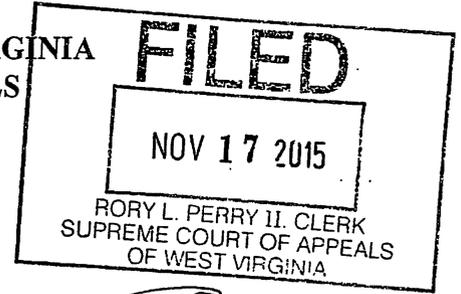


**ARGUMENT
DOCKET**

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



WILLIAM L. GILL,

Petitioner,

vs.

Supreme Court No. 14-0983
Claim No. 2012026734
Appeal No. 2049208

CITY OF CHARLESTON,

Respondent.

AMICUS CURIAE BRIEF

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I. ISSUE ON APPEAL

Whether aggravation of a pre-existing condition by a separate Workers' Compensation injury is compensable.

II. LEGAL AUTHORITIES

Deverick v. State Compensation Director, 150 W.Va. 145, 144 S.E.2d 498 (1965);

Martin v. State Compensation Commissioner, 107 W.Va. 583, 149 S.E. 824 (1929);

Caldwell v. State Compensation Commissioner, 106 W.Va. 14, 144 S.E. 568 (1928);

Hall v. State Compensation Commissioner, 110 W.Va. 551, 159 S.E. 516 (1931);

Jordan v. State Workmen's Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972);

CSR §85-20-1;

CSR §85-20-4.1;

CSR §85-20-9.1;

CSR §85-20-9.7.

III. LEGAL DISCUSSION

An award of a claim cannot be made in a Workers' Compensation case unless it is supported by satisfactory proof that the workman sustained a personal injury in the course of and resulting from his employment. Deverick v. State Compensation Director, 150 W.Va. 145, 144 S.E.2d 498 (1965).

A compensable accident is an injury incurred by an employee attributable to a definite, isolated, fortuitous occurrence. Jordan v. State Workmen's Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972).

An employee is not deprived of compensation because he is afflicted with some malady at the time he enters the employment. The act applies to every employee who suffers disability from accidental injury, and does not exclude the weak and those imperfect physically. Martin v. State Compensation Commissioner, 107 W.Va. 583, 149 S.E. 824 (1929).

An employee is certainly nonetheless entitled to compensation because he is unfortunate enough to carry on his body the effects of a former or primary injury, even though a later injury, being the one for which he seeks compensation, would not have been so serious but for the lingering effects of the former. Caldwell v. State Compensation Commissioner, 106 W.Va. 14, 144 S.E. 568 (1928).

The fact that an employee, injured in performing services arising out of and incidental to his employment, was already afflicted with a progressive disease that might someday have produced physical disability, is no reason why the employee should not be allowed compensation for the injury which, added to the disease, super induced physical disability. Hall v. State Compensation Commissioner, 110 W.Va. 551, 159 S.E. 516 (1931).

The pre-existing condition does not dispense with the necessity of showing that the injury was actually caused by an accident or injury received in the course of and arising from the

employment. Jordan v. State Workmen's Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972).

West Virginia Case Law is well settled on the point that injured workers are entitled to compensation for aggravation of a pre-existing condition so long as that aggravation can be related to an occupational injury sustained in the course of and resulting from employment. An aggravating event which does not amount to an occupational injury under West Virginia law does not entitle a claimant to Workers' Compensation coverage. This basic legal principle is well illustrated in a plethora of Supreme Court rulings issued over a long period of time. It is also reflected in Workers' Compensation Procedural Rules. CSR Title 85 Series 20 Section 9.1 provides that "[t]he Commission will only pay for those services or items that have a direct relationship to the work related injury." (emphasis added). By requiring proof of only a "direct relationship" to an occupational injury rather than a sole relationship, this rule allows claimants to obtain treatment for a pre-existing condition directly aggravated by a subsequent occupational injury. This rule is obviously intended to allow treatment for symptoms directly related to a combination of a pre-existing condition and a separate aggravating occupational injury. Otherwise, the legal standard would require proof that treatment is entirely related to an occupational injury. Furthermore, CSR §85-20-21 provides for treatment of a noncompensable condition unrelated to the occupational injury if that noncompensable condition "prevents recovery by aggravating the occupational injury." Please note that this section applies to conditions which were neither aggravated by the compensable injury nor directly related to the occupational injury. Because those conditions and treatment of those symptoms is already deemed compensable. This rule is intended to define an additional class of impairment for which treatment can be approved. This rule does not give compensable status to a noncompensable condition which prevents recovery by aggravating the occupational injury, but it does create a limited exception to the general rule which disallows treatment of noncompensable conditions.

Treatment available to any claimant is determined by the compensable diagnosis codes and predetermined treatment protocols found throughout Rule 20. Compensable diagnosis codes must be derived from the International Classification of Disorders 9th Edition. §85-20-9.7. That medical reference does not offer an option of selecting aggravation of a pre-existing diagnosis as a compensable condition.

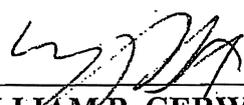
The parameters of medical management and the range of benefits available to a claimant is conditioned upon what diagnoses are found compensable. CSR §85-20-1. Any treatment in excess of, or different from, treatment recommended in Rule 20 is “presumed to be medically unreasonable.” CSR §85-20-4.1. The natural consequence of denying compensability of a pre-existing condition aggravated by a separate occupational injury is to deny claimants medical treatment and benefits which would not have been necessary but for an occupational injury and its aggravating effect on the claimant’s pre-injury condition. For example, a claimant with an occupational knee sprain which aggravates a pre-existing injury or condition is entitled to no greater treatment or recovery time than a claimant with a knee sprain which does not aggravate a pre-existing condition. CSR §85-20-43 does not permit treatment of a knee sprain for longer than three weeks without consultation and entirely denies authorization for surgery. These limitations may be reasonable for a claimant with a knee sprain which does not aggravate a pre-existing condition; however, surgery may very well be a reasonable option for a claimant who has experienced an occupational injury which aggravates preexisting degenerative changes. Unless that aggravated pre-existing condition is acknowledged as a compensable condition, the claimant would be denied authorization for surgery which has a direct relationship to an occupational injury. Acceptance of aggravated pre-existing conditions as compensable will permit claimants to obtain all treatment directly related to an occupational injury. No longer could treatment be denied based upon rigid application of treatment parameters outlined in Rule 20 based upon narrowly defined diagnosis codes. Treating physicians will be able to make

appropriate treatment recommendations based upon clinical medical evidence specific to the patient.

IV. CONCLUSION

The law is quite clear that a claimant is taken as found. Aggravation of a pre-existing compensable condition becomes compensable in a Workers' Compensation claim when that aggravation is directly related to an occupational injury sustained in the course of and as a result from employment.

Respectfully Submitted



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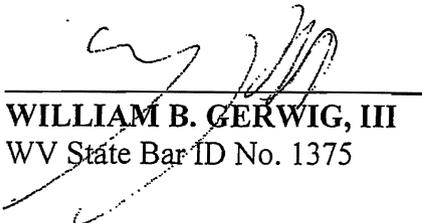
CERTIFICATE OF SERVICE

I, William B. Gerwig, III, do hereby certify that the foregoing "*Amicus Curiae Brief*," has been served upon all parties of record by depositing a true and exact copy thereof, via the United States mail, postage prepaid and properly addressed on this 16th day of November, 2015, as follows:

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