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SEP 29 2014
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In the
SUPREME COURT OF APPEALS OF WEST VIRGINIA
Charleston, West Virginia

14-0983

WILLIAM L. GILL,

Petitioner,

vs.

Appeal No. 2049208
Claim No. 2012026734
Order Date: August 29, 2014

CITY OF CHARLESTON

Respondent.

BRIEF ON BEHALF OF PETITIONER
WILLIAM L. GILL

Patrick K. Maroney, Esquire
State Bar No. 8956
Maroney, Williams, Weaver & Pancake, PLLC
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Counsel for Petitioner

September 29, 2014

PETITION FOR REVIEW
TYPE OF APPEAL

The claimant/petitioner, William Gill, seeks review of the August 29, 2014, Workers' Compensation Board of Review order which reversed the February 3, 2013, decision of the Administrative Law Judge and reinstated the Claim Administrator order of which denied 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.

STATEMENT OF THE CASE

The claimant's injury occurred on February 8, 2012, while he was participating in rescue drills. He lifted a 150 pound practice dummy and immediately had new symptoms of radicular pain in his lower back. He subsequently filed an application for benefits on February 21, 2012, and sought conservative treatment from Dr. Knipp, a chiropractor.

The claimant's medical history is well documented. During his deposition, he testified about his prior medical history and symptoms and prior to applying for his position with the City of Charleston as a Firefighter he made the City aware of these symptoms. (See 6/20/2012 Medical History Statement). The City hired the claimant with these pre-existing conditions.

The physical examination a person has to undergo to become a firefighter is very strenuous. On July 8, 2002, the claimant passed the physical and written exam and was accepted as an employee of the Charleston Fire Department. Regardless of his prior injuries, the claimant passed the medical examination and the physical position of the firefighters test. (Tr. pp. 3-8). The claimant, at this time, did not have any chronic neuritis/radiculitis; thoracic/lumbosacral sciatica; degeneration of lumbosacral IVD or facet syndrome. In fact the medical evidence submitted by the employer demonstrated the claimant did not require any treatment for this back until 2004. In 2008 the claimant had upper non-work-related back problems.

The claimant also testified to the strenuous and physical duties a firefighter undergoes on a daily basis. These duties include, in part, wearing 50 pounds of bunking gear, carrying heavy tools, wearing a self-contained breathing apparatus which weigh a 20 to 25 pounds (Tr. pp. 13-17).

When not out on a call, the claimant, along with his co-workers, utilize the City's gym equipment and do weight training and cardio. They also incorporate CPAT exercise/training that simulates firefighting activities. Some of these exercises include dragging Rescue Randy or just climbing through tunnels (*Id.* at 23-24). Work-related incidents require him to carry people out of buildings, who are all different shapes and sizes (*Id.* at 28-30).

Prior to filing the current claim, the claimant had only missed one shift, in 2003, due to his back problems. This occurred while the claimant was playing basketball at work, which was part of the firefighter's physical training. The claimant did not miss any further work due to an until this injury February 8, 2012 (*Id.* at 33).

The claimant also testified to the differences between his past medical symptoms and treatment and the medical symptoms and treatment for this current injury. He explained that his current injury he experienced a burning sensation and it felt like "my spine was pulling apart in my upper part, in my thoracic region" and it felt like he had a knife in his back (*Id.* at 35, 36). The old medical records only mention pain to the hip region that occurred after two years of working as a firefighter.

The claimant further testified that his injury on February 8, 2012, was pain like he had never felt before. When asked about radiculopathy, the claimant stated that he had never had pain down his right leg. His pain was always down his left leg and radiated into his left buttocks and he did not previously have pain down from his mid-thigh to his knee. Since this injury he gets an electrical shock that shoots down his right leg.

As noted by the employer, the claimant was evaluated regarding this injury by Dr. Weinsweig on March 21, 2012. Dr. Weinsweig had treated the claimant for a prior condition in 2008 unrelated to this occupational injury. Dr. Weinsweig did note that the claimant was doing well from the surgery. His record review of the claimant's back revealed he had intermittent back pain over the years which chiropractic care normally helped within a few days. He noted that,

since February 8, 2012, the claimant has had burning discomfort in the lower thoracic and lumbar area but the main pain has been in his right lower back with burning into the right buttock area and burning discomfort in the right great toe. He also noted that his legs go weak at times and has numbness and tingling in the back of his legs down to his feet.

The claim was subsequently submitted for a decision. By order dated August 29, 2014, the Board of Review reversed the February 3, 2013, Administrative Law Judge's ruling which reversed the Claim Administrator's order of November 12, 2009, denying an orthopedic consultation of the left shoulder.

ASSIGNMENT OF ERROR

Was the Administrative Law Judge clearly wrong to add the principal components to the injury that occurred, when the claimant was lifting a 150 pound rescue dummy while in the course of and as a result of his employment?

ARGUMENT AND POINTS OF AUTHORITY

The Claims Administrator must provide medically related and reasonably required medical treatment, healthcare or healthcare goods and services. See *West Virginia 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.

West Virginia Code §23-5-12(d), if a decision of an Administrative Law Judge is appealed, the Appeal Board shall reverse the findings of the Administrative Law Judge when the Administrative Law Judge's findings are clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The West Virginia Supreme Court of Appeals has defined the "clearly wrong" standard and its review of Workers Compensation Appeal Board cases. According to the Court, a decision is clearly wrong if it is not supported by the evidence of record, if it is clearly against the preponderance of the evidence, or it is based upon the evidence which is speculative and inadequate. *Gibson v. SWCC*, 127 W.Va. 97, 31 S.E.2d 555 (1944). *Smith v State Workers' Comp. Comm'r.* 155 W.Va. 883, 189 S.E.2d 838 (1972).

It is clear that the claimant sustained a compensable injury in the course of, and as a result of, his employment on February 8, 2012. On February 22, 2012, Sedgwick held the

claim compensable, but failed to consider all the claimant's medical conditions related to the injury. On February 3, 2014, the Administrative Law Judge correctly found that the compensable conditions should include radiculopathy, sciatica, degenerative disc disease, and facet syndrome. The Judge considered the claimant's pre-existing spine problems and the treatment of his pre-existing conditions. (See 2/03/2014 ALJ decision pp. 12, 13).

The Administrative Law Judge correctly found that the claimant's pre-existing conditions did not preclude him from performing his job responsibilities with the chargeable employer prior to the injury of February 8, 2012, and that "such aggravation of a pre-existing condition by a compensable injury, under applicable case law, necessarily sanctions the inclusion of the aggravated, pre-existing condition as a compensable element of the injury." *Charlton v. SWCC*, 236 S.E.2d 241 W.Va. (1977), *Jordan v. SWCC*, 191 S.E.2d 497 (W.Va. 1972).

When looking at the medical evidence prior to the injury it is clear the claimant had some pre-existing condition but it has been minor compared to this current injury. The claimant stated that he has not missed any work except for one shift after participating in work-related physical training.

Jordan like *Charlton,* also supports the proposition that a pre-existing infirmity of an employee does not disqualify him from prosecuting a successful claim for compensation based upon a new injury arising from his employment, but where there is evidence of a pre-existing like injury, his new claim will not be treated as compensable unless it is directly attributed to a definite, isolated and fortuitous occurrence, that is to say, from a definable incident resulting from his employment.

In this case we do have new a definable incident or new injury. The claimant injured his back while lifting a 150 pound rescue dummy. The claimant clearly described the difference between his prior back problems and this injury. The claimant described that the pain was different, it was in a different location, and that his prior pre-existing conditions were similar to stiffness after working out in his yard.

In *Jordan*, the Court cited *Dunlap v. Workmen's Compensation Commissioner*, 152 W.Va. 359, 163 S.E.2d 605 (1968), which discusses, in part, that the claimant, a cook at a restaurant who was awarded compensation by the Board, injured her back when she bent over to

pick up an empty pan weighing one to two pounds and was struck with back pain when resuming a standing position. There was evidence of a pre-existing back condition from arthritic degeneration. There was no eye-witness corroboration of the accident but a daughter of the claimant testified that her mother had no pain previous to the lifting incident and manifested pain subsequent to the incident. There was documented evidence of doctor's receipts for services rendered for lower back sprain or strain.

The Board reversed the Commissioner's decision and found compensability and this Court affirmed that decision, on the basis that the finding of the Board was not clearly wrong. In this case the claimant did have minor pre-existing pain which is documented, but since the injury, he has severe pain which is more persistent than his prior injuries. See *Jordan* p. 166 quoting *Dunlap*.

The claimant stated that his pre-existing problems were quickly resolved and similar to *Dunlap* he did not have any lost time from work from the pre-existing problems. This new injury the claimant has not experienced any relief from chiropractic treatments and the claimant has not returned to work. It is easy to distinguish the claimant's pre-existing problems versus his new injury when he lifted 150 pounds. The Administrative Law Judge was correct to add these new conditions which the claimant did not experience prior to February 8, 2012.

Also, the medical evidence by Dr. Weinsweig supports the claimant's position. The doctor reviewed the claimant's health history intake form that included the past medical history, current medications, surgical history, and social and family history. Dr. Weinsweig's impression is that he suffers from pain related to the injury at work with degenerative disc disease and element of radiculopathy.

The Administrative Law Judge's decision is founded on the evidence and finding that the claimant's medical treatment is reasonably related to the injury as required by the West Virginia Workers' Compensation Act, and whether it is under the reasoning found in *Charlton, Dunlap* and *Jordan*.

CONCLUSION

Wherefore, the claimant/petitioner, William L. Gill, respectfully requests that his petition be granted and reinstate the Administrative Law Judge order of February 3, 2014.

Respectfully yours,

Maroney, Williams, Weaver, & Pancake, PLLC
Post Office Box 3709
Charleston, WV 25337
304/346-9629

By _____

WV State Bar ID No: 8956

September 29, 2014

CERTIFICATE OF SERVICE

I, Patrick K. Maroney, counsel for Petitioner herein, do hereby certify that I served the foregoing Petition upon the following by hand delivery and/or by mailing a true and accurate copy of the same via the United States Mail, postage prepaid, on this the 29th day of September, 2014.

HAND DELIVERY:

Rory Perry, Clerk
State of West Virginia
Supreme Court of Appeals
State Capitol Building
Charleston, WV 25305

VIA UNITED STATES' POSTAL SERVICE:

Gary Nickerson, Esquire
400 White Oak Road
Bridgeport, WV 26330

Sedgwick CMS
PO Box 14490
Lexington, KY 40512

PATRICK K. MARONEY

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SUPREME COURT OF APPEALS OF WEST VIRGINIA
WORKERS' COMPENSATION DOCKETING STATEMENT

FILE COPY

Petitioner: William L. Gill Respondent: City of Charleston

Counsel: Patrick K. Maroney Counsel: Gary Nickerson

Claim No: 2012026734 Workers' Compensation Appeal Board No: 2049208

Date of Injury/Last Exposure: 02/08/2012 Date Claim Filed: 02/08/2012

Date(s) of Workers' Compensation Division Order(s): 08/22/2012

Date of Office of Judges Order: 02/03/2014

Date of Workers' Compensation Appeal Board Order Appealed from: 08/29/2014

FILED
SEP 29 2014
RORY L. PERRY II, CLERK

CLAIMANT INFORMATION:

Claimant's Name: William L. Gill

Nature of Injury: Low and Mid Back

Age: 04/22/1967 (47) Education (highest): Bachelor degree in business

Occupation: Firefighter/EMT No. of Years: 10+ yrs.

Date of Last Employment: Unknown

Other Claim Nos. None Status:
(Attach a separate sheet if necessary)

Are there any related petitions currently pending before the Supreme Court? ☐ Yes ☒ No
(If yes, cite the case name and the manner in which it is related on a separate sheet.)

Are there any other petitions related to this claimant which have been decided by the Supreme Court? (If yes, cite the case name, docket number, decision, and the manner in which it is related on a separate sheet.) ☐ Yes ☒ No

Type of issue:

☐ TTD (Temporary Total Disability) ☐ PPD (Permanent Partial Disability) ☐ PTD (Permanent Total Disability) ☒ Medical Benefits ☐ Occupational Pneumoconiosis ☐ Occupational Hearing Loss ☐ Occupational Disease ☐ Death or Widow Benefits

☐ Other (specify):

FOR SUPREME COURT USE ONLY	SUPERVISING JUSTICE'S VOTE	
I vote: GRANT [ ]	REFUSE [ ]	ORAL PRESENTATION [ ]
Signature:	Date:	
Comments:		

FOR SUPREME COURT USE ONLY	REVIEWING JUSTICE'S VOTE	
I vote: GRANT [ ]	REFUSE [ ]	ORAL PRESENTATION [ ]
Signature:	Date:	
Comments:		

Supreme Court of Appeals of West Virginia
Office of the Clerk

Rory L. Perry II, Clerk of Court
State Capitol, Room E-317
Charleston, WV 25305

Statutory Notice of Filing Petition for Appeal
October 01, 2014

William L. Gill v. WVOIC/City of Charleston
Supreme Court No.14-0983
Petition for Appeal Filed: September 29, 2014

Board of Review Information
Claim Number: 2012026734
Appeal Number: 2049208
Order Date: August 29, 2014

Dear Interested Persons:

Statutory notice pursuant to W.Va. Code § 23-5-15 is hereby given that a petition for appeal from the final order of the Workers' Compensation Board of Review has been filed in the above-captioned case.

In future correspondence or filings, please refer to the Supreme Court case number. DO NOT use the claimant's social security number on any papers filed with the Court.

Refer to Rule 12 of the Rules of Appellate Procedure for more information.

Once the case is mature, the papers filed in this matter will be passed directly to the Court for consideration. You will be advised of the Court's decision in writing.

Sincerely, Rory L. Perry II, Clerk of Court

Notice Provided to: Workers' Compensation Commission, Workers' Compensation Board of Review and to the following counsel of record:

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