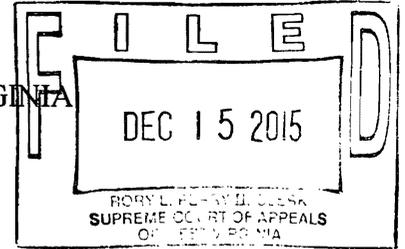


In the  
SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Charleston, West Virginia



WILLIAM L. GILL,

Petitioner,

vs.

Supreme Court No. 14-0983  
Claim No. 2012026734

CITY OF CHARLESTON

Respondent.

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SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER  
WILLIAM L. GILL

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December 15, 2015

## **SUPPLEMENTAL BRIEF**

Pursuant to the October 20, 2015, Order of the West Virginia Supreme Court of Appeals, the claimant/petitioner, William Gill, respectfully tenders this supplemental brief to address the following question posed by the Court: Whether aggravations of pre-existing conditions by work-related injuries are compensable?

### **BACKGROUND**

The claimant/petitioner, William Gill's pre-existing injury was aggravated by his work-related injuries when he lifted a 160 pound practice dummy at work. He sustained immediate pain and radicular symptoms beyond his pre-existing and/or any non-work related conditions. This is documented by his treating physician, objective diagnostic testing, and the opinion by a neurosurgeon. The medical evidence supports the Administrative Law Judge's findings that Mr. Gill sustained an aggravation of his pre-existing condition, the findings prior to the injury and the injury support an aggravation to his pre-existing condition.

The Administrative Law Judge was correct in finding that the evidence supported including the new conditions to the claim. The Board of Review's reversal of the Administrative Law Judge's decision is clearly against the evidence and West Virginia Code §§23-4-1 and 23-4-1g, that states an aggravation of a pre-existing condition is included in a workers' occupational injury.

### **The Pre-Existing Condition**

In 1992 the claimant fell approximately 80 feet and, at that time, suffered multiple injuries that included:

- Compound fractures to his left tibia/fibula.

- Fractured pelvis, fractured sacrum with a fracture of the pedicle of L5 and the superior facet of S1. No fragments were noted in the spinal canal.
- The pelvis showed fracture around the right sacral ala paralleling the sacral iliac synchondrosis and to the level of the sacral foramina. There is a lateral anterior displacement of the lateral fragment revealing a comminuted fracture of L5. The fracture of L5 was noted to be unstable. Regarding the fractured pelvis and L5 fracture the patient was treated conservatively.

Mr. Gill sustained other internal injuries from the fall which are not pertinent to this occupational injury.

### **The Work Related Injury**

On February 8, 2012, the claimant sustained an injury to his lumbar and thoracic spine while participating in rescue drills that required him to lift a practice dummy weighing 160 pounds. The claimant submitted his application for workers' compensation benefits completed by Dr. George Kipp with Short Chiropractic Clinic.

The Employer's Incident Report dated February 21, 2012, noted that the claimant was doing rescue "drags and carries" with a 160 pound rescue dummy. When the claimant got under the dummy to start lifting it he felt burning and pain in his lower back to his mid back and right side.

On February 24, 2012, Sedgwick guaranteed payment for the MRI of the thoracic and lumbar spine. Short Chiropractic then requested the claimant follow-up with a neurosurgeon consult. On March 12, 2012, Sedgwick authorized the claimant to be seen by Dr. Weinsweig regarding his ongoing lumbar and thoracic problems.

The claimant was then evaluated by Dr. Weinsweig March 21, 2012, for this current occupational injury. Dr. Weinsweig states:

"He has a history of multiple lumbar fractures and sacral fractures in 1992 from a significant injury as well as a severe injury to the lower left extremity. However, he has done well from this. He has

had some intermittent back pain over the years for which chiropractic care has helped within a couple of days. However, on February 8, 2012 apparently he bent over to lift a rescue dummy at work (he is a firefighter). Since that time, he has had burning discomfort in the lower thoracic and lumbar area. The main pain has been in the right lower back. He has some burning into the right buttock area and burning discomfort in the right great toe. His legs go weak at times. He has some numbness and tingling in the back over his legs and down to his feet.”

Dr. Weinsweig’s impression at that consult is as follows:

“My impression is that he suffers from pain temporally related to the injury at work with degenerative disc disease and an element of radiculopathy. I talked with him about options including living with the pain, further conservative measures with your care, pain clinic for epidural steroid injections or an operation. At this point, I am not overly enthusiastic about an operation. The pain has only been there for approximately six weeks.”

On August 22, 2012, Dr. Short requested adding the medical conditions neuritis/radiculitis, sciatica, degeneration of the lumbar or lumbosacral and facet syndrome. This request was denied on the same day by BrickStreet.

Both parties submitted numerous medical records from Short Chiropractic Clinic going as far back as April 16, 2002. These records show that the claimant has in the past had brief lumbar problems and radicular problems. Dr. Short diagnosed the claimant with lumbar or lumbosacral intervertebral disc, sciatica, displacement of thoracic or lumbar intervertebral disc without myelopathy, and lumbar facet syndrome.

Mr. Gill’s treatment from April 16, 2002, consisted of single episodes with very little treatment which consisted of chest pains on February 11, 2008, and a single thoracic episode on June 25, 2008.

## Analysis

*West Virginia Code* §23-4-1, provides, in part, as follows:

“...that the terms ‘injury’ and ‘personal injury’ include occupational pneumoconiosis and any other occupational disease, as hereinafter defined, and workers’ compensation benefits shall be paid to the employees of the employers in whose employment the employees have been exposed to the hazards of occupational pneumoconiosis or other occupational disease and in this State have contracted occupational pneumoconiosis or other occupational disease, or have suffered a perceptible aggravation of an existing pneumoconiosis or other occupational disease...”

In Syllabus Point 1, *Barnett v. State Workmen’s Comp. Comm’r*, 153 W.Va. 796, 172 S.E.2d 698 (1970), the court held that “[i]n order for a claim to be held compensable under, three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment.” *Sowder v. State Workmen’s Comp. Comm’r*, 155 W.Va. 889, 189 S.E.2d 674 (1972) states that “a claimant in a workmen’s compensation case must bear the burden of proving his claim but in doing so it is not necessary to prove to the exclusion of all else the causal connection between the injury and employment.”

In regard to pre-existing conditions, *Jordan v. SWCC*, 156 W.Va. 159, 191 S.E.2d 497 (1972), finds that the employer must take the employee as he finds him - with all of his attributes and all of his previous infirmities. An employee is not deprived of compensation because he is afflicted with some malady at the time he enters the employment.

In *Manning v. State Comp. Comm’r*, 124 W.Va. 620, 621 (1942), “a diseased workman who in the course of and resulting from his employment received an injury, which aggravates or accelerates the disease, to the extent of causing a disability sooner than would otherwise have occurred, is entitled to compensation...” In the *Manning* case the claimant’s pre-existing

Bueger's disease was aggravated by his occupational injury which led to the partial amputation of his left index finger.

If an injury lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, the resulting disability is to be attributed to the injury and not the pre-existing physical condition, *Keller v. SWCC*, 156 W.Va. 760 (1973). In *Keller* the claimant sustained a back injury which aggravated a tumor in his abdomen, which caused his premature death. The Court found a causal connection that the back injury aggravated his pre-existing condition/tumor which caused his premature death.

In the present case, the employer knew of the claimant's pre-existing conditions and, after passing the rigorous physical exam, the City of Charleston accepted him as a firefighter. Important to this case is the fact that prior to getting accepted as a firefighter the claimant did not have any active back problems or treatment. As a firefighter, Mr. Gill's duties included, on a daily basis, wearing 50 pounds of gear, carrying tools and, when on structure fires, wearing a self-contained breathing apparatus which weighs an additional 20 to 25 pounds.

Approximately two years after the claimant became a firefighter he sought his first treatment for back problems. This took place on April 16, 2002, when he injured his back in a work-related basketball game. The claimant did not file a workers' compensation claim for this injury, although he should have. "Recreational or social activities are within the course of employment when the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." *Emmel v. State Compensation Director*, 150 W.Va. 277, 145 S.E.2d 29 (1965).

In April 2002, the claimant was treated by Dr. Short for a simple sprain/strain. This treatment is for a single visit and no follow up treatment or long term problems to the claimant's lumbar or thoracic spine were noted. This sprain/strain did not prevent him from working or show any long term symptoms.

The work injury was different. The claimant's injury was an isolated fortuitous event that caused immediate radicular pain in different areas of his body. The claimant has had multiple treatments which have not resolved his physical symptoms and have prevented him from working. Medical treatment has consisted of injections, other medications and diagnostic testing.

This claim was held compensable for a lumbar sprain/strain and thoracic sprain/strain. After treatment and further testing the claimant continued to have symptoms without any quick resolution as he had in the past. Eventually the claimant had an MRI of the lumbar and thoracic spine. The current thoracic image was compared to an older thoracic MRI, which noted, "mildly worsened disc protrusion at C7-T1 and T2-T3 causing acquired and central canal stenosis."

The lumbar MRI found "multilevel degenerative change and disc disease causing acquired central canal and bilateral neuralforaminal narrowing with the neuralforaminal narrowing being worse on the right at L5-L1.

Comparing the claimant's pre-existing physical problems with the medical records, it is clear that the pre-existing injury was limited to the L5 lumbar spine, hip, legs and other internal injuries. The claimant's treatment for his pre-existing injury was limited to single episodes and not similar to the January 2012, incident when he lifted 160 pounds and had immediate onset of new symptoms.

The oldest chiropractic notes are simple issues that fail to mention radicular leg pain, numbness and tingling or electrical shock type symptoms. On February 7, 2012, the day prior to

this compensable injury, Mr. Gill had muscle spasms only in the lumbar area. There is not any mention of physical symptoms to the thoracic spine. Mr. Gill has never requested that the pre-existing condition be added to this claim but only that the progression and the symptoms from the work related injury be compensable.

The employer, in its brief, concedes that when comparing the MRIs, it shows a progression. In *Lilly v. State Workmen's Compensation Comm'r*, 159 W.Va. 613, 620, 225 S.E.2d 214, 218 (W.Va. 1976), the Court stated that “an employee who is injured gradually by reason of the duties of employment and eventually becomes disabled is no less the recipient of a personal injury than one who suffers a single disabling trauma.” *Lilly* was recently affirmed.

When reading the treatment notes from the day of injury, it explains why the lumbar MRI findings were worse on the right side. The claimant complained of pain on the right side of the low back he stated that it would also travel into the right foot and leg and it sometimes felt like an electric shock in the foot and his anterior thigh would occasionally go numb. As mentioned earlier, Mr. Gill’s traumatic fall mentions specific injuries, which are separate and distinct to Mr. Gill’s current physical problems.

His current problems are related to the lifting injury that occurred at work. This injury is distinguishable from this prior lumbar treatment and symptoms. The claimant’s deposition was taken on April 14, 2014. During his testimony he clarified his symptoms as follows:

- “...I had a burning sensation, and it felt like my spine was pulling apart in my upper part, my thoracic region.” (Tr. at 36)
- “...it felt like I had a knife in my back and then had the burning sensation in my thoracic, and then my lower back hurt.” (Tr. at 36)
- “When I did it on February the 8<sup>th</sup>, 2012, all my, it was new pain that I’d never had before...” (Tr. at 37)

- “No not down my right leg [pain radiating]. And I never had it go down my left leg, just my left, if you want, my left buttocks.” (Tr. at 38)
- He goes on to explain how this injury has affected his life, at work and at home. (Tr. at 48, 49).

When comparing Dr. Weinsweig’s assessment of the prior injuries and the current symptoms it is accurate compared to Dr. Hennessey’s report. Dr. Weinsweig, a neurosurgeon, found that the prior injuries were fractures to the lower extremity and lumbar, that the chiropractic treatment has helped the claimant within a couple of days and that since the lifting injury has a burning discomfort onto the right buttock and the great right toe, numbness and tingling in the back over his legs to his feet.

While Dr. Hennessey, a physiatrist, found that all the current physical problems are related to the old 1992 fall injury. If this were true, the claimant would never have passed the physical firefighters exam and he would not have been capable of performing his work duties for 10 years. Dr. Hennessey failed to look at the work injury and take into account the new physical symptoms such as the thoracic injury.

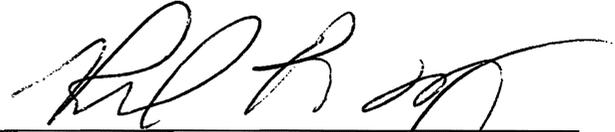
This claim should be held compensable for neuritis/radiculitis, thoracic/lumbosacral, sciatica, degeneration of lumbosacral IVD and facet syndrome since the claimant’s work requires him to perform heavy manual labor on a daily basis. The claimant’s current physical problems did not occur until after he started working as a firefighter which is reflected in the medical evidence of record.

### **CONCLUSION**

Mr. Gill’s current physical problems are related to the work incident and have continued to plague him. The Administrative Law Judge was correct to add the additional diagnosis based

upon the evidence of record. Therefore, Mr. Gill respectfully requests that the Board of Review's decision be reversed and that the Administrative Law Judge's decision be reinstated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. K. Maroney', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Patrick K. Maroney, counsel for Petitioner herein, do hereby certify that I served the foregoing Supplemental Brief 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 15th day of December, 2015.

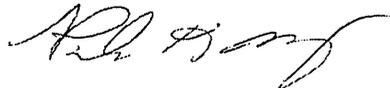
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