

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DAVID J. RADCLIFF,
Claimant Below, Petitioner

v.) No. 24-ICA-399

(JCN: 2021025164)

MOMENTUM PIPELINE, LLC,
Employer Below, Respondent

FILED
June 6, 2025

ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner David J. Radcliff appeals the September 11, 2024, order of the Workers' Compensation Board of Review. Respondent Momentum Pipeline, LLC ("Momentum") timely filed a response.¹ Mr. Radcliff did not file a reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which denied Mr. Radcliff temporary total disability ("TTD") benefits on the basis that he was paid wages in lieu of benefits for over the maximum allowed 104 weeks.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). After considering the parties' arguments, the record on appeal, and the applicable law, this Court finds that there is error in the lower tribunal's decision but no substantial question of law. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure for reversal in a memorandum decision. For the reasons set forth below, the Board's decision is reversed, and this case is remanded for further proceedings consistent with this decision.

Mr. Radcliff injured his right shoulder while working for Momentum on June 15, 2021. By order dated July 21, 2021, the claim administrator held the claim compensable for right shoulder rotator cuff rupture and left knee contusion. In a notice dated September 8, 2021, the claim administrator suspended TTD benefits on the basis that Mr. Radcliff had been released to return to work as of September 3, 2021. By order dated October 8, 2021, the claim administrator closed the claim for TTD benefits, on the basis that additional medical evidence was not received showing that Mr. Radcliff remained disabled after the notice of suspension was issued on September 8, 2021.

In lieu of paying Mr. Radcliff TTD benefits for his injury, Momentum continued paying his full wages from June 15, 2021, to December 31, 2023, when payments ceased.

¹ Mr. Radcliff is represented by Lori J. Withrow, Esq., and Reginald D. Henry, Esq. Momentum is represented by Steven K. Wellman, Esq., and James W. Heslep, Esq.

Seana Miller, the President of Momentum, completed a written affidavit dated May 30, 2024. She indicated that she was informed by the claim administrator that Momentum could pay Mr. Radcliff full wages in lieu of TTD benefits, which would help keep their workers' compensation experience modification or "e-mod" factor below 1.0.² Ms. Miller reported that Mr. Radcliff was paid full wages immediately after the compensable injury through December 24, 2023. Ms. Miller stated that it was Momentum's intention that the payment of full wages was to take the place of TTD benefits. Ms. Miller indicated that the wages totaled \$119,402.

After he stopped receiving his salary, in January 2024, Mr. Radcliff requested TTD benefits on the basis that he continued to receive treatment for his injury. By order dated January 17, 2024, the claim administrator added left foot drop and partial tear of the right rotator cuff as compensable conditions in the claim. On January 24, 2024, Momentum submitted a Wages in Lieu of Comp[ensation] Submission form to the claim administrator, which indicated that Mr. Radcliff had been paid full wages following the compensable injury. By order dated February 2, 2024, the claim administrator denied Mr. Radcliff's request for payment of TTD benefits. The claim administrator stated that the employer paid Mr. Radcliff full salary/wages in lieu of TTD benefits from June 15, 2021, to December 31, 2023, and that Mr. Radcliff was thus not entitled to TTD benefits. Mr. Radcliff protested this order to the Board.

On June 20, 2024, Mr. Radcliff gave a deposition regarding the issue of TTD benefits. Mr. Radcliff testified that he did not receive notice of a wage replacement plan, a salary continuation plan, or other benefit plan from Momentum. Mr. Radcliff also indicated that he did not request to be paid wages in lieu of TTD benefits and that the decision to do so was made unilaterally by Momentum. Mr. Radcliff acknowledged that he was paid wages from June 15, 2021, through December 24, 2023. He stated that his last check was issued on December 29, 2023, and he did not receive notice that Momentum would be discontinuing payments. Further, he indicated that he was not aware that Momentum believed they were paying wages in lieu of TTD benefits. Mr. Radcliff stated that he had a right reverse shoulder arthroplasty on May 4, 2024, to repair his work-related injury, and that he was unable to return to work. Finally, Mr. Radcliff indicated that on June 26, 2024, his treating orthopedist completed a form stating that he should remain off work until further notice.

By order dated September 11, 2024, the Board affirmed the claim administrator's February 2, 2024, order, which denied the request for TTD benefits on the basis that Mr. Radcliff was paid wages in lieu of benefits for over the maximum of 104 weeks. The Board found that the evidence establishes that Mr. Radcliff was paid more than the full amount of TTD benefits, for which he is eligible. Further, the Board found that Momentum advised

² According to Ms. Miller's affidavit, an e-mod factor above 1.0 jeopardizes Momentum's ability to win contract bids.

the claim administrator of their intent to pay wages in lieu of TTD benefits. It is from this order that Mr. Radcliff now appeals.

Our standard of review is set forth in West Virginia Code § 23-5-12a(b) (2022), in part, as follows:

The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It 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.

Syl. Pt. 2, *Duff v. Kanawha Cnty. Comm'n*, 250 W. Va. 510, 905 S.E.2d 528 (2024).

On appeal, Mr. Radcliff argues that the Board was clearly wrong in finding that TTD benefits should be denied, because Momentum did not have a wage replacement plan as required by West Virginia Code § 23-4-1c(j) (2009). We agree.

Upon review, we conclude that the Board was clearly wrong in finding that Momentum had a wage replacement plan in place that paid wages in lieu of TTD benefits. The Board was also clearly wrong when it affirmed the claim administrator's order denying TTD benefits. West Virginia Code § 23-4-1c(j) provides a method by which the claim administrator may offset from TTD benefits where there is a "wage replacement plan, salary continuation plan, or other benefits plan provided by the employer to which the employee has not contributed, and that plan does not provide an offset." West Virginia Code § 23-4-1c(j) also requires the employer to notify the claim administrator of its intention to apply the wage replacement plan so the claim administrator may offset TTD benefits. Here, Momentum's mere payment of wages, and later assertion that this was done in lieu of TTD benefits, does not constitute a plan under West Virginia Code § 23-4-1c(j).³

³ In *Globe Specialty Metals v. Carpenter*, No. 23-ICA-380, 2023 WL 8680671 (W. Va. Ct. App. Dec. 15, 2023), this Court affirmed the Board's order, which found that Globe

There was no written policy, and notably, Momentum extended payment of wages to Mr. Radcliff beyond the 104-week limit applicable to TTD benefits, which is further evidence that the wages were not part of a proper TTD plan.

Further, Momentum did not properly notify the claim administrator of its plan. The lack of notice to the claim administrator is apparent from the claim administrator's October 8, 2021, order closing the claim TTD benefits on the basis that additional medical evidence was not received which showed that Mr. Radcliff remained disabled. Finally, the Wages in Lieu of Comp form only indicated Momentum's intention, after the fact, for the wages it paid to be in lieu of TTD benefits and does not constitute a sufficient plan instituted in June of 2021. Based on the foregoing, we find that the evidence in this case establishes that there was not a proper wage replacement plan in existence pursuant to West Virginia Code § 23-4-1c(j). The wages that Momentum paid to Mr. Radcliff do not constitute TTD benefits, nor does any overpayment for purposes of TTD accrual from the payments.

Accordingly, we reverse the Board's September 11, 2024, order, and remand this case to the Board with directions to remand the issue of entitlement to TTD benefits to the claim administrator for a decision on the merits of the reopening application for TTD benefits.

Reversed and Remanded with Directions.

ISSUED: June 6, 2025

CONCURRED IN BY:

Chief Judge Charles O. Lorensen
Judge Daniel W. Greear
Judge S. Ryan White

Specialty Metals could not establish an offset pursuant to West Virginia Code § 23-4-1c(j), because it did not submit a short-term disability plan into evidence or provide dates of coverage.