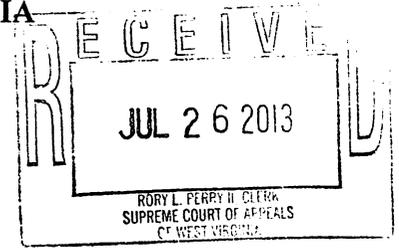


BEFORE THE STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS



ROBERT L. LACY,

Appellant,

SUPREME COURT NO.: 11-1092

v.

Appeal No.: 2045637
OOJ Case ID No.: OOJ-A310-001383
Judicial Claim No: 2010099767
BOR Order: 07/19/2011

BBL-CARLTON, LLC,

Appellee,

SUPPLEMENTAL BRIEF ON BEHALF OF
APPELLANT, ROBERT L. LACY

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Appellee.

I. ISSUE ON APPEAL

Whether the claimant is entitled to additional Vocational Rehabilitation Services.

II. STATEMENT OF THE CLAIM

The claimant, Robert Lacy, injured his low back on July 23, 2009, in the course of and resulting from his employment.

In a narrative report dated September 30, 2009, Dr. Mark Calfee indicated the claimant had been bending over, tying rebar, when he experienced sharp, stabbing pain in the lumbar spine. He immediately tried to stand up, but was stuck in a flexed position. When he was able to stand partially upright, he had a constant ache and stabbing pain in the low back. (Exhibit A).

Dr. Calfee reported on January 5, 2010, that the claimant had shown improvement, but continued to experience ongoing low back pain with intermittent radiation into the right gluteal area and lower extremities. Dr. Calfee also indicated he would withhold judgment regarding the claimant's potential to return to work as an ironworker pending receipt of a functional capacity evaluation. (Exhibit B). On April 15, 2010, Dr. Calfee listed the claimant's work restrictions as minimal bending/twisting at the waist; occasional forward bending, minimal crawling and no lifting in excess of fifty pounds. (Exhibit C).

In Task Assignment Report #1 dated December 14, 2009, vocational expert Ed Watson indicated that the claimant was advised to find work less physically demanding than the ironwork he had been doing. (Exhibit D). On January 18, 2010, Mr. Watson clarified that the claimant had earned an Associate Degree in Applied Science and Construction Engineering in 2003 before joining the Iron Workers' Union. Mr. Watson reported on February 17, 2010, that the claimant had started a work-conditioning program, but there was still concern regarding the claimant's ability to bend and his ability to perform ironwork. The claimant had been looking for jobs online and in the newspaper, but found nothing paying more than \$10.00 per hour. He felt he had no alternative, but to attempt to return to iron work. In Task Assignment Report #4 dated March 7, 2010, , Mr. Watson reported that the claimant requested that Dr. Calfee release him to return to work. Dr. Calfee refused. In physical therapy, the claimant progressed from light to heavy physical demand level and from nearly no bending to occasional bending, but he did not reach the level of frequent bending required of ironworkers. Mr. Watson noted that if the claimant's employer could not provide job accommodations, job search should be considered and if that did not lead to suitable gainful employment, then retraining would be an appropriate option to attain his pre-injury income level of \$206.24 per day. (Exhibit E).

In Task Assignment Report #6 dated April 30, 2010, Mr. Watson documented the claimant's participation in job search activities. The claimant focused on employment with a major utility or the State. The claimant received no job offer deemed comparable to his pre-injury position. (Exhibit F).

Kanawha Valley Community and Technical College notified prospective students regarding a Power Plant Technology program to apply for admission. AEP Employment Information dated March 11, 2010, indicated that over the next 5 to 7 years 30 jobs per year would become available at power plants within 100 miles of Charleston. The wage rate would

range from entry level of \$15.69 per hour to a top rate of \$29.58 per hour plus benefits of approximately 37% of wages. (Exhibit G).

Mr. Watson reported in his Rehabilitation Plan dated May 24, 2010, that he could not identify a sedentary, light, or medium job opening for which the claimant was qualified and which paid a comparable wage. Mr. Watson specifically concluded that the claimant would not likely find employment through job search, but that the Power Plant Technology Program would allow for comparable employment. (Exhibit H).

By order dated June 30, 2010, the Claims Administrator corrected the claimant's workers' compensation benefits weekly rate from \$1,031.20 to \$1,631.16. (Exhibit I).

On April 30, 2010, Mr. Watson reported that the claimant had a 3.23 GPA in his prior community college degree which supports his ability to acquire new skills that will lead to a job closer to his pre-injury wage than any job he might get without retraining. (See Exhibit F). In Task Assignment Report #7 dated May 31, 2010, Mr. Watson reconfirmed that the claimant was unable to locate comparable employment through direct job search. Mr. Lacy wanted to pursue the Power Plant Technology Program. Mr. Watson specifically endorsed that decision. (Exhibit J). On May 24, 2010, Mr. Watson submitted a Rehabilitation Plan for the Claims Administrator's consideration. Mr. Watson reported that it was obvious from the outset that job search would not yield comparable employment opportunities. Mr. Watson noted that the Power Plant Technology Program offered at Kanawha Valley Community and Technical College was designed to prepare students for employment as an entry-level power plant operator with excellent employment opportunities in West Virginia and throughout the United States. Mr. Watson requested that the Claims Administrator authorize enrollment in the Power Plant Technology Program. (See Exhibit H).

Vocational consultant Casey Vass evaluated the claimant rehabilitation potential on June 7, 2010. That report was not introduced into evidence and was not part of the evidentiary record before the Office of Judges or the Board of Review.

At a deposition on July 21, 2010, Ed Watson testified that Dr. Calfee found the claimant had reached maximum medical improvement in April 2010 and released him to attempt to return to work through a vocational rehabilitation program. Vocational rehabilitation has a 7-step hierarchy. Steps 1 through 4 involve returning to work with the previous employer in the pre-injury position or a modified position. The employer could not accommodate the claimant's work restrictions. Steps 5 and 6 are variations of job search. The claimant participated in job search, but was unable to locate comparable employment within his reduced range of physical ability. Step 7 of the vocational rehabilitation hierarchy is retraining. Mr. Watson recommended that the claimant be authorized to enroll in a Power Plant Technology Program so that the claimant could obtain suitable gainful employment which returns the injured worker as close as possible to the pre-injury employment level. (Exhibit K).

At a deposition on August 20, 2010, the claimant testified that in 2008 he earned \$60,000.00. When the Claims Administrator refused to authorize the claimant to enroll in the vocational rehabilitation program recommended by Ed Watson, he was forced to take temporary employment with Coalfield Community Action Partnership weatherizing houses for low-income households. Community Action Partnership had a one-year contract with the State. The claimant's employment would disappear with expiration of that contract. He had no upward mobility; no reasonable opportunity for long-term employment with Community Action Partnership; and no potential to approximate pre-injury income or the income potential after earning a degree in Power Plant Technology. The claimant accepted the temporary position with Community Action Partnership out of desperation because the Claims Administrator denied authorization for retraining and terminated his temporary total disability benefits. (Exhibit L).

At a deposition on September 10, 2010, Ed Watson reconfirmed that the claimant should be authorized to enroll in the Power Plant Technology Program. Mr. Watson testified that the claimant's temporary employment with Community Action Partnership is "not even close" to employment comparable to his pre-injury position or a position he could obtain after earning a degree in Power Plant Technology. He acknowledged that the claimant accepted temporary employment on an emergency basis. That employment does not disqualify the claimant for vocational retraining. Mr. Watson noted that the starting salary for a plant operator is \$15.69 per hour and it goes up to \$25.59 after three years. The claimant's current job even if he were promoted to supervisor, would not exceed \$17.00 per hour. Mr. Watson reconfirmed that the position for which the claimant seeks training is well within his physical capabilities. Mr. Watson also noted that Casey Vass had grossly understated job availability for prospective AEP employees trained in Power Plant Technology. Mr. Vass misread program information to indicate availability of only 30 jobs in the next 5 to 7 years. (6 jobs per year). In fact, Mr. Watson pointed out that AEP would create 30 job openings per year over the next 5 to 7 years (a total of 150-210 jobs). Mr. Watson also addressed a recent newspaper article reporting an expected work force reduction at AEP. Mr. Watson testified that AEP had informed him that the reduction in work force was accomplished through early retirement and would not affect job availability for junior power plant operators. (Exhibit M).

By decision dated February 25, 2011, the Office of Judges affirmed the Claims Administrator's orders dated June 9, 2010, denying a formal retraining program and August 19, 2010, closing the claim for rehabilitation services. The judge reasoned that income as a plant operator is projected to increase to a level close to the claimant's pre-injury level after three years is "merely a projection and not a guarantee and no more certain than his current job, which is a one-year contract." (Exhibit N). The claimant appealed. By order dated July 19, 2011, the Board

of Review affirmed the Office of Judges' decision dated February 25, 2011. (Exhibit O). It is from that order that the claimant petitions this Court for review.

III. LEGAL AUTHORITIES

West Virginia Code § 23-4-1c

West Virginia Code § 23-4-1g

West Virginia Code § 23-4-9

85 CSR 15-2.1

85 CSR 15-3.6

Roe v. Wade 410US113 (1973)

Williby v. West Virginia Office of Ins. Comm'r, et al., 224 W.Va. 358, 361, 686 S.E.2d 9, 11 (2009). W.Va. Code § 23-5-15(c)

IV. ARGUMENT

A. Standard of Review.

An appeal from the Board of Review (“BOR”) to the West Virginia Supreme Court of Appeals is guided by W.Va. Code § 23-5-15(b) which provides that “[i]n reviewing a decision of the board of review, the supreme court of appeals shall consider the record provided by the board and give deference to the board’s findings, reasoning and conclusions[.]” Williby v. West Virginia Office Ins. Comm’r, et al., 224 W.Va. 358, 361, 686 S.E.2d 9,11 (2009). W.Va. Code § 23-5-15 (c) provides that:

if the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of the law, or is based upon the board’s material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighting of the evidentiary record.

West Virginia Code § 23-4-9 provides for vocational rehabilitation services. The statute provides that it is a goal of the Workers' Compensation program to assist workers to return to suitable gainful employment after an injury. It is the shared responsibility of the employer, the employee, the physician and the Claims Administrator to cooperate in the development of a rehabilitation process designed to promote reemployment of injured employees. Where an employee has sustained a permanent disability or an injury likely to result in temporary disability in excess of a period to be determined by rule of the Commission, the Claims Administrator is required to determine whether the employee would be assisted in returning to remunerative employment with the provision of rehabilitation services. If such a determination is made, the Claims Administrator is to develop a rehabilitation plan for the employee.

85 CSR 15.2.1 provides "It is a goal of the workers' compensation program to assist workers to return to suitable gainful employment after a compensable injury." That proposition is restated in 85 CSR 15.2.1 with even greater clarity and specificity as follows:

It shall be the goal of the Commission and all interested parties to return injured workers to employment which shall be comparable in work and pay to that which the individual performed prior to the injury. If a return to comparable work is not possible, the goal of rehabilitation shall be to return the individual to alternative suitable gainful employment, using all possible alternatives of job modification, restructuring, reassignment and training, so that the individual will return to productivity with his or her employer or, if necessary, with another employer.

While West Virginia Code § 23-4-9 imposes an obligation upon the Workers' Compensation Program to assist workers to return to suitable gainful employment after an injury.

85 CSR 15-3.6 defines the meaning of "suitable gainful employment" in the following manner:

"Suitable gainful employment" means employment which restores the injured as closely as possible to his or her pre-injury physical demand level and pre-injury level of earnings at the time of injury, or, if this is not possible, suitable gainful employment means other work for which the employee is, or may become suited by training, experience or education.

West Virginia Code § 23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

By all accounts, this claimant cannot return to his past employment or any other employment requiring similar physical demands. The claimant's pre-injury employment paid between \$25.00 and \$30.00 an hour. He earned \$60,000.00 in 2008. When retraining was denied, the claimant took a one-year temporary position earning \$15.00 per hour while the parties litigated his entitlement to be retrained as a power plant technician. That position has entry-level compensation of \$15.00 an hour, but pay would increase to \$25.00 per hour after three years.

The claimant's temporary employment earning \$15.00 per hour weatherizing low-income homes is a dead end job with a stated expiration date and no reasonable expectation for advancement or a meaningful pay increase. It is not suitable gainful employment compared to the claimant's pre-injury position and it never will be. Vocational expert Ed Watson reported that retraining as a power plant technician is an appropriate vocational goal giving the claimant long-term ability to approximate his pre-injury income.

When the Office of Judges affirmed closure of the claimant's vocational rehabilitation services the Judge reasoned as follows:

Even though the claimant's position may be a one-year contract, it does not necessarily mean that he will not continue to work at said job. If claimant were to be retrained, job opportunities in a new field are not guaranteed.

Vocational rehabilitation is not about guaranteed employment. Rehabilitation services are intended to put the claimant in the best position to obtain suitable gainful employment. If guaranteed employment were the legal standard used in such matters no claimant would ever qualify for rehabilitation services. Rehabilitation is about opportunity. This claimant lost a career due to his occupational injury. Vocational rehabilitation to become a Power Plant Technician provides him with the best opportunity to obtain substantial gainful employment. The claimant should not be denied that opportunity because an administrative law judge thinks that the claimant's temporary employment could last longer than his employer has committed. The judge's position is even more indefensible considering that the pay rate earned from the claimant's employment does not reach the level of comparable suitable employment even if it lasts forever. By denying the claimant any opportunity to be retrained as a Power Plant Technician the Office of Judges has sentenced the claimant to earn half of his pre-injury income in a job which is intended to last no more than one year with no prospect for advancement. In no way does the claimant's temporary low wage employment with no potential for advancement satisfy the definition of suitable gainful employment. Vocational expert Ed Watson's recommendation that

the claimant be trained as a Power Plant Technician provides the claimant the only reasonable opportunity for suitable gainful employment. The Office of Judges was clearly wrong to dismiss the opinion of the Claims Administrator's vocational expert who recommended that the claimant be approved for the requested training program. The record contains no contrary opinion. The opinion of Casey Vass, which is not part of the record, is riddled with errors and inaccuracy making his conclusion unreliable even if it could be considered.

Additionally, the claimant's decision to return to work, which was not suitable, gainful employment in that it does not return the claimant, as closely as possible, to his pre-injury level of earnings, does not render the vocational rehabilitation issue moot. The claims administrator's denial of vocational retraining and the length of time required to litigate the issue effectively forced the claimant to accept any available employment, even employment that does not return him to a suitable, gainful position. If this issue is deemed moot, no claimant will ever be able to effectively litigate this issue to conclusion and the law will never be adequately settled. The United States Supreme Court in Roe V. Wade 410US113 (1973) ruled that an issue "capable of repetition, yet evading review" should be heard upon the merits of the issue raised. In that case, abortion was addressed upon its merits even after birth of baby Roe. In this claim, the claimant accepted unsuitable work out of a need to feed his family. He could not go entirely jobless for the period of years litigation would take before final resolution of his appeal. Under these circumstances, the vocational rehabilitation issue in this claim is not moot and the claimant is entitled to a ruling upon the merits of his appeal.

V. CONCLUSION

For the foregoing reasons, please authorize the formal retraining program recommended by the Claims Administrator's vocational rehabilitation expert.

Respectfully submitted,

ROBERT L. LACY

By counsel:



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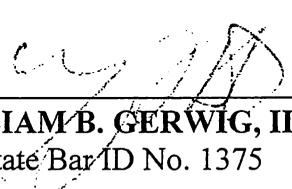
Appellee.

CERTIFICATE OF SERVICE

I, William B. Gerwig, III, do hereby certify that the foregoing "*Petition on Behalf of Claimant, Robert L. Lacy*" has been served upon all parties of record by depositing a true and exact copy thereof, via the United States mail, postage prepaid and properly addressed on this 25th day of **JULY 2013**, as follows:

BrickStreet Administrative Services
400 Quarrier Street
Charleston, West Virginia 25301

H. Dill Battle, III, Esquire
SPILMAN, THOMAS & BATTLE
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