

No. 34140
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

KASSERMAN & BOWMAN, PLLC

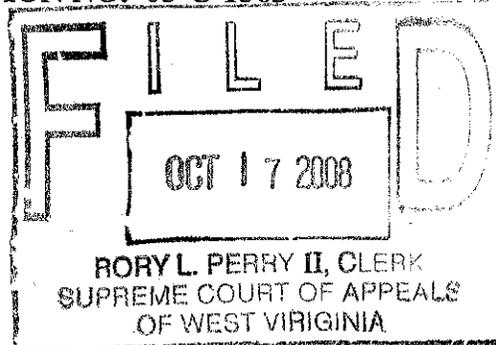
APPELLANT,

v.

**FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 05-C-1363**

**JANE L. CLINE, COMMISSIONER
WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,**

APPELLEE.



RESPONSE BRIEF OF APPELLEE IN OPPOSITION
TO APPELLANT'S APPEAL

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No. 080028

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

KASSERMAN & BOWMAN, PLLC

PETITIONER,

v.

FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 05-C-1363

JANE L. CLINE, COMMISSIONER,
WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,

RESPONDENT.

RESPONSE BRIEF OF APPELLEE IN OPPOSITION
TO PETITION FOR APPEAL

I.

KIND OF PROCEEDING AND NATURE OF RULING OF LOWER TRIBUNAL

Pending before this Court is the petition for appeal filed by the petitioner from a “final” order of the Circuit Court of Kanawha County, West Virginia entered October 17, 2007 on one of the issues presented by petitioner in his petition. The other issue presented to this Court in petitioner’s petition has never been ruled upon by the Circuit Court, although this issue is contained in the relief requested in the declaratory judgment petition filed in the Circuit Court.

In its final order in the one issue presented to it, the Circuit Court denied the petitioner’s motion for summary judgment in its favor and held “that West Virginia Code, § 23-2-5-16 (sic) [23-5-16] does not permit a 20% contingency fee to be awarded upon settlement of medical benefits in a Workers’ Compensation claim.”

II.

STATEMENT OF FACTS

The petition for declaratory judgment was initially filed by appellant in the Circuit Court of Kanawha County, West Virginia, on June 22, 2005. At that time, the petitioner/plaintiff was Siebert & Kasserman, L.C., and the respondents were Gregory A. Burton, Executive Director of the Workers' Compensation Commission, and numerous individual claimants represented by Seibert & Kasserman. Since that date, the petition has been amended from time to time and it is presently styled in the Circuit Court as petitioner, Kasserman & Bowman, PLLC, and the lone respondent is Jane L. Cline, as Commissioner of the West Virginia Office of Insurance Commissioner.

In his response to the original petition filed in Circuit Court, the respondent, Gregory A. Burton, only admitted the jurisdiction of the Circuit Court; that the petitioner correctly quoted the workers' compensation attorney fee statute in paragraph 7; and that paragraphs 12 and 13 of the petition stated the relief sought by petitioner. Nothing else was ever admitted, and when Commissioner Cline was substituted for Mr. Burton, no further responsive pleading was required or permitted.

There are no stipulations of fact or factual agreements made by the parties so as to provide the Court, whether the Circuit Court or this Court, with a factual precedent presenting a justiciable issue. Rather, all that is presented are the allegations in the petition, most of which have not been admitted. Moreover, there are no attorney fee agreements or contracts in evidence nor is there documentation to substantiate allegations that money belonging to the claimants has been escrowed by appellant in interest bearing accounts.² In short, other than the date of certain

² Indeed, it appears that all, or most all, of the appellant's clients were dismissed as parties at the Circuit Court and they have no meaningful way to voice their positions or protect their interests in this Court.

filings made in the Circuit Court, there are no facts agreed upon and the one (1) legal issue decided by the Circuit Court and presented to this Court for decision was determined in a vacuum.

The appellant filed its motion for summary declaratory judgment in the Circuit Court by certificate of service dated November 17, 2006 and asserted therein as follows:

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, Plaintiff moves the Court for an Order granting the Plaintiff summary judgment providing that it can charge a fee of 20% on the amount of settlement lump sum paid for medical benefits on behalf of a claimant for the statutory maximum period of 208 weeks. Plaintiff submits that there is no genuine issue of material fact concerning the issue presented in this case as it involves strictly an interpretation of West Virginia Code § 23-5-16.

Clearly, for purposes of summary declaratory judgment, the appellant only advanced the issue of whether attorney fees can be charged in a settlement of future medical benefits in a workers' compensation claim.

Additionally, in the appellant's memorandum of law filed with the trial court and also served by certificate of service dated November 17, 2006, the appellant affirmatively asserted in footnote 1, at 2, of its memorandum, as follows:

Plaintiff has stated in its initial pleading that it had represented West Virginia workers' compensation claimants who have been awarded permanent total disability awards at some agency level, and have later pursued and have successfully obtained earlier onset dates for permanent total disability awards through either via litigation before the Workers' Compensation Office of Judges, or an appeal to either the Workers' Compensation Board of Review or before the West Virginia Supreme Court of Appeals, after the prior determination of permanent total disability entitlement and the award of benefits from that determination. Plaintiff has also stated in its initial pleading that it had deducted the amount of 20% of the permanent total disability benefits obtained as a result of successfully obtaining an earlier onset date on behalf of said claimant, and was holding the same in escrow pending a determination of the propriety of such fee. Plaintiff was seeking a determination as to whether it could obtain an attorney fee of 20% based upon additional permanent total disability benefits awarded for an earlier on date as a result of litigation or appeals on behalf of a claimant for the statutory maximum period of 208 weeks. However, the prior named plaintiff,

Seibert & Kasserman, LC, released said funds to all claimants prior to its dissolution on March 31, 2006. Plaintiff no longer maintains that it has any funds held in escrow pertaining to permanent total disability benefits obtained as a result of successfully obtaining an earlier onset date on behalf of said claimants. As there is no real controversy at issue, Plaintiff is not seeking a determination as to this issue.

(Emphasis added.) See, Joint Designation of Record, at line 38, Petitioner's Memorandum of Law in Support of Motion for Summary Judgment.

In the memorandum filed by appellee in the Circuit Court, at 3, she acknowledges that petitioner has withdrawn the second legal issue and stated:

Since this portion (paragraphs 8 and 10) of the Plaintiff's Petition has apparently been conceded and Plaintiff's counsel made no argument related to the permanent total disability benefits in his Memorandum, this issue will not be responded to in this Memorandum. However, the Defendant reserves the right to amend this response and to make arguments on this issues (sic) if revived by Plaintiff at some future point.

(Emphasis added.) See, Joint Designation of Record, at Line 41, Memorandum of Law in Opposition of Motion for Summary Judgment. Regretfully, there was no order of the Court entered which dismissed, voluntarily or otherwise, this second issue nor was an amended petition filed withdrawing this issue.

A hearing was held on September 18, 2007 before Judge Jennifer Bailey Walker, Thirteenth Judicial District, on the motion for summary declaratory judgment. The transcript of that hearing provides the following ruling of the Circuit Court:

Well, I mean, I think what I'm being asked to do, though, is to read something into a statute that's simply not there.

In fact, it's to the contrary, and I really do believe that the legislative arena is the place where this issue ought to be addressed as to issues of public policy. That's what they do day in and day out.

So what I'm going to do is I'm going to deny the motion for summary judgment and enter it as a final order and if you want to take any appeal of that to the Supreme Court, then you know, I welcome that.

If you need any additional time to prepare, I'll enter an order to that effect. But I'm going to decline to interpret the statute anything more than what I believe it says on its face.

See, Joint Designation of Record, at Line 50, Transcript of Hearing Held on September 18, 2007.

Thereafter, an order was entered by the Circuit Court on October 17, 2007, holding, in its entirety, as follows:

On a former date came the Plaintiff, Kasserman and Bowman, PLLC, through its attorney and came the defendant, Jane L. Cline, in her capacity as the State of West Virginia Offices of the Insurance Commissioner, Defendant, through her attorney, upon the Plaintiff's Motion for Summary Judgment.

After reading the Memorandums (sic) of Law submitted by the parties and after hearing the arguments of counsel, it is the FINAL ORDER of this Court that the Plaintiff's Motion is denied. The Court finds that West Virginia Code § 23-2-5-16 (sic) does not permit a 20% contingency fee to be awarded upon the settlement of medical benefits in a Workers' Compensation claim.

The Circuit Clerk is directed to send a certified copy of this Final Order to the attorneys of record.

See, Joint Designation of Record, at Line 45, Final Order Entered.

Thus, it is clear that the only issue presented to, and ruled upon by, the Circuit Court was the issue of whether the workers' compensation attorney fee statute allowed attorney fees to be charged in a workers' compensation future medical benefits settlement.

Notwithstanding the above, in its petition for appeal to this Court, the appellant is attempting to revive the second legal issue initially set out in its petition for declaratory judgment filed in the Circuit Court. In doing so, the appellant herein explains, at footnote 3, at 1, of its petition for appeal as follows:³

³ The appellant had previously elected to rest on its petition for appeal rather than file a further appeal brief following this Court's acceptance of the petition. However, appellant did subsequently file an appeal brief and in it the appellant, among other things, appears to seek to substitute Bowman Law Office as appellant in lieu of Kasserman and Bowman, LLC, although a motion to do so has not been filed.

SK had stated in its initial pleading that it had represented West Virginia workers' compensation claimants who have been granted permanent total disability ("PTD") awards at some agency level, and have later pursued and have successfully obtained earlier onset dates for PTD awards through either via litigation before the Workers' Compensation Office of Judges, or an appeal to either the Workers' Compensation Board of Review or before the West Virginia Supreme Court of Appeals, after the prior determination of PTD entitlement and the award of benefits from that determination. SK had also stated in its initial pleading that it had deducted the amount of twenty percent (20%) of the PTD benefits obtained as a result of successfully obtaining an earlier onset date on behalf of said claimant, and was holding the same in escrow pending a determination of the propriety of such fee. SK was seeking a determination as to whether it could obtain an attorney fee of twenty percent (20%) based upon additional PTD benefits awarded for an earlier on date as a result of litigation or appeals on behalf of a claimant for the statutory maximum period of 208 weeks per award. However, SK released all of said funds to all claimants prior to its dissolution on March 31, 2006. KB had advised the Circuit Court that it no longer had any funds held in escrow pertaining to PTD benefits obtained as a result of successfully obtaining an earlier onset date on behalf of said claimants and that did not include this issue in its Motion for Summary Judgment to the Circuit Court. Nevertheless, while KB's motion for summary judgment was pending before the Circuit Court, a client of KB was awarded for an earlier on date as a result of litigation on behalf of that claimant so the issue still needs addressed.

So there is no misunderstanding as to the issues the appellant has presented to this Court for decision, in its petition for appeal/appeal brief, at 4, it states as follows:

Again, KB is seeking a determination as to whether an attorney representing a claimant:

- (1) in settlement of medical benefits can obtain an attorney fee of twenty percent (20%) based upon the amount of the settlement of medical benefits on behalf of a claimant for the statutory maximum period of 208 weeks; and
- (2) where said claimant was granted a PTD award at some agency level, and later pursued and successfully obtained earlier onset dates for PTD awards through either via litigation or appeal, can obtain an attorney fee of twenty percent (20%) based upon the additional PTD benefits granted because of said litigation or appeal not to exceed the statutory maximum period of 208 weeks per award.

Notwithstanding the assertion of a legal issue in its appeal to this Court, in filling out this Court's docketing statement, which poses certain questions, the petitioner answered as follows:

FINALITY OF ORDER OR JUDGMENT

Is the order or judgment appealed from a final decision on the merits as to all issues and parties?

YES NO

If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)?

See, Joint Designation of Record, at Line 48, Docketing Statement.

Moreover, under "Case Information" in the docketing statement, petitioner stated as follows:

CASE INFORMATION

State generally the **nature of the suit**, the **relief sought**, and the **outcome below**. [Attach an additional sheet, if necessary.]

Petition for Declaratory Relief to obtain a judicial determination as to whether West Virginia Code § 23-5-16 permitted a twenty percent (20%) contingency fee to be awarded upon (1) the settlement of medical benefits in a workers' compensation claim; and additional permanent total disability benefits awarded for an earlier on date as a result of litigation or appeals on behalf of a claimant for the statutory maximum period of 208 weeks per award. The ruling of the Circuit Court of Kanawha County was an Order Granting Defendant's Motion for Summary Judgment, finding West Virginia Code § 23-5-16 does not permit a twenty percent (20%) contingency fee to be awarded upon the settlement of medical benefits in a workers' compensation claim.

From the above facts, the following is clear:

First, the Circuit Court only ruled upon one of the legal issues presented in the petition for declaratory judgment and it did not rule on all the issues set out in the petition filed in the Circuit Court and in the appeal now presented to this Court.

Second, in ruling upon the one issue, the Circuit Court was not presented with any undisputed facts, stipulated facts, or any other facts, nor did it have before it any attorney fee

I the Defendant Kenneth Poling wish to dispute Mr. Bowmans action's to seek an additional 20%. I feel he was paid enough money from myself on this claim. I was the one injured and the one who had his hands operated on, not him. Thats the problem with lawyers they get more money than the defendant. If there is any money owed it should be paid to myself not any more lawyers.

Thank you
Ken Poling
2608 Warwood Ave
Whg WVA 26003
304-277-2102

See, Respondent's Motion to Supplement Record, at Line 4.

Admittedly, the above recitation of facts is unusual, but then, the manner in which this appeal is now before this Court is unusual. That is why this response brief includes the alternative request to dismiss the appeal herein as being improvidently granted. But before addressing the issues presented, as set out in the appellant's petition for appeal/appeal brief, certain factual matters do appear in the record.

First, there is the March 27, 2003 letter from the West Virginia Office of Disciplinary Counsel responsive to a "Request for Informal Ethics Opinion – 02-600-1." In this letter, Disciplinary Counsel responded to a request seeking advice as to whether it was ethical to take a separate statutory workers' compensation attorney fee of 20%, up to a maximum of 208 weeks, for benefits obtained for a client by litigating to obtain an earlier on-set date for the client's permanent and total disability award. In the response, and contrary to the "spin" placed upon the response by petitioner in its petition (see petition for appeal, at 2), the Disciplinary Counsel stated as follows:

The Board believes that this is not particularly an ethics question, rather it is a matter of case-by-case statutory interpretation of WV Code §23-5-16. This question should be presented to the Workers' Compensation Commissioner. If the Workers' Compensation Commissioner concludes that you may charge an additional 20% fee of the accrued benefits for the statutory period, you may do so, but you must keep in mind the ethical guidelines for the reasonableness of a fee outlined in Rule 1.5(a) of the West Virginia Rules of Professional Conduct.

See Exhibit B to Petitioner's Petition for Declaratory Relief at Joint Designation of Record on petition at Line 46, and Exhibit 2 to Petitioner's Petition for Appeal/Appeal Brief herein.

Second, there is the June 30, 2004 letter from the West Virginia Office of Disciplinary Counsel responsive to a "Request for Informal Ethics Advice 04-246I." In this letter, Disciplinary Counsel responded to a request seeking advice on whether counsel could charge a 20% attorney fee up to a maximum statutory period of 208 weeks based upon the amount of the settlement of medical benefits. The Disciplinary Counsel responded as follows:

Under West Virginia Code §23-5-16, no attorney's fee shall exceed 20% of any award of the benefits to be paid for a period of 208 weeks. It is the position of the Lawyer Disciplinary Board that nothing in the West Virginia Code expressly indicates that an attorney representing a claimant in settlement of medical benefits can obtain a new and separate attorney fee, nor has the Supreme Court of Appeals of West Virginia interpreted the fee statute to allow or disallow an attorney to charge 20% upon the settlement of medical benefits.

Thus, it is the position of the Lawyer Disciplinary Board that your firm may not charge a fee of 20% of medical benefits, resulting from negotiation and settlement of medical benefits.

See Exhibit A to Petitioner's Petition for Declaratory Relief at Joint Designation of Record, at Line 2, and Exhibit 3 to Petitioner's Petition for Appeal/Appeal Brief.

Third, in the memorandum of law submitted to the Circuit Court by the respondent, Cline, no facts were conceded, but reference was made to the allegations in the petitioner's petition. See, Memorandum of Law of respondent, at 1-3, at Designation of Record on appeal, Line 41.

Finally, we also have another fact of which this Court can take judicial notice. This fact is that in Senate Bill 2013, at W.Va. Code, § 23-5-7, effective July 1, 2003, the Legislature, for the first time in the history of workers' compensation law in West Virginia, permitted settlement of a claimant's right to future medical benefits so long as the claim does not involve medical

benefits for non-orthopedic occupational disease claims. The only exception is that Senate Bill 2013, at West Virginia Code, § 23-5-7, does not permit or allow settlements of future medical benefits for non-orthopedic occupational disease claims.

An enlightened discussion of the issues presented really requires the development of additional facts than those presented here. Nevertheless, and given the discussion to follow, it may be possible to reach a reasoned decision, at least in part, on one or both issues presented, and we will now turn to those issues, the position of the Commissioner as to each of those, and our discussion.

III.

ISSUES PRESENTED

The issues presented to the Court in the appeal herein at this time are as follows:

1. Whether the appeal herein should be dismissed as improvidently granted and the matters set out in the petition for declaratory judgment remanded to the Circuit Court for further action, development of the record, and rulings on all issues.
 - a. The Circuit Court did not rule upon all issues presented in the appeal herein.
 - b. The parties did not develop a record below so as to permit this Court to do anything other than issue an advisory opinion.

If this Court decides to proceed and rule on the issues presented in this appeal, they are as follows:

2. Whether the Circuit Court erred in holding that the West Virginia Workers' Compensation attorney fee statute, at W.Va. Code, § 23-5-16, does not permit an attorney for a claimant to charge attorney fees of up to 20%, but not to exceed benefits to be paid during a period of 208 weeks, in a lump sum settlement of claimant's claim for future medical benefits.

3. Whether the West Virginia Workers' Compensation attorney fee statute, at W.Va. Code, § 23-5-16, permits an attorney of a workers' compensation claimant who has been awarded permanent total disability benefits, consisting of accrued and future indemnity benefits, to charge an attorney fee in excess of 20% of the accrued and future benefits and without regard to the 208 week limitation provided for in the statute.

IV.

STANDARD OF REVIEW

The standard of review applicable to the appeal herein, should the appeal proceed, is clear. A Circuit Court's entry of declaratory judgment is reviewed de novo. Syl. Pt. 3, Cox v. Amish, 195 W.Va. 608, 466 S.E.2d 459 (1995). Moreover, where the issues on appeal, such as those presented here, from the Circuit Court are questions of law or involving an interpretation of a statute, a de novo standard of review is applicable. Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

V.

DISCUSSION

1. The appeal herein should be dismissed as improvidently granted and the matters set out in the petition for declaratory judgment should be remanded to the Circuit Court for further action and development of the record.

As previously demonstrated, one of the issues set out in the appellant's petition for declaratory judgment (and in its petition for appeal herein) was never submitted to the Circuit Court for decision and was, in fact, withdrawn by appellant from the Circuit Court's

consideration.⁶ Thus, the Circuit Court only ruled upon the issue of whether West Virginia Code, § 23-5-7 permitted the claimant's attorneys to charge a contingency fee on a lump sum settlement of claimant's future medical treatment benefits.

Before proceeding, even though this issue was set out in the prayer for relief in the petitioner's petition for declaratory judgment, it is again emphasized that this issue was never set for hearing, it was not briefed, and it was not ruled upon by the trial court. Moreover, the petitioner's brief to the Court below on the issue of whether attorney fees are recoverable in a settlement of future medical benefits demonstrates this other issue was withdrawn from the trial court's consideration, as set out below:

Plaintiff has stated in its initial pleading that it had represented West Virginia workers' compensation claimants who have been awarded permanent total disability awards at some agency level, and have later pursued and have successfully obtained earlier onset dates for permanent total disability awards through either via litigation before the Workers' Compensation Office of Judges, or an appeal to either the Workers' Compensation Board of Review or before the West Virginia Supreme Court of Appeals, after the prior determination of permanent total disability entitlement and the award of benefits from that determination. Plaintiff has also stated in its initial pleading that it had deducted the amount of 20% of the permanent total disability benefits obtained as a result of successfully obtaining an earlier onset date on behalf of said claimant, and was holding the same in escrow pending a determination of the propriety of such fee. Plaintiff was seeking a determination as to whether it could obtain an attorney fee of 20% based upon additional permanent total disability benefits awarded for an earlier on date as a result of litigation or appeals on behalf of a claimant for the statutory maximum period of 208 weeks. However, the prior named plaintiff, Seibert & Kasserman, LC, released said funds to all claimants prior to its dissolution on March 31, 2006. Plaintiff no longer maintains that it has any funds held in escrow pertaining to permanent total disability benefits obtained as a result of successfully obtaining an earlier onset date on behalf of said claimants. As there is no real controversy at issue, Plaintiff is not seeking a determination as to this issue.

⁶ This issue is: KB is seeking a determination as to whether an attorney representing a claimant: (2) where said claimant was granted a PTD award at some agency level, and later pursued and successfully obtained earlier onset dates for PTD awards through either via litigation or appeal, can obtain an attorney fee of twenty percent (20%) based upon the additional PTD benefits granted because of said litigation or appeal not to exceed the statutory maximum period of 208 weeks per award.

Joint Designation of Record, at line 46.

It is well-settled law in West Virginia that this Court “will not decide non-jurisdictional questions which were not considered and decided by the Court from which the appeal has been taken.” State ex rel. WV Dept. of Health v. Varney, 221 W.Va. 517, 655 S.E.2d 539, 545 at n. 12 (2007).

There is substantial additional case law supporting this well-settled principle of law.⁷

⁷ State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc., 203 W.Va. 690, 699, 510 S.E.2d 764, 773 (1998) (“Typically, we have steadfastly held to the rule that we will not address a nonjurisdictional issue that has not been determined by the lower court.”); Tiernan v. Charleston Area Med. Ctr., Inc., 203 W.Va. 135, 150 n. 27, 506 S.E.2d 578, 593 n. 27 (1998) (“This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.” (citation omitted)); Hartwell v. Marquez, 201 W.Va. 433, 442, 498 S.E.2d 1, 10 (1997) (“It is a well established principle that this Court will not decide nonjurisdictional questions which have not been raised in the court below.” (citations omitted)); Syl. pt. 2, Trent v. Cook, 198 W.Va. 601, 607, 482 S.E.2d 218, 224 (1996) (“[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.” (citations omitted)); Syl. pt. 3, Voelker v. Frederick Bus. Properties Co., 195 W.Va. 246, 465 S.E.2d 246 (1995) (“In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.” (citations omitted)); Syl. pt. 3, Hall's Park Motel, Inc. v. Rover Constr., Inc., 194 W.Va. 309, 460 S.E.2d 444 (1995) (“In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which have not been decided by the court from which the case has been appealed.” (citation omitted)); Syl. pt. 4, State ex rel. State Line Sparkler of WV, Ltd. v. Teach, 187 W.Va. 271, 418 S.E.2d 585 (1992) (“This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.” (citations omitted)); Syl. pt. 8, Charlton v. Charlton, 186 W.Va. 670, 413 S.E.2d 911 (1991) (same); Syl. pt. 2, Crain v. Lightner, 178 W.Va. 765, 364 S.E.2d 778 (1987) (same); Syl. pt. 2, Duquesne Light Co. v. State Tax Dep't, 174 W.Va. 506, 327 S.E.2d 683 (1984) (same); Syl. pt. 5, Randolph v. Koury Corp., 173 W.Va. 96, 312 S.E.2d 759 (1984) (same); Syl. pt. 3, Wells v. Roberts, 167 W.Va. 580, 280 S.E.2d 266 (1981) (“As a general rule [t]his Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.” Syl. pt. 1, Buffalo Mining Co. v. Martin, 165 W.Va. 10, 267 S.E.2d 721 (1980).”); Syl. pt. 1, Shackleford v. Catlett, 161 W.Va. 568, 244 S.E.2d 327 (1978) (same); Syl. pt. 1, Adams v. Bowens, 159 W.Va. 882, 230 S.E.2d 481 (1976) (same); Syl. pt. 2, Young v. Young, 158 W.Va. 521, 212 S.E.2d 310 (1975) (“In the exercise of its appellate jurisdiction, this Court cannot consider nonjurisdictional errors not raised and decided by the trial court.”); Syl. pt. 6, in part, Parker v. Knowlton Constr. Co., Inc., 158 W.Va. 314, 210 S.E.2d 918 (1975) (same); Syl. pt. 1, Boury v. Hamm, 156 W.Va. 44, 190 S.E.2d 13 (1972) (same); Syl. pt. 1, Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W.Va. 245, 183 S.E.2d 692 (1971) (same); Syl. pt. 1, Mowery v. Hitt, 155 W.Va. 103, 181 S.E.2d 334 (1971) (same); Syl. pt. 4, In re Morgan Hotel Corp., 151 W.Va. 357, 151 S.E.2d 676 (1966) (same); Syl. pt. 10, in part, Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963) (“[I]n cases within [this Court's] appellate jurisdiction it will not consider or decide nonjurisdictional questions which have not been determined by the trial court.”); Syl. pt. 2, Sands v. Security Trust Co., 143 W.Va. 522, 102 S.E.2d 733 (1958) (same); Syl. pt. 1, Vecellio v. Bopst, 121 W.Va. 562, 6 S.E.2d 708 (1939) (“This Court need not pass on questions not raised in the trial court the action of which is being reviewed.”); Syl. pt. 3, Nuzum v. Nuzum, 77 W.Va. 202, 87 S.E. 463 (1915) (“The [S]upreme [C]ourt will not consider questions not yet acted upon by the circuit court in the case.”); Syl. pt. 7, Kesler v. Lapham, 46 W.Va. 293, 33 S.E. 289 (1899) (same).

Moreover, and stated another way, the law in West Virginia is settled that “[T]he [S]upreme [Court] will not consider questions not yet acted upon by the circuit court in the case. Nuzum v. Nuzum, 77 W.Va. 202, 87 S.E. 463 (1915).

Likewise, with respect to the extra-ordinary writ of prohibition, this Court has consistently held that “[i]t would be premature on our part to prohibit the Circuit Court from doing that which it has yet to rule upon.” See State ex rel. Allstate Ins. v. Gaughan, 220 W.Va. 113, 640 S.E.2d 176, 185 (2006) (declining to address issues that were not ruled upon by trial court); State ex rel. Mobil Corp. v. Gaughan, 211 W.Va. 106, 114, 563 S.E.2d 419, 427 (same); State ex rel. Nationwide Mutual Ins. v. Kaufman, 222 W.Va. 37, 658 S.E.2d 728, 736 (2008) (“It would be premature on our part to prohibit the Circuit Court from doing that which it has yet to rule upon”). Thus, the second issue presented here by appellant, having not been ruled upon by the trial court, should not be considered or passed upon by this Court.

It is also noted here that all, or about all, of the claimants, who certainly had an interest in the issues presented to the circuit court and this Court, were dismissed by the appellant here as parties at the trial court level. The West Virginia Uniform Declaratory Judgment Act, at W.Va. Code, § 55-13-1 et seq., specifically requires, at W.Va. Code, § 55-13-11, in part, that:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

The claimants, whose workers’ compensation benefits are proposed to be taken by their attorney, as attorney fees, surely have an interest in and will be affected, one way or another, by a decision of this Court. Indeed, as set out and quoted in the facts, supra, at 9, at least one claimant had something to say and wanted it to be heard and considered. See, Answer of Kenneth Poling at Joint Designation of Record, at line 9.

Finally, and as stated, there really was no record developed in the trial court. There is no contingency or other fee agreement in evidence or in the record. There are no facts presented with respect to the various settlements at issue. There are no facts with respect to any litigation in any claim involving any asserted onset date of permanent total disability.

For the reasons discussed above, it is respectfully asserted that the more prudent approach would be to dismiss the appellant's appeal as improvidently granted and remand all matters to the Circuit Court for development of a record on the issues presented, to join the claimants as parties, and for the Circuit Court to rule upon the second issue presented in the appellant's appeal.

2. The West Virginia Workers' Compensation attorney fee statute, at W.Va. Code, § 23-5-16, does not permit an attorney to charge a separate 20% contingency fee based upon the settlement of a claim for medical benefits.

The West Virginia Workers' Compensation attorney fees statute, W.Va. Code, § 23-5-16, provides, in its entirety, as follows:

§23-5-16. Fees of attorney for claimant; unlawful charging or receiving of attorney fees.

No attorney's fee in excess of twenty percent of any award granted shall be charged or received by an attorney for a claimant or dependent. In no case shall the fee received by the attorney of such claimant or dependent be in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks. The interest on disability or dependent benefits as provided for in this chapter shall not be considered as part of the award in determining any such attorney's fee. However, any contract entered into in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks, as herein provided, shall be unlawful and unenforceable as contrary to the public policy of this state and any fee charged or received by an attorney in violation thereof shall be deemed an unlawful practice and render the attorney subject to disciplinary action.

The issue of attorney fees in workers' compensation claims has been considered by this Court in the following cases: Hinerman v. Levin, 172 W.Va. 777, 310 S.E.2d 843 (1983);

Committee on Legal Ethics v. Coleman, 180 W.Va. 493, 377 S.E.2d 485 (1988); Hicks v. Wilson, 182 W.Va. 660, 391 S.E.2d 350 (1990); and Committee on Legal Ethics v. Burdette, 191 W.Va. 346, 445 S.E.2d 733 (1994). This Court has consistently ruled, in all but Hicks where a pre-1975 attorney fee statute applied, that the maximum attorney fees to be charged in a workers' compensation claim may not exceed 20% of the benefits to be paid during a period of two hundred eight (208) weeks.

However, this Court has never specifically addressed the issue of attorney fees in connection with settlement of medical benefits in a workers' compensation claim. This is because it was not until July 1, 2003, the effective date of Senate Bill 2013, that the West Virginia Legislature permitted parties in West Virginia workers' compensation claims to settle the medical benefits part of a workers' compensation claim. And, prior to 2003, and even through this date, all understand that attorney fees may not be assessed in an award of medical benefits.

The petitioner has correctly stated that "[p]resumably parties are to turn to West Virginia Code § 23-5-16 for guidance on this issue." (p. 2 para. 2 of petitioner's petition for appeal Joint Designation of Record at Line 46). But then petitioner erroneously suggests that there should be an allowance of an additional 20% attorney fee for settlement of medical benefits because the attorney fee statute was in effect before medical benefits were allowed to be settled. This is in derogation of the fact that the Legislature has consistently set as a maximum, an attorney fee of not more than 20% not to exceed benefits to be paid during a period of 208 weeks, and this Court has consistently upheld that the percentage, subject to the weeks' limitation, is the maximum attorney fee which can be charged. There is no reason to believe that the Legislature intended to allow an additional award of attorney fees for the settlement of medical benefits or that the

omission of additional attorney fees for settlement of medical benefits was an oversight that should be corrected by this Court. Indeed, in Senate Bill 2013, effective July 1, 2003, the Legislature made major procedural and substantive changes to the workers' compensation laws, in addition to permitting settlement of future medical benefits in certain cases, and if it had intended for attorney fees to be available in these settlements it could have easily done so by amending the attorney fee statute. It did not.

For some unknown reason, there was no factual record developed in the Circuit Court with respect to the actual claims in issue, and it is respectfully asserted that without these facts, the legal issues should not be considered or decided.⁸ However, it is possible that a generic factual description will work because we have nothing else, and this is the situation presented here absent factual development.

This scenario is the full and final settlement (this includes all issues which are raised or which could be raised in a claim, including future medical benefits) of a workers' compensation claim for future medical benefits, as all issues relating to indemnity benefits (temporary total disability ("TTD") permanent partial disability ("PPD"), permanent total disability ("PTD")) are time barred or exhausted. Thus, the only remaining relief available to a claimant in such claim would be future medical treatment or services. All parties have an interest in settling the claim, and through negotiations the parties agree upon a specific lump sum dollar amount for settlement thereby achieving final closure of the claim.⁹ But, even here, the amount of projected future

⁸ With respect to the settlement of future medical benefits, Medicare plays a large role in workers' compensation medical benefits settlements and without complying with Medicare's set asides in certain circumstances, workers' compensation cannot settle an award of future real or potential liability for payment of future medical services and benefits.

⁹ The amount discussed preliminarily to an agreement is not just picked from the air. Rather, it involves complicated projections as to future medical benefits which may be reasonable and necessary, consideration of claimant reimbursable expenses and, if indemnity benefits are involved, projections as to them.

medical benefits and whether the claimant is receiving Social Security Disability benefits, together with the amount of the settlement, play extremely important roles.

In connection with the settlement of future medical benefits, it is important to understand that the dollars paid out today in settlement of a claim for medical benefits must be used by the claimant for future medical treatment and services for reasonable and necessary treatment and services necessitated by the compensable conditions in the claim. This is why Medicare approval of the settlement is generally required and always wise.¹⁰ If that approval is not obtained, then the "Old Fund" and the claimant remain liable to Medicare. Also, the claimant may have any such future medical treatment, if it exceeds the settlement amount, denied by Medicare. In order to obtain Medicare approval, it must agree that the lump sum settlement amount is sufficient to pay for such future medical treatment and services as may be necessitated by the compensable components of the workers' compensation claim.

If Medicare approves the settlement, then the settlement agreement is executed, and following a statutory five (5) day waiting period, the lump sum settlement amount is paid to claimant with the understanding that the lump sum settlement amount is to be used to pay for future medical benefits for compensable components associated with the claim and the claim is then forever closed as settled. But, if the attorney for the claimant takes a 20% attorney fee from the lump sum medical benefits settlement, the claimant will not be left with enough money to pay for future medical services proximately resulting from the compensable injuries in the claim.

In the past, and at a time when future medical benefits could not be settled, and even today when they can be settled, claimants' attorneys have regularly and routinely represented and

¹⁰ Actually, the writer is advised that if the settlement for future medical benefits is less than \$25,000, without regard to whether the claimant is receiving Social Security Disability benefits, Medicare approval is not necessary, but it is wise to have Medicare approval. Attached to this brief at Exhibit 1 is a two page document used to determine Medicare Set-Aside Arrangements ("MSA") with the Centers for Medicare and Medicaid Services ("CMS").

still represent their clients in disputed medical issues in workers' compensation litigation. In doing so, it was and is recognized and understood by claimants' attorneys that a fee could not and cannot be charged for successfully litigating medical benefits issues.¹¹ This is because the workers' compensation attorney fee statute only permits attorney fees to be assessed on indemnity awards and indemnity benefit settlements and then not in excess of 20% of the benefits to be paid for a period of 208 weeks. Medical benefits cannot be measured by dollar numbers over a 208-week period, except in hindsight by looking at the doctor's statement for services rendered for the medical benefits obtained during a 208-week period. Moreover, medical benefits are not measured in weeks like indemnity benefits. So, in the past, and even today, everyone, claimant's attorneys included, understands that attorney fees could not and cannot be charged in medical issue litigation, and so it would be impracticable and contrary to the statute and public policy for an attorney to charge an attorney fee in a lump sum settlement for future medical benefits in a workers' compensation claim.¹² The Legislature understood this and the public policy attendant to settlement of future medical benefits in a workers' compensation claim. It did not need to, nor did it, re-write W.Va. Code, § 23-5-16 in Senate Bill 2013 to allow for attorney fees in settlement of future medical benefits because it did not want that money, or any portion of it, to be subject to attorney fees.

Before proceeding, and upon the factual scenarios set out above, an analysis of the attorney fee statute may be appropriate. The first sentence of the statute provides:

"No attorney's fee in excess of twenty percent of any award granted shall be charged or received by an attorney for a claimant or dependent."

¹¹ And, if necessary and reasonable medical treatment is the procurement of an MRI, and the attorney takes 20% of the cost of the MRI, the claimant cannot then get the MRI.

¹² And here's the conundrum and danger. If this Court should re-interpret the workers' compensation attorney fee statute to permit attorney fees to be assessed and collected in a settlement of future medical treatment benefits, it flows from such a holding that a claimant's attorney would otherwise be able to assess and collect a fee in successful medical treatment litigation. But, where does the fee come from. Does the attorney get 20% of an MRI.

This section applies to “awards,” so arguably it does not apply to settlements, but that is not the Commissioner’s position and the workers’ compensation attorney fee statute should be applicable to awards and settlements, as a settlement is tantamount to an award. Moreover, a settlement is in the nature of an order which has been defined by this Court in Wampler Foods, Inc. v. Workers’ Compensation Commission, 216 W. Va. 129, 602 S.E.2d 805, 822 (2004) as an “award.”

The second sentence provides:

“In no case shall the fee received by the attorney of such claimant or dependent be in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks.”

This sentence clearly modifies the twenty percent permitted in the first sentence, but it is not limited to “awards.” So, any attorney fee charged, either from obtaining an “award” or in settlement, may not be in excess of twenty percent (20%) of the benefits to be paid during a period of two hundred eight weeks.

The third sentence provides:

“The interest on disability or dependent benefits as provided for in this chapter shall not be considered as part of the award in determining any such attorney’s fee.”

This sentence makes it clear that interest shall not be taken into consideration in determining the statutorily permissible attorney fee.

Finally, the fourth sentence of the statute states:

“However, any contract entered into in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks, as herein provided, shall be unlawful and unenforceable as contrary to the public policy of this state and any fee charged or received by an attorney in violation thereof shall be deemed an unlawful practice and render the attorney subject to disciplinary action.”

This sentence ties all the previous sentences together and also mandates that any attorney fee agreement (contract) providing for a fee in excess of twenty percent (20%) of the benefits to be

paid during a period of two hundred eight weeks is not only prohibited, it is unlawful and unenforceable as contrary to public policy. Any fee charged or received by an attorney (whether set out in a contract or not) is in violation of the statute and "shall be deemed" an unlawful practice thereby subjecting the attorney to disciplinary action.

In regular everyday workers' compensation matters, workers' compensation indemnity benefits are calculated in weeks. For example, each percentage of PPD awarded generally translates into four weeks of benefits. TTD benefits are typically calculated and paid on a weekly basis. Finally, PTD benefits, although paid once a month, are calculated on a weekly basis to arrive at the monthly amount due. As a result, it is easy to quantify indemnity benefits for purposes of determining the total amount of such benefits a claimant will receive over 208 weeks, or a lesser number of weeks, for purposes of applying the up to, but not in excess of, 20% of 208 weeks contingency attorney fee. The same cannot be said for future medical benefits. For example, if a claimant, aged 50, who is not receiving Social Security Disability benefits, settles future medical benefits for \$20,000.00, how can we determine the value of the first 208 weeks of these benefits. We cannot. It may be that for 208 weeks following the settlement, the claimant will not need any medical treatment which is reasonable to treat the compensable condition. But, in the fifth year, the claimant may need extensive surgery resulting from, and reasonable to treat, the compensable condition. In this circumstance, no attorney fees could be assessed because the medical benefits for the first 208 weeks are zero (0).

The appellant herein suggests that a finding of additional fees for medical benefits is important from a public policy standpoint. Petition for appeal, at 5. Appellant argues that there is a need for settlement in workers' compensation claims, but that can only be facilitated by permitting additional attorney fees for medical benefits settlements; otherwise the attorney would

not accept these claims.¹³ Petitioner also argues that the Court's caseload would be lessened by permitting attorney fees in such settlements and that a workers' compensation attorney contemplating a settlement of a claim on behalf of a client/claimant must spend significant additional time and effort beyond the actual scope of representation outlined in contracts with claimants. Petition for appeal/appellant brief, at 5. Appellant even goes on to suggest that such settlements would never be made due to the significant work involved, or that clients would be unable to get counsel to represent them.¹⁴ Notwithstanding these arguments, the significant work of an attorney is in the litigation of medical benefit issues, not in settlement of them, and to permit an attorney to charge 20% of a \$20,000.00 lump sum settlement of the future medical benefits in a workers' compensation claim, without more, would be a windfall, and a hardship to a claimant.¹⁵

Nevertheless, all of the arguments raised by appellant may have their place, but these are arguments that should be presented to the Legislature in a requested change in the controlling attorney fee statute. The inference to be drawn from appellant's argument is that the Legislature overlooked changes to the attorney fee statute when it enacted Senate Bill 2013 in 2003 and, among other things, allowed settlement of future medical benefits. However, as discussed, such is not the case. Indeed, the Legislature has more recently, in Senate Bill 1004 effective 2005, engaged in comprehensive changes to the workers' compensation statutes in the process of privatizing the workers' compensation system. With all of the attention being paid to the West Virginia workers' compensation statutes, and with input from all stakeholders during the

¹³ Lawyers have routinely over the years represented claimant's in medical treatment issues without assessing or charging attorney fees. This is because the medical treatment issues are simply a part of the claim and lawyers know their fees are obtained on the indemnity issues.

¹⁴ See footnote 6. *supra*.

¹⁵ Rule 1.5(a), Rules of Professional Conduct, is discussed *infra*, but we do not know the amount of time claimed by counsel to have been specifically devoted to the settlements in issue in the case *sub judice*.

legislative process, it is simply not credible to suggest that the workers' compensation attorney fee statute in all the workers' compensation statutes has been overlooked.

For instance, attorney's fees were considered by the Legislature in 2005 when considering the needs of claimant's counsel to receive additional payment in certain circumstances, and it addressed it in W.Va. Code, § 23-2C-21 [2005] which reads, in pertinent part:

Upon determination by Office of Judges that a denial of compensability, initial TTD award, or authorization for medical benefits was unreasonable, attorney fees and costs obtaining reversal of denial shall be awarded to claimant. W.Va. Code, § 23-2C-21(c).

Nevertheless, the West Virginia Legislature has been consistent in its insistence that the maximum attorney fee allowed not exceed 20% of the benefits paid to a claimant and that such 20% attorney fee is limited to the first 208 weeks of benefits. When there has been a need for modification, the Legislature has spoken, as in the aforementioned statutory change, specifically addressing an award of attorney fees in certain situations. When reviewing the issue of attorney fees, the Legislature was very clear that the grant of additional attorney fees relating to medical benefits could only occur if the original denial was found by the Office of Judges to be unreasonable. In consideration of this consistent and verifiable history, there is no need for this Court to modify, revise or interpret the plain language of this statute.

Importantly, even if this Court were to interpret the controlling statute (it should not as the statute is clear), the cardinal rule of statutory interpretation is to first identify the legislative intent expressed in the statute at issue. To this end, this Court has recognized that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, Smith v. State Workmen's Comp. Comm'r, 159 W.Va. 108, 219 S.E.2d 361 (1975). Where, as is the case here, the applicable statute is clear and unambiguous and plainly expresses

the legislative intent, it should be given full force and effect, and not construed or interpreted. Copier Word Processing Supply, Inc. v. WesBanco Bank, Inc., 220 W.Va. 39, 640 S.E.2d 102, 110 (2006). Moreover, at Syl. Pt. 5, State v. General Daniel Morgan Post No. 548, V.F.W., 144 W.Va. 137, 107 S.E.2d 353 (1959), this Court held:

When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.

There is also the familiar maxim of expressio unius est exclusio alterius, meaning the express mention of one thing implies the exclusion of the other. Syllabus Point 3, in part, Manchin v. Dunfee, 174 W.Va. 532, 327 S.E.2d 710 (1984). Hence, the specific statutory language that “[i]n no case shall the fee received...be in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks” relates solely to indemnity benefits to the exclusion of medical benefits. There is another rule relating to statutory construction which holds that a statute should not be interpreted to render a statute a nullity or which leads to an absurd result. Charter Communications VI, PLLC v. Community Antenna Service, Inc., 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002). Likewise this Court has held:

“[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted.*” Banker v. Banker, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-477 (1996) (citing Bullman v. D & R Lumber Company, 195 W.Va. 129, 464 S.E.2d 771 (1995); Donley v. Bracken, 192 W.Va. 383, 452 S.E.2d 699 (1994). ([E]mphasis added.). See State ex rel. Frazier v. Meadows, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (1994). Moreover, “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.” Syl. pt. 1, Consumer Advocate Division v. Public Service Commission, 182 W.Va. 152, 386 S.E.2d 650 (1989). See Sowa v. Huffman, 191 W.Va. 105, 111, 443 S.E.2d 262, 268 (1994).

Longwell v. Board of Education of County of Marshall, 213 W.Va. 486, 583 S.E.2d 109 (2003).

For this Court to “interpret” the applicable attorney fee in issue here to provide for attorney fees in settlement of future medical benefits issues would be tantamount to a re-writing of the statute.

The intent and interest in the regulation of attorney fees by the Legislature is clear. As previously recognized and expressed by this Court: “[t]he workers’ compensation system as a whole is a creature of statute, and the legislature has an interest in assuring that its statutory aim of compensating the injured is not frustrated by lawyers who siphon off excessive portions of the award as their fees.” Hinerman v. Levin, 172 W.Va. 777, 785, 310 S.E.2d 843. Clearly, neither the Legislature nor anyone else would countenance the payment of attorney fees from a settlement of future medical benefits where such settlement money is to be set aside to pay for reasonably anticipated future medical needs of the claimant proximately resulting from compensable injuries in his/her claim.

Petitioner herein also previously requested from the West Virginia Office of Disciplinary Counsel an opinion or advice as to whether an additional 20% fee could be charged a claimant in a settlement of medical benefits. The Board was unequivocal in its decision stating that the law firm was not allowed to charge a fee of 20% of medical benefits resulting from negotiations and settlements of medical benefits. This opinion of the Disciplinary Board is consistent with the position taken by the Office of Insurance Commissioner. See Petitioner’s Petition for Declaratory Relief at Joint Designation of Record, at Line 1.

The Office of Insurance Commissioner has recently been charged with regulation of workers’ compensation insurance, employer compliance with workers’ compensation laws and rules, and administration of all workers’ compensation claims where the State has liability for payment of claims including, but not limited to, all of the “Old Fund” Workers’ Compensation Commission claims with Date of Injury/Date of Last Exposure (DOI/DLE) prior to July 1, 2005.

See, W.Va. Code, § 23-2C-1 et seq; W.Va. Code, § 33-2-21; W.Va. Code, 33-2-22. It is an inherent part of this responsibility that claimants' legitimate claims to benefits be protected. Thus, an important public policy demands that the regulator/administrator not authorize any activity which interferes with a claimant's entitlement and vested right to monies properly awarded or agreed upon in settlement for their intended, and critical, purpose of paying for reasonable future medical treatment. Absent clear legislative intent to authorize attorney fees to be taken out of payments of future medical benefits settlements, it would be inappropriate, and not in the best interests of claimants, for the Office of Insurance Commissioner to agree to allow attorney fees to be subtracted from settlement of future medical benefits.

Indeed, the applicable attorney fee statute is clear. And, just as all claimants' attorneys representing clients knew in the past, and know today, that an attorney fee may not be charged on an award of medical treatment benefits, so too should such attorneys know that settlement money allocated or dedicated to pay a claimant's future medical benefits may not be the subject of an attorney fee.

Any change in the attorney fee structure provided for in the workers' compensation attorney fee statute should be made by the Legislature as part of its responsibility for the regulation of a comprehensive workers' compensation system. Therefore, any change in the amount or nature of attorney fees permitted to be assessed against workers' compensation awards or settlements must be considered and weighed in totality by the creator of the workers' compensation system in West Virginia, the West Virginia Legislature.

3. The West Virginia Workers' Compensation attorney fee statute, at W.Va. Code, § 23-5-16, does not permit an attorney to charge a separate maximum attorney fee for accrued benefits and a further separate maximum attorney fee for future benefits in an award of permanent and total disability benefits to a claimant/client.

The issue presented here has already been addressed by this Court in Hinerman v. Levin, 172 W.Va. 777, 310 S.E. 2d 843 (1983); Committee on Legal Ethics v. Coleman, 180 W.Va. 493, 377 S.E.2d 485 (1988) and Committee on Legal Ethics v. Burdette, 191 W.Va. 346, 445 S.E. 2d 733 (1994). Moreover, it is asserted that the issue here is controlled by this Court's decisions in Coleman and Burdette.

At this juncture, we again begin our discussion by reference to the applicable Workers' Compensation attorney fees statute which provides as follows:

§23-5-16. Fees of attorney for claimant; unlawful charging or receiving of attorney fees.

No attorney's fee in excess of twenty percent of any award granted shall be charged or received by an attorney for a claimant or dependent. In no case shall the fee received by the attorney of such claimant or dependent be in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks. The interest on disability or dependent benefits as provided for in this chapter shall not be considered as part of the award in determining any such attorney's fee. However, any contract entered into in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks, as herein provided, shall be unlawful and unenforceable as contrary to the public policy of this state and any fee charged or received by an attorney in violation thereof shall be deemed an unlawful practice and render the attorney subject to disciplinary action. (1995, c. 253.)

(Emphasis added.)

The Legislature, in 1995, moved the attorney fee statute from its previous location at W.Va. Code, § 23-5-5 to W.Va. Code, § 23-5-16. The predecessor attorney fee statute (W.Va. Code, § 23-5-5) was enacted in 1975 and is identical, in all aspects material and relevant to the issue present here, to W.Va. Code, § 23-5-16. As a result, this Court's decisions discussed

herein are applicable as the 1995 and 1975 statutes on attorney fees are, for our purposes here, identical.

It is also clear that the attorney fees to be charged by an attorney for representation of a client for workers' compensation benefits is controlled by the attorney fee schedule contained in W. Va. Code, § 23-5-5 (now set out at W. Va. Code, § 23-5-16). Powyoznik v. C. & W. Coal Co., 191 W. Va. 293, 445 S.E. 2d 234 (1994).¹⁶ Thus, the workers' compensation attorney fee statute sets the ceiling (maximum) fee that can be charged by an attorney. Of course, an attorney and his client may agree to a lesser fee, and this may be what has occurred here but we do not have in evidence the attorney fee agreement made by the unidentified claimant and his attorney.

Given the above, there are two statutory limitations upon attorney fees in Workers' Compensation claims: (1) the fee may not be more than twenty percent (20%) of any award granted, and (2) this fee (20%) in any award may not exceed twenty percent (20%) of the benefits to be paid during a period of 208 weeks.

Here, the attorney is seeking 20% of the accrued benefits for a 208 week period and a further 20% of future benefits for a 208 week period; all to be paid to claimant in his PTD award. Upon the case law previously cited, and upon the plain wording of the statute, it is clear that the attorney may not "double dip" as he desires, but is limited to, and may not take, attorney fees in excess of 20% of the benefits to be paid during a period of 208 weeks.

In Hinerman v. Levin, *supra*, the claimant, Mr. Levin, filed a workers' compensation claim. He was represented by Mr. Hinerman, an attorney with the United Mine Workers ("UMWA"). The Workers' Compensation Commission ruled on Mr. Levin's claim and awarded

¹⁶ During oral argument on the motion docket, Justice Albright suggested that West Virginia Code, § 30-2-15 [1923], a general attorney fee statute, may be applicable to the matters presented in this appeal. However, Powyoznik answers that question, as does the general rule of law that a specific statute controls the general.

him benefits for a 20% permanent partial disability ("PPD"). On behalf of Mr. Levin, Mr. Hinerman protested the Commission award of 20% PPD.

Mr. Hinerman then left the UMWA but Mr. Levin later signed a contingency fee agreement thereby hiring Mr. Hinerman to stay on his claim. The contingency fee agreement provided that counsel would receive 20% of all compensation awarded for a period of 208 weeks. Thereafter, the Workers' Compensation Appeal Board (this was before the Office of Judges was established by the Legislature) ordered an increased rating granting permanent total disability benefits to Mr. Levin. In this regard, the claimant (Mr. Levin) was to receive \$19,732.38 in retroactive (accrued) benefits and future payments of \$1,162.38 a month.

The claimant sent a telegram to the Commission revoking its authority to honor Mr. Hinerman's claim for attorney fees. After refusing to pay the attorney fees, Mr. Hinerman filed a civil action to collect his fees. Thereafter, he obtained a default judgment for 20% of the benefits to be paid to claimant for 208 weeks.

Mr. Levin appealed on numerous issues. Of note here, in affirming the default judgment in favor of Mr. Hinerman, the Court noted that the fee agreement was in accordance with the statutory limit. Hinerman, supra, 310 S.E.2d at 850. Nevertheless, the Court was mindful of the argument by Mr. Levin that a fee was charged in his claim on the 20% PPD award, and a further fee was assessed on the accrued and future payments resulting from his PTD award.

Acknowledging that the attorney fee statute barred an attorney from receiving a fee in excess of 20% of 208 weeks of benefits in any award granted, and despite the fact that Mr. Hinerman represented Mr. Levin pursuant to two separate contracts, this Court determined that all of the actions of Mr. Hinerman on the part of Mr. Levin were aimed toward the procurement of a single award. (Emphasis added.) Thus, notwithstanding the 20% PPD award which was

appealed and which appeal then resulted in the subsequent PTD award on appeal, it was all one award. As a result, and since Mr. Hinerman was paid \$600.00 out of the 20% PPD award, the Court ordered this amount be deducted from the amount to be paid Mr. Hinerman.

Thus, it is clear from this case that the statutory limit for attorney fees is 20% of 208 weeks of benefits, even though the claimant received substantial retroactive (accrued) benefits and substantial future benefits for life. Indeed, the \$600.00 paid Mr. Hinerman for the 20% PPD award when he was an attorney for the UMWA was deducted since the Court determined this would have been in excess of the statutory limit. There is no difference in the case at bar. If petitioner is permitted to receive 20% of 208 weeks of the retroactive (accrued) benefits, and a further 20% of 208 weeks of the future benefits to be paid claimant, the attorney will be receiving two separate attorney fees which is 100% more than the statute permits. That the statute is constitutional or is an undue regulation of the practice of law is not open to consideration. As stated by the Court in Hinerman, supra, "...the Legislature has an interest in assuring that its statutory aim of compensating the injured is not frustrated by lawyers who siphon off excessive portions of the award as their fees." 310 S.E.2d at 851.

If this Court permits petitioner to recover the fees he seeks, it would emasculate the public policy of this State, as stated and recognized by this Court in Hinerman, and allow petitioner to "double-dip," thereby siphoning off an excessive portion of claimant's award.

In Committee on Legal Ethics v. Coleman, 180 W.Va. 493, 377 S.E.2d 485 (1988), this Court was presented with the very issue presented in the case at bar. The only difference is that in Coleman, the claimant's attorney actually assessed and collected two (2) separate attorney fees. First, attorney Coleman charged and withheld 20% of the accrued benefits (172 3/7 weeks). Secondly, attorney Coleman charged and withheld 20% of the future benefits limited to

208 weeks. This was a total fee of \$12,782.40 based upon a total of 380 3/7 weeks of benefits. It was all taken by attorney Coleman from the claimant's \$28,968.00 check for accrued benefits. In the case at bar, petitioner ostensibly has charged and withheld 20% of 208 weeks of future benefits and has withheld 20% of 208 weeks of the accrued benefits, but apparently has placed this sum in escrow, although we do not know for sure as we do not have the facts developed below to fully ascertain the whereabouts of this additional fee or the amount of it.

In Coleman, this Court was presented with the "...question of whether the workers' compensation statute limiting an attorney's fee is applicable to an award of permanent total disability benefits in such a manner that the accrued benefits are not a separate award from the future benefits." Coleman, 377 S.E.2d at 486. This Court was also presented with the question of whether the attorney was subject to disciplinary action for charging and collecting an excessive or illegal fee.

In answering the first question, this Court reviewed the recent history of the workers' compensation attorney fee statute, reviewed the meaning of the term "award," and then held, at Syllabus Point 1, as follows:

Under W. Va. Code 23-5-5 [1975], an attorney's fee for assisting a workers' compensation claimant in obtaining a permanent total disability award, consisting of accrued and future benefits, is not to exceed twenty percent of the accrued and future benefits as one award subject to the 208-week limitation.

With respect to the second question presented, although not precisely relevant here, this Court believed there to be a good faith interpretation placed on the statute by attorney Coleman, and it did not uphold the disciplinary sanction imposed by the State for Ethics Committee on attorney Coleman. Coleman, 377 S.E.2d at 492.

The precise pertinent issue presented to, and decided by, this Court in Coleman is now before this Court again in petitioner's petition for appeal wherein the attorney again seeks to do

that which this Court held in Coleman that it could not do and was unlawful. Although there are accrued (retroactive benefits) and future benefits available to a claimant in a workers' compensation PTD award, they are both part and parcel of one PTD award. To hold otherwise would be contrary to the admonition in Hinerman, *supra*, that "...the injured is not frustrated by lawyers who siphon off excessive portions of the award as their fees." Hinerman, 310 S.E.2d at 851.

In Committee on Legal Ethics v. Burdette, 196 W. Va. 346, 445 S.E.2d 733 (1994), (*per curium*), the Court was again presented, among other issues, with the precise issue decided in Coleman regarding the legality of charging two (2) separate fees in one claim for PTD benefits. There, attorney Burdette collected from four (4) of his workers' compensation clients 20% of their back pay (accrued) benefits and, in addition, charged them 20% of their future benefits to be paid for 208 weeks. Indeed, just as in Coleman, the attorney in Burdette collected his separate statutory maximum fee on the future benefits from his client's checks for accrued benefits. See footnote 2 in Burdette, 445 S.E.2d at 734.

In reaching its decision, this Court stated that "...we reject respondent's suggestion that he was unaware of the Coleman decision when he asked his clients starting in January, 1989, to agree to his fee arrangement which was essentially the same as that condemned in Coleman." Burdette, 445 S.E.2d at 735.

In holding the attorney should be sanctioned by a one-year suspension from the practice of law, the Court reaffirmed in Burdette, at Syl. Pt. 2, its holding in Syl. Pt. 1 of Coleman, that:

Under W. Va. Code 23-5-5 [1975], an attorney's fee for assisting a workers' compensation claimant in obtaining a permanent total disability award, consisting of accrued and future benefits, is not to exceed twenty percent of the accrued and future benefits as one award subject to the 208-week limitation.

It bears repetition that for our purposes here, there is no difference in the workers' compensation attorney fee statute referenced in Hinerman, Coleman, and Burdette at W. Va. Code § 23-5-5 and the one now located at W. Va. Code § 23-5-16. Finally, the device or scheme conjured up by the attorneys in Coleman and Burdette is the very same advanced by the petitioner here. Because this Court has spoken to the very same issue twice before, this Court need not revisit the issue, nor should this Court condone the petitioner's attempt to defeat the Legislature's interest "...in assuring that its statutory aim of compensating the injured is not frustrated by lawyers who siphon off excessive portions of the award as their fees."

Notwithstanding the above discussion, and notwithstanding the "ceiling" W.Va. Code, § 23-5-16 places on attorney fees which can be charged for representing claimants in workers' compensation claims, one must also take into consideration Rule 1.5(a), Rules of Professional Conduct. Rule 1.5(a) provides, in pertinent part, as follows:

- (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.

This Rule was referenced by the Office of Disciplinary Counsel in the March 23, 2003 letter in the record herein relative to charging attorney fees, and it was also "front and center" in this Court's decision in Committee on Legal Ethics v. Burdette, 191 W.Va. 346, 445 S.E.2d 773 (1994).

However, because this second issue was never presented to the Circuit Court for decision and because we do not know any of the facts with respect to the asserted “on-set date” litigation, it would be speculative at this time to proceed with a discussion of the Rule 1.5(a) factors as they relate to the issues presented.

Suffice to say, Syllabus Point 1 of Committee on Legal Ethics v. Coleman, 180 W.Va. 493, 377 S.E.2d 485 (1988), and Syllabus Point 2 of Committee on Legal Ethics v. Burdette, 191 W.Va. 346, 445 S.E.2d 733 (1994), are clear: “Under W.Va. Code, § 23-5-5 [1975] [now § 23-5-16 [2003]] an attorney’s fee for assisting a workers’ compensation claimant in obtaining a permanent total disability award, consisting of accrued and future benefits, is not to exceed twenty percent of the accrued and future benefits as one award subject to the 208-week limitation.” And, as this Court held in Syllabus Point 6, in part, in Hinerman v. Levin: “This limitation applies to the litigation of one claim up to the rendition of a final order, but does not apply to new claims, such as reopenings that may be related to the first claim but involve the full litigation of a new issue.” 172 W.Va. 777, 310 S.E.2d 843 (1983).

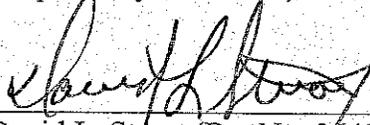
On-set date determinations with respect to permanent and total disability awards are but a part of the litigation of an application for a permanent and total disability award and no matter how one phrases it, the result is a final order/“award” involving accrued benefits and future benefits. The discussion of the issue presented herein reflects the construction placed upon the attorney fee statute [W.Va. Code, § 23-5-16] by the Commissioner and is consistent with the Legislature’s intent in the attorney fee statute at W.Va. Code, § 23-5-16 and its “interest in assuring that its [Legislature’s] aim of compensating injured [workers] is not frustrated by lawyers who siphon off excessive portions of the award as their fees.” Hinerman, 310 S.E.2d at 851.

VI.

CONCLUSION

Wherefore, for the reasons discussed, it is respectfully asserted that the appeal herein was improvidently granted. Otherwise, the ruling of the Circuit Court on the one (1) issue presented is correct and should be affirmed. Moreover, the clear language of the applicable workers' compensation attorney fee statute and the intent of the Legislature gleaned therefrom is to limit attorney fees to those specified by statute and preserve to workers' compensation claimants as much of their indemnity benefits as possible. If counsel for workers' compensation claimants wish to change the workers' compensation attorney fee statute, they should seek redress from the Legislature, not seek to have this Court re-write the statute to their satisfaction.

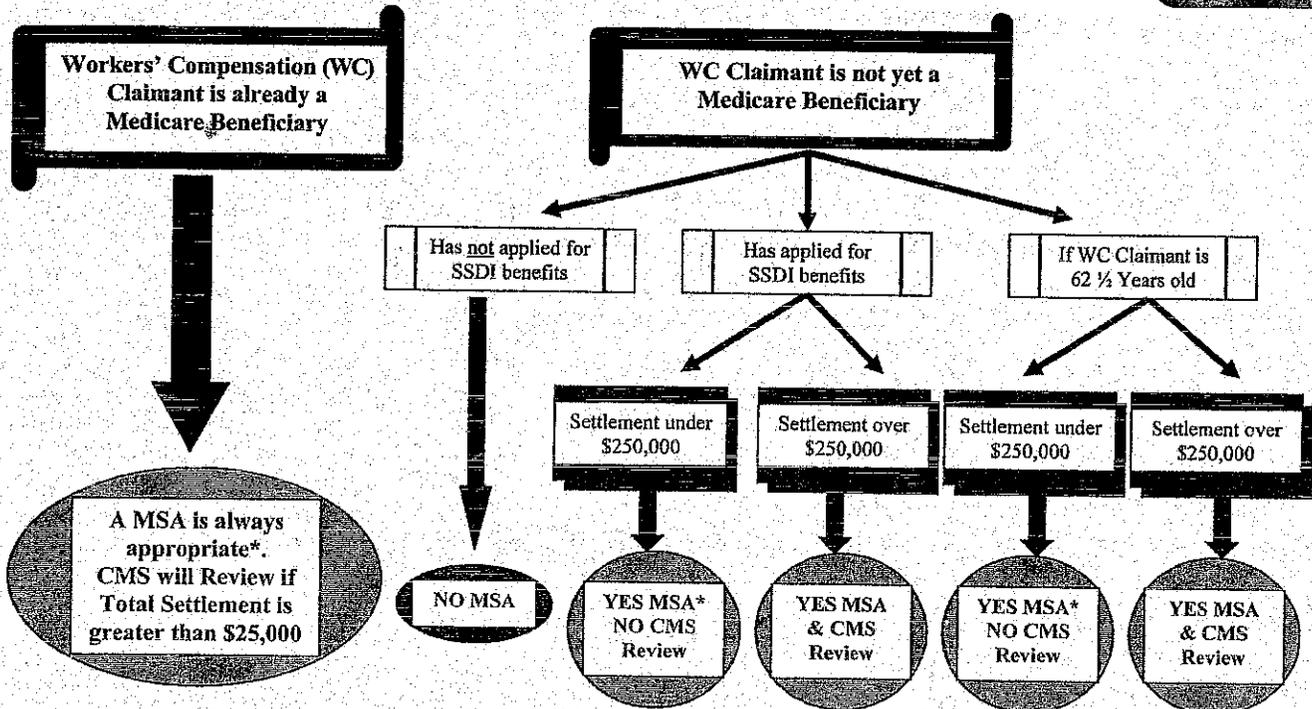
Respectfully submitted,



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Attorney for Jane L. Cline, Commissioner
West Virginia Office of Insurance Commissioner

**Medicare Set-Aside Arrangement (MSA)
When is it Appropriate? When will CMS Review the MSA?**



This chart illustrates the appropriateness of a MSA in the majority of cases; see reverse side for complete list from the Centers for Medicare & Medicaid Services (CMS). Please contact Gregg Chapman F.H.P.S. Lead Counsel/Director of MSA Education at 888.987.2667 with all MSA related questions. *See reverse side.

TO MAKE A REFERRAL CALL: 888-987-2667 OR FAX: 888-685-9375 www.firsthealthps.com

What are the thresholds for CMS Review of a Medicare Set-Aside Arrangement (MSA)?

The Centers for Medicare & Medicaid Services (CMS) has identified the following two criteria when a CMS Reviewed Medicare Set-Aside Arrangement (MSA) is appropriate:

1. If the claimant is already a Medicare beneficiary at the time of settlement, then a CMS Reviewed MSA is appropriate when the total settlement amount¹ is greater than \$25,000.
2. If the claimant is not yet a Medicare beneficiary, then both of the following must be true for a CMS Reviewed MSA to be appropriate:
 - a. The total settlement amount¹ exceeds \$250,000 AND
 - b. The claimant has a "reasonable expectation" of Medicare enrollment within 30 months² of the date of settlement

*** Why should a MSA be included in a settlement that does not meet the Review thresholds?**

In the Memorandum dated July 11, 2005, CMS stated that the criteria noted above "...are only CMS workload review thresholds, not substantive dollar or "safe harbor" thresholds for complying with the Medicare Secondary Payer (MSP) law. Under the MSP provisions, Medicare is always secondary to workers' compensation and other insurance such as no-fault and liability insurance. Accordingly, all beneficiaries and claimants must consider and protect Medicare's interest when settling any workers' compensation case; even if review thresholds are not met, Medicare's interest must always be considered."

Based on this information, it is our recommendation that a MSA be included in those WC settlements where the WC claimant is not yet a Medicare beneficiary but has applied for SSDI benefits or is at least 62 1/2 years old and the total settlement amount is less than \$250,000. Additionally, we recommend including a MSA in settlements where the claimant is already a Medicare beneficiary but the total settlement amount is equal to or less than \$25,000. The MSA in these cases would not be sent to CMS for review since the review threshold is not met. By including a MSA in these settlements, Medicare's interests are being taken into consideration. The importance of complying with the MSP law is to protect against future claims by CMS.

¹Total settlement amount includes, but is not limited to, wages, attorney fees, all future medical expenses and repayment of any Medicare conditional payments, and that payout totals for all annuities to fund the above expenses should be used rather than cost or present values of any annuities. Also note that any previously settled portion of the WC claim must be included in computing the total settlement amount.

² Situations where an individual has a reasonable expectation of Medicare enrollment within 30 months include but are not limited to:

1. The individual has applied for Social Security Disability Insurance (SSDI) benefits.
2. The individual has been denied SSDI but anticipates appealing that decision.
3. The individual is in the process of appealing and/or re-filing for SSDI.
4. The individual is 62 1/2 years old (i.e. may be eligible for Medicare based upon his/her age within 30 months).
5. The individual has an End Stage Renal Disease (ESRD) condition but does not yet qualify for Medicare based upon ESRD.

No. 34140
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

KASSERMAN & BOWMAN, PLLC

APPELLANT,

v.

FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 05-C-1363

JANE L. CLINE, COMMISSIONER
WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,

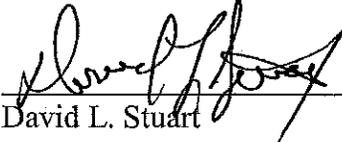
APPELLEE.

CERTIFICATE OF SERVICE

I, David L. Stuart, counsel for the appellee, do hereby certify that true and accurate copies of the foregoing "Response Brief of Appellee in Opposition to Appellant's Appeal" and "Motion of Commissioner for Leave to Accept Response Appeal Brief Out of Time" were served upon the parties of record this 17th day of October, 2008, by U.S. mail, postage prepaid, in envelopes properly addressed as follows:

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