IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. [redacted] 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 REPLY BRIEF

COUNSEL FOR PETITIONER/CLAIMANT:
James D. McQueen, Jr. (WVSB No. 2507)
McQueen Davis, PLLC
P.O. Box 176
Huntington, WV 25706
Phone: 304-522-1344
Fax: 304-522-1345
Email: jmcqueen@mcqueendavis.com

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PETITONER'S REPLY TO RESPONDENT'S ARGUMENT[1]

I. Petitioner replies that reversal of the Board's Order of April 22, 2022, warranted under W.Va. Code § 23-5-15(d)(2005); as the ALJ's Decision embraces legal conclusions otherwise, established as erroneous by the Court in *Moore v. ICG Tygart Valley, supra;* and, also by other governing precedent of the Court.

In reply to Respondent's discussion on pages 16 – 22 of its Brief ("RB"), Petitioner avers the Administrative Law Judges/Board of Review decisions, specifically referencing the ALJ's reversal and modification of the CA's Orders of February 12, 2020, and April 10, 2020, constitute comparable instances of the reversable errors discussed by the Court in *Moore*, *supra;* and, thus, warrant reversal as violations of W.Va. Code § 23-5-15(d)(2005),

In specific reply to Respondent's initial paragraph under subheading C of its Brief, Petitioner avers the record demonstrates Respondent's mischaracterization and/or contradictions as follows:

> a) While conceding the ALJ's modification of the Claim Administrator's ("CA") Order of April 2, 2020, was correct (i.e., effectively holding Petitioner's WC-1 Application dated September 19, 2019, as timely filed) Respondent exhibits mischaracterization and misinterpretation of the record by asserting Petitioner "...waited over 5 months after the injury to file an application for benefits and when he did, that application for benefits diagnosed only neck pain and low back pain, symptoms, not injuries." [Respondent Brief ("RB") p.16] Petitioner avers this quotation represents an inappropriate melding of the two WC-1 Applications of record, in that it suggests Petitioner's counsel email of February 4, 2020, to the CA constitutes the initial submission of the WC-1 Application (dated September 19, 2019); whereas, the evidence of record demonstrates (and consistent with Mr. McCreery's credible, uncontradicted testimony) the WC-1 Application of

[1] Respondent led off discussion of the issues before the Court with the ALJ's modification of the Claim Administrator's Order of April 2, 2020, which held a second WC-1 Application for Benefits, dated March 18, 2020, was rejected as a duplicate of the initial WC-1 Claim Benefit Application dated September 19, 2019. Petitioner waived challenge to the April 2 modification wherein, on page 7 of her Brief, footnote 4, it was acknowledged the April 2 modification was a correct disposition with the exception that the ALJ's discussion of this matter on pages 13 and 14 of the August 18 Decision contains what Petitioner avers to be inadvertent error - in that, on page 13, Petitioner argued it was the resubmission of the WC-1 Application dated September 19, 2019, through an email to the Claim Administrator on 2/4/20, that "sparked" the belated entry of the Claim Administrator's initial compensability Order of February 12, 2020; and, thus was not, as the ALJ commented that it was the "second application" [apparently, incorrectly referring to the WC-1 form dated March 18, 2020]; and, also, that on page 14 of the ALJ's Decision, the ALJ states that the modification in regard to the duplication of claim form submission concerns the Order of "February 12, 2020," rather than the correct reference to the Order of April 2, 2020, as confirmed in the conclusions of law portion of the ALJ's Decision on page 19.

September 19 was initially filed with the Claim Administrator by Mr. Jason Porter, as shown by the Loss Notice of record (AP 47). The Loss Notice documents submission of the injury as a no "lost time" claim, limited only to medical treatment, with appropriate medical diagnoses were multiple strains of multiple body parts, all consistent with the Mr. McCreery's credible uncontradicted testimony;

b) Constituting a mischaracterization of the WC-1 Application of September 19, 2019, Respondent asserts the record and the WC-1 showed only complaints of neck and back pain; and, failed "...to establish...an injury..." (RB, p.17) Yet, the WC-1 application, section II, at question 9, indicates Dr. Golna's documentation that the diagnosis codes of 724.2 (lumbago) and 723.1 (cervicalgia) were the result of "MVC – neck and back injury", and, further confirmed by Dr. Golna's response to question 7 that Dr. Golna's findings were the result of an "occupational injury";

c) To the extent Respondent implies that Claim Administrator exercised reasonable discretion and/or timeliness in entering the initial compensability Order of February 12, 2020, "...as compensable for a neck contusion and a low back contusion..." (RB, p.16) Petitioner replies any such implication obscures the extent of the administrative delay in responding to the "Loss Notice" filing of the claim on September 20, 2019 – which, the ALJ (AP 17) criticized, innocuously as merely "dilatory" – in contrast applicable time standard, set forth in W.Va. CSR § 85-1-10.1, requiring the CA "...shall rule on claims based on injuries...that are properly executed and filed on prescribed forms with the responsible party [shall occur] within fifteen (15) working days from receipt of all required information...." Thus, Petitioner avers it was not Mr. McCreery who delayed in waiting over "5 months" after the injury to file the claim; but, rather the CA waited "5 months" to enter the initial compensability Order of February 12, 2020, reasonably prompted, as the ALJ (AP 17) indicates occurred following the February 4 resubmission by Petitioner's counsel of the WC-1 Application and MedExpress records of September 19, 2019.

In support of Respondent's Argument (C) (RB, p. 16-22), for the affirmation of the ALJ's reversal/modification of the CA's Orders of February 12, 2020, and April 10, 2020 (the latter denying inclusion of Dr. Dejuk's diagnosis update request of March 18, 2020) Respondent quoted verbatim, the entirety of the ALJ's discussion of "II Secondary Conditions" on pages 14 – 16 of the August 18 Decision (AP 17-19). Petitioner avers the ALJ's discussion neglected application of both the evidence review standards of W.Va. Code § 23-4-1g(a)(2003), and the standard for the establishment of "legal" causation in a workers' compensation claim in *Barnett v. SWCC, 153*

W.Va. 796, 187 SE2d 213 (1972). Rather, Appellant avers the ALJ imposed her own standards of legal and/or medical causation to justify the modification of the February 12 and April 10 Orders. Petitioner replies, had the ALJ properly applied *Barnett*, *supra* and § 23-4-1g(a), (rather than committing a similar abdication of the ALJ's responsibilities as outlined in *Moore*, *supra*), such application would have required the ALJ to afford determinative evidentiary weight to the uncontradicted, reliable evidentiary record presented by Petitioner and grant Petitioner the requested relief. Also, had the ALJ applied the reasoning/rationale of the Court in *Swope, supra* and *Knicely*, *supra,* the ALJ would have recognized the inapplicability of *Swope* [i.e., as the Claimant in *Swope* experienced pre-existing, symptomatic conditions aggravated by the compensable injury while Mr. McCreery was absent pre-existing conditions] while in *Knicely* [i.e., as in Mr. McCreery's situation, Mr. Knicley had no evidence of prior treatment for the compensable condition, thus, allowing the Court in *Knicely* to modify the compensable conditions from the same ICD-9 components cited in Dr. Golna's WC-1 Application of "lumbago" to "lumbar strain"].

Rather, the ALJ approved the record by ignoring the depositions (without any finding of "unreliability") of Mr. McCreery and Dr. Dejuk, which provided an uncontradicted, credible evidentiary foundation for the requested relief. The deposition of Mr. McCreery was not found unreliable by the ALJ, nor, 1) did Respondent offer any challenge to Mr. McCreery's presentation, by, for example, the testimony of the "safety man" present at all times during Mr. McCreery's MedExpress examination on September 19, nor 2) offer any records or testimony from Mr. McCreery's coworkers or supervisors to contradict Mr. McCreery's recitation and documentation of the sequence of events of through the October 2 layoff; nor, 3) disagree his disabling symptoms with regard to lumbar radiculopathy on the morning of September 17, 2019, steadily progressed

through his unsuccessful attempt to contact Ms. Kecie Jones in December 2019, only to be told in January of 2020, by the CA's claim adjustor, that Mr. McCreery would be denied authorization to seek treatment for his progressive and unrelenting lumbar radiculopathy, continuing well beyond the 8 week period required under W.Va. CSR § 85-20-37.5 prior to a mandated consultation by a neurosurgeon or orthopedic specialist. The Employer's Claim Administrator did not offer affidavit or testimony to contradict Mr. McCreery's testimony concerning his futility to contact Ms. Jones for authorization for medical treatment related to the injury; nor, did the Employer exercise its option to have Mr. McCreery evaluated by a physician of its choice, a prerogative afforded the Employer under W.Va. Code § 23-4-8(2007).

Moreover, as in *Moore, supra*, the ALJ "abdicated responsibilities" in substituting her personal expertise over that of Dr. Dejuk's or Dr. Golna's in identifying Mr. McCreery's condition related to the compensable injury. Also, Mr. McCreery denied any history of prior lumbar radiculopathy nor did the employer offer any evidence of any intervening cause apart from the compensable injury to attribute Mr. McCreery's condition that was found and diagnosed by Dr. Dejuk as related to a cause other than the compensable injury. *See, Wilson v. WCC, 428 SE2d 485 (W.Va. 1984).*

Moreover, Petitioner finds it, the height of irony, that although, the ALJ diminishes Dr. Dejuk for not having the expertise as a neurosurgeon, Dr. Dejuk nevertheless, in his credible testimony provided a credible, lay explanation for his opinion that Mr. McCreery's condition was related to compensable injury – which, in turn, captures the applicable legal standard for the compensability of Mr. McCreery's lumbar condition, as cited by the Court in *Moore, supra* with its reference to the Louisiana decision in *Hammond v. Fid. & Cas. Co. of New York, 419 So. 2d 829, 831, (La 1982).* Dr. Dejuk's appropriate conclusion of causation (AP 144) stated in response

to a question whether Dr. Dejuk had any doubt that his examination of Mr. McCreery in combination with the MRI scan, was other than related to the compensable injury, Dr. Dejuk replied:

> As I told you before, most likely they are related. I'd think – I mean, if you believe what he told me and what happened, he didn't have any issues before that, you have an accident and you hit yourself, obviously that's what it is. (AP 144)

Sadly, in contrast to the ALJ's erroneous legal conclusion, Dr. Dejuk's "common sense" opinion summarizes the "legal" standard or causation cited by the Court in *Moore* in the *Hammond* decision from the Louisiana Supreme Court:

> A plaintiff-employee's disability will be presumed to have resulted from an employment accident if before the accident the plaintiff-employee was in good health, but commencing with the accident the symptoms of the disabling condition appear and continuously manifest themselves, provided that the evidence shows that there is a reasonable possibility of causal connection between the accident and the disabling condition. This presumption is not a conclusive one; rather, it compels the defendant to come forward with sufficient contrary evidence to rebut it.

Petitioner notes the *Hammond* standard cited in *Moore*, parallels by a similar reference in *Barnett, supra,* well prior to 1982, wherein the Court in *Barnett* reiterated the following:

> Where, in the course of and arising out of his employment, an employee in good health and of strong physique, suffers physical injury, which is followed by serious disabilities, competent physicians differing as to whether the disabilities are attributable to the injury, but only probable or conjectural reasons or causes are assigned by physicians in an effort to explain the disabilities on ground other than the injury, the presumptions should be resolved in favor of the employee rather than against him. *Pripich v. SCC, 112 W.Va. 540, 166 SE 4 (1932).*

The ALJ mischaracterized the record, wherein the ALJ said Mr. McCreery did not receive further treatment for this injury until March 18, 2020 (AP 18), which ignores again Mr. McCreery's credible testimony that he sought authorization for further treatment unsuccessfully with Ms. Keisha Jones, in December, 2019, only to be told during a phone call in January, 2020, that such authorization for treatment of his lumbar condition was not within the scope of the injury which,

at that time had not even been the object of the CA's initial compensability order of February 12, 2020; and, thus apparently only "known" to Ms. Jones despite the CA's possession of the "Loss Notice" information and the WC-1 application of September 19, 2019, and the MedExpress records.

The ALJ engages speculation in identifying the "problem in the present case is that Dr. Golna was likely unaware that West Virginia workers' compensation claims, symptoms of neck and back pain are not compensable conditions." (AP 18) Petitioner avers the ALJ's speculation constitutes an abdication of responsibility, similar to *Moore, supra;* as the ALJ substituted her expertise over the only medical evidence of record by Drs. Golna and Dejuk; namely, that Mr. McCreery presented with credible, reliable evidence of lumbar sprain, lumbar radiculopathy, requiring no further verification under the appropriate standards established in *Pripich* and *Barnett, supra.* Although, the ALJ apparently discredited the opinions of Dr. Dejuk in view of his specialty in internal medicine, there is nothing in the record that challenges or detracts from the credibility of Dr. Dejuk's opinion and experience that his examination of Mr. McCreery, in conjunction with the MRI findings, merited immediate referral to a neurosurgeon to treat the clearly disabling symptoms of disc herniation revealed on the MRI scan of August 8, 2020.

As in *Moore, supra*, the ALJ, in her August 18 Decision abdicated her responsibilities and committed abuse of discretion in affording preeminence to her "...own expertise against that of all physicians who have personally examined [Mr. McCreery]." Id. at 13. Thus, "the problem," in disposition of the evidentiary record lies not in the ALJ's speculation about the degree of workers' compensation savvy that Dr. Golna possessed in identifying compensable components of a workers' compensation injury. Rather, Petitioner avers, compatible with *Moore*, "the problem," lies in the ALJ's giving ascendancy to her own theories of legal and/or medical causation.

Petitioner avers the ALJ's abdication of responsibilities parallels and/or even exceeds those cited in *Moore*, *supra;* as, apart from Respondent's MRI "age analysis" review submitted by Dr. Luchs, the evidence is uncontradicted by any medical history, or lay physician, who actually examined Mr. McCreery (namely, Drs. Golna or Dejuk) that Mr. McCreery's lumbar radiculopathy first presented itself (with symptoms of leg pain) on the morning of September 17, 2019, and continued worsening and/or remained disabling through the remainder of his life, prior to his unfortunate demise on August 15, 2021. Moreover, as the evidence of record fails to establish that McCreery suffered from a symptomatic, pre-existing lumbar degenerative condition, nor diagnosed with lumbar disc herniation prior to September 16, 2019, Syllabus Point 5 of *Moore*, controls and negates the speculation, and degree of any credible evidentiary weight, otherwise suggested in Dr. Luchs' report.

II. The Board's Order of April of April 22, 2022, and the ALJ's Decision of August 8, 2021, in turn, violate W.Va. Code § 23-5-15d(2005), in affirming the CA's designation of Dr. Dejuk's medical evidence as a "reopening petition" violates W.Va. Code § 23-4-16(a)(2007); as, Mr. McCreery's claim had not been "closed" for payment of temporary total disability in light of Mr. McCreery's protest to the Order of February 12, 2020; and thus, Dr. Dejuk's medical documentation should have been considered as appropriate medical evidence submitted for initiation of temporary total disability benefits through litigation over the Order of February 12, 2020.

In reply to Respondent's assertion (RB, p. 22) that the Claim Administrator properly deemed Dr. Dejuk's attending physician report of March 18, 2020, as a "reopening petition" for payment of temporary total disability benefits under W.Va. Code § 23-4-16(a)(2005), Petitioner avers Mr. McCreery's claim had not been "closed," which is a prerequisite for the "reopening" remedy per § 23-4-16(a)(1)(2005). The filing of Dr. Dejuk's attending physician report dated March 18, 2020, to both the Claim Administrator, as well as the Office of Judges, was, in concert with litigation over the initial compensable no "lost time Order" of February 12, 2020; and thus,

the claim status as being "closed" was not final due to Mr. McCreery's protest to the CA's Order of February 12.

Petitioner replies Respondent, mischaracterized the record to the extent, it suggests returned to his pre-injury duties and Mr. McCreery continued to "work after the injury until he was laid off," (RB, p.22) As indicated by the uncontradicted credible testimony of Mr. McCreery, Mr. McCreery basically just "hung out" and avoided any pre-injury activity which would aggravate his lumbar spine condition from his actual return to the field, on or about September 23, 2019, until the general layoff of October 2, 2019. Moreover, the ALJ and Respondent mischaracterized the extent of Mr. McCreery's work activity following the injury of September 16, 2019; as the uncontradicted, credible testimony, Mr. McCreery establishes that he did not work on September 17, 18 or 19, due to the presence of leg and back pain; and, when he presented for work on the following Monday, September 23, 2019, his "field" foreman told him to basically hang out and do what he could but don't worry about returning to his pre-level work exertion. Thus, to the extent the ALJ and Respondent imply that Mr. McCreery returned to pre-injury work exertion, and that Mr. McCreery's post injury, medical condition posed no problem to the resumption of his pre-injury work activities is misrepresentation. Thus, contrary to Respondent's mischaracterization, Mr. McCreery "substantively" did miss work in a sense of being unable to perform his normal job responsibilities prior to the general layoff of October 2, 2019; as, the Employer allowed Mr. McCreery to, essentially, just "punch the clock" prior to the general layoff of October 2, 2019, to otherwise, Petitioner avers, avoid documentation of an otherwise substantively warranted "lost time" injury. *See, Allen, supra*

III. Based on the evidentiary record, the ALJ's Decision of August 8, 2021, and the Board's incorporation and affirmation of the ALJ Decision per its Order dated April 22, 2022, constitute an erroneous conclusion of law under W.Va. Code § 23-5-15(d)(2005); as, Mr.

McCreery's receipt of unemployment compensation benefits did not preclude a retroactive, overlapping award of temporary total disability benefits.

The ALJ, in the Decision of August 8, 2021, was presented with the issue and request of retroactive temporary total disability benefits despite potential overlap with prior receipt of unemployment benefits during the same time frame, which Mr. McCreery alleged, was not precluded under Chapter 23, nor under the language in W.Va. Code § 21A-6-3(5)(b)(2017), [the latter barring payment of unemployment "compensation" for a week Mr. McCreery received or had received "compensation for temporary total disability under the workers' compensation law of any state...."]. Rather than addressing whether § 21A-6-3(5)(b) prevented a retroactive overlap of temporary total disability benefits, the ALJ cited only W.Va. Code § 21A-6-1(3) which providers eligibility for unemployment compensation benefits depends on Mr. McCreery being 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**;" [Emphasis added]. Yet, even under the ALJ's alternate citation as cause for denying payment for temporary total disability, the ALJ, per *Moore, supra*, neglected to consider what a "reasonable and prudent person," in Mr. McCreery's situation, would do to seek and be available for suitable work. Under the ALJ's cited provision of § 21A-6-1(3), the ALJ failed to demonstrate the "reasonably prudent person" standard, in Mr. McCreery's situation, was inconsistent with a retroactive award of temporary total disability benefits; while, in turn, also engaging in his futile efforts in "seeking" merited authorized treatment and temporary total disability benefits for his disabling compensable lumbar radiculopathy. Mr. McCreery, testified, although unable to return to his preinjury exertion as a welder's helper, nevertheless, attempted to find less demanding employment as a truck driver given that his radiculopathy did not preclude driving although it did limit him to standing for more than 15 minutes (AP 86-87). Consequently,

Mr. McCreery, exercised reasonable prudence, especially given the Employer's knowledge that the workers' compensation duty form returning him to unrestricted work, as a welder's helper, was false. As Petitioner was unable to find a West Virginia Code provision, specifically prohibiting the overlap of the retroactive award of temporary total disability benefits and with prior unemployment benefits; and, further noting W.Va. Code § 21A-10-8 (1990) allows for recovery of unemployment benefits the ALJ's and Board's decision affirming denial of temporary total disability benefits solely on a potential overlap for previously paid unemployment compensation benefits, is an erroneous conclusion of law, requiring reversal of the ALJ's Decision of August 8 and the Board's Decision of April 22, 2022, and warranting the payment of temporary total disability benefits from October 30, 2019, to the date of Mr. McCreery demise on August 15, 2021.

CONCLUSION

Wherefore, Petitioner requests this Honorable Court to reverse the Board's Decision of April 22, 2022, and direct the Claim Administrator 1) to designate lumbar radiculopathy and sciatica as compensable elements of Mr. McCreery's injury of September 16, 2019, 2) to grant Petitioner payment of temporary total disability benefits from October 30, 2019 to the date of Mr. McCreery's decease on August 15, 2021; and, 3) to direct Petitioner be reimbursed for all medical expenses attributable to Mr. McCreery's compensable injury, including those advanced and paid for, out-of-pocket, by Mr. McCreery as appropriate reasonable medical treatment secondary to the compensable injury.

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 11th day of July, 2022, the attached "*Petitioner's Reply 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