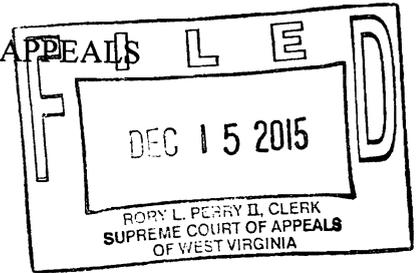


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



\_\_\_\_\_  
IN CHARLESTON  
\_\_\_\_\_

**WILLIAM L. GILL,**

**Petitioner,**

v.

**APPEAL NO: 2049208  
CLAIM NO: 2012026734  
SUPREME COURT NO: 14-0983**

**CITY OF CHARLESTON,**

**Respondent.**

**AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF  
WEST VIRGINIA IN SUPPORT OF RESPONDENT**

---

Lisa Warner Hunter (WVSB # 7523)  
Michelle Rae Johnson (WVSB # 11869)  
**PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC**  
JamesMark Building  
901 Quarrier Street  
Charleston, WV 25301  
Telephone (304) 344-0100  
Email: [lhunter@pffwv.com](mailto:lhunter@pffwv.com)  
Email: [mjohnson@pffwv.com](mailto:mjohnson@pffwv.com)

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES .....pg. 2

II. STATEMENT OF INTEREST.....pg. 3

III. ARGUMENT.....pg. 4

IV. CONCLUSION.....pg. 5

**I. TABLE OF AUTHORITIES**

Syl. Pt. 1., *Jordan v. State Workmen's Comp. Comm'r*,  
156 W.Va. 159, 191 S.E.2d 497 (1972).....3, 4

W.Va. 23-4-1(a)..... 5

W.Va. CSR § 85-20-37.8..... 5

## **II. STATEMENT OF INTEREST**

The Defense Trial Counsel of West Virginia (DTCWV) is an organization of over 500 attorneys who engage primarily in the defense of individuals and corporations in civil and administrative litigation in West Virginia. DTCWV is an affiliate of the Defense Research Institute, a nationwide organization of over 23,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. Some DTCWV members represent employers in workers' compensation cases. In addition, and as relevant to this matter, DTCWV's goals include elevating the standards of legal practice within the state of West Virginia, working for elimination of Court congestion and delays in civil and administrative litigation in West Virginia, promoting involvement of the administration of justice in West Virginia, and increasing the quality of legal services provided to our citizens.

DTCWV is interested in the issue before the Court regarding aggravations of pre-existing conditions by work-related injuries and whether the same are compensable. Specifically, this issue concerns the DTCWV as applied to the diagnosis of degeneration of lumbosacral intervertebral disc. Allowing for compensability of aggravation of age related, degenerative conditions would be a substantial burden upon insurance companies and their insureds, as the condition is age related, and affects most individuals. Further, these degenerative issues have been excluded from compensability by Rule 20. Therefore, compensability of an aggravation of a pre-existing condition is a factual determination to be made by the adjudicator on a case-by-case basis. Syl. Pt. 1, *Jordan v. SWCC*, 156 W.Va. 159, 191 S.E. 2d 497 (1972).

For these reasons, the DTCWV submits this *amicus curiae* brief in support of Respondent, City of Charleston.

### **III. ARGUMENT**

A pre-existing condition does not disqualify a claimant from coverage for a compensable injury. However, a pre-existing condition cannot be held compensable until a thorough factual determination has been made by the adjudicator as set forth in *Jordan*. This factual determination must be taken on a case-by-case basis. Specifically, in regard to issues of age related degeneration, compensability has been barred by Rule 20. In support of this argument, the DTCWV states the following:

**A. Compensability of pre-existing conditions must be made upon consideration of multiple factors pursuant to *Jordan v. SWCC*; therefore, analysis is highly fact driven.**

Although the employer must take an employee with all of his attributes and previous infirmities, the employer does not thereby become the employee's insurer against all ills or injuries which may befall him. *Jordan v. State Workmen's Comp. Comm'r*, 156 W.Va. at 165. However, where there is evidence of a preexisting injury, his claim will not be treated as compensable unless it is directly attributable to a definite, isolated and fortuitous occurrence, that is to say, for a definable incident resulting from his employment. In *Jordan*, this Court held:

The question in a workmen's compensation case as to whether the employment aggravated or, combined with the internal weakness or infirmities of claimant to produce the injury, is *a question of fact, not law*, and a finding of the Workmen's Compensation Appeal Board on this question will not be disturbed on appeal by this Court, unless such finding is plainly wrong.

Syl. Pt. 1., *Jordan v. State Workmen's Comp. Comm'r*, 156 W.Va. 159, 191 S.E.2d 497 (1972). (emphasis added). Pursuant to *Jordan*, the adjudicator must make a factual determination based upon the record as to whether there is a compensable claim and what injuries/conditions are covered under the claim. As previously mentioned, the employer does not become the insurer against all ills which may befall the claimant.

Therefore, the question proposed by the Court, whether aggravations of pre-existing conditions by work-related injuries are compensable, cannot be answered in a blanket affirmative. This question must be taken on a case-by-case basis and the adjudicator must examine each claim in order to satisfy the general compensability requirements of W.Va. 23-4-1(a).

**B. Degenerative, age related process has been excluded from compensability and the treatment guidelines of Rule 20.**

In the case at bar, the requested compensable diagnoses include degeneration of lumbosacral intervertebral disc (722.52). As indicated in *Jordan*, if one suffers a heart attack while sitting at work, that heart attack would not be compensable. However, if an employee suffers from heart disease and other ailments, is ordered to perform heavy labor at work and subsequently suffers a heart attack, then that heart attack would be compensable. Disc degeneration, unlike heart attacks or other physical conditions, has been specifically excluded from qualification for medical treatment and compensability pursuant to Rule 20. Treatment guidelines for low back musculoligamentous injury (sprain/strain) specifically state that "Modifiers (age, and coOmorbidity), 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." W.Va. CSR § 85-20-37.8.

**IV. CONCLUSION**

For all of these reasons, the DTCWV asks that this Court hold that a pre-existing condition's compensability, as with all issues of compensability, must be determined by the adjudicator on a case-by-case basis. The *Jordan* standard has been employed for more than 40 years, and allows for middle ground to be achieved between the rejection of meritorious claims and the wholesale acceptance of dubious claims or conditions.

Respectfully submitted,

**DEFENSE TRIAL COUNSEL  
OF WEST VIRGINIA**



---

Lisa Warner Hunter (WVSB # 7523)

Michelle Rae Johnson (WVSB # 11869)

**PULLIN, FOWLER, FLANAGAN, BROWN &  
POE, PLLC**

JamesMark Building

901 Quarrier Street

Charleston, WV 25301

Telephone (304) 344-0100

Email: [lhunter@pffwv.com](mailto:lhunter@pffwv.com)

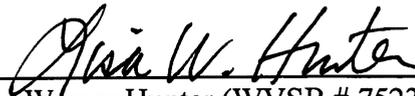
Email: [mjohnson@pffwv.com](mailto:mjohnson@pffwv.com)

**CERTIFICATE OF SERVICE**

I, Lisa Warner Hunter, hereby certify that on the 15<sup>th</sup> day of December 2015, a copy of the foregoing "AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF RESPONDENT" was mailed, postage prepaid, by First Class Mail to the following:

Patrick K. Maroney  
Maroney, Williams, Weaver & Pancake, PLLC  
Post Office Box 3709  
Charleston, West Virginia 25337

James W. Heslep  
Step toe & Johnson PLLC  
Seventh Floor, Chase Tower  
707 Virginia Street, East  
P.O. Box 1588  
Charleston, WV 25326



\_\_\_\_\_  
Lisa Warner Hunter (WVSB # 7523)

Michelle Rae Johnson (WVSB # 11869)

**PULLIN, FOWLER, FLANAGAN, BROWN &  
POE, PLLC**

JamesMark Building

901 Quarrier Street

Charleston, WV 25301

Telephone (304) 344-0100

Email: [lhunter@pffvww.com](mailto:lhunter@pffvww.com)

Email: [mjohnson@pffwv.com](mailto:mjohnson@pffwv.com)