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

Doss Enterprises, LC, Employer,

Appellant,

v.

CJCN NO. A00003024969

Patrick Case, Claimant,

SUPREME COURT NO. 21-0970

Appellee.

BRIEF ON BEHALF OF APPELLANT
Doss Enterprises, LC

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II. ASSIGNMENTS OF ERROR

The Board of Review's Order dated October 26, 2021, is clearly wrong, in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, and is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. The preponderance of the substantial, reliable and probative evidence of record establishes that the claimant had an idiopathic fall when he was descending stairs and his knee gave out while he was at work on December 9, 2020. The Administrative Law Judge properly affirmed all four orders concluding that the claimant did not sustain an injury as a result of his employment and that the injury "was idiopathic in nature."

III. STATEMENT OF THE CASE

The decision of the Office of Judges dated April 7, 2021, (Exhibit A) contains detailed Findings of Fact and Conclusions of law based on the evidence available for review at the time of the decision. The employer hereby adopts and incorporates by reference each and every Finding of Fact and Conclusion of Law contained in the Office of Judges decision dated April 7, 2021, *in toto* 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, Patrick Doss, is presently forty-two (42) years old with a date of birth of March 30, 1979. The claimant is married and lives in Gasaway, West Virginia. The claimant completed Section I of a WC-1 Employees' and Physicians' Report of Injury form on December 9, 2020. The claimant alleged he injured his right leg on December 9, 2020, when he was "coming down stairs and **knee gave out** which caused a fall". (Exhibit B). A physician from United Hospital Center, Inc., completed the physician's section of the form on December 20, 2020. The body part injured was "right knee". The description of the injury was "knee muscle/ tendon rupture". No ICD code was listed.

The claimant was transported to United Hospital Center by the City of Bridgeport EMS on December 9, 2020. The EMS report states:

> 529 WAS ALERTED VIA 911 FOR A 41 YEAR OLD MALE THAT HAD FALLEN DOWN SOME STEPS. 529 ARRIVED ON SCENE AT J.F. ALLEN TO FIND A ALERT AND ORIENTED PT SITTING ON THE STEPS. PT STATED THAT HE STARTED TO CLIMB UP THE STEPS AND HIS **RIGHT KNEE STOPPED WORKING**. HE THEN FELL DOWN 5 STEPS. LOC. PT HAD A SMALL HEMA TOMA ON THE LEFT SIDE OF HIS HEAD. + PMS IN PTS RIGHT FOOT. PTS RIGHT KNEE WAS STABLE.
>
> ASSISTED PT ON TO COT. RAILS X 2. STRAPS X 3. LOADED PT INTO AMBULANCE. CHECKED PTS VITAL SIGNS. WENT EN ROUTE TO UHC. PTS VITALS REMAINED STABLE. ARRIVED AT UHC. TOOKPT TO H15 ROOM. ASSISTED PT TO BED. GAVE STAFF A VERBAL REPORT. 529 RETURNED IN SERVICE.

(Exhibit C).

At United Hospital Center the history of present illness was recorded as:

> Patrick D Case is a 41 y.o. male presenting with a fall that happened today. The pt was at work approximately 30 min ago when his **R knee gave out** and he fell down 4-5 steps causing him to hit the L side of his head on a railing. Pt denies any pain but was not able to ambulate after, states his RLE has been weak since. Denies numbness/tingling, hx of injuries/surgeries to RLE. He denies LOC, n/v, headache, shortness of breath, chest pain, lightheadedness, and any other complaints or concerns at this time.

(Exhibit D). A CT scan of the right knee revealed:

> Suspect at least partial thickness tear of the quadriceps tendon. Also suspect partial or complete tear of the medial patellar retinaculum with significant soft tissue swelling and hematoma in the anterior knee Joint area. No fracture seen.

A CT scan of the brain showed "no evidence of acute infarct or intracranial hemorrhage". A right knee x-ray showed:

> Abnormal density in the region of the distal quadriceps tendon could be due to edema/hemorrhage or quadriceps tendon injury. MRI could be considered for further evaluation if clinically warranted.

The medical decision making/ course of action states:

> Given patients history, current symptoms, and exam; concern for, but not limited to, quadriceps tendon rupture, patellar tendon rupture, patellar fracture
>
> • On exam, patient appears well, not in distress. Afebrile, vitals stable. Right knee tender to palpation, unable to extend at his right knee.
>
> • X-ray of right knee concerning for quadriceps tendon injury.
>
> • Unable to obtain MRI due to weight limit. CT right knee concerning for at least partial-thickness tear of the quadriceps tendon, partial or complete tear of the medial patellar retinaculum.
>
> • Ortho- Dr. Courtney consulted. Recommended knee immobilizer, partial weight-bearing, follow-up as outpatient.
>
> • Results discussed with patient. Knee immobilized with Ortho Glass. Crutches given to patient. Instructed to follow-up with ortho as scheduled. Return precautions given. Patient verbalized understanding.

The claimant was treated at United Hospital Center Orthopedics by Justin Brewer, PA-C, on December 10, 2020, for a chief complaint of "Knee Injury (quadriceps patellar tendon tear). (Exhibit E). The history of present illness was:

> Patrick D Case is a 41 y.o. male. Comes to the office for initial consultation in regards to a right knee injury. This is a work related injury. He states that while at work he was going down some steps and an asphalt rig and states that he felt a pop and fell down the steps. He had immediate pain and dysfunction of the right knee. He states he is unable to extend or lift the right leg. He developed significant bruising and swelling at the right knee. States he is unable to ambulate due to the pain and dysfunction. Admits to hearing a pop. Patient went to the ER where it was found that he had a right possible quadriceps tendon rupture. He was referred here for evaluation and treatment

On examination it was noted the claimant was five feet eleven inches tall and weighed 515 pounds. The examination showed:

> he is alert, cooperative, no distress, appears stated age. A problem focused orthopedic exam was carried out of the Right knee which

> reveals positive palpable point tenderness throughout the distal quadriceps and anterior knee. He has significant ecchymosis throughout the anterior distal quadriceps region above the patella. He is unable to extend the knee. He is unable to hold the knee in extension. He is unable to lift the leg. He has a palpable defect at the distal quadriceps tendon region with noted swelling ecchymosis. His calf is supple and he is neurovascular intact distally with dorsal pedal pulse 2+bilaterally.

The findings on a CT scan of the right knee were recorded as:

> Suspect at least partial thickness tear of the quadriceps tendon. Also suspect partial or complete tear of the medial patellar retinaculum with significant soft tissue swelling and hematoma in the anterior knee joint area. No fracture seen.

An x-ray of the right knee showed:

> There is mild degenerative osteoarthrosis of the right knee joint. No acute fracture is visualized. There is a slight tilt to the patella on the lateral image. Abnormal density noted in the region of the distal quadriceps tendon which may be due to edema/hemorrhage or possibly a quadriceps tendon injury. Knee joint effusion is suspected.
>
> IMPRESSION:
>
> 1. No acute fracture.
>
> 2. Abnormal density in the region of the distal quadriceps tendon could be due to edema/hemorrhage or quadriceps tendon injury. MRI could be considered for further evaluation if clinically warranted.

An ultrasound of the right knee showed:

> The extensor mechanism was evaluated right knee a long short axis view. The quadriceps tendon full-thickness tearing about 2 cm of retraction. Patellar tendon was also evaluated long axis appears to be is intact.
>
> Impression: Quadriceps tendon tear full thickness, Patellar tendon difficult to fully evaluate to however appears to be intact.

The claimant was diagnosed with quadriceps rupture. The treatment plan was as follows:

> It is our recommendation that he undergo surgical intervention to repair the quadriceps tendon. I reviewed with patient had risks, benefits, rationale expected outcomes of undergoing right quadriceps tendon repair. Dr. Courtney also saw and examined the patient with me today and is in agreement with surgical planning. He has signed surgical consent and copies been scanned into the chart. We will plan for surgical intervention on December 21, 2020. In the meantime we recommended that he continue in a long-leg splint. Dr. Courtney is also recommended that he have a custom-molded hinged clamshell type long-leg brace made. I have sent the patient over to Morgantown orthotics with a prescription to have this completed. The patient will likely be out of work for at least 6-8 months according to Dr. Courtney's plan. We discussed the patient in great detail the went to recovery of this type of injury and surgical intervention. He will need to remain. in the long-leg brace locked in 0 for 6-8 weeks following surgical intervention and will progress physical therapy. We discussed ice and elevation. I also reviewed with the patient that he is a high risk for surgical intervention due to his morbid obesity. I have generated a work letter for him today.
>
> I placed him in a long-leg splint today with extra padding throughout the foot, heel and proximal fibular head. He was found to be neurovascular intact distally following splint placement.

The work letter states:

> This to certify that Patrick Case has been under my care for the
>
> following: Right quadriceps tendon rupture and is unable to return to work.
>
> Remarks: He will undergo surgical intervention on December 21, 2020, He will likely remain out of work for the next 6-8 months per Dr. Courtney.

The claim file contains a WC-2 Employers' Report of Injury which was completed on December 17, 2020, by Mary Baker, the Director of Human Resources. (Exhibit F). This form indicates the claimant worked as a CDL driver and that he had worked for the employer since December 3, 2013. The form also indicates the claimant injured his "right knee" on December 9, 2020, when he was "walking down stairs". An incident report was attached to the WC-2. (Exhibit G). The incident report contains the following description of the injury:

Employee was hauling asphalt for 1F Allen — Saltwell plant on the day of injury.

Plant has a catwalk installed to allow drivers to get to "higher ground" when spraying the asphalt from the bed of trucks. This catwalk has 10 stairs (including the catwalk itself).

At the time of injury, the employee was descending the stairs from the catwalk after spraying off the bed. Employee stated that about halfway down the stairs he felt a sharp pain in his right knee. Upon feeling the pain in his knee, he stopped. When he began to continue his descent, he fell down the remainder of the stairs landing on the gravel at the bottom. Employee stated that when he began to move again, he could not feel his leg under him, that it was as if it was not there.

Emergency services were contacted. Employee was taken by Ambulance to United Hospital Center. Safety Representation arrived at United Hospital Center at approximately 11:00 am. Employee had arrived. Further information on patient unable to be obtained at the hospital due to HIPAA, as well as, due to COVID.19 entry is granted only to the patient and 1 family member of the patient. Representative left a phone number to be reached by the employee.

Employee contacted Safety at approximately 11:51 am. Stated that he had hit his head when he fell and a spot was found, on his head, and that a CT scan had been conducted. He also stated that an X-Ray of his right knee had also been done. Employee was still awaiting results. At this time, he was unsure of what exactly had happened. He stated that he was not sure if his knee popped or broke while descending the stairs, but as he was walking down, all the sudden his leg gave out. Stating that it felt as if there was nothing there supporting him. This is the time at which he stated that he had fallen from the 4th or 5th step.

At approximately 3:42 pm, Patrick and his wife, Melissa, contacted Safety again. Melissa stated that he was being referred to a surgeon and requested information on Worker's Compensation claim, stating the hospital advised (as is customary) that referral could not be made without a claim number. They were advised to contact the HR Director. During this conversation, Patrick advised that his CT scan was clear, showing no injuries. He stated that he had ruptured tendons in his leg. As he recalled, he believed he had torn his patellar tendon. At this time, the employee elaborated on what had occurred. He stated that while walking down the stairs, he felt a sharp pain in his right knee. Upon feeling the pain in his knee, he

> stopped briefly. When he began to proceed to walk down the stairs, he fell, reiterating that when he took the first step, he could not feel his leg under him, supporting him. He stated that the hospital made and placed a type of "splint" on his leg to immobilize his knee, as the immobilizer would not accommodate the size of his leg.
>
> Safety spoke with the employee's supervisor, who advised when he arrived at the scene, Patrick had already been transported to United Hospital Center. He also stated that Theodore "Brent" Wilmoth was there at the time of Incident, but he did not believe that he saw anything. Supervisor advised he would speak with Brent to obtain a witness statement.
>
> 12.10.2020:
>
> Melissa, employee's wife, contacted Mary Baker today to advise that Patrick has a follow up appointment with Ortho today at 1:30 pm.
>
> Safety spoke with Brent at JF Allen at approximately 11:20 am. Brent stated that he did not see the employee fall. He was approximately 75 feet away and he saw him on the ground and went to assist him.

The incident report indicates the injury was immediately called in to the claimant's supervisor, Adam Stark and that Theodore "Brent" Wilmoth was in the area at the time of the accident.

By order of the Claims Administrator dated December 22, 2020, the claim was denied. (Exhibit H). The claimant protested the order.

By order of the Claims Administrator dated December 22, 2020, the request from UHC Orthopedics for a December 10, 2020, orthopedic appointment was denied as the claim was not compensable. (Exhibit I). The claimant protested the order.

By order of the Claims Administrator dated December 22, 2020, the request from Justin Brewer, PA-C, for a custom molded clam shell right leg brace was denied as the claim was not compensable. (Exhibit J). The claimant protested the order.

By order of the Claims Administrator dated December 22, 2020, the request by Dr. Courtney dated December 10, 2020, for a right quad tendon repair was denied as the claim was not compensable. (Exhibit K). The claimant protested the order.

The claimant testified by deposition on February 1, 2020. (Exhibit L). The claimant's testimony regarding the alleged injury was as follows

> Q. In the course of coming back down the steps, did you have some kind of accident or injury?
>
> A. I just don't know what happened. I fell and when I fell my leg ended up underneath of me.

(Depo. Transcript p.6). The claimant went on to testify about his description of the injury in Dr. Courtney's medical records:

> Q. Now, let me ask you about the day that this happened: When you were walking down the stairs, it looks like in Dr. Courtney's history he said you heard a pop as you were walking down the stairs?
>
> A. No. Like I said, I was just coming back down the stairs and fell. I don't know what happened.

(Depo. Transcript p. 12). The claimant then testified:

> Q So in the medical history where it says you felt a pop that would be incorrect?
>
> A Yes.
>
> Q And then I think on the claim application maybe it said you felt pain and stopped and then when- -
>
> A. No, like I said, I fell and that is evidently what had happened. **There was no sign of anything going up the stairs or coming down until I fell.**
>
> Q. So you didn't feel pain, you didn't feel a pop, you were just coming down the stairs and you fell?
>
> A. Yeah. That's evidently when I fell is when the tendon gave out or whatever, because once I fell I couldn't walk.

(Depo Transcript p. 13).

An expedited hearing was held in this matter on March 8, 2021.

By decision dated April 7, 2021, the Office of Judges affirmed all four (4) December 22, 2020, orders and held as follows:

> In this case, the claimant injured himself in the course of employment. Therefore, the only issue is whether his injury was incurred as a result of his employment. The claimant testified that on the day of injury, he put the material into the bed of the sump truck and then, in the course of coming back down the steps, he said he did not know what happened, but he fell and his right leg ended up u8nderneath of him. Although the Court in Cox *Id.*, found that the Workers' Compensation is a no-fault system, the claimant was simply descending stairs. This claim is very similar to Dunn, *Id.*, because there is no evidence his work either caused or contributed to the injury. The injury could have happened anywhere at any time. It was idiopathic in nature.
>
> In conclusion, the claimant did not suffer an injury in the course of and as a result of his employment on December 9, 2020. Therefore, the treatment which resulted from that incident is not medically related and reasonably necessary, as the result of the incident.

The claimant appealed this decision and by order dated October 26, 2021, the Board of Review reversed the Office of Judges decision and held this claim compensable. (Exhibit M).

IV. SUMMARY OF ARGUMENT

This claim is before this Court pursuant to the employer's appeal from the Board of Review order dated October 26, 2021, which improperly and erroneously reversed the Office of Judges decision dated April 7, 2021. The Administrative Law Judge properly affirmed four (4) separate orders of the Claims Administrator dated December 22, 2020. The first order denied the claimant's application for benefits. The second order denied a request from UHC Orthopedics for a December 10, 2020, orthopedic appointment. The third order denied the request from Justin Brewer, PA-C, for a custom molded clam shell right leg brace. The fourth order denied the request by Dr. Courtney for a right quad tendon repair. The preponderance of the substantial, reliable and probative evidence of record establishes that the claimant had an idiopathic fall when he was descending stairs and his knee gave out while he was at work on December 9, 2020. The Administrative Law Judge properly affirmed all four orders concluding that the claimant did not sustain an injury as a result of his employment and that the injury "was

idiopathic in nature." The Board of Review replaced the factual findings and conclusions of the Administrative Law Judge with their own in violation of this Court's holding in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995). This was not a valid basis upon which to reverse the considered decision of the Administrative Law Judge. The Board of Review's Order as that Order is clearly wrong, in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, and is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Accordingly, the employer requests that this Court REVERSE the order of the Board of Review dated October 26, 2021, and REINSTATE the Office of Judges decision dated April 7, 2021.

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 reverse the Board of Review's Order as that Order is clearly wrong, in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, and is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record.

B. The Board of Review's Order is clearly wrong, in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, and is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record.

The overarching issue before this Court is whether the order of the Board of Review was clearly wrong in reversing the decision of the Office of Judges dated April 7, 2021, and holding this claim compensable when the preponderance of the substantial, reliable and probative evidence of record establishes that the claimant did not sustain an injury in the course of and resulting from his employment but rather his felt pain when he was walking down stairs.

The Board of Review may only reverse the decision of the Administrative Law Judge only "if the substantial rights of [a party] have been prejudiced" in one of six statutorily enumerated ways, namely, that the findings of the Administrative Law Judge were (1) in violation of statutory provisions; (2) in excess of the statutory authority or jurisdiction of the

Administrative Law Judge; (3) made upon unlawful procedures; (4) affected by other error of law; (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W. Va. Code § 23-5-12(b)(2003). In Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), this Court addressed the clearly wrong standard of appellate review regarding an Administrative Law Judge's factual determinations in a state employee grievance matter. In Martin, this Court held that "[a]s a general rule, we uphold the factual findings of an ALJ if they are supported by substantial evidence." Martin, 195 W. Va. at 306, 465 S.E.2d at 408. The Martin Court went on to discuss at length the basis for this general rule, stating that "we cannot overlook the role that credibility places in factual determinations, a matter reserved exclusively for the trier of fact" and that "we must defer to the ALJ's credibility determinations and inferences from the evidence, despite our perception of other, more reasonable conclusions from the evidence." Martin, 195 W. Va. 306, 465 S.E.2d at 408. In the instant case, the Board ignored the mandates of Martin and replaced the factual determinations and conclusions of the Administrative Law Judge with that of his own. This was not a proper basis upon which the reverse the considered Decision of the Administrative Law Judge.

It is well established 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). 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, 108W. 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 who asserts it and the well-established rule of liberality cannot be considered to take the place of proper and satisfactory proof." Deverick v. State 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 Comnfr, 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).

West Virginia Code § 23-4-1(a) (2008) states that "Subject to the provisions and limitations elsewhere in this chapter, workers' compensation benefits shall be paid... to the employees of employers subject to this chapter who have received personal injuries in the course of and resulting from their covered employment." W. Va. Code 23-4-1(a) (2008). To establish compensability, an employee who suffers 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 Compensation Director, 150 W.Va. 145,144 S.E.2d 498 (1965). The phrases "in the course of employment" and "resulting from employment" are not synonymous, and both elements must concur in order to make a workers' compensation claim compensable. Emmel v. State Compensation Director, 150 W.Va. 277, 145 S.E.2d 29 (1965).

The court in Emmel, *supra,* noted that the circumstances surrounding the particular injury must be considered on a case by case basis to determine compensability. The court stated that, "for an injury, to be compensable, must have occurred in the course of and resulting from the employment and it is not enough to say that the activity in which the injury occurred was a vague incident of employment." Id. at 284, 34.

Here, the claimant's statement on the WC-1 was that he was coming down stairs and his knee "gave out". He told the EMS personnel "felt a pop and fell". He told the hospital emergency room staff that his "right knee gave out". He told Mr. Brewer in Dr. Courtney's

office that he "felt a pop and fell". During his deposition, the claimant testified that he did not hear a pop, and that Dr. Courtney's medical records were wrong. He also testified repeatedly that "he didn't know what happened" that "he just fell". There is no point at which the claimant described an accident or injury which either caused his knee to give out or caused him to fall. Therefore, it appears that the claimant's alleged injury is idiopathic in nature and that his knee giving out and the subsequent fall were not due to an injury received in the course of and resulting from his employment.

The Workers' Compensation Fund was created and exists only for the payment of compensation for work-related injuries and is not a health and accident fund. Barnett v. State Workmen's Compensation Comm'r, 153 W. Va. 796, 799, 172 S.E.2d 698, 700 (1970). Further, ". . . it is. . . axiomatic that the employer, by subscribing to the workmen's compensation fund, does not thereby become the employee's insurer against all ills or injuries which may befall him." Jordan v. State Workmen's Compensation Comm'r, 156 W. Va. 159, 165, 191 S.E.2d 497, 501 (1972) (citing Barnett v. State Workmen's Compensation Comm'r, 153 W. Va. 796, 172 S.E.2d 698 (1970) and James v. Rinehart & Dennis Co., Inc., 113 W. Va. 414, 168 S.E. 482 (1933). Furthermore, the employer has submitted several Supreme Court decisions which are similar to the instant claim. The claimant had a non-compensable idiopathic fall on October 8, 2019. In Dunn v. Tractor Supply Company, 2015 W. Va. LEXIS 848, 2015 WL 4546116, this Court affirmed the denial of a claim when the claimant was walking down an aisle when her knee popped concluding that:

> Ms. Dunn has failed to prove that her injury was in any way connected to her work. She was simply walking back to work when her knee popped. The injury could have happened to her at any time. Because there was no evidence that her work either caused her injury or contributed to her injury, Ms. Dunn has failed to show her injury was a result of her employment with Tractor Supply Company.

Dunn v. Tractor Supply Co., 2015 W. Va. LEXIS 848, 2015 WL 4546116, *5

In Patrick v. CCBCC, Inc., 2016 W. Va. LEXIS 180, 2016 WL 1123353, the Court affirmed the denial of claim when the claimant alleged that his knee locked up "while he was standing from a seated position." In Shrum v. Logan County Board of Education, 2016 W. Va.

LEXIS 590, 2016 WL 4133618, the Court affirmed the denial of the claim when the claimant alleged that she injured her foot while ascending stairs. In Hypes v. Jackie Withrow Hospital, 2016 W. Va. LEXIS 191, 2016 WL 1164171, the Court affirmed the denial of a claim when the claimant alleged that he was walking down a flight of stairs when his right knee gave out. This Court has repeatedly held claims that are idiopathic in nature, to be non-compensable claims. Incidents such as the one alleged herein are not compensable as the alleged injuries do not result from employment. Most recently in Gabbard v. Ashland Performance Materials, 2018 W. Va. LEXIS 550, this Court reinstated the denial of claim where the claimant was walking down stairs holding as follows:

> On May 16, 2017, the Office of Judges determined that Mr. Gabbard established that he suffered a compensable injury, which caused a right medial meniscus tear that necessitated surgery. Accordingly, the Office of Judges reversed the claims administrator's Order of January 8, 2016. The Office of Judges reasoned that the treating physician noted that the claimant had preexisting arthritis, which was aggravated by the injury. The Office of Judges determined that the injury superimposed upon Mr. Gabbard's pre-existing arthritis. The Office of Judges examined the claim in light of *Gill v. City of Charleston*, 236 W. Va. 737, 783 S.E.2d 857 (2016), which held that a pre-existing condition could not be held compensable, but a new injury or aggravation of the pre-existing condition could be held compensable. The Office of Judges found that the extreme demand put on the right knee by Mr. Gabbard's employment going up over 100 steps and descending down over seventy steps, while carrying an impact wrench, was a work-related incident that caused the medial meniscus tear.
>
> The Board of Review found the analysis of the [*6] Office of Judges to be erroneous and clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Board found that Dr. Love, Mr. Gabbard's physician, indicated on the Report of Occupational Injury form that the injury was a non-occupational condition. Dr. Love further wrote, "[p]rior knee arthritis; injury aggravated arthritis." Dr. Soulsby also opined that the medical evidence does not support the claimant's allegation that he sustained an injury to his right knee. The Board also questioned the application of this Court's holding in *Gill*. The Board found that the parties agree that there is no evidence that Mr. Gabbard suffered a torn meniscus of the right knee. His knee was initially misdiagnosed as a torn medial meniscus. Given the evidence, the Board of Review considered *Gill* and concluded that Mr. Gabbard

> did not suffer an injury to his right knee in the course of and resulting from his employment. In its Order dated February 7, 2018, the Board of Review reversed and vacated the May 16, 2017, Order of the Office of Judges, and reinstated the claims administrator's Order dated January 8, 2016, which rejected the claim.

Gabbard v. Ashland Performance Materials, 2018 W. Va. LEXIS 550, *5-6

In this claim, the cause of the "incident" was not the claimant's employment. The claimant's knee gave out. The claimant failed to show that he suffered an isolated fortuitous event. The preponderance of the evidence establishes the claimant did not sustain an injury resulting from his employment because he was engaging in normal activity when he was descending stairs and his knee gave out. This would have occurred had he been on the same type of stairs at home, at an amusement park, a sporting event, or at a house of worship. There is no evidence that the claimant's work activities either caused or contributed to the injury. And, while not directly on point, the West Virginia Supreme Court of Appeals has addressed idiopathic falls in Ware v. Comm'r, 160 W.Va. 382, 234 S.E.2d 778 (1977). The Ware court determined that when a prior disease or condition causes an employee to fall and the employee sustains injuries which he probably would not have sustained had the fall occurred away from the hazards of the place of employment, the accident is compensable. Id. at 778. In this claim, the cause of the "accident" was the claimant's knee giving out. After the fall, the claimant was diagnosed with a quadriceps rupture. In all reality the quadriceps rupture occurred as the claimant was descending the stairs because that is the point at which he said he could no longer stand on his knee, which is why it gave out, which is why he fell. Given the claimant's body habitus, it is very probable the claimant would have sustained the same type of knee problem had he fallen outside of his workplace.

The Administrative Law Judge provided a detailed analysis of the evidence of record and the law applicable to this claim. Based on this thorough analysis the Administrative Law Judge concluded that while the claimant sustained an injury in the course of employment it was not a result of his employment and "It was idiopathic in nature." The Board of Review was clearly wrong on reversing that decision and holding this claim compensable.

VII. CONCLUSION

Accordingly, as the Board of Review's Order is clearly wrong, in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, and is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record, the employer requests that this Court REVERSE the order of the Board of Review dated October 26, 2021, and REINSTATE the Office of Judges decision dated April 7, 2021.

Respectfully submitted,

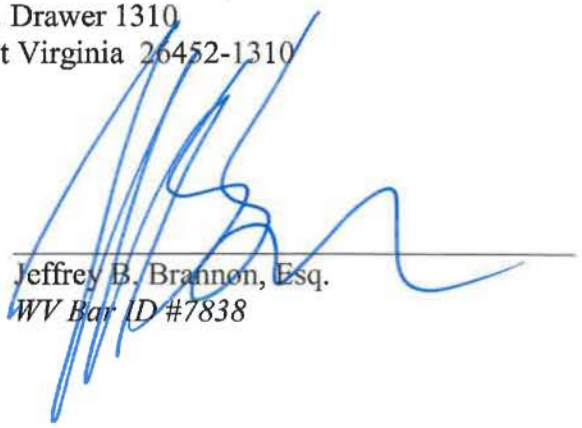
Doss Enterprises, LC
By Counsel

Jeffrey B. Brannon, Esq.
WV Bar ID #7838

CERTIFICATE OF SERVICE

I, Jeffrey B. Brannon, Esq., attorney for the Appellant, Doss Enterprises, LC, hereby certify that a true and exact copy of the foregoing "Brief on Behalf of Appellant, Doss Enterprises, LC" was served upon the Appellee by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 29th day of November, 2021 addressed as follows:

Robert Stultz, Esq.
Bailey, Stultz, Oldaker & Green, PLLC
P.O. Drawer 1310
Weston, West Virginia 26452-1310



Jeffrey B. Brannon, Esq.
WV Bar ID #7838

APPENDIX B -- REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: Patrick Case v. Doss Enterprises, LC

Petitioner: Patrick Case Respondent: Doss Enterprises, LC

Counsel: Jeffrey B. Brannon, Esq. Counsel: Robert Stultz, Esq.

Claim No.: A00003024969 Board of Review No.: 2058600

Date of Injury/Last Exposure: 12/09/2020 Date Claim Filed: 12/09/2020

Date and Ruling of the Office of Judges: 04/07/2021

Date and Ruling of the Board of Review: 10/26/2021

Issue and Relief requested on Appeal: _____

CLAIMANT INFORMATION

Claimant's Name: Patrick Case

Nature of Injury: _____

Age: _____ Is the Claimant still working? ☐Yes ■No. If yes, where: _____

Occupation: _____ No. of Years: _____

Was the claim found to be compensable? ■Yes ☐No If yes, order date: 10/26/2021

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: Right quadriceps tendon rupture
(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.