No. 23-ICA-____

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

JASON HEAVENER, Petitioner,

v.

J.F. ALLEN COMPANY, Respondent.

ON APPEAL FROM STATE OF WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF
REVIEW JCN: 2023017785

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

I. The West Virginia Board of Review erred by relying solely on the definition of "temporary" and "transitory" employee in W.Va. C.S.R. §85-8-3.17 and §85-8-3.18, and ignoring the plain language of W.Va. C.S.R. §85-8-7.3 and §85-8-7.4, which is clearly applicable and mandates that when a West Virginia worker meets the legal definition of non-temporary worker in both West Virginia and another state, the West Virginia worker can only be covered under the laws of the other state if there is a written agreement between the employer and employee stating that the employee will be subject to the laws of that other state.

II. The West Virginia Board of Review erred in failing to apply the law and holding set forth in *Fausnet v. State Workers' Compensation Comm'r,* 174 W.Va. 489, 327 S.E. 2d 470 (1985), in which the West Virginia Supreme Court held an employee was covered by the West Virginia Workers' Compensation Act even though injured in another state where he was temporarily assigned, due to his long-term work for the company in West Virginia, his hiring in West Virginia, and the absence of evidence demonstrating the out-of-state work was permanent, despite meeting the definitions of "temporary" or "transitory" employee as set forth in workers' compensation regulations.

III. The West Virginia Board of Review erred in failing to apply the five-factor jurisdictional test set forth in *Van Camp v. Olen Burrage Trucking, Inc*, 184 W.Va. 567, 401 S.E. 2d 913 (1991), which is conclusive in determining the Petitioner's workplace injury is clearly under the jurisdiction of the West Virginia Workers' Compensation Act.

IV. The West Virginia Board of Review erred in its reliance on and application of *Cassel v. Aspen Builders, Inc.*, No. 22-ICA-211 (W.Va. Ct. App. March 6, 2023), because the facts

surrounding Petitioner's employment are entirely opposite the facts surrounding the employment of the employee in *Cassel* who was hired specifically to work permanently in Kentucky and only Kentucky.

STATEMENT OF THE CASE

Petitioner, Jason Heavener, is a long-time resident of West Virginia and currently resides in Wiley Ford with his wife and daughter. Mr. Heavener has been employed by Respondent, West Virginia-based J.F. Allen Company, for over 12 years. On January 13, 2023, Mr. Heavener's right leg was severely crushed by a heavy section of pipe, leading to the amputation of his right leg above the knee.

Mr. Heavener initially worked for J.F. Allen Company from 2009 until 2015, during which time he worked exclusively in West Virginia. Mr. Heavener returned to J.F. Allen in 2017. From 2017 until January 13, 2023, he worked on a total of 7 projects, with 5 of them located in West Virginia and 2 in Pennsylvania. The first Pennsylvania project took place in Lilly in 2021 and lasted approximately one month. The second Pennsylvania project occurred from July 25, 2022, to January 13, 2023, in Greencastle. Apart from these two temporary assignments in Pennsylvania, Mr. Heavener exclusively worked in West Virginia. As will be discussed in further detail, there was never any intention by J.F. Allen that Mr. Heavener would be permanently assigned to work in Pennsylvania. Mr. Heavener was assigned to work on the Greencastle, Pennsylvania, site only until a project in Mt. Nebo, West Virginia, was ready to start.

For purposes of the issues before this Court, it is necessary to closely examine exactly where Mr. Heavener worked for J.F. Allen during the 365-day period before the injury subject of this claim. From January 1, 2022, to July 22, 2022, Jason Heavener was assigned to projects in West

Virginia. It is undisputed that during this period, Mr. Heavener worked in West Virginia for more than 30 days within the 365 days preceding his injury. By excluding weekends and public holidays, it can be calculated that Mr. Heavener worked or would have been paid for approximately 137 days in West Virginia within that 365-day timeframe. The CEO of J.F. Allen testified that Mr. Heavener was "regularly employed" by the company in West Virginia prior to his injury (Hadjis Dep. 18: 12-22).

On July 25, 2022, J.F. Allen assigned Jason Heavener to a Waste Management project located in Greencastle, Pennsylvania. Mr. Heavener was aware that this assignment was temporary and that he would eventually be transferred to a utilities division project in Mt. Nebo, West Virginia. The understanding was that once the Mt. Nebo project commenced, Mr. Heavener would leave the Greencastle project and return to work in West Virginia (Heavener Dep. 33: 19-24; 34:1-10). As J.F. Allen does not have "permanent" project assignments for its workers, on July 26, 2022, the very next day after he reported to Greencastle, Mr. Heavener was instructed by his supervisor to travel to another Waste Management site in Hedgesville, West Virginia, where he was needed to identify underground utility lines and cut asphalt roadway to allow access to those lines. (Heavener Dep. 17:12-24; 18:1-24; 19: 1-24). At his May 3, 2023, deposition, Mr. Heavener provided screenshots from his phone, which displayed his travel app information for the trip from Greencastle, Pennsylvania, to Hedgesville, West Virginia, on July 26, 2022. (Heavener Dep. 29-35). J.F. Allen has never had the supervisor, who not only ordered Mr. Heavener to Hedgesville, but also accompanied him there, dispute or rebut the fact that Mr. Heavener worked in West Virginia while he was "permanently" assigned to Pennsylvania as J.F. Allen has incorrectly alleged.

J.F. Allen's CEO testified under oath that respondent does not permanently assign workers to specific projects or areas (Hadjis Dep. 19:22-23). Workers are assigned to projects where additional workers are needed. (Hadjis Dep. 17: 16-19; Belt Dep. 18: 19-23). During his over twelve years of employment with Respondent, Petitioner worked on approximately 17 different job sites. Out of these 17 projects, 15 were located within West Virginia. The assignment in Greencastle, Pennsylvania, was not intended to be permanent and was initially scheduled to conclude in October 2022. Mr. Heavener was sent over to help his employer complete the project which was running behind schedule. Petitioner had an agreement to return to the utilities division project in Mt. Nebo, West Virginia, once it commenced.

Mr. Heavener did, however, work more than 30 days in the 365-day period in Pennsylvania, a total of 117 days. As a result, Mr. Heavener uniquely met the definition of "temporary" worker in two states, West Virginia and Pennsylvania. On the date of his injury, he was employed by respondent, headquartered in West Virginia, with facilities in Elkins and Bridgeport, West Virginia, and which regularly hired West Virginians. (Hadjis Dep. 8:5-8). From 2009 to 2014, Petitioner worked exclusively in West Virginia for Respondent (Heavener Dep. 5:22-24; 6-8; 9: 1-16). From 2017 to 2022, Petitioner worked exclusively in West Virginia for Respondent, except for two non-permanent assignments in Pennsylvania (Heavener Dep. 9: 7-24; 10-15; Hadjis Dep. 15-23). Petitioner is a West Virginia worker employed by a West Virginia company and he worked overwhelmingly in West Virginia.

Shortly after Petitioner's injury, Respondent prepared an application or report of injury to its Pennsylvania workers' compensation carrier, Zurich, which opened a Pennsylvania workers' compensation claim and began paying benefits. No extraterritorial agreement exists between Petitioner and Respondent by which Petitioner agreed to be covered by Pennsylvania workers'

compensation (Belt Dep. 18: 3-15; Hadjis Dep. 23: 15-24; Heavener Dep. 27: 15-24). Petitioner did not apply for Pennsylvania workers' compensation benefits (Heavener Dep. 27:22-24; 28:1-2). Petitioner applied for West Virginia workers' compensation benefit, and on March 23, 2023, the claims administrator denied the West Virginia claim on the basis that Petitioner worked more than 30 days in Pennsylvania in the 365 days preceding his workplace injury thereby asserting that Pennsylvania workers' compensation coverage for his injury.

The claims administrator failed to consider the relevant West Virginia workers' compensation laws and regulations applicable to Mr. Heavener's situation. Specifically, the administrator overlooked the fact that Mr. Heavener had worked more than 30 days in both West Virginia (137 days) and Pennsylvania (117 days) within the 365 days preceding his injury and that there were workers' compensation regulations which specifically dealt with that scenario. Additionally, the administrator neglected to acknowledge that Mr. Heavener had been a regular employee in West Virginia for the majority of his career with the company. By disregarding these crucial facts, the claims administrator failed to apply the specific regulations and case law that govern the scenario where an employee qualifies as a non-temporary employee in both West Virginia and another state, and where a West Virginia employee consistently worked in the state for a West Virginia-based company prior to the workplace injury.

The June 21, 2023, Order issued by the West Virginia Workers' Compensation Board of Review affirmed the claim administrator's decision to deny Petitioner West Virginia workers' compensation coverage. The Order primarily relied on the definitions of "temporary" or "transitory" as outlined in W.Va. C.S.R. § 85-8-3.17 and §85-8-3.18, and completely ignored the workers' compensation regulations which set forth how workers' compensation jurisdiction is handled when a West Virginia employee meets the definition of temporary employee in West

Virginia and another state. In fact, the Order had no analysis whatsoever of those regulations which concluded the regulations were or were not applicable. The Order is completely silent on this important issue raised by Petitioner. The Order completely ignores two West Virginia Supreme Court decisions applicable to this claim. Finally, the Order referenced *Cassel v. Aspen Builders, Inc.*, No 22-ICA-211 (W.Va. Ct. App. March 6, 2023) but did not analyze the case or address the important factual differences between Petitioner's case and *Cassel*.

SUMMARY OF ARGUMENT

The West Virginia Workers' Compensation Board of Review's failure to adequately address the legal arguments presented by the Petitioner constitutes a clear error. The Board disregarded relevant West Virginia laws and regulations that directly apply to the matter at hand. In its decision, the Board selectively applied the law, omitting any provisions that did not support its desired conclusion. Upon reviewing the Board's Order, it is evident that its interpretation and application of the law are incomplete and inconsistent with the plain language of applicable regulations and established case law precedents.

The Board committed an error by failing to address the provisions of W.Va. C.S.R. §85-8-7.3 and §85-8-7.4 in the Order's "Discussion" section. The Petitioner, who is a West Virginia worker employed by the Respondent, worked for the majority of his career within the state of West Virginia. He also worked more than 30 consecutive days (137 days) in West Virginia within the 365 days preceding his workplace injury. At the time of his injury, the Petitioner was assigned to a non-permanent job site in Pennsylvania but remained within the jurisdiction of the West Virginia Workers' Compensation Act. No agreement exists between the Petitioner and the Respondent to subject the Petitioner, a West Virginia worker, to the workers' compensation laws of another state, as required by W.Va. C.S.R. §85-8-7.3 and §85-8-7.4.

The Board committed error by failing to address the five factor workers' compensation jurisdictional test set forth in *Van Camp v. Olen Burrage Trucking, Inc.,* 184 W.Va. 567, 401 S.E. 2d 913 (1991). The most crucial of those factors is whether the Petitioner regularly worked in West Virginia prior to the injury. It is uncontested and acknowledged by the Respondent that the Petitioner regularly worked in West Virginia for J.F. Allen before the injury. Alongside the "regularly worked in West Virginia" factor, the Board of Review failed to acknowledge that other four factors in *Van* Camp are present in this case: (1) Respondent obtained authorization to conduct business in West Virginia many years ago; (2) Respondent's offices and operation centers are located in West Virginia; (3) Petitioner was hired in Buckhannon, West Virginia, at the Respondent's headquarters; and, (4) Respondent regularly hires other residents of West Virginia. These meeting of all these five factors necessitates the granting of West Virginia workers' compensation benefits to the Petitioner. The Board's failure to address these factors is clear error.

The Board committed an error by relying on *Cassel v. Aspen Builders, Inc.*, as it is distinguishable from the present case. No. 22-ICA-211 (W.Va. Ct. App. March 6, 2023). In *Cassel*, the worker was specifically hired for only out-of-state work and had no previous work history with the employer in West Virginia. The *Cassel* employee was hired by the West Virginia company specifically for a job in Kentucky. He worked a total of 3 days in West Virginia right before he left for the job in Kentucky just to get up to speed and prepare. That is not anywhere close to the facts of this case. It is not in the same zip or area code. Petitioner's case closely aligns with *Fausnet v. West Virginia Workers' Compensation Comm'r*, 174 W.Va. 489, 327 S.E. 2d 470 (1985), where the West Virginia Supreme Court determined that an employee was covered by the West Virginia Workers' Compensation Act even though injured in

another state since the employee had extensive prior work for the company in West Virginia, the employee was hired in West Virginia, and the absence of evidence indicating that the out-of-state work was permanent. Importantly, the *Fausnet* court held there was West Virginia worker's compensation coverage for the out-of-state injury despite the fact that the employee met the definitions of "non-temporary" or "non-transitory." The Board's failure to apply *Fausnet* with analogous facts is error and the Board's reliance on *Cassel* with facts opposite to this case is error.

The Board's failure to address the relevant factors, case law, and regulations that are dispositive on the issue of jurisdiction demonstrates clear errors of law in its June 21, 2023, Order. The Board's conclusion, based on these clear errors of law, should be overturned.

STATEMENT REGARDING ORAL ARGUMENT

This case should be granted oral argument pursuant to W.Va. R.A.P. Rule 19(a) and Rule 20(a), as this case revolves around a narrow issue of law which in part involves an issue of first impression regarding W.Va. C.S.R. § 85-8- 7.3 and W.Va. C.S.R. § 85-8-7.4. Oral argument is necessary as the legal issues could be more adequately presented at oral argument and the decisional process significantly aided by oral argument.

STANDARD OF REVIEW

The Intermediate Court of Appeals shall reverse, vacate, or modify the order of 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) 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.

W.Va. Code §23-5-12a(b) (2022).

"Questions of law arising in decisions by the Board of Review are reviewed de novo."

W.Va. Heating and Plumbing Co. v. Carroll, No. 22-ICA-167, (W.Va. Ct of App. May 22, 2023).

ARGUMENT

I. The West Virginia Board of Review erred by relying solely on the definition of "temporary" and "transitory" employee in W.Va. C.S.R. §85-8-3.17 and §85-8-3.18, and ignoring the plain language of W.Va. C.S.R. §85-8-7.3 and §85-8-7.4, which is clearly applicable and mandates that when a West Virginia worker meets the legal definition of non-temporary worker in both West Virginia and another state, the West Virginia worker can only be covered under the laws of the other state if there is a written agreement between the employer and employee stating that the employee will be subject to the laws of that other state.

The Board erred in its Order when it applied the definition of "temporary" to Petitioner because the definition was only applied to his time spent working in Pennsylvania and not his time spent working in West Virginia. W.Va. C.S.R. §85-8-3.17 defines the criteria for qualifying as a non-temporary worker in any state, which includes working 30 days in a given state within the 365 preceding the injury. On the date of injury, Petitioner met the legal definition of a non-temporary employee in BOTH West Virginia and Pennsylvania, since he worked more than 30 days in the preceding 365 days before his injury in both states. The Board failed to properly apply the legal definition of non-temporary to this undisputed fact and therefore reached a legally incorrect conclusion in its June 21, 2023, Order affirming the claim administrator's order denying Petitioner West Virginia workers' compensation benefits.

The Board's erroneous interpretation of the definition of "non-temporary" and its failure to properly apply West Virginia workers' compensation regulations, such as W.Va. C.S.R. §85-8-7.3 and §85-8-7.4, had significant consequences throughout its Order. By disregarding these regulations, the Board overlooked the specific guidelines that address the determination of which state's coverage should apply in the particular scenario at hand, where the Petitioner worked in both West Virginia and Pennsylvania. This error should be recognized and corrected, as it has led to an unjust outcome that is inconsistent with the applicable regulations.

When reading the regulations ignored by the Board, it is clear that the regulations are applicable to this case. If these regulations were not applicable to this case, there is no reason for their existence. The Respondent nor the Board have ever ventured as to what other purpose these regulations have than application to the very facts of this case.

W.Va. C.S.R. §85-8-7.3 is *literally* entitled "Employment by a West Virginia employer outside of the State of West Virginia." It specifically states:

> Pursuant to W.Va. Code §23-2-1(b)(3) and subsection 4.3.3 of this rule, and employer that is otherwise subject to the provisions of chapter twenty-three of the West Virginia Code does not have to provide West Virginia workers' compensation coverage for employees who perform work for the employer in a state other that the State of West Virginia in a non-temporary basis (i.e. for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period): *Provided*, That the employer must provide West Virginia workers' compensation coverage for any employee working in the state of West Virginia and who is not otherwise exempt from West Virginia's workers' compensation laws on an non-temporary basis (i.e. for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period) unless the employee has entered into an extraterritorial agreement described in section 7.4 of this rule.

Examining the language of this regulation sentence by sentence, it is clear that it is applicable to this case.

1. Respondent was an employer subject to the provisions of chapter twenty-three of the West Virginia Code.
2. Respondent did not have to provide West Virginia workers' compensation coverage to Petitioner if he was performing work for Respondent in a state other than West Virginia on a non-temporary basis (i.e. for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period).
3. *Provided,* Respondent must have likewise provided West Virginia workers' compensation coverage for Petitioner since he worked for Respondent in West Virginia on a non-temporary basis (i.e. for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period.
4. *Unless* the Petitioner entered into an extraterritorial agreement described in section 7.4 of this rule. No such agreement was ever made between Respondent and Petitioner.

Looking at W.Va. C.S.R. §85-8-7.4, it states:

> An employer and employee who are both subject to the workers' compensation laws of a state other than West Virginia may enter into a written agreement in which the employer both agree to be bound by the laws of the other state: *Provided,* That any employee entering into such an agreement must physically work for the employer entering into such agreement outside of the State of West Virginia for a period of not less than thirty (30) calendar days in any three hundred and sixty-five (365) day period, and the employer must comply with the workers' compensation laws of the other state(s).

An examination of W.Va. C.S.R. §85-8-7.4, sentence by sentence again shows its applicability to this case.

1. Petitioner, a West Virginia resident, having worked more than 30 days in 365 days in West Virginia for West Virginia employer J.F. Allen, was a non-temporary West

Virginia employee of J.F. Allen. He was, therefore, subject to the workers' compensation laws of West Virginia.

2. Respondent was subject to West Virginia workers' compensation law and had West Virginia workers' compensation coverage.
3. Petitioner having worked more than 30 days in 365 days in Pennsylvania for Respondent was a non-temporary Pennsylvania employee of Respondent as well. He was, therefore, subject to the workers' compensation laws of Pennsylvania.
4. Respondent was subject to Pennsylvania workers' compensation law and had Pennsylvania workers' compensation coverage.
5. Respondent and Petitioner were *both* subject to the laws of a state other than West Virginia, as set forth in the first sentence of Rule 7.4.
6. Once that provision is met, the employee and employer *may* enter an agreement to be bound by the laws of *the other state*. Importantly, the language here shows that the *default* coverage would be West Virginia coverage, not the state to where the employee is sent. The parties have to agree to have the other state's coverage apply.
7. *Provided,* for the agreement to be valid, the employee (Petitioner) must physically work for a period of not less than thirty (30) calendar days in any three hundred and sixty-five (365) day period, and the employer must comply with the workers' compensation laws of the other state(s). Petitioner did just that.

This is an important point and one that The Board and the claims administrator ignored. The West Virginia workers' compensation rule makers foresaw the very circumstances in this case. A West Virginia employee working for a West Virginia employer is sent to another state for a period exceeding 30 days in 365 days, thereby making both the employer and employee

subject of the other state's workers' compensation laws as well. Under that scenario, a specific set of rules was promulgated and enacted. The intent of the West Virginia law could not be clearer. West Virginia workers' compensation laws would be primary to the other state's laws (even if the worker is in the other state more than 30 days in 365 days) UNLESS there is an agreement between the employer and the employee to have the other state's workers' compensation laws apply to any injury on the job.

The Board erred in concluding that once Jason Heavener worked more than 30 days in the preceding 365 days before his injury in Pennsylvania, that the inquiry is over. That simply cannot be true. If that were so, there would be no W.Va. C.S.R. §85-8-7.3 or W.V. C.S.R. §85-8-7.4.

In applying the law correctly and completely, the Board and this Court must apply ALL the law applicable to the claim, not just part of it. The Board simply ignored analysis of W.Va. C.S.R. §85-8-7.3 and W.V. C.S.R. §85-8-7.4 in the "Discussion" section of its Order. The Board made an error of law by not just misapplying W.Va. C.S.R. §85-8-3.17, but also by outright ignoring the inconvenient truth of W.Va. C.S.R. §85-8-7.3 and §85-85.7.4. Nevertheless, the law must be applied, it cannot simply be ignored.

As a result of the failure to consider and apply W.Va. C.S.R. §85-8-7.3 and W.V. C.S.R. §85-8-7.4, the Board clearly erred as a matter of law.

II. The West Virginia Board of Review erred in failing to apply the law and holding set forth in *Fausnet v. State Workers' Compensation Comm'r,* 174 W.Va. 489, 327 S.E. 2d 470 (1985), in which the West Virginia Supreme Court held an employee was covered by the West Virginia Workers' Compensation Act even though injured in another state where he was temporarily assigned, due to his long-term work for the company in West Virginia, his hiring in West Virginia, and the absence of evidence demonstrating the out-of-state work was permanent, despite meeting the definitions

of "temporary" or "transitory" employee as set forth in workers' compensation regulations.

In *Fausnet v. State Workers' Compensation Comm'r*, , the West Virginia Supreme Court held that despite an employee being injured while assigned out of state for two months (again, like in this case more than 30 days), and meeting the definition of a non-temporary employment in that other state within the meaning of W.Va. Code §23-2-1 and W.Va.Code §23-2-1a, the employee was nevertheless covered under West Virginia's workers' compensation program because the court was "... of the opinion that the hiring of an employee in West Virginia is a factor to be considered concerning the question of whether that employee's work in a foreign state is, in fact temporary or transitory." 174 W.Va. 489, 493, 327 S.E. 2d 470, 473-474 (1985). There is absolutely no question that while Jason Heavener worked more than 30 days in the preceding 365 days making him a non-temporary employee, the assignment to Pennsylvania was transitory. There can absolutely be no truthful assertion by the employer that Petitioner was going to work in Pennsylvania beyond this assignment. His work in Pennsylvania was "transitory" as discussed in *Fausnet.* He was headed home to work in Mt. Nebo, West Virginia, when this Greencastle project was over.

In *Fausnet,* the employee sustained an injury while working on a job in Marietta, Ohio, with an expected duration of approximately two months. *Id.* at 471, 490. It was unclear whether the employee in *Fausnet*, who worked for an Ohio company, would have future assignments in West Virginia. *Id.* However, the West Virginia Supreme Court held that the employee in *Fausnet* was still covered by West Virginia workers' compensation due to several factors. These factors included the employee's regular prior work in Nitro and Elkins, West Virginia, being hired by the company in West Virginia, and the absence of evidence indicating a permanent relocation to Ohio. *Id.* at 474, 493.

Petitioner's case aligns closely with the precedent set in *Fausnet*, where the employee's out-of-state work was deemed transitory according to the court's definition. Similar to *Fausnet*, Petitioner regularly worked in West Virginia for a significant duration, was hired in West Virginia and had a transitory work assignment in Greencastle, Pennsylvania that was never intended to be a permanent assignment. The Board's failure to address and apply the relevant precedent of *Fausnet* in Petitioner's protest of the claim administrator's order constitutes a clear error of law. Based on a comprehensive analysis of West Virginia's laws and legal principles, it is evident that Petitioner falls under the jurisdiction of West Virginia's Workers' Compensation Act. Therefore, the Board's decision must be reversed.

III. The West Virginia Board of Review erred in failing to apply the five-factor jurisdictional test set forth in *Van Camp v. Olen Burrage Trucking, Inc*, 184 W.Va. 567, 401 S.E. 2d 913 (1991), which is conclusive in determining the Petitioner's workplace injury is clearly under the jurisdiction of the West Virginia Workers' Compensation Act.

The West Virginia Supreme Court then built upon the same logic of *Fausnet* in 1991 in *Van Camp v. Olen Burrage Trucking, Inc.*, holding: "... the following factors are dispositive of the issue whether an employer must provide West Virginia workers' compensation coverage to the employee pursuant to W.Va. §23-2-1: (1) whether the employer obtained authorization to do business in West Virginia; (2) whether the employer operates a business or plant or maintains an office in West Virginia; (3) whether the injured employee was hired in West Virginia; (4) whether the employer regularly hires other West Virginia residents to work at a West Virginia facility or office; and (5) whether the employee in question worked on a regular basis at a West Virginia facility for the employer prior to the injury at issue." 184 W.Va. 567, 570, 401 S.E. 2d 913, 915 (1991). If the answers to the above questions are in the affirmative, the employer is required to provide West Virginia workers' compensation coverage to the employee. *Id.* at 915,

570. Those five (5) factors form the basis that Respondent was required to have West Virginia workers' compensation coverage for Mr. Heavener despite his work in Pennsylvania. As discussed previously, Petitioner meets all five factors of this test, and the record reflects these facts which are not disputed by Respondent.

Then in 2003, the West Virginia Supreme Court again highlighted the public policy logic that West Virginians who regularly work for West Virginia companies in other states, even more than 30 days in 365 days, are to be afforded West Virginia workers' compensation coverage. The court held a key factor in the analysis of whether an employee is subject to the workers' compensation program of West Virginia is whether the employee regularly worked in West Virginia prior to the injury. *McGilton v. U.S. Xpress Enters.*, 214 W.Va. 600, 603, 591 S.E. 2d 158, 161 (2003). Again, the CEO for Respondent testified that Petitioner regularly worked in West Virginia before this transitory assignment to Pennsylvania (Hadjis Dep. 18: 12-22).

Hence, it is evident that the Board not only disregarded West Virginia workers' compensation rules and regulations in denying Petitioner's benefits but also overlooked relevant case law that supports his entitlement to those benefits. The Board's Order fails to acknowledge the valid legal authorities presented in the Petitioner's brief and should be overturned by the Court. Therefore, it is just and appropriate for the Court to award Petitioner the West Virginia workers' compensation benefits he rightfully deserves.

IV. The West Virginia Board of Review erred in its reliance on and application of *Cassel v. Aspen Builders, Inc.*, No. 22-ICA-211 (W.Va. Ct. App. March 6, 2023), because the facts surrounding Petitioner's employment are entirely opposite the facts surrounding the employment of the employee in *Cassel* who was hired specifically to work permanently in Kentucky and only Kentucky.

In *Cassel v. Aspen Builders,* 2023 No. 22-ICA-211 (W.Va. Ct. App. March 6, 2023), a West Virginia resident was hired by a West Virginia employer specifically to work on a job in Kentucky. This was the first and only job the worker held with the company and there was absolutely no dispute that the worker was hired specifically to work in Kentucky and that the Kentucky project would last more than 30 days. Before Mr. Cassel reported to Kentucky, he worked only 3 days in West Virginia. Those were the only days he worked in West Virginia, far fewer than 30 days in 365 days. Mr. Cassel could never have met the definition of "non-temporary" worker in West Virginia and he was never "regularly" employed in West Virginia. Mr. Cassel then went to work in Kentucky and was tragically killed in the first week he was there. This Court simply held that Kentucky workers' compensation would apply to the death claim even though Mr. Cassel had worked less than the full 30 days in Kentucky since the employer offered proof that the Kentucky project was definitely meant to last more than 30 days. As such, Mr. Cassel met the definition of a non-temporary employee in Kentucky. The distinctions could be no more stark from this case:

1. Petitioner was hired years ago by Respondent and had worked for years in West Virginia. In fact, both the CEO and HR Director testified in this claim that Petitioner was hired years before this Greencastle project was in existence and that Petitioner regularly worked in West Virginia before this one project. In contrast, Mr. Cassel had never before worked for Aspen Builders in any state and was specifically hired to work in Kentucky.
2. Petitioner worked more than 30 days (137 days) for Respondent in West Virginia in the preceding 365 days before his injury, thereby clearly meeting the definition of non-temporary employee in West Virginia. In contrast, Mr.

Cassel never came close to working more than 30 days (only 3 days) for Aspen Builders in West Virginia before his death.

3. Petitioner meets the definition of non-temporary employee in West Virginia and Pennsylvania. Mr. Cassel only met the definition of non-temporary employee in Kentucky.
4. Failing to meet the definition of West Virginia non-temporary employee and non-temporary employee in another state, W.Va. C.S.R.§85-8-7.3 and W.V. C.S.R. §85-8-7.4 could not be applied to the *Cassel* workers' compensation claim. As a result, West Virginia workers' compensation coverage could never have been primary coverage in the *Cassel* claim.

The very existence of W.Va. C.S.R.§85-8-7.3 and W.V. C.S.R. §85-8-7.4 shows West Virginia workers' compensation rule makers knew there would be situations like this very case where a West Virginia worker can meet the non-temporary employee definition both here and in another state. They clearly set forth how the situation was to be handled. The *Cassel* case is simply not that situation.

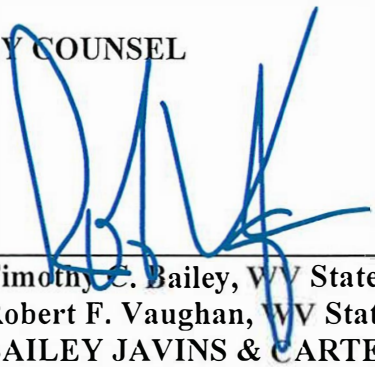
The Board's reliance on *Cassel* as a basis for its decision in the present case is erroneous, as the facts of *Cassel* are not comparable to those of the Petitioner's case. Furthermore, by disregarding other relevant case law cited by Petitioner and failing to apply the applicable regulations outlined in W.Va. Code §85-8-7.3 and §85-8-7.4, the Board's errors become more apparent. These errors are evident in the Board's Order, which diverges from the public policy and legislative intent underlying West Virginia's workers' compensation laws and regulations. Therefore, the Board's conclusion in its Order must be reversed and Petitioner granted West Virginia workers' compensation benefits.

CONCLUSION

Wherefore, based upon the foregoing, Petitioner Jason Heavener respectfully requests West Virginia Workers' Compensation Board of Review June 21, 2023, Order affirming the claim administrator's denial of West Virginia workers' compensation benefits.

JASON HEAVENER

BY COUNSEL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "**DOCKETING STATEMENT, PETITIONERS BRIEF** and **APPENDIX**" was served upon the following parties through the Court's electronic filing system (File & ServeXpress) and by U.S. Mail on this 20th Day of July 2023:

Maureen Kowalski, Esquire
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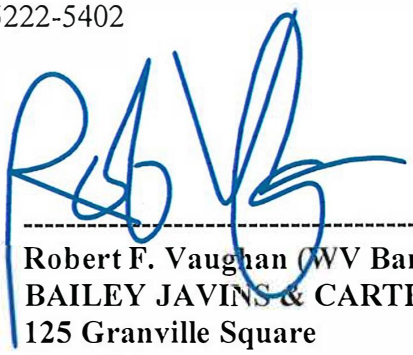
Pittsburgh, PA 15222-5402



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