

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Oct 24 2022  
02:21PM EDT  
Transaction ID 68293981

---

CASE NO. 22-ICA-138

---

PRIMECARE MEDICAL OF WEST VIRGINIA, INC.,  
Petitioner,

JCN NO.2021009577

vs.

BRITTANY FOSTER,  
Respondent.

---

RESPONDENT'S BRIEF

---

BRIEF FILED ON BEHALF OF THE CLAIMANT  
FROM AN APPEAL OF A FINAL DECISION OF THE WEST VIRGINIA  
WORKERS' COMPENSATION BOARD OF REVIEW

**Counsel for Petitioner**

Reginald D. Henry (WV Bar # 4933)  
*Counsel of Record*  
Reginald D. Henry, Attorney at Law, PLLC  
Post Office Box 465  
Mabscott, West Virginia 25871  
(304) 255-6566

**TABLE OF CONTENTS**

INTRODUCTORY NOTE ..... 1

TABLE OF AUTHORITIES ..... 1

ASSIGNMENT OF ERRORS ..... 1

STATEMENT OF THE CASE ..... 2

SUMMARY OF ARGUMENT ..... 6

STATEMENT REGARDING ORAL ARGUMENT AND DECISION ..... 6

ARGUMENT ..... 6

PRAYER ..... 11

**INTRODUCTORY NOTE**

The Respondent will be referred to as Claimant; the Workers' Compensation Board of Review will be referred to as BOR; the Administrative Law Judge will be referred to as ALJ; the third-party administrator will be referred to as CA; Primecare Medical of West Virginia, Inc. will be referred to as Employer; and temporary total disability will be referred to as TTD.

**TABLE OF AUTHORITIES**

	<b><u>Page No.</u></b>
West Virginia Code § 23-5-12a(b).....	6, 11
West Virginia Code § 23-4-1(f).....	9
West Virginia Code § 23-4-1g.....	7
West Virginia Code § 23-4-7a.....	10
West Virginia Office of the Insurance Commissioner, Bulletin No. 21-01, issued January 19, 2021.....	9, 10
<u>Allen v. State Workers' Compensation Commissioner</u> , 173 W.Va. 238, 314 S.E. 2d 401 (1984).....	10
<u>Barnett v. State Workmen's Compensation Commissioner</u> , 153 W.Va. 796, 172 S.E.2d 698 (1970).....	7

**ASSIGNMENT OF ERRORS**

1. THE BOR COMMITTED NO CLEAR ERROR REVERSING THE CA'S ORDER AND HOLDING THE CLAIMANT CONTRACTED COVID-19 IN THE COURSE OF AND RESULTING FROM HER EMPLOYMENT.

## STATEMENT OF THE CASE

On August 10, 2020, the Claimant, who worked as an LPN and Health Services Administrator at the Southern Regional Jail in Beaver, WV, had a telehealth visit with Sara M. Cales, PA with complaints of shortness of breath on exertion and at rest with coughing and wheezing. Ms. Cales noted that Ms. Foster was unable to speak in complete sentences and was advised she needed to be seen in the ER for respiratory distress emergently. The claimant presented to the Emergency Room of Summers County ARH the same day with complaints of upper respiratory infection. It was noted that the claimant works as an LPN in Southern Regional Jail and was exposed to inmate with Covid-19. The records indicate patient has productive cough, fever, and sore throat that started about 10 days ago. Chest x-rays performed at that time revealed right lower lobe infiltrate. The claimant was discharged from the hospital on August 24, 2020 with a diagnoses of right lower lobe pneumonia, Covid-19, bradycardia, nonsustained paroxysmal ventricular tachycardia, hypoxia, supplemental oxygen dependent, at risk for venous thromboembolism, and morbid obesity. **[Exhibit 1]**

The Claimant completed an Employees' and Physician's Report of Occupational Injury or Disease (WC-1) form on September 22, 2021, noting she worked as an LPN/Health Services Administrator. She stated that she had direct exposure to Covid-19 through employees and patients at her workplace on July 30, 2020, a positive Covid test, and positive pneumonia and respiratory distress syndrome test. Dr. Anand completed the physician's portion diagnosing Covid-19. Instead of answering whether or not it was an occupational illness, he wrote "N/A." He advised her remaining off work for

from September 11, 2020, on, for further workup.

Another WC-1 form completed by Dr. Haag on October 20, 2020, indicated it was a non-occupational illness. He advised she remain off work until the next office appointment on August 31, 2021.

On August 31, 2020, the Claimant again treated with Sara Cales, PA-C, for follow-up of hospitalization from Covid. It was noted she had become ill a couple of days after exposure to Covid-positive patients in her workplace. It was noted that Claimant had no history of asthma, no past pulmonary testing, and no past issues with depression. She did have some trouble with sinus tachycardia over the last few years. However, since she developed Covid, she frequently has heart palpitations, shortness of breath on exertion, tachycardia, depression, and pneumonia. **[Exhibit 2]**

Dr. Patel diagnosed asthma mild, persistent, dyspnea, hypoxemia, and lung infiltrate on September 1, 2020.

On September 11, 2020, Dr. Anand assessed right lower lobe pneumonia, Covid-19, major depressive disorder, tachycardia, hypoxia, bradycardia, abnormal heart rate and morbid obesity. Claimant was referred to a pulmonologist.

The Claimant continued treating with Dr. Anand, Dr. Patel, Dr. Cheema, Dr. Bez (psychiatrist), and PA-C Cales, and by June 23, 2021, Dr. Anand assessed fibromyalgia, Vitamin D deficiency, major depressive disorder, morbid obesity, dyspepsia, congestive heart failure, essential hypertension, and sleep apnea syndrome.

On August 2, 2021, Dr. Patel's assessment was still asthma mild, persistent, and dyspnea.

The Claimant testified at a deposition on September 7, 2021, that she worked in the Medical Department of the Southern Regional Jail as an LPN. She described that in that area of the jail, there was her office, four exam rooms, a stock room, the nurse's desk, and six cells for inmates. On or around July 27, they had their first Covid-positive inmate. She testified that she had to re-test that positive inmate. She stated she then had to test his cell mates, who also came back positive. Then by July 30th or 31st, she tested approximately 10-11 inmates who were located in the Medical Department at that time. She explained that she also tested inmates that were not in the Medical Department for Covid, either in rover rooms or they would be brought to her in the Medical Department. She testified she had to perform Covid tests on officers at the jail as well. She testified that they had a department head meeting with her supervisor, and a nurse practitioner who both tested positive for Covid after that meeting, and that they were not wearing masks at that meeting. Everyone who had been in that meeting was sent home to quarantine. She stated that during the testing she wore gloves, gown, and an N95 mask. Claimant testified that sometimes the people she was testing were not wearing masks. During this time period, at least 4 inmates and 16 staff members tested positive for Covid. She testified that the only places she went outside of work and home was a drive-through zoo where you do not get out of the car, and the ER on the 4th of August when she was having Covid symptoms. She stated she lived alone in her own house, and the family members who were in the car with her during the drive-through zoo trip did not test positive for Covid. She returned to work on August 7, 2020, however, by August 8th she could not breathe and was very sick. She described still

having symptoms such as muscle pain, having to use a cane to walk, tachycardia, vertigo, syncope, shortness of breath, sleep apnea, and asthma she was diagnosed with after Covid. **[Exhibit 3]**

On November 10, 2021, the Claimant treated with Dr. Porterfield who assessed post-Covid pneumonia, restrictive lung disease, short of breath, and morbid obesity.

Dr. Guberman assessed the Claimant on March 9, 2022. He opined the Claimant had a history of Covid-19 infection, most likely related to exposure at work, and persistent symptoms consistent with "long" Covid. He stated she was not at maximum medical improvement, that she still had significant symptoms, and that she was not taking any continuous pulmonary medication prior to Covid but has to following Covid.

**[Exhibit 4]**

Dr. Parker issued a medical review report dated April 14, 2022, opining that Claimant's current pulmonary problems were due to asthma, not Covid-19. He believed that none of her symptoms, including heart issues, were due to Covid. He further opined that her condition was non-occupational. **[See Employer's Appendix p. 625-628]**

Dr. Guberman testified at a deposition on March 9, 2022, confirming his belief that the Claimant, to a reasonable degree of medical probability, developed Covid-19 during exposure at work. He stated that it was not very likely that she would contract Covid from going to the grocery store or pumping gas. He explained that all of the peer reviewed literature about long Covid are more speculative and not definitive, and most studies end with a statement that more studies are needed. **[Exhibit 5]**

By decision dated August 29, 2022, the BOR reversed the CA's order of March 1,

2021, and held the claim compensable for COVID-19. **[Exhibit 6]** The Employer appealed.

### **SUMMARY OF ARGUMENT**

The preponderance of the evidence provides that Claimant contracted Covid-19 in the course of and resulting from her employment. The BOR decision included no clear errors. Thus, there is no basis to reverse the ruling of the BOR decision pursuant to West Virginia Code § 23-5-12a(b).

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondent submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

### **ARGUMENT**

Under West Virginia Code § 23-5-12a(b), the Intermediate Court of Appeals "shall reverse, vacate, or modify the order or 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." In the case at hand, the evidence provides that the Claimant's



Covid-19 infection was more likely than not contracted in the course of and resulting from her employment. For the reasons discussed herein, the BOR's decision was proper, and meets none of the criteria warranting reversal.

Three elements must coexist in compensability cases: (1) a personal injury; (2) received in the course of employment; and (3) resulting from that employment. Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970). Further, 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. West Virginia Code § 23-4-1g.

The BOR assessed all of the required elements of Barnett, weighed all of the evidence of record, and properly concluded that it was more likely than not that Claimant contracted Covid-19 in the course of and resulting from her employment. First, the medical evidence reveals that Claimant was hospitalized for 14 days, and that upon admittance to the hospital she tested positive for Covid-19. It was reported in the records that Claimant had been exposed to a Covid-positive patient at work. Next, the Claimant explained in her sworn testimony that part of her job duties as a medical professional at Southern Regional Jail was to perform Covid-19 tests on inmates and employees. During the relevant time, around July 28, she tested several inmates and employees who tested positive for Covid, and even re-tested an inmate who tested positive to be sure it was not a false result. She tested all of the cell mates of the inmate who was re-tested, and they all were positive as well. On July 30 or 31, 2020, she tested another 10 or 11 inmates. After a meeting with an out of town supervisor who

later tested positive, Claimant's direct supervisor tested positive for Covid on August 1, 2020, and the nurse practitioner, also at the meeting, tested positive on August 2, 2020. By August 3, 2020, Employer sent everyone from that meeting home to quarantine. Claimant returned to work August 7, 2020, and did more testing on others. During this time, 4 inmates tested positive. During this time and when she was admitted to the hospital with Covid-19, at least 16 other staff members tested positive for Covid as well. The only possible non-occupational work exposure event during this time was when Claimant rode in a car through a drive-through zoo with her parents and two nieces, where the windows are left down and you view animals from the vehicle. No one else in the car tested positive for Covid-19.

There is simply no evidence to rebut the Claimant's testimony that she performed many Covid-19 tests on a great number of inmates and co-workers who were also positive for Covid-19, and that none of Claimant's family members in her home tested positive for Covid. In fact, the medical evidence consistently reflects that Claimant tested positive and began having severe symptoms from the disease after contact with Covid-positive patients through her work. Dr. Guberman testified that it was highly unlikely that Claimant contracted the disease doing non-occupational activities such as pumping gas or visiting a grocery store, and the only other possible exposure was in a car where no one else was positive for Covid. It defies logic and all reasonableness to conclude the Claimant contracted Covid-19 through any other avenue than her employment.

W.VA. Code § 23-4-1(f) provides that diseases may be incurred in the course of

or have resulted from employment. No ordinary disease of life to which the general public is exposed outside of employment is compensable unless it is apparent: (1) there is a direct causal connection between the conditions in which work is performed and the occupational disease; (2) that it can be seen to have followed as a natural incident of the work as the result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is incidental to the character of the business and not independent of the relation of employer/employee; and, (6) that it appears to have its origin in risk connected with the employment and to have flowed as a natural consequence, though it need not have been foreseen or expected before its contraction. Further, the WV Office of Insurance Commissioner Insurance Bulletin No. 21-01 states that Workers' compensation claims for Covid-19 should not be summarily refused, denied or rejected outright due to the nature of the injury alone without proper investigation.

As discussed above, and as analyzed by the BOR decision, the evidence of record reveals that the elements of W.VA. Code § 23-4-1(f) have been satisfied. The evidence establishes: (1) the direct causal connection between performing her job duties (administering Covid-19 tests) and the disease (Covid-19 outbreak at the jail); (2) that contracting the disease flowed as a natural incident of her multiple, direct, close-contact, exposures to the contagious disease that arose by her job requirement to test for the disease; (3) that the timeline of events from her exposure, the medical evidence,

and the Claimant's testimony providing that the majority, if not all, of Claimant's exposure stemmed from her employment, revealing that her employment was the proximate cause of her injury; (4) she was not directly exposed to the disease outside of work, and even if she was, it was not nearly in an equal amount of exposure that Claimant had at her work; (5) her exposure was incidental to the nature of her duties as a health administrator at the jail; and (6) the origin of risk was the exposure to a Covid-19 outbreak in the jail, where she had to administer tests to Covid-positive inmates and co-workers, and contracting the disease through such direct contact is a natural consequence of exposure as a medical administrator. Further, Insurance Bulletin 21-01 shows that it is not the intention to deny all Covid-19 cases simply because it could be an ordinary disease of life at this point, as it requires a proper investigation of the likelihood of contraction at the workplace prior to a claim denial.

Finally, W.Va. Code § 23-4-1c provides for the payment of TTD benefits during the healing or recovery period after an injury. Allen v. State Workers' Compensation Commissioner, 173 W.Va. 238, 314 S.E. 2d 401 (1984). The claimant must submit medical evidence that he is unable to return to employment because of the compensable injury or disease. No TTD benefits will be paid after the claimant has reached his or her maximum degree of medical improvement, is released to return to work, or has returned to work, whichever first occurs. West Virginia Code § 23-4-7a.

In the case at hand, the record reflects that the Claimant has been diagnosed with, and is being treated for, long Covid. Multiple doctors have issued off-work slips for the Claimant, but Dr. Anand issued an extended medical necessity letter dated October

6, 2020 stating Claimant was unable to attend work due to medical necessity and will not be able to return to work until further notice. Claimant testified that she had not been able to work since being hospitalized with Covid, and that she continues to experience severe symptoms that were not present prior to contracting the disease. The medical evidence of record is consistent with Claimant's testimony. Dr. Porterfield's finding from November 2021 was that the Claimant had still not recovered from Covid. Dr. Guberman testified that Claimant was not at maximum medical improvement due to long Covid. His evaluation was performed on March 9, 2022. It follows that the BOR did not err in finding that the Claimant was still temporarily and totally disabled from the disease and that TTD benefits are required.

Because there was no clear error contained in the BOR decision, there is no basis under West Virginia Code § 23-5-12a(b) for its reversal. Accordingly, the August 29, 2022 decision of the BOR should be affirmed.

### **PRAYER**

**WHEREFORE**, based upon the foregoing, the Claimant respectfully moves this Honorable Court to **AFFIRM** the BOR's decision of August 29, 2022.

Respectfully submitted,  
Brittany Foster  
By Counsel



Reginald D. Henry  
WV State Bar #: 4933

A handwritten signature in black ink, appearing to read 'Lori J. Withrow', written over a light gray horizontal line.

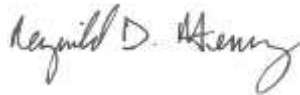
Lori J. Withrow  
WV State Bar # 13096

**CERTIFICATE OF SERVICE**

I, Reginald D. Henry, counsel for the Claimant herein, do hereby certify that I served the foregoing Respondent's Brief and Appendix by forwarding a true copy thereof by File & Serve Xpress efileing, to the following:

Mark R. Simonton, Esquire  
Offutt Nord PLLC  
P.O. Box 2868  
Huntington, WV 25728

October 24, 2022



REGINALD D. HENRY, Attorney at Law  
WV State Bar I. D. #: 4933  
Post Office Box 465