STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

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West Virginia Heating and Plumbing Co.

Petitioner,

vs.

Intermediate Court No.: 22-ICA-167
JCN: 2021022612
OOJ Order: 09/12/2022

Tyler J. Carroll,

Respondent.

BRIEF ON BEHALF OF RESPONDENT TYLER J. CARROLL

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RESPONSE BRIEF OF TYLER J. CARROLL

I. PREAMBLE

THE PETITIONER'S APPEAL IS MOOT

The Petitioner/Employer and Mary Beth Johnson, Employer/President, now concede that "after[1] litigation of the workers' compensation matter concluded before the Office of Judges", they learned that the Claimant's travel time to and from the Pittsburgh job "is compensable work time" and admit that they no longer hold the "mistaken belief" that Claimant was not owed compensation for travel, recognizing that the Fair Labor Standards Act includes the travel to and from Pittsburgh as *compensable work time*. (See, *Footnote #2*, Petitioner's Brief, Page 6)

In *Footnote #3, Page 7 of Petitioner's Brief,* the Petitioner/Employer admits that it "now understands that Claimant's travel time to and from Pittsburgh is compensable work time under the FLSA."

[1] In light of the Petitioner's concessions, this Appeal cannot proceed.

The Employer's Appeal should be immediately withdrawn, dismissed, or stricken[2]. If a withdrawal or dismissal of this Appeal does not occur forthwith the Respondent provides this Court with the following Brief requesting this Court affirm the Office of Judge's September 12, 2022, decision finding of compensability.

II. STATEMENT OF THE CASE

a. False Statements and Evidence proffered by Petitioner

The Respondent expressly alerts this Court to two critical false representations made in the Petitioner's Brief. First, the Petitioner states that based on the "State of West Virginia Uniform Traffic Crash Report, the claim was denied on June 9, 2021[3]." However, that is impossible. The State of West Virginia Uniform Traffic Crash Report did not exist in any form on June 9, 2021. The Traffic Crash Report was dated and submitted on July 7, 2021. (Petitioner's Appendix, Exhibit C, Page 21 and 22) Hence, the "Traffic Crash Report could not possibly be the basis for the Claim Administrator's June 9, 2021, denial. The Petitioner's factual recitation regarding the basis for the denial of benefits is wholly false.[4]

The Employer has provided no evidence supporting the Claim Administrator's June 9, 2021, denial of benefits. In the absence of evidence supporting the June 9, 2021 denial, the Petitioner cannot sustain a claim that Judge Mazezka's decision was

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[2] Encova, the private carrier, did not file an Appeal to the Office of Judges' September 12, 2022 decision.

[3] Petitioner's Brief on Appeal, Page 2.

[4] Employer submitted as evidence, the State of West Virginia Uniform Traffic Crash Report, See Page 23 of Decision of Administrative Law Judge, Record Considered/Employer Evidence Submitted. (Pet. Appdx., Exhibit C, Pg. 21 and 22) The Report is dated July 7, 2021. Respondent submitted evidence confirming that the Braxton County Sheriff's Dept/WV Traffic Crash Report was **sent** to Encova on July 13, 2021, See Page 22 of Decision of Administrative Law Judge, Record Considered/Claimant Evidence Submitted. (**Resp. Appx. at 204**) Transcript of Hearing held 11.10.21 confirms the Petitioner and its legal counsel's awareness of the date upon which the Crash Report was prepared, then sent to and eventually received by Encova. (**Resp. Appx. at 54-56**) All relevant dates **are after** the June 9, 2021 denial of claim.

"erroneous and wrong." A reversal of Judge Mazezka's decision based upon a non-existent crash report would be inappropriate.[5]

The second false representation made by the Petitioner relates to the "First Report of Injury."[6] The Petitioner dishonestly proffers the First Report of Injury as though it was completed and signed by Tyler Carroll on May 4, 2021.[7] This was impossible and denounced by the Medical Records. Tyler Carroll was critically injured on May 4, 2021, at 9:06 p.m. and then Airlifted from the crash scene at 10:23 p.m., still in critical condition. Carroll arrived at the CAMC ER at 10:57 p.m., still in critical condition. He was sedated and intubated upon arrival at 11:05 p.m., still in critical condition. Carroll underwent emergency surgery and did not regain consciousness until several days later.[8] He did not complete nor submit "the First Report of Injury" dated May 4, 2021. The Petitioner argues that the First Report of Injury includes a recitation that "the injury occurred while Claimant was on his way home and not on company time." The recitation cannot be found in the First Report of Injury. The Petitioner's factual recitation about the contents of the First Report of Injury is wholly inaccurate. Nowhere on the First Report of Injury do the words "not on company time" appear. Significantly, there is a complete absence of any reference or inference that the date of injury or last exposure was "not on company time." The Petitioner has fabricated the phrase, the scenario and the report.

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[5] Amended Uniform Traffic Crash Report, 12/14/21, Petitioner is fully aware of the Amended Crash Report. **Resp. Appx. at 60-71**

[6] Page 22 of Decision of Administrative Law Judge, Record Considered/Claimant Evidence Submitted, the Report of Injury, 5/4/21 **Petitioner's Appx. at 20**

[7] See Page 23 of Decision of Administrative Law Judge, Record Considered/Employer Evidence Submitted **Resp. Appx. at 205**

[8] See, Page 22 of Decision of Administrative Law Judge, Record Considered/Clamant Evidence Submitted, the CAMC/Medical Records/CT scan, Intubated, Orthopedic Consultation, Surgical Document, Operative Report and AIR Evac Life Team Report. **Petitioner's Appx. 51-61**

b. Claimant’s Report of Occupational Injury

The Claimant's "Employee and Physician Report of Occupational Injury" was filed on September 7, 2021[9] after learning that a false Report of Injury was presented resulting in a Claim Decision Denial. Additionally, the Claim Decision Denial was addressed to Respondent’s Employer denying the Respondent notice that he was denied benefits. The Claimant's actual Report of Occupation Injury describes when and how the injury occurred. The Claimant’s Report of Injury is void of any reference to Tyler Carroll's injury occurring "not on company time."

c. Respondent’s Statement of the Case for Purposes of this Appeal

This case is an appeal by the Employer/Petitioner from a final order of the Workers' Compensation Office of Judges initially dated December 22, 2021, which reversed the claims administrators order dated June 9, 2021, denying the claim, and the Administrative Law Judge's Order finding the claim compensable. After the entry of the final order, the Office of Judges notified the Board of Review that as a result of a *computer error*, two documents (Affidavit of Leonard Ernie Bragg and the Employer's closing argument dated November 10, 2021) were not considered by the Administrative Law Judge. The Employer's counsel requested a remand, and Claimant's counsel objected. The Board of Review found that consideration of the two documents was necessary and directed the claim remanded to the Office of Judges.[10]

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[9] See, Page 22 of Decision of Administrative Law Judge, Record Considered/Claimant Evidence Submitted, the Report of Injury, 9/7/21. **Petitioner’s Appx. 49-50**

[10] 4.19.22 Order Nick Casey Chairperson, **Resp. Appx. 1-3**

After that, the Workers' Compensation Office of Judges issued a Final Order on Remand dated September 12, 2022, reversing the claims administrator's order dated June 9, 2021, denying the claim and holding the claim compensable.

The Office of Judges correctly concluded that Tyler Carroll did not deviate from his employment at the time of his injury. The preponderance of the evidence clearly illustrates that while carrying out his job duties, Tyler Carroll was confronted with a fortuitous event that mandated him to stop the Employer's vehicle due to his involvement in a motor vehicle accident. The events leading up to the motor vehicle accident are not in dispute. Tyler Carroll and his supervisor performed work at the Joseph F. Weis United States Courthouse in Pittsburgh when they arrived on May 3, 2021, and then on May 4, 2021, after their overnight stay. They finished the job on May 4, 2021. The employer’s tools and the employer’s materials transported by Tyler Carroll and his supervisor in the Employer's van were necessary to complete the job in Pittsburgh. At about 5:30 p.m. on May 4, 2021, Tyler Carroll and his supervisor gathered the Employer's tools and remaining materials and placed them in the company van. They left Pittsburgh around 6:30 p.m., driving South on I-79 toward Charleston. They stopped in Morgantown to eat and fill the Employer's van with gas at the employer’s expense. They continued on I-79 South with Tyler Carroll driving. At 9:05 p.m., near Mile Marker 69, near the Sutton exit, Tyler Carroll and his supervisor observed the driver of a white pick-up truck heading northbound on I-79 lose control of his vehicle, cross the median, and barrel roll into the southbound lanes of I-79. Photographs 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. The affidavits of Tyler Carroll and his supervisor, Ernie Bragg, support Tyler Carroll's need to take evasive action to avoid a collision with the out-of-control truck. The Employer refuses to accept this undisputed fact. Judge Mazezka understandably noted the unanimous and uncontested Affidavits of Tyler Carroll and his Supervisor, confirming the need to take evasive action. Then Judge Mazezka correctly concluded that the preponderance of the evidence established the taking of evasive action and Tyler Carroll and his supervisor's involvement in the evolving events.

After taking evasive action, Tyler Carroll steered the Employer's van to the right shoulder of the southbound lanes. Carroll and his supervisor observed the disabling damage to the white pick-up truck and the driver appearing unconscious. After checking the rear-view mirror and determining no oncoming traffic, Tyler Carroll turned on the van's emergency flashers. Then, both Tyler Carroll and his Supervisor, Ernie Bragg ("Bragg"), exited the van to render aid. Tyler Carroll rushed to the driver's door of the white pick-up truck. His supervisor went to the back of the company van with his cell phone flashlight engaged in an attempt to stop any oncoming southbound traffic. As Carroll approached the white pick-up truck, he could see the driver through the windshield, and he appeared unconscious. Carroll tried to communicate with the driver, but there was no response. Then, he tried to open the door, but it was jammed closed, and he could not do so.

In the meantime, a tractor-trailer approached the crash scene, which, due to Supervisor Bragg's warning, slowed down and stopped without crashing into the disabled truck. Moments later, a second truck slowed behind the tractor-trailer. Then, a small black car traveling at high speed in the passing lane passed the stopped truck and

the tractor-trailer and struck the disabled white pick-up truck near the driver's side door and gas tank where Tyler Carroll had been working to free the driver. After hearing the impact, Supervisor Bragg looked to where Carroll was standing but he was gone. Bragg observed the white pick-up truck spinning and sliding further south on the interstate. Supervisor Bragg, with the assistance of a nurse who stopped at the scene, found Carroll gravely injured in the median. The Nurse began to render aid to Tyler Carroll. Bragg called for emergency responders. Eventually, Tyler Carroll was transported from the scene by AirEvac helicopter to the Charleston Area Medical Center. Tyler Carroll sustained multiple fractures involving all four extremities, as well as a fracture of his skull. He underwent a below-the-knee amputation of his left leg on May 11, 2021. However, there was insufficient tissue to salvage the leg below the knee level, and an above-the-knee amputation was performed on May 14, 2021. As of this filing, Tyler Carroll continues to recover from his injuries.

The facts are not disputed. There is no evidence that Tyler Carroll deviated from his employment at the time of his injury. Travel itself was a substantial part of the services performed by Tyler Carroll for his Employer. His job required him to travel considerable distances, and as in this instance, Tyler Carroll traveled over 460 miles to a worksite in Pittsburgh and back to Charleston. Judge Mazezka concluded that Tyler Carroll's employment is deemed to include travel based not only on the distance traveled but also on the nature and function of the company van. Tyler Carroll did absolutely nothing to deviate from his employment. He was transporting his Employer's personnel, tools, and materials back to Charleston when he became part of a motor vehicle crash.

Tyler Carroll was doing what was required of him by his Employer and by the rules of the road. Judge Mazezka correctly concluded that Tyler Carroll did not deviate from his employment, nor did he waive or forfeit his employment status or on-the-job status by remaining at the crash scene and rendering aid to an injured person. Judge Mazezka's adherence to the letter of well-established law should not be condemned nor reversed as he correctly found that Tyler Carroll's injury was received in the course of his employment. Moreover, Judge Mazezka correctly concluded that the Claim Administrator's ("Encova Insurance" or "Encova") Order dated June 9, 2021, rejecting Tyler Carroll's application for benefits, was contrary to the preponderance of the evidence and must be reversed. The Office of Judge's Order dated September 12, 2022, must be affirmed.

III. SUMMARY OF ARGUMENT

The evidence is overwhelmingly clear that the Respondent, Tyler Carroll, was injured in the course of his employment and that at no time did he leave the duties of his job nor deviate from his employment. The Office of Judge's Order of September 12, 2022, must be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent agrees the decisional process would not be aided by oral argument.

V. STANDARD OF REVIEW

Respondent agrees with the Petitioner's standard of review statement.

VI. ARGUMENT

A. Administrative Law Judge Mazezka correctly found that the Respondent was within the course of his employment at the time he sustained injury

West Virginia Code §23-4-1 provides benefits to employees who receive an injury during and as a result of their covered employment. It is unclear why the Petitioner is advancing the "going and coming" rule to defeat the Respondent's entitlement to benefits. The going and coming rule apply to situations where an employee is not on the job but is simply coming and going to work when he sustains an injury. West Virginia Heating & Plumbing (hereinafter "the Employer") determined that to facilitate business as a HVAC and Plumbing Contractor, it was necessary to provide its employees with adequate transportation to transport the employees and needed tools and materials to the Pittsburgh site and back to Charleston. In this regard, the journey is part of the job. There is no evidence that the Respondent was merely coming or going to work when injured. To the contrary, the Respondent was on the job performing services as a driver of his Employer's van. He was driving the van back from Pittsburgh to Charleston, hauling tools, materials, and other employees for the Employer's benefit. It is well-established law in West Virginia that where in going to and from work, the travel and means of transportation is a condition of an employee's employment on behalf of the Employer's business, then an injury sustained while doing so is considered in the course of employment. *Williby v. West Virginia Office of Insurance Commissioner*, 224 W.Va. 358, 686 S.E.2d 9 (2009) and *Calloway v. State Workmen's Compensation Comm'r*, 165 W.Va. 432, 268 S.E.2d. 132 (1980).

When the means of transportation is provided by the Employer or where the transportation is by means of the employer-owned vehicle or when the transportation is furnished by custom to the extent that it is incidental to and part of the contract of employment; or when it is the result of a continued practice in the course of the

Employer's business which is beneficial to both the Employer and the employee; or when employees travel to the job location in a company vehicle and haul the Employer's tools the travel is considered to be in the course of employment. *Courtless v. Jolliffe*, 203 W.Va. 258, 507 S.E.2d 136 at 141-142; *EIN Services, LLC v. Buantello*, West Virginia Supreme Court of Appeals, No. 12-0411, BOR Appeal No. 2046627; (Issued December 11, 2013); *Brown v. City of Wheeling*, 212 W.Va. 121, 569 S.E.2d 107 (2002); *Murphy v. E. Arrow Corp.*, West Virginia Supreme Court of Appeals, No. 12-0605; BOR Appeal No. 2046546 (Issued January 16, 2014)

In addition, the provision of transportation in this case, provided significant incidental benefits to the Employer that were not common to ordinary public commuting trips. The "going and coming rule" applies where the only evidence linking the Employer to the accident is the fact that the employee was coming or going to work. Where additional evidence exists linking the Employer to the accident, such as when the use of the roadway is required in the performance of the employee's duties or the Employer, when the employee is rendering an express or implied service to the Employer, or when there is an incidental benefit to the Employer that is not common to ordinary commuting trips, the application of the going and coming rule may be altered. *Courtless v. Joliffe*, 507 S.E.2d. 136 (W.Va. 1998)

It is well-established that West Virginia Workmen's Compensation law recognizes that an employee is entitled to compensation for an injury received while traveling on behalf of his Employer's business. Syllabus Point 1, *Calloway v. State Workmen's Compensation Comm'r,* 268 S.E.2d 197(W.Va. 2002); *Brown v. City of Wheeling*, 569 S.E.2d 132 (W.Va. 1980) The Employer herein testified that WVH&P

received a benefit from its employees transporting tool, materials, and the employees themselves to Pittsburgh in the company van[11]. The Respondent was within the scope of his employment at the time of the accident on May 4, 2021 and the preponderance of the evidence weighs heavily in favor of the Respondent.[12]

B. Administrative Law Judge Mazezka correctly found Respondent was involved in a motor vehicle accident, forcing him to take evasive action and then stop to render aid to any person injured

During the Pittsburgh to Charleston trip, Carroll was prevented from continuing his driving duties without incident by a drunk driver, who forced him and his Supervisor off of the road. Although now that the Petitioner admits that the Respondent was on the job at the time of the accident, it will not concede his entitlement to benefits. Instead, the Employer argues that the Respondent and his supervisor should have done something other than call 911 and render aid to an injured motorist.[13] It is not disputed that the Respondent performs most of his work in the "local area, " consisting of Kanawha and thirteen surrounding counties[14]. On occasion, the Respondent was required to travel outside of the local jurisdiction to Pittsburgh, Pennsylvania. At some point before the subject accident of May 4, 2021, the Respondent and his supervisor Bragg were assigned by them Employer to work on a federal project at a United States Courthouse in Pittsburgh, Pennsylvania. On May 3, 2021, the Respondent and his supervisor

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[11] Office of Judge's Hearing Transcript at Page, 14 and 15 **Resp. Appx.** at **17-18** and Mary Beth Johnson Deposition, at 48. **Petitioner's Appx. at 83**

[12] **West Virginia Code §23-4-1(g)** provides that for all awards the resolution of any issue shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen matter of resolution. (…) If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

[13] See, Petitioner's Brief at Page 7.

[14] The covered counties are Boone, Clay, Fayette, Greenbrier, Kanawha, Mercer, Monroe, Nicholas, Pocahontas, Putnam, Raleigh, Roane, Summers and Webster. **Resp. Appx. at 202**

departed Charleston, West Virginia, for Pittsburgh in their Employer's van transporting company tools and materials for the Pittsburgh project. The Union Agreement did not permit transporting of WVH&P's tools and materials to the job site in private vehicles and required a company owned or leased vehicle to be driven. The Employer paid for overnight accommodations, fuel, and meals for its employees while on the job.

With this job, the Respondent performed two separate services; first, as a driver of the Petitioner's van hauling materials, tools and employees. Federal wage law requires that all drivers of company vehicles be paid for their time while driving when traveling is required.[15] As an employer, the Petitioner previously paid the Respondent for his time driving to and from Pittsburgh. The second service provided by the Respondent on this job was at the work site, where he performed plumbing and pipefitting. Concerning this job, the Respondent and his supervisor performed work for two days in Pittsburgh and, after finishing, loaded the Employer's tools and materials into the Employer's van to be transported back to Charleston, West Virginia. On the return trip to Charleston, the Respondent was gravely injured.

The Employer argued below that the Respondent's application for benefits was properly rejected because injuries were not sustained in the course of his employment.[16] The Employer stated that the Respondent was "not on the employer's

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[15] 29 CFR § 785.41 Work performed while traveling. Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.

[16] Office of Judges Hearing Transcript, 11/10/21 at Page 44, **Resp. Appx. at 47**

clock at the time of his injury as he did not receive overtime or travel pay.[17] The employer also argued that "coming from work on a public highway is not considered to be within the course of employment and that risk of being involved in a motor vehicle accident on I-79 was not imposed by the employer."[18] Two of three of these arguments have now be conceded by the Employer as a "mistaken belief." (See, Footnote #2 and Footnote #3 of Petitioner's Brief on Appeal) This Appeal cannot proceed on the basis that the Respondent was not on the employer's clock or that the Respondent was not injured in the course of his employment.

In reality, the Petitioner argues against the Respondent's receipt of benefits because it is concerned about increase in future premiums. Immediately after the accident, the Employer contacted its insurance agent, Mountain State Insurance Agency, and expressed a concern that the Respondent's injury would affect the Petitioner's future Workers' Compensation premiums.[19]

After 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 job at the time of his injury and that he was simply "coming and going" from work. The creation of this false scenario resulted in Encova's denying the Respondent his Worker's Compensation benefits. [20] Only now, almost eighteen (18) months later, has the Petitioner conceded that the Respondent was on compensable work time when he was injured. The admission came only after the Respondent filed a wage and hour case

[17] Office of Judges Hearing Transcript, 11/10/21 at Page 42, 43 **Resp. Appx. 45 and 46**
[18] Office of Judges Hearing Transcript, 11/10/21 at Page 44 **Resp Appx. Exhibit at 47**
[19] Deposition Taylor Johnson, Mtn. State Insurance, 10/14/22, Pg 2.00 **Resp. Appx. at 123**
[20] Respondent did not receive the Notice of Claim Decision denying workers compensation benefits as it was addressed to his Employer. He was not aware that he was being denied until September of 2021. He appealed Encova's non-compensability decision

in the *United States District Court for the Southern District of West Virginia*. The civil action filed by ~~the Respondent seeks, am~~ong other damages, wages for the services he performed while returning to Charleston from Pittsburgh until after he was injured on the return journey on May 4, 2021.[21] Notably, the Petitioner is represented in this case <u>**and**</u> the wage and hour case by the law firm of Spilman Thomas. The same firm also represents the Respondent's Supervisor, Ernie Bragg. Because the Respondent's entitlement to his wages is clear, the Petitioner was forced to concede the Respondent was on the job when injured.

The lengths to which the Petitioner has gone to prevent the Respondent's recovery of benefits is monumental. In *Footnote #2 of Petitioner's Brief, the* Employer o*vertly* attempts to rebrand its dishonesty is a "mistaken belief." Regardless of what the Petitioner calls it, albeit deceitful, a fabrication, a tale, a misrepresentation, or pure fiction, the simple fact is the Respondent suffered grave and permanent injuries on the job. In the United States District Court filing, the Employer-President admits she "incorrectly testified" that the Respondent was not paid for all his time. However, despite its admissions, the Employer continues to openly obstruct the Respondent's receipt of benefits. After conceding that the Respondent was on the job at the time he sustained injuries, the Petitioner seems focused on the Respondent's actions while on the job. The Petitioner's focus is misplaced and prohibited. Tyler Carroll was injured while carrying out his job duties. He was confronted with a fortuitous event that mandated him to stop the Employer's vehicle due to his involvement in a motor vehicle

[21] <u>Tyler J. Carroll v. West Virginia Heating and Plumbing</u>, CA #. 2:22-CV-00392, Judge Berger, Presiding. Respondent moves this Court pursuant to *West Virginia Rules of Evidence, Rule 201(c)(2)* to take judicial notice of Adjudicative Facts admitted by the Employer in the Federal Wage and Hour case.

accident. The affidavits of Carroll (Petitioner's Appx. Exhibit O, Pg. 119) and his supervisor, Ernie Bragg (Petitioner's Appx. Exhibit N, Pg. 111), support Carroll's need to take evasive action to avoid a collision with the out-of-control truck. Ernie Bragg was deposed and, in his sworn deposition, gave specific details of the danger of the collision that both he and Tyler Carroll faced on the night in question.

There is no requirement for physical contact between two vehicles to meet the definition of being "involved in a motor vehicle accident." *Ellison vs. Doe*, 215 WV 517, 600 S.E.2d. 229 (2004). To recover benefits for damages, the insured must normally establish physical contact occurred between two vehicles. However, when the insured cannot show actual physical contact, the inured must show a “close and substantial physical nexus “through corroborative evidence by independent third-party evidence that *but for* the immediate evasive action of the insured, direct physical contact would have occurred between the vehicles. The "*but for*" test is satisfied, and the motorist claim can go forward if the injured insured presents independent third-party testimony by a disinterested individual, which clearly shows the negligence of another vehicle was the proximate cause of the accident. Id. at 520. The Respondent's evidence easily meets the requisite standard via the testimony of his supervisor, Ernie Bragg that *but for* the immediate evasive action of Tyler Carroll, direct physical contact would have occurred between the Employer’s work van and the out-of-control vehicle. The Petitioner offers no evidence to the contrary, yet refuses to accept the undisputed facts.

Judge Mazezka correctly concluded that the preponderance of the evidence established that Tyler Carroll and his supervisor were *involved* in a motor vehicle accident while on the job.

C. Respondent acted as required and did not deviate from his employment.

Travel itself is a substantial part of the services performed by Tyler Carroll for his Employer. His employment required him to travel considerable distances, and as in this instance, Tyler Carroll traveled over 460 miles to a worksite in Pittsburgh and back to Charleston. Judge Mazezka concluded that Tyler Carroll's employment is deemed to include travel based not only on the distance traveled but also on the nature, use and function of the company van. Tyler Carroll did absolutely nothing to deviate from his employment and acted on behalf of his Employer when he avoided the drunk driver, saving severe injury to his fellow passenger and protecting the property of his Employer.

By operation of law Tyler Carroll and his Supervisor, Ernie Bragg, were required to do the following:

- stop at the scene of the crash;
- to remain at the crash until law enforcement arrived;
- to provide the information required to investigating law enforcement officers;
- and if physically able to do so, to render aid to any person injured in such crash by providing reasonable assistance including carrying or making the arrangements for carrying of such person to a physician, surgeon, or hospital if it is apparent such treatment is necessary.

Specifically, **West Virginia Code §17C-4-1(a)** and **West Virginia Code §17C-4-3(b)** provide in pertinent part,

> the driver of any vehicle involved in a crash resulting in injury or death shall immediately stop the vehicle at the scene or a closed to the scene as possible and return to and remain at the scene of the crash until he has complied with the requirements of 17C-4-3… (b) the driver of any vehicle involved in a crash resulting in injury, if physically able to do so, shall render aid to any personal injured in such crash reasonable assistance, including the carrying, or making arrangements for the carrying of such person to a physician, surgeon or

hospital for medical or surgical treatment if it is apparent that such treatment is necessary (…)

The propriety of Tyler Carroll's actions was confirmed by the actions of his WVH&P supervisor and superior, Ernie Bragg, who also exited the Employer's vehicle and participated in the rescue attempt and rendering aid. Their concerted actions were consistent with well-established law. Carroll is not removed from the Workers' Compensation Act protections when facilitating the proper response to a motor vehicle accident in which he was involved and while operating his Employer's vehicle. Carroll was doing exactly what was required of him by his Employer and by the rules of the road. He did not deviate from his employment, nor did he waive or forfeit his employment status or on-the-job status by remaining at the crash scene and rendering aid to an injured person.

Contrary to the Petitioner's argument, Tyler Carroll did not voluntarily engage in an activity that had no connection to his employment. He did not act negligently to render aid to an injured person. In support of its position, the Petitioner cites *Morton v. West Virginia Office of Insurance Commissioner et al*. 231 W.Va. 719, 749 S.E.2d 612 (2013). The Petitioner's reliance on *Morton* is misplaced. The *Morton* facts are not remotely similar to the instant case. In *Morton*, a secretary working in an office setting sustained an injury when she made a gratuitous gesture of assisting her co-worker with the removal of a box of maternity clothes. The act involved no instrumentalities of employment and did not result from employment. The secretary's claim was rejected and affirmed on appeal.

Unlike the Claimant in *Morton*, Tyler Carroll did not abandon his employment as he was performing a job-related task when he became involved in a motor vehicle crash. While some of his job duties consist of repairing and servicing boilers and water leaks, a substantial part of his job includes transporting personnel, tools, and materials necessary to perform HVAC technician work. Here, arroll's employment thrust him into contact with an emergency. Carroll did not violate any company instruction or policy while acting within the confines of the law. Moreover, West Virginia Code §23-3-6a[22] prevents the denial of workers' compensation benefits to employees for purported on-the-job negligence, if any. While Carroll does not admit he was negligent in stopping and rendering aid after involvement in a motor vehicle accident, nor in how he rendered the aid, if his actions are found to be "negligent", that negligence cannot prevent his entitlement to benefits. *Goodman, et. al. v. Auton*, Supreme Court of Appeals of West Virginia, No. 21-0578,11/3/22.

The Petitioner simply refuses to accept that Carroll and his Supervisor were "involved in a crash." The definition of "involved" is basic and simple and does not require physical contact but instead is defined as "to engage" or "to relate closely" or "to surround." Judge Mazezka thoroughly assessed the evidence's relevance, credibility, materiality, and reliability in the context of the issue presented. The weight of the evidence overwhelmingly favors the Claimant's position that he was on the job, did not deviate from his job, was injured and is entitled to benefits. The Petitioner has failed to

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[22] *W.Va. Code* **§23-2-6a. Exemption from liability of officers, managers, agents, representatives or employees of contributing employers.**T he immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

proffer any credible or reliable evidence in the context of the issue presented and has effectively withdrawn its position on non-compensability.

CONCLUSION

Judge Mazezka was correct in finding that the Respondent's injury occurred while he was on his job. The Respondent was operating his Employer's van with permission and authorization and in furtherance of the Employer's business when he was injured. The Petitioner has not established that Judge Mazezka's findings were based on errors of law or otherwise wrong. The preponderance of the evidence is dispositive. Because the Petitioner cannot sustain its position, affirmation of compensability is appropriate. For all the preceding reasons, Tyler Carroll respectfully requests this Court affirm the Office of Judge's September 12, 2022, decision finding of compensability.

Respectfully submitted,

TYLER J. CARROLL
Respondent

s/ Cynthia M. Ranson

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STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

West Virginia Heating and Plumbing Co.

Petitioner,

vs.

Intermediate Court No.: 22-ICA-167
JCN: 2021022612
OOJ Order: 09/12/2022

Tyler J. Carroll,

Respondent.

CERTIFICATE OF SERVICE

I, Cynthia M. Ranson, do hereby certify that the foregoing "**BRIEF ON BEHALF OF RESPONDENT TYLER J. CARROLL"** has been served upon all parties via electronic filing on this 10th day of November, 2022:

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