IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

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November 8, 2001
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OF WEST VIRGINIA

No. 29264

RELEASED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ROBERT I. DODSON,
Plaintiff Below, Appellant

v.

WORKERS' COMPENSATION DIVISION
AND BROWN & ROOT,
Defendants Below, Appellees

Appeal from the Workers' Compensation Appeal Board
Workers' Compensation Appeal Board No. 51077
Claim No. 99-24949

REVERSED

Submitted: October 3, 2001
Filed: November 8, 2001

Don M. Stacy
Reginald D. Henry
Law Office of Don M. Stacy
Beckley, West Virginia
Attorneys for the Appellant

Sandra L. Evans
Charleston, West Virginia
Attorney for the Appellee,
Workers' Compensation Division

Barney Frazier
Kay, Casto & Chaney
Charleston, West Virginia
Attorney for the Appellee,
Brown & Root

JUSTICE ALBRIGHT delivered the Opinion of the Court.
JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "This Court will not reverse a finding of fact made by the Workmen's Compensation Appeal Board unless it appears from the proof upon which the appeal board acted that the finding is plainly wrong." Syllabus, *Hosey v. Workmen's Compensation Comm'r*, 151 W.Va. 172, 151 S.E.2d 729 (1966).

2. "A contract of employment for remuneration is necessary to constitute the relation of employer and employee under the [Workers'] Compensation Act." Syllabus, *Basham v. County Court of Kanawha County*, 114 W.Va. 376, 171 S.E. 893 (1933).

3. Where an offer of employment is conditioned upon an applicant successfully completing a course of safety instruction at his own expense and thereafter submitting to a physical agility test – administered under the direction and control of the employer for the benefit of the employee and the employer – involving exposure of the applicant to the significant risk of immediate physical harm, participation in the physical agility test constitutes an acceptance of employment, entitling the applicant to workers' compensation coverage for any injury sustained in the course of the physical agility test notwithstanding the absence of remuneration paid to the employee for participation in the test. To the extent that our holding contained in the Syllabus of *Basham v. County Court of Kanawha County*, 114 W.Va. 376,

171 S.E. 893 (1933), may be interpreted to require remuneration as a prerequisite for workers' compensation coverage for such an injury, it is hereby modified.

4. While "[a] claimant in a workmen's compensation case must bear the burden of proving his claim [] in doing so it is not necessary to prove to the exclusion of all else the causal connection between the injury and the employment." Syl. Pt. 2, in part, *Sowder v. State Workmen's Compensation Comm'r*, 155 W.Va. 889, 189 S.E.2d 674 (1972).

Albright, Justice:

In this appeal from the decision of the Workers' Compensation Appeal Board (hereinafter "WCAB") certified on May 31, 2000, the claimant below, Robert I. Dodson (hereinafter "Appellant"), argues that his claim for benefits was improperly denied. The WCAB's decision reversed the ruling of the Office of Judges dated September 13, 1999, which concurred with the Workers' Compensation Division decision of October 16, 1998, finding that Appellant sustained a compensable back injury while employed by Brown & Root, Inc. (hereinafter "B&R").[1] Appellant contends that the WCAB erred in finding that the administrative law judge was clearly wrong in concluding that Appellant sustained a back injury in the course and as a result of his employment. For the reasons stated below, we reverse the WCAB order.

I. Factual and Procedural Background

Appellant's claim for workers' compensation benefits, dated August 25, 1998, stated that he had pain in his lower back with throbbing and numbness in his legs as a result of an injury he sustained on July 31, 1998, "when doing [a] physical test for pre-employment" at the offices of B&R. The application also related that Appellant stopped working on August 14, 1998, due to the injury. B&R protested the application for benefits primarily on the ground

[1]No brief was submitted by the Workers' Compensation Division even though it is named as an appellee in this case.

that Appellant was not an employee at the time of the purported injury because he was not on B&R's payroll until August 3, 1998.

Events leading up to the alleged injury are revealed in the record. During a deposition on March 29, 1999, Appellant explained that some time during the month of July in 1998, he contacted B&R and asked a human resources personnel assistant, Ms. Mary Kays, about job openings for electricians. Appellant maintains that Ms. Kays asked him to report to B&R's personnel office on July 31, 1998, and advised him he had to complete a safety orientation program[2] before that date. Because he had worked for B&R before,[3] Appellant said he knew that the purpose of the July 31, 1998, appointment was to fill out the necessary paperwork, as well as to complete a drug screening test, safety comprehension test and a physical agility test.[4]

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[2]The required safety orientation was an eight-hour class which was not conducted by B&R and for which Appellant had to personally pay $50 to attend.

[3]Appellant had worked for B&R on three previous occasions.

[4]A written explanation of the agility test's purpose was made part of the record in a document entitled "Brown & Root Companies Physical Agility Test Record and Release," which stated that the test is conducted "in order to assess [] physical agility to perform the reasonable and necessary duties required of a[n] elec[trician]." The document further explained that the person taking the test would "be required to exert significant physical effort . . ." and that it would "place significant stress on [the] back, joints and muscle [sic]." The last declaration on the form states that "[t]he physical agility test must be successfully completed without actual or alleged injury."

Appellant's low back injury allegedly occurred on July 31, 1998, while performing the agility test which Ms. Kays administered. Appellant testified that one component of the agility test required a person to bend forward and pull on a bar suspended on a chain. He explained that he hurt his back the first time he tried to pull on the bar because the bar was below his knees which placed his back at a "steep angle" when he pulled on it. According to Appellant, he asked Ms. Kays to reposition the bar after the first attempt, but she encouraged him to try two more times before she acceded to his request. Appellant maintained that after the adjustment his back was in a more straightened position, which enabled him to complete the pull successfully. Appellant admitted that he did not tell Ms. Kays during or after the agility test that he experienced back pain.

Ms. Kays' testimony during a June 1, 1999, telephone deposition challenged Appellant's explanation of what transpired during the agility test. She said that she made the bar adjustment before Appellant even attempted the lift. She also confirmed that Appellant did not express, by words or behavior, that he had been injured during the test.

Immediately following the testing with Ms. Kays, Appellant was sent to Dr. Arvind Viradia, whose specialty is internal medicine, for a complete physical examination. During Dr. Viradia's testimony it was established that he had performed physical examinations for B&R for eight years. The reports and testimony of the doctor indicated that he saw no

evidence of a back injury during the course of the physical examination,[5] nor had Appellant told the doctor that he had injured his back during the agility test. In his report to B&R dated July 31, 1998, Dr. Viradia checked the box on the form which stated that Appellant was qualified to "be assigned to any work consistent with skills and training; examination revealed no immediately significant medical problems."

After completing the physical, Appellant returned to Ms. Kays' office on July 31, 1998, and Ms. Kays told him to report to work August 3, 1998. A memo dated August 26, 1998, authored by Ms. Kays to Mike King, B&R's health safety environmental coordinator, stated "Mr. Dodson was hired on July 31, 1998, as an electrician, reporting to UCC-South Charleston on August 3, 1998." Appellant was placed on B&R's payroll on August 3, 1998, and he spent the remainder of the week in an orientation class which was attended by one other trainee, Steve Collias.

Appellant testified that during that week in August, 1998, his low back felt uncomfortable sitting through the orientation, and he remarked about the discomfort to Mr. Collias. Mr. Collias filed a written statement with B&R dated August 24, 1998, saying that during the orientation classes Appellant had mentioned to him that "when he did his strength

[5]The record discloses that Dr. Viradia visually checked the flexion, extension and rotation of Appellant's cervical, thoracic and lumbar spine and examined the neurological reflexes of Appellant's extremities as part of the employment physical.

test in the Dunbar office he had hurt his back while doing one of the tests." Mr. Collias reiterated this information during a deposition held on June 1, 1999. The orientation instructor, Jimmy Johnston, was also deposed on June 1, 1999, and he testified that Appellant never told him that he injured his back and that Appellant exhibited no back problems while in the class.

The week following the orientation, August 10 through August 14, Appellant was sent by B&R to work on electrical jobs in the field. Appellant testified that on August 12 and 13, he and a coworker were assigned to a job which involved driving ten-foot-long rods into the ground with a jackhammer which weighed approximately ninety pounds. Appellant operated the jackhammer during the two-day period because he was not certified to operate the bucket lift which was needed to raise the person operating the jackhammer to a height above the rods. Additionally, Appellant lifted and carried the jackhammer about 150 feet between the bucket lift and the tool room where the jackhammers were stored. Appellant testified that lifting the jackhammer caused increased back pain, but he continued to finish out the work week which ended on Friday, August 14, 1998. Appellant testified that while driving home on that Friday, he felt a sharp pain in his groin area, and when he got out of bed the next morning he had throbbing pain at the top of his legs with a burning sensation going down the inside of his legs. On Sunday, August 16, Appellant's brother was killed in a car accident, and B&R granted Appellant's request to take the week off from work. Appellant said that the pain in his back and legs worsened during the week he was off.

It was not until he returned to work on August 24, 1998, that Appellant first reported his injury of July 31, 1998, to B&R's safety office by filing a written statement regarding the incident. While conceding that he did not comply with B&R's policy to report any on-the-job injury immediately, Appellant explained in his testimony that he did not think that the soreness and pain in his back was something that would last and said,

> I didn't want to complain because, basically, from what I've seen from Brown & Root in my past experience from working with them, it seems like to me guys that complain are the guys that go down the road first, and I'm just trying to keep a job with them basically at that time.

Appellant also testified that he had not previously injured his back in any way. The B&R Medical Questionnaire which Appellant completed before he participated in the agility test likewise indicated that he had no prior injury to his back.

After he filed the August 24, 1998, written injury statement, Appellant was taken by B&R's health safety environmental coordinator to see Dr. Viradia. Dr. Viradia testified that he found no restrictions in Appellant's range of motion, but during palpitation of the lower back he detected tenderness and muscle spasm. He diagnosed Appellant with acute lumbar sprain, supplied Appellant with muscle relaxers and anti-inflammatory medication and ordered a modified work schedule for two weeks.

Appellant went to see Dr. Vincent E. Wardlow, a chiropractor, on August 25, 1998, the same day that Appellant completed his workers' compensation claim form. Dr.

Wardlow diagnosed Appellant's condition as lumbosacral sprain, sacroiliac sprain and lumbosacral neuritis. The attending physician's portion of the claim form was completed by Dr. Wardlow, who indicated that Appellant's low back injury was the result of completing a pre-employment strength test and that the disability suffered by Appellant was the direct result of this injury.

On October 16, 1998, the Workers' Compensation Division (hereinafter "the Division") held Appellant's claim compensable and awarded temporary total disability benefits from August 25, 1998, through October 1, 1998. At the request of the Division, Appellant was examined by Dr. A.E. Landis, an orthopaedic surgeon. Dr. Landis submitted a report dated December 1, 1998, wherein he related his impression that Appellant sustained a strain/sprain type injury to the lower back in a work-related incident. His report also referenced an October 23, 1998, MRI of Appellant's lumbar spine, which showed minimal left of midline disc bulging at L4-5.

The Division ordered the closing of Appellant's claim on a temporary total disability basis on June 28, 1999. Based on the recommendation of Dr. Landis, the Division subsequently granted Appellant a five percent permanent partial disability award by order dated August 6, 1999. Timely protests were filed by both parties.

On September 13, 1999, the Office of Judges affirmed the Division's October 16, 1998, ruling which held Appellant's claim compensable. B&R appealed the September 13 ruling to the WCAB, which determined that Appellant's claim was not compensable. In support of its conclusion that the decision of the administrative law judge was clearly wrong,[6] the May 31, 2000, WCAB order set forth two specific findings: (1) Appellant was not an employee at the time he participated in a pre-employment agility test when the claimed injury occurred; and (2) even if Appellant was an employee at the time, he had not met the burden of proving his injury occurred on that date while completing the test. As a result of these findings, the WCAB reversed the ruling of the Office of Judges, rejected the claim and deemed all payments in the claim as overpayments subject to recovery. It is from the May 31, 2000, WCAB final order that this appeal is taken.

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[6]WCAB is required, pursuant to West Virginia Code § 23-5-12 (1995) (Repl. Vol. 1998), to reverse, vacate or modify an order of an administrative law judge when it determines that the judges'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).

II. Standard of Review

We apply a de novo standard of review to questions of law arising in the context of WCAB decisions. *Conley v. Workers' Compensation Div.*, 199 W.Va. 196, 199, 483 S.E.2d 542, 545 (1997). Furthermore, when the legal conclusions contained in a final order of the WCAB are found to be erroneous, this Court will reverse on appeal. Syl. Pt. 4, *Emmel v. State Compensation Director*, 150 W.Va. 277, 145 S.E.2d 29 (1965).

With regard to findings of fact of the WCAB, we stated in the syllabus of *Hosey v. Workmen's Compensation Comm'r*, 151 W.Va. 172, 151 S.E.2d 729 (1966), "This Court will not reverse a finding of fact made by the Workmen's Compensation Appeal Board unless it appears from the proof upon which the appeal board acted that the finding is plainly wrong."

III. Discussion

Appellant argues that the WCAB erred in reversing the Offices of Judges's decision on the grounds that: Appellant was not an employee of B&R on July 31, 1998, when the injury occurred; and even if Appellant was an employee of B&R on that date, the evidence did not support the conclusion that Appellant was injured on the job.

We first consider whether Appellant, as a job applicant who was allegedly injured while performing a physical agility test required by a prospective employer, is covered by the

Workers' Compensation Act (hereinafter "the Act").[7] To be entitled to benefits under the Act, a person must come within the terms of the statutory definition "employee," which states:

> Employees subject to this chapter are all persons in the service of employers and employed by them for the purpose of carrying on the industry, business, service or work in which they are engaged.

W.Va. Code § 23-2-1a (a) (1999) [2001 Supplement], in part. We are mindful that this Court also has established that "[a] contract of employment for remuneration is necessary to constitute the relation of employer and employee under the [Workers'] Compensation Act." Syllabus, *Basham v. County Court of Kanawha County*, 114 W.Va. 376, 171 S.E. 893 (1933).[8] Consequently, to determine whether Appellant was an employee when the injury occurred, we must consider whether he was in the service of the employer for the purpose of carrying on the employer's industry, business, service or work while serving under a contract for remuneration. We note further that in regard to making determinations of whether or not an employment relationship exists, this Court has said that "the most important element is the right or power of direction and control of the manner in which the work is to be performed." Syl. Pt. 5, in part, *Davis v. Fire Creek Fuel Co.*, 144 W.Va. 537, 109 S.E.2d 144 (1959), *overruled on other grounds by Yates v. Mancari*, 153 W.Va. 350, 168 S.E.2d 746 (1969).

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[7]W.Va. Code Chapter 23.

[8]The statutory provisions relied on by the Court in *Basham*, West Virginia Code §§ 23-2-1 and 23-2-5 (1931), are incorporated in the current statutory provisions of West Virginia Code §§ 23-2-1a and 23-2-5 respectively.

The specific issue of whether an injury sustained during a preliminary employment test is compensable under the Act as a job-related mishap is one of first impression for this Court. Our examination of the jurisdictions which have addressed the issue reveals two lines of thinking.

Jurisdictions which have determined that such an injury is not compensable have found that an applicant's participation in a pre-employment test did not create an employment contract between the applicant and the prospective employer as required by the law in the jurisdiction. In *Boyd v. City of Montgomery*, 515 So.2d 6 (Ala. Civ. App. 1987), the court held that "[a]lthough [the claimant] exposed herself to risk in trying out for employment with the City, she did so willingly and consciously. The benefit the City received from Boyd's taking an agility test does not rise to the level where a contract of employment can be imputed." *Id*. at 7. The court in *Sellers v. City of Abbeville*, 458 So.2d 592 (La. App. 1984), similarly concluded that when a claimant participated in an agility test, he "was taking the test for his own benefit so that he would be eligible for employment . . . . There was no employer-employee relationship." *Id*. at 594. After finding that no contractual relationship existed between an applicant injured during a pre-employment agility test and the employer requiring the test, the Oregon Court of Appeals in *Dykes v. State Accident Insurance Fund*, 613 P.2d 1106 (Or. Ct. App.1980), observed that finding the existence of a contract in such situations would compel the untenable conclusion that "every person who makes application to an employer for a job, fills out an application and takes any kind of test is *ipso facto* an

employe[e]." *Id.* at 1107. The Supreme Court of Colorado in *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991) found no employment contract was created by an applicant participating in preemployment testing when the successful completion of the tests merely qualified a pool of candidates from which final selections would be made. "At no time during the application process was [claimant] promised employment as a police officer, even if she passed all the requisite tests." *Id.* at 653.

Jurisdictions which find injuries sustained during requisite preemployment tests compensable initially establish that the statutory and decisional law of the jurisdiction do not mandate the existence of an employment contract to establish an employment relationship covered by workers' compensation. These jurisdictions then rely on the service aspect of the employer-employee relationship under the workers' compensation laws to conclude that preemployment tests requiring the performance of special skills which benefit the employer as well as the applicant qualify for workers' compensation coverage. In *Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705 (Tex. Civ. App. 1963), the appellate court examined a case claiming the employer was negligent because the plaintiff contracted tuberculosis during a preemployment physical. The *Lotspeich* court found "the physical examination was conducted on the employer's premises, not for the benefit of the applicant, but wholly for the benefit of the employer and under its direction and control. Therefore, it is clear that appellant was an employee" whose right to pursue a negligence claim was "extinguished by the Workmen's Compensation Law." *Id.* at 709. In a New York case, *Smith v. Venezian Lamp Co.*, 168

N.Y.S.2d 764 (N.Y. App. Div. 1957), a workers' compensation claimant who was injured while being tested for a job as a lamp polisher was found by the court to be an employee whose claim was compensable even though wages and hours were never discussed with the applicant, nor was he paid for any work. The *Venezian Lamp* court concluded

> "that where a tryout involves an operation that would be ordinarily viewed as hazardous under the Workmen's Compensation Law a special employment exists. . . . A tryout is for the benefit of the employer, as well as the applicant, and if it involves a hazardous job we see no valid reason why the applicant should not be entitled to the protection of the [workers' compensation] statute."

Id. at 766. In *Laeng v. Workmen's Compensation Appeals Board*, 494 P.2d 1 (Cal. 1972), the claimant was injured while completing a physical agility test conducted by his prospective employer which was designed to reflect the actual conditions of the job of a refuse crew worker. The Supreme Court of California held:

> [T]he injury incurred by [the] applicant in the performance of the arduous and potentially hazardous tasks prescribed by the employer occurred in the service of the employer . . . . Such service here was incurred for the benefit of the employer; it was performed according to his assignment and under his direction and control.

Id. at 9.

Although we find the two approaches taken by other jurisdictions instructive, neither completely embraces the situation before us in the instant case or the law of this state. As previously noted, our law requires that, for a person to be considered an employee for workers' compensation purposes, a contract of employment must exist.

The factual bases for the WCAB's conclusion that Appellant was not an employee of B&R during the agility test when the alleged injury occurred is explained in the following manner in its May 31, 2000, order: "The claimant was not hired by Brown & Root until he had completed the hiring process on July 31, 1998. The hiring process included a physical agility test. Further, the claimant was not on the payroll at Brown & Root until August 3, 1998." Based on our review of the record, we do not find that the facts of this case support the WCAB's legal conclusion.[9]

The WCAB conclusion about when the employment relationship was established ignores relevant testimony of Appellant and Ms. Kays. In responding to the questioning of counsel for B&R regarding when he was hired, Appellant said:

> A: Actually, they told me that they were going to hire me two days before that and that I had to go take another class on a Thursday before that Friday, that I had to pay $50, and eight hours of my time was involved in that class, and then the following day I came back to Brown & Root and did their test.
>
> Q: When were you actually hired as far as you understand, two days before July 31?
>
> A: Yes, verbally I was hired.
>
> Q: So that would be July 29?

[9]Findings of facts supporting the legal conclusions of the WCAB are subject to review by the courts. *Emmel v. State Compensation Director*, 150 W.Va. 277, 284, 145 S.E.2d 29, 34 (1965).

A: But I did not get paid until the following Monday. Usually – I thought I was going to get paid on that Friday for the testing that Ms. Keys [sic] gave me and whenever I very first worked with them they did pay me for that time and now they've stopped paying for that time.

Q: Who was it that verbally hired you?

A: Mary Keys [sic].

. . . .

Q: Now, what exactly did Mary say to you that leads you to say here today you were verbally hired?

A: She told me that I was going to have to go take that class before hiring . . . . She said that I would have to take that class first, pay the $50, and then come back in to see her and I would be hired.

In response to questioning by B&R's counsel regarding Appellant's hiring process, Ms. Kays testified:

A: Well, first we get labor requisitions from the job site needing certain type of people. My job then is to make contact with this person by phone.

At the time that I called Mr. Dodson, he was not interested in the job, he said he was working at the time, but he later called me and told me if the job was still available, that he would like the position, which I called the supervisor, the electrical superintendent out at the job site, and he said he still needed people, and he okayed me to hire him.

So I called and talked to Robert and told him that he could come in at such and such date, which happened to be July 31st, and I would do his

processing and get him ready to go to work on August 3rd.

. . . .

Q: Did Mr. Dodson have to complete all of those items you just mentioned on July 31st, 1998 before an offer of employment was made?

A: Yes, sir. He has to complete all – make sure the physical is intact, pass the physical agility and the safety comprehension. Everything has to be done and satisfied here in this office before he's able to go to the job site.

The testimony establishes that Ms. Kays was authorized to make, and did make, an offer of employment to Appellant on the condition that he successfully complete a series of tests. Appellant's acceptance of the offer was evidenced by him attending and personally paying for a safety class and subsequently completing the battery of preemployment tests at B&R's office, including an agility test. Appellant's participation in those tests, and particularly the strength and agility test which posed a risk of immediate and significant injury to Appellant, constituted an acceptance of the offer and created a contract of employment, notwithstanding the absence of remuneration to Appellant for participating in the agility test. The agility test was administered under the direction and control of B&R. It simulated conditions involving the exposure to risk of immediate and significant physical harm, to which an electrician might be exposed in the B&R workplace. The test benefitted and assisted B&R in carrying on its business by defining and testing a minimum level of strength and agility which B&R considered

essential to the performance of the duties by such electricians. Therefore, we find that Appellant comes within the definition of employee in West Virginia Code § 23-2-1a(a), for the purposes of worker's compensation.

Accordingly, we hold that where an offer of employment is conditioned upon an applicant successfully completing a course of safety instruction at his own expense and thereafter submitting to a physical agility test – administered under the direction and control of the employer for the benefit of the employee and the employer – involving exposure of the applicant to the risk of immediate and significant physical harm, participation in the physical agility test constitutes an acceptance of the employment, entitling the applicant to workers' compensation coverage for any injury sustained in the course of the physical agility test notwithstanding the absence of remuneration paid to the employee for participation in the test. To the extent that our holding in the Syllabus of *Basham v. County Court of Kanawha County*, 114 W.Va. 376, 171 S.E. 893 (1933), requires remuneration as a prerequisite for workers' compensation coverage for such an injury, it is hereby modified.[10] We emphasize that our conclusion reached today is narrowly drawn and driven by the facts of this case. Participation

[10]The conclusion we reach today is narrowly drawn. It addresses immediate and significant risks of injury which might occur in the workplace, with or without the fault of any person, for which an employee would have little or no recourse under traditional common law remedies and defenses despite having rendered a meaningful service to an employer at substantial personal risk. We do not address preemployment tests directed primarily at verifying basic aptitudes.

in a preemployment test does not, standing alone, create an employment contract for workers' compensation purposes.

We now examine the second reason why the WCAB reversed the administrative law judge's order: "[E]ven if the claimant was considered to be an employee of Brown & Root on July 31, 1998, he has not met his burden of proving that an injury occurred on July 31, 1998, while he was completing the [agility] test."

In order to be compensable under the Act, an injury must be proven to be incurred during the course of and as a result of employment. W.Va. Code § 23-4-1 (1989) (Repl. Vol 1998). To prove a compensable claim, a claimant must produce evidence which demonstrates the coexistence of: "(1) a personal injury (2) received in the course of employment and (3) resulting from that employment." Syl. Pt. 1, in part, *Barnett v. State Workmen's Compensation Comm'r*, 153 W.Va. 796, 172 S.E.2d 698 (1970). The level of proof a claimant must produce to prove a claim compensable is evidence, however slight, that would lead a reasonable person to conclude that the claimant was injured while performing his duties in the course of his employment or duties incidental to that employment. *Machala v. State Compensation Comm'r*, 109 W.Va. 413, 155 S.E. 169 (1930); *Ramey v. State Compensation Comm'r*, 150 W.Va. 402, 146 S.E.2d 579 (1966). However, while "[a] claimant in a workmen's compensation case must bear the burden of proving his claim [] in doing so it is not necessary to prove to the exclusion of all else the causal connection between

the injury and the employment." Syl. Pt. 2, in part, *Sowder v. State Workmen's Compensation Comm'r*, 155 W.Va. 889, 189 S.E.2d 674 (1972). Moreover, we have consistently stated that the Act requires that evidence in a workers' compensation claim must be liberally construed in favor of the claimant. *See, e.g., Myers v. State Workmen's Compensation Comm'r*, 160 W.Va. 766, 770, 239 S.E.2d 124, 126; (1977); Syl. Pt.1, *Johnson v. State Workmen's Compensation Comm'r*, 155 W.Va. 624, 186 S.E.2d 771 (1972); Syllabus, *Fulk v. State Compensation Comm'r*, 112 W.Va. 555, 166 S.E. 5 (1932). We conduct our review of the evidence based on these well-established tenets.

B&R contends that the WCAB correctly overturned the ruling of the administrative law judge because Appellant did not prove the causal connection between his complaints and a work-related event, noting that all of the medical, testimonial and other evidence presented by Appellant could only be characterized as "totally subjective, biased, self-serving statements."

Our review of the record shows that Appellant indicated on a medical questionnaire completed on July 31, 1998, before he participated in the physical agility test in question, that he had no previous back injuries or conditions. He restated this information when he was deposed. Appellant's testimony established that he injured his low back while completing lifts in the course of an agility test he took on July 31, 1998. The record includes an August 24, 1998, written statement filed with B&R by an employee who attended a week

long orientation with Appellant the week after the alleged injury occurred. The fellow employee's written statement and his later testimony related that Appellant informed him the week after the agility test was taken that Appellant was uncomfortable sitting through an orientation class because he had injured his back while completing the agility test. The rebuttal evidence offered by B&R was the testimony of Ms. Kays, Mr. King and Mr. Johnston, all of which stated that the claimant never mentioned the low back injury, pain or condition on July 31, 1998.

Appellant's medical evidence included the diagnosis by Dr. Wardlow of lumbosacral sprain, sacroiliac sprain and lumbosacral neuritis, which the doctor concluded were the result of completing a pre-employment strength test. Appellant also relied on the examination completed by Dr. Landis, the Divisions's examining orthopaedic surgeon. In his written report in the record, Dr. Landis related that the onset of Appellant's lower back injury symptoms coincided with the lifting requirements of the July 31, 1998, agility test and that the symptoms increased when Appellant operated and carried a jackhammer while working for B&R as an electrician. Dr. Landis' report concluded that Appellant sustained a sprain/strain type of injury to his lower back in a work-related incident.

The only medical evidence supplied by B&R was information from two examinations completed by B&R's physician, Dr. Viradia. Dr. Viradia examined Appellant on July 31, 1998, before the injury was reported, for a routine physical required by the employer.

Dr. Viradia found nothing unusual during the course of the physical and reported to B&R that Appellant could "be assigned to any work consistent with his skills and training." On the day Appellant reported the injury, August 24, 1998, Dr. Viradia re-examined Appellant and, based on Appellant's complaint, he detected tenderness and muscle spasm in Appellant's lower back and diagnosed acute lumbar sprain.

We find no evidence in the record which indicates that Appellant's lower back condition was caused by any event other than the work-related incidents of the agility test lifts, which we have heretofore concluded to be an employment activity, and the later use of a jackhammer to complete an assigned job after Appellant was on B&R's payroll. However, we observe with particular concern that the evidence of injury or aggravation of injury associated with Appellant's use of a jackhammer, at a time when Appellant clearly was a B&R employee, was either overlooked or disregarded without explanation in WCAB's order.

Consequently, based on all of the evidence presented, we find that a reasonable person could conclude that Appellant was injured while performing duties in the course of and as a result of employment, and the administrative law judge's ruling of September 13, 1999, finding the same and holding the claim compensable, was not clearly wrong. Therefore, we find that the WCAB erred in its finding that there was insufficient evidence to support the Office of Judge's compensability decision.

For the reasons herein stated, we find that the May 31, 2000, WCAB order contains erroneous legal conclusions regarding both the employment status of Appellant when he participated in the agility test and the sufficiency of evidence. Accordingly, we reverse the May 31, 2000, WCAB order, and thereby reinstate the provisions of the September 13, 1999, order of the Office of Judges.

Reversed.