

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

DAVID EDDIE COWAN,
Petitioner,

vs.

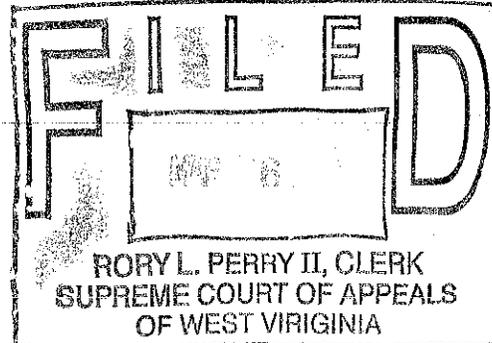
CLAIM NO. 970029573

DOI: 11/20/1996

Case No. ~~070846~~ 33436

JANE CLINE, INSURANCE COMMISSIONER,
STATE OF WEST VIRGINIA and BRICKSTREET
ADMINISTRATIVE SERVICES, Acting as the Third
Third Party Administrator on behalf of the Insurance
Commissioner,

Respondents



PETITION FOR WRIT OF MANDAMUS

1. David E. Cowan, a claimant for benefits pursuant to the West Virginia Workers' Compensation Act, by counsel, invokes this Court's jurisdiction pursuant to Rule 14 of the Supreme Court's Rules of Appellant Procedure seeking an order directing BrickStreet Administrative Services, the third party administrator on behalf of the Insurance Commissioner, to act pursuant to the lawful orders of the Workers' Compensation Office of Judges entered on February 25, 2000, and the former Workers' Compensation Commissioner's order of July 23, 1999.

2. The Supreme Court will issue a *writ of mandamus* when three elements coexist: (1) a clear, legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy. See Wampler Foods, Inc. v Workers' Compensation Division, 602 S.E.2d 805 (W.Va. 2004).

3. The claimant filed an application for permanent total disability benefits on June 28, 1999 under Claim No. 82-42066. The application listed all other claims filed by the Petitioner including the most recent claim, Claim No. 97-29573.

4. On July 23, 1999, the former Workers' Compensation Commissioner, William F. Vieweg, issued an order which indicated, among other things, that the petition/application for a permanent total disability filed by the claimant on June 28, 1999, would be addressed in Claim No. 97-0029573.

5. The claimant appealed this matter to the Office of Judges and the Office of Judges issued an order dated February 25, 2000, finding, among other things, that the claimant's petition application for a permanent total disability award would be addressed in Claim No. 97-0029573 which was the latest of the workers compensation claims filed by the claimant. This order was not appealed by any party.

6. The former Commissioner and now BrickStreet Administrative Services operating as the third party administrator for the Insurance Commissioner have failed to address the claimant's petition and application for permanent total disability benefits in Claim No. 97-0029573 or in any other claim.

7. On April 28, 2006, the claimant filed a motion with BrickStreet Administrative Services asking that a decision be made with reference to the claimant's application for a total life award filed on June 29, 1999. The claimant received no response to that motion.

8. On October 4, 2006, the claimant filed a motion to compel with the West Virginia Workers' Compensation Office of Judges seeking to compel compliance with the former Commissioner's order and with the Office of Judges' order of February 25, 2000, ordering that the prior application be decided under Claim No. 97-0029573.

9. The Office of Judges issued an order dated November 21, 2006 indicating that W.Va. C.S.R.93-1-18 did not apply to the Office of Insurance Commissioner through its third party

administrator and as an "Old Fund" claim, the provisions of W. Va. Code 23-4-1c(a)(3) were not applicable. The Office of Judges effectively concluded that they did not have the authority to compel the Insurance Commissioner or BrickStreet Administrative Services, acting on behalf of the Insurance Commissioner, to act.

10. The Insurance Commissioner for the State of West Virginia, acting through its third party administrator, BrickStreet Administrative Services, has a clear legal duty to act and to issue a decision in the total life award application in Claim No. 97-29573 consistent with the former Workers' Compensation Commissioner's order of July 23, 1999 and with the Office of Judges' order of February 25, 2000. In addition, the Insurance Commissioner and its third party administrator are under an obligation pursuant to West Virginia Code 23-4-16(b) to act upon applications for total life awards within thirty (30) days of the date of receipt of the application.

11. The West Virginia Workers' Compensation Board of Review issued a decision dated February 13, 2007 which indicated that W. Va. Code 23-4-1c(a)(3) was not applicable to this case and that the Office of Judges did not have authority to compel the Office of the Insurance Commissioner or BrickStreet to act. The Board of Review held that the claimant's proper remedy was a *mandamus* action against the Office of the Insurance Commissioner.

12. The claimant has filed both a direct appeal and a *mandamus* action. If the Court were to determine that the Office of Judges and Board of Review were correct and that they did not have authority to compel the Insurance Commissioner to act, then the claimant would meet all of the requirements for a *mandamus* proceeding and that the Petitioner would have no other adequate remedy at law.

13. The petitioner avers that there is no dispute that the claimant did file an application

for a permanent total disability award. The former Workers' Compensation Commissioner and the present Insurance Commissioner and its third party administrator, BrickStreet Administrative Services, have failed to act upon this request for eight (8) years and, further, that pursuant to the previous orders of the Workers' Compensation Commissioner and the Office of Judges that this matter should be decided under Claim No. 97-0029573. Further, they have failed to comply with previous orders of the Workers Compensation Commission and Office of Judges that held that this matter should be decided under Claim No. 97-0029573.

PRAYER FOR RELIEF

Wherefore, the Petitioner requests that the West Virginia Supreme Court of Appeals issue a Rule to Show Cause why the Writ of Mandamus should not be granted and pursuant to this Petition for Writ of Mandamus, enter an order granting a Writ of Mandamus compelling the Insurance Commissioner and BrickStreet Administrative Services, acting as a third party administrator on behalf of the Insurance Commissioner to render a decision regarding the claimant's application for a total life award in Claim No. 97-0029573.

DAVID E. COWAN, Petitioner
By Counsel

JEROME J. MCFADDEN, Esquire
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vs.

CLAIM NO. 970029573

DOI: 11/20/1996

Case No. _____

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COMMISSIONER, STATE OF
WEST VIRGINIA and BRICKSTREET
ADMINISTRATIVE SERVICES, Acting
as the Third Party Administrator on
behalf of the Insurance Commissioner,
Respondents

MEMORANDUM OF NAMES AND ADDRESSES
UPON WHOM THE RULE TO SHOW CAUSE IS TO BE SERVED

BrickStreet Administrative Services
PO Box 431
Charleston, WV 25322-0431

Jane Cline, Commissioner
WV Insurance Commission
1124 Smith Street, Room 309
Charleston, WV 25301



JEROME J. MCFADDEN, Esquire
WV State Bar ID No.: 4608
214 South Walker Street
Princeton, West Virginia 24740

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behalf of the Insurance Commissioner,
Respondents

**MEMORANDUM IN SUPPORT OF AN
APPLICATION FOR WRIT OF MANDAMUS**

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ADMINISTRATIVE SERVICES, Acting
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Respondents.

**MEMORANDUM IN SUPPORT OF A
PETITION FOR WRIT OF MANDAMUS**

On June 29, 1999, the Petitioner submitted a permanent total disability application/reopening for a total life award in Claim No. 82-42066. The application filed on June 29, 1999 listed all of the claimant's other claims, including Claim No. 97-0029573. The Commissioner issued a decision dated July 23, 1999 in Claim No. 82-0042066. That decision indicated, among other things, that the claimant's petition/application for a permanent total disability would be addressed in Claim No. 97-0029573. The case was appealed and the Office of Judges' order of February 25, 2000 issued by Administrative Law Judge Sara Hall made a specific finding that the petition/application for a permanent total disability would be addressed in Claim No. 97-0029573, which is the latest of the claimant's worker's compensation claims.

The Petitioner underwent extensive medical treatment related to his most recent claim and was receiving TTD benefits in that claim as late as November of 2004. On April 26, 2006, claimant's counsel made a motion that a decision be made with reference to the pending application

for a total life award in Claim No. 97-0029573 to BrickStreet now the third-party administrator for the "Old Fund" claims. The claimant received no response to this motion.

On October 4, 2006, the claimant filed a motion to compel to the West Virginia Office of Judges seeking a decision regarding the application for a total life award in Claim No. 97-0029573. The motion to compel was denied by the Office of Judges on the basis of W.Va C.S.R. 93-1-18 and W. Va. Code 23-4-1c(a)(3).

The claimant appealed to the Board of Review and in an order dated February 13, 2007, the Board stated that since this claim was administered by the Office of Insurance Commissioner through its third party administrator, BrickStreet, that pursuant to W. Va. Code 23-4-1c(a)(3), that the appropriate remedy would be to file a *mandamus* action against the Insurance Commissioner.

ARGUMENT

The Supreme Court will issue a *writ of mandamus* when three elements coexist: (1) a clear, legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy. See Wampler Foods, Inc. v Workers' Compensation Division, 602 S.E.2d 805 (W.Va. 2004).

The claimant filed an application for a permanent total disability award/reopening on June 29, 1999. This application has now been pending for eight (8) years. BrickStreet, the administrator for "Old Fund" claims on the Insurance Commissioner's behalf, has failed to act upon this motion despite the fact that the former Workers' Compensation Commissioner's own order of July 23, 1999 indicated that this application would be addressed in Claim No. 97-0029573 and that the Office of Judges' order of February 25, 2000 also indicated that the petition/application for total disability would be addressed in Claim No. 97-0029573.

There can be no serious dispute that BrickStreet, while acting on behalf of the Insurance Commissioner, should rule upon this application for a total life award that has now been pending for eight (8) years. BrickStreet and the Insurance Commissioner have a clear legal obligation to comply with the Office of Judges' order of February 25, 2000, and to comply with West Virginia Code 23-4-16(b) which requires that action be taken on petitions related to permanent total disability within thirty (30) days.

If this Court determines that the Office of Judges has the inherent authority to compel BrickStreet acting on behalf of the Insurance Commission to issue a decision in this matter, then a direct appeal would be the appropriate remedy. The Petitioner has filed a direct appeal of the Board of Reviews order of February 13, 2007 that is now pending before this Court. If, in the alternative, the this Court were to determine that the Office of Judges lacks the authority to compel BrickStreet acting as the third party administrator on behalf of the Insurance Commissioner to act, then this Court should issue a rule to show cause in this matter and grant the *mandamus* action filed by the Petitioner and compel BrickStreet and the Insurance Commissioner to act upon claimant's application for a total life award in Claim No.970029573.

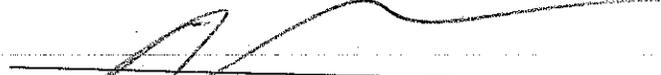
CONCLUSION

There can be no serious dispute that the claimant has a pending motion for a total life award that was filed in 1999 that has not been ruled upon by the third party administrator, BrickStreet, and the Insurance Commissioner in Claim No. 97-0029573. The question before this Court is whether the Office of Judges has the inherent authority to compel BrickStreet acting as a third party administrator for the Insurance Commissioner to act or whether the claimant's only remedy is a *mandamus* proceeding. The claimant has filed this *mandamus* action and a direct appeal and would

respectfully submit that while the ultimate decision in this matter is for the Court, the Petitioner must have some remedy to compel the Insurance Commissioner and its third party administrator, BrickStreet, to act upon the petitioner's application for a total life award in Claim No. 97-0029573.

DAVID E. COWAN, Appellant

By Counsel



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CERTIFICATE OF SERVICE

I, Jerome J. McFadden, counsel for the Petitioner, do hereby certify that I served a true and exact copy of the *Memorandum in Support of an Application for Writ of Mandamus* on the parties of record by United States Mail, postage prepaid, this 15th day of March, 2007, as follows:

David Stuart, Esq.
Workers' Compensation Commission
P.O. Box 4318
Charleston, WV 25364-4318

BrickStreet Administrative Services
PO Box 431
Charleston, WV 25322-0431

Jane Cline, Commissioner
WV Insurance Commission
1124 Smith Street, Room 309
Charleston, WV 25301



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