IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0404

Tracey A. McCreery,

Petitioner/Dependent,

Alexander McCreery,

Employee, Deceased,

v.

Board of Review (BOR)
Appeal No.: 2057350
JCN: 202008286 & 2020022164
DOI: 09/16/2019

Apex Pipeline Services, Inc.,

Respondent/Employer.

PETITIONER'S BRIEF

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ASSIGNMENT OF ERRORS

A) The Administrative Law Judge's ("ALJ") modification of the Claim Administrator's ("CA") order of February 12, 2020, holding the claim compensable "...for injuries to the low back and neck....," is clearly wrong and result from an erroneous conclusion of law pursuant to § 23-5-15(d)(2005); as, the ALJ'S *sua sponte,* equivocal characterization of injuries to the "low back and neck", in effect, mirrors the same lack of reliance on the medical evidence, ignored by the CA in its February 12, 2020 order. The uncontradicted, credible evidence, contains adequate diagnoses from the attending physicians of record (either Drs. Derek Golna or Miguel Dejuk) – citing the compensable injury involved "low back pain; neck pain; lower back radiculopathy; low back pain and sciatica." Thus, the only "medical" designation of compensable elements concern those identified by Drs. Golna and Dejuk, including confirmation from Dr. Dejuk's medical records and Dr. Dejuk's credible testimony;

B) The ALJ'S disposition of the CA's orders of February 12, 2020, and April 10, 2020, remanding the claim to the CA pending Mr. McCreery's evaluation by a medical specialist is moot due to Mr. McCreery's demise on August 15, 2021. Petitioner argued, unsuccessfully, Mr. McCreery's death constituted administrative error, warranting reconsideration of the ALJ'S decision of August 18, 2021, and entry of a supplemental decision on the merits based upon the available record, as outlined and required by *Martin V. WVCD, Syl. Pt. 5 210 W.Va. 270, 557 SE2d 324 (2001).* Petitioner avers the evidence of record establishes a credible, preponderant evidentiary foundation for the designation of compensable elements of the injury as determined by Dr. Dejuk, in his diagnosis update request and/or Dr. Dejuk's medical documentation including his testimony;

C) The ALJ's affirmation of the CA's action/order dated April 10, 2020, in designating Dr. Dejuk's attending physician's report as a "reopening petition" and denying temporary total disability benefits, constitutes an erroneous conclusion of law; as, Mr. McCreery's claim was never "closed," otherwise requiring a "reopening for TTD benefits", per W.Va. Code § 23-4-16(a)(2005). Rather, the posture of the clam remained "open" for the payment of TTD benefits with Mr. McCreery's protest to the CA's order of February 12, 2020; thus, objecting to the CA's designation of the claim as a "no lost time" (i.e., no TTD benefits payable) claim. Petitioner contends Dr. Dejuk's attending physician report should not have been deemed a petition to reopen; but, rather treated as reliable demonstration of Mr. McCreery's temporary total disability status, in turn, meriting the reversal of the CA's order of February 12, 2020, as a "no lost time claim" to one involving and meriting payment of TTD benefits; and,

D) The interpretation of the lumbar MRI scan of August 6, 2020, by Dr. Jonathan Luchs, dated March 26, 2021, is not reliable evidence as a basis to deny the inclusion of Dr. Dejuk's diagnosis codes as compensable elements; as, Dr. Luchs' opinion, to the extent of suggesting pre-existing conditions were, nevertheless, either asymptomatic, or not the object of treatment, prior to the compensable injury. *Moore V. ICG Tygart Valley, LLC Syl. Pt. 5 (W.Va. Sup. Ct.; NO. 20-0028; April 28, 2022)*

STATEMENT OF THE CASE

The history of Mr. McCreery's lumbar/cervical spine compensable injury of September 16, 2019, (easily compatible with serious lumbar spine trauma, and, in turn, ultimately, requiring treatment, for lumbar disc herniation, though improperly, callously denied by the Employer's Claim Administrator ["CA"]), is charted in Mr. McCreery's uncontradicted testimony of January 12, 2021 (AP 057) and his answers to Employer's Interrogatories, dated July 7, 2020. (AP 178) Mr. McCreery, on September 16, 2019, at the end of his shift around 7 p.m., while serving as a welder's helper with the Employer, was exiting alone in his service truck from his pipeline worksite. The truck's brakes and power steering failed, while traversing up a steep hill of approximately three hundred (300) yards in length. The truck reversed direction approximately one hundred fifty (150) yards, and careened off a narrow bridge, dropping approximately three/four foot into a creek bed, with the vehicle coming to rest on the driver's side. Although his back hurt, he did not think he had suffered major trauma and refused emergency care at that time. When he awoke the following morning, he was unable to work stating "I couldn't really move at all. My back was hurting. My leg was bothering me a lot. I don't know why my leg was bothering me – and my left leg, it was just bothering me. I had, like I said, a slight pain in my back." (AP 067) Mr. McCreery was allowed to take the next two (2) days off due to his condition; and, on September 19th, he was taken for medical attention, by his "safety man" who witnessed the entire examination, at Wheeling MedExpress. (AP 069) Mr. McCreery described his leg pain as "just tingling and just, you know, kind of prickly." (AP 070) Mr. McCreery testified Dr. Golna, the attending physician, told him to return if it didn't get any better. (AP 070) In regard to work restrictions and discharge instructions, Mr. McCreery testified the physician gave him some pain medication; advised him not to lift anything over fifty (50) pounds; and, stated he would be on

"light duty." (AP 071) Mr. McCreery testified he thought he was on "light duty", but "he actually – on the paperwork, he cleared me for full back to duty." (AP 071) Mr. McCreery testified Dr. Golna advised him to take it easy for a few days; and, the "safety man" told him to take the rest of the day (i.e., 09/19/2019) off with pay. Mr. McCreery further testified the safety man advised him to just show up at the yard the following day which was a Friday; and on Friday, Mr. McCreery went to the yard in Triadelphia, West Virginia and just "hung out." (AP 072) On the following Monday, a "substitute foreman" sent Mr. McCreery out to the field; as, the substitute foreman relied on MedExpress "duty form" releasing Mr. McCreery to work without restriction. Yet, Mr. McCreery testified his "crew foreman" at the "field" worksite, advised him "Don't worry. Just come out there and hang out in the truck and if you can do something, do it. If not, just don't worry about nothing." (AP 073) Mr. McCreery testified he worked in that fashion for several more days and was given a "general lay off" effective October 2, 2019. (AP 075; 092) Mr. McCreery went home to Florida and did not seek any further treatment believing it would just take time and that things were not going to heal in one (1) day. (AP 074) Mr. McCreery testified at home in Florida, the pain was constant, stating "I always had that pain. It just kept getting worse and worse." (AP 076) Around the holidays in December, I called Kecia Jones, which is the case – you know, Creative Risk Solutions with workers comp. I tried to get – to see if I could go to the doctor. And then she basically (during his only phone conversation with her in January 2020) said, well, that doesn't have to do with what you are approved for or whatever. You know, she said, no, they weren't going to let me go to the doctor." (AP 076) Upon receipt of the CA's initial, "no lost time" compensability Order of February 12, 2020. Mr. McCreery, sought treatment from an orthopedic specialist at Orthopedic MedExpress in Gainesville, Fla; and, was told he could not be seen without "prior authorization". (AP 080) Next, Mr. McCreery was seen "out of pocket" by Dr. Miguel

Dejuk, in March of 2020. Mr. McCreery, testified, he successfully applied for unemployment compensation benefits from West Virginia, which continued for approximately one (1) year from October, 2019 to October, 2020. Mr. McCreery testified he attempted to get work and when he advised potential employers, that he could only stand for, "...15 – more than 15 minutes, at a time sometimes, they're like, yeah, I can't use you". (AP 086)

Inconsistent with the CA's belated entry of its initial compensability Order of February 12, 2020, the record contains, the CA's "Loss Notice" with a "date of creation of 9/20/2019", filed/reported by Mr. Jason Porter, the Employer's presumed "safety man". (AP 047) Reasonably assuming the record forwarded to Creative Risk Solutions by Mr. Porter on 09/20/2019 included the WC-1 application of September 19, 2019, the "Loss Notice" indicates an injury to "multiple body parts." The "Loss Notice" specifies the "type of injury" is "strain" to "multiple body parts", with initial treatment from Wheeling MedExpress. The "Loss Notice" designated the claim as a "medical only **claim**."

As the only possible medical records available to the CA on February 12, 2020, consisted of the MedExpress office visit of September 19, 2019 and the WC-1 form, dated 09/19/2019, the CA's limitation of the compensable elements to solely "contusions to the low back and neck", was patently fallacious; as, the MedExpress records lacked any indication that Mr. McCreery's injury involved only contusions of low back and neck; while, arbitrarily ignoring the substance of the MedExpress records and Dr. Golna's diagnoses on the WC-1 application. (AP 041-045)

The CA's fictitious characterization of the injury to mere contusions of the low back and neck, is clear from any reasonable inspection of the Wheeling MedExpress records of September 19, 2019.[1] Also, blatantly inconsistent with the fallacy of the injury being limited to alleged,

[1] Dr. Golna reported an injury to his back with extremity weakness and saddle anesthesia as a result of a motor vehicle accident. "Restrained driver, truck rolled back and flipped ... c/o neck and low back pain, stiffness", with a

undocumented neck and back contusions, is the documentation notes discharge instructions relating to **back and cervical sprain/strain were given to the patient** – and was advised to return if symptoms worsened. Also inconsistent with neck and back contusions is Dr. Golna's script for the muscle relaxant medication methocarbamol 500 mg. for a period of five (5) days. (AP 045)

In March, 2020, Dr. Dejuk diagnosed lumbar radiculopathy consistent with the traumatic injury of September 16, 2019; and referred Mr. McCreery for a lumbar MRI scan. (AP 052-053) Mr. McCreery, secured the MRI scan "out of pocket" on August 6, 2020.[2]

Dr. Dejuk's credible testimony of January 5, 2021 indicates, on March 18, 2020, Mr. McCreery presented with complaint of lower back pain and lower radiculopathy. Consistent with Dr. Dejuk's examination, Dr. Dejuk completed forms for submission to the CA dated March 18, 2020 requesting diagnosis update amendments citing ICD10-CM diagnosis codes M54.5 and M79.605 designating lower radiculopathy and sciatica as compensable elements of the injury, noting Mr. McCreery was in severe pain, lower back radiated to the left with numbness. Also, on March 18, 2020, Dr. Dejuk completed an attending physician's report certifying Mr. McCreery as temporarily totally disabled ("TTD") from October 30, 2019 through a date "to be determined" following the MRI scan of the lumbar spine and neurosurgical consultation. Notwithstanding the

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moderate intensity reporting pain of "sharp aching and constant." Patient reported injury to neck, back pain, leg pain, myalgia, pain, and headache. The MedExpress record appears absent any neck or back contusion. On the contrary, the MedExpress report indicates Mr. McCreery denied any abnormal bruising, swelling. In regard to the musculoskeletal examination performed by Dr. Derrick Golna, Dr. Golna reported a full range of motion during flexion in neck bilaterally **but painful** with full range of motion during rotation in neck **but painful**. Midline spinous tenderness was noted in neck with paraspinous tenderness also noted in the neck. Dr. Golna also reported **limited range of motion during flexion and low back due to pain limited range of motion during extension and lower back due to the pain with limited rotation in lower back bilaterally due to pain. Dr. Golna also noted midline tenderness to the lower back and paraspinous tenderness to the lower back as well as muscle spasms to the lower back**. Again, directly contrary to the CA's coverage of alleged fabricated contusions, Dr. Golna reported "**no lacerations, no skin abrasion present, no ecchymosis observed, no hematoma present**." (emphasis added)

[2] The MRI scan confirmed Mr. McCreery's clinical presentation of radiculopathy with impression of "disc herniation L3-4 with inferior foraminal narrowing impinging right L3 nerve root. Broad based disc protrusion L4-5 with narrowing of the central canal and neural foramina impinging the L4 and S5 nerve roots bilaterally. Posterior herniation L5 – S1. Inferior foraminal narrowing abutting L5 nerve roots right worse than left."

uncontradicted credibility of Dr. Dejuk's conclusions and the submission of the above-referenced forms together with his office note, the CA, by Orders dated April 10, 2020 denied reopening the claim for TTD benefits and/or diagnosis update amendments; as, the CA arbitrarily held to its artifice of February 12, 2020, limiting the claim to fictitious contusions of the lower back and neck.

Dr. Dejuk opined there was no indication of any other type of traumatic injury or other independent intervening cause[3] between the date of injury of September 16, 2019 and his treatment of Mr. McCreery; and, thus, Dr. Dejuk attributed Mr. McCreery's condition and the MRI scan findings as related to the compensable injury. Dr. Dejuk confirmed there was no question that the source of Mr. McCreery's pain correlated with the MRI scan findings of August 6, 2020. (AP 137)

In challenge to the MRI scan from Express Medical Imaging on August 6, 2020, the Employer offered the report of an "Age of Injury" analysis of the MRI scan, from Dr. Jonathan Luchs, a Board-Certified Radiologist. (AP 308) In interpreting the August 6 MRI scan [which was read, initially, by Dr. Neville Ramchander, a Diplomat of the American Board of Radiology double fellowship], Dr. Luchs concurred with the "...disc abnormalities at L3-4, L4-5 and L5-S1, as there is evidence of disc desiccation with disc space narrowing endplate remodeling and endplate osteophyte formation as well as endplate modic change, all reflecting chronic degenerative disc disease which was not reported by the primary reader". Dr. Luchs concluded the MRI findings "appear chronic" without any clear indication as to whether he is referring to degenerative findings and/or the findings concerning the disc herniations. Dr. Luchs also omitted any definition and/or clarification of the probable time frame for "chronic"; as, the MRI scan of August 6, 2020 was taken approximately eleven (11) months post injury of September 16, 2019.

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[3] *Wilson v. WCC, 174 W.Va. 611, 328 SE2d 485 (1984)*

Yet, even suggesting pre-existing degenerative change (or even suggesting pre-existing disc herniation), which are either asymptomatic, nor the object of treatment, before the September 16 injury does not negate the opinion of compensable, disabling traumatic induced disc herniation based on the findings and recommendations of Drs. Dejuk and/or Ramchander; per, the recent governing standard in *Moore v. ICG Tygart Valley, LLC (W.Va. Sy Ct. No. 20-0028; April 28, 2022.*

The office notes of Dr. Dejuk from March 18, August 6 and 10, 2020 (AP 052-056) are consistent with his testimony of January 5, 2021 with the office note of March 18, 2020 citing;

> Chief complaint patient had an accident. Pain is really severe in lower back and going down left leg and now going into both. Patient states the left leg goes numb sometimes and right also. Patient states this has been going on for 6 months. On clinical examination, Dr. Dejuk notes all limbs moving well except pain in left leg when raising it. The assessment was lower radiculopathy and sciatica.

In reference to the treatment records from the Florida Pain and Rehab Association in Gainesville, Florida, these treatment notes from the Florida Pain facility indicate Mr. McCreery, initially, reported lower back pain from the compensable injury of September 16, 2019, in the treatment note of January 30, 2020 [i.e., following the CA's denial of treatment that same month] with continued reference through February 18, 2021. (AP 231-307)

In response to the CA's receipt of Mr. McCreery's WC-1 Initial Benefit Application dated September 19, 2019 (AP 041); the medical records from MedExpress (AP 040-046); Dr. Dejuk's attending physician's report (AP 050) and diagnosis update form (AP 051), as well as, the office notes from Dr. Dejuk (AP 052-056), the CA entered the following orders:

> 1) February 12, 2020, holding the claim compensable on a "no lost" time basis for the asserted, fabricated compensable diagnosis of contusions of the neck and back; 2) April 10, 2020, denying the inclusion of Dr. Dejuk's recommended diagnostic codes of lower back radiculopathy, low back pain and sciatica; and,

3) April 10, 2020, treating Dr. Dejuk's attending physician's report as a reopening petition and denying the payment of temporary total disability benefits[4]

Following Mr. McCreery's protest to these orders, the Office of Judges entered the Decision dated August 18, 2021, (AP 004) reversing the Order of February 12, 2020, excluding the inclusion of low back and cervical contusions as unsupported by the evidence of record; and, modified the claim as compensable for injuries to the low back and neck, with a remand for Mr. McCreery's further medical examination, to secure additional opinion, on whether the findings from the MRI scan of August 6, 2020, were related to the compensable injury. Also, the ALJ affirmed a second Order dated April 10, 2020, denying reopening of the claim for temporary total disability benefits, in light of, Mr. McCreery's receipt of unemployment compensation benefits, during the approximate time frame of October 2019 through October 2020.

On Petitioner's Appeal, the Board of Review, in its Order of April 22, 2022, affirmed the Office of Judges Decision of August 18, 2021, adopting, by incorporation, the findings and fact and conclusion of law from the ALJ's decision. Both the Office of Judges and the Board of Review denied respective motions for reconsideration (AP 023; 033; 310; 001) and/or remand, and supplemental decision, despite Mr. McCreery's unfortunate demise on August 15, 2021, three (3) days before the ALJ's Decision.

SUMMARY OF ARGUMENT

As the Board of Review's ("Board") Order of April 22, 2022, represents a total incorporation and adoption of the findings of fact and conclusions of law from the ALJ's Decision

[4] The CA also entered an order dated April 2, 2020, identifying a second WC-1 application as a duplicate, in separate claim – JCN: 2020022164, and rejecting the claim, which is not an issue in the appeal.

of August 18, 2021, Petitioner avers the Board of Review and Office of Judges made erroneous conclusions of law and these decisions are clearly wrong based on the credible evidence; as, demonstrated by *Martin v. WVCD, Syl Pt. 5, 210 W.Va. 270,557 SE2d 324 (W.Va. 2001)* and *Moore v. ICG Tygart Valley, LLC (Slip Opinion W.Va. Sup. Ct. No. 20-0028;April 28, 2022)*;and, thus, in turn, warrant reversal of the Board of Review's Decision of April 22, 2022.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully avers oral argument is unnecessary pursuant to the criteria provided in Rule 18a of the Rules of Appellant Procedure. The facts and legal arguments appear adequately presented in the briefs and record on Appeal.

ARGUMENT

A. In addition to discussed, infra, erroneous conclusions of law, from the ALJ and the Board, Mr. McCreery's decease precluded the evidentiary development directed by the ALJ's remand to the Claim Administrator (i.e., ordering Mr. McCreery's examination by a neurosurgeon/orthopedic specialist).

Petitioner avers Mr. McCreery's decease does not bar the final disposition [i.e., on the submitted record] of the protests in litigation, otherwise improperly deferred by the ALJ's August 18 Decision. *See, Martin v. WCD, Syl. Pt. 5, 210 W.Va. 270, 557 S.E.2d 324 (W.Va. 2001).* Petitioner avers, *Martin, supra* supports reversal of the Board's Order of April 22, 2022 (and ALJ Decision of August 18, 2021), and the issuance of a supplemental disposition on the merits regarding Mr. McCreery's protests to 1) the Claim Administrator's ("CA") Order of February 12, 2020, insofar as the Board and ALJ denied temporary total disability ("TTD") as a "no lost time" injury; 2) the CA's Order of April 10, 2020, denying the inclusion of lower back radiculopathy, low back pain (LBP) and sciatica as compensable elements of the injury; and, 3) the CA's Order

dated April 10, 2020, improperly designating Dr. Dejuk's Attending Physician's Report, dated March 18, 2020, as a "petition to reopen;" and, then denying temporary total disability benefits. As governed by the Court's decision in *Martin, supra*, Petitioner, as the widow and sole surviving dependent (AP 031-032) of Mr. Alexander McCreery, merits a final decision on the above cited three (3) issues, otherwise, improperly denied by the ALJ's Decision of August 18, 2021[5] and the Board's Order of April 22, 2022.

B. The Board's and ALJ's disposition of Mr. McCreery's protest to CA's order dated February 12, 2020 results from erroneously refusing both consideration of TTD benefits; and, erroneously refusing to accept Dr. Dejuk's diagnoses as compensable.

In reference to the ALJ's discussion on page 14 of the August 18 Decision captioned "Secondary Conditions," (AP 017) Petitioner avers error of law [i.e., W.Va. Code § 23-5-15(d)(2005)] occurred; as, the Board's and ALJ's disposition involving the Order of February 12, 2020, is limited solely to the CA's designation of the injury's compensable elements; while, excluding consideration of the Order's companion designation of the injury as a "no lost time claim"- thus, discounting any consideration of an initial award of temporary total disability ("TTD") benefits. Petitioner avers the ALJ, overlooked review of the record as demonstrating the injury was a "lost time" event, warranting an initial grant of TTD benefits – thus, apart, distinct, and immune from the CA's improper attempt to treat the TTD issue as only available under the

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[5] Mrs. McCreery's request for disposition is compatible with the Court's decision in *Martin* which held, notwithstanding the death of the Claimant, Mr. Martin's dependent widow was entitled to a resolution of the issues pending in litigation at the time of Mr. Martin's demise; as, the Court explained:

> At the time Mr. Martin petitioned the Court in this case, before his death, the disputed issue is whether Mr. Martin was owed additional compensation for his occupational pneumoconiosis impairment. Had he not died, and had this Court found in his favor, Worker's Compensation Division would have owed Mr. Martin two things: a back-pay award for the period of time from the onset date of his disability to the date of his favorable decision, and ongoing payments from the date of his decision until Mr. Martin's condition changed or until he died. But, though Mr. Martin's death obviously impacts any future payments still living Mr. Martin might have received, we cannot see why his death should have any impact whatsoever on the question of what sort of award he was entitled to for the time he was still alive, i.e., the backpay award. Either the evidence shows he deserved it, or shows he did not. His death has no bearing on that question. *Martin*, supra at 335

"inapplicable" procedural remedy of reopening a "closed" claim per the CA's mischaracterization/Order of April 10, 2020. (AP 039) Petitioner avers, the ALJ's August 18 Decision inappropriately limited consideration of the issue of TTD benefits solely in the context of the CA's artifice, in designating Dr. Dejuk's Attending Physician's Report, dated 3/18/2020 a "reopening petition" of a "closed" claim. Consequently, Petitioner argues the ALJ's Decision, lacks a final resolution/decision on the protest to the Order of February 12, 2020, regarding Mr. McCreery's objection to its "no lost time" designation [i.e., no TTD benefit status]. Petitioner avers the issue of initial TTD benefit entitlement falls within litigation over the February 12 Order; which, in turn, does not require meeting the evidentiary standards of "progression" and/or "aggravation" under the "reopening" remedy of a "closed claim," otherwise required by *Harper v. SWCC, 160 W.Va. 364,234 S.E.2d 779 (1977).*

Petitioner acknowledges the ALJ's Decision of August 18 properly held the CA's Order of February 12, 2020, lacked any medical foundation to restrict the injury's compensable elements to, otherwise, "fictional" contusions of the neck and back. (AP 021) Yet, Petitioner avers the ALJ committed clear error in limiting the "modified" compensable elements to general "neck and low back injuries" from the injury. (AP 019) The ALJ has committed error analogous to the CA's "February 12 action", in substituting *sua sponte,* the ALJ's lay description of the injury, [i.e., "...compensable for injuries to the low back and neck"] rather than relying on the diagnoses of Drs. Dejuk and/or Golna. The ALJ, noted, on page 15 of the August 18 Decision (AP 018), the only medical diagnoses, available to the CA on February 12, 2020, were the MedExpress physician's (i.e., Dr. Derek Golna) citation [in both the MedExpress chart of September 19, 2019, as well as the completed physician's section, (by Dr. Golna) on the WC-1 Form, (also dated September 19, 2019)], to ICD 9 diagnosis codes 724.2 (lumbago) and 723.1 (cervicalgia). Yet,

Dr. Golna, in the MedExpress chart of September 19, 2019, and per his documentation on the WC-1 Form of the same date, found no history of neck and/or back injury prior to September 16, 2019. Consequently, Petitioner, avers error of law in the ALJ's finding that the Employer's reliance on the *Swope* and *Knicely* cases, (cited in the August 18 Decision on page 15) was, "persuasive" for holding Dr. Golna's diagnoses of lumbago cervicalgia were non-compensable, vague symptoms. (AP 018) Petitioner avers the *Swope* and *Knicely* fact situations are clearly distinguishable from Mr. McCreery's medical history; and, thus, are not dispositive in denying neither Dr. Golna's nor Dr. Dejuk's diagnosis codes as compensable elements - in light of Mr. McCreery's lack of specific neck and /or low back treatment[6] /or injury prior to the September 16, 2019, injury. [7] *See, Moore,supra.*

Moreover, in lieu of the CA's fabrication of a mere "no lost time", for a neck/back "contusion" claim, the Board and the ALJ [the latter per *Knicely, supra*] passed on a reasonable interpretation of the MedExpress records, as support for holding the claim "compensable" for

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[6] Although the office visits from Florida Pain & Rehab Associates document reports of "musculoskeletal" complaints of "Back Pain, Joint Stiffness, Joint Swelling. Persistent pain in joints," the initial "Chief Complaint" of "current pain in the low back, left leg "first appears on January 30, 2020.

[7] In *Swope v Quad Graphics, Inc.*, 2018 W.Va. Lexis 666 (Supr. Ct. November 2, 2018; Mem. Dec.) the scenario involves a Claimant who was treated extensively for neck and low back pain prior to the compensable injury considered by the Court. Moreover, in his record review, Dr. Joseph Grady noted Mr. Swope had a long history of lumbar treatment prior to the compensable injury and was also treated for chronic pain syndrome prior to the compensable injury, thus, opining that Mr. Swope had preexisting myalgia and low back pain. Dr. Grady further opined that cervicalgia could possibly be added to the claim but since the claim was already compensable for cervical sprain this would embrace cervicalgia. Thus, Petitioner avers the *Swope* Decision is inapplicable; as Dr. Golna's diagnoses of neck and/or back pain were not the object of prior treatment before the compensable injury. Dr. Golna's identification of compensable neck and back pain are not vague and non-specific symptoms embracing conditions prior to Mr. McCreery's compensable injury but appear distinct as derived from the compensable injury of September 16, 2019.
Also, the Employer's reference and the ALJ's citation of *Knicely v. Myers Fun Times Café, LLC,* 215 W. Va. Lexis 214 (Supr. Ct. March 17, 2015; Mem. Dec.) is also distinguished from Mr. McCreery's situation in that the Board of Review in *Knicely* found lumbago should not be held a compensable condition because there was initially no complaint of a back injury during the initial treatment. The Court in *Knicely* held that such analysis represented material misstatement. Although the Court "stated "lumbago" was a general diagnosis that means back pain, the Court case reversed and remanded with instruction to hold the claim compensable for "lumbar sprain." Consequently, *Knicely* serves as precedent to deem lumbar sprain as a compensable element of the injury in lieu of "lumbago" or "back pain."

lumbar and cervical spine sprain/strain as of February 12, 2020 –which, are consistent with Dr. Golna's clinical findings and also with the "discharge instructions" provided for treatment of "lumbar" and "cervical sprain/strain". *See, Moore, supra.*

Moreover, the Employer offered no effective evidence to challenge the, credible testimony and documentation of Dr. Dejuk; namely, that Mr. McCreery sustained disc herniation producing distinct "non-vague" symptoms of lower extremity radiculopathy and sciatica as clear, precise elements of the September 16 injury. The CA passed on its option to have Mr. McCreery examined by a medical evaluator of its selection; and, yet the CA denied Mr. McCreery, in December 2019 – January 2020, any follow-up evaluation, consistent with the Rule 20 regulations; [specifically, providing that Mr. McCreery's failure to improve from his lumbar condition post eight (8) weeks required reevaluation by a neurosurgeon and/or orthopedic specialist, as set forth in W.Va. CSR § 85-20-37.6]. These omissions and medical authorization denials by the CA, should only establish that the CA should be estopped from challenging the reliability of the uncontested documentation and testimony of Dr. Dejuk; namely demonstrating an evidentiary "preponderance", that it "...is more likely than not," Mr. McCreery sustained disc herniation and disabling symptoms of sciatica and lower extremity radiculopathy as a result of the compensable injury of September 16, 2019. Petitioner avers the Board and the ALJ, in effect, "rewarded" or condoned the CA's action [by the ALJ's remand of the claim for further medical evaluation] in denying reasonable medical treatment, as requested of the CA by Mr. McCreery in December 2019, and rejected by telephone, in January, 2020.

In reference to treatment records from the Florida Pain and Rehab Association in Gainesville, Florida, submitted to the OOJ by both parties, Mr. McCreery, received treatment from this facility, over the last several years, due to another workers' compensation injury involving his

left wrist; and was prescribed narcotic pain medication for its chronic pain; however, the prescribed medication was also helping with pain reduction for the compensable injury of September 16, 2019. (AP 087-088)

Petitioner avers degenerative changes, as documented by the Employer's radiographic "age analysis" interpretation of the August 6 MRI scan, per the report of Dr. Luchs; dated March 26, 2021, (AP 308) failed to justify the ALJ's refusal to afford determinative reliance to Dr. Dejuk's medical treatment and credible testimony; as, the Court has long established that a Claimant is not required to disprove every possible non-occupational contribution or cause to otherwise prove a compensable injury. See, *Myers v SWCC 160 W.Va. 766, 239 S.E.2d 124 (W. Va. 1977).*

Moreover, the Court's recent Decision in *Moore v. ICG Tygart Valley, LLC* (W.Va. Sup.Ct.; No. 20-0028; April 28, 2022; Slip Opinion) further discredits and renders, without merit, any reliance upon the reading of the MRI scan of August 6, 2020, by Dr. Luchs. Even if, Dr. Luchs' findings of degenerative conditions, implied preexistence to the injury of September 19, there is no indication in the record, that Mr. McCreery sustained, as object of treatment, any preexisting lumbar degenerative conditions, nor only preexisting, symptomatic disc herniations prior to the injury of September 16, 2019. Consequently, to the extent the Employer contends Mr. McCreery's disc herniations and/or degenerative changes preexisted the September 16 injury, the absence of any symptomatic problems and/or treatment from the MRI diagnoses, prior to September 16, 2019, merit no determinative evidentiary weight; as, there is no evidence any preconditions were other than asymptomatic or the object of medical treatment, prior to the traumatic injury of September 16, 2019.

Petitioner avers the ALJ's interpretation of Dr. Luchs' report was "clearly wrong" in concluding Dr. Luchs' "... found that none of the findings are related to the injury in the claim"

(AP 019) Petitioner avers this conclusion misconstrues Dr. Luchs' opinion, who, opined only, and, arguably, ambiguously "... the above findings on this exam appear chronic." Petitioner avers Dr. Luchs' statement is equivocal as no definition is provided of the lapse of time necessary to render Dr. Luchs' findings as "chronic"; nor, does Dr. Luchs' reference to "above findings," clearly define whether he is addressing only (or both) degenerative changes or disc herniations on the August 6 MRI scan. Petitioner also notes the interpretation of the August 6 MRI scan by Dr. Neville Ramchander, M.D., (Diplomat American Board of Radiology/Double Fellowship Body Imaging) limits his report to "significant findings," leaving a reasonable question of whether Dr. Ramchander thought any findings of degenerative changes were "insignificant" to Mr. McCreery's presenting symptoms. Consequently, Petitioner avers Dr. Luchs' report precludes any opinion about the "cause" of the abnormalities disclosed on the August 6 MRI scan. Thus, absent and, appropriately, rejecting the ALJ's interpretation (mischaracterization) of Dr. Luchs' report, there is no credible medical opinion in opposition to Dr. Dejuk's opinion that Mr. McCreery's disabling lumbar spine condition was the result of the September 16, 2019 injury.

C. The Board and ALJ decisions erroneously concluded, by affirmation of CA's Order of April 10, 2020, that the record did not establish payment of TTD benefits.

Petitioner avers the Board's and ALJ Decisions also reflect error of law in the failure to consider Mr. McCreery's temporary total disability benefits during the time frame he received unemployment compensation benefits, citing the provision of W. Va. Code § 21A-6-1 {i.e., eligibility for unemployment benefits requires the worker be "...able to work and available for full time work for which he or she is fitted by prior training or experience and is doing that which a reasonable prudent person in his or her circumstances would do in seeking work"}. (AP 020)

Although W. Va. Code § 21A-6-3(5)(b)(2020) precludes the payment of unemployment compensation benefits for any week "...with respect to which he or she is receiving or has received: compensation for temporary total disability under the Workers' Compensation law of any state....", Petitioner is unaware of any provision in Chapter 23 which specifically precludes a "retroactive" award of temporary total disability benefits during a time frame, involving receipt of unemployment compensation benefits. [See, overlap situations involving TTD benefits and Social Security Disability or Permanent Total Disability benefits; *Bevins v. W.Va. Office of the Ins. Comm'r*, Pts. 7,8, 708 S.E.2d 509 (W. Va. 2010); *Cropp v. SWCC*, Syl. Pt. 2, 236 S.E.2d 480 (W.Va. 1977).][8] In reference to the coordination of unemployment benefits and TTD benefits, discussion from Larson's Workers' Compensation Law provides background.[9]

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[8] *Williams v. Molded ELC. Inc*, 233 N.W.2d 895 (Minn.1975), the employer attempted to have unemployment benefits credited against the Workers' Compensation award. The Workers' Compensation statute contained no provision for such crediting, but the unemployment statute had a disqualification for any week in which benefits equal so those of the unemployment statute are received under a Workers' Compensation law. The proper course was therefore the Department of Unemployment Services to recover back any improper duplicate payments. The employer-insurer should not benefit from the employee's receipt of unemployment payments; rather the state should "benefit" by getting back erroneously made payments.

[9] 14 Larson's Workers' Compensation Law § 157.02 states: "Although most people would probably now agree that these views are wrong, and that all wage loss devices should be part of an overall system, the jerry-built character of American social legislation has resulted at many points in failure to anticipate and provide for appropriate coordination. Thus, as shown earlier in the discussion of compensation benefits, several jurisdictions have permitted collection of both unemployment and workers' compensation benefits for the same period, in the absence of any statutory prohibition. The majority of unemployment statutes, however, now specifically forbid benefits to anyone drawing workers' compensation. These statutes very in scope, some applying only to temporary workers' compensation payments and some to temporary and permanent; many make an exception of schedule benefits. Although a few compensation acts have recently added an offset for unemployment insurance benefits, the original workers' compensation laws, having had no preexisting social legislation to coordinate with at the time of their enactment, usually contained no such specific provision; in fact, with an eye to private accident policies or independent personal sources of income, these acts often state in quite broad language that benefits from any other source should not be used to reduce the amount payable as compensation first, under an unemployment act forbidding such benefits if workers' compensation is being received or is about to be received, and later applies for workers' compensation for the same period, the court in these states is confronted with an awkward problem: The obvious legislative intention is to prevent dual benefits, but the specific act before the court – the workers' compensation act – contains no authorization for reduction of benefits on this ground. The Supreme Judicial Court of Massachusetts, in dealing with the exact question stated:

> Both the workers' compensation act, designed to relieve hardships experience by employees injured while engaged in the performance of their work, and the employment security act, aimed at alleviating the harmful consequences to workmen resulting from times of business depression, are different and distinct parts of a general statutory plan adopted by the Legislature for the enhancement of the public welfare. "Both acts must be construed as harmonious and consistent parts of this general plan.

The ALJ's denial of retroactive TTD benefits during a time frame involving his receipt of unemployment compensation benefits discounted Mr. McCreery's credible, uncontradicted testimony; namely, that Mr. McCreery engaged in futile attempts to secure the CA's authorization of treatment for his disabling lumbar spine condition; and, by reasonable inference, sought to properly change his unemployment benefits to TTD benefits with appropriate "CA approved" medical treatment. The ALJ failed to afford credibility to Mr. McCreery's undisputed testimony that his lumbar condition continued to deteriorate upon his return to Florida. Such failure to afford appropriate weight to this uncontested, credible evidentiary presentation, allowed the CA evade responsibility for the severity of the compensable injury through reliance on an obvious, false, inaccurate Workers' Compensation Duty Form from MedExpress and the CA's restriction of the injury to fabricated back and neck contusions. Mr. McCreery's testimony indicates he was unable to resume pre-injury physical demand work as a welder's helper; and, engage in, name only, very limited light duty prior to layoff. Yet, Mr. McCreery testified he was hoping to find work as a

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Accordingly, the court read the restriction of the unemployment act into the compensation act, and held that one who has recovered unemployment benefits cannot later recover workers' compensation benefits. As to the compensation law section forbidding reduction because of other benefits, the court held that the prohibition did not extend to benefits under parallel wage-loss legislation, citing a case in which it had decided that the section did not apply to benefits received under the federal compensation act.

The Massachusetts court has made a valuable contribution in stressing that, even in absence of an express clause in the particular act before it, coordination must be achieved by assuming that all wage-loss legislation was meant to be interpreted as a consistent and harmonious general system. Nevertheless, the optimum solution is to have this coordination achieved by the legislature, since detailed questions are certain to arise that can only be handled by carefully considered legislation. For example, in the particular problem of *Pierce's Case*, a choice must be made between putting the worker to an absolute election at peril, as against some plan that, although preventing dual benefits, may yet permit the worker to have the benefit of the more favorable legislation if he or she can in fact bring himself or herself within it after having made the less favorable election. Accordingly, although several courts, notably those in California, Oregon, and Rhode Island, have followed the lead of Pierce's Case, many others have declined to do so and have concluded that the judicial power should not be used to achieve this coordination between two statutory systems. The Minnesota court has suggested that, in a state whose unemployment compensation statute bars duplicate benefits, the remedy for double recovery is for the state to recover back from the employee the unemployment benefits mistakenly paid to the employee. (Footnotes omitted); See 14 Larsons' Workers' Compensation Law § 157.02D.2 (case summaries).

delivery driver to try to accommodate his disabling limitations from his back condition. (AP 087) See, *Allen v. WCC, 173 W. Va. 238, 314 SE2d 401 (1984)*

The ALJ speculated Dr. Golna, in his execution of the WC-1 form, "was likely unaware that ...neck and back pain [were] not compensable conditions." (AP 018) Yet, to the extent speculation is allowed, Petitioner avers it appropriate to speculate that the Employer's "safety man's" acquiescence to an obviously flawed/incorrect MedExpress release (per the Workers' Compensation Duty Form) of Mr. McCreery to "full duty without restrictions" [despite contradiction with Dr. Golna's verbal "light duty" restrictions/instructions to Mr. McCreery during the examination of September 19], was perhaps an attempt to improperly avoid/divert a "lost-time" injury, to otherwise compel/channel Mr. McCreery to the alternate wage reimbursement "source" than unemployment compensation benefits, given the Employer's fast approaching general layoff on October 2, 2019[10]. Although, the ALJ cited Mr. McCreery's testimony in January 2021, regarding his effort to find employment as a delivery driver, such pursuit is indicative of "light duty" (i.e., compatible with the oral instruction given by Dr. Golna on 9/19/19); but, yet also compatible with an inability to resume his pre-injury exertion as a "welder's helper." See, *Allen,supra* Mr. McCreery's testimony is also compatible with Dr. Dejuk's confirmation of the disabling nature of Mr. McCreery's injury (secured through his out-of-pocket expense after the CA refused any follow-up treatment, otherwise implied, after the September 19 MedExpress discharge instructions).

CONCLUSION

[10] Such speculation is consistent with a parallel reversal of the logic and implication from the provisions of W. Va. Code § 23-4-1c(a)(2) (2009) in which expectations of a layoff maybe deemed detrimental to a Claimant filing a new claim/reopening.

As Petitioner avers the Board of Review Order of April 22, 2022, in the context of the holdings in *Martin, supra*, and more recently, *Moore, supra*, merits reversal; as, the evidentiary record establishes a preponderant, credible evidentiary foundation that the Claim Administrator hold the claim compensable on a "lost time" basis, for the compensable conditions, cited by Dr. Dejuk in his diagnosis update request and medical documentation, to include lumbar radiculopathy and sciatica as compensable elements of the injury of September 16, 2019; and, in view of Mr. McCreery's unfortunate demise, that the CA pay his sole dependent, Ms. Tracey A. McCreery, temporary total disability benefits from October 30, 2019 through August 15, 2021, the latter commensurate with Mr. McCreery's date of demise; and, further, that the issue of any repayment of unemployment compensation benefits, for any overlapping period, be left to negotiations with the parties and WorkForce WV. Also, Petitioner, requests reimbursement for the "out-of-pocket," expenses incurred by Mr. McCreery, in his efforts to effect reasonable medical treatment for the compensable injury of September 16, 2019; and thus, reimbursable to Mr. McCreery's sole dependent, Ms. Tracey A. McCreery.

Respectfully submitted,

James D. McQueen, Jr., (WVSB No. 2507)

Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

Petitioner, Tracey A. McCreery, by undersigned counsel, certifies on the 20th day of May, 2022, the attached "*Petitioner's Brief*" was served by forwarding a true and exact copy via U.S. Mail, upon all parties or counsel of record as follows:

Jeffrey B. Brannon, Esquire
Cipriani & Werner
500 Lee Street, Suite 900
Charleston, WV 25301

James D. McQueen, Jr.
West Virginia State Bar No. 2507

APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: Tracey A. McCreery, Petitioner/Alexander McCreery, Deceased Employee v. Apex Pipeline Services, Inc

Petitioner: Tracey A. McCreery Respondent: Apex Pipeline Services, Inc.

Counsel: James D. McQueen, Jr. Counsel: Jeffrey Brannon

Claim No.: JCN: 202008286 & 2020022164 Board of Review No.: 2057350

Date of Injury/Last Exposure: 09/16/2019 Date Claim Filed: 09/19/2019

Date and Ruling of the Office of Judges: 08/18/2021; Denied TTD Benefits/Modified Compensability/Remand

Date and Ruling of the Board of Review: 04/22/2022; Affirm OOJ Decision 08/18/2021

Issue and Relief requested on Appeal: Amend compensability diagnoses; grant TTD benefits

CLAIMANT INFORMATION

Claimant's Name: Tracey A. McCreery, Dependent Widow; Alexander McCreery, Deceased Employee

Nature of Injury: 09/16/2019

Age: 56 Is the Claimant still working? ☐Yes ■No. If yes, where: _____

Occupation: Welder's Helper No. of Years: 10-20

Was the claim found to be compensable? ■Yes ☐No If yes, order date: 02/12/2020

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: low back and neck injuries
(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.