

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

SALVADOR AVILA-HERNANDEZ, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 TIMBER PRODUCTS, )  
 )  
 Appellee. )  
\_\_\_\_\_)

CECIL PALOMINO, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 CHRISTIANA CARE HEALTH SERVICES, )  
 )  
 Appellee. )  
\_\_\_\_\_)

C.A. No. N10A-06-002 DCS  
(Consolidated)

JULIO MUNOZ, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 BERGER BROTHERS, )  
 )  
 Appellee. )

Submitted: October 6, 2011  
Decided: January 6, 2012

*Appeal of Decisions of the Industrial Accident Board  
Hearing Nos. 1333032, 1285570, and 1308606  
Decisions **REVERSED and REMANDED***

**MEMORANDUM OPINION**

*Appearances:*

Gary S. Nitsche, Esquire, Wilmington, Delaware, Attorney for Appellants

Andrew J. Carmine, Esquire, Wilmington, Delaware, Attorney for Appellee Timber Products

Amy M. Taylor, Esquire, Wilmington, Delaware, Attorney for Appellee Christiana Care Health Services

Luciana M. Gorum, Esquire, Wilmington, Delaware, Attorney for Appellee Berger Brothers

**STREETT, J.**

## Introduction

Appellants Salvador Avila-Hernandez, Cecil Palomino, and Julio Munoz, (“Claimants”), have consolidated their cases and petitioned this Court for review of three orders of the Industrial Accident Board, (the “Board”), dismissing as untimely Claimants’ petitions appealing Utilization Review determinations.<sup>1</sup> These Utilization Review determinations found that various medical services received by Claimants for compensable work-related injuries were not in compliance with Health Care Practice Guidelines. Claimants (through their attorney) filed their petitions contesting these Utilization Review determinations after the 45-day time limit imposed by Workers’ Compensation Regulation 5.5.1 which was adopted by the Department of Labor on June 1, 2009.<sup>2</sup> As a result, Timber Products, Christiana Care Health Services, and Berger Brothers, (collectively, the “Employers”), moved to dismiss the petitions for being untimely. Claimants appeal to this Court on the grounds that the provision contained in Regulation 5.5.1 limiting the time for filing a petition to 45 days after receipt of the Utilization Review determination is invalid.

The Court finds that the Board’s decisions to dismiss Claimants’ petitions as untimely are legally incorrect. Therefore, for the reasons discussed herein, the Court reverses the decisions of the Board.

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<sup>1</sup> *Salvador Avila-Hernandez v. Timber Products*, Hrg. No. 1333032 (Del. Ind. Acc. Bd. May 6, 2010); *Palomino v. Christiana Care Health Svcs.*, Hrg. No. 1285570 (Del. Ind. Acc. Bd. June 16, 2010); *Munoz v. Berger Brothers*, Hrg. No. 1308606 (Del. Ind. Acc. Bd. August 12, 2010).

<sup>2</sup> See 19 Del. Admin. C. § 1341-5.5.1; Claimant Avila’s Hearing Transcript, 10 (May 6, 2010) (hereinafter “Avila Hrg. Tr.”).

## **Factual and Procedural Background**

After being injured in compensable work-related accidents, Claimants filed Petitions to Determine Additional Compensation Due with the Board contesting Utilization Review determinations that certain medical services they had received were not in compliance with Health Care Practice Guidelines. As such, the bills for these medical services would not be paid by the Employers.

On January 21, 2009, Claimant Avila-Hernandez was injured in a compensable work-related accident resulting in a low back injury. As of October 2009, forty sessions of physical therapy and two injections were administered to him for the injury.<sup>3</sup> On November 24, 2009, a Utilization Review determination was issued by the Department of Labor, (the “DOL”), approving two injections and twelve sessions of physical therapy.<sup>4</sup> The Utilization Review determination rejected the other twenty-eight sessions of physical therapy finding that they were not in compliance with Health Care Practice Guidelines.<sup>5</sup> Based on the Utilization Review determination, the employer’s insurance carrier paid for twelve therapy sessions and two injections but denied payment for twenty-eight therapy sessions.<sup>6</sup> The Utilization Review determination was not issued by the DOL to Claimant Avila-Hernandez’s counsel. However, Claimant Avila-Hernandez’s counsel did receive a copy of the determination from the medical provider on December 29, 2009.<sup>7</sup> Claimant

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<sup>3</sup> Avila Hrg. Tr. at 6.

<sup>4</sup> Avila Hrg. Tr. at 6.

<sup>5</sup> Avila Hrg. Tr. at 6.

<sup>6</sup> Avila Hrg. Tr. at 6.

<sup>7</sup> Avila Hrg. Tr. at 9.

Avila-Hernandez contested the determination in a petition filed with the Board on February 22, 2010, more than 45 days after receipt of the Utilization Review determination by Claimant Avila-Hernandez's counsel.<sup>8</sup> The employer moved to dismiss on the grounds that the appeal was not timely. The employer's motion was granted by the Board on May 6, 2010.<sup>9</sup>

On April 27, 2006, Claimant Palomino was injured in a compensable work-related accident. Two UR determinations were issued by the DOL on September 30, 2009, and received by Claimant Palomino on October 14, 2009.<sup>10</sup> The Utilization Review determinations were not issued to Claimant Palomino's counsel.<sup>11</sup> Claimant Palomino, through his attorney, contested the determination in his petition to the Board dated February 26, 2010, more than 45 days after their receipt.<sup>12</sup> The employer moved to dismiss on the grounds that the petition was not timely, and the motion was granted by the Board on June 16, 2010.<sup>13</sup>

On August 29, 2007, Claimant Munoz was injured in a compensable work-related accident. The Utilization Review determination that his medical services were not in compliance with Health Care Practice Guidelines was issued by the DOL on March 17,

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<sup>8</sup> Avila Hrg. Tr. at 6.

<sup>9</sup> Avila Hrg. Tr. at 15.

<sup>10</sup> Claimant Palomino's Hearing Transcript, 5 (June 10, 2010) (hereinafter "Palomino Hrg. Tr.").

<sup>11</sup> Palomino Hrg. Tr. at 6.

<sup>12</sup> Palomino Hrg. Tr. at 5.

<sup>13</sup> Palomino Hrg. Tr. at 11.

2010.<sup>14</sup> The determination was not issued to Claimant Munoz's counsel, and Claimant Munoz did not provide a copy to his lawyer until June 9, 2010.<sup>15</sup> A petition contesting the determination was filed by Claimant Munoz's attorney immediately thereafter on June 10, 2010, presumably more than 45 days after Claimant Munoz's receipt of the determination.<sup>16</sup> The employer moved to dismiss on the grounds that the petition was untimely, and the motion was granted "very reluctantly" by the Board on August 12, 2010.<sup>17</sup>

Claimants have timely appealed the Board's decisions to dismiss the claims. The matters have been consolidated, and briefing is complete.

### **Contentions of the Parties**

Claimants contend that the Board's decisions to dismiss their petitions for being untimely are legally incorrect because those decisions are based on Regulation 5.5.1 which is invalid. Claimants assert that the adoption of Regulation 5.5.1 by the DOL exceeds the DOL's authority because Regulation 5.5.1 shortens the statute of limitations contained in the authorizing statute. The regulation provides a 45-day limitation whereas the statute of limitations in the Workers' Compensation Act is five years. Claimants also contend that DOL notice of Utilization Review determinations should have been issued, not only to Claimants, but to Claimants' attorney.

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<sup>14</sup> Claimant Munoz's Hearing Transcript, 6 (Aug. 12, 2010) (hereinafter "Munoz Hrg. Tr.").

<sup>15</sup> Munoz Hrg. Tr. at 6.

<sup>16</sup> Munoz Hrg. Tr. at 5.

<sup>17</sup> Munoz Hrg. Tr. at 9-10.

The Employers argue that the time limitation of 45 days required by Regulation 5.5.1 (1) is reasonable and in Claimants' best interests, (2) is longer than comparable 30-day time limitations for appeals, (3) is allowable because it is in accord with the stated purpose of the authorizing statute, and (4) is necessary to accomplish that purpose.

The Board did not formally contribute its position on the issue. However, the Board indicated at the hearing for Claimant Munoz that it was "in a dilemma" over the regulation and granted the order to dismiss albeit "reluctantly."<sup>18</sup>

### **Standard of Review**

The Court reviews the Board's decision to determine if substantial evidence exists in the record to support the Board's findings of fact and to determine if the Board erred in its application of the law.<sup>19</sup> The Court "consider[s] the record in the light most favorable to the prevailing party below."<sup>20</sup> The Court, however, reviews *de novo* questions of law such as the construction of the worker's compensation statute and whether the statute of limitations bars a claim.<sup>21</sup> Not only is the issue of construction of statutory law subject to plenary review by the Court but so is the application of that law to undisputed facts.<sup>22</sup> Thus, the Court may consider, but does not defer to, an agency's interpretation of a

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<sup>18</sup> Munoz Hrg. Tr. at 9.

<sup>19</sup> *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Shively v. Allied Systems, Ltd.*, 2010 WL 537734, \*9 (Del. Super. Feb. 9, 2010).

<sup>20</sup> *Shively*, 2010 WL 537734 at \*9.

<sup>21</sup> *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007); *Anchor Motor Freight*, 716 A.2d at 156; *Shively*, 2010 WL 537734 at \*9.

<sup>22</sup> *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381 (Del. 1999) (quoting *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992)).

statute it administers even if the agency's interpretation is rational or not clearly erroneous.<sup>23</sup>

### **Discussion**

Where a statute is unambiguous, the Court applies the plain meaning of the language and does not engage in statutory construction.<sup>24</sup> Where ambiguity exists, however, the statute is construed so as to “promote its apparent purpose and harmonize it with other statutes within the statutory scheme.”<sup>25</sup> An ambiguity exists where 1) the language is reasonably susceptible to different meanings or 2) the plain meaning of the language would lead to an absurd result not intended by the legislature.<sup>26</sup> Furthermore, the Court evaluates the legislative scheme *en bloc* and not solely by its individual parts.<sup>27</sup> The goal of such statutory construction is to effectuate legislative intent.<sup>28</sup>

More particularly, when interpreting the Worker's Compensation Act, the Court engages in a liberal construction so as to accomplish the statute's purpose to compensate injured employees resolving “any reasonable doubts in favor of the worker.”<sup>29</sup> In addition, the Workers' Compensation Act specifically states that “[n]o agreement, rule,

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<sup>23</sup> *DiPasquale*, 735 A.2d at 382-83.

<sup>24</sup> *LeVan*, 940 A.2d at 933; *Lawhorn v. New Castle County*, 2006 WL 1174009 (Del. Super. May 1, 2006) *aff'd*, 913 A.2d 570 (Del. 2006).

<sup>25</sup> *LeVan*, 940 A.2d at 933.

<sup>26</sup> *LeVan*, 940 A.2d at 933.

<sup>27</sup> *J.N.K., LLC v. Kent County Levy Court*, 974 A.2d 197, 204 (Del. Ch. 2009).

<sup>28</sup> *LeVan*, 940 A.2d at 932.

<sup>29</sup> *Lawhorn*, 2006 WL 1174009 at \*2 (quoting *Hirneisen v. Champlain Cable Corp.*, 892 A.2d 1056, 1059 (Del. 2006)).



regulation or other device shall in any manner operate to relieve any employer or employee in whole or in part from any liability created by this chapter, except as specified in this chapter.”<sup>30</sup> Furthermore, Delaware courts apply rules with a “liberal construction because of the underlying public policy that favors” a litigant’s right to a day in court as opposed to a judgment due to default.<sup>31</sup>

Here, an ambiguity exists in that the Workers’ Compensation Act contains a five-year statute of limitations<sup>32</sup> but also authorizes the DOL to adopt a Utilization Review process for the “prompt resolution” of medical service issues.<sup>33</sup> To that end, the DOL

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<sup>30</sup> 19 Del. C. § 2305.

<sup>31</sup> *Dishmon v. Fucci*, 784, 2010, 2011 WL 5438957, \*5 (Del. Nov. 10, 2011).

<sup>32</sup> 19 Del. C. § 2361(b) (stating “Where payments of compensation have been made in any case under an agreement approved by the Board or by an award of the Board, no statute of limitation shall take effect until the expiration of 5 years from the time of the making of the last payment for which a proper receipt has been filed with the Department”); *see LeVan*, 940 A.2d at 932.

The Court notes that the Workers’ Compensation Act also contains the following two-year statute of limitations:

In case of personal injury, all claims for compensation shall be forever barred unless, within 2 years after the accident, the parties have agreed upon the compensation as provided in § 2344 of this title or unless, within 2 years after the accident, 1 or more of the interested parties have appealed to the Board as provided in § 2345 of this title. In cases of death, all claims for compensation shall be forever barred unless, within 2 years after the death, the parties have agreed upon the compensation as provided in § 2344 of this title or unless, within 2 years after the death, 1 or more of the interested parties have appealed to the Board as provided in § 2345 of this title.” 19 Del. C. § 2361(a).

The parties have focused their arguments on the five-year statute of limitations. However, the Court, here, neither engages in a discussion of nor determines which of these two statutes of limitation govern. Rather, the Court uses the five-year statute of limitations as a basis for its discussion as to whether the 45-day time limit in Regulation 5.5.1 is invalid.

<sup>33</sup> 19 Del. C. § 2322F(j) (stating “The Health Care Advisory Panel shall develop a utilization review program. The intent is to provide reference for employers, insurance carriers, and health care providers for evaluation of health care and charges. The intended purpose of utilization review services shall be the prompt resolution of issues related to treatment and/or compliance with the health care payment system or practice guidelines for those claims which have been acknowledged to be compensable. An employer or

adopted Regulation 5.5.1 which contains a 45-day time bar for contesting a Utilization Review determination, thereby significantly reducing the five-year statute of limitations for such claims.<sup>34</sup>

An administrative agency's authority to promulgate regulations is derived from the statute creating the agency and defining the power thereof.<sup>35</sup> The agency's power must appear affirmatively in the authorizing statute with any doubt as to the existence of the power being resolved against the agency.<sup>36</sup> Moreover, an express grant of power to an agency includes, by implication, the power to do what is reasonably necessary to implement the grant of authority.<sup>37</sup> And, while the legislature "is presumed to have had in mind the previous statutes relating to the same subject matter" when it enacts a provision, its "failure to craft language in a new statute that is identical to language addressing a similar topic in an older statute is not dispositive evidence of an intention to

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insurance carrier may engage in utilization review to evaluate the quality, reasonableness and/or necessity of proposed or provided health care services for acknowledged compensable claims . . . . If a party disagrees with the findings following utilization review, a petition may be filed with the Industrial Accident Board for *de novo* review. Complete rules and regulations relating to utilization review shall be approved and recommended by the Health Care Advisory Panel. Thereafter, such rules shall be adopted by regulation of the Department of Labor pursuant to Chapter 101 of Title 29. Such regulations shall be adopted and effective not later than 1 year after the first meeting of the Health Care Advisory Panel").

<sup>34</sup> 19 Del. Admin. C. § 1341-5.5 (stating "If a party disagrees with the findings following utilization review, a petition may be filed with the Industrial Accident Board for *de novo* review. 5.5.1 The decision of the utilization review company shall be forwarded by the Department of Labor, by Certified Mail, Return Receipt Requested, to the claimant, the health care provider in question, and the employer or its insurance carrier. A decision of the utilization review company shall be final and conclusive between the parties unless within 45 days from the date of receipt of the utilization review decision any interested party files a petition with the Industrial Accident Board for *de novo* review").

<sup>35</sup> *Retail Liquor Dealers Ass'n of Delaware v. Delaware Alcoholic Beverage Control Comm'n*, 1980 WL 273545, \*3 (Del. Ch. Apr. 23, 1980); *Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 740 (Del. Super. 1962).

<sup>36</sup> *Tigue*, 183 A.2d at 740.

<sup>37</sup> *Retail Liquor Dealers Ass'n of Delaware*, 1980 WL 273545 at \*3.

reject rights expressly contained in the older statute.”<sup>38</sup> Therefore, “. . . an inferior body, cannot impose a deadline resulting in a forfeiture of the rights expressly conferred in a state statute.”<sup>39</sup>

Even if the legislature by way of new legislation arguably contemplated change to an older statute, the omission of express language of such a change is deemed intended.<sup>40</sup> Furthermore, “. . . for a court to supply alleged statutory omissions by the legislature transcends the judicial function in a constitutional system that provides for a separation of powers.”<sup>41</sup>

In this matter, given that Claimants’ contention is that a provision of Workers’ Compensation Regulation 5.5.1 is invalid, the Court begins by reviewing the Workers’ Compensation Act. The Workers’ Compensation Act, (the “Authorizing Statute”), provides a five-year statute of limitations for claims and also authorizes Utilization Review of contested health care services for compensable work-related claims<sup>42</sup> in order “to provide reference for employers, insurance carriers, and health care providers for evaluation of health care and charges,” and promptly resolve issues related to treatment and compliance with health care practice guidelines including the quality, reasonableness

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<sup>38</sup> *Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770, 780-81 (Del. Ch. 1998).

<sup>39</sup> *Univ. of Delaware v. New Castle County Dept. of Fin.*, 891 A.2d 202, 207 (Del. Super. 2006) *aff’d*, 903 A.2d 323 (Del. 2006).

<sup>40</sup> *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 753, 2010, 2011 WL 6148717, \*4 (Del. Dec. 12, 2011).

<sup>41</sup> *Friends of H. Fletcher Brown Mansion*, 753, 2010, 2011 WL 6148717, at \*4.

<sup>42</sup> 19 Del. C. §§ 2322F, 2361(b).

or necessity of health care services.<sup>43</sup> The Authorizing Statute also affirmatively empowers the DOL to adopt rules and regulations related to Utilization Review which have been approved by a Health Care Advisory Panel.<sup>44</sup> In addition, the Authorizing Statute provides for *de novo* review of Utilization Review determinations by the Industrial Accident Board upon petition of a party.<sup>45</sup> However, although the Authorizing Statute provides no specific change of the five-year statute of limitations regarding such a petition, the DOL adopted a regulation limiting the time for the filing of this petition to 45 days from receipt of a Utilization Review determination.<sup>46</sup>

The provision empowering the DOL to adopt regulations pertinent to Utilization Review was enacted in 2007 with the intent of promptly resolving “issues related to treatment and/or compliance with the health care payment system or practice guidelines . . . .”<sup>47</sup> The DOL, per the mandate, adopted Workers’ Compensation Regulations. Included in these regulations is Regulation 5.5.1, adopted in 2009, which limits the time for petitions contesting Utilization Review determinations to 45 days after receipt.

19 *Del. C.* § 2361(b), which precedes Regulation 5.5.1, states:

“[w]here payments of compensation have been made in any case under an agreement approved by the Board or by an award of the Board, no statute of limitation shall take effect until the expiration of 5 years from the time of the making of the last payment . . . .”<sup>48</sup>

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<sup>43</sup> 19 *Del. C.* § 2322F(j).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See 19 *Del. C.* § 2322F(j); 19 *Del. Admin. C.* § 1341-5.5.1.

<sup>47</sup> 76 *Del. Laws ch. 1* (2007) (S.B. 1); 19 *Del. C.* § 2322F(j).

<sup>48</sup> 19 *Del. C.* § 2361(b).

Moreover, the Supreme Court has consistently emphasized that the Section 2361(b) statute of limitations is unambiguous in its provision “that *no* statute of limitations shall take effect until five years . . . .”<sup>49</sup> Thus, the provision in Workers’ Compensation Regulation 5.5.1 limiting the contesting of a Utilization Review determination to 45 days drastically alters the rule and spirit of the Workers’ Compensation Act which prohibits any statute of limitations of less than five years from the last payment and significantly impedes a claimant’s right to petition for compensation. Furthermore, since an inferior body, such as the Department of Labor, is not permitted to impose deadlines that cause a party’s statutory rights to be forfeited or ignore statutory limitations that have not been amended by the General Assembly, the 45-day deadline in the regulation does not stand.<sup>50</sup>

While the intent of the Authorizing Statute is to promptly resolve issues as to the reasonableness, necessity and payment of medical services, the statute provides no specific deviation from the five-year statute of limitations regarding the filing of a petition to review a Utilization Review determination. Instead, it is the regulation that creates a 45-day limitation that significantly curtails the five-year limitation of the statute.

Mindful of the legislators’ intent to compensate injured employees, promptly resolve medical services issues, and the need to resolve any doubts in favor of the worker,<sup>51</sup> the Court looks to the application of the *expressio unius est exclusio alterius*

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<sup>49</sup> *LeVan*, 940 A.2d at 932.

<sup>50</sup> *See Univ. of Delaware*, 891 A.2d at 207.

<sup>51</sup> *See Lawhorn*, 2006 WL 1174009.

rule of statutory construction, namely, that the expression of one thing is the exclusion of another.<sup>52</sup> The five-year statute of limitations<sup>53</sup> in the Workers' Compensation Act is express—precise and affirmatively designated—and, therefore, excludes any ambiguity raised by the term “prompt resolution”<sup>54</sup> as that term relates to the creation of a shorter time limit for contesting Utilization Review.<sup>55</sup> In so doing, the express mandate of the statute of limitations acts to limit the DOL's power,<sup>56</sup> thus, invalidating the 45-day limit of Regulation 5.5.1. Therefore, since the statute of limitations specifically allows a five-year time limit, it cannot be significantly altered by a regulation. And, while the Authorizing Statute conveys the legislature's intent to promptly resolve issues concerning the reasonableness, necessity and payment of medical services by providing for the systematic Utilization Review of these services, it does not include express language that shortens the time limitation for the filing of petitions contesting such Utilization Review determinations. Moreover, the DOL cannot impose such language in a regulation without causing a forfeiture of rights expressly conferred in a state statute.<sup>57</sup> Likewise, the Court

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<sup>52</sup> See *Hickman v. Workman*, 450 A.2d 388, 391 (Del. 1982); *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) (stating that *Expressio unius est exclusio alterius* is a maxim applied to statutory interpretation meaning “where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature”).

<sup>53</sup> 19 Del. C. § 2361(b).

<sup>54</sup> 19 Del. C. § 2322F(j).

<sup>55</sup> Indeed, the term “prompt resolution” may very well be pertinent to other aspects of Utilization Review and, thus, not excluded or ambiguous as to those other aspects.

<sup>56</sup> See e.g. *Hickman*, 450 A.2d at 391.

<sup>57</sup> See e.g. *Univ. of Delaware*, 891 A.2d at 207.

cannot imply the inclusion of such language without transcending its judicial function.<sup>58</sup> “If the policy or wisdom of a particular law is questioned as unreasonable or unjust, then only the elected representatives of the people may amend or repeal it.”<sup>59</sup> If the General Assembly had intended in 19 *Del. C. § 2322F(j)* to change the statute of limitations by expediting resolution through Utilization Review, it would have expressly so stated.<sup>60</sup>

Therefore, because the time limit contained in Workers’ Compensation Regulation 5.5.1 is in direct contrast to the statute of limitations in 19 *Del. C. 2361(b)* and cannot be reconciled, it does not disqualify Claimants’ petitions to contest their Utilization Review determinations.

In *E-Town Quarry v. Goodman*,<sup>61</sup> the Court of Appeals of Kentucky encountered a similar issue regarding their Utilization Review regulation created pursuant to Kentucky’s Workers’ Compensation statute. In that case, the Court ultimately held that a utilization review regulation should not conflict with adjudicatory rights established by the Kentucky Legislature.<sup>62</sup> Although *E-Town Quarry* involves whether a claimant must exhaust the utilization review process before proceeding with adjudication on the merits, the Court there stated that the regulation did not mandate exhaustion of the utilization

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<sup>58</sup> See e.g. *Friends of H. Fletcher Brown Mansion*, 753, 2010, 2011 WL 6148717, at \*4; *Reyes v. Kent Gen. Hosp., Inc.*, 487 A.2d 1142, 1146 (Del. 1984) (“Judges must take the law as they find it . . .”).

<sup>59</sup> *Reyes*, 487 A.2d at 1146.

<sup>60</sup> See e.g. *Friends of H. Fletcher Brown Mansion*, 753, 2010, 2011 WL 6148717, at \*4 (stating that “[i]f the General Assembly had wanted to provide this same delegation authority for the Chief Engineer and the City Solicitor, it could have done so by including comparable delegation language”); *Leatherbury*, 939 A.2d at 1291 (stating that “if the General Assembly had intended to permit Notice of Intent to investigate . . . by using alternative means of actual notice, it would have done so”).

<sup>61</sup> 12 S.W.3d 708 (Ky. Ct. App. 2000).

<sup>62</sup> *E-Town Quarry*, 12 S.W.3d at 710.

review process and that “applying a procedural bar for failure to complete the [utilization] review process would be inappropriate.”<sup>63</sup> Here, as in *E-Town Quarry*, a regulatory procedural bar mandating dismissal of Claimants’ petitions for being untimely would forfeit Claimants’ rights under the five-year statute of limitations and is, thus, inappropriate.

While the Employers assert that Workers’ Compensation Regulation 5.5.1 is reasonable and necessary in order to accomplish the Authorizing Statute’s purpose to promptly resolve medical services issues and a 45-day time limitation may be a rational interpretation of the Authorizing Statute’s stated purpose of prompt resolution, this is not a sufficient standard for the Court to defer to Regulation 5.5.1 and reject the rights expressly contained in the statute of limitations.<sup>64</sup>

For the reasons outlined above, the Court finds that the provision contained in Workers’ Compensation Regulation 5.5.1 limiting the time to contest a Utilization Review determination to 45 days after receipt is invalid. As a result, the Court does not reach the argument of whether the DOL is required to provide notice of Utilization Review Determinations to Claimants’ counsel as well as Claimants themselves. Moreover, since the provision for a 45-day limitation on petitions contained in Workers’ Compensation Regulation 5.5.1 is deemed invalid, the Court finds that the Board erred in relying on it in its decisions to dismiss Claimants’ petitions.

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<sup>63</sup> *E-Town*, 12 S.W.3d at 709-711.

<sup>64</sup> *See DiPasquale*, 735 A.2d at 382-83.



**ACCORDINGLY**, the decisions of the Board are ***REVERSED and REMANDED*** for consideration of Claimants' petitions on the merits.<sup>65</sup>

**IT IS SO ORDERED.**

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Diane Clarke Streett, Judge

Original to Prothonotary

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<sup>65</sup> See 19 Del. C. § 2350(b).