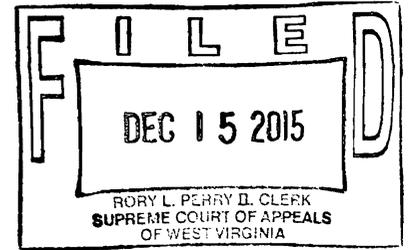


No. 14-0983

**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**

**SUPPLEMENTAL BRIEF ON BEHALF OF
CITY OF CHARLESTON**

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ISSUE PRESENTED

By order dated October 20, 2015, the Supreme Court of Appeals directed the parties to file supplemental briefing addressing whether aggravations of pre-existing conditions by work-related injury are compensable.

SUMMARY OF ARGUMENT

No rigid or fixed formula exists for determining whether an aggravation of a pre-existing condition by work-related injury is compensable. Compensability in “mixed” risk scenarios is dependent upon multiple variables. It depends upon the claimant, the nature of the pre-existing condition, and the type and extent of the work-related injury. Consistent with the majority of Courts in this country, for more than 40 years, this Court has correctly recognized that the question of compensability for such an aggravation is a question of fact to be determined by the adjudicator. Although the workers’ compensation system has undergone significant changes in the past decade, this Court’s determination in *Jordan* remains cogent and applicable:

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). The Court’s opinion in *Jordan* remains the best approach to this day because it recognizes that each claimant holds a unique medical history and experiences a unique mechanism of injury. It is this uniqueness that prevents the application of a hard and fast response in the negative or the affirmative to the Court’s question. For every claim that indicates such coverage should be denied, there is a corresponding claim in which coverage should be granted. And for each of those claims, there are scores of claims for which no answer is readily apparent absent a rigorous factual inquiry by experienced adjudicators, aided and assisted by medical expert testimony when necessary. Thus, in order to secure a fair and just determination on each claim presented, the adjudicator is, and must continue to be, provided with the authority

to consider all factors germane to compensability in determining whether a claim for workers' compensation benefits should be accepted or denied.

ARGUMENT

- A. **The facts presented in *Jordan* and in the instant case illustrate the need for a rigorous and informed case-by-case consideration of all facts surrounding a claim for workers' compensation benefits in determining compensability.**

Jordan v. State Workmen's Comp. Comm'r, 156 W. Va. 159, 191 S.E.2d 497 (1972), provides the starting point for any examination of compensability of pre-existing conditions under the Workers' Compensation Act. James Jordan alleged that he sustained an injury to his low back while packing boxes on January 6, 1969. This alleged injury superimposed itself on an extensive history of medical care for low back problems. Upon reviewing the facts presented in Jordan's claim for workers' compensation benefits, the Commissioner denied Jordan's claim. The Appeal Board then concluded that the elements of compensability had not been met upon its review of the matter. In challenging this determination before the Supreme Court of Appeals, Jordan argued that the evidence he presented established that he had sustained a new injurious event. The Court, however, disagreed and maintained the denial of Jordan's claim.

The facts presented in *Jordan* are strikingly similar to those presented in this case. Here, the claimant alleged that he sustained an injury to his back on February 8, 2012, while moving a "Rescue Randy" mannequin during firefighter/EMT training. This injury superimposed itself upon a 20-year history of traumatic back injury and treatment that began with a significant fall from a height of 80 feet while the claimant was mountain climbing in 1992.

The claims administrator held this claim compensable for (847.1) thoracic sprain/strain and (847.2) lumbar sprain/strain two weeks after the date of injury. The claimant then requested that (724.4) neuritis/radiculitis thoracic/lumbosacral, (724.3) sciatica, (722.52) degeneration of lumbosacral intervertebral disc, and (724.8) facet syndrome be recognized as additional compensable conditions under this claim. Essentially, the issue presented to the claims administrator through the claimant's request was whether the compensable claim would cover generalized back pain and arthritis; conditions that were present and routinely treated for many years prior to the work-related injury. Consistent with this Court's 40-year precedent, after careful review and consideration of the medical evidence, the claims administrator correctly declined to extend coverage to these conditions.

Under protest to the Office of Judges, the claimant argued that his 2012 injury had aggravated his pre-existing conditions. The employer responded with evidence indicating that the claimant had received routine treatment of his back pain and degenerative conditions prior to the 2012 injury, including chiropractic treatment received the day before the work-related injury, thus making his current condition indistinguishable from his pre-injury condition. In reversing the denial of coverage of the contested conditions, the Office of Judges noted the factual finding that the claimant had been under active treatment for the pre-existing conditions immediately preceding the date of injury in this claim. Despite this fact, the Office of Judges incorrectly ruled in this case that "aggravation of a preexisting condition by a compensable injury, under applicable case law, necessarily sanctions the inclusion of the aggravated preexisting condition as a compensable element of the injury per Charlton v. SWCC, 236 S.E. 2d 241 (W. Va. 1977); Jordan v. SWCC, 191 SE2d 497 (W. Va. 1972)." See Petitioner's Appendix 6 at pp. 13.

The employer appealed this determination to the Board of Review on the basis that the Office of Judges' interpretation of the compensability standard and the facts presented were clearly wrong. In the underlying decision, the Office of Judges committed a common error in interpreting *Jordan*. Although *Jordan* is often cited for the proposition that the aggravation or progression of a pre-existing condition may be compensable, its actual holding is not so broad as to require a rigid application of law that would result in compensability for all pre-existing conditions, even when not supported by fact or common sense. Instead, Syllabus Point 1 of *Jordan* sets forth that the compensability of an aggravation of a pre-existing condition is a factual determination to be made by the adjudicator. Moreover, it must be remembered that *Jordan* resulted in the *rejection* of a claim filed under the old rule of liberality standard—a standard weighted in favor of the claimant under which the claimant had only a minimal burden in establishing a compensable claim.

Similar to the facts presented in *Jordan*, the facts of this claim gave rise to significant questions regarding compensability. First, did the claimant have a relevant pre-existing condition? Here, the record below of his medical history established that he did have a relevant pre-existing condition for which he regularly received treatment prior to the work-related injury. Second, did a sufficient factual basis exist to establish whether the pre-existing condition had been aggravated or progressed by the work-related injury? After a rigorous and informed factual inquiry, the lower tribunal correctly determined that it did not.

It is this second question—whether there is a link, or lack thereof, between a pre-existing condition and aggravation/progression by a work-related injury—that *Jordan* mandates the adjudicator examine. This evaluation is necessary to satisfy the general compensability requirement found at W. Va. Code § 23-4-1(a), and protects against results that are inconsistent

with fact and common sense. As this Court has previously held on numerous occasions, compensability relies upon the coexistence of three elements: (1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment. *Barnett v. State Workmens' Comp. Comm'r.*, 153 W. Va. 796, 172 S.E.2d 698 (1970). *Jordan* recognizes that these three elements must be satisfied for both new conditions and pre-existing conditions. Accordingly, the factual analysis as to each condition asserted under a particular claim must be made by the claims administrator and is subject to *de novo* review before the Office of Judges and the Board of Review. Here, the diagnoses requested by the claimant could not satisfy the three elements of compensability.

The medical evidence submitted during the litigation of the protest simply did not create a preponderance of evidence sufficient to establish a factual link between the claimant's pre-existing condition and his work-related injury such that an aggravation of the claimant's pre-existing conditions had occurred. The importance in the outcome of the instant claim, however, is that the legally relevant questions of fact were asked, debated and then reviewed, analyzed and reasonably ruled on by the adjudicator during the litigation process. Regardless of the compensability determination, the act of informed factual analysis is what *Jordan* requires. That is the fairest and most accurate method of determining the compensability of pre-existing conditions under a workers' compensation claim. Aside from possible expedience, there is no rationale for deviating from such a requirement.

B. The standard of review supports the preservation of the fact-finding authority of the Board of Review.

Throughout each level of administrative litigation in the workers' compensation system, the adjudicator is charged with making findings of fact. These findings are the essential bases in ruling upon every contested issue. Findings of fact are not to be disturbed unless they

are clearly wrong. West Virginia Code § 23-5-15(d) affords great deference to the fact-finding function of the Workers' Compensation Board of Review when this Court reviews that body's decisions. Likewise, W. Va. Code § 23-5-12 requires that the Board of Review only reverse a decision of the Office of Judges if the underlying order is clearly wrong based on the substantial evidence on the whole record. This fact-finding function and standard of review is essential to arriving at a fair determination regarding the award of workers' compensation benefits. The respective fact-finding power reserved to each adjudicator is particularly important when considering questions of compensability. Rigid rules pre-supposing which claims are compensable and which are not prior to an intensive factual inquiry undermine the fact-finding authority and common sense approach relegated to the claims administrator, the Office of Judges, and the Board of Review in workers' compensation matters. In order to support that fair and reasonable approach, which is also a statutory mandate, every effort should be made to preserve the independent fact-finding capabilities of each entity and the standard of review of those findings.

C. The adoption of a rigid rule regarding the compensability of pre-existing conditions under workers' compensation would result in unfair results divested from factual circumstances and injustice to either the claimant or the employer.

Nuance is unpopular. Analysis is rarely clean or easy. Nonetheless, the *Jordan* Court understood that decisions of compensability must be made upon careful consideration of multiple factors. A pre-existing medical condition could lead to the denial of a claim, or it could form the basis of a compensable claim. The historical success of the *Jordan* opinion is found in its refusal to adopt a rigid, one-size-fits-all approach to compensability. Rather, *Jordan* maintained the importance of thoughtfulness and informed analysis in reaching a decision as to compensability in each case.

Reliance upon a reasonable, common sense approach places West Virginia in the majority position on this issue. *Larson's Workers' Compensation Law* states the majority position:

Preexisting disease or infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying that the employer takes the employee as it finds that employee.

Larson's Workers' Compensation Law, Vol. 1, § 9.02[1] [2014] at 9-15. In reviewing the jurisprudence on this general rule, however, the treatise goes on to note that "*most of the problems in this area are medical rather than legal.*" *Larson's*, Vol. 1, § 9.02[4] at 9-19, (emphasis added). It is this distinction that has led the majority of jurisdictions, including West Virginia, to recognize such questions of compensability as questions of fact in which the adjudicator is entitled to significant deference by appellate bodies:

Whether the employment aggravated, accelerated, or combined with the internal weakness or disease to produce the disability is a question of fact, not law, and a finding of fact on this point by the commission based on any medical testimony, or, in the commoner afflictions where the commissioners themselves have acquired sufficient medical expertise, based on the commission's expert knowledge even without medical testimony, will not be disturbed on appeal.

Larson's, Vol. 1, § 9.02[5] at 9-20. This essential fact-finding authority granted to the adjudicator assures that neither the claimant nor the employer is subjected to the injustice of a blanket rule that either requires all claims to be compensable or to be denied. While at first glance the majority rule might not always result in quick, uniform results, it does facilitate the most reasonable and just result in each particular case.

Moreover, the majority rule employed in West Virginia allows for predictability in the risks assessed by all employers and insurers. In reliance on this Court's jurisprudence in

Jordan, employers have considered and prepared for this type of risk for more than 40 years. A drastic turn from this historically recognized standard would require a significant shift in the manner in which risk is assessed and valued on the part of an employer and could result in fewer employment opportunities and/or benefits to employees if employers have to scramble to rearrange business practices to accommodate for a rigid rule that could place all risk associated with treatment of an employee's pre-existing conditions on the employer even in situations when there is no factual or proximate link between a work-related injury, which is compensable, and a pre-existing injury or condition. Similarly, a rigid rule denying employees the opportunity to present facts and expert testimony to demonstrate a factual and proximate link between a work-related injury and aggravation of a pre-existing condition would result in injustice to the employee.

Workers' compensation is not intended to be a program of insurance of all injuries and conditions of an employee pre-dating or unrelated to employment; instead it is a system designed to reasonably and fairly compensate an employee for injuries and conditions arising from employment and imposes that compensability obligation—and only that obligation—on employers. A rigid rule that would impose compensability for treatment of a pre-existing injury/condition pre-dating and unrelated to employment is beyond the permissible scope of the statutory workers' compensation scheme and is not a fair and reasonable interpretation of those laws.

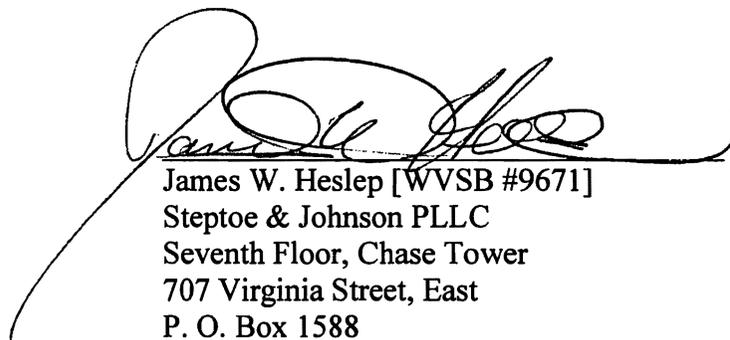
In this case, these issues are magnified because the City of Charleston, like many municipalities, self-insures its workers' compensation risk. The costs that it incurs are paid with public funds. Abandonment of the *Jordan* standard would severely alter the manner in which the City of Charleston and other public entities measure and insure their workers' compensation risk. The extraordinary care that must be utilized when performing these functions with public funds

would create significant uncertainty of risk among the City of Charleston and like-situated public entities. Any potential change to this system must be considered in the light of the seismic risk and cost structures that would be destabilized by such a change.

CONCLUSION

This Court's precedents, which are consistent with the majority rule, the statutory scheme of workers' compensation and its standards of review, and the furtherance of fair dealing and common sense require that the question of whether a pre-existing condition is compensable under a workers' compensation claim must be decided after a rigorous and informed factual inquiry by the adjudicator on a case-by-case basis. An abandonment of this standard would necessarily result in either the wholesale rejection of meritorious claims or the wholesale acceptance of dubious claims. The *Jordan* standard that has been employed for more than 40 years allows for greater accuracy and for balance between the rights and interests of employers and employees. The discretion allowed under the *Jordan* standard is a fair and necessary method to test the validity of coverage in workers' compensation, and it should be preserved by this Court.

For these reasons, the employer respectfully requests the Court to affirm the Board of Review's decision dated August 29, 2014.



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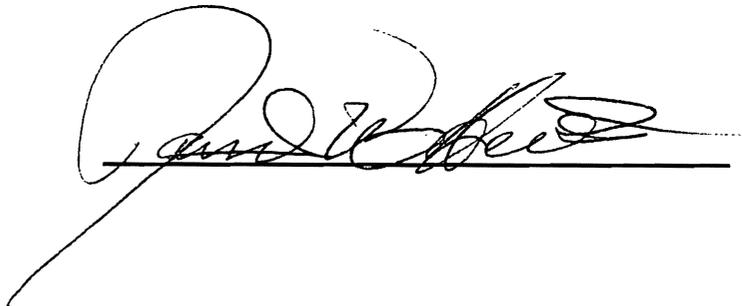
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2015, I served the foregoing
“**Supplemental Brief 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
P.O. Box 3709
Charleston, WV 25337

A handwritten signature in black ink, appearing to read "Paul W. Weaver", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the beginning.