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February 24, 2023

Intermediate Court of Appeals
Attn: Edythe Nash Gaiser, Clerk of Court
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Charleston, WV 25304

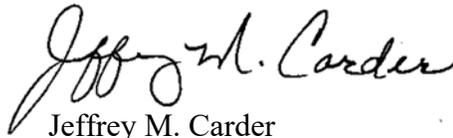
Re: Claimant: Bucky Thompson
Employer: Western Construction, Inc.
JCN: 2020021920
Claim No. FPV2635
Intermediate No: 23-ICA-26

Dear Edythe Nash Gaiser:

Enclosed please find the original of the "Brief on Behalf of the Respondent, Western Construction, Inc." in the above claim.

Thank you for your consideration of this matter.

Very truly yours,


Jeffrey M. Carder

JMC/ces

cc: Western Construction, Inc.
Angelique J Hill, Travelers
Schrader, Companion, Duff & Law, PLLC

BEFORE THE WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

Bucky Thompson, Claimant,

Petitioner,

v.

JCN No.: 2020021920
Intermediate No: 23-ICA-26

Western Construction, Inc., Employer,

Respondent,

BRIEF ON BEHALF OF RESPONDENT
Western Construction, Inc.

Jeffrey M. Carder WV Bar ID # 12725
William J. Ferren & Associates

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I. ASSIGNMENT OF ERROR

THE WORKERS' COMPENSATION BOARD OF REVIEW WAS CORRECT IN AFFIRMING THE CLAIM ADMINISTRATOR'S ORDER DATED OCTOBER 25, 2021, WHICH AWARDED THE CLAIMANT 7% IN PERMANENT PARTIAL DISABILITY BENEFITS AT A RATE OF 4 WEEKS OF BENEFITS PER PERCENT OF DISABILITY AS PROVIDED UNDER W. VA. CODE §23-4-6(E)(1).

II. STATEMENT OF THE CASE

The Petitioner has appealed from the Board of Review Order dated January 12, 2023, which affirmed the Claims Administrator's Order dated October 25, 2021 granting the claimant a 7% permanent partial disability ("PPD") award. The Petitioner indicates he takes no issue with the 7% permanency rating but instead argues he is entitled to a higher benefit rate. Claimant's award was paid at a rate of 4 weeks of benefits per percent of disability as set forth under W. Va. Code §23-4-6(e)(1). However, Claimant argues that he is entitled to have his rate calculated at a rate of 6 weeks for each percent of disability as outlined in W. Va. Code §23-4-6(e)(2) because he was not returned to his pre-injury job after reaching maximum medical improvement following surgery. The preponderance of evidence demonstrates the claimant was terminated for cause several months prior to becoming disabled due to his injury. The claimant not being returned to work had nothing to do with his workers' compensation injury but instead is because he had previously been terminated from his employment with the employer. Accordingly, the Board of Review correctly held that the claimant was not entitled to the higher rate on the basis that the claimant had been terminated for cause, unrelated to his work injury and/or workers' compensation, claim and therefore was no longer an employee at time he was released back to work following surgery. The claimant was not entitled to reinstatement to his pre-injury job and therefore did not qualify for the 6 weeks per 1% rate as provided under W. Va. Code §23-4-6(e)(2) and was properly compensated at a rate of 4 weeks per percentage of disability as set forth under W. Va. Code §23-4-6(e)(1). The relevant facts are as follows:

A. RELEVANT FACTS

The claimant herein, Bucky Thompson was employed as a laborer for Western Construction. The claimant completed Section I of a West Virginia Workers' Compensation Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) form alleging his sustained injury to his left shoulder on December 21, 2019 when he slipped and fell at work. [*App. 1*]. Section II of the WC-1 form was completed by medical personnel at Wetzel County Hospital. The medical personnel indicated that the claimant's date of initial treatment was January 6, 2020. [*App. 1*]. The occupational injury was listed as left shoulder pain. [*App. 1*]. The injury aggravated degenerative changes. [*App. 1*]. The medical provider indicated that the claimant could return to work as of January 8, 2020. [*App. 1*].

An evidentiary hearing was held on July 30, 2021 before Administrative Law Judge Scott Nuckles in regard to, among other issues, claimant's protest to a claims administrator's order denying initial temporary total disability ("TTD") benefits. [*App. 2*]. The claimant testified he was hired on December 16, 2019 to work for the employer as a laborer. [*App. 2*]. He worked December 16, 2019, but then took off December 17-20, 2019 because his father was sick. [*App. 2*]. The claimant's second day of actual work for the employer was on December 21, 2019, which is the date of injury. [*App. 2*]. He worked through December 23rd, and then took off a few days for Christmas break. [*App. 2*]. He continued doing work at his regular job until January 11, 2021, when he texted his employer that he needed to take off because his shoulder was hurting. [*App. 2*]. He then missed work on January 13-15 because he had a tooth pulled and was on pain medication. [*App. 2*]. The claimant took off work once again on January 20th for tooth pain. [*App. 2*]. He was terminated on January 20, 2020, after faxing the HR representative a slip from the dentist and information from Wetzel County Hospital. [*App. 2*]. Following x-rays taken at Wetzel

Hospital on January 6, 2020, the claimant indicated that he did not receive treatment for his left shoulder again until May 6, 2020. [App. 2].

In the January 14, 2022 decision addressing temporary total disability (“TTD”) benefits, Administrative Law Judge Nuckles ruled that evidence demonstrated the claimant returned to work on December 23, 2019 and continued to work for three weeks, as reflected in his hearing testimony given on July 30, 2021. [App. 3]. Judge Nuckles therefore ruled the Claims Administrator was not in error in denying initial TTD benefits. [App. 3].

Dr. Joseph Grady evaluated the claimant on October 1, 2021. [App. 4]. He noted that the injury occurred on December 22, 2019. [App. 4]. The claimant indicated that he was seen at the ER and an x-ray was done. [App. 4]. He went to Corporate Health on May 7, 2020. [App. 4]. Dr. Grady noted that the claimant attended physical therapy from August 19, 2020 through September 21, 2020. [App. 4]. Dr. Abbott performed surgery on May 4, 2021. [App. 4]. He underwent physical therapy again from June 30, 2021 through August 12, 2021. [App. 4]. He opined that the claimant sustained an internal derangement of the left shoulder superimposed upon pre-existing left shoulder arthritis. The claimant had reached maximum medical improvement. [App. 4]. He found 7% whole person impairment for the left shoulder injury. [App. 4].

Accordingly, by claims administrator’s order dated October 25, 2021, the claimant was awarded 7% in PPD benefits on the basis of Dr. Grady’s report. [App. 5]. The award was calculated by awarding 4 weeks per percent of disability as outlined under W. Va. Code §23-4-6(e)(1). [App. 5].

The claimant has submitted into evidence emails exchanged between counsel in which counsel for the employer stated as follows:

Good morning. We have reviewed your email below requesting payment of the PPD benefits at the rate of 6 weeks per % of PPD.

Travelers will not increase the amount of the award to 6 weeks per % as the requirements of the statutory section are not met. The PPD award is paid at 6 weeks per % only if the employer has a job available and does not offer the job to the claimant. That is not the case here. Travelers will not plan to issue another order on the PPD award or monetary amount since the claimant is entitled to protest the current PPD award and challenge the monetary amount for the award.

[*App.* 6]. The claimant protested the October 25, 2021 order.

B. THE BOARD OF REVIEW ORDER

By Order dated January 12, 2023, the Workers' Compensation Board of Review affirmed the Claims Administrator's Order dated October 25, 2021 awarding a 7% permanent partial disability ("PPD") award paid at a rate of 4 weeks or compensation for each percent of disability. [*App.* 7]. The Board found that the claimant had been terminated by the employer in January of 2020. [*App.* 7]. The claimant was not released to return to work until September 14, 2021. [*App.* 7]. Accordingly, the Board of Review held 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 6 weeks compensation per percent of disability for PPD purposes. [*App.* 7].

III. SUMMARY OF ARGUMENT

The Workers' Compensation Board of Review was not clearly wrong in affirming the claims administrator's order dated October 25, 2021, which awarded the claimant 7% in permanent partial disability benefits at a rate of 4 weeks of benefits per percent of disability as provided under W. Va. Code §23-4-6(e)(1). The Petitioner indicates he takes no issue with the 7% permanency rating but instead argues he is entitled to a higher benefit rate. Claimant's award was paid at a rate of 4 weeks of benefits per percent of disability as set forth under W. Va. Code §23-4-6(e)(1). However, Claimant argues that he is entitled to have his rate calculated at a rate of 6 weeks for each percent of disability as outlined in W. Va. Code §23-4-6(e)(2) because he was not returned to his pre-injury job after

reaching maximum medical improvement following surgery. The preponderance of evidence demonstrates the claimant was terminated for cause several months prior to becoming disabled due to his injury. The claimant not being returned to work had nothing to do with his workers' compensation injury but instead is because he had previously been terminated from his employment with the employer. Accordingly, the Board of Review correctly held that the claimant was not entitled to the higher rate on the basis that the claimant had been terminated for cause, unrelated to his work injury and/or workers' compensation, claim and therefore was no longer an employee at time he was released back to work following surgery. The claimant was not entitled to reinstatement to his pre-injury job and therefore did not qualify for the 6 weeks per 1% rate as provided under W. Va. Code §23-4-6(e)(2) and was properly compensated at a rate of 4 weeks per percentage of disability as set forth under W. Va. Code §23-4-6(e)(1).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents do not request oral argument as oral argument would be unnecessary and inappropriate under the standard set forth by Rule 19 of the *West Virginia Rules of Appellate Procedure*. Respondents instead request entry of a memorandum decision on the merits as presented in the parties' individual briefs.

V. ARGUMENT

A. STANDARD OF REVIEW

West Virginia Code § 23-5-15 sets forth the standard of review regarding appeals from the Board of review providing that “[i]n reviewing a decision by the Board of Review, [this Court] shall consider the record provided by the board and give deference to the board’s findings, reasoning, and conclusions, in accordance with subsection (d) and (e) of this section”, as follows:

(d) If the decision of the board represents an affirmation of a prior ruling by both the commission and the Office of Judges that was

entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

(e) If the decision of the board effectively represents a reversal of a prior ruling of either the commission or the Office of Judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision.

The Board of Review shall reverse a final order **ONLY** if the substantial rights of the petitioner have been prejudiced because the Administrative Law Judge's findings are (1) in violation of statutory provisions; (2) in excess of the statutory authority or jurisdiction of the Administrative Law Judge; (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. W. Va. Code § 23-5-12(b). (*Emphasis added*).

Here, the Board of Review was not clearly wrong in affirming the claims administrator's order dated October 25, 2021, which awarded the claimant 7% in permanent partial disability benefits at a rate of 4 weeks of benefits per percent of disability as provided under W. Va. Code §23-4-6(e)(1). Accordingly, the Board of Review's decision should not be disturbed on appeal.

B. APPLICABLE LAW

Initially, it must be remembered that the claimant bears the burden of establishing her claim. "In order to establish compensability an employee who suffers a disability in the course of his employment must show by competent evidence that there was a causal connection between such disability and his employment." *Deverick v. State Workmen's Compensation Director*, 150 W. Va. 145, 144 S.E. 2d 498 (1965) (Syl. pt 3). Simply stated, benefits should not be paid from a workers' compensation policy "unless there be a satisfactory and convincing showing" that the claimed disability actually resulted from the claimant's employment. *Whitt v. State Workmen's Compensation Comm'r*, 153 W. Va. 688, 693, 172 S.E. 2d 375, 377 (1970) (quoting *Machala v. Compensation Comm'r*, 108 W. Va. 391, 397, 151 S.E. 313, 315 (1930)).

Permanent partial disability awards are governed by W. Va. Code § 23-4-6(i), which provides that the degree of an injured worker's permanent disability shall be determined exclusively by the degree of whole body medical improvement that he or she sustained as a result of his or her injury. West Virginia Code R. §85-20-64.1 provides ". . . all evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment, which a claimant has suffered shall be, conducted and composed in accordance with the 'Guide[s] to the Evaluation of Permanent Impairment' (4th ed. 1993), as published by the American Medical Association."

Compensation shall be provided as follows:

(e)(1) For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, if the injury causes permanent disability less than permanent total disability, the percentage of disability to total disability shall be determined and the award computed on the basis of four weeks' compensation for each percent of disability determined at the maximum or minimum benefit rates as follows: Sixty-six and two-thirds percent of the average weekly wage earnings, wherever earned, of the injured employee at the date of injury, not to exceed seventy percent of the average weekly wage in West Virginia: *Provided*, That in no event shall an award for permanent partial disability be subject to annual adjustments resulting from changes in the average weekly wage in West Virginia: *Provided, however*, That in the case of a claimant whose award was granted prior to the effective date of the amendment and reenactment of this section during the year two thousand three, the maximum benefit rate shall be the rate applied under the prior enactment of this section which was in effect at the time the injury occurred.

(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.

W. Va. Code Ann. § 23-4-6.

C. ARGUMENT

The Workers' Compensation Board of Review was not clearly wrong in affirming the claims administrator's order dated October 25, 2021, which awarded the claimant 7% in permanent partial disability benefits at a rate of 4 weeks of benefits per percent of disability as provided under W. Va. Code §23-4-6(e)(1). The Petitioner indicates he takes no issue with the 7% permanency rating but instead argues he is entitled to a higher benefit rate. Claimant's award was paid 4 weeks of benefits per each percent point of disability as set forth under W. Va. Code §23-4-6(e)(1). However, Claimant

argues that because he was not returned to his pre-injury employment after he reached maximum medical improvement following surgery, he is entitled to have his rate computed on the basis of 6 weeks for each percent of disability as outlined in W. Va. Code §23-4-6(e)(2).

West Virginia 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.

Here, the evidence of record demonstrates the employer did not refuse to return the claimant to preinjury employment when he was first released to return to work by his treating physician. The claimant sustained injury to his shoulder on December 21, 2019 for which he treated at Wetzel County Hospital on January 6, 2020. He was released to return to work on January 8, 2020, and he did return to work. He was then subsequently terminated for cause, unrelated to his workers' compensation claim on January 20, 2020 – nearly three weeks after he returned to work following his injury.

It was only several months after he had been terminated from his employment with the employer that the claimant became disabled in relation to his left shoulder injury, either when he sought treatment again on May 7, 2020 or when he eventually underwent surgery on May 4, 2021. Therefore, when the claimant was released back to work following shoulder surgery, he was no longer an employee of the employer and had not been for more than two years. The claimant not being returned to work had nothing to do with his workers' compensation injury but rather was because he had previously been terminated from his employment with the employer.

The Petitioner argues that “there are no exceptions.” For any reason, if he is not returned to his pre-injury employment, even if he had been terminated 2 years prior, he is entitled to the higher

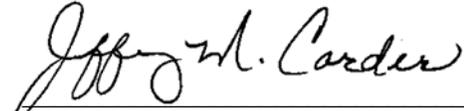
benefit rate. *See Petitioner's Brief*. Under that argument, the Petitioner would receive more compensation than those employees who remain in good standing with the employer. In other words, Petitioner argues he is entitled more benefits than other employees because he was fired. However, the legislative intent behind enacting a higher permanency rate under W.Va. Code §23-4-6(e)(2) is to encourage employers to return their current employees to gainful employment rather than replace them or eliminate their position while the employee was off work recovering from a workplace injury. *See WV S. B. Hist., 2003 2nd Spec. Sess. S. B. 2013*. It was never to go back and provide a former employee who had been terminated prior to becoming disabled for a work injury more benefits than those available to current employees.

Accordingly, the Board of Review was correct in finding that the claimant was not entitled to benefits at a rate of 6 weeks for each percentage point of disability under W. Va. Code §23-4-6(e)(2) on the basis that the claimant was no longer an employee of the employer when he was released back to work following surgery. The claimant was properly compensated at a rate of 4 weeks per percent of disability as set forth under W. Va. Code §23-4-6(e)(1).

VI. CONCLUSION

Based upon the foregoing, the employer submits that the Workers' Compensation Board of Review was not clearly wrong in affirming the claims administrator's order dated October 25, 2021, which awarded the claimant 7% in permanent partial disability benefits at a rate of 4 weeks of benefits per percent of disability as provided under W. Va. Code §23-4-6(e)(1). Accordingly, the employer respectfully requests this Honorable Court for entry of an order affirming the Board of Review Order dated January 12, 2023.

Respectfully submitted,
Western Construction, Inc.
By Counsel

A handwritten signature in black ink that reads "Jeffrey M. Carder". The signature is written in a cursive style with a large, stylized initial "J".

Jeffrey M. Carder *WV Bar ID # 12725*

JMC/ces

cc: Western Construction, Inc.
Angelique J Hill, Travelers
Schrader, Companion, Duff & Law, PLLC

BEFORE THE WEST VIRGINIA
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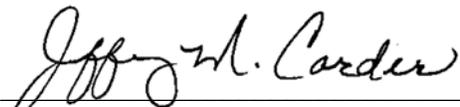
Western Construction, Inc., Employer,

Respondent,

CERTIFICATE OF SERVICE

I, Jeffrey M. Carder, attorney for the Respondent, Western Construction, Inc., hereby certify that a true and exact copy of the foregoing “Brief on Behalf of Respondent, Western Construction, Inc.” was served upon the Petitioner by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 24th of February 2023 addressed as follows:

Sandra K. Law, Esquire
Schrader Companion Duff & Law, PLLC
401 Main Street
Wheeling, West Virginia 26003



Jeffrey M. Carder WV Bar ID # 12725

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Respondent,

APPENDIX TO THE BRIEF ON BEHALF OF RESPONDENT
WESTERN CONSTRUCTION, INC.

- Exhibit 1: West Virginia Workers' Compensation Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) form;
- Exhibit 2: Hearing Transcript from July 30, 2021;
- Exhibit 3: Workers' Compensation Administrative Law Judge decision dated January 14, 2022;
- Exhibit 4: Medical Evaluation Report by Dr. Joseph Grady dated October 1, 2021;
- Exhibit 5: Claims Administrator's Order dated October 25, 2021;
- Exhibit 6: Email from Lisa Hunter, Esq. from November 15, 2021;
- Exhibit 7: Workers' Compensation Board of Review Order dated January 12, 2023.