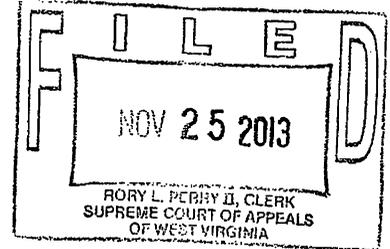


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13-1125

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



WAYNE LOWRY,

Petitioner,

v.

CCN: 2011008583

DOI: 02/16/2011

TEAM ENVIRONMENTAL LLC,

Respondent.

RESPONSE TO PETITION
FOR APPEAL OF
TEAM ENVIRONMENTAL LLC

Lucinda Fluharty (WV Bar ID #5158)
JACKSON KELLY PLLC
P. O. Box 871
Wheeling, West Virginia 26003
lfluharty@jacksonkelly.com
304-233-4000

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	1
II.	STATEMENT OF THE FACTS.....	1
III.	ALLEGED ERROR.....	5
IV.	SUMMARY OF ARGUMENT.....	5
V.	ARGUMENT AND POINTS OF AUTHORITY.....	5
VI.	CONCLUSION.....	8
VII.	CERTIFICATE OF SERVICE.....	9

TABLE OF AUTHORITIES

Cases Cited:

<i>Conley v. Workers' Compensation Division</i> 199 W. Va. 196, 483 S.E.2d 542 (1997).....	7
<i>Rasmus v. Workmen's Comp. Appeal Bd.</i> 117 W. Va. 55, 184 S.E. 250 (1936).....	8
<i>Gibson v. State Comp. Comm'r.</i> 127 W. Va. 97, 31 S.E.2d 555 (1944).....	8

Statutes Cited:

W. Va. Code § 23-4-1g.....	5
W. Va. Code § 23-4-14(b)(2).....	6
W. Va. Code § 23-5-12(b).....	7

STATEMENT OF THE CASE

The employer responds to the Petition for Appeal filed by claimant over the October 7, 2013 Board of Review Order. The Board of Review reversed a Decision of Administrative Law Judge issued June 5, 2013, which reversed an Order of January 22, 2013, denying a request to increase the claimant's rate of pay. The employer asserts that the Board of Review's reversal of the administrative law judge decision was not clearly wrong, and that claimant's Petition for Appeal must be denied.

STATEMENT OF THE FACTS

Claimant had requested a change to his rate of pay for TTD benefits, based on an assertion that he was paid \$16 an hour for the work he performed for this employer, which equated to a daily rate of pay of \$128.00. This request came from claimant's counsel in a letter dated January 10, 2013. A portion of a copy of a deposition transcript of the employer's representative Mr. Chenoweth, was attached to the request as support. *See* Supplemental Appendix, Exhibit 1. The request was denied in the order issued January 22, 2013. Claimant protested.

The order of January 22, 2013, denied the request on the basis that the information of record was not consistent and failed to support the asserted wage payment of \$16 an hour. After this claim had been held compensable, efforts had been undertaken to determine the rate of pay at which to pay benefits to claimant. The information provided by the employer at that time contained no information which would have supported a pay rate of \$16 an hour. Rather, the information provided show sporadic employment over a number of years.

A civil suit was filed as a result of claimant's injury, Civil Action No. 12-C-10, and that is the venue in which the deposition of Mr. Chenoweth was taken. Mr. Chenoweth testified he was not exactly sure how much claimant had worked during 2008 and 2009. Mr.

Chenoweth denied having any records that would show when and where claimant was working when he did work (page 40). In terms of checks available that were paid by the employer to claimant, Mr. Chenoweth testified that some of those checks included money for items other than employment, such as money the employer gave for claimant's father's funeral, and money to help him get his license back. Although Mr. Chenoweth testified claimant was paid \$16 an hour when he worked (pages 41-45), he further testified later in his deposition that claimant was not a permanent employee, but was considered a subcontract employee, and that claimant was not on his payroll (page 119). *See* Supplemental Appendix, Exhibit 2.

An Affidavit was submitted from Amy Taylor, the adjuster of the insurer in this claim. In her March 11, 2013 Affidavit, Ms. Taylor attested that claimant was advised on October 12, 2011 that he would be "entitled to TTD benefits as may be credibly proven and substantiated by proper medical evidence and wage documentation." It was requested that claimant send to Ms. Taylor paycheck stubs for employment verification, and provide "documented proof of wages for the 4 quarters preceding the date of injury in order to calculate a benefit rate for this claim." No such information was ever provided to Ms. Taylor.

Ms. Taylor's Affidavit further reveals that she requested employment and wage information from the employer. She was provided with a 1099-MISC for 2008 and 2011, payroll checks for the time period of October 1, 2010 through February 11, 2011. These checks totaled \$9,671.00. Ms. Taylor attested she was also able to review a Notarized statement from the employer, Mr. Chenoweth. Ms. Taylor explained that based on the information provided, claimant's TTD indemnity checks were paid at a rate of \$396.92 per week. This rate was determined by the receipt of cashed checks from the employer made payable to the claimant for October 1, 2010 for \$600.00, October 12, 2010 for \$1,200.00, October 23, 2010 for \$800.00, November 19, 2010 for \$2,500.00, December 11, 2010 for \$2,000.00, December 22, 2010 for

\$725.00, January 28, 2011 for \$500.00, February 3, 2011 for \$656.00, and February 11, 2011 for \$690.00. These checks were totaled together based on the quarter of the year in which they fell. The rate of pay was then based 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 was \$7,825.00. That was then converted to the average weekly wage of \$595.38, resulting in the paid compensation rate of \$396.92. *See* Supplemental Appendix, Exhibit 3.

The August 25, 2011 Notarized Statement from Mr. Chenoweth was submitted as evidence on this issue. Mr. Chenoweth asserted that claimant had started working for the company in 2007, but at no time would he have been considered an employee. If claimant wanted to work, Mr. Chenoweth asserted he would call, and Mr. Chenoweth would find work for him. Mr. Chenoweth asserted that claimant was not on the payroll. When claimant did work during 2007, he was paid by check with nothing deducted from his pay, per claimant's request. Mr. Chenoweth further explained claimant had worked some in 2008, for which a 1099-MISC form was completed for his services. Claimant worked sporadically in 2009, but had spent time in jail during 2009 and 2010. Mr. Chenoweth had intended to file a 1099-MISC form for the time period of 2011, because claimant had not been on the payroll. Nowhere in this statement does Mr. Chenoweth assert that claimant was paid \$16 an hour when he did work. As well, Mr. Chenoweth never indicated claimant was paid an established daily rate of pay. *See* Supplemental Appendix, Exhibit 4.

Claimant submitted an Affidavit on this issue as well. Claimant attested that the first check he received after the date of injury, for \$1,200.00, was for work done, plus help with medication and other expenses. Claimant further attested that he was instructed to keep track of hours he worked. Sometimes when he was paid, he would be asked how many hours he had worked. Claimant asserted his pay would range from \$16 to \$20 an hour. Claimant also testified

his work hours ranged weekly from thirty to as high as seventy. However, there is no evidence to corroborate this statement from claimant. There is also no information from the employer to support this assertion. As well, there are no paystubs or documents to support claimant's assertion of a consistent weekly hours worked. Conversely, the testimony and Affidavit of Mr. Chenoweth support that claimant was not on the payroll and worked sporadically for him. Moreover, both claimant and Mr. Chenoweth asserted that with the paystubs that are even available, the amount the checks reflect could have included money for items other than wages.

When the administrative law judge reviewed the evidence on this issue, the order denying the requested rate change was reversed. The administrative law judge relied upon the testimony of Mr. Chenoweth wherein he had testified claimant had been generally paid \$16.00 an hour, and the administrative law judge found the evidence preponderated that claimant was working at least eight hour days. The administrative law judge also relied on the testimony of Mr. Chenoweth that claimant had worked "all day" on February 15, 2011 with Mr. Chenoweth, and had been working with him on the date of the injury, February 16, 2011. So, the administrative law judge appears to have looked at that small window of time prior to the date of injury, and since the employer had testified claimant had been working with him the day before the injury, and the date of the injury for at least eight hours a day, that the claimant's daily rate of pay should have been \$128.00. The employer appealed that decision, and asserted that the administrative law judge failed to apply the applicable law to the full set of circumstances, but instead bent the law to fit the period of time simply close to the date of injury to support the rate of pay. The employer asserts this was clearly wrong, and argued on appeal that the Decision of Administrative Law Judge should be reversed.

The Board of Review reversed the Decision of Administrative Law Judge in the order issued October 7, 2013. The Board of Review determined that the administrative law

judge based the decision on speculative evidence and not supported by a preponderance of the evidence. The Board of Review determined the preponderance of the evidence established that claimant worked sporadically and did not have a daily rate of pay of \$128.00, and that the claims administrator had utilized the proper method of calculating the claimant's benefit rate pursuant to statute.

ALLEGED ERROR

WHETHER THE BOARD OF REVIEW ERRED IN REVERSING THE DECISION OF ADMINISTRATIVE LAW JUDGE, WHICH RESULTED IN REINSTATEMENT OF THE ORDER DENYING THE REQUEST TO INCREASE THE RATE OF CLAIMANT'S PAY?

SUMMARY OF ARGUMENT

CLAIMANT WAS NOT ENTITLED TO AN INCREASE TO HIS BENEFIT RATE, AS THE EVIDENCE SHOWED HIS EMPLOYMENT WAS SPORADIC, THAT HE NEVER HAD AN ESTABLISHED DAILY RATE OF PAY DUE TO HIS SPORADIC EMPLOYMENT, AND THUS THE CLAIMS ADMINISTRATOR HAD NOT ERRED IN CALCULATING HIS BENEFIT RATE BASED ON THE AVERAGE WEEKLY WAGE DERIVED FROM THE BEST QUARTER OF WAGES OUT OF THE PRECEDING FOUR QUARTERS OF WAGES, PURSUANT TO WEST VIRGINIA CODE § 23-4-14(b)(2).

ARGUMENT AND POINTS OF AUTHORITY

West Virginia Code § 23-4-1g provides that resolution of an issue in a workers' compensation claim is to be based on a weighing of the evidence, and a finding that the preponderance of the evidence supports the chosen manner of resolution. Evidence shall be weighed to determine its relevance, credibility, materiality, and reliability. No issue can be resolved by allowing claimant to prevail simply because some evidence supports the outcome he requests. Rather, claimant can only prevail if there is at least an equal amount of reliable evidence supporting his requested outcome.

Herein, the Board of Review did not err in reversing the administrative law judge decision. Rather, the administrative law judge had been clearly wrong by not complying with the statutory framework in place to determine a proper rate of pay of benefits. W. Va. Code § 23-4-14(b)(2) provides that “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 average weekly average derived from the best quarter of wages out of the preceding four quarters of wages....” Although the statute does indicate that the method to be used is the one most favorable to the claimant, the employer asserts that where there is insufficient evidence to reflect that claimant was actually ever *paid* a daily rate of pay reflective of an hourly rate of \$16 an hour, the claimant is not entitled to TTD benefits based on a daily rate of pay.

The evidence simply does not preponderate in claimant’s favor in this claim, as the evidence as to the rate of pay claimant actually earned is unsubstantiated, and inconsistent when there is proof of it. The employer signed a statement on August 25, 2011 and had it notarized, asserting claimant worked for him sporadically, and failed to identify a rate of daily pay. Then, Mr. Chenoweth testified in a deposition that he paid claimant \$16 an hour. Moreover, there has never been any accounting framework, no pay stubs, no formal paperwork whatsoever to back up that claimant was paid \$16 an hour for his work for the employer, and most definitely no evidence to show claimant had an established daily rate of pay. Claimant’s own Affidavit does not frame his wages in terms of a daily rate of pay, but rather indicates that he was paid an hourly wage. Claimant attested that his pay would range from \$16 to \$20 an hour, and his hours would range from thirty to as high as seventy. Nowhere in this Affidavit does claimant assert he was ever paid a daily rate of pay. He was instead paid by the hour for the number of hours he might have worked in a day.

The claims administrator, Amy Taylor, substantiated in her Affidavit that she sought information from the claimant and the employer to reveal claimant's wages, in order to ascertain an accurate benefit rate. The information received was sparse, being only a 1099-MISC for 2008 and 2011, payroll checks from time period of October 1, 2010 through February 11, 2011. Based on the information received on claimant's past wages, Ms. Taylor calculated claimant's benefit rate based on the four quarters prior to the date of injury, which was the fourth quarter of 2010, the highest quarter of earnings preceding the quarter in which the date of injury fell.

The Board of Review may reverse decision of an administrative law judge if the judge has committed a legal error, a clear error in reviewing the evidence in terms of its reliable, probative or substantial nature, or an abuse of discretion in deciding the claim. W. Va. Code § 23-5-12(b). In accordance with *Conley v. Workers' Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542 (1997), the Board of Review must accord deference to decisions from the Office of Judges, but can reverse decisions if the type of error set forth in § 23-5-12(b) is established. Herein, the administrative law judge had been clearly wrong in finding that there was a preponderance of reliable evidence to support a rate of pay based on an hourly rate of pay of \$16.00, coupled with the fact that there was testimony to support that claimant had worked a full day the day before his injury.

The Board of Review acted entirely properly by reversing the administrative law judge decision. There is no reliable evidence to support that claimant was paid a daily rate of pay. Rather, the only evidence on claimant's pay reveals it was sporadic based on claimant's work being sporadic, and is only reflective of wages earned when and if claimant worked. There is absolutely no evidence to support that claimant performed work for this employer pursuant to an established daily rate of pay. Therefore, it was entirely proper that claimant's benefit rate was

calculated pursuant to W. Va. Code § 23-4-14(b)(2), to provide him an average weekly wage based on the highest quarter of earnings he had in the four quarters before his injury.

This Honorable Court will not disturb the findings of the Board of Review unless they are clearly wrong. *Rasmus v. Workmen's Comp. Appeal Bd.*, 117 W. Va. 55, 184 S.E.250 (1936). Except for error of law or where the findings are clearly against the preponderance of the evidence, this Honorable Court will not reverse the Board of Review. *Gibson v. State Comp. Comm'r.*, 127 W. Va. 97, 31 S.E.2d 555 (1944). Herein, the Board of Review acted entirely properly by reversing the administrative law judge decision when the administrative law judge had not properly applied the statute to the facts of this claim. The fact is claimant had no established daily rate of pay. The only evidence is that he was paid an hourly wage when and if he worked. There was no error in the original determination to base his benefit rate on the highest wages he earned in one of the four quarters of earnings before his date of injury. The Board of Review corrected the administrative law judge's clearly wrong ruling. This Honorable Court must thus deny claimant's Petition for Appeal.

CONCLUSION

Based on the evidence of record and the foregoing argument, the appellant asserts that claimant's Petition for Appeal must be denied.

Respectfully submitted,

TEAM ENVIRONMENTAL LLC
By Counsel



Lucinda Fluharty (WV Bar ID #5158)
JACKSON KELLY PLLC
P. O. Box 871
Wheeling, West Virginia 26003

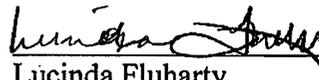
CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2013, I served the within *Response to Petition for Appeal of Team Environmental LLC*, by depositing a true and exact copy thereof in the United States Mail, postage prepaid, in an envelope addressed to the following:

Workers' Compensation Board of Review
P. O. Box 2628
Charleston, West Virginia 25329

Christopher Wallace, Esquire
The Wallace Firm, PLLC
Post Office Box 2100
Weirton, West Virginia 26062

BrickStreet Mutual Insurance Company
400 Quarrier Street
Charleston, WV 25301



Lucinda Fluharty