No. 23-ICA-317

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

JASON HEAVENER, Petitioner,

v.

J.F. ALLEN COMPANY, Respondent.

**ON APPEAL FROM STATE OF WEST VIRGINIA
WORKERS' COMPENSATION BOARD
OF REVIEW JCN:2023017785**

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

J.F. Allen Company's Respondent Brief ("Respondent's Brief") provides an incomplete and inaccurate portrayal of key facts, and attempts to dismiss certain laws, regulations, and court cases that J.F. Allen Company ("Respondent") finds inconvenient. The facts of this case are clear – Jason Heavener ("Petitioner") is a West Virginia worker hired in West Virginia by Respondent, a West Virginia Company, and he worked regularly in West Virginia for Respondent for over twelve years prior to his catastrophic injury on January 13, 2023, on a non-permanent job assignment in Greencastle, Pennsylvania. Importantly, Jason Heavener worked in West Virginia for more than 30 days in the preceding 365 days before his injury and worked in Pennsylvania more than 30 days in the preceding 365 days before his injury.

The laws and regulations of West Virginia are clear and consistent when applied to the facts surrounding Petitioner's injury. Persons regularly employed in the state of West Virginia prior to a workplace injury, even if injured without the state on a job assignment lasting more than 30 days, are covered under the West Virginia Workers' Compensation Act. The analysis of "temporary" or "transitory" does not end at whether an employee worked without the state more than 30 days in the 365 days preceding the injury. In fact, just the opposite. The case law surrounding the statutes and regulations germane to this case are unambiguous – several factors must be considered when determining whether an employer must provide West Virginia Workers' Compensation benefits to an injured employee. Petitioner meets all factors delineated by the legislature and courts of West Virginia, and he is therefore entitled to coverage under the West Virginia Workers' Compensation Act.

II. PETITIONER'S REPLY TO RESPONDENT'S BRIEF "STATEMENT OF THE CASE"

The Respondent seeks to spotlight a narrow definition of "temporary" or "transitory" in an attempt to have the Court believe that this definition exists in a vacuum that supersedes the West Virginia Workers' Compensation Act statutory scheme and relevant case law. Respondent asserts that Petitioner's work in Pennsylvania was not temporary or transitory within the meaning of W.Va. Code §§ 23-2-1 and 23-2-1a, and that this is where the analysis ends. Respondent ignores the fact that Petitioner meets the definition of non-temporary worker in the State of West Virginia in addition to Pennsylvania, dismisses the fact that no extra-territorial agreement exists between Petitioner and Respondent to be covered by the workers' compensation laws of another state, and Respondent ignores the unambiguous reality that Petitioner meets **every** criterion outlined by the West Virginia Supreme Court necessary for an employee to be covered by West Virginia Workers' Compensation Act.

A key fact acknowledged by Respondent is that Respondent does not hire employees to work in one geographic area, but rather hires/keeps employees for the project or jobs that Employer is working. Gegory Hadjis, President of J.F. Allen, admits this in his deposition on April 21, 2023. (Hadjis Dep. 19:22-23). Mr. Hadjis also specifically admitted Petitioner was "regularly employed" by Respondent in West Virginia prior to Petitioner's injury (Hadjis Dep. 18:12-22).

These two facts are crucial. Respondent admits that employees are not hired to work on any project permanently – Petitioner therefore was not permanently assigned to the Greencastle, Pennsylvania project. Respondent also admits that Petitioner was regularly employed in West Virginia prior to the injury – both the West Virginia workers' compensation statute and case law

state that employees covered by the West Virginia Workers' Compensation Act are those employees regularly employed in the state prior to injury. Petitioner regularly worked in West Virginia for Respondent prior to his injury, and he was not permanently assigned to Pennsylvania, therefore Respondent is required to provide West Virginia workers' compensation benefits to Petitioner.

Respondent asserts that Pennsylvania law required Respondent to file a workers' compensation claim in Pennsylvania if the injury occurred in Pennsylvania. However, under West Virginia law, a workers' compensation claim can be transferred to West Virginia despite initially being filed in another state. W.Va. Code §23-2-1c(d) provides for instances where an employee receives benefits both under an out-of-state workers' compensation plan and under the West Virginia Workers' Compensation Act. *Coburn v. C&K Industrial Services*, 2007 WL 2789468. Citing the same statute, the West Virginia Supreme Court of Appeals ("WVSCA") held that a claimant ". . . can receive benefits under West Virginia workers' compensation scheme so long as the other state's benefits are credited to the amount payable under the West Virginia scheme." *Rosciti Constr. Co. LLC v. Moran*, 2015 WL 6839865. The Pennsylvania workers' compensation claim does not prevent Petitioner from receiving West Virginia workers' compensation benefits.

Respondent refers to the Claim Administrator's Order dated March 23, 2023, that denied Petitioner's West Virginia application for benefits on the justification that the claim was accepted in Pennsylvania and that Petitioner was working in Pennsylvania for more than 30 days at the time of the injury. As noted above, a Pennsylvania workers' compensation claim does not preclude opening a West Virginia claim, and the claim administrator ignored Petitioner's

relevant work history in West Virginia with Respondent prior to his injury, as well as relevant case law and regulations that apply to the present claim.

Respondent asserts that Petitioner requested to work at the Greencastle project, as testified to by Mr. Hadjis. However, Petitioner refutes this assertion in his May 3, 2023, deposition testimony when he stated, "No ma'am, I did not ask to work [at the Greencastle, Pennsylvania project]. I was presented with, asked to me if I would be willing to go there. . . It was either be laid off or keep working because we were running out of work, and they needed help." (Heavener Dep. 35: 11-19). No additional evidence is provided to bolster Mr. Hadjis's assertion that Petitioner asked to be assigned to the Greencastle, Pennsylvania project. Petitioner's undisputed work history illustrates that he regularly worked almost exclusively in West Virginia, including projects as far south as Oak Hill, West Virginia in Fayette County.

Petitioner's work history with Respondent since 2009 is overwhelmingly within West Virginia, with only two non-permanent assignments in Pennsylvania. Respondent asserts that there is no evidence that Petitioner was only assigned to work at the Greencastle, Pennsylvania project until a project in Mt. Nebo, West Virginia was ready to start. Respondent asserts that J.F. Allen would not send Petitioner to Mt. Nebo because it is excessively far away from his home. However, the very first project Petitioner ever worked for Respondent was in Oak Hill, West Virginia in 2009, which is approximately 20 minutes farther south on Route 19 than Mt. Nebo. (Heavener Dep. 6:16-20). Respondent does not refute this fact.

Petitioner worked on 15 projects in West Virginia from 2009 to 2022, while only 2 projects in Pennsylvania that totaled no more than 6 months. Mr. Heavener's work history and testimony strongly suggest that the assignment to Mt. Nebo, West Virginia would happen. Other than refuting this in their brief, Respondent offers no evidence as to why the Mt. Nebo, West

Virginia assignment would not happen. It is reasonable to assume that Mr. Heavener was telling the truth in his deposition and that he would return to work in West Virginia after the Greencastle, Pennsylvania project but for his injury on January 13, 2023.

On June 21, 2023, the Board affirmed the Claim Administrator's Order of March 23, 2023, denying Petitioner West Virginia workers' compensation benefits. However, The Board refuses to apply the court precedent of *Fausnet v. West Virginia Workers' Compensation Comm'r* or *Van Camp v. Olen Burrage Trucking, Inc.* **in any way.** The Board does not mention these cases once in its June 21, 2023, Order. Respondent itself admits that *Fausnet* is applicable. The Board's omission of these cases alone represents a clear error of law. Moreover, the Board refused to apply the W.Va. C.S.R. 85-8-7.3 and 7.4 analysis. Petitioner addressed these cases and regulations in detail in his Closing Argument before the Board. Therefore, by refusing to apply dispositive case law precedent and refusing to apply relevant West Virginia workers' compensation regulations, the Board's Order must be reversed, and Petitioner granted workers' compensation benefits.

III. PETITIONER'S REPLY TO RESPONDENT'S "SUMMARY OF ARGUMENT"

The Board made a clear error of law by refusing to apply West Virginia case law directly relevant to the issue of coverage under West Virginia Workers' Compensation Act. By correctly applying relevant case law to the facts of this case, it is clear that Petitioner working for more than 30 days in Pennsylvania is but one factor to be considered. Mr. Hadjis confirmed that Petitioner was not permanently assigned to any given project and that Petitioner regularly worked in West Virginia prior to the January 13, 2023, injury. Petitioner reasonably assumed he would return to working in West Virginia but for his January 13, 2023, workplace injury. Petitioner meets **all** the criteria set forth in *Fausnet v. West Virginia Workers' Compensation*

Comm'r, 174 W. Va. 489, 327 S.E. 2d 470 (1985) and *Van Camp v. Olen Burrage Trucking, Inc.*, 184 W.Va. 567, 401 S.E. 2d 913 (1991). No extraterritorial agreement exists pursuant to W.Va. C.S.R. S85-8-7.3 and 7.4 which means, because Petitioner meets the factors of *Fausnet* and *Van Camp*, Respondent is obligated to provide West Virginia workers' compensation benefits to Petitioner.

IV. PETITIONER'S REPLY TO RESPONDENT'S ARGUMENT

The issue before the Court is a question of law arising from the Board of Review's June 21, 2023, order, which is reviewed de novo. *W.Va. Heating and Plumbing Co. v. Carroll*, No. 22-ICA-167, (W.Va. Ct. of App. May 22, 2023). The Board failed to apply dispositive case law and regulations to the facts surrounding Petitioner's West Virginia workers' compensation claim. The Board's omissions are clear errors of law. By applying the case law and regulations that the Board did not, The Court must arrive at the conclusion that Petitioner must be awarded West Virginia workers' compensation benefits.

A. Respondent's interpretation of W.Va. C.S.R. 4§§ 85-8-7.3 and 85-8-7. leads to an absurd conclusion that defeats the purpose of the regulation's existence.

If this Court were to adopt the Respondent's position in this matter, it would beg the question: Why then do regulations W.Va. C.S.R. 4 §§ 85-8-7.3 and 85-8-7 exist? Petitioner has repeatedly challenged the Respondent and the Board below to provide a workplace injury scenario where these regulations apply if not to this one. The response to the challenge has been silence. The plain wording of these regulations show they are applicable to this case. The Board's decision completely ignored the application of these 2 regulations.

W.Va. Code §23-2-1a(a)(1) provides that the individuals who are employees covered by the West Virginia Workers' Compensation Act are those employees employed for the purpose of

carrying on the industry, business and service or work in which they are engaged, including, but not limited to, "**persons regularly employed in the state** whose duties necessitate employment of a temporary or transitory nature by the same employer without the state..." (emphasis added). As Mr. Hadjis confirmed, Petitioner was regularly employed by Respondent in West Virginia prior to his injury.

Respondent asserts that it does not matter that Petitioner meets the definition of "non-temporary" worker within the state of West Virginia but provides no reasoning or evidence to support this assertion. W.Va. C.S.R. §85-8-3.17 defines the criteria for qualifying as a non-temporary worker in any state, which includes working 30 days in a given state within the 365 preceding an injury. On the date of injury, Petitioner met the legal definition of a non-temporary employee in BOTH West Virginia and Pennsylvania, since he worked more than 30 days in the preceding 365 days before his injury in both states. This interpretation of "non-temporary" falls within the logic of W.Va. Code §23-2-1a(a)(1) of "persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state...".

West Virginia law has likewise established a strong public policy in the State in favor of compensating West Virginians under West Virginia law even when injured outside the state. In *Mills v. Quality Supplier Trucking, Inc.* 203 W.Va. 621, 623, 510 S.E. 2d 280, 282 (1998), the West Virginia Supreme Court held that to allow a West Virginian to be denied protections and claims available under West Virginia law because the injury occurred in another state which had no such protections or claims was adverse to West Virginia public policy. It is very simple and very just that West Virginia's legislature and its highest court have declared that West Virginians take their West Virginia legal protections and claims with them. In *Quality,* the court declared

that the foreign automobile guest passenger statutes violated the strong public policy of West Virginia in favor of compensating persons injured by the negligence of others. The same public policy reasoning expressed in *Quality* is shown in the legislature's drafting and enactment of W.Va. C.S.R. §§ 85-8-7.3 and 85-8-7.4. West Virginia workers take their West Virginia protections with them to other states absent a written agreement to the contrary. West Virginia's legislative intent in these regulations is consistent with its recorded public policy to protect West Virginians regularly employed in West Virginia when they work out-of-state. The Petitioner's position is the only position in the case which is consistent with all the statutes, regulations and case law. Again, if this case is not the very case where W.Va. C.S.R. §§ 85-8-7.3 and 85-8-7.4 apply, then these regulations are simply worthless and have no meaningful purpose. Courts are usually charged with assuming the legislature had some purpose in mind when going to all the trouble to draft and enact legislation.

As established in *Fausnet* and *Van Camp* (discussed below), a central factor deciding if an injured worker is covered by West Virginia workers' compensation is whether the worker regularly worked in West Virginia prior to the injury, even if the worker was injured out of state on an assignment lasting more than 30 days. This is a reflection of the meaning of W.Va. Code 23-2-1a(a)(1) language "persons regularly employed in the state…" W. Va. C.S.R. §§ 85-8-7.3 and 85-8-7.4 must reflect the intention of the legislature and West Virginia public policy. *Lovas v. Consolidation Coal Co.*, 662 S.E. 2d 645, 222 W.Va. 91. These regulations were enacted because the legislature thought it sound public policy to ensure West Virginia residents regularly employed in West Virginia who are assigned to work out of state have a guarantee of West Virginia coverage, unless the West Virginia employee and West Virginia employer opt out of the West Virginia workers' compensation coverage through a written agreement. This interpretation

reflects the plain language of the West Virginia Workers' Compensation Act and the Court's articulation of West Virginia public policy in *Quality*.

W.Va. C.S.R. §§85-8-7.3 and 85-8-7.4 exist for the very scenario Petitioner finds himself. Under W.Va. Code § 23-2-1a(a)(1), Petitioner is a person regularly employed in West Virginia. Under W.Va. C.S.R. §85-8-3.17, Petitioner meets the definition of non-temporary in two different states. Therefore, under W.Va. C.S.R. §85-8-7.3, Respondent does not have to provide West Virginia workers' compensation coverage to an employee working outside of the state on a non-temporary basis, **PROVIDED** Respondent and Petitioner entered into an extraterritorial agreement for Petitioner to be covered by the laws of another state pursuant to the criteria put for in W.Va. C.S.R. § 85-8-7.4.

Respondent confusingly claims in Respondent's Brief that W.Va. C.S.R. §85-8-7.4 does not apply because "[c]laimant does not satisfy the initial prerequisite—working in a state other than West Virginia on a non-temporary basis." (Respondent's Brief, page 10). While Petitioner certainly agrees that he does not meet the criteria for "non-temporary" based on the court case of *Fausnet and Van Camp* (discussed below), Petitioner certainly meets the prerequisite of this regulation which states: "[t]hat any employee entering into such an agreement must physically work for the employer entering into such an agreement outside of the State of West Virginia for a period of not less than thirty (30) calendar days in any three hundred and sixty-five (365) day period . . ."

W.Va. C.S.R. § 85-8-7.4 also state "an employer and an employee who are both subject to the workers' compensation laws of a state other than West Virginia may enter into a written agreement in which the employer and employee both agree to be bound by the laws of the other state." What is the purpose of such an extraterritorial agreement? If an employee meets the

criteria of "non-temporary" in another state, and the employer does not have to provide West Virginia's workers' compensation coverage, why would the employer and employee have to enter into an agreement to be subject to the workers' compensation laws of another state?

The answer is that West Virginia workers' compensation is the primary coverage for West Virginia employer's and employee's regularly working in West Virginia prior to injury. Otherwise, W.Va. C.S.R. §§ 85-8-7.3 and 85-8-7.4 are redundant and vestigial. However, when read in conjunction with W.Va. §23-2-1a(a)(1) and the relevant case law of *Fausnet and Van Camp*, it is clear that these regulations serve the purpose delineated in the text – a West Virginia employer and West Virgnia employee may enter into an extraterritorial agreement to be subject to the workers' compensation laws of another state if the West Virginia employee works greater than 30 days outside of West Virginia for the West Virginia employer. If no agreement exists in this scenario, the employer and employee remain under the West Virginia Workers' Compensation Act. No such agreement exists in this case, and as an employee regularly employed in West Virginia prior to his injury, Petitioner remains covered by West Virginia workers' compensation insurance.

B. Respondent incorrectly states the Board correctly applied the holding and law set forth in *Fausnet v. State Workers' Compensation Commissioner*, 174 W.Va. 489, 327 S.E. 2d 470 (1985), when in reality the Board completely ignores *Fausnet*, and Respondent's Brief misapplies the holding and law in *Fausnet*.

The Board chose not to apply *Fausnet* at all, and as Respondent concedes, the case is directly applicable to the instant claim. Therefore, by neglecting the *Fausnet* analysis, the Board clearly erred as a matter of law. When applied, and applied correctly, Petitioner's claim is closely analogous to *Fausnet,* and like in *Fausnet* where West Virginia workers' compensation benefits

were awarded, so too here should Petitioner be awarded West Virginia workers' compensation benefits.

In *Fausnet,* the Court points out "we are of the opinion that the hiring of an employee in West Virginia is a factor to be considered concerning the question of whether that employee's work in a foreign state is, in fact temporary or transitory." 174 W.Va. 489, 493, 327 S.E. 2d 470, 473-474 (1985) The Court in *Fausnet* held that the regulation defining temporary or transitory is not the end of the analysis, but rather the regulation must be put into the context several other pertinent factors to determine if a worker is temporary or transitory. *Id.* Just like Mr. Fausnet, the additional factors surrounding Petitioner's employment clearly illustrate that he was not permanently assigned out of state. Despite being assigned to an out-of-state work project for more than 30 days (2 months) in the 365 days preceding his injury, the employee in *Fausnet* was held to not be a non-temporary employee because of several other factors, including where the employee was hired. Like Mr. Fausnet, Petitioner was hired in West Virginia.

The central questions to analyze regarding Petitioner's employment with Respondent is to determine if his:

> "contact with West Virginia was sufficient within the meaning of this State's workers' compensation laws to enable [the employee] to seek workers' compensation benefits in West Virginia[,] we focused on three factors: (1) the employee was hired in West Virginia; (2) the employee had, prior to the accident in question, worked in West Virginia for the employer; and (3) the employer maintained an office in Charleston, West Virginia." *Id.* at 493,474 (as quoted in *Van Camp v. Burrage Trucking, Inc*, 184 W.Va. 567,569 401 S.E. 2d 913, 915 (1991)).

Petitioner, like Mr. Fausnet, should be awarded West Virginia workers' compensation benefits because (1) like Mr. Fausnet, Petitioner was hired in West Virginia; (2) like Mr. Fausnet, Petitioner regularly worked in West Virginia prior to the workplace injury; and (3) like Mr. Fausnet's employer, Respondent maintains offices in West Virginia (Buchannon, Elkins and Bridgeport, West Virginia). Based on the criteria established by *Fausnet*, which Respondent admits is directly applicable to this instant claim, Petitioner unequivocally meets the criteria for coverage under the West Virginia Workers' Compensation Act.

Respondent points out that in *Fausnet* "the record does not indicate that Fausnet was to be permanently located in Ohio". *Id.* at 327 S.E.2d 493, 327 S.E.2d at 474. Here, Mr. Hadjis stated in his deposition that " [J.F. Allen] [doesn't] hire people to work geographically in certain areas. We hire people for the projects we have." (Hadjis Dep. 19: 22-23). Respondent did not hire Petitioner to work permanently in Pennsylvania. Petitioner's work history and deposition testimony establish that he regularly worked in West Viriginia prior to the injury, and in all likelihood would have returned to West Virgnia to work but for his injury. The overwhelming majority of his career was spent working in West Virginia, and Petitioner had the reasonable belief he would go to Mt. Nebo, West Virginia to work after the Greencastle, Pennsylvania project. Petitioner meets all the factors delineated in *Fausnet* and therefore must be awarded West Virginia workers compensation coverage.

The Board made a clear error of law by **completely ignoring** the holding and law applied in *Fausnet.* Therefore, the Court must reverse the Board's decision for its clear errors of law and grant Petitioner West Virginia workers' compensation benefits.

C. The Petitioner incorrectly asserts that *Van Camp v. Olen Burrage Trucking Inc.* is not applicable.

Respondent attempts to misdirect the Court by stating *Van Camp v. Olen Burrage Trucking, Inc.* is not applicable because the employer in *Van Camp* was a foreign corporation, unlike Respondent. 184 W.Va. 567, 401 S.E. 2d 913(1991). However, the Court does not limit its decision in *Van Camp* to claims involving foreign corporations. The court in *Van Camp* identifies five factors that are dispositive to the issue of whether an employer has to subscribe to the fund and provide West Virginia workers' compensation to an employee. *Id* at 569, 915. Three of the five factors delineated in *Van Camp* were derived from *Fausnet* which Respondent admits is applicable to this case. If *Fausnet* is applicable to the present claim, then it necessarily follows that *Van Camp* is applicable as well. The Board clearly erred as a matter of law by completely ignoring *Van Camp* and *Fausnet.*

In *Van Camp,* the Court builds upon the three factors delineated in *Fausnet* to create a five-factor test that is dispositive to the issues of whether an employer must maintain West Virginia workers' compensation insurance and provide coverage to its employees pursuant to W.Va. §23-2-1:

1. Whether the employer obtained authorization to do business in West Virginia;
2. Whether the employer operates a business or plant or maintains an office in West Virginia;
3. Whether the injured employee was hired in West Virginia;
4. Whether the employer regularly hires other West Virginia residents to work at a West Virginia facility or office; and

5. Whether the employee in question worked on a regular basis at a West Virginia facility for the employer prior to the injury at issue.

Id. at 184 W.Va. 569, 570, 401 S.E. 2d 913, 915 (1991).

Factors 3 through 5 are taken directly from *Fausnet*. Petitioner and Respondent meets all five- factors as described in Petitioner's Closing Argument and Petitioner's Brief before this Court. The holding and law of *Van Camp* apply to the present claim, even if the facts of *Van Camp* are somewhat different. The same reasoning applies to *Van Camp* as *Fausnet*. Petitioner meets all the factors from both court decisions, and the Board made a clear error by ignoring these decisions and neglecting to provide Petitioner with West Virginia workers' compensation coverage.

D. Respondent incorrectly asserts the facts of *Cassel v. Aspen Builders, Inc.*, No. 22-ICA-211 (W.Va. Ct. App. March 6, 2023) are analogous to the Petitioner's claim.

In *Cassel,* the Court held that the employee was permanently assigned to work out-of-state in Kentucky and therefore not eligible for West Virginia workers' compensation. The employee in *Cassel* had no relevant work history in West Virginia for the employer. The employee, Mr. Cassel, worked only four days in Kentucky before his tragic work-related death. Because he was specifically hired to work only in Kentucky it logically followed that he was permanently assigned to work in Kentucky. The Court correctly held that Mr. Cassel was a non-temporary worker not subject to the West Virginia Workers' Compensation Act. *Cassel* is distinct from Petitioner's claim in several important ways.

Petitioner, unlike Mr. Cassel, had 12 years of work experience in West Virginia for the employer prior to the workplace injury. Mr. Cassel only worked three days in West Virginia and could not be considered a person regularly employed in the state prior to his injury. Petitioner,

unlike Mr. Cassel, was not hired for the specific purpose of working out of state. Again, Mr. Hadjis testified that J.F. Allen does not hire employees to work in any specific geographic area, but rather assigns workers to where they are needed. (Hadis Dep. 19: 22-23) The project Petitioner was assigned to in Greencastle, Pennsylvania was not permanent. No project Respondent has is permanent. Petitioner had the reasonable belief that he would return to work in West Virginia but for the January 13, 2023, injury. Petitioner's work history supports the belief that he would return to West Virginia, and the Pennsylvania assignment was not permanent. The overwhelming majority of his work history is in West Virginia, and only a tiny fraction was in Pennsylvania comparatively.

The Board made a clear error of law by finding the facts of this case are analogous to the facts of *Cassel* in its June 21, 2023, order. The facts of the two cases are vastly different. Therefore, the Court must reverse the Board's Order and grant the Petitioner West Virginia workers' compensation benefits.

V. CONCLUSION

Petitioner is a West Virginia resident who was regularly employed in West Virginia prior to his injury for Respondent, a West Virginia employer. Petitioner meets all the factors delineated in *Fausnet* and *Van Camp* to be covered under West Virginia's Workers' Compensation Act as a "person regularly employed" in West Virginia pursuant to W.Va. Code §23-2-1a(a)(1). Pursuant to W.Va. C.S.R. §§ 85-8-7.3 and 85-8-7.4, nested within the context of the plain language of Chapter 23 and Court precedent, the public policy of West Virginia is to provide workers' compensation coverage to persons regularly employed in West Virginia unless an extraterritorial agreement exists between the employee and employer to be covered by another state's workers' compensation laws if the employee worked more than 30 days in the preceding

365 days in the other state. Petitioner is a person regularly employed in West Virginia prior to his injury and no extraterritorial agreement exists, therefore he deserves coverage under the West Virginia Workers' Compensation Act.

The Board's Order was affected by a clear error of law. The Board completely ignores the holding in *Fausnet* and *Van Camp* that include factors dispositive to the question of whether Petitioner should be granted West Virginia workers' compensation coverage by Respondent. The Board also refuses to address W.Va. C.S.R. §§ 85-8-7.3 and 85-8-7.4 in the "Discussion" portion of its order. The Board erroneously relies on *Cassel* despite the facts of that case being drastically different from the present case. These are all clear errors of law, and the Court must therefore reverse the Board's Order and grant Petitioner West Virginia workers' compensation benefits.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of foregoing **"DOCKETING STATEMENT, PETITIONERS BRIEF** and **APPENDIX"** was served upon the following parties through the Court's electronic filing system (File & ServeXpress) and by U.S. Mail on this 11th day of September 2023:

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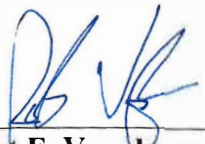

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