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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES A. MOORE, JR.,

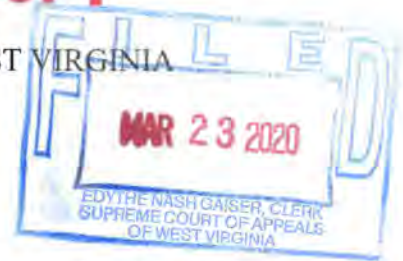
Claimant Below,
Petitioner,

v.

ARCH COAL, INC.,

Employer Below,
Respondent.

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No: 20-0028

BOR No.: 2053723

BOR No.: 2054350

JCN: 2017012631

PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF APPELLANT JAMES MOORE, JR.

I. INTRODUCTION

This is not a typical appeal from the Workers' Compensation Board of Review ("Board"). The claimant, James Moore, Jr., raises issues that are fundamental to the resolution of cases where the employer contends that the injured worker should be denied benefits because he has a preexisting injury. This is not hyperbole presented by Moore to bolster an otherwise weak case. To the contrary, Moore's case provides this Court with an opportunity to address and clarify the proper analysis of an employee's entitlement to benefits where the undisputed evidence demonstrates that the employee had an undiagnosed cervical spondylosis and was entirely asymptomatic prior to a serious accident in the coal mine where he worked.

Under prior decisions of this Court, including *Charlton v. State Workmen's Compensation Comm'r*, 160 W. Va. 664, 238 S.E.2d 241 (1977), Moore should have been awarded benefits, as a matter of law, since the undisputed evidence demonstrated that Moore "aggravate[d] or accelerate[d]" his preexisting, but asymptomatic disc disease "to the extent of causing a disability sooner than would otherwise have occurred. . . ." *Charlton* was discussed in *Gill v. City of Charleston*, 236 W. Va. 737, 744-745, 783 S.E.2d 857, 864-865 (2016), but nothing in *Gill* overruled Syl. Pt. 2 of *Charlton* and nothing in *Gill* overruled Syl. Pt. 3, in *Manning v. State Compensation Commissioner*, 124 W. Va. 620, 22 S.E.2d 299 (1942) or the sole syllabus point in *Hall v. State Compensation Comm'r*, 110 W. Va. 551, 159 S.E. 2d 299 (1931). Moore addressed this issue in Petitioner's Appeal Brief ("Moore's Brief") citing the relevant syllabus points and demonstrating why those syllabus points required a decision in Moore's favor. Moore's Brief, pp. 1, 15-16, 25, 27. Yet, neither the Board's Order nor the Response Brief of Arch Coal, Inc. ("Arch's Brief") in this appeal even mentioned *Charlton*, *Manning*, or *Hall*. Rather than explain why Arch

thinks these cases do not require a decision in Moore's favor, the Board in its Order and Arch in its Brief acted as if these three cases do not even exist.

Likewise, although Moore relied on a number of decisions by this Court including three (3) decisions issued since *Gill* was decided (Moore's Brief at 20-21), Arch's Brief fails to address those cases and fails to do anything to clarify the meaning of *Gill*'s "discreet new injury" test. Arch's silence is even more surprising since the Board, in upholding the ALJ Decision, wrote "*in the absence of further clarification regarding the Gill case, the Board finds the Administrative Law Judge's Decision is not clearly wrong.*" A-0045 (emphasis added). The Board implicitly asked the Court for clarification of the scope of *Gill*. Moore urged this Court to address the need for clarification. Moore Brief, p. 2. Yet, Arch's Brief fails to discuss, let alone rebut, Moore's argument that this Court should recognize the need to clarify the test for entitlement to benefits where a worker with preexisting, but asymptomatic, disc disease develops cervical radicular pain or radiculopathy following a traumatic workplace accident.

This Court should provide the "further clarification" of what it meant when it introduced "discreet new injury" into the jurisprudence of preexisting injury cases. The failure to do so leaves it to medical witnesses like Dr. Jin, who have their own diverse biases, to interpret "discreet new injury" with whatever meaning they choose to give it. The result, as in this case, a worker who was seriously injured in a workplace accident is denied benefits even though he never had any symptoms of cervical radicular pain before the accident and who probably would be working in the coal mines today if his head had not smacked into his shuttle car's canopy.

II. ARCH FAILS TO DISPUTE THE CENTRAL ARGUMENTS ADVANCED BY MOORE

Arch failed to rebut the crucial arguments advanced by Moore, substituting cherry picked excerpts from the extensive medical records, instead of admitting that Dr. Jin's records and testimony supported most of the facts upon which Moore relied.

In his Brief, Moore represented that Dr. Jin repeatedly diagnosed Moore with radicular pain, the pain associated with radiculopathy, from the record of Moore's initial visit with Dr. Jin on January 5, 2017, and continuing throughout the time Dr. Jin saw him. *See, e.g.*, Moore's Brief, 5, 6, 7, 8, 10. Nothing in Arch's Brief disputes that fact.

In his Brief, Moore represented that he never had any cervical or radicular pain prior to his injury of November 14, 2016. Moore's Brief, 4. In her deposition, Dr. Jin did not contest that fact. A-0072, 9:6-10:12 .

In his Brief, Moore represented that Dr. Jin actually documented Moore's illness as cervical radiculopathy using the same diagnosis code as Dr. Vaglienti, *i.e.*, M54.12. Moore's Brief, 6-7, 27; A-0138; *see also see* A-0119.¹ Arch did not deny that Dr. Jin relied on the same diagnosis code as Dr. Vaglienti.

Arch did not deny Moore's contention that, following the accident, he had new symptoms triggered by his "neck being jarred." Moore's Brief, 11. Nor did Arch deny that Dr. Jin admitted that the accident caused something new "symptomatically" (*id.*), that cervical radicular pain (which she diagnosed) occurs when a nerve is irritated or impinged (*id.*), and that there was no evidence that Moore had a nerve irritation or radicular pain prior to the accident on November 14, 2016. *Id.*

¹ Unless otherwise stated, citations to the Appendix are to the plaintiff's Appendix.

Arch did not contest Moore's contention that, as Dr. Jin admitted, Moore's disc disease was not unusual for a coal miner of Moore's age. Moore's Brief, 4.

Nor did Arch deny that Moore "[b]umped his head forcefully enough to initiate cervical pain and radiculopathy that he did not have -- was not symptomatic before that day[.]" A-0075, 21:9-13.

Likewise, Arch does not contest Dr. Jin's admission that, when Moore jarred his head into the canopy, the force likely caused compression of Moore's spine. Moore's Brief, 4

Moore did have an undiagnosed disc disease before his accident, but his disc disease did not result in the cervical radicular pain or the numbness and tingling that radiated from his neck down his shoulder and arm after the accident. Again, Arch does not appear to contest these facts.

What disabled Moore from continuing to work as a miner was not the preexisting disc disease. Rather, it was the disabling cervical radicular pain and the numbness and tingling that began after the shuttle car accident and that might not have occurred for many years, if at all, without Moore's accident in the mine. *See, e.g.*, Moore Brief, 4, 14 and A-0074, 17:17-18:2; 36:13-17.

Finally nothing in Arch's brief even suggests that Moore's description of the accident or of the pain that led to his cervical fusion is not credible. Although Dr. Jin may have questioned the diagnosis of radiculopathy, she clearly believed that Moore suffered from cervical radicular pain and included that diagnosis throughout her office records.²

² The problem is that there is apparently inconsistency in how doctors diagnose radiculopathy. Dr. Jin noted that cervical radicular pain and radiculopathy "are strictly speaking not the same, but a lot of doctors use loosely (*sic*)." A-0077, 31:8-12. This disagreement between Dr. Jin and Drs. France and Vaglianti does not alter the very real nature of Moore's post-accident, cervical radicular pain.

III. DR. JIN'S TESTIMONY DOES NOT SUPPORT AN INFERENCE THAT MOORE HAD A HISTORY OF SYMPTOMS OF DISC DISEASE BEFORE HIS ACCIDENT

The employer relies on Dr. Jin for the proposition that Moore “*had a history of degenerative disc disease, the symptoms of which having been exacerbated by the injury. . . .*” Arch’s Brief, 5 (emphasis in original). This misleadingly suggests that Moore had symptoms of degenerative disc disease *before* the injury and that the injury “exacerbated” those preexisting symptoms. Yet, Arch has not pointed to one iota of evidence that Moore ever suffered from *any* symptoms of disc disease *prior to* November 14, 2016. In fact, Dr. Jin’s deposition testimony expressly rebuts Arch’s representation. As set forth in Moore’s Brief, Dr. Jin “*agreed that there was no evidence that Moore had a nerve irritation or radicular pain prior to November 14, 2016.*” Moore’s Brief, 10, A-0081, 46:11-14 (emphasis in original); *see also*, A-0077, 32:12-20.

Arch’s Brief was its opportunity to identify evidence that supports its suggestion that Moore had a history of preexisting symptoms. Yet, Arch produced no such evidence, a fact that is not surprising since, as Dr. Jin’s testimony demonstrated, there was no such evidence to produce. A-0072, 9:3-18.

IV. THE OVERRIDING ISSUE IN THIS CASE IS WHETHER MOORE’S POST-ACCIDENT DISABLING PAIN, NUMBNESS, AND TINGLING IS COMPENSABLE, WHETHER IT IS CALLED CERVICAL RADICULAR PAIN OR RADICULOPATHY

Arch contends that the “overriding issue in this appeal is the claimant’s request to add C5-6 spondylosis with C6 radiculopathy as a compensable diagnosis in this claim.” Arch’s Brief, 2. In support of this argument, Arch argues that Dr. France’s Diagnosis Update requests compensation for spondylosis, a preexisting condition and is therefore not compensable.

There are several problems with this argument.

First, Moore is not requesting compensation for his preexisting spondylosis. Rather, he is seeking compensation for the cervical radicular pain (or radiculopathy) that he might never have suffered had he not been injured on November 14, 2016 and that led to the need for a cervical fusion. Dr. France's diagnosis code is for spondylosis *with* radiculopathy, not *without*, radiculopathy. Had the accident never occurred, Moore would most likely be mining coal today, not seeking workers compensation benefits. The reason he is not mining coal today is that his workplace accident resulted in a diagnosis of either cervical radiculopathy or cervical radicular pain. Either diagnosis represents an entirely new chapter in Moore's medical history and a chapter that the workers' compensation system was designed to address. The notion that Moore is seeking damages for a preexisting spondylosis is mistaken.

Second, although Dr. France requested that spondylosis with C6 radiculopathy be approved as a compensable diagnosis, his request does not prevent the ALJ and/or the Board from approving an alternative diagnosis if it is supported by the evidentiary record. *See* Moore's Brief, 28-30. This result is consistent with the purposes of the workers' compensation system and the cases referenced above in Moore's Brief at 29-30. As a result of a workplace accident, Moore developed, for the first time, radiculopathy (Drs. France and Vaglienti) or cervical radicular pain (Dr. Jin) that he had not had before that accident. Dr. France saw Moore's diagnosis through the eyes of an orthopedic surgeon and concluded that the appropriate diagnosis code was M47.22, the ICD-10-CM diagnosis code for "Other spondylosis with radiculopathy, cervical region." Dr. Vaglienti, a pain management specialist,³ relied on the code M54.12 for "radiculopathy, cervical region." Dr. France, an orthopedic

³ Although not necessary to decide this matter, Moore points out the irony of a decision where the employer relies on an occupational health generalist rather than orthopedic surgery and pain management specialists who are more regularly involved with spinal injuries than a generalist like Dr. Jin. It is even more

surgeon, opted for a diagnosis code of M47.22. Dr. Vaglienti and Dr. Jin opted for a diagnosis code M54.12.

Although the physicians may have chosen different diagnostic codes, they were all describing the same post injury cervical radicular pain, numbness, and tingling radiating from Moore's neck, down his shoulder and arm. Nothing in workers' compensation law or regulations required the ALJ or the Board to deny Moore benefits because his doctors could not agree on whether cervical radicular pain was better diagnosed as radicular pain or radiculopathy or was more accurately described by M54.12 or M47.22. In either case, the doctors agree that Moore was involved in a serious workplace accident that resulted in serious cervical and radicular pain and that entitled Moore to workers' compensation benefits.

Arch argues that Moore cannot request that the ALJ, the Board, or this Court to recognize that, whatever name one gives it, Moore suffered from significant nerve irritation or impingement that caused his cervical radicular pain.⁴ Entitlement to benefits should not depend on the name one's doctors assign to a medical condition where, as in the present case, they all agree that Moore's accident initiated serious and disabling cervical radicular pain.

Contrary to Arch's Brief, Moore is not asking that the "preexisting degenerative condition of spondylosis be accepted as compensable." Arch's Brief, 22. Although Moore did have a

ironic given that Dr. Jin requested Dr. France to review Moore's MRI (A-0133) and referred Moore to Dr. Vaglienti for pain management (A-0134).

⁴ Arch notes that "neither MRI revealed any significant spinal cord impingement." Arch Brief, 8. The MRI finding did not rule out a nerve impingement. The MRI reviewer of the December 2016 MRI noted "C5-6 diffuse posterior disc bulge without *definite* nerve root impingement." A-103, emphasis added. Most important, whether Moore had a nerve impingement or, as Dr. Jin opined, a nerve irritation, he certainly went to work on November 14, 2016, without any cervical radicular pain and left work with a significant new source of pain that ultimately led to a cervical fusion.

preexisting degenerative disease, he is not asking that the preexisting disc disease be held compensable. Rather, Moore requests compensation because a serious accident, involving trauma to his cervical spine, resulted in cervical radicular pain that, as Dr. Jin agrees, might not have otherwise occurred for years. His request for compensation results from what happened on November 14, 2016, not for his condition before that date. *See* discussion at pages 26-28 of Moore's Brief. If one follows Arch's logic, the onset of an injury related to a previously asymptomatic disc disease would never be compensable, no matter how advanced the disc disease, nor how serious the post trauma pain, numbness, and tingling because, under Arch's vision of West Virginia law, once a worker develops disc disease, the onset of cervical radicular pain or of radiculopathy following a trauma to the spine will never be compensable. Workers' compensation promised workers who are injured at work compensation for their injuries. Arch's view of the law breaks that promise.

V. THE ALJ AND THE BOARD AS WELL AS THIS COURT CAN CONSIDER ALTERNATIVES TO DR. FRANCE'S DIAGNOSIS UPDATE GIVEN THE FACTS OF THIS CASE

Arch argues that the Court cannot grant relief to Moore because "[t]here has been no request by the claimant to add cervical radicular pain or radiculopathy as a compensable condition in this claim." Arch's Brief, 2. However, as explained in Moore's Brief at pages 28-30, the Board has the authority to determine that an injury is compensable if the evidence supports such a claim whether or not there is a formal request for a diagnosis update. Moreover, Moore did request that the Board consider adding diagnosis code M54.12, the code relied upon by Drs. Vaglianti and Jin. In his brief to the Board, Moore addressed this issue noting that there was "evidence in the record of Moore's claim to support the addition of his radiating pain as a compensable condition, regardless of how that radiating pain is labeled." Corrected Brief of Appellant James Moore, Jr., 37. Moore requested that

the Board adopt either Dr. France's diagnosis code or that used by Drs. Jin and Vaglienti in the alternative.

In this case, both Dr. Jin and Dr. Vaglienti used the diagnosis code M54.12, "radiculopathy, cervical region" to refer to Moore's radicular pain and, in Dr. Vaglienti's case, to radiculopathy. Dr. Jin should not be heard to question M54.12 as a diagnostic code because it is precisely the code used in her records for her diagnosis of radicular pain.

Id., 38.⁵ The same contention was included in Moore's Brief to this Court:

Furthermore, there is evidence in the record of Moore's claim to support the addition of his radiating pain as a compensable condition, regardless of how that radiating pain is labeled. In fact, as discussed *supra*, Dr. Jin's diagnostic code (M54.12) is the same as that of Dr. Vaglienti.

Moore's Brief, 29. Thus, contrary to Arch's contention, this Court can either adopt the diagnosis code it deems appropriate or remand this case to the Board for a decision as to the appropriate code to support the compensability of the claim.

VI. DR. JIN DID APPLY HER OWN TEST FOR COMPENSABILITY WHERE THE EMPLOYER CONTENDS THERE WAS A PREEXISTING CONDITION

Arch contends that Dr. Jin "did not 'have a test for compensability.'" Arch's Brief, 23. However, the ALJ and, presumably, the Board, relied on her notion of causation in concluding that Moore's claim was not compensable. *See* Moore's Brief, 21-24. *See, e.g.*, A-0018 where the ALJ adopts Dr. Jin's opinion that "the record does not indicate that the claimant's degenerative disease was causally related to the compensable injury." However, the ALJ's opinion, relying primarily on Dr. Jin, asks the wrong question. The issue is not whether Moore's proposed compensable injury (cervical radicular pain or radiculopathy) was causally related to his degenerative disease as the ALJ

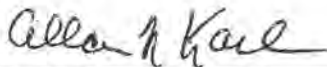
⁵ *See also* Claimant's Response to Employer's Closing Argument, 11, n. 9, where Moore advised the ALJ that "[t]he difference in diagnosis codes does not change the compensability of Moore's cervical radiculopathy."

concluded. Rather, the issue was whether *Charlton, Manning, and Hall* applied and, if not, whether Moore's cervical radicular pain and/or radiculopathy resulted from the accident and constituted this Court's "discrete new injury."

Although Dr. Jin insisted that the accident did not cause any of Moore's post-accident cervical radicular symptoms, she admitted that the accident caused new symptoms because his neck was "jarred" in the accident, that the accident triggered or made his symptoms manifest, that it caused something new symptomatically, and that it resulted in new problems including the irritation of a nerve causing his cervical radicular pain. *See* discussion of Moore's admissions at Moore's Brief, 10-11. Dr. Jin also agreed that Moore's pain resulted from a nerve irritation that put pressure on a nerve, pressure that did not exist before the accident. *Id.* Dr. Jin's denial of a causal relation between the accident and the subsequent pain and disability is contrary to a common sense notion of causation and should not be adopted as this Court's concept of *Gill's* "discreet new injury."

WHEREFORE, Moore requests that this Court reverse the decision of the Board.

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I, Allan N. Karlin, hereby certify that on March 20, 2020, service the foregoing "Petitioner's Reply Brief" was made upon the parties listed below via U.S. Mail:

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