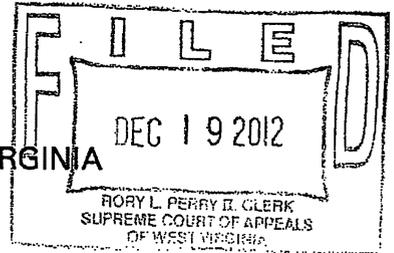


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

GARY E. HAMMONS, ✓

12-1473

Petitioner,

v.

A & R TRANSPORT, INC. ✓

and

WVOC,
West Virginia Office
Respondents.
Insurance Commission

CLAIM NUMBER: 2004030436 ✓
APPEAL NO.: 2046457 ✓

FROM THE WORKERS' COMPENSATION APPEAL BOARD

dated 11/28/12

PETITION FOR APPEAL

George Zivkovich
Counsel for Petitioner,
Gary E. Hammons

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304/865-3434
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POINTS AND AUTHORITIES RELIED UPON

CASES	PAGE NO.
<i>Baker v. State Workers' Compensation Commissioner</i> , 263 S.E.2d 883, 164 W.V. 389 (1980)	5, 12
<i>Bowers v. WVOIC</i> , 224 W.Va. 398, 686 S.E.2d 49 (2009)	15
<i>Bowman v. Workmen's Compensation Commissioner</i> , 150 W.Va. 592, 148 S.E.2d 708 (1966)	14
<i>Hardy v. Richardson</i> , 479 S.E.2d 310, 198 W.V. 11 (1996)	5, 12

STATUTES	PAGE NO.
W. Va. Code §23-4-1g	5
W.Va. Code §23-4-7a(d)	4, 12
W.Va. Code §23-4-7a(f)	4, 11
W.Va. Code §23-4-16	13, 14
W.Va. Code §23-4-22	13, 14

I

KIND OF PROCEEDING AND NATURE OF RULING

By Order dated August 11, 2010, the Claims Administrator barred the claim for further permanent partial disability benefits because the initial award date for permanent partial disability benefits was June 3, 2005, for his leg, and the request for an evaluation for his back was not received until August 9, 2010, which the Claims Administrator stated was beyond five (5) years from June 3, 2005, when the claimant was awarded a permanent partial disability award for his leg. The Petitioner/Appellant (hereinafter referred to as "claimant") filed a timely protest to this Order.

Hearings were held and evidence was introduced. At the close of the evidence, the case was submitted to the Office of Judges for a decision. By Order dated September 27, 2011, the Office of Judges reversed the Claims Administrator's Order of August 11, 2010, and authorized the claim for consideration of permanent partial disability and referred the claimant to an evaluator selected by the Claim Administrator. The employer filed a timely appeal to this Order with the Board of Review. The case was argued and briefed.

By Order dated November 28, 2012, the Board of Review reversed the Office of Judges' Order of September 27, 2011, and reinstated the Claims Administrator's Order of August 11, 2010, denying the request for consideration of additional permanent partial disability benefits.

It is the claimant's contention that the Board of Review's Order of November 28, 2012, denying the claim for consideration of permanent partial disability, should be reversed.

The claimant contends that the Claims Administrator failed to initiate a permanent partial disability examination for the back, which the Claims Administrator was obligated to do by case law and statute.

II

STATEMENT OF FACTS

On January 5, 2004, the claimant sustained a work-related injury to his leg and low back. Unfortunately, the claimant did not mention the low back injury on the initial claim form. By Order dated February 11, 2004, the claim was ruled compensable for 924.10 (contusion of lower leg) and 729.81 (swelling of the limb). The claim was closed for temporary total disability benefits for the leg injury only on April 6, 2004.

The claimant was evaluated on April 28, 2005, and granted a 4% permanent partial disability award for his leg only based on a report from James Dauphin, M.D., which was entered by the Claims Administrator on June 6, 2005.

On October 18, 2005, the claimant came under the care of Dr. Michael Shramowiat. Dr. Shramowiat deemed the claimant temporarily and totally disabled, indicating he injured his low back in this claim of January 5, 2004. Dr. Shramowiat then wrote to the Claims Administrator asking for the following diagnostic codes of 722.10 (disc protrusion at L5-S1), 724.4 (lumbar radiculopathy) and 847.2 (lumbar strain) be added to the claim, which was denied by the Claims Administrator. Dr. Shramowiat also requested that the claim be reopened for temporary total disability benefits from October 18, 2005, and thereafter, for his low back only, and also asked for physical therapy for the low back. The reopening for temporary total disability, the diagnostic code request and the physical therapy request were all tried before the Office of Judges who upheld all of the denials by Orders dated October 16, 2006, and January 30, 2007. This matter was heard by the Board of Review who affirmed the denials by two (2) Orders dated October 15, 2007, as well. The case was then appealed to this Honorable Court.

This Court entered a final Order dated **January 4, 2010**, making the low back a part of the claim and approving the diagnostic codes of 722.10 (disc protrusion at L5-S1), 724.4 (lumbar radiculopathy) and 847.2 (lumbar strain), ordered that temporary total disability benefits be paid from October 18, 2005, through July 25, 2006, and thereafter as could be properly substantiated by medical evidence, and authorized physical therapy for the spine. Subsequently, the Claims Administrator sent the claimant a check dated **February 9, 2010**, paying him temporary total disability benefits from October 18, 2005, through July 25, 2006, for his low back.

The Claims Administrator, on **March 8, 2010**, closed the claim for temporary total disability benefits regarding the low back without a referral for an independent medical evaluation as required by statute and case law, which was protested by the claimant, and litigated before the Office of Judges who affirmed the temporary total disability closure by Order dated June 30, 2011, and is currently on appeal to the Board of Review. The Claims Administrator, after closing the claim for temporary total disability benefits for the low back, failed to send the claimant out for a permanent partial disability evaluation for the low back.

On August 9, 2010, a letter dated April 9, 2010, was faxed to the Claims Administrator asking for the claimant to be evaluated for permanent partial disability for his back only. The letter was mistakenly dated April 9, 2010, but the fax cover sheet was correctly dated August 9, 2010. On August 11, 2010, the Claims Administrator stated the claim was barred for further permanent partial disability benefits because the initial award date for permanent partial disability was dated June 3, 2005, which was for his leg, and the request for an evaluation to the back was more than five (5) years from that date. The Claims Administrator mistakenly treated this request as a request for reopening, when, in fact, it was a request to have an independent medical evaluation for the low back which the Claims Administrator was required to perform by statute and case law.

III

ASSIGNMENT OF ERROR

WHETHER THE BOARD OF REVIEW'S ORDER OF NOVEMBER 28, 2012, SHOULD BE REVERSED?

IV

DISCUSSION OF LAW

The sole issue before this Honorable Court is whether the claimant should be referred for permanent partial disability evaluation to an independent medical evaluator regarding the low back.

Chapter 23-4-7a(f) provides as follows:

(f) Notwithstanding the anticipated period of disability established pursuant to the provisions of subsection (b) of this section, **whenever in any claim temporary total disability continues longer than one hundred twenty days from the date of injury** (or from the date of the last preceding examination and evaluation pursuant to the provisions of this subsection or pursuant to the directions of the commission under other provisions of this chapter), the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, **shall refer the claimant to a physician or physicians of the commission's selection for examination and evaluation** in accordance with the provisions of subsection (d) of this section and the provisions of subsection (e) of this section are fully applicable: Provided, That the requirement of mandatory examinations and evaluations pursuant to the provisions of this subsection shall not apply to any claimant who sustained a brain stem or spinal cord injury with resultant paralysis or an injury which resulted in an amputation necessitating a prosthetic appliance.

W.Va. Code § 23-4-7a(d) provides that when the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, concludes that **an independent medical evaluation is indicated, or that a claimant may be ready for disability**

evaluation in accordance with other provisions of this chapter, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, **shall** refer the claimant to a physician or physicians of its selection for examination and evaluation.

In the case of *Hardy v. Richardson*, 479 S.E.2d 310, 198 W.V. 11 (1996), this Court held that in workers' compensation cases, after compensability has been determined, the Workers' Compensation Commissioner (or in this case a Claims Administrator) must take initiative in further processing the claim and the next step is to evaluate for permanent partial disability and inform the claimant of his or her award.

In *Baker v. State Workers' Compensation Commissioner*, 263 S.E.2d 883, 164 W.V. 389 (1980), this Court held that it is not incumbent upon a workman compensation claimant, whose claim has been held compensable, to initiate the procedure for an evaluation of his permanent partial disability, rather, it is the obligation of the Workers' Compensation Commissioner (or in this case a Claims Administrator) to then take such action as is necessary, including referral for medical treatment, if needed to arrive at a disability award.

W. Va. Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue 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. No issue may 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. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing

workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

V

ARGUMENT

THE BOARD OF REVIEW'S ORDER OF NOVEMBER 28, 2012, SHOULD BE REVERSED.

The Board of Review's Order of November 28, 2012, should be reversed. The evidence in this claim demonstrates that the claimant is entitled to be evaluated for permanent partial disability regarding his low back.

The Office of Judges, in its Order of September 27, 2011, held as follows:

By Order of August 11, 2010, the Claim Administrator denied a reopening of the claim for consideration of permanent partial disability. It was noted that the claim was barred and could not be given this consideration because the initial award for permanent partial disability was June 3, 2005 and any request for additional rating must be received within five years of the initial award. The claimant protested the denial and evidence was submitted by the parties asserting their respective positions.

It is noted that the claim was initially held compensable for contusion of the lower leg and swelling of limb with a date of injury of January 5, 2004. Dr. Shramowiat requested the addition of diagnosis codes 722.10, 847.2, and 724.4 as early as May 18, 2006, which was denied by Claim Administrator's Order of June 23, 2006. This denial was litigated through the Office of Judges' Decision of January 30, 2007, which affirmed the denial. The West Virginia Workers' Compensation Board of Review affirmed the Administrative Law Judge Decision and the West Virginia Supreme Court of Appeals reversed the Board of Review by Order of January 4, 2010. The matter was remanded to the Claim Administrator to enter an Order including the diagnosis codes of 722.10, disc protrusion at L5-S1, 724.4, lumbar radiculopathy, and 847.2, lumbar strain, as well as authorizing physical therapy for spinal stabilization, reopening the claim for temporary total disability benefits from October 18, 2005 through July 25, 2006 and any additional period as established by reliable medical evidence. In response to the Supreme Court mandate, by Order of January 18, 2010, the Claim Administrator held the claim compensable for diagnosis codes 722.10, 724.4, and 847.2 and reopened the claim for temporary total disability benefits.

Although the Claim Administrator processed the instant matter as an application to reopen for further permanent partial disability, counsel for the claimant requested on August 9, 2010 that the claimant be evaluated for permanent partial disability as soon as possible to include the diagnosis codes 722.10, disc protrusion at L5-S1, 724.4, lumbar radiculopathy, and 847.2, lumbar strain. (Counsel for the claimant indicated that this letter was inadvertently dated April 9, 2010 and should have been August 9, 2010). The request herein is not in actuality for a reopening for consideration of additional permanent partial disability but rather a bid for an initial evaluation for compensable components added after lengthy litigation.

The claimant attempted to include the additional components within two years after the injury, however the new diagnoses were not recognized until the West Virginia Supreme Court added them in 2010. W.Va. Code §23-4-7a (f) prescribes an evaluation to determine whether a claimant has reached his maximum degree of medical improvement and what his permanent impairment would be. The provision reads as follows:

Notwithstanding the anticipated period of disability established pursuant to the provisions of subsection (b) of this section, whenever in any claim temporary

total disability continues longer than 120 days from the date of injury (or from the date of the last preceding examination and evaluation pursuant to this subsection or pursuant to the directions of the Commission under other provisions of this chapter), the Commission, successor to the Commission, other private carrier, or self-insured employer, whichever is applicable, shall refer the claimant to a physician or physicians of the Commission's selection for examination and evaluation in accordance with the provisions of subsection (d) of this section and the provisions of subsection (e) of this section are fully applicable. *Provided*, That the requirement of mandatory examinations and evaluations pursuant to the provisions of this subsection shall not apply to any claimant who sustained a brain stem or spinal cord injury with resultant paralysis on injury which resulted in an amputation necessitating a prosthetic appliance.

In the present claim, the claimant received temporary total disability benefits for his back payable, as mandated by the Supreme Court, from October 18, 2005 through July 25, 2006 by check dated February 9, 2010. The claimant was paid beyond the 120 days of temporary total disability for his back components and the Claim Administrator should have referred him to a physician for an evaluation after payment and subsequent closure on March 8, 2010.

The Claim Administrator contends that the claim cannot be reopened as the request was untimely. West Virginia code §23-4-16 limits reopening for further consideration as follows:

- (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 request must be made within five years of the closure. During that time period, only two requests may be filed.
- (2) Except as stated below, in any claim in which an award of permanent disability was made, any request must be made within five years of

the date of the initial award. During that time period, only two 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 commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, a new five-year period begins upon the date of the subsequent award. With the advice of the health care advisory panel, the executive director and the board of managers shall by rule designate those progressive diseases which are customarily the subject of claims.

However, it is not a reopening situation subject to the above-cited statute. Even if §23-4-16 were to apply, the claim was not closed for temporary total disability for the back until March 8, 2010 and the time does not begin to run until the date of the closure order relevant herein. The request for permanent partial disability under §23-4-16 was made within five years from the date the claim was closed for temporary total disability, albeit for the low back only. The proviso regarding five years from the initial award is not applicable because an "initial award" has not been paid for the components added by the West Virginia Supreme Court, with an award of temporary total disability benefits. Counsel for the Old Fund cites *Bowers v. WVOIC*, 224 W.Va. 398, 686 S.E. 2d 49 (2009) and *Fox v. WVOIC*, No. 100806, Claim Number 990071699, (W.Va. Supreme Court, July 21, 2011) (Memorandum Decision) but the factual scenarios are distinguishable from the circumstances presented herein. In *Fox*, the claimant's depression was added as a component by the Office of Judges three years prior to his request for an evaluation. The Court, in *Bowers*, was addressing the disparate treatment of psychiatric claims by Rule 20 which required manifestation within 6 months of an occupational injury. In a footnote, the Court, stated that the time limitations for adding a diagnosis of depression would be controlled by the time limits of other compensable claims under §23-4-16(a)(2) and indicated that the claims of both of the claimants in the *Bowers* decision had been closed. **In the present claim, the Supreme Court found that the claimant was temporarily and totally disabled from October 18, 2005 through July 25, 2006, and possibly thereafter, thereby adding a dimension not present in the afore cited cases.** (emphasis provided) The claimant in the matter at hand

attempted to add components well within five years from the 4% award of permanent partial disability benefits on June 6, 2005. Obviously, Mr. Hammons could not have sought a permanent partial disability evaluation for the back condition before it was an added component and the Supreme Court found impairment from the back condition in granting him a new period of temporary disability.

W.Va. Code Chapter §23-4-22 cited in the prior statute provides:

Notwithstanding any provision of 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 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 if a request for an evaluation was made in a claim prior to the twenty-ninth day of March, one thousand nine hundred sixty-three (**should read 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 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.** [Emphasis added]

The claimant did not receive notice that he had the right to an evaluation following the remand from the West Virginia Supreme Court but nonetheless requested an evaluation within months after the ensuing closure Order. The claim was not ruled compensable for the low back until January 4, 2010, not closed for temporary total disability benefits until March 8, 2010 and the request for the evaluation was timely made pursuant to §§23-4-16 and 23-4-22.

The claimant is entitled to an evaluation of his permanent impairment for his low back and the Claim Administrator should provide the same.

The request that the claimant made on August 9, 2010, to be evaluated for permanent partial disability regarding his low back was not a request to reopen his claim but to receive an evaluation for his low back that is mandated by statute as well as case law and that the Claims Administrator failed to do.

The claimant contends that the Claims Administrator had a duty pursuant to W. Va. Code 23-4-7a(f) to send the claimant out for an evaluation to determine whether the claimant had reached his maximum degree of medical improvement and, if so, what his permanent impairment would be regarding his low back especially when this Court held the claim compensable for 722.10 (disc protrusion at L5-S1), 724.4 (lumbar radiculopathy) and 847.2 (lumbar strain). Those diagnostic codes are evidence of a permanent impairment. Chapter 23-4-7a(f) provides as follows:

Notwithstanding the anticipated period of disability established pursuant to the provisions of subsection (b) of this section, whenever in any claim temporary total disability continues longer than one hundred twenty days from the date of injury (or from the date of the last preceding examination and evaluation pursuant to the provisions of this subsection or pursuant to the directions of the commission under other provisions of this chapter), the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall refer the claimant to a physician or physicians of the commission's selection for examination and evaluation in accordance with the provisions of subsection (d) of this section and the provisions of subsection (e) of this section are fully applicable.

The claimant received temporary total disability benefits for his back only payable from October 18, 2005, through July 25, 2006, by check dated February 9, 2010. Clearly, the claimant had been paid beyond 120 days of temporary totally disability for his back only and, thus, the Claims Administrator should have referred him to a physician for an evaluation upon the payment of that check and the subsequent closure on March 8, 2010, pursuant to the aforesaid statute and also based

upon the diagnostic codes that have been added to the claim. The Claims Administrator failed to perform his statutory duty and, thus, the claimant had to request that it be done.

W.Va. Code § 23-4-7a(d) provides that when the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, concludes that an independent medical evaluation is indicated, or **that a claimant may be ready for disability evaluation** in accordance with other provisions of this chapter, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, **shall** refer the claimant to a physician or physicians of its selection for examination and evaluation.

Not only does Section 23-4-7(d) and (f) mandate the Claims Administrator to conduct the evaluation, but case law does, as well.

Pursuant to the case of *Hardy v. Richardson*, 479 S.E.2d 310, 198 W.Va. 11 (1996), this Court held that in workers' compensation cases, after compensability has been determined, the Workers' Compensation Commissioner, or in this case a Claims Administrator, must take initiative in further processing the claim, and the next step is to evaluate disability and inform the claimant of his or her award. The claim was not ruled compensable for the low back until January 4, 2010. The Claims Administrator failed to not only follow the *Hardy* case but also Chapter 23-4-7a(d) and (f) in sending the claimant out for an evaluation for the low back.

Moreover, in *Baker v. State Workers' Compensation Commissioner*, 263 S.E.2d 883, 164 W.V. 389 (1980), this Court held that it is not incumbent upon a workman compensation claimant, whose claim has been held compensable, to initiate procedure for evaluation of his disability, rather, it is the obligation of the Workers' Compensation Commissioner, or in this case a Claims Administrator, to then take such action as is necessary, including referral for medical treatment, if needed to arrive at a disability award.

The Claims Administrator in this claim mistakenly used the reopening statute of Chapter 23-4-16 to bar the claimant's claim for permanent partial disability related to his low back only and failed to follow the above case law and statutory mandate requiring it to take the initiative in evaluating for disability. The leg was originally ruled compensable on February 11, 2004. The claim was not ruled compensable for the low back until January 4, 2010. Chapter 23-4-16 provides that:

except as provided in section twenty-two 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, *** any request must be made within five years of the closure

Assuming arguendo that section applies, the claimant contends that he has met the statutory requirements for the reason that his claim was not ruled compensable for the low back until January 4, 2010, and he was not paid temporary total disability benefits for the back until February 9, 2010, when he received a check paying him from October 18, 2005, through July 25, 2006, by check dated February 9, 2010. The claim was closed for temporary benefits on March 8, 2010, for the low back. Thus, the Claims Administrator failed to perform their statutory duty when the claimant met the requirements of this section. The request for permanent partial disability, thus, under Chapter 23-4-16 was made within five years from the date the claim was closed for temporary total disability benefits regarding the back, which was March 8, 2010, and the claimant met the statutory burden under Chapter 23-4-22 because the request was made within five years after the claim was closed for the receipt of temporary total disability benefits regarding the back.

Chapter 23-4-22 provides as follows:

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 if 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 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.

Again, the claimant reiterates that his request for a permanent partial disability evaluation was not a request to reopen his claim but a request for the Claims Administrator to conduct a permanent partial disability evaluation, which the Claims Administrator, by case law and statute, was mandated to do. The claimant further asserts and reiterates that if the reopening section, Chapter 23-4-16 of the West Virginia Code has any applicability, which the claimant believes it does not, the claimant met the statutory requirements of that section.

The facts of this case reveal that the claim was not ruled compensable for the low back until January 4, 2010, and the claim was not closed for temporary total disability benefits relating to the back until March 8, 2010, and, thus, the request for the evaluation was made timely, pursuant to Chapter 23-4-16 and Chapter 23-4-22. Moreover, none of the closures for temporary total disability for either the leg or back advised the parties of their right to a permanent partial disability evaluation as required by statute.

Bowman v. Workmen's Compensation Commissioner, 150 W.Va. 592, 148 S.E.2d 708 (1966), which was cited in the Insurance Commission's brief, can be distinguished from the case at hand. In the *Bowman* case, the claim was ruled initially compensable for a hernia, peyronie's disease and back injury all at the same time. In the case at bar, the claimant's claim was ruled compensable only for the leg injury on the February 11, 2004, and lengthy litigation occurred to make the back a part of the claim, which was not added until this Honorable Court's Order of January 4, 2010.

In *Bowers v. WVOIC*, 224 W.Va. 398, 686 S.E.2d 49 (2009), this Court addressed the disparate treatment of psychiatric claims by Rule 20, which required manifestation within six-months of an occupational injury. No such issue is involved in this claim.

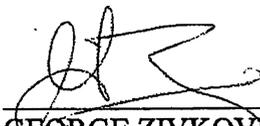
The Board of Review failed to consider the statutory mandates and the case law, which requires the Claims Administrator to evaluate the claimant for permanent partial disability.

VI

CONCLUSION

Based on the aforesaid, the claimant respectfully prays that this Honorable Court reverse the Board of Review's Order of November 28, 2012, and authorize the claimant to be evaluated for permanent partial disability and refer him to an independent medical evaluator for that purpose.

Respectfully submitted this 18th day of December 2012.



GEORGE ZIVKOVICH
Counsel for Petitioner/Appellant,
Gary E. Hammons

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 18th day of December 2012, a true copy of the foregoing and hereto annexed PETITION FOR APPEAL was deposited in the facilities of the United States Mail, addressed to the following at the last address known to the undersigned:

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Legal Counsel to the Office of
Insurance Commission Old Fund
Workers' Compensation Defense Division
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Charleston, WV 25364-4318

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Sedgwick CMS - Charleston
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Lexington, KY 40512

Gary E. Hammons
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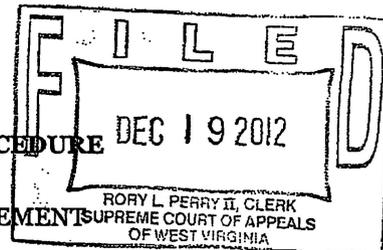


GEORGE ZIVKOVICH
Counsel for Petitioner/Appellant,
Gary E. Hammons

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APPENDIX B - REVISED RULES OF APPELLATE PROCEDURE



WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: Gary E. Hammons v. A & R Transport, Inc., WVOIC
Petitioner: Gary E. Hammons Respondent: A & R Transport, Inc.
Counsel: George Zivkovich Counsel: David L. Stuart
Claim No.: 2004030436 Board of Review No.: 2046144
Date of Injury/Last Exposure: January 5, 2004 Date Claim Filed: January 20, 2004
Date and Ruling of the Office of Judges: September 27, 2011
Date and Ruling of the Board of Review: November 28, 2012
Issue and Relief requested on Appeal: claimant to be evaluated for PPD and refer him to an independent medical evaluator

CLAIMANT INFORMATION	
Claimant's Name	<u>Gary E. Hammons</u>
Nature of Injury	<u>back and leg</u>
Age: <u>55</u>	Is the Claimant still working? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If yes, where:
Occupation: <u>muck driver</u>	No. of Years: <u>5 1/2</u>
Was the claim found to be compensable? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If yes, order date: <u>February 11, 2004</u>	

ADDITIONAL INFORMATION FOR PTD REQUESTS	
Education (highest):	Old Fund or New Fund (please circle one)
Date of Last Employment:	
Total amount of prior PPD awards:	(add dates of orders on separate page)
Finding of the PTD Review Board:	

List all compensable conditions under this claim number: 924.10, 729.81, 722.10, 724.4 and 847.2
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?
 Yes No
(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? Yes No
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? Yes No
If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

GARY E. HAMMONS

DOCKETING STATEMENT ATTACHMENT

Are there any related petitions currently pending or previously considered by the Supreme Court?

PREVIOUSLY CONSIDERED

Claim No. 2004030436 - DOI 01/05/04

Gary E. Hammons v. A & R Transport, Inc./WVOIC - Workers' Compensation Board of Review Nos. 80197 and 80198 - held the claim compensable for diagnosis codes 722.10 (disc protrusion at L5-S1), 724.4 (lumbar radiculopathy, and 847.2 (lumbar strain), authorized physical therapy for spine stabilization exercises and William's flexion exercises and reopened the claim for temporary total disability basis and granted the claimant temporary total disability benefits from October 18, 2005, through July 25, 2006, and for any additional time periods as established by reliable medical evidence

CURRENTLY PENDING

Claim No. 2004030436 - DOI 01/05/04

Gary E. Hammons v. A & R Transport, Inc./WVOIC - Workers' Compensation Board of Review No. 2046144 - whether the claimant should be granted temporary total disability benefits after July 25, 2006, until his 104 weeks statutory period for TTD has expired

Manner in which this Petition is related:

Same claim, different issues.

Supreme Court of Appeals of West Virginia

Office of the Clerk

RORY L. PERRY II, Clerk of Court
State Capitol, Room E-317
Charleston WV 25305

STATUTORY NOTICE of FILING of PETITION FOR APPEAL

December, 19, 2012

Gary E. Hammons v. WVOIC/A & R Transport, Inc.

Supreme Court No. 12-1473

Petition for Appeal Filed: December 19, 2012

Board of Review Information

Claim Number 2004030436

Order Date: November 28, 2012

Appeal Number: 2046457

Dear Interested Persons:

Statutory notice pursuant to W.Va Code 23-5-15 is hereby given that a petition for appeal from the final order of the Workers' Compensation Board of Review has been filed in the above-captioned case.

In future correspondence or filings, please refer to the Supreme Court case number. DO NOT use the claimant's social security number on any papers filed with the Court.

The Court has a mediation program for certain types of workers' compensation cases. You will be contacted if the Office of Counsel later determines that the case is appropriate for mediation.

The papers filed in this matter will be passed directly to the Court for consideration. You will be advised of the Court's decision to grant or refuse the petition for appeal by copy of an order.

Sincerely, RORY L. PERRY II, Clerk of Court

NOTICE PROVIDED TO: Workers' Compensation Commissioner and Workers' Compensation Board of Review
and to the following counsel of record and unrepresented entities, as indicated:

Counsel for Petitioner:

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Counsel for Respondent(s):

Unrepresented Entities:

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