

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

INTERMEDIATE COURT NO.: 23-ICA-317

JASON HEAVENER,)	JCN NO.: 2023017785
)	
Petitioner,)	BOARD OF REVIEW DECISION:
)	June 21, 2023
v.)	
)	
J.F. ALLEN COMPANY,)	
)	
Respondent.)	

**BRIEF ON BEHALF OF RESPONDENT
J.F. ALLEN COMPANY**

Maureen Kowalski, Esquire
West Virginia I.D. No. 7051

Dickie, McCamey & Chilcote, P.C.
Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402
(412) 392-5226
mkowalski@dmclaw.com

Attorney for Respondent,
J.F. Allen Company

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Board of Review Order: June 21, 2023

I. STATEMENT OF THE CASE

Jason Heavener (“Claimant”) appeals the June 21, 2023 Order of the Workers’ Compensation Board of Review (“Board”), which affirmed the Claim Administrator’s Order dated March 23, 2023. This Claim Administrator’s Order denied Claimant’s request for West Virginia workers’ compensation benefits for lack of jurisdiction. Respondent J.F. Allen Company (“Employer”) asserts the Board’s Order should be affirmed as the reliable and credible evidence demonstrates that the Board did not commit an error in determining that the State of West Virginia lacks jurisdiction as Claimant’s work in Pennsylvania was not temporary or transitory within the meaning on W.Va. Code §§23-2-1 and 23-2-1a. As Claimant’s work in Pennsylvania was not temporary or transitory, the Board did not an error in determining that Claimant is not entitled to the benefits of the West Virginia Workers’ Compensation Act.

Claimant is a resident of West Virginia who lives in Wiley Ford. (Petitioner Appendix, Page 48). He worked for Employer, a domestic West Virginia business, initially from August 10, 2009 to July 7, 2014 and was rehired on September 18, 2017. (Petitioner Appendix, Page 19). On the injury date, January 13, 2023, Claimant was working for Employer on a project for a customer, Waste Management, in Greencastle, Pennsylvania. (Petitioner Appendix, Page 3). Claimant solely worked on this project in Pennsylvania from around July 27, 2022 until January 13, 2023 when a

heavy piece of pipe fell on his right leg resulting in a crush injury and ultimately a right leg amputation above the knee. (Petitioner Appendix, Page 56).

Employer is a construction company licensed to do work and has done various projects in Kentucky, Ohio, Pennsylvania, Virginia, and more recently in North Carolina. (Petitioner Appendix, Page 3; Respondent Appendix, Page 94). Gregory Samuel Hadjis, President of Employer, explained that Employer does not hire employees to work in one geographic area but rather hires/keeps employees for the projects or jobs that Employer is working.¹ (Id. at 6). However, Employer makes every effort to assign workers to job sites that are close to their home. (Respondent Appendix, Page 94). From April 1, 2022 until April 1, 2023 Employer was insured with Zurich American Insurance Company at Policy Number WC 5098868-13 for workers' compensation insurance in Kentucky, Pennsylvania, and West Virginia. (Respondent Appendix, Page 4).

After Claimant's work accident, Zurich American Insurance Company established a claim in Pennsylvania with claim number 2230576780, WCAIS number 8994339 (this is Pennsylvania's equivalent of a JCN number) as the Pennsylvania Workers' Compensation Act mandates that it "shall apply to all injuries occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended ...". 77 P.S. §1. Had Employer and Zurich not established a Pennsylvania claim for Claimant, they would have been in violation of Pennsylvania law and potentially subject to fines and penalties. Therefore, in accordance with Pennsylvania law, a Notice of Compensation Payable ("NCP") was issued indicating that the claim was accepted for a lower leg amputation. (Respondent Appendix, Page 86). Per the NCP,

¹ Claimant testified in his deposition that he had periods of lay off including seasonal layoffs but also layoffs for lack of work. He testified that he went to job at a different job Lilly, Pennsylvania to get him working because he was laid off. (Petitioner Appendix, Page 50). Mr. Hadjis testified that usually in the winter Employer is shut down. (Petitioner Appendix, Page 6).

Claimant's weekly compensation rate is \$944.12 based on an average weekly wage of \$1,416.32. (Respondent Appendix, Page 87). Claimant has been receiving medical and indemnity benefits in accordance with Pennsylvania law since January 14, 2023. (Respondent Appendix, Page 87, Petitioner Appendix, Page 55).

Claimant filed an application for West Virginia workers' compensation benefits by completing a WC-1 dated by him on February 13, 2023 and a medical provider on February 24, 2023. By Claim Administrator's Order dated March 23, 2023 the claim administrator denied Claimant's West Virginia application for benefits and stated the reasoning behind this decision was that the claim was accepted in Pennsylvania since there is no jurisdiction in West Virginia as Claimant was working in Pennsylvania for more than 30 days at the time of the accident. (Respondent Appendix, Page 1). As he was in Pennsylvania working for greater than 30 days, he was not working in Pennsylvania on a temporary basis.

Claimant was deposed on May 3, 2023 (Petitioner's Appendix, No. 3). As indicated above, Claimant began working in Greencastle, Pennsylvania on July 25, 2023. Claimant confirmed in his deposition that he worked exclusively in Pennsylvania from July 27, 2022 until his injury on January 13, 2023. (Petitioner Appendix, Page 56; Page 33: 3-18). Claimant confirmed that during this period of time Claimant performed no work in West Virginia; all his work occurred in Pennsylvania. (Id.).

Mr. Hadjis testified that he reviewed Claimant's employment records and from those records they confirm that Claimant worked continuously in Pennsylvania from July 25, 2022 until January 13, 2023. (Id. at 3). Mr. Hadjis also testified that Claimant "worked on the Barrackville project and requested to work on the Pennsylvania Greencastle project that he was permanently assigned to then because it was in closer proximity to his house." (Id. at 5; Page 16: 21-24; 17:1).

Dr. Hadjis' testimony makes sense as the Greencastle, Pennsylvania job is only one hour and 12 minutes away from Claimant's home. (Petitioner Appendix, Page 64). On the other hand, Barrackville, West Virginia is about 1 hour and 35 minutes away from Wiley Ford. Mr. Hadjis' testimony is consistent with Employer's policy to make every effort to assign workers to job sites that are close to home. (Respondent Appendix, Page 94).

As for the details of the Greencastle, Pennsylvania project, the project was for Employer to build reinforced soil stabilized walls to expand how much waste could be accepted and then tie in piping for the methane gas that is produced to be treated or controlled. (Petitioner Appendix, Page 7). Claimant testified that the Greencastle project was not complete on January 13, 2023. (Petitioner Appendix, Page 56). After Claimant's work injury, this project was suspended by Waste Management and about two months later Waste Management terminated its contract with Employer for this project. (Petitioner Appendix, 7). Had it not been for Claimant's injury, this project would have continued for an unknown period of time as the project was not yet complete and was continually extended due to delays by another Waste Management subcontractor and extra work given to Employer by Waste Management. (Respondent Appendix, Page 95).

In his deposition and brief Claimant discussed a trip that he took to Hedgesville, West Virginia on July 26, 2022.² Regarding this trip, Claimant testified that he started his day at the Greencastle job site and worked there for a few hours. (Petitioner Appendix, Page 52). His superintendent then asked him to do some work in Hedgesville, West Virginia. (Id.). Per his GPS trip information, Claimant was at the Greencastle, Pennsylvania job site from 6:14 am – 12:18 pm. (Petitioner Appendix, Page 64). He then drove from 12:18 pm – 1:03 pm, at which time he arrived at the Waste Management landfill in Hedgesville, West Virginia. (Petitioner Appendix, Page 65).

² Notably, the GPS trip information relied upon by Claimant and is part of the evidentiary record lacks any date for this trip. Therefore, the date of this trip has not been established except for by Claimant's deposition testimony.

He was at this job site from 1:03 pm – 2:54 pm. (Id.). He then drove to Hardee’s in Hancock, Maryland and then home. (Petitioner Appendix, Page 65-66). It appears Claimant may have made another stop on the way home from Hardee’s per the GPS information as it indicates Claimant made five visits. (Petitioner Appendix, Page 63). However, despite asking for this complete GPS information multiple times from Claimant’s attorney, this have never been provided to Employer’s counsel. Therefore, from the GPS information provided, Claimant was only at the project in Hedgesville, West Virginia for about one hour, fifty-one minutes. (Petitioner Appendix, Page 65). If Claimant did work in Hedgesville, West Virginia on July 26, 2022, his time there was so insignificant that Employer did not even have a record of Claimant performing any work at this location as his paychecks are coded to the project. (Petitioner Appendix, Page 20). Regardless of this one trip to Hedgesville, West Virginia for less than two hours allegedly on July 26, 2022, Claimant agreed that he worked exclusively in Pennsylvania from July 27, 2022 through January 13, 2023. (Petitioner Appendix, 56 – 33: 9-13).

There is zero evidence in the record that Claimant “had an agreement to return to the utilities division project in Mt. Nebo, West Virginia, once it commenced” or that he was only assigned to work at the Greencastle, Pennsylvania project until a project in Mt. Nebo, West Virginia was ready to start as alleged in his brief. Mt. Nebo, West Virginia is approximately three to four hours (depending on the route taken and construction/traffic), one way, from Wiley Ford, West Virginia. The Greencastle, Pennsylvania project is only a one hour and 12 minute drive from Claimant’s home per the GPS information. (Petitioner Appendix, Page 64). Moving Claimant to Mt. Nebo, West Virginia would be against Employer’s policy to assign worker’s to job sites that are close to their home, at least as long as the Pennsylvania project was ongoing. (Respondent

Appendix, Page 94). Further, there is no evidence in the record as to if and when this Mt. Nebo project started.

Mr. Hadjis testified that the Greencastle, Pennsylvania Waste Management project continued to be extended as Employer received additional work and the project was behind schedule due to delays from other Waste Management subcontractors. (Petitioner Appendix, 3; Respondent Appendix, Page 95). Employer also continuously bids on work with Waste Management in Pennsylvania and it has other clients in Pennsylvania. (Petitioner Appendix, Page 3). Claimant had previously worked on projects with those clients. (Id.). Mr. Hadjis testified that Claimant's work in Pennsylvania could have continued indefinitely had it not been for this injury. (Id.).

On June 21, 2023, the Board issued its Order affirming the Claim Administrator's March 23, 2023 Order denying West Virginia workers' compensation benefits for lack of jurisdiction. (Petitioner's Appendix, No. 9). The Board found the evidence establishes that Claimant does not meet the requirements of W.Va. Code §23-2-1a(1). (Petitioner Appendix, Pg. 101). The Board found Claimant's employment outside of the State of West Virginia was not "temporary" or "transitory," so as to entitled him to the benefits of the West Virginia Workers' Compensation Act." (Id.). The Board considered Claimant's argument that because the parties did not enter into an extraterritorial agreement West Virginia workers' compensation benefits is the default. (Id.). The Board explained that neither the statutes nor the Rules support this argument. (Id.). The Board concluded that as Claimant had been working in Pennsylvania for over thirty days when he was injured the evidence established that Claimant's duties in Pennsylvania were not of a temporary or transitory nature. The Board affirmed the Claim Administrator's Order dated March 23, 2023 rejecting the claim for lack of jurisdiction. Claimant then filed this appeal.

II. SUMMARY OF ARGUMENT

The Board was not clearly wrong and did not err in finding that Claimant's work in Pennsylvania was not temporary or transitory. The preponderance of the evidence shows that Claimant had worked exclusively in Pennsylvania for over thirty days (from July 27, 2022 through January 13, 2023) before his accident. Further, Mr. Hadjis' testimony confirmed that Claimant's work in Pennsylvania would likely have continued indefinitely but for this accident. Claimant confirmed that the project he was working on in Pennsylvania was not complete at the time of his work injury. His duties in Pennsylvania were therefore not of a temporary or transitory nature as defined under West Virginia law. Accordingly, it was appropriate for the Board to find that Claimant's work in Pennsylvania was not temporary or transitory and thus concluding that Claimant is not entitled to West Virginia workers' compensation benefits.

III. STATEMENT REGARDING ORAL ARGUMENT

Employer does not request oral argument and does not believe that oral argument would assist this Court in the adjudication of this matter. There are no principles of law to be established or modified that would require oral argument.

IV. ARGUMENT

A. Standard of Review

Per W.Va. Code §23-5-12a(b), the Intermediate Court of Appeals shall reverse, vacate, or modify the order or decision of the Board if the substantial rights of the petitioner have been prejudiced because the Board'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.

B. The Board was not clearly wrong and did not err in finding that West Virginia lacked jurisdiction as Claimant's work in Pennsylvania was not temporary or transitory. Claimant had worked in Pennsylvania for over five months prior to the work injury and his work in Pennsylvania would have continued indefinitely but for the work injury.

A claimant in a workers' compensation proceeding has the burden of proving his or her claim. See e.g. Syl. pt 2, *Clark v. State Workmen's Compensation Commissioner*, 155 W.Va. 726, 187 S.E.2d 213, 214 (1972); Syl. pt. 1, *Staubs v. S.W.C.C.*, 153 W.Va. 337, 168 S.E.2d 730 (1969). "Pursuant to W.Va. Code §23-4-1g(a) (2003) (Repl. Vol. 2010), a claimant in a workers' compensation case must prove his or her claim for benefits by a preponderance of the evidence." Syl. pt. 2, *Gill v. City of Charleston*, 236 W.Va. 737, 783 S.E.2d 857 (2016).

The evidentiary record supports the Board's finding that Claimant's duties in Pennsylvania were not of a temporary or transitory nature and consequently is not entitled to West Virginia workers' compensation benefits. The evidence record establishes that Claimant was assigned to work on the Greencastle, Pennsylvania Waste Management project and had worked exclusively on that project for over five months (117 days according to Claimant's brief) before the January 13, 2023 work accident. Had it not been for the work accident, Claimant would have continued working in Pennsylvania for an indefinite amount of time as the Greencastle, Pennsylvania project was not complete at the time of the injury and had been continuously extended due to delays and additional work. The evidence supports that Claimant was not regularly working in West Virginia when the accident occurred and his work in Pennsylvania was not temporary. Therefore, the appropriate jurisdiction for this claim is Pennsylvania and benefits are being properly paid in accordance with Pennsylvania law.

W.Va. Code §23-2-1 and §23-2-1a provides limits on West Virginia law and its application to “temporary employees.” W.Va. Code §23-2-1(a)-(b)(3) provides that all employers regularly employing another person for the purposes of carrying on any form of industry, service, of business in West Virginia are employers within the meaning of this chapter. However, employers are not required to procure workers’ compensation insurance while the employees are employed without the state except in cases of temporary employment without the state.

Further, W.Va. Code §23-2-1a(a)(1) provides that the individuals who are employees covered by the West Virginia Workers’ Compensation Act are those employees employed for the purpose of carrying on the industry, business, service, or work in which they are engaged, including, but not limited to, persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state.

The West Virginia Insurance Commissioner has issued a rule clarifying coverage issues and what individuals are considered employees who are entitled to West Virginia Workers’ Compensation Benefits under Chapter 23 of the West Virginia Code. W.Va. C.S.R. §85-8-2. Pursuant to this rule, “[t]emporary’ or ‘[t]emporarily,’ as the term is used in W.Va. Code §§23-2-1(b)(3), §23-2-1a(a)(1), and 23-2-1c(c), and in this rule, means for a period not exceeding thirty (30) calendar days within any three hundred and sixty-five (365) day period.” W.Va. C.S.R. §85-8-3.17 This rule also provides that “[t]ransitory,” as the term is used in W.Va. Code §23-2-1a(a)(1) and this rule, means for a period not exceeding thirty (30) calendar days within any three hundred and sixty-five (365) day period.” W.Va. C.S.R. §85-8-3.18.

This rule also provides guidance on this specific question. Specifically, W.Va. C.S.R. §85-8-7.3 states:

Pursuant to West Virginia Code §23-2-1(b)(3) and subsection 4.3.3 of this rule, an 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 than West Virginia on a non-temporary basis** (i.e. for a period exceeding thirty calendar days in any three hundred and sixty five (365) 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 workers' compensation laws 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) unless the employee has entered into an extraterritorial agreement described in section 7.4 of this rule.

(Emphasis added).

Claimant further urges the Court to focus its analysis on W.Va. C.S.R. §7.4 which discusses extraterritorial agreements. This regulation provides:

[a]n employer and an 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 and employee 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).

(Emphasis added).

Claimant's argument regarding the extraterritorial agreement is misplaced based on the clear language of these regulations. Claimant does not satisfy the initial prerequisite – working in a state other than West Virginia on a non-temporary basis. Without meeting that initial prerequisite, the remainder of the regulation's commands are irrelevant, including the requirement that the employer and employee reach an agreement to be subject to the workers' compensation laws of another jurisdiction.

The plain language of these regulations is quite simple. They provide that the general rule is that West Virginia employers do not need to provide West Virginia coverage to their West Virginia domiciled employees that are working outside West Virginia greater than 30 calendar days in any year.³ However, they still need to provide West Virginia workers' compensation insurance coverage to those West Virginia domiciled employees who continue to work in West Virginia. However, West Virginia employers are allowed to enter into extraterritorial agreements with any West Virginia domiciled employee that is working outside West Virginia greater than thirty days as long as the employer complies with the laws of the other state. An extraterritorial agreement is not mandatory – the regulation simply permits these agreements in West Virginia. The plain language of the regulations is quite clear – West Virginia coverage is the exception for employees working outside West Virginia greater than 30 calendar days in a year, not the default.

Claimant's argument that he was a non-temporary employee in both West Virginia and Pennsylvania is a red herring and simply incorrect. The plain language of the statute is clear – non-temporary means for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period. W.Va. C.S.R. §85-8-2, §85-8-7.3. As Claimant worked outside West Virginia greater than 30 calendar days in a 365 day period, his work outside West Virginia was not temporary. The fact that he also worked in West Virginia within that same 365 day period does not mean that he was also a non-temporary employee in West Virginia. The key question is whether, at the time of the work injury, the work he was performing outside West Virginia was on a non-temporary basis. The answer to this question must be yes.

Mr. Hadjis explained that Employer hires/keeps employees for the projects or jobs that Employer is working. If Claimant was not working on a specific job, he was laid off. At the time

³ W.Va. C.S.R. §85-8-7.1 and §85-8-7.2 have different rules for extraterritorial employees working in West Virginia.

of the work injury, he was working on a specific job in Greencastle, Pennsylvania. He had been working solely at that job site since July 27, 2022. He would have continued to work at this job site but for his work accident. Accordingly, the facts here support that Claimant's job in Greencastle, Pennsylvania was not temporary or transitory.

The Board properly applied both the West Virginia Workers' Compensation Act as well as the West Virginia Insurance Commissioner regulations. They found that as Claimant had worked outside West Virginia greater than 30 calendar days at the time of his work injury, his work outside West Virginia was not temporary. This is consistent with the plain language of the West Virginia Workers' Compensation Act and West Virginia Insurance Commissioner Regulations. Accordingly, the Board did not err and was not clearly wrong in its decision. Therefore, its Order must be affirmed.

C. The Board correctly applied the holding and law set forth in *Fausnet v. State Workers' Compensation Commissioner*, 174 W.Va. 489, 327 S.E.2d 470 (1985).

In the Syllabus of *Fausnet v. State Workers' Compensation Commissioner*, the West Virginia Supreme Court held:

[a]n employee injured in another state in the course of and resulting from his employment is entitled to seek workers' compensation benefits in West Virginia, where the employee's employment in the other state is temporary or transitory in nature within the meaning of W.Va. Code §23-2-1 and W.Va. Code §23-2-1a, under which statutes "employers" and "employees" subject to this State's workers' compensation laws are determined.

Syl. *Fausnet v. State Workers' Compensation Commissioner*, 174 W.Va. 489, 327 S.E.2d 470 (1985).

In *Fausnet*, Mr. Fausnet began working for Appalachian Drilling Company, Inc. ("Appalachian") in January of 1978. *Id.* at 327 S.E.2d 489, 327 S.E.2d at 471. Mr. Fausnet began working for Appalachian in West Virginia and worked in West Virginia at various locations prior

to the injury. *Id.* In May of 1978 Mr. Fausnet began working for Appalachian in Ohio and sustained a back injury while working in Ohio on May 17, 1978. *Id.* He then drove to his home in North Carolina. *Id.* Claimant later filed a claim in West Virginia for West Virginia workers' compensation benefits. *Id.*

The Court explained that W.Va. Code §23-2-1 and W.Va. Code §23-2-1a(a)(1) focuses on whether an injured employee's employment in a state other than West Virginia is temporary or transitory. *Id.* at 327 S.E.2d 493, 327 S.E.2d at 473. The Court explained that the hiring of an employee in West Virginia can be a factor to be considered in determining whether an employee's work in a foreign state is temporary or transitory. *Id.* at 327 S.E.2d 493, 327 S.E.2d at 474. The Court found that West Virginia was the appropriate jurisdiction because of the temporary or transitory nature of Mr. Fausnet's Ohio employment. *Id.*

The facts in *Fausnet* are important because they can be distinguished from the facts in this case. In *Fausnet*, while Mr. Fausnet was hired in West Virginia, it appears he only worked in Ohio for about 17 days, at most, prior to his work injury. *Id.* at 327 S.E.2d 489, 327 S.E.2d at 471. While the Court found that the hiring of an employee in West Virginia can be a factor to be considered in determining whether an employee's work in a foreign state is temporary or transitory, it did not find that this was the sole determining factor. The Court ultimately found that Mr. Fausnet's work in Ohio was temporary or transitory. One of the factors they discussed in making this determine was that "the record does not indicate that Fausnet was to be permanently located in Ohio." *Id.* at 327 S.E.2d 493, 327 S.E.2d at 474. Here, Mr. Hadjis confirmed that Claimant's job in Pennsylvania could have continued indefinitely but for his accident.

While the hiring of Claimant in West Virginia is a factor to be considered concerning the question of whether an employee's work in another state is temporary or transitory, it is not the

sole determinative factor. Here, the determinative factor why Claimant cannot seek benefits in West Virginia is because he had worked in Pennsylvania for over 30 calendar days when the injury occurred. In *Fausnet*, he only worked in Ohio for, at most, 17 days before his injury occurred. Here, Claimant's work in Pennsylvania was not complete and the amount of time he would have continued to work in Pennsylvania was indefinite as the job was continually extended and delayed.

The Board correctly applied the relevant precedent of *Fausnet* as well as the West Virginia Workers' Compensation Act and West Virginia Insurance Commissioner Regulations. The facts do not support Claimant's argument his work in Pennsylvania was temporary or transitory. The Board did not err and was not clearly wrong in its decision that Claimant's work in Pennsylvania was not temporary or transitory. Therefore, its Order must be affirmed.

D. The Board did not err in not applying the five-factor test set forth in *Van Camp v. Olen Burrage Trucking, Inc.* Had the Board applied this five-factor test, it would have erred as this test is only applicable when the employer is a foreign business, not a West Virginia business, and the employee is injured in West Virginia.

The Board did not err by failing to apply the five-factor test set forth in *Van Camp v. Olen Burrage Trucking, Inc.*, 184 W.Va. 567, 401 S.E. 2d 913 (1991). The Supreme Court of Appeals of West Virginia set forth in *Van Camp* the determinative factors that must be considered in assessing whether a foreign corporation or business is required to subscribe to the West Virginia Workers' Compensation Fund (the "Fund"). The *Van Camp* five factors are as follows:

- (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 has worked on a regular basis at a West Virginia facility for the employer prior to the injury at issue.

Syl., *Van Camp*; *McGilton*, at 602-603.

If the answers to each of these questions is in the negative, then the employer is not required to subscribe to the Fund. Syl., *Van Camp*.

In *Van Camp*, the employer, Burrage Trucking, was an interstate long-haul carrier with corporate headquarters in Philadelphia, Mississippi. *Van Camp*, at 184 W.Va. 567, 401 S.E. 2d 913, n. 1. The issue was whether “whether or not Burrage Trucking was a corporation regularly employing another person for the purpose of carrying on any type of business in West Virginia at the time of Van Camp's accident as contemplated by the provisions of W.Va. Code §23-2-1.” *Van Camp*, at 184 W.Va. 569, 401 S.E. 2d 915. If it was, it would have been required to subscribe to the Fund. To answer this question, the Court set forth the five factors above to answer the issue of whether an employer must subscribe to the Fund pursuant to W.Va. Code §23-2-1.

Here, Employer is not a foreign corporation - it is a domestic West Virginia business. Further, Claimant was not injured in West Virginia - he was injured in Pennsylvania. The issue is not whether Employer must have subscribe to the Fund. The issue is whether Claimant was working in Pennsylvania on a temporary or non-temporary basis. Thus, the *Van Camp* five factors is not applicable to the facts of in this matter and should not be applied.

Claimant also cites *McGilton v. U.S. Xpress Enterprises, Inc.*, 214 W.Va. 600, 591 S.E.2d 158 (2003). In *McGilton*, the Court explained that the *Van Camp* test is to be considered “where the worker is injured in West Virginia and the employer is a foreign corporation or business.” *McGilton* at 214 W.Va. 603, 591 S.E.2d 161. The Court said that a relevant factor in this (the *Van Camp*) analysis is regular work in by the worker in West Virginia prior to the injury. (*Id.*). As

Claimant was not injured in West Virginia and did not work for a foreign business, the *Van Camp* analysis is not applicable. In *McGilton*, the Court explains what when a worker is employed by a domestic West Virginia business, *Fausnet* applies. In discussing the cases, the Court writes:

The plain thrust of the authorities is that for a worker who is injured in a foreign state to be eligible for the benefits of the West Virginia Workers' Compensation Act, the worker must have worked regularly in West Virginia prior to his injury, **and the injury must have occurred while he was temporarily working in the foreign state.**

McGilton at 214 W.Va. 603, 591 S.E.2d 161 (Emphasis added).

Again, as *McGilton* explains, the key question here is whether Claimant's injury occurred while he was temporarily working in Pennsylvania. The facts here do not support that Claimant was temporarily working in Pennsylvania as he had solely worked in Pennsylvania for over five months and would have continued working there but for his injury. Accordingly, the Board did not err and was not clearly wrong in finding that Claimant's Pennsylvania work was not temporary or transitory. Its Order should therefore be affirmed.

E. The Board did not err in discussing *Cassel v. Aspen Builders, Inc.*, 22-ICA-211 (March 6, 2023) in its discussion and finding that Claimant's work in Pennsylvania was not temporary or transitory.

As this Court knows, in *Cassel*, Mrs. Cassel's husband was working for Aspen Builders in Kentucky on July 9, 2020 when he was killed. Aspen Builders is a West Virginia business and the Cassels were West Virginia residents. Mr. Cassel was hired in West Virginia. Prior to his death, Mr. Cassel worked in West Virginia for four days. He then worked in Kentucky for four days when the accident occurred. There was a dispute between the parties regarding if Claimant was specifically hired to work in Kentucky and how long he was going to work in Kentucky. According to Mrs. Cassel's testimony, her understanding based on her conversations with her husband were that he was not going to be working exclusively in Kentucky. She testified that that text messages

exchanged between them indicated that Mr. Cassel did not know from week to week if he would be working in West Virginia or Kentucky. The Vice President of Aspen Builders disputed Mrs. Cassel's testimony and instead testified that Mr. Cassel was hired to work specifically in Kentucky. The Board concluded that Mr. Cassel's work in Kentucky had not been temporary or transitory and therefore affirmed the denial due to lack of West Virginia jurisdiction.

In applying W.Va. Code §23-2-1a (2021), *McGilton*, and the definitions of "temporary" and "transitory" in W.Va. C.S.R. §85-8-3.17 and §85-8-3.18, this Court held that the Board was correct in its finding that Mr. Cassel's work in Kentucky was not temporary or transitory. This Court found that the testimony of Vice President of Aspen Builders established that Claimant would be working in Kentucky for greater than thirty days and the project he was working did continue for greater than thirty days. Therefore, Mr. Cassel's work in Kentucky was not temporary or transitory and accordingly West Virginia lacked jurisdiction.

Here, it was appropriate for the Board to discuss this case as Claimant is a West Virginia resident, Employer is a West Virginia employer, Claimant was hired in West Virginia, Claimant was injured in Pennsylvania, and there is a dispute as to how long Claimant was going to be working in Pennsylvania. The main distinction between *Cassel* and the instant matter is that here Claimant actually worked at the job he was assigned in Pennsylvania for greater than thirty days whereas Mr. Cassel had only worked in Kentucky for four days before his death. Despite only working in Kentucky for four days before his death, this Court found Mr. Cassel's employment in Kentucky to be temporary or transitory as he was expected to work in Kentucky greater than thirty day but for the accident.

Here, there is not dispute that Claimant actually worked in Pennsylvania for greater than thirty days. Mr. Hadjis testified that Claimant would have continued to work on this Waste

Management project in Pennsylvania indefinitely. Claimant confirmed that this project was not completed when his accident occurred and the project was behind what he thought to be the schedule. Mr. Hadjis confirmed that the project had been extended by Waste Management due to additional work assignment plus delays from other subcontractors. Accordingly, not only did Claimant actually work in Pennsylvania for greater than thirty days, but for the accident, he would have continued working in Pennsylvania indefinitely.

V. CONCLUSION

West Virginia Code §23-4-1g requires that the resolution of the instant issue requires a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. Here, the preponderance of the evidence supports a finding that Claimant's work in Pennsylvania was not temporary or transitory due to the undisputed fact that he had solely worked in Pennsylvania from July 27, 2022 through January 13, 2023. Claimant confirmed that the job he was working in Pennsylvania was not finished as of the time of his accident. Mr. Hadjis testified that Claimant's work in Pennsylvania would likely have continued indefinitely but for the accident as this was a very large project that continuously got extended. The Board appropriately found that a preponderance of the evidence establishes that Claimant's duties in Pennsylvania were not of a temporary or transitory nature.

Claimant failed to show that the Board's Order was in violation of statutory provisions; in excess of the statutory authority or jurisdiction of the Board of Review; made upon unlawful procedures; affected by other error of law; clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. For the reasons set forth above, Employer requests this Court affirm the Board's June 21, 2023 Order affirming the March 23, 2023 Claim

Administrator's Order denying West Virginia workers' compensation benefits for lack of jurisdiction.

Respectfully submitted,

DICKIE, MCCAMEY & CHILCOTE, P.C.

By: Maureen Kowalski
Maureen Kowalski, Esquire

Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402
(412) 392-5475

Attorneys for Respondent,
J.F. Allen Company

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

INTERMEDIATE COURT NO.: 23-ICA-317

JASON HEAVENER,)	JCN NO.: 2023017785
)	
Petitioner,)	BOARD OF REVIEW DECISION:
)	June 21, 2023
v.)	
)	
J.F. ALLEN COMPANY,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

I, Maureen Kowalski, Esquire, of Dickie, McCamey & Chilcote, P.C., hereby certify that a true and accurate copy of BRIEF ON BEHALF OF RESPONDENT J.F. ALLEN COMPANY has been served this 21st day of August, 2023, by File & Serve Xpress efilng, to the following:

Timothy C. Bailey, Esquire
Robert F. Vaughan, Esquire
Bailey, Javins & Carter, LC
125 Granville Squire
Suite 250
Morgantown, WV 26501

DICKIE, MCCAMEY & CHILCOTE, P.C.

By: Maureen Kowalski
Maureen Kowalski, Esquire

Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402
(412) 392-5475

Attorney for Respondent,
J.F. Allen Company