BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

ICG Tygart Valley, LLC, Employer,

Appellant,

v.

James Moore, Claimant,

Appellee.

Supreme Court No. 20-0028
BOR Appeal Nos. 2053723 and 2054350

BRIEF ON BEHALF OF APPELLEE
ICG Tygart Valley, LLC

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II. NATURE OF PROCEEDING

This claim is before this Court pursuant to the claimant's appeal of two Orders of the Board of Review dated December 13, 2019. The first Order of the Board of Review affirmed the June 13, 2019, decision of the Office of Judges which affirmed the following orders of the claims administrator:

- the October 19, 2017, order closing the claim for temporary total disability benefits;
- the September 17, 2018, order denying the claimant's request to reopen the claim for temporary total disability benefits; and
- the September 17, 2018, order denying a request to add C5-6 spondylosis with C6 radiculopathy as a compensable diagnosis in this claim.

The second Order of the Board of Review affirmed the Office of Judges November 26, 2018, decision which properly affirmed the Claim Administrator's September 26, 2017, Order granting a 0% permanent partial disability award.

The employer submits that the December 13, 2019, Orders of the Board of Review are correct and should not be disturbed on appeal. 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. The claimant would have this Court believe that this appeal is about the claimant's request for "a diagnosis update to include a diagnosis for his cervical radicular pain or radiculopathy" which "were denied by the Board." That is simply not the case. There has been no request by the claimant to add cervical radicular pain or radiculopathy as a compensable condition in this claim. There has been no order by the claims administrator regarding such a request that has been protested by the claimant. **The only issue regarding the addition of a compensable condition in this claim is the denial of the addition of C5-6 spondylosis with C6 radiculopathy as a compensable condition.** Accordingly, the employer requests that this Board AFFIRM the decision of the Office of Judges dated June 3, 2019. [1]

[1] The Office of Judges affirmed the October 19, 2017 Order of the Claims Administrator in its May 22, 2018, decision, finding that the claimant was not temporarily totally disabled due to the compensable conditions. On appeal the Board of Review remanded the protest to the Office of Judges due to the claimant's protests of the September 18, 2018, Orders. By Order dated December 13, 2018, the Office of Judges consolidated the protests.

III. STATEMENT OF THE CLAIM

The orders of the Board of Review dated December 13, 2019, and the decisions of the Office of Judges dated November 26, 2018, and June 3, 2019, each contain detailed Findings of Fact and Conclusions of Law based on the evidence available for review at the time of decision. The employer hereby adopts and incorporates by reference each and every Finding of Fact and Conclusion of Law contained in the orders of the Board of Review and the decisions of the Office of Judges as if fully restated herein. Further, the following facts and evidence are of record and relevant to this Court's review of the issue before it.

The claimant, James Moore, is presently fifty-one (51) years of age, with a date of birth of April 26, 1968. The claimant was employed with Arch Coal as a buggy operator. The claimant completed Section I of a WC-1 Report of Injury on November 17, 2016, alleging that he sustained an injury to his neck and right shoulder on November 14, 2016, when the brakes of his shuttle car locked up causing him to hit his head on the canopy and jerking his right arm. Section II of the form is signed by Dr. Monte McAlester of the Bridgeport MedExpress on November 17, 2016. Dr. McAlester checked the box alleging the claimant sustained an occupational injury and diagnosed the claimant with a *sprain/strain of the right shoulder and a strain of the upper back* and listed diagnosis codes 840.9 (sprain shoulder/arm NOS) and 728.85 (spasm of muscle). The doctor stated that he first examined the claimant on November 17, 2016, and released the claimant to return to work on November 17, 2016. (Exhibit A)

The claimant presented to MedExpress in Bridgeport on November 17, 2016, reporting complaints of neck and right shoulder pain due to hitting his head on the canopy of his shuttle car and jerking his right arm when the brakes of the shuttle car locked up while going over a dip. On examination, the following was noted:

> No midline spinous tenderness noted in neck. No crepitation noted in neck. No Step-off noted on palpation of cervical spine.

The claimant exhibited paraspinous tenderness in the neck. Dr. McAlester diagnosed the claimant with an *unspecified sprain of right shoulder joint, muscle spam, and neck pain.* (Exhibit B)

By Order dated November 28, 2016, the claim was held compensable on a no lost time basis listing diagnosis codes "S43.409A" unspecified sprain of unspecified shoulder joint, initial encounter and "M62.838" other muscle spasm as the only compensable conditions. The claimant did not protest this Order.

On November 28, 2016, the claimant returned to MedExpress for follow-up reporting no improvement in his right shoulder and neck pain. Dr. Freedman noted the following on examination:

> Range of motion of neck is normal, Normal strength against resistance in neck, Neck normal in appearance, No midline spinous tenderness noted in neck, No paraspinous tenderness noted in neck, No lateral tenderness noted in neck, No anterior tenderness noted in neck, No Step-off noted on palpation of the cervical spine.

Dr. Freedman diagnosed the claimant with neck pain using diagnosis codes 723.1 and M54.2. (Exhibit C)

The claimant underwent an MRI of the cervical spine on December 3, 2016. (Exhibit D) The MRI revealed as follows:

1. C4–5 degenerative disc change and left posterior paracentral disc bulge or small HNP with equivocal ventral nerve root impingement.

2. C5–6 diffuse posterior disc bulge without definite nerve root impingement.

The claimant was treated at MedExpress for right shoulder pain on December 5, 2016. The claimant was diagnosed with "unspecified sprain of the right shoulder joint, subsequent encounter." **There was no mention of cervical spine pain and the claimant exhibited normal range of motion of the cervical spine.** It was noted the claimant continued to have right shoulder pain and that he was continuing to work with restrictions. The claimant was referred to physical therapy for the right shoulder. (Exhibit E)

The claimant was evaluated at PRO PT for physical therapy on December 9, 2016. The claimant complained of right shoulder and neck pain, and explained this was the result of being "pushed into the canopy of the equipment." The therapist noted the claimant had right shoulder

pain, cervical pain, radicular symptoms in the right upper extremity, muscle weakness of the right shoulder, and limited cervical range of motion. The therapist recommended physical therapy for 8 weeks, 2 to 3 times per week. (Exhibit F)

On January 5, 2017, the claimant attended a consultation with Dr. Jin, an occupational specialist at WVU Occupational Medicine. The claimant reported complaints of continuing neck pain radiating down into his right shoulder, as well as tingling and numbness in the finger of his right hand. Dr. Jin noted that the claimant's medical history was positive for angina, arthritis, asthma, COPD, coronary artery disease, CPAP dependence, GERD, hearing loss, hyperlipidemia, hypertension, morbid obesity, myocardial infarction, sleep apnea, and Type II diabetes. Dr. Jin noted the claimant's MRI showed degenerative disc disease. Dr. Jin also noted the claimant's range of motion of the cervical spine was normal, and the claimant had full strength of the bilateral upper extremities. She assessed the claimant with cervical sprain, right rotator cuff tear, and cervical radicular pain, noting that *the claimant had a history of degenerative disc disease, the symptoms of which having been exacerbated by the injury*, as well as a partial right rotator cuff tear. Dr. Jin recommended that the claimant continue with physical therapy transitioning into home exercises, and for the claimant to continue with modified duty work. (Exhibit G)

By order dated January 9, 2017, the Claims Administrator approved a diagnosis update to include "Neck Pain (ICD-10: M54.2)." (Exhibit H) This order was not protested.

On February 8, 2017, the claimant followed up with Dr. Jin. Dr. Jin noted the claimant continued to complain of neck pain that radiated down into his right shoulder and arm. The claimant has also experienced leg numbness, mainly in the left leg. Dr. Jin explained to the claimant that his leg pain was unrelated to his neck injury. Dr. Jin also noted that the claimant was suffering from pneumonia and was in the hospital for seven days and that the claimant had not been working due to the pneumonia that is unrelated to the compensable injury. Dr. Jin recommended that the claimant continue with modified duty, but discussed that he may not be able to work underground in coal mines because of his multiple medical and health issues. She suggested that he may need to consider changing his profession or trade. The claimant requested

to see a doctor from the spine center for a second opinion regarding his leg. Dr. Jin requested a referral for the spine center. (Exhibit I)

By Order February 23, 2017, the Claims Administrator suspended the claimant's temporary total disability benefits based on the February 13, 2017, report of the claimant's treating physician which found the claimant to have reached his maximum degree of medical improvement and released the claimant to light duty employment that the employer could accommodate. (Exhibit J)

On March 6, 2017, the claimant returned to Dr. Jin for complaints regarding his neck. Dr. Jin noted that the claimant attended a consultation with Dr. France at the Spine Center, and did not recommend surgery. Dr. Jin noted that the claimant has been on modified duty, which he has tolerated so far. Dr. Jin recommended a pain clinic referral and continuing physical therapy for the neck pain. Dr. Jin also recommended home traction. (Exhibit K)

The claimant was treated by Dr. Vaglienti on April 3, 2017, for complaints of neck pain. The reason for the consultation was listed as "neck pain with right radicular symptoms." On examination, Dr. Vaglienti noted the claimant had full range of motion of the cervical spine. The neurological examination was negative for tingling, weakness, numbness, and headaches. Dr. Vaglienti diagnosed cervical radicular pain and recommended epidural steroid injections. (Exhibit L)

On May 8, 2017, based on her examination of the claimant, Dr. Jin noted the claimant was "probably at MMI in terms of his cervical strain." Thus, Dr. Jin, the claimant's treating physician found the claimant to have reached his maximum degree of medical improvement due to the compensable neck sprain. (Exhibit M)

On June 20, 2017, Dr. Vaglienti performed a right cervical medial branch blocks at C5, C6 and C7. **The pre-procedure diagnoses were neck pain, tingling in extremities, and cervical facet arthropathy**. The pre-operative diagnoses were listed as "Asthma, GERD, Hypertension, Atherosclerosis, Coronary Artery Disease, Hyperlipidemia, COPD, Depression, Diabetes Mellitus, Type II, Lightheadedness, Thymoma, Dysphagia, Abnormal digestive system

diagnostic imaging, Gastritis, Neck pain, Shoulder pain." The post-operative diagnoses was the same. (Exhibit N)

Dr. Jin saw the claimant on September 12, 2017, when the claimant advised that he was only taking 1 or 2 over-the-counter Aleve tablets a day for his neck pain. Based on her examination of the claimant, Dr. Jin stated that the claimant had reached his maximum degree of medical improvement and that no further treatment would change his status. (Exhibit O)

By Order dated September 26, 2017, the claimant was awarded 0% in PPD benefits. The claimant has protested this Order. (Exhibit P)

In her October 10, 2017, progress note Dr. Jin again concluded that the claimant had reached his maximum degree of medical improvement and noted the claimant was encouraged to try a home exercise program. Thus, Dr. Jin again found the claimant to have reached his maximum degree of medical improvement, concluded that no additional treatment would benefit the claimant. (Exhibit Q)

By Order dated October 19, 2017, the claim was closed for temporary total disability ("TTD") benefits, as no evidence had been received demonstrating that the claimant was off work due to the compensable injury. The claimant protested this Order. (Exhibit R)

The report of Dr. Richard Vaglienti from WVU Pain Management dated January 17, 2018, indicates that the claimant underwent a trigger point injection with ultrasound but does not state where the injection was performed and does not state why. In fact, the preoperative and post-operative diagnoses were listed as "Asthma, GERD, Hypertension, Atherosclerosis, Coronary Artery Disease, Hyperlipidemia, COPD, Depression, Diabetes Mellitus, Type II, Lightheadedness, Thymoma, Dysphagia, Abnormal digestive system diagnostic imaging, Neck pain, Shoulder pain." There is no mention of the alleged injury in this claim. (Exhibit S)

A February 5, 2018, cervical MRI report listed the impression as "reversal of expected lordotic curvature," "Advanced uncovertebral osteoarthritis at C5-C6 with spinal canal and foraminal narrowing" and "C4-C5 has disc herniation on the left." **Thus, the findings were identical to those in the December 3, 2016, MRI**. (Exhibit T)

Dr. Vaglienti treated the claimant on February 15, 2018. Dr. Vaglienti listed principal diagnoses of "stenosis, cervical region" and "radiculopathy, cervical region." The final diagnosis listed by Dr. Vaglienti was "spinal stenosis cervical region." On the Consent to Surgery or Special Procedures for the Epidural Steroid Injection the claimant signed, it was noted the claimant had been referred to Dr. Vaglienti for "chronic pain." Dr. Vaglienti listed the pre-procedure diagnoses as:

1. Neck pain
2. DDD (degenerative disc disease, cervical)
3. Cervical spondylosis with myelopathy and radiculopathy
4. Facet arthropathy
5. Cervical spinal stenosis
6. Right arm pain
7. C6 radicuplopathy

These diagnoses remained the same after the epidural steroid injection. (Exhibit U)

Correspondence from Dr. Vaglienti addressed to the claimant allegedly dated March 16, 2018, alleges the claimant's complaints are related to the injury in this claim. However, he fails to indicate whether the claimant's condition is related to the significant preexisting degenerative changes in his cervical spine. Further, while Dr. Vaglienti speculates that there is a 51% chance that the herniated disc noted on the MRI is related to this injury, he fails to note that neither MRI revealed any significant spinal cord impingement. (Exhibit V)

Dr. Jonathon Luchs performed an Age of Injury Analysis regarding the December 3, 2016, cervical spine MRI on April 18, 2018. Dr. Luchs report states as follows:

> **HISTORY**: Nineteen days after an injury the patient had an MRI of the cervical spine. The primary reader described C4/5 degenerative disc change and left posterior paracentral disc bulge and/or small herniated disc with equivocal ventral nerve impingement and C5/6 diffuse posterior disc bulge without definitive nerve root impingement. The primary reader described slight reversal of midcervical lordosis.
>
> **DISCUSSION**: I concur with the primary reader's findings of reversal of midcervical lordosis. I concur with the primary reader's findings of disc abnormalities at C4/5 and C5/6, as there is evidence of disc/osteophyte complex at C5/6 larger than C4/5, which results in flattening of the ventral thecal sac. Uncovertebral,

joint hypertrophy/arthropathy and facet arthropathy are evident at C4/5 and C5/6, and this, along with the degenerative disc disease at C5/6 results in neural foraminal narrowing.

CONCLUSION:

Therefore, in conclusion, this MRI of the cervical spine performed 19 days after an injury demonstrates degenerative disc disease and degenerative arthropathy. These finding are chronic. Reversal of midcervical lordosis is evident which correlates to the site of degenerative changes and is therefore chronic.

(Exhibit W)

The claimant was seen by Dr. John France on May 8, 2018, for a chief complaint of "right-sided neck pain with radicular symptoms." Dr. France noted the claimant's x-rays as well as MRI were reviewed and those showed he had "A C5-C6 spondylosis with mild right-sided C5-C6 foraminal narrowing. Otherwise, no significant pathology was identified." (Exhibit X)

By decision dated May 22, 2018, the Office of Judges affirmed the September 15, 2017 and October 19, 2017, Orders of the Claims Administrator. (Exhibit Y)

On August 21, 2018, the claimant requested his claim be reopened for the payment of temporary total disability. (Exhibit Z) Also on August 21, 2018, the claimant requested to add cervical spondylosis with C6 radiculopathy and neck pain as compensable conditions in this claim. (Exhibit AA)

By Order dated September 17, 2018, the Claims Administrator denied the claimant's motion to reopen the claim for payment of temporary total disability benefits (Exhibit BB) and denied the request to add cervical spondylosis with C6 radiculopathy and neck pain as compensable conditions in this claim. (Exhibit CC) The claimant protested these Orders.

By decision dated September 26, 2018, the Office of Judges affirmed the December 12, 2017, Order denying further evaluation by Dr. Vaglienti. (Exhibit DD)

Dr. Chuanfang Jin testified by deposition on January 9, 2019. (Exhibit EE) On direct examination when asked about the radiculopathy Dr. Jin testified as follows:

Q. So something must have happened on November 14, 2016, to cause the cervical—to cause the cervical pain and radiculopathy; true?

A. Well this question is a little bit complicated to answer.

Q. Okay. Well, go ahead.

A. He had an accident because the bump on the head caused the jar to the neck. So the mechanism of injury is more like a mechanical jar force and that specifically, unless that caused disk herniation; so that may or may not be real cause for radiculopathy. What I'm trying to say, for some people, they bump, which caused jarred head and then they get better. **And for some people it might cause a problem because if their spine is already degenerated and the disk is so frail, and so then it becomes a combination of that incident and the situation of the spine; so it's more like a combination result.**

Q. **There was some MRI evidence of preexisting disk disease; correct?**

A. Right.

(Depo Transcript pp. 10, 11)

The deposition continued with Dr. Jin testifying:

Q. Is there any evidence of a nerve impingement prior to November 14, 2016?

A. Well, not clinically, but pathologically, yes there are. **Because the MRI show that the MRI finding was not due to that accident. The MRI finding at that time was preexisting degenerative change. That –that is well-known cause, you know, the radicular symptoms and sometimes radiculopathy.**

Q. There was no evidence of any kind of nerve impingement prior to?

A. Well, you did not do MRI then, so it's hard to say. Only - - everything is only- -I mean, you know, the analysis, according to the natural history of the disease pathology. So the degeneration generally does occur long before the start, long before you can see it.

Q. I understand that there is degeneration. But there was nothing causing radiculopathy prior to November 14, 2016; true?

A. **But the degeneration is the cause of radiculopathy.**

(Depo Transcript pp. 14, 15)

Dr. Jin repeatedly testified that the pathology of the cervical spine did not change, only the symptoms changed. At pages 26 and 27, Dr. Jin testified:

A. So about just from the medical perspective, logically how medical condition injury affect the patient's body. I did not consider legal perspective because that's not really my specialty.

Q. Well, can we just agree on his that whatever the cause test is, that on November 14, 2016 when Mr. Moore hit his head on a canopy, something new and in addition to what existed before happened to him, something new happened?

A. From legal perspective.

Q. Something new happened. Can you answer that question? If you can't that's okay.

A. I mean, medically.

Q. I'm sorry?

A. **Like I explained, the medical, I said the accident did play a role, but not the cause. If you want to say there's new pathology, no. I mean, but the incident/accident did play a role to make patient symptomatic.**

Q. It caused something new to happen?

A. **Well, I guess my English, I just don't feel medically I should say that.**

Dr. Jin testified that cervical radicular pain was different from radiculopathy. Cervical radiculopathy is the nerve impinged causing neurologic deficit, which the claimant did not have. Regardless, of how claimant's counsel phrased the question Dr. Jin did not waiver in her opinion.

A. Irritation could be. Sometimes an impingement can have irritation, can cause radicular pain.

Q. Okay. The variations are the same thing, aren't they?

A. No, they are strictly speaking not exactly the same, but a lot of doctors use loosely.

Q. Okay. So he had cervical pain and - - but you did later note radiculopathy, did you not, at some point?

A. I think I used cervical radicular pain. I did not use radiculopathy unless there's a true neurological deficit documented.

Q. Well, he eventually needed- - didn't that turn into radiculopathy because? Did you know if Dr. France saw that?

A. Yeah, Dr. France used that for surgery because you cannot do surgery for radicular pain.

Q. So Dr. France, who's an orthopedic surgeon, eventually concluded that he had radiculopathy.

A. He did.

Q. Do you have any reason to disagree with him?

A. **From my exam, that's radicular pain.**

(Depo Transcript pp. 31, 32)

Dr. Jin testified the claimant has C5-C6 spondylosis, but she did not diagnose him with that because it was not a compensable condition. When asked about the radicular symptoms Dr. Jin testified as follows:

Q. And can you explain when you're just, once again, for – when you were treating him for radicular pain, what did – in your notes, what do you mean by that?

A. It's normally if it's a simple sprain/strain, most people have pain. Very, very rare they're going to have the radicular pain.

But when incident of injury superimpose on pre-disk degeneration, a lot of patients have radicular pain, and sometimes have radiculopathy.

It's, to me, it is not specifically due to that accident because there is preexisting pathology there that events certainly can trigger the symptoms.

So while we generally treat the patient, even though certain part may not be completely from the injury itself, but we treat. The goal for us is to help patient get better; they can go on with their life. So that's our goal.

So during the treatment, we don't say, this pain is due to degeneration. We don't treat you, and we only treat you for sprain/strain.

So when patient diagnosed as sprain/strain, worker's comp accept as compensable condition, we actually treat everything for that body part. We don't differentiate this part is due to degeneration; this part is due to accident.

(Depo Transcript pp. 57, 58). Dr. Jin went on to discuss her numerous determinations that the claimant had reached maximum medical improvement:

A. Because the - - the compensable condition really covered his cervical sprain/strain. The natural history of sprain/strain is really short lived and generally recover over tie with treatment, without treatment.

To my personal experience, I know patient when they have degeneration, the disease process generally is delayed and not always going to the full healing outcome.

So we normally treat, and those are normally- - most people do not think it's indication for surgery, so that's why we send for pain clinic, hope injection can bring down the symptoms for radicular pain, and the patient have better exercise to get better outcome.

Q. Okay.

A. So when everything failed on this road, we normally thing there's no more things for the sprain/strain-type injury superimposed on degeneration.

Q. **And C5-C6 spondylosis, what is spondylosis, medically speaking?**

A. **It's actually another term for degenerative change of the structure.**

(Depo Transcript pgs. 61, 62)

Dr. Jin testified that the claimant's work accident exacerbated the pre-existing degenerative disc disease. The herniated disk seen on the December 2, 2016, MRI was chronic, as the findings did not represent a true traumatic disk herniation, but represented a disk bulge or disk protrusion.

By decision dated June 3, 2019, the Office of Judges affirmed the October 19, 2017, and both September 17, 2018, Orders concluding that:

> The other diagnosis request addressed by the Order is C5-6 spondylosis with C6 radiculopathy. According to Dorland's Illustrated Medical Dictionary (29th ed.), spondylosis is defined as a "general term for degenerative spinal changes due to osteoarthritis." More specifically, Dorland's defines cervical spondylosis as a "degenerative joint disease affecting the cervical vertebrae, intervertebral discs, and surrounding ligaments and connective tissue, sometimes with pain or paresthesia radiating down the arms as a result of pressure on the nerve roots." These definitions are consistent with the sworn testimony of Dr. Jin, who described spondylosis as a "fancy name for degeneration." Therefore, cervical spondylosis refers to a degenerative condition as opposed to a traumatic injury diagnosis. Moreover, the weight of evidence firmly establishes that the claimant's degenerative condition or spondylosis predated the compensable injury and was not caused by the incident of November 14, 2016. In that regard, an MRI of the claimant's cervical spine taken only a few weeks after the compensable injury demonstrated degenerative changes at the C4-5 and C5-6 levels of the cervical spine, while a subsequent MRI study performed on February 1, 2018, showed "advanced uncovertebral osteoarthritis at C5-6." In addition, Dr. Jin, Dr. Luchs, Dr. Guberman, and Dr. Vaglienti have all acknowledged that the claimant's cervical osteoarthritis or degenerative disease predated the compensable injury in this claim. Accordingly, it is

found that the requested diagnosis of C5-6 spondylosis is not causally related to the compensable injury of November 14, 2016.

In support of his protest to the Claim Administrator's Order, claimant's counsel argues that according to established case law, radiculopathy should be added as a compensable diagnosis in this claim. Specifically, counsel asserts that the compensable injury aggravated the claimant's pre-existing degenerative disc disease (spondylosis) so as to produce a discrete new diagnosis of radiculopathy. **What distinguishes this case from the other cases cited by claimant's counsel, however, is that the requested diagnosis in this claim is "C5-6 spondylosis with C6 radiculopathy." [Emphasis added]. Dr. France did not request a stand-alone diagnosis of cervical radiculopathy; rather, he requested a diagnosis of spondylosis with associated radiculopathy**. According to the ICD-10 medical coding reference, the diagnosis code of M47.22 (spondylosis with radiculopathy) is a subset of the primary diagnosis of spondylosis. In other words, according to the diagnosis used by Dr. France in this claim, the claimant's radiculopathy is a finding or symptom arising from the primary diagnosis of spondylosis. As fully explained above, spondylosis in not a traumatic injury diagnosis; it is a general term used to describe degenerative findings related to osteoarthritis. Accordingly, it necessarily follows that any findings, diagnoses, or symptoms arising as a result of spondylosis, such as radiculopathy, would likewise be non-compensable.

Claimant's counsel argues that the claimant had no symptoms of cervical pain or radiculopathy prior to the compensable injury in this claim. While this may true, the argument does not support the addition of C5-6 spondylosis with C6 radiculopathy as a compensable condition in the claim. As noted above, the requested diagnosis in this claim is cervical spondylosis, and the record does not indicate that the claimant's degenerative disease was causally related to the compensable injury in the claim. Additionally, Dr. Jin testified that once degenerative changes progress to a certain point, minor incidents, like a soft tissue injury, can trigger the manifestation of significant symptoms due to the aggravation of the underlying degenerative disease. She explained that while the claimant may have developed new symptoms following the injury, **the objective imaging evidence established that the injury did not produce any new cervical pathology to cause radiculopathy. In other words, the objective medical evidence of record establishes that the compensable event did not result in discrete new cervical injury capable of producing cervical radiculopathy.**

In addition to the foregoing, the record raises significant questions regarding the very diagnosis of radiculopathy in this claim. Although the record is replete with medical documentation of the claimant's subjective complaints of upper extremity radicular pain, the objective medical evidence of record does not support a diagnosis of true radiculopathy. An MRI of the claimant's cervical spine performed only a few weeks after the compensable injury revealed osteophytes and a diffuse bulge at C5-6 without definite nerve root impingement at the C5-6 level. Thereafter, Dr. Luchs performed a review and assessment of the cervical MRI. Dr. Luchs also found that the MRI showed no evidence of nerve root impingement. More importantly, Dr. Guberman notes in his IME report of November 6, 2018, that an EMG/NCS of the claimant's bilateral upper extremities performed on January 30, 2018, showed evidence of bilateral CTS with no definitive evidence of cervical radiculopathy. In that regard, it is noted that the record contains no objective imaging or electrodiagnostic evidence to support a diagnosis of true radiculopathy in this claim.

Similarly, the objective clinical findings of the various evaluators and medical providers of record do not support a diagnosis of radiculopathy. The record shows that Dr. Jin performed physical examinations of the claimant on February 8, 2017, March 6, 2017, April 10, 2017, May 8, 2017, September 12, 2017. Similarly, the objective clinical findings of the various evaluators and medical providers of record do not support a diagnosis of radiculopathy. The record shows that Dr. Jin performed physical examinations of the claimant on February 8, 2017, March 6, 2017, April 10, 2017, May 8, 2017, September 12, 2017, and October 10, 2017. On each occasion, Dr. Jin's neurological examination of the claimant's upper extremities revealed no motor or sensory abnormalities consistent with a true radiculopathy. The record shows that Dr. Vaglienti examined the claimant on April 3, 2017 and May 2, 2017. Like Dr. Jin, Dr. Vaglienti's neurological examination of the claimant's upper extremities revealed no abnormalities consistent with cervical radiculopathy. On June 27, 2018, the claimant was examined by Dr. France. Like Drs. Jin and Vaglienti before him, Dr. France's neurological examination of the claimant's upper extremities revealed no sensory or motor abnormalities consistent with true radiculopathy. Dr. France further noted that the claimant's imaging studies revealed C5-6 spondylosis with mild foraminal narrowing and no other significant pathology. Finally, Dr. Guberman performed an examination of the claimant on November 6, 2018. Like every other evaluator of record, Dr. Guberman's neurological examination of the claimant's upper

> extremities revealed no motor or sensory abnormalities consistent with a true cervical radiculopathy. **So, while several medical evaluators of record have diagnosed C5-6 radiculopathy in this claim, those diagnoses appear to have been based solely upon the claimant's subjective complaints, as the record contains little to no objective medical evidence to support such a diagnosis. In light of the foregoing, it is found that the weight of the objective medical evidence does not support a diagnosis of true radiculopathy in this claim.**

Regarding the temporary total disability issue, the Office of Judges stated as follows:

> This claim is only compensable for right shoulder sprain, upper back strain, and neck pain. The claimant's treating physician, Dr. Jin, found the claimant to be at MMI and in need of no further treatment for his compensable conditions on October 10, 2017. Following Dr. Jin's finding of MMI, the claim administrator closed the claim for TTD by Order dated October 19, 2017. Although Dr. Vaglienti and Dr. France both opined that the claimant remained totally disabled subsequent to Dr. Jin's finding of MMI, Dr. Vaglienti's and Dr. France's findings were based upon the non-compensable diagnosis of cervical spondylosis with radiculopathy. Simply put, there is no reliable medical evidence of record to support a finding that the claimant remained temporarily and totally disabled due to a compensable diagnosis at the time his claim was closed for TTD on October 19, 2017.

The Office of Judges went on to find:

> The claimant's reopening application was completed by Dr. France on August 21, 2018. Dr. France indicated that the claimant was unable to work due to the diagnosis of C5-6 spondylosis with radiculopathy. As fully explained above, C5-6 spondylosis with radiculopathy is a non-compensable degenerative condition. Accordingly, it must be found that Dr. France's request to reopen the claim is based upon a non-compensable diagnosis. Moreover, the record contains no reliable medical evidence of a progression or aggravation of a compensable condition or of new facts not previously considered which would entitle the claimant to a reopening of the claim. For these reasons, the Order of September 17, 2018, denying the claimant's reopening request must be affirmed.

(Exhibit FF) The Board of Review affirmed the Office of Judges in its December 13, 2019, Order (Exhibit GG)

By decision dated November 26, 2018, the Office of Judges affirmed the September 26 2017, Order granting no permanent partial disability award. The Office of Judges concluded:

> The weight of the evidence establishes that the claimant has reached maximum medical improvement in regard to his compensable conditions. The claimant's treating physician, Dr. Jin, found the claimant to be at MMI and in need of no further treatment for his compensable conditions. In support of his protest, the claimant relies upon the medical records of his treating pain management specialist, Dr. Vaglienti. Although Dr. Vaglienti opined that the claimant is not at MMI and requires additional treatment, is opinion fail to rebut Dr. Jin's finding that the claimant is at MMI in regard to his compensable conditions. Specifically, Dr. Vaglienti's records indicate that the claimant remains disabled and requires additional treatment due to a variety of non-compensable conditions, including radiculopathy, cervical spinal stenosis, facet arthropathy, cervical spondylosis, and degenerative disc disease. In that regard, the record contains no medical evidence to rebut Dr. Jin's finding that the claimant has reached MMI in regard to his compensable conditions
>
> In terms of impairment, the claimant has not submitted any medical evidence showing that he has more than 0% whole person impairment for his compensable injuries according to the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment and the permanent partial disability provisions of W. Va. C.S.R. § 85-20-1, *et seq.* Therefore, based upon the evidence of record, it must be found that the claimant has failed to show by a preponderance of evidence that he has more than 0% PPD in this claim.

(Exhibit HH) The Board of Review affirmed the Office of Judges decision in its December 13, 2019, Order. (Exhibit II)

IV. SUMMARY OF ARGUMENT

The Orders of the Board of Review dated December 13, 2019, are not in clear violation of a constitutional or statutory provision; are not clearly the result of erroneous conclusions of law; and are not based upon material findings of fact that are clearly wrong. Rather, the Orders

of the Board of Review are correct and consistent with the evidence of record, the statues applicable to this claim, and this Court's prior decisions.

The overriding issue in this appeal is the claimant's request to add C5-6 spondylosis with AC6 radiculopathy as a compensable diagnosis in this claim. The claimant would have this Court believe that this appeal is about the claimant's request for "a diagnosis update to include a diagnosis for his cervical radicular pain or radiculopathy" which "were denied by the Board." That is simply not the case. There has been no request by the claimant to add cervical radicular pain or radiculopathy as a compensable condition in this claim. There has been no order by the claims administrator regarding such a request that has been protested by the claimant. **The only issue regarding the addition of a compensable condition in this claim is the denial of the addition of C5-6 spondylosis with C6 radiculopathy as a compensable condition**.

Additionally, the award for 0% permanent partial disability is supported by the substantial evidence of record. The claimant failed to submit any evidence of a permanent partial disability greater than 0% due to the compensable conditions in this claim. Accordingly, the employer requests that this Board AFFIRM the decision of the Office of Judges dated June 3, 2019.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments are adequately presented by the employer's brief and record before the Court. Therefore, the employer respectfully submits that oral argument is not needed for this appeal.

VI. ARGUMENT

A. Standard of Review

West Virginia Code § 23-5-15(b) provides states that in this Court's review of a final Order by the Board of Review that it shall consider the record before the Board of Review and

give deference to the Board of Review's findings, reasoning and conclusions, in accordance with the following:

> (c) If the decision of the board represents an affirmation of a prior ruling by both the commission and 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 provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

W. Va. Code § 23-5-15(c). Recently, this Court addressed its standard of review and held at Syllabus Point 1 of Moran v. Rosciti Constr. Co., LLC, 2018 W. Va. LEXIS 462, 2018 WL 2769077 as follows:

> When reviewing a decision of the West Virginia Workers' Compensation Board of Review ("the Board"), this Court will give deference to the Board's findings of fact and will review de novo its legal conclusions. The decision of the Board may be reversed or modified only if it (1) is in clear violation of a constitutional or statutory provision; (2) is clearly the result of erroneous conclusions of law; or (3) is based upon material findings of fact that are clearly wrong.

Moran v. Rosciti Constr. Co., LLC, 2018 W. Va. LEXIS 462, *1, 2018 WL 2769077. With due consideration to this standard of review, this Court must affirm the Board of Review's Orders as the Orders are clearly correct and not in clear violation of constitutional or statutory provision, are not clearly the result of erroneous conclusions of law, and are not based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record.

Initially, it must be remembered that the claimant bears the burden of establishing his claim. "In order to establish compensability an employee who suffers a disability in the course of his employment must show by competent evidence that there was a causal connection between such disability and his employment." Deverick v. State Workmen's Compensation Director, 150 W. Va. 145, 144 S.E. 2d 498 (1965) (Syl. pt 3). Further, "Where proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim." Clark v. State Workmen's Compensation Comm'r, 155 W. Va. 726, 187 S.E.2d 213 (1972) (Syl pt. 4). Simply stated, benefits should not be paid from a workers' compensation policy "unless there be a satisfactory and convincing showing" that the claimed disability actually resulted from the claimant's employment. Whitt v. State Workmen's Compensation Comm'r, 153 W. Va. 688, 693, 172 S.E. 2d 375, 377 (1970) (quoting Machala v. Compensation Comm'r, 108 W. Va. 391, 397, 151 S.E. 313, 315 (1930)).

Not even under the old "rule of liberality" was the claimant relieved of this burden. In fact, the West Virginia Supreme Court of Appeals previously stated that "[w]hile informality in the presentation of evidence is permitted in workmen's compensation cases and a rule of liberality in favor of the claimant will be observed in appraising the evidence presented, still the burden of establishing a workmen's compensation claim rests upon the one that asserts it and the well-established rule of liberality cannot be considered to take the place of proper and satisfactory proof." Deverick v. State Workmen's Compensation Director, 150 W. Va. 145, 144 S.E. 2d 498 (1965) (Syl. pt 1) (quoting Point 2, Syllabus, Hayes v. State Compensation Director, *et al.*, 149 W. Va. 220), Simply stated, the rule of liberality did not relieve the claimant of the burden of proving his claim. Clark v. State Workmen's Compensation Comm'r, 155 W. Va. 726, 733, 187 S.E. 2d 213, 217 (1972); see also Deverick v. State Compensation Director, 150 W. Va. 145, 144 S.E. 2d 498 (1965). In the instant claim, the preponderance of the substantial, reliable and probative evidence of record establishes that Office of Judges and the Board of Review were correct, and the Orders should be affirmed.

B. The Board of Review properly affirmed the denial of the request to add C5-6 spondylosis with C6 radiculopathy as a compensable diagnosis

The overarching issue in this claim is whether the Claims Administrator's September 17, 2018, order denying the addition of M47.22, C5-C6 spondylosis with C6 radiculopathy and

M54.2, neck pain was correct. The Claims Administrator did not need to add neck pain as compensable in September of 2018, because the claim was held compensable for neck pain on January 9, 2017. Therefore, the main issue is whether the Claim Administrator was correct in denying the addition of M47.22, C5-C6 Spondylosis with C6 radiculopathy as a compensable component of the claim.

The Diagnosis Update was completed by Dr. France on August 21, 2018. Dr. France's request for a diagnosis update is essentially asking that the pre-existing degenerative condition of spondylosis, be accepted as compensable. **There is not one medical opinion that spondylosis is anything other than a degenerative condition.** The claimant has failed to establish that spondylosis should be added as a compensable condition in the claim. And, instead of focusing on the issue and what order of the claims administrator that has been protested, the claimant now argues that the Board of Review erred in not finding the claim compensable for cervical radicular pain or radiculopathy. This issue is not before this Court, as there has not been a request to add cervical radicular pain or radiculopathy as compensable conditions in this claim. Therefore, the claims administrator has not issued protestable orders on those issues.

The medical records of Dr. Jin clearly show the claimant had complaint of cervical radicular pain. Dr. Jin cleary and thoroughly explained why the complaints of pain were not the same as cervical radiculopathy. As the Office of Judges pointed out, there is no objective testing showing the claimant has a C6 radiculopathy. There was no EMG testing. Even if this claim was held compensable for cervical radicular pain, as requested by claimant's counsel, the result would be the same. The claimant would still not have any objective evidence of radiculopathy, and the diagnosis of radiculopathy would still be related to the cervical spondylosis which is a degenerative condition.

The claimant requested that cervical spondylosis and C6 radiculopathy be added as a compensable diagnosis. The physicians all agree that cervical spondylosis is a degenerative preexisting condition. This Court addressed preexisting conditions in the context of claims. The Court in Gill v. City of Charleston, 236 W. Va. 737, 783 S.E.2d 857, 2016 W. Va. LEXIS 61 (W. Va. Feb. 10, 2016) held at Syllabus Point 3 as follows:

> A noncompensable preexisting injury ***may not*** be added as a compensable component of a claim for workers;' compensation medical benefits merely because it may have been aggravated by a compensable injury. To the extent that the aggravation of a noncompensable preexisting injury ***results in a discreet new injury***, that new injury may be found compensable.

Dr. Jin opined the claimant had radicular symptoms but did not have radiculopathy. As the Administrative Law Judge pointed out, the established case law that the claimant's attorney relies on, including Gill, and the facts of those cases are distinguishable from this claim. Here, the request was to add spondylosis with radiculopathy as a compensable condition. Spondylosis is a degenerative condition, and the radiculopathy arose out of that condition. At most the claimant aggravated the preexisting degenerative condition. There was no new injury, discreet or otherwise to the cervical spine that caused or resulted in cervical spondylosis with C6 radiculopathy.

The claimant has argued that Dr. Jin used the wrong test for compensability and that the claimant's condition was dormant before this injury and therefore should now be compensable. Those are just red herring. Dr. Jin was the claimant's treating physician. She is not required to know what conditions are compensable under the West Virginia Workers' Compensation statute. She did not "have a test for compensability." She merely treated the claimant and referred him to other professionals for treatment. Dr. Jin did not apply her "own definition of the test for compensability." She merely advised she only considered the medical aspect of the claim. Moreover, it is not her job to determine compensability. She repeatedly provided the same answers to questions that were worded differently in her deposition. Moreover, the test for compensability in West Virginia has nothing to do with the dormant status of a preexisting degenerative condition.

C. **The Board properly affirmed the denial of the reopening of the claim for temporary total disability benefits and the award of 0% permanent partial disability.**

The remaining issues regarding temporary total disability and the permanent partial disability award flow from the denial of cervical stenosis and C6 radiculopathy as compensable components of the claim. The claimant's request to reopen his claim for temporary total disability benefits was denied as he had reached maximum medical improvement due to the

compensable conditions related to his. His inability to work was not due to his work injury, but due to his pre-existing degenerative spondylosis. Additionally, the claimant presented no evidence that he has more than a 0% permanent partial disability due to the compensable conditions in this claim.

Regarding this issue it must again be remembered that the claimant's cervical spine MRI revealed significant preexisting noncompensable degenerative conditions of the cervical spine and no actual new injury; and that Dr. Jin, the claimant's treating physicians found on May 8, 2017, September 12, 2017, and October 10, 2017, that the claimant had reached his maximum degree of medical improvement and did not require any further treatment. This claim was properly closed for temporary total disability benefits as the claimant failed to submit evidence of continued disability due to the compensable condition.

It must be remembered that permanent partial disability awards are granted to compensate injured workers for actual whole body medical impairment related to the compensable injury. West Virginia Code § 23-4-6(i) provides that the degree of an injured worker's permanent disability shall be determined exclusively by the degree of whole body medical improvement that he or she sustained as a result of his or her injury. The Office of the Insurance Commissioner, through the Industrial Council, has adopted regulations regarding evaluating claimant's for permanent impairment. 85 C.S.R. §20-65.1 states:

> [A]ll evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment, which a claimant has suffered shall be conducted and composed in accordance with the "Guides to the Evaluation of Permanent Impairment," (4th ed. 1993), as published by the American Medical Association.

85 C.S.R. § 20-65.1 (eff. January 20, 2006)

The Board of Review properly affirmed the 0% permanent partial disability award as the claimant is not entitled to permanent partial disability for noncompensable conditions.

VII. CONCLUSION

Accordingly, for the reasons set forth above, the employer requests that this Court AFFIRM the Board of Review's Orders dated December 3, 2019.

Jane Ann Pancake
WV Bar ID # 10743
Jeffrey B. Brannon
WV Bar ID # 7838

CERTIFICATE OF SERVICE

I, Jane Ann Pancake, attorney for the Employer, Allen's Body Shop, hereby certify that a true and exact copy of the foregoing "Brief on Behalf of the Employer, Allen's Body Shop, LLC" was served upon the Appellee by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 21th day of February, 2020 addressed as follows:

Jane Ann Pancake
WV Bar ID # 10743
Jeffrey B. Brannon
WV Bar ID # 7838