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

**Docket No.** 21-0754

**ROBERT E. HOOD,**

**Petitioner,**

**v.**

**LINCARE HOLDINGS, INC.**

**Respondent.**

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**BOR Appeal No. 2056412  
ALJ Decision: 2/4/2021  
JCN No. 2020023734  
Claims Adm. Order: 5/21/2020**

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**BRIEF OF PETITIONER  
ROBERT E. HOOD**

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### ASSIGNMENTS OF ERROR

Your Petitioner respectfully asserts and assigns an error that the Board of Review in its Order of August 23, 2021 (Appendix 1, hereafter “App.”) was clearly wrong in view of the reliable probative and substantial evidence on the whole record in affirming the Office of Judges Order of February 4, 2021 (App. 3). That Order affirmed a Claims Administrator’s Order of May 21, 2020 (App. 10) which denied his claim for Workers’ Compensation benefits finding Petitioner “did not sustain an injury in the course of and result from his employment” when he was descending the steps of a Lincare customer’s home and had his right knee “pop.”

### STATEMENT OF THE CASE

The Petitioner, Robert E. Hood, was 52 years old at the time of his injury. Petitioner is 6’ 2” tall and weighs approximately 440 lbs. Petitioner was a delivery driver for Lincare delivering cylinders of compressed oxygen, liquid oxygen, hospital beds, canes and wheelchairs which are termed durable medical equipment. The main office of Lincare is located in Wheeling, West Virginia. Petitioner’s delivery area is generally a 50 mile radius from Wheeling.

On the day of his injury Petitioner was assigned to the Moundsville area, which is south of Wheeling and he was on his third or fourth delivery of the day. Petitioner arrived at the home of a regular customer, Mr. Mitchell. Petitioner is responsible for hand-delivering whatever the customer needs, including, for example an electric wheelchair (App. 19). The Mitchell delivery on that day was 5 oxygen bottles. Upon arrival Petitioner saw Mr. Mitchell standing by his door so he walked to him and asked if he needed anything else. Mr. Mitchell responded that he did not and Petitioner picked up the oxygen carrier with the empty bottles, returned to the van and returned with 5 new bottles which he placed inside the front door. Petitioner then turned to go down the steps, “I stepped down on the first step with my left knee and when I put my right knee

on the second step, I heard a very loud pop and had extreme burning in my legs and could hardly stand.” (App. 21). Petitioner did not fall to the ground.

Prior to May 1, 2020 Petitioner had no injuries or procedures to his knee. Petitioner returned to his van and called his supervisor to advise that he had hurt his knee. Petitioner had one more delivery but could not get up the steps to the property. He returned to the shop and drove himself to Wheeling Hospital Emergency Department which was approximately 3 miles.

At the Emergency Department Petitioner had x-rays done that showed degenerative changes with possible small effusion (App. 44), the impression being right knee sprain.

The WC-1 Form Petitioner completed that day reported “walking down steps and felt and heard R knee pop.” (App. 46) The physician portion of the WC-1 which was completed on May 5, 2020, indicated an occupational injury with diagnosis code (583.91) for sprain of unspecified site right knee. The report from the ED on 5/1/2020 says “he felt a pop to his right knee when walking down the steps at work.” (App. 46) The Employer’s report to Travelers insurance notes the accident was not on their property and states “IW was walking down the stairs when IW felt and heard his right knee pop.” (App. 52)

In a follow-up visit to Wheeling Hospital the report is “patient reports that he was walking down the steps from a client’s patio when he experienced a popping sensation to his right knee” (App. 54) The impression was “acute right knee sprain. While an MRI was considered, the claim was denied before it was accomplished (App. 25).

#### SUMMARY OF ARGUMENT

The Petitioner asserts that he was in the course of and the scope of his employment at the time of his accident. Petitioner asserts as well that his injury was “resulting from his employment”, the second requirement of a compensable injury under the pole star case of

*Barnett v. State Workers' Compensation Commissioner*, 153 W.Va. 796; 172 S.E.2d 698 (1970);  
*Jordan v. State Workers' Compensation Commissioner*, 156 W.Va. 159, 191 S.E.2d 497 (1972);  
and W.Va. Code §23-4-1.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner does not believe that oral argument is appropriate or necessary in this case.

#### ARGUMENT

Walking to and from a customer's home is a regular ordinary part of Petitioner's job whether it is a commercial or individual customer (App. 27). The "terrain can consist of high rises up to 12 floors, concrete, mud, gravel, busted sidewalks, broken down steps, a lot of ice and snow" (App. 27). The customers cannot come to him so he must "go to them" and "go over, or around whatever obstacles are there or whatever type of ground is there" (App. 28).

In a recent case this Court in an opinion found in *American Medical Facilities Management v. Parsons*, (No. 19-1174, April 23, 2021) that the Board of Review and Office of Judges were correct in overruling a claim administrator's rejection of the Parsons claim for falling in a tunnel on her way to a mandated lunch period on company property. That case included a fact that she claimed water on the floor was (she) believed the cause of her fall. This Court noted in its Memorandum Opinion that while the wet floor was "in dispute", it did not alter the opinion.

In his opinion Judge Atkins notes reference to a prior injury which appears in the record. He reports as well that Petitioner submitted an affidavit that denies any prior incident (App. 56), which was also in evidence. However this is not a *Gill* case as it was denied for the basic statutory and case related standards which Judge Atkins says were not met. "In summary the

facts of this case indicate that the claimant developed pain in his right knee while engaging in an ordinary activity of daily life, and no evidence was presented that the claimant's work activity either cause or contributed to the injury." (App. 7)

Petitioner respectfully disagrees. The Petitioner did not "develop" pain in his right knee, he had a "single isolated fortuitous event" while departing on steps form a customer's porch. A customer to whom Petitioner had delivered before and a delivery which required him to go up and down the steps to return and deliver oxygen tanks. Judge Atkins distinguished this Court's earlier decision in *King v. Constellium Rolled Products*, (no. 19-0155, December 6, 2029) as Mr. Hood was not "carrying materials related to his employment." However, Mr. Hood certainly had to return to the van to complete his day's work, and was therefore, in the same context as Ms. Parsons, injured as a result of his employment.

#### CONCLUSION

Petitioner therefore respectfully request, upon review, the Court reverse the Administrative Law Judge and Board of Review's decisions as "clearly wrong in view of this reliable, probative and substantial record as a whole", finding Mr. Hood was injured in the course of and as a result of his employment.

Respectfully submitted,

ROBERT E. HOOD, Petitioner

By:  \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

Service of the foregoing BRIEF OF PETITIONER, ROBERT E. HOOD, was had upon the following by mailing a true and complete copy thereto to their last known address, by regular United States mail, postage prepaid, this 21<sup>st</sup> day of September, 2021, as follows:

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APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT



Complete Case Title: Robert E. Hood v. Lincare Holdings, Inc.  
Petitioner: Robert E. Hood Respondent: Lincare Holdings, Inc.  
Counsel: William C. Gallagher Counsel: Lisa Werner Hunter  
Claim No.: FPU2329 / JCN 2020023734 Board of Review No.: 2056412  
Date of Injury/Last Exposure: May 1, 2020 Date Claim Filed: May 6, 2020  
Date and Ruling of the Office of Judges: February 4, 2021  
Date and Ruling of the Board of Review: August 23, 2021  
Issue and Relief requested on Appeal: Denial of claim - review and reverse decisions of ALJ and BOR

CLAIMANT INFORMATION

Claimant's Name: Robert E. Hood  
Nature of Injury: Sprain of unspecified site, Rt. knee  
Age: 52 Is the Claimant still working? ☒ Yes ☐ No. If yes, where: Lincare  
Occupation: Delivery Person No. of Years: UNK  
Was the claim found to be compensable? ☐ Yes ☒ No If yes, order date: \_\_\_\_\_

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): \_\_\_\_\_ Old Fund or New Fund (please circle one)  
Date of Last Employment: \_\_\_\_\_  
Total amount of prior PPD awards: \_\_\_\_\_ (add dates of orders on separate page)  
Finding of the PTD Review Board: \_\_\_\_\_

List all compensable conditions under this claim number: None  
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?  
☐ Yes ☒ No  
(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? ☐ Yes ☒ No  
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? ☐ Yes ☒ No  
If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.