IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. _____

BRITTANY FOSTER,
Petitioner,

vs.

PRIMECARE MEDICAL OF WEST VIRGINIA, INC.,
Respondent.

ICA: 23-ICA-266
JCN NO.2021009577
DOI: 08/10/2020

PETITIONER'S BRIEF

BRIEF FILED ON BEHALF OF THE CLAIMANT
FROM AN APPEAL OF A FINAL DECISION OF THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

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INTRODUCTORY NOTE

The Petitioner will be referred to as Claimant; the West Virginia Intermediate Court of Appeals will be referred to as ICA; the Workers' Compensation Board of Review will be referred to as BOR; Office of Judges will be referred to as OOJ; the Administrative Law Judge will be referred to as ALJ; the third-party administrator will be referred to as CA; Primecare Medical of West Virginia, Inc. will be referred to as Employer; and temporary total disability will be referred to as TTD.

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ASSIGNMENT OF ERRORS

THE ICA WAS CLEARLY WRONG IN: 1) USURPING THE FUNCTION OF THE TRIER OF FACT; 2) ESTABLISHING A NEW STANDARD AGAINST PRECEDENT REGARDING W.VA. CODE § 23-4-1(f); AND 3) FINDING THE PREPONDERANCE OF EVIDENCE DID NOT ESTABLISH CLAIMANT CONTRACTED COVID-19 IN THE COURSE OF AND RESULTING FROM HER EMPLOYMENT.

STATEMENT OF THE CASE

On August 10, 2020, the Claimant, who worked as an LPN and Health Services Administrator at the Southern Regional Jail in Beaver, WV, had a telehealth visit with Sara M. Cales, PA with complaints of shortness of breath on exertion and at rest with coughing and wheezing. Ms. Cales noted that Ms. Foster was unable to speak in complete sentences and was advised she needed to be seen in the ER for respiratory distress emergently. The claimant presented to the Emergency Room of Summers County ARH the same day with complaints of upper respiratory infection. It was noted that the claimant works as an LPN in Southern Regional Jail and was exposed to inmate with Covid-19. The records indicate patient has productive cough, fever, and sore throat that started about 10 days ago. Chest x-rays performed at that time revealed right lower lobe infiltrate. The claimant was discharged from the hospital on August 24, 2020, with diagnoses of right lower lobe pneumonia, Covid-19, bradycardia, nonsustained paroxysmal ventricular tachycardia, hypoxia, supplemental oxygen dependent, at risk for venous thromboembolism, and morbid obesity. **[Exhibit 1]**

The Claimant completed an Employees' and Physician's Report of

Occupational Injury or Disease (WC-1) form on September 22, 2021, noting she worked as an LPN/Health Services Administrator. She stated that she had direct exposure to Covid-19 through employees and patients at her workplace on July 30, 2020, a positive Covid test, and positive pneumonia and respiratory distress syndrome test. Dr. Anand completed the physician's portion diagnosing Covid-19. Instead of answering whether or not it was an occupational illness, he wrote "N/A." He advised her remaining off work for from September 11, 2020, on, for further workup. **[Exhibit 2]**

Another WC-1 form completed by Dr. Haag on October 20, 2020, indicated it was a non-occupational illness. He advised she remain off work until the next office appointment on August 31, 2021.

On August 31, 2020, the Claimant again treated with Sara Cales, PA-C, for follow-up of hospitalization from Covid. It was noted she had become ill a couple of days after exposure to Covid-positive patients in her workplace. It was noted that Claimant had no history of asthma, no past pulmonary testing, and no past issues with depression. She did have some trouble with sinus tachycardia over the last few years. However, since she developed Covid, she frequently has heart palpitations, shortness of breath on exertion, tachycardia, depression, and pneumonia. **[Exhibit 3]**

Dr. Patel diagnosed asthma mild, persistent, dyspnea, hypoxemia, and lung infiltrate on September 1, 2020.

On September 11, 2020, Dr. Anand assessed right lower lobe pneumonia,

Covid-19, major depressive disorder, tachycardia, hypoxia, bradycardia, abnormal heart rate and morbid obesity. Claimant was referred to a pulmonologist. **[Exhibit 4]**

The Claimant continued treating with Dr. Anand, Dr. Patel, Dr. Cheema, Dr. Bez (psychiatrist), and PA-C Cales, and by June 23, 2021, Dr. Anand assessed fibromyalgia, Vitamin D deficiency, major depressive disorder, morbid obesity, dyspepsia, congestive heart failure, essential hypertension, and sleep apnea syndrome.

On August 2, 2021, Dr. Patel's assessment was still asthma mild, persistent, and dyspnea.

The Claimant testified at a deposition on September 7, 2021, that she worked in the Medical Department of the Southern Regional Jail as an LPN. She described that in that area of the jail, there was her office, four exam rooms, a stock room, the nurse's desk, and six cells for inmates. On or around July 27, they had their first Covid-positive inmate. She testified that she had to re-test that positive inmate. She stated she then had to test his cell mates, who also came back positive. Then by July 30th or 31st, she tested approximately 10-11 inmates who were located in the Medical Department at that time. She explained that she also tested inmates that were not in the Medical Department for Covid, either in rover rooms or they would be brought to her in the Medical Department. She testified she had to perform Covid tests on officers at the jail as well. She testified that they had a department head meeting with her supervisor, and a nurse

practitioner who both tested positive for Covid after that meeting, and that they were not wearing masks at that meeting. Everyone who had been in that meeting was sent home to quarantine. She stated that during the testing she worse gloves, gown, and an N95 mask. Claimant testified that sometimes the people she was testing were not wearing masks. During this time period, at least 4 inmates and 16 staff members tested positive for Covid. She testified that the only places she went outside of work and home was a drive-through zoo where you do not get out of the car, and the ER on the 4th of August when she was having Covid symptoms. She stated she lived alone in her own house, and the family members who were in the car with her during the drive-through zoo trip did not test positive for Covid. She returned to work on August 7, 2020, however, by August 8th she could not breathe and was very sick. She described still having symptoms such as muscle pain, having to use a cane to walk, tachycardia, vertigo, syncope, shortness of breath, sleep apnea, and asthma she was diagnosed with after Covid. **[Exhibit 5]**

On November 10, 2021, the Claimant treated with Dr. Porterfield who assessed post-Covid pneumonia, restrictive lung disease, short of breath, and morbid obesity. **[Exhibit 6]**

Dr. Guberman assessed the Claimant on March 9, 2022. He opined the Claimant had a history of Covid-19 infection, most likely related to exposure at work, and persistent symptoms consistent with "long" Covid. He stated she was not at maximum medical improvement, that she still had significant symptoms,

and that she was not taking any continuous pulmonary medication prior to Covid but has to following Covid. **[Exhibit 7]**

Dr. Parker issued a medical review report dated April 14, 2022, opining that Claimant's current pulmonary problems were due to asthma, not Covid-19. He believed that none of her symptoms, including heart issues, were due to Covid. He further opined that her condition was non-occupational. **[Exhibit 8]**

The Employer submitted a small study called *Risk Factors Associated with SARS-CoV-2 Seropositivity Among US Health Care Professionals,* dated March 10, 2021. **[Exhibit 9]**

Dr. Guberman testified at a deposition on March 9, 2022, confirming his belief that the Claimant, to a reasonable degree of medical probability, developed Covid-19 during exposure at work. He stated that it was not very likely that she would contract Covid from going to the grocery store or pumping gas. He explained that all of the peer reviewed literature about long Covid are more speculative and not definitive, and most studies end with a statement that more studies are needed. **[Exhibit 10]**

By decision dated August 29, 2022, the BOR reversed the CA's order of March 1, 2021, and held the claim compensable for COVID-19. **[Exhibit 11]** The Employer appealed, and, following oral arguments, the ICA, by decision dated March 6, 2023, remanded the decision with an order for the BOR to analyze the six factors of W.Va. Code § 23-4-1(f). **[Exhibit 12]** The ICA order was certified by mandate the same date. **[Id.]**

On May 19, 2023**,** the BOR issued a second decision, as ordered by the ICA on remand, which analyzed the six factors of W.Va. Code § 23-4-1(f), finding that the claim should be held compensable and authorizing TTD benefits to be paid accordingly. **[Exhibit 13]** Employer appealed, and by Memorandum Decision dated November 1, 2023, certified by Mandate dated December 4, 2023, the ICA reversed the BOR decision and rejected the claim. **[Exhibit 14]** The Claimant now submits the instant appeal to this Honorable Court.

SUMMARY OF ARGUMENT

The preponderance of the evidence provides that Claimant contracted Covid-19 in the course of and resulting from her employment. The BOR decision was amply supported by the evidence of record and included no clear errors. Thus, it was wholly improper for the ICA to reverse it. Further, the ICA went against established case precedent and established a new, practically unobtainable, standard for reviewing "W. Va.Code § 23-4-1(f). Accordingly, the ICA decision was clearly wrong and should be reversed pursuant to Conley v. Workers' Comp. Div., 199 W.Va. 196, 199, 483 S.E.2d 542, 545 (1997).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

Under West Virginia Code § 23-5-12a(b), the Intermediate Court of Appeals "shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are: (1) In violation of statutory provisions; (2) In excess of the statutory authority or jurisdiction of the Board of Review; (3) Made upon unlawful procedures; (4) Affected by other error of law; (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Further, West Virginia Code § 23-4-1g requires that the resolution of the instant issue requires a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. If, after weighing all the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

An order of the BOR (now the ICA) should be reversed when it is clearly wrong. Conley v. Workers' Comp. Div., 199 W.Va. 196, 199, 483 S.E.2d 542, 545 (1997). For the reasons discussed herein, the ICA's decision was clearly wrong, and warrants reversal.

In the case at hand, the evidence provides that the Claimant's Covid-19 infection was more likely than not contracted in the course of and resulting from

her employment. The BOR, the trier of fact in this case, analyzed the entire record on two separate occasions and came to the same conclusion both times: that the preponderance of the evidence overwhelmingly reveals that the Claimant contracted Covid-19 in the course of and resulting from her employment, and that the record further provides that the claim meets all of the elements to hold compensable a disease of ordinary life. The BOR's final decision was proper, and meets none of the criteria warranting reversal.

First, three elements must coexist in compensability cases: (1) a personal injury; (2) received in the course of employment; and (3) resulting from that employment. Barnett v. State Workmen's Compensation Commissioner,153 W.Va. 796, 172 S.E.2d 698 (1970). In the case at hand, the BOR assessed all of the required elements of Barnett, weighed all of the evidence of record, and properly concluded that it was more likely than not that Claimant contracted Covid-19 in the course of and resulting from her employment. It is undisputed at this point in the record that the Barnett factors are met in this case. The only instructions given to the BOR on remand by the ICA was to discuss whether the evidence of record meets the ordinary disease of life factors of W.Va. Code § 23-4-1(f) more thoroughly than it did in its first decision. **[See Exhibit 12]**

W.Va. Code § 23-4-1(f) provides that diseases may be incurred in the course of or have resulted from employment. No ordinary disease of life to which the general public is exposed outside of employment is compensable unless it is apparent: (1) there is a direct causal connection between the conditions in which

work is performed and the occupational disease; (2) that it can be seen to have followed as a natural incident of the work as the result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is incidental to the character of the business and not independent of the relation of employer/employee; and, (6) that it appears to have its origin in risk connected with the employment and to have flowed as a natural consequence, though it need not have been foreseen or expected before its contraction.

The BOR decision of May 19, 2023, properly complied with the ICA's instructions, as it plainly lays out the analysis of the six factors in six separate paragraphs, discussing each factor in easy to parse out sections. **[See Exhibit 13, p. 17-18]** Because the BOR did, obviously in form, address the six factors as ordered by the ICA decision, the only contention the ICA had with the BOR decision was the substance of its analysis when weighing of the evidence as the trier of fact. **[See Exhibit 14]**

The court "will not reverse a finding of fact made by the Workmen's Compensation Appeal Board unless it appears from the proof upon which the appeal board acted that the finding is plainly wrong." Plummer v. Worker's Com. Div., 209 W.Va. 710, 712 551 S.E.2d 46, 48 (2001) (citing Syl. Pt. Rushman v. Lewis, 173 W.Va. 149, 313 S.E.2d 426 (1984)). Recently, the ICA expanded on the prevailing standard of review in David Duff, II, v. Kanawha County

Commission, 2022 WL 17546598 at *1 (W. Va. Ct. App. Dec. 9, 2022), explaining that the plainly wrong standard "presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." It is against the Duff backdrop that the ICA's decision must be analyzed.

First, the ICA decision states unequivocally that the BOR decision contains "no substantial question of law." **[Exhibit 14, p. 1]** Interestingly, the ICA further admitted that "the BOR did include a much more detailed analysis of its decision..." **[Id. at p. 4]** Thus, the sole contention the ICA has with the BOR decision is the weight it gave, or did not give, to one study that was submitted by Employer, as it relates to the fourth element of W.Va. Code § 23-4-1(f).

The ICA, usurping the BOR's given role as trier of fact, alleges that this single study called *Risk Factors Associated with SARS-CoV-2 Seropositivity Among US Health Care Professionals,* dated March 10, 2021 (only about a year from the start of the pandemic in the United States), should be given total weight in element four, as to negate the unrebutted facts in the record that show that the Claimant was frequently exposed to a multitude (at least 20) of proven Covid-19-positve patients at work during the pertinent timeframe, with only one incidence of possible exposure in public (during a car ride with family, windows down, where none of the other family ever contracted Covid-19). This was clear error and against established case precedent, for reasons discussed below.

The BOR, in its decision, discussed the Employer's March 2021 document in detail, explaining that the facts in this case drastically differed from the

subjects in the study, namely considering that the Claimant here had proven she had a much greater exposure at her workplace rather than out in the general public, as noted above. **[Exhibit 13, p. 16]** The BOR decision extensively discussed the timeline and Claimant's time of exposure in great detail, and addressed the fact that from July 27, 2020, through August 3, 2020, she had a known exposure to at least 20 Covid-positive people. She actually performed the Covid tests herself on many of them, some of whom already had a prior known positive test result at the time she performed the second tests on them. **[Id. at 15]** Thus, she had multiple instances of known exposure at her workplace. Further, she little to no exposure outside of work. The only incident in the record for realistic potential exposure during the timeline was a drive-through zoo where she had car windows down, and on one in her car ever tested positive for Covid following that trip. **[Id.]**

The BOR decision next recognized that the study was performed in metropolitan areas only with a much higher population and rate of exposure than the rural area of Hinton, West Virginia, where Claimant resides, making the report totally inaccurate as it compares to actual circumstances in this claim and rendering the report irrelevant. **[Id. at 16]** Further still, Dr. Guberman, when asked about such Covid studies, testified that all of the peer reviewed literature about Covid are more speculative and not definitive, and most studies end with a statement that more studies are needed, providing even more support to the BOR's decision to give this article less weight. **[Exhibit 10]** After multiple

paragraphs of discussion on the study, the BOR properly found that the Claimant was not equally exposed to Covid-19 outside of work. **[Exhibit 13, p. 16]**

Because there was substantial evidence showing that Claimant was not equally exposed to Covid-19 outside of her workplace, and that the March 2021 study did not pertain to Claimant at all due to her unrebutted daily activities, and her zip code which the study did not consider at all, the ICA should have given deference to the lower tribunal's finding because it was not plainly wrong under Duff.

Instead, the ICA decision creates a new standard, stating that element four of W.Va. Code § 23-4-1(f) requires that the trier of fact completely ignore the actual facts and circumstances in the case in front of them and instead analyze the element in a "general" setting. **[Exhibit 14, p. 4]** The ICA decision states that the word "workmen" used in element four's "that [the disease] does not come from a hazard to which workmen would have been equally exposed outside of employment" means that the lower tribunal must ignore the actual individual facts of the case, and attempt to analyze it under an entirely objective scenario. **[Id.]** The ICA does not expand on this new standard of analysis, but simply decides that, since the Employer's irrelevant and small-scale study of metropolitan area (published extremely early in the pandemic) is the only study submitted into the record, it must be given the ultimate weight. It is against reason and precedent to interpret element four so broadly. In cases where no studies on exposure exist at all, will the BOR have to ignore the facts in front of them in favor of some

generality it assumes might be true of "workmen" everywhere? Does this new general "workmen" include women? Does it include only the claimant's specific occupation, or "workmen" in general in all occupations? Does it include that occupation only in West Virginia, or in the United States as a whole? Using the proposed standard offered by the ICA decision, whatever study is submitted, even if it does not apply to the proper geographic area, state, or circumstances, it should still be given more weight than any other piece of evidence. It is speculative at best, and is immensely prejudicial to workers, especially those who prove (as in this case) that they actually contracted the disease at work due to having a proven greater exposure at work than existed for them outside of work. Under this new standard, the BOR is essentially forced to rule against a worker who has met their burden of proof that they contracted a disease at work, and that their exposure at work was much greater than their exposure outside of work, because, in general, in circumstances that are unlike the claimant's, and are possibly imaginary circumstances, other "workmen" may be equally exposed to such hazard inside and outside of their places of employment. It is simply too speculative, and cannot be what the legislature intended when enacting the rule.

Additionally, the study that the ICA decision solely relies on literally states that known exposures are the strongest risk associated with Covid-19 seropositivity, "along with living in a zip code with higher Covid-19 incidents." **[Exhibits 9 and 14]** The record in this case overwhelmingly reflects that the Claimant did in fact have multiple known exposures at work, no known exposures

outside of work, and she lived in a zip code with fewer Covid-19 incidents due to its rural nature. The very study that the ICA decision relies on actually advises that individual circumstances like "known exposures" and different "zip codes" can cause the study's results to be inapplicable. Thus, even in it's reliance on this single report, the ICA decision cherry-picks which part of the report to rely on, rather than the report in its entirety.

Finally, and most importantly, it goes directly against case precedent set by this Honorable Court in Casdorph v. West Virginia Office Ins. Com'R, 690 S.E.2d 102 (W. Va. 2009). The Casdorph court discussed, in detail, the factual evidence in the case, which was specific to this individual's circumstance, and obtained from the claimant's own testimony, and the testimony of his wife and co-workers:

> "...the claimant was subjected to these various petroleum based products as part of his duties as a mechanic. Appellant demonstrated that he would remove fuel filters on a daily basis. This caused him to get gasoline on his hands and smell these fumes. He occasionally siphoned gasoline tanks by mouth and cleaned mechanical parts with gasoline as well. It was also established that there were gasoline fumes from discarded gasoline that was kept in the work place and he was exposed to solvent and paint fumes on occasion." Id.

The claimant's treating physician in the Casdorph case even testified that the cause of the disease is not actually known, yet after hearing the testimony in the case, he believed that his work exposure was causative. Id. The employer introduced experts who testified that there was no causal connection between the claimant's work and his disease, as well as Peer Reviewed Scientific

Literature stating the same. Yet, in the end, the Office of Judges relied on the opinion of the claimant's treating physician more so than the studies. This Court stated:

> "Taking the Appellant's exposure history and the medical and scientific evidence on record into consideration, we conclude that the elements of W. Va.Code § 23-4-1 were indeed met by the Appellant, as the evidence reveals that (1) he has established a direct causal connection between the conditions under which his work was performed and his CML; (2) his CML followed as a natural incident of his work as a result of his exposure occasioned by the nature of his employment; (3) the proximate cause of his CML can be fairly traced to the Appellant's employment, and (4) that *his disease* did not come from a hazard to which *he would have been* equally exposed outside of the employment. Id. [*Emphasis added.*]

It is clear from the ruling in Casdorph that, while there was reputable, scientific evidence presented that concluded that his work exposure was unlikely to cause the disease, the finder of fact was given deference to weigh such evidence; and because the factual evidence in the case supported its conclusion that the claimant did in fact contract the disease at work, the BOR (which is now the ICA) was plainly wrong in reversing it, explaining that it "...may make investigations in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of this chapter). Id.

The Casdorph Court did not once mention that prong four of W. Va. Code § 23-4-1 required any type of "general" finding. In fact, it specifically stated that prong four was met because the individual in the claim proved that his own personal exposure "did not come from a hazard to which *he* would have been

equally exposed outside of the employment." Id. As emphasized above, the Court specifically used the non-general terms "his disease" and "he" when discussing the fourth element of W. Va. Code § 23-4-1 that is currently at issue in this case.

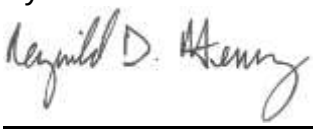
It defies logic, given the undisputed facts in the case, along with the timeline and medical evidence, that there is not substantial evidence to support the BOR's finding that the Claimant's abundant, proven, direct exposure to Covid-19 positive individuals at work -- along with the almost-complete lack of chance of exposure in public -- is the proximate cause of her own Covid-19 infection. The BOR decision went to great lengths to discuss the timeline, the undisputed facts in the case, and the how the evidence overwhelmingly supports it's conclusion that all of the elements of W.Va. Code § 23-4-1(f) have been properly met by the Claimant, and it came to that same conclusion after reviewing the entire record twice. The ICA was clearly wrong in disregarding established precedent, and, in turn, implementing an unreasonably broad new standard when reversing the BOR's decision.

Because there was no clear error contained in the BOR decision and it's decision was supported by the substantial evidence of record, there was absolutely no basis under West Virginia Code § 23-5-12a(b) for its reversal. Accordingly, the ICA decision was clearly wrong and must be reversed, and the May 19, 2023, decision of the BOR be reinstated.

PRAYER

WHEREFORE, based upon the foregoing, the Claimant respectfully moves this Honorable Court to **REVERSE** the ICA's decision of November 1, 2023, and enter a final decision which reinstates the BOR's decision holding the claim compensable.

Respectfully submitted,
Brittany Foster
By Counsel



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CERTIFICATE OF SERVICE

I, Reginald D. Henry, counsel for the Claimant herein, do hereby certify that I served the foregoing Petitioner's Brief and Appendix by forwarding a true copy thereof by File & Serve Xpress efiling, to the following:

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