



# *West Virginia Workers' Compensation Law Notes*

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## **TIME LIMITATIONS TO APPLY FOR DEPENDENT'S DEATH BENEFITS EXTENDED**

W.Va. Code §23-4-15(a) provides:

To entitle any employee or dependent of a deceased employee to compensation under this chapter, other than for occupational pneumoconiosis or other occupational disease, the application for compensation shall be...[filed] within six months from and after the injury or death, as the case may be, and unless filed within the six months period, the right to compensation under this chapter is forever barred, such time limitation being hereby declared to be a condition of the right and hence jurisdictional...

On December 7, 2010, Russell H., a young coal miner, died in his sleep from a seizure. He had suffered a work-related injury on March 24, 2009 when a wrench fell from a mine's ceiling, hitting him on the head. He was momentarily unconscious and developed a golf-ball size knot on his head. He received emergent care, but did not seek any additional treatment for the injury. In fact, he returned to work a few days later and, in May 2009, his claim for temporary total disability benefits was closed because he was off for less than three days. Twenty-one months later, on December 7, 2010, he died.

An autopsy was performed the day after his death but, for unknown reasons, the autopsy report was not made available to the decedent's family until August 24, 2011, more than eight months after the date of death. The report stated: "[He] died as a result of a seizure while sleeping in the setting of a traumatic seizure disorder following a remote head injury at work....[T]he manner of death is best certified as an accident.

The decedent left behind a six-year old child. Exactly six months after receiving the autopsy report,

the child's grandmother applied for dependent's death benefits on behalf of the child. The claims administrator rejected the application on the basis that: 1) the application was filed more than six months after the decedent's death and 2) the grandmother was not the proper person to file the application because she was not the child's legal guardian.

The claims administrator's decision was affirmed by the Office of Judges and the Board of Review. The Supreme Court, however, disagreed.

First, the Court noted that the legislative intent behind setting time limitations for claims under the Workers' Compensation Act is two-fold: 1) it protects employers from frivolous or outdated claims and 2) it affords claimants sufficient opportunity to investigate a claim before it is filed. The position taken by the claims administrator that the time limitation in W.Va. Code §23-4-15(a) can never be tolled, under any circumstances, is contrary to both of the legislative goals. It would harm employers because it would encourage a decedent's family to file a rushed application for death benefits before it has sufficient medical evidence. It would also harm claimants who, as here, would be saddled with the impossible task of linking an injury to a death that occurred twenty-one months later. Even the decedent's treating physicians and his employer did not recognize the injury as life threatening.

Second, the Court noted that W.Va. Code §23-4-15(a) provides that when an employee or dependent of an employee "is mentally or physically incapable of filing the application, it may be filed by his or her attorney or by a member of his or her family." By law, the six-year old child was not mentally or physically competent to file an application. As such, the grandmother was a proper party to file an application on the child's behalf.



Thus, in the case of *Sheena H. for Russell H., deceased, and on behalf of the minor child, L.H., v. West Virginia Office of the Insurance Commissioner and Amfire, LLC, No. 13-0875, Filed April 10, 2015*, the Supreme Court of Appeals of West Virginia held:

...[W]here a claimant to dependent's death benefits under the Workers' Compensation Act delays filing a claim because the claimant was unaware, and could not have learned through reasonable diligence, that the decedent's cause of death was work-related, and the delay was due to the medical examiner completing

and making available an autopsy report, the six-month time limitation for filing a claim in West Virginia Code §23-4-15(a) [2010] is tolled until the claimant, through reasonable diligence, could have learned of the autopsy report finding that the decedent's cause of death was, in any material degree, contributed to by an injury or disease that arose in the course of and resulting from the decedent's employment. However, we limit our holding to death benefits under the Workers' Compensation Act where the delay was on the part of the medical examiner, not the claimant. This holding does not apply to claimant's who delay having an autopsy performed.

### **Referral for PPD Evaluation Granted Even Though Time for Reopening Claim Expired**

The Supreme Court of Appeals recently issued a decision involving appeals by two claimants who sustained employment-related injuries and sought additional workers' compensation benefits as a result of further related symptoms. Although both claimants timely requested that the new diagnoses be added to their original claims, there were significant litigation delays before the Court found that they were entitled to the requested compensability ruling/medical treatment; however, because of these delays, the claimants' subsequent requests for permanent partial disability ("PPD") benefits were denied by the workers' compensation system as untimely filed.

On appeal to the Supreme Court of Appeals, the claimants asked that their PPD requests be found to have been timely filed. For the following reasons, the Court agreed. Their additional injuries were deemed compensable. The Commission had failed to refer the claimants for required PPD evaluations, and the Board of Review's denial of the claimants' requests for PPD evaluation for their additional injuries was improper because it deprived them of their statutory rights to receive a PPD evaluation and to be compensated for their injuries. Thus, the Court reversed the Board of Review and remanded the cases for further proceedings.

*Gary E. Hammons v. West Virginia Office of the Insurance Commissioner and A & R Transport, Inc., In the Supreme Court of Appeals of West Virginia, January 2015 Term, No. 12-1473, Filed May 20, 2015.* Gary E. Hammons ("Hammons"), suffered an injury to his leg on January 5, 2004. As a result, he received a 4% PPD award on June 6, 2005. Thereaf-

ter, his doctor determined that his low back symptoms were attributable to his January 5, 2004 injury, and Hammons sought to have it added to his original workers' compensation claim. On January 4, 2010, the Supreme Court of Appeals ruled that his low back injury was a compensable component of his original work-related injury, and also awarded him temporary total disability ("TTD") benefits for his low back injury from October 18, 2005 through July 25, 2006. On March 8, 2010, the Claims Administrator closed the claim for TTD benefits for the back injury.

Although Hammons met the requisite criteria for a mandatory PPD evaluation pursuant to W. Va. Code Section 23-4-7a(f) (2005) (Repl. Vol. 2010), the Workers' Compensation Commission ("Commission") never referred him for an evaluation. On August 9, 2010, Hammons sent a letter to the Claims Administrator requesting a PPD evaluation regarding his low back injury. On August 11, 2010, the Claims Administrator denied the request as untimely to reopen his original claim pursuant to W. Va. Code Section 23-4-16(a) (2005) (Repl. Vol. 2010). Hammons then appealed to the Office of Judges ("OOJ"), which reversed the Claims Administrator's determination on September 27, 2011. The employer then appealed to the Board of Review, which reversed the OOJ and reinstated the Claims Administrator's initial determination on November 28, 2012. Hammons then appealed to the Supreme Court of Appeals.

*Clara L. Stinnett v. West Virginia Office of the Insurance Commissioner and West Virginia Department*



*of Corrections, In the Supreme Court of Appeals of West Virginia, January 2015 Term, No. 13-0312, Filed May 20, 2015.* As a result of an August 31, 1998 work-related injury to her wrist, Clara L. Stinnett (“Stinnett”) received a 22% PPD award on January 21, 2000. Thereafter, on January 14, 2005, a lumbar sprain/strain attributable to her August 31, 1998 injury was ruled compensable. Eventually on July 22, 2009, despite repeated denials, the Supreme Court of Appeals determined that Stinnett’s request for posterior lumbar interbody fusion surgery for her back should have been approved. As a result, on August 7, 2009, the third-party administrator authorized a lumbar interbody fusion/sextant decompression, which Stinnett underwent on June 22, 2010.

Stinnett claimed that her back injury could not be evaluated for PPD benefits until she had reached maximum medical improvement, which occurred once she had, and then recovered from, her back surgery. The Commission failed to make the required referral of Stinnett for a PPD evaluation. On July 5, 2011, she requested consideration of PPD benefits related to her compensable back injury, which request was denied by the Claims Administrator on July 28, 2011 as an untimely request to reopen her original claim. Stinnett appealed to the OOJ, which also denied her request on September 11, 2012. These denials were affirmed by the Board of Review on February 25, 2013. Stinnett then appealed to the Supreme Court of Appeals.

#### The Court’s Rationale:

The Court addressed the appeals of Hammons and Stinnett in the same decision. The main issue on appeal was whether the claimants’ requests for PPD evaluations were timely pursuant to W. Va. Code Section 23-4-16(a)(2). In considering this issue, the Court focused on three distinct rights afforded injured workers by the governing statutes:

- (1) an injured worker’s right to 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 the injury support it.

The Court stated that its finding that the claimants were entitled to request such referrals, irrespective of the reopening time periods, was consistent with these three rights.

Under West Virginia law, injured workers have the

rights to receive medical treatment and benefits for work-related injuries, and to receive such compensation expediently. They may also seek to reopen their claims to permit further medical treatment or benefits attributable to additional symptoms experienced from the initial work-related injury. Where the claimant has received an award of PPD benefits, he or she must file a reopening request within five years of the initial claim’s closure.

Also under West Virginia law, when a claimant receives an unfavorable ruling, the workers’ compensation statutes allow him or her to appeal that decision through the workers’ compensation systems and, ultimately, to the Supreme Court of Appeals. Also, claimants have been further granted the right (1) to request the reopening of their claims when they experience a progression or aggravation in their condition, or can demonstrate some other fact or facts which previously were not considered in the former findings and which would entitle them to greater benefits than they already had received; and (2) to object to a decision denying a reopening request.

West Virginia law provides that, should a claimant appealing from an adverse decision of the Claims Administrator to the Office of Judges fail to obtain a favorable resolution of the claim, he or she may then appeal the adverse ruling to the Board of Review. Finally, an aggrieved claimant may appeal an unfavorable ruling of the Board of Review to the Supreme Court of Appeals. As a result, in the cases at issue, the Court stated that it was apparent that both claimants were exercising their legislatively-granted appeal rights when they pursued favorable determinations of their compensability and medical treatment requests, which relief provided the foundation for the PPD evaluations they were seeking.

Once a claimant’s treatment for his or her work-related injury permits him or her to return to work, and/or he or she has reached maximum medical improvement, the claimant is entitled to be referred for a PPD evaluation to determine permanent disability caused by the work-related injury and to receive the resulting benefits. The Commission has been charged with the responsibility of facilitating such a referral when a claimant has a lengthy period of TTD. The Commission’s statutory duty to refer a claimant for a PPD evaluation after the requirements of W. Va. Code Section 23-4-7a(f) have been satisfied is mandatory. In the instant cases, while both claimants had received TTD benefits in excess of the



120-day benchmark, neither had received a PPD evaluation referral from the Commission.

Under West Virginia law, a failure to effectuate such a referral does not leave the claimant's claim open indefinitely until a PPD referral is made; however, the Commission is required to inform a claimant of his or her right to receive a PPD evaluation under W. Va. Code Section 23-4-22 (1993). Pursuant to this, the Court said that it was apparent that both claimants had a legislatively-created right to receive a PPD evaluation referral, and such a referral was required to be initiated by the Commission.

When considering the aforementioned, the Supreme Court of Appeals stated that the Board of Review's denial of the claimants' requests for PPD evaluation referrals deprived them of their right to receive such evaluations. Thus, the Court said that the result was patently inconsistent with the workers' compensation statutes affording claimants the aforementioned rights and the Court's interpretation of same.

The Court concluded that the Commission's denial of the PPD evaluation referrals requested by the claimants was inconsistent with, and directly contrary to, the claimants' rights to receive such evaluations and the benefits commensurate therewith.

Therefore, the Court reversed the Board of Review's orders rejecting the claimants' PPD evaluation referral requests as untimely, and instead found that the claimants were permitted to request such referrals to determine whether they had sustained any permanent disability as a result of their additional work-related back injuries.

The Court stated that its decision was necessary to achieve the stated legislative purposes of providing compensation for employees' work-related injuries, and affording them the opportunity to receive a permanent disability evaluation. The Court further said that, despite the claimants' clear entitlement to receive the PPD evaluation referrals, the effect of the Commission's denial produced an absurd and inconsistent result by ruling an injury compensable on the one hand, but denying an award of benefits on the other.

Accordingly, the Supreme Court of Appeals held that when a workers' compensation claimant: (1) receives a PPD award for an initial workplace injury; (2) timely files a reopening request pursuant to W. Va. Code Section 23-4-16(a)(2) (2005) (Repl. Vol. 2010) seeking to add an additional, related injury to his or her claim; (3) such additional injury is ruled compensable; and (4) the Commission, or other named party, fails to refer the claimant for a PPD evaluation in accordance with W. Va. Code Section 23-4-7(a)(f) (2005) (Repl. Vol. 2010), the claimant may request a PPD evaluation referral even if the time period for reopening the initial claim, contemplated by W. Va. Code Section 23-4-16(a)(2), has expired.

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