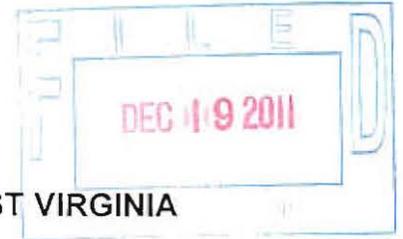


SUPREME COURT NO. ~~11-1689~~



BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

INSURANCE COMMISSIONER )  
 OF WV IN ITS CAPACITY AS )  
 ADMINISTRATOR OF THE OLD FUND, )  
 PETITIONER, )  
 )  
 )  
 )  
 V. )  
 )  
 CYNTHIA S. LEWIS, )  
 )  
 )  
 AND )  
 )  
 )  
 TRINITY MEDICAL CENTER )  
 WEST, INC., )  
 RESPONDENTS. )

BOR Appeal No.: 2045919  
Claim No.: 960022062

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PETITION FOR APPEAL ON BEHALF  
 OF THE OFFICE OF INSURANCE COMMISSIONER

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OFFICE OF INSURANCE  
COMMISSION OLD FUND,

By Counsel,

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December 16, 2011

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**INSURANCE COMMISSIONER OF WV  
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PETITIONER,**

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

**V.**

**CYNTHIA S. LEWIS,  
RESPONDENT,**

**AND**

**TRINITY MEDICAL CENTER WEST, INC.,  
EMPLOYER.**

---

**PETITION FOR APPEAL**

---

**I. PROCEDURAL HISTORY**

This case comes to this Honorable Court on appeal from an order of the Workers' Compensation Board of Review dated November 14, 2011 affirming the decision of the Workers' Compensation Office of Judges dated April 14, 2011. The Office of Judges reversed the Claim Administrator order dated January 25, 2010 and added carpal tunnel syndrome as a compensable condition in this claim and held that the Claimant is entitled to medically necessary treatment in relation to carpal tunnel syndrome. The Office of Judges additionally held that this claim is time-barred for consideration of permanent partial disability benefits for the compensable condition of carpal

tunnel syndrome. The Board of Review order should be reversed in part because the Claimant's request to add an additional compensable condition was time-barred under W.Va. Code §23-4-16(a)(2).

## II. STATEMENT OF FACTS

The Claimant injured her back on November 21, 1995, when she was bent over doing wound care on a patient's leg. The report of occupational injury diagnosed the Claimant as having back pain with an estimated period of disability of less than four (4) days.

Thereafter, the Claimant received her initial award of permanent partial disability benefits by order dated October 25, 2001 and the claim was closed for permanent partial disability benefits.

Nearly twelve and a half (12½) years later, by diagnosis update dated April 16, 2008, the Claimant's treating physician sought to add the secondary diagnosis of carpal tunnel syndrome as a compensable condition in this claim.

By order dated January 25, 2010, the Claim Administrator denied the request to add carpal tunnel syndrome stating that this claim is time-barred for adding additional compensable conditions pursuant to W.Va. Code §23-4-16(a)(2) and the Claimant protested. Thereafter, by decision dated April 14, 2011 the OOJ reversed and ordered that carpal tunnel syndrome be added as a compensable condition and directed that necessary medical benefits be authorized. The OOJ additionally held that this claim is barred for permanent

partial disability benefits arising out of the compensable carpal tunnel syndrome pursuant to W.Va. Code §23-4-16(a)(2).

Administrative Law Judge Armstrong noted that the Claimant's first diagnosis of probable carpal tunnel syndrome was found in Dr. Moossy's treatment record dated June 25, 2007 which is nearly 12 years after the date of injury in this claim. Notwithstanding the substantial period of time having elapsed between the date of injury and the onset of carpal tunnel symptoms, ALJ Armstrong found that the evidence established the causal link between initial occupational injury and the current symptoms of carpal tunnel syndrome. The Commissioner appealed the OOJ decision to the BOR.

By decision dated November 14, 2011 the BOR affirmed the OOJ. The BOR noted that the facts in the instant claim are similar to those considered in Fox v. West Virginia Office of the Insurance Commissioner, Memorandum Decision No. 100806 (July 21, 2011) wherein the initial PPD award was granted on April 14, 2004, an additional diagnosis was added on April 26, 2006 and a request for a PPD evaluation was made on May 13, 2009. In Fox this Court held that the request for the PPD evaluation was not made within the 5 years of the date of the initial award per W.Va. Code §23-4-16(a)(2); as such, the request was time-barred.

The Commissioner does not dispute the similarity of the facts of the instant claim in comparison to the Fox case with respect to the issue of whether any request for a permanent partial disability rating was timely submitted. It is the Commissioner's position that the similarities end when the issue is whether

an additional compensable condition was timely requested. In short, the Commissioner maintains that the additional diagnosis was time-barred and should not have been added as a compensable condition in this claim.

### III. ISSUE PRESENTED

Whether the BOR committed reversible error in its decision of November 14, 2011.

### IV. ARGUMENT

The decision of the BOR should be reversed because the decision contains an improper application of W.Va. Code §23-4-16(a)(2).

#### Standard of Review

W.Va. Code §23-5-15 sets forth the standard of review of an appeal before this Court.

(b) In reviewing a decision of the board of review, the supreme court of appeals shall consider the record provided by the board and give deference to the board's findings, reasoning and conclusions, in accordance with subsections (c) and (d) of this section.

(c) If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or

statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

W.Va. Code §23-5-15.

#### Argument

The Board of Review's decision contains an improper application of W.Va. Code §23-4-16(a)(2) and should be reversed.

"[T]he commission shall disburse the workers' compensation fund to the employees of employers subject to this chapter who have received personal injuries in the course of and resulting from their covered employment . . . ."

W.Va. Code §23-4-1. There are three elements which must be proved by the claimant in order for a claim to be held compensable: (1) a personal injury; (2) received in the course of employment; and (3) which resulted from that employment. Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970). There must be a causal connection between the claimant's injury and the claimant's employment. Emmel v. State Compensation Director, 150 W.Va. 277, 145 S.E.2d 29 (1965); Deverick v. State Compensation Director, 150 W.Va. 145, 144 S.E.2d 498 (1965).

“A claimant in a workmen’s compensation proceeding has the burden of proving his claim.” Staub v. State Workmen’s Compensation Commissioner, 153 W.Va. 337, 168 S.E.2d 730 (1969); Sowder v. State Workmen’s Compensation Commissioner, 155 W.Va. 889, 189 S.E.2d 674 (1972). “Where proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim.” Clark v. State Workers’ Compensation Commissioner, 155 W.Va. 726, 187 S.E.2d 213 (1972).

W.Va. Code §23-4-1g(b) states;

[e]xcept as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers’ compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

Further, that same section sets forth the standard for the evaluation of evidence in subsection (a) which states:

For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party’s interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the

resolution that is most consistent with the claimant's position will be adopted.

**The BOR Erred in Affirming the OOJ Decision Which Added a Compensable Condition Beyond the Time Limitations Set Forth in W.Va. Code §23-4-16(a)(2).**

As noted above, the salient facts are fairly straight-forward. The Claimant received her initial permanent partial disability award by order dated October 25, 2001 and this claim was closed for permanent partial disability. In order to be timely filed any request to add an additional compensable condition in this claim it had to have been made no later than October 25, 2006 (W.Va. Code §23-4-16(a)(2)). The Claimant's request to add carpal tunnel syndrome was made by Diagnosis Update dated April 16, 2008. Clearly, the request to add carpal tunnel syndrome was time-barred per W.Va. Code §23-4-16(a)(2). ALJ Armstrong noted in his decision that the Claimant's treating physician gave an initial diagnosis of carpal tunnel syndrome or Guyon's canal problems in a treatment record dated October 4, 2007. Assuming *arguendo* that October 4, 2007 was a proper date requiring the Claim Administrator to have acted upon a purported request to add the additional diagnosis, the facts still demonstrate that any request at this time was already barred under W.Va. Code §23-4-16(a)(2).

The denial by the Claim Administrator to add carpal tunnel syndrome as a compensable condition is in accord with this Court's decision in Bowers v. W.Va. Office of Insurance Commissioner, 224 W.Va. 398, 686 S.E.2d 49 (2009) wherein it was again held that any request to add a compensable

condition must be made within the five years of the initial award and closure of the claim.

“That is not to say, however, that a claimant’s workers’ compensation claim remains open indefinitely. W. Va. Code § 23-4-16 (a)(2) [ ] 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. [ ] 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.” [ ] [T]hus, 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.”

Footnote 6, Bowers, 686 S.E.2d at 56 (emphasis added).

Based on the very specific language set forth in Bowers, it is clear that W.Va. Code §23-4-16(a)(2) mandates that any request to add a compensable condition must be made within five years of the date of the initial PPD award and the closure of the claim for additional PPD. Under the facts detailed above, it is clear that such a request was not timely made in the instant claim.

The BOR failed to properly apply the law having affirmed the reversible error of the OOJ. Accordingly, the decision of the BOR should be reversed.

## V. CONCLUSION

The Worker’s Compensation Board of Review and the Office of Judges erred as a matter of law due to their having added a compensable condition to

this claim under circumstances where it is time-barred. The Board of Review decision of November 14, 2011 should be reversed.

INSURANCE COMMISSIONER OF WV  
IN ITS CAPACITY AS ADMINISTRATOR  
OF THE OLD FUND  
By counsel,



---

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AND

TRINITY MEDICAL CENTER WEST, INC.,  
EMPLOYER.

CERTIFICATE OF SERVICE

I, Jack M. Rife, Legal Counsel to the Office of Insurance Commissioner Old Fund, do hereby certify that copies of the foregoing "*Petition for Appeal*", "*Motion for Enlargement of Time to file Petition for Appeal*" and "*Commissions Appendix of Documents*" was served upon the parties of record this 16<sup>th</sup> day of December, 2011, by United States Mail, to the following persons properly addressed as follows:

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