

14-0983

STATE OF WEST VIRGINIA  
WORKERS' COMPENSATION BOARD OF REVIEW

MWWP PLLC  
SEP 02 2014  
RECEIVED

CITY OF CHARLESTON,  
Appellant

v.

WILLIAM L. GILL,  
Appellee

Appeal No: 2049208  
JCN: 2012026734  
DOI 02/08/2012

ORDER

The following case is an appeal by the employer from a final order of the Workers' Compensation Office of Judges dated February 3, 2014, which reversed the claims administrator's order dated August 22, 2012, denying the request to add neuritis/radiculitis, thoracic/lumbosacral (724.4), sciatica (724.3), degeneration of lumbosacral IVD (722.52) and facet syndrome (724.8) as compensable components of the claim, and the Administrative Law Judge added the diagnoses as compensable components of the claim.

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia Supreme Court of Appeals. Upon our review of this case, we have determined to reverse the decision of the Office of Judges, as the substantial rights of the employer have been prejudiced.

FINDINGS OF FACT:

The Board adopts the final order's Findings of Fact.

DISCUSSION:

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. At issue is whether neuritis/radiculitis, thoracic/lumbosacral (724.4), sciatica (724.3), degeneration of lumbosacral IVD (722.52) and facet syndrome (724.8) should be added as compensable components of this claim. On February 8, 2012, the claimant was getting under a rescue dummy and started the lift when he felt burning and pain in his back. On February 22, 2012, the claims administrator held the claim compensable for lumbar sprain/strain and thoracic sprain/strain.

The Administrative Law Judge added the conditions of neuritis/radiculitis, thoracic/lumbosacral (724.4), sciatica (724.3), degeneration of lumbosacral IVD (722.52) and facet syndrome (724.8) as compensable components of the claim. The Board notes that the claimant suffered from these conditions prior to the compensable injury. Additionally, West Virginia Code of State Rules § 85-20-37.8 provides as follows: "Co-morbidity (e.g., degenerative disc disease, spondylolisthesis, segmental instability, osteoporosis, spine deformity) may be associated with a higher incidence of persistent symptoms but are not compensable conditions."

In 1992, the claimant was admitted to Cabell Huntington Hospital with a history of falling about 80 feet. A report dated December 18, 1992, indicates that the claimant suffered a fractured pelvis, fractured sacrum with fracture of the pedicle of L5 extending to a depth of L5 as well as the superior facet of S1, and the fracture of L5 was noted to be unstable. The claimant was transferred to a hospital in Pittsburgh, Pennsylvania.

Records from Short Chiropractic show that the claimant was treated for thoracic and/or lumbar complaints during 2004, 2005, 2006, 2008, 2009, 2011, and 2012. A Treatment Plan from Short Chiropractic dated April 16, 2004, lists the following diagnoses: "724.3 L-Rad; 722.52 L-Disc Degen; 722.10 L-Disc Displace; 724.8 L-Facet Syn." During the month prior to the compensable injury, the claimant was treated at Short Chiropractic on at least seven occasions for thoracic and lumbar complaints. On February 7, 2012, which is the day before the compensable injury, the claimant was treated for the following diagnoses: "724.1 thoracalgia, 724.3 sciatica, 722.52 degeneration of lumbar or lumbosacral IVD, 728.85 spasm of muscle."

On March 21, 2012, Dr. David Weinsweig indicated that the claimant has multilevel degenerative disc disease with stenosis. Records from St. Mary's Medical Center dated May 15, 2012, state that the claimant presents with a long history of low back pain with radiculopathy and the assessment was radicular low back pain secondary to degenerative change in the lumbar spine causing spinal canal and

neuroforaminal stenosis. On June 28, 2012, Dr. Bill Hennessey reported that the claimant has a very significant medical history of pre-existing back pain dating back to 18 years of age. Based upon the claimant's history, medical records, and in light of the preponderance of the evidence standard set forth in West Virginia Code § 23-4-1g, the Board finds that the additional diagnoses are not compensable components of the claim.

CONCLUSIONS OF LAW:

Accordingly, it is hereby ORDERED as follows:

1. The final order of the Workers' Compensation Office of Judges dated February 3, 2014, is REVERSED and VACATED.
2. The claims administrator's order of August 22, 2012, which denied the request to add the conditions of neuritis/radiculitis, thoracic/lumbosacral (724.4), sciatica (724.3), degeneration of lumbosacral IVD (722.52) and facet syndrome (724.8) as compensable components of the claim, is REINSTATED.

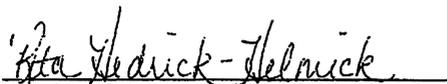
From any final decision of the Board, including any order of remand, an application for review may be prosecuted by any party to the Supreme Court of Appeals within thirty days from the date of this order. The appeal shall be filed with Rory L.

WILLIAM L. GILL

Appeal No. 2049208

Perry, II, Clerk of the West Virginia Supreme Court of Appeals, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

DATED: August 29, 2014



Rita Hedrick-Helmick, Chairperson

cc: CITY OF CHARLESTON  
JAMES W. HESLEP  
SEDGWICK CMS  
WILLIAM L. GILL  
PATRICK K. MARONEY

**STATE OF WEST VIRGINIA  
WORKERS' COMPENSATION OFFICE OF JUDGES**

IN THE MATTER OF:

JCN: 2012026734

William L. Gill,  
CLAIMANT

DOI: 02-08-12

and

City of Charleston,  
EMPLOYER

**DECISION OF ADMINISTRATIVE LAW JUDGE**

**PARTIES:**

Claimant, William L. Gill, by counsel, Thomas Maroney  
Employer, City of Charleston, by counsel, Gary Nickerson

**ISSUE:**

The claimant protested the Claim Administrator's Order, dated August 22, 2012, denying the inclusion of ICD9-CM diagnosis codes 724.4 (neuritis/radiculitis, thoracic/lumbosacral); 724.3 (sciatica); 722.52 (degeneration of lumbosacral IVD); and, 724.8 (facet syndrome).

**DECISION:**

It is ORDERED the Claim Administrator's Order, dated August 22, 2012, is REVERSED and the Claim Administrator is ORDERED to designate and include ICD9-CM diagnosis codes 724.4 (neuritis/radiculitis, thoracic/lumbosacral); 724.3 (sciatica); 722.52 (degeneration of lumbosacral IVD); and, 724.8 (facet syndrome) as compensable elements of the injury of February 8, 2012.

**RECORD CONSIDERED:**

See attached record considered.

**FINDINGS OF FACT:**

1. By Order dated August 22, 2012, the Claim Administrator denied the inclusion of ICD9-CM diagnosis codes 724.4 (neuritis/radiculitis, thoracic/lumbosacral); 724.3 (sciatica); 722.52 (degeneration of lumbosacral

IVD); and, 724.8 (facet syndrome) as compensable elements of the thoracic/lumbar strain/strain injury of February 8, 2012. The authorization denial was a response to a request from the claimant's attending chiropractic physician, Dr. Brett A. Short. The Claim Administrator's rationale for the denial cited the evaluation from Dr. William Hennessey, dated June 28, 2012, who, in turn, cited the compensable diagnoses as ICD9-CM diagnosis codes 847.2 (lumbar sprain/strain); and, 847.1 (thoracic sprain/strain).

2. Pursuant to §93-1-7.5.B, judicial notice acknowledges the earlier decision of this Office, dated June 19, 2013. That decision, following consideration of a substantial amount of the documentation submitted in regard to the instant litigation (i.e., the claimant's protest to the Claim Administrator's Order of August 22, 2012), reversed the Claim Administrator's denial of authorization of lumbar epidural injections and additional chiropractic treatment per Orders dated July 13, 2012. The June 19 decision, in summary, held the claimant's lumbar and thoracic spine condition, prompting the request for the denied treatment per the July Orders, was the result of a compensable aggravation of preexisting conditions in reliance Charlton v SWVV, 236 S.E. 2d 241 (W. Va. 1977). On appeal, an Order of the Worker's Compensation Board of Review, dated January 23, 2014, remanded Mr. Gill's claim for further evidentiary development-instructing the Office of Judges, to then again issue a decision either affirming, reversing or modifying the decision of June 19, 2013. The Board's opinion, in relevant part, stated as follows:

The employer asserts the spinal injections and additional chiropractic treatment are for non-compensable conditions. The employer seeks a remand of the claim to submit evidence regarding prior symptoms and conditions. The Board notes that the claimant has requested that additional diagnoses be added to the claim. The Claim Administrator's Order, dated August 22, 2012, denying the additional diagnoses, is on protest at the Office of Judges. Whether or not the diagnoses are added to the claim is relevant to the treatment issues herein. The Board finds that additional evidence is necessary for a full and complete development of the facts of the claim. Therefore, the claim must be remanded to the Office of Judges. (pp.1-2).

3. In response to the submission of the claimant's "employees'/physicians' report of injury," dated February 22, 2012 (asserting the compensability of a lumbar spine injury occurring February 8, 2012), the Claim Administrator, by Order dated February 22, 2012, held Mr. Gill's application compensable on a lost time basis for lumbar and thoracic sprain/strain per ICD9-CM diagnosis codes 847.2 and 847.1. Although the claimant's portion of the application in regard to how the injury occurred is substantially illegible, the record designation also includes the typewritten employer's report of injury dated

February 21, 2012. The employer's report indicates the claimant, while participating in firefighter/EMT training injured his mid and lower back and right side while "...doing rescue drags and carries with the rescue dummy. When getting under the dummy to lift [he] started the lift and felt burning pain in [his] lower to mid back and right side." The employer's report indicates the injury occurred February 8, 2012 at approximately 1:30 p.m. While the medical portion of the application is also substantially illegible, it appears completed by the claimant's attending chiropractic physician diagnosed thoracic and lumbar sprain as a result of a lifting injury at work. His initial treatment for the injury occurred February 12, 2012.

4. The record designation includes the claimant's credible deposition of October 8, 2012 in which he testified he has been employed as a firefighter/EMT with the chargeable employer since July 2002; that the back injury of February 8, 2012, occurred when "me and my partner, Pat Beats, were at our...it's basically a gym, but it's the old Station 8 on the west side, and we were down there doing physical training, and I was dragging the "Rescue Randy," which weighs between 160 to 180 pounds, I don't know exactly. As I went to pick up the "Rescue Randy," I had severe pain in the middle and my lower back and my side and I put the...set him back down, the "Rescue Randy," and told Pat that I needed to go back to the station because my back was hurting." (pp. 4-5); that his pain was immediate in the mid to lower back and right side between his belt and shoulder and "...felt like a knife was in my right side." (p. 5); that shortly after the injury, the claimant experienced pain down his right leg and "...I even have...my right foot will get numb now, and I have electric...I call them electrical shocks that go down my leg and come out...feels like they come out my toes." (p. 6); that he presented for initial treatment the following day at Short Chiropractic, Inc. where treatment consisted primarily of traction and electric muscle stimulation; that these treatments were helping his condition in the sense that it does not completely take away his pain but allows him to function better on a daily basis; that without chiropractic treatment, his pain increases with worsening symptoms affecting his daily activities; that lumbar injections had been recommended and he received one of a series of three from a Dr. Haikal at St. Mary's Hospital; that he had the initial injection in June of 2012; that the injection was beneficial and that it improved his ambulation; that he has participated in two functional capacity evaluations one on August 8, 2012 which he characterized as a failure in that he only retained the residual capacity to lift 20 pounds or less; that he was referred for physical therapy authorized by the Claim Administrator; that his second functional capacity evaluation occurred September 25, 2012 and that his residual functional capacity increased to 50 pound lifting, indicating progress; that when he presented for examination by Dr. William Hennessey, he brought his 2012 MRI scan; that he underwent MRI scans for the cervical and thoracic spines in 2008; that in reference to page 2 of Dr. Hennessey's report, he believed that he was being asked if he had any prior problems in regard to his thoracic spine; that he acknowledged that he had prior lumbar spine problems in the past with an initial back injury occurring in 1985 when he lifted the door handle up on his car

and felt back pain at the age of 18 years; that he sustained a back injury in 2003 while playing basketball as part of his physical training with the chargeable employer and that was the first time he had presented for back treatment since 1992; that he characterized his examination with Dr. Hennessey as beginning at noon and ending by 12:15 p.m.; that to the best of his knowledge that in regard to the specifics of the examination, he remembered Dr. Hennessey measured his legs and tested his reflexes; that he was asked to stand up and Dr. Hennessey did push on his right side; that he was not aware if Dr. Hennessey performed range of motion measurements; that in regard to the injury of February 8, 2012, he started missing work approximately February 20 through July 16, 2012; that he is still under care of his chiropractic physician, Dr. Short; that he did present for examination with a neurosurgeon, Dr. Weinsweig, in March of 2012; that Dr. Weinsweig recommended lumbar injections; that in regard to current symptoms, the claimant has "...pain in my right side, my lower back, and in my mid back. The pain from my lower back goes down my right leg. My right leg, actually, as we're sitting here, is asleep. And I get tingling in my feet, especially my right foot." (p. 23); that Dr. Weinsweig, Dr. Halkal, and his attending chiropractic physician have all advised the claimant that his injury of February 8, 2012 involves more than a sprain/strain soft tissue injury; that he acknowledged that in 1992, he sustained an injury in the form of fractures to the left leg and pelvis; that his reason for the cervical MRI scan of 2008 was his experiencing chest pain and thought he was having cardiac difficulty; that since 2003, he has presented for chiropractic treatment periodically for lower back problems; that he has denied in regard to his prior problems ever experiencing severe foot pain like he has experienced subsequent to the injury of February 8, 2012.

5. The employer's record designation includes the MRI scan of the thoracic spine from Tri-State MRI dated July 28, 2008 which references a diagnostic impression of "mild multilevel degenerative change and disc disease, most prominent T7-T8 causing mild cord abutment but no significant neural foraminal narrowing."

6. The claimant's record designation includes the following MRI scans from St. Mary's Medical Center dated March 2, 2012:

a) Thoracic scan which in comparison with the July 2008 scan showed "mildly worsened disc protrusion at C7-T1 and T2-T3 causing acquired and central canal stenosis. Not mentioned above, there is persistent left sided T1-T2 and T2-T3 neural foraminal narrowing very similar to the prior study. Worsened inferior disc extrusion at T5-T6 causing acquired central canal stenosis, but no significant neural foraminal narrowing."; and,

b) Lumbar MRI scan with a diagnostic impression of "multilevel degenerative change and disc disease causing acquired central

canal and bilateral neuralforaminal narrowing. Neuralforaminal narrowing is worse on the right at L5-S1."

7. The record designation includes treatment notes from Short Chiropractic, Inc. summarized as follows:

a) May 30, 2012 with Dr. George Knipp advising overall lumbar pain felt the same as last visit with objective examination revealing areas of spasm tenderness at T7, T10 and L5 and a diagnostic assessment of thoracic and lumbar sprain/strain; treatment included electrical stimulation and mechanical traction;

b) June 6, 2012 with the claimant reporting claimant has felt better since the last visit and started injections on June 4, 2012; Dr. Knipp's examination revealed spasms and tenderness indicative of subluxation at T7-T10 and L5; the diagnostic assessment was thoracic and lumbar sprain/strain with treatment including electric stimulation and mechanical traction;

c) June 19, 2012 with Dr. Knipp reporting that the claimant's overall thoracic and lumbar complaints felt better since the last visit; objective examination revealed there is a spasm and tenderness indicative of subluxation at T7, T10 and L5; diagnostic assessment is expanded to include thoracic lumbar neuritis/radiculitis; degeneration of the lumbar intervertebral disc; sciatica, facet syndrome and muscle spasm. Treatment plan included electrical stimulation and computer generated traction; Dr. Knipp diagnostic impression referenced ICD 9-CM diagnosis codes 724.4 (neuritis/radiculitis thoracic/lumbosacral); 722.52 (degeneration of lumbar or lumbosacral IVD); 724.3 (sciatica); 724.8 (facet syndrome); and 728.85 (spasm of muscle). Dr. Knipp noted that the claimant's prognosis was good with a decrease in symptoms since treatment began. Dr. Knipp recommended that the claimant return once a week for four weeks.

d) June 29, 2012 with Dr. Knipp reporting claimant's thoracic and lumbar complaints felt better since the last visit; Dr. Knipp's exam revealed spasm and tenderness indicative of subluxation at T7-T10 and L5; the diagnostic assessment remains as referenced in the office note of June 19, 2012; treatment plan included electrical stimulation and computer generated lumbar traction; Dr. Knipp diagnostic impression referenced ICD9-CM diagnosis code 724.4

e) July 20, 2012 with Dr. Short reporting the claimant's right foot toes have experienced burning sensation like "frostbite"; Dr. Short

noted a history that the claimant presented with low back and mid back pain from the February 8, 2012 injury; patient, a fireman, suffered an injury on picking up a dummy during a drill and felt immediate burning sensation. Has pain on the right side of low back, seems to start in the center and travels to the right side and will travel into the right leg and foot, sometimes feels electric shock in foot and anterior thigh goes numb occasionally. The claimant's pain in February was rated as a 10/10 on VAS scale and today he rates it as 6/10. Laying on an exercise ball relieves his pain temporarily. Static sitting and sleeping are difficult. Pain increases when he leans to the left. The objective examination found area of spasms and tenderness indicative of subluxation at T7-T10 and L5; diagnostic assessment was as referenced in the two above previous office notes of June 19 and June 29, 2012; Dr. Short represented the claimant's prognosis as good with improvement after treatment with increase in passive joint motion and decrease in symptoms; treatment plan included electrical stimulation and computer generated traction;

f) August 21, 2012 with Dr. Short continued the ICD9-CM diagnosis code as referenced in the June 19, 2012 office note; Dr. Short advising the claimant was past due for treatment and has experienced increased symptoms due to missing last week; pain has increased in the upper back and low back. Dr. Short's examination revealed spasm and tenderness indicative of subluxation at T4, T7, T10 and L5 as well as indicative of subluxation at the right pelvis. Exam findings were also positive for sacroiliac joint dysfunction; Dr. Short's assessment were the diagnoses as referenced in the office visits of June 19, June 29 and July 20, 2012. Treatment plan included electrical stimulation and computer generated lumbar traction, as well as spinal adjustment. Dr. Short recommended claimant participate in a work conditioning regimen at Barboursville Physical Therapy, as well as following through with lumbar injections at St. Mary's Pain Clinic.

8. The record designation includes treatment notes from Short Chiropractic Incorporated, from either Dr. George W. Knipp, II, and/or Dr. Brett A. Short, D.C., summarized as follows:

a) February 9, 2012, with Dr. George W. Knipp dictating a presenting history that the claimant presented with mid thoracic, lower thoracic, and lumbar complaint "...felt worse due to an exacerbation since the last visit. This is all being re-entered on 2-24-12 due to computer error. He did suffer a [workers'] compensation claim yesterday, dated 2-8-12. We will try conservative care before taking radiographic films and thorough

exam." Dr. Knipp stated that due to the "...high level acuteness and instability of the patient's condition, it is recommended that William receive treatment daily until the symptoms decrease and stability of the affected area improves." On clinical examination palpation showed areas of spasm, hypomobility and end-point tenderness indicative of subluxation at T7, T10 and L5. He tested positive for myofascitis. This is an inflammation of the muscle and fascia, particularly the fascial insertion of muscle to bone.";

b) February 10, 2012, with Dr. Knipp recording the claimant's lower thoracic, mid thoracic and lumbar complaint were the same since the prior visit. Dr. Knipp's diagnostic impression remained thoracic and lumbosacral sprain/strain with the recommendation of continued daily treatment;

c) February 13, 2012, with Dr. Knipp reporting the mid thoracic, lower thoracic and lumbar complaints were same as prior visit; diagnostic impressions remained thoracic and lumbar sprain/strain with recommendation of daily treatment;

d) February 20, 2012, with Dr. Knipp reporting the claimant presented with mid thoracic, lower thoracic and lumbar complaints "...felt poor since last visit. We will re-examine him tomorrow and take new radiographs." The diagnostic assessment remained thoracic and lumbosacral sprain/strain with recommendation for daily treatment until symptoms decrease;

e) March 1, 2012, with Dr. Knipp reporting the claimant's mid thoracic, lower thoracic and lumbar complaints remained the same since prior visit; the diagnostic impressions remained thoracic and lumbosacral sprain/strain with recommendation that the claimant return for treatment at an interval of three times a week for three weeks; and,

f) June 1, 2012, documenting treatment plan of Dr. Knipp for 1-2 weeks of chiropractic treatment for a total of eight visits with treatment running from June 1, 2012, to August 1, 2012. The diagnostic impressions remained thoracic and lumbar sprain/strain showing the date of onset of symptoms as February 8, 2012;

9. The employer's record designation includes treatment notes from Short Chiropractic Clinic from January 11, 2012 through February 7, 2012 evidencing chiropractic treatment including electrical stimulation, spinal adjustments and mechanical traction for ICD9-CM diagnosis codes 724.1 (thoracalgia); 724.3 (sciatica); 722.52 (degeneration of lumbar lumbosacral IVD); and 728.85 (muscle spasm). Dr. Knipp's subjective notes from the visit of February 7, 2012, a day

prior to the compensable injury, stated the claimant's overall lumbar and thoracic complaints felt better but then returned, but not as bad since the last visit. Dr. Knipp's physical examination indicated sacroiliac joint dysfunction, hypertonicity in the mid thoracic, lower thoracic and lumbar regions positive for myofascitis indicating inflammation of the muscles and fascia. Dr. Knipp's assessment was that the patient had responded poorly since his last treatment. Dr. Knipp's prognosis was good with improvement after treatment. Treatment plan included electrical stimulation, spinal adjustments and mechanical traction, with a recommendation that the claimant return for treatment as needed. The treatment note also includes documentation from a message therapist from Short Chiropractic indicating the claimant presented today with a complaint of left lumbar and right lumbar discomfort rating the discomfort as 5 on a 10-point scale, noting that the onset of pain was "gradual." The therapist noted in her assessment there had been a 15% improvement in the lumbar function and pain since beginning of care.

10. The claimant's record designation includes the "functional capacity evaluation summary report," of claimant from Barboursville Physical Therapy. The author of the narrative, Mr. Mike Kennedy, recommended a three to four week work conditioning program with a discharge goal of progressing from the light to light-medium and possibly medium physical demand level. Mr. Kennedy stated the claimant provided a full physical effort; that the evaluation findings were reasonable and reliable; and that on the basis of the testing the claimant would be placed in the light physical demand category.

11. The claimant's record designation includes a narrative from Mr. Rob Crowder, PT addressed to the claimant's attending chiropractic physician, Dr. Brett Short, dated August 28, 2012. Mr. Crowder advised that the claimant tolerated two hours of work conditioning regimen well. The claimant rated his pain as a 5/10 on a 0 to 10 point scale, a reduction from 6/10 on the date of the above-referenced functional capacity evaluation of August 8, 2012.

12. The claimant's record designation includes the report from Mr. Rob Crowder, PT, of Barboursville Physical Therapy dated September 25, 2012 addressed to the claimant's attending chiropractic physician, Dr. Brett Short. Mr. Crowder advised that the claimant's participation in the work conditioning program was completed and that the claimant had given "excellent effort." Mr. Crowder assessed that the claimant continued to have "significant complaints of pain in the thoracic and lumbar spine (especially in the right) throughout the lumbar region." Mr. Crowder noted that, in comparison to the functional capacity evaluation of August 8, 2012, Mr. Gill's material handling activities increased from 0 pounds to 20 pounds on August 8, 2012 to 24 pounds to 70 pounds on September 25, 2012.

13. The employer's record designations includes a progress note from Dr. Ahmed Abdelgaber of Ultimate Health Services dated August 19, 2008. The

physician notes the claimant presented with episodes of palpitation, chest pain and heart beating very fast, perhaps maybe more than 150. This happened a couple times with the last one being yesterday. The history also notes the claimant recently had physical therapy and did admit to the therapist he was having some neck and back pain so an MRI was taken which showed severe spinal stenosis in the cervical spine. He was seen by Dr. Weinsweig who recommended surgery which he will have in October 2008. The physician's assessment noted claimant's recurrent palpitation with chest pain with exhaustion of all kinds of testing in conjunction with those symptoms. CT scan of the carotid arteries was not sufficient. He had a cardiac cath that was normal, stress tests were okay, as well as endoscopies.

14. The record designation includes an outpatient consultation from St. Mary's Medical Center, dated May 15, 2012, from Dr. Lee Haikal, an interventional radiologist on a referral from Dr. David Weinsweig. Dr. Haikal recorded the following history:

This is a 45-year-old white male who works as a firefighter for the City of Charleston who presents with a long history of low back pain with radiculopathy. The back pain is getting worse primarily with radiculopathy into the right lower extremity at the L4 and L5 nerve root distribution as by history. He has had trauma in the left lower extremity with compound fracture of the tib-fib and repair many years ago. The MRI of the lumbar spine demonstrates significant spinal canal stenosis and neuroforaminal stenosis bilaterally. Neuroforaminal stenosis is worse at the L5-S1 level on the right side. He has used a chiropractor as well, and he states that the chiropractic manipulations of the low back do help in the short run; however, the pain does recur after a day or two.

Dr. Haikal's treatment plan recommended epidural steroid injections for diagnostic and therapeutic purposes. If the first injection were successful, would continue with two additional injections a month apart; however, if the first injection was not successful, than other treatment modalities would be considered.

15. The record designation includes office notes of chiropractic treatment for the lumbar and thoracic spine from Short Chiropractic on dates of December 17, 2008; December 22, 2008; April 22, 2009; June 23, 2009; June 26, 2009; September 23, 2009; November 9, 2011; and December 2011.

16. The employer's record designation includes a discharge summary from Cabell Huntington Hospital dated December 18, 1992 indicating the claimant was admitted to the trauma service with a history of falling about 80 feet. The claimant was admitted with severe pain along the back area and definite in the back and abdominal area. There was a definite open compound

fracture of the left tibia/fibula. The claimant was noted to have a fractured pelvis, fractured sacrum and fracture of the pedicle of the L5 extending to a depth of L5 as well as superior facet of S1. Discharge summary notes patient was transferred for further treatment regarding the pelvic fracture and the L5 fracture to Dr. William Lauerman at the Presbyterian Hospital in Pittsburgh, Pennsylvania.

17. The record designation includes a case progress note and treatment plan from Short Chiropractic Incorporated respectively dated April 15, 2004, and April 16, 2004 evidencing treatment for ICD 9-CM diagnosis codes 724.3 (lumbar radiculopathy); 722.52 (lumbar disc degenerative disc disease); 722.10 (lumbar disc displacement); and 724.8 (lumbar facet syndrome).

18. The record designation includes the following Claim Administrator's Orders summarized as follows:

a) February 22, 2012, holding the claim compensable for ICD 9-CM diagnosis codes 847.1 (thoracic sprain/strain); and 847.2 (lumbar sprain/strain); with notice of temporary total disability benefits on-setting February 22, 2012;

b) May 21, 2012, advising that the authorization request for lumbar epidural steroid injections would be deferred pending evaluation by Dr. Bill Hennessey, scheduled for June 28, 2012;

c) July 13, 2012, denying authorization for additional chiropractic treatments requested by Scott Chiropractic on June 1, 2012;

d) July 13, 2012, denying authorization for lumbar epidural injections;

e) July 13, 2012, denying the claimant a permanent partial disability award;

f) July 1, 2013, approving payment for two epidural steroid injections on June 1, 2012, through August 1, 2012.

19. The employer's record designation includes the evaluation of the claimant by Dr. Bill Hennessey dated June 28, 2012. Following his examination, Dr. Hennessey opined the claimant had achieved maximum medical improvement concerning the compensable diagnoses of thoracic and lumbar sprain/strain from the injury of February 8, 2012. Dr. Hennessey opined that no further chiropractic treatment or injections were medically necessary. In an addendum from Dr. Hennessey dated August 16, 2012, Dr. Hennessey stated that his review of the claimant's deposition did not cause him to vary from his opinions as expressed in his evaluation of June 28, 2012.

20. The employer's record designation includes the evaluation of the claimant by Dr. P. B. Mukkamala dated January 22, 2013. Following his examination of the claimant, Dr. Mukkamala concluded that the claimant had achieved maximum medical improvement in relation to the compensable injury of February 8, 2012 without any need for additional treatment other than a home exercise program.

21. The employer's record designation includes the neurosurgical consultation of the claimant by Dr. David Weinsweig dated March 21, 2012. Dr. Weinsweig references his prior treatment history of the claimant in which he performed a cervical discectomy and fusion at C5-6 and C6-7 in October 2008. Dr. Weinsweig also noted a history of "...multiple lumbar fractures and sacral fracture in 1992 from a significant injury as well as a severe injury to the left lower extremity. However, he has done well from this. He has had some intermittent back pain over the years for which chiropractic care has helped within a couple days. However, on 2/08/12 he apparently bent over to pick up a 'rescue dummy' at work (he is a firefighter). Since that time he has had burning discomfort in the lower thoracic and lumbar area. The main pain is in the right lower back. He has some burning into the right buttock area and burning discomfort in the right great toe. His legs go weak at times. He has some numbness and tingling in the back of his legs and down to his feet. He denies any bowel or bladder dysfunction. Your treatments do help. However, he has not been able to work since February 11 because of the discomfort mainly in the right lower back." (p.1). Dr. Weinsweig also reviewed the above-referenced lumbar MRI scan and opined the claimant undoubtedly "...does have multilevel degenerative disc disease with an element of stenosis, particularly at L3/4 and varying areas elsewhere. It is not overly severe to my viewing. He has significant degenerative disc disease with disc space narrowing." (p. 2) Dr. Weinsweig's diagnostic impression was as follows:

My impression is that he suffers from pain temporally related to the injury at work with degenerative disc disease and an element of radiculopathy. I talked with him about options including living with the pain, further conservative measures with your care, pain clinic for epidural steroid injections or an operation. At this point I'm not overly enthusiastic about an operation. The pain has only been there for approximately six weeks. I think there is hope that it will improve without an operation. He fully agrees. He is not anxious to have an operation. He would like to try some injections in his back. Apparently his father gets injections in his back. I hereby ask for authorization from Compensation for a referral to St. Mary's Pain Clinic for consideration of epidural steroid injections." (p. 2)

**DISCUSSION:**

The issue is whether the claimant is entitled to the requested medical treatment. The claim administrator must provide medically related and reasonably required medical treatment, health care or healthcare goods and services under the W.Va. Code §23-4-3 and 85 CSR 20. In making this determination, the treatment must be for an injury or disease received in the course of or as a result of employment.

W. Va. Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based upon 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. No issue may 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. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

The issue in litigation is whether ICD9-CM diagnosis codes 724.4 (neuritis/radiculitis, thoracic/lumbosacral); 724.3 (sciatica); 722.52 (degeneration of lumbosacral IVD); and, 724.8 (facet syndrome), should be designated compensable elements of the injury of February 8, 2012. The employer's closing argument of November 14, 2013, urges affirmation of the Claim Administrator's Order of August 22, 2012, in summary, asserting that the claimant's extensive history of preexisting degenerative change and treatment for the lumbar spine, including radiculopathy, establishes a credible, preponderant evidentiary foundation for the conclusion that the claimant's current treatment is unrelated to the compensable injury. Following the remand of the claim by the Order of the Worker's Compensation Board of Review, the employer has supplemented the record with medical and chiropractic documentation indicating that the claimant

was treated for lumbar conditions prior to the compensable injury; and thus, the employer argues the claimant's current symptoms and treatment protocol, are unrelated to the compensable injury.

However, as indicated in the earlier decision of this Office, dated June 19, 2013, the fact that the claimant has preexisting lumbar spine problems, similar to his current condition, is not dispositive of the issue of whether the claimant's current treatment should be deemed secondary to the compensable injury. The record designation demonstrates that the claimant's injury of February 8, 2012, catalyzed or precipitated a disabling aggravation of his preexisting lumbar spine condition. Such aggravation of a preexisting condition by a compensable injury, under applicable case law, necessarily sanctions the inclusion of the aggravated, preexisting condition as a compensable element of the injury, per Charlton v. SWCC, 236 S.E. 2d 241 (W. Va. 1977); Jordan v. SWCC, 191 SE2d 497 (W.Va. 1972).

Dr. Weinsweig, a neurosurgeon, in his narrative of March 2012, opined that the claimant's current condition was temporally related to the compensable injury; and, recommended further conservative pain management modalities such as epidural steroid injections. The claimant has an extensive history of a preexisting lumbar condition, even immediately preceding the compensable injury. Yet, such fact would also give rise to a reasonable inference, that the traumatic event lifting incident of February 8, 2012, rendered the claimant more vulnerable, to the disabling exacerbation of his preexisting condition. The claimant was receiving chiropractic treatment in the month preceding the injury, including the day before February 8, 2012. However, the claimant's condition, apparently, did not preclude him from performing his job responsibilities with the chargeable employer, prior to the injury of February 8, 2012. Thus, the fact that the requested diagnostic codes, denied in the Order of August 22, 2012, were also part of the claimant's diagnostic portrait prior to the compensable injury, does not preclude their inclusion as compensable elements of the injury due to their disabling exacerbation by the compensable injury—in accord and in observance of the Charlton standard.

#### **CONCLUSIONS OF LAW:**

The record designation, in the context of applicable case law, demonstrates that the ICD9-CM diagnosis codes, namely 724.4 (neuritis/radiculitis, thoracic/lumbosacral); 724.3 (sciatica); 722.52 (degeneration of lumbosacral IVD); and, 724.8 (facet syndrome), requested by the claimant's attending chiropractic physician, Dr. Brett Short on or about June 19, 2012, and/or August 22, 2012, are compensable elements of the injury of February 8, 2012.

William L. Gill

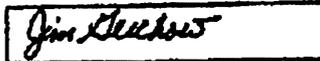
JCN: 2012026734

Accordingly, it is ORDERED the Claim Administrator's Order, dated August 22, 2012, is REVERSED and the Claim Administrator is ORDERED to designate and include ICD9-CM diagnosis codes 724.4 (neuritis/radiculitis, thoracic/lumbosacral); 724.3 (sciatica); 722.52 (degeneration of lumbosacral IVD); and, 724.8 (facet syndrome) as compensable elements of the injury of February 8, 2012.

**APPEAL RIGHTS:**

Under the provisions of W.Va. Code §23-5-12, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or action of the Administrative Law Judge. The appeal shall be filed directly with the Workers' Compensation Board of Review at P.O. Box 2628, Charleston, WV, 25329.

Date: February 3, 2014



Jim Gerchow  
Administrative Law Judge

JG:lg

cc: WILLIAM L GILL  
THOMAS MARONEY - COUNSEL FOR CLAIMANT  
CITY OF CHARLESTON  
GARY NICKERSON - COUNSEL FOR EMPLOYER  
SEDGWICK CMS

William L. Gill

JCN: 2012026734

JCN: 2012026734

Date: February 3, 2014

Record Considered

Issue:

The Claimant's protest to the Claims Administrator's order of August 22, 2012, regarding COMPENSABILITY OF ADDITIONAL CONDITIONS IN THIS CLAIM.

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified  
Document Date: 2/9/2012  
Submit Date: 11/1/2013  
Author: Chart Notes / Short Chiropractic

Document Type: Not Specified  
Document Date: 2/10/2012  
Submit Date: 11/1/2013  
Author: Chart Notes / Short Chiropractic

Document Type: Not Specified  
Document Date: 2/13/2012  
Submit Date: 11/1/2013  
Author: Chart Notes / Short Chiropractic

Document Type: Not Specified  
Document Date: 2/20/2012  
Submit Date: 11/1/2013  
Author: Medical Record / Short Chiropractic

Document Type: Not Specified  
Document Date: 2/21/2012  
Submit Date: 11/9/2012  
Author: City of Charleston

Document Type: Not Specified  
Document Date: 2/21/2012  
Submit Date: 11/1/2013  
Author: Report of Injury

Document Type: Not Specified  
Document Date: 2/22/2012  
Submit Date: 11/9/2012  
Author: Short Chiropractic Inc.

Document Type: Not Specified

**William L. Gill**

**JCN: 2012028734**

**Document Date:** 3/1/2012  
**Submit Date:** 11/1/2013  
**Author:** Chart Notes / Short Chiropractic

**Document Type:** Not Specified  
**Document Date:** 3/2/2012  
**Submit Date:** 11/1/2013  
**Author:** MRI (Thoracic) / St. Mary's Medical Center

**Document Type:** Not Specified  
**Document Date:** 3/2/2012  
**Submit Date:** 11/1/2013  
**Author:** MRI (Lumbar) / St. Mary's Medical Center

**Document Type:** Not Specified  
**Document Date:** 3/21/2012  
**Submit Date:** 11/1/2013  
**Author:** Medical Record / David L. Weinsweig, M.D

**Document Type:** Not Specified  
**Document Date:** 5/30/2012  
**Submit Date:** 11/9/2012  
**Author:** Short Chiropractic Inc.

**Document Type:** Not Specified  
**Document Date:** 6/1/2012  
**Submit Date:** 11/9/2012  
**Author:** Short Chiropractic Inc.

**Document Type:** Not Specified  
**Document Date:** 6/6/2012  
**Submit Date:** 11/9/2012  
**Author:** Short Chiropractic Inc.

**Document Type:** Not Specified  
**Document Date:** 6/19/2012  
**Submit Date:** 11/9/2012  
**Author:** Short Chiropractic Inc.

**Document Type:** Not Specified  
**Document Date:** 6/29/2012  
**Submit Date:** 11/9/2012  
**Author:** Short Chiropractic Inc.

**Document Type:** Not Specified  
**Document Date:** 7/13/2012  
**Submit Date:** 11/9/2012  
**Author:** Claims Administrator

**Document Type:** Not Specified

**William L. Gill**

**JCN: 2012026734**

**Document Date: 7/13/2012**  
**Submit Date: 11/9/2012**  
**Author: Claims Administrator**

**Document Type: Not Specified**  
**Document Date: 7/13/2012**  
**Submit Date: 11/9/2012**  
**Author: Short Chiropractic Inc.**

**Document Type: Not Specified**  
**Document Date: 7/13/2012**  
**Submit Date: 11/9/2012**  
**Author: Claims Administrator**

**Document Type: Not Specified**  
**Document Date: 7/20/2012**  
**Submit Date: 11/9/2012**  
**Author: Short Chiropractic Inc.**

**Document Type: Not Specified**  
**Document Date: 8/8/2012**  
**Submit Date: 11/9/2012**  
**Author: Barboursville Physical Therapy**

**Document Type: Not Specified**  
**Document Date: 8/21/2012**  
**Submit Date: 11/9/2012**  
**Author: Short Chiropractic Inc.**

**Document Type: Not Specified**  
**Document Date: 8/22/2012**  
**Submit Date: 11/9/2012**  
**Author: Claims Administrator**

**Document Type: Not Specified**  
**Document Date: 8/28/2012**  
**Submit Date: 11/9/2012**  
**Author: Barboursville Physical Therapy**

**Document Type: Not Specified**  
**Document Date: 9/25/2012**  
**Submit Date: 11/9/2012**  
**Author: Barboursville Physical Therapy**

**Document Type: Not Specified**  
**Document Date: 10/8/2012**  
**Submit Date: 4/11/2013**  
**Author: DEPOSITION / WILLIAM GILL**

**Document Type: Not Specified**  
**Document Date: 6/19/2013**  
**Submit Date: 11/1/2013**

William L. Gill

JCN: 2012026734

Author: ALJ Decision / Judge Gerchow  
Document Type: Not Specified  
Document Date: 7/1/2013  
Submit Date: 11/1/2013  
Author: Claims Administrator Order / Sedgwick

Employer Evidence

Document Type: Not Specified  
Document Date: 12/18/1992  
Submit Date: 4/10/2013  
Author: DISCHARGE SUMMARY / CABELL HUNTINGTON HOSPITAL

Document Type: Not Specified  
Document Date: 4/16/2004  
Submit Date: 9/19/2013  
Author: TREATMENT PLAN / SHORT CHIROPRACTIC

Document Type: Not Specified  
Document Date: 6/7/2005  
Submit Date: 9/19/2013  
Author: CASE PROGRESS / SHORT CHIROPRACTIC

Document Type: Not Specified  
Document Date: 7/28/2008  
Submit Date: 4/10/2013  
Author: MRI (THORACIS SPINE) / TRI STATE MRI

Document Type: Not Specified  
Document Date: 8/19/2008  
Submit Date: 4/10/2013  
Author: PROGRESS NOTE / AHMED ABDELGABER, M.D.

Document Type: Not Specified  
Document Date: 12/17/2008  
Submit Date: 9/19/2013  
Author: OFFICE NOTES / SHORT CHIROPRACTIC

Document Type: Not Specified  
Document Date: 4/22/2009  
Submit Date: 9/19/2013  
Author: OFFICE NOTES / SHORT CHIROPRACTIC

Document Type: Not Specified  
Document Date: 9/20/2009

William L. Gill

JCN: 2012026734

Submit Date: 9/19/2013  
Author: OFFICE NOTES / SHORT CHIROPRACTIC

Document Type: Not Specified  
Document Date: 11/9/2011  
Submit Date: 9/19/2013  
Author: OFFICE NOTES / SHORT CHIROPRACTIC

Document Type: Not Specified  
Document Date: 1/11/2012  
Submit Date: 4/10/2013  
Author: MEDICAL RECORDS (MULTIPLE DOCUMENTS) / SHORT  
CHRIPRACTIC

Document Type: Not Specified  
Document Date: 2/7/2012  
Submit Date: 9/19/2013  
Author: CHART NOTES / SHORT CHIROPRACTIC

Document Type: Not Specified  
Document Date: 2/21/2012  
Submit Date: 4/10/2013  
Author: REPORT OF INJURY

Document Type: Not Specified  
Document Date: 2/21/2012  
Submit Date: 4/10/2013  
Author: REPORT OF INJURY

Document Type: Not Specified  
Document Date: 2/22/2012  
Submit Date: 4/10/2013  
Author: CAO / SEDGWICK

Document Type: Not Specified  
Document Date: 3/21/2012  
Submit Date: 4/10/2013  
Author: MEDICAL RECORD / DAVID L. WEINSWEIG, M.D

Document Type: Not Specified  
Document Date: 5/15/2012  
Submit Date: 9/19/2013  
Author: NEW OUTPATIENT CONSULT / ST. MARY'S MEDICAL  
CENTER

Document Type: Not Specified  
Document Date: 5/21/2012  
Submit Date: 4/10/2013  
Author: CAO / SEDGWICK

Document Type: Not Specified  
Document Date: 6/28/2012

William L. Gill

JCN: 2012026734

Submit Date: 4/10/2013  
Author: IME / BILL HENNESSEY, M.D.

Document Type: Not Specified  
Document Date: 7/13/2012  
Submit Date: 4/10/2013  
Author: CAO / SEDGWICK

Document Type: Not Specified  
Document Date: 7/13/2012  
Submit Date: 4/10/2013  
Author: CAO / SEDGWICK

Document Type: Not Specified  
Document Date: 8/22/2012  
Submit Date: 4/10/2013  
Author: CAO / SEDGWICK

Document Type: Not Specified  
Document Date: 10/8/2012  
Submit Date: 4/10/2013  
Author: DEPOSITION / WILLIAM GILL

Document Type: Not Specified  
Document Date: 10/18/2012  
Submit Date: 4/10/2013  
Author: ADDENDUM REPORT / BILL HENNESSEY, M.D.

Document Type: Not Specified  
Document Date: 1/22/2013  
Submit Date: 4/10/2013  
Author: IME / PRASADARAO B. MUKKAMALA, M.D.

**CLOSING ARGUMENTS:**

Party Submitted: Employer  
Letter Date: 8/5/2013  
Party Submitted: Employer  
Letter Date: 11/14/2013

Sedgwick  
PO Box 14490  
Lexington, KY 40512-4480



sedgwick.

Phone: 304-347-9616 Fax: 304-347-9610

08/22/2012

William Gill  
2210 Lenora St.  
Milton, WV 25541

MWWP PLLC

AUG 24 2012

RECEIVED

**DENIAL OF AUTHORIZATION**

CLMT: William L. Gill  
CLM #: B267100273-0001-01  
DOI: 02/08/2012

2012026734

Dear Mr. Gill:

We have received a request dated 08/22/2012 from Short Chiropractic to follow through with the injections. This request to continue the remaining two injections and the current conditions listed below are **DENIED**.

**Current Condition is listed as**

**724.4 Neuritis/Radiculitis, Thoracic/Lumbosacral**

**724.3 Sciatica**

**722.52 degeneration of lumbar or lumbosacral IVD**

**724.8 facet syndrome.**

We are denying this request based on the Independent Medical Evaluation report from Dr. Hennessey dated June 28, 2012 and the only compensable diagnosis is 847.2 lumbar sprain/strain and 847.1 thoracic sprain/strain.

Any party to this claim may protest this decision within 60 days from receipt of this letter. You must send a written protest, along with a copy of this order, to the Office of Judges, PO Box 2233, Charleston, WV 25328-2233. A copy of this protest must be sent to all parties in the claim.

If you have any questions regarding this matter, please contact me at (304) 347-9616.

Sincerely,

Becky Davis  
Claims Examiner

cc: Jackie Blair – City of Charleston  
Bowles Rice McDavid Graff & Love PLLC  
Maroney, Williams, Weaver & Pancake, PLLC  
Short Chiropractic (via fax: 304-733-4818)

*PKW*