

**INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

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Joseph Dorsey,  
Claimant Below, Petitioner

v.) No. 24-ICA-254

Blackhawk Mining, LLC,  
Employer Below, Respondent

and

John Adkins,  
Claimant Below, Petitioner

v.) No. 24-ICA-256

Marfork Coal Company, LLC  
Employer Below, Respondent

**RESPONSE BRIEF ON BEHALF OF SECOND NAMED  
RESPONDENT, MARFORK COAL COMPANY, LLC**

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**NATURE OF PETITION FOR APPEAL**

This brief responds to the brief in support of the petition for appeal filed on behalf Petitioner, John Adkins (“the claimant”), from the Workers’ Compensation Board of Review’s order dated May 22, 2024, which affirmed the claims administrator’s decision dated December 27, 2023, to the extent that such decision ruled that the payment of the claimant’s 15% permanent partial disability (“PPD”) award was to be made in monthly installments beginning on January 1, 2024, and ending February 23, 2025. The second named Respondent in the caption above/the claimant’s employer, Marfork Coal Company, LLC (“the employer”), by counsel, urges this Honorable Court to affirm the order entered below because it is consistent with applicable and current law, as opposed to the inapplicable and outdated law relied upon and cited by the claimant.

### **STATEMENT OF THE CASE**

On November 2, 2023, the Occupational Pneumoconiosis Board (“the O.P. Board”) examined the claimant, took x-rays of the claimant’s chest, conducted pulmonary function testing/spirometry and diffusion capacity testing of the claimant, and rendered its findings (see Joint Appendix at pages 040-042 or 047-049). The O.P. Board detected on x-rays taken of the claimant’s chest, insufficient pleural or parenchymal changes to establish a diagnosis of occupational pneumoconiosis. Further, the O.P. Board obtained completely normal pulmonary function test/spirometry results, but a reduced diffusion capacity test result [DLCOunc (ml/min/mmHg)] of 67% of predicted. The O.P. Board concluded on November 2, 2023, that the claimant had a diagnosis of occupational pneumoconiosis with a 15% pulmonary impairment, due to this presumed disease, and added, as follows: “Significant findings were due to diffusion studies made for the Occupational Pneumoconiosis Board of 11-2-23” (Id.).

By letter dated December 12, 2023, the West Virginia Offices of the Insurance Commissioner forwarded the O.P. Board’s findings dated November 2, 2023, to SmartCasualtyClaims (“the claims administrator”) and the claimant (see Joint Appendix at page 039).

In accordance with the O.P. Board’s findings, the claims administrator rendered a decision dated December 27, 2023, in which it stated that it had received the O.P. Board’s findings on December 14, 2023, granted the claimant a 15% PPD award, and informed the claimant as follows: “You will receive the monthly amount of \$2912.09 from January 1, 2024 through February 23, 2025. Your payment will be mailed within 15 days of the date of this letter” (see Joint Appendix, pages 037-038). The employer, by counsel, protested the claims administrator’s decision dated December 27, 2023, in order to litigate the merits of the 15% PPD award, and the claimant, by counsel,

protested the same decision to challenge the onset date of the PPD benefit payments (see Joint Appendix at pages 031 & 033-036). It should be noted here that with the claimant's protest, the claimant, by counsel, submitted a letter dated January 26, 2024, in which he argued that he was entitled to be paid PPD benefits with an onset date of June 21, 2023, which was the date of the filing of the claimant's application for benefits, and characterized in such letter as the "date of disability," and argued further that he was entitled to interest at an annual rate of 7% on the "backpayment" pursuant to the "West Virginia Supreme Court of Appeals' Statement on Interest for 2023" (see Joint Appendix at pages 034-036). Both this onset date and interest rate identified by the claimant on January 26, 2024, changed after the claimant, by counsel, had received the Employer's Closing Argument dated April 11, 2024 (see Joint Appendix at pages 064-066).

Keeping its promise, the claims administrator issued the first monthly PPD benefits check in the amount of \$2,912.09 to the claimant on January 5, 2024 (see Joint Appendix at pages 044-045).

By order dated January 30, 2024, the Workers' Compensation Board of Review ("the Board of Review") acknowledged the claimant's protest to the claims administrator's decision dated December 27, 2023, and established a concurrent evidentiary deadline of April 1, 2024 (see Joint Appendix at page 043).

The claimant underwent diffusion capacity testing at CAMC Occupational Lung Center at the request of employer's counsel on February 14, 2024 (see Respondent's Supplemental Appendix, Exhibit A). The parties herein agreed to the inclusion in the Joint Appendix of CAMC Occupational Lung Center's test report dated February 14, 2024, but claimant's counsel omitted this report from the Joint Appendix filed with this Honorable Court. Be that as it may, the test administrator marked

the results of the diffusion capacity testing of the claimant on February 14, 2024, with asterisks, which meant that such results were invalid, undoubtedly due in whole or in part to the claimant's elevated carboxyhemoglobin (COHb) level of 3.1, which was evidence that the claimant, who had allegedly stopped smoking cigarettes 10 years earlier, had recently been exposed to tobacco smoke (Id.).

In addition to the O.P. Board's findings dated November 2, 2023, and CAMC Occupational Lung Center's test report dated February 14, 2024, the employer, by counsel, introduced into evidence below, a copy of W. Va. Code § 23-4-6a (2005), the statute most applicable to the claimant's protest and the issue on appeal (see Respondent's Supplemental Appendix, Exhibit B). Again, the parties herein agreed to include this submission in the Joint Appendix, but the claimant, by counsel, omitted it from the Joint Appendix filed with this Honorable Court.

After the concurrent evidentiary deadline of April 2, 2024, had passed, counsel for the parties herein submitted closing arguments to the Workers' Compensation Board of Review ("the Board of Review") (see Joint Appendix at pages 057-066), then the Board of Review, by order dated April 18, 2024, submitted the claimant's protest for a final decision (see Joint Appendix at pages 050-052). The Employer's Closing Argument, which was e-filed and served on claimant's counsel on April 11, 2024, addressed the contentions made in claimant's counsel's letter dated January 26, 2024 (see Joint Appendix at pages 064-066). After having received the Employer's Closing Argument dated April 11, 2024 (Id.) and the Board of Review's order granting his motion for leave to file a late closing argument dated April 18, 2024 (see Joint Appendix at page 056), the claimant, by counsel, submitted the Claimant's Closing Argument dated April 18, 2024, in which he changed his desired onset date of the claimant's 15% PPD award from June 21, 2023, to April of 2023, and desired

interest rate from 7%, based upon the West Virginia Supreme Court of Appeals’ “Statement of Interest for 2023,” to 6%, based upon West Virginia Code § 23-4-16a (2005) (see Joint Appendix at pages 058-062).

By order dated May 22, 2024, the Board of Review affirmed the claims administrator’s decision dated December 27, 2023, which granted the claimant a 15% PPD award to be paid in monthly installments from January 1, 2024, through February 23, 2025, and added, as follows: “The issue in this protest is solely related to the claimant’s assertion that the claims administrator failed to make payment in accordance with W. Va. Code § 23-4-18” (see Joint Appendix at pages 070-074). Board of Review Chairperson Nick Casey correctly ruled that the case law interpreting § 23-4-18 (2003) involved the date of disability for permanent *total* disability benefits and that the claims administrator had complied with W. Va. Code § 23-4-6a (2005), the applicable statute (*Id.*). The claimant, by counsel, has filed a petition for appeal from the Board of Review’s order dated May 22, 2024.

### **SUMMARY OF ARGUMENT**

The employer, by counsel, disagrees with the claimant’s assignment of error. The O.P. Board had the exclusive statutory duty to determine whether the claimant had sustained pulmonary impairment, if any, due to occupational pneumoconiosis, and the claims administrator had the statutory obligation to rule in accordance with the O.P. Board’s findings, and did so, but was not required to begin the payment of the claimant’s PPD award on a date before the date that it received the O.P. Board’s findings. The law upon which the claimant relies on appeal is inapplicable and outdated. For these reasons, the Board of Review’s order dated May 22, 2024, which affirmed the claims administrator’s decision to the extent that such decision ruled that the payment of the



claimant's 15% PPD award was to be made in monthly installments beginning on January 1, 2024, and ending February 23, 2025. should be affirmed.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Employer's counsel does not request that oral argument be scheduled in the instant claim, as the order entered below is clearly valid.

**ARGUMENT**

**THE BOARD OF REVIEW'S ORDER DATED MAY 22, 2024, SHOULD BE AFFIRMED BECAUSE IT IS CLEARLY CONSISTENT WITH, AND SUPPORTED BY, APPLICABLE LAW, AND THE CLAIMANT RELIES UPON INAPPLICABLE AND OUTDATED LAW IN SUPPORT OF HIS POSITION ON APPEAL.**

The Board of Review's order dated May 22, 2024, which affirmed the claims administrator's decision dated December 27, 2023, which ruled that the payment of the claimant's 15% PPD award was to be made in monthly installments beginning on January 1, 2024, and ending February 23, 2025, is correct and should be affirmed. The Intermediate Court of Appeals shall reverse, vacate or modify an order entered by the Board of Review, if the substantial rights of the petitioner 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; or (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W. Va. Code § 23-5-12a(b) (2022). The order entered below is legally valid and the claimant's arguments on appeal are fatally flawed.

The employer, by counsel, respectfully requests this Honorable Court to reject the invalid

contentions of the claimant, by counsel, that the onset date of the payment of the claimant's 15% PPD award should have been in April of 2023, which claimant's counsel wrongly characterizes as the, "date of disability," and that the claimant is entitled to interest, as applicable current law does not support these contentions. A claimant is not "disabled" as a result of occupational pneumoconiosis unless and until the O.P. Board deems him to be so disabled. More specifically, W. Va. §23-4-6a (2005) provides, in pertinent part, as follows: "If an employee is found to be permanently disabled due to occupational pneumoconiosis, as defined in section one [§ 23-4-1] of this article, the percentage of permanent disability is determined by the degree of medical impairment that is found by the Occupational Pneumoconiosis Board." In other words, a claimant is not disabled by occupational pneumoconiosis—either totally or partially--until the O.P. Board finds him to be so.

The claimant herein was not evaluated by the O.P. Board until November 2, 2023, which was more than seven months after the claimant, by counsel, wrongly deemed the claimant to be disabled. In its findings dated November 2, 2023, the O.P. Board reported that the claimant's chest x-rays did not reveal sufficient pleural or parenchymal changes to establish a diagnosis of occupational pneumoconiosis, but recommended a 15% pulmonary impairment due to presumed occupational pneumoconiosis, based primarily upon its reduced diffusion capacity test result (DLCO) of 67% of predicted. In fact, the O.P. Board specifically reported in its findings of November 2, 2023, as follows: "Significant findings were due to diffusion studies made for the Occupational Pneumoconiosis Board of 11-02-03." In other words, the following argument contained on page 8 of claimant's appellate brief is clearly wrong: "The date of disability based on the examination by Dr. Spencer was April 2, 2023. JA 040. This is the same testing that the O.P. Board relied upon in

reaching their finding of 15% impairment.” The O.P. Board clearly based its 15% pulmonary impairment rating upon its own diffusion capacity test results obtained on November 2, 2023, and not on any test report rendered by Dr. Spencer. It also should be noted that no report rendered by Dr. Spencer is contained in the evidentiary record.

For whatever the reason, the O.P. Board’s findings are not often forwarded to the claims administrator promptly and were not so in the instant claim, either. By letter dated December 12, 2023, the West Virginia Offices of the Insurance Commissioner forwarded—presumably, by U.S. mail--the O.P. Board’s findings dated November 2, 2023, to the claims administrator. Further, according to its decision dated December 27, 2023, which granted the claimant the 15% PPD award, the claims administrator received the O.P. Board’s findings on December 14, 2023, and intended to pay out such award in monthly installments of \$2,912.09 from January 1, 2024, through February 23, 2025. As the copy of the check introduced into evidence on the claimant’s behalf establishes, the claims administrator timely paid the first monthly installment of the claimant’s 15% PPD award on January 5, 2024. The claims administrator’s first payment of the claimant’s award complied with both W. Va. Code § 23-4-1d(a) (2005), which required such payment to be made within 15 working days of the date of the PPD award, and W. Va. C.S.R. § 85-1-10.5.c (2009), which authorized the claims administrator to pay out the claimant’s PPD award in installments.

On appeal, the claimant, by counsel, relies upon inapplicable and outdated law instead of the law cited in the three paragraphs above. Although it is stated in W. Va. Code § 23-4-18 (2003) that a compensation award “shall be calculated and paid from the date of disability,” the Board of Review was correct to find that the case law interpreting and/or applying this statute involves permanent *total* disability awards, as opposed to a PPD award, the award granted herein. Moreover, the old case law

upon which the claimant relies on appeal—including *Miracle v. Work. Comp. Comm'r*, 121 W. Va. 571, 5 S.E.2d 804 (1989), *Carter v. Spieler*, 183 W. Va. 126, 394 S.E.2d 528 (1990), and *Lambert v. Work. Comp. Comm'r*, 211 W. Va. 436, 566 S.E.2d 573 (2002)—all involves permanent *total* disability awards, as opposed to a PPD award, the award granted herein. This distinction is important because a permanent total disability award is considered to be wage replacement for the wages that the injured employee would have earned but for his/her work-related injury pursuant to *Fitzgerald v. Fitzgerald*, 219 W. Va. 774, 639 S.E.2d 866, 874 (2006), whereas a PPD award is not a wage replacement benefit, and, therefore, there is not the same urgency to pay out the latter award as there is the former award. Further, the West Virginia Legislature amended W. Va. Code § 23-4-6(j) (2003) in 2003, so that the onset date of a permanent total disability award was changed to the date on which a properly completed and supported application for permanent total disability benefits was filed, which rendered moot the “date of disability” analysis contained in the old case law cited in the claimant’s appellate brief.

A couple of other contentions contained in the claimant’s appellate are flawed, as well. On page 6 of the claimant’s appellate brief, the claimant, by counsel, argues that “...the initial date that permanent partial disability exists due to OP is logically the date from which medical or other expert evidence first indicated that such permanent partial disability existed” and “...the date of disability for commencement of payments should be the first date on which the OP Board credited pulmonary function testing that supported the impairment rating assigned by the OP Board.” As noted above, W. Va. §23-4-6a (2005) grants the exclusive authority to the O.P. Board to determine whether the claimant is disabled due to occupational pneumoconiosis, and, if so, the extent to which the claimant is so disabled, which makes “the date from which medical or other expert evidence first indicated

that such permanent partial disability existed” irrelevant, unless the O.P. Board is the first such expert. Moreover, as also noted above, the O.P. Board based its 15% pulmonary impairment rating upon its own diffusion capacity test results dated November 2, 2023, and did not “credit” any prior pulmonary function test results, so the contention of claimant’s counsel is meaningless, and does not support the claimant’s alleged entitlement to PPD benefits with an onset date in April 2023.

There is simply no logic in the claimant’s position. The employer in a claim for occupational pneumoconiosis benefits is already required to begin and continue the payment of a PPD award, pursuant to W. Va. Code § 23-4-1d(a) and (d) (2005), even though its claims administrator has a non-discretionary duty to base the PPD award upon the O.P. Board’s impairment finding, pursuant to W. Va. Code § 23-4-6(i) (2005), and the employer files a protest to the decision granting the PPD award, which is the case here. Further, the resolution of the employer’s protest herein has been delayed—while it continues to pay PPD benefits to the claimant--because of the claimant’s poor performance and elevated carboxyhemoglobin during retesting administered at the CAMC Occupational Lung Center on February 14, 2024. West Virginia workers’ compensation is an unusual, if not unique, system, which requires the employer to pay the claimant PPD benefits even where the employer objects to the decision awarding such benefits and/or files an appeal, but instead of being appreciative of this possible windfall, the claimant, by counsel, demands that the employer pay even more money up front, knowing that he will not have to return this money should he lose in litigation and that the employer often has little opportunity to collect an overpayment resulting from a successful outcome in litigation.

In addition to wrongly arguing that the claimant’s “date of disability” is April of 2023, and that the claimant is entitled to retroactive benefits back to April of 2023, the claimant, by counsel,

incorrectly contends on appeal that the claimant is entitled to interest at a rate of 6% per annum, in addition to the back benefits he seeks. West Virginia Code § 23-4-16a (2005) provides, in pertinent part, as follows: “Whenever any award of...permanent partial...disability...benefits...is made on or after the first day of July, one thousand nine hundred seventy-one, **and a protest is filed to the award or an appeal is taken from the award by an employer only and not by the claimant...**and the award is not ultimately denied or reduced following the protest or appeal, the self-insured employer...shall add interest to the award at the simple rate of six percent per annum from the date the award would have been payable had the protest or appeal not been filed or taken, exclusive of any period for which a continuance was granted upon motion of any party other than the protesting or appealing employer.” [emphasis added] In other words, if he were to prevail on appeal, the claimant would not be entitled to interest, as the claimant herein protested the claims administrator’s order dated December 27, 2023, which granted him a 15% PPD award, then filed a petition for appeal from the Board of Review’s order dated May 22, 2024. Moreover, interest would not be available to the claimant because the claims administrator—as it has been required to do pursuant to W. Va. Code § 23-4-1d(a) and (d) (2005)—has been paying out the claimant’s 15% PPD award, notwithstanding the employer’s protest.

### **CONCLUSION**

The Board of Review’s order dated May 22, 2024, which affirmed the claims administrator’s decision dated December 27, 2023, to the extent that such decision ruled that the payment of the claimant’s 15% PPD award was to be made in monthly installments beginning on January 1, 2024, and ending February 23, 2025, is consistent with, and supported by, applicable law. The O.P. Board had the statutory duty to determine the claimant’s pulmonary impairment due to occupational

pneumoconiosis, if any, and the claims administrator was not required to begin the payment of the claimant's PPD award on a date prior to a date on which it received the O.P. Board's findings. Moreover, the law upon which the claimant, by counsel, relies is inapplicable and outdated. Therefore, the Board of Review's order dated May 22, 2024, should be affirmed.

Respectfully submitted,

MARFORK COAL COMPANY, LLC

By counsel



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**CERTIFICATE OF SERVICE**

I, Sean Harter, do hereby certify that on this 20th day of August, 2024, I served a true copy of each of the foregoing, "Response Brief on Behalf of Second Named Respondent, Marfork Coal Company, LLC" and "Respondent's Supplemental Appendix of Exhibits," via File and ServeXpress, upon the following:

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