STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

20-0537

IN THE MATTER OF:

SUPREME COURT NO.:_____
BOR: 2055031

CHARLES G. DELBERT

JCN: 2014014137-OP

Claimant,

and

DLE: May 19, 2009

MURRAY AMERICAN ENERGY, INC.

ALJ: December 17, 2019
BOR: June 25, 2020

Self-Insured Employer

PETITION AND BRIEF OF THE CLAIMANT,

CHARLES G. DELBERT,

IN SUPPORT OF HIS APPEAL

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July 17, 2020

INDEX

II. TABLE OF AUTHORITIES

1. Statutory

2. Cases

III. ASSIGNMENTS OF ERRORS:

The claimant files this appeal from the decision, issued on June 25, 2020, Exhibit F, by the Board of Review affirming the Decision issued on December 17, 2019, Exhibit D, by the Office of Judges affirming the order dated August 12, 2019, Exhibit B, which denied the reopening petition dated July 22, 2019, Exhibit A, for additional PPD ***and treatment for the compensable occupational lung disease***. The order denied the reopening petition, Exhibit A, based upon pending litigation on the denial of the application for permanent total disability in the same claim. The claimant protested and explained the reasons for the protest, set forth in Exhibit C. Those assignments of error are as follows:

A. THE LOWER TRIBUNALS ERRED IN DENYING THE REOPENING OF THE CLAIM BY THE FAILURE TO READ THE STATUTES IN PARA MATERIA.

B. THE LOWER TRIBUNALS FAILED TO APPLY THE STATUTORY PROVISIONS OF *W.VA. CODE* 23-4-16 CORRECTLY BY THE DENIAL OF A REOPENING PETITION FOR AN INCREASE IN THE OP IMPAIRMENT, WHICH TRIGGERS THE OP TREATMENT GUIDELINES.

The 50% PTD threshold is no longer in issue, since the Supreme Court in the Memorandum Opinion, filed on February 21, 2020, Exhibit G, in Docket No. 19-0040, at pages 4-5, affirmed the ALJ Decision issued on July 6, 2018 finding that the claimant had met the 50% filing threshold:

> After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Pursuant to West Virginia Code § 23-4-6(n)(1), in order to receive a permanent total disability award, a claimant must first show that he or she has received at least 50% in permanent partial disability awards. Next, the claimant must be evaluated by the reviewing Board and be found to have at least 50% whole body impairment. ***In this case, Mr. Delbert has shown that he has at least 50% in prior permanent partial disability awards. The issue is whether he has 50% whole person impairment. The Office of Judges, and by extension Board of Review, committed no reversible error in finding that he passed the second threshold for a permanent total disability award.....Mr. Delbert should be further considered for a permanent total disability award.*** [Emphasis added.]

IV. STATEMENT OF THE CLAIM:

A. PROCEDURAL HISTORY:

The claimant filed an application for occupational pneumoconiosis dated June 3, 2013, with a date of last exposure listed as May 20, 2009, with a history of dust exposure based upon 35 years of underground mine employment. Dr. Lenkey indicated there was insufficient evidence for the diagnosis of OP. ALJ 6/14/2017, Finding 5, page 2.

The claim administrator ruled the claim compensable on a presumptive non-medical basis by order dated February 6, 2014. Exhibit D, ALJ 12/17/2019, Finding 4, page 2. On July 31, 2014, the claimant was granted a 10% PPD for his occupational pneumoconiosis based upon the examination on June 3, 2014, by the OP Board. Exhibit D, ALJ 12/17/2019, Finding 6, page 2.

The claimant filed a PTD application dated August 13, 2014, listing 6 claims, with a total of 59% in PPD awards. ALJ 4/15/2016, Finding 26, page 7 and Exhibit D, ALJ 12/17/2019, Finding 7, page 2.

By order entered on November 13, 2015, the claim administrator denied the PTD based upon the Final Recommendations of the PTD Examining Board issued on November 9, 2015. The claimant protested. ALJ 4/15/2016, Finding 1, page 1, and Exhibit D, ALJ 12/17/2019, Finding 8, page 2.

On April 15, 2016, the Office of Judges affirmed the order of November 13, 2015, denying PTD for the failure to meet the 50% filing threshold, and the claimant filed a timely appeal. Exhibit D, ALJ 12/17/2019, Finding 8, page 2.

The claimant filed a petition to reopen the claim for additional PPD on October 13, 2016, based upon testing at EORH on August 15, 2016. ALJ 6/14/2017, Finding 14, page 4, and Exhibit D, ALJ 12/17/2019, Finding 9, at page2.

The claimant protested the Order dated November 9, 2016 by HealthSmart which denied oxygen services ***and stated that a claimant must have at least 15% awarded impairment to qualify for medical***

equipment and the claimant has been granted only 10% PPD. Exhibit D, ALJ 12/17/2019, Finding 10, page 2.

The claimant protested the Order dated November 9, 2016, by HealthSmart which denied the request to reopen the claim for permanent partial disability on the basis that:

> ....The Claim Administrator stated that W. Va. Code §23-4-16(e) allows a Claimant only to have one active request for permanent partial disability award pending in a claim at any given time and that his claim is currently in litigation before the Board of Review regarding denial of a permanent total disability award. ALJ 6/14/2017, Finding 2, page 2.

On November 10, 2016, in Appeal No. 2051291, the Board of Review REVERSED the decision dated April 15, 2016 affirming the order of November 13, 2015, denying a PTD award ***and REMANDED the claim to the claim administrator with instructions to refer the claimant to the PTDRB for additional consideration***. Exhibit D, ALJ 12/17/2019, Finding 8, page 2.

On February 14, 2017, the Office of the Insurance Commissioner advised the claimant by letter that the PTDRB determined that additional medical information was needed to make a decision and the claim was being referred to the claim administrator for development. ALJ 6/14/2017, Finding 16, page 4, and Exhibit D, ALJ 12/17/2019, Finding 11, page 3.

By Decision entered on June 14, 2017, the Office of Judges affirmed the order dated November 9, 2016, denying a reopening of the claim and a second order dated November 9, 2016, denying treatment. Exhibit D, ALJ 12/17/2019, Finding 12, page 3. On appeal by the claimant, on November 6, 2017, the Board of Review affirmed the decision of June 14, 2017. Exhibit D, ALJ 12/17/2019, Finding 13, page 3.

On August 14, 2017, the PTDRB issued the Modified Initial Recommendations finding that the claimant had a combined valued impairment of only 49% whole person impairment. ALJ 7/6/2018, Finding 49, page 17.

On February 12, 2018, the PTDRB issued Modified Final Recommendations, ALJ 7/6/2018, Finding 51, pages 17-18, in which the PTDRB stated as follows at page 4:

Spine	40%
- Cervical (25%)	
- Lumbar (13%)	
- Thoracic (8%)	
Occupational Pneumoconiosis	10%
Psychiatric	4%
Right Ring Finger	1%
Forearm	0%
COMBINED VALUE	**49% Whole Person Impairment**

> Accordingly, pursuant to W. Va. Code § 23-4-6(n)(l) and 23-4-6(j)(5), the Board finds that the claimant does not suffer from a medical impairment of at least fifty percent (50%) on a whole body basis and has not sustained a thirty-five percent (35%) or greater statutory disability.
>
> Accordingly, the Board finds that the claimant has failed to meet the required level of whole body medical impairment for further consideration of an award of permanent total disability. Therefore, the claimant's application for permanent total disability should be DENIED.

The order dated February 14, 2018, protested by the claimant, determined, with emphasis added:

> On February 13, 2018, HealthSmart Casualty Claims Solutions received a final recommendation from the Permanent Total Disability Examining Board dated February 12, 2018 (copy enclosed). The Permanent Total Disability Examining Board recommended that you be denied a permanent total disability award for the following reason:
>
> ***You have not met the threshold for pursuing permanent total disability benefits.*** [Emphasis added.]

An Order dated March 27, 2018 by HealthSmart authorized testing and treatment, identified as spirometry, lung volumes, diffusion capacity testing, arterial blood gas studies. ALJ 7/6/2018, Finding 52, page 18 and Exhibit D, ALJ 12/17/2019, Finding 15, page 3.

By Decision entered on July 6, 2018, the Office of Judges REVERSED the order dated February 14, 2018 finding that the claimant did not meet the 50% filing threshold to be considered for permanent total disability and found that the claimant ***did meet the impairment for the filing threshold of 50%.*** On December 21, 2018, the Board of Review affirmed that decision of July 6, 2018, following the

employer's appeal in BOR No. 2053111. On the employer's appeal, in Supreme Court No. 19-0040, the lower tribunal decisions finding that the claimant met the 50% for the filing threshold were affirmed by Decision filed on February 21, 2020. Exhibit G.

By Order dated May 28, 2019, SmartCasualty Claims granted authorization for the CT scan without contrast. Exhibit D, ALJ 12/17/2019, Finding 17, page 3. On July 22, 2019, Exhibit A, the claimant filed a petition for reopening, based upon the progression of his lung disease, as supported in part by the authorized CT scan on May 29, 2019. Exhibit D, ALJ 12/17/2019, Finding 19, page 4.

The Order dated August 12, 2019, Exhibit B, by SmartCasualty Claims denied reopening. The claimant protested, as set forth in Exhibit C, with explanation. Exhibit D, ALJ 12/17/2019, Finding 1, page 1. The litigation was closed and submitted by Order dated December 5, 2019.

The claimant protested the Order dated September 19, 2019 denying PTD on the basis that the claimant could be substantially and gainfully employed. Exhibit D, ALJ 12/17/2019, Finding 20, page 4.

On December 17, 2019, Exhibit D, the Office of Judges affirmed the order dated August 12, 2019, Exhibit B, denying the reopening of the claim. The claimant filed a timely appeal, to include a Motion for Remand, Exhibit E, based upon the Memorandum Decision of the West Virginia Supreme Court on February 21, 2020, Exhibit G. On June 25, 2020, Exhibit H, the Board of Review affirmed the Decision of December 17, 2019, Exhibit D.

The claimant files this appeal to seek a reopening of the claim for additional PPD to support additional medical treatment under the Rule 20 guidelines for OP medical management. Exhibit H.

B. STATEMENT OF THE FACTS:

The claimant was examined by the OP Board on June 3, 2014. Exhibit D, ALJ 12/17/2019, Finding 5, page 2. The OP Board determined as follows:

> .... Chest x-rays showed insufficient pleural or parenchymal changes to establish a diagnosis of occupational pneumoconiosis. ***Significant findings*** were due

> to blood gas studies, diffusion studies and pulmonary function studies made on June 3, 2014. FEV1/FVC ratio was 71, pre-bronchodilator and 73 post-bronchodilator. DLCO was 70% of predicted and DLA/A was 71%; pC02 was 41 and p02 was 67. The Board found sufficient evidence to justify a diagnosis of occupational pneumoconiosis with 10% pulmonary function impairment attributable to the disease. [Emphasis added.] ALJ 6/14/2017, Finding 7, pages 2-3.

On July 31, 2014, the claimant was granted a 10% PPD award based upon the findings from the examination by the OP Board on June 3, 2014. Exhibit D, ALJ 12/17/2019, Finding 6, page 2.

The claimant filed a petition to reopen the claim for additional PPD on October 13, 2016. Exhibit D, ALJ 12/17/2019, Finding 9, page 2. That petition was based upon the following evidence, as outlined by the ALJ, in the following findings 10-13 at page 3 of the Decision issued on June 14, 2017:

> 10. The claimant underwent pulmonary function studies at East Ohio Regional Hospital on August 15, 2016. It was noted that the data is acceptable and reproducible. The FEV1/FVC ratio is 75. The DLCO is 68% and the DLA/A is 98%.
>
> 11. An August 25, 2016, chest x-ray, read by Dr. Linger, showed no radiographic evidence of pneumoconiosis.
>
> 12. In a September 8, 2016, report. Dr. Lenkey noted the claimant's blood gas studies showed mild hypoxia with a P02 of 68, not significantly changed from a blood gas several years before. He believed the hypoxia was secondary to the claimant's longstanding coal dust exposure. Dr. Lenkey's assessment was a 10% impairment.
>
> 13. A September 20, 2016, Certificate of Medical Necessity, signed by Dr. Ganesh, indicates the claimant is In need of oxygen for the duration of his lifetime. This is based on a 78% oxygen saturation during sleep on September 18, 2016.

A request dated May 22, 2019 was filed by his provider, Amy Rapp, FNP-C, Wheeling Hospital, for a CAT chest scan for pneumoconiosis. Exhibit D, ALJ 12/17/2019, Finding 17, page 3. The CT scan report dated May 29, 2019 of the CT chest without contrast from Wheeling Hospital revealed "the impression of lower lobe bronchiectasis and mild reticular opacities at the bases, atelectasis versus scarring: coronary artery calcifications." Exhibit D, ALJ 12/17/2019, Finding 18, at page 3.

V. SUMMARY OF ARGUMENT

The lower tribunals erred in the statutory construction in *para materia*, of *W.Va. Code,* 23-4-3,

23-4-7, and 23-4-16, *inter alia,* since the claimant petitioned to reopen the claim for further and prompt treatment of his compensable lung disease based in part upon an increase in the prior 10% award for occupational pneumoconiosis. The order dated August 12, 2019, Exhibit B, of the claim administrator denied reopening for PPD and thus also denied associated treatment, which is based upon the PPD percentage under the Rule 20 regulations, Exhibit H, based upon the pending litigation on the issue of PTD under *W.Va. Code,* 23-4-16 (e). The end result is that the claimant has been denied the statutory mandates to provide prompt and "reasonably required" medical treatment by his pursuit of the issue of PPD, essential for treatment based upon the impairment percentage under Rule 20 guidelines, while also pursuing the PTD under the established, final determination of the PTD threshold in excess of 50%.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The claimant waives oral argument herein, in that the facts are set forth in the documents under review in the Appendix and the error occurred in the review of the facts and the application of the law to the facts. The claimant submits that pursuant to Rule 18 of the Rules of the Revised Rules of Appellate Procedure, oral argument is not necessary because the facts and the legal arguments are adequately presented in the briefs and the record on appeal, including the Appendix, and the decisional process would not be significantly aided by oral argument.

VI. ARGUMENT:

A. STANDARD OF REVIEW:

The standard of review for workers' compensation appeals to the Supreme Court from the Board of Review is set forth in *W.Va. Code* §§ 23-5-15(b-c) (2005) (Repl. Vol. 2010):

> (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. [Emphasis added.]

The Supreme Court has held: "When it appears from the proof upon which the Workmen's Compensation [Board of Review] acted that its finding was plainly wrong an order reflecting that finding will be reversed and set aside by this Court." Syllabus point 5, *Bragg v. Comm'r*, 152 W. Va. 706, 166 S.E.2d 162 (1969). Syl. pt. 1, *Bowers v. Comm'r*, 224 W. Va. 398, 686 S.E.2d 49 (2009). *See also* Syl. pt. 4, *Emmel v. State Comp. Dir.*, 150 W. Va. 277, 145 S.E.2d 29 (1965) ("An order of the workmen's compensation appeal board, approving an order of the state compensation commissioner, will be reversed by this Court on appeal, where the legal conclusions of the appeal board are erroneous.").

The Supreme Court also has applied the standard of review of statutory provisions: "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 Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995); Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995); *Hale v. W.Va. Office of Ins. Com'r*, 228 W.Va. 781, 784, 724 S.E.2d 752, 755 (2012).

B. PETITION TO REOPEN FOR PPD INCREASE IN OP TO TRIGGER TREATMENT:

1. THE LOWER TRIBUNALS ERRED IN DENYING THE REOPENING OF THE CLAIM BY THE FAILURE TO READ THE STATUTES *IN PARA MATERIA*.

W. Va. Code, § 23-1-1(b), states, "It is the further intent of the Legislature that this chapter be interpreted ***so as to assure the quick and efficient delivery of indemnity and medical benefits*** to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the

specific intent of the Legislature that workers' compensation cases ***shall be decided on their merits....***" [Emphasis added.] Further, at *W.Va.Code,* §23-1-1 (c), declares, "The purpose of the commission is to ensure the ***fair, efficient*** and financially stable administration of the workers' compensation system of the state of West Virginia." [Emphasis added.]

W. Va. Code, 23-4-3 provides:

> a) The Workers' Compensation Commission, and effective upon termination of the commission, the Insurance Commissioner, shall establish and alter from time to time, as it determines appropriate, a schedule of the maximum reasonable amounts to be paid to health care providers, providers of rehabilitation services, providers of durable medical and other goods and providers of other supplies and medically related items or other persons, firms or corporations for the rendering of treatment or services to injured employees under this chapter. The commission and effective upon termination of the commission, the Insurance Commissioner, also, on the first day of each regular session and also from time to time, as it may consider appropriate, shall submit the schedule, with any changes thereto, to the Legislature.
>
> The commission, and effective upon termination of the commission, all private carriers and self-insured employers or their agents, shall disburse and pay for personal injuries to the employees who are entitled to the benefits under this chapter as follows:
>
> (1) Sums for health care services, rehabilitation services, durable medical and other goods and other supplies and medically related items ***as may be reasonably required.*** The commission, and effective upon termination of the commission, all private carriers and self-insured employers or their agents, shall determine that which is reasonably required within the meaning of this section in accordance with the guidelines developed by the health care advisory panel pursuant to section three-b of this article: Provided, That nothing in this section shall prevent the implementation of guidelines applicable to a particular type of treatment or service or to a particular type of injury before guidelines have been developed for other types of treatment or services or injuries.... [Emphasis added.]

Additionally, in *W.Va. Code,* § 23-4-7 the legislative policy is expressed as "to provide benefits to an injured claimant promptly" and in *W.Va. Code,* § 23-4-7a, the legislative policy is expressed: "injured claimants should receive the type of treatment needed as promptly as possible." *W.Va. Code,* §23-5-13: "***It is the policy of this chapter that the rights of claimants for workers' compensation be determined as speedily and expeditiously as possible to the end that those incapacitated by injuries and the dependents of deceased workers may receive benefits as quickly as possible*** in view of the severe economic hardships which immediately befall the families of injured or deceased workers....***It is***

also the policy of this chapter to prohibit the denial of just claims of injured or deceased workers or their dependents on technicalities." [Emphasis added.]

Pursuant to *W.Va. Code*, 23-4-8d, the claimant can request medical services for OP at any time:

> **§23-4-8d. Occupational pneumoconiosis claims *never* closed for medical benefits with exception of settled claims.**
>
> Notwithstanding the provisions of subdivision (4), subsection (a), section sixteen of this article, with the exception of claims settled pursuant to article five, section seven of this chapter, ***a request for medical services, durable medical goods or other medical supplies in an occupational pneumoconiosis claim may be made at any time.*** [Emphasis added.]

The Supreme Court has affirmed the principles approved in *Ney v. Comm'r.*, -W. Va.-, 297 S.E.2d 212 (1982), by acknowledging that one of the basic purposes of workers compensation legislation is to impose upon industry, the cost of medical expenses incurred in the treatment and rehabilitation of workers who have suffered injuries in the course of and as a result of their employment. In the more recent decision *Jennifer Moore v. K-Mart Corporation*, 234 W.Va. 658, 664, 769 S.E. 2d 35, 41 (No. 12-1127, 2015), the Supreme Court acknowledged and reiterated these principles:

> The primary reason Respondent's argument lacks merit is because it ignores the fundamental purpose of workers' compensation legislation. ***There is no rational basis to discourage medically necessary treatment; this reasoning is wholly incompatible with the Act's benevolent objectives. One of the overriding purposes of the Act is to provide reasonable and necessary medical treatment to employees who are injured on the job. W.Va. Code § 23-4-1....*** [Emphasis added.]

Also as noted by the Supreme Court in footnote 10 in *Moore, supra:*

> In addition to their obligation as medical professionals, physicians have financial incentives to provide appropriate medical treatment under the workers' compensation system because the commission may suspend or permanently terminate their right to obtain payment for services if the "commission finds that the health care provider is regularly providing to injured employees health care that is excessive, medically unreasonable or unethical [.]" W.Va. Code § 23-4-3c (1). (2010).

The only test for medical treatment in a claim is the standard of "reasonably required" medical treatment as set forth in *W.Va. Code*, 23-4-3. The pending PTD application and litigation over the 50% filing threshold, now finalized and concluded as having been met, Exhibit G, should not be used as a

reason to deny "reasonably required" medical treatment by barring consideration of any additional PPD under *W.Va. Code*, 23-4-16. The Board of Review erred in the Decision of June 25, 2020, Exhibit F, by denying the Claimant's Motion for Remand, Exhibit E.

The rules of statutory construction must be followed to avoid the absurd result of denying the legislative goal of the compensation statute to provide prompt and reasonably required medical treatment, under *W.Va. Code*, 23-4-3, by denying reopening for treatment under *W.Va. Code* 23-4-16, when PPD is also the regulatory provision for impairment awards triggering treatment, Exhibit H. The litigation and appellate procedures should not be used to deny timely requests for "reasonably required" medical treatment.

In *Hammons v. WVOIC,* 235 W.Va.577, at 584, 775 S.E. 2d 458, at 465 (No. 12-1473, May 20, 2015), the Supreme Court reasoned:

> With specific respect to workers' compensation statutes, we have held that [i]nterpretations as to the meaning and application of workers' compensation statutes rendered by the Workers' Compensation Commissioner, as the governmental official charged with the administration and enforcement of the workers' compensation statutory law of this State, pursuant to W. Va. Code § 23–1–1 (1997) (Repl. Vol. 1998), should be accorded deference ***if such interpretations are consistent with the legislation's plain meaning and ordinary construction.***
>
> Syl. pt. 4, *State ex rel. ACF Indus. v. Vieweg,* 204 W.Va. 525, 514 S.E.2d 176 (1999) (emphasis added). Similarly,
>
> > [i]t is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.
>
> Syl. pt. 2, *Click v. Click,* 98 W.Va. 419, 127 S.E. 194 (1925). *Accord* Syl. pt. 2, *Newhart v. Pennybacker,* 120 W.Va. 774, 200 S.E. 350 (1938) ("Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made."). Finally, "[i]t is always presumed that the legislature will not enact a meaningless or useless statute." Syllabus point 4, *State ex rel. Hardesty v. Aracoma–Chief Logan No. 4523, Veterans of Foreign Wars of the United States, Inc.,* 147 W.Va. 645, 129 S.E.2d 921 (1963).

In *Hammons, supra*, the Court also reasoned at 235 W.Va. 584-585, 775 S.E.2d 465-466:

> Having reiterated the rules of statutory construction guiding our analysis, we now turn to a determination of the issue before us. Integral to our deliberation are three distinct rights afforded to injured workers by the governing statutes: (1) an injured worker's right to the payment of benefits for workplace injuries; (2) an injured worker's right to appeal adverse decisions; and (3) an injured worker's right to be referred for a PPD evaluation when the circumstances of his/her injury support such a referral. We find the confluence of these statutes supports the PPD evaluation referrals that Mr. Hammons and Ms. Stinnett have requested. Finding that Mr. Hammons and Ms. Stinnett are entitled to request such referrals ***irrespective of the reopening time periods provided by W. Va. Code § 23-4-16(a)(2) is consistent with the enforcement of the claimants' rights to receive benefits for their work-related injuries***; to appeal adverse workers' compensation rulings; and to be referred for a PPD evaluation, which referrals are supported by the compensability ruling and medical treatment approval the claimants were seeking when the subject reopening periods expired. [Emphasis added.]

Denying medical treatment --- when the legislative policies mandate prompt medical treatment--- while litigation continues on the sometimes lengthy litigation of PPD and PTD is an absurd result. *W.Va. Code*, 23-4-8d expressly allows "a request for medical services, durable medical goods or other medical supplies in an occupational pneumoconiosis claim ***may be made at any time***." [Emphasis added.]

Occupational pneumoconiosis is a known progressive disease and the level of the OP impairment awards triggers the level of treatment under Rule 20, Exhibit H. In *Lester v. Comm'r.*, 161 W.Va. 299, 242 S.E.2d 443, 445 (1978), the Supreme Court observed and acknowledged the well-known progressive nature of occupational pneumoconiosis:

> **In resolving this question, we must look not only to the language of the statutory provisions but also to their purpose.** Considering the amendments together, the legislature has expressly abandoned any fixed and rigid time restrictions within which a claim for occupational pneumoconiosis benefits must be filed and has opted instead for a limitation period based on the claimant's discovery of the occupational disease.
>
> The legislature's actions signify an awareness that occupational pneumoconiosis may go undetected for a long time, for this disease often does not become manifest until years after the victim was last exposed to the causes of the disease. The amendments also manifest legislative recognition of the fact that a fixed and rigid time restriction on the filing of a claim would occasionally result in a harsh and unjust result. **It would serve as a trap for the unwary worker whose claim would be barred for an injury which was unknown to him at the time filing was required. A set time limitation could conceivably lapse before the symptoms of this insidious disease became evident or before the disease results in disability. It was just this kind of result the legislature expressly sought to prevent.**

> Keeping in mind the beneficent purposes of the Workmen's Compensation Act and the liberality rules as to its construction, and being aware of the mischief sought to be remedied by the legislative amendments, we perceive no reason why the legislature would not have intended such amendments to be applicable to claims which were alive and well and not barred by the previously existing time limitations. The necessary implication arising from the history and purpose of the liberalizing amendments is a legislative intent to ensure that workers who have contracted occupational pneumoconiosis shall have a reasonable opportunity, after learning of its presence, to present a claim for benefits. Fairness, justice, and common sense indicate the legislature desired as many injured workers as possible to have the benefit of its liberalizing enactments not just those who were last exposed to the hazards of occupational pneumoconiosis subsequent to the effective date of each amendment. [Emphasis added.] Id., at 445-446.

Rule 20 provides at 85-20-67.1, Exhibit H, that the OP Board may use the Guides to the extent that the board deems appropriate. At Table 85-20A, Exhibit H, that the results of any medically acceptable tests or procedures reported by a physician which are not addressed in the pulmonary table but which tend to demonstrate the presence or absence of pneumoconiosis or the sequela may be submitted and given appropriate consideration. Further, at 85-20A (c), it is stated: "It is also important that the Occupational Pneumoconiosis Board use all clinical history and physical findings that would enhance or detract from any percentage of impairment in the above table." At 85-20A (f) , it is stated that the method of establishing impairment attributable to a cause that is not occupational pneumoconiosis need not be a matter of exact mathematical or scientific formulation, but should be based upon the entirety of the evidentiary record.

2. **PROCEDURAL RIGHT TO REOPEN**:

THE LOWER TRIBUNALS FAILED TO APPLY THE STATUTORY PROVISIONS OF *W.VA. CODE* 23-4-16 CORRECTLY BY THE DENIAL OF A REOPENING PETITION FOR AN INCREASE IN THE OP IMPAIRMENT, WHICH TRIGGERS THE OP TREATMENT GUIDELINES

The lower tribunals erroneously failed to recognize that the impairment level of the occupational lung disease triggers treatment but also that the reopening requests should be merged or consolidated and not denied under W.Va. Code, 23-4-16 (e) which provides: "A claimant may only have one active

request for a permanent disability award pending in a claim at any one time. Any new request that is made while another is pending shall be consolidated into the former request."

This interpretation of the statute is not entirely accurate, because the statute also provides that the ***requests shall be merged*** and not outright denied. There is no provision simply to deny the application based upon a prior pending petition for impairment. The following is the entire provision of *W.V. Code* 23-4-16 (e):

> (e) A claimant may have only one active request for a permanent disability award pending in a claim at any one time. ***Any new request that is made while another is pending shall be consolidated into the former request.*** [Emphasis added.]

The test to reopen a claim has always been described as ***any evidence which would tend to justify, but not to compel the inference that there has been a progression of aggravation of the former injury***.

There is evidence sufficient to create a prima facie cause to reopen the claim, especially given the progression of black lung and the treatment guidelines based upon the level of lung impairment. That difference exists partly in the report of the CT scan report dated May 29, 2019 of the chest without contrast which revealed "the impression of lower lobe bronchiectasis and mild reticular opacities at the bases, atelectasis versus scarring: coronary artery calcifications." Exhibit D, ALJ 12/17/2019, Finding 18, at page 3.

The claim should have been reopened for consideration of the level of lung impairment, in order to determine the right to treatment for the compensable lung disease. The Supreme Court in *Fraga v. State Compensation Comm'r,* 125 W. Va. 107, 23 S.E.2d 641 (1942), stated that a reference should be made to the OP Board instead of a dismissal of the claim:

> We do not mean to hold that there should be a reference by the commissioner to the medical board in all cases, but we are of the opinion that such procedure should be followed where there is a reasonable doubt on any medical question, ***and where an investigation thereof might tend to clarify any matter which might affect the final decision of the commissioner.*** [Emphasis added.]

The reopening of the claim and the referral of the claimant, Charles Delbert, for the OP Board evaluation is a reasonable step given both the progressive nature of OP as well as the impairment level needed for medical treatment of OP. The Supreme Court of West Virginia on June 26, 2008 issued a decision, in *Fenton Glass v. Garrison,* et al, No. 33673, 664 S.E. 2d 761 (WV 2008) giving great deference and approval to the OP Board findings:

> .....We observe that the O.P. Board is not only a board comprised of experts in the field of occupational pneumoconiosis, but also that the O.P. Board's members are presumptively impartial. Accordingly, we believe that great deference should be given to the conclusions of the O.P. Board not only on medical, but also on exposure issues, related to the disease known as occupational pneumoconiosis.

Therein the Supreme Court set forth its reliance upon the prior decision in *Rhodes v. Workers' Compensation Division*, 209 W. Va. 8, 543 S.E.2d 289 (2000):

> In *Rhodes*, we reviewed not only the importance of the role of the O.P. Board in medical determinations of awards for occupational pneumoconiosis, but also the deference required by West Virginia law for findings and conclusions of the O.P. Board on medical issues:
>
> First, we note that the OP Board plays an integral role in the decision of an OP claim: "[t]he function of the board is to determine *all* medical questions relating to cases of compensation for occupational pneumoconiosis under the direction and supervision of the commissioner." W. Va. Code § 23-4-8a (1999) (Supp. 2000) (emphasis added). *See also Newman v. Richardson*, 186 W. Va. 66, 69-70, 410 S.E.2d 705, 708-09 (1991) ("Because the Occupational Pneumoconiosis Board is composed of doctors who have 'by special study or experience, or both, acquired special knowledge of pulmonary diseases' (W. Va. Code, 23-4-8a, [1974]), the Board is to determine all medical questions in an occupational pneumoconiosis claim under the direction and supervision of the Commissioner. *Ferguson v. State Workmens' Compensation Commissioner*, 152 W. Va. 366, 163 S.E.2d 465 (1968)." (footnote omitted)).
>
> Furthermore, the Division and the OOJ are mandated, in W. Va. Code § 23-4-6a (1995) (Repl. Vol. 1998), to give substantial weight to the OP Board's determination of a claimant's degree of medical impairment:
>
> If an employee is found to be permanently disabled due to occupational pneumoconiosis, as defined in section one [§ 23-4-1] of this article, *the percentage of permanent disability shall be determined by the degree of medical impairment that is found by the occupational pneumoconiosis board.* The division *shall* enter an order setting forth the findings of the occupational pneumoconiosis board with regard to whether the claimant has occupational pneumoconiosis and the degree of medical impairment, if any, resulting therefrom. That order *shall* be the final decision of the

> division for purposes of section one [§ 23-5-1], article five of this chapter. If such a decision is objected to, the office of judges *shall affirm* the decision of the occupational pneumoconiosis board made following hearing *unless* the decision is *clearly wrong* in view of the reliable, probative and substantial evidence on the whole record.
>
> 209 W. Va. at 14, 543 S.E.2d at 295 (emphasis in original) (internal footnotes omitted). (See footnote 10)
>
> In reviewing the statutory language applicable to the medical issue herein, it is and has been the function of the OP Board to determine *all* medical questions relating to cases of compensation for occupational pneumoconiosis. W. Va. Code § 23-4-8a (2005). *Rhodes*, 209 W. Va. at 14, 543 S.E.2d at 295. Furthermore, "the percentage of permanent disability is determined by the degree of medical impairment that is found by the occupational pneumoconiosis board." W. Va. Code § 23-4-6a (2005). Finally, should exception be taken to the medical findings and conclusions of the O.P. Board, provision has been made for a final hearing at which time all medical evidence may be considered and the O.P. Board shall submit to examination and cross-examination. W. Va. Code § 23-4-8c (d) (2005). In reviewing such exceptions, the "office of judges *shall affirm the decision of the occupational pneumoconiosis board* made following hearing *unless the decision is clearly wrong* in view of the reliable, probative and substantial evidence of the whole record." W. Va. Code § 23-4-6a (2005) (emphasis added). The word "shall" is mandatory. *See State v. Allen*, 208 W.Va. 144, 153, 539 W.Va. 87, 96 (1999).
>
> The Legislature has clearly conveyed its intention through such statutory language that the O.P. Board is to be accorded considerable deference on medical matters related to the diagnosis and, if any, impairment related to occupational pneumoconiosis. Because the O.P. Board is charged with determining *all* medical questions relating to occupational pneumoconiosis cases, and because of the substantial deference afforded to the O.P. Board in connection with occupational pneumoconiosis cases, the party challenging the O.P. Board's findings and conclusions bears the burden of establishing through competent and reliable evidence that such findings and conclusions are clearly wrong. W. Va. Code § 23-4-6a (2005). *See Rhodes*, 209 W. Va. at 16-17, 543 S.E.2d 297-298; *Whitt v. State Compensation Commissioner*, 153 W. Va. 688, 693-694, 172 S.E.2d 375, 377-378 (1970). Here, as amply found by Judge Haslebacher, the claimant did not meet his burden with competent, reliable medical proof.

In *Harper v. Comm'r*,-W.Va.-, 234 S.E. 2d 779, 780 (1977), the Supreme Court held that for the purposes of re-opening a claim pursuant to *Code*, §23-5-1(a) and *Code*, §23-5-1(b), the claimant must *show* a prime facie cause, which means nothing more than ***any evidence which would tend to justify, but not to compel the inference that there has been a progression of aggravation of the former injury***. [Emphasis added.]

The claimant respectfully submits that he established sufficient evidence for a prima facie cause

to reopen the claim in 2019, based upon the CT scan of May 2019, and the claimant should have been referred to the OP Board. To delay the referral until the PTD litigation is concluded, favorably or unfavorably, is a delay and denial of the prompt medical treatment mandated by statute.

The Office of Judges erred in failing to reopen the claim for the purposes of the OP Board evaluation and the treatment, as requested in 2019, with the following reasoning at page 5 of the Decision issued on December 17, 2019, Exhibit D:

> By Order dated August 12, 2019, the Claim Administrator denied claimant's request to reopen the claim for additional permanent partial disability consideration as the West Virginia Code specifies that a claimant may only have one permanent disability claim pending in a claim at any time. Claimant has a petition for permanent total disability pending before the West Virginia Supreme Court of Appeals.
>
> West Virginia Code §23-4-16(e) provides: "A claimant may only have one active request for a permanent disability award pending in a claim at any one time. Any new request that is made while another Is pending shall be consolidated into the former request."
>
> This issue has been addressed before in this claim. By Decision dated June 14, 2017, this tribunal denied the claimant's request to reopen the claim for additional permanent partial disability consideration based on his pending application for PTD. This Decision was affirmed by the Board of Review.
>
> There are currently two matters regarding permanent disability pending before the Office of Judges, the Instant protest to the Claim Administrator's Order dated August 12, 2019 and the protest filed by claimant on November 4, 2019 regarding the Claim Administrator's denial of PTD by Order dated September 19, 2019. ***Additionally, on January 18, 2019, the employer filed a statutory Notice of Appeal of the Board of Review Order dated December 21, 2018 affirming the finding that the claimant had met the threshold for PTD consideration.*** [Emphasis added.]

The issue of permanent impairment for the 50% filing threshold for PTD is now concluded and is res judicata. Impairment over 50% is no longer an issue to be addressed in this claim for the purposes of the PTD application and determination. Therefore, there is no rationale to delay the OP Board referral. The Supreme Court in Docket 19-0040 filed on February 21, 2020, Exhibit G, has affirmed the decision dated July 6, 2018 by the Office of Judges and affirmed the decision dated December 21, 2018 by the Board of Review, which affirmed and approved the 50% filing threshold. The issue of PPD for the purposes of the 50% PTD filing threshold is now *res judicata* and no longer under review by any tribunal.

The Board of Review on June 25, 2020, Exhibit F, erred in denying the Claimant's Motion for Remand, Exhibit E, based upon the finality of the 50% PTD filing threshold. The issue of PTD now before the Office of Judges is an issue of whether the claimant can be substantially and gainfully employed and not the degree of permanent impairment.

At pages 5-6 of the Decision issued on December 17, 2019, Exhibit D, the Office of Judges relied upon the prior litigation concerning PPD reopening in 2016, due to the pending litigation addressing the 50% PTD filing threshold at the same time. Even assuming *arguendo* that the interpretation is correct, the 50% impairment is no longer in issue, Exhibit G. The claimant had filed a prior petition to reopen his claim ***for treatment and for PPD***, on October 13, 2016, which requested a reopening of the claim for consideration of the impairment and the treatment, to include oxygen. [Emphasis added.]

In the opinion of December 17, 2019, Exhibit D, under review in this appeal, the ALJ, despite acknowledging that Rule 20 requires a level of impairment awards in order to grant treatment for compensable OP, as set forth in Exhibit H, has denied the very process of the reopening and the referral to the OP Board to address the level of impairment which could entitle the claimant to more treatment. The level of impairment from occupational pneumoconiosis, and therefore the reopening application, is important, relevant and necessary because the percentage of impairment triggers medical care under Rule 20, whether for office visits, for medications, for oxygen, or for other treatment. Throughout the record it is noted that the claimant is a non-smoker.

Section 85-1-52 addresses the procedure in Occupational Pneumoconiosis cases, and specifically, Section 85-1-52.10 addresses medical treatment. Therein, for awards in excess of 15% PPD, pulmonary rehabilitation services can be authorized and other various services. Further, it is noted that prior authorization is required for oxygen, as follows: "Except when administered for medical emergency, oxygen therapy requires prior authorization and will only then be authorized when in compliance with the

guidelines of the American Thoracic Society."

The claimant submits that the preponderance of the evidence, including the progressive nature of occupational pneumoconiosis, supports the medical necessity and reasonableness of the reopening under the standard of "reasonably required" medical treatment set forth in *W.Va. Code*, Section 23-4-3, but also prompt medical services, when the entire record is reviewed as a whole.

The ALJ in the Decision of December 17, 2019, Exhibit G, erroneously relied upon a Memorandum Decision in *Pintarich v. WVOIC*, No. 15-0081 (WV November 19, 2015), which can be easily distinguished from the current claim. The ALJ in the Decision of December 17, 2019, at pages 5-6, Exhibit G, reasoned:

> The West Virginia Supreme Court of Appeals, in *Pintarich v W.Va. Office of the Ins. Comm'r.*, No. 15-0081, (W.Va. Supreme Court, November 19, 2015) (Memorandum Decision), determined that the language of West Virginia Code §23-4-16(e) is clear, and, under the facts of that case, prevents two applications for permanent total disability benefits from being considered at the same time. The matter herein cannot proceed with multiple requests for permanent impairment pending.
>
> While consolidation of dual protests is cited in the statute, the protest regarding the PTD denial cannot logistically be consolidated with the request for additional occupational pneumoconiosis permanent partial disability. Doing so will create an absurd result which could cause an endless cycle of remanding a finding of additional PPD to the Claim Administrator to review in the context of the PTD. ***Until the final ruling is issued regarding his PTD the claimant cannot prosecute requests for further permanent partial disability.*** The Order dated August 12, 2019 denying a reopening for further permanent partial disability consideration should be affirmed. [Emphasis added.]

The Claimant Pintarich had filed successive applications for PTD when there was no requirement of a 50% filing threshold under the statute and the impairment was the only question, not the need for an increase in PPD in order to trigger medical treatment.

Additionally, although the "final order" regarding the 50% filing threshold for Mr. Delbert was not affirmed and did not become final until after the Memorandum Decision of the Supreme Court was issued on February 21, 2020, Exhibit G, that 50% filing threshold is now final. In the Finding 20, at page 4 of the Decision dated December 17, 2019, Exhibit D, the ALJ determined:

20. The Claim Administrator, by Order dated September 19, 2019, based on the September 9, 2019, Permanent Total Disability Review Board's final recommendations, denied the claimant a permanent total disability award. By letter dated November 4, 2019, the claimant, through counsel, protested the September 19, 2019 Order.

Therefore, the sole issue before the Office of Judges is no longer the PPD required to meet the 50% PTD filing threshold; now the issue before the Office of Judges on the protest to the order dated September 19, 2019, denying PTD, is: Having met the 50% filing threshold to be considered for PTD, is the claimant able to be substantially and gainfully employed? Impairment is no longer a critical issue in that litigation. Any conflict should be construed in favor of the claimant under *W.Va. Code,* Section 23-4-1g.

IX. CONCLUSION:

The claimant requests that the Supreme Court REVERSE the Decision dated June 25, 2020, affirming the decision dated December 17, 2019 by the Office of Judges; that the Supreme Court REMAND the claim to the claim administrator with directions that the claimant be referred to the OP Board for further evaluation to determine the level of impairment, which level of impairment is a triggering fact for treatment; and for such further relief as may seem just and proper.

CHARLES G. DELBERT, Claimant

By: _____
Of counsel for claimant

VI. CERTIFICATE OF SERVICE:

Service of the foregoing Petition and Brief of the Claimant, CHARLES G. DELBERT, in Support of His Appeal was had upon the parties herein by mailing true and correct copies thereof by regular United States mail, postage prepaid and properly addressed this 17th day of July, 2020, as follows: Aimee M. Stern, Esq., Dinsmore & Shohl, LLP, Bennett Square, 2100 Market Street, Wheeling, WV 26003.

CHARLES G. DELBERT, Claimant

By: _____
Of counsel for claimant

APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: Charles G. Delbert v. Murray American Energy, Inc.
Petitioner: Charles G. Delbert Respondent: Murray American Energy, Inc.
Counsel: M. Jane Glauser, Esq. (WVSB#1397) Counsel: Aimee M. Stern, Esq.
Claim No.: 2014014137-OP Board of Review No.: 2055031
Date of Injury/Last Exposure: May 19, 2009 Date Claim Filed: Application dated June 3, 2013
Date and Ruling of the Office of Judges: December 17, 2019
Date and Ruling of the Board of Review: June 25, 2020
Issue and Relief requested on Appeal: The claimant seeks a reopening of the claim and a referral of the claimant to the OP Board

CLAIMANT INFORMATION

Claimant's Name: Charles G. Delbert
Nature of Injury: occupational lung disease (occupational pneumoconiosis)
Age: Birthdate: 4-5-1954 Is the Claimant still working? ☐Yes X No. If yes, where:
Occupation: underground coal miner No. of Years: approximately 35 years
Was the claim found to be compensable? X Yes ☐ No If yes, order date: February 6, 2014
Issue: Whether the lower tribunals erred in denying reopening of the claim for consideration of a higher impairment, since medical treatment is based upon the impairment award under Rule 20 treatment guidelines

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: occupational pneumoconiosis of 10% impairment

Are there any related petitions currently pending or previously considered by the Supreme Court?
x Yes ☐ None (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? X 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 X 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.

Charles G. Delbert
Claim No. 2014014137-OP
DOI: May 19, 2009
Employer: Murray American Energy, INC.
BOR No.: 2055031

A. PENDING PROTESTS BEFORE THE OFFICE OF JUDGES IN CLAIM NO. 2014014137-OP

The claimant protested the Order dated September 19, 2019, by SmartCasualty Claims, which denied a permanent total disability award. The order stated:

> On behalf of the employer, we acknowledge receipt of the West Virginia Offices of the Insurance Commission Permanent Total Disability Review Board's final recommendations dated September 9, 2019 (copy enclosed). The Permanent Total Disability Review Board has recommended you be denied a permanent total disability (PTD) award. The PTD Review Board has opined that you have vocational rehabilitation potential and are able to return to employment. Based upon these findings, you are hereby denied a permanent total disability award.

The time frame order entered on November 12, 2019 expired for the claimant on May 11, 2020 and expires for the employer on November 9, 2020.

B. PENDING APPEALS BEFORE BOARD OF REVIEW IN CLAIM NO. 2014014137-OP

There are no pending appeals before the Board of Review at this time.

C. PRIOR APPEALS BEFORE THE SUPREME COURT IN CLAIM NO. 2014014137-OP

BOR No. 2053111
Supreme Court No. 19-0040

The employer appealed from the Decision of the Board of Review on December 21, 2018 affirming the Decision dated July 6, 2018 finding that the claimant met the 50% filing threshold for PTD.

On February 21, 2020, the Supreme Court affirmed the Decision by the Board of Review. See Exhibit G in the Claimant's Appendix filed in the appeal *sub judice*.