

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO.: _____

*****ELECTRONICALLY FILED*****

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL
UNION NO. 89, by and through Fred Zuckerman, its President

KENTUCKY CHAPTER OF THE AMERICAN FEDERATION
OF LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS, by and through Bill Londrigan, its President

CHARLES E. McCOY
334 West Seminary St
Owenton, KY 40359

DONALD WHALEN
5000 Wolfpen Woods Dr.
Prospect, KY 40059

LINDA MILLER
8970 Dover Rd.
Shelbyville, KY 40065

AND

JAMES BAKER
383 SpringHill Estates
Eminence, KY 40019

PETITIONERS

VS. **PETITION FOR DECLARATORY JUDGMENT AND
RELIEF IN THE NATURE OF MANDAMUS**

MATTHEW G. BEVIN, in his official capacity as
Governor of the Commonwealth of Kentucky

SERVE: ANDY BESHEAR
Attorney General of Kentucky
The Capitol, Suite 118
700 Capitol Ave.
Frankfort, KY 40601

DWIGHT LOVAN, in his official capacity as
Commissioner of the Department of Workers' Claims,
657 Chamberlain Ave
Frankfort, KY 40601

LOUIS D. KELLY, in his alleged official capacity as a purported
member of the Workers' Compensation Nominating Commission
alleged to have been created by Executive Order issued on 05/09/16
28 Edwards Ave.
Florence, KY 41042

VICTORIA E. BOGGS, in her alleged official capacity as a purported
member of the Workers' Compensation Nominating Commission
alleged to have been created by Executive Order issued on 05/09/16
1722 Gresham Road
Louisville, KY 40205

JOSHUA W. DAVIS, in his alleged official capacity as a purported
member of the Workers' Compensation Nominating Commission
alleged to have been created by Executive Order issued on 05/09/16
2527 Top Hill Road
Louisville, KY 40206

MARK FLORES, in his alleged official capacity as a purported
member of the Workers' Compensation Nominating Commission
alleged to have been created by Executive Order issued on 05/09/16
2272 Chamblee Lane
Lexington, KY 40513

MEGAN E MERSCH, in her alleged official capacity as a purported
member of the Workers' Compensation Nominating Commission
alleged to have been created by Executive Order issued on 05/09/16
1069 Altavia Avenue
Park Hills, KY 41011

RUNAN S. PENDERGRAST, in her alleged official capacity as a purported
member of the Workers' Compensation Nominating Commission
alleged to have been created by Executive Order issued on 05/09/16
2413 Danby Woods Circle
Lexington, KY 40509

And

JORDAN TONG, in his alleged official capacity as a purported member of the Workers' Compensation Nominating Commission alleged to have been created by Executive Order issued on 05/09/16
8141 Oakridge Court
Owensboro, KY 42303

SERVE: ANDY BESHEAR
Attorney General of Kentucky
The Capitol, Suite 118
700 Capitol Ave.
Frankfort, KY 40601

RESPONDENTS

* * * * *

The Petitioners, General Drivers Warehousemen & Helpers Local Union 89 (Affiliated with the International Brotherhood of Teamsters) ("Teamsters"); Kentucky Chapter of the American Federation of Labor and Congress of Industrial Organizations ("KY AFL-CIO"); Charles E. McCoy; Donald Whalen; Linda Miller and James Baker, by counsel, for their Petition for Declaratory Judgment against the Respondents Governor Matthew G. Bevin ("Governor Bevin"); Commissioner Dwight Lovan ("Commissioner Lovan"); Louis D. Kelly ("Respondent Kelly"); Victoria E. Boggs ("Respondent Boggs"); Joshua W. Davis ("Respondent Davis"); Mark Flores ("Respondent Flores"); Megan E. Mersch ("Respondent Mersh"); Runan S. Pendergrast ("Respondent Pendergrast"); and Jordan Tong ("Respondent Tong") state as follows:

1. This is a petition for a declaratory judgment pursuant to KRS 418.040 *et seq.* and CR 57 and corresponding injunctive relief to enjoin acts taken by Respondent Governor Matthew G. Bevin ("Governor" or "Governor Bevin") and threatened to be taken by the remaining Respondents in violation of the constitutional and statutory rights of the individual Petitioners and the members of the Teamsters and KY AFL-CIO, and other persons working in the Commonwealth of Kentucky.

2. In accordance with CR 81, Petitioners also seek relief in the nature of mandamus against Respondents.

3. Venue is appropriate in this Court pursuant to KRS 452.405.

THE PARTIES

4. Petitioner Teamsters Union is an unincorporated labor union comprised of workers employed and seeking employment throughout the Commonwealth of Kentucky and protected by the Workers' Compensation Act, KRS Chapter 342.

5. To the extent that it is necessary for Teamsters Local Union No. 89 as an unincorporated labor organization representative on behalf of all members affiliated with the Teamsters to bring this action as a class action, Teamsters Local Union No. 89 brings this action by and through its President, Fred Zuckerman ("Zuckerman"), as a class action on behalf of all members of Teamsters Local Union No. 89. Zuckerman is a member of Local 89. He brings this action as a class representative on behalf of all members affiliated with Teamsters Local Union No. 89. The class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative party are typical of the claims or defenses of the class; and the representative party will fairly and adequately protect the interest of the class. The Respondents have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

6. Petitioner KY AFL-CIO is an unincorporated federation of labor organizations in Kentucky. The KY AFL-CIO is comprised of over fifty (50) labor organizations and unions in Kentucky, which together represent the interests of over 100,000 Kentucky working men and women who are members of labor organizations. The KY AFL-CIO advocates for the interests

of its members' constituents, and advocates for the interests of Kentucky working men and women generally.

7. To the extent that it is necessary for the KY AFL-CIO as an unincorporated labor organization to bring this action as a class action, the Petitioners state that the KY AFL-CIO brings this action by and through its President, Bill Londrigan ("Londrigan"), as a class action on behalf of all members of the KY AFL-CIO. Londrigan is a member of the KY AFL-CIO. He brings this action as a class representative on behalf of all members of all labor organizations affiliated with the KY AFL-CIO. The class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative party are typical of the claims or defenses of the class; and the representative party will fairly and adequately protect the interest of the class. The Respondents have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

8. Petitioner Charles E. McCoy of Owen County, Kentucky is and continues to be notwithstanding the unconstitutional and otherwise unlawful action of the Respondent Governor on 05/09/16, which is the subject of this Petition, a duly appointed and acting member of the Kentucky Workers' Compensation Nominating Commission ("KRS 342.213 Statutory Commission"). McCoy has served on the KRS 342.213 Statutory Commission since 2009. He was reappointed in 2013 for a fixed four-year term which was to expire in 2017. He had previously served as a member of the KRS 342.213 Statutory Commission for years prior to 2009.

9. Petitioner Donald Whalen of Jefferson County, Kentucky is a worker who has been injured on the job in Jefferson County, Kentucky, who has filed a Form 101 seeking

Workers' Compensation benefits, but whose claim has not yet been assigned to an Administrative Law Judge. In the event that Mr. Whalen's case is assigned to a Judge nominated by Governor Bevin's Commission, the validity of any decision by that Judge will be in doubt, thereby causing irreparable harm to Petitioner Whalen. Petitioner Whalen has been injured on the job and has medical treatment and the extent and duration of his work injury has been disputed by his employer. Petitioner Whalen was discharged by his employer on grounds that he is not capable of performing his job because of his work injuries, even though his doctors and the medical provider providing a Functional Capacity Evaluation for him had both opined that he is capable of returning to work.

10. Petitioner Linda Miller of Shelby County, Kentucky is a working was injured on the job in Kentucky and who has been awarded benefits, both temporary and permanent for her work injury including future medical expenses. The medical treatment and work relatedness of the work injuries of Petitioner Miller and her need for medical treatment has been disputed by her employer, both during the proceedings following the filing of the Form 101 on her behalf and more recently, even though the treating physician of Petitioner Miller is a treating physician who is widely respected within the Workers' Compensation system. Petitioner Miller may be involved in future Medical Fee Disputes regarding treatment for her injuries which could be assigned to Judges nominated by a Commission created by Governor Bevin (hereinafter referred to as "Governor Bevin's Commission"), pursuant to the Executive Order issued on 05/09/16, as more fully discussed below "Governor Bevin's Commission.

11. Petitioner James Baker of Henry County, Kentucky is a worker in the Commonwealth of Kentucky who has suffered an injury compensable under the Kentucky Workers' Compensation Act pursuant to KRS chapter 342, and who has been awarded benefits

by an Administrative Law Judge over the objection of his employer, who disputed the extent and duration of his injuries. The condition of Petitioner Baker caused and brought about by his work injury is such that his condition may worsen and he may need further medical treatment which may be disputed by his Workers' Compensation carrier, which may become the subject of a Medical Fee Dispute which could be assigned to Judges nominated by Governor Bevin's Commission.

12. Respondent, Hon. Matthew G. Bevin is the duly elected Governor of the Commonwealth of Kentucky, vested with such powers as are afforded him by the Constitution of this Commonwealth and related statutes. The Governor is the chief executive officer of the Commonwealth and charged by Section 69 and Section 81 of the Kentucky Constitution with taking care that the laws of the Commonwealth be "faithfully executed".

13. Respondent, Dwight Lovan is the Commissioner of the Department of Workers' Claims, Prevention Park, 657 Chamberlin Avenue, Frankfort, KY 40601.

14. Respondent, Louis D. Kelly is a resident of Boone County, Kentucky, who has been appointed by Governor Bevin under the alleged authority of Executive Order issued on 05/09/16 (attached hereto as Exhibit A) to be a member of an alleged substitute for the KRS 342.214 Statutory Commission (substitute hereinafter being referred to as "Governor Bevin's Commission"). Respondent Kelly has been elected chairman of Governor Bevin's Commission by the other members of the Commission at a meeting of Governor Bevin's Commission held on 05/13/16 in Frankfort.

15. Respondent, Victoria E. Boggs is a resident of Jefferson County, Kentucky, who has been appointed by Governor Bevin to Governor Bevin's Commission.

16. Respondent, Joshua W. Davis is a resident of Jefferson County, Kentucky, who has been appointed by Governor Bevin to Governor Bevin's Commission.

17. Respondent, Mark Flores is a resident of Fayette County, Kentucky, who has been appointed by Governor Bevin to Governor Bevin's Commission.

18. Respondent, Megan E. Mersch is a resident of Kenton County, Kentucky, who has been appointed by Governor Bevin to Governor Bevin's Commission.

19. Resident, Runan S Pendergrast is a resident of Fayette County, Kentucky, who has been appointed by Governor Bevin to Governor Bevin's Commission.

20. Resident, Jordan Tong is resident of Davies County, Kentucky, who has been appointed by Governor Bevin to Governor Bevin's Commission.

21. The Attorney General has been served with a copy of this Petition because this Petition raises questions as to the Constitutional status and lawfulness of Governor Bevin's Commission and the Executive Order 2016-256 issued by Governor Bevin on 05/09/16 and whether KRS 12.028, which is the statute pursuant to which Governor Bevin's Commission was appointed, is unconstitutional on its face or as applied.

THE FACTS

22. The Constitution of Kentucky, which was adopted when Kentucky became a state in 1792, provides for a democratic separation of powers and other checks and balances.

23. When our new Workers' Compensation Act was issued, pursuant to KRS Chapter 342 in 1988, Kentucky issued a system of a trial on the laws and facts of a Workers' Compensation claims to be conducted before Administrative Law Judges. It was necessary that a constitutional system be adopted for appointing those who would serve as Administrative Law Judges.

24. Pursuant to their constitutional authority, the Legislature enacted KRS 342.213 and KRS 342.230 with respect to the appointment, qualifications and terms of Administrative Law Judges. Pursuant to KRS 342.213, a Commission known as the Workers' Compensation Nominating Commission ("WCNC") was created, which consist of seven members, two of which are to be attorneys experienced in the practice of Workers' Compensation, one of whom customarily represents claimants and one of whom customarily represents employers, three of whom are members of the political party having the largest number of registered voters and two of whom are members of the political party having the second largest number of registered voters, to serve for certain terms which are staggered as part of the checks and balances pursuant to the KRS 342.213 Statutory Commission. Provisions are made in the said statutes for recommendation of which Administrative Law Judges should be retained for additional terms. In filling vacancies in the position of Administrative Law Judges, the WCNC is to present three candidates in each instance to the Governor. Within a certain time pursuant to KRS 342.230(3) and (6), the Governor is to appoint as Administrative Law Judge an Administrative Law Judge recommended to be retained by the WCNC or from the candidates named by the WCNC, with the Senate to consent within a certain time in accordance with KRS 11.160. It is the implicit intent of KRS 342.213 that the persons who comprise the WCNC have the qualifications, knowledge and experience to select qualified and experienced Administrative Law Judges to preside over the proper administration of the Workers' Compensation laws.

25. It often happens that Administrative Law Judges perform their jobs satisfactorily well and for that reason are recommended to be retained by the WCNC, and are reappointed to serve additional terms by the Governor with the consent of the Senate. It was unprecedented before 2016 that an Administrative Law Judge who had previously been nominated by the

KRS 342.213 Statutory Commission, appointed by Governor and confirmed by the Senate, and who was re-nominated by the KRS 342.213 Statutory Commission, reappointed by the Governor, was not confirmed by the Senate.

26. As of the fall of 2015, there were eight Administrative Law Judges whose terms were expiring, seven of which were recommended to be retained by then Governor Steven E. Beshear. Ultimately, it was Governor Bevin who selected from one of the candidates nominated by the WCNC a person to fill the eighth Administrative Law Judge position, the recommendation to fill the eight positions of Administrative Law Judge being subject to the consent of the Senate pursuant to KRS 11.160.

27. During the 2016 Legislative Session, upon information and belief, the Secretary of Labor with the consent and authority of the Governor, recommended to the Senate that only five of the eight persons which had been nominated which the Senate was to consider for confirmation pursuant to KRS 11.160(b) confirmed, all of which were members of the political party of which the Governor is a member or were otherwise acceptable to that party, the three not being recommended all being members of the opposing political party. The Senate accepted this recommendation and confirmed only the five Administrative Law Judges recommended to be confirmed through the list provided to the Senate by the Secretary of Labor. When the Senate did so, it did so with the expectation that these three positions would be filled by persons nominated by the KRS 342.213 Statutory Commission.

28. The five Administrative Law Judges who were confirmed by the Senate are well qualified, competent Administrative Law Judges whose terms should have been extended and which had been recommended to be appointed by the KRS 342.213 Statutory Commission. However, the three Administrative Law Judges whose nominations were not confirmed are also

competent Administrative Law Judges whose terms should have been extended, and all are members of a political party other than the political party for which Governor Bevin is a member.

29. As of 05/09/16, the Commission was composed of seven members, all of whom had been duly and lawfully appointed and all of whom were serving fixed four-year terms of office, none of which was set to expire before 12/04/17, namely:

Charles E. McCoy, whose term was set to expire on December 4, 2017

Charles J. Baird, whose term was set to expire on December 4, 2017

McKinnley Morgan, whose term was set to expire on December 4, 2018

Sherri Brown-Keller, whose term was set to expire on December 4, 2018

William Grover Arnett, whose term was set to expire on December 4, 2019

Robert Wayne Carlisle, whose term was set to expire on December 4, 2019

Brockton L. Edwards, whose term was set to expire on December 4, 2019

30. During the 2016 Legislature, a bill was proposed being Senate Bill 204 (hereinafter "SB 204") (a copy of which is attached hereto as Exhibit B) which would have reorganized the WCNC, thereby creating a WCNC with a majority of whose members have connections with employers subject to the Workers' Compensation Act, Chapter 342. Had the bill been passed by the Legislature and become law, this likely would have resulted in stacking the positions of Administrative Law Judges with those who are more sympathetic to the beliefs and positions of employers subject to the Workers' Compensation laws. SB 204 was not considered or passed by either Chamber of the Legislature.

31. Shortly after the Legislature recessed, an Executive Order was issued by Respondent Governor Bevin on 05/09/16, styled as a "Reorganization of the Workers' Compensation Nominating Commission", which purportedly was issued pursuant to KRS 12.028, which is a statute which contemplates only that temporary action be taken by Executive Order between Sessions of the Legislature, and which as further explained below, is

unconstitutional on its face and as applied in the 05/09/16 Executive Order, being Executive Order 2016-256 (sometimes referred to herein as “05/09/16 Executive Order,” a copy of which is attached herein as Exhibit A). The 05/09/16 Executive Order was filed with the Secretary of State at 4:48 p.m. on that date.

32. During 2016, four additional qualified and incumbent Administrative Law Judges whose terms were to expire in 2016 were re-nominated by the WCNC to be retained. However, the Governor recommended that only one of those Judges, who is a member of his political party, who is well qualified be confirmed and that the remaining three Judges not be confirmed, all three of whom are members of the opposing political party. The act of the Governor in rejecting the other three recommended retentions having occurred after the Legislature adjourned on 04/15/16 at approximately 11:58 p.m. pursuant to Sections 36 and 48 of the Kentucky Constitution will result in the terms of those three Administrative Judges expiring on 07/14/16. This left the Workers’ Compensation system with unprecedented six vacancies in the position of Administrative Law Judge.

33. Pursuant to KRS 12.028, an Executive Order may be issued between Legislative sessions only under circumstances that the action taken thereby is temporary in nature and is be done to achieve greater economy, efficiency and improve administration and temporary organization plan be reviewed by an interim joint Legislative Committee with appropriate jurisdiction if there can be such a Committee within 60 days thereafter, which was not done by the 05/09/16 Order.

34. KRS 12.028 is unconstitutional on its face as the General Assembly cannot delegate the authority to enact Legislation to an interim Committee as provided therein, and even if the General Assembly could delegate such power to an interim joint Legislative Committee, in

this case, the interim joint Legislative Committee was not given the power to reject Executive Orders, issued pursuant to KRS 12.028, it was only given the power to review such orders. KRS 12.028 provides for an unconstitutional delegation of Legislative authority to the Governor.

35. Further, the 05/09/16 Executive Order is unconstitutional as it is not temporary in nature and purports to abolish the duly constituted KRS 342.213 Statutory Commission and to provide terms to members of its purported replacement Commission for the WCNC (“Governor Bevin's Commission”) of more than one year, which is inconsistent with a temporary measure.

36. Further, the 05/09/16 Executive Order, the reorganization plan does not contain all the safeguards KRS 342.213, including the staggering of the terms of the members in such a matter as to check and balance the power of new Governors as they come into the office. However, if Governor Bevin has the power in the first place to reorganize the Commission as he did, then the service of its members with staggered terms can be abolished in a subsequent reorganization of the Commission.

37. Shortly after the issuance of the 05/09/16 Executive Order, Governor Bevin nominated the seven persons listed here as respondents, Louis Kelly, Victoria Boggs, Joshua Davis, Mark Flores, Megan Mersch, Runan Pendergast, Jordan Tong, which persons do not have the qualifications, experience and background which were possessed by the members of the KRS 342.213 Statutory Commission (hereinafter "Governor Bevin's Commission"). Pursuant to the 05/19/16 Executive Order, the terms of the members of Governor Bevin’s Commission expire on one of the following days 05/06/17, 05/06/18, 05/06/19, or 05/06/20.

38. On 05/13/16, the members of Governor Bevin's Commission had an organizational meeting. At the 05/13/16 meeting, Governor Bevin's Commission scheduled another meeting for Monday, 05/23/16, to consider applicants to be recommended to the

Governor pursuant to statute to fill these six vacant Administrative Law Judge positions (see Exhibit C attached hereto).

39. A meeting of the KRS 342.213 Statutory Commission had been scheduled for 05/16/16 to make recommendations to the Governor to fill the vacancies created by the failure of the three incumbent Judges who had been approved by the KRS 342.213 Statutory Commission and recommended by the previous Governor to be confirmed.

40. At the 05/13/16 meeting, it was decided that Governor Bevin's Commission would fill all six of the vacant positions of Administrative Law Judge with those who had already applied in response to the advertisement sent out by the KRS 342.213 Statutory Commission. Upon information and belief, after Governor Bevin had nominated members to constitute his Commission (Governor Bevin's Commission), upon information and belief, after the 05/09/16 Executive Order was issued by Governor Bevin, the Secretary of Labor instructed the Commissioner of the Department of Workers' Claims to forward all applications submitted thereafter to Governor Bevin's Commission, rather than to the KRS 342.213 Statutory Commission, thereby precluding the KRS 342.213 Statutory Commission from fulfilling its statutory duty.

Commission

41. Pursuant to KRS 12.028, the Committee designated by the Legislature has up to 60 days to review an Executive Order such as the 05/09/16 Executive Order. Upon information and belief, Governor Bevin was to submit a basis for him to having issued the 05/09/16 Executive Order to this interim Committee, but has not done so. Petitioners will suffer irreparable harm if a Restraining Order and injunctive relief, temporary and permanent, are not granted to preserve the status quo ante and preclude Governor Bevin's Commission from making

nominations, recommending those nominations to be confirmed by the Senate and for the interim Committee designated by the Legislature to pass review of the 05/19/16 Executive Order. Pursuant to the said statutes, any person purported to be nominated by Governor Bevin to fill the six Administrative Law Judge vacancies would serve from that point forward until the Senate next convenes, which without a Special Session of the Legislature, will not happen before the 2017 Legislature convenes on or about 01/2017.

42. The Department of Workers' Claims administers the provisions of KRS Chapter 342, which is an act which has been issued for the purpose of redressing physical and mental injuries and damages arising from the employee/employer relationship. The foremost purpose of the act has been held to be policy of compensating disabled workers' for the decrease in their wage earning capacity which has resulted from an injury caused by work. Second, with the goal of promoting the prompt disposition of the compensation claims and of controlling the expense of prosecuting the claim.

43. Pursuant to KRS 342.700, Workers' Compensation benefits are the sole remedy that an employee has against his or her employer for an on the job injury, provided that the employer has complied with the requirement to provide Workers' Compensation insurance to the employee.

44. Because some workers do not have health insurance or lose their health insurance while off work due to their injuries, with the workers compensation benefits the employee is entitled to receive pursuant to KRS 342.020 are often the only means that the employee has of paying for the need for medical care caused and brought about by the work injury. Another provision of KRS 342.020 contains provisions issued to purpose insuring that the medical care of the injured worker provides reasonable benefit to the employee.

45. While an employee is off work, the employee receives reimbursement for his or her time off work up to two-thirds of his or her average weekly wage as determined by the act subject to but not in the amount in excess of the average wage of employees of the state pursuant to KRS 342.730.

46. If the employee is permanently injured, the employee receives compensation for that permanent injury based on the Fifth Edition of the American Medical Association Guides pursuant to KRS 342.730.

47. Section 12 of the Practice Regulations, 3 KAR 25:010 allow those employees who would suffer irreparable harm, injury, loss or damage pending a final decision on Workers' Compensation application to apply for interlocutory relief in order to obtain awards from the Administrative Law Judge who indicates as assigned for reimbursement for temporary total disability benefits to reimburse for time off work. Without that relief, employees would often otherwise be unable to obtain medical care and to make commitments necessary to keep up their homes and support their families.

48. It is essential to the proper, efficient, equitable and just administration of the Workers' Compensation laws that the Administrative Law Judges who preside over Workers' Compensation claims, have the experience and skill necessary to make just, fair decisions resolving claims of a worker.

49. It is unprecedented that at this time, six of the seventeen judges who were presiding over Workers' Compensation claims during the calendar year of 2016 have been removed. This creates a great strain on the system to efficiently administrate workers' claims.

50. In the event that Governor Bevin's Commission is allowed to replace the six Administrative Law Judges who have been lost, there will be a cloud over the validity of their

decisions. This would result frequently in the party who is not satisfied with the decision to appeal. Workers' compensation appeals can often and do take years, including first an appeal to the Workers' Compensation Board which typically takes months to resolve, and then an appeal to the Court of Appeals which takes a year and a half to two years to resolve, and then an appeal to the Supreme Court which takes a year or more to be resolved. Workers cannot wait this long for their claims to be resolved without receiving reimbursement which enables them to obtain medical treatment and have an opportunity to rehabilitate their physical condition and return to work as they best can and without having income benefits to support their families and compensation for their permanent impairments.

51. After a worker receives an award for settlement, the case is often reopened pursuant to KRS 343.125 because the medical condition or economic circumstances of the employee has worsened or changed or because there is a dispute regarding what medical care is necessary and reasonable for the employee to receive pursuant to KRS 342.020. With a cloud over the validity of decisions made by those Administrative Law Judge's appointed through Governor Bevin's Commission, those who become parties to motion to reopen for reimbursement for the worsening of their condition and for their medical treatment could be delayed by protracted appeals in which it could take years. The fact that an employer could stall an employee from receiving medical care for years by moving to reopen and having the case assigned to one of Governor Bevin's Administrative Law Judge's could put a chilling effect on the efforts of employees to obtain medical care for their injuries and compensation for the worsening of their conditions.

52. It is most unfortunate if the Administrative Law Judges nominated by Governor Bevin's Commission and appointed by him take the position of favoring under pressure from

him regarding their potential renominations of rendering decisions and rulings which favor one side or the other, and in particular the side of the employer. Upon information and belief, it is the intention of Governor Bevin and his Governor Bevin's Commission to appoint Administrative Law Judges who would make decisions which are most favorable to the employers' side of Workers' Compensation cases.

53. In addition, this had a chilling effect on the application of persons who would otherwise have applied for the position of Administrative Law Judge because of the uncertainty being able to retain their positions and because of the use of the political power and political choices in approving and re-nominating Judges.

54. Upon information and belief, Governor Bevin intends to adopt other Executive Orders which are unprecedented, and which would constitute a violation of the separation of powers in the Kentucky Constitution.

CAUSES OF ACTION

Count I: Violation of Separation of Powers, KY. CONST. §§ 27, 28 & 29

55. Petitioners incorporate and re-allege each of the allegations contained in paragraphs 1 to 54 as if fully set out herein.

56. KY. CONST. § 27 states:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are Legislative, to one; those which are executive, to another; and those which are judicial, to another.

57. KY. CONST. § 28 states:

No person or collection of persons being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

58. KY. CONST. § 29 states:

The Legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the General Assembly of the Commonwealth of Kentucky.

59. By effectively amending KRS 342.213 with the Executive Order, which purports to, for example, alter the political make-up of the Commission establish term limits for appointed Commissioners, and provide the Governor with an express power of removal of any Commissioner, all in direct contravention of the statute, the Governor has violated Sections 27, 28 and 29 of the Kentucky Constitution by invading the province of the General Assembly's authority.

Count II: Violation of KY. CONST. §§ 15 & 42

60. Petitioners incorporate and reallege each of the allegations contained in paragraphs 1 to 59 as if fully set out herein.

61. KY. CONST. § 15 titled "Laws to be suspended only by General Assembly" states: "No power to suspend laws shall be exercised unless by the General Assembly or its authority."

62. KY. CONST. § 42 provides in pertinent part that "The members of the General Assembly shall severally receive from the State Treasury compensation for their services: Provided, No change shall take effect during the session at which it is made; nor shall a session occurring in odd-numbered years extend beyond March 30; nor shall a session of the General Assembly occurring in even-numbered years continue beyond sixty Legislative days, nor shall it extend beyond April 15; these limitations as to length of sessions shall not apply to the Senate when sitting as a court of impeachment. A Legislative day shall be construed to mean a calendar day, exclusive of Sundays, legal holidays, or any day on which neither House meets."

63. The Governor, by issuing the Executive Order in which he purports to abolish and recreate the Commission, effectively suspends KRS 342.213 without authority and has thereby violated Sections 15 and 42 of the Kentucky Constitution.

Count IV: Violation of KY. CONST. §§ 69 & 81

64. Petitioners incorporate and re-allege each of the allegations contained in paragraphs 1 to 63 as if fully set out herein.

65. KY. CONST. § 69 provides that the Supreme Executive Power of the Commonwealth should be vested in a Chief Magistrate, who should styled the Governor of the Commonwealth of Kentucky.

66. KY. CONST. § 81 titled “Governor to enforce the laws” states: “He shall take care that the laws be faithfully executed.”

67. The Governor is required to faithfully execute the Constitution and the Kentucky Revised Statutes, including KRS 342.213, KRS 342.230 and KRS 12.028. The Governor, by violating the provisions of the Kentucky Constitution and statutes discussed herein, has violated Sections 69 and 81 of the Kentucky Constitution.

Count V: Violations of KRS 342.213

68. Petitioners incorporate and reallege each of the allegations contained in paragraphs 1 to 67 as if fully set out herein.

69. KRS 342.213(2) unequivocally sets the terms each of the seven members of the Commission “shall” serve. By issuing the Executive Order, the Governor has violated the statute by removing without authority each of the seven members of the Commission who are duly serving unexpired terms.

70. KRS 342.213(2) unequivocally sets forth the composition of the Commission to include two experienced Workers' Compensation practitioners, three members of the political party having the largest number of registered voters, and two members of the political party having the second largest number of registered voters. By issuing the Executive Order, the Governor has violated KRS 342.213(2) by purporting to abolish the lawful KRS 342.213 Statutory Commission and replace it with Governor Bevin's Commission.

71. KRS 342.230(3) & (6) requires that the Governor in exercising his powers in upholding his obligation to enforce the laws of Kentucky, and take care that those laws be faithfully executed pursuant to Section 69 and Section 81 of the Constitution appoint and recommend to the Senate Administrative Law Judges appointed by the lawful WCNC, which is the KRS 342.213 Statutory Commission. Upon information and belief, Governor Bevin will refuse to do so, unless ordered to do so by this Court. Should Governor Bevin refuse to do so, Petitioners will suffer irreparable harm for which they are entitled to injunctive relief and relief in the nature of mandamus.

Count VII: Violations of KRS 12.028

72. Petitioners incorporate and re-allege each of the allegations contained in paragraphs 1 to 71 as if fully set out herein.

73. KRS 12.028(1) & (2) confer on the Governor the power to temporarily reorganize organizational units and administrative bodies by creating/altering/abolishing such units/bodies and transferring functions, etc. “from one (1) organizational unit or administrative body to another” for “economy, efficiency and improved administration” when the General Assembly is between sessions.

74. By the Executive Order, the Governor has exceeded the authority granted to him to reorganize units or bodies and has failed to do so for the reasons allowed by KRS 12.028(1) & (2).

Count VIII: Injunctive Relief and Declaration of Rights

75. Petitioners incorporate and re-allege each of the allegations contained in paragraphs 1 to 74 as if fully set out herein.

76. If injunctive relief is not granted, temporary and permanent, restraining and enjoining the members of Governor Bevin's Commission for nominating candidates to fill the six Administrative Law Judge vacancies and further restraining and enjoining Governor Bevin from appointing Judges from amongst those nominated by the Governor Bevin's Commission, irreparable harm will be suffered by petitioners and other injured workers in the Commonwealth of Kentucky. Pursuant to law, if relief is not rendered in the nature of mandamus requiring Governor Bevin to nominate for Administrative Law Judge one of the candidates submitted to him by the KRS 342.213 Statutory Commission, irreparable harm will be suffered by Petitioners and other injured workers in the Commonwealth of Kentucky.

77. Without injunctive relief and an Order being rendered by this Court in the nature of mandamus that the Commissioner of the Department of Workers' Claims provide copies of all applications for Administrative Law Judge submitted to the KRS 342.213 Statutory Commission, irreparable harm will be suffered by Petitioners and other injured workers in the Commonwealth of Kentucky, as the capacity of the KRS 342.213 Statutory Commission to perform its statutory duties will be impaired.

78. Injunctive relief, temporary and permanent, is necessary to preserve the status quo and to protect the public interest.

79. Without intervention of this Court, irreparable harm will be suffered by the Petitioners including a destabilization of the Workers' Compensation System by appointment of Administrative Law Judges whose authority and the validity of whose actions will not be determined until after lengthy appeals and the resulting cloud over the litigation claims of workers until this matter is resolved.

80. The allegations set out in every count set out above are hereby incorporated into every other count.

81. The amount in controversy as to each of the above counts is in excess of the jurisdictional amount for filing suit in this Court.

82. Pursuant to KRS 418.040 a genuine and actual controversy exists between the parties. Petitioners request that the Court make a binding declaration of rights to the parties, as requested herein.

REQUEST FOR RELIEF

WHEREFORE, Petitioners pray that this Court declare the rights of the parties as follows:

1. That the 05/09/16 Executive Order is null and void as contrary to the terms of the Kentucky Constitution and KRS 342.213 and Governor Bevin's Commission does not have the authority to take the actions pursuant to KRS 342.213.

2. That the true and lawful WCNC is the KRS 342.213 Statutory Commission, as it was constituted prior to the 05/09/16 Executive Order.

3. That this Court render injunctive relief, both temporary and permanent, enjoining Respondents Kelly, Boggs, Davis, Flores, Mersch, and Tong, from submitting any nominations to Governor Bevin for vacancies in the positions of Workers' Compensation Administrative Law

Judges, and further enjoining Governor Bevin from appointing any Workers' Compensation Administrative Law Judges from any nominations submitted by the aforesaid Respondents, and enter a writ of mandamus that Governor Bevin recommend Administrative Law Judges from those persons nominated by the KRS 342.213 Statutory Commission.

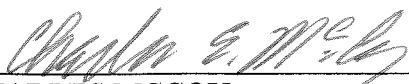
4. That this Court render an order of mandamus that Commissioner Lovan provide copies of all applications for the position of Administrative Law Judge to the KRS 342.213 Statutory Commission, which is the legitimate WCNC.

5. Any other relief to which the Petitioners may be entitled.

This petition has or will be verified by Charles McCoy and/or others in accordance with legal procedure.

VERIFICATION

I, CHARLES MCCOY, upon being duly sworn, do hereby swear that I have read the foregoing petition for declaratory judgment and relief in the nature of mandamus and that the factual allegations set out herein are true and correct to the best of my knowledge.

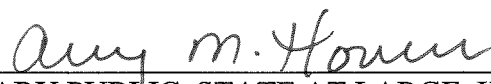


CHARLES MCCOY

COMMONWEALTH OF KENTUCKY

COUNTY OF Owen


Subscribed and sworn to before me by CHARLES MCCOY this the 19th day of May,
2016. My Commission expires: Dec. 6, 2019



NOTARY PUBLIC, STATE AT LARGE, KY
ID # 546390

VERIFICATION

I, LINDA MILLER, upon being duly sworn, do hereby swear that I have read the foregoing petition for declaratory judgment and relief in the nature of mandamus and that the factual allegations set out in paragraph #10 thereof are true and correct to the best of my knowledge, as well as the other factual allegations set out therein.



LINDA MILLER

COMMONWEALTH OF KENTUCKY

COUNTY OF JEFFERSON

Subscribed and sworn to before me by LINDER MILLER this the 19 day of May,
2016. My Commission expires: 10-09-2019



NOTARY PUBLIC, STATE AT LARGE, KY

Respectfully submitted,

/s/ Eric M. Lamb

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EXHIBIT A



MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER

RECEIVED AND FILED
DATE May 9, 2016
4:48 pm

Secretary of State
Frankfort
Kentucky

2016-256
May 9, 2016

ALISON LUNDERGAN GRIMES
SECRETARY OF STATE
COMMONWEALTH OF KENTUCKY
BY K. Allen

**RELATING TO REORGANIZATION OF THE
WORKERS' COMPENSATION NOMINATING COMMISSION**

WHEREAS, the Commonwealth of Kentucky must always promote the effective and efficient management of state government operations; and

WHEREAS, it is the responsibility of state government to provide the citizens of the Commonwealth with an economical and efficient governmental structure that can be administered in a consistent, ethical, and coordinated manner; and

WHEREAS, pursuant to KRS 342.213, the Workers' Compensation Nominating Commission is a state agency consisting of seven (7) members appointed by the Governor, including attorneys who practice in the area of workers' compensation representing claimants and employers, and others representing political party affiliation; and

WHEREAS, it has been determined that the Workers' Compensation Nominating Commission as established by the provisions of KRS 342.213 should be abolished, recreated, and restructured with new governing membership and a more focused vision and purpose designed to carry out the objectives of KRS Chapter 342 concerning injured workers and rights and obligations of employers so as to achieve greater economy, efficiency, and improved administration of the Kentucky workers' compensation system:

NOW, THEREFORE, I, Matthew G. Bevin, Governor of the Commonwealth of Kentucky, under the authority vested in me by the Kentucky Constitution, Sections 69 and 81, and KRS 12.028, do hereby Order and Direct the following:

- I. The Kentucky Workers' Compensation Nominating Commission as established by KRS 342.213 is abolished. The terms of the members appointed by the Governor serving on the Kentucky Workers' Compensation Nominating Commission as it existed prior to the filing of this Order shall expire immediately upon the filing of this Order.



MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2016-256
May 9, 2016

- II. The Kentucky Workers' Compensation Nominating Commission ("Commission") is hereby recreated and established as an agency of state government charged with carrying out the duties and responsibilities as set forth in KRS Chapter 342 and other applicable law. The Commission shall be attached to the Labor Cabinet for administrative purposes.
- III. The Board shall consist of seven (7) members appointed by the Governor as follows:
- (a) One (1) member from the state at-large shall serve a term of one (1) year, but he or she, should the Governor reappoint him or her, or his or her successor shall thereafter be appointed to a term of four (4) years.
 - (b) Two (2) members shall be attorneys experienced in the practice of workers' compensation, one (1) of whom customarily represents claimants, and one (1) of whom customarily represents employers. Both shall serve terms of two (2) years, but they, should the Governor reappoint them, or their successors shall thereafter be appointed to terms of four (4) years.
 - (c) (1) One (1) member of the political party having the largest number of registered voters and one (1) member of the political party having the second largest number of registered voters shall serve a term of three (3) years.
 - (i) Thereafter, in the event a vacancy is created, whether voluntarily or otherwise, the vacant seat shall be filled by an appointee from the same political party for a term of four (4) years.
 - (2) One (1) member of the political party having the largest number of registered voters and one (1) member of the political party having the second largest number of registered voters shall serve a term of four (4) years.
 - (i) Thereafter, in the event a vacancy is created, whether voluntarily or otherwise, the vacant seat shall be filled by an appointee from the same political party for a term of four (4) years.
 - (d) Notwithstanding the provisions of paragraphs III(a)-(c) of this Order, at least three (3) members of the Commission shall be individuals who directly derive no earned income from the workers' compensation program. In order to satisfy the requirement of this paragraph, and notwithstanding the Governor's general authority to remove any member pursuant to KRS 63.080(1), the Governor shall remove any existing member of the Commission who directly derives earned income from the workers' compensation program and replace that member with an



MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2016-256
May 9, 2016

individual who does not derive earned income from the workers' compensation program.

- (e) At the first meeting to occur in each calendar year, the members shall select a Chairman of the Commission who shall then serve as Chairman for the duration of that calendar year.
- IV. Any member appointed to fill a vacancy occurring for any reason other than by expiration of a term shall be appointed for the remainder of the unexpired term. No person, however, shall be appointed to serve a term of four (4) years more than twice, regardless of whether those terms fall consecutively or non-consecutively.
- V. The Commission shall meet as often as necessary to perform its statutory responsibilities, including, but not limited to, the mandates enumerated in KRS 342.213(5)(a). A majority of the members of the Commission shall constitute a quorum for the transaction of business.
- VI. Members shall be reimbursed from funds collected pursuant to KRS 342.122 for necessary expenses in the manner and amounts prescribed for state employees by KRS 45.101 and the administrative regulations promulgated under the authority of that statute. In addition, each member of the Commission shall be paid at a rate of one hundred dollars (\$100.00) per day for each meeting attended, and these expenses shall be financed from funds collected pursuant to KRS 342.122.
- VII. Except as otherwise provided, the Commission shall have exclusive control and direction over all duties, functions, and responsibilities previously exercised by the Kentucky Workers' Compensation Nominating Commission as it existed prior to the filing of this Order. All authority, functions, and responsibilities vested in the Kentucky Workers' Compensation Nominating Commission as it existed prior to the filing of this Order are transferred to the newly created Commission, which shall utilize that authority, function, and responsibility to carry out the functions of the Commission. All duties, functions, responsibilities, records, equipment, staff, and supporting budgets of the Kentucky Workers' Compensation Nominating Commission as it existed prior to the filing of this Order and all functions, rights, powers, duties, and obligations set forth in KRS Chapter 342 concerning the Kentucky Workers' Compensation Nominating Commission and other relevant provisions of law are hereby transferred to the newly created Commission.
- VIII. The Finance and Administration Cabinet, Labor Cabinet, Personnel Cabinet and the Governor's Office of Policy and Management shall take all necessary action to effectuate the provisions of this Order.



MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2016-256
May 9, 2016

- IX. I hereby appoint the following to serve as a member of the Commission, to serve for a term expiring May 6, 2017:

Mark Flores, 2272 Chamblee Lane,
Lexington, Kentucky 40513.

- X. Further, I hereby appoint the following to serve as members of the Commission, to serve a term expiring May 6, 2018:

Megan E. Mersch, 1069 Altavia Avenue,
Park Hills, Kentucky 41011; and

Joshua W. Davis, 2527 Top Hill Road,
Louisville, Kentucky 40206.

- XI. Further, I hereby appoint the following to serve as members of the Commission, to serve a term expiring May 6, 2019:

Jordan Tong, 8141 Oakridge Court,
Owensboro, Kentucky 42303; and

Victoria E. Boggs, 1722 Gresham Road,
Louisville, Kentucky 40205.

- XII. Further, I hereby appoint the following to serve as members of the Commission, to serve a term expiring May 6, 2020:

Louis D. Kelly, 28 Edwards Avenue,
Florence, Kentucky 41042; and

Runan S. Pendergrast, 2413 Danby Woods Circle,
Lexington, Kentucky 40509.

Please issue commissions to them.



MATTHEW G. BEVIN, Governor
Commonwealth of Kentucky



ALISON LUNDERGAN GRIMES
Secretary of State

REORGANIZATION PLAN

This Reorganization modifies the membership of the Workers' Compensation Nominating Commission for members appointed to serve a term of four (4) years. However, the total membership of the Workers' Compensation Nominating Commission will remain at seven (7). This Reorganization also establishes term limits.

This reorganization is for administrative purposes with no resulting personnel or fiscal impact. Moreover, this reorganization will not result in any increased expenditures to Kentucky state government.

EXHIBIT B

AN ACT relating to the Workers' Compensation Nominating Commission.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 342.213 is amended to read as follows:

- (1) The Governor shall make all appointments to the board, and appoint the administrative law judges and the commissioner of the Department of Workers' Claims, subject to the consent of the Senate in accordance with KRS 11.160, and in accordance with this section, KRS 342.215, 342.228, and 342.230 by choosing from names presented to him or her by the Workers' Compensation Nominating Commission.
- (2) The Workers' Compensation Nominating Commission shall consist of seven (7) members appointed by the Governor as follows:
 - (a) ***One (1) member from the Kentucky Coal Association;***
 - (b) ***One (1) member from the Kentucky Chamber of Commerce;***
 - (c) ***One (1) member from the Kentucky Association of Manufacturers;***
 - (d) ***One (1) member from the Kentucky Chapter of National Federation of Independent Businesses;***
 - (e) ***One (1) member from the Kentucky Justice Association;***
 - (f) ***One (1) member from the Kentucky Employee Safety Association;***
 - (g) ***One (1) at-large member chosen from the general public;***

~~[Two (2) members shall be attorneys experienced in the practice of workers' compensation, one (1) of whom customarily represents claimants, and one (1) of whom customarily represents employers. Both shall serve terms of two (2) years, but their successors shall be appointed to terms of four (4) years;~~

 - ~~(b) 1. One (1) member of the political party having the largest number of registered voters and one (1) member of the political party having the second largest number of registered voters shall serve a term of three (3) years; and~~

~~2. Two (2) members of the political party having the largest number of registered voters and one (1) member of the political party having the second largest number of registered voters shall serve a term of four (4) years.~~

~~3.](h)~~ Thereafter, as each term expires, the vacancy so created shall be filled by an appointee from the same political party for a term of four (4) years;

~~(i)(e)~~ Appointments to fill the unexpired term of a member shall be for the remainder of the term; and

~~(j)(d)~~ The members shall annually select a chairman of the nominating commission.

(3) Notwithstanding the provisions of subsection (2) of this section, at least three (3) members of the Workers' Compensation Nominating Commission shall be individuals who directly derive no earned income from the workers' compensation program. In order to satisfy the requirement of this subsection, the Governor may remove any existing member of the Workers' Compensation Nominating Commission and replace that member with an individual who does not derive earned income from the workers' compensation program.~~[On or before March 1, 1997, the Governor shall submit to the Senate a list of the members of the commission identifying the positions they fill and the terms they shall serve in accordance with the provisions of this section.]~~

(4) The commissioner shall monitor the workload of the administrative law judges and, whenever a vacancy occurs, determine whether filling the position is necessary to expeditious resolution of claims brought under this chapter. One hundred twenty (120) days prior to the expiration of the terms of the administrative law judges, and when a vacancy occurs under other circumstances, the commissioner shall certify to the Workers' Compensation Nominating Commission that filling the position is necessary and the Workers' Compensation Nominating Commission shall act to fill

only such positions as have been certified as necessary by the commissioner.

- (5) (a) The Workers' Compensation Nominating Commission shall consult with the commissioner, chief administrative law judge, and a member of the Workers' Compensation Board as to the performance in office of the administrative law judges. The Workers' Compensation Nominating Commission may recommend retention of any sitting administrative law judge, or present to the Governor the names of three (3) qualified individuals nominated for the position. The Workers' Compensation Nominating Commission shall report its recommendation for retention to the Governor no later than thirty (30) days after receipt from the commissioner of certification of the necessity to fill the position and shall render to the Governor its list of nominees to fill vacancies within sixty (60) days of receipt of the commissioner's certification. The name of an individual who has been rejected by the Governor when recommended for retention shall not be presented thereafter as a nominee for the same position. No sitting administrative law judge shall be nominated to fill more than one (1) vacancy except for separate vacancies as an administrative law judge.
- (b) Within thirty (30) days of receipt of the recommendation, the Governor may reject recommendations of retention, in which event the Workers' Compensation Nominating Commission shall, within thirty (30) days, reconvene and present a list of the names of three (3) nominees for each position for which a recommendation for retention has been rejected by the Governor.
- (6) The Governor shall appoint the commissioner of the Department of Workers' Claims from a list of three (3) names submitted by the nominating commission. The list submitted to the Governor shall contain names of individuals who meet the qualifications and requirements contained in KRS 342.228. The commissioner shall

be subject to Senate confirmation in accordance with KRS 11.160.

- (7) (a) The Governor shall appoint the members of the Workers' Compensation Board. The nominating commission shall present to the Governor a list of three (3) candidates for appointment to the board no later than thirty (30) days prior to the expiration of a board member's term. For the purpose of filling vacancies on the board which occur for reasons other than an expiration of term, the nominating commission shall present a list of three (3) names to the Governor no later than sixty (60) days after a vacancy occurs.
- (b) If the Governor fails to appoint a member of the board within thirty (30) days following receipt of a list of names from the nominating commission, the previous appointee may remain in the position until the ninetieth day following the date the nominating commission provided the Governor with its list of names, at which time he or she shall vacate the position.
- (8) The nominating commission shall meet as often as necessary to perform its responsibilities, and the members shall be reimbursed from funds collected pursuant to KRS 342.122 for necessary expenses in the manner and amounts prescribed for state employees by KRS 45.101 and the administrative regulations promulgated under the authority of that statute.~~[In addition, each member of the nominating commission shall be paid at a rate of one hundred dollars (\$100) per day for each meeting attended, and these expenses shall be financed from funds collected pursuant to KRS 342.122.]~~

➔Section 2. Persons serving on the nominating commission on the effective date of this Act shall continue to serve until their terms expire or until they cease to serve for some other reason. Appointments made to the nominating commission after the effective date of this Act shall be made in accordance with KRS 342.213 as amended in Section 1 of this Act.

EXHIBIT C

[KWA] WCNC Meeting (5/13/16)

Ched Jennings via KWA [kwa@lists.thecyberwerks.com]

Sent: 5/14/2016 11:13 AM

To: kwa@lists.thecyberwerks.com

Cc: "Ched Jennings" <chedjen@aol.com>

To All,

Sources have reported that the new **Workers Compensation Nominating Commission** held its first meeting on Friday, May 13th. These are the takaways from the first meeting:

1. Four of the recently appointed members were present with three participating by telephone.
2. The Secretary of Labor spoke very briefly. Also attending were the Commissioner, CALJ and Chmn of the Board. This was a open meeting which was attended by various Labor leaders and one member of the Media.
3. **Louis D. Kelly**, of Florence, who is an attorney with the law firm of Adams, Stepner, Woltermann & Dusing, PLLC in Covington, Ky. was elected as Chairman. He will serve for a term expiring May 6, 2020.
4. The new WCNC decided that they would like for applicants to also include with their applications a copy of their writing ability and the number of workers compensation cases handled. This requirement may serve our community well when it comes down to the WCNC picking somebody with questionable qualifications and experience.
5. Those approximate 50 applications will receive an email or letter requesting each to supplement their applications by the end of the week, May 20th.
6. There will be no additional advertising for the six vacancies.
7. **The next meeting of the WCNC will be on Monday, May 23rd, for purposes of selecting and recommending to the Governor the names of three applicants for each of the six vacancies.**

Ched Jennings
JENNINGS LAW OFFICES
One Riverfront Plaza
401 W. Main Street
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Louisville, KY 40202

(502)583-3882
(502)583-8333(F)

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO.: _____

*****ELECTRONICALLY FILED*****

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL
UNION NO. 89, by and through Fred Zuckerman, its President, ET AL.

PETITIONERS

VS.

MOTION TO ENTER RESTRAINING ORDER

MATTHEW G. BEVIN, in his official capacity as
Governor of the Commonwealth of Kentucky, ET AL.

RESPONDENTS

* * * * *

Please take notice that on the 20th day of May, 2016, at 2:30 p.m., in the Courtroom of the Court to which this petition has been assigned, or at such time before that or after that as the Court may allow,

Petitioners, by counsel, move that the Court enter the Restraining Order tendered herewith restraining Respondents from taking certain actions pending further Order of Court and injunction.

In support of the motion, Petitioners incorporate herein the allegations set out in their petition for declaratory judgment and relief in the nature of mandamus, which has been verified either as part of the said petition and memorandum. In support hereof, Petitioners rely upon the petition and memorandum they have filed or will file in support of their motions for restraining order, injunctive relief both temporary and permanent, a declaration of rights, and relief in the nature of mandamus.

Respectfully submitted,

/S/ Eric M. Lamb

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/S/ Robert Colone (with permission)

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Phone: 502-368-5885

CO-COUNSEL FOR LOCAL UNION No. 89

CERTIFICATE

This is to certify that a copy hereof was electronically filed this 19th day of May, 2016.

/S/ Eric M. Lamb

ERIC M. LAMB

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO.: _____

*****ELECTRONICALLY FILED*****

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL
UNION NO. 89, by and through Fred Zuckerman, its President, ET AL.

PETITIONERS

**MEMORANDUM IN SUPPORT OF MOTIONS OF PETITIONERS
FOR RESTRAINING ORDER, INJUNCTIVE RELIEF TEMPORARY
VS. AND PERMANENT, A DECLARATION OF RIGHTS, AND
RELIEF IN THE NATURE OF MANDAMUS**

MATTHEW G. BEVIN, in his official capacity as
Governor of the Commonwealth of Kentucky, ET AL.

RESPONDENTS

* * * * *

Petitioners, by counsel, file this memorandum in support of their motions for restraining order and injunctive relief, temporary and permanent, a declaration of rights, and relief in the nature of mandamus.

This action challenges Governor Bevin's attempt to abolish the Workers' Compensation Nominating Commission, which makes nominations to the Governor for appointment or reappointment to the positions of Workers' Compensation Board members, Administrative Law Judges and Commissioner of the Department of Workers' Claims, and to reestablish a new Commission with members of his own choosing. He purported to do this on 05/09/16, despite the fact that all seven members of the Commission had been duly appointed to fixed four-year terms and none of those terms had expired.

On 05/23/16, the improperly appointed new members of Governor Bevin's Commission have determined to take action to nominate persons for up to six vacant positions as Workers' Compensation Administrative Law Judges. Therefore, this Court's intervention by restraining order or temporary injunction is necessary to prevent irreparable harm and maintain the status quo ante before the improperly appointed Commission members act.

The facts set out in the petition for declaratory judgment and relief in the nature of mandamus are incorporated herein as if fully set out.

In particular, as of 05/09/16, and for many years before that, the Commission was composed of seven members, all of whom had been duly and lawfully appointed by governors who preceded Governor Bevin and all of whom were serving fixed four-year terms of office. None of their terms were set to expire before 2017. All are well experienced as Commission members.

Because of the existing vacancies in the positions of Workers' Compensation administrative law judges, the members of the Commission as it existed prior to 05/09/16, had scheduled a meeting for 05/16/16, to consider candidates for those vacant positions and to make nominations or recommendations for reappointment to Governor Bevin to fill these vacancies.

On 05/09/16, Governor Bevin issued Executive Order 2016-256 ("05/09/16 Executive Order"), which is attached as Exhibit B to the herein petition for declaratory judgment, and caused it to be filed with the Secretary of State at 4:48 p.m. that day. Under the 05/09/16 Executive Order, Governor Bevin purported to "abolish" the existing Commission appointed by previous governors under KRS 342.213 ("KRS 342.213 Statutory Commission") and asserted that the terms of the members as existed prior to the filing of the Executive Order shall "expire immediately upon the filing of this Order."

By the 05/09/16 Executive Order, Governor Bevin also purported to recreate and establish a new Commission (“Governor Bevin’s Commission”) with the same name as the prior Commission and purported to appoint as members of the Governor Bevin’s Commission seven individuals, Mark Flores, Megan E. Mersch, Joshua W. Davis, Jordan Tong, Victoria E. Boggs, Louis D. Kelly and Runan S. Pendergrast, all defendants herein, to serve terms expiring after one, two, three or four years.

There are many inconsistencies between the KRS 342.213 Statutory Commission and Governor Bevin’s Commission. One of the changes is that the 05/09/16 Executive Order requires that only two members of the Commission be members of the political party having the largest number of registered voters and two members be members of the political party having the second largest number of registered voters, and provides that one member shall be “at-large”, without regard to political party membership. On the other hand, KRS 342.213 requires that three members of the Commission be members of the political party having the largest number of registered voters and two members be members of the political party having the second largest number of registered voters. Thus, Governor Bevin has attempted to avoid appointing three members of the party having the largest number of voters and to appoint instead an at-large member in his complete discretion.

Under the 05/09/16 Executive Order, Governor Bevin will appoint all of the members of the Commission for virtually his entire term and, at the expiration of that term, will leave his successor with at least four members who will continue their membership for at least two years into the term of his successor.

On 05/13/16, the members of Governor Bevin's Commission met for an organizational meeting. At that meeting, the members set a second meeting for Monday, 05/23/16, to consider applicants for vacant ALJ positions and make nominations to the Governor.

Upon information and belief, pursuant to the instructions of the Secretary of Labor or otherwise, on 05/09/16 the Commissioner of the Department of Workers' Claims ceased providing applications and resumes of those who have submitted their names for consideration by the WCNC to the KRS 342.213 Statutory Commission, thereby impairing the ability of that commission to nominate persons to the Governor to fill the unprecedented six Workers' Compensation administrative law judge vacancies.

For the reasons set out in the petition for declaratory judgment and relief in the nature of mandamus, , petitioners and others in the state of Kentucky will suffer irreparable harm if a restraining order is not rendered to preserve the status quo and if injunctive relief is not ordered to insure that Governor Bevin does not violate the Constitution of Kentucky, that Governor Bevin's Commission be declared null and void and that the KRS 342.213 Statutory Commission be declared to be the entity which has the sole authority to move forward with nominations for Administrative Law Judges.

ARGUMENT

Petitioners seek a restraining order to prohibit Governor Bevin's Commission members of his newly purposed Workers' Compensation Nominating Commission from making nominations for vacant positions of Administrative Law Judges until such time as this Court has determined whether Executive Order 2016-256 is a valid exercise of the Governor's authority.

CR 65.03(1) and CR 65.04(1) provide for the issuance of a restraining order and temporary injunction where it has been shown that the movant's rights are being or will be

violated by an adverse party and that the movant will suffer irreparable injury, loss, or damage, pending final judgment in the action. “[I]njunctive relief is basically addressed to the sound discretion of the trial court.” Maupin v. Stansbury, 575 S.W.2d 695, 697-698 (Ky. App. 1978).

The party seeking temporary relief is not required “to show a substantial probability of success on those merits... [I]f the complaint shows a probability of irreparable injury and the equities are in favor of issuance, it is sufficient if the complaint raises a serious question warranting a trial on the merits.” Maupin, 575 S.W.2d at 699. “If a party requesting a temporary injunction has shown the probability of irreparable injury, presented a substantial question as to the merits and the equities are in favor of issuance, then a temporary injunction should be granted.” Cowan v. Wilkinson, 828 S.W.2d 610, 613 (Ky. 1992). “The clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur prior to trial.” Maupin, 575 S.W.2d at 698 (1978). “In any temporary injunctive relief situation, the relative benefits and detriments should be weighed. Obviously, this entails a consideration of whether the public interest will be harmed by the issuance of the injunction or whether its effect will merely be to maintain the status quo.” *Id.*

IRREPARABLE INJURY

Irreparable injury here is inevitable if the Governor’s Executive Order is found to be invalid or unconstitutional because the final judgment will be rendered completely meaningless, especially as to the recently deposed members of the Commission, claimants who have workers’ compensation claims pending which will be heard by an administrative law judge, and the working men and women of the Commonwealth who will be denied their right to a hearing

before an administrative law judge who has been appointed pursuant to the statutory procedure and whose claims and award may be thrown into great uncertainty.

The validity of any Administrative Law Judges appointed through Governor Bevin's Commission cannot be resolved without protracted appeal, which would take years. Due to the questions surrounding the qualifications of the members of Governor Bevin's Commission as compared to the qualifications of the KRS 342.213 Statutory Commission, it is more likely that the KRS 342.213 Statutory Commission will appoint qualified Administrative Law Judges. Upon information and belief, it is the intention of Governor Bevin and his newly proposed Commission to appoint Administrative Law Judges who will be more favorable to the employer in workers' compensation decisions.

Deposed members of the Commission such as Petitioner McCoy, absent this Court's restraining order, will be denied the ability to fulfill their statutory obligations to make nominations for vacant ALJ positions. Once the current purported members make nominations, the lawfully constituted members of the KRS 342.213 Statutory Commission will have forever lost their ability to fulfill their statutory obligations. This cannot be remedied by a later declaratory judgment or permanent injunction in their favor, as those nominated by Governor Bevin would continue to serve as Administrative Law Judges until such time as their appointments are up for confirmation by the legislature, which without a special session of the legislature being called, would not occur until 01/17.

Injured workers whose claims are pending, and workers who may have claims in the future, will be denied the right to have properly constituted ALJs hear their cases. Again, a declaratory judgment and permanent injunction cannot restore the status quo to those individuals. They will have forever lost this precious constitutional right.

SUBSTANTIAL QUESTION ON THE MERITS

The petitioners have raised serious and substantial questions concerning the legal issues in this action. KRS 342.213 is clear. The seven deposed Commission members have months and years left on their terms under the will of the General Assembly. Governor Bevin's purported "reorganization" is a blatant and strong-armed attempt by the Governor to replace the duly appointed and constituted members of the Commission with others more to his liking and to rewrite a statute while the General Assembly is not in session.

That is not designed to achieve "greater economy, efficiency and improved administration" as required by the reorganization statute, KRS 12.028.

KRS 342.213 sets forth a specific statutory structure and composition of the WCNC. There are no exceptions to the statute and, as a matter of statutory interpretation none can be read into the statute. *Com. v. Boarman*, 610 S.W.2d 922, 924 (Ky. Ct. App. 1980) ("A legislature making no exceptions to positive terms of the statute, is presumed to have intended to make none").

Governor Bevin has relied upon KRS 12.028. However, KRS 12.028 allows the Governor to submit a reorganization plan to the General Assembly regarding "changes in the state government organizational structure which may include the creation, alteration or abolition of any organizational unit or administrative body and the transfer of functions, personnel, funds, equipment, facilities, and records from one (1) organizational unit or administrative body to another"). KRS 12.028 allows a "temporary" reorganization change if "first reviewed by the interim joint legislative committee with appropriate jurisdiction." KRS 12.028(2). The remaining sections of KRS 12.028 provide for review of the plan/temporary reorganization by the interim joint legislative committee. KRS 12.028(3), (4), (6). Pursuant to the statute, the LRC has been

given latitude to refer the reorganization plan to the “appropriate” committee for review, which leaves room for the LRC to refer the matter to a committee which does not mirror the constitutionally elected legislature.

There are serious questions as to whether the Governor complied with the statute, as discussed below. Even if the Governor complied with KRS 12.028, that statute is unconstitutional as an improper delegation of legislative power to the Governor in violation of Sections 15, 27, 28, 42, 69, and 81.

The Kentucky Supreme Court found parts of KRS 12.028, which delegated legislative oversight to the LRC while the General Assembly was out of session, were unconstitutional in violation of Sections 27 and 28 (as well as Section 42 which provides that a session of the General Assembly cannot extend beyond April 15). Legislative Research Comm'n By & Through Prather v. Brown, 664 S.W.2d 907, 917 (Ky. 1984). In Brown, the Court held that the delegation of legislative functions to the LRC—an agency independent of the legislature—violated the separation of powers provisions of the Kentucky Constitution. If a legislative function cannot be delegated to the LRC, it doesn’t seem that a legislative function can be delegated to a committee to a committee selected by the LRC or to the chief executive by inaction on the part of a committee selected by the LRC, and especially not when the reorganization is expressly contrary to the terms of a statute, here KRS 342.213.

The Governor is charged with enforcing statutes, see Sections 69 and 81 of the Kentucky Constitution, not tinkering with validly enacted legislation while the General Assembly is out of session. In fact, the Kentucky “constitution contains explicit provisions which, on the one hand, mandate separation among the three branches of government, and on the other hand, specifically prohibit incursion of one branch of government into the powers and functions of the others.

Thus, our constitution has a double-barreled, positive-negative approach.” Beshear v. Haydon Bridge Co., 416 S.W.3d 280, 295 (Ky. 2013)(citations omitted). Legislating from the Executive branch is simply not in option in Kentucky. Additionally, even if the legislative delegation of power to the Governor is constitutionally appropriate, the Governor is still in fact “legislating” via executive order after the General Assembly is out of session as of April 15. That independently violates Section 42 of the Kentucky Constitution (sessions of the General Assembly expire on April 15).

Even if the applicable sections of KRS 12.028 are constitutionally valid on their face, there is a good argument that those sections are unconstitutional as applied in violation of the separation of powers doctrine. A limited delegation from the General Assembly to the Governor to temporarily effect administrative reorganizations with saving money or administrative effort as its primary goal, if facially constitutional, is different than allowing the Governor, by executive order, to rewrite KRS 342.213. The executive order permanently changes the statutory make-up of the WCNC.

The 05/09/16 Executive Order suspends KRS 342.213 and inappropriately removes all seven commissioners in violations of Section 15 of the Kentucky Constitution (“No power to suspend laws shall be exercised unless by the General Assembly or its authority.”) Section 15 was recently addressed by the Supreme Court recently in Beshear v. Haydon Bridge Co., 304 S.W.3d 682, 701 (Ky. 2010), *as corrected* (Mar. 17, 2010). That case held that a workers' compensation revenue statute was subject to suspension by a budget bill without violating Section 15, but here it is the Governor—not the legislature—exercising his authority to not only exceed an express legislative framework (i.e. KRS 342.213) but dismantling it and recreating it in his own vision.

The following sections of the Kentucky Constitution are implicated:

“No power to suspend laws shall be exercised unless by the General Assembly or its authority.” Ky. Const. § 15

“The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.” Ky. Const. § 27

“No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.” Ky. Const. § 28

“The members of the General Assembly shall severally receive from the State Treasury compensation for their services: Provided, No change shall take effect during the session at which it is made; nor shall a session occurring in odd-numbered years extend beyond March 30; nor shall a session of the General Assembly occurring in even-numbered years continue beyond sixty legislative days, nor shall it extend beyond April 15; these limitations as to length of sessions shall not apply to the Senate when sitting as a court of impeachment. A legislative day shall be construed to mean a calendar day, exclusive of Sundays, legal holidays, or any day on which neither House meets.” Ky. Const. § 42

“The supreme executive power of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the “Governor of the Commonwealth of Kentucky.” Ky. Const. § 69

“He [the Governor] shall take care that the laws be faithfully executed.” Ky. Const. § 81

Since its amendment after KRS 12.025 (12.028’s predecessor) was found unconstitutional (*Legislative Research Comm’n By & Through Prather v. Brown*, 664 S.W.2d 907, 917 (Ky. 1984)), KRS 12.028 has not been construed by the courts. However, a plain reading of the statute indicates that the 05/09/16 Executive Order exceeds greatly the power to administratively reorganize units. The actions taken in the 05/09/16 Executive Order do not meet the requirements of the statute that there be, 1) “economy, efficiency and improved administration”; 2) “organizational structure,” and; 3) “transfer . . . from one (1) organizational unit or administrative body to another.”

KRS 342.213 sets out the considered judgment about the composition of the WCNC, the terms of office of the commissioners, etc., and that the Governor has not simply reorganized the WCNC for purposes of economy, efficiency or improved administration, but rather has attempted to use KRS 12.028 to amend the substantive provisions of KRS 342.213 to his liking. Note that OAG 16-001 appears unfavorable to the idea that the Governor could have removed all the commissioners and reappointed those of his choosing under KRS 63.080, but the Governor went much further than removing/appointing here to change substantive provisions relating to the WCNC. As such, the Governor has exceeded the authority granted to him under KRS 12.028.

By issuing the 05/09/16 Executive Order, the Governor has violated KRS 342.213 by improperly abolishing the WCNC, effectively removing commissioners that had unexpired terms to serve (OAG 16-001). Furthermore, the commission “created” does not comply with the requirement set out in the statute that three members will be from the political party with the most registered voters, and two members will be from the political party with the 2nd most registered voters. Pursuant to the 05/09/16 Executive Order, the Governor has appointed a WCNC consisting of two Democrats, two Republicans and one “at-large” member. It is presumed that this “at-large” member is Republican, which would directly violate the WCNC make-up mandated in the statute.

On its face, the statute purports to delegate a legislative function from the General Assembly to the Governor for purposes of temporary reorganization between sessions. KRS 12.028(1) does not offend the separation of powers doctrine found in KY. CONST. §§ 27 & 28 because it allows the Governor to “propose” for General Assembly approval changes in state government organizational structure. However, KRS 12.028(2) improperly delegates the

legislature's sole function in government to the Governor, and as such, makes KRS 12.028(2), and the bulk of the remaining sections unconstitutional.

Because the interim joint Legislative Committee to which the Legislative Research Commission refers the proposed Reorganization Plan and/or the 05/09/16 Executive Order has up to 60 days for its review, irreparable harm may occur if a Restraining Order and preliminary injunction are not rendered. This is because the 05/09/16 Executive Order was effective immediately and Governor Bevin's Commission planned to act before 60 days have passed.

As pointed out above, if the recently appointed members of the Commission are allowed to act, petitioners and others in the Commonwealth of Kentucky will suffer great irreparable harm. The harm will be great.

The delay of those nominations only so long as it takes this Court to make an ultimate decision on the merits, even if there is are appeals, could be resolved much more quickly than it would be resolved through the years required to complete protracted appeals of the workers' compensation decisions by the Administrative Law Judges appointed through Governor Bevin's Commission.

Finally, the relief sought by Plaintiffs will only preserve the status quo. The integrity of the nomination process will be maintained by injunctive relief. The public interest in this case clearly favors the enforcing of the statutory policy expressed in KRS 342.213. The public has an interest in this case to see that the correct nominating process is maintained and that Administrative Law Judges are appointed pursuant to the correct statutory procedure.

Accordingly, the status quo and the public interest will be protected by a restraining order.

CONCLUSION

For the reasons stated above, petitioners submit that they have met all the requirements of a restraining order and for a preliminary injunction of relief, enjoining the defendant recently appointed Board members from making nominations and restraining the Governor from making appointments from any nominations made by those Commission members.

Respectfully submitted,

/S/ Eric M. Lamb

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CERTIFICATE

This is to certify that a copy hereof was electronically filed this 19th day of May, 2016.

/s/ Eric M. Lamb

ERIC M. LAMB

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO.: _____

*****ELECTRONICALLY FILED*****

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL
UNION NO. 89, by and through Fred Zuckerman, its President, ET AL.

PETITIONERS

VS.

RESTRAINING ORDER

MATTHEW G. BEVIN, in his official capacity as
Governor of the Commonwealth of Kentucky, ET AL.

RESPONDENTS

* * * * *

Motion having been made, and the Court being sufficiently advised,

IT IS HEREBY ORDERED THAT pending further Order of Court, Respondents Governor Matthew G. Bevin; Louis D. Kelly; Victoria E. Boggs; Joshua W. Davis; Mark Flores; Megan E. Mersch; Runan S. Pendergrast and Jordan Tong are restrained and enjoined as follows:

1. Respondents Louis D. Kelly; Victoria E. Boggs; Joshua W. Davis; Mark Flores; Megan E. Mersch; Runan S. Pendergrast and Jordan Tong shall not conduct the meeting which they had planned for 05/23/16 or any other meetings for the purpose of taking any purported actions pursuant to the 05/09/16 Executive Order as if they were the duly constituted Workers' Compensation Nominating Committee pursuant to KRS 342.213, pursuant to the Executive Order 2016-256 issued by the Governor on 05/09/16 or otherwise, said Respondents being restrained and enjoined from taking actions including without limitation the review of applications for vacant Workers' Compensation Administrative Law Judge positions and the

nomination of persons to be considered by Respondent Governor Matthew G. Bevin to be appointed to fill the vacant Administrative Law Judge positions.

2. Respondent Governor Matthew G. Bevin shall not appoint any person as an Administrative Law Judge nominated by Respondents Louis D. Kelly; Victoria E. Boggs; Joshua W. Davis; Mark Flores; Megan E. Mersch; Runan S. Pendergrast and/or Jordan Tong in their purported capacities as members of the Workers' Compensation Nominating Committee pursuant to the Executive Order 2016-256 issued on 05/09/16, pursuant to KRS 342.213, and KRS 342.230 or otherwise.

JUDGE

Entered: _____