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

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SCOTTISH RITE BODIES OF CHARLESTON,

Petitioner,

v.

Appeal No.: 2057460

JCN: 2020023177

BOR Order: 04/27/2022

SC Docket: 22-0427

THOMAS WEESE,

Respondent.

FROM THE WEST VIRGINIA WORKERS' COMPENSATION BOARD OF REVIEW

Petition for Appeal on Behalf of Scottish Rite Bodies of Charleston

SCOTTISH RITE BODIES OF CHARLESTON

By SPILMAN THOMAS & BATTLE, PLLC

Charity K. Lawrence, Esq.

P. O. Box 273

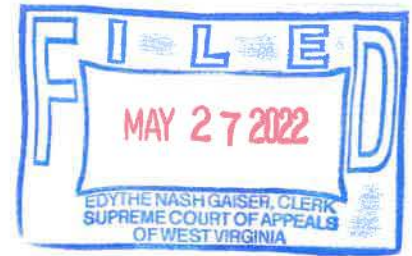
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Memorandum of Parties

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II. Assignments of Error

The findings of the Board of Review are plainly wrong and must be reversed because it made lay assumptions about the causal connection of Claimant's alleged occupational disease without a medical expert opinion causally linking the alleged disease to Claimant's employment. The Petitioner's substantial rights were prejudiced because the Board of Review's decision was affected clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Board ignored the preponderance of the evidence and relied instead on inconsistent findings from Claimant's treating physician.

III. Statement of the Case

This is a petition for appeal by Scottish Rite Bodies of Charleston ("Employer" or Petitioner") from the April 27, 2022 Order (Petitioner's Appendix No. 1, p. 1-4.) of the Workers' Compensation Board of Review ("Board of Review"), which reversed and vacated the October 1, 2021 Decision (Petitioner's Appendix No. 2, p. 5-16.) of Administrative Law Judge Gary M. Mazezka ("Judge Mazezka") which affirmed the Claim Administrator's June 4, 2020 order (Petitioner's Appendix No. 3, p. 17.) rejecting Claimant Thomas Weese's ("Claimant" or "Respondent") claim for benefits.

Claimant was employed by Scottish Rite Bodies as a maintenance man from January 1, 2008 to March 4, 2020 where he alleges that he was exposed to Legionella.

Employer's Evidence - Claimant's Prior Medical History

Claimant has a long history of various chronic conditions that preceded his alleged occupational exposure. According to his medical records from Dr. Sampath

dated June 7, 2010 he had a history of diabetes, hypertension, hyperlipidemia, hypothyroidism and a cerebrovascular accident in 2008 affecting his right cerebral artery. Claimant was admitted to Charleston Area Medical Center ("CAMC") on June 8, 2010 for a non-ST elevated myocardial infarction. He had a cardiac catheterization which revealed significant three vessel coronary artery disease for which he underwent coronary artery bypass x 4 on June 14, 2010.

At a February 12, 2018 visit with Dr. John Lewis it is noted that Claimant's blood pressure has been poorly controlled due to noncompliance. Claimant was not recording his blood pressure at home and did not monitor his blood sugar. Records from Dr. Lewis continue to note issues with Claimant's compliance with diet, exercise and medications.

On May 18, 2018, Claimant was discharged from CAMC for hospitalization due to an abnormal stress test. History and Physical noted a history of coronary artery disease with myocardial infarction and coronary artery bypass. Claimant reported shortness of breath with exertion. He underwent a left heart catheterization on May 18, 2018.

Claimant followed up with Dr. Lewis on September 23, 2019 to discuss lab work that indicated his kidney function was worsening and his blood sugar was uncontrolled. Dr. Lewis noted that he remained noncompliant with his diabetes management despite many years of discussion.

On October 29, 2019 Claimant was referred to Dr. Samar Sankari for management of his diabetes. Claimant complained of polyuria, nocturia, blurred vision,

numbness and burning in his feet, and claudication. Dr. Sankari instructed Claimant on diet, exercise, compliance with his medications, monitoring and complications of uncontrolled diabetes.

Claimant saw Dr. Gharib with CAMC Cardiology on February 19, 2020 to follow up on his coronary artery disease. Records note that Claimant deferred heart catheterization in April 2019 following a nuclear stress test which revealed a moderate sized area of severe lateral ischemia.

Employer's Evidence - Current Claim History

Claimant presented to Greg McCartney, PA on March 4, 2020 and stated that he felt like "his heart was racing." Claimant noted that this problem had been present intermittently for the past two months, but was worse in the past few days. He also reported shortness of breath and dizziness. He had been to see his cardiologist 2 weeks prior, who said that he was fine. Claimant also reported fatigue and lack of energy. He was advised to go to the emergency room ("ER") for further evaluation.

On March 7, 2020, Claimant presented to CAMC with complaints of nausea, vomiting, diarrhea and generalized weakness. He reported feeling generalized weakness for the past week along with nausea/vomiting on and off for several weeks and diarrhea which started a day earlier. His family had tried to get him up that day but he was very weak and could not ambulate due to weakness. Claimant met sepsis criteria in the ER due to fever, leukocytosis, and tachycardia. A chest x-ray revealed pneumonia which was new in comparison to previous x-ray from three days prior. Claimant was admitted and tested positive for Legionella pneumonia. He was placed on

a ventilator from March 10 to March 13, 2020. On March 18, 2020, he underwent a heart catheterization and stent placement, and he was discharged on March 20, 2020.

On April 16, 2020, Claimant had a chest x-ray to follow up on his pneumonia. The x-ray found no evidence of pneumonia, pneumothorax, or pleural effusion. There had been resolution of the previously demonstrated right-sided infiltrate.

Dr. Randall Short performed a medical review of the claim on June 3, 2020. Dr. Short noted that Claimant was evaluated at the CAMC emergency room on March 7, 2020 with complaints of generalized weakness, nausea, vomiting and diarrhea that had worsened over the past month. Dr. Short also noted that Claimant had a significant prior history of coronary artery disease with subsequent coronary artery bypass surgery in 2010, chronic kidney disease, stroke, diabetes, hypertension, hypothyroidism and peripheral artery disease. Dr. Short also stated that Dr. Takubo noted that the claim was for a "non-occupational condition" on the report of injury. Upon review of the available medical records, Dr. Short found that there was no objective evidence to support exposure to Legionella in the workplace.

Based upon this review, the Claim Administrator issued a decision on June 4, 2020 rejecting Claimant's application for benefits on the basis that the disability complained of was not due to an injury or disease received in the course of and resulting from employment. Further, there was no documentation to support that Legionella pneumonia was contracted at the place of employment.

Claimant's Evidence

In addition to evidence noted above, Claimant submitted the WC-1 that appears to have been signed by Claimant on March 20, 2020. He noted a date of last exposure of March 4, 2020. For body parts injured, Claimant noted "lungs and heart." When asked to describe how the injury occurred, Claimant stated, "helping install a boiler, cleaning up standing water and paint chips from another location in building." The Physician's section of the WC-1 was completed by Dr. Tom Takubo on April 13, 2020, noting a date of initial treatment of March 9, 2020. In answer to the question, "Have you advised the patient to remain off work 4 or more days?" Dr. Takubo answered "Yes" and indicated Claimant would need to be seen in follow up. As indicated on the WC-1, initially Dr. Takubo stated the condition was a direct result of a **non-occupational condition**. (emphasis added) In answer to the question "Did this injury aggravate a prior injury/disease?" Dr. Takubo answered "Yes" and described the injury/occupational disease as "Reactive Airway from Inhalation Cleaning Supplies." Almost seven months later, Dr. Takubo amended the Physician Section on November 4, 2020 to mark out his checkmark on the "non-occupational condition" and instead mark that Claimant's condition was the result of an occupational injury.

Claimant also submitted a transcript of his January 13, 2020 deposition and a series of photographs of Claimant's workplace described during the deposition. Claimant testified that he was employed as a janitor for Scottish Rite Bodies and was responsible for building repairs. Claimant testified that he cleaned up standing water from the basement and other areas of the building. In regard to the boiler project

described on Claimant's application for benefits, Claimant testified that the boiler replacement project began in March 2019. Claimant worked as a helper on this project. The old boiler was hauled away in June 2019 (more than 8 months before Claimant's illness) and the new one was installed in December 2020 (more than 2 months before Claimant's illness).

The ALJ's Decision

On October 1, 2021, Judge Mazezka issued a decision affirming BrickStreet's June 4, 2020 order rejecting the claim. Judge Mazezka concluded that Claimant did not "establish by a preponderance of the evidence that he sustained Legionella pneumonia in the course of and resulting from employment." Specifically, Judge Mazezka found that Dr. Takubo's November 4, 2020 change in compensability opinion is unreliable because it is inconsistent with his initial finding of a non-occupational injury, both of which were based on similar evidence.

Judge Mazezka noted that Dr. Takubo initially opined Claimant's diagnosis of restrictive airway disease was a non-occupational condition, then amended his opinion seven (7) months later and found the restrictive airway disease was the direct result of an occupational injury. Dr. Takubo's amendments were eight (8) months after Claimant's first reported symptoms and five (5) months after the Claim Administrator's denial of the claim. In addition, the evidence was essentially the same at the time of Dr. Takubo's November 2020 opinion that Claimant suffered an occupational injury as it was in April 2020 when he opined Claimant had a non-occupational condition. On Claimant's section of the March 20, 2020 WC-1, Claimant reported he was working on a

boiler project and was cleaning up standing water. Thus, Judge Mazezka found Dr. Takubo was aware of Claimant working on the boiler project and of his exposure to water at work prior to Dr. Takubo's April 13, 2020 opinion that the injury was non-occupational. Judge Mazezka noted the evidence fails to establish any logical reason or explanation or reason as to why Dr. Takubo changed his compensability opinion.

Judge Mazezka noted that, because Dr. Takubo's opinion is unreliable and because he is the only physician of record to opine the Legionella was work-related, the record is void of any expert medical opinion relating Claimant's Legionella pneumonia to his work. Therefore, Judge Mazezka found the Claim Administrator did not err in rejecting the claim.

By Order dated April 27, 2022, the Board of Review reversed and vacated Judge Mazezka's decision. (Petitioner's Appendix No. 1, p. 1-4.) The Employer appeals the Board of Review's Order and asks this Court to reinstate the Claim Administrator's June 4, 2020 order rejecting the claim.

IV. Summary of Argument

The Petitioner's substantial rights were prejudiced because the Board of Review's decision was clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Board ignored the fact that Claimant presented no medical expert opinion linking his alleged occupational disease to his employment. Ignoring the preponderance of the evidence relied upon by Judge Mazezka, the Board improperly substituted its lay opinion to find a causal connection between Claimant's employment and his alleged occupational disease.

V. Statement Regarding Oral Argument and Decision

The Petitioner submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

VI. Argument

A. Standard of Review

An appeal from the Board of Review to the West Virginia Supreme Court of Appeals is guided by W. Va. Code § 23-5-15(b) which provides that “[i]n reviewing a decision of the board of review, the supreme court of appeals shall consider the record provided by the board and give deference to the board’s findings, reasoning and conclusions[.]” *Williby v. West Virginia Office Ins. Comm’r, et al.*, 224 W.Va. 358, 361, 686 S.E.2d 9, 11 (2009). W. Va. Code § 23-5-15(d) provides:

If the decision of the board effectively represents a reversal of a prior ruling of either the commission or 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 provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board’s findings, reasoning and conclusions, there is insufficient support to sustain the decision. 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 so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of

the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision.

In recognition of this standard, the Court has held:

When it appears from the proof upon which the Workmen's Compensation [Board of Review] acted that its finding was plainly wrong an order reflecting that finding will be reversed and set aside by this Court." Syllabus point 5, *Bragg v. State Workmen's Compensation Commissioner*, 152 W.Va. 706, 166 S.E.2d 162 (1969).

Syl. pt. 1, *Bowers v. West Virginia Office of the Ins. Comm'r*, 224 W.Va. 398, 686 S.E.2d 49, 50 (2009). See also Syl. pt. 4, *Emmel v. State Comp. Dir.*, 150 W.Va. 277, 145 S.E.2d 29 (1965) ("An order of the workmen's compensation appeal board, approving an order of the state compensation commissioner, will be reversed by this Court on appeal, where the legal conclusions of the appeal board are erroneous."); *Hammons v. West Virginia Office of Ins. Com'r*, 235 W. Va. 577, 583, 775 S.E.2d 458, 464 (2015).

A *de novo* standard of review is applied by the Court to review questions of law arising in the context of decisions issued by the Board of Review. *Gill v. City of Charleston*, 783 S.E.2d 857, 860-61 (W. Va. 2016) (citing *Justice v. West Virginia Office Insurance Commission*, 230 W.Va. 80, 83, 736 S.E.2d 80, 83 (2012)).

In this case, the Administrative Law Judge Decision affirmed the Claim Administrator's order, and the Board of Review reversed the Administrative Law Judge's Decision. As argued herein, the findings of the Board of Review are plainly wrong and must be reversed because the Board substituted its own lay opinion to find causation

although Claimant never presented any medical expert opinion linking his alleged occupational disease to his employment.

B. The Board of Review's findings are clearly wrong because Claimant presented no medical expert opinion linking his alleged occupational disease to his employment.

The Employer's substantial rights were prejudiced because the Board of Review's findings are clearly wrong in view of the reliable, probative and substantial evidence on the whole record. See W. Va. Code § 23-5-12(b).

West Virginia Code § 23-4-1 provides benefits to employees who receive an injury in the course of and as a result of their covered employment. Resolution of any issue before the Office of Judges shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. W. Va. Code § 23-4-1g.

A claimant in a workers' compensation proceeding has the burden of proving his claim by a preponderance of the evidence. See, e.g., *Clark v. State Workmen's Comp. Comm'r.*, 155 W. Va. 726, 187 S.E.2d 213, Syl. Pt. 2 (1972); *Staubs v. State Workmen's Comp. Comm'r.*, 153 W. Va. 337, 168 S.E.2d 730, Syl. Pt. 1 (1969).

A claimant must establish compensability through competent evidence demonstrating he suffers from a disability incurred in the course of and resulting from his employment and that there is a causal connection between the disability and his employment. See *Deverick v. State Compensation Director*, 150 W. Va. 145, 144

S.E.2d 498 (1965). An award of a claim for compensation cannot be made unless it is supported by satisfactory proof that the claimant sustained an injury in the course of and resulting from his employment. See Syl. Pt. 3, *Hayes v. State Compensation Commissioner*, 149 W. Va. 220, 140 S.E.2d 443 (1965).

According to W. Va. Code § 23-4-1, an occupational disease is a disease incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of the employment shall be compensable except when it follows as an incident of occupational disease as defined in this chapter. Except in the case of occupational pneumoconiosis, a disease shall be deemed to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances (1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease, (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, (3) that it can be fairly traced to the employment as the proximate cause, (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment, (5) that it is incidental to the character of the business and not independent of the relation of employer and employee, and (6) that it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

Claimant did not meet his burden of proof in this case. The initial WC-1 did not reflect that Claimant sustained an occupational injury or an occupational disease. On the report, Dr. Takubo stated Claimant's condition was a direct result of a **non-occupational** condition. (emphasis added) In fact, Dr. Takubo initially described the injury/occupational disease as "Reactive Airway from Inhalation Cleaning Supplies."

Although Dr. Takubo amended the WC-1 in November 2020, the evidence was essentially the same when Dr. Takubo rendered his first opinion as it was when he changed his opinion. Dr. Takubo knew Claimant had worked on a boiler project and cleaned up standing water at work when Dr. Takubo opined the condition was not occupational. There was no evidence presented by Claimant to explain why Dr. Takubo changed his compensability opinion.

Moreover, Dr. Takubo himself did not provide any explanation for the change in the WC-1 nor did he provide any deposition testimony to clarify the change. It is difficult, if not impossible, to decipher Dr. Takubo's writing on the amended WC-1 that describes the alleged occupational injury. In addition, although Dr. Takubo wrote "got Legionella" on the amended W-1, the description of injury/occupational disease remained "reactive airway from inhalation cleaning supplies." Dr. Takubo did not amend the injury/occupational disease to a diagnosis of Legionella pneumonia. There is no explanation in the record for Dr. Takubo's amended WC-1 that occurred eight (8) months after Claimant's symptoms and five (5) months after the clam was denied, and the WC-1 certainly does not provide a reliable medical expert opinion to link Claimant's alleged condition to his employment. As Judge Mazezka noted, Dr. Takubo is the only

physician of record to opine the Legionella was work-related, and that opinion is unreliable because of his inconsistent statements. Claimant submitted no reliable expert medical opinion relating his Legionella pneumonia to his work, and the BOR had no medical opinions upon which to base its decision. Claimant's deposition testimony that he sometimes worked around water and leaks is not enough to sustain his burden of providing he contracted Legionella pneumonia from his job. Only a medical expert can provide such a causal connection. Moreover, the Board of Review ignored the fact that the boiler project was completed in December 2020, months before Claimant allegedly contracted Legionella pneumonia.

Claimant did not establish compensability through competent medical evidence that he suffers from a disability incurred in the course of and resulting from his employment and that there is a causal connection between the disability and his employment. See *Deverick v. State Compensation Director*, at 149, 144 S.E.2d at 501 (cerebral thrombosis suffered while engaged in usual employment not sufficient to establish compensability where there is no proof such disability resulted from employment).

The Employer's substantial rights were prejudiced because the Board of Review's decision was clearly wrong in view of the reliable, probative and substantial evidence on the whole record. See W. Va. Code § 23-5-12(b)(4) and (5).

In order to reverse a finding of the Workers' Compensation Board of Review, it must appear from the proof upon which the Board acted that the finding in question was plainly wrong. *Bragg v. State Workmen's Compensation Commissioner*, 152 W. Va.

706, 166 S.E.2d 162 (1969). The findings of the Board of Review are manifestly against the weight of evidence because it reversed Judge Mazezka's proper weighing of the evidence pursuant to W. Va. Code § 23-4-1g. Moreover, the findings of the Board of Review are plainly wrong and must be reversed because it improperly made a causal connection between Claimant's alleged occupational disease and his employment without a proper medical expert opinion to substantiate such a finding. The Board relied upon Claimant's lay deposition testimony and inconsistent conclusions of Dr. Takubo, ignoring the preponderance of the evidence that Claimant did not sustain an occupational disease in the course of and resulting from his employment. Moreover, the Board broadly and vaguely concluded that "the claimant's condition meets the six requirements for an occupational disease" without any explanation of its reasoning for that conclusion.

VII. Conclusion

For the foregoing reasons, Petitioner Scottish Rite Bodies of Charleston respectfully requests this Honorable Court reverse the Board of Review's April 27, 2022 order and reinstate the claim administrator's June 4, 2020 order rejecting the claim.

Respectfully submitted,

SCOTTISH RITE BODIES OF CHARLESTON


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Certificate of Service

I, Charity K. Lawrence, counsel for Scottish Rite Bodies of Charleston, do hereby certify that I have served a true copy of the foregoing "**Petition for Appeal on Behalf of Scottish Rite Bodies of Charleston**" and "**Appendix**" upon the following, by regular U. S. first class mail, and addressed as follows on May 27, 2022:

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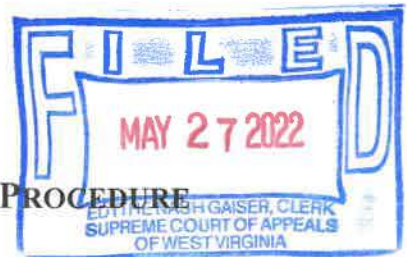


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APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: Thomas W. Weese v. Scottish Rite Bodies of Charleston
Petitioner: Scottish Rite Bodies of Charleston Respondent: Thomas W. Weese
Counsel: Charity K. Lawrence Counsel: Patrick K. Maroney
Claim No.: 2020023177 Board of Review No.: 2057460
Date of Injury/Last Exposure: 03/04/2020 Date Claim Filed: _____
Date and Ruling of the Office of Judges: 10/01/2021
Date and Ruling of the Board of Review: 04/27/2022
Issue and Relief requested on Appeal: 06/04/2020 Denial of claim

CLAIMANT INFORMATION

Claimant's Name: Thomas W. Weese
Nature of Injury: Legionella pneumonia
Age: 77 Is the Claimant still working? ☐ Yes ☒ No If yes, where: _____
Occupation: Maintenance No. of Years: 12
Was the claim found to be compensable? ☐ Yes ☒ No If yes, order date: 06/04/2020 denied
04/27/2022 reversed
and vacated

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): _____ Old Fund or New Fund (please circle one) _____
Date of Last Employment: 03/04/2020
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: Legionella pneumonia/Legionnaires' disease
(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.