

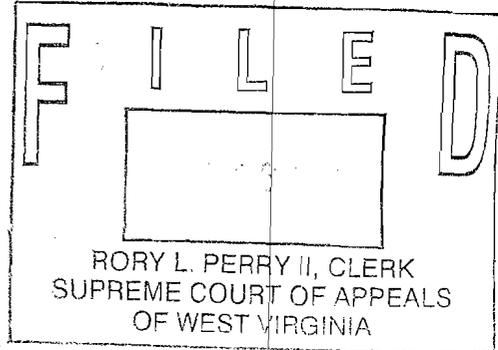
WEST VIRGINIA SUPREME COURT OF APPEALS

JOHN PHILLIP HALE JR.,
Petitioner

vs.

APPEAL NO. 2044114
JCN: 2004024859
CRN: 001054108RSD404312517Q
DATE OF INJURY: 11/22/03
OOJ CASE ID: OOJ-A308-002979

ROCKSPRING DEVELOPMENT, INC.,
Respondent



**PETITION/BRIEF FOR REVIEW FROM AN ORDER OF THE
WORKERS' COMPENSATION BOARD OF REVIEW DATED
AUGUST 9, 2010**

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NATURE OF PROCEDURE AND RULING BELOW

This is a petition for review from an Order of the Workers' Compensation Board of Review of August 9, 2010, which affirmed an Administrative Law Judge Decision dated February 1, 2010. The Administrative Law Judge affirmed the Claims Administrator's Order of November 4, 2008, denying the request to add 311.0, depression, as a compensable component of this claim.

This petition/brief for review is filed pursuant to Chapter 23, Article 5, Section 4, of the West Virginia Code, as amended.

The claimant moves that this Honorable Court reverse the Board of Review's Order dated August 9, 2010, and direct that the claimant's depression be recognized as a compensable component in this claim.

ASSIGNMENT OF ERROR

The Board of Review erred in affirming the Decision of Administrative Law Judge. The Administrative Law Judge's Decision is clearly wrong and must now be reversed. Here, the Administrative Law Judge stated the claimant's evidence was "deficient" to show the claimant's depression condition should be added to the claimant. However, the claimant has submitted an Intake Narrative, showing the documentation of the claimant's condition resulting from the compensable injury from early on. There are also treatment notes from those who treated the claimant and continued to document the claimant's condition. Finally, the claimant's treating physician completed a Diagnosis Update form, requesting that the condition be added, as it is related to the compensable injury in this claim. Despite these items of evidence, the Administrative Law Judge felt the claimant's evidence was "deficient." However, it is significant to note, as this Honorable Court is well informed, the standard by which the evidence is to be judged is that of a preponderance of the evidence – a showing that something is more likely so than not so. Here, the claimant has made such a showing, and there is no credible opposing medical evidence. As such, the Decision is clearly wrong, and the claimant respectfully requests that this Honorable Court reverse and direct the relief requested.

STATEMENT OF FACTS

John P. Hale was injured on November 22, 2003, while lifting 30 to 40 pound pallets. Dr. Bonifacio Aranas subsequently treated him. An MRI dated December 19, 2003, revealed no focal disc herniation but abnormalities at L2 and L5 levels, which may represent hemangiomas. Another MRI of April 2, 2004, showed degenerative disc disease throughout the lumbar spine

and no disc herniation. Dr. Aranas continues to treat the claimant, and he was found to have reached maximum medical improvement on June 23, 2004.

As a direct result of the effects of the compensable orthopedic injury in this claim, the claimant began experiencing psychiatric problems. Though the claimant had been treating with Dr. Aranas for psychiatric problems sometime prior, in his Intake Narrative of June 30, 2004, William Downs, MSW found that the claimant's symptoms of depression at that time were attributable to his compensable injury in the instant claim. Specifically, Downs writes, "[The] symptoms probably are associated with a back injury last November while he was working in the mines." (p. 1.) Additionally, Downs found that though the claimant "acknowledges a significant amount of anxiety which has been lifelong. It has certainly been exacerbated by his current dilemma." (p. 2.)

As a result, the claimant began treating with Richard Gardner, PA-C, who on July 21, 2004, diagnosed the claimant with Major Depressive Disorder, Recurrent, Moderate and Panic Disorder without Agoraphobia. Gardner noted that the claimant did suffer with "depressive symptoms during the winter." (Treatment Notes p. 9.) However, he went on to note, "This, coupled with his inactivity due to the back pain, intensified his depression earlier this year." (*Id.*) And again on February 6, 2006, PA-C Gardner diagnosed the claimant with Major Depressive Disorder, aggravated by chronic pain.

Because of these findings, Dr. Aranas, the claimant's treating physician, submitted a Diagnosis Update on the Claims Administrator's own approved form, dated October 14, 2008, indicating that the claimant suffers from depression, which he opined is a "direct result of his Workers' Comp Injury."

Additionally, the claimant submitted to the Claims Administrator that same Diagnosis Update, as well as the Intake Narrative and Treatment Notes mentioned above. The claimant requested that the Claims Administrator add his depression as a compensable component in this claim.

By Order dated November 4, 2008, the Claims Administrator denied the addition of depression as a compensable component in the claim. In particular, the Claims Administrator based its determination on the fact that the claimant's depressive symptoms manifested more

than six months after the orthopedic injury, that his treatment was not approved by the employer and that his psychiatric condition preexisted the injury. The claimant timely protested the Order.

In support of his protest, the claimant relies on the Intake Narrative, Treatment Notes and Diagnosis Update, as previously discussed.

The Administrative Law Judge's Decision of February 1, 2010, affirmed the Claims Administrator's Order of November 4, 2008, denying the request to add depression as a compensable component of this claim. Thus, the claimant filed an appeal to the Workers' Compensation Board of Review who entered an Order on August 9, 2010. The Board of Review affirmed the prior Decision of the Administrative Law Judge. The claimant now petitions this Honorable Court from the Board of Review's Decision.

POINTS OF LAW RELIED UPON

- I. The sole requirement for compensability upon the Workers' Compensation law is that an employee shall "have received personal injuries in the course of and resulting from their covered employment". West Virginia Code § 23-4-1.
- II. Evidence from which a reasonable person may conclude that the claimant was injured while performing his duties in the course of his employment is sufficient to sustain the claimant's burden of proving his claim. Medical evidence as to the cause of an injury is not always required to establish compensability of an injury in a compensation case. *Pennington vs. SWCC*, 175 S.E.2d 440 (1970).
- III. A claimant in a workers' compensation case must bear the burden of proving his claim but in doing so it is not necessary for him to prove to the exclusion of else the causal connection between the injury and the employment. Frequently in a workers' compensation claim there is an absence of direct evidence in which event, circumstantial evidence must be relied on and if this were not permitted, a claimant would often be unable to prove a valid claim. It was further held that to establish the validity of a claim in a workers' compensation case, the degree of proof is not as great as that required in the usual action law. When a fair and reasonable appraisal of the evidence supports the claimant's position, the proof may be considered proper and satisfactory. *Sowder vs. SWCC*, 189 S.E.2d 674 (1972).
- IV. Where, in the course of and arising out of his employment, an employee in good health and of strong physique suffers physical injury, which is followed by serious disabilities, competent physicians differing as to whether the disabilities are attributable to the injury,

but only probable or conjectural reasons or causes are assigned by physicians in an effort to explain the disabilities on grounds other than the injury, the presumptions should be resolved in favor of the employee rather than against him. *Pripich vs. SWCC*, 166 S.E. 4 (1932).

- V. If an injured employee provides some evidence to demonstrate that a particular injury did arise from the subject industrial accident, absent evidence which to some degree of certainty attributes the injury to a cause other than the subject accident, it will be presumed to have resulted from such accident. *Dunlap vs. SWCC*, 232 S.E.2d 343, 346 (1977).
- VI. It was held that if evidence, though slight, is sufficient to make a reasonable person conclude that decedent was injured while performing his duties in the course of his employment, or duties incidental to that employment, then that feature of the case is proved. *Ramey vs. SWCC*, 146 S.E.2d 579, 584 (1966).
- VII. When an employee receives an injury in the course of and as a result of his employment, compensability of such injury will not be denied for the mere reason that the injury was received while the employee was engaged in the usual and ordinary duties of his employment. *Pennington vs. SWCC*, 222 S.E.2d 579 (1976).
- VIII. 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.** West Virginia Code § 23-4-1g (2003).
- IX. The West Virginia Supreme Court of Appeals will reverse an Order of the Workers' Compensation Board of Review which is not supported by the evidence and for that reason is plainly wrong. *Smith v. State Workmen's Compensation Commissioner*, 189 S.E.2d 838 (1972).

ARGUMENT

The Board of Review Order was wrong in affirming the Administrative Law Judge's Decision. In the instant claim, the Decision is clearly wrong, requiring reversal. Here, the Administrative Law Judge stated that the claimant's evidence of record was "deficient" to show that the requested depression condition should be added to the claim. Simply put, what more must a claimant do to show that a condition is causally related to the claim?

Of record, there is an Intake Narrative, which shows the claimant's condition arose as a result of the injury in this claim. There are treatment notes, following the claimant's progress, as well as a diagnosis update from the claimant's physician, requesting the addition of depression. Further, counsel for the employer has submitted no medical evidence to show why the addition of depression should be denied. Nevertheless, the Administrative Law Judge believes the claimant's evidence is "deficient" to show depression should be added as a compensable condition. Such a result is clearly wrong.

As previously noted, those medical professionals who have treated the claimant have causally linked the claimant's psychiatric condition to his injury. In particular, in his Intake Narrative, William Downs opined that the claimant's depression were probably associated with his back injury. Also, PA-C Gardner noted several times that the depression was related to the injury. Moreover, the claimant's treating physician, Dr. Aranas, attributed the depression to the injury and as a result, submitted a Diagnosis Update form clearly indicating his medical opinion. Thus, we can see – a preponderance of the evidence shows that the claimant's depression resulted from his compensable injury in this claim.

Despite the clear medical evidence, the Claims Administrator denied authorization for the addition of depression to the claim on faulty bases. First, the Claims Administrator stated that the addition of depression should be denied because the condition did not arise six months after the compensable injury in this claim, citing the Psychiatric Guidelines.

However, it should be noted that the claimant had not even reached maximum medical improvement from an orthopedic standpoint until June of 2004. Until that time, it is safe to assume the claimant hoped he could still be made well. However, in finding that he had reached the highest level of wellness he could achieve with regard to his back injury, it is only understandable that he would become depressed when he was told he would heal no further. Thus, only a month after becoming aware that he had achieved maximum medical improvement, these psychiatric symptoms manifested, as is reflected by the evidence of record.

Next, the Claims Administrator attempted to deny authorization on the basis that the employer had not authorized the initial evaluation or subsequent treatment. As this Order was coming from the Claims Administrator, it seems it would be apparent to the Claims Administrator that the employer should not or does not exercise the power to authorize anything

in a claim. Thus, the Claims Administrator citing this as a basis for denying authorization is somewhat mysterious.

With that said, the Claims Administrator's reasoning is still incorrect in that according to Section 9.10.g. of Rule 20, an initial psychiatric evaluation does not require prior authorization, so long as the claimant's treating physician agrees there is need. (*Id.* at § 12.4.) Here, those circumstances exist. Beyond that, subsequent treatment is to be authorized on a request-by-request basis. Thus, it is essentially irrelevant whether the evaluation was authorized. **The claimant was entitled to the initial evaluation by right.**

Nevertheless, the claimant has clear medical evidence indicating he is suffering with a psychiatric condition as a result of his compensable injury in this claim. In contrast, the employer has submitted absolutely no medical evidence to support the notion that the claim for depression should be denied. In sum, there is no report of record stating that the claimant's depression is not related to the compensable injury, and the reliable and credible medical evidence of record shows by a preponderance that it is related.

The Claims Administrator also attempted to deny authorization by stating that the claimant's condition preexisted his compensable injury. Obviously, a claimant need not prove to the exclusion of all else and must simply prove by a preponderance of the evidence in this particular case that the psychiatric problems complained of are as a direct result of the compensable injury. As previously stated, the weight of the evidence from those who treated the claimant acknowledge he suffered with depression before the injury, but also, they all state that his current condition was caused by the injury at issue. Thus, to the extent he was previously suffering with a psychiatric condition, the compensable injury and resulting effects served only to exacerbate the psychiatric condition.

Moreover, though the claimant may have suffered with depressive symptoms previously, the most recent document of record to the compensable injury dates back to February 25, 2002, which was a year and a half prior to the compensable injury and even further from the onset of his current psychiatric symptoms. If the claimant did suffer with psychiatric problems before, the evidence shows that his condition was at least stabilized until the onset of the symptoms that resulted from the compensable injury in this claim. Thus, the claimant experienced a period of

some sort of resolution of his symptoms prior to the compensable injury in this claim, which the evidence clearly shows caused his depression.

Because the Administrative Law Judge failed to recognize these facts, the Decision is wrong. As such, the claimant respectfully requests that this Honorable Court reverse and direct the relief requested.

The evidentiary analysis on this particular issue by virtue of its Order date must be conducted pursuant to the preponderance standards. Among other things, those preponderance standards require that “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.” This is not a “back door” attempt to seek relief from the “rule of liberality” nor is it implying that the reliable report with the highest degree of impairment wins. Rather, it is simply asking for what the preponderance standards themselves require. Implicit in these standards is that to even be considered in the equation, the report from which the award is ultimately based must itself be reliable. The preponderance standards further instruct that the evaluation of evidence comes down to consideration “of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented.”

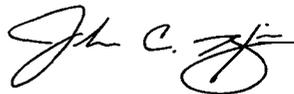
Applying the above standards to the evidentiary record at hand, it is evident the Board of Review Order is clearly wrong and must now be reversed. As has been shown, no *credible* nor specifically identifiable reasoning has been pointed to showing the evidence relied upon by the claimant to be either unreliable or deserving of less evidentiary weight than any other report of record in this claim. Similarly, no one has pointed to any credible or specifically identifiable reasoning why any opposing evidence should have been found to be more reliable or deserving of more evidentiary weight than the evidence relied upon by the claimant. Therefore, under any reasonable interpretation of the phrase, it is clear that the evidence relied upon by the claimant is at least equal in evidentiary weight than any opposing evidence in this record. When this happens, the preponderance standards require very clearly that the award be based upon the evidence most favorable with the claimant's position. In this claim, that evidence is the evidence relied upon by the claimant. As such, it is clear the Order is inconsistent with the preponderance

standards, has no legitimate basis in law or fact, and must now be reversed by this Honorable Court.

WHEREFORE, the claimant prays that this Honorable Court grant this petition/brief for review, and upon granting of such review, reverse and set aside the Board of Review's Order of August 9, 2010, and direct that the claimant's depression be recognized as a compensable component in this claim.

Respectfully submitted,

BLAIR LAW OFFICES, PLLC

A handwritten signature in black ink, appearing to read "John C. Blair". The signature is stylized with a large, looped initial "J" and a cursive "C" and "B".

By: John C. Blair
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CERTIFICATE OF SERVICE

JOHN PHILLIP HALE JR.,
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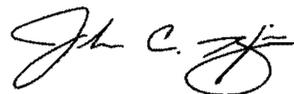
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Respondent

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This is to certify that I mailed a copy of the foregoing document to the following parties by United States Mail, with sufficient postage attached thereto on the 20th day of August 2010.

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