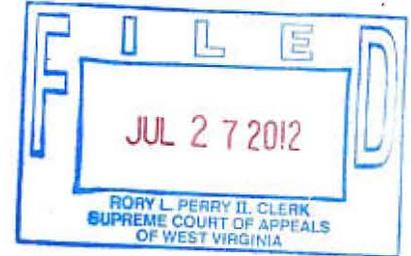


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Cynthia S. Lewis
Petitioner

vs.) No. 11-1689



West Virginia Office Insurance Commission,
Respondent

AND

West Virginia Office of Insurance Commission,
Petitioner

vs.) No. 11-1722

Cynthia S. Lewis,
Respondent

SUPPLEMENTAL BRIEF ON BEHALF
OF CLAIMANT, CYNTHIA S. LEWIS

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INTRODUCTION

Pursuant to the Order of the West Virginia Supreme Court of Appeals entered on June 19, 2012, the Court Ordered that Appeal Nos. 11-1689 and 11-1722 be consolidated for the purposes of supplemental briefing, argument and decision. The Court further Ordered that the parties file supplemental briefs addressing the following:

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

The Claimant, Cynthia Lewis, respectfully submits her following response:

I. WHAT CONSTITUTES AN INITIAL AWARD?

The 1993 amendment to, W. Va. Code § 23-4-16(a) stated with respect to indemnity benefits that:

The power and jurisdiction of the commissioner over each case shall be continuing and he may from time to time after due notice to the employer, make such modifications or changes with respect to former findings or orders as may be justified: Provided, that no further award may be made in fatal cases arising after the seventh day of March, one thousand nine hundred twenty-nine, except within two years after the death of the employee, or in case of non fatal injuries, on and after the seventh day of March, one thousand nine hundred twenty-nine except within five years after payments for temporary disability shall have ceased or not 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: Provided, however, that no such modification or change may be made in any case in which no award has been made, except within five years after the date of injury . . .

W. Va. Code § 23-4-16a) (1994 Replacement Volume).

In 1995 the West Virginia Legislature amended § 23-4-16, essentially rewriting the statute.

It provided with respect to the modification of indemnity benefits the following in pertinent part:

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

(1) Except as provided in section twenty-two [§ 23-4-22] of this article, in any claim which was closed without the entry of an order regarding the degree, if any, of permanent disability that a claimant has suffered, or in any case in which no award has been made, any such request must be made within five years of the closure. During that time period, only two such requests may be filed.

(2) Except as stated below, in any claim in which an award of permanent disability was made, any such request must be made within five years of the date of the initial award. During that time period, only two such requests may be filed. With regard to those occupational diseases, including occupational pneumoconiosis, which are medically recognized as progressive in nature, if any such request is granted by the division, then a new five-year period shall begin upon the date of the subsequent award. With the advice of the health care advisory panel, the commissioner and the compensation programs performance council shall by rule designate those progressive diseases which are customarily the subject of claims.

(b) In any claim in which an injured employee shall make application for a further period of temporary total disability, if such application be in writing and filed within the applicable time limit stated above, then the division shall pass upon the request within thirty days of the receipt of the request. If the decision is to grant the request, then the order shall provide for the receipt of temporary total disability benefits. In 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 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 further examinations as may be necessary.

W. Va. Code § 23-4-16 (1997 Supplement)

It is argued that the structure of the statute as it existed in 1994 is more linear. Simply stated a claim could be modified within five years from the payment of the last temporary total disability check or five years from the date of last payment of the original PPD award or any subsequent increase thereto in any permanent disability case.

The structure of the 1995 amendment appears to be somewhat less linear. In order to set forth her argument with respect to the 1995 amendment the claimant suggests that it is necessary to clarify certain language contained within the applicable portions of the statute. First, it is argued that the language in 23-4-16(a)(1) stating "Except as provided in section twenty-two [§ 23-4-22] of this article" stands for two propositions. First, that those claims which were closed on a no lost time basis more than five years from the effective date of § 23-4-22 (April 8, 1993) are not subject to reopening under the 1995 amendment.¹ Second, that this statute does not abrogate the Commissioner's duty to conduct a permanent partial disability evaluation and to give notice to the claimant of her right to a PPD evaluation.

¹ W. Va. Code § 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 to still be open or the subject for an evaluation of the claimant for permanent disability merely because an evaluation has not previously been conducted and a decision on permanent disability has not been made: Provided, That is a request for an evaluation was made in a claim prior to the twenty-ninth day of March, one 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).

Second, it is argued that the language in 23-4-16(a)(2) stating "Except as stated below" modifies the remainder of the paragraph contained within (a)(2) and refers to those occupational diseases that have been recognized as progressive by the commissioner and compensation programs performance council.² Thus, under § 23-4-16(a)(2) a claim must be reopened within 5 years of an "initial" permanent partial disability award except for progressive diseases which are subject to a new five year period in which to reopen beginning upon the date of the subsequent award.

Third, as previously cited herein, § 23-4-16(b) states in pertinent part:

...In 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 above, ... and, if the division determines that a 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)

The claimant argues that the language "as stated above" refers to both sub-section (a)(1) and (a)(2). Consistent with this position and with respect to permanent total disability applications, W. Va. Code R. § 85-5-3.3 provides: "a claim will not be re-opened for PTD consideration unless the application has been filed with five years of the date of closure of the claim, or within five (5) years of the date of the initial PPD, whichever is applicable as required by West Virginia Code § 23-4-16." Given that 23-4-16(b) provides for the conjunctive "or" between application for permanent partial disability benefits or permanent total disability benefits, the claimant argues that modification requests effecting permanent partial disability would also be subject to either the 5 years from date of closure in sub-section (a)(1) or 5 years from an initial permanent partial disability award in (a)(2).

² It is the claimant's position as will be set forth later herein, that the commissioner or the performance council, has never issued a rule designating those occupational diseases recognized as progressive in nature.

The claimant argues that she meets the criteria for reopening under (a)(1) and (a)(2). Assuming *arguendo*, that the Claims Administrator's Orders dated June 29, 2006, granting a 6% psychiatric disability for psychiatric disability and July 21, 2010, granting an 8% PPD award for neurogenic bladder and surgical skin scarring, do not constitute reopening of the claim under (a)(2), the claimant meets the criteria under (a)(1). By operation of West Virginia Code § 23-5-1,³ the Claims Administrator's Order of October 25, 2001, granting a 32% PPD award for the claimant's low back condition did not become "final" due to the claimant's protest and subsequent Decision of Administrative Law Judge dated July 22, 2002, affirming the award. On November 16, 2006, the claimant filed a diagnosis update form requesting that the claimant's condition of Xerostomia be added to the claim as a compensable diagnosis. The Claims Administrator did not take any action until February 8, 2008 at which time the request to add Xerostomia was reversed. Per Decision of Administrative Law Judge January 6, 2009, the ALJ reversed the Claims Administrator's Order and ruled Xerostomia as a compensable condition. By letter dated January 19, 2009, the claimant requested a permanent partial disability evaluation based on the addition of Xerostomia.

Thus, the claimant's claim was closed without entry of an order regarding the degree of permanent partial disability that the claimant suffered due to her Xerostomia. Furthermore, the claimant's request to add Xerostomia was made prior to closure by final Order of her claim. Unfortunately, due to the Claims Administrator's delay in ruling upon the claimant's request and

³ W. Va. Code § 23-5-1 provides in pertinent part:

(b) Except with regard to interlocutory matters and those matters set forth in subsection (d) of this section, 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 commission, the successor to the commission, other private insurance carriers and self-insured employers shall give notice, in writing, to the employer, employee, claimant or dependant as the case may be, of its action. The notice shall state the time allowed for filing an objection to the finding. The action of the commission, the successor to the commission, other private insurance carriers and self-insured employers is final unless the employer, employee, claimant or dependant shall, within thirty days after the receipt of the notice, object in writing, to the finding. Unless an objection is filed with the thirty-day period, the finding or action is final...

W. Va. Code § 23-5-1 (2005 Replacement Volume)

the further delay of litigation, the claimant was not in a position to request a permanent partial disability evaluation for her Xerostomia until the ALJ's Decision of January 6, 2009. In this regard the claimant argues that her right to a PPD evaluation "vested" upon her application of November 16, 2006 to add Xerostomia to her claim in light of the ALJ Decision which ultimately approved the condition.

The claimant also meets the criteria under (a)(2). It is argued that the language in (a)(1) clarifies the language in (a)(2). Sub-section (a)(1) states in pertinent part: "... in any claim which was closed without the entry of an order regarding the degree, if any, of permanent disability that a claimant has suffered, or in any case in which no award has been made, any such request must be made within five years of closure...." W. Va. Code § 23-4-16 (1997 Supplement, emphasis provided). Similarly, (a)(2) states in pertinent part: "... in any claim in which an award of permanent disability was made, any such request must be made within five years of the date of the initial award...". W. Va. Code § 23-4-16 (1997 Supplement, emphasis provided).

The language emphasized above is all the more relevant because of the Legislature's removal of the term "original award" from the 1993 statute. By removing the term "original" from the 1993 statute the legislature intended to remove the linear extension of benefits that sprang from the original award, including the extension of the reopening period resulting from the award of temporary disability benefits. It also intended to shift the basis of reopening from the receipt of award checks to the granting of an award, specifically an award of permanent partial disability. Thus, it was the intent of the legislature to base the rights and limitations under (a)(1) and (a)(2) not on the original award of permanent partial disability but on an award of permanent partial disability. Any ambiguity which may exist with respect to the interpretation of the term "an award", is resolved by the legislature's intent in omitting "original award" from the 1995 amendment. Thus,

under both (a)(1) and (a)(2) “an award” intended to include subsequent awards granted or not granted for additional components of a claim.

This intent is further evinced in the legislature’s use of the term “initial” award in the 1995 amendment. The term “initial” has meaning with respect to awarding PPD benefits for additional components of a claim because it connotes the beginning of that separate process in the claim. While the term “initial award” fits the concept of the beginning of the new process, the term “original” clearly does not. Simply put “initial” means a beginning; “original” means the beginning.⁴ The legislative would not have changed the language of the statute from “original” to “initial” had it intended the five year reopening period to run from the date of the original PPD award.

It was not the intent of the legislature to limit claims to essentially five years. Nor was it the intent of the legislature to allow insurance carriers to manipulate such a brief time limit by scheduling premature evaluations or in denying diagnosis update requests thereby throwing what has now become the keystone issue into litigation in the hopes of delaying the outcome of the PPD issue past five years. For instance, in this case the claimant submitted her request to add avascular necrosis to this claim in November, 2006. Her request was denied because the claimant’s treating physician provided the narrative diagnosis of avascular necrosis but put down the wrong diagnosis code number. The Claims Administrator only ruled on the diagnosis code number and not the narrative diagnosis. This caused extensive litigation and the diagnosis of avascular necrosis was not approved until this Court mandated that it be approved per Order entered on February 24, 2011.

Moreover, in cases involving multiple injuries there would be even more opportunity for manipulation. For instance, in a claim involving a minor hand sprain and a severe lumbar herniated

⁴ The Oxford English Dictionary, Second Edition defines “original” as: “Adj. Of or pertaining to the origin, beginning, or earliest stage of something; that belonged at the beginning to the person or thing in question; that existed at first, or has existed from the first.” In contrast, it defines “initial” as “Adj. Of or pertaining to a beginning; existing at, or constituting, the beginning of some action or process; existing at the outset; primary; sometimes = elementary, rudimentary.”

disc, the claims administrator could order an early PPD evaluation and issue an early 0% PPD order on the fast healing hand sprain. If the “original” PPD award is considered to be the “initial” award, then the Order issued on the hand sprain governs the time limitations upon the much more severe lumbar condition. If the insurance carrier further manipulates the claim by denying or delaying the diagnosis update for the lumbar herniated disc, and/or would deny or delay treatment such as surgery, a claimant could very well lose his remedy of permanent partial disability award for his severe lumbar condition. It is believed that the legislature did not have such intent.

For the above stated reasons the claimant argues that an “initial” award under § 23-4-16 is an initial permanent partial disability award granted for a component or diagnosis that has been added to the claim subsequent to the original PPD award. This position is consistent not only with the intent of the legislature but our case law. As stated 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 70 (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.

Accordingly, as the claimant’s claim has been reopened pursuant to initial permanent partial disability awards granted for the claimant’s psychiatric condition in 2006 and for the claimant’s neurogenic and surgical skin scarring in 2010, the claimant argues that the analysis under (a)(2) applies over the analysis under (a)(1) and that her claim remains open pursuant to the initial permanent partial disability awards granted for the additional conditions of her claim.

II. WHETHER A CLAIMANT MUST REOPEN HIS OR HER CLAIM IN ORDER TO BE GIVEN A PERMANENT PARTIAL DISABILITY AWARD

The claimant argues that there is a difference in providing information or an application that would entitle the claimant to a permanent partial disability award and obtaining the action needed i.e. a medical examination, to effectuate the permanent partial disability award. In a case in which the medical condition for which the claimant seeks an evaluation has previously been approved, or in which the claimant has submitted evidence of a progression of his condition, it is argued that a request for permanent partial disability evaluation need not be made to effectuate the award. As set forth in the claimant's Petition Brief, Baker and Hardy support the proposition that the Commissioner has a duty to proceed with a permanent partial disability evaluation and that a request for a permanent partial disability evaluation does not constitute reopening. Moreover, W. Va. Code § 23-4-22 provides that: "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) Also, § 23-4-16 (a)(1) excepts the provisions of § 23-4-22 from the requirement to reopen within five years of closure if the commissioner has not provided the claimant with notice of his right to a permanent partial disability evaluation. See W. Va. Code § 23-4-16(a)(1) (1997 Supplement). Thus, the claimant argues that if a Diagnosis Update has been previously approved or if the claim reopening application has been granted for a progression of disability, that this constitutes the reopening of the claim and that the commissioner has a duty to evaluate the claimant pursuant to the reopening. It is argued that a second reopening need not be made to effectuate the evaluation of the claimant.

III. CAN A CLAIMANT, WHO SUFFERS FROM THE SUBSEQUENT RESIDUAL EFFECTS OF A COMPENSABLE INJURY, SEEK A PERMANENT PARTIAL DISABILITY AWARD ONCE FIVE YEARS HAS ELAPSED SINCE THE INITIAL AWARD?

Assuming that the subsequent residual effects are related to the medical condition for which the claimant was granted a permanent partial disability more than five years prior, § 23-4-16(a)(2) would seem to preclude any additional permanent partial disability award for that component of his injury. However, under the interpretation of "initial award" as set forth herein, his claim may still be subject to reopening for other components of his injury, e.g. additional diagnosis, if they are unrelated to his previously rated medical conditions and if the reopening is made prior to the closure of the claim by final order.

IV. WHICH OCCUPATIONAL DISEASES ARE RECOGNIZED AS PROGRESSIVE IN NATURE AS STATED IN W. VA. CODE § 23-4-16(a)(2)?

The undersigned counsel has reviewed the workers' compensation statutes of the West Virginia Code as well as the Code of State Regulations and could not locate any designation of progressive diseases as required by West Virginia Code § 23-4-16(a)(2). It is believed that no such designation has been made. The claimant argues that the failure to make such a designation violates her right to Due Process as well as the Certain Remedies Clause of the West Virginia Constitution. In this regard it should be recognized that the claimant's claim has been approved for numerous disease processes which may be progressive in nature, specifically, degenerative intervertebral lumbar disc disease, Xerostomia, and avascular necrosis.

**V. CAN A CLOSED CASE BE REOPENED FOR THE
INCLUSION OF AN ADDITIONAL COMPONENT FOR
MEDICAL TREATMENT ONLY, OUTSIDE THE FIVE-YEAR
WINDOW AS DISCUSSED IN W. VA. CODE § 23-4-16(a)(2)?**

The issue of entitlement for medical treatment is totally independent from the issue of reopening for indemnity benefits under 23-4-16(a)(1) (a)(2). For instance, the final closing of a claim for indemnity benefits has no effect on the claimant's entitlement to authorized medical treatment. Pursuant to this Court's interpretation in Lovas v. Consolidation Coal Company, 662 S.E. 2d 645 (W. Va. 2008), § 23-4-16(a)(4) does not require "reopening" as a basis for entitlement for medical treatment.⁵ The traditional inquiries related to entitlement to medical treatment are 1) Is the medical condition for which the claimant is seeking treatment related to the injury? and 2) Is the treatment medically necessary. As long as the claimant has received medical treatment within the last five years, the claimant's request for medical treatment is timely.

As stated in Craft v. State Compensation Director, 138 S.E. 2d 422 (W. Va. 1964): "The time limitations contained in this section (23-4-16) are applicable only to a reopening of a claim for workers' compensation benefits previously closed by a final order of the commissioner." The claimant suggests that the legislature could not have intended for entitlement to medical treatment to be governed by the reopening procedure of (a)(1) or (a)(2). Accordingly, it would be the claimant's position that a case closed for indemnity benefits could not be reopened for the inclusion of an additional component. However, a Diagnosis Update request for the purpose of obtaining medical treatment would be reviewable under § 23-4-16 (a)(4) to determine issues of relatedness and entitlement to medical treatment.

⁵ In Lovas, the West Virginia Supreme Court of Appeals, in striking down the administrative closure of claims after six months of the date of last medical service stated:

The administrative closure accomplished through the regulation inaccurately connotes that the claim has been closed notwithstanding the contrary language of West Virginia Code § 23-4-16 (a)(4). A claim remains open for medical benefits on an unlimited basis until it satisfies the statutory requirements for permanent closure identified in West Virginia Code § 23-4-16 (a)(4).
Lovas, 662 S.E. 2d at 650.

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2012, I served the within *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:

Hon. Rita Hedrick-Helmick, Chairman
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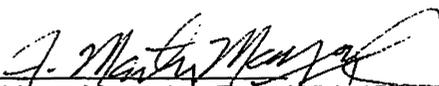
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