

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

INSURANCE COMMISSIONER OF WV
IN ITS CAPACITY AS ASMINISTRATOR OF THE OLD FUND,
PETITIONER,

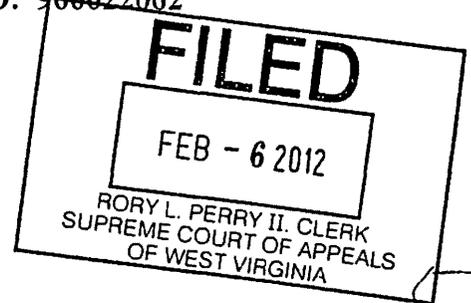
V.

CYNTHIA S. LEWIS
RESPONDENT,

AND

TRINITY MEDICAL CENTER WEST, INC.
EMPLOYER.

SUPREME COURT NO: 11-1689
BOR APPEAL NO: 2045919
CLAIM NO: 960022062



RESPONSE OF CYNTHIA S. LEWIS
TO PETITION FOR APPEAL OF THE
INSURANCE COMMISSIONER OF WV

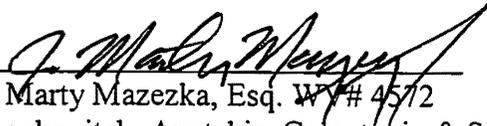

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I. STATEMENT OF THE CASE

The Insurance Commissioner petitioned this Honorable Court for a review of the Workers' Compensation Board of Review order of November 14, 2011. The Board of Review affirmed the decision of Administrative Law Judge April 14, 2011, which reversed the Claims Administrator order dated January 25, 2010 and added carpal syndrome as a compensable diagnosis and held that the claimant is only entitled to medical treatment related to this condition. The claimant responds to the Insurance Commissioner's Petition for Appeal and asserts that the Board of Review did not err in affirming the ALJ's Decision adding carpal tunnel as a compensable diagnosis and that the Insurance Commissioner's Petition for Appeal must be denied.

II. STATEMENT OF THE FACTS

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. In order to become mobile the claimant must use a walker, electric scooter, or wheelchair. (Respondent's Exhibit I-A). 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, 3001.

Subsequently, the claimant developed numerous medical conditions associated with her severe lumbar injury and treatment thereof. By Diagnosis Update form completed on April 16,

2008, Dr. John J. Moossy, the claimant's treating neurosurgeon, requested that the diagnosis of carpal tunnel syndrome –354.0, be added to the claimant's claim. Doctor Moossy explained on the Diagnosis Update form that the claimant's carpal tunnel was the result of using her walker which put pressure on her nerves. Per medical report dated July 30, 2008, Dr. Moossy stated:

She suffers from post-laminectomy syndrome which we are currently treating with her intrathecal opioid pump. She has developed mood changes consistent with depression. She also has developed Xerostomia from the persistent use of her medications. The chronic use of steroids to treat her condition has led to degeneration of her hip. This in turn has led to the diagnosis of avascular necrosis, which will require further surgical treatment. As a result of her poor recovery from surgery she has also developed a leg length discrepancy, neurogenic bladder and skin changes/scarring. Most recently her treatment extends to spondylolysis and stenosis, all resulting from her initial injury of the spine causing further deterioration also requiring surgery to prevent worsening of her instability. Lastly she has developed carpal tunnel syndrome from the use of her walker as she required an assisted device while her condition continued to progress. (See Respondent's Exhibit II-A).

By report dated July 25, 2007, Dr. Moossy stated: "We also gave her a prescription for a wheelchair. She is complaining of new upper extremity numbness and suggested an EMG and nerve conduction study. Since she is using a walker most of the time, she may be developing either carpal tunnel or Guyon's canal problems as a consequence of that overuse phenomenon." (Respondent's Exhibit II-B). An EMG conducted on December 31, 2007, revealed "carpal tunnel syndrome median nerve neuropathy, bilateral, more involved on the left". (See Respondent's Exhibit II-C).

However, it was not until almost two years later, on January 25, 2010, that the Claims Administrator took action on the claimant's diagnosis update request. On this date, the Claims Administrator rejected the request to add carpal tunnel syndrome as a compensable diagnosis on

the grounds that the request was not made within five years of the date of the initial permanent partial disability award. The claimant filed a timely protest to the Claims Administrator's Order dated January 25, 2010.

For the purpose of this response it is 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 diagnoses. Per PPD Reopening notice dated July 16, 2004, the Commission stated that this claim will be reopened and that the claimant would be referred for an orthopedic and psychiatric IME exam. (Respondent's Exhibit I-B). Per Order dated June 29, 2006, the Claims Administrator granted the claimant a 6% PPD award pursuant to the psychiatric report of Dr. Ryan Finkenbine. (Respondent's Exhibit I-C). Per Order dated July 21, 2010 the claimant was awarded an 8% PPD based on the medical report of Dr. Judith Brown dated August 31, 2004, for the diagnoses of neurogenic bladder and surgical skin scarring. (Respondent's Exhibit I-D). In addition, it is relevant that per Claims Administrator's Order dated December 6, 2006, the claimant was granted authorization for a decompressive Laminectomy L2-L5 with screw fixation and a change of her pump catheter. (Respondent's Exhibit I-E). This authorized surgery was conducted on May 1, 2007. The Claimant appeals Per Decision of Administrative Law Judge dated April 14, 2011, which reversed the Claims Administrator's Order dated January 25, 2010, denying the addition of carpal tunnel syndrome and directed that said condition be approved as a covered diagnosis in this claim for treatment purposes only. The ALJ also ruled that the claimant was time barred from requesting a permanent partial disability evaluation for her carpal tunnel pursuant to West Virginia Code § 23-4-16 (a)(2). The Board of Review affirmed the Decision of Administrative Law Judge.

III. ERROR ALLEGED BY PETITIONER

WHETHER THE BOARD OF REVIEW ERRED IN AFFIRMING THE ADMINISTRATIVE LAW JUDGE DECISION WHICH REVERSED THE CLAIMS ADMINISTRATOR'S ORDER AND RULED THAT CARPAL TUNNEL SYNDROME BE ADDED AS A COMPENSABLE DIAGNOSIS.

IV. ARGUMENT AND POINTS OF AUTHORITY

The Board of Review did not err in affirming the Decision of Administrative Law Judge, adding carpal tunnel syndrome as a compensable diagnosis. The claimant argues that this claim has not been closed by a final order for either permanent partial disability or medical treatment. Accordingly, the Insurance Commissioner's Petition For Appeal should be denied.

In Baker v. State Workman's Compensation Commission, 263 S.E.2d 883 (W.Va. 1980), a claimant requested a permanent partial disability evaluation after more than three years had passed from 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 claimant's 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.

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 4, 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. (See Respondent's Exhibits I-F, I-G, I-C, and I-D, respectively). 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 W.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.

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

Based on the claimant's initial PPD award of 32% granted per the Claims Administrator's Order of October 25, 2001, the Insurance Commission argues found that the claimant is time-barred for adding an injury related diagnosis. In light of Bowers, the claimant argues that the Insurance Commission's position lacks merit. 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 two 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 (1991) (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, 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 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’s 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 holdings 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 on 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 OJ, by the Board of

Review's order entered December 29, 2004. CF, Syl. Pt. 2, in part, Pugh v. Workers' Compl. Comm'r, 188 W. Va. 414, 424, S.E.2d 759 (1992) (holding that statutory time 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 that a factor that must be considered in determining whether a claim has been "previously closed by a final order of the director", is whether there has been a subsequent increase to the original permanent partial disability award.

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. In Bowers this court held in Syllabus point 5, citing Bowman v. Workmen's Compensation Commissioner, 148 S.E.2d 708 (W.Va. 1966), that:

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 as of a different character or one affecting a different part of the claimant's body. Bowers, 686 S.E. 2d at 50.

The claimant argues pursuant to Bowers, Pugh, and Craft that the Claims Administrator's Order 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 PPD increases. See Pugh, Syllabus pt. 2 Furthermore, the June 29, 2006 and July 21, 2010 increases in her PPD award establishes 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 Claims Administrator's Order dated December 6, 2006, which authorized a decompressive Laminectomy L2-L5 with screw fixation and a change of her pump catheter.¹ (See Respondent's Exhibit I-E.). Based on the existence of this document the claimant argues that the request to add a diagnosis to a claim cannot be refused on the grounds that it was filed more than five years from the date of the initial PPD award under § 23-16 (a)(2) where to do so would be to deprive the claimant of the medical treatment statute of limitations of five years from the date of the last significant performed treatment under § 23-4-16 (a)(4).²

Here based on her authorized December, 2006 low back surgery, the claimant's statute of limitations to obtain authorization for medical treatment would not expire until December 2011 under 23-4-16 (a) (4). It is the Insurance Commission's apparent argument that a diagnosis update request can only be reviewed under the permanent partial disability provisions of 23-4-16 (a)(2) and not the medical treatment provisions of § 23-4-16 (a)(4). Thus, the Insurance Commissioner argues that the claimant can be deprived of medical treatment for her injury related carpal tunnel syndrome, even though she is well within her statute of limitations to obtain authorization for said

¹ This surgery was conducted on May 1, 2007. Moreover, this was not the claimant's last significant authorized treatment.

² W.Va. Code §23-4-4-16 (a) (4) states in its entirety:

With the exception of the items set forth in subsection (d), section three [§ 23-4-3] of this article, in any claim in which medical or any type of rehabilitation service has not been rendered or durable medical goods or other supplies have not been received for a period of five years, no request for additional medical or any type of rehabilitation benefits shall be granted nor shall any medical or any type of rehabilitation benefits or any type of goods or supplies be paid for by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, if they were provide without a prior request. For the exclusive purposes of this subdivision, medical services and rehabilitation services shall not include any encounter in which significant treatment was not performed.

W.Va. Code § 23-4-16 (a) (4) (2005 Rep. Vol.).

treatment, because of its allegation that the claimant did not file her diagnosis update timely under 23-4-12 (a)(2). The claimant argues that a diagnosis update request may be made for numerous purposes, including to obtain medical treatment.³ W.Va. Code 23-4-16 (a) provides in pertinent part that: “...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...”. Clearly, subdivision 23-4-16 (a)(4) is a “following subdivision” and one by which a claimant may seek such modification, change or reopening. Thus, to categorize a diagnosis update request solely as a mechanism governed by 23-4-12 (a)(2) is not supported by the plain language of 23-4-16. Moreover, such a position breeches the concern raised in Syllabus pt. 5 in Bowers that a claim must be considered in its entirety and cannot be regarded as divisible in the sense of being barred.

V. CONCLUSION

For the above stated reasons the respondent, Cynthia Lewis, prays that the Insurance Commission’s Petition For Appeal be denied.



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³For example, in a claim involving a situation where a claimant dies from infection related to an authorized low back surgery which is conducted more than five years past the initial permanent partial disability award, it would be the apparent position of the Insurance Commission that the widow would have no standing to file a claim for dependents’ benefits because the diagnosis associated with “infection” had not been added to the claim as a compensable diagnosis within the time required by § 23-4-12 (a) (2).

CERTIFICATE OF SERVICE

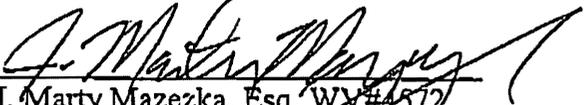
I hereby certify that on January 31, 2012, I served the within *Motion on Behalf of Respondent, Cynthia S. Lewis, to Accept Filing of Brief in Response to Petition For Appeal, Response to Petition for Appeal and Motion of Cynthia Lewis, . and Respondent's Appendix of Exhibits* by depositing a true and exact copy thereof in the United States Mail, Postage prepaid, in an envelope addressed to the following:

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