SUPREME COURT NO.: 35219
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARTY L. GREATHOUSE, APPELLANT, V. INSURANCE COMMISSIONER OF WV IN ITS CAPACITY AS ADMINISTRATOR OF THE OLD FUND, AND THE WACKENHUT CORPORATION, APPELLEES.	)))))))))))))	B.O.R. APPEAL NO.: 2037617 CLAIM NO.: 2004026955

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BRIEF OF THE APPELLEE ON BEHALF OF THE OFFICE OF INSURANCE COMMISSIONER

OFFICE OF INSURANCE
COMMISSION OLD FUND,

By Counsel,

Jack M. Rife
State Bar No. 7782

Workers' Compensation Litigation Division
Post Office Box 4318
Charleston, West Virginia 25364
(304) 558-0708

November 30, 2009

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CLAIM NO: 2004026955

V.

INSURANCE COMMISSIONER OF WV
IN ITS CAPACITY AS ADMINISTRATOR OF THE OLD FUND,

AND

THE WACKENHUT CORPORATION,
APPELLEES.

BRIEF OF THE APPELLEE ON BEHALF OF THE OFFICE OF INSURANCE COMMISSIONER[1]

I. PROCEDURAL HISTORY

This case comes to this Honorable Court on appeal from an Order of the Workers' Compensation Board of Review dated March 5, 2008 which reversed the decision of the Workers' Compensation Office of Judges dated March 29,

[1] On December 31, 2005 at 11:59 p.m., pursuant to West Virginia Code §§ 23-2C et. seq., and a proclamation of the Governor, the Workers' Compensation Commission was terminated. West Virginia Employers' Mutual Insurance Company, d/b/a BrickStreet Mutual Insurance Company, a private employer mutual insurance company, is now the sole provider of workers' compensation insurance in West Virginia for all claims with a date of injury of July 1, 2005 and thereafter. All earlier claims, such as the claim in issue here, remain a State of West Virginia obligation in what is statutorily referred to as the "Old Fund." The Old Fund is administered by the Insurance Commissioner. The Insurance Commissioner in its capacity as Administrator of the Old Fund is the real party-in-interest here. This pleading will refer to the Insurance Commissioner as Administrator of the Old Fund as the "Commissioner" when referring to events before and after January 1, 2006. The term "WCC" refers to the predecessor Workers' Compensation Commission and/or Division. This response is that of the "Commissioner."

2007. The decision of the Office of Judges reversed an order of the Claims Administrator dated September 25, 2006 denying a reopening of this claim for temporary and total disability benefits. The Office of Judges reopened this claim and granted temporary and total disability benefits from June 26, 2006 to October 1, 2006. The Board of Review's Order should be affirmed because no reversible error was committed.

II. STATEMENT OF FACTS

The Claimant, a security guard for the employer, Wackenhut Corporation, was injured on December 17, 2003 when another employee pushed him into two computers on a desk jamming his left elbow, arm and shoulder underneath him. The next day, the Claimant began chiropractic treatment three days per week with a chiropractor.

The issue at hand arose pursuant to a reopening application filed by the Claimant and received by the Claim Administrator on August 16, 2006. The request was for a reopening of the claim for medical benefits and temporary and total disability benefits.

By Order dated September 25, 2006, the Claim Administrator denied reopening for medical benefits. It did not rule on the issue of temporary and total disability benefits. The Claimant protested the Claim Administrator order.

In support of the protest, the Claimant submitted his deposition and the deposition of Dr. Jeffrey Summers. The Office of Judges (hereinafter the "OOJ") ruled that there was sufficient evidence of an aggravation or progression of the compensable injury and reopened the claim for temporary

and total disability benefits and granted the same for the period June 26, 2006 to October 1, 2006. The Commission appealed to the Board of Review (hereinafter the "BOR") and, by decision dated March 5, 2008, the BOR reversed the OOJ and reinstated the Claim Administrator order dated September 25, 2006. The BOR found that the Claimant is not entitled to temporary and total disability benefits during the period he was receiving Social Security Disability benefits.

> The Board finds the final order's analysis and conclusions were clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The evidence of record establishes that the claimant was not entitled to temporary total disability benefits, which are wage replacement benefits. The evidence establishes that the claimant was receiving Social Security Disability benefits at the time he signed the Claim Re-opening Application in 2006. Consequently, he had no wages to replace. Therefore, this Board holds that the claimant is not entitled to temporary total disability benefits for the time period from June 26, 2006 to October 1, 2006.

BOR order dated March 5, 2008.

The Claimant petitioned this Honorable Court for review of the BOR decision dated March 5, 2008 and the petition was granted by order dated September 29, 2009.

III. ISSUE PRESENTED

Whether the BOR committed reversible error in its order of March 5, 2008.

IV. ARGUMENT

The order of the BOR should be affirmed because no reversible error was committed.

Standard of Review

W. Va. Code § 23-5-15 sets forth the standard of review of an appeal before this Court.

> (b) In reviewing a decision of the board of review, the supreme court of appeals shall consider the record provided by the board and give deference to the board's findings, reasoning and conclusions, in accordance with subsections (c) and (d) of this section.
>
> (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.

W. Va. Code § 23-5-15.

Argument

The BOR order is in conformity with the law and no evidence was misstated or mischaracterized.

"[T]he commission shall disburse the workers' compensation fund to the employees of employers subject to this chapter who have received personal injuries in the course of and resulting from their covered employment . . . ." W.Va. Code §23-4-1. There are three elements which must be proved by the claimant in order for a claim to be held compensable: (1) a personal injury; (2) received in the course of ernployment; and (3) which resulted from that employment. Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970). There must be a causal connection between the claimant's injury and the claimant's employment. Emmel v. State Compensation Director, 150 W.Va. 277, 145 S.E.2d 29 (1965); Deverick v. State Compensation Director, 150 W.Va. 145, 144 S.E.2d 498 (1965).

"A claimant in a workmen's compensation proceeding has the burden of proving his claim." Staubs v. State Workmen's Compensation Commissioner, 153 W.Va. 337, 168 S.E.2d 730 (1969); Sowder v. State Workmen's Compensation Commissioner, 155 W.Va. 889, 189 S.E.2d 674 (1972). "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 Workers' Compensation Commissioner, 155 W.Va. 726, 187 S.E.2d 213 (1972).

W.Va. Code §23-4-1g(b) states;

> [e]xcept as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the

> application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

Further, that same section sets forth the standard for the evaluation of evidence in subsection (a) which states:

> 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 BOR Should be Affirmed Because the Claimant was Receiving Social Security Disability During the Time he Sought TTD Benefits.

As noted above, the evidence reveals that the Claimant is not entitled to additional temporary and total disability benefits. Specifically, the reopening application filed by the Claimant disclosed that he sought additional TTD benefits during the time he was receiving Social Security Disability benefits. Moreover, the Claimant testified that he was receiving SSD at the time he sought TTD benefits.

It is well-settled West Virginia workers' compensation law that temporary and total disability benefits are wage replacement benefits. A claimant who is

receiving SSD benefits is disqualified from receiving TTD benefits due to the fact that there are no wages to replace.

Accordingly, the BOR did not violate a law nor did it misstate or mischaracterize any fact in reversing the OOJ and reinstating the Claim Administrator order. It was not error, reversible or otherwise, to find that the Claimant's receiving SSD automatically disqualified him from receiving TTD benefits during the same period. As such, the BOR should be affirmed.

V. CONCLUSION

The Worker's Compensation Board of Review was correct to reverse the Office of Judges and reinstated the Claim Administrator order denying the reopening of this claim for additional temporary and total disability benefits. The Board of Review order of March 5, 2008 should be affirmed.

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CERTIFICATE OF SERVICE

I, Jack M. Rife, Legal Counsel to the Office of Insurance Commissioner Old Fund, do hereby certify that copies of the foregoing *"Brief of the Appellee"* and "*Commission's Appendix of Documents*" were served upon the parties of record this 30th day of November, 2009, by United States Mail, to the following persons properly addressed as follows:

HAND DELIVERED
Mr. Rory L. Perry, II, Clerk
WV Supreme Court of Appeals
Bldg. 1, Rm E-317 - State Capitol Complex
1900 Kanawha Blvd., E.
Charleston, WV 25305-0831

U.S. MAIL
The Wackenhut Corporation
2333 MacCorkle Ave. – Suite 200
St. Albans, WV 25177

U.S. MAIL
G. Patrick Jacobs, Esquire
LAW OFFICES OF BICKLEY & JACOBS
7020 MacCorkle Ave., S.E.
Charleston, WV 25304

Jack M. Rife