

STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

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

**PETITIONER / CLAIMANT’S
REPLY BRIEF**

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CLAIMANT'S REPLY ARGUMENT

The petitioner/claimant files this Reply Brief, noting the respondent/employer's entire argument is based upon a fact which is not in the record. The employer repeatedly alleges the claimant was terminated for cause unrelated to his work injury – but points to absolutely no evidence in support of that assertion. No one testified to that effect, no disciplinary warnings or write-ups were produced, and no evidence was offered supporting such an allegation. The employer cannot just make a statement that the claimant's firing was unrelated to his work injury, with no support for that allegation.

The only testimony in the case came from the claimant. The claimant testified when he could no longer work in January of 2021 due to his shoulder injury, 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 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)

Additionally, the employer does not address the fact that W.Va. Code §23-5A-1 states it is a discriminatory practice 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.” Clearly, the claimant's termination shortly after he

advises the employer he can no longer work due to his shoulder injury, and his submission of medical evidence to the employer about his ongoing shoulder injury, falls into the category of a discriminatory practice. The claimant contends the employer cannot get out of its mandatory obligation (per 23-5A-3 stating “shall...reinstate”) to re-employ the claimant by firing him. Allowing such an action would defeat the entire purpose of having a discriminatory practice statute under the Workers’ Compensation Act.

Additionally, the employer’s brief does not address the mandatory nature of W.Va. Code §23-4-6(e)(2), which states “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] As the claimant noted, and the employer cites no authority to dispute - 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).

There is no dispute that the claimant was released to return to work, without restrictions on September 14, 2021, and the employer did not offer to reinstate him.

Under W.Va. Code §23-4-6(e)(2), that entitles the claimant to be paid at the six week benefit rate.

Therefore, 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 10th day of March, 2023, I electronically filed the foregoing PETITIONER/CLAIMANT'S BRIEF upon all counsel of record, by e-filing a copy thereof to the following:

Jeffrey M. Carder, Esq.

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