BEFORE THE STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

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WEST VIRGINIA HEATING
AND PLUMBING CO.,

Petitioner,

v.

TYLER J. CARROLL,

Respondent.

Intermediate Court No.: 22-ICA-167
JCN: 2021022612
Claim No.: 2021011505
DOI: 05/04/2021
OOJ Order: 09/12/2022

PETITIONER WEST VIRGINIA HEATING AND PLUMBING CO.'S REPLY TO BRIEF ON BEHALF OF RESPONDENT TYLER J. CARROLL

West Virginia Heating and Plumbing Co. ("Employer or "Petitioner"), by counsel, hereby submits its reply brief in response to the arguments and assertions contained in the "Brief on Behalf of Respondent Tyler J. Carroll" ("Respondent's Brief"). As an initial matter, Respondent filed two briefs, one on November 8, 2022 and another on November 10, 2022, in violation of the West Virginia Rules of Appellate Procedure. Rule 12(h) specifies that respondents may file "a brief" within thirty days of the petitioner's brief, and the brief must comply with the page limitations set forth in Rule 38. Rule 38(c) states that workers' compensation respondent briefs have a 20-page limit. Respondent's November 8, 2022 brief violates these rules because it is 40 pages long. Thus, any arguments contained in the brief after page 20 should be stricken and not considered by this Court. Respondent's second brief, filed on November 10, 2022, should also be stricken and not considered by this Court because it does not comply with the one-brief limit of the West Virginia Rules of Appellate Procedure for workers' compensation appeals.

In support of Petitioner's argument against Respondent's brief, Petitioner states as follows:

A. Respondent's brief misrepresents facts and incorrectly describes the reason for the claim denial.

Respondent's brief contains an alleged quote from page 2 of Petitioner's brief that simply does not exist in Petitioner's brief. Specifically, Respondent states "the Petitioner states that

based on the 'State of West Virginia Uniform Traffic Crash Report, the claim was denied on June 9, 2021.'" He cites to page 2 of the Petitioner's Brief. However, that quote is not on page 2 of Petitioner's brief, nor can it be found anywhere in Petitioner's brief. Nowhere in Petitioner's brief is there an argument that the claim was denied based on the Traffic Crash Report. Instead, Petitioner argues the claim was denied because the injury was not received in the course of and resulting from employment. Petitioner's brief provides pages of factual and legal support for the denial, mentioning the Traffic Crash Report only twice in the body of the argument to show no mention of evasive action by Respondent in regard to the accident.

B. Respondent's brief improperly refers to documents that were specifically rejected as evidence by the Office of Judges.

Respondent has improperly submitted to this Court an Amended State of West Virginia Uniform Traffic Crash Report dated December 14, 2021 that was specifically rejected by the Office of Judges ("OOJ") because it was submitted outside the evidentiary time frame.[1] The report is not part of the evidentiary record considered by the Administrative Law Judge. Respondent cannot now, at the appellate stage, attempt to introduce new evidence to support his claims. "The record on appeal consists of the documents and exhibits filed in the proceedings in the lower tribunal, the official transcript or recording of proceedings, if any, and the docket entries of the lower tribunal." W. Va. R. App. P. 6(a). "Anything not filed with the lower tribunal shall not be included in the record on appeal unless the Intermediate Court or the Supreme Court grants a motion for leave to supplement the record on appeal for good cause shown." W. Va. R. App. P. 6(b). West Virginia Code of State Regulations § 93-1-3.7 (July 1, 2008) specifically states "[t]he 'record' upon which a protest is decided shall mean evidence timely submitted by a party to the Office of Judges and evidence taken at hearings conducted

[1] Petitioner has filed a Motion for Leave to Supplement the Appendix to include the December 22, 2021 Decision of Administrative Law Judge for this Court's review of the ruling rejecting the December 14, 2021 Amended State of West Virginia Uniform Traffic Crash Report as untimely evidence. *See* Petitioner's Exhibit U, page 149, as included in the Supplemental Appendix attached to the Motion.

by the Office of Judges." *See also*, W. Va. C.S.R. § 102-1-3.13 (July 1, 2022).[2] Because the December 14, 2021 Amended State of West Virginia Uniform Traffic Crash Report was rejected by the OOJ, it is not part of the record on appeal and should not be considered by this Court.

C. Respondent's multiple factual misrepresentations and allegations that Petitioner made false representations to its insurer are wholly without merit.

Respondent alleges Petitioner dishonestly proffered a First Report of Injury ("FROI") as though it was completed and signed by Respondent on May 4, 2021. There are several inaccuracies surrounding this argument. First, the FROI (Petitioner's Exhibit S, p. 143-146) is a BrickStreet document completed as an initial injury report from the Employer's insurance agency representative, Lisa Litton, following the injury. Contrary to Respondent's representation, the FROI was not dated May 4, 2021. In fact, it was not dated at all. Furthermore, the FROI was not signed by anyone, including Respondent, nor has Petitioner asserted that Respondent was involved in the creation or submission of this document. Respondent argues that the recitation "the injury occurred while Respondent was on his way home and not on company time" cannot be found in the FROI. However, this exact statement is, in fact, found on the last page of the FROI. (*See* Petitioner's Exhibit S, page 146).

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[2] W. Va. Code § 23-5-12a(a) states that "[t]he Workers' Compensation Board of Review, after receiving a copy of the notice of appeal, **shall forthwith make up a transcript of any proceedings before the board of review** and certify and transmit it to the Intermediate Court of Appeals. The certificate shall incorporate a brief recital of the proceedings in the matter and recite each order entered or decision issued and the date thereof." (emphasis added) W. Va. Code § 23-5-12a(b) states "[t]he review by the court **shall be based upon the record submitted to it** and such oral argument as may be requested and received." (emphasis added). The Board of Review is statutorily barred from considering new evidence pursuant to W. Va. Code § 23-5-12(b). The Board of Review is confined to the record of the proceedings before the commissioner in considering compensation matters on review concerning questions passed upon by the commissioner. *See Nicely v. State Compensation Commissioner*, 127 W. Va. 249, 32 S.E.2d 231 (1944). Hearings before the Board of Review are confined to the showing made before the commissioner as disclosed by a claimant's file and record. *See Dillon v. State Compensation Commissioner*, 129 W. Va. 223, 39 S.E.2d 837 (1946).

Respondent is likely confusing the First Report of Injury with the Report of Occupational Injury.[3] That document is dated May 4, 2021 and was purportedly signed by Respondent and a physician who treated him after his injury. There is no reference to "company time" on that document. It was not until this litigation that Respondent began to claim the report was not signed by him.[4] Other than his post-litigation representations, there is no evidence to substantiate that claim. Further, this claim and argument are irrelevant to this appeal. The claim was ultimately rejected by the Claim Administrator because it was found the injury did not result from employment. Moreover, Petitioner has admitted that Respondent was owed compensation for his travel time under the Fair Labor Standards Act, and any issue regarding whether Respondent was on company time at the time of his injury is now moot.

Respondent argues the appeal cannot proceed because Petitioner has conceded Respondent was on the clock and owed compensation for his travel time. However, in order for an injury to be considered a compensable work injury, two elements must be satisfied: that the injury occurred (1) in the course of employment, and (2) as a result of the employment. Here, Petitioner has clearly articulated in its previously-filed brief that the injury did not occur as a result of the employment because Respondent left the duties of his employment when he exited his company vehicle and crossed I-79 to render assistance to a wrecked truck driver. He was injured as a result of this deviation from his employment, not as a result of his employment. Both elements of compensability are not satisfied, thus this appeal is not moot as argued by Respondent.

Respondent's assertion on page 18 of his November 8, 2022 brief and page 13 of his November 10, 2022 brief that "[a]fter consulting with its insurance agent, the Employer made a decision to provide false information to the private carrier that the Respondent was not on the

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[3] *See* Petitioner's Exhibit B, page 20.

[4] Three (3) months after his claim had been rejected, Respondent submitted a September 7, 2021 Employee and Physician Report of Occupational Injury then subsequently filed a protest to the June 9, 2021 claim rejection seven days later, on September 14, 2021.

job at the time of his injury" is wholly inaccurate. There is simply no evidence in the record that Petitioner made a decision to provide false information to the carrier. Respondent is arguing a red herring and a moot point. Petitioner admitted in its brief it was initially under the mistaken impression that travel time is not compensable, but then later discovered it is compensable work time under the Fair Labor Standards Act. This has nothing to do with the compensability of Respondent's injury under the Workers' Compensation Act because the injury was not a result of his employment. Knowledge based on information has the potential to change over time. Petitioner's initial mistaken belief that Respondent was not owed compensation for his travel does not equate to a deliberate decision by Petitioner to provide false information to its insurance carrier, and there was no evidence of this presented to the Administrative Law Judge. Petitioner is no longer advancing its initial argument that Respondent was not on the Petitioner's clock when he was injured. Thus, there is simply no substantiation to Respondent's assertion that false representations have been made by Petitioner.

D. Respondent's reference to outside lawsuits and evidence developed in those lawsuits is improper and should not be considered by this Court in this workers' compensation appeal.

Respondent argues that Petitioner has argued against the receipt of benefits in this claim because it is concerned about its payment of future premiums. There is absolutely zero evidence in the record to support this claim. With his brief, Respondent has improperly submitted a deposition transcript of Taylor Johnson[5] that was taken last month, on October 14, 2022, in a civil action pending in The United States District Court for the Northern District of West Virginia which was filed by Respondent against Westfield National Insurance Company. Respondent's submission of evidence at the appeal stage is improper and the evidence should not be considered by the Intermediate Court of Appeals.[6] Petitioner is not a party to that lawsuit

[5] Taylor Johnson is Vice President and General Counsel for the Employer's insurance agent.
[6] *See*, W. Va. R. App. P. 6(a) and (b); W. Va. C.S.R. § 93-1-3.7; W. Va. C.S.R. § 102-1-3.13; *Nicely, supra;* and *Dillon, supra.*

and the lawsuit does not concern workers' compensation issues. All of the evidence developed by the parties in that federal civil case was developed after this workers' compensation claim had already been litigated before the OOJ and while Respondent and Petitioner were awaiting a final decision from the OOJ. None of the evidence developed by the parties in the federal civil case is part of the evidentiary record considered by the Administrative Law Judge in this workers' compensation claim. The deposition transcript of Taylor Johnson is not part of the record in this workers' compensation action and it should not be considered by this Court in this appeal.

Respondent also relies on evidence and argument from a second federal civil lawsuit that he has filed in the United States District Court for the Southern District of West Virginia against the Employer related to a wage and hour claim. Similar to his lawsuit against Westfield National Insurance Company, the wage and hour lawsuit against the Employer was filed after this workers' compensation claim was litigated before the OOJ. None of the evidence developed by the parties in that federal civil case is part of the record in this workers' compensation claim, and the pleadings in that lawsuit are not part of the record in this workers' compensation action. Therefore, Respondent's attempted assertion of that lawsuit into this appeal is improper, and any reference to that outside litigation should not be considered by this Court in regard to the instant workers' compensation appeal. This appeal must be decided on its own merits based on the information, testimony, documents, and evidence that is part of the record in this matter alone; not on extraneous lawsuits filed by Respondent in federal court that have nothing to do with workers' compensation.

Again, Petitioner admitted in its brief that Respondent was on the job on his drive home from Pittsburgh. By focusing on the fact that Respondent was on the job and owed wages for his drive, Respondent ignores the primary issue in this appeal: that he was not injured as a result of his employment because he left the duties of his employment when he exited his company vehicle to render assistance to the wrecked truck driver. He was injured as a result of

this deviation from his employment; he broke from his employment-related duties and was no longer acting in the course of his employment. As cited in Petitioner's brief, "When an employee engages in a major deviation from the business purpose of travel, workers' compensation for injuries suffered while traveling can be denied." Syl. Pt. 3, *Calloway v. State Workmen's Comp. Comm'r.*, 165 W. Va. 432, 268 S.E.2d 132 (1980). *See also Williby v. W. Va. Office Ins. Comm'r.*, 224 W. Va. 358, 363-365, 686 S.E.2d 9, 14-16 (2009) (holding the claimant's injury did not occur in the course of or as a result of her employment when she was injured while traveling across the street to get lunch. The employee was on a break from employment, she was not conducting business for the employer, the employer did not control what she could do on her break, and she was exposed to the same risk as every other member of the public walking on the street.) Therefore, Respondent was not injured as a result of his employment in order to qualify for workers' compensation benefits.[7]

E. Respondent was not involved in the pickup truck accident on I-79 and he was not required to risk his life to render aid.

Respondent argues that he was specifically involved in a motor vehicle accident and was required to render assistance. He argues that he was forced off the road by a drunk driver. However, this conflicts with the evidence. As indicated in Petitioner's brief, the State of West Virginia Uniform Traffic Crash Report described Respondent as a bystander traveling south who

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[7] In Respondent's November 8, 2022 brief, Respondent attempts to make an issue of the fact the claim administrator itself, Encova, did not appeal the September 12, 2022 OOJ decision. However, a claim administrator, such as Encova, is not a party in a workers' compensation claim. "'Party' shall mean the injured worker (claimant), claimant's dependents, the employer, and, with respect to claims involving funds created in 23-2C-1 *et seq.* of the W. Va. Code, the Offices of the Insurance Commissioner. **Private carriers, insurance agents, and third-party administrators are not parties to the litigation**." (emphasis added). *See* W. Va. C.S.R. § 93-1-3.2 (effective until July 1, 2022) and W. Va. C.S.R. § 102-1-3.10 (effective July 1, 2022). Instead, the Employer is the party to the litigation before the OOJ and the Board of Review, and thus the Employer was the appropriate party to file an appeal. Encova cannot be a party to litigation before the Office of Judges except for specific circumstances defined by the procedural rules and statutes (W. Va. Code § 23-4-1c(a)(3), W. Va. C.S.R. § 93-1-18, and W. Va. C.S.R. § 93-1-19), and Respondent's argument is irrelevant to any matter in this appeal.

observed the white truck wreck. There is no mention of evasive action or involvement of Respondent in the wreck itself. Although Respondent now claims that "[p]hotographs show that the white-pickup truck came to rest mainly in the southbound passing lane, but a significant portion of the truck was also in the right lane of I-79 South" there are no photos in the record that show the white pickup truck before it was hit by oncoming traffic. The only photos of record are the grainy black and white photos included with the Traffic Crash Report, which do not depict the truck as it was located on the Interstate before Respondent attempted to render assistance and was hit by oncoming traffic. Instead, the photos show the truck after it was hit and necessarily repositioned due to the force of the collision. Those photos make it impossible to determine where the truck was located on the Interstate when Respondent exited his work van to render aid, and they certainly do not show its position when it first stopped.

Moreover, in the September 7, 2021 Employee's and Physician's Report of Occupational Injury submitted by Respondent after the claim was denied, he indicated the truck landed **near** his lane of travel, not in it.[8] In the Mountain State Insurance claim file that Respondent submitted as evidence in this litigation, a note indicates that Respondent "saw a car wreck in front of him." There is no mention of Respondent's actual involvement in the wreck itself. The same claim file indicates Ernie Bragg reported "[t]hey saw a truck traveling north, veering into the median and barrel roll into the southbound side of the interstate and it came to rest in the passing lane of the southbound side, facing south. The claimant pulled off the interstate onto the right shoulder. There was no traffic coming behind them, so they backed up until they could see the disabled truck out the front windshield." Again, there is no mention of Respondent being involved in the truck's accident. Ernie Bragg stated in his November 8, 2021 Affidavit that he and Respondent saw a pickup truck wreck on the Interstate, and that Respondent pulled the van off the Interstate onto the shoulder, backed up, parked, and exited the van to see if he could

[8] *See* Petitioner's Brief, Exhibit F, page 49.

help the driver of the wrecked pickup truck. There is no mention of Respondent being involved in the wreck. The preponderance of the evidence shows Respondent was not involved in a crash or collision with the truck. Thus, of W. Va. Code §17C-4-1 and §17E-4-3 does not apply to this claim and Respondent was not required to physically render aid.

Conclusion

Even though Respondent was going home from work at the time of the accident, he was injured when he deviated from his employment by leaving his company vehicle and walking across the interstate to assist the truck driver. Although Respondent's actions were benevolent, his injuries were sustained when he was voluntarily engaged an activity that has no relation to or connection with his employment as an HVAC tech.[9] His actions in rendering aid did not benefit Petitioner and he did not use any of Petitioner's tools or the work van to render aid. He was not involved in an accident with the truck itself, and he was not required to walk out onto the Interstate at night in the dark to render aid. The preponderance of the evidence shows that Respondent's injury did not result from his employment, and the claim was properly rejected by the claim administrator.

For all the foregoing reasons, as well as those reasons more fully described in Petitioner's brief filed on October 12, 2022, Petitioner respectfully requests this Court reverse the September 12, 2022 Office of Judges decision that reversed the June 9, 2021 rejection of the claim.

[9] On page 15 of Respondent's November 8, 2022 brief and page 11 of his November 10, 2022 brief, he references page 7 of Petitioner's brief and he argues that "the Employer argues that the Respondent and his supervisor should have done something other than call 911 and render aid to an injured motorist." This is incorrect. In fact, Petitioner states on page 7 of its brief that the Employer's president, Mary Beth Johnson, testified in her deposition that Respondent and Mr. Bragg should have called 911 and made sure they were clear of anything that could happen on the interstate with traffic coming.

Respectfully submitted,

WEST VIRGINIA HEATING & PLUMBING CO.

Charity K. Lawrence

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W. Va. State Bar ID #10592

CKL/

cc: Cynthia Ranson, Esquire
Mary Beth Johnson, West Virginia Heating & Plumbing Co.
Heather N. Haynes, Encova

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CERTIFICATE OF SERVICE

I, Charity K. Lawrence, do hereby certify that the foregoing "**PETITIONER WEST VIRGINIA HEATING AND PLUMBING CO.'S REPLY TO BRIEF ON BEHALF OF RESPONDENT TYLER J. CARROLL**" has been served upon all parties via electronic filing on this 28th day of November 2022 as follows:

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