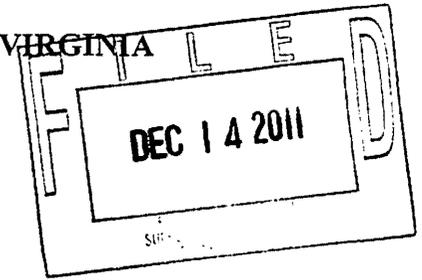


IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA



CYNTHIA S. LEWIS

Petitioner,

v.

Board of Review Appeal No. 2045770
JCN. 960022062
D.O.I. 11-21-1995

WV OFFICES OF THE INSURANCE
COMMISSIONER
and TRINITY MEDICAL CENTER WEST, INC.

Respondent.

PETITION FOR APPEAL
ON BEHALF OF CYNTHIA S. LEWIS
FROM AN ORDER OF
THE WORKERS' BOARD OF REVIEW
ENTERED ON NOVEMBER 14, 2011

J. Marty Mazezka, Esq. WV# 4572
Frankovitch, Anetakis, Colantonio & Simon
21 Twelfth Street
United Bank Building, Sixth Floor
Wheeling, WV 26003
(304) 233-1212
marty@facslaw.com

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF THE CASE.....	1
III.	SUMMARY OF ARGUMENT.....	6
IV.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	7
V.	ARGUMENT.....	7
VI.	CONCLUSION.....	15

TABLE OF AUTHORITIES

<u>Cases Cited:</u>	Page
<i><u>Baker v. State Workman's Compensation Commissioner,</u></i> 263 S.E. 2d 883 (W. Va. 1980).....	7
<i><u>Bowers v. West Virginia Office of the Insurance Commissioner,</u></i> 6876 S.E. 2d 49 (W. Va. 2009).....	11
<i><u>Bowman v. Workmen's compensation Commissioner,</u></i> 148 S.E. 2d 708 (W. Va. 1966).....	11
<i><u>Bragg v. State Workmen's Compensation Commissioner,</u></i> 166 S.E. 2d 162 (W. Va.).....	12
<i><u>Craft v. State Compensation Director,</u></i> 138 S.E. 2d 422 (W. Va. 1964).....	12
<i><u>Fox v. West Virginia Office of the Insurance Commissioner,</u></i> Supreme Court No. 100806 (July 21, 2011).....	5
<i><u>Hardy v. Andrew N. Richardson, Commissioner,</u></i> 479 S.E. 2d 310 (W. Va. 1996).....	8
<i><u>Perry v. State Workmen's Compensation Commissioner,</u></i> 165 S.E. 2d 609 (W. Va. 1969).....	10
<i><u>Pugh v. Workers' Compensation Commissioner,</u></i> 148 S.E. 2d 759 (W. Va. 1966).....	12
 <u>Statues Cited:</u>	
W.Va. Code § 23-4-16 (a) (2) (2005 Replacement Value).....	5
W.Va. Code § 23-4-22 (2005 Replacement Value).....	10
W.Va. Code § 23-5-15 (c) (2005 Replacement Value).....	6
 <u>Rules:</u>	
W.Va. CSR 85-20-6.6.....	4

I. ASSIGNMENTS OF ERROR

THE WORKERS' COMPENSATION BOARD OF REVIEW ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE CLAIMANT'S REQUEST FOR A PERMANENT PARTIAL DISABILITY EVALUATION CONSTITUTES A CLAIM REOPENING PETITION THAT MUST BE MADE WITHIN A FIVE YEAR STATUTE OF LIMITATION UNDER W.VA. CODE §23-4-16.

THE WORKERS' COMPENSATION BOARD OF REVIEW ERRED AS A MATTER OF LAW IN FAILING TO CONCLUDE THAT A REQUEST FOR A PERMANENT PARTIAL DISABILITY EVALUATION IS NOT A CLAIM REOPENING AND THAT SUCH REQUEST IS GOVERNED BY W.VA. CODE §23-4-22.

ASSUMING *ARGUENDO*, THAT THE BOARD OF REVIEW CORRECTLY CONCLUDED THAT A CLAIMANT HAS AN AFFIRMATIVE DUTY TO REOPEN HIS CLAIM TO SECURE A PERMANENT PARTIAL DISABILITY EVALUATION, THE BOARD OF REVIEW ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE CLAIMANT'S REQUEST WAS TIME BARRED BY W.VA. CODE §23-4-16.

THE WORKERS' COMPENSATION BOARD OF REVIEW ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE CLAIMANT WAS NOT ENTITLED TO A PERMANENT PARTIAL DISABILITY EVALUATION FOR HER CONDITION OF XEROSTOMIA WHICH WAS APPROVED AS A COMPENSABLE DIAGNOSIS PURSUANT TO AN OFFICE OF JUDGES DECISION ISSUED IN JANUARY, 2009.

II. STATEMENT OF THE CASE

The claimant, Cynthia Lewis, sustained a compensable injury on November 21, 1995, which has resulted in very serious medical conditions, including a spinal condition that has required extensive treatment. The claimant has undergone three authorized surgeries to her low back at the L2-L5 levels, including a lumbar fusion of L3 to L5. She has had four additional authorized surgical procedures for the placement and re-placement of Dilaudid pumps. MRI

performed in 1999 showed distortion of the cauda equina and suggested arachnoiditis. (Appendix Exhibit II-A) In order to become mobile the claimant must use a walker, electric scooter, or wheelchair. (See Decision of Administrative Law Judge dated February 28, 2005, Appendix Exhibit I-D). Per Order dated October 25, 2001, the claimant was awarded a 32% permanent impairment for her lumbar spine based on the medical report of Robert M. Yanchus, M.D., dated June 20, 2001. (Appendix Exhibit I-E)

The claimant filed a timely protest to the Divisions Order of October 21, 2001 and introduced evidence during the course of litigation. Per Decision of Administrative Law Judge dated July 22, 2002, the ALJ affirmed the Division's order granting the 32% PPD award. (Appendix Exhibit I-F)

Subsequently, the claimant developed numerous medical conditions associated with her severe lumbar injury and treatment therefore. By Diagnosis Update form completed on November 16, 2006, which was re-submitted on February 7, 2007 with numerical codes, Dr. John J. Moossy, the claimant's treating neurosurgeon, requested in part, that the diagnoses of Xerostomia (dry mouth), Dysuria (bladder dysfunction), and avascular necrosis of the hip, be added to the claimant's claim. (Appendix Exhibit I-G)

However, it was not until February 8, 2008 that the Claims Administrator took action on the claimant's diagnosis update request. On this date, the Claims Administrator rejected the request to add disturbance of salivary secretion (Xerostomia-dry mouth) as a compensable diagnosis. The claimant filed a timely protest to the Claims Administrator's Order dated February 8, 2008. Per Decision of Administrative Law Judge dated January 6, 2009, the ALJ reversed the Claims Administrator's Order and ruled that the claimant's disturbance of salivary secretions (dry mouth) was a compensable condition. (Appendix Exhibit I-I) The Workers'

Compensation Board of Review, per Order entered on August 6, 2009, affirmed the ALJ's Decision insofar as it added disturbance of salivary secretions as a compensable condition.

A more complete prior history of this claim with respect to the diagnosis of disturbance of salivary secretions is necessary. By letter dated July 16, 2003, the claimant's treating dentist, John A. Basil, DDS, advised that the claimant's medications prescribed for her low back injury over the years has caused her to have Xerostomia (dry mouth) consequently causing her teeth to break down and become grossly decayed. (Appendix Exhibit II-D) By letter dated March 30, 2004, Dr. Basil reiterated that the claimant remained on medications known to cause Xerostomia and that the claimant needed continued dental care consisting of tooth extractions and dental implants. Dr. Basil requested authorization for the claimant to be referred to a Dr. Patterson for the dental implants. (Appendix Exhibit II-E)

On November 18, 2003, the Office of Medical Services conducted a review of Dr. Basil's request of July 16, 2003 as well as a report from Dr. Moossy setting forth the medications prescribed to claimant. Per report of Cheryl Jones, RN the following was concluded;

This nurse case manager has reviewed the provided medical records with Dr. Randall Short, Office of Medical Services physician. Dr. Short notes that oxycodone, mirtazapine, scopolamine, and lasix all have the side effect of causing dry mouth and that proper dental care is important while on those medications. Based on this, Dr. Short recommends authorization of dental care due to decay. (See OMS Report, Cheryl Jones, RN, November 18, 2003, Appendix Exhibit II-I).

Per Order dated November 19, 2003, the Commission authorized routine dental care. Per Order dated May 4, 2004 the Commission denied authorization for dental implants. Per Order dated May 11, 2004, the Commission denied dental treatment retroactive from June 11, 1996. The claimant filed timely protests to the Orders of May 4, 2004 and May 11, 2004. Per Decision of Administrative Law Judge dated February 17, 2005, the ALJ concluded that: "The medicines

that the claimant is taking to treat the November 21, 1995 compensable injury, which are authorized by the Commission, is responsible for the claimant's accelerated dental decay." (Appendix Exhibit I-D at 4). Despite the Claims Administrator's Order of November 19, 2003, authorizing the treatment for Xerostomia and the ALJ's Decision of February 17, 2005, the Claims Administrator did not issue an Order approving Xerostomia as a compensable diagnosis. It should be noted, however, that West Virginia CSR 85-20-6.6, the diagnosis update rule, was not in effect in November of 2003 when the Claims Administrator recognized the claimant's Xerostomia as a condition resulting from authorized medical treatment.

For the purpose of this appeal it is also necessary to set forth the medical diagnoses, in addition to the lumbar condition, that have been approved in this claim as well as the permanent partial disability awards that have been granted for these conditions. Per Order dated June 29, 2006, the Claims Administrator granted the claimant a 6% permanent partial disability award pursuant to the psychiatric report of Dr. Ryan Finkenbine. (Appendix Exhibit II-L) Per Order dated July 21, 2010, the claimant was awarded an 8% permanent partial disability based on the medical report of Dr. Judith Brown dated August 31, 2004, for the diagnoses of neurogenic bladder and surgical skin scarring.¹ (Appendix Exhibit II-M)

In response to the ALJ's Order dated January 6, 2009, adding Xerostomic as a compensable condition, the claimant by letter to the Claims Administrator dated January 15, 2009, requested that a permanent partial disability examination be conducted for said condition. (Appendix Exhibit I-C) Per Order dated January 25, 2010, the Claims Administrator denied the claimant's request for a permanent partial disability evaluation, indicating that the request is

¹ In addition, the West Virginia Supreme Court of Appeals, per Mandate Order entered on February 24, 2011, reversed the Board of Review's decision in No. 204534 and remanded the claim with directions to grant the claimant's request to add avascular necrosis of the hip as a compensable component. (See Appendix Exhibit I-N). As is set forth in this brief, the claimant's request to add avascular necrosis was made per Diagnosis Update form of Dr. Moosy dated November 16, 2006.

time-barred for the claimant's initial permanent partial disability award was October 25, 2001. The claimant filed a timely protest to this Order.

The ALJ rejected the claimant's argument as unpersuasive that the February 17, 2005 Decision of Administrative Law Judge, which ruled that the authorized medications that the claimant was taking to treat her compensable injury were responsible for the claimant's Xerostomia and accelerated tooth decay, constituted a finding of compensability of those conditions. Instead, the ALJ found that the evidence established that the Administrative Law Judge Decision on January 6, 2009, "actually added disturbance of salivary secretion as a compensable condition". (Decision of Administrative Law Judge, March 16, 2011 at 5, attached as Appendix Exhibit I-B). The ALJ further concluded that:

Although the claimant would be entitled to treatment for this compensable condition, the claimant would not be entitled to additional permanent partial disability pursuant to W. Va. Code §23-4-16 (a) (2). Thus, based upon the evidence of record it is determined that the claimant's request for additional permanent partial disability in relation to the compensable condition of disturbance of salivary secretion is time barred, for the request for additional permanent partial disability was outside the 5 year time limitation requirements for the claimant's initial award was October 25, 2001
(Id.).

The claimant appealed to the Workers' Compensation Board of Review. Per Order entered on November 14, 2011, the Board of Review adopted the findings of fact and conclusions of law set forth in the Administrative Law Judges Decision dated March 16, 2011. In affirming the ALJ's Decision the Board of Review stated that facts similar to those in the instant claim were considered in the case of Fox v. West Virginia Office of the Insurance Commissioner. No. 100806 (July 21, 2011). The Board noted that in Fox the West Virginia Supreme Court of Appeals affirmed rulings below that the claimant's request for reopening for a

permanent partial disability evaluation was time-barred where the initial permanent partial disability award was granted on April 14, 2004, the additional diagnosis was added on April 26, 2006, and the request to reopen for a permanent partial disability evaluation was made on May 13, 2009. (See Appendix Exhibit I-A).

III. SUMMARY OF ARGUMENT

The Administrative Law Judge has erred as a matter of law in affirming the Claims Administrator's Order of January 25, 2010 denying the claimant's request for a permanent partial disability rating for the compensable diagnosis of disturbance of salivary secretion. The ALJ was plainly wrong in equating a request for a permanent partial disability evaluation with a reopening petition. Therefore, the ALJ wrongfully evaluated the claimant's request for a PPD evaluation under § 23-4-16 (a) (2) instead of § 23-4-22. Assuming, *arguendo*, that a request for a PPD evaluation is a "reopening" petition, the ALJ further erred in determining that the Decision of Administrative Law Judge dated January 6, 2009, which approved the diagnosis of disturbance of salivary secretion (Xerostomia) constituted the date upon which the issue of the statute of limitations was to be decided instead of the date of the claimant's Diagnosis Update request by Dr. Moossy on November 16, 2006. The ALJ further erred as a matter of law in failing to determine that this claim has not been closed by a final order and that a claim cannot remain open for one body part and closed for another. Accordingly, the Order of the Workers' Compensation Board of Review should be reversed pursuant to W. Va. Code § 23-5-15 (c) (2005 Replacement Value).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellant states that oral argument is unnecessary under Rule 18 (a) as the facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument.

V. ARGUMENT

In Baker v. State Workman's Compensation Commission, 263.S.E.2d 883 (W.Va. 1980), the West Virginia Supreme Court of Appeals specified that a request for a permanent partial disability evaluation is not a reopening. In Baker a claimant requested a permanent partial disability evaluation after more than three years had passed after his date of injury with no award having been made. The Commissioner, based on the then three year statute of limitation for reopening a claim under § 23-4-16, concluded that he was without jurisdiction to further consider the claim and denied the request.

Subsequently, the Workmen's' Compensation Appeal Board affirmed. On appeal the Supreme Court of Appeals reversed the Commissioner's decision and directed that a permanent partial disability evaluation be conducted. In Syllabus Point 1, the Court, citing Craft v. State Compensation Director, 138.S.E 2d 422 (W.Va. 1964), held that: "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." Baker, 138 S.E.2d at 883. In Syllabus Point 2, the Court held:

It is not incumbent upon a claimant whose claim has been held compensable, to initiate the procedure for the evaluation of his disability; rather it is the obligation of the commissioner to then take such action as is necessary, including referral for medical treatment, if needed, to arrive at the disability award, if any, to which the claimant is entitled.

Id.

The Court found that: “The claimant only asked that the percentage of his disability be determined. The time limitation in the pertinent statute is inapposite in this circumstance.” Id. at 885. The Court emphasized: “This is not a reopening case. The claimant is not attempting to have his claim reopened. The order of compensability, entered by the commissioner, was favorable to him. It stands and he now desires only a determination of his disability. This, he is entitled to.” Id.

In Hardy v. Andrew N. Richardson, Commissioner, 479 S.E.2d 310, (W.Va. 1996), the Supreme Court of Appeals, in a case subsequent to the passage of W. Va. Code § 23-4-22, affirmed the continued viability of Baker. In Hardy, a claimant with a 1985 injury requested a permanent partial disability evaluation the day before the effective date of § 23-4-22 in April, 1993.² The claimant’s request was part of a mass listing made by claimant’s counsel of all claimants represented by counsel. The Commissioner denied the mass request and directed claimant’s counsel to file individual motions for each respective claimant. Hardy’s request was made on June 2, 1993, which was denied by the Commissioner under § 23-4-22. The Supreme Court of Appeals reversed the Commissioner’s decision partly on the basis that the statute did not provide a 90-day notice from enactment. Hardy, 479 S.E.2d at 315. In addition, after its review of § 23-4-22 and the holding in Baker, the Court in Syllabus Point 1 held that:

² Section 23-4-22 states in its entirety:

Notwithstanding any provision in this chapter to the contrary, any claim which was closed for the receipt of temporary total disability benefits or which was closed on a no-lost-time basis and which was more than five years prior to the effective date of this section shall not be considered because an evaluation has not previously been conducted and a decision on permanent disability has not been made: Provided, That if a request for an evaluation was made in a claim prior to the twenty-ninth day of March, on thousand nine hundred ninety-three, the commission shall have the evaluation performed. In every instance, a claim shall be a case in which no award has been made for the purposes of section sixteen [§ 23-4-16] of this article. In every claim closed after the effective date of this section, the commission shall give notice to the parties of the claimant’s right to a permanent disability evaluation. W.Va. Code § 23-4-22 (2005 Replacement Volume).

In workers' compensation cases, upon the consideration of our statutes, particularly W.Va. Code § 23-4-1, 6, and 8 (1931), all as amended, it is reasonable to conclude that after compensability has been determined, the Workers' Compensation Commissioner must take the initiative in further processing the claim. The next step is to evaluate the disability and inform the claimant of his award, if any.
Hardy, 479 S.E.2d at 311.

With respect to Baker the Court stated:

Appellee argues that Baker is inapposite, but we are unable to discern the basis upon which [***14] appellee would have us distinguish the case and can find no other reason to do so. We recognize that appellant had a duty to prove his claim, but we do not see that duty as abrogating the duty of the Commissioner to evaluate a claimant's disability and enter an appropriate order. Accordingly, we conclude that on the effective date of the statute in question, appellant's case was open and not closed, that the Commissioner had a duty to proceed to permanent disability evaluation, and that the request of appellant for which an evaluation was timely and appropriate. In the circumstances before us, the statute in question applies on its face only to a case "closed on a no lost time basis and which closure was more than five years prior to effective date of this section." We note that the statute also requires that with respect to cases closed after the effective date of the section, "the commissioner shall give notice to the parties, of the claimant's right to a permanent disability evaluation."
Id. at 315.

The claimant argues pursuant to Baker that the ALJ erred as a matter of law in treating the claimant's request for a permanent partial disability evaluation as a reopening request under § 23-4-16(a). Clearly, it is not; particularly given the Supreme Court's admonition in Baker that: "This is not a reopening case. The claimant is not attempting to have his claim reopened." See Baker, 263 S.E.2d at 392. The claimant argues that in Baker and Hardy, the Supreme Court of Appeals has recognized a difference between a petition to reopen or modify a claim pursuant to § 23-4-16 and a request to compel the Commissioner to perform a required duty. A reopening petition under § 23-4-16 requires evidence showing a progression or aggravation of the

claimant's condition or some new fact not theretofore considered by the commissioner which would entitle the claimant to greater benefits than has already been received. Perry v. State Workmen's Compensation Commissioner, 165 S.E. 2d 609 (W. Va. 1969). Thus, it is argued, for example that a claimant's letter to a commissioner requesting that he/she pay a medical bill or previously authorized medical treatment would not constitute a petition to reopen under § 23-4-16. Similarly, a letter requesting a permanent partial disability evaluation to which a claimant is entitled based on a prior reopening of his claim would not constitute a petition to reopen under § 23-4-16. Thus, the ALJ was plainly wrong in evaluating the claimant's PPD request under § 23-4-16(a) (2).

Accordingly, the claimant's PPD request should be evaluated under the applicable portions of § 23-4-22. As set forth in Hardy, the largest portion of § 23-4-22 applies only to cases that were closed more than five years prior to the effective date in 1993. The only portion of § 23-4-22 that is applicable is the final sentence which states: "In every claim closed after the effective date of this section, the commission shall give notice to the parties of the claimant's right to a permanent partial disability evaluation." W.Va. Code § 23-4-22 (2005 Replacement Volume)

Here, it can hardly be said that the claimant's claim was closed by final order on October 25, 2001. Since then, the claimant's claim has been reopened in the following non-exclusive ways: addition of the claimant's diagnosis of disturbance of salivary secretions per ALJ Decision of January 6, 2009 which was based on the claimant's Diagnosis Update form of November 16, 2006; 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 form; the 6% permanent partial psychiatric disability award for depression issued in June 2006,

and the 8% PPD award for neurogenic bladder and surgical skin scarring issued July 21, 2010 (which the ALJ failed to mention in his Findings of Fact but which is listed in the Record Considered). (See Appendix Exhibits I-H, I-N, I-L, I-M). As set forth in Syllabus Point 5 of Bowers v. West Virginia Office of the Insurance Commissioner, 686 S.E.2d 49 (W.Va. 2009), citing Bowman v. Workmen's Compensation Commissioner, 148 S.E.2d 708 (W.Va. 1966)

A workmen's compensation claim must be considered in its entirety and cannot be regarded as divisible in the sense of being barred 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.

Bowers, 686 S.E.2d at 50.

Furthermore, and probably because her claim has not been closed, the Claims Administrator has not given any notice to the claimant of her right to a permanent partial disability evaluation with respect to her compensable dental condition as is required by § 23-4-22.

Assuming, *arguendo*, that the claimant's request for a permanent partial disability is a reopening which must be evaluated under § 23-4-16, the ALJ was plainly wrong in concluding that the claimant's request was outside the five year statute of limitations from the claimant's initial award on October 25, 2001. Based on the claimant's initial PPD award of 32% granted per the claims Administrators' Order of October 25, 2001, the ALJ found that the claimant is time-barred for a PPD evaluation. In light of Bowers, the claimant argues that the ALJ's finding is error. In footnote 6 of Bowers the Court stated in pertinent part:

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 tow requests maybe filed.” However, such time limits only apply 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 many be justified, providing 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.” (emphasis added)); Syl. Pt. 1, Craft v. State Comp. Dir., 149 W.Va. 28, 138 Se.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, and, 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. Bowers v. W.Va. Office of Insurance Commissioner, 686 S.E.2d 49, 55 (W.Va. 2009)

In Bowers the Court further stated that:

Applying these holding to the facts of the two cases before us, we conclude that the decisions to deny the claimant’s request to add a diagnosis of depression were plainly wrong. See Syl. Pt. 5, Bragg v. State Workmen’s Comp. Comm’r, 152 W.Va. 706, 166 S.E.2d 162. Pursuant to W.Va. Code § 23-4-16 (a) (2), requests to modify, change, or reopen an existing claim “must be made within five years of the date of the initial award.” Here, both Mr. Bowers and Mr. Dotson met this threshold requirement. Mr. Bowers requested the addition of a depression diagnosis o May 24, 2006, which date was within five years of his initial 34% permanent partial disability award, which was granted on November 18, 2005, and the appeal of which was dismissed at Mr. Bowers’s request. Likewise, Mr. Dotson requested the addition of a depression diagnosis on February 1, 2006, which date was within five years of his initial PPD award, which was granted on February 25, 2003,

and ultimately affirmed, as modified by the OOJ, by the Board of Review's order entered December 29, 2004. CF, Syl. Pt. 2, in part, Pugh v. Workers' Comp. Comm'r, 188 W. Va. 414, 424, S.E.2d 759 (1992) (holding that statutory time a limit set forth in W.Va. Code § 23-4-16 (a) (2) begins to run from "the last payment in the original award or any subsequent increase thereto"). Therefore, both claimants have met the temporal requirements for requesting a modification of their underlying claims.
Bowers, 686 S.E.2d at 57.

Thus, in Bowers, the Supreme Court's reliance on the application of Pugh and Craft illuminates two factors that must be considered in determining whether a claim has been "previously closed by a final order of the director" —1) whether there has been a subsequent increase to the original permanent partial disability award and 2) whether the original award has been closed pursuant to subsequent litigation.

Accordingly, the claimant identifies the Claims Administrator's orders dated June 29, 2006, granting an additional 6% permanent partial disability award for psychiatric disability, and July 21, 2010, granting an additional 8% PPD for neurogenic bladder and surgical skin scarring, as relevant documents. (Appendix Exhibits I-L, I & M) The claimant argues pursuant to Bowers, Pugh, and Craft that the Claims Administrator's Orders dated June 29, 2006, granting an additional 6% PPD award, and July 21, 2010, granting an additional 8% PPD establish that there has been a subsequent increase in her permanent partial disability award and that her November 2006 request to add Xerostomia as a compensable condition was made well within the 5 years of her said subsequent PPD increases. See Pugh, Syllabus pt. 2. Furthermore, these increases in her PPD award establish that the 32% PPD award granted in October of 2001 was not a final order closing her claim. See Craft, Syllabus pt. 1.

The claimant also identifies as a relevant document the Decision of Administrative Law Judge dated July 22, 2002. (Appendix Exhibit I-F) The claimant filed a protest to the Order of

October 25, 2001 granting a 32% permanent partial orthopedic award and submitted evidence in support of her protest. Per the aforementioned Decision, the Office of Judges affirmed the Claims Administrator's Order. Accordingly, pursuant to Bowers, Pugh and Craft the claimant argues, in the alternative and excluding consideration of her subsequent PPD awards in 2006 and 2010, that her claim was not closed for PPD by final order until July 22, 2002. Thus, again, the claimant's November, 2006 request to add Xerostomia should be considered timely as well as the PPD request to which the claimant became entitled with the addition of this diagnosis.

It is further argued that the Claims Administrator below has wrongfully characterized the claimant's request for a permanent partial disability evaluation as a reopening petition under § 23-4-16 in an attempt to "undo" prior litigation. The ALJ and Board of Review were plainly wrong and exceeded their authority in affirming this attempt. It can certainly be argued that the Decision of Administrative dated February 17, 2005 and the resulting Commission's Order of December 13, 2006 constituted a de facto approval of the claimant's Xerostomia (dry mouth) as a compensable diagnosis. Per the February 17, 2005 Decision of Administrative Law Judge the ALJ ruled that "The medicines that the claimant is taking to treat the November 21, 1995 compensable injury, which are authorized by the commission, is responsible for the claimant's accelerated tooth decay." See Decision of Administrative Law Judge, February 17, 2005 at 4 attached as Appendix Exhibit I-D). The resulting Commission's Order dated December 13, 2006 stated: "This shall serve as an extension for dental implant procedure and for ongoing dental care due to Xerostomia from medication which causes decay." (See Appendix Exhibit I-O).

Assuming *arguendo*, that the ALJ's 2005 Decision did not constitute approval of the claimant's Xerostomia as a compensable diagnosis, it is important to note that the Claims

Administrator's Order dated February 8, 2008 which denied the addition of diagnosis of disturbance of salivary secretions (Xerostomia), as incomprehensible as that may be given the prior litigation history, did so only on a medical causation basis. The February 8, 2008 Order did not find that the claimant's November 16, 2006 request to add Xerostomia as a compensable diagnosis was time-barred by § 23-4-16. Moreover, the Decision of Administrative Law Judge dated January 6, 2009, reversed the Commission's Order dated February 8, 2008 and added Xerostomia as well as avascular necrosis of the hip as compensable conditions based on its review of medical causation evidence. There was no evidence or argument presented by the employer or Insurance Commissioner to the ALJ that the addition of this diagnosis was time barred under § 23-4-16 and the ALJ did not rule that it was time barred. (See Decision of Administrative Law Judge dated January 6, 2009, attached as Appendix Exhibit I-H). Per Order of the Board of Review dated August 6, 2009, attached as Appendix Exhibit I-I, the Board affirmed the ALJ's Decision adding Xerostomia as a compensable diagnosis. Again, there was no argument or finding that the addition of this diagnosis was time barred by § 23-4-16.

The claimant's subject request for a permanent partial disability evaluation is simply a request that he be evaluated for a medical condition that was approved by prior reopening litigation. The claimant's Xerostomia has not been time-barred under § 23-4-16. The claimant is entitled to an evaluation pursuant to § 23-4-22.

VI. CONCLUSION

For the above stated reasons the appellant, Cynthia Lewis, respectfully requests that the Decision of Administrative Law Judge dated March 16, 2011 be reversed with directions to grant a permanent partial disability evaluation.



J. Marty Mazezka, Esq. WV 4572
Frankovitch, Anetakis, Colantonio & Simon
21 Twelfth Street
United Bank Building, Sixth Floor
Wheeling, WV 26003
(304) 233-1212
Counsel for Petitioner

CERTIFICATE OF SERVICE

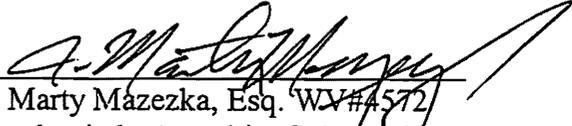
I hereby certify that on December 13, 2011, I served the within *Response to Petition for Appeal of Cynthia Lewis*, by depositing a true and exact copy thereof in the United States Mail, Postage prepaid, in an envelope addressed to the following:

Rita Hedrick-Helmick, Chairman
Workers' Compensation Board of Review
PO Box 2628
Charleston, WV 25329

Jack M. Rife
WV Claims Defense Division
P.O. Box 4318
Charleston, WV 25364-4318

Trinity Medical Center West, Inc.
4000 Johnson Road F11
Steubenville, OH 43952

Sedgwick CMS
PO Box 14490
Lexington, KY 40152-4490


J. Marty Mazezka, Esq. WV#4572
Frankovitch, Anetakis, Colantonio & Simon
21 Twelfth Street
United Bank Building, 6th Floor
Wheeling, WV 26003
(304) 233-1212
Counsel for Appellant