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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Justin Hart,
Claimant Below, Petitioner,

vs.) No. 21-0853 (BOR Appeal No. 2056780)
(JCN: 2021004803)

Panhandle Cleaning and Restoration, Inc.,
Employer Below, Respondent.

MEMORANDUM DECISION

West Virginia Code § 23-4-2(a) (2015)[1] provides that (1) if an employee is given a blood test within two hours of a workplace accident and (2) if the blood test reveals a blood alcohol concentration ("BAC") of .05 or above, "the employee is deemed intoxicated and the intoxication is the proximate cause of the injury." *Id.* The sole issue presented in this appeal is whether an employee, who is given a blood test within two hours of a workplace accident and whose resulting BAC is .05 or above, may rebut the statutory presumption of intoxication. After review, we find that under the plain, unambiguous language of West Virginia Code § 23-4-2(a), the statutory presumption of intoxication, once established, is not rebuttable. Therefore, we affirm the Workers' Compensation Board of Review's ("BOR") September 17, 2021, order.[2]

Petitioner Justin Hart ("Petitioner") was employed by Respondent Panhandle Cleaning & Restoration, Inc. ("Respondent").[3] On September 13, 2020, Petitioner arrived at Respondent's Wheeling office at 7:00 a.m. Approximately twenty minutes later, Petitioner and a co-worker departed and travelled to the Mr. Bee Potato Chip Factory in

[1] We use the 2015 version of West Virginia Code § 23-4-2(a) because it was in effect at the time Petitioner filed his application for workers' compensation benefits. The statute was amended by the Legislature in 2023; however, the amendments do not affect this case.

[2] We find that a memorandum decision affirming the BOR's order is appropriate. *See* W. Va. R. App. P. 21.

[3] Petitioner is represented by Christopher J. Wallace. Respondent is represented by Steven K. Wellman and James W. Heslep.

Parkersburg. Upon arriving at the job site, Petitioner spoke to two supervisors and took part in a group meeting. Petitioner states that no one questioned him about being impaired or smelling of alcohol. He was assigned to work in a lift that was seventeen feet above a concrete floor. Petitioner states that he began working "up in the ceiling of the factory around 8:30 a.m."

According to Petitioner, the workplace accident occurred at approximately 12:00 p.m.[4] Petitioner was working in the lift when the accident occurred. He described the accident as follows: "My break-a-way harness was not long enough for me to reach my next tie-off. When I unclipped from the one point of support, I fell trying to tie-off onto the other point [of] support." Petitioner fell seventeen feet and landed on the concrete ground, suffering multiple injuries including fractures of the left femoral neck, left olecranon, left radial head, and left pelvis.

Petitioner was taken to the hospital. His blood was taken and tested in the emergency room at 12:55 p.m. The blood test revealed that Petitioner's BAC was .053. Petitioner did not challenge the results of the blood test. He admitted that he was a heavy drinker and stated that he drank the night before the accident. Petitioner denies that he was hungover when the accident occurred.

Petitioner submitted an application for workers' compensation benefits to the claims administrator. The claims administrator denied the claim on the basis that the "[i]injury was caused by intoxication." Petitioner protested the claims administrator's decision to the Office of Judges ("OOJ"). The OOJ affirmed the claims administrator's denial. It explained its ruling as follows:

> The claimant's argument that he rebutted any presumption that his intoxication caused the fall is well taken. While following the statute does lead to a flawed, perhaps absurd, presumption in the present case, it can not be ignored that the statute does not provide for a rebuttable presumption. The statute states that, when the elements are met, the employee is "deemed intoxicated" and "the intoxication is the proximate cause of the injury." Therefore, the Order must be affirmed.

The BOR affirmed the OOJ's order on September 17, 2021. It found that Petitioner's claim was "barred by West Virginia Code § 23-4-2(a)." Petitioner appeals the BOR's order.

[4] Respondent's First Report of Injury provides that the injury occurred at 11:40 a.m.

Petitioner contends that the BOR erred by concluding that West Virginia Code § 23-4-2(a) barred his claim. We apply a de novo standard of review to questions of law arising in the context of decisions issued by the BOR. *Justice v. W. Va. Office Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012). Further, this Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the BOR, and when its decision affirms prior rulings by both the claims administrator and OOJ, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is based upon a material misstatement or mischaracterization of the evidentiary record. *See* W. Va. Code §§ 23-5-15(c) & (d). With these standards in mind, we turn to the parties' arguments.

The sole issue is whether a claimant, who is given a blood test within two hours of a workplace accident and whose resulting BAC is .05 or above, may rebut the statutory presumption of intoxication contained in West Virginia Code § 23-4-2(a).[5] We emphasize at the outset that Petitioner has not challenged the result of the blood test that revealed his BAC was .053, nor does he dispute that the blood test was administered within two hours of his workplace accident.[6]

The issue requires us to examine West Virginia Code § 23-4-2(a). It provides, in relevant part:

> (a) Notwithstanding anything contained in this chapter, no employee or dependent of any employee is entitled to receive any sum under the provisions of this chapter on account of any personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of the employee. Upon the occurrence of an injury which the employee asserts, or which reasonably appears to have, occurred in the course of and resulting from the employee's employment, the employer may require the employee to undergo a blood test for the purpose of

[5] This Court has recognized that "[t]he right to workmen's compensation benefits is wholly statutory." Syl. Pt. 2, in part, *Dunlap v. State Comp. Dir.*, 149 W. Va. 266, 140 S.E.2d 448 (1965). Further, "[i]n order for a claim to be held compensable under the Workmen's Compensation Act, three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment." Syl. Pt. 1, *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970).

[6] West Virginia Code § 23-4-2(a) does not foreclose a claimant from challenging the result of a blood test administered after a workplace accident. Petitioner could have done so in this case if he believed the BAC result was inaccurate or if he believed the blood test was not administered within the timeframe set forth in the statute, i.e., within two hours of the accident. He has not raised either of these challenges in this matter.

> determining the existence or nonexistence of evidence of intoxication: Provided, That the employer must have a reasonable and good faith objective suspicion of the employee's intoxication and may only test for the purpose of determining whether the person is intoxicated. If any blood test for intoxication is given following an accident, at the request of the employer or otherwise, and if any of the following are true, *the employee is deemed intoxicated and the intoxication is the proximate cause of the injury*:
>
> (1) If a blood test is administered within two hours of the accident and evidence that there was, at that time, more than five hundredths of one percent, by weight, of alcohol in the employee's blood[.]

Id. (emphasis added).

When examining this statute, we are mindful of our rules of statutory interpretation. This Court has held that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). Additionally, "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted).

Petitioner argues that West Virginia Code § 23-4-2(a) is silent as to whether the presumption of intoxication, once established, may be rebutted. According to Petitioner, "[t]here is nothing in the statute that states that there is an irrebuttable presumption. That term does not appear in the statute." Further, Petitioner contends that the word "deemed" in the statutory phrase "the employee is *deemed* intoxicated and the intoxication is the proximate cause of the injury," is ambiguous and should be construed to permit a claimant to rebut intoxication once it has been established. *Id.* Additionally, Petitioner asserts that he has overcome the presumption of intoxication in this case, noting that he worked multiple hours before the accident and communicated with other employees that morning without exhibiting signs of intoxication.

By contrast, Respondent asserts that the BOR's order should be affirmed because the statutory presumption of intoxication has been established: Petitioner was given a blood test within two hours of the workplace accident and his BAC was .053. Petitioner did not challenge the result of the blood test or the timeframe in which it was given. Thus, under West Virginia Code § 23-4-2(a), Respondent asserts that Petitioner "is deemed intoxicated

and the intoxication is the proximate cause of the injury." *Id.* According to Respondent, once intoxication has been established pursuant to West Virginia Code § 23-4-2(a), it may not be rebutted.

Upon review, we find that the language of West Virginia Code § 23-4-2(a) is clear and unambiguous. Under the plain language of the statute, two conditions must be satisfied to establish intoxication: a blood test administered within two hours of an accident that results in a BAC of .05 or above. Once intoxication has been established, the statute provides two mandatory directions: (1) "the employee *is* deemed intoxicated" and (2) "the intoxication *is* the proximate cause of the injury." *Id.* (emphasis added). There is no language in this statute permitting a claimant to rebut intoxication once it has been established.[7]

While we find that the plain language of West Virginia Code § 23-4-2(a) resolves our inquiry, we decline Petitioner's invitation to read a rebuttable presumption into the statute for two additional reasons. First, we have recognized that "[i]t is not for this Court arbitrarily to 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." *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (internal citation omitted). Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advoc. Div. v. Pub. Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989). Because the plain language of West Virginia Code § 23-4-2(a) does not permit a claimant to rebut intoxication once it has been established, it is not this Court's role to add that language to the statute.[8]

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[7] We reject Petitioner's argument that the word "deemed" in West Virginia Code § 23-4-2(a) creates ambiguity. Black's Law Dictionary provides that the word "deem" means "[t]o consider, think, or judge." *Deem*, Black's Law Dictionary (11th ed. 2019). In the context of West Virginia Code § 23-4-2(a), once the employee is "considered" or "judged" to be intoxicated, intoxication *is* the proximate cause of the injury. Based on this definition, we do not find any support for Petitioner's argument that the word "deemed" creates ambiguity.

[8] During oral argument, Petitioner's counsel provided this Court with a hypothetical situation in which a claimant, who was technically intoxicated under West Virginia Code § 23-4-2(a), suffers a workplace injury in a manner that arguably had nothing to do with the claimant's intoxication. Under this scenario, counsel argued that applying West Virginia Code § 23-4-2(a) could lead to an absurd result if the claimant is not afforded the ability to rebut the presumption of intoxication. We are sympathetic to counsel's argument and can foresee a situation in which applying the plain language of West Virginia Code § 23-4-2(a) could potentially produce an absurd result. We recognize, however, that it is

Further, the Legislature has explicitly included rebuttable presumptions in a number of workers' compensation statutes. *See* W. Va. Code § 23-4-1(h) (2021) (setting forth a "rebuttable presumption" that certain diseases result from employment if incurred by a professional fire fighter); W. Va. Code § 23-4-6(d) (2005) (setting forth a "rebuttable presumption" of permanent total disability once a certain threshold of prior permanent partial disability has been awarded); and W. Va. Code § 23-4-8c(b) (2009) (providing that any claimant who suffers a respiratory disability under certain, specified conditions is presumed to have contracted occupational pneumoconiosis, but specifying that the "presumption is not conclusive"). Because the Legislature has explicitly included rebuttable presumptions in the foregoing statutes and omitted any mention of a rebuttable presumption in West Virginia Code § 23-4-2(a), we conclude that this omission was intentional.

Accordingly, we conclude that under West Virginia Code § 23-4-2(a), if two conditions have been established, namely (1) a blood test given within two hours of an accident (2) that results in a BAC of .05 or above, the employee is deemed intoxicated and the intoxication is the proximate cause of the injury. Once established, the presumption of intoxication is not rebuttable.

Applying this conclusion to the instant case, we affirm the BOR's order because Petitioner was given a blood test within two hours of the workplace accident and his BAC was .053. Petitioner did not contest either of these findings. Thus, under the plain language of West Virginia Code § 23-4-2(a), the BOR correctly determined that Petitioner's claim is barred.

We affirm the BOR's September 17, 2021, order.

Affirmed.

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within the purview of the Legislature to consider whether West Virginia Code § 23-4-2(a) should be amended to afford a claimant the opportunity to rebut the presumption of intoxication once it has been established. Unless the Legislature chooses to amend the statute, we must apply the statute's plain language, rather than "attempt to make it conform to some presumed intention of the Legislature not expressed in the statutory language." *Cart v. Gen. Elec. Co.*, 203 W. Va. 59, 63 n.8, 506 S.E.2d 96, 100 n.8 (1998).

ISSUED: November 8, 2023

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn