

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

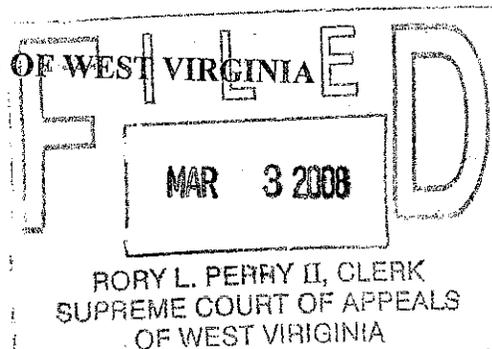
JOHN J. LOVAS,

APPELLANT,

v.

CONSOLIDATED COAL COMPANY,

APPELLEE.



Claim No. 2000011537

DOI: 08/13/1999

BOR Appeal No. 78056

SCt. No. 33670

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AMICUS CURIAE BRIEF  
ON BEHALF OF THE  
WEST VIRGINIA OFFICES OF THE INSURANCE COMMISSIONER

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Offices of the Insurance Commissioner

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I. INTRODUCTION

This appeal is pending in the Supreme Court of Appeals of West Virginia from an order of the Workers' Compensation Board of Review dated April 11, 2007. This order affirmed a Decision of the Administrative Law Judge dated August 24, 2006. This Decision affirmed the Self-Insured Employer order dated February 22, 2006, which administratively closed the claim for medical benefits. The West Virginia Offices of the Insurance Commissioner (hereinafter "OIC") is not a party in interest to this claim, as the Self-Insured Employer has exclusive jurisdiction over the administration of its workers' compensation claims pursuant to West Virginia Code §23-2-9(b)(1). However, because the findings of this Court on the issue of administrative closures will have a significant impact on the OIC's regulatory functions over the workers' compensation system in the

State of West Virginia; the OIC offers this Amicus Curiae brief to the Court and requests that this Court affirm the April 11, 2007 order of the Workers' Compensation Board of Review.

## II. STATEMENT OF FACTS

John J. Lovas, the claimant herein, sustained a workers' compensation injury to his back while working for the Self-Insured Employer as a mechanic on August 13, 1999.

By order dated September 30, 1999, the claim was held compensable. Ultimately, the claimant was granted a 19% permanent partial disability award.

The record reflects that the last authorized service in the claim occurred on January 21, 2002.

By order dated February 22, 2006, the Self-Insured Employer administratively closed the claim pursuant to 85 CSR §1(14.1)<sup>1</sup> as it had been more than six months since the claimant was last authorized medical treatment. The claimant protested this order to the Office of Judges.

The claimant submitted no evidence that there were medical services rendered after January 21, 2002.

By Decision dated August 24, 2006, the Administrative Law Judge affirmed the Self-Insured Employer order dated February 22, 2006. In reaching this Decision, the Administrative Law Judge responded as follows:

After due deliberation, the adjudicator finds as follows. First, 85 CSR 1§14.1 is not contrary to the provisions of W.Va. Code 23-4-16(a)(4). The regulation deals only with administrative closure of the claim. W.Va. Code 23-4-16 and its various subsections bar a claim from being reopened after the applicable time provisions have expired. The Code section does not state when a claim may be closed; it

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<sup>1</sup> Now 85 CSR §1(13)

merely states for how long, and when, a claim may be reopened. There is a significant difference between a claim being administratively closed for treatment and being barred for further treatment. In support of this interpretation, the protested Order expressly acknowledges the claimant's right to attempt to reopen the claim for treatment in the future.

Furthermore, there is no adverse effect foreseen to the claimant since the claimant may still reopen his claim for additional treatment and the number of reopening requests for additional treatment is not limited by statute. The only limitation on the reopening for additional treatment is the time limitation of five years from last significant treatment.

The only potential adverse effect upon the claimant is that the claimant would have to submit a reopening request to the administrator before additional treatment may be approved. However, additional treatment could not be approved, even under the system in place before the Rule was adopted, without the filing of a request for approval and some showing that the claimant required that he or she did not require before. The pre-Rule system required a *de facto* "reopening" of the claim in order to obtain additional treatment. Therefore, the reopening request requirement imposed by the Rule is, in actuality, no more restrictive of the claimant than the pre-Rule system.

It was from this Decision that the claimant appealed to the Workers' Compensation Board of Review.

By order dated April 11, 2006, the Board of Review affirmed the Administrative Law Judge Decision dated August 24, 2006.

The claimant filed a Petition for Appeal with this Court, which was accepted on October 24, 2007. This claim is now set for oral argument on April 2, 2008.

### III. ISSUE

WHETHER THE ADMINISTRATIVE CLOSURE RULE PROMULGATED BY THE FORMER WORKERS' COMPENSATION COMMISSION AT 85 C.S.R. §1(14.1) IS A VALID AND PERMISSIBLE CONSTRUCTION OF THE WORKERS' COMPENSATION STATUTES.

### IV. STANDARD OF REVIEW

West Virginia Code §23-5-15(c) provides the Standard of Review when an appeal is made from the Board of Review to the West Virginia Supreme Court:

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.

[West Virginia Code §23-5-15(c), 2003]

The OIC respectfully requests that this Court affirm the order of the Workers' Compensation Board of Review dated April 11, 2007, insofar as the validity of an administrative closure, as there is no clear constitutional or statutory violation by its use in the workers' compensation system.

## V. ARGUMENT

### A. **THE ADMINISTRATIVE CLOSURE RULE HAS A PRACTICAL AND LEGITIMATE PURPOSE.**

85 CSR §1(14.1) provides that a claim may be closed for medical benefits six months after the date of last service:

Medical benefits in all no lost time claims and claims for temporary total disability benefits shall cease and the claim administratively closed six (6) months after the last date of service in the claim. A protestable order shall be issued by the Commission or private carrier upon said administrative closure. Nothing in this provision shall be deemed to abridge an injured workers' right to attempt to reopen the claim at a later date under applicable law.

The purpose behind the administrative closure rule was to permit claims administrators to internally manage their pending workers' compensation claim files by providing a mechanism to deem files active or inactive. An administrative closure is purely a bookkeeping function. It is not intended to permanently close or bar a claim, nor is it intended to prohibit the claimant from requesting additional medical treatment necessary to treat the compensable injury. Rather, the rule has a practical and legitimate business purpose as it permits efficient management of workers' compensation claims by limiting administrative costs by deactivating dormant claim files, which are otherwise eligible to receive benefits as they are not permanently barred under West Virginia Code §23-4-16.<sup>2</sup>

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<sup>2</sup> Pursuant to West Virginia Code §23-4-16(a)(4), in any claim in which medical or any type of rehabilitation service has not been rendered or durable medical goods or other supplies have not been received for a period of five years, no request for additional medical or any type of rehabilitation benefits shall be granted nor shall any medical or any type of rehabilitation benefits or any type of goods or supplies be paid for by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, if they were provided without a prior request. For the exclusive purposes of this subdivision, medical services and rehabilitation services shall not include any encounter in which significant treatment was not performed.

For example, the OIC is responsible for administering approximately 40,000 workers' compensation claims. The OIC has hired three Third Party Administrators to manage these claims for payment of benefits.<sup>3</sup> The OIC pays these companies to manage workers' compensation files on a per claim basis. To the extent that many of these files can be administratively deactivated, there will be significantly less administrative and overhead cost attributed to the dormant claims.

West Virginia will open the workers' compensation market for private competition on July 1, 2008.<sup>4</sup> Upon undertaking the responsibility of regulating the workers' compensation industry in 2006, the OIC immediately began preparing the current system for the private market. With that in mind, the OIC has the responsibility of ensuring that workers receive prompt, appropriate treatment for their work place injuries as well as developing a healthy, competitive insurance market that meets the needs of West Virginia businesses. This balance of injured worker and business interests is a critical component of the privatization effort. It is also necessary that insurers providing workers' compensation coverage be able to efficiently manage their workers'

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<sup>3</sup>Pursuant to West Virginia Code §23-2C-1 *et. seq.*, the Workers' Compensation Commission was terminated on December 31, 2005. On January 1, 2006, BrickStreet Mutual Insurance Company, a private employer mutual insurance company, became the sole provider of workers' compensation insurance in West Virginia for all claims with a date of injury or date of last exposure of July 1, 2005 and thereafter. All claims with a date of injury or date of last exposure on or before June 30, 2005, remain the obligation of the State of West Virginia. Pursuant to statute, the Insurance Commissioner is mandated to administer these claims which are statutorily referred to as the "Old Fund." However, pursuant to W.Va. Code §23-2C-16(a), BrickStreet Mutual Insurance was required to manage the Old Fund for a period of seven years, as the Third Party Administrator. BrickStreet Mutual through their subsidiary, BrickStreet Administrative Services, subcontracted this management responsibility to Cambridge Integrated Services in 2006. As a result of Legislative changes to W.Va. Code §23-2C-16(a) in 2005, the Insurance Commissioner was required to assume responsibility for both administering and managing the Old Fund. On January 1, 2008, the OIC officially began managing the Old Fund claims. To assist in this responsibility, the OIC hired three independent companies: Sedgwick Claims Management Services, Wells Fargo Disability Management, and American Mining Claims Services.

<sup>4</sup> On July 1, 2008, other private insurance carriers will be allowed to provide workers' compensation coverage for new claims and BrickStreet Mutual Insurance will no longer be the sole provider of the coverage.

compensation claims. As West Virginia enters the private market era, the OIC believes that insurance carriers should be permitted to function with routine operating procedures to which they are accustomed nationwide; provided, that these operating procedures do not interfere with any statutory right of the claimant. It is the understanding of the OIC that administrative closures are a common trade practice which permit the carrier to set reserves based upon activity, or lack of activity, in a claim file. However, this function should never interfere with a claimant's substantive right.

**B. THE ADMINISTRATIVE CLOSURE RULE DOES NOT EXCEED STATUTORY AUTHORITY.**

The Appellant contends that the Administrative Closure Rule is contrary to the provisions of W.Va. Code §23-4-16(a)(4), as it places a burden on the claimant to formally re-open a claim that is not permanently closed for medical treatment. However, the statute does not support the claimant's argument. West Virginia Code §23-4-16(a)(4) provides in pertinent part:

...In any claim in which medical or any type of rehabilitation service has not been rendered or durable medical goods or other supplies have not been received for a period of five years, no request for additional medical or any type of rehabilitation benefits shall be granted nor shall any medical or any type of rehabilitation benefits or any type of goods or supplies be paid for by the commission, successor to the commission, or other private carrier or self-insured employer, whichever is applicable, if they were provided without a prior request. For the exclusive purposes of this subdivision, medical services and rehabilitation services shall not include any encounter, in which significant treatment was not performed.

[West Virginia Code §23-4-16(a)(4), 2005]

In order to understand why the administrative closure rule is not contrary to the provisions of the above referenced statute, a distinction must be made between a

temporary deactivation of a claim file, as opposed to a permanent bar for further benefits. A claim for medical benefits is always either open or closed, eliminating the necessity for reopening. The claimant is either eligible to receive additional medical benefits or he or she is statutorily barred from receiving additional medical benefits. To the extent that a claim has been deactivated by a claim administrator by a closure notice, it still remains open for medical benefits on an unlimited basis until it meets the statutory requirements of permanent closure found in W.Va. Code §23-4-16(a)(4). The rule does not operate to permanently bar medical treatment in eligible claims, as the claimant may be granted additional medical benefits, at any time, so long as the requested authorization is medically necessary and reasonably required to treat the compensable injury. As noted in the Administrative Law Judge Decision dated August 26, 2006, the evidentiary burden by the rule is, in actuality, no more restrictive of the claimant than the pre-rule system.

**C. OIC INTERPRETATION OF THE ADMINISTRATIVE CLOSURE RULE.**

While the OIC believes there is a legitimate purpose to this rule provision, it is acknowledged that the rule does not reflect the OIC's interpretation as to how administrative closures should be implemented. It is important to note that the rule was inherited from the former Workers' Compensation Commission as it was made effective by the Workers' Compensation Board of Managers<sup>5</sup> on June 1, 2005, and predates the OIC assumption of regulatory responsibility on January 1, 2006. In fact, the OIC is

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<sup>5</sup> Pursuant to W.Va. Code §23-1-1b(k), the Workers' Compensation Board of Managers terminated with the Workers' Compensation Commission on December 31, 2005. Thereafter, the Legislature created the Workers' Compensation Industrial Council within the Offices of the Insurance Commissioner to assist with regulatory issues related to workers' compensation matters. (See W.Va. Code §23-2C-5.)

considering amendments to 85 CSR §1, which would include a proposed amendment to 85 CSR §1(14.1) regarding administrative closures.

The OIC considers it unfortunate that the words "closed" and "re-opened" were utilized in this rule provision. This language implies that the claim is "closed for medical treatment" as described in W.Va. Code §23-4-16, and that in order to secure further medical benefits, the claimant must show an aggravation or progression in his or her condition. Again, a claim is never closed for medical treatment, unless the request is beyond the five year period as outlined in W.Va. Code §23-4-16(a)(4). Furthermore, in order to secure additional treatment, a claimant merely needs to demonstrate that the requested authorization is medically necessary and reasonably required to treat the compensable injury. The OIC is further troubled by the fact that the rule requires that a protestable order be issued upon entry of the administrative closure. This language implies that a substantive right of the claimant has been affected. In reality, the claimant is in no way prejudiced by the entry of such closure order (thereby, negating the need for issuance of a protestable decision.)

It is the OIC's position that the claims administrator should be permitted to administratively deactivate a workers' compensation claim solely as an internal operating function. As noted above, it is the OIC's position that an administrative closure does not prejudice the claimant's statutory rights for treatment. Simply put, a claim file may be re-activated by submission of documentation satisfying the statutory requirement that the request be medically necessary and reasonably required to treat the compensable injury. No formal or informal requirement of re-opening is necessary to further process the request for medical benefits. The only function of the administrative closure would be to

deem a claim file active or inactive. To the extent that the practical application of the rule has placed any additional burden on the claimant beyond that contemplated in the statute, there has been an improper interpretation or misapplication of the rule by the claim administrator.

This Court has repeatedly held that great deference must be given to the regulating agency's interpretation of workers' compensation law. "Interpretation as to the meaning and application of workers' compensation statutes rendered by the Workers' Compensation Commission, as the governmental official charged with the administration and enforcement of the workers' compensation statutory law of this State, pursuant to West Virginia 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. A.C.F. Industries, v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999), as quoted in Syl. Pt. 7, *Wampler Foods, Inc. v. Workers' Compensation Division*, 216 W.Va. 129, 602 S.E.2d 805 (2004).

If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. Syl. Pt. 4, *Appalachian Power Company v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995); *City of Wheeling v. Public Service Commission*, 199 W.Va. 252, 483 S.E.2d 835 (1997); *West*

*Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 472 S.E.2d 411 (1996).

In the case of administrative closures for medical benefits, Chapter 23 of the West Virginia Code is silent, and there is no precise statutory language as to when or under what circumstances a workers' compensation claim may be administratively deactivated. However, pursuant to W.Va. Code §23-2C-22, authority to enforce 85 CSR §1 was transferred to the Insurance Commissioner. As this Court has held, a valid legislative rule is entitled to substantial deference, and can only be ignored if the agency has exceeded its constitutional authority or is arbitrary or capricious. In addition, this Court has held that great deference must be given to the regulating agency's interpretation of workers' compensation laws.

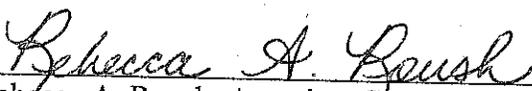
The OIC has not exceeded its constitutional or statutory authority in permitting the use of administrative closures in the workers' compensation system because the rule is not contrary to the provisions of WV Code §23-4-16, as alleged by the Appellant. As the record reflects, not only is it the position of the OIC that the rule is not contrary to the provisions of WV Code §23-4-16, it is also the position taken by the Office of Judges and the Workers' Compensation Board of Review. Further, the promulgated rule has a legitimate and practical purpose, as it permits efficient management of workers' compensation claims by limiting administrative costs by deactivating dormant claim files. Thus, it cannot be considered arbitrary or capricious. The OIC interprets 85 CSR §1(14.1) to permit claim administrators to manage their pending claims without infringing upon the substantive rights of claimants to medical treatment. Based upon the foregoing, the interpretation of the regulating agency should be given great deference and

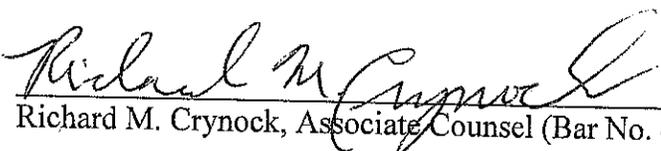
this Court should find that the administrative closure rule is a valid and permissible construction of the workers' compensation statutes.

V. CONCLUSION

For all the foregoing reasons, the West Virginia Offices of the Insurance Commissioner files this Amicus Curiae brief with the Supreme Court of Appeal of West Virginia respectfully requesting that the order of the Workers' Compensation Board of Review dated April 11, 2007 be affirmed, insofar as it relates to the validity of an administrative closure, as there is no clear constitutional or statutory violation by its use in the workers' compensation system.

Respectfully submitted,

  
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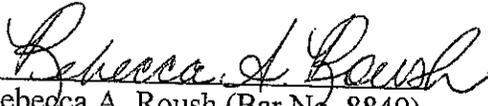
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CERTIFICATE OF SERVICE

I, Rebecca A. Roush, attorney for the Commissioner, do hereby certify that a true and accurate copy of the foregoing "Amicus Curiae Brief on Behalf of the West Virginia Offices of the Insurance Commissioner" was served by depositing the same in the United States Mail, first-class, postage prepaid, to the following persons at the below listed addresses this the 3<sup>rd</sup> day of March, 2008.

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