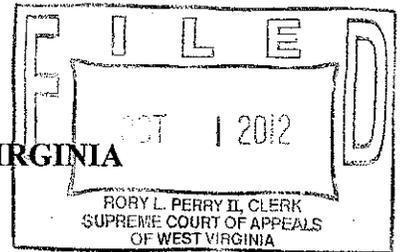


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Cynthia S. Lewis
Petitioner

No. 11-1689
BOR APPEAL NO.: 2045770
JCN: 960022062
DOI: 11-21-1995

v.
Trinity Medical Center West, Inc.,
Employer,

and

West Virginia Office Insurance Commission,
In its Capacity as Administrator of
Workers' Compensation Old Fund,
Respondents.

AND

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
DOI: 11-21-1995

v.
Cynthia S. Lewis,
Petitioner,

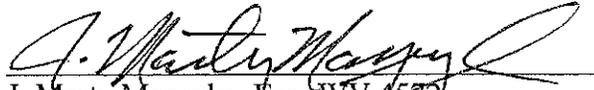
and

Trinity Medical Center West, Inc.,
Employer,

Respondents.

REPLY TO THE COMMISSION'S SUPPLEMENTAL BRIEF
ON BEHALF OF CLAIMANT, CYNTHIA S. LEWIS

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I. THE COMMISSION'S ATTEMPT TO PORTRAY ITS APPLICATION OF THE 1995 AMENDMENT TO W.VA. CODE § 23-4-16 AS A MONOLITH OF CONSISTENT POLICY MUST FAIL

In its supplemental brief the Commission extensively cites Wampler Foods Inc. v. Workers' Compensation Division, 602 S.E. 2d 805 (W.Va. 2004) and State ex rel. ACF Industries v. Vieweg, 514 S.E.2d 176 (W.Va. 1999), for the proposition that the 1995 and 2003 amendments to our workers' compensation law evinced a legislative intent to bring finality to workers' compensation claims and acknowledge that a workers' compensation claim must, at some point, have an end (See Commission's Supplemental Brief at 6). The claimant does not dispute this general statement of intent.¹ An issue before this honorable Court is whether the legislature in passing the 1995 amendment to §23-4-16 intended to limit the time for reopening for indemnity benefits to what in practice will be little more than a five year period.

As reflected in the respective prior arguments of the parties, there is an ambiguity with respect to the intent of the legislature in removing the term "original" award from the 1993 amendment and replacing it with the term "initial" in the 1995 amendment. Beyond this ambiguity with respect to the language of §23-4-16, there is ambiguity with respect to the manner in which the Commission/Claims Administrator have applied the statute. In State ex rel. ACF Industries, Inc. v. Vieweg, 514 S.E.2d 176 (W. Va. 1999), this Court stated: "[W]hen a statute's language is ambiguous, a court often must venture into extra-textual territory in order to distill an appropriate construction". ACF Industries, 514 S.E.2d at 188. The Court further stated:

[W]hen the administration and execution of a body of statutory law has been delegated to or entrusted with a specific governmental officer or agency, this Court first looks to such officers or agency's interpretation of the controverted statute.

¹ It may seem absurd at this point in our history to think that lifetime injuries with lifetime impairments would not be subject to statutory time limitations but from the inception of our Workers' Compensation Act in 1913 to 1929, there was no limitation upon the time within which a Compensation claimant could apply for reopening of his claim. See Craft v. State Compensation Director, 138 S.E.1d 422, 427 (W.Va. 1964).

When such an interpretation comports with the legislative intent and canons of statutory construction, we afford the officer's or agency's interpretation great deference.
Id. at 188, 189.

Thus, it is important to look at the Commissioner's interpretation of the law over time.

In its supplemental brief at page 9, the Commission states that: "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". However, the Commission offers no evidence of any contemporaneous construction that "initial" has "always" been construed as the "first" award. It should be emphasized that the amendment of §23-4-16 at issue was passed in 1995. One would think that if the term "initial award" had been consistently applied as the "first award" since 1995, that this issue would have reached this honorable Court long ago.

Moreover, it is important to note that the "longstanding" policy claimed by the Commission has not even been applied in the instant case. In this regard it should be recalled that the original PPD award was granted in this claim on October 25, 2001. More than five years subsequent to this award this claim has been reopened for the addition of the claimant's diagnosis of disturbance of salivary secretions (Xerostomia) per ALJ Decision of January 6, 2009 which was based on the claimant's Diagnosis Update form of November 16, 2006; for the addition of the claimant's diagnosis of avascular necrosis per Supreme Court mandate issued on February 24, 2011 and which was based on the November 16, 2006 Diagnosis Update; and the 8% PPD award for neurogenic bladder and surgical skin scarring issued on July 21, 2010. At no point during the processing or litigation of these issues did the Commission/Claims Administrator raise the issue of statutory limitation pursuant to §23-4-16.² Thus, it is argued that Commissioner's interpretation of

² The Commission first set forth the argument that the claimant's claim was time barred by § 23-4-16 in its brief to the West Virginia Supreme Court of Appeals in reply to the Claimant's Petition for Appeal filed on August 23, 2010

the “initial” award being the “first” PPD award under 23-4-16(a)(2), is relatively recent phenomena which had its genesis not from the 1995 amendment but from footnote 6 in Bowers v. W.Va. Office of the Insurance Commissioner, 686 S.E.2d 49 (W.Va. 2009). The Commission’s interpretation does not represent a contemporaneous construction of the 1995 amendment but a recent change in policy. The claimant argues that the reason that the Commission did not raise the limitation issue under §23-4-16(a)(2) with respect to the November 2006 Diagnosis Update requests is because it then interpreted the claimant’s June 29, 2006 6% psychiatric PPD award for Major Depression as the initial award under §23-4-16(a)(2) for that added component. Based on its new interpretation of policy, the Commission now seeks to “undo” the effect of the timely reopenings for the addition of Xerostomia and avascular necrosis by characterizing the PPD requests pursuant to those reopenings as “additional reopenings” which, it argues, may be denied based on their new interpretation that the PPD Order October 21, 2001 was the “initial” award. The claimant argues that the claimant’s mere request for a PPD evaluation for the already added conditions does not require an analysis under §23-4-16(a)(2).

In interpreting the meaning and application of a statute, the Court will also look to sister statutes comprising the same body of law. See ACF Industries, 514 S.E.2d at 190. Similarly, “statutes which relate to the same subject matter should be read and applied together so that the legislature’s intention can be gathered from the whole of the enactments.” Id. Here, it is important to read §23-4-16(a)(1) and (a)(2), in para materia with its close relative §23-4-16(b) which states in pertinent part:

[I]n any case in which an injured employee shall make application for a further award of permanent partial disability benefits or for an award of permanent total disability benefits, if such application be in writing and filed within the applicable time limit as stated

with respect to the Board of Review’s Order entered on August 6, 2009, which reversed the Decision of Administrative Law Judge adding avascular necrosis as a compensable component to this claim.

above, the division shall pass upon the request within thirty days of this receipt and, if the division determines that the claimant may be entitled to an award, the division will then refer the claimant for such examinations as may be necessary.
W.Va. Code §23-4-16(b) (1997 Supplement).

Thus, it is clear that a reopening request must be evaluated under §23-4-16(a)(1) or (a)(2) the same for permanent partial disability requests as it is for permanent total disability requests.

In State ex rel. ACF Industries, Inc. v. Vieweg, 514 S.E.2d 176 (W.Va. 1999), the Court in addressing the affect of the 1995 Amendments and in “keeping with our prior precedents and the Legislature’s intent in companion statutes, and deferring to the Workers’ Compensation Commission’s interpretation of statutes” stated as follows:

In rendering this decision, we wish to emphasize 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 injury or occupational disease 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); W.Va. code §23-4-16 (1993) (Repl. Vol. 1994) (same); W.Va. Code §23-4-16 (1983) (Repl. Vol. 1985)(same); W.Va. Code §23-4-16 (1978) (Cum. Supp. 1980) (same); Syl. Pt. 2, *Pugh v. Workers’ Compensation Commissioner*, 188 W. Va. 414, 424 S.E.2d 759 (1999) (same).
ACF Industries, 514 S.E.2d at 190, 191, emphasis provided.

Approximately six years after ACF Industries, the West Virginia Insurance Commissioner adopted W.Va. C.S.R §85-5-3 effective August 1, 2005. Rule 3.3 states in pertinent part:

A claim will not be re-opened for PTD consideration unless the Application has been filed within five (5) years of the date of closure of the claim, or within five (5) years of the date of the initial PPD award, whichever is applicable, as required by West Virginia Code Section 23-4-16...
W.Va. C.S.R. § 85-5-3.3

In accord see Harris v. West Virginia Office of Insurance Commissioner, No. 101060, January 19, 2012. In Harris the claimant’s original permanent partial disability award was granted

in December 1997. Due to the Commission's failure to timely respond to the claimant's multiple requests to be evaluated for pulmonary impairment due to lung scarring, the claimant was not evaluated for this condition and did not receive permanent partial disability award until a Board of Review decision dated March, 2008. Thereafter, the claimant applied for a permanent total disability award. Ultimately, the Board of Review held that under 23-4-16(a)(2) that the claimant's PTD request was untimely as it was filed more than 5 years after the date of the 1997 initial award. This Court reversed the Board of Review's decision and held pursuant to 23-4-16(a)(1) that the claimant's application was timely based on the final order issued in the March 2008.

Thus, it is well established that W.Va. Code §23-4-16(a)(1), permits the filing of an application for permanent total disability benefits within 5 years of the final order. West Virginia Code §23-4-16(a)(1) applies in the same way to reopening requests for additional permanent partial disability. There is no difference between permanent partial disability requests and permanent total disability requests under (a)(1). Certainly, there is no expression of legislative intent in 23-4-16 to treat PPD different than PTD under (a)(1). To the contrary, §23-4-16(b) states that the "time limits as stated above" are applicable "[i]n any case in which an injured employee shall make application for a further award of permanent partial disability benefits or for an award of permanent total disability benefits...". W.Va. code §23-4-16(b) (1997 Sum. Supp.), emphasis provided. Accordingly, it is argued that a claimant may reopen his claim for additional permanent partial disability benefits or for permanent total disability benefits within 5 years of the final order issued in the claim under §23-4-16(a)(1).

This position does not conflict with the application of §23-4-16(a)(2). To the contrary, it is quite consistent. The legislative purpose of (a)(1) is to limit the reopening of claims. The legislative purpose of (a)(2) is to limit the reopening of components of claims. This legislative

intent is evinced not only in the change from “original award” in the 1993 amendment to the term “initial award” in the 1995 amendment but also in the discussion of the additional component of occupational disease contained within (a)(2). It was not the intent of the legislature to limit the life of claims to essentially a five year period. Instead it was the intent of the legislature to limit aspects of claims to five years from the initial award. In other words, (a)(2) limits the life for reopening of a recognized medical condition to five years from the initial permanent partial disability award related to that condition. Section 23-4-16(a)(2) is not intended to foreclose the claimant from adding additional latent medical conditions arising from his injury if he is still within the limitations imposed by §23-4-16(a)(1). However, once the latent medical condition is recognized and the claimant receives a permanent partial disability for that latent medical condition, he may only reopen his claim for a progression of that condition within five years of the initial award under (a)(2).

Thus, in a situation where a claimant is granted a PPD award for lumbar sprain/strain in 2005, a PPD award for lumbar disc herniation in 2007, and thereafter seeks to reopen his claim for the recognition of a latent condition such as osteomyelitis resulting from an authorized low back surgery in 2001, §23-4-16(a)(1) would permit reopening by virtue of the final order granted in 2007. However, at the same time (a)(2) operates to serve the important fiduciary purpose of limiting the time during which a claimant may receive indemnity benefits for the added medical condition to five years from the date of the initial award. While the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is overly restrictive and in conflict with legislative intent, the agency’s interpretation is inapplicable.

The adoption of the commission's position in this matter requires an interpretation that institutes a conflict between (a)(1) and (a)(2). The requirement that claims be reopened within 5 years of the initial award under (a)(2) invalidates the applicability of (a)(1) where claims have not yet been closed by final order.³ Furthermore, the Commission's position in light of C.S.R. 85-5-3, would require different treatment for PPD and TTD reopenings than it would for PTD applications, which would clearly be contrary to the provisions of §23-4-16(b).

Here, the Commission's interpretation of (a)(2) as limiting a claims' life to five years is underly restrictive. It fails to take into consideration the delays attendant to litigating multiple layers of issues in claims, including but not limited to denial of diagnosis updates, denial of treatment, and denial of temporary total disability. It fails to take into consideration negligent or purposeful delays of claims administrators. For example in this case it took from November 2006 to February 2008 to deny the claimant's pertinent diagnosis update request. It fails to consider the latency of certain medical conditions. For instance, in this case the claimant's injury was in 1995. Her avascular necrosis related to long term authorized and prescribed steroid use was not diagnosed until November 2006. Accordingly, it is respectfully requested that the Commission's position be rejected.

II. THE COMMISSIONER'S POSITION THAT THE CLAIMANT'S CLAIM IS CLOSED UPON THE ISSUANCE OF A PPD ORDER BY THE CLAIMS ADMINISTRATOR LACKS MERIT

It is the position of the Commission that "Once determined, an initial award on the issue of PPD benefits is entered by the Claims Administrator, and the claimant's claim is closed." See Commission's supplemental Brief at 11. This interpretation does not comport with either our case law or statutes. In footnote 6 of Bowers v. West Virginia Office of the Insurance Commissioner,

³ Of course there may be numerous instances where the original PPD award would also be the final PPD award closing the claim, in which case there would be no conflict between (a)(1) and (a)(2).

686 S.E.2d 49 (W.Va. 2009), this Court stated, citing Pugh v. Workers' Compensation Commissioner, 424 S.E.2d 759 (W.Va. 1992), that the time limits of 23-4-16 only apply to claims in which an order has been entered closing the claim. Bowers, 686 S.E.2d at 55. Citing Craft v. State Compensation Director, 138 S.E.2d 422 (W.Va. 1964), the Court further stated: "The time limitations contained in Code, 23-4-16, as amended, are applicable only to the reopening of a claim for workman's compensation benefits previously closed by a final order of the director." Bowers, 686 S.E.2d at 55.

It is important to recall that at the time of the rulings in Craft the Workers' Compensation Office of Judges did not exist. At the time of Craft the Director would issue a protestable ruling, the claimant's protest would be litigated before the Director and a second order would be issued by the Director which was appealable to the Workers' Compensation Appeal Board.

Thus, in Craft the operative facts are that the Director issued a protestable order granting the claimant a 12% PPD award on May 24, 1956. The employer filed a protest to this award and a hearing was thereafter held before the Director. The Director then set aside the 12% award upon the finding that the claimant needed further medical treatment and was still temporarily totally disabled. On July 15, 1957 the Director granted the claimant a 15% permanent partial disability award. The claimant protested the order and hearings were thereafter held. On March 17, 1959 the Director ordered that the claimant be referred out for a myelographic study and that if treatment was not recommended that the claimant's permanent partial disability be ascertained. The Director also ordered that a supplemental hearing be held. However, the Director did not include language in the order that it was appealable. Craft, 138 S.E.2d at 423. Consequently, and as the claimant did not wish to have a myelogram, no further action was taken in this claim until January 2, 1964 when the claimant wrote a letter to the Director requesting that he be granted additional

compensation. On January 9, 1964, the Director issued an appealable order denying the claimant's request pursuant to §23-4-16 and by virtue of more than one year having elapsed since the last payment on a permanent partial disability award. The claimant appealed to the Appeal Board which affirmed. Craft, 158 S.E.2d at 424. The Supreme Court reversed the Appeal Board's order. The Supreme Court found that reference to the director's order of March 17, 1959 clearly showed that it was not intended to be, and was not, a decision of the "final hearing". The Court stated:

However, inasmuch as almost five years elapsed before he again contacted the director, after declining to comply with the director's order of March 17, 1959, directing that he submit to a medical examination and possible further treatment, whether the last payment was upon a temporary total disability basis, as found by the board, or a permanent partial disability basis the claim would be barred by the applicable statutes heretofore quoted if that were an order entered 'after final hearing'. It is the view of this Court that that order was not an order entered 'after final hearing', was not final, and therefore the claimant lost no rights by not attempting to appeal therefrom.
Craft, 138 S.E.2d at 425.

With respect to the director's failure to include notice of the time for appeal in the March 17, 1959 order the Court stated: "But to reiterate that order was not a final order of the director as contemplated by Code, 23-5-1, as amended, and it was not necessary for it to contain any information as to the time within which the claimant could protest or appeal to the board." Craft, 138 W.E.2d 427. The Court concluded in Craft:

It is the view of this Court that this case is not barred by any statute of limitations contained in Chapter 23 of the Code; that the case is still in litigation; and therefore the order of the board of May 15, 1964, affirming the order of the director of January 9, 1964, is reversed and the case is remanded for further proper proceedings.
Craft, 138 S.E.2d at 429, emphasis provided.

The Commission's position that an original PPD award constitutes a final order closing the claim is erroneous. It is clear from a reading of Craft that the "initial" protestable PPD awards granted on May 24, 1956 and July 15, 1957 by the Director were not final orders closing the claim. Instead, the Craft Court recognized that it was the Director's order issued on March 17, 1959, after litigation, that would have constituted the final order closing the claim had the Director not neglected to enter an order after a final hearing. In Craft, the claim remained within the statute of limitations because of the procedural shortcomings of the second Director's Order of March 17, 1959, not because of the initial PPD orders issued prior to litigation.

Accordingly, the claimant argues that a "initial" PPD award cannot constitute a final order closing the claim if it is protested and subject to litigation. Consistent with the application of §23-4-16 and §23-5-1 in Craft, the current statutory process provides:

[E]xcept with regard to interlocutory matters, upon making any decision, upon making or refusing to make any award or upon making any modification or change with respect to former findings or orders, as provided by section sixteen [§23-4-16], article four of this chapter, the Insurance Commissioner... shall give notice in writing, to the parties to the claim of its action. The notice shall state the time allowed for filing a protest to the finding. The action of the Insurance Commissioner... is final unless the decision is protested within sixty days after the receipt of such decision. Unless a protest is filed within the sixty-day period, the finding or action is final...

W.Va. Code §23-5-1(b)(1) (2008 Supp.), emphasis provided.

With respect to the Office of Judges, § 23-5-9 provides: "The decision of the Office of Judges regarding objections to a decision of the Insurance Commissioner... is final...". W.Va. Code §23-5-9 (2008 Supp.)

There are at least two major problems with the Commission's position that the "initial" PPD award closes the claim and tolls the statutes of limitations under §23-4-16(a)(2). First, under (a)(2) the initial award, even if it is protested, serves to toll the statute of limitations no matter how

deficient the decision turns out to be. The initial PPD award, through the light of litigation, may be determined to be premature, it may be no award, conceivably it may even be determined to be fraudulent, and yet it would still start the clock ticking on the claimant's statute of limitations. Under the Commission's interpretation the only operable fact is the date of the initial award. The claimant argues that due process requires that a state of limitations can only begin with a valid event and that the validity of the initial PPD award can only be determined through the opportunity to litigate such an award and arrive at a final order pursuant to Craft and our current laws, which should serve as the basis to toll the statute.

Secondly, an initial award, if protested, simply does not close the claim. As set forth above, to consider a protested initial PPD award as a final order would be contrary to Craft, Pugh, W.Va. Code §23-5-1, and §23-5-9. Moreover, "the time limitations contained in Code; 23-4-16, as amended, are applicable only to the reopening of a claim for workman's compensation benefits previously closed by a final order of the director." Craft v. State Compensation Director, 138 S.E.2d 411 (W.Va. 1964). Thus, pursuant to Craft and Pugh the claimant argues that the better position is this – if litigation is conducted on the initial PPD award and it results in a final order confirming or increasing the PPD award within 5 years from the date of the initial PPD, then the claimant shall have the benefit of a 5 year statute of limitation running from the date of the final order.

III. THE COMMISSION'S POSITION WITH RESPECT TO THE DEFINITION OF OCCUPATIONAL DISEASE AND THE STATUTE OF LIMITATION'S ASSOCIATED THEREWITH IS MISTAKEN

The Commission admits in the supplemental brief at page 19 that: "There is not a rule or regulation that designates which occupational diseases are progressive diseases which are customarily the subject of claims." The commission further explains the "immense difficulty

from a medical, administrative, and legal perspective to perform such a task”, relying for its explanation on certain medical treatises such as the AMA Guides, 4th, 5th, and 6th Editions, that did not with any success identify references to, or definitions of, disease progression. See Commission’s Supplemental Brief at pp. 19, 20. The commission, however, does not discuss any fact that would leave one to believe that the task of designating “those progressive diseases which are customarily the subject of claims” as mandated by §23-4-16(a)(2), was ever attempted or even thought of by the Commission and/or Compensation Programs Performance Council. The Commission ultimately concludes in its supplemental brief that whether an occupational disease is progressive occupational disease will depend on the facts in each case. See Commission’s Supplemental Brief at p. 21. In light of the failure of the Commission/Compensation Programs Performance Council to perform its mandate; a case by case basis analysis appears to be all that is available.

The claimant suggests that an analysis of §23-4-16(a)(2) first requires as identification of those conditions which can be considered an occupational disease. The claimant argues that the definition of occupational disease is not limited to those conditions resulting from continued exposure to some environmental hazard. The claimant further argues that diseases that arise from the occupational injury or from medical treatment of the occupational injury are also occupational diseases for the purpose of §23-4-16(a)(2).

In Syllabus point 2 of Lilly v. State Workmen’s compensation Commissioner, 225 S.E.2d 214 (W.Va. 1976), this Court held that:

An employee who sustains an injury which occurred as a result of repeated performances of a specific job duty, upon proof that such injury took place in the course of and resulting from his employment, has sustained an occupational disease, which, under the provisions of W.Va. code, 1931, 23-4-1, as amended, constitutes a personal injury.
Lilly, 225 S.E. 2d at 214.

In Lilly the claimant, a garment worker, was injured gradually by virtue of repeatedly lifting and twisting with 25 pound bundles of ladies clothing. In the course of litigation the claimant's attorney, realizing that he could not prove that the claimant's injury was as a result of single, fortuitous, isolated event, moved the Commissioner to consider the claimant's application as one for occupational disease. The Commissioner set aside his former order of compensability and held that the claimant did not suffer injury in the course of and resulting from her employment. In so doing the Commissioner did not consider the claimant's motion with respect to occupational disease. Upon appeal the Workman's Compensation Appeal Board affirmed. Lilly, 225 S.E.2d at 215, 216. Citing W.Va. Code, 1931, 23-4-1, as amended,⁴ the Court held:

Upon examination of the record and in accordance with the decisions hereinafter noted, we are of the opinion that the back condition of which the claimant complains was incurred in the course of and as a result of her employment and that it constitutes an occupational disease within the contemplation of the above quoted statute.

Lilly, 225 S.E.2d at 618, 619.

The Court recognized that while the cause of the injury was not a single event, "it was a situation that developed over a period of time resulting in impairment of the physical condition of the claimant. Such body impairment or ailment satisfies the definition of disease. Webster's New

⁴ W.Va. code, 1931, 23-4-1, as amended, provided:

For the purposes of this chapter, occupational disease means a disease incurred in the course of and resulting from employment... except in the case of occupational pneumoconiosis, a disease shall be deemed to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances (1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease, (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, (3) that it can be fairly traced to the employment as the proximate cause, (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment, (5) that it is incidental to the character of the business and not independent of the relation of employer and employee, and (6) that it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

Lilly, 225 S.E.2d at 216, 217.

The current statute is virtually identical.

International Dictionary (2nd Ed. 1955). Lilly, 225 S.E.2d at 619. In accord the Court cited the case of Fruehauf Corp. v. Workmen's Compensation Appeals Board, 68 Cal. 2d 569, 68 Cal. Rptr. 164, 440 P.2d 236 (1968), a California case also involving cumulative trauma to the low back. The California Court noted that this situation must be considered an occupational disease so as to be a personal injury under their workers' compensation law.⁵ In Lilly the Court concluded:

We concur in the thoughts expressed and the principles enunciated by the authorities quoted and cited above. Accordingly we hold that the back injury suffered by the claimant Laura L. Lilly, constitutes an occupational disease within the contemplation of W.Va. Code, 1931, 23-4-1, as amended, and that it occurred in the course of and as a result of her employment; that there is a direct causal connection between the conditions under which her work was performed and the occupational disease; that her back condition can be seen to have followed as a natural incident of her work, and that it can be fairly traced to the employment as the proximate cause. To hold otherwise would operate to defeat certain valid claims merely because there was no sustainable single, isolated, fortuitous event which caused the injury...
Lilly, 225 S.E.2d at 217, 218.

Here, the claimant's claim has ultimately been approved for avascular necrosis and xerostomia. These medical conditions resulted over a period of time due to the claimant's ingestion of prescribed and authorized steroid medications. Thus, the claimant argues that these condition meet the definition of disease under §23-4-1(f) (2008 Supp.). It is further argued that they meet the definition of occupational disease under §23-4-16(a)(2) as they are medically recognized as progressive in nature.⁶

⁵ The Court in Lilly also cited Buchanan v. Bethlehem Steel Company, 302 N.Y. 848, 100 N.E.2d 45 (1951), Underwood v. National Motor Casting Division, 329 Mich. 273, 45 N.W.2d 286 (1951); and Bondar v. Simmons Co., 23 N.J. Sup. 109, 91 A.2d 642 (1952).

It is important to note that while §23-4-16(a)(2), lends guidance as to the effect of a request to reopen with respect to the progression of an occupational disease, i.e. if any such request is granted “then a new five-year period shall begin upon the date of the subsequent award”, it lends no guidance with respect to the first discovery of an injury related occupational disease. Again with respect to this claimant’s avascular necrosis, the disease resulted from long term medical treatment (ingestion of steroid medication) and was not discovered until 2006, eleven years after the claimant’s injury. The claimant argues that in cases where the original PPD is conducted very early in the claim, indemnity for occupational diseases resulting from medical treatment or some other sequelae of compensable injury, would not occur if “initial award” is interpreted as the original PPD award under §23-4-16(a)(2).

⁶ National Institute of Arthritis and Musculoskeletal and Skin Diseases, Department of Health and Human Services, *Questions and Answers about Osteonecrosis (Avascular Necrosis)* , August 2011:

Osteonecrosis (avascular necrosis) is a disease resulting from the temporary or permanent loss of blood supply to the bones. Without blood, the bone tissue dies, and ultimately the bone may collapse. If the process involves the bones near a joint, it often leads to collapse of the joint surface. Osteonecrosis (avascular necrosis) is also known as avascular necrosis, aseptic necrosis, and ischemic necrosis....

The amount of disability that results from osteonecrosis (avascular necrosis) depends on what part of the bone is affected, how large an area is involved, and how effectively the bone rebuilds itself. Normally, bone continuously breaks down and rebuilds— old bone is replaced with new bone. This process, which takes place after an injury as well as during normal growth, keeps the skeleton strong and helps it to maintain a balance of minerals. In the course of osteonecrosis (avascular necrosis), however, the healing process is usually ineffective and the bone tissues break down faster than the body can repair them. If left untreated, the disease progresses, the bone collapses, and the joint surface breaks down, leading to pain and arthritis...

Aside from injury, one of the most common causes of osteonecrosis (avascular necrosis) is the use of corticosteroid medications such as prednisone....

eMedicineHealth.com, definition. Source: MedTerms™ Medical Dictionary. Last editorial review: 3/19/2012:

Xerostomia: Dry mouth. Xerostomia can be associated with systemic diseases, such as Sjogren's syndrome, systemic lupus erythematosus, and rheumatoid arthritis; and it can be a side effect of medication and poor dental hygiene. Xerostomia results from inadequate function of the salivary glands, such as the parotid glands. Treatment involves adequate intake of water, use of artificial saliva, and good dental care. Untreated, severe dry mouth can lead to increased levels of tooth decay and thrush.

Moreover, if an occupational disease resulting from compensable medical treatment can, indeed, constitute an “occupational disease” under §23-4-1 and §23-4-16(a)(2), a strict interpretation of “initial award” to mean original award would conflict with the legislative intent expressed in W.Va. Code §23-4-15 that a “discovery rule” component be attendant to occupational disease claims. West Virginia Code §23-4-15(c) states in pertinent part:

To entitle any employee to compensation of occupational disease other than occupational pneumoconiosis under the provisions of this section, the application for compensation shall be made... and filed with the Commission... within three years from and after the day on which the employee was last exposed to the particular occupational hazard involved or within three years from and after the employee’s occupational disease was made known to him or her by a physician or which he or she should reasonably have known, whichever last occurs...
W.Va. Code §23-4-15(c) (2005 Re. Vol.).

It is recognized that §23-4-15(c) concerns the original application for benefits for a claim being filed solely for an occupational disease. However, this appears to be a distinction without a difference. An occupational disease such as treatment related avascular necrosis is not any less subject to the issues of discovery and latency than dust exposure related lung diseases. Accordingly, a claimant should be permitted to file a reopening for recognition and indemnity of occupational diseases related to medical treatment or other injury related sequelae, within 5 years of the final award under §23-4-16(a)(1) or within three years of discovery as provided in §23-4-15(c).

IV. CONCLUSION

The times and concerns corresponding to the Wampler decision were very much different than the times and concerns attendant to the original passage of our Workers’ Compensation Act. (See footnote 1). The concerns of today are different than at the time of Wampler. In July of this year State officials quietly announced another reduction in workers’ compensation

premiums. Since privatization overall premiums have been decreased by 51.8 percent. Charleston Daily Mail, June 6, 2012.

In these times this honorable Court is asked once again “to make sense of confusing and convoluted workers’ compensation statutes that contain little, if any, guidance as to their practical application.” See ACF Industries, 514 S.E.2d at 191. And to do so when the world of workers’ compensation litigation has been so recently and so radically altered by the diagnosis update issue. And yet these recent changes must be applied in conjunction with a 1995 statute.

It is respectfully requested 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 Claims Administrator’s January 25, 2010 order denying the claimant’s request for a permanent partial disability rating for disturbance of xerostomia be reversed.

It is respectfully requested that this Court affirm the November 14, 2011 final order of the Board of Review, affirming the April 14, 2011 decision from the Workers’ Compensation Office of Judges insofar as it added carpal tunnel syndrome as a compensable condition and held that the claimant was entitled to medically necessary treatment in relation to carpal tunnel syndrome.

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2012, I served the within *Reply to the Commission's Supplemental Brief on Behalf of Claimant Cynthia Lewis*, by depositing a true and exact copy thereof in the United States Mail, Postage prepaid, in an envelope addressed to the following:

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