



WEST VIRGINIA INFORMATIONAL LETTER

NO. 177

TO: All Insurance Companies Licensed to Write Workers' Compensation Insurance in the State of West Virginia, Third-Party Administrators that Administer Workers' Compensation Plans, and Employers that Self-insure their Workers' Compensation Risks

RE: Processing of Occupational Pneumoconiosis Claims

The purpose of this Informational Letter is to set forth the Offices of the Insurance Commissioner's ("OIC's") interpretation of the law and enforcement position relating to the proper processing of a claim when a claimant files an application for occupational pneumoconiosis ("OP") benefits, and after review of the medical evidence, the OP Board determines that the claimant suffers from total pulmonary function impairment attributable to OP. For the reasons set forth below, it is the OIC's position that the claimant in this situation should be awarded a 65% permanent partial disability ("PPD") award. The claimant should not be granted a permanent total disability ("PTD") award based upon the OP Board's determination. There are a number of reasons for the OIC's position.

First, there is no legal authority for a claims administrator to convert a claimant's application for OP benefits into an application for PTD benefits, nor is there legal authority to convert an application for PTD benefits into an application for OP benefits. Although not directly on point, the Supreme Court of Appeals of West Virginia, in *Newman v. Richardson*, 186 W. Va. 66, 410 S.E.2d 705 (1991), noted years ago that when a claim for OP benefits is filed, the Workers' Compensation Commissioner had to process the claim under the OP processing system, and if a claim for an occupational disease is filed, the Commissioner had to process the claim as an occupational disease claim (not as an OP claim). Under the guidance of this decision, it is reasonable to conclude that a claim for OP benefits may not be automatically converted by the claims adjuster into a claim for PTD benefits.

Second, the statutory processing systems for OP claims and PTD claims are entirely different. W. Va. Code § 23-4-24(b) notes that any claim or request for PTD benefits arising under W. Va. Code §§ 23-4-6(d) or 23-4-6(n) must be presented as part of an initial claim filing or by way of a reopening. Once the claimant files an application for PTD benefits, he or she must meet the initial threshold requirements under W. Va. Code § 23-4-6(n)(1), such as having 50% in prior PPD awards. If the claimant meets those requirements, the claim will be referred to the PTD reviewing body, as directed under W. Va. Code § 23-4-6(n)(1), to determine if the claimant has suffered a whole body medical impairment of 50% (or, pursuant to W. Va. Code § 23-4-6(f), a 35% statutory disability). If the claimant meets that requirement, the PTD reviewing body, pursuant to W. Va. Code § 23-4-6(n)(1), will again review the claim to determine if the claimant is permanently and totally disabled under the vocational rehabilitation standards under W. Va. Code § 23-4-6(n)(2).



On the other hand, if a claimant files an application for OP benefits, the application or claim for benefits must be processed under the statutory processing system for OP claims. As noted by the West Virginia Supreme Court in the *Newman* case, once the claims administrator verifies the exposure requirements and determines other essential nonmedical questions, the claim must be referred to the OP Board to determine the claimant's impairment due to OP. As can be seen by comparing the processing systems, the PTD reviewing body is the entity charged with determining whether a claimant is permanently and totally disabled, whereas the OP Board is the entity charged with determining the amount of impairment a claimant suffers as a result of OP.

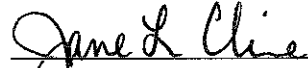
Third, W. Va. Code § 23-4-6(n)(1) notes that there are certain claims that do not have to meet the PTD eligibility requirements discussed above. Those are claims that fall under W. Va. Code § 23-4-6(m). These claims, in which a claimant loses the use of his eyes, hands, feet or one hand and one foot, are conclusively presumed to be total in character. It is noted that a claim for OP benefits in which the OP Board finds that the claimant has total pulmonary function impairment due to OP is not listed in W. Va. Code § 23-4-6(m). As such, even if the OP Board makes such a finding, the claimant must still file an application for PTD benefits, and his claim must be processed under the PTD processing system.

Fourth, pursuant to W. Va. Code § 23-4-6(i), the degree of permanent disability, other than PTD, that a claimant suffers, is determined exclusively by the degree of whole body medical impairment that a claimant has suffered. The OP Board must also premise its decisions on the degree of pulmonary function impairment that claimants suffer solely upon whole body medical impairment. Thus, the degree of medical impairment is the degree of PPD that is awarded to a claimant. A review of Table 85-20A, Impairment of Pulmonary Function, in 85CSR20, indicates that a claimant can suffer impairment ranging from 0% to TOTAL. It is the OIC's position that based on the appropriate medical literature and expertise, a TOTAL impairment represents a whole body medical impairment of 65%. Consequently, if the OP Board determines that a claimant suffers from total pulmonary function impairment attributable to OP, it is the OIC's position that the claimant has a whole body medical impairment of 65% and should be awarded a 65% PPD award. This result does not conflict with W. Va. Code § 23-4-6(h), which directs that a finding of the OP Board has the force and effect of an award. The award, in the case where the OP Board finds total pulmonary functional impairment due to OP, is an award of 65% PPD.

Finally, W. Va. Code § 23-4-6a directs that if an employee is found to be permanently disabled due to OP, the percentage of permanent disability is determined by the degree of medical impairment that is found by the OP Board. The claims administrator must enter an order setting forth the findings of the OP Board with regard to whether the claimant has OP, and the degree of medical impairment, if any, resulting from the OP. This statute conforms to W. Va. Code § 23-4-6(i), in that the degree of pulmonary function impairment is based upon whole body medical impairment, and once the degree of medical impairment is determined, that is the award of PPD that will be granted to the claimant.

Based on all of the above, it is the OIC's position that if a claimant files a claim for OP benefits, and if the OP Board determines that the claimant suffers from total pulmonary function impairment attributable to OP, the claimant should be awarded a 65% PPD award. If the claimant has already received a prior award for OP benefits, the amount of that award can be subtracted from the 65% amount. Thus, if a claimant has already received a 10% award for OP and, in a new claim for OP, the OP Board determines that the claimant has total pulmonary function impairment, the claimant will receive a 55% PPD award for the new claim.

Any questions regarding this Informational Letter should be addressed to the Legal Division of the West Virginia Offices of the Insurance Commissioner at (304) 558-0401 or legal@wvinsurance.gov.



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