BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN CHARLESTON

JUSTIN HART,

Petitioner,

v.

CARRIER REF. NO.: 2020021240
JURISDICTION CLAIM NO.: 2021004803
BOR APPEAL NO.: 2056780
SUPREME COURT NO.: 21-0853

PANHANDLE CLEANING & RESTORATION, INC.,

Respondent.

RESPONSE ON BEHALF OF PANHANDLE CLEANING & RESTORATION, INC. TO CLAIMANT'S PETITION FOR APPEAL

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I. TABLE OF AUTHORITIES

The right to workmen's compensation benefits is wholly statutory. Under the workmen's compensation statutes of this state, a claimant has a right to receive benefits and the director of workmen's compensation is authorized to pay benefits to a claimant in no greater amount than is expressly authorized by statute. Syl. pt. 2, *Dunlap v. State Comp. Director*, 140 S.E.2d 448 (1965). Cited on page 7.

It has been held repeatedly by this Court that the right to workmen's compensation benefits is based wholly on statutes, in no sense based on the common law; that such statutes are sui generis and controlling; that the rights, remedies and procedures thereby provided are exclusive; that the commissioner is authorized to award and pay benefits and that a claimant is authorized to demand payment of benefits only in such manner and in such amounts as are authorized by applicable statutes. *Bounds v. State Workmen's Comp. Comm'r*, 172 S.E.2d 379, 382-83 (1970) (citations omitted). Cited on pages 7-8.

Notwithstanding anything contained in this chapter, no employee...is entitled to receive any sum under the provisions of this chapter on account of any personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of the employee. Upon the occurrence of an injury which the employee asserts, or which reasonably appears to have, occurred in the course of and resulting from the employee's employment, the employer may require the employee to undergo a blood test for the purpose of determining the existence or nonexistence of evidence of intoxication: *Provided,* That the employer must have a reasonable and good faith objective suspicion of the employee's intoxication and may only test for the purpose of determining whether the person is intoxicated. If any blood test for intoxication is given following an accident, at the request of the employer or otherwise, and if any of the following are true, **the employee is deemed intoxicated and the intoxication is the proximate cause of the injury**:

(1) If a blood test is administered within two hours of the accident and evidence that there was, at that time, more than five hundredths of one percent, by weight, of alcohol in the employee's blood. W.Va. Code § 23-4-2 (a) (2015) (emphasis added). Cited on page 8.

When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute. Syl. pt. 5, *State v. General Daniel Morgan Post, V.F.W.*, 107 S.E.2d 353 (1959). Cited on page 8.

The claimant has the burden of establishing by positive evidence, or by evidence from which the inference can fairly and reasonably be drawn, that he sustained an injury in the course of and resulting from his employment. *Emmel v. State Comp. Director*, 145 S.E.2d 29, 32 (W.Va. 1965) (citation omitted). Cited on page 12.

[I]t is incumbent upon the claimant to establish compensability, that if he suffers from a disability that resulted in the course of his employment, he must show by competent evidence

that there was a causal connection between such disability and his employment. *Deverick v. State Comp. Director*, 144 S.E.2d 498, 501 (W.Va. 1965) (citation omitted). Cited on page 12.

It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits and that a rule of 'liberal construction' based on any 'remedial' basis of workers' compensation legislation shall not affect the weighing of evidence in resolving such cases. Accordingly, the Legislature hereby declares that any remedial component of the workers' compensation laws is not to cause the workers' compensation laws to receive liberal construction that alters in any way the proper weighing of evidence as required by [applicable law]. W.Va. Code § 23-1-1 (b) (2007). Cited on page 13.

For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on 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. Under no circumstances will an issue 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. W.Va. Code § 23-4-1g (a) (2003). Cited on pages 13-14.

Except as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter. W.Va. Code § 23-4-1g (b) (2003). Cited on page 14.

The West Virginia Supreme Court applies a "de novo standard of review to questions of law arising in the context of decisions issued by the Workers' Compensation [Board of Review]." *SWVA, Inc. v. Birch*, 237 W.Va. 393, 396, 787 S.E.2d 664, 667 (2016) (citation omitted). Cited on page 14.

If the decision of the [Board of Review] 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. W.Va. Code § 23-5-15 (c) (2005). Cited on page 14.

II. ASSIGNMENT OF ERROR

The Workers' Compensation Board of Review did not commit reversible error. A blood test was administered within two hours of claimant's injury, and claimant's blood alcohol was above the statutory limit of .05 blood alcohol by volume, and therefore, this claim was correctly rejected based upon intoxication.

III. STATEMENT OF THE CASE

While working on September 13, 2020, claimant fell from an elevated platform, suffering multiple injuries, including fractures of the left leg, arm, and face, as well as other injuries. The incident occurred at lunchtime, and more specifically the WC-1 submitted by the claimant says it occurred at approximately 12:00 noon. *See* Petitioner's Appendix, Ex. B. The employer submitted a First Report of Injury, which indicates that the incident occurred at 11:40 a.m. *See* Appendix, Ex. 1.

Claimant was transported to Camden Clark Medical Center and underwent a serum ethanol[1] test, and the report shows that the specimen was collected at 12:55 p.m. *See* Appendix, Ex. 2. According to the Mayo Clinic, as cited in the footnote, an ethanol level above 50 (.05) produces an increased state of euphoria. Claimant's specimen revealed a blood concentration of .053, and is in the "toxic" range.

As reported on the hospital's lab report, claimant had undergone several previous blood tests for alcohol intoxication at the same hospital, including two on November 2, 2019, and one each on November 3 and 4, 2019, February 20, 2020, and June 19, 2020. The result of the first test on November 2, 2019 was .477, which can be lethal, and June 19, 2020 was .156, causing depression of the central nervous system.

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[1] Serum ethanol is a blood test for alcohol. *See* https://www.mayocliniclabs.com/test-catalog/Clinical+and+Interpretive/8264.

Notably, claimant also underwent a urine drug screen on September 13, 2020. *See* Appendix, Ex. 3. This was positive for cannabinoids (marijuana) and fentanyl.

Based upon the positive blood test after the fall on September 13, 2020, with a blood alcohol level above .05, the claim administrator issued an order dated September 23, 2020, rejecting the claim. *See* Petitioner's Appendix, Ex. C. Claimant protested.

The employer submitted the September 27, 2020 report of Christopher O'Neal, D.O. *See* Appendix, Ex. 4. Clamant was seen in the emergency room complaining of subacute pain from his fall. He had run out of pain medication and wanted a refill. He admitted to drinking every day, and had consumed a liter of liquor approximately one hour before this ER visit. Claimant had undergone surgery of the left olecranon and was placed in a splint, with staples over the left hip and elbow. He removed the splint without doctor's orders. He did not have any idea of any follow-up appointments for his injuries and did not know how to care for himself and had made no calls to follow-up on his treatment plan. Two days before the ER visit, he went to another hospital, also seeking pain medication, and when discharged from the hospital on September 14, 2020, had received 40 Oxycodone pills and 2 Narcan doses. Claimant reported that he drank a fifth of Jack Daniels every day for the past year, and before that, a case of beer per day. He also reported smoking marijuana every day. Dr. O'Neal refused to give pain medication, noting that claimant was "acutely very intoxicated." Claimant refused any information for treatment of alcoholism, stating he has no reason to stop drinking. Dr. O'Neal cautioned claimant against narcotic pain medication and alcohol use, and claimant was to follow-up with the "orthopedic office" in the morning for additional care for his injuries.

Claimant submitted an affidavit which he signed on February 24, 2021. *See* Petitioner's Appendix, Ex. A. The emphasis of the affidavit was that the employer did not suspect that

claimant was intoxicated on the date of injury, as there was no evidence of odors or behavior that raised concerns about his sobriety. Claimant expressed his own opinion that he was not intoxicated at the time of the injury.

The Office of Judges affirmed the claim administrator's order rejecting this claim by decision dated May 11, 2021. *See* Petitioner's Appendix, Ex. E. The ALJ held that there is no dispute that claimant was injured in the course of and as a result of his employment. She held that claimant "is deemed intoxicated" by operation of W.Va. Code § 23-4-2 (a), and that intoxication "is" the proximate cause of the injury, also according to the same statute. Claimant argued that the statutory presumption of intoxication was rebutted in this case, which the ALJ found to be "well taken," and that "following the statute does lead to a flawed, perhaps absurd, presumption in the present case." However, she correctly noted that "the statute does not provide for a rebuttable presumption." Addressing the urine test results, which were positive for both marijuana and fentanyl, the ALJ speculated that the emergency room may have given claimant fentanyl for treatment of the injuries, but since this was a urine test and not a blood test, this "test would not qualify as a basis to deny the claim under the statute." Based on the irrebuttable presumption in the statute, the ALJ affirmed the claim administrator's order denying this claim. Claimant appealed to the Workers' Compensation Board of Review.

The Board of Review issued a decision dated September 17, 2021. *See* Petitioner's Appendix, Ex. F. The Board adopted the ALJ's findings of fact and conclusions of law, but did not adopt the ALJ's discussion in which she opined that it is "absurd" to follow the statute. The Board found the claim barred by W.Va. Code § 23-4-2 (a) based upon intoxication and affirmed the denial of the claim.

IV. SUMMARY OF ARGUMENT

This claim was properly denied based upon the clear and unambiguous terms of the statute. Claimant's injury was statutorily barred because his blood alcohol was above .05 based upon a blood test obtained within two hours of the injury.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The employer respectfully urges that oral argument is unnecessary, pursuant to the criteria provided in Rule 18(a) of this Honorable Court's Rules of Appellate Procedure. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the unique arguments advanced by claimant are narrowly targeted to his claims and are not capable or likely of repetition in general workers' compensation jurisprudence.

VI. ARGUMENT

There are no disputes of fact in this appeal. Claimant admits that he underwent a blood test within two hours of the accident that is the subject of this claim and that the result was above .05. The only question presented in claimant's appeal is whether the statutory presumption of intoxication in W.Va. Code § 23-4-2 (a) is rebuttable. It is ***not*** rebuttable, and the Board of Review reached the only decision which the statute permits.

(A) The claim is barred under the express, clear, and unambiguous terms of the statute.

Workers' compensation is a purely statutory remedy, and a claimant may only recover benefits if the statute so provides.

> The right to workmen's compensation benefits is wholly statutory. Under the workmen's compensation statutes of this state, a claimant has a right to receive benefits and the director of workmen's compensation is authorized to pay benefits to a claimant in no greater amount than is expressly authorized by statute. Syl. pt. 2, *Dunlap v. State Comp. Director*, 140 S.E.2d 448 (1965).
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> It has been held repeatedly by this Court that the right to workmen's compensation benefits is based wholly on statutes, in no sense based on the

> common law; that such statutes are sui generis and controlling; that the rights, remedies and procedures thereby provided are exclusive; that the commissioner is authorized to award and pay benefits and that a claimant is authorized to demand payment of benefits only in such manner and in such amounts as are authorized by applicable statutes. *Bounds v. State Workmen's Comp. Comm'r*, 172 S.E.2d 379, 382-83 (1970) (citations omitted).

Thus, the statute guides whether the claimant is entitled to recover benefits, and the statute is clear and unambiguous on its face.

> Notwithstanding anything contained in this chapter, no employee...is entitled to receive any sum under the provisions of this chapter on account of any personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of the employee. Upon the occurrence of an injury which the employee asserts, or which reasonably appears to have, occurred in the course of and resulting from the employee's employment, the employer may require the employee to undergo a blood test for the purpose of determining the existence or nonexistence of evidence of intoxication: *Provided,* That the employer must have a reasonable and good faith objective suspicion of the employee's intoxication and may only test for the purpose of determining whether the person is intoxicated. If any blood test for intoxication is given following an accident, at the request of the employer or otherwise, and if any of the following are true, **the employee is deemed intoxicated and the intoxication *is* the proximate cause of the injury**:
>
> (1) If a blood test is administered within two hours of the accident and evidence that there was, at that time, more than five hundredths of one percent, by weight, of alcohol in the employee's blood. W.Va. Code § 23-4-2 (a) (2015) (emphasis added).

Because his blood alcohol was above .05 on a blood test obtained within two hours, claimant "is" deemed intoxicated and the intoxication "is" the proximate cause of the injury, and therefore, the claim is barred by statute.

"When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, *State v. General Daniel Morgan Post, V.F.W.*, 107 S.E.2d 353 (1959). Since the clear and unambiguous terms of the statute bar this claim, it is unnecessary and improper to engage in statutory construction to determine legislative intent, and

the Office of Judges and Board of Review clearly reached the only result which the statute would allow and the Board's decision should be affirmed.

It should also be noted that workers' compensation is not the only example of a law which includes an irrebuttable presumption where it comes to intoxication. W.Va. Code § 17C-5-2 provides that a person is presumed to be in an "impaired state" and subject to criminal penalties if his or her blood alcohol is above .08 while operating a motor vehicle. Just as with the workers' compensation statute, if the required blood alcohol level is proven, the presumption of driving while in an "impaired state" is irrebuttable, and the impaired driver is subjected to criminal and administrative sanctions. Also, the fact that the threshold for driving a motor vehicle is .08, while only .05 for determining intoxication while working, is irrelevant. The legal limit for operating a commercial motor vehicle is only .04 by weight. *See* W.Va. Code § 17E-1-14. Therefore, the legislature may decide and define what constitutes "intoxication," based upon the context, situation, and setting.

(B) Even if one consults the legislature's intent, the claim was properly denied.

Assuming *arguendo* that the Court accepts claimant's invitation to look beyond the plain language of the statute, which again is contrary to case law, the legislative intent is clear that the claim should not be compensable.

As this Honorable Court is well aware, there are other statutory provisions in the workers' compensation Code which set forth presumptions, but if the presumptions are rebuttable, the legislature specifically said so. W.Va. Code § 23-4-1 (h)(1) creates a "**rebuttable**" presumption that certain diseases result from employment if incurred by a professional fire fighter. W.Va. Code § 23-4-6 (d) creates a "**rebuttable**" presumption of permanent total disability for any person who has suffered 85% or more in prior permanent

partial disability awards. W.Va. Code § 23-4-8c (b) states that any claimant who suffers a respiratory disability after exposure to minute particles of dust in the course of his or her employment for specifically defined time periods is presumed to have contracted occupational pneumoconiosis, though this presumption is "**not conclusive**." W.Va. Code § 23-2-14 (f) states that the transfer of assets in the sale of a business is presumed to be "a transfer of all or substantially all of the assets if the transfer affects the employer's capacity to do business," but this presumption "**can be overcome**." Where the legislature intends for a presumption to be rebuttable, the law so states, and claimant is incorrect in arguing that if the legislature intended for the presumption to be irrebuttable, it would so state. In fact, the ***inverse*** is true; where the legislature intends for a presumption to be rebuttable, it so states, and otherwise, a presumption is conclusive. In this case, the words "presume" or "presumption" are not even used...the statute says that a blood test within two hours of the accident which shows a blood alcohol of .05 or greater means that claimant "is" intoxicated, and intoxication "is" the proximate cause of the injury. If the legislature intended for claimant to be able to rebut these facts, then it would have so stated, as it did in each and every one of the above statutes.

This Honorable Court is also surely aware that W.Va. Code § 23-4-6 (a) creates an incredibly difficult standard for an employer or claim administrator to prove intoxication in the first place. One, the test must be a blood test, which is very rarely obtained, and two, in the case of alcohol intoxication, the test must be obtained within two hours of the accident, which is usually impossible. The undersigned has practiced workers' compensation law for over 23 years, and this is the first claim of which I am aware that has ever met both of those criteria.

Thus, even if one construes legislative intent, the legislature engaged in something of a balancing of the equities. On the one hand, it is incredibly difficult to prove that an employee

was intoxicated at the time of the injury. However, if such proof is presented, then the legislature stated that claimant, by his or her action in working while intoxicated, as that term is defined by statute, forfeited his or her right to receive workers' compensation benefits. The legislature obviously had no desire for the workers' compensation system to engage in speculation as to whether an accident or injury would or would not have occurred, but for the claimant's intoxication. Rather, it found that if an employee works in an intoxicated state, within the strict proof requirements stated, then that person's injury results from such intoxication as a matter of law. Once again, the statute says that a person with a blood alcohol above .05 **is** intoxicated, and the intoxication **is** the proximate cause of the injury.

Claimant makes much of the fact that the ALJ found the result to be "absurd." With all due respect to the ALJ, the rejection of this claim is neither flawed nor absurd. It is a legislative balance. While it is very difficult to prove intoxication, if such proof is made, the claimant has no claim. This presents significant incentive for employees to be sober when working, protecting themselves, the public, and claimant's co-workers. It is a public policy determination, wholly within the legislature's authority.

Claimant points out that he worked for several hours prior to the accident and that his employer did not suspect that he was intoxicated. He admits that he "drank heavily the night before," and theorizes that this was why his blood test was positive. Even if one assumes that he did not secretly drink on the job and that his blood alcohol was due to heavy drinking the night before, it is also true that his blood alcohol, when finally tested at almost 1:00 p.m., was .053, so one can imagine that when he started his workday at 7:00 a.m., nearly six hours before, it was obviously much higher. Either way, by his actions, he exposed himself ***and his co-workers*** to significant danger from working in an intoxicated state, whether he realized it or not, and the

legislature was free to act as it did to bar the claimant's claim and disincentivize such behavior. The message that must be sent and which the courts should not undermine is that there are consequences for coming to work and/or working in an intoxicated state, a state which the legislature defined as anything above .05 by weight in the case of blood alcohol.

(C) Claimant's history and subsequent urine test suggest an even greater possibility that he was actually intoxicated at the time of injury.

Even if the statutory presumption is rebuttable, which it is not, claimant's affidavit states that the injury occurred when he "was back working on the ceiling [and his] break-away harness was not long enough for [him] to reach [his] next tie-off [and when he] unclipped from the one point of support, [he] fell trying to tie-off onto the other point support." Affidavit of claimant, at ¶ 16. Who is to say that claimant's intoxication had no role in his fall and/or his inability to reach the next "tie-off" after unclipping from the previous "tie-off?" Intoxication could have triggered any number of contributory causes, including lack of balance and coordination, lack of dexterity, inability to recognize a hazard, and/or inability to react quickly and effectively to an emergency situation. This is another reason why the statute makes the presumption conclusive.

It is, of course, claimant's burden to prove all the elements of a compensable claim, and it is not the employer's burden to disprove compensability. "The claimant has the burden of establishing by positive evidence, or by evidence from which the inference can fairly and reasonably be drawn, that he sustained an injury in the course of and resulting from his employment." *Emmel v. State Comp. Director*, 145 S.E.2d 29, 32 (W.Va. 1965) (citation omitted). "[I]t is incumbent upon the claimant to establish compensability, that if he suffers from a disability that resulted in the course of his employment, he must show by competent evidence that there was a causal connection between such disability and his employment." *Deverick v. State Comp. Director*, 144 S.E.2d 498, 501 (W.Va. 1965) (citation omitted).

Claimant admits to being a very heavy drinker, and at one time had a blood alcohol test which was within the *lethal* range at .477, more than 9½ times greater than the statutory limit to be deemed intoxicated while working. His urine test on the date of injury also showed that he had used marijuana and there was fentanyl in his system.

The ALJ disregarded the urine test, insofar as it was not a blood test, and due to pure speculation that the emergency room may have given claimant fentanyl to treat his injuries. Notably, claimant never testified that the emergency room gave him fentanyl and no records to that effect were ever offered. One could reasonably conclude that the emergency room personnel, who knew of claimant's substance abuse history and the results of his blood test, likely would *not* have given him fentanyl. The point is that the claimant's history and his urine test both support the reasonable conclusion that he was, more likely than not, intoxicated at the time the injury occurred. While by themselves perhaps not enough to bar the claim, taken in conjunction with the positive blood alcohol test, obtained within two hours of the incident, there is a clear preponderance of evidence and a strong inference that claimant was, more likely than not, intoxicated, and therefore, his judgment and decision-making, as well as his balance, speed, reflexes, and dexterity, were more likely than not impaired at the time of the injury.

> It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits and that a rule of 'liberal construction' based on any 'remedial' basis of workers' compensation legislation shall not affect the weighing of evidence in resolving such cases. Accordingly, the Legislature hereby declares that any remedial component of the workers' compensation laws is not to cause the workers' compensation laws to receive liberal construction that alters in any way the proper weighing of evidence as required by [applicable law]. W.Va. Code § 23-1-1 (b) (2007).
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> For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on 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. Under no circumstances will an issue 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. W.Va. Code § 23-4-1g (a) (2003).
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> Except as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter. W.Va. Code § 23-4-1g (b) (2003).
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> The West Virginia Supreme Court applies a "de novo standard of review to questions of law arising in the context of decisions issued by the Workers' Compensation [Board of Review]." *SWVA, Inc. v. Birch*, 237 W.Va. 393, 396, 787 S.E.2d 664, 667 (2016) (citation omitted).
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> If the decision of the [Board of Review] 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. W.Va. Code § 23-5-15 (c) (2005).

There was no misstatement or mischaracterization of the evidence in this case. Claimant asks this Court to read the statute to include a rebuttable presumption, which it clearly does not. The statute clearly and unambiguously holds that a positive blood alcohol test of .05 or greater obtained within two hours of an accident means that the accident was proximately caused by intoxication. Claimant's conduct created a danger for himself and others, and the legislature expressed a clear intent, even if one engages in statutory construction, for such conduct not to

create a compensable workers' compensation claim. The result certainly was not in "clear violation" of, but instead was completely consistent with, W.Va. Code § 23-4-2 (a). Accordingly, the employer respectfully requests that this Honorable Court affirm the Board of Review's decision of September 17, 2021.

VII. CONCLUSION

WHEREFORE, the Respondent, Panhandle Cleaning & Restoration, Inc., respectfully prays that this Honorable Court affirm the Workers' Compensation Board of Review's order of September 17, 2021.

Respectfully submitted,

PANHANDLE CLEANING
& RESTORATION, INC.

By counsel

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CERTIFICATE OF SERVICE

I, Steven K. Wellman, hereby certify that on the 10th **day of November 2021**, a copy of the foregoing "RESPONSE ON BEHALF OF PANHANDLE CLEANING & RESTORATION, INC." was mailed, postage prepaid by First Class Mail to the following:

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