

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

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Billy Johnson, Claimant,

Petitioner,

v.

Claim No.: 2077524
JCN No.: 2023009705
Appeal No. 24-ICA-50
Supreme Court No. 24-516

Blackhawk Mining LLC, Employer,

Respondent.

BRIEF ON BEHALF OF RESPONDENT
BLACKHAWK MINING LLC

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II. STATEMENT OF THE CASE

The Memorandum Decision of the Intermediate Court of Appeals dated July 1, 2024¹, as well as the decision of the Board of Review dated January 4, 2024, both contain detailed Findings of Facts and Conclusions of Law based on the evidence submitted by the parties. (Exhibit A and B) The employer hereby adopts and incorporates *in toto* the Findings of Fact and Conclusions of Law contained in the Memorandum Decision of the Intermediate Court of Appeals dated July 1, 2024, and the Board of Review’s January 4, 2024, decision as if full restated herein.

The claimant herein, Billy Johnson, a truck driver for the employer, is presently 49 years old with a date of birth of June 6, 1975. The claimant is a resident of P.O. Box 82, Lorado, West Virginia.

The record contains a 24 Hr. Incident Investigation Report, completed by the employer on June 28, 2022. (Exhibit C) The date and time of the alleged incident was noted to be June 28, 2022, at 3:00 a.m. Under “Description”, the following was noted:

Employee Billy Johnson states he was operating CN 24520. Billy Johnson states he got loaded at the shovel and left the pit to go to the dump area. Billy Johnson states when he arrived at the dump area it was getting foggy. Billy Johnson states he thought he was in the correct area. Billy Johnson stated that he was actually on the upper level instead of the lower dump point. Billy Johnson states he backed up beside a pile of rock he saw and set his park brake. Billy Johnson then stated he began to raise the bed up to dump and as the bed was raising the truck rolled backwards through the berm and over the embankment. CN 24520 came to a stop at the toe of the embankment. Billy Johnson stated he had discomfort in his

¹ The Intermediate Court of Appeals issued its Mandate Order on August 1, 2024.

lower back and was jarred in the cab. Billy Johnson was transported to CAMC General via ambulance and drug tested. Billy Johnson was released from CAMC General to return to his next scheduled shift.

The record contains records from CAMC General dated June 28, 2022. (Exhibit D)
Under "Chief Complaint", the following was noted:

Pt to ER with s/p "rock truck" rollover over ledge. No restraint. Pt reports he "felt his back pop" and has tingling down BIL legs. Pt ambulatory into ED with EMS.

Under "History of Present Illness", the following was noted:

Patient presents to the ER for history of a brought (sic) truck accident. He states that the rock truck when up and down and rock his back. He is having significant pain in his middle back down his spine. He has had occasional tingling in his legs. Denies any numbness. Denies any loss of bowel or bladder control. Denies any other injuries. He was unrestrained but not ejected from the vehicle.

Assessment was back pain. Claimant was given Motrin and discharged in stable condition.

The claimant completed Section I of a WC-1 Employees' and Physicians' Report of Injury form on June 28, 2022, alleging injury to his low back on June 28, 2022. (Exhibit E) The claimant described the alleged incident, as follows:

Dumping load of rock & ground gave up.

Section II of the WC-1 was completed on June 28, 2022, a provider at CAMC. The provider **diagnosed a low back strain only. The claimant was not taken off work.**

The claimant was seen by Leah Smith APRN-CNP on June 29, 2022, wherein the claimant was diagnosed with "lower back sprain" and "encopresis". (Exhibit F)

The employer completed a WC-2 Employers' Report of Occupational Injury form on June 30 2022. (Exhibit G) The employer noted that the claimant was hired on May 23, 2022, that the claimant was injured at 3:00 a.m. on June 28, 2022, and that the claimant returned to

work on June 28, 2022. (Please note that the claimant's scheduled shift was from 5p.m. to 3 a.m., thus he was injured at 3 a.m. on June 28, 2022, and returned to work at 5 p.m. on June 28, 2022.)

The claimant returned to work on June 28, 2022, at which time he was suspended without pay pending completion of the investigation into the accident and terminated on July 1, 2022.

The claimant was seen by Ms. Smith on July 7, 2022, wherein she diagnosed the claimant with only "lower back sprain". (Exhibit H)

The claimant was seen by Connie Dale Cook, PA C on July 15, 2022, wherein the claimant only diagnosed with "low back sprain". (Exhibit I)

The claimant was seen by Ms. Smith on August 1, 2022, wherein the claimant was again diagnosed with only "lower back sprain". (Exhibit J)

An MRI of the lumbar spine was performed at CAMC on August 26, 2022, for a diagnosis of "Sprain of ligaments of lumbar spine". The MRI was interpreted as revealing "moderate narrowing right neural foramina and mild narrowing left neural foramina at the L5-S1 level" with "no spinal stenosis". (Exhibit K)

The claimant was seen by Mr. Cook on August 29, 2022, wherein the claimant was again diagnosed with "lower back sprain". (Exhibit L)

By order dated March 31, 2023, the Claims Administrator held this claim compensable on a no lost time basis for a low back sprain only. (Exhibit M) The claimant protested this order only insofar as it held the claim compensable on a no lost time basis. However, the Board of Review acknowledged the protest as a protest to compensable conditions and the no lost time determination.

The claimant was seen by Mr. Cook on October 24, 2022, wherein the claimant was again diagnosed with only "lower back sprain". (Exhibit N)

The claimant testified by deposition on August 31, 2023. (Exhibit O) The claimant testified that he was hired by the employer on May 23, 2022. (Tr. p. 4). The claimant testified that he had an incident that resulted in damage to the rock truck he was operating on

June 16, 2022. (Tr. p. 5). The claimant also testified that he was involved in another incident with the rock truck he was driving on June 28, 2022. (Tr. p. 6). The claimant also testified that between May 23, 2022, and June 28, 2022, he got the rock truck he was operating stuck on at least 2 occasions. (Tr. p. 9). The claimant testified as follows regarding the incident that occurred on June 28, 2022:

Q. Okay. Now, this incident happened the morning of June 28th; correct?

A. Yes.

Q. Okay. And your next scheduled shift was the evening of June 28th or the morning of June 29th; is that correct?

A. Yes. I was – I went to work, then they sent me home.

Q. Okay. Now when you went to work, did you meet with anybody?

A. Yeah, Chad Bailey, and RC and John Godfrey.

Q. Okay. How about Greg Long or Jessica Risner, R-I-S-N-E-R?

A. There was a woman there.

Q. Okay. And on the morning of June 28th when you returned to work, were you suspended pending an investigation?

A. No. They just told me to go home and get some sleep and come back.

Q. Okay. And did you come back?

A. –going to do (speaker glitch), yeah.

Q. I'm sorry, what?

A. I was going to do another shift, but they sent me home.

Q. Okay.

A. That same day later, I got fired.

Q. Okay. And then you were terminated on July 1st, 2022; is that correct?

A. Yes, that's about right.

(Tr. pp. 10-11). The claimant later testified as follows:

Q. In the little over a month that you worked for Blackhawk, you damaged two vehicles; is that correct?

A. Yes, sir, I have.

Q. Okay. Now you returned to work on June 29th and were told to go home; correct?

A. Yes.

Q. You were ready, willing, and able to work your shift but they sent you home?

A. Yes.

(Tr. p. 24). Thus, the claimant testified that he returned to work on June 28, 2022, the same day as the injury in this claim and that he was ready willing and able to work his shift but that he was sent home and then was terminated.

The employer submitted the employer's position statement to Mine Safety & Health Administration (MSHA) which documents the claimant's incidents involving damage to the rock trucks he was operating and states regarding the incident in this claim and the claimant's termination as follows:

In the second incident, Johnson claimed that he was attempting to raise the bed to dump the load, but the investigation found that the bed was not raised. Johnson was taken to CAMC General via ambulance and drug tested per procedure. The results were negative. Johnson was fully released from CAMC to return to his next scheduled shift. Upon his return, he was suspended pending a full investigation of the incident and eventually terminated for substandard performance in performing this unsafe act.

Panther Creek decided to part ways with Johnson on or about June 20, 2022. In only one (1) month, Johnson caused significant damage to 2 different rock trucks through inattentiveness. As a result, Johnson failed to meet the necessary performance standards of his job.

(Exhibit P)

The employer also submitted the statement of Jon Dahlke dated October 12, 2022, which documented the MSA interview and stated in relevant part:

Johnson was released to return to work and reported to work the next day. When he arrived, he was brought into a meeting with Greg Long, Tad Bailey Jessica Risner, and me where he was suspended pending an investigation. He did not make any complaints about injuries. He was terminated due to property damage and the risk he posed to himself and others by not operating equipment safely. Johnson never made any safety complaints to me and I am not aware of any safety complaints to others.

(Exhibit Q)

The employer submitted the following medical records which document the claimant's preexisting history of injuries and complaints.

Hill Chiropractic Center chart note dated August 24, 2015. (Exhibit R) The following complaints were documented

Complaint #1: Lumbar, left lumbar, left sacroiliac and left posterior thigh dull and aching discomfort. The claimant stated that complaints had stayed the same since last visit. He reported his ability to bend over had stayed the same with no changes when bending over. Pain 6/10. The low back was very tender and there was spasm around L5-S1.

Complaint #2: Left side of neck, posterior cervical (neck), right side of neck, left trapezius, upper thoracic and right posterior trapezius dull and aching discomfort. The claimant stated that complaints had worsened since the last visit. He reported his ability to look over the shoulder(s) had worsened with increased symptoms when looking over his shoulder(s). Pain 6/10. Right rotation was extremely restricted and painful.

The objective findings revealed:

Spinal restriction(s)/subluxation(s): C2, C3, C4, C5, C6, T2, T3, T4, T5, T6, L3, L4, L5, sacrum, left pelvis and right pelvis.

Pain/tenderness: Upper to mid-cervical, mid to lower cervical, cervicothoracic, upper thoracic, lower lumbar and lumbosacral.

Postural analysis: Head forward flexed.

Muscle spasm(s): Moderate muscle spasms in the posterior cervical (neck), upper thoracic, mid-thoracic and lumbar.

Range of motion concern(s): Entire lumbar and cervical spine was recorded as mildly reduced with pain noted.

Logan Regional Medical Center physician documentation report by Dr. Mahmoud Hamza, dated August 7, 2018. (Exhibit S) Private MD: Dale C. Cook. According to the history of present illness, the claimant presented to the ER via walk in with complaints of motor vehicle collision – back injury. He sustained upper back injury and low back injury. The symptoms were very mild at their worst. The claimant denied prior similar symptoms. Diagnosis: Low back pain. The claimant was discharged home in stable condition. Naprosyn was prescribed and one day work release was given.

Logan Regional Medical Center physician documentation report by Dr. Billie Hall, dated September 13, 2018. (Exhibit T) CT scan of the head without contrast, lumbar spine x-rays and cervical spine CT without contrast were ordered. Toradol/Norflex IM administered. Diagnosis: Headache; thoracic back pain; low back pain. The claimant was discharged home in stable condition. He was to follow-up with Dr. Cook in two to three days.

Hill Chiropractic Center chart note dated January 4, 2019. (Exhibit U) The following complaints were documented:

Complaint #1: Lumbar, left lumbar, left sacroiliac and left posterior thigh dull and aching discomfort. The claimant stated that complaints had worsened since last visit. He reported his ability to bend over had worsened with increased symptoms when bending over. Pain 7/10.

Complaint #2: Left side of neck, posterior cervical (neck), right side of neck, left trapezius, upper thoracic and right posterior trapezius dull and aching discomfort. The claimant stated that complaints had worsened since the last visit. He reported his ability to look over the shoulder(s) had worsened with increased symptoms when looking over his shoulder(s). Pain 7/10.

Dr. Mallory noted the claimant had not been seen for a few years and that he did well with adjustments and wanted full spine adjustment. Dr. Mallory further noted the claimant stated

there had been no new injuries. He was working as an equipment operator. The objective findings were documented as follows::

Spinal restriction(s)/subluxation(s): C1, C3, C4, C6, T2, T3, T5, T6, T8, L3, L4, L5, sacrum, left pelvis and right pelvis.

Pain/tenderness: Upper to mid-cervical, mid to lower cervical, cervicothoracic, upper thoracic, mid-thoracic, lower lumbar and lumbosacral.

Postural analysis: Head forward flexed.

Muscle spasm(s): Moderate muscle spasms in the posterior cervical (neck), upper thoracic, mid-thoracic and lumbar.

Range of motion concern(s): Entire lumbar and cervical spine was recorded as mildly reduced with pain noted.

The assessment noted: Exacerbation as the claimant had not been in for adjustment recently.

Hill Chiropractic Center chart note dated April 5, 2021, indicated the claimant returned for evaluation and possible treatment for a new episode of a previous condition. (Exhibit V) The complaints were recorded as follows:

Complaint #1: The claimant described frequency and quality as an acute dull and aching discomfort of insidious onset (non-radiating) located in the lumbar region(s). Pain 7/10 and described as gradual onset for the past several months. Complaints were aggravated by almost any movement and relieved by nothing. Previous treatment included chiropractic. The claimant reported previous episodes of that condition.

Complaint #2: The claimant described frequency and quality as an acute dull and aching discomfort of insidious onset (non-radiating) located in the posterior cervical (neck), upper thoracic and mid-thoracic region(s) of unknown origin. Pain 6/10 with onset and duration as gradual and for the past several years. The claimant reported aggravation by almost any movement and relieved by nothing. The claimant denied previous treatment for those symptoms. He denied previous episodes. No additional concerns were related by the claimant.

The objective findings were documented as follows::

Spinal restriction(s)/subluxation(s): Occiput, C1, C2, C4, C5, C6, T2, T3, T5, T6, T8, T9, L3, L4, L5, sacrum, left pelvis and right pelvis.

Pain/tenderness: Upper to mid-cervical, mid to lower cervical, cervicothoracic, upper thoracic, mid-thoracic, lower lumbar and lumbosacral.

Postural analysis: Head forward flexed.

Muscle spasm(s): Moderate muscle spasms in the posterior cervical (neck), upper thoracic, mid-thoracic and lumbar.

Range of motion concern(s): Entire lumbar and cervical spine was recorded as moderately reduced with pain noted.

The diagnosis was listed as M99.01 – segmental and somatic dysfunction of cervical region; M99.02 – segmental and somatic dysfunction of thoracic region; M99.03 segmental and somatic dysfunction of lumbar region.

Logan Regional Medical Center physician documentation report by Gail Moore, PA-C, dated July 17, 2021. (Exhibit W) According to the history of present illness, the claimant presented to the ER via walk in with complaints of back pain and left leg pain following MVC just prior to arrival. He was the front seat passenger of a car and was unrestrained. The vehicle was impacted on the front end and was traveling at a very low speed. The vehicle did not rollover, the claimant was not ejected, extrication was not required and the claimant was ambulatory at the scene. The force of impact was very low. The claimant sustained upper back injury and low back injury. Note was made of chronic back pain. The claimant denied head pain or neck pain. He had pain radiating down the left leg. There was no numbness, tingling, weakness, saddle anesthesia, incontinence of bowel or bladder, abdominal pain, chest pain or shortness of breath. Examination of the neck revealed the cervical spine appeared grossly normal with no vertebral tenderness and no acute changes. Examination of the back revealed moderate pain of the lumbar area, normal range of motion, normal spinal alignment, vertebral tenderness at T9, T10, T11, T12, L1, L2, L3 and L4. There was no muscle spasm. Straight leg raising was negative. Extremity exam was negative. Motor exam was normal. Sensory exam was normal. Lumbar and thoracic spine x-rays were reported to show no acute findings. Diagnosis: Dental caries, unspecified; low back pain; thoracic back pain.

Hill Chiropractic Center chart note dated November 24, 2021. (Exhibit X) The complaints were documented as:

Complaint #1: Lumbar, left lumbar, left sacroiliac and left posterior thigh dull and aching discomfort. The claimant stated that complaints had improved since last visit. He reported his ability to bend over had improved with decreased symptoms when bending over. Pain 5/10.

Complaint #2: Left side of neck, posterior cervical (neck), right side of neck, left trapezius, upper thoracic and right posterior trapezius dull and aching discomfort. The claimant stated that complaints had improved the same since the last visit. He reported his ability to look over the shoulder(s) had improved with decreased symptoms when looking over his shoulder(s). Pain 5/10.

The objective findings were documented as follows::

Spinal restriction(s)/subluxation(s): C1, C3, C4, C6, T2, T3, T5, T6, L4, L5, sacrum, left pelvis and right pelvis.

Pain/tenderness: Upper to mid-cervical, mid to lower cervical, cervicothoracic, upper thoracic, mid-thoracic, lower lumbar and lumbosacral.

Postural analysis: Head forward flexed.

Muscle spasm(s): Mild to moderate muscle spasms in the posterior cervical (neck), upper thoracic, mid-thoracic and lumbar.

Range of motion concern(s): Entire lumbar and cervical spine was recorded as mildly reduced with pain noted.

Hill Chiropractic Center chart note dated February 14, 2022. (Exhibit Y) The following complaints were documented:

Complaint #1: Lumbar, left lumbar, left sacroiliac and left posterior thigh dull and aching discomfort. The claimant stated that complaints had stayed the same since last visit. He reported his ability to bend over had improved with decreased symptoms when bending over. Pain 5/10.

Complaint #2: Left side of neck, posterior cervical (neck), right side of neck, left trapezius, upper thoracic and right posterior trapezius dull and aching discomfort. The claimant stated that

complaints had stayed the same since the last visit. He reported his ability to look over the shoulder(s) had improved with decreased symptoms when looking over his shoulder(s). Pain 5/10.

The objective findings were documented as follows:

Spinal restriction(s)/subluxation(s): C1, C3, C4, C6, T2, T3, T5, T6, L4, L5, sacrum, left pelvis and right pelvis.

Pain/tenderness: Upper to mid-cervical, mid to lower cervical, cervicothoracic, upper thoracic, mid-thoracic, lower lumbar and lumbosacral.

Postural analysis: Head forward flexed.

Muscle spasm(s): Mild to moderate muscle spasms in the posterior cervical (neck), upper thoracic, mid-thoracic and lumbar.

Range of motion concern(s): Entire lumbar and cervical spine was recorded as mildly reduced with pain noted.

Hill Chiropractic Center chart note dated April 4, 2022. (Exhibit Z) The following complaints were documented:

Complaint #1: Lumbar, left lumbar, left sacroiliac and left posterior thigh dull and aching discomfort. The claimant stated that complaints had stayed the same since last visit. He reported his ability to bend over had improved with decreased symptoms when bending over. Pain 5/10.

Complaint #2: Left side of neck, posterior cervical (neck), right side of neck, left trapezius, upper thoracic and right posterior trapezius dull and aching discomfort. The claimant stated that complaints had stayed the same since the last visit. He reported his ability to look over the shoulder(s) had improved with decreased symptoms when looking over his shoulder(s). Pain 5/10.

The objective findings were documented as follows:

Spinal restriction(s)/subluxation(s): C1, C3, C4, C6, T2, T3, T5, T6, L4, L5, sacrum, left pelvis and right pelvis.

Pain/tenderness: Upper to mid-cervical, mid to lower cervical, cervicothoracic, upper thoracic, mid-thoracic, lower lumbar and lumbosacral.

Postural analysis: Head forward flexed.

Muscle spasm(s): Mild to moderate muscle spasms in the posterior cervical (neck), upper thoracic, mid-thoracic and lumbar.

Range of motion concern(s): Entire lumbar and cervical spine was recorded as mildly reduced with pain noted.

Hill Chiropractic Center chart note dated May 11, 2022. (Exhibit AA) The following complaints were documented:

Complaint #1: Lumbar, left lumbar, left sacroiliac and left posterior thigh dull and aching discomfort. The claimant stated that complaints had improved since last visit. He reported his ability to bend over had improved with decreased symptoms when bending over. Pain 4/10.

Complaint #2: Left side of neck, posterior cervical (neck), right side of neck, left trapezius, upper thoracic and right posterior trapezius dull and aching discomfort. The claimant stated that complaints had stayed the same since the last visit. He reported his ability to look over the shoulder(s) had improved with decreased symptoms when looking over his shoulder(s). Pain 4/10.

The objective findings were recorded as follows:

Spinal restriction(s)/subluxation(s): C2, C4, C6, T2, T3, T6, L4, L5, sacrum, left pelvis and right pelvis.

Pain/tenderness: Upper to mid-cervical, mid to lower cervical, cervicothoracic, upper thoracic, mid-thoracic, lower lumbar and lumbosacral.

Postural analysis: Head forward flexed.

Muscle spasm(s): Mild to moderate muscle spasms in the posterior cervical (neck), upper thoracic, mid-thoracic and lumbar.

Range of motion concern(s): Entire lumbar and cervical spine was recorded as mildly reduced with pain noted.

Hill Chiropractic Center chart note dated May 12, 2022. (Exhibit BB) The complaints were documented as follows:

Complaint #1: Lumbar, left lumbar, left sacroiliac and left posterior thigh dull and aching discomfort. The claimant stated

that complaints had stayed the same since last visit. He reported his ability to bend over had improved with decreased symptoms when bending over. Pain 4/10.

Complaint #2: Left side of neck, posterior cervical (neck), right side of neck, left trapezius, upper thoracic and right posterior trapezius dull and aching discomfort. The claimant stated that complaints had stayed the same since the last visit. He reported his ability to look over the shoulder(s) had improved with decreased symptoms when looking over his shoulder(s). Pain 4/10.

The objective findings were documented as follows:

Spinal restriction(s)/subluxation(s): C2, C4, C6, T2, T3, T6, L4, L5, sacrum, left pelvis and right pelvis.

Pain/tenderness: Upper to mid-cervical, mid to lower cervical, cervicothoracic, upper thoracic, mid-thoracic, lower lumbar and lumbosacral.

Postural analysis: Head forward flexed.

Muscle spasm(s): Mild to moderate muscle spasms in the posterior cervical (neck), upper thoracic, mid-thoracic and lumbar.

Range of motion concern(s): Entire lumbar and cervical spine was recorded as mildly reduced with pain noted.

Hill Chiropractic Center chart note dated June 20, 2022, only 8 days prior to the injury in this claim. (Exhibit CC) The complaints were documented as follows:

Complaint #1: Lumbar, left lumbar, left sacroiliac and left posterior thigh dull and aching discomfort. The claimant stated that complaints had improved since last visit. He reported his ability to bend over had improved with decreased symptoms when bending over. Pain 3/10.

Complaint #2: Left side of neck, posterior cervical (neck), right side of neck, left trapezius, upper thoracic and right posterior trapezius dull and aching discomfort. The claimant stated that complaints had stayed the same since the last visit. He reported his ability to look over the shoulder(s) had improved with decreased symptoms when looking over his shoulder(s). Pain 4/10.

The objective findings were documented as follows:

Spinal restriction(s)/subluxation(s): C2, C4, C6, T2, T3, T6, L5, sacrum, left pelvis and right pelvis.

Pain/tenderness: Upper to mid-cervical, mid to lower cervical, cervicothoracic, upper thoracic, mid-thoracic, lower lumbar and lumbosacral.

Postural analysis: Head forward flexed.

Muscle spasm(s): Mild to moderate muscle spasms in the posterior cervical (neck), upper thoracic, mid-thoracic and lumbar.

Range of motion concern(s): Entire lumbar and cervical spine was recorded as mildly reduced with pain noted.

Thus, the claimant was seen for complaints and treatment of his lumbar spine and cervical spine only 8 days prior to the injury in this claim. Further, the claimant was treating consistently for hi lumbar and cervical complaints in the months prior to the injury in this claim.

The claimant was seen by Dr. Prasadarao Mukkamala on July 31, 2023. (Exhibit DD) Dr. Mukkamala, following his review of all of the claimant records and his examination of the claimant, issued a report dated July 31, 2023. Based on his review of the claimant's records and his examination of the claimant Dr. Mukkamala diagnosed the claimant with a lumbar sprain/strain and stated:

The compensable injury is lumbar sprain/strain.

EXPLANATION:

The records indicate that the claimant was involved in a truck accident. The truck did not really roll over, but the claimant stated that the brakes failed, and he developed pain in the low back. Therefore, lumbar sprain/strain is the proper diagnosis.

Dr. Mukkamala concluded that the claimant has reached his maximum degree of medical improvement and rated the claimant's permanent impairment as follows:

I will calculate the permanent impairment using the AMA guides fourth edition. I will submit figure 79 and figure 80 to document the range of motion and impairment. The claimant has 6% whole person impairment for loss of range of motion. Furthermore, there was no motor deficit and there was no specific sensory deficit of a radicular type and therefore there was no permanent impairment

based upon neurological findings. I will place the claimant under item II B from table 75 for a 5% whole person impairment. All of that combines to 11% whole person impairment.

Therefore, I conclude that the claimant has 11% whole person impairment for his low back and lumbar spine under the range of motion model.

Per rule 20 this would be classified under lumbar category II 85-20-C with an acceptable range of 5-8. I placed in the claimant the lumbar category II because there was no objective evidence of radiculopathy and there was no evidence of loss of motion segment integrity.

The range of motion impairment that was calculated at 11% does not fall within the accepted ranges for this category. Therefore, the impairment has been adjusted to 8% pursuant to rule 20, section VII, table 85-20-C.

Please note that the 8% whole person impairment that I calculated is resulting from the pre-existing back pain, the pre-existing noncompensable degenerative spondyloarthropathy as well as the compensable incident of 6/28/2022.

Please note that this claimant has had back pain with several visits to the medical personnel starting in 2014. Please also note that even on the day before this particular injury of 6/28/2022 meaning 6/27/2022 he presented to Leah Smith, the nurse practitioner with complaints of back pain. They referred the claimant to physical therapy at that time. That was only one day prior to the compensable injury of 6/28/2022.

Therefore, I will apportion impairment and allocate 4% to pre-existing noncompensable back pain with degenerative spondyloarthropathy and 4% to the compensable injury of 6/28/2022.

Therefore, all in all I conclude that the claimant has 4% whole person impairment resulting from the compensable injury dated 6/28/2022 with the claim number 2077524.

The Board of Review following its review of all of the evidence submitted by the parties and the arguments set forth by the parties, issued a decision dated January 4, 2024, affirming the Claims Administrators order dated March 31, 2023. (See Exhibit B) In affirming that order the Board of review provided 29 separate detailed Findings of Fact and provided the following analysis regarding the denial of reopening for temporary total disability benefits issue:

For purposes of obtaining a reopening of a workers' compensation claim under the provisions of W.Va. Code §§ 23-5-2 and 23-5-3 the claimant must make application in writing showing a progression or aggravation of the compensable condition or some other fact or facts which were not previously considered which would entitle the claimant to greater benefits than he or she has already received.

As defined in *Harper v. State Workmen's Compensation Commissioner*, 160 W.Va. 364, 234 S.E.2d 779 (1977), "cause" for further adjustment of an award has been interpreted as a showing of a prima facie cause which means nothing more than any evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the former injury.

The claimant sustained a compensable injury to his low back on June 28, 2022. By claim administrator's order dated August 29, 2022, the claim was held compensable for sprain to the low back and no TTD benefits were granted. The claimant requested a reopening of the claim for TTD benefits from June 28, 2022, through March 13, 2023, and such subsequent dates as may be documented. By claim administrator's order dated March 31, 2023, the claimant's request for reopening was denied.

The claimant argues that he suffered the additional injury of cervical strain resulting from the compensable injury and therefore, he should be granted TTD benefits. Per the Board of Review Order dated December 27, 2023, the claim administrator's order dated August 29, 2022, holding the claim compensable for low back sprain, and granting no TTD benefits, was affirmed. No additional conditions were found compensable including cervical strain. Further, per the order dated March 31, 2023, the request to reopen the claim for TTD benefits was dated February 27, 2023. No reopening request of that date is of record. Regarding the grant of any TTD benefits, the evidence establishes that the claimant was terminated for cause from his employment on June 30, 2022. In *Buzzard v. W. Va. Office of Ins. Comm'r*, No. 15-0771 (W. Va. 2016) (memorandum decision), the Supreme Court of Appeals concluded that TTD benefits were wage replacement benefits. Because the claimant had no wages to replace, no further TTD benefits are warranted. The claimant has not established otherwise. **The evidence fails to establish an aggravation or progression of the compensable injury or facts not previously considered which would entitle the claimant to additional TTD benefits.**

The claimant appealed this decision and by Memorandum Decision dated July 1, 2024, the Intermediate Court of Appeals affirmed the decision of the Board of Review concluding as follows (See Exhibit A):

In the Board's January 4, 2024, order, the Board found that Mr. Johnson failed to establish that there was an aggravation or progression of the injury which would entitle him to a reopening for additional TTD benefits. Further, the Board cited to *Buzzard v. W. Va. Off. of Ins. Comm'r*, No. 15-0771, 2016 WL 3574838 (W. Va. June 24, 2016) (memorandum decision), and stated that TTD benefits were wage replacement benefits, and because Mr. Johnson had no wages to replace due to his termination, he was not entitled to further TTD benefits. This Court notes that West Virginia Code § 23-4-1c(a)(2)(B) (2009) does not provide an automatic bar to an award of benefits where an employee is laid off or terminated from employment. *See Bevins v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 315, 708 S.E.2d 509 (2010). 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.")**

In both orders, the Board noted that Mr. Johnson's claim was held compensable only for a lumbar sprain, and further noted that the medical evidence in the record did not support the compensability of cervical strain as requested by Mr. Johnson. **Indeed, Dr. Mukkamala and PA-C Cook diagnosed Mr. Johnson with a lumbar sprain, and Mr. Johnson submitted no medical evidence establishing that a neck injury was caused by the June 28, 2022, workplace accident. Therefore, the Board did not commit error when it affirmed the claim administrator's order holding the claim compensable for a lumbar sprain.**

To qualify for TTD benefits, a claimant must be unable to return to employment because of a compensable injury. If a claimant is released to return to work, returns to work, or is placed at maximum medical improvement, he or she is no longer entitled to TTD benefits. *See W. Va. Code § 23-4-7a* (2005). Further, in order to reopen a claim for TTD benefits, a claimant must show an

aggravation or progression of a compensable condition or facts not previously considered, which would entitle the claimant to greater benefits than previously received. *See* W. Va. Code § 23-5-2 (2005) and 23-5-3a. As defined in Syllabus Point 3 of *Harper v. State Workmen's Compensation Commissioner*, 160 W. Va. 364, 234 S.E.2d 779 (1977), "cause" for further adjustment of an award has been interpreted as a showing of a prima facie cause, which means nothing more than any evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the former injury.

Here, it is undisputed that Mr. Johnson testified on August 23, 2023, that he was ready, willing, and able to return to work on June 29, 2022, which was one day after the compensable injury. Moreover, the treatment record from CAMC dated June 28, 2022, does not restrict Mr. Johnson from working. Mr. Johnson also failed to submit a claim reopening form which could establish that he sustained an aggravation or progression of the compensable lumbar sprain, and Dr. Mukkamala found him to be at MMI. Moreover, PA-C Cook's attending physician reports are not good evidence of an aggravation or progression, because they contradictorily state that Mr. Johnson was not at MMI, but that he was ready for a PPD evaluation. Mr. Johnson was not restricted from work. Thus, he did not qualify for TTD benefits and the Board correctly affirmed the claim administrator's orders denying TTD benefits.

Based on the foregoing, the Board committed no errors which affect the outcome of this case. Therefore, we affirm the Board's December 27, 2023, and January 4, 2024, orders affirming the claim administrator's denial of Mr. Johnson's request for TTD benefits, denial of the request to reopen TTD benefits, and holding the claim compensable for a lumbar sprain.

III. SUMMARY OF ARGUMENT

The Intermediate Court of Appeal was clearly correct in affirming the decision of the Board of Review dated January 4, 2024. The Claims Administrators order dated March 31, 2023, properly denied the claimant's request to reopen this claim for additional temporary total disability benefits as the claimant failed to establish that he suffered an aggravation or progression of the compensable condition in this claim or that he was entitled to temporary total disability benefits. It must be remembered that this claim was approved for only a low back sprain/strain on a no lost time basis. The preponderance of the substantial, reliable, and probative

evidence of record, establishes that the only compensable condition in this claim is a low back strain. The claimant failed to submit any evidence to show he had experienced an aggravation or progression of his compensable low back strain. Therefore, the claimant's request to reopen the claim for additional temporary total disability benefits due to an aggravation or progression of the compensable low back strain was properly denied and properly affirmed the by the Board of Review. The decision of the Intermediate Court of Appeals is clearly correct and not in clear violation of constitutional or statutory provision; is not clearly the result of erroneous conclusions of law; and is not based upon the Court's material misstatement or mischaracterization of particular components of the evidentiary record. On appeal, the claimant has failed to establish that the Intermediate Court of Appeal erred in any manner.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments are adequately presented by the employer's brief and record before the Court. Therefore, the employer respectfully submits that oral argument is not needed for this appeal.

IV. ARGUMENT

A. Standard of Review

West Virginia Code § 23-5-15(c) provides that this Court's review of a final Order of the Intermediate Court of Appeals shall consider the record before the Intermediate Court of Appeals and this Court should give deference to the findings, reasoning and conclusions of the, in accordance with the following:

(c) If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly

violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

This Court addressed its standard of review in Moran v. Rosciti Constr. Co., LLC, 240 W. Va. 692, 815 S.E.2d 503, in stating in Syllabus Pt. 1:

When reviewing a decision of the West Virginia Workers' Compensation Board of Review ("the Board"), **this Court will give deference to the Board's findings of fact** and will review de novo its legal conclusions. The decision of the Board may be reversed or modified only if it (1) is in clear violation of a constitutional or statutory provision; (2) is clearly the result of erroneous conclusions of law; or (3) is based upon material findings of fact that are clearly wrong.

With due consideration to this standard of review, this Court must affirm the decision of the Intermediate Court of Appeal as the decision is clearly correct and not in clear violation of constitutional or statutory provision; is not clearly the result of erroneous conclusions of law; and is not based upon the Court's material misstatement or mischaracterization of particular components of the evidentiary record.

B. The Memorandum Decision of the Intermediate Court of Appeals dated July 1, 2024, was clearly correct and not in clear violation of constitutional or statutory provision; is not clearly the result of erroneous conclusions of law; and is not based upon the Court's material misstatement or mischaracterization of particular components of the evidentiary record in its affirmation of the decision of the Board of Review dated January 4, 2024, as the claimant failed to establish he suffered an aggravation or progression of his compensable lumbar strain or that he was entitled to any temporary total disability benefits.

The Memorandum Decision of the Intermediate Court of Appeals was clearly correct and not in clear violation of constitutional or statutory provision; is not clearly the result of erroneous conclusions of law; and is not based upon the Court's material misstatement or mischaracterization of particular components of the evidentiary. The Intermediate Court of Appeals provided the following detailed analysis of its review of the evidence of record in this claim in regards to compensable conditions:

To qualify for TTD benefits, a claimant must be unable to return to employment because of a compensable injury. If a claimant is

released to return to work, returns to work, or is placed at maximum medical improvement, he or she is no longer entitled to TTD benefits. *See* W. Va. Code § 23-4-7a (2005). Further, in order to reopen a claim for TTD benefits, a claimant must show an aggravation or progression of a compensable condition or facts not previously considered, which would entitle the claimant to greater benefits than previously received. *See* W. Va. Code § 23-5-2 (2005) and 23-5-3a. As defined in Syllabus Point 3 of *Harper v. State Workmen's Compensation Commissioner*, 160 W. Va. 364, 234 S.E.2d 779 (1977), "cause" for further adjustment of an award has been interpreted as a showing of a prima facie cause, which means nothing more than any evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the former injury.

Here, it is undisputed that Mr. Johnson testified on August 23, 2023, that he was ready, willing, and able to return to work on June 29, 2022, which was one day after the compensable injury. Moreover, the treatment record from CAMC dated June 28, 2022, does not restrict Mr. Johnson from working. Mr. Johnson also failed to submit a claim reopening form which could establish that he sustained an aggravation or progression of the compensable lumbar sprain, and Dr. Mukkamala found him to be at MMI. Moreover, PA-C Cook's attending physician reports are not good evidence of an aggravation or progression, because they contradictorily state that Mr. Johnson was not at MMI, but that he was ready for a PPD evaluation. Mr. Johnson was not restricted from work. Thus, he did not qualify for TTD benefits and the Board correctly affirmed the claim administrator's orders denying TTD benefits.

It must be remembered that the claimant bears the burden of establishing his claim. "In order to establish compensability an employee who suffers a disability in the course of his employment must show by competent evidence that there was a causal connection between such disability and his employment." Deverick v. State Workmen's Compensation Director, 150 W. Va. 145, 144 S.E.2d 498 (1965) (Syl.pt 3). Further, "Where proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim." Clark v. State Workmen's Compensation Comm'r, 155 W. Va. 726, 187 S.E.2d 213 (1972) (Syl.pt 4). Simply stated, benefits should not be paid from a workers' compensation policy "unless there be a satisfactory and convincing showing" that the claimed disability actually resulted from the claimant's employment. Whitt v. State Workmen's

Compensation Comm'r, 153 W. Va. 688, 693, 172 S.E.2d 375, 377 (1970) (quoting Machala v. Compensation Comm'r, 108 W. Va. 391, 397, 151 S.E. 313, 315 (1930)).

Not even under the old “rule of liberality” was the claimant relieved of this burden. In fact, the West Virginia Supreme Court of Appeals previously stated that “[w]hile informality in the presentation of evidence is permitted in workmen’s compensation cases and a rule of liberality in favor of the claimant will be observed in appraising the evidence presented, still the burden of establishing a workmen’s compensation claim rests upon the one who asserts it and the well-established rule of liberality cannot be considered to take the place of proper and satisfactory proof.” Deverick v. State Compensation Director, 150 W. Va.145, 144 S.E.2d 498 (1965) (Syl. Pt 1) (quoting Point 2, Syllabus, Hayes v. State Compensation Director, et al., 149 W. Va. 220). Simply stated, the rule of liberality did not relieve the claimant of the burden of proving his claim. Clark v. State Workmen’s Compensation Comm’r, 155 W. Va. 726, 733, 187 S.E.2d 213, 217 (1972); see also Deverick v. State Compensation Director, 150 W. Va. 145, 144 S.E.2d 498 (1965).

This claim was held compensable for a low back strain on a no lost time basis. The claimant protested that determination and both the Board of Review and the Intermediate Court of Appeals affirmed that determination. That issue is the subject of a separate petition for appeal from the July 1, 2024, Memorandum Decision of the Intermediate Court of Appeals. That is not the issue before this Court regarding this appeal.

The issue before the Court in this appeal is whether the Intermediate Court of Appeal was correct in affirming the Board of Review decision dated January 4, 2024, which affirmed the March 31, 2023, order denying the claimant’s request to reopen this claim for temporary total disability benefits. On appeal, the claimant argues erroneously that he was entitled to temporary total disability benefits for the period of time until the claimant reaches MMI or returns to work. This is incorrect and ignores the statutory requirement regarding the reopening of a claim which has been closed as this claim was.

As noted above, this claim was held compensable on a no lost time basis and this claim was closed for temporary total disability benefits. When the claimant seeks to reopen a claim, he has the burden of proof pursuant to the provisions of West Virginia Code §§ 23-4-16 and 23-5-2

to establish a progression or aggravation of his compensable injury. See also Harper v. State Workmen's Compensation Comm'r. 160 W. Va. 364, 234 S.E.2d 779 (1977) (Syl. Pt. 1). A claim cannot be reopened unless the claimant shows by factual evidence that there has been an aggravation or progression of his disability. See W. Va. Code § 23-5-2 (2005); W. Va. Code § 23-5-3 (2009). In the instant claim, the claimant has failed to establish that he suffered an aggravation or progression of the compensable condition in this claim. The statutory standard for reopening of a claim for indemnity benefits is specifically addressed in W.Va. Code §23-5-2, which states,

In any case where an injured employee makes application in writing for a further adjustment of his or her claim under the provisions of section sixteen [§ 23-4-16], article four of this chapter **and the application discloses cause for a further adjustment**, the commission shall, after due notice to the employer, make the modifications, or changes with respect to former findings or orders in the claim that are justified. Any party dissatisfied with any modification or change made by the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, is, upon proper and timely objection, entitled to a hearing, as provided in section nine [§ 23-5-9] of this article.

The claimant is required to show a progression or aggravation of the injury. West Virginia Code §23-5-3 states,

If it appears to the Insurance Commissioner, private insurance carriers and self-insured employers, whichever is applicable, **that an application filed under section two [§ 23-5-2] of this article fails to disclose a progression or aggravation in the claimant's condition, or some other fact or facts which were not previously considered in its former findings and which would entitle the claimant to greater benefits than the claimant has already received, the Insurance Commissioner, private insurance carriers and self-insured employers, whichever is applicable, shall, within a reasonable time, notify the claimant and the employer that the application fails to establish a prima facie cause for reopening the claim.** The notice shall be in writing stating the reasons for denial and the time allowed for objection to the decision of the commission. The claimant may, within sixty days after receipt of the notice, object in writing to the finding. Unless the objection is filed within the sixty-day period, no objection shall be allowed. This time limitation is a condition of

the right to objection and hence jurisdictional. Upon receipt of an objection, the Office of Judges shall afford the claimant an evidentiary hearing as provided in section nine of this article.

W. Va. Code §23-5-3. Thus, the claimant is required by statute to show an aggravation or progression of his compensable condition. The claim failed to establish that he suffered an aggravation or progression of his compensable condition and the Intermediate Court of Appeals specifically found:

Here, it is undisputed that Mr. Johnson testified on August 23, 2023, that he was ready, willing, and able to return to work on June 29, 2022, which was one day after the compensable injury. Moreover, the treatment record from CAMC dated June 28, 2022, does not restrict Mr. Johnson from working. Mr. Johnson also failed to submit a claim reopening form which could establish that he sustained an aggravation or progression of the compensable lumbar sprain, and Dr. Mukkamala found him to be at MMI. Moreover, PA-C Cook's attending physician reports are not good evidence of an aggravation or progression, because they contradictorily state that Mr. Johnson was not at MMI, but that he was ready for a PPD evaluation. Mr. Johnson was not restricted from work. Thus, he did not qualify for TTD benefits and the Board correctly affirmed the claim administrator's orders denying TTD benefits.

On appeal the claimant has identified no regulation, statute, or case law to support his position. Moreover, his argument regarding the payment of initial temporary total disability benefits is not before this Court in relation to this appeal. Simply put, the claimant has failed to establish that the Intermediate Court of Appeals erred in affirming the denial of the reopening of the claim.

It also appears that the claimant is arguing that he was entitled to temporary total disability benefits until such time as Dr. Mukkamala found he had reached his maximum degree of medical improvement. The claimant's argument fails in this regard as the claimant was released to return to work on June 28, 2022, without restrictions and the claimant, in fact, returned to work on June 28, 2022, and testified that he was ready willing and able to return to work.

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). In the instant claim, the evidence establishes that the claimant returned to work on June 28, 2022, without restrictions, testified that he was ready, willing and able to work, and that he was suspended and then terminated for cause

This Court addressed a similar issue in Ramsey v. Greenbrier Hotel Corporation, 2014 W. Va. LEXIS 859, 2014 WL 3954045 (W. Va. August 13, 2014) and stated as follows:

West Virginia Code § 23-4-7a (2005) states that temporary total disability benefits are not payable after a claimant has reached maximum medical improvement, is released to return to work, or actually returns to work, whichever occurs first.

In Ramsey the Court noted that the claimant had been found to have reached her maximum degree of medical improvement by an IME physician as well as her treating physician and that she had failed to establish that she was disabled thereafter. In the instant claim, the claimant was released to return work and the claimant actually returned to work but was thereafter terminated for cause. There is no evidence thereafter that he was unable to perform her job duties due to the compensable injury in this claim, thus, the claimant was not eligible for temporary total disability benefits. (See also Andrews v. Lamrite West, Inc., 2014 W. Va. LEXIS 884, 2014 WL 3954027 (W. Va. Aug. 13, 2014) ; Campbell v. Cogar Manufacturing, Inc., 2014 W. Va. LEXIS 881, 2014 WL 3954025 (W. Va. Aug. 13, 2014).

While the Intermediate Court of Appeals affirmed the denial of reopening and denial of entitlement to temporary total disability benefits on other grounds, the employer submits that pursuant to this Court's decision in Shrader v. Par-Mar Oil Co., 2015 W. Va. LEXIS 835 the claimant's return to work on June 28, 2022, and termination for cause precluded any entitlement to temporary total disability benefits. The Shrader Court held as follows:

West Virginia Code § 23-4-7a (2014) states that temporary total disability benefits are not payable after a claimant has reached maximum medical improvement, is released to return to work, or actually returns to work, whichever occurs first. The evidence of record demonstrates that immediately following the compensable injury, Ms. Shrader initially received temporary total disability benefits. However, the record also clearly demonstrates that as of October 19, 2012, she was released to return to work at light duty and actually returned to work in that capacity until her employment was terminated on June 11, 2013, after which time she requested additional temporary total disability benefits. Therefore, pursuant to the provisions of *West Virginia Code § 23-4-7a*, Ms. Shrader's eligibility for temporary total disability benefits in relation to the compensable injury ended on October 19, 2012, because she was not only released to return to work on that date but actually returned to work on October 19, 2012.

Finally, it is important to note that although the Office of Judges declined to discuss Ms. Shrader's eligibility for temporary total disability benefits following the termination of her employment for employee misconduct, *West Virginia Code §§ 23-4-6(b)* and *23-4-6d(b)* (2014) provides that temporary total disability benefits represent the replacement of lost wages arising from a compensable injury. Because Ms. Shrader's employment was terminated for employee misconduct one day prior to the requested onset date for temporary total disability benefits, she is also not entitled to temporary total disability benefits pursuant to *West Virginia Code §§ 23-4-6(b)* and *23-4-6d(b)*.

Shrader v. Par-Mar Oil Co., 2015 W. Va. LEXIS 835 at pp. 5-6. The claimant herein returned to work on June 28, 2022, and testified that he was ready willing and able to work at that time, however, the claimant was suspended and terminated for cause. Thus, as this Court held in Shrader he is not entitled to temporary total disability benefits.

C. The Memorandum Decision of the Intermediate Court of Appeals dated July 1, 2024, was clearly correct and not in clear violation of constitutional or statutory provision; is not clearly the result of erroneous conclusions of law; and is not based upon the Court's material misstatement or mischaracterization of particular components of the evidentiary record in its affirmation of the Board of Review properly weighed the evidence in affirming the March 31, 2023, Order of the Claims Administrator denying the reopening of the claim for temporary total disability benefits

The Memorandum Decision of the Intermediate Court of Appeals was clearly correct and not in clear violation of constitutional or statutory provision; is not clearly the result of erroneous conclusions of law; and is not based upon the Court's material misstatement or mischaracterization of particular components of the evidentiary.

The claimant argues that Intermediate Court of Appeals and the Board of Review “confined its analysis to conclusory statements which did not reflect the weighing of the evidence as required by the statute”. West Virginia Code, §23-4-1g(a) required the Board of Review to make “an assessment of the relevance, credibility, materiality and reliability” of evidence. Here, the Board of Review relied on its December 27, 2023, Order which affirmed the August 29, 2022, order accepting the claim as compensable for a low back sprain. The Board of Review noted that the request to reopen the claim dated February 27, 2023, was not in evidence. The claimant failed to submit evidence of an aggravation or progression of the compensable low back sprain. The Board of Review properly affirmed the denial of the request to reopen the claim for temporary total disability benefits for the compensable low back sprain. The Intermediate Court of Appeals likewise reviewed all of the evidence and concluded that the Board had made did not err in affirming the decision of the Board of Review.

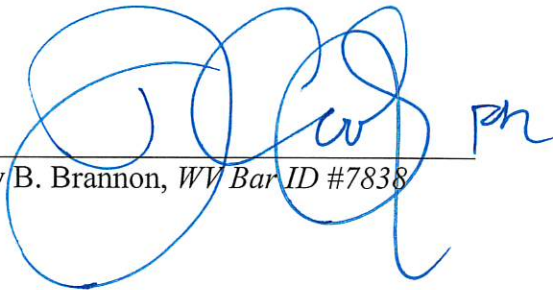
The claimant also argues “there was no assessment of the relevance credibility, materiality, and reliability of the evidence in the context of whether the Claimant should be disqualified” from temporary total disability benefits. The Board of Review was not required to make any findings regarding the claimant’s disqualification for the initial payment of temporary total disability benefits as that was not an issue before it. The Board of Review simply addressed the claimant’s argument and the actual issue before it. The Intermediate Court of Appeals found no error in the Board of reviews analysis or decision.

In the instant claim, the preponderance of the substantial, reliable and probative evidence of record establishes that the claimant was released to return to work on June 28, 2022, actually returned to work on June 28, 2022, and testified that he was ready will and able to work on June 28, 2022. The only reason he did not work his shift that day was because he was suspended for reasons unrelated to the compensable injury in this claim. The Intermediate Court of Appeals was clearly correct in affirming the January 4, 2024, decision of the Board of Review and the

claimant has failed, on appeal, to establish that the Intermediate Court of Appeals erred in any fashion.

V. CONCLUSION

Based on the facts of this claim, the evidence of record, and the law applicable thereto, the employer requests that this Court AFFIRM the memorandum decision of the Intermediate Court of Appeals dated July 1, 2024.



Jeffrey B. Brannon, WV Bar ID #7838

CERTIFICATE OF SERVICE

I, Jeffrey B. Brannon, attorney for the Respondent, Blackhawk Mining LLC, hereby certify that a true and exact copy of the foregoing “Brief on Behalf of Respondent Blackhawk Mining LLC”, was served upon the Petitioner by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 3rd day of October, 2024, addressed as follows:

John H. Skaggs, Esquire
Law and Arts Center West
500 Randolph Street
Charleston, WV 25302



Jeffery B. Brannon, WV Bar ID #7838