>10</sup>

W. Va. Code §23-4-16(a)(2) applicable to workers’ compensation claims today was amended by the Legislature in S.B. 250 when it re-wrote then existing W.Va. Code §23-4-16. Prior to the effective date of S.B. 250, W.Va. Code §23-4-16 provided, in pertinent part, as follows:

**§23-4-16. Commissioner’s jurisdiction over case continuous; modification of finding or order; time limitation on awards; reimbursement of claimant for expenses.**

The power and jurisdiction of the commissioner over each case shall be continuing and he may from time to time, after due notice to the employer make such modifications or changes with respect to former findings or orders as may be justified: Provided, that no further award may be made in fatal cases arising after March seventh, one thousand nine hundred twenty-nine, except within five years after payments for temporary disability shall have ceased or not more than two

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<sup>10</sup> The short answer is: No.

times within five years after the commissioner shall have made the last payment in the original award or any subsequent increase thereto in any permanent disability case: Provided, however, that no such modification or change may be made in any case in which no award has been made, except within five years after the date of injury: Provided further, that the further award may be made for medical benefits only at any time.

An often cited opinion of this Court applying the pre-S.B. 250 version of W.Va. Code §23-4-16 is Pugh v. Workers' Compensation Commission, 188 W.Va. 414, 424 S.E.2d 759 (1992). In Pugh, the claimant, by counsel, sought reopening of his claim by application filed on May 22, 1990. The reopening application was denied as randomly filed because it was filed more than five (5) years from the date claimant had last received PPD payments in his claim, and, as a result, the Commissioner being without jurisdiction to award further disability benefits.

Previously, the claimant had been awarded 12% PPD on March 14, 1983, and although claimant protested this award, he accepted payments of the award, which began in 1983 and concluded in January 1984.

On appeal from an order of the former Appeal Board affirming the Commissioner's order, this Court affirmed. In doing so, this Court determined the language contained in W.Va. Code §23-4-16 [1983] was clear and without ambiguity, and the plain meaning of the statute must be accepted without resort to the rules of interpretation. Pugh, 424 S.E.2d at 761-762. And, this Court then held:

W.Va. Code §23-4-16 [1983] permits the power and jurisdiction of the Workers' Compensation Commissioner to continue over cases before the Commissioner and to make modifications or changes with respect to former findings or orders as may be justified, provided that no further award may be made in the cases of nonfatal injuries more than two times within five years after the Commissioner shall have made the last payment in the original award or any subsequent increase thereto in any permanent disability case. Again, we emphasize that these time limitations do not apply within cases *not yet closed* by a final order of the Commissioner.

Pugh, 424, S.E.2d, at 762.

The current version of W.Va. Code §23-4-16 (a)(2) is also clear and without ambiguity, and provides:

**§23-4-16. Jurisdiction over case continuous; modification of finding or order; time limitation on awards; reimbursement of claimant for expenses; reopening cases involving permanent total disability; promulgation of rules.**

(a) The power and jurisdiction of the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, over each case is continuing and the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, may, in accordance with the provisions of this section and after due notice to the employer, make modifications or changes with respect to former findings or orders that are justified. Upon and after the second day of February, one thousand nine hundred ninety-five, the period in which a claimant may request a modification, change or reopening of a prior award that was entered either prior to or after that date shall be determined by the following subdivisions of this subsection. Any request that is made beyond that period shall be refused.

\* \* \*

(2) Except as stated below, in any claim in which an award of permanent disability was made, any request must be made within five years of the date of the initial award. During that time period, only two requests may be filed. With regard to those occupational diseases, including occupational pneumoconiosis, which are medically recognized as progressive in nature, if any such request is granted by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, a new five year period begins upon the date of the subsequent award. With the advice of the health care advisory panel, the executive director and the board of managers shall by rule designate those progressive diseases which are customarily the subject of claims.

As this Court noted in Bowers v. West Virginia Office of the Insurance Commission, 224

W.Va. 398 n. 6, at 405, 686 S.E.2d 49 n.6, at 55 (2009):

W.Va. Code §23-4-16(a)(2) (2005) (Repl. Vol. 2005) very explicitly requires that requests for modification be made within five years of a claimant's award of permanent disability benefits: "Except as stated below, in any claim in which an award of permanent disability was made, any request [to modify, change, or reopen a prior award] must be made within five years of the date of the initial award. During that time period, only two requests may be filed." However, such time limits apply only to claims in which an order has been entered closing the claim. See, e.g., Syl. Pt. 2, Pugh v. Workers' Comp. Comm'r., 188 W.Va. 414, 424 S.E.2d 759 (1992) ("W.Va. Code, 23-4-6 [1983], in part, permits the power and jurisdiction of the Workers' Compensation Commissioner to continue over

cases before the Commissioner and to make modifications or changes with respect to former findings or orders as may be justified provided that no further award may be made in the case of nonfatal injuries more than two times within five years after the Commissioner shall have made the last payment in the original award or any subsequent increase thereto in any permanent disability case.” (emphasis added); Syl. Pt.1, Craft v. State Comp. Dir., 149 W.Va. 28, 138 S.E.2d 422 (1964) (“The time limitations contained in Code, 23-4-16, as amended, are applicable only to the reopening of a claim for workmen’s compensation benefits previously closed by a final order of the director.” (emphasis added). In conjunction with their receipt of permanent partial disability awards, both Mr. Bowers’ and Mr. Dotson’s underlying compensable claim has been closed, thus, the time limits established by W.Va. Code §23-4-16(a)(2) apply to their requests to add a diagnosis of depression to their compensable claims.

Given the above, and given the plain meaning of W.Va. Code §23-4-16(a)(2), there is no subject matter jurisdiction (statutory authority) to reopen a claim for modification, adjustment or change after the passage of five years following the initial award of permanent disability benefits.

This Court has subsequently held the same in Fox v West Virginia Office of Insurance Commissioner, No.100806, Claim Number 990071699 ( W.Va. Supreme Court, filed July 21, 2011) (Memorandum Decision) when it affirmed the Board of Review’s final order affirming the Offices of Judges decision holding that “ based upon a review of the record and a review specifically of W.Va. Code §23-4-16(a)(2), it is determined that the statute does not distinguish permanent partial disability from any other type of reopening issue, thus the claimant’s request must be made within five (5) years of the initial award.” Fox, at 2.

In addition, in Fisher. supra, this Court affirmed a final order by the Board of Review. It held:

Under West Virginia Code §23-4-16(a)(2), to reopen “in any claim in which an award of permanent disability was made, any request must be made within five years of the date of the initial award.” A decision on impairment was made more than five years prior to the date of the application to reopen, September 8, 2009, qualifying as an initial award. See Wampler Foods, Inc. v. Workers Compensation Div., 216 W.Va. 129, 602 S.E.2d 805 (2004)

Fisher, at 2. Finally, in Kuhns v West Virginia Office of Insurance Commissioner, No. 11-0026, Claim No. 990046860 (W.Va. Supreme Court, July 26, 2012) (Memorandum Decision), this Court affirmed the final order of the Board of Review, as follows:

The Office of Judges found the record demonstrates Mr. Kuhns suffered significant physical and psychiatric disabilities as a result of the compensable injuries. However, the Office of Judges also found the denial of reopening was based upon legal arguments rather than factual ones. As a result, the Office of Judges held the statutory and common law does not allow this claim to be reopened on a psychiatric permanent partial disability basis by Mr. Kuhn's petition of September 11, 2009, due to the initial award of permanent partial disability being granted on April 11, 2001. The office of Judges, too, found no basis for granting Mr. Kuhn's reopening request or for disputing the claims administrator's findings. The Board of Review reached the same reasonable conclusion in affirming the Office of Judges in its decision of December 9, 2010.

Kuhns, at 2.

In the case, sub judice, the claimant's petition/application to reopen her claim to adjust, modify or change it by requesting an additional condition be held compensable, was filed on April 16, 2008. However, where, as in this instant case, the initial award was made and entered on October 25, 2001, the re-opening request is time barred. The Commissioner does not have jurisdiction, or statutory authority, to consider the reopening request. Likewise, with respect to this Court's question, a claimant may not have a claim reopened for additional PPD after the passage of five years from the initial award on the issue of permanent disability.

With respect to a much earlier version of W.Va. Code §23-4-16, this Court consistently held that failure to file a letter/application/petition to modify, adjust or reopen a claim within the time set out in W.Va. Code §23-4-16 deprived the Commissioner of jurisdiction to reopen the claim. At Syl. Pt. 1 of Dudash v. State Compensation Commissioner, 145 W.Va. 258, 114 S.E.2d 475 (1960) this Court held:

Code 1931, 23-4-16, providing that 'no further award may be made \* \* \* in cases of non-fatal injuries, except \* \* \* within one year after the commissioner

shall have made the last payment in any permanent disability case' does not confer jurisdiction on the compensation commissioner to re-open claims on petitions filed after the expiration of said one-year period.

Likewise, in the sole syllabus of Cook v. State Compensation Commissioner, 113 W.Va. 370, 168 S.E.369 (1933) this Court held:

Code 1931, 23-4-16, providing that "no further award may be made \* \* \* in cases of non-fatal injuries, except \* \* \* within one year after the commissioner shall have made the last payment in any permanent disability case," does not confer jurisdiction on the compensation commissioner to reopen claims on petitions filed after the expiration of said one-year period.

4. Which occupational diseases are recognized as progressive in nature as stated in W.Va. Code §23-4-16(a)(2).

There is not a rule or regulation that designates which occupational diseases are progressive diseases which are customarily the subject of claims. The reason as to why the Workers' Compensation Division, the Workers' Compensation Commission, and the West Virginia Offices of the Insurance Commissioner have not proposed a rule to designate those progressive diseases which are customarily the subject of claims is the immense difficulty from a medical, administrative, and legal perspective to perform such a task, which largely must be determined on a case by case basis. The various above named West Virginia government agencies are not alone.

A search of the commercially available workers' compensation treatment guidelines finds that neither of the two major guidelines utilized by many states, the American College of Occupational and Environmental Medicine's *Occupational Medicine Practice Guidelines, Second Edition* (2004), previously *Reed's MDA* or the *Official Disability Guidelines, Eight Edition* (2010), from the Work Loss Data Institute, address the issue of occupational disease progression, nor do they attempt to identify conditions falling into these categories. In addition, a review of The American Medical Associations', *Guides to the Evaluation of Permanent*

*Impairment, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Editions* was conducted without any success in identifying references to, or definitions of, disease progression. The *Guides* give a basic review of causality and aggravation of injury but apparently the notion of “progressive” versus “non-progressive” diseases was not thought to be within the purview of the editorial committee.

The *Guides* note that the documentation of causality and aggravation depends “in large measure on the acquisition, review, and analysis of existing office and hospital records dating from the onset of the condition and including the initial evaluation for the condition; the results of tests or diagnostic procedures showing when and how the individual's health was affected by an alleged physical, chemical, or biologic factor; and the results of occupational or environmental surveys, tests, or analyses.” *See Guides, Fourth Edition* (1995), pages 316-317. In fact, it is very helpful in deciding the aggravation (or progression) or causation of any disease to gather “[r]ecords containing an explanation of the medical basis for any conclusion that the individual experienced, or is likely to experience, progression or worsening of the condition as a result of continued exposure to physical, chemical, or biologic factors.” *See Guides, Fourth Edition* (1995), page 317.

The very fact that so much information is needed to determine whether an occupational disease is progressive (which, in turn, makes it so difficult to promulgate a rule on this subject) should not come as a surprise when considering that this Honorable Court decided long ago that whether a compensable injury occurred in the course of and resulting from employment depends upon the particular facts of each case. Syl. Pt. 2, Emmel v. State Compensation Director, 150 W. Va. 277, 145 S.E.2d 29 (W. Va. 1965). Furthermore, this Court has held that W. Va. Code §23-4-1 provides coverage for each new occupational disease as medical science verifies it and establishes it as such, without the need for special legislative recognition by adding the disease to the scheduled diseases. Syl. Pt. 2, Powell v. State Workmen's Compensation Commissioner, 166

W. Va. 327, 273 S.E. 2d 832 (1980). Thus, in many instances, whether an occupational disease is a progressive occupational disease will depend upon the facts of each case, and also if current medical science verifies and establishes that said occupational disease is really a progressive occupational disease. Finally, in many instances it will be the physical makeup of the patient/claimant/injured employee that will determine if the occupational disease truly becomes a progressive occupational disease or, as noted in the *Guides*, ““It is not nearly as important what illness a patient has, as what patient has the illness.”” See *Guides, Fourth Edition* (1995), page 307.

5. Can a closed case be reopened for the inclusion of an additional component for medical treatment only, outside the five-year window as discussed in W.Va. Code §23-4-16(a)(2)?<sup>11</sup>

W.Va. Code §§23-5-2 and W.Va. Code 23-5-3, as applied through W.Va. Code §23-4-16(a)(2), act as limitations upon the subject matter jurisdiction of the Commissioner, as well as all other workers’ compensation insurers and self-insured employers in West Virginia. Workers’ compensation claims, which previously could be said to have an infinite life span prior to the 1995 and 2003 workers’ compensation statutory changes, are now finite. A workers’ compensation claim may not be reopened for any change, modification or adjustment after five years following entry of the initial award of permanent disability benefits closing the claim; excepting the claim may remain open for medical treatment to the extent set out in W.Va. Code §23-4-16(a)(4).

The question presented should be broken down into its elements and considered first as to the dispositive issue presented, and later, if applicable, as to any non-dispositive issue remaining. As previously discussed, by application of the plain meaning of W.Va. Code §23-4-16(a)(2), together with the prior opinions and decisions of this Court, a workers’ compensation claim may not be reopened following the passage of five years from the date of the initial award order of

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<sup>11</sup> The short answer is: No.

permanent disability benefits closing the claim. As a result, the claimant's claim herein should not have been reopened to consider Carpal Tunnel Syndrome as an additional compensable component of claimant's injury. Stated otherwise, the addition of a compensable component to a claimant's closed claim filed after five years have passed from the initial award is an adjustment, change or modification of the claim. By law, the Commissioner [claim administrator] does not have statute authority or jurisdiction to take such action.

The question presented appears to implicate this Court's opinion in Bowman v Workmen's Compensation Commissioner, 150 W.Va.592, 148 S.E.2d 708 (1966), a case relied upon by this Court in Bowers, supra, by asking a similar question as was presented in Bowman wherein this Court stated:

We believe the precise question presented for decision in this case is whether a claim for workmen's compensation benefits can be regarded as divisible in the sense that, on one hand, it may be regarded as alive and litigable in relation to a disability of one character or a disability affecting one part of the body of the claimant; and, on the other hand, whether at the same time the claim may be regarded as dead, unalterably closed and not litigable in relation to a disability of a different character, or one affecting a different part of the claimant's body, notwithstanding the fact that both types of disability arose from a single injury.

Bowman, 748 S.E.2d, at 711.

In its sole syllabus in Bowman, this Court answered the question presented, as follows:

A workmen's compensation claim must be considered in its entirety and cannot be regarded as divisible in the sense of being barred by the provisions of Code, 1931, 23-4-16, as amended, in relation to a disability of one character, or a disability affecting one part of the claimant's body, but, at the same time, alive and litigable in relation to another disability arising from the same injury but of a different character or one affecting a different part of the claimant's body.

Thus, and as plainly set out in W.Va. Code, §23-4-16(a)(2), once the initial award of permanent disability is made in any workers' compensation claim, the claimant has a period of five years in which to seek an adjustment, or modification of the claim by obtaining a reopening of the claim. During this five year period, only two re-openings are available. Where, as here,

the five year period has passed, the claim may not be reopened for any reasons because the Commissioner is deprived of jurisdiction (statutory authority) to act. And, in connection with the discussion of the questions posed by this Court, in the sole syllabus of Bailes v. State Workmen's Compensation Commission, 152 W.Va. 210, 161 S.E.2d 261 (1968) this court, with respect to the version of W.Va. Code §23-4-16 in effect at the time stated:

The one year period of limitation provided by Section 16, Article 4, Chapter 23, Code, 1931, as amended, begins to run from the entry of a permanent partial disability compensation award when such award has been paid when made by prior payments of temporary total disability compensation and the amount of such compensation exceeds the amount of the permanent partial disability award; and an application to reopen a claim for compensation after the expiration of one year from the entry and payment of such award is barred by the statutory limitation of one year from the payment of such award and must be refused by the commissioner.

Having a finite life, with foreseeable and predictable benefits, is important in today's workers' compensation climate as the State moves ever forward in the privatization of workers' compensation. Insurers must be able to reserve for claims, and, in the process, be in a position to assess reasonable premiums for coverage. As illustrated by the events occurring in workers' compensation in West Virginia from the mid-1990's and through enactment of S.B. 2013 in 2003, and perhaps even up to this Court's opinion in Wampler, supra, the financial impact of workers' compensation claims with infinite lifetimes was not only staggering, but portended insolvency of the system and the State. That is why the Legislature found in W. Va. Code §23-1-1(a) that such a financial crisis required limitations on any expectations that may have arisen from prior enactments of Chapter 23. Thus, such prior expectations as having claims with infinite lifetimes or having the principle of workers' compensation statutes being liberally construed to determine the constitutionality of Chapter 23, had to be limited.

So, going forward, it seems the following parting words of this Court in Wampler were prophetic:

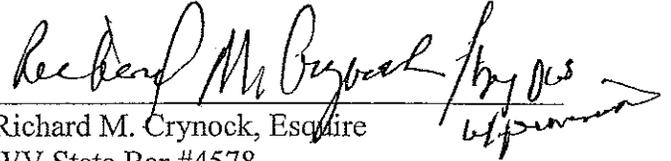
The Court agrees with the positions taken by the Workers' Compensation Division--now reconstituted as Workers' Compensation Commission--[now reconstituted West Virginia Office of Insurance Commissioner as administrator of the Workers' Compensation Old Fund] with respect to all of the issues in these cases. We trust that now the Commission[er] can administer the workers' compensation laws, as modified by the 2003 Legislative changes, in a fiscally responsible and sound manner.

Wampler, 602 S.E.2d, at 824.

#### CONCLUSION

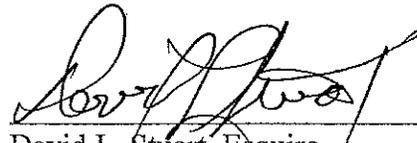
Wherefore, upon the reasons and case law presented and discussed, the final order of the Board of Review in the Old Fund's appeal to this Court is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain its final order. It is respectfully requested that this Court reverse the November 14, 2011 final order of the Board of Review, affirming the April 14, 2011 decision from the Workers' Compensation Office of Judges which added carpal tunnel syndrome as a compensable condition, held that the claimant was entitled to medically necessary treatment in relation to carpal tunnel syndrome, and held that any request for permanent partial disability benefits would be time barred, and reinstate the January 25, 2010 Claim Administrator's order which denied carpal tunnel as a compensable condition of this claim (thus, medical treatment would not be rendered for a condition that is not compensable, nor would the claimant be entitled to a permanent partial disability rating for a condition that is not compensable). Finally, it is respectfully suggested that the November 14, 2011 final order of the Board of Review which affirmed the March 16, 2011 decision from the Workers' Compensation Office of Judges affirming the Claim Administrator's January 25, 2010 order denying the claimant's request for a permanent partial disability rating for disturbance of salivary secretion, be affirmed.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard M. Crynock". To the right of the signature, there are some additional handwritten notes, possibly initials or a date, which are partially obscured and difficult to decipher.

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Offices of the Insurance Commissioner

A handwritten signature in cursive script, appearing to read "David L. Stuart". The signature is written over a horizontal line.

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Counsel for the Old Fund

Nos. 11-1689 and 11-1722  
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CYNTHIA S. LEWIS, CLAIMANT,  
PETITIONER,

v.

TRINITY MEDICAL CENTER WEST, INC.,  
EMPLOYER,

and

WEST VIRGINIA OFFICE OF INSURANCE COMMISSION,  
IN ITS CAPACITY AS ADMINISTRATOR OF  
WORKERS' COMPENSATION OLD FUND,  
RESPONDENTS,

\*

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WEST VIRGINIA OFFICE OF INSURANCE COMMISSION,  
IN ITS CAPACITY AS ADMINISTRATOR OF  
WORKERS' COMPENSATION OLD FUND,  
PETITIONER,

v.

CYNTHIA S. LEWIS, CLAIMANT,  
PETITIONER,

and

TRINITY MEDICAL CENTER WEST, INC.,  
EMPLOYER,

RESPONDENTS.

No. 11-1689  
BOR APPEAL NO.: 2045770  
JCN: 960022062  
D.O.I.: 11/21/1995

No. 11-1722  
BOR APPEAL NO.: 2045919  
JCN: 960022062  
D.O.I.: 11/21/1995

CERTIFICATE OF SERVICE

I, David L. Stuart, counsel for Old Fund, do hereby certify that a true and accurate copy of the foregoing "Consolidated Supplemental Brief of Old Fund" was caused to be served upon the following at the below listed addresses, by depositing the same in the United States Mail,

first-class, postage prepaid, and also by facsimile to Mr. Mazezska, on this 14<sup>th</sup> day of  
September, 2012:

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