

DO NOT REMOVE
FROM FILE

FILE COPY

No. 14-0983

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

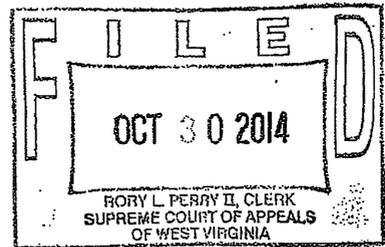
WILLIAM L. GILL,

Petitioner,

v.

CITY OF CHARLESTON,

Respondent.



**On appeal from the West Virginia Workers' Compensation
Board of Review Appeal No.: 2049208
Claim No.: 2012026734**

**MEMO IN OPPOSITION ON BEHALF OF
CITY OF CHARLESTON**

JAMES W. HESLEP [WVSB #9671]
STEPTOE & JOHNSON PLLC
SEVENTH FLOOR, CHASE TOWER
707 VIRGINIA STREET, EAST
P. O. BOX 1588
CHARLESTON, WV 25326-1588

ATTORNEY FOR RESPONDENT
CITY OF CHARLESTON

STEPTOE & JOHNSON PLLC
Charleston, West Virginia
Of Counsel

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	7
ARGUMENT	8
<p>THE BOARD OF REVIEW WAS NOT PLAINLY WRONG TO REINSTATE THE CLAIMS ADMINISTRATOR'S ORDER AS THE PREPONDERANCE OF THE RECORD ESTABLISHES THAT THE CLAIMANT HAD BEEN DIAGNOSED WITH THE CONDITIONS ADDED BY THE OFFICE OF JUDGES PRIOR TO THE COMPENSABLE INJURY.</p>	
CONCLUSION.....	16

No. 14-0983

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

TABLE OF AUTHORITIES

	<u>Page</u>
West Virginia Code § 23-4-1g [2012].....	8
West Virginia Code § 23-5-15(d) [2012].....	8
<i>Charlton v. State Workmen's Comp. Comm'r</i> , 160 W. Va. 664, 236 S.E.2d 241 (1977)	7, 10, 11, 12, 13, 15
<i>Conley v. Workers' Compensation Division</i> , 199 W. Va. 196, 483 S.E.2d 542 (1997).....	8
<i>Dunlap v Workmen's Compensation Commissioner</i> , 152 W. Va. 359, 163 S.E.2d 605 (1968).....	13, 14, 15
<i>Jordan v. State Workmen's Comp. Comm'r</i> , 156 W. Va. 159, 191 S.E.2d 497 (1972)	11, 12, 15
<i>McGeary vs. State Comp. Dir.</i> , 148 W. Va., 436, 135 S.E.2d 345 (1964).....	8

STATEMENT OF THE CASE

The respondent finds the petitioner's Statement of the Case to be insufficient to fully explain the facts of this claim.

On February 21, 2012, the claimant completed an application for benefits, reporting he incurred an injury to his thoracic and lumbar spine while participating in rescue drills when he lifted a practice dummy. *See Exhibit A.* The physician's portion of the application was completed by Dr. Knipp, the claimant's longstanding personal chiropractor. Dr. Knipp diagnosed thoracic and lumbar strains, which remain the only compensable conditions in this claim. The employer's report of injury is also dated February 21, 2012. *See Exhibit B.* The claimant participated in conservative treatment in the form of a spinal injection, physical therapy, and chiropractic treatment. The claimant has not returned to work. The claimant was evaluated by Dr. William Hennessey, who produced a report dated June 8, 2012. *See Exhibit C.* Dr. Hennessey determined the claimant had reached maximum improvement and required no additional treatment in relation to the compensable injury.

On or about August 22, 2012, Short Chiropractic requested authorization for injections to treat radiculitis, sciatica, degenerative disc disease, and facet syndrome. The request was denied pursuant to the report of Dr. Hennessey and the fact that the injections were for conditions that were not compensable. *See Exhibit D.* As mentioned, the claimant protested the order denying the injections and the Office of Judges interpreted it to be a denial of additional compensable conditions. It does not appear a formal diagnosis update form was ever submitted by the claimant's treating physician.

In support of his protest, the claimant submitted myriad records from his chiropractor indicating the claimant began with the simple diagnoses of thoracic and lumbar

strains. The last record from the chiropractor is dated August 21, 2012, and indicates the diagnoses of radiculitis, sciatica, degenerated disc and facet syndrome.

The claimant also submitted MRI reports pertaining to the thoracic and lumbar spines, both of which are dated March 2, 2012. *See* Exhibit E. The conclusion of the radiologist for the lumbar MRI reads: “multilevel degenerative change and disc disease causing acquired central canal and bilateral neural foraminal narrowing.” The interpretation of the thoracic MRI is quite similar, in that it shows disc osteophyte complexes at all levels of the thoracic spine. However, the MRI was compared to a previous study conducted in 2008 and the current MRI indicates a slight worsening of a disc extrusion at T5-6.

The claimant also submitted his own testimony, dated October 8, 2012. *See* Exhibit F. During his deposition, the claimant delineated his symptoms, which appear to be focused in the lower back and right leg. As the legs are innervated through the lumbar spine, the radicular symptoms expressed by the claimant stem from the lumbar spine.

Other interesting facts to be garnered from the claimant’s testimony include that at the age 18, he lifted the handle on his car door and experienced lumbar pain that made him fall down. Also, the claimant denied any trauma that precipitated his need for cervical fusion surgery, which occurred prior to the compensable injury. The claimant’s testimony suggests he has a congenitally fragile spine.

Beginning with a report from Short Chiropractic dated April 16, 2004, the claimant was diagnosed with lumbar radiculopathy, lumbar disc degeneration, lumbar disc displacement, and lumbar facet syndrome—the exact conditions requested under this claim. *See* Exhibit G. On June 7, 2005, the claimant reported pain across his hips. *See* Exhibit H. On the same document under the entry dated June 12, 2006, the claimant reported he injured his back and hip while pushing a stroller up hill. On December

17, 2008, the claimant reported lumbar pain radiating from right hip to knee. *See* Exhibit I. On April 22, 2009, the claimant reported low back pain on his right side, which is the exact location of his current complaints. *See* Exhibit J. On September 20, 2009, the claimant reported he was “just walking” when his lower back “gave out[.]” *See* Exhibit K.

During his testimony, the claimant reported his leg was asleep while he was testifying as an example of his current radicular symptoms. On November 9, 2011—*approximately two months prior to the compensable injury*—the claimant reported to his chiropractor that his right leg was going to sleep. *See* Exhibit L.

The compensable injury occurred on February 8, 2012. On February 7, 2012, the claimant presented himself to Short Chiropractic complaining of left and right lumbar discomfort. *See* Exhibit M. The evaluator noted tenderness, spasm, trigger points, and “resistance to mobilization” (which is limited range of motion) in various lumbar muscle groups. The evaluator diagnosed the claimant with thoracic back pain, sciatica, degenerative disc disease, and muscle spasm. Additional chiropractic records indicate the claimant sought treatment seven times between the dates of January 11, 2012, and February 7, 2012. *See* Exhibit N.

The employer also submitted the claimant’s testimony to further exemplify the discrepancy in the claimant’s testimony versus the historical records submitted by the employer. During his testimony, the claimant attempted to minimize his previous injuries to his lumbar and thoracic spines to the point of stating his 2008 MRI studies were to determine the cause of chest pain. However, the MRI studies themselves, as well as other evidence of record, clearly indicate the claimant had ongoing thoracic and lumbar symptoms which prompted the need for the MRI studies. *See* Exhibit O.

The employer submitted a discharge summary from Cabell Huntington Hospital dated December 18, 1992. *See* Exhibit P. While the record is obviously remote, the severity of the claimant's injuries is significant. The claimant fell approximately 80 feet while rock climbing. The claimant fractured his lumbar and sacral spines as well as an open fracture of his left tibia and fibula. He also required repair of internal organs as a result of the fall. Such an event would explain the severity of the claimant's degenerative changes and also why he continued to receive ongoing treatment up through February 7, 2012, the day before the reported injury.

The 1992 incident was the focus of a report from St. Mary's Medical Center dated May 15, 2012. *See* Exhibit Q. During this evaluation that occurred three months after the compensable injury, the claimant reported he had a long history of low back pain with radiculopathy. The report is devoid of any mention of the compensable injury. Rather, the report refers to the 1992 injury as an explanation for the origin of the claimant's symptoms. The evaluator determined the claimant had radicular low back pain secondary to degenerative changes in the lumbar spine.

The employer also submitted a report from Dr. Weinsweig, dated March 21, 2012. Dr. Weinsweig noted the claimant's symptoms are associated with the lower thoracic and lumbar spines, with the lumbar being the main focus. Dr. Weinsweig reviewed the MRI of the claimant's spine and found nothing except degenerative disc disease.

Dr. Weinsweig then stated the claimant suffers from pain "temporally" related to the work injury, with degenerative disc disease and an element of radiculopathy. The term "temporally" is defined by Webster's as relating to time as opposed to eternity. Dr. Weinsweig's use of the term suggests the claimant was experiencing temporary symptoms associated with the compensable injury as well as the degeneration and radiculopathy. Dr.

Weinsweig in no way shape or form asserted the radiculopathy or degeneration was associated with the compensable injury.

Finally, the employer submitted aforementioned report from Dr. Hennessey, as well as a report from Dr. Mukkamala. Both physicians determined the claimant had reached maximum improvement and required no additional treatment related to the compensable injury. *See Exhibit R.*

The claim was subsequently submitted for decision. By decision dated February 3, 2014, the Office of Judges added four conditions to the claim. In rendering his decision, Judge Gerchow cited *Charlton v SWCC*, 236 S.E. 2d 241 (W.VA. 1977), as justification for adding the conditions due to his opinion the conditions were aggravated by the compensable injury.

The employer appealed to the Board of Review, which reversed the Office of Judges' decision on August 29, 2014. Within its decision, the Board determined that based on the claimant's testimony and the medical records considered under the preponderance standard, the diagnoses added by the Office of Judges are not compensable components to this claim. It is from the Board of Review's decision that the claimant brings his petition.

SUMMARY OF ARGUMENT

The preponderance of the record establishes the claimant has a very long and consistent history of back pain. The claimant had been diagnosed with all four conditions added by the Office of Judges prior to the compensable injury. The claimant received fairly regular treatment from his chiropractor, including the day before the compensable injury.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not request oral argument.

ARGUMENT

THE BOARD OF REVIEW WAS NOT PLAINLY WRONG TO REINSTATE THE CLAIMS ADMINISTRATOR'S ORDER AS THE PREPONDERANCE OF THE RECORD ESTABLISHES THAT THE CLAIMANT HAD BEEN DIAGNOSED WITH THE CONDITIONS ADDED BY THE OFFICE OF JUDGES PRIOR TO THE COMPENSABLE INJURY.

This Court has held that an order of the Appeal Board affirming the finding of the Commission will not, as a general rule, be set aside if there is substantial evidence and circumstances to support it. *McGeary vs. State Comp. Dir.*, 148 W. Va. 436, 135 S.E.2d 345 (1964). More recently, this Honorable Court reiterated its position that it “will not reverse a finding of fact made by the Workers’ Compensation Board of Review unless it appears from the proof upon which the Appeal Board acted that the finding is plainly wrong.” *Conley v. Workers’ Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542 (1997). “Moreover, the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal’s actions are valid as long as the decision is supported by substantial evidence.” *Id.*

West Virginia Code § 23-4-1g states that for all awards made after July 1, 2003, the resolution of any issue shall be based on a weighing of all evidence pertaining to an issue and a finding that a preponderance of the evidence supports a chosen manner of resolution. A claim for compensation must be decided on its merit and not according to any principle that requires statutes governing workers’ compensation statutes to be liberally construed.

Pursuant to W.Va. Code § 23-5-15(d), if the decision of the Board effectively represents a reversal of a prior ruling of either the commission or the Office of Judges that was entered on the same issue in the same claim, the decision of the Board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or

is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. The court may not conduct a de novo re-weighing of the evidentiary record.

Upon review of the appendix included with the claimant's petition, the employer has realized the claimant did not include any of the evidence that was properly submitted before the Office of Judges, with the exception of Dr. Weinswieg's report and the protested order. The claimant included within the appendix his deposition dated April 14, 2014. As the Office of Judges decision was rendered on February 3, 2014, it is blatantly obvious the deposition was not a part of the evidentiary record considered by the Office of Judges or Board of Review. Finally, the claimant's appendix includes his pre-employment medical examination report, which was not submitted to the Office of Judges. Thus, the only records included within the claimant's appendix that were considered by the Office of Judges and Board of Review are the report from Dr. Weinsweig dated March 21, 2012, and the protested order.

However, with regards to the pre-employment medical examination, the employer asserts the documents are irrelevant to the current issue as the claimant was diagnosed with radiculopathy and disc displacement two years after the pre-employment evaluation. Further, the employer does address the claimant's testimony dated April 14, 2014, within the body of the following argument.

There is no dispute within the record that the claimant has the diagnoses of radiculopathy, sciatica, degenerative disc disease and lumbar facet syndrome. The dispute derives from the question of whether the compensable injury caused or exacerbated the

diagnoses. The historical records clearly and convincingly establish the claimant's diagnoses subject to the protested order were present prior to the compensable injury.

In spite of this, the Office of Judges decision added radiculopathy, degenerative disc disease, and facet syndrome as compensable conditions. In rendering the decision, the adjudicator opined that the compensable event "catalyzed or precipitated a disabling aggravation" of the pre-existing conditions, pursuant to *Charlton v. State Workmen's Comp. Comm'r*, 160 W. Va. 664, 236 S.E.2d 241 (1977).

John Charlton was a claimant who was diagnosed with Buerger's Disease, which is known to cause massive scarring and ulceration of the feet and hands. Mr. Charlton's claim for compensability was due to job related tasks requiring him to stand in water treated with magnetite and sulphuric acid for long periods of time. It was medically deemed that the water aggravated the claimant's feet, causing disability. Thus, the Court reversed the rejection of Mr. Charlton's claim.

The employer agrees that the *Charlton* precedent appears to be applicable upon first blush. However, in *Charlton*, it can be presumed the claimant had the disease beforehand, but there is no indication he had pre-existing ulcerations or scarring on his feet. Water treated with sulphuric acid would likely cause ulcerations with or without complications from Buerger's. A reading of the *Charlton* decision indicates the claim for ulcerated feet was initially rejected as an occupational disease not occurring in the course of employment. There was no mention of Buerger's Disease at that point. The claimant appealed to the Appeal Board, who remanded for additional medical development saying the record was very sparse. The Commissioner referred the claimant to Dr. Kuhn, who diagnosed Buerger's Disease. Thus, the Buerger's diagnosis was used as a defense against ulcerations caused by exposure to treated water. The injury occurred *before* the diagnosis of

the underlying disease. Mr. Charlton did not have symptoms of Buerger's prior to the compensable injury. The employer asserts the distinction is significant.

In the current matter, the employer's evidence establishes the claimant was both symptomatic and carried the diagnoses of radiculopathy, degenerative disc disease, sciatica and facet syndrome before the compensable injury. On the day before the reported injury, the claimant's treating chiropractor diagnosed lumbar degenerative disc disease, sciatica, thoracalgia, and muscle spasm. The muscle spasm indicates the claimant's back was in a perpetual state of strain. The same chiropractor diagnosed lumbar radiculopathy and lumbar facet syndrome in 2004.

While the little snippet that is often quoted from *Charlton* does suggest that any exacerbation of any condition is compensable, such a basic interpretation is contrary to other decisions rendered by the Supreme Court. For example, in *Jordan v. State Workmen's Comp. Comm'r*, 156 W. Va. 159, 191 S.E.2d 497 (1972), the Court held that harms from a risk personal to the claimant are universally non-compensable. Thus, the basic interpretation of *Charlton* does not mesh with *Jordan*, as Mr. Charlton's Buerger's disease was obviously personal to himself. Rather, the employer asserts, additional language from *Jordan* clarifies the distinction.

The Court in *Jordan* held that, "...the employer, by acquiring workers' compensation insurance, does not thereby become the employee's insurer against all ills or injuries which might befall [a claimant]." The *Jordan* Court also held that, "...when the claimant has a pre-existing back condition and claims a new injury, it becomes difficult for the workers' compensation appeal board, as the fact-finding body, to distinguish an injury caused by a risk arising or resulting from employment and an injury which results from a risk clearly personal to the employee. Harms from the first one are universally compensable.

Those from the second are 'universally non-compensable.'" The employer asserts the fact that the Court purposely noted the pre-existing symptoms when trying to discern a new injury of similar symptoms is the key difference between *Charlton* and *Jordan*. Without such a difference, the decisions are not commensurate.

Again, in *Charlton*, there is no indication the claimant had symptoms of his disease prior to the development of the ulcers. It appears the Commissioner and the employer relied upon the heretofore latent diagnosis of Buerger's Disease as justification for the rejection. Neither the diagnosis nor the symptoms were present before the compensable injury. This contrasts with *Jordan* in that the claimant had a documented pre-existing back injury and then claimed a new injury after lifting a box of insulation. *Jordan* was decided in 1972 while the *Charlton* decision was rendered in 1977. Interestingly, there is no reference to *Jordan* within *Charlton*, establishing the Court did not feel the respective decisions conflicted in any way. The employer asserts *Charlton* is distinguished from *Jordan* as well as the current matter because the claimant in *Charlton* had no symptoms or diagnosis prior to the compensable injury.

Jordan is the most appropriate controlling precedent. First, both *Jordan* and the current matter both involve back injuries. Second, the claimants in both *Jordan* and the current matter had well documented pre-existing diagnoses involving the very same symptoms and conditions claimed to have been aggravated by the compensable injury. The *Jordan* claim was rejected and upheld by the Supreme Court because the Court determined the claimant had a well established personal risk factor that precluded compensability.

Here, it is well established that the claimant sought treatment for his lumbar condition from his chiropractor seven times in the month leading up to the compensable injury, including the day before the compensable injury. He carried with him into the

compensable injury all of the diagnoses added by the Office of Judges decision, as well as the associated symptoms. As noted, the chiropractor diagnosed muscle spasms the day before the reported injury. Thus, the preponderance of the record indicates the claimant's conditions were already in a state of exacerbation before the compensable injury occurred.

Interestingly, the petitioner does not rely on *Charlton* in his argument, but rather *Dunlap v Workmen's Compensation Commissioner*, 152 W.Va 359, 163 S.E.2d 605 (1968). Junie Dunlap was working for two weeks at Humphrey's Dairy Bar when she lifted an empty tray and reported back pain. According to the Supreme Court decision, the employer submitted no medical evidence that the claimant had pre-existing symptoms involving her lower back. The employer did present testimony from two witnesses that asserted the claimant mentioned having lower back pain prior to the injury, but the claimant provided rebuttal testimony denying she uttered the alleged statements. Citing the liberality rule, the Court determined the claimant's testimony was supported by the testimony of her daughter, who also asserted the claimant never had back trouble prior to the injury. Although a post-injury X-ray revealed the degenerative condition of hypertrophic spurs, the Court specifically stated in its conclusion that "...it does not appear from the record that the diagnoses of low back strain or sprain could have been confused with the pre-existing condition disclosed by the X-ray report."

The Court's conclusion is quite pertinent to the applicability of *Dunlap* to the current issue. Junie Dunlap was diagnosed with a lumbar strain caused by the reported injury. The statement by the Court indicates that if the claimant had been diagnosed with hypertrophic spurs as being caused (or aggravated) by the reported injury, the Court would not have upheld the compensability of *Dunlap*. In other words, because there was no proof the diagnosis of lumbar strain pre-existed the reported injury, the Court concluded the claim

should be compensable. The evidence of record in the current matter clearly distinguishes *Dunlap* from the current matter.

At the risk of sounding redundant, this claimant reported to his physician that his right leg was “going to sleep” on November 9, 2011. On page 23 of his deposition transcript, the claimant was asked what symptoms he was having in relation to the injury. The claimant said his right leg “was asleep” as he was sitting there. Other symptoms referenced by the claimant, including right-sided back pain and radiation of pain into right leg pre-existed the compensable injury as well. On the *day before* the compensable injury, the claimant reported “burning, tightness and discomfort” in his lumbar spine, and was diagnosed with thoracalgia, sciatica, degenerative disc disease, and muscle spasms. On March 21, 2012, the claimant told Dr. Weinsweig that he had “burning discomfort” in the right lower back radiating into his right leg.

In bringing his petition, the claimant relies very heavily on his own testimony. The petition relays the claimant’s sworn testimonial that he had never experienced pain in his right leg before the compensable injury. The claimant was adamant during his April 14, 2014 deposition on pages 38-41 that he had never experienced right leg pain or right leg numbness. The records from Short Chiropractic dated December 17, 2008 and November 9, 2011, indisputably refute the claimant’s sworn testimony. The claimant denied any recollection of ongoing lumbar symptoms leading up to the date of injury, which is also refuted by Short Chiropractic records from January and February 2012.

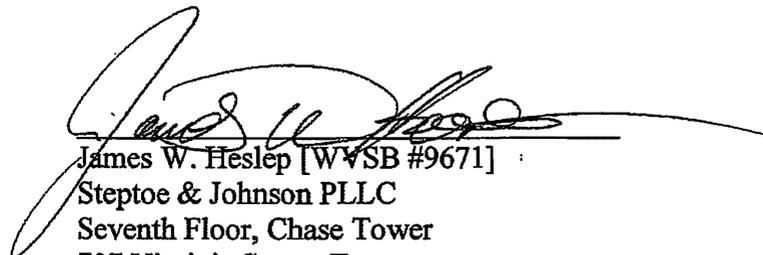
Dunlap is further distinguished by the undisputed fact that the claimant was diagnosed with the four conditions he seeks to add long before the compensable injury. These conditions are not self-limiting conditions like the lumbar strain in *Dunlap*. The requested conditions result from anatomical changes, not simple irritation of musculature.

The claimant's anatomical changes that led to the diagnoses all occurred prior to the compensable injury.

The Board of Review was not plainly wrong to reinstate the claims administrator's order. Pursuant to *Jordan*, the employer is not the claimant's insurer for all ills and injuries that may befall him. Literally, the claimant fell 80 feet and broke multiple bones, including his lumbar spine and hip in 1992. Although very remote, the severity of the fall should not be overlooked. Three months after the compensable injury of this claim, the 80 foot fall was the precipitating event discussed during the claimant's visit to St. Mary's on May 15, 2012. The claimant has been proven to be less than forthcoming in his testimony regarding his medical history as his attempts to attribute previous lumbar treatment to a cardiac issue were refuted with objective evidence showing it was, in fact, a lumbar issue. Neither *Charlton* nor *Dunlap* can be controlling in this matter pursuant to the preceding discussions. In short, the Office of Judges was clearly wrong to add the conditions as exacerbated because the preponderance of the record shows the conditions were already in a state of exacerbation. Accordingly, the Board of Review was not plainly wrong to remove the conditions.

CONCLUSION

Therefore, the employer respectfully requests the Court to affirm the Board of Review's decision dated August 29, 2014. Thank you for your attention in this matter.



James W. Heslep [WVSB #9671]
Step toe & Johnson PLLC
Seventh Floor, Chase Tower
707 Virginia Street, East
P. O. Box 1588
Charleston, WV 25326-1588

Attorney for Respondent
City of Charleston

STEPTOE & JOHNSON PLLC
Charleston, West Virginia
Of Counsel

No. 14-0983

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

WILLIAM L. GILL,

Petitioner,

v.

CITY OF CHARLESTON,

Respondent.

**On appeal from the West Virginia Workers' Compensation
Board of Review Appeal No.: 2049208
Claim No.: 2012026734**

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2014, I served the foregoing "Memo in Opposition on Behalf of the City of Charleston" upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Maroney Williams Weaver & Pancake, PLLC
PO Box 3709
Charleston, WV 25337

