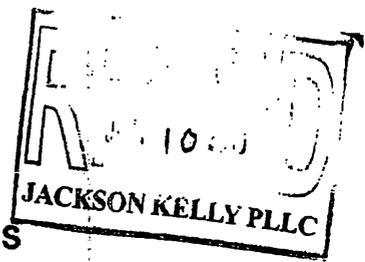


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13-1125



STATE OF WEST VIRGINIA  
WORKERS' COMPENSATION OFFICE OF JUDGES  
P. O. Box 2233, Charleston, WV 25328  
Telephone (304) 558-0852

IN THE MATTER OF:

Wayne R. Lowry,  
CLAIMANT

JCN: 2011041489

CCN: 2011008583

and

DOI: 2/16/2011

Team Environmental LLC.  
EMPLOYER

DECISION OF ADMINISTRATIVE LAW JUDGE

PARTIES:

Claimant, Wayne R. Lowry, by counsel, Christopher J. Wallace  
Employer, Team Environmental LLC., by counsel, Lucinda Fluharty

ISSUE:

The claimant protested the Claim Administrator's Order dated January 22, 2013, denying the request to increase the rate of the claimant's pay.

DECISION:

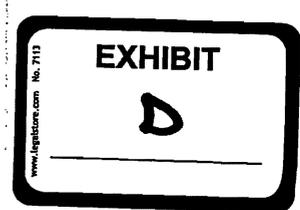
It is hereby ORDERED that the Claim Administrator's Order dated January 22, 2013, refusing the claimant's request for adjustment of compensation benefits, is REVERSED, and the claimant's benefit rates are to be adjusted as according to a daily rate of pay of \$128.00.

RECORD CONSIDERED:

See Attached, Record Considered:

FINDINGS OF FACT:

1. The claimant, Wayne R. Lowry, worked as an Environmental Field Tec for Team Environmental – Ravenswood. The claimant received an injury to



his left leg and right shoulder while removing a well lid and was struck and run over by another vehicle.

2. The claimant by counsel submitted his affidavit dated September 16, 2011; wherein at paragraph 14-15, the claimant stated that he was paid between \$16.00 and \$20.00 per hour and averaged 40 hours per week.

3. The claimant submitted the excerpts from the October 25, 2012 deposition of Carson Chenoweth, taken in a Civil Action No. 12-C-10; wherein he testified that the claimant worked with him at a Cleveland site "all day" abandoning approximately 10 wells. The following day, the date of injury: They poured concrete at the Cleveland site in the morning until around 11:00; then had lunch at McDonald's; from there the two drove approximately 45 minutes between the Cleveland site and the Speedway site, where the injury occurred. The claimant was scheduled to not only complete the task where the claimant was injured, but also had another job to complete later on that day. The claimant submitted another excerpt, the cover page and Attorney sheet, showing representations.

4. The employer submitted the 2008 Form 1099-Miscellaneous Income (non-employee compensation).

5. The employer submitted the claimant's pay checks dated October 1, 2010 through February 11, 2011.

6. The employer submitted the August 25, 2011 notarized statement of Carson C. Chenoweth, Owner. Mr. Chenoweth stated that the claimant began working for him in 2007 and at no time was he considered an employee of his company. The claimant was treated as an Independent Contractor, performing work only when he was available or wanted to work. The claimant was never on the payroll.

7. The employer submitted the 2011 Form 1099-Miscellaneous Income (non-employee compensation).

8. The employer submitted excerpts from October 25, 2012 deposition of Carson C. Chenoweth, taken in a Civil Action No. 12-C-10. From pages 36 through 47 and pages 111 through 119. Mr. Chenoweth testified that the claimant worked for him off and on from 2007 through 2011. He worked 50/50 in the shop and in the field. It was further testified that the claimant was generally paid \$16.00 an hour. Mr. Chenoweth testified that he handles the payroll for the claimant and the other employees are processed by Jill Weekley.

9. The employer submitted the correspondence dated January 10, 2013, from claimant's counsel, Christopher Wallace addressed to Brickstreet Mutual Insurance along with an excerpt from Carson Chenoweth's deposition of

October 25, 2012 (pages 40 through 47). Mr. Wallace is requesting that Brickstreet increase the claimant's daily rate of pay or issue a protestable order stating their reason for not doing so. On page 43 of excerpt Mr. Chenoweth testified that he paid the claimant generally \$16.00 an hour.

10. The employer submitted the Claim Administrator's Order dated January 22, 2013; deny changing the wage rate of the claimant.

11. The employer by counsel, Lucinda Fluharty submitted a subpoena duces tecum, served on claimant through his counsel. The employer's counsel is requesting a complete copy of the deposition transcript of Mr. Chenoweth, taken in Civil Action No. 12-C-10, and if the claimant's deposition was taken in that civil action, a copy of the claimant's deposition transcript as well.

12. The employer submitted the affidavit of Amy Taylor, Claim Adjuster for Brickstreet Mutual Insurance Company. She reported that she is the Claims Adjuster for the claimant and how she went about calculating the claimant's rate of pay.

13. The claimant submitted a closing argument dated March 30, 2013, in which he argues for an adjustment of his daily wage to \$128.00.

14. The employer submitted a closing argument dated March 25, 2013, in which it is argued that the Claim Administrator Order dated January 22, 2012 be affirmed.

### **DISCUSSION:**

W. Va. Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based upon 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.

Senate Bill 2013 amended W.Va. Code §23-4-6 in 2003. In particular, the maximum benefit rates for TTD and PPD were reduced. Subsection (b) [23-4-6(b)] reduced maximum TTD benefits from seventy to sixty-six and two-thirds percent of the claimant's average weekly wage earnings. Subsection (e)(1) [23-4-6(e)(1)] reduced maximum PPD benefits by lowering the 'cap' from one hundred percent to sixty-six and two-thirds percent of the state's average weekly wage. Both benefit rate changes apply, according to the amendment's language, to "all awards made on or after the effective date of the amendment".

In Wampler Foods, Inc. v. Workers' Compensation Division, 602 S.E.2d 805 (W.Va. 2004), the West Virginia Supreme Court upheld the Commission's application of the 2003 amendments to reduce benefit rates made in awards on or after July 1, 2003, regardless of the date of injury. The Court further found the Commission's application to be a constitutional interpretation.

Per W.Va. Code §23-4-14(b)(2):

. . .the expression "average weekly wage earnings, wherever earned, of the injured person, at the date of injury", within the meaning of this chapter, shall be computed based upon the daily rate of pay at the time of the injury or upon the weekly average derived from the best quarter of wages out of the preceeding four quarters of wages as reported to the commission pursuant to subsection (b), section two [§23-2-2], article two of this chapter, whichever is most favorable to the injured employee. . .

It is found by a preponderance of the evidence that the claimant is entitled to have his average weekly wage earnings based upon a daily rate of pay of \$16.00 per hour. On December 5, 2012, the claimant raised the issue of his correct daily rate of pay as per the correspondence dated January 10, 2013. Prior to this on September 6, 2011, the claimant swore via affidavit that his pay ranged from \$16.00 an hour to \$20.00 an hour and that he averaged 40 hours a week. With regard to the hourly pay, this was confirmed by the employer through the testimony of Mr. Chenoweth dated October 25, 2012, wherein, he testified that the claimant was generally paid \$16.00 an hour. (See deposition excerpt of Mr. Chenoweth at pg. 43) Further, the evidence preponderates the claimant was working at least eight hour days. Per the testimony of Mr. Chenoweth, on

February 15, 2011 the claimant worked with Mr. Chenoweth at a Cleveland site "all day" abandoning approximately 10 wells. (Id. at pg. 66-67). The following day, the date of injury: They poured concrete at the Cleveland site in the morning until around 11:00; then had lunch at McDonald's; from there the two drove approximately 45 minutes between the Cleveland site and the Speedway site, where the injury occurred. (Id.). This evidence establishes a daily rate of pay of \$16.00 per hour for at least an eight (8) hour workday at the time of the claimant's injury resulting in a daily rate of pay of \$128.00.

**CONCLUSIONS OF LAW:**

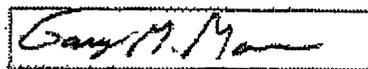
In conclusion, the preponderance of the evidence finds that the claimant's daily rate of pay is \$128.00, and therefore, the claimant's benefit rates are to be adjusted accordingly.

Accordingly, it is hereby ordered that the Claim Administrator's Order dated January 22, 2013, refusing the claimant's request for adjustment of compensation benefits, is reversed, and the claimant's benefit rates are to be adjusted as according to a daily rate of pay of \$128.00.

**APPEAL RIGHTS:**

Under the provisions of W.Va. Code §23-5-12, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or action of the Administrative Law Judge. The appeal shall be filed with the **Board of Review at P.O. Box 2628, Charleston, WV, 25329.**

Date: June 5, 2013



Gary M. Mazezka  
Administrative Law Judge

GMM:KC:lg

cc: BRICKSTREET MUTUAL  
WAYNE R LOWRY  
CHRISTOPHER J WALLACE - COUNSEL FOR CLAIMANT  
TEAM ENVIRONMENTAL LLC  
LUCINDA FLUHARTY - COUNSEL FOR EMPLOYER

JCN: 2011041489  
Date: June 5, 2013

Record Considered

Issue:

The Claimant's protest to the Claims Administrator's order of January 22, 2013, regarding APPROPRIATE BENEFIT RATE .

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified  
Document Date: 9/6/2011  
Submit Date: 3/6/2013  
Author: Affidavit of Claimant

Document Type: Not Specified  
Document Date: 10/25/2012  
Submit Date: 3/25/2013  
Author: Excerpts/ depo/ Carson Chenoweth

Document Type: Not Specified  
Document Date: 10/25/2012  
Submit Date: 3/8/2013  
Author: Carson Chenoweth/EXCERPTS

Employer Evidence

Document Type: Not Specified  
Document Date: 1/1/2008  
Submit Date: 2/25/2013  
Author: 2N/AN/A8 Mis. Income/ Team  
Environmental Field Services

Document Type: Not Specified  
Document Date: 10/1/2010  
Submit Date: 2/25/2013  
Author: Team Environmental,  
LLC/1N/A-1-1N/A to 2-11-11

Document Type: Not Specified  
Document Date: 8/25/2011  
Submit Date: 2/25/2013

Author: Carson Chenoweth

Document Type: Not Specified  
Document Date: 1/1/2012  
Submit Date: 2/25/2013  
Author: 2N/A11- W2

Document Type: Not Specified  
Document Date: 10/25/2012  
Submit Date: 3/15/2013  
Author: Carson Chenoweth/EXCERPTS

Document Type: Not Specified  
Document Date: 1/10/2013  
Submit Date: 2/25/2013  
Author: Christopher Wallace, Esq.(Depo-  
1N/A-25-12 C. Chenoweth)

Document Type: Not Specified  
Document Date: 1/22/2013  
Submit Date: 2/25/2013  
Author: Claims Administrator Order

Document Type: Not Specified  
Document Date: 2/25/2013  
Submit Date: 2/25/2013  
Author: Lucinda Fluharty, Esq./  
Subpoena Ducus Tecum

Document Type: Not Specified  
Document Date: 3/11/2013  
Submit Date: 3/15/2013  
Author: Affidavit/ Amy Taylor

**CLOSING ARGUMENTS:**

Party Submitted: Claimant  
Letter Date: 3/30/2013  
Party Submitted: Employer  
Letter Date: 3/25/2013

**STATE OF WEST VIRGINIA  
WORKERS' COMPENSATION BOARD OF REVIEW**

TEAM ENVIRONMENTAL, LLC,  
Appellant

v.

WAYNE R. LOWRY,  
Appellee

Appeal No: 2048469  
JCN: 2011041489  
DOI 02/16/2011

**ORDER**

The following case is an appeal by the employer from a final order of the Workers' Compensation Office of Judges dated June 5, 2013, which reversed the claims administrator's order dated January 22, 2013, denying the request to increase the rate of claimant's pay, and the Administrative Law Judge held that the claimant's benefit rate is to be adjusted as according to a daily rate of pay of \$128.00.

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia Supreme Court of Appeals. Upon our review of this case, we have determined to reverse the decision of the Office of Judges, as the substantial rights of the employer have been prejudiced.

**FINDINGS OF FACT:**

The Board adopts the final order's Findings of Fact with the following modification: In Finding of Fact No. 2, "September 16, 2011" is modified to "September 6, 2011."



DISCUSSION:

The Board finds the final order's analysis and conclusions are clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The issue presented is the calculation of the claimant's benefit rate pursuant to West Virginia Code § 23-4-14. In an affidavit dated March 11, 2013, Amy Taylor, the claims adjuster, explained that she asked the claimant to send in paycheck stubs and provide documented proof of wages for the four quarters preceding the date of injury in order to calculate a benefit rate for this claim. She said that no such information was received from the claimant. The employer provided her with a 1099-Misc form for the years 2008 and 2011 and payroll checks for the time period of October 1, 2010 through February 11, 2011. Following is a list of the checks: 10/1/2010 for \$600.00; 10/12/2010 for \$1,200.00; 10/23/2010 for \$800.00; 11/19/2010 for \$2,500.00; 12/11/2010 for \$2,000.00; 12/22/2010 for \$725.00; 1/28/2010 for \$500.00; 2/3/2011 for \$656.00; and 2/11/2011 for \$690.00. Ms. Taylor stated: "These checks were totaled together based on the quarter of the year they fell in. We based his rate of pay on the highest quarter preceding the quarter the date of injury fell in, which would have been the 4th quarter of 2010. The total of the wages earned for that quarter were \$7,825.00. That was then converted to the average weekly wage of \$595.38, resulting in the compensation rate of \$396.92."

The Administrative Law Judge found the claimant's daily rate of pay is \$128.00, based upon an hourly rate of \$16.00 for at least an eight-hour workday. The

Administrative Law Judge based this finding on the employer's testimony that the employer and the claimant worked all day on the day before the injury, they were to work all day on the day of the injury, and they were to work the day after the injury. The Board concludes that using this narrow window of time as the basis for the claimant's benefit right is speculative and not supported by the preponderance of the evidence. The checks from the employer to the claimant, the 1099-Misc forms, the employer's affidavit of August 25, 2011, and the testimony from the employer on October 25, 2012, do not establish that the claimant worked at least eight-hour days. In the affidavit of August 25, 2011, the employer stated that the claimant worked when he was available or wanted to work. On October 25, 2012, the employer testified that the claimant worked on and off, and it was not consistent. The Board concludes that the preponderance of the evidence establishes that the claimant worked sporadically and did not have a daily rate of pay of \$128.00. The claims administrator used the proper method of calculating the claimant's benefit rate pursuant to West Virginia Code § 23-4-14.

CONCLUSIONS OF LAW:

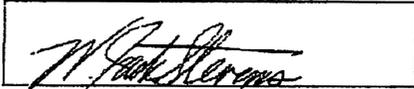
Accordingly, it is hereby ORDERED as follows:

1. The final order of the Workers' Compensation Office of Judges dated June 5, 2013, is REVERSED and VACATED.

2. The claims administrator's order of January 22, 2013, which denied the request to increase the rate of the claimant's pay, is REINSTATED.

From any final decision of the Board, including any order of remand, an application for review may be prosecuted by any party to the Supreme Court of Appeals within thirty days from the date of this order. The appeal shall be filed with Rory L. Perry, II, Clerk of the West Virginia Supreme Court of Appeals, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

DATED: October 7, 2013



W. Jack Stevens, Chairperson

cc: TEAM ENVIRONMENTAL, LLC  
LUCINDA FLUHARTY  
BRICKSTREET MUTUAL  
WAYNE R. LOWRY  
CHRISTOPHER J. WALLACE