

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Case No.: 22-ICA-138

PRIMECARE MEDICAL OF WEST VIRGINIA, INC., Employer Below,

Petitioner,

v.

BRITTANY FOSTER, Claimant Below,

Respondent.

PETITIONER'S REPLY BRIEF

Brittany Foster, Claimant

v.

PrimeCare Medical of West Virginia, Inc., Employer

State of West Virginia Workers' Compensation Board of Review

Claim No. 2021009577

PRIMECARE MEDICAL OF WEST VIRGINIA, INC.

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INTRODUCTION

Petitioner, PrimeCare Medical of West Virginia, Inc. (“Petitioner”) hereby respectfully submits the foregoing *Reply Brief* pursuant to Rule 12 of the West Virginia Rules of Appellate Procedure. For the reasons set forth below and in its initial *Brief* Petitioner respectfully requests that the decision of the Board of Review be reversed.

ARGUMENT

Respondent, Brittany Foster, (“Respondent”) has failed to address most, if not all, of the fundamental arguments raised in Petitioner’s Brief. In fact, Respondent largely failed to provide any analysis beyond noting that the Board of Review reached a decision under the appropriate statute, so therefore it must have been the correct decision. Specifically, Respondent’s argument notably omits any justification for the Employees’ and Physician’s Report of Occupational Injury or Disease (WC-1) forms wherein two individual treating physicians affirmatively indicated that her COVID-19 infection was not occupational in nature. (*See* Employees’ and Physicians’ Report of OID dated October 20, 2020, *Appendix* at pp. 20-21; *see also*, Employees’ and Physicians’ Report of OID dated Sept. 25, 2020, *Appendix* at pp. 22-23.) Moreover, Respondent failed to produce any reliable medical tests or diagnostic studies suggesting, let alone proving or showing with any degree of certainty or apparentness, that her COVID-19 infection was transmitted occupationally. Permitting recovery in the absence of such evidence directly contradicts and is irreconcilable with parameters for compensability set forth by the West Virginia

Legislature in West Virginia Code Section 23-4-1(f) which specifically provides that “[n]o ordinary disease of life to which the general public is exposed outside of employment is compensable...[unless]...it is apparent to the rational mind, upon consideration of all the circumstances:...(3) [t]hat it can be fairly traced *to the employment as the proximate cause* [and]; (4) that is does not come from a hazard to which workmen would have been *equally exposed outside of the employment*.” See W. Va. Code § 23-4-1(f).

The absence of any detailed argument by Respondent in this regard is expected given that **absolutely no one**, including Respondent’s retained IME expert, Dr. Bruce Guberman, has been able to opine regarding the source of Respondent’s COVID-19 infection with any degree of certainty. Specifically, Dr. Guberman, who was hired to investigate this specific issue, testified as follows regarding his use of testing or other scientifically-recognized methodologies to determine the source of Respondent’s infection:

Q: That wasn’t my question. I’m asking you about the source of it, Doctor. You’re relying on no medical tests to determine a source; true?

A: **Yes.**

Q: No medical literature; true?

A: **The medical literature would not be pertinent.**

Q: No peer-reviewed publications recognizing a medically qualified source or test of determining the source; true?

A: **Yeah. Correct.**

(Deposition of Dr. Bruce A. Guberman at 26:6-16, *Appendix* at pp. 742.) This, of course, begs the question: If no medical tests or literature can identify the source of Respondent's COVID-19 infection or any recognized test for determining the source of such infection, than what, if anything, did the Board of Review use for the foundation of its determination? The answer is speculation. Nothing contained in West Virginia Code Section 23-4-1(f) permits recovery based on speculation. Moreover, COVID-19 is no longer a novel issue. It has plagued the world for nearly three years now and the West Virginia Legislature has had numerous opportunities to address its potential for compensability and to amend the parameters of West Virginia Code Section 23-4-1(f) and has yet to do so. Therefore, there can simply be no finding of compensability for a disease of ordinary life to which the general public is exposed outside of employment and where exposure is equally, if not more likely,¹ outside of the employment setting. Accordingly, the Board of Review's decision must be reversed as a matter of law.

The compensability of Respondent's claim is grounded in the fact that as Health Services Administrator, she was required to administer COVID-19 tests and attend staff meetings where individuals subsequently tested positive for COVID-19. This ignores the vast assemblage of personal protective equipment utilized by

¹ Keep in mind that Respondent was actually less likely to contract COVID-19 at work given that she wore Personal Protective Equipment (PPE) during her shifts. (See Brittany Foster Deposition Transcript at p. 7, *Appendix* at p. 461) (Q: When you're performing the testing, what kind of protective clothing and/or devices are you wearing? A: Glover [sic], gown, PPE, and then a95 mask).) The use of PPE makes it less likely that Respondent's COVID-19 infection was contracted at work. (See Risk Factors Associated With SARS-CoV-2- Seropositivity Among US Health Care Personnel, *Appendix* pp. 477-489 ("These findings provide reassurance that current infection prevention practices in diverse health care settings are effective in preventing transmission of SARS-CoV-2 from patients to [health care providers].").)

Respondent and the substantial decrease in likelihood of transmission associated with the same, as highlighted in the scientific study referenced in Petitioner's Brief. Moreover, this ignores the undisputed, scientifically recognized communicable nature of the COVID-19 virus, and its ability to spread from person to person in any setting, whether they may be symptomatic or not. There is simply no mechanism to determine whether Respondent's COVID-19 infection was occupational, and speculatively ruling otherwise creates a precedent where every communicable disease may be arbitrarily deemed compensable. Therefore, this Court should reverse the decision of the Board of Review and find that Respondent's claim is not compensable.

Finally, it should be noted that Petitioner's contract with the State of West Virginia ended effective June 25, 2022 and Petitioner no longer provided services in the State of West Virginia after the expiration of the contract. Accordingly, Respondent's employment with Petitioner would have also been terminated effective that date. Therefore, it is in error for the Board of Review to award any benefits beyond June 25, 2022.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that this Court reverse the decision of the West Virginia Workers' Compensation Board of Review.

RESPECTFULLY SUBMITTED,

PRIMECARE MEDICAL OF WEST VIRGINIA, INC.

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CERTIFICATE OF SERVICE

I, Mark R. Simonton, counsel for Petitioner, PrimeCare Medical of West Virginia, Inc., do hereby personally certify the a true and correct copy of the foregoing *“Petitioner’s Reply”* was served upon the following by the Court’s File & ServeXpress e-file system and/or by depositing an envelope containing the same in the United States Mail, First Class, postage prepaid, this 2nd day of **November, 2022** addressed as follows:

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