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No. 12-1473

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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<b>FILED</b>
JAN 23 2013
RORY L. PERRY II, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA

GARY E. HAMMONS, CLAIMANT,

PETITIONER,

v.

BOR APPEAL NO.: 2046457

JCN: 2004030436

DOI: 01/05/2004

A & R TRANSPORT, INC., EMPLOYER,

and

WEST VIRGINIA OFFICES OF INSURANCE  
COMMISSIONER IN ITS CAPACITY AS  
ADMINISTRATOR OF THE WORKERS'  
COMPENSATION OLD FUND, STATUTORY PARTY,

RESPONDENTS.

*Response*

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BRIEF OF OLD FUND IN OPPOSITION TO APPEAL AND  
IN SUPPORT OF BOARD OF REVIEW FINAL ORDER

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**BRIEF OF OLD FUND IN OPPOSITION TO APPEAL AND  
IN SUPPORT OF BOARD OF REVIEW FINAL ORDER**

I.

STATEMENT OF CASE

A. Procedural History of Claim Issue in Litigation.

Pending before this Honorable Court is the appeal petition of Gary E. Hammons (hereinafter "claimant" or "petitioner") from a final order of the Board of Review (hereinafter "BOR") dated November 28, 2012 (Petitioner's Appendix, at BOR Order), which reversed a decision of the Office of Judges (hereinafter "OOJ") dated September 27, 2011 (Petitioner's Appendix, at OOJ Decision), and in which decision the OOJ reversed the Claim Administrator's

award order dated August 11, 2010 denying claimant's request to reopen his claim for further consideration of permanent partial disability benefits. (Old Fund's Appendix, at Exhibit 3.)

Claimant has now filed his appeal petition from the aforesaid BOR final order to this Court. Upon the matters discussed herein, the final order of the BOR should be affirmed.

B. Statement of Facts.

By date of January 17, 2004, the claimant signed, and then thereafter filed, his "Employees' and Physicians' Report of Injury" seeking workers' compensation benefits for an injury alleged to have occurred on January 5, 2004. Thereafter, by Claim Administrator's "Claim Decision" dated February 11, 2004, the claim was held compensable. The conditions covered in the claim were listed as:

1. 924.10 Contusion of lower leg; and
2. 729.81 Swelling limb.

Petitioner's Appendix, Claim Administrator's Award Order dated February 11, 2004.

Claimant began receiving medical treatment and temporary total disability ("TTD") benefits. Thereafter, by Claim Administrator's award order dated June 6, 2005, claimant was initially awarded four percent (4%) permanent partial disability ("PPD") based upon an independent medical evaluation performed by James M. Dauphin, M.D., and his claim was closed for permanent disability benefits. Petitioner's Appendix, Claim Administrator's Final Order dated June 6, 2005.

Thereafter, claimant sought to have diagnosis codes 722.10 (disc protrusion at L5-S1), 724.4 (lumbar radiculopathy), and 847.2 (lumbar strain); all relating to the lumbar spine, held compensable in his claim. Following the Claim Administrator's award order denying these conditions as being compensable, litigation ensued. Thereafter, the OoJ affirmed the Claim

Administrator's award order. Then, on appeal by claimant to the BOR from the OoJ decision, the BOR affirmed the OoJ decision affirming the Claim Administrator's award order.

Litigation as to whether diagnosis codes 722.1, 724.4 and 847.2 should be added as compensable conditions in claimant's claim continued in this Court. Thereafter, and notwithstanding a denial by all workers' compensation administrative tribunals of the claimant's quest to have these conditions held compensable, by memorandum order dated December 1, 2009, this Court ruled, as follows:<sup>1</sup>

The Court, having maturely considered the petition for appeal filed in the above-captioned case in Claim No. 2004030436, Workers' Compensation Board of Review Nos. 80197 and 80198, doth hereby reverse the final decision of the Workers' Compensation Board of Review, and doth hereby remand to the Board of Review with directions to remand to the Workers' Compensation Commission, successor thereto, other private carrier or self-insured employer, whichever is applicable, with directions to enter an order holding the claim compensable for Diagnosis Codes 722.10-disc protrusion at L5-S1, 724.4-lumbar radiculopathy, and 847.2-lumbar strain; authorizing physical therapy for spine stabilization exercises and William's flexion exercises; reopening the claim on a temporary total disability basis; and granting 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.

By facsimile dated August 9, 2010, the claimant filed his request for an IME to determine further permanent partial disability (hereinafter "PPD") in this claim. The Claim Administrator denied this request by award order dated August 11, 2010 and explained as follows:

We have received your request dated 4/9/10, to consider further permanent partial disability benefits.

Your claim is barred and cannot be given this consideration because the initial award date for PPD benefits is 6/3/05. Any request for additional rating must be received within five years of initial award.

This decision was based primarily on the following: Request was not received within five years of initial award. Request is dated 4/9/10, but this request was not received until 8/9/10 which is beyond the five year period.

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<sup>1</sup> It is noted that the Court's Mandate, issued upon its memorandum order, was entered January 4, 2010.

Petitioner's Appendix, Claim Administrator's Award Order dated June 6, 2005. The claimant protested this order to the OOJ.

Following expiration of the time frames for submission of evidence into the record at the OOJ, and after allowing time for closing arguments, the OOJ issued its decision on September 27, 2011, reversing the Claim Administrator's order. In its decision the OOJ discussed the question of law presented to it, 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. This 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 revisions 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 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, this 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. 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 Jun 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 provisions 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, 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 rights 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.

Petitioner's Appendix, OOJ decision, at 7-10.

Thereafter, the Old Fund timely filed its appeal to the BOR from the OOJ decision, and also petitioned for a stay of the OOJ decision pending a final order of the Board. By order dated October 18, 2011, the BOR granted the requested stay.

After allowing time for the parties to file briefs and for oral argument, by final order dated October 26, 2012, the BOR reversed the OOJ decision and explained and held as follows:

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code [sic] § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia

Supreme Court of Appeals. Upon our review of this case, we have determined to reverse the decision of the Office of Judges as the substantial rights of the Insurance Commission have been prejudiced.

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\*

DISCUSSION:

The Board finds that the Office of Judges' order is affected by error of law. The issue is whether or not the claimant's request for a permanent partial disability evaluation is time barred. The claimant's initial permanent partial disability award was granted on June 6, 2005. By order dated January 4, 2010, the Supreme Court directed that three lumbar diagnoses codes be added as compensable components of the claim, that physical therapy be authorized, and that the claim be reopened on a temporary total disability basis and temporary total disability benefits be granted. On January 18, 2010, the claims administrator complied with the Supreme Court's order.

On February 4, 2010, the claims administrator notified the claimant that the claim may close for temporary total disability benefits on March 6, 2010, if medical evidence showing continued disability is not received. On March 8, 2010, the claims administrator issued an order closing the claim for temporary total disability benefits. The claimant protested these two orders, and on June 30, 2011, the Office of Judges affirmed the orders. The claimant appealed, and on October 26, 2012, the Board affirmed the Office of Judges' order of June 30, 2011.

Meanwhile, on August 9, 2010, the claimant's counsel faxed a letter to the claims administrator requesting that the claimant be evaluated for permanent partial disability for his back. The claimant's counsel indicated that the letter was mistakenly dated April 9, 2010, but the fax cover sheet to the claims administrator was correctly dated August 9, 2010. The request for a permanent partial disability evaluation was not made within five years of June 6, 2005, which is the date of the claimant's initial permanent partial disability award. Therefore, the claimant's request is barred by the limitation set forth in West Virginia Code [sic] § 23-4-16(a)(2), which provides as follows: "...[I]n 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."

The Board notes that facts similar to those in the instant claim were considered in the case of Lewis v. West Virginia Office of the Insurance Commission, Nos. 11-1689 and 11-1722 (Memorandum Decision dated November 16, 2012). In the Lewis case, an order was issued on October 25, 2001, granting the claimant's initial permanent partial disability award. By order dated January 6, 2009, the Office of Judges added additional conditions as compensable components of the claim. By letter dated January 15, 2009, the

claimant requested a permanent partial disability evaluation for the additional conditions. The claims administrator, Office of Judges, and Board of Review concluded that the request was time barred. The Supreme Court affirmed.

CONCLUSIONS OF LAW:

Accordingly, it is hereby ORDERED as follows:

1. The final order of the Workers' Compensation Office of Judges dated September 27, 2011, is REVERSED and VACATED.
2. The claims administrator's order of August 11, 2010, which denied the request for consideration of additional permanent partial disability benefits, is REINSTATED.

Petitioner's Appendix, BOR Final Order, at 1 and 2-3.

II.

SUMMARY OF ARGUMENT

The decision of the Office of Judges was properly and correctly reviewed by the Board of Review and the Final Order of the Board of Review is correct, as a matter of law. As demonstrated by this Court's authored opinions in Pugh v. Workers' Compensation Commissioner, 188 W.Va. 141, 424 S.E.2d 759 (1992); Bowers v. WVOIC, 224 W.Va. 398, 686 S.E.2d 49 (2009); and Bowman v. Workers' Comp. Comm'r, 150 W.Va. 592, 148 S.E.2d 708 (1966), as well as this Court's memorandum decisions cited hereafter, the claimant's application to reopen his claim for further permanent partial disability benefits made and received on August 9, 2010, was beyond the five (5) year statutory period set out in W. Va. Code § 23-4-16(a)(2) where the initial award of permanent partial disability benefits was made by order dated May 3, 2005.

### III.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with Rule 18(a)(3), West Virginia Revised Rules of Appellate Procedure, the dispositive issue presented has previously been authoritatively decided so oral argument is not necessary. Moreover, since no new issue of law is presented, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

### IV.

#### ARGUMENT

##### A. Standard of Review.

In Lovas v. Consolidation Coal Company, 222 W.Va. 91, 662 S.E.2d 645 (2008), this Court affirmed that West Virginia Code § 23-5-15 (2003)<sup>2</sup> provides the standard of review for appeals from the BOR to this Court. Applicable here, West Virginia Code §§ 23-5-15(b) and (d) provide as follows:

(b) In reviewing a decision of the BOR, 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.

(d) If the decision of the board effectively represents a reversal of a prior ruling of either the commission or 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 provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. 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 of 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 so clearly wrong based upon the evidentiary record that even when all inferences are resolved in

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<sup>2</sup> This statute was amended in 2005; however, the subsections quoted herein were not altered.

favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision.

Lovas, supra 662 S.E.2d at 645. See also Wilkinson v. West Virginia Office Insurance Commission, 222 W.Va. 394, 664 S.E.2d 735 (2008).

This Court, in Lovas, also stated:

In Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970), this Court explained that "[w]hile the findings of fact of the [BOR] are conclusive unless they are manifestly against the weight of the evidence, the legal conclusions of the [BOR], based upon such findings, are subject to review by the courts." 153 W.Va. at 812, 172 S.E.2d at 707 (quoting Emmel v. State Compen. Dir., 150 W.Va. 277, 284, 145 S.E.2d 29, 34 (1965)). Conclusions of law are subjected to de novo inspection. Syl. Pt. 3, Adkins v. Gatson, 192 W.Va. 561, 453 S.E.2d 395 (1994). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). In syllabus point one of Appalachian Power Company v. State Tax Department, 195 W.Va. 573, 466 S.E.2d 424 (1995), this Court also explained that "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review."

Lovas, 662 S.E.2d at 649.

Thereafter, in Hale v. West Virginia Office of Ins. Com'r, 228 W.Va. 781, 724 S.E.2d 752 (2012), this Court stated that "[t]o the extent that our resolution of this matter requires us to interpret provisions contained in the West Virginia Code of State Rules, our review is de novo" thereby reaffirming that interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review. Hale, supra 724 S.E.2d at 755.

It is also well settled law that interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review. Syl. pt. 1, Appalachian Power Co. v. State Tax Department of Wet Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995); Simpson v. West Virginia Office of Ins. Com'r., 223 W.Va. 495, 678 S.E.2d 1, 10 (2009); Syl. pt. 2, Davies v. West Virginia Office of Ins. Com'r., 227 W.Va. 330, 708 S.E.2d 524 (2011).

In addition to the above determinations, in Fenton Art Glass Company v. West Virginia Office of the Insurance Commissioner, 222 W.Va. 420, 664 S.E.2d 761 (2008), this

Court stated:

Because our consideration of the issues before us necessarily requires us to consider the standard of review of the BOR, we observe that “[w]hen the [BOR] reviews a ruling from the [OOJ] it must do so under the standard of review set out in W.Va. Code § 23-5-12(b) (1995), and failure to do so will be reversible error.” Syl. Pt. 6, Conley v. Workers’ Compensation Div., 199 W.Va. 196, 483 S.E.2d 542 (1997). West Virginia Code § 23-5-12(b) (1995), directs, in relevant part, that

The [BOR] may affirm the order or decision of the [OOJ] or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the [OOJ] if the substantial rights of the petitioner or petitioners have been prejudiced because the [OOJ]’s findings are:

- (1) In violation of statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the [OOJ]; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion of clearly unwarranted exercise of discretion.

Fenton, 664 S.E.2d at 768.

It is respectfully asserted that in the BOR final order on appeal herein, the BOR complied with the requirements of West Virginia Code § 23-5-12(b); the BOR applied the proper standard of review to the decision of the OOO; and the BOR final order is not in clear violation of constitutional or statutory provision and, is not clearly the result of erroneous conclusions of law.

B. Discussion.

Since the Claim Administrator's order protested to the OoJ herein was entered after July 1, 2003, the amendments to the workers' compensation law made in Senate Bill 2013, effective July 1, 2003, and re-enacted in 2005 apply. Wampler Foods, Inc. v. Workers' Compensation Division, 216 W.Va. 129, 602 S.E.2d 805 (2004).

1. THE DECISION OF THE OoJ WAS PROPERLY AND CORRECTLY REVIEWED BY THE BOR AND THE FINAL ORDER OF THE BOR IS CORRECT.

a. The claimant's request to modify, adjust or reopen his claim for indemnity benefits was time barred.

Subject matter jurisdiction of the Claim Administrator over a claim is limited by W. Va. Code § 23-4-16 (2003, as amended) (Repl. Vol. 2010). Specifically applicable here, W. Va. Code § 23-4-16(a)(2), provides as follows:

(a) The power and jurisdiction of the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, over each case is continuing and the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, may, in accordance with the provisions of this section and after due notice to the employer, make modifications or changes with respect to former findings or orders that are 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 that date shall be determined by the following subdivision of this subsection. Any request that is made beyond that period shall be refused.

\* \* \*

(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.

In addition to the above, W. Va. Code § 23-4-16(b) (2005), (Repl. Vol. 2010) specifically provides that:

In any case in which an injured employee makes application for a further award of permanent partial disability benefits..., if the application is in writing and filed within the applicable time limit as stated above, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall pass upon the request within thirty days of its receipt and, if the commission determines that the claimant may be entitled to an award, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall refer the claimant for further examinations that are necessary.

The statute is clear: an application or request to modify or change [adjust or reopen] a former order must be filed/received "within five years of the date of the initial award." And, where the language of the statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation. Syl. pt. 1, Pugh v. Workers' Compensation Commissioner, 188 W.Va. 414, 424 S.E.2d 759 (1992).

In award order dated June 6, 2005, the claimant was awarded four percent (4%) PPD and his claim was closed for permanent disability, as follows:

Medical evidence has been received from James M. Dauphin, M.D., dated 04/28/2005, that indicates you have a 4% permanent partial disability. You are being granted this award for permanent impairment resulting from your injury. A check for the amount due will be mailed to you.

\* \* \*

The granting of this award closes your claim for permanent partial disability benefits. If it is later determined you are not entitled to these benefits, you will be directed to reimburse the full amount.

(Emphasis added.) This award order was protested by claimant to the OOJ. By decision of the OOJ dated May 30, 2007, the Claim Administrator's award order was affirmed. The OOJ decision was not appealed and is now final.

The request to reopen claimant's claim for further permanent disability benefits, although dated April 9, 2010, was not received by the Claim Administrator until August 9, 2010, which is

more than five (5) years after the date of the award order making the initial award of permanent disability and closing the claimant's claim for permanent disability dated June 6, 2005.<sup>3</sup>

This Court addressed this precise issue in an authored opinion most recently in Bowers v. WVOIC, 224 W.Va. 398, 686 S.E.2d 49 (2009). In Bowers, the issue presented was whether a claimant must manifest symptoms of a "work injury-related psychiatric disorder within the six-month time frame established by W. Va. C.S.R. § 85-20-12.2.a to render such work injury-related psychiatric disorder a compensable component of the claimant's underlying work-related injury claim." Bowers, supra, 686 S.E.2d at 54. In deciding the issue presented, this Court looked to the workers' compensation statutes and stated:

The statutes authorizing injured workers to apply for an adjustment of their claims to add additional, compensable components of their initial work-related injury do not impose any such time periods [six (6) months] within which an additional symptom, condition, or aggravation of their initial work-related injury must appear to be held compensable.

Bowers, supra 686 S.E.2d at 55.

This Court then set out, at footnote 6 of Bowers, 686 S.E.2d at 55-56, an analysis particularly applicable to the issue here, and stated:

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 may be filed." However, such time limits apply only to claims in which an order has been entered closing the claim. *See, e.g., Syl. Pt. 2, Pugh v. Workers' Comp. Comm'r*, 188 W. Va. 414, 424 S.E.2d 759 (1992) ("*W. Va. Code*, 23-4-6 [1983], in part, permits the power and jurisdiction of the Workers' Compensation Commissioner to continue over cases before the Commissioner and to make modifications or changes with respect to former findings or orders as may be justified, provided that no further award may be made in the cases of nonfatal injuries more than two

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<sup>3</sup> Although there is an application to reopen submitted into the record containing the date April 9, 2010, the actual facsimile date is August 9, 2010, and the facsimile itself, on the fax cover sheet, is dated August 9, 2010.

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. Bower’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 request to add a diagnosis of depression to their compensable claims.

Following its analysis of the applicable workers’ compensation statutes, and in particular W. Va. Code § 23-4-16, our Court held that W. Va. C.S.R. § 85-20-12.2.a. (2005) was an invalid administrative rule. In doing so, our Court went on to hold, with respect to the two (2) workers’ compensation claims consolidated in Bowers, that:

Pursuant to W. Va. Code § 23-4-16(a)(2) [2005], 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 dated was within five years of his initial 34% permanent partial disability award, which was granted on November 18, 2005, and the appeal of which was dismissed at Mr. Bowers’s request. Likewise, Mr. Dotson requested the addition of a depression diagnosis on February 1, 2006, which date was within five years of his initial PPD award, which was granted on February 25, 2003, and ultimately affirmed, as modified by the OOJ, by the Board of Review’s order entered December 29, 2004.

Bowers, *supra*, 686 S.E.2d at 57.<sup>4</sup> (Emphasis added.)

Given our Court’s holdings in Bowers, and the clear language of W. Va. Code § 23-4-16, where an initial award of permanent disability benefits has been made, and the claim closed,

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<sup>4</sup> It is noted that W. Va. Code § 23-4-16(a)(2) was amended in 1995 to require requests to modify, change or reopen an existing closed claim “must be made within five years of the initial award” and it remains the same today, whereas the language of W. Va. Code § 23-4-16(a)(2) considered by our Court in Pugh v. Workers’ Compensation Commissioner, 188 W.Va. 414, 424 S.E.2d 759 (1992) provided that the statutory five (5) year time limit set forth in W. Va. Code § 23-4-16(a)(2) immediately prior to the 1995 change began to run from “the last payment on the original award or any subsequent increase thereto.”

which is the situation here, any request to modify, change, adjust or reopen a closed claim must be filed/received "within five years of the initial award."

In arriving at its holding in Bowers, *supra*, our Court cited to and placed substantial reliance upon Bowman v. Workers' Comp. Comm'r, 150 W.Va. 592, 148 S.E.2d 708 (1966), and its sole syllabus which held, in part, as follows:

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 56. It is respectfully asserted that Bowers provides the precedent necessary for the BOR to reverse the OOJ decision appealed to it, but the bottom line ruling in Bowman is that a claim cannot be divided into different disabilities [compensable conditions] and thereby remain open and litigable for one disability [compensable condition] but closed for another. But, that is precisely what the claimant seeks to do here, and what the OOJ did here. The claimant concedes, as he must, that his claim was closed for PPD when he received his initial award by order dated June 3, 2005, but he is asserting that the lower back compensable conditions should be divided away [separated] from the other compensable conditions [disability] and remain open for additional PPD. Under Bowman, and Bowers, this is not permitted, and as the Supreme Court stated, there is no statutory authority to allow for such a division of compensable conditions [disabilities] to happen. And, just as in Bowman, all agree that claimant sustained one injury on January 5, 2004.

In addition to the above signed opinions, this Court has issued many memorandum decisions over the past couple of years re-affirming that any request to reopen, modify, adjust or change a claim which is not made within five (5) years of the initial award of permanent

disability benefits is time barred by W. Va. Code § 23-4-16(a)(2).<sup>5</sup> See also Lewis v. West Virginia Office of Insurance Comm’r, Nos. 11-1689 and 11-1722 (W. Va. Supreme Court, November 16, 2012) (Memorandum Decision) (Request to reopen for further PPD made on January 15, 2009, was time barred where initial award of permanent disability benefits made on October 25, 2001.); Lovas v. West Virginia Office of Insurance Commissioner, No. 11-0288, (W. Va. Supreme Court, September 14, 2012) (Memorandum Decision); Kuhns v. West Virginia Office of Insurance Commissioner, No. 11-0026, (W. Va. Supreme Court, July 26, 2012) (Memorandum Decision) (denying September 11, 2009, request to reopen claim for additional psychiatric permanent partial disability benefits where initial award of permanent disability was made on April 11, 2001); Fisher v. WVOIC, No. 11-0031, (W. Va. Supreme Court, July 6, 2012) (Memorandum Decision) (denying September 8, 2009, request to reopen claim for temporary total disability benefits where the initial decision on permanent impairment was made on August 23, 2000); Buzzard v. West Virginia Office of Ins. Comm’r, No. 101433, (W. Va. Supreme Court, March 29, 2012) (Memorandum Decision) (denying January 25, 2010 request to reopen for permanent partial disability which was “after the five (5) year statute of limitations expired”); Puher v. WVOIC, No. 101483 (W. Va. Supreme Court, March 26, 2012) (Memorandum Decision) (denying November 3, 2008, request to reopen for permanent partial disability benefits where permanent benefits were initially granted on March 18, 1994); Stover v. WVOIC, No. 11-0097 (W. Va. Supreme Court, Dec., 2011) (Memorandum Decision) (denying February 18, 2009, request to reopen claim for permanent partial disability benefits where initial award of permanent benefits was made on April 25, 2003); Speights v. WVOIC, No. 101173 (W. Va. Supreme Court, Nov. 10, 2011) (Memorandum Decision) (denying request to reopen claim for

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<sup>5</sup> In accordance with Rule 21(e), West Virginia Revised Rules of Appellate Procedure (2010), Memorandum Decisions of the Supreme Court may now be cited in any court or administrative tribunal in the State of West Virginia. As a result, they are also a public record.

permanent total disability benefits where application was made beyond “the five year time limit” from the date of the initial permanent disability award); Fox v. WVOIC, No. 100806, (W. Va. Supreme Court, July 21, 2011) (Memorandum Decision) (May 13, 2009, request to reopen for PPD benefits time barred by W. Va. Code § 23-4-16(a)(2) where initial award entered on April 9, 2004.)

Finally, reopening the claimant’s claim for temporary total disability benefits has nothing to do with determination of whether the claimant herein met the threshold or temporal requirement of seeking to modify or adjust his claim within five (5) years of the initial award.

As our Court stated in Bowers, at footnote 6:

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 may be filed.” However, such time limits apply only to claims in which an order has been entered closing the claim.

Here, the claimant received his initial award on June 5, 2005, and his claim was closed. Any request made by the claimant thereafter to modify, adjust, change or reopen his claim must be made within five (5) years of June 3, 2005. His request herein was not made within that five (5) year period, and his claim and his request is time barred.

Claimant relies upon the cases of Baker v. State Workmen’s Compensation Commissioner, 164 W.Va. 389, 263 S.E.2d 883 (1980) and Hardy v. Richardson, 198 W.Va. 11, 479 S.E.2d 310 (1996) to support reversal of the BOR final order and reinstatement of the OOI decision. However, these two (2) cases are distinguished and not applicable because the key fact in both of them was that there was no order closing the claims for PPD benefits. Moreover, there

had never been an initial award of PPD benefits entered in either of them. As previously discussed, the claimant's claim herein has previously been closed, and it was accomplished in the initial award order awarding PPD benefits dated June 3, 2005. As this Court noted in footnote 6 of Bowers v. WVOIC, 224 W.Va. 398, 686 S.E.2d 49 (2009), the time limitations in W. Va. Code § 23-4-16(a)(2), as amended, are applicable where there has been an initial award of PPD and the claim has been closed.

Accordingly, the claimant's request herein is time barred, the OoJ decision is wrong as a matter of law. The BOR final order reversing the OoJ decision and reinstating the Claim Administrator's award order is correct.

V.

CONCLUSION

Wherefore, for the reasons discussed, the final order of the BOR affirming the OoJ decision was correct. The BOR final order should be affirmed.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GARY E. HAMMONS, CLAIMANT,

PETITIONER,

v.

BOR APPEAL NO.: 2046457

JCN: 2004030436

DOI: 01/05/2004

A & R TRANSPORT, INC., EMPLOYER,

and

WEST VIRGINIA OFFICES OF INSURANCE  
COMMISSIONER IN ITS CAPACITY AS  
ADMINISTRATOR OF THE WORKERS'  
COMPENSATION OLD FUND, STATUTORY PARTY,

RESPONDENTS.

CERTIFICATE OF SERVICE

I, David L. Stuart, counsel for the Old Fund, do hereby certify that a true and accurate copy of the foregoing "Brief of Old Fund in Opposition to Appeal and in Support of Board of Review Final Order," along with a "Motion for Leave to File Brief of Old Fund Out of Time" was served by depositing the same in the United States Mail, first-class, postage prepaid, to the following parties at the below listed addresses this the 23<sup>rd</sup> day of January, 2013.

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