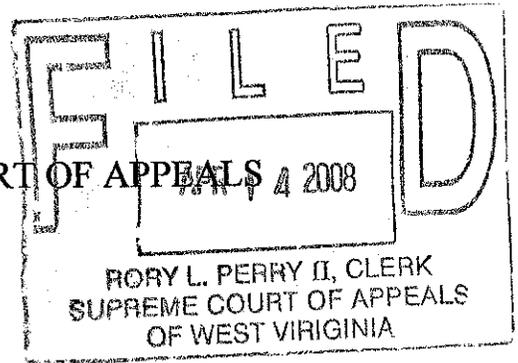


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



AT CHARLESTON

COPY

JOHN H. GROSE,

Appellant,
Respondent below.

vs.

S. Ct. Action No. **33901**
(Appeal from a **September 20, 2007**
Order of the Circuit Court of
Nicholas County, 87-C-59)

SHIRLEY E. GROSE,

Appellee,
Petitioner below.

BRIEF OF THE APPELLANT IN SUPPORT
OF HIS PETITION FOR APPEAL

James Wilson Douglas
Attorney at Law
Counsel for the Appellant
April 11, 2008

*And like a man bound treacherously while he
sleeps, he woke up fettered by the long chain of
disregarded years. — Joseph Conrad, The... 'Narcissus'*

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BRIEF OF THE APPELLANT IN SUPPORT
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Comes now the Appellant, **JOHN H. GROSE**, Respondent below, by his attorney, James Wilson Douglas, pursuant to Rule 10 of the Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals, and in and for his Brief in Support of his Petition for Appeal, does aver, depose and say, as follows:

STANDARDS OF REVIEW

Appellant maintains that the appropriate standards of review for the issues presented hereinafter are *clearly erroneous, abuse of discretion* and *de*

novo.

NATURE OF THE PROCEEDING AND RULING BELOW

After a twenty-three year marriage, the Parties were separated on or about January 26, 1987 and divorced by a May 19, 1989 bifurcated Final Divorce Decree, followed by the August 6, 1990 Final Equitable Distribution Order. One of the items treated by the August 6, 1990 Final Equitable Distribution Order was the retirement of the Appellant, which was a defined benefits pension under the 1974 UMWA Pension Plan, 1988 edition. Specifically, the full benefits of the 1974 Plan could only be realized by the Appellant if he attained the age of 62 years and had worked continuously in a union mine for a period of at least ten (10) years. At the time of the Parties' divorce and the entry of the aforesaid 1990 Final Equitable Distribution Order, Appellant had met the work period requirement but, having been born on January 21, 1941, he was only 49 years of age or thirteen (13) years shy of the minimum age qualifier for the subject maximum pension.

The August 6, 1990 Final Equitable Distribution Order provided, in pertinent part:

"2. Any pension or retirement benefits which may be presently vested in the [Appellant], or which may in the future become vested in the [Appellant], are martial property to the extent that said benefits were earned or accrued during the period of time the parties

were married to each other and living together. . . .” (Emphasis supplied).

The Appellant was injured in a mining accident on March 16, 1991, which was twelve (12) years before his 62nd birthday, and nearly one (1) year after the April 17, 1990 final hearing culminating in the August 6, 1990 Final Equitable Distribution Order, within which the above quoted Paragraph No. 2 appeared. Moreover, said injury occurred almost three (3) years after the September 24, 1988 final divorce hearing that was reflected in the May 19, 1989 bifurcated Final Divorce Decree.

Appellant was subsequently declared disabled and he was awarded a disability pension under the 1974 Plan, but he did not and will not receive a retirement pension. Appellant began receiving his disability pension on April 30, 1993, based upon the March 16, 1991 injury, being four (4) years after the entry of the May 19, 1989 bifurcated Final Divorce Decree and three (3) years after the April 17, 1990 final hearing culminating in the August 6, 1990 Final Equitable Distribution Order.

Thirteen (13) years later, or on or about April 25, 2006, Appellee filed an action in the captioned case requesting a Qualified Domestic Relations Order (hereafter ‘QDRO’) to commence receiving her distributive share of Appellant’s retirement pension, despite her actual knowledge of Appellant’s

disability. Appellant responded with his May 12, 2006 Motion to Dismiss, later amended, predicated upon the uncontroverted facts that the award of his disability pension, which is a substitute for the loss of future earnings, and the injury giving rise to the same, *were not only post separation, but also, post divorce decree.*

Appellant also argued that under the entitlement terms of Paragraph No. 2 of the August 6, 1990 Final Equitable Distribution Order, his disability pension was neither vested nor even contemplated for future vesting at the time of the August 6, 1990 Decree; and the disability pension was not "*earned or accrued during the time the Parties were married*".

Hearings before the Family Court Judge were conducted on August 28, 2006 and March 19, 2007, resulting in the Family Court Judge's finding that the Appellant's post divorce decree disability pension had both a disability and a retirement component, and that the Appellee was entitled to 50% of 82% of the disability pension which was the quotient obtained by dividing the number of service years the Parties were together until the separation date, being 20 years, by the Appellant's total service of 24.5 years up to the date of the 1991 injury.

Appellee also moved for and was granted through a June 25, 2007 Order of the Family Court Judge, an award of attorney fees in the amount of \$2500.00 without any rate comparisons, need analysis, economic resource

identification, competent evidence or other proof that would entitle her to such award.

Both Family Court Orders were timely appealed to the Circuit Court of Nicholas County, the Honorable Gary Johnson presiding, who, following argument on September 4, 2007, affirmed the same, thereby necessitating Appellant's Petition for Appeal. Judge Johnson granted a sixty (60) day stay from the September 20, 2007 entry of his affirming Order on Petition for Review in order to facilitate the Appellant's Petition for Appeal.

STATEMENT OF THE FACTS OF THE CASE

Appellant was a coal miner all of his adult life. Although Appellant worked in the mines prior to his July 11, 1964 marriage, Appellant only commenced working in a union mine after the aforesaid date of the Parties' marriage, up through and after the Parties' January 26, 1987 separation. The divorce action between the Parties resulted in a bifurcated Final Divorce Decree entered on May 19, 1989, and then, since the Parties had no minor children, a hearing on equitable distribution was conducted on April 17, 1990, the entry of which was delayed until August 6, 1990. The equitable distribution decision contained a Paragraph No. 2 awarding the Appellee her ratable share of

“[a]ny pension or retirement benefits which may be presently vested in the

[Appellant], or which may in the future become vested in the [Appellant], are martial property to the extent that said benefits were earned or accrued during the period of time the parties were married to each other and living together.” (Emphasis supplied).

Neither decree was appealed by either Party and the same became final. Appellant was age 49 at the time of the entry of the 1990 decree.

In the relevant series of events, the Appellant next suffered a disabling and unforeseen injury on March 16, 1991 while engaged in active employment. The date of the accident leading to the injury and ultimate disability was one (1) month to the day short of one (1) year after the hearing on the equitable distribution issues, and more than two and one-half (2 ½) years after the September 24, 1988 divorce hearing embodied within the bifurcated May 19, 1989 bifurcated Final Divorce Decree.

After the true nature of his medical state became known, and being cognizant that he was now ineligible for the defined benefits retirement pension, the then 50 year old Appellant applied for and received on April 30, 1993, the disability pension available to him under the United Mine Workers of America 1974 Pension Plan, effective April 1, 1991. Appellant’s monthly pension amount was \$583.75.

Despite her actual knowledge of Appellant’s disability, Appellee

delayed the quest for a QDRO until April 25, 2006. Taking the position that the disability pension was a substitute for the loss of future earnings which would be post divorce, and thus the separate property of the Appellant, and that the same was not an asset that was in existence at the time of the April 17, 1990 Equitable Distribution Decree hearing, Appellant resisted by filing a May 12, 2006 Motion to Dismiss which was amended on May 22, 2006.

The Family Court Judge conducted hearings on August 28, 2006 and March 19, 2007, which witnessed very little in the way of factual disputes, but the Family Court Judge did receive into evidence as the Joint Exhibit #1¹ of the Parties on March 19, 2007, the January 25, 2007 written explanation of Rollin H. Marquis, Special Payment Analyst for the UMWA Health and Retirement Funds, to the effect that:

1. the Appellant did not pay any premiums during his marriage for his disability retirement; and,
2. the Appellant did not pay any dues or other assessments during his marriage which made him eligible for his disability retirement; and,
3. the Appellant's disability pension is paid from the same fund as a retirement pension, being the UMWA 1974 Pension Trust; and,

¹Appellant's Exhibit "A1" attached hereto.

4. the Appellant's disability pension *would never convert* into a regular retirement pension unless he miraculously became able after having been permanently and totally disabled; therefore, the concept points of recovery and conversion were moot; and,

5. the UMWA 1974 Pension Plan under which Appellant qualified was a multi-employer defined benefit plan which is not funded in any way by employee contributions; and,

6. the UMWA 1974 Pension Plan includes and embodies a number of *different types*² of retirement pensions; and,

7. the Appellant's disability pension was a type of retirement pension but it was not the same as *the* classic, regular or "*normal*" UMWA retirement pension which a worker is entitled to after having attained the age of 62 and completed at least ten (10) years of signatory (union) service; and,

8. to be eligible for a disability retirement benefit, the Appellant must have been permanently and totally disabled, and the disability must be causally

²The UMWA 1974 Pension Plan (1988 and 2003 editions) recognize Age 55 Retirements, Normal Retirements, Disability Retirements, Minimum Disability Retirements, Deferred Vested Retirements and Special (30-and-Out Pension) Retirements. See Appellant's Exhibit "D", admitted at the August 28, 2006 hearing before the Family Court Judge, and reproduced here, in pertinent part (in order to comply with the Court's page limitation rules), as Appellant's Exhibit "B1".

related to his union coal work, both of which events³ regarding the Appellant's eligibility occurred after his 1989 divorce and the entry of the 1990 equitable distribution order; and,

9. the Appellant had applied for the disability pension in October 1992, or more than three (3) years after his 1989 divorce and more than two (2) years after the entry of the 1990 equitable distribution order; and,

10. the Appellant began receiving his disability pension in April 30, 1993, or nearly four (4) years after his 1989 divorce and nearly three (3) years after the entry of the 1990 equitable distribution order.

At the final March 19, 2007 hearing before the Family Court Judge, the presiding jurist found from the aforesaid Joint Exhibit #1 that the Parties had been married 20.07 years of the 24.50 years of the Appellant's credited signatory service, for the purpose of the disability pension calculation, and that the Appellant had continued to work and was injured after the Parties' 1987 separation and after the Parties' 1990 divorce decree. See Paragraph 12. of the Findings of Fact of the June 5, 2007 Order Granting Judgment to Plaintiff below.

Ignoring the fact that a normal retirement pension has different

³Appellant's disabling accident, while working on a union job, was on March 16, 1991; but the determination of a total and permanent disabling injury was not made until October 22, 1992, and the whole process was not concluded until April 1993.

eligibility requirements, the Family Court Judge further found that the disability pension was calculated the same as a normal retirement pension, and that the two types of pensions were paid from the same Plan fund, and since the Appellant would never receive a normal retirement pension because of his disability, the Family Court Judge, citing *Staton v. Staton*, 624 SE2d 548 (WV 2005), ruled that the Appellant's disability pension had a normal retirement component that was marital property from the date of Appellant's 62nd birthday, and thus subject to a ratable (41%) distribution and back-pay of Appellant's disability pension to the date of her April 25, 2006 filing. See Paragraphs 12., 13. and 15. of the Findings of Fact; and Paragraphs 4. and 8. of the Conclusions of Law of the June 5, 2007 Order Granting Judgment to Appellee below.

In short, the Family Court Judge found that from 1993 until the Appellant turned 62 on January 21, 2003, the disability pension was the separate property of the Appellant, but after the Appellant turned 62, the disability pension was transformed into marital property because there was no normal retirement available to share with the Appellee (!). See Pages 6-7, Paragraphs 5. and 6. of the Family Court Judge's Conclusions of Law of the June 5, 2007 Order Granting Judgment to Appellee below.

Adding insult to injury, the Family Court Judge, without taking any

evidence, entered his June 25, 2007 Order awarding attorney fees to the Appellee former wife in the amount of \$2500.00.

Both Family Court Orders were timely appealed to the Circuit Court of Nicholas County, West Virginia, the Honorable Gary Johnson presiding, on or about June 15, 2007⁴, who affirmed the same by his Order of September 20, 2007, hence this appeal.

ERRORS ASSIGNED

1. Is a disability pension a replacement for the loss of future earnings and/or compensation for personal injuries?
2. Can a disability pension, arising from a post divorce injury, be the subject of equitable distribution?
3. Must a family court receive competent evidence as an antecedent to determining the appropriateness of making an award of attorney fees?

ARGUMENT

I

“To the extent that its purpose is to compensate an individual for pain, suffering, disability, disfigurement, or other debilitation of the mind or body,

⁴The June 25, 2007 Order awarding attorney fees was pronounced on June 5, 2007, but was not reduced to a written and entered Order until June 25, 2007.

a personal injury award constitutes the separate non-marital property of an injured spouse.’ Syl. Pt. 1, *Hardy v. Hardy*, 186 WV 496, 413 SE2d 151 (1991).”

Syllabus Point 2, *Huber v. Huber*, 200 WV 446, 490 SE2d 48 (1997). Similarly, disability pensions are a substitute for the loss of future earnings and/or compensation for personal injury. *Staton v. Staton*, 218 WV 201, 624 SE2d 548, 2005 WV Lexis 165 (2005); *Gragg v. Gragg*, 12 SW3d 412 (TN 2000); and *Hoffner v. Hoffner*, 577 So2d 703, 704 (FL 4th DCA 1991).

As a general rule, a disability pension is personal to the recipient, and usually not subject to equitable distribution in a divorce action; however, the issue of whether a disability pension is marital property or whether a disability pension has acquired a marital component must be decided on a case by case basis.

Conrad v. Conrad, 216 WV 696, 612 SE2d 772 (2005). See also *Metz v. Metz*, 61 P3d 383 (WY 2003).

For instance, if the premiums for a disability insurance policy were paid during a marriage from marital funds and by a mutual decision of the husband and wife, then the benefits of the disability will be marital. *Conrad, supra*. If a disabling event occurred during the marriage, and an employment related disability pension was partially funded by wage deductions, then the same will be designated as a marital asset. *Staton, supra*. A major factual determination in the

classification of disability pensions as marital or separate properties, turns on whether a disability pension was in pay status during the marriage sought to be dissolved. *Conrad and Staton, supra*.

II

West Virginia has treated the classification of disability pensions within a divorce case only twice. See *Conrad and Staton, supra*.

In *Conrad*, the Parties had discussed the advisability of acquiring a disability pension, the same had been paid for from marital funds for over thirty (30) years, and the Parties were receiving payments from the disability pension *before* separation.

Unlike *Conrad and Metz*, the disability pension in the case at bar was not paid for during marriage from funds or wage withholdings which would have been otherwise used for family living expenses or invested for the family's benefit. There was no mutual decision by the Parties herein to purchase a disability pension, as there was in *Conrad*, because the 1988 BCOA/UMWA contract⁵ to which the Appellant was not a party, provided for funding of different types of UMWA pensions. Of greater significance to this exercise, Appellant's disability

⁵The Appellant's 1991 disability occurred under the 1988 UMWA contract, which was subsequent to the January 26, 1987 separation date of the Parties.

did not commence until six (6) years after separation and nearly four (4) years after the divorce, where in both *Conrad* and *Staton*, the disability pensions were in pay status at the time of separation.

Unlike *Staton*, there is *no chance* that the Appellant will subsequently receive a retirement pension from the same fund as the disability pension. See Exhibit "A1" attached hereto and incorporated by and for reference. Moreover, as opposed to *Staton*, there is no retirement pension component to the disability pension in the case before the Court, nor is there a conversion between a disability pension and a retirement pension with the UMWA. In the case *sub judice*, it is another type of of UMWA pension altogether; i.e, an entirely *different* pension. See Exhibit "B1" attached hereto and incorporated by and for reference.

Aside from the factual differences between the case under scrutiny and *Conrad* and *Staton*, West Virginia Code §48-7-104 (1) provides that a family court should "[d]etermine the net value of all marital property of the parties *as of the date of the separation of the parties* . . . ". (Emphasis added). In accordance therewith, this Court has consistently recognized that the separation date of parties to a divorce action is important to a determination of marital property subject to equitable distribution. *Chafin v. Chafin*, 202 WV 616, 505 SE2d 679 (1998).

In the case before the Court, there was no disability pension to distribute at the time of the separation of the Mr. and Mrs. Grose. There was no disability pension to distribute at the time of the original bifurcated 1989 divorce decree. There was no disability pension to distribute at the time of the 1990 equitable distribution order. In other words, the disability pension was not "presently vested", as contemplated by Paragraph 2. of the April 17, 1990 Equitable Distribution Order. Succinctly stated, the April 17, 1990 Order in this case, being the last decree entered (August 6, 1990) in this cause pertaining to equitable distribution, did not and could not deal with a "disability pension" that only came into being six (6) years after the Parties' separation and less than one month short (April 30, 1993) of four (4) years after the Parties' 1989 divorce decree.

Upon further examination of the applicable 1989 and 1990 Orders in the underlying divorce case, it is apparent that the Family Court erred by ruling that the Appellee Wife was entitled to any portion of the Appellant Husband's disability pension, in that, although the aforesaid August 6, 1990 Order contemplated equitable and ratable distribution of "any pension or retirement benefits", the same, as a matter of West Virginia law, does not include post divorce decree disability benefits, which are personal, and thus separate, to the

injured party. Moreover, the same are a substitute for future earnings, after a disabling event. See *Staton, supra*.

Further, the Appellant became disabled at age 50, or five (5) years before the minimum retirement age of 55 that would have ordinarily qualified him for a regular or normal (*defined benefits*) retirement/pension upon attaining the latter age with a minimum number of years of specified employment. See the National Bituminous Coal Wage Agreement of 1974, 1988 and 2003 editions, attached hereto as Exhibit "B1". Succinctly, in order for a regular defined benefits pension to vest, an employee must have obtained a certain age and been actively employed for a specific number of years to be entitled to the normal retirement benefits, which, due to Appellant's unforeseen disability, did not occur⁶.

The Family Court Judge below simply misapplied *Staton* by holding that from 1993 until the Appellant turned 62 on January 21, 2003, the disability pension was the separate property of the Appellant, ***BUT after the Appellant turned 62, or about fourteen (14) years after the Parties' divorce,*** the disability pension was miraculously changed *into marital property* and subject to equitable

⁶The Appellant became disabled on or about March 19, 1991, or approximately eight (8) months after the aforesaid August 6, 1990 Equitable Distribution Order, and nearly two (2) years after the May 19, 1989 bifurcated Final Divorce Decree. Appellant began receiving disability benefits from the UMWA Health and Retirement Funds on or about April 30, 1993.

distribution (!). See Pages 6-7, Paragraphs 5. and 6. of the Family Court Judge's Conclusions of Law of the June 5, 2007 Order Granting Judgment to Appellee below.

Finally, the Appellant would contend that the Family Court loses jurisdiction of the property issues of the instant case after entry of the original divorce decree, which was not appealed, and thus, became final. *Segal v. Beard*, 181 WV 92, 380 SE2d 444 (1989).

III

Plain error is evident when the Circuit Court below affirmed the Family Court who improperly awarded the Appellee attorney fees, in that, the Appellee failed to make any persuasive showing or otherwise introduce competent evidence that would entitle her to an award of attorney fees; e.g.; (1) whether the time and labor the Appellee's attorney has expended was appropriate for the case; (2) was there novelty in and difficulty of the questions involved; (3) the skill required to perform the foregoing legal services; (4) whether the attorney for the Appellee had to give priority to the Appellee's aforesaid action, due to the complexity thereof and inherent timelines, thereby precluding other employment by Appellee's attorney due to acceptance of the instant case; (5) whether the hourly rate and fee charged is reasonable under the circumstances and in line with

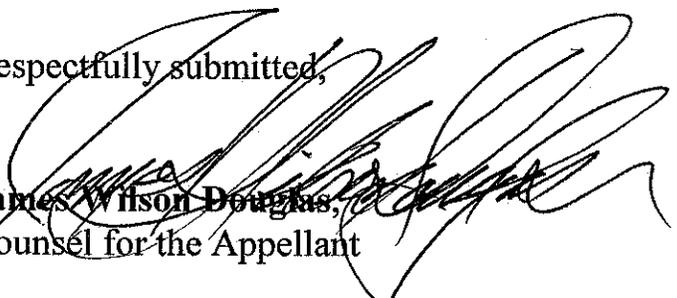
customary fees in comparable cases before the Family Court in Nicholas County; (6) whether there were time limitations imposed by the circumstances of the case; (7) is the amount in controversy herein greater than the amount of attorney fees sought; (8) were the results obtained in Appellee's favor; (9) the experience, reputation, and ability of Appellee's attorney in matters of family law within the legal community; (10) the undesirability of this case; (11) has Appellee's attorney maintained a professional relationship with the Appellee since the beginning of this case; and, (12) is the award sought consistent with prior awards by this Court in similar cases. See *Aetna Casualty & Sur. Co. v. Pitrolo*, 176 WV 190, 196, 342 SE2d 156, 162 (1986) and 57 ALR3d 475 (1974). See also *Banker v. Banker*, 196 WV 535, 474 SE2d 465 (1996);

CONCLUSION

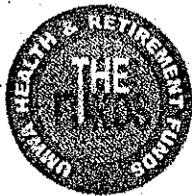
FOR the reasons given and upon the facts stated and the authority cited, the September 20, 2007 Order on Petition for Review of the Circuit Court of Nicholas County, West Virginia, the intermediate appellate trial court below, and the Family Court Judge's June 5, 2007 (Final) Order Granting Judgment to the Appellee and the Family Court Judge's June 25, 2007 Order Awarding Attorney Fees to the Appellee in the captioned proceedings, should be **reversed**, set aside and held for naught; or in the alternative, that the same be **remanded with instructions**; and that Appellant be granted such other and further relief as this

Court may deem equitable, proper and just, and in the premises, meet.

Respectfully submitted,


James Wilson Douglas,
Counsel for the Appellant

JAMES WILSON DOUGLAS, L.C.
Attorney at Law
181 B Main Street
Post Office Box 425
Sutton, West Virginia 26601
W.V. State Bar # 1050



S.C. "A1"
4/11/08

EX "A1"
10/3/07

UMWA HEALTH AND RETIREMENT FUNDS

2121 K Street, NW • Suite 350 • Washington, DC 20037 • Telephone: 800.291.1425

January 25, 2007

JF Ex I
admitted
3/19/07

Harvey E. Stollings, Esq.
710 Broad Street
Summersville, West Virginia 26651

Mineworker Name: John H. Grose
Mineworker SSN: 236-60-9189

Dear Mr. Stollings:

I am in receipt of your letter of January 10, 2007 to my colleague, Ms. Antonie Clark-Baxter, Disability Specialist, and of the January 5, 2007 *Status Conference Order* covered by that letter. Antonie has forwarded both items to me as the logical person in this office to handle any inquiries which involve or may involve a *Qualified Domestic Relations Order* ("QDRO"). Indeed, sir, I have been previously consulted in this case and I am surprised that your colleague, James W. Douglas, did not share that fact and my contact information with you, as it could have saved you a deal of time.

Now that your current communication *has* been brought to my attention, I am able to see on our computer system, where the Funds *has* previously received two inquiries from you: letters dated September 25, 2006 and October 27, 2006. (Be advised that I do *not* show that we have ever received the inquires from you dated October 2, 2006 or December 5, 2006, which are cited in the *Status Conference Order*.) Our department is attempting to go "paperless," and, within the past eleven months, incoming mail and faxes are routinely scanned/converted to digital images, retrievable by the SSNs of the mineworkers in question, which are then routed to the applicable individuals. The two letters we did receive were not addressed to any individual and it would appear that our Records Management clerks failed to "connect the dots" and determine that they should come to me. I apologize for this oversight.

Now that I have those letters in front of me, I shall attempt to respond to your questions, per the *Release of Financial Information* signed by Mr. Grose. I hope and trust that my responses will suffice your purposes, although you are certainly welcome to follow up with further questions. If, however, per the *Status Conference Order*, you still *must* have a Funds appointee for purposes of a verbal deposition, please so inform me and I will be happy to pass the case to the Funds Office of General Counsel, from which quarter one of our attorneys will contact you at his or her convenience.

Let me begin, Mr. Stollings, by furnishing what I already supplied to your colleague. Mr. Wilson's office, in the person of a Jill Cooper, telephoned the Funds on May 12, 2006 to request from us a model order, were any available. It was, and I did so under cover of a letter of that date, also including data on our QDRO review procedures. Ms. Cooper subsequently telephoned me on May 15, 2006, leaving a message asking if they might also be supplied with general retirement information re the UMWA 1974 Pension Plan ("Plan"), to which end, on May 16, 2006, I mailed a copy of its Summary Plan Description to Mr. Douglas's office. Copies of my letter, its two enclosures, and the SPD are enclosed here.

With that, allow me to turn to your letter of September 25, 2006, attempting to answer the questions in the order you posed them.

Did Mr. Grose pay premiums against some disability retirement?

No

Harvey E. Stollings, Esq.
January 25, 2007

Page Two

Did Mr. Grose pay dues or other assessments which made him eligible for a disability retirement?

No.

Is Mr. Grose eligible to have the disability retirement converted to a regular retirement? Has he ever been? If so, when and under what circumstances?

Please see my response to your next question.

Is the disability retirement paid from the same fund as regular retirement?

Yes, a Disability Pension type and all other pension benefits types under the UMWA 1974 Pension Plan are funded under and paid from the UMWA 1974 Pension Trust. Because, under the Plan, a Disability Pension is a retirement pension, the only reason it would ever "convert" would be if the Disability Pension recipient became ineligible for that type by reason of no longer being considered disabled. Were that to happen, the Disability Pension payments would cease and the affected individual would be reconsidered to see if, at that time or any future time, he met eligible for one of the other pension benefit types. This has never occurred in Mr. Grose's case and we presume that the benefit now being paid to him is the benefit he will continue to receive for the remainder of his life. Thus, while he *could* be eligible for such a "conversion" in the future, should his medical situation improve drastically, at the time of this writing he is *not* eligible because the contemplation of any conversion is a moot point.

What were the criteria under which Mr. Grose qualified for a disability retirement?

The basic requirement for eligibility for pension benefits under the 1974 Pension Plan is ten (10) years or more of signatory service, which Mr. Grose had met at the time of his separation from service. To be eligible for a Disability Pension specifically, the requirement is twofold. First, the mineworker must be totally and permanently disabled, and second, the disability must be causally related to his classified signatory (i.e., union) coal work.

With regard to the determination of total and permanent disability itself, we rely on the existence of an award of Social Security Disability Insurance to the individual. In other words, if the Department of Health and Human Services concurs with the individual's claim that he is disabled, that is good enough for the Plan; anything short of that is not. It would appear that Mr. Grose had more than one go-round with DHHS/SSA but, ultimately, U.S. Administrative Law Judge Thomas J. Mancuso issued an October 22, 1992 decision that Mr. Grose was so disabled and had been effective March 16, 1991.

With that decision and its supporting material in hand, and aided by additional information requested from and provided by the Participant, medical experts at the Funds reviewed the case and ultimately agreed that the disability was directly connected to Mr. Grose's mine work. Our determination process concluded in April of 1993 (Mr. Grose's application had been submitted in October of 1992).

The UMWA 1974 Pension Plan (the "Plan") is a multi-employer defined benefit plan which is not funded by employee contributions. Individual mineworker accounts are not maintained within the 1974 Pension Trust and there is no provision within the Plan for lump-sum payments or other withdrawal options (e.g., loans). The amount of monthly pension benefits payable to a mineworker is determined subsequent to retirement from the coal industry and election to commence benefits. This calculation is based upon a number of variable factors, including:

1. Date of Retirement
2. Age at Retirement

Harvey E. Stollings, Esq.
January 25, 2007

Page Three

3. Date of Birth
4. Amount and Type of Service
5. Type of Pension Payable
6. Election of Pension Effective Date

According to Funds' records, Mr. Grose had earned 24.50 years of credited signatory service during the period from January 1, 1967 through March 16, 1991. Enclosed please find a copy of the *Explanation of Pension Credit Awarded or Denied* (from microfiche) which shows the service accrual by year.

Based upon his service credit, his last day of service, and the Disability Pension type, his initial pension was calculated at \$583.75 per month, effective April 1, 1991 (the first of the month following his incurring of the total disability). His initial check, paid in May of 1993, included 26 months' payments, i.e., that month's payment and those of the 25 retroactive months, as well as a \$290.00 pension bonus which had been payable in December 16, 1993 for all Disability Pensions in effect on or before December 15, 1993 (no pension bonus had been applicable for 1992, and the 1991 pension bonus had been payable @ February 1, 1991, i.e., prior to the effective date of his pension). The amount of his monthly pension has been increased thrice since its effective date, per Cost-of-Living Adjustments ("COLAs") which were contractually negotiated in collective bargaining agreements in 1997, 2001 and 2006. Twelve more annual bonuses have also been paid to date (totaling \$4,310; no bonus was applicable in 1998).

The initial calculation of Mr. Grose's monthly amount and the subsequent accretions thereto are as follows:

<u>10</u> years	<input checked="" type="checkbox"/> \$ <u>32.50</u>	= \$ <u>225.00</u>
1967-1976	rate	
<u>10</u> years	<input checked="" type="checkbox"/> \$ <u>23.00</u>	= \$ <u>230.00</u>
1977-1986	rate	
<u>2</u> years	<input checked="" type="checkbox"/> \$ <u>23.50</u>	= \$ <u>47.00</u>
1987-1988	rate	
<u>1</u> years	<input checked="" type="checkbox"/> \$ <u>30.00</u>	= \$ <u>30.00</u>
1989	rate	
<u>1½</u> years	<input checked="" type="checkbox"/> \$ <u>34.50</u>	= \$ <u>51.75</u>
1990-1991	rate	
24½ years		

\$ <u>583.75</u>	The Normal Retirement Age (62) monthly amount.
<input checked="" type="checkbox"/> <u>n/a</u>	No reduction factor for younger age applicable with this type.
\$ <u>583.75</u>	Monthly amount effective April 1, 1991.
+ \$ <u>15.00</u>	January 1, 1998 contractual increase.
\$ <u>598.75</u>	Monthly amount effective January 1, 1998.
+ \$ <u>15.00</u>	January 1, 2002 contractual increase.
\$ <u>613.75</u>	Monthly amount effective January 1, 2002.
+ \$ <u>15.00</u>	January 1, 2007 contractual increase.
\$ <u>628.75</u>	Monthly amount effective January 1, 2007.

Please provide a history of all payments to Mr. Grose back through August, 1991.

An Excel spreadsheet is enclosed. The total, through February 1, 2007 (which payment has already been processed as of this writing), is: \$118,706.25.

Harvey E. Stollings, Esq.
January 25, 2007

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If you have any questions, please contact the undersigned at 1-800-291-1425, ext. 2366.

Sincerely,



Rollin H. Marquis
Special Payments Analyst
Eligibility Services

enclosures

PENVAL1

S.Ct. "B1"
4/11/08

ER "BZ1"
10/5/08
"Subst" "D"
8/28/08

Summary Plan Description

UMWA 1974 Pension Plan

February 2003

United Mine Workers of America Health and Retirement Funds

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TERMS YOU SHOULD KNOW

age fifty-five retirement pension—The type of pension paid to a mine worker who satisfies the plan's service requirements and retires on or after his fifty-fifth birthday but before his sixty-second birthday. If a mine worker chooses to start receiving his pension before the age of sixty-two, the dollar amount of the pension he would have received had he waited until age sixty-two will be reduced 0.25 percent for each month, or 3 percent for each full year, that the mine worker is under the age of sixty-two when his pension starts. For additional details, see pages 16, 26-28.

attainment of age—A mine worker shall be deemed to have attained an age as of 12:01 A.M. on his birthday.

classified job—A job that is considered bargaining unit work under the coal wage agreement in effect when the work is performed.

classified signatory job—Work in a classified job for a signatory employer.

credited nonsignatory service—Work in a classified job for a nonsignatory employer before April 1, 1971. Credit for classified nonsignatory service may also be awarded for certain periods of military service before April 1, 1971, and for up to four years before December 7, 1974, when a mine worker was awarded state worker's compensation payments as a result of a mine-related injury or occupational disease. Under certain conditions, credit for classified nonsignatory service may be given for periods of employment by the UMWA before March 27, 1978. For additional details, see page 21.

credited service—The time that will be used to determine eligibility for a pension and the amount of pension benefits; generally, it is time spent working in a classified job in the bituminous coal industry. For additional details, see page 21.

credited signatory service—Work in a classified job for a signatory employer. Credit for classified signatory service may also be awarded for certain periods in which a mine worker received sickness and accident benefits, for certain periods of employment by the UMWA if his retirement date is after March 26, 1978, for certain periods of military service, and for up to 120 days during a twelve-month period when he is temporarily assigned to a supervisory job. In addition, credited signatory service may include up to four years before December 6, 1974, when he was awarded state worker's compensation due to a mine-related injury or occupational disease sustained while employed in a classified signatory job. For additional details, see page 21.

deferred vested pension—The type of pension paid to a mine worker who satisfies the plan's service requirements whose last day of credited service is before his fifty-fifth birthday and who is not eligible for any other type of pension under the plan. For additional details, see page 28.

deferred vested pension - special—The type of pension paid to a mine worker who ceases work in a classified signatory job on or after his fiftieth birthday but before his fifty-fifth birthday, who has twenty or more years of signatory service, and who is involuntarily terminated because of physical reasons or laid off and has not refused recall to the mine from which he was laid off and who is not eligible for any other type of pension under the plan (other than a deferred vested pension). If a mine worker chooses to start receiving a deferred vested pension—special before the age of sixty-two, the amount of his pension will be calculated as if it were an age fifty-five retirement pension. For additional details, see page 28.

deferred vested pension - enhanced 1996—The type of pension paid to a mine worker who ceases work in a classified signatory job on or after December 16, 1993, but before his fifty-fifth birthday, who has twenty or more years of signatory service, who is involuntarily terminated because of physical reasons or laid off and has not refused recall to the mine from which he was laid off, who was not receiving pension benefits on or before August 16, 1996, and who is not eligible for any other type of pension under the plan (other than a deferred vested pension or deferred vested pension—special pension). If a mine worker chooses to start receiving a deferred vested pension—enhanced 1996 before the age of sixty-two, the amount of his pension will be calculated as if it were an age fifty-five retirement pension. For additional details, see page 28.

disability pension [see also, minimum disability pension]—The type of pension paid to a mine worker who has been totally disabled by a mine accident which happened while he was working in a classified job for a signatory employer. To be eligible for a disability pension, a mine worker must have ten or more years of credited signatory service and he must be eligible for Social Security Disability Insurance benefits as a result of the mine accident. The amount of his pension will be calculated as if it were a normal retirement pension. For additional details, see pages 18 and 30-31.

hours of service—The hours of work for which a mine worker is paid either for the performance of duties, or on account of a period during which no actual duties are performed, including vacations, holidays, personal leave, sick leave, bereavement leave, military duty, and jury duty. Before January 1, 1978, all hours of service count toward determining the amount of pension credit to be given for a calendar year for all purposes. Beginning January 1, 1978, hours for which he is paid but did not actually work count only for purposes of vesting and determining eligibility.

hours worked—The hours of actual work for which a mine worker is paid or entitled to be paid by a signatory employer, time spent performing contractual obligations such as safety inspections and mine committee work, and periods when eligible to receive sickness and accident benefits; it does not include time off such as vacations, sick days and holidays for which he is paid. Beginning January 1, 1978, only hours worked will be counted when determining the dol-

lar amount of a mine worker's pension; 1,000 hours of work or, effective December 16, 1993, 800 hours of work on the weekend/holiday crew of a signatory employer, as provided in Appendix C of the applicable National Bituminous Coal Wage Agreement are needed for a full year's pension credit. For calendar year 1993, miners who participated in an authorized strike or who were laid off as a direct result of an authorized strike following the expiration of the 1988 Wage Agreement and worked at least 500 hours are entitled to a full year's pension credit for that year. For additional details, see page 21.

Joint and survivor annuity.—This is an optional form of pension benefit paid to the surviving spouse of a mine worker who does not qualify for the surviving spouse benefit, in which case the mine worker's pension is automatically paid as a joint and survivor annuity unless it is waived with the spouse's written consent. The joint and survivor annuity entails a further actuarial reduction in the amount of the mine worker's pension, so that the mine worker's spouse can receive a pension in the event the mine worker dies first. For additional details, see page 20.

mine accident.—An accident involving a physical injury sustained while working in a classified job for a signatory employer. Pneumoconiosis (black lung) is not regarded as a mine accident.

minimum disability pension [see also, *disability pension*].—The type of pension paid to a mine worker who is totally disabled by a mine accident which happens while working in a classified job for a signatory employer and the mine worker has less than ten years of credited signatory service. To be eligible for a minimum disability pension, a mine worker must be eligible for Social Security Disability Insurance benefits as a result of the mine accident. For additional details, see pages 18 and 30-31.

normal retirement pension.—The type of pension paid to a mine worker who satisfies the plan's service requirements and retires on or after his sixty-second birthday. For additional details, see pages 16 and 26.

preretirement survivor annuity.—This is a type of pension benefit applicable to individuals who are not eligible for the surviving spouse benefit; it is paid to qualified surviving spouses of mine workers with a vested right to a pension who died before attaining the age of fifty-five. For additional details, see page 20.

retirement date.—The last day of credited service, provided that the mine worker is then eligible for a pension; this is usually the last day actually worked or the last day for which sickness and accident benefits are paid or would have been paid, but may also be the last day of employment by the UMWA credited as classified signatory service.

sickness and accident benefits.—Cash benefit provided by an employer (usually through an insurance carrier) to an employee to compensate for time lost from work due to sickness or injury. For purposes of the plan, this term refers only

to sickness and accident benefits provided in accordance with coal wage agreements.

signatory employer.—An employer obligated to contribute to the trust by virtue of signing a wage agreement.

signatory service.—Different from credited signatory service, this term is important for purposes of vesting and determining eligibility; it may include classified work, nonclassified work, and hours of service as described earlier in this section.

special permanent layoff pension.—The type of pension paid to a mine worker who ceases work in a classified signatory job on or after January 1, 1998, but before his fifty-fifth birthday, and who satisfies certain other criteria in the plan, including having twenty or more years of signatory service, being laid off because the mine in which he worked is permanently closed, or being laid off for at least 180 days and having not refused recall to the mine from which he was laid off. The amount of his pension will be reduced by a factor of 21.0 percent (the same reduction as if the mine worker had been age 55). For additional details, see page 27.

special 30-and out layoff pension.—The type of pension paid to a mine worker who ceases work in a classified signatory job on or after January 1, 2002, and who satisfies certain other criteria in the plan, including having thirty or more years of signatory service and, being laid off and having not refused recall to the mine from which he was laid off. If the mine worker was not working as of December 31, 2001, because of lay off, he generally must earn 250 or more hours of signatory service following his return to work. The amount of his pension is not reduced by each year that he is under the age of sixty-two. For additional details, see page 27.

surviving spouse.—A widow or widower of a former mine worker.

surviving spouse benefit.—The type of pension paid to a mine worker's surviving spouse which does not involve a reduction in the mine worker's benefits. In general, an active mine worker's surviving spouse is eligible for the surviving spouse benefit if the mine worker was fifty-five or older at the time of death and satisfied the plan's service requirements. Surviving spouses of mine workers who die while receiving pensions with the exception of deferred vested pensions based upon less than twenty years of credited service are also eligible for the surviving spouse benefit. The amount of this pension is three-fourths of the amount of the pension that the mine worker was receiving, or eligible to receive, at the time of death. For additional details, see page 31.

vesting.—The right to receive a pension upon reaching retirement age. A vested right to a pension cannot be taken away for any reason. Once a mine worker has obtained a vested right to a pension by satisfying the plan's service requirements, he can collect some level of benefits upon reaching retirement age. This

is true even if he stops working in the bituminous coal industry before reaching retirement age. Under certain circumstances, there may no benefits payable on behalf of a vested participant who dies before his pension begins. This would include a participant who dies without a surviving spouse. In general, a miner who earned service on or after July 1, 1999, and who has at least five years of signatory service is vested. A miner who did not earn any service on or after July 1, 1999 is generally vested after earning 10 or more years of signatory service.

30-and-out pension—The type of pension paid to a mine worker who ceases work in a classified signatory job on or after January 1, 2003, and who satisfies certain other criteria in the plan, including having thirty or more years of signatory service. If the mine worker was laid off and not working as of December 31, 2001, he generally must earn 250 or more hours of signatory service following his return to work. The amount of his pension is not reduced by each year that he is under the age of sixty-two. For additional details, see page 27.

United Mine Workers of America

1974 Pension Plan

February 1, 1988

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if the participant's last such service before July 1, 1985 was for a Construction Employer.

B. When Retirement Occurs

For the purposes of this Plan, in the case of any Participant, retirement shall be considered to occur on the last day of credited service, within the meaning of Article IV C(8), provided that on such day he was eligible for an immediate or deferred pension under this Plan.

C. Attainment of Age

For the purposes of this Plan, a Participant shall be deemed to have attained an age as of 12:01 A.M. on the respective anniversary date of the Participant's birth.

ARTICLE II - ELIGIBILITY

A. Age 55 Retirement

Any Participant who (a) has at least 10 years of signatory service or at least twenty years of credited service, including the required amount of signatory service as set forth in Article IV(C)(6), and (b) has attained the age of 55 years (but not the age of 62) prior to retirement shall be eligible to retire on or after February 1, 1988, and shall upon his retirement (hereinafter "Age 55 Retirement") be eligible for a pension.

B. Normal Retirement

(1) Any Participant shall be eligible to retire on or after February 1, 1988, and shall upon his retirement (hereinafter "Normal Retirement") be eligible for a pension, provided such Participant has attained the normal retirement date which shall be the earlier of --

(a) a Participant's attainment of age 62 years and completion of at least 10 years of signatory service or at least 20 years of credited service, including the required amount of signatory service as set forth in Article IV(C)(6), or

(b) the later of --

(i) the time a Participant attains age 62, or
(ii) the 10th anniversary of the time the Participant became employed in signatory service.

(2) In determining the time the Participant became employed in signatory service (for purposes of Article II(B)(1)(b)(ii)), any employment of a Participant in signatory service who is not entitled to a pension under Article II (A) or (E) (Age 55 Retirement or Deferred Vested Retirement) shall be disregarded if it precedes a period of consecutive one-year breaks in signatory service and the number of consecutive one-year breaks in signatory service equals or exceeds the greater of

(a) five, or

(b) the aggregate number of years of signatory service before such breaks.

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In addition to the foregoing, any employment prior to a period of consecutive one-year breaks in signatory service shall be disregarded unless the Employee completes 1,000 hours of signatory service within a 12-month period after the breaks in signatory service. Such aggregate number of years of signatory service before any period of consecutive one-year breaks in signatory service shall be deemed not to include any years of signatory service not required to be taken into account under this subparagraph by reason of any prior break in signatory service. For purposes of this Article II(B)(1)(b)(ii), a year of signatory service shall be calculated on the basis of a calendar year and in the manner specified in Article IV; a break in signatory service shall be defined in accordance with the terms of Article II(G)(3); and nonclassified signatory service shall be disregarded unless it immediately precedes or follows classified signatory service with the same Employer.

C. Disability Retirement

A Participant who (a) has at least 10 years of signatory service prior to retirement, and (b) becomes totally disabled as a result of a mine accident occurring on or after February 1, 1968, shall, upon retirement (hereinafter "Disability Retirement"), be eligible for a pension while so disabled. A Participant shall be considered to be totally disabled only if by reason of such accident such Participant is subsequently determined to be eligible for Social Security Disability Insurance Benefits under Title II of the Social Security Act or its successor.

When a Participant who has been receiving a disability pension under this Section C recovers sufficiently to become ineligible for Social Security disability benefits or is disqualified because of earnings, the Trustees shall implement procedures to determine the Participant's ability to perform classified work in the industry. The continuance of a disability pension shall be based on medical evidence that supports the Participant's inability to be employed in classified work in the industry.

If such Participant is medically certified able to perform classified work in the industry, he will no longer be eligible for a disability pension.

D. Minimum Disability Retirement

Any Participant who (a) has less than 10 years of signatory service prior to retirement and (b) becomes totally disabled as a result of a mine accident occurring on or after February 1, 1968, shall, upon retirement (hereinafter "Minimum Disability Retirement") be eligible for a pension while so disabled. A Participant shall be considered to be totally disabled only if by reason of such accident such Participant is subsequently determined to be eligible for Social Security Disability Insurance Benefits under Title II of the Social Security Act or its successor.

When a Participant who has been receiving a disability pension under this Section D recovers sufficiently to become ineligible for Social Security disability benefits or is disqualified because of earnings, the Trustees shall implement procedures to determine the Participant's ability to perform classified work in the industry. The continuance of a disability pension shall be based on medical evidence that supports the Participant's inability to be employed in classified work in the industry.

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If such Participant is medically certified able to perform classified work in the industry, such Participant will no longer be eligible for a disability pension.

E. Deferred Vested Retirement

(1) Any Participant who ceases working in a classified job for an Employer for any reason, except as provided in (2) below, and who is not eligible to receive a pension under any other provision of this Article II, shall be eligible for a pension (hereinafter "Deferred Vested Pension"), upon attaining age 62, or at the election of the Participant, such Participant shall be eligible for a reduced pension beginning at any time after attaining age 55, provided

(a) the Participant's last day of Credited Service is on or after February 1, 1988, but prior to the attainment of age 55, and

(b) the Participant has

(i) at least 10 years of signatory service, or

(ii) at least 20 years of Credited Service as set forth in Article IV(C)(6).

(2) Any Participant who ceases working in a classified job for an Employer, who is not eligible to receive a pension under any other provision of this Article II, shall be eligible for a pension (hereinafter "Deferred Vested Pension - Special") upon attaining age 62, or at the election of the Participant, such Participant shall be eligible for a reduced pension beginning at any time after attaining age 55, calculated pursuant to Article III A(5)(b), provided

(a) the Participant's last day of Credited Service is on or after February 1, 1988, but prior to attainment of age 55;

(b) had 20 years of signatory service on the date last worked;

(c) had attained the age of 50 on the date last worked; and either

(d) had been laid off and had not refused recall to the mine from which the Participant was laid off; or

(e) had been terminated under Article III, Section (j) of the Wage Agreement (or if the Participant had not been terminated, there had been a deterioration in physical condition which prevented the Participant from performing the Participant's regular work as determined by a panel of three physicians, if the degree of physical deterioration is disputed by the Trustees) and was not employed in the coal industry thereafter.

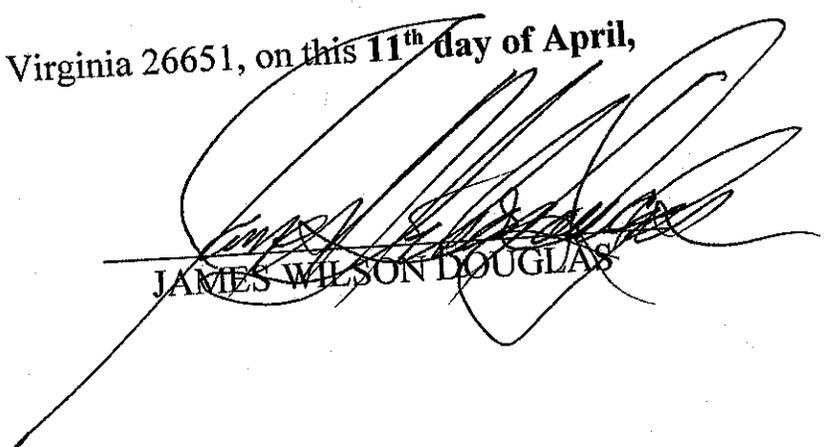
Within a reasonable period of time after such Participant's employment has ceased, an appropriate written notice of eligibility and other relevant data will be provided.

F. Nonduplication

(1) A Participant shall be entitled to receive a pension under only one of

CERTIFICATE OF SERVICE

I, JAMES WILSON DOUGLAS, the undersigned attorney do hereby certify that a true copy of the foregoing Brief of the Appellant in Support of His Petition for Appeal was deposited in the regular United States mail in an envelope properly stamped and addressed to Harley E. Stollings, Attorney at Law, 710 Broad Street, Summersville, West Virginia 26651, on this 11th day of April, 2008.


JAMES WILSON DOUGLAS