IN THE SUPREME COURT OF APPEALS OF WEST VIRGININA

Case No.: 23-726

BRITTANY FOSTER,

***Petitioner*,**

v.

PRIMECARE MEDICAL OF WEST VIRGINIA, INC.

***Respondent*.**

RESPONDENT'S BRIEF

On Appeal From The Intermediate Court of Appeals of West Virginia

ICA No.: 23-ICA-266
JCN No.: 2021009577

PRIMECARE MEDICAL OF WEST VIRGINIA, INC.

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RESPONSE TO ASSIGNMENT OF ERRORS

In the instant appeal, Petitioner asserts the following assignments of error:

1. THE ICA WAS CLEARLY WRONG IN USURPING THE FUNCTION OF THE TRIER OF FACT;

2. THE ICA WAS CLEARLY WRONG IN ESTABLISHING A NEW STANDARD AGAINST PRECEDENT REGARDING W. VA. CODE § 23-4-1(f); and

3. THE ICA WAS CLEARLY WRONG IN FINDING THE PREPONDERENCE OF THE EVIDENCE DID NOT ESTABLISH CLAIMANT CONTRACTED COVID-19 IN THE COURSE OF AND RESULTING FROM HER EMPLOYMENT.

For the reasons more thoroughly set forth and explained *infra*, this Court should affirm the decision of the lower court and find that the Intermediate Court of Appeals of West Virginia (the "ICA") properly and appropriately reversed the erroneous decision of the West Virginia Workers' Compensation Board of Review (the "Board of Review") and denied Petitioner's claim for workers' compensation benefits based on her contraction of COVID-19.

STATEMENT OF THE CASE

1. Petitioner, Brittany Foster ("Petitioner"), was employed by PrimeCare Medical of West Virginia, Inc. ("Petitioner"), a West Virginia Corporation that previously[1] staffed medical personnel within various correctional facilities throughout the State of West Virginia, including the Southern Regional Jail. (*See* Deposition Transcript of Brittany Foster, 3:21-4:18, *Petitioner's Appendix* at Exhibit 5, pp. 3-4.) More specifically, during the time period relevant hereto, Petitioner held

[1] Respondent's contractual relationship with the State of West Virginia, pursuant to which it provided medical staffing to various jails throughout the State of West Virginia, ended on June 25, 2022.

the position of Health Services Administrator with Respondent at the Southern Regional Jail in Beaver, West Virginia. (*See* id at 3:21-22, *Petitioner's Appendix* at Exhibit 5, p. 3.)

2. Beginning on or about July 27, 2020, until approximately July 31, 2020, as part of her administrative role as the Health Services Administrator, Petitioner undertook a limited role in administering COVID-19 tests to inmates located in the Medical Unit of Southern Regional Jail – a few of which returned as positive. (*See* id. at 3:10-16, 8:15-16, *Petitioner's Appendix* at Exhibit 5, pp. 3, 8.) During the time that Petitioner undertook her limited role in administering such tests, she wore all available personal protective equipment (*i.e.*, "PPE") including a mask (specifically a medical grade N-95 mask), gloves, and protective gown. (*Id*. at 7:17-23, *Petitioner's Appendix* at Exhibit 5, p. 7.)

3. On July 30, 2020, again as part of her administrative role as the Health Services Administrator, Petitioner attended a management staff meeting scheduled by the Superintendent of Southern Regional Jail with the heads of each department in the jail. (*See* Melissa Jeffrey, LPN Affidavit at ¶ 5, *Respondent's Appendix* at p. 2.) Masks were required to be worn by all participants throughout the meeting. (*See* id.)

4. Five days later, on August 4, 2020, Petitioner underwent a COVID-19 test at Summers County ARH Hospital, which was negative. (*See* id. at ¶ 6, *Respondent's Appendix* at p. 2.)

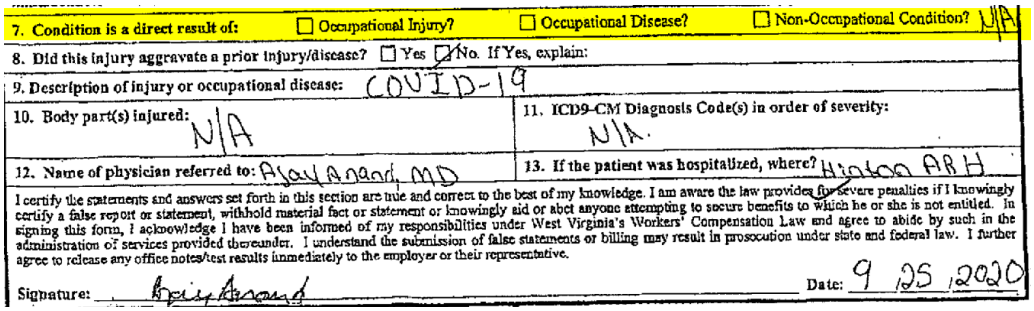
5. Eleven days after the aforementioned administrative meeting, Petitioner underwent a second COVID-19 test on August 10, 2020, which returned

positive. (*See* id. at ¶ 9, *Respondent's Appendix* at p. 2.) However, in the days prior to her positive COVID-19 test and after her negative COVID-19 test, Petitioner engaged in numerous non-occupational activities that increased her risk of COVID-19 exposure. (*See* Depo. Tr. of Brittany Foster at 10:12-21; 15:22-17:12, *Petitioner's Appendix* at Exhibit 5, pp. 10, 15-17.) For example, ten days prior to her second test, on August 1, 2020, Petitioner visited a drive-through zoo along with her mother, father, and two nieces. (*See* id. at 10:12-21, *Petitioner's Appendix* at Exhibit 5, p. 10.) Additionally, during this time, Petitioner visited the grocery store, pharmacy, and gas station, where she admittedly did not use the same PPE measures that she utilized at work. (*See* id. at 16:16-20, *Petitioner's Appendix* at Exhibit 5, p 16.) Moreover, beginning on or around August 3, 2020, Petitioner resided with her mother and father, who cared for Petitioner's two nieces during the day, each of which were susceptible to community exposure.[2] (*See* id. at 17:13-18:11, *Petitioner's Appendix* at pp. 17-18.)

6. Petitioner completed an Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) form, which she signed on September 22, 2020. (*See* Employees' and Physicians' Report of OID dated Sept. 25, 2020*, Petitioner's Appendix* at Exhibit 2, p. 1.) The portion of the form that was required to be completed by a physician was completed by Dr. Ajay Anand, and dated September

[2] Specifically, Petitioner testified that her sister, the mother of Petitioner's nieces for which Petitioner's parents cared for during the day while Petitioner resided with them, worked at a restaurant during the time that Petitioner was residing in the subject residence. (*See* id. at 17:17 – 18:3, *Petitioner's Appendix* at Exhibit 5 pp. 17-18.) Given that COVID is a known communicable disease, Petitioner's exposure could have come from a source within the home in which she was residing.

25, 2020. (*See* id.) On this form Dr. Anand certified that Petitioner's COVID-19 was "N/A" (meaning non-applicable) to an occupational condition. (*Id.* (shown below).)



7. Condition is a direct result of: ☐ Occupational Injury? ☐ Occupational Disease? ☐ Non-Occupational Condition? N/A

8. Did this injury aggravate a prior injury/disease? ☐ Yes ☐ No. If Yes, explain:

9. Description of injury or occupational disease: COVID-19

10. Body part(s) injured: N/A

11. ICD9-CM Diagnosis Code(s) in order of severity: N/A

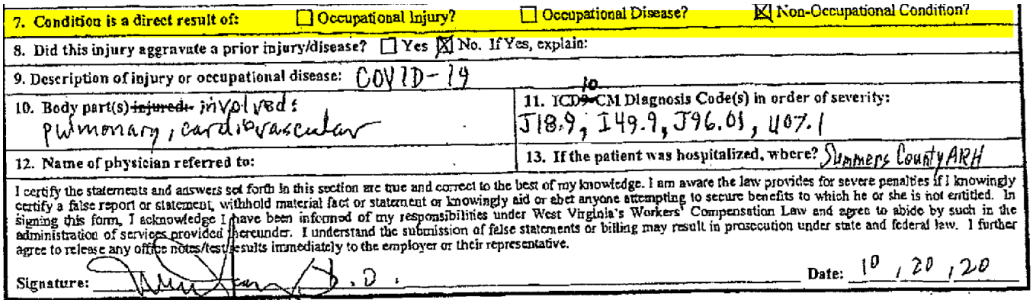
12. Name of physician referred to: Ajay Anand, MD

13. If the patient was hospitalized, where? Hinton ARH

I certify the statements and answers set forth in this section are true and correct to the best of my knowledge. I am aware the law provides for severe penalties if I knowingly certify a false report or statement, withhold material fact or statement or knowingly aid or abet anyone attempting to secure benefits to which he or she is not entitled. In signing this form, I acknowledge I have been informed of my responsibilities under West Virginia's Workers' Compensation Law and agree to abide by such in the administration of services provided thereunder. I understand the submission of false statements or billing may result in prosecution under state and federal law. I further agree to release any office notes/test results immediately to the employer or their representative.

Signature: Ajay Anand Date: 9 /25 /2020

7. On October 22, 2020, Petitioner completed a second WC-1 form. (*See* Employees' and Physicians' Report of OID dated October 20, 2020, *Respondent's Appendix* at pp. 4.) The portion of the form that was required to be completed by a physician was completed by Dr. Matthew Haag, and dated October 20, 2020. (*See* id.) On this form, Dr. Haag certified that Petitioner's COVID-19 was a "non-occupational condition[.]" (*Id.* (shown below).)



7. Condition is a direct result of: ☐ Occupational Injury? ☐ Occupational Disease? ☒ Non-Occupational Condition?

8. Did this injury aggravate a prior injury/disease? ☐ Yes ☒ No. If Yes, explain:

9. Description of injury or occupational disease: COVID-19

10. Body part(s) ~~injured~~ involved: pulmonary, cardiovascular

11. ICD~~9~~-10-CM Diagnosis Code(s) in order of severity: J18.9, I49.9, J96.01, U07.1

12. Name of physician referred to:

13. If the patient was hospitalized, where? Summers County ARH

I certify the statements and answers set forth in this section are true and correct to the best of my knowledge. I am aware the law provides for severe penalties if I knowingly certify a false report or statement, withhold material fact or statement or knowingly aid or abet anyone attempting to secure benefits to which he or she is not entitled. In signing this form, I acknowledge I have been informed of my responsibilities under West Virginia's Workers' Compensation Law and agree to abide by such in the administration of services provided thereunder. I understand the submission of false statements or billing may result in prosecution under state and federal law. I further agree to release any office notes/test results immediately to the employer or their representative.

Signature: M. D. Date: 10 /20 /20

8. On November 20, 2020, Petitioner submitted a claim with Respondent's Workers' Compensation Claims Administrator following her COVID-19 diagnosis. (*See e.g.*, Acknowledgement and Automatic Time Frame Order, at ¶ 1, *Respondent's Appendix* at p. 5-6.) On March 1, 2021, the Claims Administrator denied compensability for Claimant's workers' compensation claim, citing "non-occupational

injury[,]" as confirmed by both Dr. Anand and Dr. Haag, and pre-existing conditions included on the physicians' portion of the WC-1 form. (*See generally*, id.)

9. On August 29, 2022, the Board of Review issued an Order reversing the Claims Administrator's March 1, 2021, denial and awarding temporary total disability benefits from August 10, 2020 through March 9, 2022, and continuing thereafter as substantiated by proper medical evidence. (*See* Order (August 29, 2022), *Petitioner's Appendix* at Exhibit 11, pp. 1-12.)

10. Respondent sought appellate review of the Board of Review's Order and on March 6, 2023, the ICA issued an Opinion vacating the Board of Review's August 29, 2022 Order and remanding the matter to the Board of Review for a thorough analysis of the six factors set forth in West Virginia Code Section 23-4-1(f). *See generally*, *PrimeCare Med. of W. Va., Inc. v. Foster,* 247 W. Va. 590, 885 S.E.2d 171 (W. Va. App. 2023) (hereinafter referred to as "*PrimeCare I*").

11. In *PrimeCare I*, the ICA held, *inter alia*, that "…although there is no prohibition on a claim for workers' compensation benefits arising from or relating to COVID-19, ***it is generally not compensable***, as it is a disease of ordinary life, ***unless the six factors contained in [West Virginia Code Section] 24-4-1(f) are met***." *See* id. at 594, 885 S.E.2d at 175 (emphasis added). Accordingly, the ICA instructed the Board of Review to "address whether the claimant has satisfied his or her burden to prove the presence of each factor" contained in West Virginia Code Section 23-4-1(f). *Id*. at 595, 885 S.E.2d at 176. Further, the ICA specifically instructed that given the unrefuted medical study offered into evidence by

Respondent,[3] in order to satisfy the elements of West Virginia Code Section 23-4-1(f), Petitioner would be required, on remand, to present additional evidence, if any exists, to prove each of the specific factors set forth therein. *See* id. ("***Evidence must be presented***, and the BOR must address this evidence in meaningful findings of fact and conclusions of law.") (emphasis added).

12. In purported compliance with the ICA's remand instructions as discussed *supra*, on May 19, 2023, the Board of Review, once again, issued an Order reversing the Claim Administrator's March 1, 2021 Order and granting temporary total disability benefits from August 10, 2020 through March 9, 2022, and continuing thereafter as substantiated by proper medical evidence based on Claimant's contraction of COVID-19. (*See generally*, Order (May 19, 2023), *Petitioner's Appendix*

[3] The ICA noted in *PrimeCare I* that with the lack of meaningful analysis of the six factors contained in West Virginia Code Section 23-4-1(f) was problematic because Respondent introduced into evidence a medical study, which was unrefuted by Petitioner, that essentially cut against any reasonable finding that factor four could be proven. *Id.* The ICA stated:

> This lack of meaningful discussion is especially problematic given the evidence in the record, relevant to factor four. Specifically, PrimeCare introduced into the record an article published on March 10, 2021, titled *Risk Factors Associated with SARS-CoV-2 Seropositivity Among US Health Care Professionals*. This article 'found that the factors presumed to be most associated with COVID-19 infection risk among health care personnel, including workplace role, environment, and caring for COVID-19 patients, were not associated with increased health care personnel risk of COVID-19 infection. <u>As the only medical study in the record, this evidence cuts against a finding of compensability under factor four. Ms. Foster bears the burden to prove her case and refute contrary evidence placed into the record such as this article</u>. Mere speculation that a medical professional is at a greater risk of exposure than those outside of such employment is insufficient to satisfy factor four. ***Evidence must be presented***, and the BOR must address this evidence in meaningful findings of fact and conclusions of law.

Id. (emphasis added).

at Exhibit 13, pp. 1-21.) In this Order, the Board of Review failed to address Petitioner's lack of presentation of additional evidence on remand and based its findings solely on unsupported representations of the evidence below and conclusory assumptions. (*See* id.)

13. Respondent, once again, sought appellate review of the Board of Review's Order and on November 1, 2023, the ICA issued a Memorandum Decision finding that Petitioner "had failed to put forth any evidence to establish that her exposure of COVID-19 positive individuals presented a greater hazard of contracting COVID-19 than that to which workman outside of employment" would be exposed and reversed the Board of Review's Order and denied Petitioner's claim for compensability of her COVID-19 diagnosis. *See PrimeCare Med. of W. Va. v. Foster*, Case No. 23-ICA-266, 2023 W. Va. App. LEXIS 292, 2023 WL 7203395 (W. Va. App. November 1, 2023) (Memorandum Decision) (hereinafter referred to as "*PrimeCare II*").

14. Petitioner now seeks appellate review by this Court of the ICA's decision in *PrimeCare II*.

SUMMARY OF ARGUMENT

The ICA's decision below was appropriate, well-reasoned and should be affirmed by this Court. COVID-19 is a communicable disease of ordinary life which has no origins tied explicitly to an employment setting. Given that COVID-19 is a disease of ordinary life (and importantly, communicable in nature), a claimant who has contracted COVID-19 and desires to assert a claim for workers' compensation benefits as a result thereof, must undertake the insurmountable task of *proving* each

of the six factors set forth in West Virginia Code Section 23-4-1(f). Here, Petitioner seeks relief from this Court simply because she disagrees with the ICA's decision yet did nothing to offer sufficient evidence to prove her alleged entitlement to workers' compensation benefits, even after being given a second chance to do so by the presentation of additional evidence on remand following *PrimeCare I*. Petitioner's failure in this regard is explained simply by the fact that no evidence is sufficient to prove that the known characteristics of COVID-19 fit anywhere within the statutory framework for compensability of diseases of ordinary life set forth in West Virginia Code 23-4-1(f). Accordingly, this Court should affirm the decision of the ICA below.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent asserts that oral argument is warranted in this matter as it involves an issue of first impression by this Court and none of the disqualifying factors for oral argument set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure are applicable. *See e.g.*, W. Va. R. App. P. 18(a). Respondent asserts that given the lengthy litigation history of this matter and the uniqueness of the issues presented, the decisional process would be significantly aided by oral argument. *Id*. Further, Respondent asserts that this matter is appropriate for Rule 20 oral argument as the issues raised concerning the compensability of COVID-19 under West Virginia's statutory workers' compensation framework is an issue of first impression and is of fundamental public importance. *See* W. Va. R. App. P. 20(a).

ARGUMENT

West Virginia Workers' Compensation law is clear that "[n]o disease of ordinary life to which the general public is exposed outside of the employment is

compensable except when it follows as an incident of occupational disease" as forth in West Virginia Code Section 23-4-1(f). *See* W. Va. Code § 23-4-1(f). As we all, unfortunately, know and have likely experienced, COVID-19 is a communicable disease of ordinary life which does not limit its exposure to that of a workplace setting. *See e.g.*, *PrimeCare I*, 247 W. Va. at 594, 885 S.E.2d at 175 ("…although there is no prohibition on a claim for workers' compensation benefits arising from or related to COVID-19, it is generally not compensable, as it is a disease of ordinary life, unless the six factors contained in § are met."); *see also*, *Morrill v. Lifepoint Hosps., Inc.*, Case No. 22-ICA-198, 2023 W. Va. App. LEXIS 193, *8 (W. Va. App. June 15, 2023 (Memorandum Decision) ("…COVID-19 is generally not compensable, as it is a disease of ordinary life, unless the six factors contained in West Virginia Code [Section] 23-4-1(f) (2021) are met."); *see also*, *Hutchison v. Raytheon Corp.*, Case No. 22-ICA-105, 2023 W. Va. App. LEXIS 95, *6, 2023 WL 2568817 (W. Va. App. March 20, 2023) (Memorandum Decision) ("…a determination of occupational disease when addressing COVID-19, requires the BOR to meaningfully assess the facts of each claim under the six-factors set forth in West Virginia Code § 23-4-1(f)"). Accordingly, *all* of the six factors set forth in West Virginia Code Section 23-4-1(f) must be proven in order for a claim for workers' compensation benefits based on COVID-19 exposure to be justified as compensable. *See* id.; *see also*, W. Va. Code § 23-4-1(f); *see also*, *Morrill*, 2023 W. Va. App. LEXIS 193, *8 ("As all factors must be met, if a claimant fails to satisfy one of the factors, then further analysis is unwarranted."). As the ICA correctly found below, Petitioner failed to offer sufficient evidence to prove all six

factors of West Virginia Code Section 23-4-1(f) and is therefore not entitled to the recovery of workers' compensation benefits due to her contraction of COVID-19.

A. Standard of Review

Pursuant to West Virginia Code Section 51-11-10(c), this Court "has discretion to grant or deny the petition for appeal or certiorari of a decision by the Intermediate Court of Appeals." *See* W. Va. Code § 51-11-10(c); *see also*, W. Va. Code §58-5-1(b) ("…a party in interest may petition the Supreme Court of Appeals for appeal of a final order or judgment of the Intermediate Court of Appeals in accordance with the rules promulgated by the Supreme Court of Appeals."). In this case, the ICA's decision on appeal was issued in accordance with West Virginia Code Section 23-5-8b(d)(2). *See* W. Va. Code § 23-5-8b(d)(2) ("The West Virginia Intermediate Court of Appeals, created in § 51-11-1 *et seq.* of this code, has exclusive appellate jurisdiction over…[a]ll final order or decisions issued by the Workers' Compensation Board of Review after June 30, 2022.")

An appeal from the ICA to this Court should be guided by West Virginia Code Section 23-5-15(c)[4] which provides that "[i]n reviewing a decision of the [ICA], [this Court] shall consider the record provided by the [ICA] and give deference to the [ICA's] findings, reasoning and conclusions[.]" *See Williby v. West Virginia Office Ins.*

[4] The West Virginia Legislature created the Intermediate Court of Appeals in the West Virginia Appellate Reorganization Act of 2021. *See* W. Va. Code § 51-1-1, *et seq.* Several provisions of Chapter 23 of the West Virginia Code were amended as a result of the new court and the transfer of duties and jurisdiction to the Board of Review from the Workers' Compensation Office of Judges. *See* W. Va. Code § 23-5-8b(b). While it appears that the West Virginia Legislature failed to revise the language of West Virginia Code 23-5-15, Respondent asserts that the correct standard of review in an order from the ICA in a workers' compensation case such as this is set forth in subdivisions (c) and (e) of West Virginia Code Section 23-5-15. *See* W. Va. Code §§ 23-5-15(c), (e).

Comm'r, et al., 224 W. Va. 358, 361, 686 S.E.2d 9, 11 (2009). Further, West Virginia Code Section 23-5-15(e) is applicable to this Court's review of the ICA decision in that is providers that:

> If the decision of the [ICA] effectively represents a reversal of a prior ruling of [the Board of Review] that was entered on the same issue in the same claim, the decision of the [ICA] may be reversed or modified by [this Court] ***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 [ICA's] findings, reasoning, and conclusions, there is insufficient support to sustain the decision.*** [This Court] may not conduct a de novo reweighing of the evidentiary record…

See W. Va. Code § 23-5-15(e) (emphasis added).

B. The ICA correctly concluded that the Board of Review's decision was in error because Petitioner had failed to offer evidence sufficient to satisfy her burden of proving each factor set forth in West Virginia Code Section 23-4-1(f). Nothing about the ICA's decision in this regard amounts to a usurping of the role of the trier of fact and no new evidence was submitted during the remand following *PrimeCare I*.

Under West Virginia Code Section 23-4-1(f), the West Virginia Legislature restricted the compensability of "ordinary diseases of life to which the general public is exposed outside of employment" to situations were claimants can prove six specific factors. *See* W. Va. Code 23-4-1(f). Those six factors are as follows:

> (1) that there is a direct causal connection between the conditions under 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 a result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employer as a 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 and employee; and (6) that it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction […]

Id. These six compensability factors must be established by a purported claimant, such as Petitioner, by a preponderance of the evidence, through the submission of proper and satisfactory proof. *See* Syl. Pt. 1, *Staubs v. State Workmen's Compensation Comm'r.*, 153 W. Va. 337, 168 S.E.2d 730 (1969) ("A claimant in a workmen's compensation proceeding has the burden of proving his claim."); *Id.* at Syl. Pt. 3 ("Though the general rule in workmen's compensation cases is that the evidence will be construed liberally in favor of the claimant, the rule does not relieve the claimant of the burden of proving his claim and such rule cannot [*sic*] take the place of proper and satisfactory proof."); *see also*, *Morrill*, Case No. 22-ICA-198, 2023 W. Va. App. LEXIS 193, *8

Having found in *PrimeCare I* that COVID-19 was a disease of ordinary life which requires an analysis of the six factors set forth in West Virginia Code Section 23-4-1(f), the ICA remanded this matter to the Board of Review for the undertaking of an analysis of those six factors. *PrimeCare I*, 247 W. Va. at 595, 885 S.E.2d at 176. More specifically, in *PrimeCare I*, the ICA found that the Board of Review's "lack of meaningful discussion [of the six factors] is especially problematic given the evidence in the record relevant to factor four. *Id.* The ICA noted that Respondent had offered into evidence before the Board of Review an article titled *Risk Factors Associated with*

SARS-CoV-2 Seropositivity Among US Health Care Professionals (the "Seropositivity study") which concluded, *inter alia*, that "the factors presumed to be most associated with COVID-19 infection risk among health care personnel, including workplace role, environment, and caring for COVID-19 patients, were not associated with increased health care personnel risk of COVID-19 infection." *Id.* The ICA further noted that this was the only medical study offered into evidence and that this evidence cuts against a finding of compensability under factor four of West Virginia Code Section 23-4-1(f). *Id.* Accordingly, understanding that Petitioner bore the burden to prove each element of West Virginia Code 23-4-1(f) and to refute contrary evidence, the ICA expressed concern that the Seropositivity study essentially cut against a finding as to factor four[5] of West Virginia Code Section 23-4-1(f) and remanded the matter for presentation of evidence, if any exist, by Petitioner as to the six factors contained in West Virginia Code Section 23-4-1(f) – specifically factor four. *Id.*

The ICA instructed that on remand, "[e]vidence must be *presented*, and the [Board of Review] must address *this evidence* in meaningful findings of fact and conclusions of law." *Id.* (emphasis added). No such evidence was presented by Petitioner, and the record before the Board of Review on remand following *PrimeCare I* was identical to that of its initial decision. *See PrimeCare II*, 2023 W. Va. App. LEXIS 292, *7, 2023 WL 7203395 ("The BOR's order and record below establish that no additional evidence was taken by the BOR of submitted by either party on any issue on remand.").

[5] Factor four requires proof that the disease at issue "does not come from a hazard to which workmen would have been equally exposed outside of the employment." *See* W. Va. Code § 23-4-1(f).

While Petitioner now asserts, in her first assignment of error, that the ICA erred in usurping the Board of Review's role as the trier of fact; that is simply not the case. While the Board of Review did purport to undertake an analysis of the six factors contained in West Virginia Code Section 23-4-1(f) on remand following *PrimeCare I*, simply mentioning the factors is not sufficient, as the Board of Review's obligation is to make a decision based on the evidence in the record as a whole. *See Mountaineer Dough v. Milano*, 2023 W. Va. App. LEXIS 278, at *10, 11, 2023 WL 7202965 (2023) (reversing the Board of Review's decision based upon, *inter alia*, a failure to consider a "critical piece of evidence in the claim."). Specifically, as to factor four of West Virginia Code Section 23-4-1(f) –which requires that the disease "does not come from a hazard to which workmen would have been equally exposed outside of the employment[,]" – the ICA noted in *PrimeCare II* that, once again, despite the remand instructions, no evidence existed in the record to refute the Seropositivity study's conclusion that, *inter alia*, health care workers, such as Petitioner, are not at an increased risk of COVID-19 infection simply because of their workplace role, environment or caring for COVID-19 patients. *See PrimeCare II*, 2023 W. Va. App. LEXIS 292, *7, 2023 WL 7203395. Given the lack of evidence submitted by Petitioner to refute this medical study, the ICA correctly noted that "mere speculation that a medical professional is at a greater risk of exposure than those outside of such employment is insufficient to satisfy factor four." *See* id. at *5.

The absence of evidence submitted by Petitioner as to factor four of West Virginia Code Section 23-4-1(f) left the Board of Review only to speculate that the

study was incorrect based on its interpretation of the data collected in support of its conclusion. **No actual evidence** was submitted in the record before the Board of Review to prove, let alone even suggest, that COVID-19 is not a disease to which workmen would be equally exposed outside of the employment sitting, as required by factor four of West Virginia Code Section 23-4-1(f). Therefore, the ICA appropriately concluded that:

> On remand, the [Board of Review] focused only on whether the employer has introduced evidence of either known exposures outside of the workplace or zip code with high COVID-19 rates. However, the [Board of Review] ignored the basic finding of the study, that COVID-19 infection risk among health care personnel was not associated with increased health care personnel risk of COVID-19 infection. ***With no evidence to refute the findings of the study, we now concluded that the evidence introduced by [Petitioner] fails to satisfy factor four of West Virginia Code [Section] 23-4-1(f).***
>
> While we agree that the [Board of Review] has discretion to give a medical study a degree of evidentiary weight, on a preponderance of evidence standard, ***the record herein is devoid of any evidence which contradicts the introduced study.*** Despite remanding the matter, no further evidence was taken. ***Without any evidence in the record to rebut the medical study…[Petitioner's] evidence of treatment of COVID-19 patients was insufficient to show that her disease did not come from a risk "to which workman would have been equally exposed outside of the employment."***

See PrimeCare II, 2023 W. Va. App. LEXIS 292, *8, 2023 WL 7203395 (emphasis added).

Accordingly, there is no error in the ICA's decision reversing the Board of Review's granting of workers' compensation benefits to Petitioner as such award was

contrary to unrefuted medical evidence and based solely on mere speculation that Petitioner was at a greater risk of COVID-19 infection within her employment than outside of her employment. Therefore, this Court should affirm the decision of the ICA.

C. The ICA did not establish a *new* standard against precedent; but, instead, simply applied the plain language of West Virginia Code Section 23-4-1(f). Accordingly, no substantial legal error occurred.

Petitioner erroneously asserts that the ICA created a "new standard" in "stating that element four of [West Virginia Code Section 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." *See* Petitioner's Brief at p. 13. Petitioner's argument in this respect is an exaggeration and is fundamentally flawed in that such is not a *new* standard, but, instead, a mere application of the plain language set forth in West Virginia Code Section 23-4-1(f) as promulgated by the West Virginia Legislature. *See e.g.*, W. Va. Code 23-4-1(f). Every word in a statute is to be given meaning and effect, *verba cum effectu sunt accipienda*, because the West Virginia Legislature is presumed to have such an intent. *See State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979) ("It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.").

Specifically, the plain and unambiguous language of factor four under West Virginia Code Section 23-4-1(f) states that the disease "does not come from a hazard to which workmen would have been equally exposed outside of the employment

setting." *See* W. Va. Code § 23-4-1(f). When reading element (4) as written by the West Virginia Legislature, the test for such is clearly an objective test of "workmen" regarding the circumstances surrounding the exposure of those who are employed in general, not the subjective circumstances surrounding the possible exposure of an individual workman or claimant. The ICA correctly recognized that "[b]y the language of the statute, an objective standard is contemplated which focuses on 'workmen' generally as opposed to the specific exposure of the employee claiming occupational disease." *See PrimeCare II*, 2023 W. Va. App. LEXIS 292, *7, 2023 WL 7203395.

Nothing about ICA's analysis is in error. The six factors set forth in West Virginia Code Section 23-4-1(f) represent a mixed analysis specific to both the disease itself (*i.e.*, a generally objective analysis) and the specific work conditions and environments for a specific employee (*i.e.*, a generally subjective standard). For example, the six elements of West Virginia Code Section 23-4-1(f) contain some subjective elements that specifically refer to "the work" or "the employment[,]" while other factors are simply refer to the disease objectively by using general terms such as "a hazard" or "workmen[.]" Accordingly, the ICA's decision represents a mere application of basic black-letter statutory interpretation and was not in error.

Further, the factual basis of this Court's decision in *Casdorph v. W. Va. Office Ins. Comm'r*, 225 W. Va. 94, 690 S.E.2d 102 (2009) is easily distinguishable and Petitioner's reliance on the same to support a subjective "workmen" standard is clearly misplaced. Specifically, in *Casdorph*, this Court found that the claimant there

acquired chronic myelogenous leukemia ("CML") due, at least in part, to consistent benzene exposure resulting from twenty-two years of employment as a mechanic for the West Virginia State Police. *See generally* id. In finding the claim compensable, this Court noted, *inter alia*, "that his disease did not come from a hazard to which he would have been equally exposed outside of the employment." *Id.* at 104. However, this Court's reference to the Claimant's specific potential for exposure outside the workplace does not establish nor support a subjective "workmen" standard because for one individual to be equally exposed to a hazard outside of the employment, all individuals, or "workmen," must be susceptible to exposure from a particular hazard, or disease, outside of the workplace. That is exactly the case with communicable diseases, such as COVID-19, where workmen in general remain at risk of acquiring the disease regardless of environment. Contrarily, when this Court identifies a particular non-communicable workplace hazard, such as prolonged exposure to benzene, the general public assumes no risk of exposure by interacting in a non-workplace setting.

D. The ICA's decision that the weight of the evidence clearly cut against a finding of compensability was not in error.

Petitioner's mere presence among COVID-19 positive individuals at work is not sufficient to establish that COVID-19 is not a hazard to which she would have been equally exposed outside of her employment. It is certainly likely, if not more likely,[6] that she was exposed to COVID-19 positive individuals outside of the

[6] Claimant was more likely than not exposed to more individuals in general (COVID-19 positive or not) outside of the employment setting, thereby statistically increasing the chances of positive COVID-19 transmission outside of the employment setting.

employment setting. Due to the communicable nature of COVID-19 and similar bacterial diseases[7], *any* interaction with individuals or objects outside of her employment would have subjected Petitioner to possible COVID-19 transmission. Any argument to the contrary would simply defy common sense and logic.[8]

In an attempt to justify the Board of Review's conclusory and unsupported decision, Petitioner perplexingly asserts that she had an "almost-complete[9] lack of chance of public exposure" to COVID-19. *See* Petitioner's Brief at p. 17. However, this statement ignores the undeniable truth that Petitioner visited a zoo, the grocery store, the pharmacy and the gas pump all before testing positive for COVID-19. (*See* Brittany Foster Depo. Tr. at 10:12-21; 15:22-17:12; 16:16-20, *Petitioner's Appendix* at Exhibit 5, pp. 10, 15, 16-17.) Moreover, Petitioner's presentation to the Emergency Department at Summers County ARH on August 4, 2020 (prior to testing positive for COVID-19), during the midst of the COVID-19 pandemic, should be regarded as a "strong risk factor outside of work for developing COVID-19." Simply stated, it would

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[7] "It is a matter of rather common knowledge that 'colds,' influenza and pneumonia are the result of bacteria – in common parlance, germs – attacking the body. These germs appear and cause epidemics in cities, towns and counties. It is also a matter of rather common knowledge that many such germs appear to be in the very atmosphere surrounding us, at all times. Any and every person is 'exposed' to them without being conscious of the fact. Medical science teaches that we fall victims of these germs because at the time of attack we are not physically able to withstand their assaults." *Ingram v. Conrad*, 2001 Ohio App. LEXIS 6017, *12 (4th Dist. December 20, 2001); quoting *Bewley v. Texas Employers Ins. Assoc.*, 568 S.W.2d 208, 210-211 (Tex.Civ.App. 1978)

[8] Beyond defying common sense and logic, such a contrary argument cuts against the very grain of workers' compensation laws. *Yeager v. Arconic Inc.*, No. 2021-T-0052, 2022-Ohio-1997, 2022 WL 2114656 at *2 (11th Dist., June 13, 2022) ("'[A] common illness to which the general public is exposed' is not compensable as an occupational disease . . . To conclude otherwise 'would extend workers' compensation laws beyond their intended purpose.'").

[9] "Almost" being the operative and important word.

be a strain from reality to even suggest that Petitioner was not, at least equally, if not more, exposed to the threat of COVID-19 outside of her employment as she was within the environment of her employment. This undeniable fact serves as a complete bar to compensability under West Virginia Code Section 23-4-1(f) and the ICA's decision was correct in recognizing such. Accordingly, this Court should affirm the decision of the ICA below.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests that this Court affirm the decision of the Intermediate Court of Appeals of West Virginia.

RESPECTFULLY SUBMITTED,

PRIMECARE MEDICAL OF WEST VIRGINIA, INC.

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CERTIFICATE OF SERVICE

I, Mark R. Simonton, counsel for Petitioner, PrimeCare Medical of West Virginia, Inc., do hereby personally certify that a true and correct copy of the foregoing **"*Respondent's Brief*"** was served upon the following by the Court's File & ServeXpress e-file system this **18th** day of **January**, **2024** addressed as follows:

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