IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Spring 2023 Term

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EDYTHE NASH GAISER, CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

No. 23-ICA-26

BUCKY THOMPSON,
Claimant Below, Petitioner,

v.

WESTERN CONSTRUCTION, INC.,
Employer Below, Respondent.

Appeal from Workers' Compensation Board of Review
(JCN: 2020021920)

REVERSED AND REMANDED

Submitted: May 16, 2023
Filed: June 15, 2023

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JUDGE SCARR delivered the Opinion of the Court.

SCARR, JUDGE:

Petitioner, Bucky Thompson, appeals the January 12, 2023, Workers' Compensation Board of Review ("Board") order affirming the claim administrator's October 25, 2021, decision that Mr. Thompson was not entitled to compensation under West Virginia Code §23-4-6(e)(2) (2005) at the rate of six weeks for each percent of disability because he was not employed by Western Construction when he was released to return to work. Having considered the parties' oral and written arguments, the record on appeal, and the applicable law, we hold that a claimant does not have to be a current employee to recover six weeks of compensation for each percent of disability under §23-4-6(e)(2), and therefore reverse the decision of the Board and remand this matter for further proceedings consistent with our opinion.

I. Factual and Procedural Background

Mr. Thompson started working for Western Construction as a welder on December 16, 2019. On December 21, 2019, he slipped and fell, injuring his left shoulder. Mr. Thompson continued to work for a few weeks, but the pain in his shoulder increased, and he finally stopped working on January 11, 2020. When he was no longer able to work, he reported his injury and was asked by Western Construction's Human Resources Department to provide medical records pertaining to his injury, to which he complied. Shortly thereafter, he was terminated.

Although Mr. Thompson was terminated in January of 2020, he was not released to return to work until September 14, 2021. When he was released, his employer did not reinstate him in his preinjury job or offer him a similar job. There is no evidence in the record that Mr. Thompson's preinjury job, or a comparable job, was not available when he was released to return to work without any restrictions.

Joseph Grady, M.D., a physician retained by Western Construction to perform an independent medical examination (IME), diagnosed Mr. Thompson with an internal derangement of the left shoulder superimposed upon preexisting arthritis. Based on Dr. Grady's report, the claim administrator granted a 7% permanent partial disability (PPD) award computed on the basis of four weeks of compensation for each percent of disability pursuant to West Virginia Code §23-4-6(e)(1).

Mr. Thompson did not protest the 7% PPD award, but he did protest the claim administrator's use of four weeks of benefits for each percent of disability under West Virginia Code §23-4-6(e)(1), arguing that he should have received six weeks compensation for each percent pursuant to West Virginia Code §23-4-6(e)(2). Under the latter section, a claimant is entitled to six weeks of compensation for each percent of disability when the employer fails to reinstate the employee in his or her preinjury job or one that is comparable.

By order dated January 12, 2023, the Board affirmed the claim administrator's award, finding that §23-4-6(e)(2) did not apply to Mr. Thompsons's situation, because he had been terminated in January of 2020 but had not been released to return to work until September 14, 2021. The Board reasoned that Mr. Thompson was not an "employee" for purposes of §23-4-6(e)(2) when he was released to return to work, and therefore was not entitled to six weeks of compensation for each percent of disability.[1] Mr. Thompson appeals from the Board's order.

II. Standard of Review

Our standard of review is set forth in West Virginia Code §23-5-12a(b) (2022), in part, as follows:

> The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are:

[1] There is some dispute as to whether Mr. Thompson was properly fired for cause or was improperly fired because of his injury, but the Board's decision was not based in any way on the reason for termination, nor does Western Construction argue on appeal that the reason for termination is relevant to our decision. The record contains little or no evidence that Mr. Thompson was fired for cause, and we have been directed to no statutory language which would preclude recovery where the employee was terminated for cause. Although Western Construction asserted in its brief that Mr. Thompson had been fired for cause, its counsel made it clear during oral argument that the employer was not claiming that termination for cause disqualified a claimant from enhanced benefits. Instead, the employer was more broadly asserting that, regardless of the reason for separation from employment, claimants were not entitled to increased compensation unless they were still employed when they were released to return to work.

> (1) In violation of statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the Board of Review;
> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (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.

Duff v. Kanawha Cnty. Comm'n, 247 W. Va. 550, __, 882 S.E.2d 916, 921, (Ct. App. 2022). Questions of law arising in decisions issued by the Board are reviewed de novo. *Justice v. West Virginia Office Insurance Comm'n*, 230 W. Va. 80, 83, 736 S.E 2d 80, 83 (2012).

III. Discussion

West Virginia Code §23-4-6 states in pertinent part that:

> Where compensation is due an employee under the provisions of this chapter for personal injury, the compensation shall be as provided in the following schedule:
>
> . . . .
>
> (e)(1) For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, if the injury causes permanent disability less than permanent total disability, the percentage of disability to total disability shall be determined and the award computed on the basis of four weeks' compensation for each percent of disability. . . .

West Virginia Code §23-4-6(e)(2) increases the number of weeks of compensation for each percent of disability where a claimant is released to return to work

and the preinjury employer does not offer the preinjury job or a comparable job when available. This section states that:

> (2) If a claimant is released by his or her treating physician to return to work at the job he or she held before the occupational injury occurred and if the claimant's preinjury employer does not offer the preinjury job or a comparable job to the employee when a position is available to be offered, the award for the percentage of partial disability shall be computed on the basis of six weeks of compensation for each percent of disability.

Admittedly, the language of West Virginia Code §23-4-6(e)(2) may be somewhat confusing, referring in two places to the "claimant" and in one place to the "employee." Of course, a "claimant" is not necessarily someone who is currently employed by the employer,[2] but Western Construction argues that the use of "employee" later in this subsection limits its application, and the increased benefits it provides, to current employees.[3] Mr. Thompson, however, argues that the relevant factor is whether someone

[2] For example, a "claimant" could be someone who is seeking death benefits for a deceased worker, *see* W. Va. Code §23-4-20 (2005) (referring to the "claimant" and the "employer" with regard to "examinations that are necessary to determine the cause of the deceased employee's death"); a retired worker seeking pneumoconiosis or occupational disease benefits, *see* W. Va. Code §23-4-8 (2009) (referring to physical examinations of a "claimant"); or a former employee seeking to reopen a case for permanent partial disability benefits. *See* W. Va. Code §23-4-16(d)(2) (2005) (stating that the Commission may have the "claimant" evaluated, but the "former employer" will not be a party to the reevaluation).

[3] Western Construction also argues that Mr. Thompson's job was no longer available to him because he was fired before he was released to return to work, but the plain language of the statute does not require such a narrow construction. The question under the statute is whether the claimant's prior job or a comparable job is available when he or she is released to return to work.

was an employee at the time of their injury, not whether they are an employee when they are released to return to work. Given the language of West Virginia Code §23-4-6, and the proper role of courts in interpreting our workers' compensation statutes, we decline to read in a limitation on recovery that was not clearly required by the legislature, either through express language or necessary implication.

Section 23-4-6 begins with the statement that "[w]here compensation is due an **employee** under the provisions of this chapter for personal injury, the compensation shall be provided in the following schedule…." (emphasis added). Subsequent language in this statute makes it clear that its use of "employee" is not limited to claimants who are currently employed. Subsection (d), which pertains to permanent total disability benefits uses the word "claimant" twice. Of course, claimants eligible for permanent total disability, given the nature of their injuries, are likely to be former, rather than current employees, and many of them will fall into the category of former employees. Thus, "employees" under §23-4-6 are not limited to current employees.

In interpreting this statute, we are also mindful of the nature of the workers' compensation system, which is a creature of statute, and requires the legislature to balance "the conflicting goals of minimizing premiums while providing full and fair compensation to injured workers…." Syl. Pt. 4, *State ex rel. Beirne v. Smith*, 214 W. Va. 771, 591 S.E. 2d 329, (2003) (per curiam). This task is "the exclusive province of our publicly elected legislators, and is not to be invaded by the Commissioner, or the Courts." *Id.* Thus, it is not

our role to rewrite the statute to create exceptions to recovery where the legislature has not seen fit to do so.

Furthermore, we note that our high court has refused on a number of occasions to find limits on recovery that were not clearly and specifically written into a statute by the legislature. *See, e.g.*, *Bevins v. West Virginia Office of Ins. Com'r*, 227 W. Va. 315, 328, 708 S.E. 2d 509, 522 (2010) ("…because the Legislature has elected *not* to include the receipt of Social Security disability benefits within the list of reasons rendering a claimant ineligible to receive workers' compensation benefits and because it is not the province of this Court to alter statutes which the Legislature has seen fit to enact, it must be presumed that the Legislature did not intend to impose such a bar upon recipients of Social Security disability benefits.") (emphasis in original); *State ex rel. McKenzie v. Smith*, 212 W. Va. 288, 293 n. 1, 569 S.E.2d 809, 814 n.1 (2002) ("The Workers' Compensation Act does not contain any limitation concerning 'seasonal employees'…"); *Moran v. Rosciti Const. Co.*, 240 W. Va. 692, 698, 815 S.E. 2d 503, 509 (2018) (a workers' compensation provision which provided a credit for worker's compensation benefits or damages recovered from an employer under the laws of another state did not cover third party settlements because "[t]he absence of any mention of a recovery from a third party indicate[d] an intention on the part of the Legislature that the provision is not meant to apply to such recoveries.").

In *Birchfield-MODAD v. West Virginia Consol. Pub. Ret. Bd.*, No. 20-0747, 2022 WL 16646485 (W. Va. 2022) (memorandum decision), the court warned about rewriting statutes to limit the class of persons entitled to benefits when the legislature had not incorporated such limitations in the statute. In *Birchfield-MODAD,* our high court reversed a circuit court decision affirming a decision by the Consolidated Public Retirement Board ("Board") which reduced the claimant's service credit years in the Teachers Retirement System ("TRS") because of the Board's unduly restrictive interpretation of eligibility language in the statute. In the court's words, the decision in *Birchfield-MODAD* "hinge[d] entirely upon whether Petitioner was a teaching or nonteaching member in 1982 when she began making contributions to TRS." *Id*. at *3. In concluding that the claimant was a "teaching member," and therefore covered by the TRS, the court discussed the proper role of courts in analyzing statutes:

> We have long recognized that "[i]t is not for this Court to arbitrarily read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." …. Similarly, we have held that "[a] statute ... may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."…. Here, under the guise of interpretation, the circuit court effectively rewrote the definition of "administrative staff of the public school" to exclude persons from that definition who the Legislature explicitly included: secretaries. That was outside of the realm of interpretation and constituted clear legal error.

Id. at *5 (citations omitted).

Our reluctance to read limitations on recovery into the workers' compensation statute in the present case is also supported by the holding in *McElroy Coal Co. v. West Virginia Office of Ins. Com'r*, No. 11-0727, 2013 WL 466401 (W. Va. Feb. 5, 2013) (memorandum decision), where the Supreme Court of Appeals of West Virginia refused to read a limitation into §23-4-6(e)(2) which had not been expressly stated by the legislature. In *McElroy*, the question was whether the claimant could recover an additional two weeks for each percent of disability for supplemental permanent partial disability benefits under §23-4-6(e)(2) for an award granted *before* he had experienced any return to work issue. In its opinion, the court held that the claimant was not restricted to supplemental payments awarded *after* his return to work issue arose, explaining that:

> The Office of Judges found that if the Legislature had intended for the Statute to be construed in the way the claims administrator interpreted it, language reflecting such an interpretation would undoubtedly have found its way into the Statute. The Office of Judges further found that there is no language in the Statute limiting payment of supplemental permanent partial disability benefits only for permanent partial disability awards entered following a release to return to work. The Board of Review reached the same reasoned conclusion in its decision of April 6, 2011. We agree with the reasoning and conclusions of the Board of Review.

Id. at *2-3.

Similarly, in the case at bar, we decline to read in language requiring a claimant to be a "current" employee in order to recover compensation at the rate of six weeks for each percent of disability under West Virginia Code §23-4-6(e)(2) and remand

for entry of an order granting recovery at the rate of six weeks for each percent of disability pursuant to West Virginia Code §23-4-6(e)(2).

IV. Conclusion

For the foregoing reasons, we reverse the Board's order of January 12, 2023.

Reversed and Remanded.