

# **STATE OF WEST VIRGINIA**

## **FULL PERFORMANCE EVALUATION OF THE WORKERS' COMPENSATION DIVISION**

### **PERMANENT TOTAL DISABILITY BACKLOG**

Noncompliance with Court's Time Frame for Backlog Resolution

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#### **Background**

The reported inquiry relates to the Workers' Compensation and Legal Services Divisions' Court ordered disposition of permanent total disability claims under the mandamus action Anderson v. Vieweg, and covers the period of October 1997 to August 1998. However, events occurring prior to this period have been included as necessary. This report is the first of several anticipated installments of the 1998 Full Performance Evaluation of the Workers' Compensation Division. The evaluation included a planning process and the development of audit steps necessary to collect competent, sufficient and relevant evidence to answer the audit objectives. Physical, documentary, testimonial and analytical evidence used in the evaluation was collected through interviews, review of records, and site visitations.<sup>1</sup> The evaluation was conducted in accordance with Generally Accepted Government Auditing Standards (GAGAS) issued by the Comptroller General of the United States.

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<sup>1</sup>*Documentary evidence is created information such as letters, contracts and records. Physical evidence is the direct observation of the activities of people, property or events. Testimonial evidence consists of statements received in response to inquiries or from interviews, and analytical evidence includes the separation of information into components such as computations, comparisons and reasoning.*

## Mission of the Workers' Compensation Division

*...to accurately, efficiently, fairly and promptly administer quality workers' compensation services through the collection of premiums from employers and the payment of benefits to injured workers and to the dependents of fatally injured workers, with the intent of hastening the worker's return to work.*

The Workers' Compensation Division (WCD), codified in Chapter 23 of the *West Virginia Code*, was created in 1913 for the purpose of offering workers' compensation insurance. Initially an optional plan, the program became compulsory in 1974. The purpose of the program is "to provide workers with a simple method of securing immediate relief from the physical and economic effects of job related injury and disease." Further, the State is the sole provider of workers' compensation insurance. However, those employers that are eligible may opt to self-insure their workers' compensation risk. ***Although the Division is a public entity it operates like a private insurance company, collecting premiums, investing the funds, and paying benefits to injured workers making compensable claims.*** The Division administers several funds including the Workers' Compensation Fund, the Coal Workers' Pneumoconiosis Fund, Employers' Excess Liability Fund, the Disabled Workers' Relief Fund and a Surplus Fund which is made up of a Catastrophe Reserve, a Second Injury Reserve, and a Supersedeas Reserve.

The financial condition of the Division has eroded over many years. For FY 1989 the Division was believed to have a \$404 million to \$504 million deficit.<sup>2</sup> In 1990, the Division transferred \$210 million declared to be an actuarially determined surplus from the Coal Workers' Pneumoconiosis Fund to the Workers' Compensation Fund. While the assets transferred cannot be used to satisfy the debts of the Workers' Compensation Fund until all other assets of the Fund have been expended, the interest earnings may be used for this purpose. By FY 1996 the deficit was believed to be \$2.224 billion. ***By June 30, 1997 the deficit had been reduced to \$2.139 billion, a reduction of \$86 million from the previous year.***

In 1991, Ernst and Young (E & Y) was engaged in a \$45,000 contract by the Bureau of Employment Programs to audit the Workers' Compensation Division's financial statements for fiscal year 1991. In lieu of issuing financial statements for the Division, ***E & Y issued a draft management letter on March 16, 1992 that found the Workers' Compensation Division to have "an overall lack of internal controls resulting in what we [Ernst and Young] consider to be a pervasive material weakness situation..."*** E & Y defined a material weakness as

a reportable condition in which the design or operation of one or more of the specific internal control structure elements does not reduce to a relatively low level the risk that errors or irregularities in amounts that would be material in relation to the financial statements being audited may occur and may not be detected within a timely period by employees in the normal course of performing their assigned functions.

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<sup>2</sup>*Financial audits indicate the reliability of financial information pre-dating FY 1995 is highly suspect. In addition, a change in the methodology of calculating the estimated liability for unpaid claims beginning FY 1993 was made as required by GAAP. This new methodology increased the deficit, as reported, by over \$565 million.*

The final draft management letter detailed the material weaknesses of the Division, which rendered the Division impossible to audit. In subsequent financial audits for FY 1993 and FY 1994, Ernst and Young continued to find the Division's records to be

generally inadequate to produce reliable financial information with respect to premiums receivable from subscribers and self-insurers; premium advance deposits; and the estimated liability for unpaid claims and claim adjustment expenses, including contingent liabilities for self-insured employers who have defaulted or who may reasonably be expected to default. Additionally, weaknesses in the internal control structure are of an extent that cannot be overcome by auditing procedures.

Generally, the purpose of a financial audit is to provide the users of the resulting financial statements assurance that the financial statements do accurately represent the financial status of the auditee (an "unqualified opinion"). Because of the pervasive material weakness situation, E & Y was unable to express an opinion on the Division's financial statements. The 1993 and 1994 reports of E & Y also stated "the Division's recurring losses and deficit raise substantial doubt about its ability to continue as a going concern in its present form," meaning the Workers' Compensation Division would not be able to meet its obligations to claimants in the foreseeable future if problems were not corrected.

During the 1995 Legislative Session, the West Virginia Legislature passed S.B. 250 which made many reforms to the workers' compensation system. As a result of the legislation, the efforts of the management and employees of the Bureau and Division, and several consulting firms involved in the Division's Total Quality Initiative (TQI), the Workers' Compensation Division received its first unqualified audit opinion from Ernst and Young for fiscal year 1995. More importantly, the 1995 financial audit also marked the end of the "going concern" paragraph. The Division has received unqualified opinions in all financial audits completed since that time.

**Issue Area: The Bureau of Employment Programs has made about one-half of the workers' compensation permanent total disability decisions ordered by Circuit Court Special Judge to be made by June 15, 1998**

West Virginia *Code* §23-4-16 requires the Workers' Compensation Division (WCD) to make decisions upon petitions for permanent total disability awards (PTDs) within 30 days of filing. In the consolidated mandamus action, Anderson, et al and Young, et al v. Vieweg (see Appendix A), the petitioners sought to compel the Commissioner of the Bureau of Employment Programs to enter orders on these cases, some of which, according to the order, had "lingered for years without receiving any attention or action from the Division." The case was heard by Special Judge James O. Holliday who was recalled and assigned to Kanawha County by administrative order of the Supreme Court under the provisions of Article VIII, Sections 3 and 8, of the State Constitution and by the provisions of *West Virginia Code*, §51-9-10, for the purposes of:

- (1) reviewing any petitions for peremptory writs of mandamus in workers' compensation matters as may be filed in the Circuit Court of Kanawha County, conducting such hearings or proceedings therein as

he deems necessary, and entering final, appealable orders in the same; and (2) conducting such other hearings and/or proceedings in workers' compensation matters and making such findings of fact and recommendations therein as this Court may direct.

On October 9, 1997, Special Judge Holliday granted a writ of mandamus compelling the Commissioner to issue orders or have claimants participating in rehabilitation programs by or before June 15, 1998 for a total of 3,679 claims.<sup>1</sup> As work on the backlog continued, the WCD's understanding of this backlog continued to evolve. As of July 29, 1998 the WCD understood the Anderson writ to be relevant to 2,485 Ferrell "Old Law" cases (compared to the 2,198 Ferrell "Old Law" cases expressed in the writ) and 1,461 "Old Law" cases (compared to the 1,481 "Old Law" cases expressed in the writ) for a total of 3,946 (3,679 were identified in the writ).<sup>2</sup>

As of July 29, 1998, 44 days beyond the Anderson writ of mandamus deadline, case resolution was not complete for 67% of Ferrell "Old Law" cases (1,665 of 2,485). These cases were due to be completed as of June 15, 1998. By July 29, 1998; 8% of "Old Law" cases (123 of 1,461), were still not resolved. July 29, 1998 was 150 days beyond the Court's deadline of March 31, 1998 for this group of cases. Of the total 3,946 cases ordered to be resolved through either decisions or rehabilitation assignments by June 15 at the latest, 1,788 (45% of the cases) were not complete as of July 29, 1998.

### **Legal History of the Ferrell "Old Law" and "Old Law" Cases**

On September 16, 1997, a month before the Anderson decision, Kanawha County Circuit Court Judge James O. Holliday issued a writ of mandamus on behalf of a group of workers' compensation claimants in the case of Ferrell v. Vieweg. The action arose from the application of changes to the Workers' Compensation Act dealing with permanent total disability benefits (PTD), with the passage of SB 250 in 1995. Among the changes in SB 250 was a reduction in benefits from previous levels. PTD benefits were calculated at 70% of the claimant's average weekly wage earnings under the pre-1995 law. Following the 1995 amendment, benefits were calculated at 66 2/3% of a claimant's average weekly wage earnings. Another provision of the 1995 amendment adopted a 50% threshold of whole body impairment required for PTD eligibility. The orders granting the Ferrell petitioners their respective PTD benefits were entered after the effective date of the amendment (as deemed by the Supreme Court in Blankenship v. Richardson to be May 11, 1998), although the dates of injury for these claimants pre-dated the 1995 amendment. The Court found that the application of the benefit changes to these cases violated the petitioners' due process rights. Furthermore, the Court ordered that the

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<sup>1</sup>It was ordered that the 1,481 "Old Law" claimants would either be in a rehabilitation program or have their petitions for PTDs granted or denied by March 31, 1998. The 2,198 Ferrell "Old Law" claims were to be likewise completed by June 15, 1998.

<sup>2</sup>Because 1995 amendments to the Workers' Compensation Act affected benefit levels and eligibility, the courts found in several key decisions, most notably Ferrell v. Vieweg, that the law that was in effect at the time of the claimant's injury is the relevant law in determining eligibility, benefits and any other matter affecting the substantive rights of the claimant. Hence the "Old Law," Ferrell "Old Law," and "New Law" designations which are described in a subsequent part of this report.

Commissioner

*may not apply the provisions of the 1993 and 1995 amendments to the Workers' Compensation Act to claimants who filed claims prior to the effective date of such amendments when to do so would affect their substantive rights to receive PTD benefits.*

Thus, each claimant's date of injury controls what laws are applicable when substantive rights are affected. Operationally, "Old Law" claims are those having a date of injury predating May 11, 1995; "New Law" claims are those having a date of injury of May 11, 1995 or later; and Ferrell "Old Law" claims are those in which the date of injury predated May 11, 1995, but the petition date for PTD benefits postdated May 11, 1995 (many were originally treated by the WCD as "New Law" claims). Ferrell cases are conceptually a sub-category of "Old Law" cases. The term "Old Law" is mutually exclusive of the "Ferrell 'Old Law'" designation in this report and the Anderson writ.

There are currently new PTD claims being filed with the Workers' Compensation Division with dates of injury prior to May 11, 1995. As of September 1, 1998, 718 new petitions fall into this category. Although these claims are not covered by the time frames of the Anderson writ of mandamus, the Workers' Compensation Division must treat them as Ferrell cases with respect to the rates of compensation awarded and the criteria under which to determine PTD. Again, this is because cases must be decided according to the law that was in effect at the date of injury. An appeal to Ferrell v. Vieweg is currently before the Supreme Court of Appeals. This appeal could affect the standing of Anderson, should the Court overturn the decision that date of injury is controlling.

### **Court Ordered Time Frames for Anderson**

Over an extended period of time, a large number of PTD cases were neither processed nor decided by the WCD. The Supreme Court of Appeals held in Meadows v. Lewis (1983) that the Workers' Compensation Commissioner has a mandatory duty to act with regard to PTD cases within the time periods specified by statute. On October 9, 1997 Judge Holliday issued a writ of mandamus combining two petitions, Anderson v. Vieweg and Young v. Vieweg. The order established time frames for processing and deciding approximately 1,481 cases to be decided under the pre-1995 law. These are known as "Old Law" cases and were the subject of the Meadows decision. The order also established time frames for processing and deciding 2,198 claims covered by the Ferrell decision. The pre-1995 law was also applicable to these claims because their dates of injury took place prior to the effective date of the 1995 amendment. By March 31, 1998 all "Old Law" claimants were required to either be in a rehabilitation program, or to have been formally denied PTD benefits. The Ferrell claims' time frames were as follows:

- By February 15, 1998 all reopenings were to have been completed.
- By April 15, 1998 all rehabilitation assessments were to have been completed.
- By June 15, 1998 all Legal Services Division (LSD) decisions were to be rendered.

*The time frames adopted by the order were the same as those proposed by the Commissioner in the Court ordered conference between the petitioners and the respondent which occurred on September 24, 1997.*

**Status of “Old Law” and Ferrell “Old Law” Cases**

The current status of these cases is based on a Workers’ Compensation Division case tracking report dated July 29, 1998. It should be noted that by July 29, the Court’s latest deadline for resolving these cases (June 15) had passed by 44 days. A total of 2,485 Ferrell cases were eventually identified by the Division as being subject to the time frames delineated in the Anderson writ. Table 1 shows the status of these cases.

**Table 1  
Disposition of Ferrell Claims**

<b>Cases</b>	<b>Stage of Disposition</b>
314	Cases denied a PTD award by Legal Services Division
316	Cases granted a PTD award by Legal Services Division
5	Misc. orders (moots, etc.)
10	Cases denied reopening by PTD Unit
11	Withdrew petition
<b>656</b>	<b>Cases completed with an order (subtotal)</b>
164	Cases receiving TTD benefits
<b>1,124</b>	<b>Cases currently pending Legal Services Division</b>
<b>541</b>	<b>Cases reported incomplete</b>
<b>2,485</b>	<b>Total <u>Ferrell</u> Cases</b>

As the table illustrates, 10 of the cases were denied reopening by the Permanent Total Disability (PTD) Unit and, therefore, were not sent to the Legal Services Division (LSD). The next 11 cases listed were resolved because the claimants withdrew their petitions. The next two categories describe cases which have been decided by the LSD and have either been denied or granted. The 164 cases receiving temporary total disability benefits (TTD) have been determined to be candidates for rehabilitation and retraining and are candidates to eventually return to work. *Of concern are the 1,124 cases remaining with Legal Services that have not been decided and the 541 cases lacking information necessary to refer them to the LSD for a decision. It is these 1,665 cases, or 67% of the Ferrell “Old Law” cases identified as being subject to the writ’s time frame that constitute a material noncompliance of the Anderson writ of mandamus.*

The total number of Ferrell cases given in the most recent tracking report (2,485) differs from the total listed in the original order (2,198). This is due to the WCD's identification of additional cases whose date of injury place them into the Ferrell "Old Law" case category. Senior Counsel for the Legal Services Division projected that over 700 additional Ferrell cases will eventually be referred to the LSD by the Workers' Compensation Division. The Senior Counsel made this statement in an August 4, 1998 backlog resolution report submitted to Judge Holliday.

Judge Holliday's order also identified a backlog of approximately 1,481 cases covered by the pre-1995 law and not included in the Ferrell decision. The WCD has since revised its total count of these cases. At the time of the order, the WCD submitted the most accurate count then available, but has subsequently identified 20 cases which were duplicate claims. Table 2 describes the status of each of these cases per the July 29, 1998 tracking report.

**Table 2**  
**Disposition of "Old Law" Cases**

Cases	Stage of Disposition
581	Cases denied a PTD award by Legal Services Division
531	Cases granted a PTD award by Legal Services Division
15	Misc. orders (Moots, etc)
118	Cases denied reopening by PTD Unit
7	Withdrew petition
<b>1,252</b>	<b>Cases completed with an order (subtotal)</b>
86	Cases receiving TTD benefits and in a rehabilitation program
<b>85</b>	<b>Cases in process</b>
<b>38</b>	<b>Cases currently in Legal Services Division awaiting a final decision</b>
<b>1,461</b>	<b>Total "Old Law" cases</b>

As the table illustrates, the WCD either issued an order or the claimant is participating in a rehabilitation program for 1,338 of the 1,461 claims, or 92%. One-thousand-two-hundred-fifty-two (1,252) cases have either received a final order granting or rejecting their PTD petition. Eighty-six cases are currently receiving TTD benefits and the claimants are enrolled in rehabilitation programs. Of the remaining 123 "Old Law" cases, 38 are awaiting an order from the LSD. Eighty-five cases are, however, currently "in process" and have not yet been forwarded to the LSD for a PTD decision. "In process" claimants have received rehabilitation assessments and may have formerly been enrolled in a rehabilitation program, but have not yet received a PTD decision. The WCD is within 123 cases of having all the cited "Old Law" cases decided or in rehabilitation programs. The Anderson writ required all "Old Law" claims to be completed by

March 31, 1998 (case disposition data current on July 29, 1998).

### **The Bureau's Efforts to Adhere to Legal Time Frames**

Permanent total disability cases are multidimensional, voluminous and complex. Resolving nearly 4,000 PTD cases without slowing the resolution of other types of cases is a mammoth undertaking. Clearly, the Bureau has made a concerted effort to comply with the decision, though its efforts have fallen short of what was directed in the Court's order. Since the decision, the Bureau has made regular reports to the Court, apprising it of the status of cases and any relevant issues. On one occasion the Bureau requested clarification from the Court on how the stay in Ferrell should impact its disposal of related Anderson cases, and on another occasion the Bureau proposed a revised plan for case disposition. The Court responded to neither, nor has the Court enforced its order. While the Court's silence can be interpreted to mean many things, the order stands. *This review has assessed compliance with the order and is not a gauge of the Court's satisfaction or dissatisfaction with the Bureau's progress.*

Several factors contributed to the failure to comply with the deadlines established the Anderson directive, including the following:

- an inaccurate count of cases on which the Workers' Compensation Division's proposed case disposition plan was based (the plan was later adopted in the Court's Order);
- a three month stay of Ferrell v. Vieweg while it was under appeal to the Supreme Court by the Workers' Compensation Division;
- delays associated with having too few in-state qualified rehabilitation professionals and having to engage out-of-state vendors to get the rehabilitation assessments completed; and,
- delays in the Legal Services Division's hiring of contract attorneys to decide these cases and failure to hire sufficient numbers of contract attorneys to complete the work.

Because the net increase in cases (267) was relatively small (7%) with respect to the total number of cases under the order (3,679), and the stay on Ferrell specified that it in no way relieved the Commissioner of his responsibilities in Anderson, the bottlenecks of getting qualified rehabilitation professionals to complete rehabilitation assessments and getting the Legal Services Division's contract attorneys to complete orders on cases ready for decisions were and are the two most significant sources of delay. Each of these causes are discussed in greater detail in the paragraphs below.

As stated previously, Judge Holliday's writ of mandamus specified time frames which were established according to a detailed proposal submitted to the Court by the WCD. The time standards in the order were adopted from the Workers' Compensation Division's proposal.



Clearly the Court sought the Workers' Compensation Division's guidance in setting time frames and was respectful of what it communicated it could achieve.

Contributing to the Workers' Compensation Division's failure to meet its own proposal for resolving this backlog is that the WCD undercounted the number of Ferrell cases at the time of the order. The number of cases increased by 267 as more cases fitting into this category were identified. At the same time, the number of "Old Law" cases fell by 20 as duplicate claims were removed from this category. See Tables 3 and 4 for detailed evolution of the number of cases identified.

A court issued stay in a related case was also a source of delay in compliance with Anderson. The Bureau of Employment Programs appealed the Ferrell decision, and as a result the Supreme Court of Appeals granted a 30 day stay on Ferrell on October 16, 1997. The Circuit Court of Kanawha County then stayed its order in Ferrell by order of October 21, 1997, pending resolution in the Supreme Court of Appeals. The same order was explicit that its stay in Ferrell did not alter the Commissioner's responsibilities to adhere to the time frames set forth in Anderson, et al v. Vieweg. Seeking further guidance, the Legal Services Division stated in the December 8, 1997 backlog resolution report to Judge Holliday, that orders granting reopening of cases were not being entered and the claims were not advancing to the next stage. The next stage was referral for rehabilitation assessments. The LSD also requested guidance from the Court on whether or not it should begin processing Ferrell claims according to the directives of Anderson or to defer action on these claims until the stay was lifted. The Supreme Court refused the appeal on January 15, 1998, thus ending the three-month delay in the issuance of final orders for Ferrell cases. Decisions were made by the Bureau on whether or not to grant PTD petitions following the Ferrell appeal, but no orders were issued until the appeal was rejected by the Supreme Court of Appeals on January 15, 1998.

**Table 3**  
**Ferrell "Old Law" Case Flows**

<b>Phases of Disposition</b>	<b>01/26/98</b>	<b>03/04/98</b>	<b>04/20/98</b>	<b>06/15/98</b>	<b>07/29/98</b>
PTD Granted	13	38	63	162	316
PTD Denied	0	17	37	135	314
Misc. Orders (Moots, etc.)	0	0	0	3	5
Withdrawn Petitions	0	0	6	11	11
Cases Denied Reopening	139	162	159	11	10
Litigation, settlement, no petition	1	0	0	3	0
<b><i>Completed With Order (subtotal)</i></b>	<b>153</b>	<b>217</b>	<b>265</b>	<b>325</b>	<b>656</b>
<b><i>Receiving TTD/Rehabilitation</i></b>	<b>5</b>	<b>1</b>	<b>31</b>	<b>120</b>	<b>164</b>
Cases in LSD	22	198	704	1,159	1,124
Cases Otherwise in Process	2,346	2,124	1,540	888	541

<b>Total Cases</b>	<b>2,526</b>	<b>2,540</b>	<b>2,540</b>	<b>2,492</b>	<b>2,485</b>
<i>Source: Tracking updates provided in LSD reports to Court and July 29 update as corrected.</i>					

**Table 4**  
**“Old Law” Case Flows**

<b>Phases of Disposition</b>	<b>01/26/98</b>	<b>03/04/98</b>	<b>04/20/98</b>	<b>06/15/98</b>	<b>07/29/98</b>
PTD Granted	215	316	418	495	531
PTD Denied	211	304	479	543	581
Misc. Orders (Moots, etc.)	0	0	0	9	15
Withdrawn Petitions	4	0	7	7	7
Cases Denied Reopening	132	139	131	128	118
Litigation, settlement, no petition	12	9	11	15	0
<b>Completed With Order (subtotal)</b>	<b>574</b>	<b>768</b>	<b>1,046</b>	<b>1,197</b>	<b>1,252</b>
<b>Receiving TTD/Rehabilitation</b>	<b>47</b>	<b>80</b>	<b>128</b>	<b>121</b>	<b>86</b>
<i>Cases in LSD</i>	<i>94</i>	<i>164</i>	<i>190</i>	<i>82</i>	<i>38</i>
<i>Cases Otherwise in Process</i>	<i>732</i>	<i>435</i>	<i>86</i>	<i>56</i>	<i>85</i>
<b>Total Cases</b>	<b>1,447</b>	<b>1,447</b>	<b>1,450</b>	<b>1,456</b>	<b>1,461</b>
<i>Source: Tracking updates provided in LSD reports to Court and July 29 update as corrected.</i>					

As Tables 3 and 4 illustrate, the Legal Services Division had relatively few cases on which to make final orders until April 1998. Having engaged the services of more rehabilitation specialists, the WCD was able to make a large number of rehabilitation assessments in a short period of time, thereby drastically increasing the number of Ferrell cases sent to the LSD for final orders. Correspondingly, the number of incomplete Ferrell cases fell as rehabilitation assessments were completed and cases were sent to the LSD. During March 1998, the number of “Old Law” cases in the LSD increased as the number of incomplete cases decreased. The new rehabilitation specialists, therefore, had an impact on the processing of “Old Law” cases as well. The LSD was, however, better able to keep up with the *smaller increase* in the number of these cases requiring final orders. ***Thus the data suggests two critical bottlenecks in the disposition of these cases, representing the most important delays in the disposition of these cases. First, the completion of rehabilitation assessments was complicated by the short supply of qualified rehabilitation professionals. Second, once the assessments were completed, the Legal Services Division was unable to make orders as quickly as it received additional cases.***

In the March 5, 1998 backlog resolution report submitted by the Legal Services Division to Judge Holliday, the Bureau requested that the time frame for rehabilitation assessments on Ferrell cases be extended to October 15, 1998. At the time of the report, the WCD was in the process of engaging Qualified Rehabilitation Professionals to assist in the rehabilitation

assessment of Ferrell claims. These assessments must be completed before a case can be referred to the Legal Services Division for a PTD order.<sup>1</sup> The Bureau also requested that the time frame for final PTD decisions be extended to February 28, 1999. The Bureau was, therefore, aware of difficulties in adhering to the required time frames prior to the deadlines specified by the order. While increasing the number of rehabilitation specialists, the Bureau should have been aware of an increased flow of cases to the Legal Services Division as additional rehabilitation assessments were made. Additional contract attorneys could have been hired by the Legal Services Division and trained in preparation for the increased number of final orders required from the LSD. By July 1998, 1,124 Ferrell cases were still awaiting a final order from the Legal Services Division. This means that the LSD had nearly five months from the time it recognized the staffing problem in the March 5, 1998 backlog resolution report to the time of this performance evaluation to redress its staffing problems and to issue final orders on the remaining cases. This was the situation a month and one-half after the June 15, 1998 legal deadline for the completion of final orders by the LSD. The Special Judge expressed the petitioners' lack of confidence in the Workers' Compensation Division in his order which reads in part:

The Petitioners assert that the Respondent's time frames for clearing out the current backlog of PTD cases are not in accordance with the procedural time limits set forth in W.Va. Code, 23-4-16(a) (1993), nor W.Va. Code, 23-4-16 (1995). Furthermore, the Petitioners state there is little sense of confidence that the Respondent will achieve the goals of the proposed time frames now being espoused taking into consideration the traditional practice of failing to adequately staff and supervise by in-house policies and procedure guidelines, the appropriate number of personnel necessary to achieve those goals.

The Legal Services Division began the backlog resolution project with 10 contract attorneys and was considering hiring an additional 6. The total number employed eventually fell to 9 attorneys. On April 1, 1998, the LSD had hired 6 additional contract attorneys, bringing the Division's total to 15. Given this staffing level, the LSD estimated that final orders could be issued for 200-250 PTD claims per month. It is important to note that these contract employees are paid \$50 per hour which is capped at \$300 per case and \$50,000 per year. No benefits or other compensation is made to these employees. Therefore, there is no additional expense associated with hiring more contract attorneys, other than the opportunity costs of allocating a full-time employee's time to training, and the actual costs of paying attorneys for actual time in training. In theory, 30 attorneys could do the same work in half the time as 15, but at roughly the same expense. Another advantage of hiring a larger number of contract attorneys is that when the workload begins to wain and the LSD is faced with having to reduce the number of contract attorneys, it would have a larger selection pool from which to choose which highly productive

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<sup>1</sup>It should also be noted that existing cases sometimes require new rehabilitation assessments to be completed, thereby increasing demands placed on available qualified rehabilitation specialists. Seventy-nine cases have been remanded to the WCD by the Office of Judges, the Workers' Compensation Appeals Board and the Supreme Court of Appeals for this reason. These cases must have new rehabilitation assessments completed before the PTD petitions can be decided. The WCD is also required to monitor PTD awards and may from time to time, "reopen a claim for reevaluation of the continuing nature of the disability and possible modification of the award," in accordance with *Code 23-4-16*.

and effective attorneys to retain until the project is completed. In addition to the 1,162 cases already bottlenecked at the LSD, the Senior Counsel for the LSD estimates that as many as 700 additional Ferrell cases will be referred to the LSD. The Bureau should have previously prepared for the increased demand for final orders.

Status reports to the Court show that the Bureau was aware of an increase in the number of Ferrell cases that it would have to process shortly after the October 9, 1997 order. The November 5, 1997 backlog resolution report showed an increase in the number of Ferrell cases from the 2,198 mentioned in the order, to 2,336. The Bureau was also aware of the approximate number of final orders that the LSD could make in the course of a month and that additional contract attorneys would be needed. The LSD did not finish hiring additional rehabilitation specialists until March 1998 in spite of the knowledge of these facts. The Bureau appears to have been aware of both the caseload that it was handling and a lack of adequate staff shortly after the October 9, 1997 order.

In August 1998, the Bureau of Employment Programs began a new effort to encourage and facilitate the settlement of workers' compensation claims. Part of this effort included the promulgation of a policy statement, clarifying several previously unresolved issues that were thought to be impairing use of settlement provisions. Attorneys are being encouraged to settle cases within the approximately sixty-day period in which cases leave the Workers' Compensation Division awaiting decision by the Legal Services Division. Any of the Anderson cases that may be settled by the parties would certainly contribute to the elimination of the backlog.

### **The Effects of the Delay in Processing Ferrell Cases**

The WCD has not completed issuing final orders in a large percentage of Ferrell cases in spite of an early awareness of potential difficulties in processing these cases. This has led to a delay in the receipt of benefits for claimants who have, in some cases, already been waiting for several years. Depending on the WCD's final order, some claimants will still have to go through the appeal process in order to settle their claims. Furthermore, those claimants who could be rehabilitated and return to work have had to wait for assessments and rehabilitation plans which are necessary to prepare them to return to the job market. The delay in receiving rehabilitation may result in some claimants remaining permanently unemployed. Table 5 shows the number of Ferrell claimants still waiting for final orders, according to the years of their petitions.

**Table 5**  
**Ferrell cases: No Final Orders**

<b>Year</b>	<b>Number of Claimants</b>
1990	1
1991	1
1992	0

1993	2
1994	3
1995	71
1996	1,677
1997	187
1998	17

The Workers' Compensation Division is also in violation of §23-4-16 of the West Virginia Code which requires it to make decisions upon petitions for permanent total disability awards within 30 days of the petition. Table 5 shows the year petitions for PTD were entered for the unresolved Anderson claims.

## Conclusion

The Bureau has been able to complete orders on nearly all "Old Law" cases, although some claimants who have received rehabilitation assessments or have been enrolled in rehabilitation programs are now awaiting final orders. These cases were given the higher priority of management because of their relative age.

The Bureau has had less success in deciding Ferrell cases in a timely fashion. The Bureau failed to issue final orders for three months while appealing the Ferrell decision. Furthermore, after the Bureau began issuing final orders in January 1998, it found itself in need of a larger pool of Qualified Rehabilitation Providers (QRP) to complete assessments timely. In March 1998, the WCD engaged with QRP's located out of state to expedite the assessments. Once the Workers' Compensation Division looked beyond the State's borders, a large number of rehabilitation assessments were then completed within a short amount of time. The Legal Services Division found itself unprepared for the sudden increase in the number of cases requiring final orders. This was due to a shortage of contract attorneys. The need for more QRP's and, especially, contract attorneys was foreseen far enough in advance for the WCD and the LSD to have planned for the efficient processing and deciding of Ferrell cases. A pattern of staffing shortages was predicted by the petitioners in the Anderson case. As quoted earlier from the Special Judge's order:

Furthermore, the Petitioners state that there is little sense of confidence that the Respondent will achieve the goals of the proposed time frames now being espoused taking into consideration the traditional practice of failing to adequately staff and supervise by in-house policies and procedure guidelines, the appropriate number of personnel necessary to achieve those goals.

The Workers' Compensation Division should have completed its hiring of qualified rehabilitation personnel much earlier than March 1998 (March 31 was the deadline for having

assessments completed). However, the LSD had even more warning that it needed to engage additional contract attorneys. In addition to the 1,162 cases already bottlenecked at the LSD, the Senior Counsel for the LSD estimates that as many as 700 additional Ferrell cases will be referred to the LSD. Because contract attorneys are being compensated at an hourly rate of \$50 per hour, capped at \$300 per case and \$50,000 per year, the only additional cost in hiring more contract attorneys is training time. Providing the Bureau has capacity for the additional supervisory review, 30 contract attorneys could complete the backlog in half the time as 15, but at roughly the same cost.

### **Recommendation**

*The Legal Services Division should evaluate its current contract attorney needs so that it may issue final orders on the remaining Ferrell cases as quickly as possible. In so doing, it should provide for adequate supervisory review of decisions drafted by contract lawyers. It may be necessary to increase capacity for supervisory review by assigning an exemplary contract attorney to review cases, with limited random sampling of these reviewed decisions by LSD full-time attorneys.*