

**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**No. 24 - \_\_\_\_\_**

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**BILLY JOHNSON**

**PETITIONER,**

**V.**

**BLACKHAWK MINING**

**RESPONDENT,**

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**BRIEF IN SUPPORT OF APPEAL**

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## ASSIGNMENTS OF ERROR

This is an Appeal of the Memorandum Decision of the Intermediate Court of Appeals (hereafter ICA) filed July 1, 2024 finalized by Mandate dated August 1, 2024. In this case, the Board of Review Order (hereafter BOR) was premised entirely on the issue of whether the Claimant was barred from Temporary Total Disability (TTD) for misconduct. While the ICA found that in error, it proceeded to consider the TTD issue, despite the fact that the BOR made no specific findings regarding TTD.<sup>1</sup> The ICA consolidated this appeal with another appeal in the same claim regarding the addition of cervical strain to the claim.

The Intermediate Court of Appeals (ICA) and the Board of Review (BOR) erred in finding that the Claimant had not met his burden of proof to show a period of Temporary Total Disability (TTD), where he had submitted an appropriate Insurance Commissioner form completed by a medical provider and the Employer's examining physician, Dr. Mukkamala, attributed 4% of his total 8% permanent partial disability to the current injury and the Employers' report of Occupational Injury stated, "There was no reason to question the injury."<sup>2</sup>

The ICA erred by finding that the BOR had committed error by affirming denial of TTD on grounds of cause, but affirmed the decision on "other grounds."<sup>3</sup> It is not apparent from the

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<sup>1</sup> The BOR stated, "The claimant submitted an Attending Physician Benefits Form indicating that he was TTD from June 28, 2022, through March 13, 2023. However, the claimant testified that he returned to work on June 29, 2022, and was ready, willing, and able to work his shift that day. He did not work his shift because he was sent home by the employer and two days later was terminated from his employment with cause. The evidence establishes that the claimant could return to work but has not returned to work due to causes other than his compensable lumbar sprain injury. The claim administrator was not in error in denying TTD benefits. Appendix 000277. In fact, here there was no evidence that the Claimant had returned to work or had reached MMI until Dr. Mukkamala's report of July 31, 2023.

<sup>2</sup> "12. The Employer submitted the Employers' Report of Occupational Injury or Disease dated June 30, 2022. The date of injury was noted to be June 28, 2022. The Employer noted it had no reason to question the injury. It was reported that the Claimant returned to work on June 28, 2022, and that June 28, 2022, was his last day of work." BOR Order Page 3, Appendix 000270 – 000280. The statement that the Claimant returned to work was wrong.

<sup>3</sup> The ICA stated, "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

record that there is no evidence of TTD by either return to work or reaching maximum degree of improvement. The ICA was clearly wrong in making the finding of no TDD.<sup>4</sup>

The ICA found that the Claimant had reached his maximum degree of improvement at the time of the injury, despite there being no evidence to support that. Dr. Mukkamala found only on July 23, 2023 that he had reached the maximum degree of improvement.

The ICA and BOR committed error in failing to weigh the evidence as required by statute and make findings of fact to support its conclusions. West Virginia Code, §23-4-1g. *Weighing of evidence.*

#### STATEMENT OF THE CASE

This is the appeal of a decision of the ICA and the BOR which affirmed an Order of the Third-Party Administrator which held the claim compensable but denied temporary total disability benefits on the grounds that the Claimant had returned to work.<sup>5</sup> In fact, as demonstrated below, the Claimant did not return to work and submitted evidence of temporary total disability in the form required by the Commissioner. The Claimant was injured when the brakes on a rock truck he was operating failed, and he rolled over a berm. The Claimant was awarded 4% permanent partial disability, allocated from a total of 8% permanent partial disability based on the report of Dr. Mukkamala. The Employer, in its Report of Occupational

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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.")"

<sup>4</sup> The Claimant argued below that the BOR committed error and exceeded its jurisdiction by finding that the Claimant was disqualified from TTD benefits for cause, when there was no evidence of misconduct as required by the Workers Compensation Statute. West Virginia Code §23-4-2(a) Disbursement where injury is self-inflicted or intentionally caused by employer; legislative declarations and findings; "deliberate intention" defined.

<sup>5</sup> The BOR Order states the issue is,  
"ISSUE:

The claimant protested the claim administrator's order dated August 29, 2022, which held the claim compensable for sprain to the low back. The order granted no temporary total disability (TTD) benefits because the claimant had returned to work and was not entitled to wage loss benefits." BOR Order page 1, Appendix 000270 - 000280.

Injury, stated there was no reason to question the injury, and that the Claimant had returned to work. Footnote 1, infra., BOR Order Page 3, Appendix 000270 - 000280. The Claimant did not in fact return to work. Deposition page 7, Appendix 000182 - 000219<sup>6</sup>

#### STATEMENT OF FACTS

This was pending on the Claimant's protest to the order of the Employer which stated,

Based upon the information currently available to us, we have determined that your claim is approved for the following injuries that you sustained while employed by the above referenced employer; Sprain to low back. As a result of your work-related accident, Rockwood Casualty Insurance Company will provide reasonable and necessary medical benefits to you in accordance with the West Virginia Workers' Compensation Act. Based upon our information, you have returned to work and are not entitled to wage loss benefits at this time. Appendix 000134 – 000135.

The Claimant testified that he was injured when a rock truck he was operating backed over a strip mine berm. Transcript page 5-6, incident report, filed by Employer. Appendix 000006 - 000017. The report of injury states that the Claimant "suffered an occupational injury and did not aggravate a prior injury/disease." Employer submission January 12, 2023. Appendix 000146 – 000148.

The Claimant testified that he was treated by CAMC General. Transcript page 6 and 7, Appendix 000182 – 000219, and Claimant's interrogatories answers to employer, submitted January 5, 2023. Appendix 000108 - 000113. By evidentiary submission dated January 5, 2023, the Claimant submitted a copy of the attending physician's report which documented that Claimant was temporarily totally disabled from "6/28 to present." The form was faxed to Elise

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<sup>6</sup> Q Have you returned to work?

18 A I have not.

19 Q Since the incident?

20 A I haven't received a dime since June 28th.

21 Q That is what I was getting at. You have

22 not worked anywhere after June 28, 2022; is that right?

23 A I have not, no, sir.

Transcript page 7, Appendix 000182-000219.

Chalk at the Third-Party Administrator. Appendix 000154 – 000155. The records show that the Claimant had an MRI at Women’s and Children’s Hospital. Claimant’s submission. Appendix 000098 – 000100. The Claimant explained that he had to wait for an MRI there because he could not fit in the machine in Logan. Transcript page 10. Appendix 000183 – 000219. In the interrogatories the Claimant stated that he injured his Neck C1 and C3 and Back L5 and S1. Appendix 000108 - 000113. The Report of Dr. Mukkamala also notes that the Claimant was to be off work for 4 weeks. Appendix 61, Report page 35. The BOR of review found that the record included reports that the Claimant was disabled from June 28, 2022, to the present, Appendix 000274, paragraph 19; that the Claimant was not at the maximum degree of improvement but was ready for a PPD rating, and the period of disability was from June 28, 2022, to the present, March 12, 2023, Appendix 000275, Paragraph 23.

The Claimant testified that over the years he had been treated for back issues but had never missed time from work. Transcript page 11-12. Appendix 000182 – 000219. The Claimant testified that the pain he suffered after June 28, 2022, was different. He had pain in his legs, feet, and that his back pain was worse. Transcript page 13. Claimant’s submission February 22, 2023. Appendix 000182 – 000219.

The record dated June 29, 2022, includes statements that the Claimant felt a “pop” in his back following the accident and trouble with bowels, numbness, and tingling in BLE. Smith, page 1, Submission February 24, 2023. The neurological examination showed motor disturbances and sensory disturbances. Appendix 000173 – 000176.

Records submitted by the Employer for the treatment on June 20, 2022, clearly state, Daily Assessment: showing improvement as indicated in today's subjective. - Current Status: Improving because he is reporting less discomfort and is showing improved

function. Page 1, Hill Chiropractic Center, Employer's Submission January 18, 2023.  
Appendix 000069 – 000072.

The records show that on June 20, 2022, prior to the injury at issue, the Claimant was improving and of course able to work. The records from the emergency room treatment, June 28, 2022, show that his condition was significantly worse. Appendix 000129, 000189.

On August 29, 2022, the record reflects the following:

The Chief Complaint is: Patient in the office today for follow up on workers comp injury. He had his MRI on Friday ... BK Summers, Comp Clerk.

HISTORY OF PRESENT ILLNESS

Billy Johnson is a 47 year old male.

**Flu on Worker's Compo Pt c/o pain in mid back and lower back radiating into neck and lower extremities. Still having pain.**

Pain scale 6 on scale of 10.

Pt states was driving rock truck at work on 6/28/22 when ground gave away and rock truck fell approx 40 feet.

**Still having bowel irregularity. Intermittent constipation.**

• **Musculoskeletal symptoms.**

unable to tolerate tramadol--causing irritability and constipation.

Employer submission January 18, 2023. Appendix 000073 – 000097.

On October 24, 2022, the Claimant was evaluated for workers compensation purposes, and the record shows,

The Chief Complaint is: COMP VISIT ... SS RMA The Chief Complaint is:

Patient in the office today for follow up on workers comp injury. Still having pain. **Also with numbness to bilateral hands** ... BK Summers, Comp Clerk.

HISTORY OF PRESENT ILLNESS

Billy Johnson is a 47 year old male.

Flu on Worker's Compo Pt clo **pain in mid back and lower back radiating into neck and lower extremities.** Still having pain.

Pain scale 8 on scale of 10.

• **Musculoskeletal symptoms.**

Employer submission January 18, 2023. Appendix 000073 – 000097.

The record here clearly shows that the Claimant suffered additional pain and symptoms not of record prior to the June 28, 2022, injury, including severe pain, pain extending into both lower extremities, and other complaints.

The Claimant submitted both to the Third-Party Administrator and the BOR, the report of temporary total disability, which has not been acted on by the Employer.

The Employer submitted the report of Dr. Mukkamala dated July 31, 2023. Dr. Mukkamala concluded:

CONCLUSIONS:

1. What condition(s) are compensable and causally related to this claim? Please state with specificity the basis for your opinion.

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 rollover, but the claimant stated that the brakes failed and he developed pain in the low back. **Therefore, lumbar sprain/strain is the proper diagnosis.**

2. Has the claimant reached maximum medical improvement with regard to the compensable condition(s) related to this claim?

**I conclude that the claimant has reached maximum degree of medical improvement from the compensable injury dated 6/28/2022.**

3. What, if any, permanent impairment is the claimant presently suffering from exclusively related to the compensable condition(s) in this claim? If the claimant suffers from preexisting or non-compensable impairment, please exclude that impairment from your impairment rating calculation and state with specificity the amount of such pre-existing or noncompensable impairment and the basis for the exclusion of such impairment.

...

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 conclusions were expressed with a reasonable degree of medical certainty.

The evidence submitted by the Employer is that the Claimant reached the maximum degree of improvement on the date of Dr. Mukkamala's exam on July 31, 2023. The Claimant's protest to the order should be upheld, and the Claimant granted temporary total disability from June 28, 2022 until the date of the attending physician's report, dated November 4, 2022, and for such further time as the Claimant may qualify, that the compensability be extended to pain in the back, neck, both lower extremities, hands, and bowel, and such further relief as may be deemed appropriate.

#### STANDARD OF REVIEW

The 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.

On appeal of a decision of the West Virginia Workers' Compensation Board of Review from the Intermediate Court of Appeals of West Virginia to the Supreme Court of Appeals of West Virginia, the Supreme Court of Appeals is bound by the statutory standards contained in West Virginia Code § 23-5-12a(b) (eff. Jan. 13, 2022). Questions of law are reviewed de novo, while findings of fact made by the Board of Review are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Duff v. Kanawha County Commission*, No. 23-43 (W Va: Supreme Court of Appeals 2024)

#### SUMMARY OF ARGUMENT

The Claimant argued below that the BOR made a finding of discharge for cause, which is not within its jurisdiction. The ICA agreed that the BOR was in error but affirmed on the grounds that the Claimant was not temporarily totally disabled. The medical report of Dr. Mukkamala submitted by the Employer states that the Claimant suffered an injury which resulted in a 4% permanent partial impairment. The medical record establishes that the Claimant suffered impairments in addition to the back sprain that was initially ruled compensable. The Claimant should be awarded a period of TTD from the date of injury to the date of the report of Dr. Mukkamala, or in that alternative the claim should be remanded for findings regarding the period of TTD.

#### STATEMENT REGARDING ORAL ARGUMENT

Oral argument will significantly aid the decisional process with regard to the application of the law to the facts and standards of appeal at issue.

## ARGUMENT

### THE ICA 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)

The statute requires that claimants be paid temporary total disability for the period of time ending with their return to work or they have reached their maximum degree of improvement.<sup>7</sup> No evidence was submitted by the Employer prior to July 31, 2023 to establish maximum degree of improvement, and as noted in the BOR Order the Claimant submitted reopening forms documenting temporary total disability. In so far as the medical evidence is concerned, and as documented in the references in Dr. Mukkamala's report, the first medical evidence of record of the ending of Temporary Total Disability was his report. 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

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<sup>7</sup> §23-4-7a(c) When the authorized treating physician concludes that the claimant has either reached his or her maximum degree of improvement or is ready for disability evaluation, or when the claimant has returned to work, the authorized treating physician may recommend a permanent partial disability award for residual impairment relating to and resulting from the compensable injury, and the following provisions govern and control...*See also*, §23-4-7e(3) **When other evidence submitted to the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, justifies a finding that the claimant has reached his or her maximum degree of improvement;**

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 testified:

19 You went back to work. Tell me about  
20 the situation with -- you were hurt.  
21 Now, were you hurt at the beginning of  
22 the shift or the end of the shift on the 28th?  
23 A. I was at the end of the shift because I was  
24 the last one to get loaded and dump my load, then  
August 31, 2023, Transcript page 17, Appendix 000006 – 000017.

1 go to the park up. I never did make it to the park  
2 up because I flipped at 8:30.  
Q. Then what happened the next day? Did you  
4 come back to work? Is that when you had this  
5 meeting you were asked about?  
6 A. Yes. I went back to work. Chad Bailey  
7 told me "come here, we need to talk in the office,"  
8 and they started talking to me, and they just told  
9 me to go home. "We'll get in touch with you."  
10 Then RC called me. It's -- Eric Charles is his  
11 name.  
12 And he called me, he said, "You no  
13 longer work here."

14 But my thing is, when I got hurt that  
15 night, I went on camp.  
16 Q. Right.  
17 A. And then two days later, they fired me.  
18 Q. Well, when you say they fired you, they did  
19 that over the telephone?  
20 A. Yes, sir, they did.  
August 31, 2023, Transcript page 18, Appendix 000006 – 000017.

10 Q. Now, on your -- as we sit here today, are  
11 you -- have you had any additional medical  
12 treatment for your injuries?  
13 A. Yeah. I've been going to therapy two days  
14 a week on my neck and back. I messed up 14  
15 vertebrae between my neck and back.  
16 Q. Okay. Now, when you were working on June  
17 28th before this happened, you were able to do your  
18 job the way you were supposed to; right?  
19 A. Yes, sir.  
20 Q. And this situation with the prior event  
21 with the brakes and pulling off on the side of the  
22 road had -- that wasn't a physical problem. That  
23 had nothing to do with any prior back injury; is  
24 that correct?  
August 31, 2023, Transcript page 19, Appendix 000006 – 000017.

Here, the Claimant reported back to his place of employment in good faith. Dr. Mukkamala, for the Employer, found that he had 4% of his condition attributable to the injury of June 28, 2022. Dr. Mukkamala considered in extensive detail the entirety of the Claimant's medical record and made findings.<sup>8</sup>

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<sup>8</sup> *See also:* .1. To qualify for temporary total disability benefits, the claimant must be unable to work as a result of the compensable injury more than three (3) consecutive calendar days following the date of injury before benefits become payable. To receive temporary total disability benefits for the first three (3) days of disability, the claimant must be unable to work as a result of the compensable injury more than seven (7) consecutive calendar days following the date of injury.

5.2. If an individual retires, as long as the individual remains retired, he or she is disqualified from receiving temporary total disability indemnity benefits as a result of an injury received from the place of employment from which he or she retired, unless the application for benefits was received prior to his or her retirement. An individual who has retired is also barred from reopening for temporary total disability indemnity benefits an earlier claim filed in connection with an injury received at the place of employment from which he or she retired. This section does not preclude payments of benefits otherwise due a claimant if the retiree has returned to employment and suffers a compensable injury or payment of benefits if the compensable injury causes the individual to retire.

The ICA states that the report for the Claimant was contradictory because it stated that the Claimant was not at MMI but reading for PPD evaluation.<sup>9</sup> This finding disregards the period of time from the date of the injury to the date of that report, which was March 13, 2023. Further, PPD and MMI are not mutually exclusive. The statute specifically states,

(c) When the authorized treating physician concludes that the claimant **has either reached his or her maximum degree of improvement or is ready for disability evaluation**, or when the claimant has returned to work, the authorized treating physician may recommend a permanent partial disability award for residual impairment relating to and resulting from the compensable injury, and the following provisions govern and control:  
West Virginia Code §23-4-7a(c).

As demonstrated in this case, maximum degree of improvement in the context of prior injuries is not equivalent to permanent partial disability evaluation. All the treating provider was saying is that the Claimant was not at MMI but in his opinion a Permanent Partial Disability evaluation was appropriate. The ICA was clearly wrong in disregarding the multiple references to TTD for this reason.

The ICA and BOR failed to apply the law properly regarding eligibility for temporary total disability benefits. The Claimant submitted evidence of TTD from the time of the accident until the date of the report of Dr. Mukkamala. There is evidence of TTD which was disregarded by the ICA.

**THE ICA 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**

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5.3. If a period of disability includes a reasonably ascertainable period of time during which the claimant would not have been performing work for any employer, then temporary total disability indemnity benefits shall not be paid during that period. This section does not apply to periods of time caused by a reduction in force, lay-off, or time-off provided in connection with an employee benefit.  
W. Va. Code R. § 85-1-5

<sup>9</sup> “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.”

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.

The ICA and BOR here confined their analysis to conclusory statements which did not reflect the weighing of the evidence as required by the statute. There was no assessment of the relevance, credibility, materiality, and reliability of the evidence in the context of whether the Claimant should be disqualified. Likewise, there is no legal analysis of the very issue whether a Claimant can be disqualified for “cause” under the circumstances where there is no evidence of intoxication or deliberate intent to cause his own injury. The evidence indeed is that the conditions were less than favorable, the vehicle had a history of brake trouble, the dozer spotter was not on the job, and the Employer’s own examiner found the Claimant suffered a compensable injury.

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 BOR 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 findings.

The ICA cited a *per curiam* decision in support of its finding that the issue of TTD could be resolved on other grounds. Syl. Pt. 2, *Adkins v. Gatson*, 218 W. Va. 332, 333, 624 S.E.2d 769, 770 (2005). Here, the ICA does not fully consider the evidence of TTD cited by the BOR, the Claimant and Dr. Mukkamala. Its failure to do so prevents the Claimant from fairly appealing the decision of the BOR.

The issue here is that the Workers Compensation statutory scheme provides a specific instruction to the triers of fact regarding the consideration and weighing of evidence. In this context, the determination of the ICA to find error on the part of the BOR but to substitute its findings regarding TTD deprived the parties of an appropriate finding under the statute. For these reasons, the general law regarding the authority of the reviewing court has to be administered in the context of the weighing statute. There is no finding of the “relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented” because the ICA took a different approach from the BOR.

The issue before the ICA appeared to be limited to the issue of whether the Claimant was barred from receiving benefits for cause. The ICA decided that BOR decision to that extent was in error, but in turn committed error by failing to fully consider the evidence of TTD submitted by both the Employer and the Claimant. The ICA’s failure to properly consider the evidence of TTD was clearly wrong.

## CONCLUSION

The Board of Review shall reverse, vacate, or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:

- (1) In violation of statutory provisions; or
  - (2) In excess of the statutory authority or jurisdiction of the administrative law judge; or
  - (3) Made upon unlawful procedures; or
  - (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. V. Code §23-5-12(b)

In this case, 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;

Misapplying the law regarding obvious errors in its finding of no TTD, where the first evidence of Maximum Degree of Improvement was from Dr. Mukkamala on July 31, 2023.

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 in upholding the denial of TTD. It was clearly wrong in its finding that MMI and PPD are equivalent.

The decision of the BOR should be reversed. 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 this Court may deem appropriate. In the alternative, because the findings of the BOR were based on a different legal theory than that utilized by the ICA, the claim should be remanded to the BOR for further

proceedings regarding the dates of TTD in accordance with the Weighing of the Evidence statute.

**Petitioner,  
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