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**STATE OF WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF REVIEW**

IN THE MATTER OF:

Bucky K. Thompson,
CLAIMANT

JCN: 2020021920

DOI: December 22, 2019

and

Western Construction, Inc.,
EMPLOYER

ORDER

PARTIES:

Claimant, Bucky K. Thompson, by counsel, Sandra K. Law
Employer, Western Construction, Inc., by counsel, Jeffrey M. Carder

ISSUE:

The claimant protested the claim administrator's order dated October 25, 2021, which granted the claimant a 7% permanent partial disability (PPD) award. The claimant does not protest the amount of PPD, but rather the benefit rate calculation (four weeks of compensation vs. six weeks per percent of disability).

DECISION:

It is hereby ORDERED that the claim administrator's order dated October 25, 2021, granting the claimant a 7% PPD award at a rate of four weeks of compensation per percent of disability, be AFFIRMED.

RECORD CONSIDERED:

See attached, **Record Considered**.

FINDINGS OF FACT:

1. The claimant submitted the Cash In Bank-Payroll report of the employer regarding the claimant for the dates of December 16, 2019, through July 7, 2021. The report indicates that the claimant's last check date was January 24, 2020.

2. The claimant and the employer submitted the testimony of the claimant taken by evidentiary hearing on July 30, 2021. The claimant testified

that he was terminated from the employer's employment after January 20, 2020. The claimant testified that TTD started on October 23, 2020, the date surgery was requested for the compensable injury. The claimant testified that he was currently receiving TTD benefits.

3. The claimant submitted the correspondence of Abigail Smith, PA, dated September 14, 2021. The claimant was released to return to work with no restrictions on September 14, 2021.

4. The employer submitted the medical report of Joseph E. Grady, II, M.D., dated October 1, 2021. The claimant presented with a left shoulder injury. The claimant was injured on December 22, 2019, while working as a welder. The claimant reported that he was currently working as a welder. The assessment was status post left shoulder surgery. Dr. Grady opined that the claimant had a 7% whole person impairment (WPI) due to the compensable injury.

5. The claimant submitted the email of the claim administrator's representative dated November 15, 2021. Such was reviewed and considered.

6. The employer submitted a Motion to Take Judicial Notice dated October 3, 2022. (In the electronic file under the date of January 14, 2022.) The employer requested that judicial notice be given to the Decision of Administrative Law Judge (ALJ) dated January 14, 2022. The motion is granted. Per the decision, the claim administrator's denial of reopening for TTD benefits was reversed and the claimant was granted TTD benefits from June 1, 2020, through October 22, 2020.

7. The claimant submitted the list of Evidence in Support of Claimant's Protest. Such was reviewed and considered.

8. The claimant submitted a Closing Argument dated June 8, 2022.

9. The employer submitted a Closing Argument dated October 13, 2022.

DISCUSSION:

W. Va. Code § 23-4-1g provides that, for all awards made on or after July 1, 2003, 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 manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality, and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's

interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined merely by counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

W.Va. Code §23-4-6(e)(2) provides that if a claimant is released by his or her treating physician to return to work at the job he or she held before the occupational injury occurred and if the claimant's preinjury employer does not offer the preinjury job or a comparable job to the employee when a position is available to be offered, the award for the percentage of partial disability shall be computed on the basis of six weeks of compensation for each percent of disability.

In the claim at hand, the claimant was terminated by the employer in January of 2020. The claimant was not released to return to work until September 14, 2021. Thus, the claimant was not an employee of the employer at the time he was released to return to work and therefore, he is not entitled to six weeks of compensation per percent of disability for PPD purposes.

CONCLUSIONS OF LAW:

The claimant was not an employee of the employer at the time he was released to return to work and therefore is not entitled to six weeks of compensation per percent of disability.

Accordingly, it is hereby ORDERED that the claim administrator's order dated October 25, 2021, granting the claimant a 7% PPD award based upon four weeks of compensation per percent of disability, be AFFIRMED.

APPEAL RIGHTS:

Under the provisions of West Virginia Code § 23-5-12a, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or final action of the Board of Review. **The appeal shall be filed with the West Virginia Intermediate Court of Appeals (304-558-3258).**

Date: January 12, 2023

A rectangular box containing a handwritten signature in black ink that reads "Ted A. White".

Ted A. White, Board Member

cc: BUCKY K THOMPSON
SANDRA K. LAW - COUNSEL FOR CLAIMANT
WESTERN CONSTRUCTION, INC.
JEFFREY CARDER - COUNSEL FOR EMPLOYER
TRAVELERS

JCN: 2020021920

Date: January 12, 2023

Record Considered

Issue:

The claimant's protest to the claim administrator's order of October 25, 2021, regarding PERMANENT PARTIAL AWARD.

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified
Document Date: 12/16/2019
Submit Date: 6/8/2022
Author: WESTERN CONSTRUCTION INC. DIRECT DEPOSIT REGISTER 12/16/19-7/7/21

Document Type: Not Specified
Document Date: 7/30/2021
Submit Date: 6/8/2022
Author: BUCKY THOMPSON TRANSCRIPT

Document Type: Not Specified
Document Date: 9/14/2021
Submit Date: 6/8/2022
Author: WHEELING HOSPITAL WORK EXCUSE ABIGAIL SMITH PA-C

Document Type: Not Specified
Document Date: 11/15/2021
Submit Date: 6/8/2022
Author: LISA HUNTER ESQ. EMAIL

Document Type: Not Specified
Document Date: 6/8/2022
Submit Date: 6/8/2022
Author: SANDRA LAW ESQ. LETTER LISTING EVIDENCE

Employer Evidence

Document Type: Not Specified
Document Date: 7/30/2021
Submit Date: 10/3/2022
Author: HEARING TRANSCRIPT

Document Type: Not Specified
Document Date: 10/1/2021
Submit Date: 10/3/2022
Author: DR. JOSEPH E. GRADY, III/IME REPORT

Document Type: Not Specified
Document Date: 10/25/2021
Submit Date: 10/3/2022
Author: CLAIM ADMIN. ORDER

Document Type: Not Specified
Document Date: 1/14/2022
Submit Date: 10/3/2022
Author: ALJ DECISION

CLOSING ARGUMENTS:

Party Submitted: Claimant
Letter Date: 6/8/2022
Party Submitted: Employer
Letter Date: 10/13/2022