STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

Bucky Thompson,	:	
	:	
Petitioner/Claimant,	:	JCN: 2020021920
	:	
	:	DOI: December 22, 2019
v.	:	
	:	
Western Construction, Inc.,	:	
	:	
Respondent/Employer.	:	

PETITIONER / CLAIMANT'S

BRIEF

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I. Assignments of Error

The Board of Review (BOR) erred in its interpretation of W.Va. Code §23-4-6(e)(2), finding the employer did not have to pay the higher benefit rate on a permanent partial disability award because the claimant was no longer an employee when he was released to return to work without restrictions following his compensable injury.

II. Statement of the Case and Procedural History

On December 22, 2019, the claimant, while working for his employer Western Construction, Inc. as a pipeline welder, slipped and fell, injuring his left shoulder. (App. Ex. 4) The claimant reported his injury, but continued to work. (App. Ex. 5) The claimant tried to keep working, but the pain in his shoulder increased, and he finally had to stop working on January 11, 2020. (App. Ex. 5) On May 4, 2021, the claimant had left shoulder arthroscopic surgery with labral debridement, synovectomy, chondroplasty, acromioplasty and open left distal clavicle excision. (App. Ex. 4)[1] The claimant had several months of physical therapy before he was released to return to work. (App. Ex. 4). The claimant was released to return to work, without restrictions, on September 14, 2021. (App. Ex. 3)

When the claimant could no longer work in January of 2021, he contacted the Human Resources department and was asked to provide them with medical records relating to his injury. (App. Ex. 5). The claimant testified that he faxed the HR department records from Wetzel County hospital with his shoulder x-rays. (App. Ex. 5) The Claimant also testified he told his supervisor prior to his termination, that he

[1] The claimant would note that the onset of his injury and need for treatment occurred at the beginning of the Covid outbreak, which sometimes made getting treatment difficult.

needed to "get a hold of HR because my shoulder ... I couldn't even lift my arm no more. I needed to get a hold of HR to let them know what was going on." (App. Ex. 5) Shortly after providing records relating to his shoulder injury, the claimant was told he was terminated. (App. Ex. 5)

The employer acknowledged in their closing argument that immediately after his injury, the claimant did work for three weeks, but then he was terminated on January 20, 2020. (App. Ex. 6) The claimant was not returned to his prior job, or a comparable job, after his surgery and his release to return to work without restrictions on September 14, 2021.

The claimant underwent an IME with Dr. Grady on October 1, 2021. (App. Ex. 4) Dr. Grady concluded the claimant had a 7% permanent partial disability (ppd) due to his December 22, 2019 left shoulder injury. (App. Ex. 4). In a claim decision dated October 25, 2021, the claimant was granted a 7% ppd award. (App. Ex. 1). The 7% ppd award was paid out at a benefit rate of 4 weeks for each percent of disability. (App. Ex. 1)

The claimant protested the 7% ppd on the grounds the award should have been paid at a benefit rate of 6 weeks for each percent of disability (instead of four weeks). (App. Ex. 2) The Board of Review upheld the 4 week benefit rate in a decision dated January 12, 2023. (App. Ex. 2). The claimant is now appealing the BOR decision.

III. Summary of Argument

The BOR held that because the claimant was no longer an employee of Western Construction at the time he was released to return to work, he was not entitled to the six week benefit rate when he was not offered his pre-injury job or a

comparable position. However, W.Va. Code §23-4-6(e)(2) does not provide for such an exception. The statute contains a mandatory "shall" provision, that if the claimant is released to return to work at a pre-injury job, and the employer does not offer the job or a comparable position, the benefit "shall" be paid at the six week rate.

IV. Statement Regarding Oral Argument

The Claimant requests the opportunity to present oral argument.

V. Argument

Standard of Review:

Pursuant to W. Va. Code §23-5-12a:

(a) Any employer, employee, claimant, or dependent who shall feel aggrieved by a decision of the Workers' Compensation Board of Review shall have the right to appeal to the West Virginia Intermediate Court of Appeals, created by §51-11-1 *et seq.* of this code, for a review of such action....

(b) ... The review by the court shall be based upon the record submitted to it and such oral argument as may be requested and received. The Intermediate Court of Appeals may affirm, reverse, modify, or supplement the decision of the Workers' Compensation Board of Review and make such disposition of the case as it determines to be appropriate. Briefs may be filed by the interested parties in accordance with the rules of procedure prescribed by the court. The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It 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.

"When it appears from the proof upon which the Workmen's Compensation [Board of Review] acted that its finding was plainly wrong an order reflecting that

finding will be reversed and set aside by this Court." Syllabus point 5, *Bragg v. Comm'r*, 152 W. Va. 706, 166 S.E.2d 162 (1969). Syl. pt. 1, *Bowers v. Comm'r*, 224 W. Va. 398, 686 S.E.2d 49 (2009).

In *Barnett v. State Workmen's Compensation Commissioner,* 153 W.Va. 796, 172 S.E.2d 698 (1970), the Supreme Court explained that "[w]hile the findings of fact of the [BOR] are conclusive unless they are manifestly against the weight of the evidence, the legal conclusions of the [BOR], based upon such findings, are subject to review by the courts." 153 W.Va. at 812, 172 S.E.2d at 707 (quoting *Emmel v. State Compen.* Dir., 150 W.Va. 277, 284, 145 S.E.2d 29, 34 (1965)).

Discussion of Authorities and Argument

Pursuant to W.Va. Code §23-4-6(e)(2), "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." [Emphasis added]

The inclusion of the word "shall" in the statute is significant, in that the W.Va. Supreme Court has repeatedly held the word "shall" in a statute "should be afforded a mandatory connotation." Syl. Pt. 1, *State ex rel Coats v Means*, 423 S.E.2d 636, 188 W.Va. 233 (1992), citing Syl. Pt. 2, *Terry v Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969); Syl. Pt. 5, *Rogers v Hechler*, 348 S.E.2d 299, 176 W.Va. 713 (1986); and Syl. Pt. 2, *Peyton v City Counsel,* 387 S.E.2d 532, 182 W.Va. 297 (1989).

In this case, the Claimant was released to return to work on September 14, 2021, without restriction (see note from Wheeling Hospital, App. Ex. 3), and was not offered a return to work position by the Employer. The ppd rating was calculated using a four week, rather than a six week rate, per each percent of disability (App. Ex. 1). There is no dispute about these facts.

The BOR's sole reason for denying the six week benefit rate was to acknowledge the claimant had been terminated by the employer, and because he was not an employee at the time he was released to return to work, he was not entitled to the six weeks benefit rate. However, there is absolutely nothing in the statute that requires the claimant be a current employee to be entitled to the six week benefit rate. To qualify for the six week benefit rate, the statute only requires (1) a claimant; (2) be released by his treating physician to return to work at the job he held before the occupational injury occurred, and (3) that the employer does not offer the preinjury job or a comparable position. In this case, all the conditions to qualify for the six week benefit rate were met.

Additionally, it would be patently unfair to make such a distinction (that a claimant must be a current employee) in this case, in that the claimant was terminated right after he faxed records, including records about his shoulder injury, to human resources. The Claimant also testified he told his supervisor prior to his termination, that he needed to "get a hold of HR because my shoulder ... I couldn't even lift my arm no more. I needed to get a hold of HR to let them know what was going on."

It is a discriminatory practice under the Workers' Compensation Act, for an employer to "discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits."

W.Va. Code §23-5A-1. The discriminatory practices section of the Act goes on to note it "**shall** be a discriminatory practice … for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position." W.Va. Code §23-5A-3 [Emphasis added] As noted above, the claimant was released to return to his former position, without restrictions, on September 14, 2021. (App. Ex. 3)

W.Va. Code §23-4-6(e)(2), requires the payment of a ppd rating at a higher rate if a claimant is not returned to work following an injury. The statute does not contain any requirement that a claimant still be actively employed by the employer at the time the ppd award is issued and the rate is calculated. The only consideration is whether the claimant was or was not offered a return to work following an injury. As the W.Va. Supreme Court noted in another case involving W.Va. Code 23-4-6(e)(2), "if the Legislature had intended for the Statute to be construed in the way the claims administrator interpreted it, language reflecting such an interpretation would undoubtedly have found its way into the Statute." *McElroy Coal Co. v. W. Va. Office of Ins. Comm'r* ,(Memorandum Decision, W. Va. 2013)[2]

The W.Va. Supreme Court of Appeals has held that if a claimant is released to return to work with restrictions that would prohibit a return to work, then an employer is excused from paying the higher rate. See *Richardson v Speedway, LLC, (*Memorandum Decision, W.Va. 2015). However, that is not the case here, as the claimant was released with no restrictions.

[2] *McElroy* involved interpreting W.Va. Code 23-4-6(e)(2) in light of when a ppd order was entered in relation to a return to work.

The claimant meets the clear standard under W.Va. Code 23-4-6(e)(2) to be awarded a ppd rating based on a six week rather than a four week basis – he was released to return to work at the job he held before the occupational injury occurred, he was released with no restrictions, and the employer did not offer the preinjury job or a comparable job to the claimant.

VI. Conclusion

The claimant respectfully requests that the Intermediate Court of Appeals REVERSE the Board of Review Decision dated January 12, 2023, and instruct the employer to pay the claimant's ppd award at the six week benefit rate.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2023, I electronically filed the foregoing PETITIONER/CLAIMANT'S BRIEF upon all counsel of record, by efiling a copy thereof to the following:

Jeffrey M. Carder, Esq.

Bucky Thompson, Claimant

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