

STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

ALLIANCE COAL, LLC

ICA NO. 23-ICA-339

SELF-INSURED EMPLOYER

and

JCN: 2016011244

DOI: October 25, 2015

RICHARD E. HEATH,

BOR: June 29, 2023

a. February 7, 2022

CLAIMANT

b. May 13, 2022

RESPONDENT'S BRIEF OF THE CLAIMANT,

RICHARD HEATH,

IN OPPOSITION TO EMPLOYER'S APPEAL

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III. ASSIGNMENTS OF ERRORS:

The Petitioner-Employer, hereinafter Employer, filed an appeal from the Decision issued on June 29, 2023, E00093, by the Board of Review which REVERSED the order dated August 18, 2022, E00053, which closed the claim for additional rehabilitation TTD benefits. Contrary to judicial decisions, the Employer limited the same to 3 weeks. The Employer has argued that this Decision exceeded the authority under *W.Va. Code*, 23-4-9, which is not the issue. The error is not the statutory restrictions, since three Decisions by lower tribunals have awarded the rehab benefits in the disputed period from February 2020 until March 2021.

The Respondent-Claimant, hereinafter Claimant, submits that the Employer's assignment of error is without merit for several reasons:

- (1). The lower tribunals have awarded rehab TTD benefits for the disputed time period of February 19, 2020 to March 16, 2021, less any interim payments, in two prior decisions, on January 12, 2021, Exhibit 1, and July 13, 2022, Exhibit 2, which decision became final. The Employer failed to address these decisions.
- (2). The Decision of January 13, 2021, Exhibit 1, became final after the elapse of two years, and cannot be amended, corrected, set aside, revised, or otherwise modified, pursuant to *W.Va. Code*, 23-5-1a (e). The Decision of July 22, 2022, Exhibit 2, is also final as any appellate action is now untimely. The Employer is barred by *res judicata* and collateral estoppel from re-litigating the same issue.
- (3). The Decision of June 29, 2023, E00093, correctly reasoned at page 9, "However, the claim administrator [in the order of August 18, 2022] did not address payment of benefits during the period between February 19, 2020, and February 15, 2021, as directed by the July 13, 2022, Board of Review order."
- (4). *W.Va. Code*, 23-4-9 (d) provides for an "aggregate" award of benefits and the goal of rehabilitation should be considered in *para materia* with the other legislative policies addressed in the statutes.
- (5). The Supreme Court has held in several cases that statutory restrictions may be nullified when the claimant is denied rights he has pursued.

Respectfully the Claimant submits that the above reasons establish that no reversible

error has occurred pursuant to *W. Va. Code*, 23-4-9 or 23-5-12a. The Decision of June 29, 2023, E00093, should be affirmed in regard to the award of rehabilitation TTD benefits. If the Decision of June 29, 2023 is reversed, then the claimant has relied to his detriment upon the decisions of the lower tribunals granting benefits and he should be referred for temporary partial rehabilitation benefits and retraining, if necessary. The claimant has not become substantially and gainfully employed and would be substantially prejudiced by the actions of the Employer.

II. STATEMENT OF THE CLAIM:

The Claimant references the following Decisions omitted by the Employer in the brief and in the Appendix, as well as omissions from the Employer’s statement of the claim. These Decisions are relevant and appear in the Appendix by the Claimant:

EXHIBIT NUMBER	DATE OF DECISION	IDENTIFICATION
6	10/17/2018	The Office of Judges REVERSED the order of July 27, 2017, and ORDERED that the claimant be referred out for a new vocational rehabilitation evaluation once he reaches MMI. Exhibit 5, ALJ 10/20/20. Finding 7, page 3.
5	10/20/2020	The Office of Judges affirmed the 4 orders of June 18, 2019; July 25 2019; September 24, 2019; and October 24, 2019.
1	01/13/2021	The Office of Judges ORDERED at page 1: “It is hereby ORDERED that the Claim Administrator’s Order of February 28, 2020 be REVERSED, and vocational rehabilitation services reinstated. It is further ORDERED that the claimant’s rehabilitation TTD benefits be reinstated and paid until such time as good cause exists for the termination of those benefits.”
3	06/22/2021	Decision of the Board of Review affirmed the Decision of January 13, 2021, by the Office of Judges, in the Employer’s Appeal No. 2056220.
2	07/12/2022	At page 1, the Board of Review ordered: “It is ORDERED that the orders of April 1, 2021, and November 9, 2021, are AFFIRMED. The orders of February 5, 2021, and February 17, 2021, are REVERSED and the claimant GRANTED vocational rehabilitation temporary total disability benefits from February 19, 2020, to March 16, 2021, less any vocational rehabilitation temporary total disability benefits the claimant was paid during this time period. [This decision was not appealed and is referenced in the order of August 18, 2022, E00053].

By order dated November 3, 2015, the claim was ruled compensable on a lost time basis, and the diagnosis was approved for S82.309A Unspecified fracture of lower end of the left Tibia, Init For Clos Fx. ALJ 5/8/2019, Finding 3, page 2. By order dated December 15, 2016, the diagnosis of Displaced Pilon Fracture of the Left Tibia was approved as requested by Dr. Hubbard but the additional diagnosis of Complex Regional Pain Syndrome was denied pending the IME scheduled for 12/15/16. The claimant protested. An order dated January 3, 2017, by Alliance Coal accepted the additional diagnosis of Post Traumatic Arthritis to the Left Ankle and Tarsal Tunnel Syndrome to the left lower leg, but denied the additional diagnosis of Complex Regional Pain Syndrome. The claimant protested.

The claimant protested the Order dated May 19, 2017, which granted a 5% psychiatric PPD award based upon the IME report dated May 17, 2017, by Dr. Bobby Miller.

The claimant protested the Order dated July 20, 2017, by Alliance Coal, LLC, which terminated vocational rehabilitation services effective July 20, 2017.

The Decision dated September 8, 2017, by the Office of Judges, added chronic regional pain syndrome as a compensable. Exhibit 1, Finding 2, page 2, and Exhibit 2, Finding 12, page 3. The same was affirmed by the Board of Appeal on appeal by the Employer. Exhibit 4.

On October 6, 2017, the Office of Judges REVERSED the order dated January 3, 2017, and awarded TTD benefits to the claimant from January 3, 2017 and continuing thereafter as substantiated by proper medical evidence. Exhibit 2, ALJ 7/13/2022, Finding 13, page 3. The employer appealed. In Appeal No. 2052238, on February 1, 2018, the Board affirmed the decision of October 6, 2017. Exhibit 4.

The claimant never refused nor declined rehabilitation and had requested rehabilitation to

return to work. When denied rehabilitation, the claimant has protested. The ALJ found: “The claimant stated that he was seeking physical and vocational rehabilitation so that he could return to substantial gainful employment with Alliance Coal or another employer.” Exhibit 5, ALJ 10/20/20, Finding 5, page 2.

On June 6, 2018, the Office of Judges REVERSED the order of January 3, 2017, granting an 8% PPD and remanded the claim to the claim administrator for a new IME and PPD order once the claimant has reached MMI. Exhibit 2, ALJ 7/13/2022, Finding 19, page 4.

On July 12, 2018, the Office of Judges affirmed Order of May 19, 2017, which granted the claimant a 5% permanent partial disability award for psychiatric impairment.

On September 11, 2018, the Office of Judges affirmed orders of January 6, 2018, and February 16, 2018, granting medical TTD benefits from November 18, 2017 through December 31, 2017 and which closed the claim for further TTD benefits, based upon the maximum TTD under *W.Va. Code*, 23-4-6 (c). Exhibit 5, ALJ 10/20/2020, Finding 6, at page 3.

On October 17, 2018, Exhibit 6, the Office of Judges REVERSED the order of July 27, 2017, and ORDERED that the claimant be referred for a new vocational rehabilitation evaluation once he reaches MMI. Exhibit 5, ALJ 10/20/20. Finding 7, page 3, and Exhibit 6.

In a vocational rehabilitation agreement on November 8, 2018, the claimant agreed to “fully cooperate.” E00028. *See also* Exhibit 5, ALJ 10/20/20, Finding 8, page 3, and E00093, Finding 7, page 2.

Allegiant reported on April 30, 2019, E00093, Finding 9, page 3, and also as set forth by the ALJ in the Decision dated October 20, 2020, Exhibit 5, Finding 14, page 4:

....Following the November 8, 2018 meeting, Ms. Saniga placed vocational rehabilitation services on hold pending the claimant's completion of

a trial spinal cord stimulator (SOS). The claimant experienced 50% improvement with the trial SOS, and a consultation was scheduled with a neurosurgeon to consider permanent SOS implantation. The neurosurgeon, Dr. Braudmeir, recommended permanent implantation of a SOS device. According to Dr. Braudmeir, the estimated recovery time for an SCS implant was four to six weeks followed by a course of physical therapy. Dr. Braudmeir further indicated that a functional capacity evaluation would be appropriate four to six weeks after the claimant had completed physical therapy. Ms. Sangia's vocational recommendations included obtaining clearance and authorization for a functional capacity evaluation after the claimant had fully recovered from the SCS implant. She further noted that a rehabilitation plan would be prepared for the claimant at the appropriate time. [Emphasis added.]

The claimant protested the Order dated June 18, 2019, which denied the request dated June 17, 2019, for rehabilitation TTD. Exhibit 5, ALJ 10/20/20, Finding 20, page 4. On June 27, 2019, the vocational service, Allegiant, reported that Ms. Saniga would schedule an FCE “once the claimant was cleared...and, when appropriate, preparing a rehabilitation plan for the claimant.” Exhibit 5, ALJ 10/20/20, Finding 22, page 5. The Order dated June 20, 2019 from Alliance Coal approved the FCE as scheduled. Exhibit 5, ALJ 10/20/20, Finding 21, page 5.

The claimant protested the Order dated July 25, 2019, denying the request dated July 24, 2019, for rehabilitation TTD benefits for participation in a “physical rehabilitation program” for a trial of a SCS. Exhibit 5, ALJ 10/20/20, Finding 20, page 4, and Finding 23, page 5.

Allegiant reported on September 18, 2019 that an FCE was scheduled and a vocational plan would be prepared after the FCE. Exhibit 5, ALJ 10/20/20, Finding 24, page 5. See also, E00093, Findings 10 and 11, page 3. The Allegiant report dated October 22-23, 2019, recommended rehab benefits to commence on October 23 to November 12, 2019, during vocational exploration. Exhibit 5, ALJ 10/20/20, Finding 28, page 6. See also, E00093, Finding 12, page 3. The rehabilitation plan of November 13, 2019, reflected that the claimant had progressed to vocational job search and required that the claimant “research the job positions

before applying to ensure that the jobs were vocationally, physically, and geographically appropriate.” Exhibit 5, ALJ 10/20/20, Finding 30, pages 6-7. *See also*, E00093, Finding 13, page 3.

The claimant protested the Order dated September 24, 2019, which denied the request dated September 23, 2019, for rehabilitation temporary total disability benefits while participating in a “functional capacity exam (FCE).” Exhibit 5, ALJ 10/20/20, Finding 25, pages 5-6. The claimant protested the order dated October 24, 2019, by Alliance Coal which approved rehabilitation with an onset date of October 23, 2019, as the Claimant requested rehab TTD with an earlier onset date. Exhibit 5, ALJ 10/20/20, Finding 29, page 6.

In the vocational reports from November 14, 2019 to January 23, 2020, the claimant was monitored for job search for jobs which were physically appropriate. The claimant was advised that it was “anticipated” that his program would end on or about February 19, 2020. Exhibit 5, ALJ 10/20/20, Findings 31-37, pages 7-8. *See also*, E00093, Findings 13 -19, pages 3-4.

The Progress Report, E00031, dated March 17, 2020 by Allegiant, at page 3, sets forth that the TPR eligibility could be considered. Exhibit 5, ALJ 10/20/20, Finding 38, page 8:

An e-mail update was sent to Ms. Bishop's attention on 03/13/2020. An inquiry was made regarding continued file monitoring versus file closure. A response was received indicating that it would be appropriate to keep the file open for a period of time to determine if an offer of employment was extended based on any of the applications submitted during the course of his participation in job search.

Recommendations;

1. Maintain contact with Mr. Heath to determine if an offer of employment is extended by Murray Energy.
2. If an offer of employment is extended and a qualifying wage loss is identified, prepare a rehabilitation plan to facilitate payment of TPR benefits.
3. Provide updates to Ms. Bishop as appropriate .

On October 20, 2020, Exhibit 5, the Office of Judges affirmed the four orders of June 18,

2019; July 25 2019; September 24, 2019; and October 24, 2019. The claimant appealed.

On August 20, 2020, the claim manager granted an additional 6% PPD based upon an IME report, E00034, by Dr. Lultschik. The claimant protested.

In the Decision of January 13, 2021, Exhibit 1, the Office of Judges reasoned at page 11:

The Claim Administrator's Order of February 28, 2020 closing vocational rehabilitation services in this claim is not supported by the weight of the evidence of record. Although Ms. Saniga did note in her progress note of January 23, 2020 that rehab TTD benefits would not be extended beyond February 19, 2020, *she provided no reasoning, explanation, or basis for that decision.* Pursuant to W.Va. C.S.R. § 85- 15-6, a rehabilitation plan may be terminated upon a finding of good cause. In this claim, *no good cause has been identified or articulated by Ms. Saniga, the claim administrator, or the employer to support the closure of vocational rehabilitation services in this claim. There is no evidence that the claimant was not cooperating or was non-compliant with the rehab plans formulated by Ms. Saniga, and neither Ms. Saniga nor the employer have accused the claimant of non-cooperation or non-compliance with the vocational rehabilitation process.* Although the employer enjoys broad discretion in determining whether vocational rehabilitation services are appropriate in a workers' compensation claim, once those services are authorized, as was done in this case, there must be good cause to support the termination of those benefits. According to W.Va. C.S.R. § 85-15-6, good cause may consist of any number of different things, such as reemployment, a change in the claimant's physical condition, or a lack of satisfactory progress in completing the vocational rehabilitation plan. However, W.Va. C.S.R. § 85-15-6 requires that some form of good cause be shown for the closure or termination of vocational rehabilitation services. In this particular claim, claimant's vocational rehabilitation services were closed without any given cause or reason. [Emphasis added.]

See also E00093, Finding 23, page 4, of the Decision dated June 29, 2023.

The Employer appealed from the order dated January 13, 2021, Exhibit 1, by the Office of Judges, reversing the order dated February 28, 2020. On June 22, 2021, Exhibit 3, in Appeal No. 2056220, the Board of Review affirmed the decision of January 13, 2021, Exhibit 1, appealed by the Employer. That Decision of January 13, 2021, Exhibit 1, is now more than two years in final resolution and cannot be modified or revised by the claim manager. *W.Va. Code*, 23-5-1a (e).

By Order dated January 4, 2022, E00093, Finding 32, page 5, Alliance authorized the debridement surgery *of the left ankle*. On February 7, 2022, E00051, and E00093, page 1, the

claim manager denied the request for physical rehabilitation benefits for the authorized surgery. The claimant protested.

The Board of Review issued Findings of Fact in the Decision of June 29, 2023, Exhibit E00093. Therein, the Board reviewed the Allegiant Closure Report dated May 9, 2022, E00093, Finding 38, page 6, and Exhibit 7. The Allegiant Report recited at page 2:

No further vocational rehabilitation services are being recommended at this time. As previously indicated, vocational services were placed on hold at Mr. Heath's request in October 2021. Notice was subsequently received that Mr. Heath secured employment and that he established a for-profit business. Payment of rehabilitation TTD benefits would, accordingly, be inappropriate.

At pages 3-4 of the Closure report the following is stated:

Via correspondence dated 11/01/2021, Attorney Glauser advised that Mr. Heath was selected for FEMA's disaster housing inspector position through Vanguard. Hourly rate associated with this position was estimated to be \$34.80. A specific start date was not identified.

Summary of File Activities:

As indicated in the previous report to file, correspondence was received from Ms. Glauser on 11/01/2021. Ms. Glauser advised that Mr. Heath had been selected for FEMA's disaster housing inspector position with Vanguard. This PRN employment was expected to offer an hourly rate of \$34.80. **Review of job search logs submitted by Mr. Heath confirmed that an application for the position of Disaster Housing Inspector with Vanguard was submitted on 09/28/2021.**

File services have been on hold since October 2021. *As no further services have been deemed appropriate, file closure has been recommended and approved.*

Recommendations:

- I am proceeding with file closure at this time. If I can be of further assistance, please do not hesitate to contact our office.[Emphasis added.]

On May 13, 2022, E00052, the claim for rehabilitation was closed, and the claimant protested. E00093, page 1.

On July 13, 2022, Exhibit 2, the Board of Review affirmed several protested orders, but the decision did REVERSE the orders dated February 5, 2021 and February 17, 2021, due to the

gap in rehabilitation benefits. This decision of July 13, 2022, Exhibit 2, was affirmed by the Board of Review on appeal for other grounds by the Claimant to the ICA in Docket No. 22-ICA-17; the Employer did not appeal from this decision granting rehabilitation TTD benefits. In Finding 45, page 7, of the Decision dated July 13, 2022, Exhibit 2, the Board specifically found:

45. An Administrative Law Judge, by decision dated January 13, 2021, reversed the claim administrator's order of February 28, 2020, which closed the claim for vocational rehabilitation services on February 19, 2020, and ordered that vocational rehabilitation services be reinstated; the adjudicator further ordered that rehabilitation TTD benefits be reinstated and paid until such time as good cause existed for termination of the same. The Board of Review affirmed on June 22, 2021.

Thereafter the Claimant protested the order dated August 18, 2022, E00053, acknowledging the Decision dated July 13, 2022, Exhibit 2, by the Office of Judges, upon the basis that the claim manager ignored the prior decisions and limited benefits for only three additional weeks. Such action was contrary to the prior rehab TTD benefits awarded in the Decisions dated January 13, 2021, Exhibit 1, and July 13, 2022, Exhibit 2. At page 1 of the Decision dated July 13, 2022, Exhibit 2, the Board ordered: "The orders of February 5, 2021, and February 17, 2021, are REVERSED and the claimant GRANTED vocational rehabilitation TTD from February 19, 2020, to March 16, 2021, less any vocational rehabilitation temporary total disability benefits the claimant was paid during this time period." [Emphasis added.]

On June 29, 2023, E00093, the Board of Review determined at Finding 40, page 6, that on October 4, 2022, that the claimant had testified by deposition, Exhibit 8, as follows:

40. In his October 4, 2022, deposition, the claimant testified that he sustained a crush injury to his left leg on October 25, 2015; that he has continuous nerve pain and swelling in his left leg; that Alliance Coal has not offered him a job since the work injury; that he had looked into returning to work with Alliance; that there were available jobs with Alliance Coal that he could have done; that he talked to Erin Saniga numerous times about positions with Alliance Coal; that he qualified to be a FEMA inspector but is not able to

perform inspections right now because of his leg; that he would be paid for each inspection; that if he could work every day inspecting, his income would have been comparable to what he was making at Alliance Coal; that his wife has a for profit pizzeria business where he works around 8 hours a week but does not get paid; and that Dr. Hofbauer has not released him to return to work since his last surgery in January of 2022.

On June 29, 2023, E00093, the Board of Review REVERSED the order dated August 18, 2022, E00053, and awarded TTD benefits as awarded by the Board of Review on July 12, 2022, Exhibit 2, with the exception of February 16, 2021, through March 16, 2021, [The Claimant had previously received benefits commencing on February 8, 2021 and February 16, 2021 until March 16, 2021. Exhibit 2, page 1, Issues 1 and 2.] The Employer filed a limited appeal of the Decision of June 29, 2023, limited to the award of rehabilitation benefits in excess of 52 weeks.

V. SUMMARY OF ARGUMENT:

The claimant has been awarded rehabilitation TTD benefits from February 19, 2020 through March 16, 2021, less prior payments for any of the disputed time period, by at least three judicial decisions on January 13, 2021, July 22, 2022, and most recently on June 29, 2023, which prior awards were not affected by appeals or otherwise. Res judicata and collateral estoppel bar the re-litigation of the awards, which have become the law of the claim. The prior decisions on January 13, 2021 and July 22, 2022 are now final and cannot be modified, reversed or set aside pursuant to *W.Va. Code*, 23-5-1. There are judicial and appellate decisions recognizing that actions, contrary to the legislative policies of the compensation statutes, will be corrected and a claimant will be permitted benefits in order to provide the beneficent purposes of the statute.

VI: STATEMENT REGARDING ORAL ARGUMENT AND DECISION:

The claimant waives oral argument. Under Rule 18 of the Rules of the Revised Rules of Appellate Procedure, oral argument is not necessary because the facts and the legal arguments

are adequately presented in the briefs and record on appeal, including the Appendices. If the ICA finds oral argument would significantly aid the decisional process, there is no objection.

VII. ARGUMENT:

A. STANDARD OF REVIEW:

The Claimant respectfully acknowledges the statutory guidelines in *W.Va. Code*, §23-5-12a. for appeals to the Intermediate Court of Appeals.

"When it appears from the proof upon which the Workmen's Compensation [Board of Review] acted that its finding was plainly wrong, an order reflecting that finding will be reversed and set aside by this Court." Syllabus point 5, *Bragg v. Comm'r*, 152 W. Va. 706, 166 S.E.2d 162 (1969). Syl. pt. 1, *Bowers v. Comm'r*, 224 W. Va. 398, 686 S.E.2d 49 (2009).

In *Barnett v. State Workmen's Compensation Commissioner*, 153 W.Va. 796, 812, 172 S.E.2d 698, 707 (1970), the Supreme Court explained: "[w]hile the findings of fact of the [BOR] are conclusive unless they are manifestly against the weight of the evidence, the legal conclusions of the [BOR], based upon such findings, are subject to review by the courts." The Court referred to *Emmel v. State Compen. Dir.*, 150 W.Va. 277, 284, 145 S.E.2d 29, 34 (1965).

B. DISCUSSION OF AUTHORITY AND ARGUMENT:

The Employer identifies the issue at page 2 in the Table of Contents:

THE WORKERS' COMPENSATION BOARD OF REVIEW ERRED IN GRANTING REHABILITATION TEMPORARY TOTAL DISABILITY BENEFITS IN EXCESS OF THE STATUTORY MAXIMUM SET FORTH AT W. VA. CODE §23-4-9(d).

The Claimant submits that the Employer's assignment of error is without merit for several reasons. The goal of rehabilitation is to return the injured worker to suitable gainful employment, which has not occurred herein, and all parties are charged with a "shared responsibility" for the

same. *WV Code, 23-4-9*. The Claimant has not been released to return to the same level of physical demand as the pre-injury employment. The Claimant has persistently pursued rehabilitation, both vocational and physical, in order to pursue employment opportunities, despite the repeated denials and hurdles imposed by the Employer.

The lower tribunals have previously considered several rehabilitation closures issued in the claim; has REVERSED vocational rehabilitation closures; and awarded rehab TTD benefits for the disputed time period of February 19, 2020 to March 16, 2021, less any payments during that disputed period. The Decisions, Exhibits 1 and 2, have been upheld on appeal when an appeal has been filed. These decisions have become final and cannot be set aside, modified or changed under *W. Va. Code, 23-5-1a*. Those Decisions include the following:

- (a). The Decision dated January 13, 2021, Exhibit 1, by the Office of Judges, relevant but omitted from the Employer's Appendix, granted at page 1: "It is hereby ORDERED that the Claim Administrator's Order of February 28, 2020 be REVERSED, and vocational rehabilitation services reinstated. It is further ORDERED that the claimant's rehabilitation TTD benefits be reinstated and paid until such time as good cause exists for the termination of those benefits." Further, at page 11, the ALJ ORDERED "Accordingly, the Order of February 28, 2020 must be reversed, and vocational rehabilitation services reinstated. It is further ordered that the claimant's rehabilitation TTD benefits be reinstated from the date of last payment and continuing thereafter until such time as good cause exists for the termination of the benefits."
- (b). The Decision of January 13, 2021, Exhibit 1, became final after the elapse of two years, and cannot be amended, corrected or set aside, revised, or otherwise modified, pursuant to *W.Va. Code, 23-5-1a (e)*.
- (c). The employer did not file an appeal from the Decision dated July 13, 2022, Exhibit 2, highly relevant but omitted from the Employer's Appendix, which awarded benefits from February 19, 2020, to March 16, 2021. The Employer did not request a stay under §102-1-22. This Decision was acknowledged in the underlying protested order of August 18, 2022, E000053, with specific reference to the disputed time period of February 19, 2020, to March 16, 2021. Therein, at pages 10-11 of the Decision dated July 13, 2022:

Next is a review of the claimant's temporary total disability benefits for participation in a vocational rehabilitation program. An Administrative Law Judge reversed the claim administrator's order of February 28, 2020, and ordered that rehabilitation temporary total benefits be reinstated and paid until such time as good cause existed for termination of the same.¹ Thereafter, the claim administrator granted the claimant benefits from February 8, 2021, to March 16, 2021. However, the period from the improper closure on February 28, 2020, until February 8, 2021, was not addressed. The Administrative Law Judge ordered that the claimant's rehabilitation temporary total disability benefits be reinstated from the date of last payment and continue thereafter until good cause to terminate is established. The record is devoid of evidence that this occurred. Therefore, the claim should not have been closed for rehabilitation temporary total disability and the claimant is entitled to benefits from the time his benefits ceased on February 19, 2020, to March 16, 2021, less any rehabilitation temporary total disability benefits the claimant was paid during this time period. The orders of February 5, 2021, and February 17, 2021, are reversed.

1. This Decision was affirmed by the Board of Review Order dated June 22, 2021

The Decision of January 13, 2021, Exhibit 1, became final after two years, and cannot be amended, corrected, set aside, revised, or otherwise modified. *W.Va. Code*, 23-5-1a (e). The Decision of July 22, 2022, Exhibit 2, has also become final as any appellate action is now untimely. The Employer is barred by res judicata and collateral estoppel from re-litigating the same issue. *See*, Memorandum Decision in *Roupe v. McElroy*, No. 12-1204 (W.Va., April 24, 2014), wherein the Supreme Court found that res judicata and collateral estoppel applied in a compensation claim.

The Decision of July 13, 2022, Exhibit 2, the underlying basis for the protested order of August 18, 2022, E00053, under review herein, correctly observed at page 9, "However, the claim administrator did not address payment of benefits during the period between February 19, 2020, and February 15, 2021, as directed by the July 13, 2022, Board of Review order." The Decision of June 29, 2023, E00093 *sub judice*, simply enforces the prior final decisions, Exhibits 1 and 2, which are final on the entitlement to benefits from February 19, 2020 to March 16, 2021, less any payments during that period. On three occasions the judicial authorities have reviewed the evidence, awarded benefits, and granted relief to the Claimant.

W.Va. Code, 23-4-9 (d) provides for an “aggregate” award of benefits. As protested by the Claimant, the judicial decisions have set aside rehabilitation closures by the Employer as improperly entered. This procedural history substantiates the decisions of the lower tribunals awarding the retroactive benefits. The Supreme Court has held that statutory restrictions may be nullified and a claimant provided relief, if the claimant is denied benefits. See the following, *inter alia*:

- (a) In *Sheena H. for Russell H. v. Amfire*, 235 W. Va. 132, 772 S.E.2d 317 (No. 13-0875, April 10, 2015), the Syllabus by the Supreme Court held in Points 4 and 5:

4. “A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part[.]” Syl. Pt. 5, in part, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908).

5. Where a claimant to dependent’s death benefits under the Workers’ Compensation Act delays filing a claim because the claimant was unaware, and could not have learned through reasonable diligence, that the decedent’s cause of death was work related, and the delay was due to the medical examiner completing and making available an autopsy report, the six-month time limitation on filing a claim in West Virginia Code §23-4-15(a) [2010] is tolled until the claimant, through reasonable diligence, could have learned of the autopsy report finding that the decedent’s death was, in any material degree, contributed to by an injury or disease that arose in the course of and resulting from the decedent’s employment.

- (b). The Supreme Court in *Gary Hammons v. v. WVOIC*, 235 W.Va.577, 775 S.E. 2d 458 ((No. 12-1473, May 20, 2015), also refused to enforce the statutory time restrictions on reopening, in *W.Va. Code*, 23-4-16, because the claimant had been pursuing the statutory right to the addition of compensable diagnoses, and when successful, allowed the claim to be reopened. The Supreme Court held that the injured claimant was entitled to prompt benefits and the statutory right to pursue treatment and benefits through protest and appeal.

- (c) In *Reed v. Excel Logistics*, 815 S.E. 2d 511 (WV, No. 17-0864, 2018), the West Virginia Supreme Court considered the statutory overpayment provisions when TTD payments exceeded the statutory maximum of two years, when the claimant was not at fault. Further, the Supreme Court reasoned:

In the instant case, the claims examiner had complete control of the claim and of the payment of temporary total disability benefits. We do not know why the claims examiner did not seek to modify and terminate the claimant's benefits at the end of 104 weeks; perhaps it was carelessness, or perhaps it was an act of grace to assist the claimant. All we can say from this record is that the claimant relied to his detriment upon the claims examiner's actions, did not return to the work force, and continued to seek physical rehabilitation for his work-related injury. Because the claims examiner did not seek to modify and terminate the temporary total disability benefits at the end of 104 weeks, as required by the clear language of W.Va. Code § 23-4-1c(h), the claims examiner may not seek to recover as overpayments the 156 days of benefits paid beyond that deadline. [Emphasis added.] 815 S.E. 2d at 518.

During litigation on the protest to the order dated August 18, 2022, E00053, the Employer filed evidence, including information from the West Virginia Secretary of State's Business Organization Detail dated March 3, 2022, which was for a limited liability company, domestic and for profit, effective December 6, 2021, wherein the Claimant is listed as a member and the organizer. *See also* Exhibit 2, the BOR decision dated July 13, 2022, Finding 53, at page 8. The effective date of the limited liability company is December 6, 2021, outside of the disputed rehab TTD benefit period awarded from February 19, 2020 to March 16, 2021.

The claimant testified by deposition on October 4, 2022, Exhibit 8, in support of his claim. After the rehab TTD benefits were suspended, the claimant secured potential employment on an "as needed" basis as a FEMA inspector through an application filed during his rehabilitation plan in the fall of 2021 and thereafter assisting his wife with her business. *See also*, Claimant deposition, Exhibit 8, 10/4/2022, at 17-18 and at 22-23. The claimant was not receiving rehab TTD benefits during the unrelated time of these unsuccessful efforts at employment. *See* Exhibit 1, ALJ 01/13/2021, Findings 41, 42, and 43, pages 6-7. There is no evidence of any statutory substantial gainful participation in the daily operation of the limited liability company

or whether he was deriving income, wages, etc. from the FEMA certificate. The majority of the evidence on the issue was submitted by the Claimant testimony at his deposition on October 4, 2022, Exhibit 8, that he had not received any income from this business or from FEMA.

Although the ALJ had awarded rehab TTD effective February 19, 2020, until properly closed or terminated, in the Decision of January 13, 2021, Exhibit 1, the Employer disregarded that determination and awarded only prospective rehab TTD under the protested orders of February 5, 2021 and February 17, 2021. The Decision of July 13, 2022, Exhibit 2, also REVERSED rehabilitation closures in February, 2021 and determined, for the third time, at page 1:

....The orders of February 5, 2021, and February 17, 2021, are REVERSED and the claimant GRANTED vocational rehabilitation temporary total disability benefits from February 19, 2020, to March 16, 2021, less any vocational rehabilitation temporary total disability benefits the claimant was paid during this time period. [Emphasis added.]

The Employer has continuously failed to follow the prior decision of January 13, 2021, Exhibit 1, affirmed by the Board of Review on June 22, 2021, Exhibit 3. No further appeals were taken. That Decision became final and clearly stated at page 11:

Therefore, based upon the evidence of record, and for the reasons set forth above, it is found that the claimant has demonstrated by a preponderance of evidence that his vocational rehabilitation services were improperly closed on February 19, 2020. Accordingly, the Order of February 28, 2020 must be reversed, and vocational rehabilitation services reinstated. It is further ordered that the claimant's rehabilitation TTD benefits be reinstated from the date of last payment and continuing thereafter until such time as good cause exists for the termination of the benefits.

The Employer did not file an appeal from the Decision dated July 13, 2022, Exhibit 2, awarding rehab benefits again. The Employer failed to pursue any argument that the statutory limits on the payment of rehab TTD were applicable. The Employer also did not request a stay under §102-1-22.1.

The Decision of July 13, 2022, Exhibit 2, and previously the Decision of January 13, 2021, Exhibit 1, have become final on the issue of payment of the rehabilitation benefits for the judicially ordered period of time for rehab TTD from February 19, 2020 until March 16, 2021, less any payments for that period of time. Therefore, the Claimant protested the order dated August 18, 2022, E00053, limiting and restricting the award of rehab TTD benefits to three weeks, contrary to final judicial decisions.

The underlying claim history in these Decisions are relevant due to the delay and time consuming process of the litigation on diagnoses and treatment as well as the numerous interruptions of rehabilitation. As observed in the evidentiary record, the Claimant identified and submitted several Decisions by the Office of Judges in explanation of the efforts made by the Claimant to pursue rehabilitation. This supports the rationale of the judicial decisions granting the rehabilitation TTD for the full 1 year or 104 weeks of benefits.

Much as in the *Reed* case, *supra*, the Employer had complete control over the approval or denial of rehabilitation benefits until the judicial decisions were entered on January 13, 2021, Exhibit 1, and July 13, 2022, Exhibit 2. While the Employer may rely upon discretion over rehabilitation, that discretion is not absolute and must be viewed under the legislative policies, in *para materia*, supporting rehabilitation for the injured worker, especially when the Claimant has timely protested and presented evidence in support of the rehabilitation, for which judicial and appellate opinions have consistently granted the relief.

As discussed previously herein, the Decision dated July 13, 2022, Exhibit 2, by the Board of Review at pages 10-11, and not appealed by the Employer, reasoned that the claimant was entitled to the rehab benefits as ordered by the prior Decision of January 13, 2021, Exhibit 1.

As substantiated in the evidentiary record, and in the testimony at his deposition, Exhibit 8, the Claimant told providers and examiners repeatedly of his desire to return to employment.

The Supreme Court reasoned, in *State ex rel McKenzie v. Smith*, 212 W.Va. 288, 569 S.E. 2d 809, at 822 (202), as follows:

Additionally, we hold that when the Commissioner determines that a claimant is a candidate for rehabilitation services, *W.Va. Code*, 23-4-9 requires the Commissioner to develop and implement a plan for the claimant's rehabilitation services. The Commissioner must, with the assistance of the claimant's rehabilitation professional develop and monitor the rehabilitation plan, and the employer, the claimant, the claimant's physician and the Commissioner must cooperate in the development of the rehabilitation plan.

Further, the Court in *State ex rel McKenzie v. Smith*, 212 W.Va. 288, 569 S.E. 2d 809, at 826 concluded--- without the label of "discretionary:"

The Commissioner *has a clear legal duty to develop and implement rehabilitation plans* for eligible claimants, in cooperation with the employer, the claimant, and the claimant's physician, and with the assistance and monitoring of the claimant by a rehabilitation professional. The petitioner, and claimants similarly situated, have a right to initially choose their provider of rehabilitation services, free from the constraints of any contracts by employers for those services. The petitioner's right to relief from the existing regulations and policies of the Commissioner is clear, and we discern no other remedy other than granting the requested relief. [Emphasis added.]

The legislative policy for the consideration of rehabilitation is prompt services and "early identification" of candidates for rehabilitation in order to reduce hardship for injured workers and with the goal to return the injured worker to suitable gainful employment. *W.Va. Code*, 23-4-9. Despite this goal, the Employer interrupted the rehabilitation efforts of the Claimant, who was without fault and which closures were corrected by the judicial and appellate system. Case law allows the rehabilitation benefits to be paid in accordance with the goal. The evidentiary record herein clearly granted these prior awards of rehabilitation benefits, set forth in a judicially determined period of February 19, 2020 until March 21, 2021, less any prior payments. The decision of the Board of Review on June 29, 2023, E00093, is not based upon a material

misstatement or mischaracterization of the evidentiary record and is consistent with prior determinations in the claim, as well as collateral estoppel and res judicata principles.

V. CONCLUSION:

The claimant requests that the Intermediate Court of Appeals AFFIRM the Decision of June 29, 2023, REVERSING the order dated August 18, 2022; that the ICA AFFIRM the continued award of TTD benefits from February 19, 2020 until March 16, 2021, less any prior payments made for that period of time; and for such further relief as may seem just and proper.

Richard Heath, Claimant

By: 
Of counsel for claimant

VI. CERTIFICATE OF SERVICE:

Service of the foregoing Respondent's Brief, excluding the prior Supplemental Appendix filed on August 11, 2023, of the Claimant, Richard Heath, in Opposition to the Employer's Appeal, was had upon the parties herein by mailing true and correct copies thereof by efileing, properly addressed this 27th day of December, 2023, as follows:

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Richard Heath, Claimant

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