

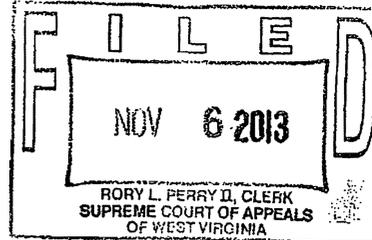
DO NOT REMOVE  
FILE COPY

FILE COPY

THE WEST VIRGINIA SUPREME COURT OF APPEALS

*R.*  
WAYNE LOWRY, ✓

13-1125



Claimant/Petitioner

vs. *West Virginia Office  
Insurance Commission*  
TEAM ENVIRONMENTAL, LLC ✓

Employer/Respondent

*order date: 10/7/13*

**CLAIMANT/PETITIONER WAYNE LOWRY'S BRIEF**

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

Counsel for Petitioner, Wayne Lowry:

Christopher J. Wallace (7807)  
The Wallace Firm, PLLC  
P.O. Box 2100  
Weirton, WV 26062  
Ph.: (855)530-9300  
Fx.: (888)474-7300  
[cwallace@wallace-firm.com](mailto:cwallace@wallace-firm.com)

**TABLE OF CONTENTS**

Table of Contents.....i

Table of Authorities.....ii

Assignment of Error..... 1

Statement of Facts and Proceedings Below.....1-3

Statement Regarding Oral Argument and Decision..... 3

Conclusions of law and Citations of Authority..... 3-4

Argument.....4-7

Conclusion.....7

Certificate of Service.....8

**TABLE OF AUTHORITIES**

*State v. General Daniel Morgan Post No. 548, Veterans  
of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353(1959).....3,6

West Virginia Code §23-4-14.....2,4,5,6

West Virginia Code §23-4-1g.....3

West Virginia Code §23-5-12(b).....3-4

**I. ASSIGNMENT OF ERROR**

THE BOARD OF REVIEW COMMITTED REVERSIBLE ERROR BY ADDING REQUIREMENTS AND STANDARDS TO WEST VIRGINIA CODE § 23-4-14 THAT DO NOT EXIST IN THE PLAINLY WORDED STATUTE AND IN DOING SO REVERSED THE OFFICE OF JUDGES AND DEPRIVED PETITIONER THE DAILY WAGE HE IS ENTITLED FOR HIS WORKERS COMPENSATION CLAIM

**II. STATEMENT OF FACTS AND PROCEEDINGS BELOW**

Claimant/Petitioner Wayne Lowry (hereafter Claimant) had his lower leg crushed by a pickup truck on February 16, 2011 in the course and scope of his employment with Employer/Respondent Team Environmental, LLC (hereafter Employer). Claimant received benefits commensurate with what the claims administrator determined to be his daily rate of pay, which was \$57.69. For an individual making \$16.00 per hour and working full time at the date of injury, this is not the appropriate wage. The daily rate of pay should be \$128.00 per day, that being eight hours times \$16.00 per hour.

At the inception of this claim, and long before the litigation which brings the parties before this Honorable Court, Claimant swore in a September 16, 2011 affidavit that he was paid between \$16.00 per hour and \$20.00 per hour, depending on his assigned tasks. (Exhibit A, p. 4 at ¶ 14) That affidavit also referenced and had attached to it as an Exhibit a December 5, 2008 letter from the Employer indicating that "Wayne Lowry works forty hours, five days a week with weekends off." (Exhibit A, p. 14) The claims administrator attempted to confirm this amount with the Employer, which conveniently could not find Claimant's pay records.

However, Employer's owner had a different version of events in his October 25, 2012 deposition in a civil action involving Claimant's injuries. In that deposition Carson Chenowith, the owner of Team Environmental, LLC, clearly and without quibbling, testified Claimant was paid \$16.00 per hour at the time of injury. (Exhibit B, Chenowith depo. at p. 43) Chenowith

also testified that Claimant worked “all day” the day before, started work the morning of the injury, finished one well closing task, was starting the second well closing task around 2:00 p.m. and then had a third well closing to perform that same day. (Id. at 67 and 143). This was no casual slip of the tongue by the Employer. It was during a civil deposition, under oath and while Employer was being represented by **four separate attorneys**.

Claimant brought this to the attention of the claims representative and reminded her that Claimant had sworn an affidavit to that amount over a year and a half earlier. Despite this, the claims representative refused to adjust the daily wage. A January 22, 2013 Order was entered denying the change to the appropriate wage rate. (Exhibit C) Claimant filed a timely appeal.

The Office of Judges reviewed all of the evidence submitted, including the Employer’s sworn testimony. In a detailed and thorough June 5, 2013 Order the Administrative Law Judge reversed the claims administrator and found that Claimant’s daily wage should be adjusted to reflect the sworn testimony of the Employer, namely \$128.00 per day. (Exhibit D) The Office of Judges considered the testimony of both Claimant and Chenowith and applied the clear, unambiguous language of W. Va. Code § 23-4-14 which states that Claimant’s benefit rate is to be determined “... 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 as reported to the Commission...whichever is most favorable to the injured employee....” In essence the Office of Judges found that *for over two years Claimant was paid less than half what he should have been*. The Employer filed a timely appeal.

The Board of Review (hereafter the Board) reversed the ALJ’s well reasoned decision. Citing no legal authority whatsoever, the Board found that Claimant’s work was “sporadic” and even though it was undisputed that Claimant was paid at \$16.00 per hour and was scheduled to

work at least eight hours on the day of injury, Claimant's "inconsistent" work history prohibited from being paid the wage mandated by statute. By adding the requirement of consistent and regular employment to the wage statute, the Board committed reversible error. Based on this error, Claimant has filed the instant petition.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Because the principle issues in this case have been authoritatively addressed by W. Va. Code § 23-4-14, oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

### **IV. CONCLUSIONS OF LAW AND CITATIONS OF AUTHORITY**

1. The resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding based on a preponderance of 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. 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. W. Va. Code § 23-4-1g.
2. The Workers Compensation Appeal Board shall reverse, vacate or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are: (1) In violation of statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the

administrative law judge; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W. Va.Code § 23-5-12(b) (1995).

3. For the purposes of temporary total disability, 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 as reported to the Commission... whichever is most favorable to the injured employee...." W. Va. Code§ 23-4-14.

4. When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute. Syllabus point 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

## V. ARGUMENT

The evidence is clear that the daily rate of pay \$16.00 per hour at 8 hours a day is more favorable to Claimant. As such, pursuant to W.Va. Code §23-4-14, the wage was properly adjusted by the Office of Judges for all past temporary total disability and for all future vocational benefits, permanent partial disability or any other benefit to be paid to Claimant. The then Board exceeded its authority and improperly construed a plain and unambiguous statute to Claimant's great detriment.

The claims administrator and employer seek to defend this case based on the Employer's poor record keeping. When the wage was first established the employer did not keep regular pay records for Claimant. The Employer's sloppy bookkeeping should not prejudice Claimant. This is especially the case in light of the undisputed and clear testimony of the Employer itself as to

wages and hours on the date of injury. Further, Claimant's affidavit filed nearly two years ago supports the same wage. When the Employer and Claimant have both stated under oath what the wage is, the debate should end.

The Employer argued below that there is "insufficient evidence" to demonstrate the hours worked and wages paid. The sworn testimony of the owner of the company is sufficient evidence. The affidavit of the Claimant alone is sufficient evidence. When considered together these independent sources of proof must be considered compelling evidence. The only reason why this evidence may even be slightly questioned is the inability of the employer to properly document what it pays its workers and when they work. Again, this should not prejudice Claimant. If this Court endorses an argument that sloppy and missing bookkeeping can be a defense to a proper benefit rate, it sends a very dangerous message to Employers across the State.

Claimant's burden was the preponderance of evidence. The Employer's testimony carries that burden. Claimant's affidavit cements the fact that the burden was met. The Order of the Administrative Law Judge shows a thoughtful consideration of all of the evidence presented.

Sadly the Board of Review lost its way. It fell prey to the Employer's last ditch argument that Claimant must demonstrate a sustained and continuous rate of earnings. This is clearly demonstrated by the Board's reference to Claimant's employment as "not consistent" (Exhibit E, p. 3). The Employer had argued below that Claimant must demonstrate sustained and continuous earnings at the same rate of the earnings on the date of injury. This simply is not what the statute requires.

The pertinent portion of W.Va. Code 23-4-14 states for the purposes of temporary total disability, 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 as reported to the Commission...whichever is most favorable to the injured employee....”** (emphasis added). There is absolutely no requirement that Claimant demonstrate his wages were “consistent” or that his employment was sustained and continuous.

The statute requires that if more favorable, the daily rate of pay on the date of accident must be used to calculate benefits. There is no disagreement between the parties as to what Claimant was being paid on the date of his injury. It was sixteen dollars an hour for at least an eight hour day. That should result in a daily rate of pay for Claimant’s benefits of \$128.00.

The statute at issue is plainly written, clear and unambiguous. It does not require proof of “consistent” wages. It only requires proof of wages of the daily rate of pay on the date of injury. By adding the requirement of consistent employment, the Board is adding requirements to the statute that do not exist. It attempted to interpret a statute that needed no interpretation. In doing so it violated the clear mandates of this Court that when a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe, but to apply the statute. Syllabus point 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

The Board construed W.Va. Code §23-4-14 when there was no need to do so. It construed the matter directly against Claimant and in doing so reversed the decision of the Office of Judges which was clearly the correct decision, both factually and legally. This faulty decision on an illegal basis warrants reversal.

Further, consider an employee injured on the first day of a new job. Following the Board’s flawed logic; the Employer could pay benefits based upon either a lack of earlier wages or from prior employment which was at a much lower wage. This is precisely the type of injustice that the statute was meant to avoid.

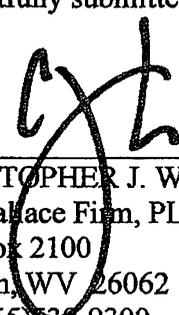
Finally, if the Board was concerned about continuous employment, it should not have ignored the letter from the Employer itself that stated Claimant worked forty hours a week. (Exhibit A, p. 14) Claimant certainly does not concede that proof of continuous employment is needed. However, if the Board was insisting on using that flawed standard, it should have at least considered the Employer's own signed statement that Claimant worked forty hours per week.

**VI. CONCLUSION**

WHEREFORE, Claimant respectfully requests that this Honorable Court reverse Board of Review's misguided decision and reinstate the Order of the Administrative Law Judge. All of the evidence presented indicates that Claimant's daily wage was properly adjusted to \$128.00 per day. There is simply no requirement for "continuous" employment at this rate. Claimant has been wrongfully denied the appropriate benefit rate since the date of injury over two and a half years ago. It is hoped that this wrong done to Claimant will be righted by this Court's reversal of the Board and reinstating the daily rate of pay of \$128.00.

Respectfully submitted,

BY:

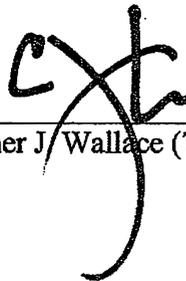


CHRISTOPHER J. WALLACE (7807)  
The Wallace Firm, PLLC  
P.O. Box 2100  
Weirton, WV 26062  
Ph.: (855)536-9300  
Fx.: (888)474-7300  
[cwallace@wallace-firm.com](mailto:cwallace@wallace-firm.com)  
*Counsel for Claimant/Petitioner*  
*Wayne Lowry*

CERTIFICATE OF SERVICE

A true and accurate copy of Claimant/Petitioner's Brief was served on the 4th day of November, 2013, by placing a copy of same in the United States Mail with service to the following:

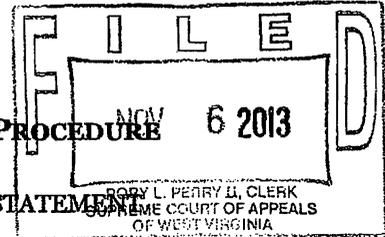
Lucinda Fluharty, Esq.  
Jackson Kelly, PLLC  
P.O. Box 871  
Wheeling, WV 25329  
Counsel for the Employer

A handwritten signature in black ink, appearing to read 'CJ Wallace', is written over a horizontal line. The signature is stylized and cursive.

Christopher J. Wallace (7807)

DO NOT REMOVE  
FILE COPY

FILE COPY



APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: Wayne Lowry v. Team Environmental, LLC  
Petitioner: Wayne Lowry Respondent: Team Environmental, LLC  
Counsel: Christopher Wallace, The Wallace Firm, PLLC Counsel: Luchnda Fluharty, Jackson Kelly, PLLC  
Claim No.: 100342454243 Board of Review No.: 2048469  
Date of Injury/Last Exposure: 02/16/11 Date Claim Filed: 05/17/11  
Date and Ruling of the Office of Judges: 08/05/13  
Date and Ruling of the Board of Review: 10/07/13  
Issue and Relief requested on Appeal: What is Petitioner's daily wage for determining benefits? Find daily wage to be \$128.00

CLAIMANT INFORMATION

Claimant's Name: Wayne Lowry  
Nature of Injury: Crushing injury left leg  
Age: 48 Is the Claimant still working?  Yes  No If yes, where: \_\_\_\_\_  
Occupation: NA No. of Years: \_\_\_\_\_  
Was the claim found to be compensable?  Yes  No If yes, order date: 10/08/11

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): \_\_\_\_\_ Old Fund or New Fund (please circle one)  
Date of Last Employment: \_\_\_\_\_  
Total amount of prior PPD awards: \_\_\_\_\_ (add dates of orders on separate page)  
Finding of the PTD Review Board: \_\_\_\_\_

List all compensable conditions under this claim number: crushing injury left leg, tendon tear of shoulder, hernia, PTD from depression  
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?  
 Yes  No  
(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below?  Yes  No  
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case?  Yes  No  
If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

**STATUTORY NOTICE of FILING of PETITION FOR APPEAL**

November, 6, 2013

**Wayne R. Lowry v. WVOIC/Team Environmental, LLC**

**Supreme Court No. 13-1125**

**Petition for Appeal Filed: November 6, 2013**

**Board of Review Information**

**Claim Number: 2011041489**

**Appeal Number: 2048469**

**Order Date: October 7, 2013**

Dear Interested Persons:

Statutory notice pursuant to W.Va Code 23-5-15 is hereby given that a petition for appeal from the final order of the Workers' Compensation Board of Review has been filed in the above-captioned case.

**In future correspondence or filings, please refer to the Supreme Court case number. DO NOT use the claimant's social security number on any papers filed with the Court.**

The Court has a mediation program for certain types of workers' compensation cases. You will be contacted if the Office of Counsel later determines that the case is appropriate for mediation.

The papers filed in this matter will be passed directly to the Court for consideration. You will be advised of the Court's decision to grant or refuse the petition for appeal by copy of an order.

Sincerely, RORY L. PERRY II, Clerk of Court

---

**NOTICE PROVIDED TO:** Workers' Compensation Commissioner and Workers' Compensation Board of Review  
*and to the following counsel of record, as indicated:*

**Counsel for Petitioner:**

Christopher J. Wallace, Esq.  
Wallace Law Firm  
P.O. Box 2100  
Weirton  
WV WV 26062

**Counsel for Respondent(s):**

Lucinda L. Fluharty, Esq.  
Jackson Kelly-Wheeling  
1144 Market Street  
Post Office Box 871  
Wheeling WV 26003-0871