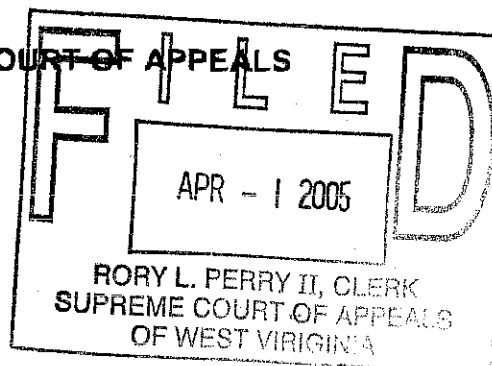


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
IN CHARLESTON



STATE OF WEST VIRGINIA
ex rel. JUDY D. PARKS,

Petitioner,

Supreme Court No. 32519
Claim No. 90-19860

v.

GREGORY A. BURTON,
Executive Director
Workers' Compensation Commission

Respondent,

ANSWER AND MOTION TO DISMISS PETITIONER'S WRIT OF MANDAMUS

The Respondent, Gregory A. Burton, Executive Director, Workers' Compensation Commission (Commission, also referred to as Workers' Compensation Division or Division, and also referred to as the Workers' Compensation Commissioner), on behalf of himself and the Commission, by counsel, respectfully requests that the petition for Writ of Mandamus filed by the *pro se* Petitioner with this Honorable Court on January 26, 2004, be denied and dismissed.

For ANSWER to the Petitioner's petition, the Respondent says:

The claimant's (Judy D. Parks) application for benefits for the injury of October 4, 1989, was ruled compensable by the Commissioner's order of November 9, 1989. By ruling dated March 9, 1998, the Division denied the March 6, 1998 request from

Bluestone Health Association or Center to have the claimant supplied with the drugs Pamelor, Vistaril, and Darvocet.

By order dated December 9, 1998, the Workers' Compensation Office of Judges (Office of Judges) affirmed the Division's ruling of March 9, 1998, denying Pamelor, Vistaril, and Darvocet. The Workers' Compensation Appeal Board (Appeal Board), by order dated June 30, 1999, affirmed the December 9, 1998 order from the Office of Judges denying the medications to the claimant.

The West Virginia Supreme Court, by order dated November 27, 2000, reversed the June 30, 1999 decision of the Appeal Board and remanded this claim to the Workers' Compensation Commissioner with directions to enter an order authorizing medical benefits. It is important to note that the only issue in litigation before the Supreme Court was the claimant's entitlement to the three drugs (Pamelor, Vistaril, and Darvocet) requested by the Bluestone Health Association, and that no other type of medical or monetary benefits were at issue when the Court entered its order of November 27, 2000.

By protestable orders dated December 29, 2000, the Division, in response to the Supreme Court order of November 27, 2000, approved the request from the Bluestone Health Association for the drugs Pamelor, Vistaril, and Darvocet. The authorization period for these drugs was from March 6, 1998 through June 6, 1998. The Division also issued an acknowledgement order on April 3, 2001, indicating that, once again, the medications of Pamelor, Vistaril, and Darvocet were authorized.

By ruling dated November 20, 2001, the Division denied the claimant's request to reopen her claim for permanent total disability benefits. By order dated June 24, 2002, the Office of Judges noted that the claimant was last paid temporary total disability

benefits in 1991, and that the claimant was granted a 12% orthopedic permanent partial disability award by order dated September 6, 1991, and an additional 8% psychiatric permanent partial disability award by order dated January 5, 1993. As a result, the June 24, 2002 order from the Office of Judges affirmed the ruling of November 20, 2001, noting that the claimant's request to reopen her claim for permanent total disability benefits was barred pursuant to the provisions of W. Va. Code § 23-4-16. No appeal was filed to the order of June 24, 2002, and it is a final order.

By letter dated January 22, 2004 (filed on January 26, 2004), the Petitioner, Judy D. Parks, *pro se*, requested that the Supreme Court of Appeals of West Virginia compel the Commission to start paying medical bills as ordered by the Court in its order of November 27, 2000. By order dated October 22, 2004, the Court, on its own motion, having considered the petition for writ of mandamus in this matter, determined that a response to the petition for writ of mandamus was necessary. As such, the Supreme Court ordered the Respondent to file a response to the petition for writ of mandamus.

On January 5, 2005, the Respondent, filed an Answer and Motion to Dismiss the Petitioner's Writ of Mandamus. On January 6, 2005, Melissa M. Robinson, Esquire, of Jackson & Kelly, PLLC, filed a response in opposition to the Petitioner's Writ of Mandamus on behalf of the employer, Hills Stores Company.

On January 20, 2005, Jason R. Parks, *pro se*, presented to the West Virginia Supreme Court his motion to be substituted as the party petitioner in this matter, pursuant to Rule 27(a) of the Rules of Appellate Procedure. The Court, by order dated January 20, 2005, granted the motion and substituted Jason Parks as the Petitioner in this case.

The West Virginia Supreme Court, on January 20, 2005, after having considered both the January 5, 2005 Answer and Motion to Dismiss filed by the Respondent, and the January 20, 2005 response from the Petitioner, ordered that the motion to dismiss be refused as moot. In another order entered by the Supreme Court on January 20, 2005, the Court, after having considered the January 26, 2004 Petition for Writ of Mandamus, the January 5, 2005 response from the Respondent, and the January 6, 2005 response from counsel for the employer (it is noted in the Court's order that Hills Stores Company is also a respondent, but there has never been a formal order from the Court naming the employer as a respondent), commanded and directed that Respondent, Gregory A. Burton, Executive Director, Workers' Compensation Commission, show cause, if he could, by April 26, 2005, as to why a writ of mandamus should not be awarded against the Respondent, as prayed for by the Petitioner, unless sooner mooted by the payment of the relevant medical bills in full.

MOTION TO DISMISS

1. The Petitioner has failed to state a claim upon which relief can be granted.
2. The Respondent is not the proper chargeable party in this matter.
3. A writ of mandamus should not be used as a legal proceeding to grant benefits when there are other statutory remedies available to the Petitioner that need to be utilized and followed in order to determine whether such benefits should be granted.
4. In order for a writ of mandamus to issue, three elements must coexist: (a) a clear legal right in the petitioner to the relief sought; (b) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (c) the absence of another remedy. *State ex. rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E. 2d

367 (1989). None of these three elements exist in this matter. Therefore, the Petitioner's Writ of Mandamus must be denied.

ARGUMENT

1. The only issue in litigation before the Supreme Court when it entered its ruling of November 27, 2000, was the claimant's entitlement to the three drugs (Pamelor, Vistaril, and Darvocet) requested by the Bluestone Health Association. As previously noted, the order of November 27, 2000, remanded this matter to the Workers' Compensation Commissioner with directions to enter an order authorizing medical benefits. Clearly, the Respondent acted in accordance with the Supreme Court's order with entry of the orders of December 29, 2000, authorizing the three medications. Although the Petitioner does have a clear legal right to have those medications authorized (for the requested periods) and paid for, the Petitioner does not have a clear legal right, and she has not shown a clear legal right, to have the Respondent pay for those medications.

The reason that the Petitioner does not have a clear legal right to have the Respondent pay for these medications is that the Petitioner's employer, Hills Stores Company, elected to self-insure its workers' compensation risk, and also elected to make direct payment of health care provider and medical invoices. As the employer in this claim elected to make direct payment of health care provider and medical invoices, it is the party, and not the Respondent, that has the legal obligation to pay for the appropriate medications as directed by the Division's orders of December 29, 2000. As the Petitioner does not have a clear legal right to have the Respondent pay for the medications in question, the petition for writ of mandamus must be denied.

2. The Respondent does not have a legal duty to do the thing, or to grant the relief, that the Petitioner seeks to compel in this writ of mandamus. As noted above, the employer in this claim is self-insured and has elected to make direct payment of health care provider and medical invoices. In addition, W. Va. Code § 23-2-9(b)(1), directs that effective July 1, 2004, all self-insured employers shall administer their own claims. Pursuant to C.S.R. § 85-18-15.1, all self-insured employers shall administer their own claims, and any employee of a self-insured employer is entitled to all of the same benefits, including the proper and timely payment of medical bills, as those afforded to injured workers whose claims are administered by the Commission.

As such, even though the employer had, before July 1, 2004, elected to make direct payment of health care providers and medical invoices, it now not only has the continued responsibility to make such payments in this and other claims if appropriate, but it now has the authority and additional responsibility to make decisions in this claim (as well as other claims) regarding the amount and type of monetary and medical benefits that the petitioner could receive in this matter. Thus, in order to do the thing that the Petitioner seeks to compel (which, as will later be discussed in more detail, appears to be a grant of new monetary benefits and the payment of additional medical expenses), the Respondent would have to violate provisions of both Chapter 23 of the West Virginia Code as well as the provisions of the Code of State Regulations. Clearly, the Respondent does not any legal duty to commit such violations. Accordingly, the Petitioner's Writ of Mandamus must be denied.

3. Although the self-insured employer does have the ability to administer its own claims, it is not absolute authority. W.Va. Code § 23-2-9(b)(1) specifically directs that the Executive Director (of the Commission), pursuant to rules promulgated by the Board

of Managers, shall regulate the administration of claims by employers granted permission to self-insure their obligations under Chapter 23 of the West Virginia Code. In fact, pursuant to C.S.R. § 85-18-18.1, the employer's ability to maintain its status as a self-insured employer depends, in part, on how it satisfies the requirements of any order of the Commission.

Keeping this information in mind, it is interesting to note that after reviewing the Commission's records, it is apparent the Petitioner did not submit one bill to the Commission from January 1, 1998 until December 31, 2004, for the three medications authorized by the Division's orders of December 29, 2000 (for the period from March 6, 1998 through June 6, 1998), pursuant to the Supreme Court's order of November 27, 2000. In discussions with Acordia, the third party administrator for the employer, it appears the last invoice received for the three medications in question was on March 11, 1998.

Although the Respondent does not have the legal obligation to pay for the three medications, and although the Respondent does not have the authority to administer this claim and make decisions regarding awards of new monetary and medical benefits, it does have the authority to order the employer in this matter to pay for the medications that it directed to have authorized by the Division's orders of December 29, 2000, provided that the medical bills are timely and actually filed. Accordingly, as noted in the Commission's protestable order of April 1, 2005, the Respondent has directed that the medical bills (for the authorized periods) for the three medications in question be paid by the employer. (See Attached Respondent's Exhibit). Such action should result in all relevant medical bills, that have been submitted and timely filed, being paid in full,

which, as indicated by the Supreme Court's order of January 20, 2005, would render the Petitioner's Writ of Mandamus moot.

4. In the Petitioner's Writ of Mandamus, the Petitioner requested that the Supreme Court compel the Commission to start paying medical bills as ordered by the Court in its order of November 27, 2000. As the above information indicates, the proper party to pay these bills is the employer, not the Respondent. Although the Respondent does not have the authority to enter new awards of monetary and medical benefits, it does have authority to require the employer to make these payments (given the fact that the medical benefits were authorized by the Division's orders of December 29, 2000), and by doing so could render this mandamus moot. On the other hand, in the January 20, 2005 opposition response filed by the Petitioner, Jason R. Parks, it is apparent that the family is seeking additional benefits (in terms of funeral expenses, the payment of additional medical expenses, the possible payment of additional monetary benefits) to be paid in this claim as a result of the petition for writ of mandamus. Needless to say, if that is what the Petitioner is seeking, the payment of three medications for a specific period of time will not produce the desired result for the family.

Fortunately, if the Petitioner is seeking additional benefits, there is another adequate remedy available to the Petitioner to seek such benefits. Pursuant to W. Va. Code § 23-4-10, if a compensable injury or if an occupational disease causes death of an employee, an application for dependents' benefits can be filed. The West Virginia Supreme Court has held in *Bradford v. Workers' Compensation Commissioner*, 185 W. Va. 434, 408 S.E.2d 13 (W. Va. 1991), that the appropriate test to determine whether such benefits will be granted is whether the injury or disease contributed in any material degree to the employee's death. As a result, if the Petitioner's family is seeking

additional benefits in this claim, they have an adequate remedy available to them in the form of filing an application for dependents' benefits. If the family is successful in showing that there is the "material contribution" as required by *Bradford*, then an award of benefits could be granted to the family. If not successful, the family would then have a protestable ruling denying the application for dependents' benefits, which would not only allow the family to challenge the decision (thus, providing another remedy), but also provide the opportunity to develop evidence which could be used to overturn the unfavorable decision. Given the existence of this remedy, the Petitioner's Writ of Mandamus must be denied.

5. A writ of mandamus is a proper remedy to compel the Commission to act when it refuses to do so, in violation of its duty, but it is never employed to prescribe in what manner it shall act, or to correct orders that it has made. *Anderson v. Richardson*, 191 W. Va. 488, 446 S.E.2d 710 (W. Va. 1994). Accordingly, a writ of mandamus should not be used as a legal proceeding to grant benefits when there are other statutory remedies available to the Petitioner that need to be utilized and followed in order to determine whether such benefits should be granted.

Although filing an application for dependents' benefits is clearly available to the Petitioner, it is a remedy that requires: (a) the filing of the appropriate forms within the statutory time frames (as Mrs. Parks unfortunately died on December 21, 2004, the family, pursuant to the most restrictive standard of W. Va. Code § 23-4-15(a), would have six months from and after the death (or until June 21, 2005) to file the application of dependents' benefits); (b) the necessary medical evidence and review to establish the *Bradford* test; and (c) the subsequent entry of the proper rulings and orders in this claim. Using the writ of mandamus as a legal mechanism to circumvent established

statutory and regulatory procedures (which every other family in the State of West Virginia must follow in the event of the tragic death of a family member because of a compensable workers' compensation injury or occupational disease) is clearly not the purpose of a writ of mandamus. Given these factors, the Petitioner's Writ of Mandamus must be denied.


CONCLUSION

Accordingly, the Respondent, by Counsel, respectfully submits that the Petitioner is not entitled to the requested relief, and therefore, respectfully requests that the Petitioner's Writ of Mandamus be denied and dismissed from the docket of the Honorable Court.

Respectfully submitted,

Gregory A. Burton, Executive Director
Workers' Compensation Commission

By counsel,


Richard M. Crynock, Senior Counsel
Workers' Compensation Commission
Legal Services Division
4700 MacCorkle Avenue, S.E.
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STATE OF WEST VIRGINIA
WORKERS' COMPENSATION COMMISSION

Ms. Judy D. Parks
Post Office Box 1882
Princeton, West Virginia 24740-1882

Hills Stores Company
c/o Acordia Employers Service Corporation
Post Office Box 3389
Charleston, West Virginia 25333-3389

RE: Judy D. Parks, Claimant
Claim No. 90-19860
S. S. No. 233-88-3976
D. O. I. 10-04-1989

PROTESTABLE DECISION

This claim came on again this day to be considered upon the entire record. By ruling dated March 9, 1998, the Workers' Compensation Division (Division, also referred to as Workers' Compensation Commission or Commission, and the Workers' Compensation Commissioner), denied the March 6, 1998 request from Bluestone Health Association to have the claimant supplied with the drugs Pamelor, Vistaril, and Darvocet.

By order dated December 9, 1998, the Workers' Compensation Office of Judges (Office of Judges), affirmed the Division's ruling of March 9, 1998 denying Pamelor, Vistaril, and Darvocet. The Workers' Compensation Appeal Board (Appeal Board), by order dated June 30, 1999, affirmed the December 9, 1998 order from the Office of Judges denying the medications to the claimant.

The West Virginia Supreme Court, by order dated November 27, 2000, reversed the June 30, 1999 decision of the Appeal Board. The Court also directed that the matter be remanded to the Workers' Compensation Commissioner with directions to enter an order authorizing the medical benefits.

Judy D. Parks, Claimant
Claim No. 90-19860
Page 2

By protestable orders dated December 29, 2000, the Division, in response to the Supreme Court order of November 27, 2000, approved the request from the Bluestone Health Association for the drugs Pamelor, Vistaril, and Darvocet. The authorization period for these drugs was from March 6, 1998 through June 6, 1998. The Division also issued an acknowledgement order on April 3, 2001, indicating that, once again, the medications of Pamelor, Vistaril, and Darvocet were authorized.

By letter dated January 22, 2004 (filed on January 26, 2004), the claimant requested that the Supreme Court of Appeals of West Virginia compel the Commission to start paying medical bills as ordered by the Court in its order of November 27, 2000. By order dated January 20, 2005, the Supreme Court commanded and directed the Commission to show cause, if it could, by April 26, 2005, as to why a Writ of Mandamus should not be awarded against the Commission unless sooner mooted by payment of the relevant medical bills in full.

Following review and investigation, it appears that no medical bills were submitted to the Commission from January 1, 1998 until December 31, 2004, for the three medications authorized by the Division's orders of December 29, 2000, pursuant to the Supreme Court's order of November 27, 2000. In discussions with Acordia, the third party administrator for the employer, it appears that the last invoice received for the three medications in question was on March 11, 1998. This would make sense in that the request from Bluestone Health Association was made on March 6, 1998. Acordia did not pay the invoice given the fact that the Division, by ruling dated March 9, 1998, did not authorize the three medications.

Based on the Supreme Court's orders of November 27, 2000 and January 20, 2005, and also based on the Division's orders of December 29, 2000, it is apparent that the employer should pay for the three medications that have been authorized by Division and Supreme Court decisions, provided that the medical bills are timely and actually filed. As the March 11, 1998 invoice was filed within five days of the March 6, 1998 request, it is apparent that the invoice was filed well within the two year limit (after rendering the service) that was provided by W. Va. Code § 23-4-3(a)(2). The Commission is well aware that W. Va. Code § 23-4-3(a)(2) was amended in 2003 to provide that the invoice has to be filed now within six months after rendering the service. As the March 11, 1998 invoice was received within five days of the March 6, 1998 request for treatment, it is readily apparent that the invoice was timely filed even under the 2003 version of W. Va. Code § 23-4-3(a)(2).

Finally, although W. Va. Code § 23-2-9(b)(1), directs that effective July 1, 2004, all self-insured employers shall administer their own claims, the same legislative section also provides that the Executive Director of the Commission, pursuant to rules promulgated by the Board of Managers, shall regulate the administration of claims by employers granted permission to self-insure their obligations under Chapter 23 of the West Virginia Code. In fact, pursuant to C.S.R. § 85-18-18.1, the employer's ability to maintain its status as a self-insured employer depends, in part, on how it satisfies the

Judy D. Parks, Claimant
Claim No. 90-19860
Page 3

requirements of any order of the Commission. As the Division's orders were entered on December 29, 2000, this is not a matter of the Commission attempting to administer the claim; rather it is just an effort to provide regulation to make sure that orders previously entered by the Division (years before July 1, 2004), are enforced.

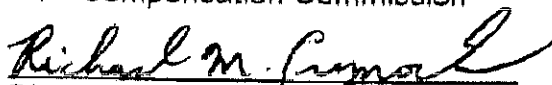
Accordingly, it is **ORDERED** that the employer (or Acordia, acting as the third party administrator) implement the Division's orders of December 29, 2000, and only pay for the medications Pamelor, Vistaril, and Darvocet, for the authorized period from March 6, 1998 through June 6, 1998. As only one invoice had been timely submitted to either the Commission or the employer, it is further **ORDERED** that the invoice submitted on March 11, 1998, is the only bill that has been timely filed and that should be paid. Finally, it is **ORDERED** that this decision has no bearing or impact on any other action of the employer relating to this claim other than implementing the Division's orders of December 29, 2000, which authorized Pamelor, Vistaril, and Darvocet, for the period from March 6, 1998 through June 6, 1998.

Any party to this claim may protest this decision within 30 days from the date you receive this letter. You must send a written protest, along with a copy of this order, to the Office of Judges, P.O. Box 2233, Charleston, WV 25328-2233. Copies must also be sent to all other parties to the claim.

Pursuant to W. Va. Code § 23-5-7, with the exception of medical benefits for non-orthopedic occupational disease claims, the claimant, the employer and the Workers' Compensation Commission may negotiate a final settlement of any and all issues in a claim wherever the claim is in the administrative or appellate processes. To inquire about settling this claim, contact Workers' Compensation Internal Management Services, Settlement Unit, at P. O. Box 3587, Charleston, WV 25336-3587.

ENTERED: April 1, 2005

Workers' Compensation Commission

By: 
Richard M. Crynock, Senior Counsel
Legal Services Division

RMC/lfs

cc: Melissa M. Robinson, Esquire
Supervisor, WCC Defense Division
Jason R. Parks
File

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
IN CHARLESTON

STATE OF WEST VIRGINIA
ex rel. JUDY D. PARKS,

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v.

Supreme Court No. 32519
Claim No. 90-19860

GREGORY A. BURTON,
Executive Director
Workers' Compensation Commission,

Respondent,

CERTIFICATE OF SERVICE


I, Richard M. Crynock, counsel to the Workers' Compensation Commission, do hereby certify that a copy of the foregoing **ANSWER AND MOTION TO DISMISS PETITIONER'S WRIT OF MANDAMUS** was served by REGULAR U.S. MAIL upon the parties of record this 1st day of April 2005:

Melissa M. Robinson, Esquire
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