BEFORE THE WEST VIRGNIA SUPREME COURT OF APPEALS

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No. 24 - 516

BILLY JOHNSON

PETITIONER,

V.

BLACKHAWK MINING

RESPONDENT,

CLAIMANT'S REPLY TO THE RESPONSE OF THE RESPONDENT EMPLOYER

John H. Skaggs (WVSB #3432)
Calwell Luce diTrapano PLLC
500 Randolph Street
Charleston, WV 25302
(304) 343-4323
jskaggs@cldlaw.com

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THE INTERMEDIATE COURT OF APPEALS AND BOARD OF REVIEW ERRED IN FINDING THAT THE CLAIMANT HAD NOT MET HIS BURDEN OF PROOF TO SHOW A PERIOD OF TEMPORARY TOTAL DISABILITY UNDER §23-4-7a(c) AND §23-4-7e(3)

This is the reply of the Claimant to the Response of the Employer to the Claimant's Appeal. The Claimant will not repeat here the facts and arguments set forth in the filed briefs and will restrict his comments to refuting the argument of the employer.

The BOR and the ICA clearly erred in finding that the Claimant did not offer evidence in support of his claim for Temporary Total Disability. The Claimant testified that he was injured, that he sought treatment, returned to report to work, and was fired. He offered completed reports establishing his period of Temporary Total Disability (TTD) and the record is clear that there is no report of maximum degree of improvement until the examination and report from Dr. Mukkamala. The reports are noted and recognized by the BOR. Medically, the Claimant is entitled to TTD for the period of time from the date of injury on June 28, 2022, to July 31, 2023.

Prior case law consistently holds that the key issue regarding Temporary Total Disability is whether the Claimant has reached his maximum degree of improvement. *Mitchell v. State Workmen's Compensation*, 256 SE 2d, citing *Perry v. State Workmen's Compensation Commissioner*, 152 W.Va. 602, 607, 165 S.E.2d 609, 612 (1969), and *Dunlap v. State Workmen's Compensation Commissioner*, W.Va., 232 S.E.2d 343, 344 (1977). As stated in Mitchell, "in Dunlap, we noted that there was no 'specific language that relates return to work as affecting total temporary disability benefits.' 232 S.E.2d at 345. There, we found that a claimant receiving temporary total disability benefits who attempted to return to work did not lose resumption of the benefits when he was unable to continue working." In *Perry*, the Court stated,

> In light of the foregoing discussion and mindful of the axiom that HN6 the Workmen's Compensation Act is remedial and should be liberally construed in favor of the injured

> workman, *Spaulding v. State Workmen's Compensation Commissioner*, 157 W. Va. 849, 205 S.E.2d 130 (1974); *Hughes v. State Workmen's Compensation Commissioner*, 156 W. Va. 146, 191 S.E.2d 606 (1972); *Johnson v. State Workmen's Compensation Commissioner*, 155 W. Va. 624, 186 S.E.2d 771 (1972), we hold that an injured employee who receives temporary total disability benefits does not lose those benefits when he attempts to return to work and is unable to continue working because of the medical condition which gave rise to his temporary total disability. The fact that he elects to return to work with another employer rather than the employment where he received the injury causing his temporary total disability should not alter the rule. *Perry*, id., 232 S.E.2d at 345

The fact that the Claimant reported back to employment after the injury under *Dunlap* is irrelevant. The issue is whether he had reached maximum degree of improvement. The Claimant did what many say claimants should do, report to work for the resolution of whether they are able to work, based on their workplace duties.

The purpose of Temporary Total Disability is by definition to pay a claimant for the period of time between injury and the date they have reached maximum degree of improvement. The Employer states at page 26 the contrary:

> It must be remembered that temporary total disability benefits are wage replacement benefits. The claimant herein is simply not entitled to temporary total disability benefits. The plain language of West Virginia Code § 23-4-7a(e) states:
>
> > Under no circumstances shall a claimant be entitled to receive temporary total disability benefits either beyond the date the claimant is released to return to work or beyond the date he or she actually returns to work.
> > W. Va. Code § 23-4-7a(e).

Here, there is no evidence that the Claimant was either released to return to work or actually returned to work. He did what employers claim they want workers to do, he reported for duty and was fired. If the Employer wanted to it could have promptly had him examined. It did not do so until it obtained the report from Dr. Mukamala on July 31, 2023.

THE INTERMEDIATE COURT OF APPEALS AND BOARD OF REVIEW COMMITTED ERROR IN FAILING TO WEIGH THE EVIDENCE AS REQUIRED BY STATUTE AND MAKE FINDINGS OF FACT TO SUPPORT ITS CONCLUSIONS

It bears repeating that the ICA, by making findings which were not in the record below, erred. In this administrative proceeding, there is no basis the adjudicators, including the ICA, to make conclusions without following the statute regarding weighing of the evidence.

West Virginia Code, §23-4-1g. Weighing of evidence, provides:

> (a) For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter **shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution.** The process of weighing evidence **shall** include, but not be limited to, **an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented.** Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted. Emphasis added.

The ICA substituted its finding for those of the BOR based on well-established case law from contexts other than this administrative proceeding. The ICA stated,

> Based on the foregoing, the Board's reliance on Mr. Johnson's termination as the basis for denying further TTD benefits was in error. However, we affirm the Board's decision on other grounds apparent in the record, as stated below. Syl. Pt. 2, *Adkins v. Gatson*, 218 W. Va. 332, 333, 624 S.E.2d 769, 770 (2005) (citation omitted)
> ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.") ICA Decision, page 5.

While the ICA makes reference to the record, it does not meet the requirement of the statute to weigh the evidence. Further, its conclusion is clearly wrong. The lack of analysis required by the statute deprives the Claimant of the ability to effectively appeal this adverse decision and hampers this Court from reviewing the decision in a meaningful way. The finding at

a minimum should have been that evidence was at best of equal weight. Therefore, the resolution most consistent with the position should have been adopted. The ICA erred as a matter of law in failing to apply West Virginia Code §23-4-1g in its decision-making process and not reversing the denial of the TTD benefits. The decision of the BOR should be reversed on that basis and the Claimant awarded TTD for the period from the date of injury to July 31, 2023, the date of finding he reached his maximum degree of improvement. In the alternative, the claim should be remanded for further proceedings.

CONCLUSION

In this case, the ICA and the BOR violated statutory provisions by:

> Not making appropriate findings and properly weighing the evidence as required by West Virginia Code, §23-4-1g. Weighing of evidence;
>
> Not applying the terms of §23-5A-3. Termination of injured employees prohibited; reemployment of injured employees and §23-4-7a(c);
>
> Failing to apply the plain language of West Virginia Code §23-4-2(a) regarding disqualification for benefits.

The BOR exceeded its statutory authority by finding that the Claimant was disqualified for cause, without statutory authority for such a finding.

The BOR was clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, including but not limited to the testimony of the Claimant, the medical evidence, the findings of its own examining doctor, Dr. Mukkamala, and the record as a whole.

The BOR was arbitrary and capricious in its application of the law, and in particular disregarding the medical evidence of record and finding that the Claimant was disqualified by cause.

The decision of the BOR should be reversed and the additional injuries added as compensable, and further the Claimant should be awarded TTD from the date of injury, June 28,

2022, to the date of the finding by Dr. Mukkamala of maximum degree of improvement on July 31, 2023, and such further relief as the Intermediate Court may deem appropriate.

Petitioner,
By Counsel:

/s/John H. Skaggs, Esq.
John H. Skaggs, Esq. (WVSB 3432)
Calwell Luce DiTrapano PLLC
500 Randolph Street
Charleston, WV 25302
(304) 343-4323