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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

At Charleston

ROBERT L. LACY,

Petitioner,

v.

APPEAL NO.: 2045637
CRN: 2009016629
JCN: 2010099767
DOI: 07/23/09
BOR: 07/19/11
SUPREME COURT NO.: 11-1092

BBL-CARLTON, LLC,

Respondent.

FROM THE WEST VIRGINIA WORKERS' COMPENSATION BOARD OF REVIEW

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT BBL-CARLTON, LLC TO PETITION FOR REVIEW

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MEMORANDUM OF PARTIES

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I. STATEMENT OF THE CASE

Claimant was employed as an iron worker when he injured his low back while tying rebar on July 23, 2009. He was seen at a Health Plus facility, and subsequently treated with Mark Calfee, D.C. On September 30, 2009, Dr. Calfee concurred with a lumbar sprain/strain diagnosis. (Petitioner's Exhibit A.) Ultimately, claimant saw Matthew Walker, M.D. for a neurosurgical consultation on November 17, 2009. (Respondent's Appendix No. 1.) Dr. Walker noted that claimant has multilevel degenerative disc disease ("DDD") and low back pain for which surgery was not

warranted. His recommendations were for strength training and conditioning, and that claimant seek employment that requires less strenuous labor.

The Claim Administrator referred claimant to Edwin Watson for rehabilitation services, and eventually, Mr. Watson submitted a plan to retrain claimant for employment in the field of power plant technology. (Petitioner's Exhibit H.)

In its June 9, 2010 order, the Claim Administrator denied Edwin Watson's plan to retrain claimant for employment in power plant technology. (Respondent's Appendix No. 2.) The Claim Administrator found that claimant is employable at his current physical demand level, without training, in occupations commensurate to his pre-injury annual earnings. The Claim Administrator added that claimant is certified in Welding, OSHA/MSHA and CPR/First Aid, and has an Associate's Degree in Architectural Drafting and Construction Technology. The Claim Administrator noted that the recommendation to pursue work not requiring "so much strenuous labor as far as lifting, twisting and bending" was due to claimant's DDD which is not a compensable diagnosis. The Claim Administrator further found that the job duties in the proposed vocational goal exceed the treating physician's current restrictions. The Claim Administrator deemed employment opportunities in the power plant technology field to be very limited noting the potential employer in West Virginia is currently undergoing a workforce reduction. Claimant protested.

The following evidence is of record in this proceeding:

Power plant employment information: In reference to the power plant technology field in which claimant seeks retraining, claimant submitted a Position Description for Equipment Operator Junior from Appalachian Power ("AEP") (Respondent's Appendix

No. 3), AEP Employee Information Updated 3/11/10 (Petitioner's Exhibit G), a letter by Ron Rogillio, Director of the Power Plant Technology program at Kanawha Valley Community and Technical College (Respondent's Appendix No. 4), Occupation Profile for Power Plant Operators in West Virginia (Respondent's Appendix No. 5), and the Dictionary of Occupational Titles description for Power Plant Operator (Respondent's Appendix No. 6).

12/14/09 Task Assignment Report #1 by Edwin Watson: BBL-Carlton advised that the job claimant worked on is completed and they have no active construction. Claimant **graduated from West Virginia State in 2003 with a degree in Construction Engineering.** Dr. Walker suggested a less strenuous occupation. Dr. Calfee wants a functional capacity evaluation ("FCE") before making a determination. Dr. Calfee is to provide a report addressing whether the current TTD and prognosis for return to the pre-injury occupation is a consequence of the work injury or due to the DDD. (Petitioner's Exhibit D.)

01/05/10 Progress Update by Mark Calfee, M.D.: Significant improvement, but continues with ongoing low back pain with intermittent radiation into the right gluteal and lower extremity regions. Dr. Walker, a neurosurgeon, determined he did not have a surgical case, but suggested changing occupations. Will continue chiropractic therapy and withhold a prognosis for return to work as an iron worker pending receipt of the recent FCE. (Petitioner's Exhibit B.)

01/13/10 (DOE 12/29/09) lumbar x-ray report by Jack Henry, D.C.: Impression: 1. Non-specific calcification projected overlying the right renal shadow. KUB evaluation may be helpful as initial follow up. 2. The appearance of the L4 and L5 pars is most

likely related to stress. 3. Facet tropism, lumbar spine. 4. Facet arthrosis at the lumbar spine. 5. Minute spondylosis, mid lumbar spine. 6. Mild degenerative posterior stair step L3 level. (Respondent's Appendix No. 7.)

01/18/10 Task Assignment Report # 2 by Edwin Watson: Claimant is in work conditioning/work hardening. He feels he is doing well but finds it depressing that he won't be able to return to work as an Ironworker. He wanted information about vocational rehabilitation so he was given some basic explanations. (Respondent's Appendix No. 8.)

02/17/10 Task Assignment Report # 3 by Edwin Watson: In work conditioning he worked hard and progressed but has concerns about bending. He advanced to work hardening, and bending improved. Claimant was looking online and at newspaper ads and found nothing that pays more than $10 per hour, so he feels he has no choice but to return to work as an Ironworker while continuing to look for another occupation. (Respondent's Appendix No. 9.)

03/07/10 Task Assignment Report # 4 by Edwin Watson: Claimant was discharged from work hardening. He had progressed from no bending to "Occasional Plus" bending, but that does not meet the DOT requirement for frequent bending for the occupation of Structural Steel Worker. Claimant said he had increased symptoms with bending. Based on the work hardening discharge report, Dr. Calfee did not provide a work release but did recommend referral to a pain clinic. (Petitioner's Exhibit E.)

03/15/10 letter by Mark Calfee, M.D.: The work hardening exit report showed progression to the heavy PDL. He was unable to complete frequent requirements for bending due to severe low back pain. Based on his ongoing difficulty in flexion

maneuvers (which is required as iron worker), he should undergo pain management to determine if this may result in more functional improvement. (Respondent's Appendix No. 10.)

04/06/10 Task Assignment Report # 5 by Edwin Watson: The employer advised that it cannot accommodate the restrictions in the 03/04/10 Functional Capacities Overview. Dr. Calfee's office faxed a 03/24/10 work release with a 25 lb max lift, minimal bending/twisting of the waist or crawling and no forward bending. He is a poor candidate for a sustained return to heavy work; however, I had medium with occasional bending in mind. Instead Dr. Calfee provided a work release for light work with ***no forward bending***. This markedly narrows vocational options for job search. Claimant was also surprised and plans to discuss it with Dr. Calfee. He feels he can lift more and can bend though he cannot remain in a stooped position. Claimant has been mostly applying to larger companies where he has contacts and likely more than light jobs, but he ***needs to explore jobs on the Plan regardless of possible pay***. (Respondent's Appendix No. 11.)

04/15/10 note by Dr. Calfee: Work restrictions in effect through 05/31/10: ***Minimal bending/twisting of waist***. ***Occasional forward bending***. Maximum lifting 50 lbs. Minimal crawling. (Petitioner's Exhibit C.)

04/30/10 Task Assignment Report # 6 by Edwin Watson: Claimant's primary focus is on employment with one of the major utilities or the State. He is generally applying for Medium level jobs even though the work release is for Light jobs. He was advised that he needs to fully participate in the plan, not worry about wasting other people's time and document what he can about job openings/wages that are actually

available. Claimant asked if he can turn down job offers paying low wages. I told him to call me first. (Petitioner's Exhibit F.)

On 04/20/10, claimant provided a new 04/15/10 work release from Dr. Calfee with a ***maximum lift of 50 pounds, occasional forward bending, minimal bending/twisting of the waist and minimal crawling (Medium)***. Mr. Watson provided claimant with a report of Medium jobs to add to his job search and advised he would have a new Rehab Plan for the next meeting. *Id.*

On 04/26/10, a new plan was signed. Claimant was interested in the Power Plant Tech program at a community college. On 04/29/10, he said he had been offered a job paying $8.00 an hour (with no benefits) working at a bowling alley. His pre-injury average weekly wage was $1,031.00. The Claim Administrator's initial response was that claimant must accept the job with TPR, but that response was under review. *Id.*

Mr. Watson advised claimant that he did not have to accept the job unless he chose to do so, which he did not. He also noted that the goal of rehabilitation is a return to comparable work and pay, and that suitable gainful employment is defined in Rule 15 as "employment which restores the injured worker as closely as possible to his preinjury level of earnings. 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, but not limited by his or her previous level of earnings." *Id.*

Mr. Watson opined that $8.00 per hour is not "comparable" to an average weekly wage ("AWW") of $1,031.00, and that requiring claimant to take the bowling alley job and 52 weeks of TPR is not a return to suitable gainful employment "using all possible alternatives." He further opined that the bowling alley job offer supports that return to

work at Hierarchy level 5 is "unlikely to result in placement ... into suitable gainful employment." He further opined that claimant's 3.23 GPA in his prior community college degree supports that he has the capacity to acquire new skills and thereby a job that pays more, though likely not as much as his pre-injury AWW, with potential to advance closer to his pre-injury wage. Claimant was to continue his job search with exploration of alternate positions that may or may not require additional training. *Id.*

05/25/10 Rehabilitation Plan by Edwin Watson: Mr. Watson reported that he could not identify a Sedentary, Light or Medium job opening that pays more than $12.00 per hour. Mr. Watson asserted that a job search clearly will not lead to suitable gainful employment, but that his training proposal will. Claimant therefore decided to pursue the power plant technology program. AEP ***reportedly advised*** Mr. Watson that the job typically does not require any lifting over 50 pounds and when it does there is always help available. The physical abilities assessment mentioned below requires a candidate carry a 50 pound tool box 25 feet, lift 25 pounds of sand with a shovel, bolt a 10-5 pound plate to a flange and climb 17 steps on a ladder. Mr. Watson concluded that the job falls in the Medium category with occasional bending based on claimant's detailed observations of the job in own work as an Ironworker at AEP, Mr. Watson's discussion with a relative who is an instrument technician at AEP, his discussion with Mike Howard in HR at John Amos, his conversation with Ron Rogillio, the director of the Power Plant Technology program, a review of documentation provided about the physical requirements and the pre-employment physical (from the school and AEP), and the Dictionary of Occupational Titles. (Petitioner's Exhibit H.)

Mr. Watson reported that excellent employment opportunities exist in West Virginia for students who complete the power plant technology program. Students are free to obtain employment with any power company or industrial company. Graduates are qualified to start at a power plant as a Junior Operator, and will have participated in a power plant internship. Earnings Potential is reportedly **$15.69 per hour to start** and **up to** $25.56 per hour **at three years** based on input from the school and AEP. Mr. Rogillio advised that AEP's plan for workforce reduction was being achieved by a voluntary termination/buy-out program. Mr. Howard indicated the hiring of program graduates **will be temporarily slowed** but, due to an aging workforce, he **expects demand to be restored** and not an issue in mid-2012 when claimant would graduate. *Id.*

05/31/10 Task Assignment Report # 7 by Edwin Watson: Assignment is job search. On 03/15/10, Mr. Samples advised BBL cannot accommodate restrictions. On 04/15/10, I have yet to identify a Sedentary, Light or Medium job opening for which he is qualified that pays more than $12.00 per hour. Claimant's only job offer was one that paid $8.00 per hour. We will continue job search but clearly it will not lead to suitable gainful employment while the proposed training will. Therefore, he would like to pursue this program and does so with my support. Waiting until after 05/30/10 when classes start 06/14/10 was inadvisable so it was submitted on 05/25/10. (Petitioner's Exhibit J.)

06/01/10 Rehabilitation Plan by Edwin Watson: Claimant was to continue his job search as requested by the Claim Administrator. (Respondent's Appendix No. 12.)

06/30/10 BrickStreet notice: AWW was changed from $1,013.20 to $1,631.16. (Petitioner's Exhibit I.)

July 21, 2010 deposition of Ed Watson: Ed Watson is a rehabilitation counselor and case manager and has been working with claimant through physical rehab, work conditioning and a return to work as an iron worker. In his work with claimant he had the opportunity to review all relevant medical records and those indicating that he ultimately ended in a medium work capacity with occasional bending and minimal crawling and twisting. (Petitioner's Exhibit K.)

After the work hardening was complete, Mr. Watson sent a copy of the discharge report to BBL Carlton and asked if they could accommodate claimant's restrictions, and they could not. According to Mr. Watson, that eliminated the first several steps of the rehab hierarchy and next was job search. Mr. Watson described the steps for the job search with the ultimate goal of the entire rehab process being "suitable gainful employment" which he described as employment which gets the worker back as close as possible to the pre-injury work and pre-injury earnings. If that is not possible, then other work for which the worker may be suited, possibly with the acquisition of new skills and not necessarily at the same earnings. He said this definition comes from Rule 15. Mr. Watson believes that there is the flexibility in the Rule to move someone to retraining if that will provide more opportunity to return to his pre-injury income level, than other jobs which might match their physical restrictions but not close to income. *Id.*

As far as TPR, Mr. Watson said that there are 52 weeks available, and **if the alternative employment cannot be expected to include increases over that time limit which would bring the worker to a similar level of income, that would not be suitable gainful employment**. Claimant's job search only yielded one job offer at a

bowling alley for $8/hour, which was not suitable employment and Mr. Watson stated that BrickStreet ultimately agreed. *Id.*

Claimant was advised to continue with the job search, but Mr. Watson (in additional to ongoing job search) also submitted a plan for the training in Power Plant Technology at Kanawha Valley Community Technical in conjunction with AEP. He also noted that while the claim adjuster stated that the job was more physically demanding than lifting 50#, he spoke with several people involved in the program, including Ron Rogillio (who is the program director), who stated that it is no more than 50# with occasional bending. This is also consistent with claimant's observations from the times he worked at AEP and saw the operators. *Id.*

Under direct examination by claimant's counsel, Mr. Watson was questioned extensively regarding the details of Casey Vass' review of the proposed training. He testified that there were five reasons he felt the training was not necessary. The following are the reasons and Mr. Watson's response:

1. Claimant is employable because he has a college degree. Response: He is employable but not in any job that will get him close to his pre-injury pay. There were no drafting jobs for claimant, and any that were open were looking for a specific type of drafting, with 5-7 years of experience, and were paying $12-15/hour.

2. The job for which claimant seeks the training is too physically demanding. Response: Mr. Watson's research and claimant's own knowledge of the position shows that it is within claimant's physical capabilities. Mr. Vass' concern seemed to be mostly focused on the bending because it was identified in the training program documents that

it requires some shoveling. "Some shoveling" does not equate to constant shoveling. He noted that claimant is able to bend up to one-third of the day.

3. The projected job availability is insufficient: only 30 jobs in the next 5-7 years (6 jobs per year). Response: Mr. Watson noted that Mr. Vass misread the information from the program, and it actually indicates that it will be thirty jobs per year over the next 5-7 years. (A total of 150 - 210.) Plus, through his contacts with AEP and Ron Rogillio, Mr. Watson learned that the reduction in force at AEP that was noted in the news was actually accomplished through early retirements, and AEP still anticipated the same demand for junior operators.

4. Claimant's limitations in bending are due to some non-compensable conditions. Response: BrickStreet has authorized physical and vocational rehabilitation all along and not questioning whether it was related to the compensable injury.

5. Rate of pay should not be used as justification for training. Response: Rate of pay is included in assessing whether alternative work is suitable gainful employment and is therefore a good reason to look at training. *Id.*

Finally, Mr. Watson confirmed that claimant's efforts in the job search were good and sincere and he believes the only way to get claimant to suitable gainful employment close to his pre-injury income level is through re-training. *Id.*

Claimant testified on August 20, 2010 regarding his seven-plus year career as an ironworker. (Petitioner's Exhibit L.) Claimant's testimony regarding his efforts at vocational rehabilitation was consistent with that of Mr. Watson including his progression through the rehab hierarchy. Claimant was able to provide more detail regarding his pay increases during his 7+ year career as an ironworker. He started out

as an apprentice and moved very quickly to journeyman. A journeyman ironworker makes between $25 - $30 dollars an hour, and claimant stated that in 2008, he made approximately $60,000, which would be consistent with the $28 - $30/hour range. His understanding with regard to the program he wants to attend to become a power plant technician is that his entry level pay would start at $15/hour and by the end of three years would be to about $25/hour.

Claimant also testified that he has recently taken a job as a weatherization technician for Coalfield Community Action Partnership. His pay is $15/hour and there is no real opportunity for upward mobility except for the possibility of becoming a crew leader for $17/hour. He has a one year contract and the job requires more bending than he should really do, but he testified that he really needed to get a job. *Id.*

On September 10, 2010, vocational consultant Ed Watson testified in reference to claimant's new employment. (Petitioner's Exhibit M.) This testimony related to the new employment claimant obtained with Coalfield Community Action Partnership weatherizing low income houses. The job pays $15/hour and is a one-year contract with no possible advancement. This is a government funded job for that one-year period. Mr. Watson testified that this information does not change his opinion that claimant needs to be retrained for a position as a power plant technician. Mr. Watson testified that this new employment is "not even close" to being comparable to the employment that claimant had before his injury.

Mr. Watson indicated that the starting salary would be $15.69 per hour to start, and **projected to be** up to $25.56 per hour after three years for a forty-hour week. *Id.*

Although claimant indicated at his deposition that he has a one-year contract, Mr. Watson did not discuss with claimant whether that necessarily means that the job ends after a year. He agreed that the supervisor's job would increase his pay to $17/hour, but Mr. Watson did not know what claimant's chances were for obtaining that position, and felt that it still would not be comparable to his pre-injury income or the potential income of the plant technician. *Id.* He admitted that he did not independently investigate the details of claimant's current employment or the possibilities of long term employment and advancement.

By order dated August 19, 2010, the Claim Administrator closed the claim for rehabilitation services on the basis that claimant obtained suitable gainful employment with a new employer. (Respondent's Appendix No. 13.) Claimant protested.

In reference to the August 19, 2010 rehabilitation closure, the Employer submitted into evidence orders by BrickStreet Insurance dated August 24, 2010, August 24, 2010, September 3, 2010, September 3, 2010, September 10, 2010, September 28, 2010, October 5, 2010, October 5, 2010, October 12, 2010, October 12, 2010, October 22, 2010 and November 9, 2010. (Respondent's Appendix No. 14.) These orders granted claimant temporary partial rehabilitation ("TPR") benefits for the period from July 26, 2010 (the day claimant started the job with Coalfield Community Action Project) through October 23, 2010. TPR benefits continued to be granted after the expiration of the evidentiary time frame in this matter.

After considering all of the evidence summarized above, Administrative Law Judge Martha Hill ("Judge Hill") issued a Decision dated February 25, 2011 affirming the orders dated June 9, 2010, and August 19, 2010. (Petitioner's Exhibit N.) Judge Hill

concluded that a preponderance of the evidence supports the denial of Mr. Watson's rehabilitation plan, and the closure of the claim for rehabilitation services. The Judge noted that "claimant returned to substantial gainful employment without the need for an additional training program." Although claimant was working in his new employment with a one year contract, Judge Hill observed that such did not mean that he would be unable to continue in the job in the future. In reference to the proposed retraining program, Judge Hill further noted that "job opportunities in a new field are not guaranteed." It is from this decision which claimant prosecutes the instant appeal.

By Order dated July 19, 2011, the Board of Review affirmed Judge Hill's Decision. (Petitioner's Exhibit O.) Claimant prosecutes the instant petition for review from the Board of Review's Order.

II. SUMMARY OF ARGUMENT

Claimant has not demonstrated with reliable and credible evidence that the retraining program he seeks to have authorized will provide a more suitable alternative employment than he has already retained without such training. Judge Hill's decision was not clearly wrong in finding that a preponderance of the evidence supports the denial of Mr. Watson's rehabilitation plan, and the closure of the claim for rehabilitation services. As Judge Hill noted, claimant returned to substantial gainful employment without the need for an additional training program. Additionally, Claimant fails to demonstrate that the findings of fact of the Board of Review are manifestly against the weight of evidence. *See* W. Va. Code § 23-5-15(c).

III. 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 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-weighing of the evidentiary record.

Claimant has not identified any constitutional or statutory violation nor has he specifically pointed to any erroneous conclusions of law. Rather, claimant simply argues for an evidentiary construction that differs from the Office of Judges' findings that were adopted by the BOR. Accordingly, the BOR's Order may only be reversed or modified upon a determination that the BOR has made a "material misstatement or mischaracterization of particular components of the evidentiary record."

In this case, the BOR affirmed the Administrative Law Judge's Decision under the standards set forth at W. Va. Code § 23-5-12(b), which provides in pertinent part that the BOR may reverse the decision of the administrative law judge only "if the

substantial rights of [a party] have been prejudiced" because the administrative law judge's decision was unlawfully made, the decision exceeded the jurisdiction of the administrative law judge or the decision was "[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record."

In applying the "clearly wrong" standard, this Court has said, "if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact." *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402, 412 (1994). This Court has also emphasized that "[t]he Legislature has determined by its enactment of W. Va. Code § 23-5-12(b) that the [BOR], in essence, must accord deference to decisions by the [Office of Judges]." *Conley v. Workers' Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542, 549 (1997). Thus, this Court and the Legislature have both made it clear that the decision of the administrative law judge must be "clearly wrong" before the BOR can reverse its decision. *Id.*

The Supreme Court recently explained that "'[w]hile the findings of fact of the [BOR] are conclusive unless they are manifestly against the weight of the evidence, the legal conclusions of the [BOR], based upon such findings, are subject to review by the courts.'" *Lovas v. Consolidation Coal Co.*, 222 W. Va. 91, 95, 662 S.E.2d 645, 649 (2008)(quoting *Barnett v. State Workmen's Compensation Commissioner,* 153 W. Va. 796, 172 S.E.2d 698 (1970)). Claimant fails to demonstrate that the findings of fact of the BOR are manifestly against the weight of evidence and asks this Court for a

de novo review of the evidentiary record that is not allowed by statute. *See* W. Va. Code § 23-5-15(c).

B. Judge Hill was not clearly wrong in affirming the order denying Mr. Watson's rehabilitation plan.

The goal of vocational rehabilitation is to return a worker to "suitable gainful employment" which is defined as employment which restores the injured worker **as closely as possible** to his or her pre-injury level of earnings. 85 C.S.R. § 15-3.6 (Emphasis added), and the vocational plan should reflect that goal. Although the claimant in this matter estimates that his pre-injury wages were in the range of $28 - $30 per hour, he testified that he accepted a job which pays $15 per hour. It is undisputed that this is significantly below his pre-injury wage; however, claimant accepted the job and has been receiving TPR benefits at the same time.

While matching pre-injury wages is a part of the definition of suitable gainful employment, it is recognized that this is not always possible. "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, but not limited by his or her previous level of earnings." 85 C.S.R. § 15-3.6. This rule is promulgated to achieve the goals as provided for in the Workers' Compensation statute: It is the goal of rehabilitation to return injured employees to employment which is 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 is to return the individual to alternative suitable 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. W. Va. Code § 23-4-9(a) (Emphasis added).

Following the hierarchy of vocational rehabilitation, there was no work available with the pre-injury employer within the claimant's restrictions. In fact, the employer indicated that the construction job on which claimant was working had ended, and there was no active construction, so the claimant began a job search, which yielded only a job offer from a bowling alley at $8.00 per hour. After an unsuccessful job search, which included spending time investigating jobs which were clearly *not* comparable, claimant looked into an education program which would qualify him for a junior operator position at a power plant. This pursuit began without any realistic documentation of attempts to obtain employment which would make use of the skills and training he obtained from his prior college education. The program is run by AEP and specifies that a graduate would qualify for an entry level position at $15.69 per hour to start, and, according to Mr. Watson, claimant's rehab counselor, it is **projected to be up to** $25.56 per hour **after three years**.

The problem with the proposed program is that there are many uncertainties associated with the projections: it is a rigid attempt to attain the "comparable" pay, without consideration of the variables: the success of the program, the *projected* jobs, the *projected* pay after three years as a junior operator. None of these factors is any more certain than the job claimant obtained at a rate of pay comparable to the entry level position after completion of the training program, and Mr. Vass, a vocational specialist, discussed his concern about the real likelihood of sufficient openings for the program's graduates in light of AEP's work force reductions. On that topic, Mr. Watson

could only confirm that although AEP's plan for workforce reduction was being achieved by a voluntary termination/buy-out program, a spokesperson, Mr. Howard, indicated the hiring of program graduates **will be temporarily slowed** but, due to an aging workforce, he **expects demand to be restored.** Even further, there is the fact that, in addition to the uncertainties, it could take up to five years before the claimant *might* attain a pay status which *might* be comparable to his pre-injury pay. The portions of Mr. Watson's testimony which are in bold above highlight the uncertainties.

These uncertainties are highlighted by several of claimant's submissions. Claimant submitted a one-page document titled "AEP Employment Information" which purports to contain the optimistic employment projections heavily relied upon by Mr. Watson to suggest that the training program is appropriate. It states that "Over the next 5 to 7 years approximately 30 jobs per year will be open at 7 AEP Power Plants within 100 miles of Charleston . . . ." Immediately following that prediction, however, and never mentioned by Mr. Watson, is the caveat that "economic uncertainty may cause the projection to be significantly reduced." (Petitioner's Exhibit H.) Since the time of the litigation and referenced several times by Mr. Watson is the reality that many AEP plants were experiencing the need for reduction in forces and even closures, despite the optimistic hope that the necessary reductions would be achieved by retirements. Indeed, contrary to the projections used by AEP to promote its training program (with a cost of over $11,000.00), the "Occupational Profile for Power Plant Operators: West Virginia" submitted into evidence by claimant and contained in Respondent's Appendix No. 5, the state trends for power plant operators in West Virginia show a predicted growth from 400 such jobs in 2006 to only 410 in 2016 – not quite the 30 jobs per year

over the next 5 – 7 years (beginning in 2010) as promoted in the training program materials. The source of information for the "Occupational Profile" appears to be Workforce West Virginia – a source with no evident interest in promoting AEP's power plant operator training program.

The plan for vocational rehab which included the junior operator's program was rejected because of the employability factors claimant possesses and the uncertainties associated with the program claimant wanted to attend. Mr. Watson unwaveringly adheres to the pre-injury wage as the determining factor, yet, after one and a half years of education, the claimant will only come out with a pay rate of $15.69 per hour with the *potential* of increasing to $25 per hour after three years. Claimant is *currently* working at $15 per hour and receiving supplementation in the form of TPR payments. Mr. Watson cites to uncertainties and pay with his current job as making it an inappropriate job, yet, while claimant indicated at his deposition that he has a one-year contract, Mr. Watson did not discuss with claimant whether that necessarily means that the job ends after a year. He also agreed that the supervisor's job would increase his pay to $17/hour, but did not know what claimant's chances were for obtaining that position, and felt that it still would not be comparable to his pre-injury income or the ***potential*** income of the plant technician.

An uncertain potential cannot compare to a certain job with supplementation provided for in the Workers' Compensation Code. While no one can provide certainty regarding the job market, the one certain thing is that claimant is currently earning a pay close to what he only *might* be able to earn in another year and a half after attending the plant operator program.

C. **Judge Hill was not clearly wrong in affirming the order closing the claim for rehabilitation services.**

The closure of rehabilitation services was appropriate given claimant's successful return to gainful employment and the fact that the alternative plan from Ed Watson provides no certainty about obtaining employment after completion or a higher rate of pay at the entry level.

Claimant has taken a new job with a new employer and has testified to that effect at deposition. Although the new job provides less income than claimant's pre-injury income, claimant is receiving TPR benefits to compensate for the difference in pay. Moreover, and more importantly, he is making approximately the same as he possibly could at the entry level plant operator position after completing the proposed retraining program in nearly two years. Claimant's presumed argument is that the income for a plant operator is projected to increase to close to his pre-injury level after three years. This, however, is merely a projection and is not a guarantee -- it is no more certain than his current job. There is no certainty even that claimant could obtain an entry level position after completing the nearly two-year plant operator training program. Moreover, that entry level job is projected to provide the same wage as he is currently making, without a guarantee that he will make the "projected" $25 per hour after three more years.

Claimant obtained alternative suitable employment and is receiving supplemental benefits as provided in the Code. The rehabilitation closure was therefore proper.

Claimant fails to demonstrate that the findings of fact of the BOR are manifestly against the weight of evidence. *See* W. Va. Code § 23-5-15(c); *Lovas*, at 95, 662

S.E.2d at 649. Moreover, the decision of the Board of Review is not clearly wrong. *See Conley*, 483 S.E.2d at 549.

Claimant failed to demonstrate that the Board of Review Decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. *See* W. Va. Code § 23-5-12(b). Therefore, Claimant's petition for appeal should be refused.

IV. CONCLUSION

The reliable evidence supports Judge Hill's Decision finding that a preponderance of the evidence demonstrates that claimant returned to substantial gainful employment without the need for an additional training program. The Board of Review properly determined that Judge Hill's Decision should be affirmed. For the foregoing reasons, the Employer urges this Court to affirm the Board of Review's July 19, 2011 Order.

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Dated: August 26, 2013

CERTIFICATE OF SERVICE

I, Karin L. Weingart, counsel for BBL-Carlton, LLC, do hereby certify that I have served a true copy of the foregoing **"SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT BBL-CARLTON, LLC TO PETITION FOR REVIEW"** upon the following, by placing the same in the United States mail, first class, postage prepaid, and addressed as follows on August 26, 2013:

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