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

Alexander McCreery, Claimant,

Appellant,

v.

Apex Pipeline Services, Inc., Employer
Appellee.

JCN NO. 2020008286 & 2020022164
Appeal No. 2057350
SUPREME COURT NO. 22-0404

BRIEF ON BEHALF OF APPELLEE
Apex Pipeline Services, Inc.

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II. STATEMENT OF THE CASE

The Order of the Board of Review dated April 22, 2022, (Exhibit A) and the decision of the Office of Judges dated August 18, 2021, (Exhibit B) both contain detailed Findings of Fact and Conclusions of Law based on the evidence available for review at the time of decision. The employer hereby adopts and incorporates by reference each and every Finding of Fact and Conclusion of Law contained in the Order of the Board of Review dated April 22, 2022, and the decision of the Office of Judges dated August 18, 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 herein, Alexander McCreery, was 56 years old when he passed away on August 15, 2021. The claimant was married and resided at 109 S. 12 Street, Palatka, Florida.

The claimant was seen at MedExpress in Wheeling, West Virginia on September 19, 2019. (Exhibit C) The claimant's subjective complaints were recorded as follows:

> Patient comes in today for an injury to back and injury to neck. DOI 9/16/19, was driving a truck up a pipeline, truck stalled, went backwards downhill, truck went over 3ft embankment, was wearing seatbelt.

Further, the history recorded the following:

> MVC, restrained driver, truck rolled back and flipped, denied LOC, did not hit head, c/o neck pain and low back pain, stiffness; Intensity: Reports Moderate; Quality: Reports Sharp, Aching; Timing: Reports Constant; Context: Reports MVA, work related.

The musculoskeletal examination was recorded as follows:

> NORMAL: Gait and stance normal, Neck normal in appearance, No lateral tenderness noted in neck, NO anterior tenderness noted in neck, NO Step-Off noted on palpation of cervical spine, Range of motion of upper back is normal, Full strength against resistance in upper back, Upper Back normal in appearance, No midline tenderness noted in upper back, NO Step-off noted with palpation of spine of upper back, Lower back normal in appearance, No Step-off noted on palpation of lower back.
>
> ABNORMAL: Full ROM during flexion in neck bilaterally but painful, Full ROM during extension in neck bilaterally but painful, Full ROM during rotation in neck bilaterally, but painful, Midline spinous tenderness noted in neck, Paraspinous tenderness noted in neck, Limited ROM during flexion in lower back due to pain, Limited ROM during extension in lower back due to pain, Limited rotation in lower back bilaterally due to pain, Midline tenderness noted to lower back, Paraspinous tenderness noted to lower back, Muscle spasm noted to lower back.

The claimant was diagnosed with "Pain, low back (724.2, M54.5) and "Pain, neck (723.1, M54.2). **The claimant was released back to full duty work, with no restrictions, as of September 19, 2019**.

The claimant testified by deposition on January 12, 2021. (Exhibit D) The claimant testified that he returned to work and did not stop working until there was a general layoff, testifying as follows:

> Q. All right. Your testimony is that you continued to work until there was a general layoff; is that correct?
>
> A. Yes, sir.
>
> Q. That was an order about October 30th of 2019; is that correct?
>
> A. No. It was October 2nd.
>
> Q. October 2nd, general layoff. And then your traveled back to Florida where you reside; is that correct?
>
> A. Yes, Sir.

(Tr. p. 35). The claimant also testified on direct examination by his counsel that he filed for and received unemployment benefits for approximately a year testifying as follows:

> Q. When you were laid off, did you apply for unemployment?
>
> A. Yes.
>
> Q. Where
>
> A. West Virginia.
>
> Q. What happened to that?
>
> A, They gave it to me.
>
> Q. You got awarded unemployment?
>
> A. Yes.
>
> Q. How long?
>
> A. For a year.
>
> Q. What?
>
> A. For a year.

(Tr. pp. 20-21). Thus, the claimant testified that he received unemployment benefits through at least October of 2020.

On February 4, 2020, claimant's counsel faxed a completed WC-1 Employees and Physicians Report of Occupational Injury form to the Claims Administrator. (Exhibit E)

The claimant allegedly completed Section I of the WC-1 on either September 14, 2019, or September 19, 2019. The claimant alleged he sustained an injury on September 16, 2019, to his "back, neck" when "truck flipped on side from three-foot drop that I was driving". Section II of the WC-1 form was completed by Dr. Derek Gohna on September 19, 2019. Dr. Gohna stated that he first examined the claimant on September 19, 2019, released the claimant to full duty work as of September 19, 2019, and diagnosed the claimant with "neck, back" and diagnosis codes "724.2" which is lumbago and "723.1" which is cervicalgia.

By order dated February 12, 2020, the Claims Administrator held this claim compensable on a no-lost time basis accepting "contusion of low Back" and Contusion of Neck" as compensable conditions and specifically denying "low back pain" and "cervicalgia" as compensable conditions. (Exhibit F) The claimant protested this order.

On March 27, 2020, claimant's counsel emailed the claims Administrator providing an Attending Physicians Benefits Form, Diagnosis Update and a new WC-1 form.

The **Attending physicians form contained no diagnosis, no evidence of any physical examination and no other evidence** to support the request for TTD from 10/30/2019 to "to be determined". (Exhibit G) This form was dated March 18, 2020.

The Diagnosis Update form likewise contained no evidence of any physical examination, no medical records, and requested "lower radiculopathy, LBP" and "sciatica" be added to the claim. (Exhibit H)

The WC-1 form submit was addressed in a Jurisdictional Claim No. 2020022164 and Carrier Claim No. WCHG0203303-001. (Exhibit I)

By order dated April 10, 2020, the Claims Administrator denied the claimant's request to reopen this claim for temporary total disability benefits stating:

> We have received your application to reopen this claim for temporary total disability benefits dated March 18, 2020, on March 27, 2020. Your request to reopen this claim for temporary total disability benefits is hereby denied as the evidence submitted does not indicate that you sustained an aggravation or progression of your compensable injury. This decision is based in part on the following information:
>
> Workers' Compensation Attending Physicians Benefits form
>
> All other evidence contained in the claim file.

(Exhibit J) The claimant protested this order.

By order dated April 10, 2020, the Claims Administrator denied the diagnosis update request for Dr. Miguel Dejuk stating:

> We have received a request from Dr. Miguel Dejuk dated March 18, 2020, requesting that the following conditions be added as compensable in your claim: 345.5, M79.605 (Lower back radiculopathy, LBP, and Sciatica). Based on the medical evidence contained in the claim file this request is hereby DENIED as these conditions are not causally related to the injury you sustained on 9/16/2019.

(Exhibit K) The claimant protested this order.

All of the evidence discussed above has been submitted for the Office of Judges consideration. Additionally, both parties have submitted the medical records of Dr. Dejuk from March 18, 2020, through November 1, 2020. (Exhibit L)

The claimant was seen by Dr. Miguel Dejuk on 3/18/2020 to establish care. The patient stated that he had an accident and developed severe low back pain going down the left leg. He stated that both legs were numb at times. The patient stated that the symptoms had been occurring for six months. He denied any other concerns. Height 71". Weight 190 pounds. Body mass index 26.50. Examination revealed the patient moved all limbs well and reported pain when raising the left leg. Assessment: Lower radiculopathy, sciatic. MRI of the lumbar spine was ordered.

The claimant was seen by Dr. Miguel Dejuk five (5) months later on 8/6/2020 for checkup. The patient complained of back pain that went down the back of the left leg. Height 71". Weight 197 pounds. Body mass index 27.48. Subjectively the patient also complained of numbness and tingling in the left leg. Examination revealed the patient moved all limbs well and reported pain when raising the left leg. Assessment: Lower radiculopathy, sciatic. Lumbar spine MRI was advised.

An MRI of the lumbar spine without contrast was performed at Express Medical Imaging on 8/6/2020. (Exhibit M) History: M54.5 – Low back pain. Indication: Severe chronic low back pain. Findings:

> Osseous structures: Straightening of the lumbar spine. No compression fracture. No marrow infiltrating lesions. No abnormal segmental motion.
>
> Disc spaces:
>
> L1-2: Normal disc height and hydration. Negative for herniation, central or lateral spinal stenosis or neural impingement.
>
> L2-3: Normal disc height and hydration. Negative for herniation, central or lateral spinal stenosis or neural impingement.
>
> L3-4: Circumferential herniation and inferior foraminal narrowing impinging the right L3 nerve root. Central canal patent. Facet joints normal.
>
> L4-5: Broad-based posterior disc protrusion effacing the thecal sac and narrowing the central canal. Lateral recess and foraminal narrowing present impinging the L4 and L5 nerve roots bilaterally. AP diameter central canal measured 6-7 mm.
>
> L5-S1: Broad-based herniation. Inferior foraminal narrowing present abutting L5 nerve roots right worse than left.
>
> Intradural space: The thecal sac terminated at the thoracolumbar junction. No intramedullary or intradural abnormality.
>
> Paraspinal soft tissues: Normal.
>
> Impression: "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 L5 nerve roots bilaterally. Posterior herniation L5-S1. Inferior foraminal narrowing abutting L5 nerve roots right worse than left." Electronically signed by Neville Ramchander, MD.

The claimant submitted an undated correspondence by Dr. Miguel Dejuk which indicated the patient had MRI of the lumbar spine performed on 8/6/2020 that showed disc herniation at L3-4 with inferior foraminal narrowing imping right L3 nerve root, broad-based disc protrusion L4-5 with narrowing of the central canal and neural foramina impinging the L4 and L5 nerve roots bilaterally also, posterior herniation L5-S1 with inferior foraminal narrowing abutting L5 nerve roots right worse than left. Dr. Dejuk advised that the patient see Dr. Gabriel STAT for possible surgery due to those findings. (Exhibit N)

The claimant was seen by Dr. Miguel Dejuk on 8/10/2020 for checkup. The patient stated that his pain was bad and going down the left leg. Height 71". Weight 198 pounds. Body mass index 27.62. MRI was reviewed. Assessment: Herniated disc. Follow-up with Dr. Gabriel was advised.

The claimant was seen by Dr. Miguel Dejuk on 11/11/2020 for checkup. The patient stated that his back was hurting, and he wanted to discuss a deposition. He denied any other concerns. Height 71". Weight 195 pounds. Body mass index 27.20. Assessment: Herniated disc. Follow-up with Dr. Gabriel was advised.

The employer submitted and Age of Injury Analysis of the MRI of the lumbar spine dated March 26, 2021, from Dr. Jonathan Luchs. (Exhibit O) Dr. Luchs stated as follows:

> I concur with the primary reader's findings of 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. There is also evidence of facet arthropathy of the lower lumbar spine, all of which is chronic and was not reported by the primary reader**. I concur with the primary reader's findings of evidence of narrowing and contact/impingement of the right L3 nerve root, and this is secondary to asymmetry of the disc bulge extending towards the right lateral aspect posterior disc space into the extraforaminal location. **Surrounding endplate osteophytes are noted. This**

> **reflects a chronic finding**. I concur with the primary reader's findings of narrowing of the central canal and foraminal narrowing with impingement of the nerve roots at L4/5, and this is secondary to diffuse disc bulge extending more posterior than anterior with surrounding endplate osteophytes, as well as a congenitally narrowed canal with congenitally short pedicles, **all of which is chronic** and was not stated by the primary reader. I concur with the primary reader's findings of evidence of abutment of the L5 nerve roots at L5/S1. **This is secondary to degenerative disc bulge which is asymmetric to the right with surrounding endplate osteophytes reflecting chronic changes of the disc. I, therefore, disagree with the primary reader's findings of disc herniation at L5/S1.**

Dr. Luchs concluded, "**Therefore, in conclusion, the above findings on this exam appear chronic.**"

Both parties submitted medical records from Dr. Valentine. (Exhibit P) These records indicate that the claimant was receiving pain management treatment for a significant amount of time before the alleged injury in this claim. **Further, these records establish that the claimant made no mention of any alleged injury to his back until more than 4 months after the injury and that he made no mention of the injury or complaints in October, November or December of 2019 or January of 2020. The first mention of any back complaints was January 30, 2020.**

Both parties also submitted the transcript of the deposition of Dr. Dejuk. (Exhibit Q)

By decision dated August 18, 2021, the Office of Judges held Claim No. 202008286 compensable for injuries to the low back and neck until an appropriate and more specific diagnosis was requested by a medical provider; reversed and remanded the April 10, 2020, order which denied secondary conditions until the claimant was seen by a neurosurgeon or orthopedic specialist for a determination of whether any of the MRI findings are related to the compensable injury; affirmed the April 10, 2020, order denying a reopening of Claim No. 2020008286 for temporary total disability benefits; and modified the April 2, 2020, Order, in Claim No. 2020022164 and held that it was a duplicate claim application. In arriving at this decision, the Administrative Law Judge made the following specific Conclusions of Law:

1. The claimant's second WC-1 application, which was denied in

Claim Number 2020022164, was a duplicate application for the same injury in Claim Number 2020008286.

2. The claim administrator had no medical basis to hold Claim Number 2020022164 compensable for contusions of the neck and back. However, low back pain and neck pain are symptoms of other diagnoses rather than compensable diagnoses in a West Virginia workers' compensation claim.

3. The diagnoses of radiculopathy and sciatica most likely be a result of some spine condition as seen on the MRI. **The compensability of these diagnoses is not ruled out, only postponed until the proper specialist examines and diagnoses the claimant.**

4. The claimant did not prove by a preponderance of the evidence that he suffered an aggravation or progression of the compensable injury or that he was temporarily totally disabled as a result of his compensable injuries.

The claimant appealed this decision to the Board of Review and requested to present oral argument. Counsel for the claimant failed to appear for the oral argument before the Board of Review and by Order dated April 22, 2022, the Board of Review properly affirmed the decision of the Office of Judges.

III. SUMMARY OF ARGUMENT

This claim is before this Court pursuant to an appeal filed by the widow of the claimant from the Order of the Board of Review dated April 22, 2022, which properly affirmed the decision of the Office of Judges dated August 18, 2021. The decision of the Office of Judges addressed several issues in Claim No. 2020008286: the February 12, 2020, Order, which denied low back pain and cervicalgia as compensable conditions in this claim; the April 10, 2020, Order, which denied a reopening of this claim for temporary total disability benefits; the April 10, 2020, Order, which denied a diagnosis update; as well as the April 2, 2020, Order, is Claim No. 2020022164, which denied that claim. The decision of the Office of Judges modified the February 12, 2020, Order, and held Claim No. 202008286 compensable for injuries to the low back and neck until an appropriate and more specific diagnosis was requested by a medical provider; reversed and remanded the April 10, 2020, Order, which denied secondary conditions until the claimant was seen by a neurosurgeon or orthopedic specialist for a determination of whether any of the MRI findings are related to the compensable injury; affirmed the April 10,

2020, Order, denying a reopening of Claim No. 2020008286 for temporary total disability benefits; and modified the April 2, 2020, Order, in Claim No. 2020022164 and held that it was a duplicate claim application. The preponderance of the substantial, reliable and probative evidence of record establishes that the Order of the Board of Review dated April 22, 2022, was clearly correct and supported by the substantial reliable and probative evidence of record. While the employer believes that there was sufficient evidence before the Office of Judges to affirm all the Claims Administrator's Orders, the employer did not appeal that decision as the Office of Judges simply gave the claimant an additional chance to prove his case, another "bite at the apple" if you will, since he failed to establish his case during over a year of litigation in this claim. Unfortunately, the claimant died on August 15, 2021, due to complications from COVID-19. On appeal it appears that the claimant is disputing the impact that this fact has on this claim. Regarding the modification of the order denying Claim No. 2020022164, it has little if any effect as that claim is clearly a duplicate of Claim No. 2020008286 as there is no evidence the claimant sustained a separate injury on September 16, 2019. Regarding the April 10, 2020, Order, denying a reopening of Claim No. 2020008286, it has no effect as there is no evidence that the affirmation of the denial reopening for temporary total disability benefits as according to the claimant's own testimony he continued to work until he was laid off, filed for and received unemployment compensation benefits from October of 2019 through October of 2020 and thus was not entitled to temporary total disability benefits and further the claimant failed to establish that he suffered an aggravation or progression of the compensable conditions in this claim. That leaves the issue of what conditions are compensable in this claim. Clearly, low back pain and cervicalgia are vague symptoms and not compensable conditions, and it is the employer's position that the claimant does not suffer from a herniated disc but rather suffers from preexisting noncompensable degenerative changes, which are not related to the injury in this claim. On appeal the claimant is requesting that this Court replace the findings and conclusions of the Board of Review with his own. This is simply not a valid basis upon which to reverse the Order of the Board of Review. On appeal the claimant has failed to establish that the Order of the Board of Review is in error as that Order is not in clear violation of constitutional or statutory provision, is not clearly the result of erroneous conclusions of law and is not based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary

record. Accordingly, the employer requests that this Court AFFIRM the Order of the Board of Review dated April 22, 2022.

IV. 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.

V. ARGUMENT

There are currently four issues before this Court:

1. Whether the Order of the Board of Review was correct in affirming the Decision of the Office of Judges, which modified the April 2, 2020, Order, in Claim No. 2020022164 and holding that the application for benefits in this claim was a duplicate of Claim No. 2020008286 when the claimant specifically testified that the application was a duplicate of the prior claim filed.

2. Whether the Order of the Board of Review was correct in affirming the Decision of the Office of Judges which modified the February 12, 2020, Order, in Claim No 2020008286 which held this claim compensable and denied low back pain and holding this claim compensable for injuries to the neck and back until a more specific diagnosis was requested by the claimant's medical provider when the claimant's initial medical provider diagnosed only vague symptoms and not any injury diagnosis and when the claimant's subsequent medical provider diagnosed the claimant with vague symptoms and not injuries and testified that he would defer to an expert as to what conditions were compensable in this claim;

3. Whether Order of the Board of Review was correct in affirming the Decision of the Office of Judges which reversed and remanded the April 10, 2020, Order, in Claim No. 2020008286 which denied the request to add additional conditions of lower back radiculopathy, LBP, and Sciatica, and remanded this claim to the Claims Administrator to not rule on the request for additional conditions until the claimant sees a neurosurgeon or orthopedic specialist for a determination of whether any of the MRI findings are related to the

compensable injury when the only competent evidence of record regarding the interpretation of the MRI establishes that all of the findings on the MRI are chronic and degenerative and not related to the injury in this claim;

4. Whether Order of the Board of Review was correct in affirming the Decision of the Office of Judges which affirmed the April 10, 2020, Order, in Claim No. 2020008286 denying a reopening of this claim for temporary total disability benefits when the preponderance of the evidence of record establishes that the claimant missed no work due to this injury, was laid off, filed for and received unemployment benefits from October of 2019, through October of 2020, did not seek additional medical treatment in this claim for 5 months after he was laid off and began receiving unemployment compensation benefits and the claimant testified that he was looking for work in Florida where he resided.

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 affirm the Board of Review's Order as that Order is clearly correct and not in clear violation of constitutional or statutory provision, is not clearly the result of erroneous conclusions of law and is not based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record.

It must be remembered 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). Simply stated, 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, 108 W.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 Comm'r, 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).

B. The Order of the Board of Review dated April 22, 2022, was not in clear violation of constitutional or statutory provision, was not clearly the result of erroneous conclusions of law, and was not based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record in affirming the Office of Judges decision which modified the April 2, 2020, order in Claim No. 2020022164 and holding that the application for benefits in that claim was a duplicate of Claim No. 2020008286.

There is no, and can be no, dispute that the application for benefits in Claim No. 202022164 was the second application for benefits the claimant completed and submit regarding the September 16, 2019, injury. In fact, the claimant testified to this fact during his deposition. It appears that the claimant is not appealing from this portion of the Board of Review's Order, however, the undersigned out of an abundance of caution is addressing this issue. The Board of Review affirmed the Administrative Law Judge's conclusion regarding this issue which was as follows:

> The claimant protested the Order dated April 2, 2020, issued in Claim Number 2020022164, which denied the application for benefits. The Order stated that the application was denied, in part, because it was not received within 6 months of the date of injury. The Order also acknowledged that the claimant had previously filed an application for benefits for the same date of injury and that this application had been accepted in Claim Number 2020008286. Thus, the Order indicated that the application at issue here was a duplicate.
>
> In a closing argument dated July 20, 2021, the claimant acknowledged that he filed two applications for the injury at issue. He argued that it was this second application that sparked a

> response in the form of an initial compensability Order, dated February 12, 2020, by the claim administrator.
>
> Based upon a review of the evidence, including the two WC-1 forms and the Order dated February 12, 2020, issued in Claim Number 2020008286, it appears that the second WC-1 form filed by the claimant was a duplicate. The claimant likely filed the second application because the claim administrator had been dilatory in issuing an Order for the initial application. Nonetheless, it is found to be improper to have two ongoing claims for the same injury. Therefore, while the claim was timely filed and is compensable, the second claim is unnecessary. The Order of February 12, 2020 is modified such that it denies the second application for benefits for a duplicate claim for an injury that occurred on September 16, 2019.

As there is no dispute regarding the Board of Review's Order in this regard the employer requests that this Court AFFIRM the Order of the Board of Review.

C. The Order of the Board of Review dated April 22, 2022, was not in clear violation of constitutional or statutory provision, was not clearly the result of erroneous conclusions of law, and was not based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record in affirming the Office of Judges decision which modified the February 12, 2020, order in Claim No 2020008286 which held this claim compensable and denied low back pain and held this claim compensable for injuries to the neck and back until a more specific diagnosis was requested by the claimant's medical provider and was also correct and not clearly wrong in remanding the April 10, 2020, order which denied the request to add additional conditions of lower back radiculopathy, LBP, and Sciatica, to the Claims Administrator to not rule on the request for additional conditions until the claimant sees a neurosurgeon or orthopedic specialist for a determination of whether any of the MRI findings are related to the compensable injury.

Initially, the employer does not dispute that the claimant sustained a compensable injury in this claim on September 16, 2019. However, the claimant was released to return to full duty work, continued to work until laid off, waited over 5 months after this 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. The Claims Administrator accepted this claim as compensable for a neck contusion and a low back contusion on a no lost time basis, which the claimant protested. While the claimant protested this order, he failed to submit evidence that established any other conditions as compensable and related to the injury in this claim. Instead,

the claimant submitted a diagnosis update with no supporting documentation. When that request was denied, the claimant protested and again submitted no reliable evidence to establish that any of the conditions requested were causally related to the injury in this claim. While the undersigned disagrees with the unnecessary editorial *dicta* contained in the Office of Judges decision and adopted by the Board of Review, there is not dispute that the evidence of record does not establish that the claimant sustained any injury and only complained of cervical pain or lumbar pain the only diagnoses listed on the WC-1 which were symptoms, not injuries. Instead of denying this claim the Claims Administrator accepted the claim and provided the claimant an opportunity to litigate the issue and establish what conditions he believed were compensable. In fact, the claimant was given over a year to develop and submit evidence on this issue, from May 2020 until June of 2021. The claimant failed to do so. Even though the claimant failed to submit reliable medical evidence, the Administrative Law Judge did not affirm the order but instead modified the order and provide the claimant yet more time for a decision on compensable conditions to be rendered. Similarly, the Administrative Law Judge remanded the denial of secondary conditions issue ordering the Claims Administrator to not rule on the request until the claimant was seen by a neurosurgeon or orthopedic specialist, just as his evidence recommended. Thus, the Administrative Law Judge was correct in holding that the claimant sustained a compensable injury and modifying the compensability order. Further, The Administrative Law Judges was correct to remand the diagnosis update issue to the Claims Administrator with directions not to rule on the issue until an opinion from a neurosurgeon or orthopedic specialist was received.

Before secondary conditions can be lawfully added to a claim, three elements must coexist in compensability cases: (1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment. Barnett v. State Workmen's Compensation Commissioner, 153 W. Va. 796, 172 S.E. 2d 698 (1970); Jordan v. State Workmen's Compensation Commissioner, 156 W. Va. 159, 191 S.E. 2d 497 (1972). W. Va. Code § 23-4-1 provides "the [Claims Administrator]...shall disburse the workers' compensation fund to the employees...[who] have received personal injuries in the course of and resulting from their covered employment..." W. Va. Code §23-4-1 (2005). 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. Rinehard & Dennis Co., Inc., 113 W. Va. 414, 168 S.E. 482 (1933)).

Recently, the West Virginia Supreme Court of Appeals addressed preexisting conditions in the context of claims. The Court in Gill v. City of Charleston, 236 W. Va. 737, 783 S.E.2d 857, 2016 W. Va. LEXIS 61 (W. Va. Feb. 10, 2016) held at Syllabus Point 3 as follows:

> A noncompensable preexisting injury ***may not*** be added as a compensable component of a claim for workers;' compensation medical benefits merely because it may have been aggravated by a compensable injury. To the extent that the aggravation of a noncompensable preexisting injury ***results in a discreet new injury***, that new injury may be found compensable.

Id.

In the instant claim, the evidence does not establish that the claimant sustained a discreet new herniated disc. The reliable medical evidence establishes that the claimant had, at best, an exacerbation or aggravation of a chronic preexisting degenerative conditions. *See also* Murray Am. Energy, Inc. v. Barlow, 2017 W. Va. LEXIS 303, Dye v. Arcelormittal USA XMB, 2017 W. Va. LEXIS 199, and Delaney v. W. Va. Mine Power, Inc., 2016 W. Va. LEXIS 270. The preponderance of the evidence of record establishes that the claimant does not have a herniated disc but rather he is suffering from preexisting noncompensaale degenerative changes in his lumbar spine.

Further, low back pain and cervicalgia as well as low back pain with radiculopathy and sciatica are symptoms and not an injury diagnosis. This Court has addressed diagnoses of pain and concluded that they were not injuries. This Court found nonspecific and vague symptoms of pain to be noncompensable. Swope v. Quad Graphics, No. 18-0378 (2018), see also, Knicely v. Myers Fun Times Café, LLC, No. 14-0010 (2015). In the instant claim these diagnoses were

properly denied, and the claimant failed to establish that these conditions are compensable and related to the injury in this claim.

The Board of Review properly affirmed the decision of the Administrative Law Judge who addressed these issues and concluded as follows:

> The claimant protested an Order dated February 12, 2020, which held the claim compensable for contusions of the low back and neck, but not for low back pain or cervicalgia. This Order was issued in Claim Number 2020008286. The claimant also protested the Order dated April 10, 2020, which denied the secondary conditions of lower back radiculopathy, low back pain, and sciatica (Diagnosis Codes 354.5 and M79.605) that were requested by Dr. Dejuk in a Diagnosis Update dated March 18, 2020. The Order stated that the denial of the conditions was based on the medical evidence contained in the file as the conditions were not causally related to the injury sustained on September 16, 2019.
>
> The evidence reveals that the claimant was injured on September 16, 2019, when the truck he was driving malfunctioned and slid down a hill and off an embankment, rolling over. He first sought treatment on September 19, 2019, at MedExpress. There, he was treated by Dr. Golna who diagnosed an occupational injury to the claimant's neck and back. The treatment records from MedExpress dated September 19, 2019, noted that the claimant reported to Dr. Golna that he had a neck injury and that he had back pain, leg pain, myalgia, and a headache. Cervical and lumbosacral x-rays were normal. He was discharged with the diagnoses of low back pain, 724.2 (M54.5), and neck pain 723.1 (M54.2). Dr. Golna listed those diagnoses on the claimant's WC-1 form that he completed at the visit on September 19, 2019.
>
> The claimant did not receive further treatment for his injury until March 18, 2020, when he began being treated by Dr. Dejuk in Florida in his home state of Florida. Thus, the claimant's first treatment by Dr. Dejuk was after the claim administrator issued the initial compensability Order in the claim on February 12, 2020. At the time the Order was issued, the only medical diagnoses were those contained in the MedExpress report, and the WC-1 form completed at MedExpress on September 19, 2019.
>
> As argued by the claimant, the claim administrator held the claim compensable for the "nonexistent conditions" of contusions of the neck and back. The MedExpress report noted that no hematomas were seen. It is found that the claim administrator did not have a medical basis to hold the claim compensable for contusions of the

neck and back.

On the other hand, the employer's argument is persuasive that nonspecific and vague symptoms of pain have been ruled noncompensable by the West Virginia Supreme Court of Appeals in *Swope v. Quad Graphics,* No. 18-0378 (memorandum decision) (November 2, 2018) and *Knicely v. Myers Fun Times Cafe, LLC,* No 14-0010 (memorandum decision)(March 17, 2015). In *Swope,* the Court ruled that the Office of Judges and Board of Review correctly found that myalgia, cervicalgia, and low back pain were essentially symptoms and not medical conditions. It also agreed that chronic pain syndrome was not caused by the compensable injury. In *Knicely,* the Court noted that the Board of Review had reversed the Office of Judges' Decision insofar as ii held lumbago to be a compensable diagnosis. The Board of Review found that there was no lumbar diagnosis initially. The Court reversed the Board of Review and held that "lumbago" was a general diagnosis that means back pain and found that the claim should be held compensable for "lumbar sprain."

The problem in the present case is that Dr. Golna was likely unaware that in West Virginia workers' compensation claims, symptoms of neck and back pain are not compensable conditions. What is clear, however, is that the claimant suffered an injury to his neck, and more so to his low back in the course of and as a result of the accident in this claim. Further, it is clear that the claim administrator was without a medical basis to hold the claim compensable for contusions.

The claimant began receiving treatment for his injuries from Dr. Dejuk on March 18, 2020. The Diagnosis Update by Dr. Dejuk dated March 18, 2020, listed the primary diagnosis as lower radiculopathy (M54.5) and the secondary diagnosis of sciatica (M79.605).

At the time of the Diagnosis Update, the MRI had not yet been performed. It was not performed until August 6, 2020. The MRI revealed a disc herniation at L3-4 with inferior foraminal narrowing impinging the right L3 nerve root, a broad- based disc protrusion at L4-5 with narrowing of the central canal, and neural foramina impinging the L4 and L5 nerve roots bilaterally, and a posterior herniation at L5-S1 with inferior foraminal narrowing abutting the L5 nerve roots, right worse than left. On November 11, 2020, Dr. Dejuk diagnosed a herniated disc and he noted that the claimant had severe low back pain that radiated to his left leg.

It would seem that radiculopathy and sciatica are not

"freestanding" conditions. These conditions arise from spinal abnormalities - perhaps from the conditions identified in the MRI of August 6, 2020. That is not to say, however, that any or all of the conditions identified on the MRI are related to the compensable injury. In a report dated March 26, 2021, Dr. Luchs, a board-certified radiologist, offered an opinion that the conditions reflected on the MRI were chronic degenerative conditions and congenital conditions. He found that none of the findings were related to the injury in the claim.

It is noted that, according to Dr. Dejuk, an internal medicine specialist, the claimant has not seen a neurosurgeon or orthopedic specialist. Dr. Dejuk testified at his deposition on January 5, 2021, that he felt that the positive MRI findings were related to the work accident, but he admitted that he was not an expert on this. He testified, and his medical reports reflect, that he wanted to send the claimant to an expert, Dr. Gabriel, a neurosurgeon. However, this had not happened. **Thus, a proper specialist has not examined the claimant and determined what conditions seen in the MRI are more likely related to the injury in the claim versus naturally occurring conditions. Therefore, it is found premature to make this determination.**

It is found that the claimant suffered compensable neck and low back injuries as a result of the vehicle accident that occurred on September 16, 2019. The claim was improperly held compensable for contusions of the neck and low back as there was no medical documentation of contusions to support these diagnoses. **Until the claimant sees a specialist, it is premature to rule on the diagnoses of radiculopathy and sciatica since these would most likely be a result of some spine condition as seen on the MRI. The compensability of these diagnoses is not ruled out, only postponed until the proper specialist examines and diagnoses the claimant. Until then, the specific compensable conditions in this claim are undetermined other than neck and low back injuries.**

Given the facts of this claim, the Order of the Board of Review was correct and not clearly wrong. On appeal the claimant is asking that this Court to supplant the considered and reasoned opinion of the Board of Review with his speculations. The decision of the Administrative Law Judge was not adverse to the claimant, and in fact, was favorable to the claimant and permitted the claimant another opportunity to submit additional evidence regarding the conditions he believed were compensable in this claim. The Board of Review simply affirmed this favorable ruling to the claimant. It must be remembered that the injury in this

claim occurred on September 16, 2019, and the claimant was provided until June 14, 2021, to seek treatment, develop evidence and submit evidence in support of his protests. He failed to do so. Instead, based on the claimant's untimely demise, claimant's counsel is requesting that this Court manufacture a compensable condition in this claim, the exact thing he is complaining the Board of Review and Office of Judges did. The simple fact is that the preponderance of the reliable medical evidence of record fails to establish what, if any, conditions are compensable and causally related to this claim. It is an unfortunate turn of events that the claimant predeceased the Office of Judges decision, however, that does not make that decision wrong. Had the claimant not predeceased the Office of Judges Decision presumably he would have seen a neurosurgeon or an orthopedic specialist who would have provided an opinion on compensable conditions. Simply because this is an impossibility now does not render the decision of the Office of Judges in error or the Board of Review's affirmation erroneous. It simply makes the claimant's arguments moot.

D. The Order of the Board of Review dated April 22, 2022, was not in clear violation of constitutional or statutory provision, was not clearly the result of erroneous conclusions of law, and was not based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record in affirming the Office of Judges Decision, which affirmed the April 10, 2020, Order, in Claim No. 2020008286 denying a reopening of this claim for temporary total disability benefits as the preponderance of the evidence of record establishes that the claimant missed no work due to this injury, was laid off, filed for and received unemployment benefits from October of 2019, through October of 2020, did not seek additional medical treatment in this claim for 5 months after he was laid off and began receiving unemployment compensation benefits and the claimant testified that he was looking for work in Florida where he resided.

On appeal it appears that the claimant is complaining that this claim was held compensable on a no lost basis and that his second application for benefits and the attending physicians report he submitted were treated as a reopening application. Much like the initial compensability order discussed above the claimant fails to realize the Claims Administrator was actually acting favorably to the claimant. There can be no question that this claim was a no lost time claim. The claimant continued to work after the injury until he was laid off. The claimant did not miss more than 3 days of work due to this injury. In fact, the claimant waited until after he was laid off to file his application for benefits. Thus, while the Claims Administrator did not

have to consider the claimant's duplicate application for benefits and attending physicians report as a reopening it did so. However, none of the claimant's evidence established that he suffered an aggravation or progression of the injury in this claim (which as discussed above cannot even be established) or that he was entitled to temporary total disability benefits.

When the claimant seeks to reopen a claim, he has the burden of proof pursuant to the provisions of West Virginia Code §§ 23-4-16 and 23-5-2 to establish a progression or aggravation of his compensable injury. See also Harper v. State Workmen's Compensation Comm'r, 160 W. Va. 364, 234 S.E.2d 779 (1977) (Syl.pt 1). "Facts appearing in the record at the time of an award of compensation for permanent partial disability will be treated as having been considered by the commissioner in making such award." Taylor v. Workman's Compensation Comm'r, 151 W. Va. 409, 151 S.E.2d 283 (1966) (Syl.pt 2). After a claimant has accepted an award of permanent partial disability, his claim may be reopened only upon a showing that there has been an aggravation or progression of his former injury, or some new fact not previously considered by the Division. See, e.g., Perry v. State Workmen's Compensation Comm'r, 152 W. Va. 602, 165 S.E.2d 609 (1969). Simply stated, a claim cannot be reopened unless the claimant shows by factual evidence that there has been an aggravation or progression of his disability. See W. Va. Code § 23-5-2; W. Va. Code § 23-5-3.

The statutory standard for reopening of a claim for indemnity benefits is specifically addressed in W.Va. Code §23-5-2, which states,

> In any case where an injured employee makes application in writing for a further adjustment of his or her claim under the provisions of section sixteen [§ 23-4-16], article four of this chapter **and the application discloses cause for a further adjustment,** the commission shall, after due notice to the employer, make the modifications, or changes with respect to former findings or orders in the claim that are justified. Any party dissatisfied with any modification or change made by the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, is, upon proper and timely objection, entitled to a hearing, as provided in section nine [§ 23-5-9] of this article.

In the instant claim, the Attending Physicians' Report is simply insufficient to reopen the claim.

In addition, the claimant is required to show a progression of aggravation of the injury. West Virginia Code §23-5-3 states,

> If it appears to the Insurance Commissioner, private insurance carriers and self-insured employers, whichever is applicable, **that an application filed under section two [§ 23-5-2] of this article fails to disclose a progression or aggravation in the claimant's condition, or some other fact or facts which were not previously considered in its former findings and which would entitle the claimant to greater benefits than the claimant has already received, the Insurance Commissioner, private insurance carriers and self-insured employers, whichever is applicable, shall, within a reasonable time, notify the claimant and the employer that the application fails to establish a prima facie cause for reopening the claim.** The notice shall be in writing stating the reasons for denial and the time allowed for objection to the decision of the commission. The claimant may, within sixty days after receipt of the notice, object in writing to the finding. Unless the objection is filed within the sixty-day period, no objection shall be allowed. This time limitation is a condition of the right to objection and hence jurisdictional. Upon receipt of an objection, the Office of Judges shall afford the claimant an evidentiary hearing as provided in section nine of this article.

W. Va. Code §23-5-3. Thus, the claimant is required by statute to show an aggravation or progression of his compensable condition. The claimant clearly failed to carry his burden in this respect.

Further, it must be remembered that temporary total disability benefits are wage replacement benefits. In the instant claim, the claimant was released to return to work full duty on the date of injury and in fact returned to full duty work until he, like all other employees, were laid off. The plain language of West Virginia Code § 23-4-7a(e) states:

> **Under no circumstances shall a claimant be entitled to receive temporary total disability benefits either beyond the date the claimant is released to return to work or beyond the date he or she actually returns to work.**

W. Va. Code § 23-4-7a(e). Additionally, the claimant clearly testified that he filed for and received unemployment compensation benefits from at least October of 2019 through October 2020. Thus, he is not entitled to temporary total disability benefits during that period. This

Court addressed a similar issue in Ramsey v. Greenbrier Hotel Corporation, 2014 W. Va. LEXIS 859, 2014 WL 3954045 (W. Va. August 13, 2014) and stated as follows:

> West Virginia Code § 23-4-7a (2005) states that temporary total disability benefits are not payable after a claimant has reached maximum medical improvement, is released to return to work, or actually returns to work, whichever occurs first.

In Ramsey, the Court noted that the claimant had been found to have reached her maximum degree of medical improvement by an IME physician as well as her treating physician and that she had failed to establish that she was disabled thereafter. In the instant claim, the claimant was released to return to work, actually returned to work, was laid off along with all other employees and then he filed for and received unemployment compensation benefits. There is no evidence thereafter that he was unable to perform his job duties due to the compensable injury in this claim. Thus, the claimant was not eligible for temporary total disability benefits. (See also Andrews v. Lamrite West, Inc., 2014 W. Va. LEXIS 884, 2014 WL 3954027 (W. Va. Aug. 13, 2014); Campbell v. Cogar Manufacturing, Inc., 2014 W. Va. LEXIS 881, 2014 WL 3954025 (W. Va. Aug. 13, 2014)). i

The Board of Review affirmed the Administrative Law Judge's Decision in which the Administrative Law Judge discussed in detail the facts and evidence and the basis for her decision concluding as follows:

> The claimant protested an Order dated April 10, 2020, which denied his application to reopen the claim for temporary total disability dated March 18, 2020. The Order stated that the request was denied because the evidence submitted did not indicate the claimant sustained an aggravation or progression of the compensable injury based in part on the Workers' Compensation Attending Physician form and all other evidence contained in the claim file.
>
> The Attending Physician Benefits Form dated March 18, 2020, completed by Dr. Dejuk, stated that the claimant was not at maximum medical improvement, and the estimated period of disability was from October 30, 2019, to an undetermined date. Dr. Dejuk also indicated on the WC-1 form that he completed on March 18, 2020, that the claimant was unable to work from October 30, 2019, until an undetermined date.

The claimant testified in his deposition on January 12, 2021, that he worked after the injury although he took it easy as his safety director had allowed. The claimant also testified that at his first treatment visit for the injury, Dr. Golna gave him a lifting restriction and told him to take it easy for a few days. However, he acknowledged that the paperwork he was given cleared him for full- duty work. The injury occurred on September 16, 2019, and he worked until October 2, 2019, when the entire crew was laid off. The claimant testified that he received unemployment benefits for a year. He also testified that his condition had worsened, and he was now unable to stand for very long and **that he was looking for a delivery job because his ability to drive was unaffected by the injury.**

It appears that the claimant did not miss work due to the injury from the date it occurred and until his job was terminated by a layoff on October 2, 2019. After that, he received unemployment benefits, which disqualifies him from receiving temporary total disability benefits. W. Va. Code § 21A-6-1 provides that, in order to be eligible for unemployment benefits, the worker must be "able to work and [be] available for full-time work for which he or she is fitting by prior training or experience and is doing that which a reasonably prudent person in his or her circumstances would do in seeking work."

Thus, in order for the claimant to have been eligible for unemployment benefits, he was required to be able to work. On the other hand, in order to receive temporary total disability benefits, a claimant must be unable to work due to the compensable injury or disease. Filing a claim for temporary total disability benefits and alleging an inability to work is inconsistent with receiving unemployment compensation. Also, it is noted that W. Va. Code§ 21A-6-3(5)(b) states that a worker is disqualified for unemployment compensation for a week he or she received temporary total disability benefits. **The claimant testified that he received unemployment benefits for a year - in other words, it appears that he received unemployment from October 2019 to October 2020.**

Therefore, he was ineligible for temporary total disability benefits from October 2019 and through March 18, 2020, when Dr. Dejuk examined him and completed the Attending Physician's form. It must be noted that Dr. Dejuk found that the claimant was not at maximum medical improvement. An injured worker is not necessarily temporarily totally disabled even if he is not at maximum medical improvement. **In fact, the claimant**

even testified that he was looking for work as a delivery driver. Thus, it does not appear that he was temporarily totally disabled from working.

It is found that the claimant has not proven by a preponderance of the evidence that he suffered a progression or aggravation of the compensable condition or some other fact or facts which were not previously considered which would entitle him to temporary total disability benefits. The evidence reveals that he was laid off from his work in October 2019 and that he received unemployment benefits until October 2020. Three months later he testified on January 12, 2021, that he was looking for work as a delivery driver. Therefore, the Order of April 10, 2020, is affirmed.

The decision of the Office of Judges was clearly correct in affirming the denial of a reopening of this claim for temporary total disability benefits and the Board of Review committed no error in affirming that decision. On appeal the claimant is requesting that temporary total disability benefits even though there is no medical evidence to support the request and even though according to the claimant's own testimony he is not entitled to temporary total disability benefits.

VI. CONCLUSION

Based on the facts of the claim, the evidence of record, and the arguments as set forth above the employer requests that this Court AFFIRM the Order of the Board of Review dated April 22, 2022.

Jeffrey B. Brannon, Esq., *WV Bar ID #7838*
T. Jonathan Cook, Esq., *WV Bar ID #9057*

CERTIFICATE OF SERVICE

I, Jeffrey B. Brannon, attorney for the Appellee, Apex Pipeline Services, Inc., hereby certify that a true and exact copy of the foregoing "Brief on Behalf of Appellee, Apex Pipeline Services, Inc." was served upon the Appellant by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 21st day of June, 2022, addressed as follows:

James McQueen, Esquire
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