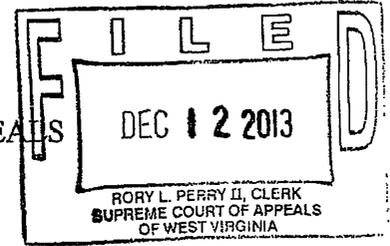


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THE WEST VIRGINIA SUPREME COURT OF APPEALS



WAYNE LOWRY,

Claimant/Petitioner

13-1125

vs.

TEAM ENVIRONMENTAL, LLC

Employer/Respondent

CLAIMANT/PETITIONER WAYNE LOWRY'S REPLY BRIEF

RE: B.O.R. Appeal #: 2048469
JCN #: 2011041489
OOJ Order: 06/05/13

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REPLY BRIEF

Claimant/Petitioner Wayne Lowry files this reply brief in further support of his Petition filed with this Honorable Court. This reply serves to point out the legal and factual flaws in Employer/Respondent's brief.

I. The Board of Review committee legal error in interpreting a plainly worded statute

The brief of the Employer/Respondent Team Environmental, LLC (hereafter "Employer") does nothing to address the primary argument of Claimant/Petitioner Wayne Lowry (hereafter "Claimant"). The Board of Review has added a requirement of steady, continuous work to a plainly worded statute that limits the inquiry to a "daily rate of pay".

The language of 23-4-14 is clear. For purposes of temporary total disability compensations wages "...shall be compensated upon the daily rate of pay on the date of injury or upon the weekly average derived from the best quarter of wages out of the preceding four quarters of wages... whichever is more favorable to the injured employee..."

The daily rate of pay remains a simple and unambiguous term, despite the Employer's best attempts to twist and pervert its meaning. The daily rate of pay is just what it sounds like; whatever the employee was to be paid on the day he or she got hurt. The statute simply does not require anything more. The Board of Review committed legal error in attempting to interpret this plainly worded statute. By requiring a "consistent" daily rate of pay, the Board committed clear legal error.

II. Sufficient evidence of Claimant's daily rate of pay on the date of injury was submitted to the Office of Judges

Employer repeatedly states there was "absolutely no evidence "to support Claimant's daily rate of pay. (Employer's brief, p. 7) It attempts to do this by adding qualifiers to the simple term daily rate of pay. It argues that a daily rate of pay must be an "established" rate and that a

Claimant with sporadic employment cannot have a daily rate of pay. Employer seeks to add to the requirements of the statute by requiring a larger "window" of earnings to be examined. The statute simply makes no such requirement and it was wrong for the Board of Review to add such a requirement to Claimant's burden.

There was obviously sufficient evidence of the daily rate of pay and it came from the Employer itself. He testified clearly that Claimant was paid sixteen dollars per hour. He also testified that Claimant worked "all day" the day before the accident. On the date of injury Claimant had finished one of three wells he was to close and it was already 2:00 p.m. Claimant had two more wells to close and as such was only a third of the way through his work day when he was injured. The finding of the ALJ that Claimant was entitled to an eight hour work day is supported by the evidence. Certainly the Employer presented no evidence that Claimant was not scheduled to work at least an eight hour day.

The evidence is undisputed that Claimant was paid sixteen dollars an hour on the date his leg was crushed. The only evidence submitted regarding the number of hours worked is that he was one third through his work day and it was only 2:00 p.m. That is more than sufficient evidence of a daily rate of pay. Perhaps if Employer kept better records, the issues could be clearer. But to punish Claimant for Employer's sloppy bookkeeping is plainly wrong.

III. Conclusion

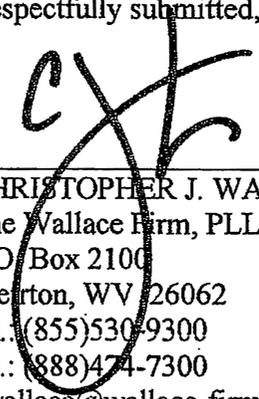
The Board of Review committed an error of law. It added requirements to a plainly worded statute. It demanded continuous and "consistent" wages when the law simply doesn't require that evidence. A "daily rate of pay" is a clear and simple concept. It is what a person would earn in a day of work. There is a reason the statute gives two choices, the daily rate of pay or the weekly analysis over preceding quarters. At times, as in the instant case, there will

not be a sufficient wage history to examine the preceding quarters. At that point the statute presents a simple question: "What was the injured worker to be paid in the day he was hurt?" The evidence in the instant case presents a clear answer. Claimant would be entitled to a daily wage of at least \$128.00.

The Board of Review simply cannot add legal requirements to a plainly worded statute. It committed reversible error in doing so and should be reversed and the Office of Judge's Order reinstated.

Respectfully submitted,

BY:

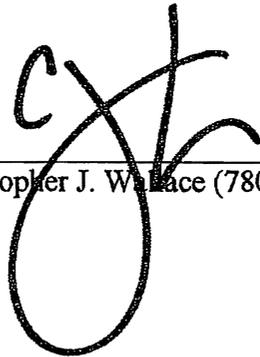


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CERTIFICATE OF SERVICE

A true and accurate copy of Claimant/Petitioner's Reply Brief was served on the 9th day of December, 2013, by placing a copy of same in the United States Mail with service to the following:

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