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

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**CASE NO. _____**

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**DONALD GWINN,**

**Petitioner,**

**vs.**

**JP MORGAN CHASE,**

**Respondent.**

**ICA NO. 22-ICA-250**
**JCN: 2016001947**
**BOR: 2058360**
**DOI: 07/16/2015**

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# PETITIONER'S BRIEF

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**BRIEF FILED ON BEHALF OF THE CLAIMANT**
**FROM AN APPEAL OF A FINAL DECISION OF THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS**

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## INTRODUCTORY NOTE

The Petitioner will be referred to as Claimant; the Intermediate Court of Appeals will be referred to as ICA; the Office of Judges will be referred to as OOJ; the Workers' Compensation Board of Review will be referred to as BOR; the Administrative Law Judge will be referred to as ALJ; the third-party administrator will be referred to as CA; JP Morgan Chase will be referred to as Employer; temporary total disability benefits will be referred to as TTD.

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## ASSIGNMENT OF ERRORS

1. THE ICA WAS CLEARLY WRONG AFFIRMING THE BOR'S DECISION, FINDING THAT THE SURGERY AND PHYSICAL THERAPY REQUESTED ARE NOT MEDICALLY NECESSARY AND REASONABLY RELATED TO THE COMPENSABLE INJURY.

2. THE ICA WAS CLEARLY WRONG IN AFFIRMING THE BOR'S DECISION, FINDING THAT TTD BENEFITS SHOULD NOT BE REINSTATED.

## STATEMENT OF THE CASE

The Claimant sustained an injury on July 16, 2015, when he tripped over a door stop and fell down steps. He injured his left ankle, left knee, left hip, left arm, left side ribs, and head, but the primary concern was pain in his left lower back with radiation into the hips. On July 21, 2015, Dr. McClintic assessed lumbar sprain/strain and sciatica. **[Exhibit 1]**

A lumbar spine x-ray dated July 22, 2015 revealed bilateral pars defects at L5 with grade 1 anterolisthesis of L5 on S1, and negative for fracture.

On July 28, 2015, by order of the CA, the claim was held compensable for left ankle sprain, left knee sprain, left hip sprain, left wrist sprain, unspecified head injury, and lumbar sprain/strain. **[Exhibit 2]** By order of the CA dated November 13, 2015, L5 radiculopathy was recognized as a compensable condition. **[Exhibit 3]**

An MRI dated August 20, 2015 revealed bilateral pars defects at L5 grade I anterior spondylolisthesis of the L5-S1, bilateral inferior neural frontal recess encroachment, and abutment of the exiting L5 nerve root bilaterally. There was no evidence of marrow replacing process or macro fracture. There was desiccation of L4-5 and L5-S1 disc and there was a broad-based disc displacement at L2-3 but no evidence of additional disc herniation or central canal stenosis. **[Exhibit 4]**

In Dr. Patel's note dated July 13, 2016, he noted the spondylolisthesis was pre-existing but asymptomatic before the fall, and that the compensable injury made it worse, causing symptoms and stenosis, accounting for the left leg pain

and radiculopathy. **[Exhibit 5]**

An order of the CA dated October 16, 2017 authorized a lumbar back brace and stated the compensable conditions were lumbar sprain, sciatica, left ankle sprain, left knee sprain, left hip sprain, left wrist sprain, unspecified head injury and L5 radiculopathy. **[Exhibit 6]**

Progress notes by Dr. Patel dated November 6, 2017 state that the Claimant was still working, but his pain was worsening. Surgery could be entertained, and injections were scheduled. Dr. Patel suggested another MRI to see if there had been a change. **[Exhibit 7]**

The MRI dated January 9, 2018, showed bilateral L5 spondylolysis with 1 cm anterior spondylolisthesis of L5 on S1, bilateral foraminal encroachment at L5-S1 related to a multiplicity of factors, mild bilateral inferior foraminal encroachment at L4-5 related to disc bulge., and facet arthropathy. After reviewing the MRI on January 15, 2018, Dr. Patel stated that surgery would be needed for spondylolisthesis with neural foraminal narrowing. The Claimant was still having pain, and a brace was ordered. Claimant had one injection, and a second was scheduled. **[Exhibit 8]**

By decision dated January 3, 2019, the OOJ reversed a CA order and authorized a referral to Dr. Thymius and lumbar injections. **[Exhibit 9]**

The Claimant continued treatment by Dr. Patel. In his progress notes dated October 17, 2018, through July 29. 2020, he noted Claimant's continued severe pain, and stated a lumbar fusion would be the last resort. Dr. Patel assessed

lumbar sprain, spondylolisthesis L5-S1, lumbar disc bulging L5-S1, neural foraminal narrowing bilateral L5-S1, left L5 radiculitis, and lumbar degenerative disc disease. By June 8, 2020, Dr. Patel reported Claimant's continued radicular symptoms in the left leg, and felt a lumbar fusion was now reasonable. A new MRI had revealed spondylolisthesis L5-S1 with neural foraminal narrowing bilateral L5-S1, and spondylolysis bilateral L5. **[Exhibit 10]**

On November 3, 2020, a request for an anterior spinal fusion and instrumentation with the application of a prosthetic device and allograft x2 at L5-S1, posterior lumbar fusion at L5-S1, laminotomy/laminectomy at L5-S1, outside foraminotomy at L5-S1, and posterior instrumentation at L5-S1 was denied by order of the CA. **[Exhibit 11]**

On November 9, 2020, Dr. Patel took the Claimant off work due to worsening pain. It was noted that the requested anterior and posterior fusion was denied. Dr. Patel requested authorization for physical therapy. **[Exhibit 12]**

By application dated November 18, 2020, the Claimant petitioned to reopen the claim for TTD, noting that his left leg had worsened, and gave out at times. He stated he was not released to work, and Dr. Patel signed off on the application. **[Exhibit 13]**

Notes from December 7, 2020, reflect Claimant still having severe pain, and was waiting on surgery. He had lost more than 20 pounds. Dr. Patel issued an off work excuse, taking the Claimant off work from December 7, 2020 to January 7, 2021. **[Exhibit 14]**

By two separate orders dated January 28, 2021, the CA denied authorization for physical therapy, and denied the Claimant's petition to reopen for TTD benefits. **[Exhibit 15]**

In his report dated June 28, 2021, Dr. Patel stated that Claimant had significant discomfort in his lower back and left leg. He initially recommended conservative treatment and an aggressive weight loss regimen. He stated the spondylolysis and spondylolisthesis were pre-existing but that the compensable injury caused them to become symptomatic. The Claimant reported no symptoms to the leg prior to his injury, but an EMG shoed active radiculopathy of S1 on the left side following the injury. The initial treatment of injections and physical therapy were to allow the Claimant to function at a higher level, but that the Claimant became deconditioned over time. He believed that the lumbar fusion was related to the compensable injury because the fall was what aggravated the spondylolisthesis and spondylolysis to make them symptomatic. Claimant's severe limitations in his back and left leg caused by his fall indicates the surgery is reasonable. Dr. Patel further noted that the Claimant had attempted to go back to work, yet was unable to perform his regular duties because of pain. He believed that the surgery, and physical therapy thereafter, would help the Claimant return to baseline. **[Exhibit 16]**

Dr. Jin evaluated the Claimant pursuant to the Employer's request, and in her report dated September 22, 2021, his impression was status post fall with multiple sprain/strain involving several body parts, chronic low back pain with

sprain/strain type injury of the lumbar spine superimposed on pre-existing degenerative lumbar spine disease with pre-existing spondylolisthesis at left L5 over S1 and left L5 radiculopathy, most likely from pre-existing degenerative lumbar spine disease and pre-existing spondylolisthesis L5 over S1. She stated that the fall did not cause the sciatica and radiculopathy, but was a symptom trigger. She stated that the treatments requested by Dr. Patel (injections, physical therapy, surgery) were for pre-existing lumbar spine disease. She believed it reasonable to treat the radicular symptoms, but not the pathology. **[Exhibit 17]**

By decision dated June 1, 2022, the OOJ upheld the CA decisions dated November 3, 2020, January 28, 2021, and January 28, 2021. **[Exhibit 18]** The Claimant appealed.

By decision dated October 26, 2022, the BOR affirmed the OOJ decision, adopting its findings of fact and conclusions of law. **[Exhibit 19]**

By Memorandum Decision dated February 2, 2023, the ICA affirmed the BOR decision. **[Exhibit 20]** Such decision was certified by Mandate dated March 6, 2023. **[Exhibit 21]** The Claimant now submits the instant Petition.

## SUMMARY OF ARGUMENT

The preponderance of evidence of record proves that the requested surgery (and follow-up physical therapy) should be authorized because they are medically necessary and reasonably related to the compensable injury. Further, the preponderance of evidence provides that the Claimant was temporarily and totally disabled while waiting for the necessary medical treatment, and as such,

the Claimant is entitled to TTD benefits. Therefore, the BOR's decision was clearly erroneous, causes extreme prejudice to the substantial rights of the Claimant, and the ICA should have reversed it pursuant to West Virginia Code § 23-5-12a(b).

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

## ARGUMENT

Under West Virginia Code § 23-5-12a(b), the Intermediate Court of Appeals "shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are: (1) In violation of statutory provisions; (2) In excess of the statutory authority or jurisdiction of the Board of Review; (3) Made upon unlawful procedures; (4) Affected by other error of law; (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Further, West Virginia Code § 23-4-1g requires that the resolution of the instant issue requires a weighing of all evidence pertaining to the issue and a

finding that a preponderance of the evidence supports the chosen manner of resolution. If, after weighing all the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

It is the Claimant's position that the ALJ's decision is clearly wrong because a preponderance of the evidence of record establishes that the request for lumbar fusion surgery (and subsequent physical therapy) is to treat the compensable conditions of radiculopathy and sciatica. Because the Claimant has not received proper treatment, and the symptoms of radiculopathy and sciatica kept the Claimant off work via order from his treating physician from November 9, 2020 to January 29, 2021, the Claimant should be provided TTD benefits for such timeframe. Accordingly, there was a basis pursuant to West Virginia Code § 23-5-12(a)(b) to reverse the decision of the OOJ issued June 1, 2022, and the BOR, and the ICA thereafter, should have done so.

First, there is absolutely nothing in the record that shows the Claimant was symptomatic with radiculopathy or sciatica prior to the compensable injury. While his doctor does agree that the spondylolisthesis and spondylolysis were likely pre-existing, Dr. Patel noted multiple times in his reports that the symptoms of radiculopathy and sciatica, and the pain and limitations that they caused, were directly related to the compensable injury. **[See Exhibits 5, 16]** In fact, both of those diagnoses were held compensable by the CA's order.

The ICA decision improperly failed to consider pertinent recent precedent

which holds: "A claimant's disability will be presumed to have resulted from the compensable injury if: (1) before the injury, the claimant's preexisting disease or condition was asymptomatic, and (2) following the injury, the symptoms of the disabling disease or condition appeared and continuously manifested themselves afterwards..." Moore v. ICG Tygart Valley, LLC, 879 S.E.2d 779 (W.Va. 2022), Syllabus Pt. 5.

The evidence of record clearly proves that the Claimant meets the Moore elements, as the Claimant was asymptomatic prior to the injury at hand, yet following the injury, his symptoms have continuously manifested. As such, his compensable conditions should be awarded proper treatment.

Further, while treating the Claimant over a span of several years, Dr. Patel noted early on that Claimant was headed towards surgical intervention, but that he wanted to try the conservative measures Dr. Thymius suggested first. **[Exhibit 10, p. 3]** By March 6, 2019, Dr. Patel reported that the claimant was in severe pain, that he would see how the injections and bracing options go, and that surgical intervention could be entertained as a last resort at this time. **[Id. at 9, 11]** On September 18, 2019, Dr. Patel reported that the claimant's symptoms continued to worsen, and that it would be reasonable to try facet injections, and that he recommended epidurals from Dr. Thymius one more time, as well as physical therapy prior to surgery to help him gain strength and focus on losing weight for surgery. **[Id. at 13, 15]** By December 16, 2019, he recommended Claimant go to Dr. Thymius for facet ablations on January 20, 2020, and focus on

weight loss for his surgery. **[Id. at 19]** Finally, on July 29, 2020, Dr. Patel discussed surgery in detail with the claimant. He noted that an update MRI revealed spondylolisthesis L5-S1 with neural foraminal narrowing bilateral L5-S1 and spondylolysis bilateral L5. **[Id. at 29-30]** Then, Dr. Patel submitted a letter dated June 28, 2021, reiterating his belief that the spondylolisthesis and spondylolysis are symptomatic because of the claimant's compensable injury. **[Exhibit 16]** He stated that the injury caused the claimant to suffer from radiculopathy, evidenced by an EMG, and that the radiculopathy resulted from the spondylolisthesis and spondylolysis becoming symptomatic. **[Id.]** Dr. Patel further stated in his letter that over the last few years they have tried multiple conservative options, but claimant has continued severe limitations due to the injury, and that the requested surgery is the next step to try to relieve symptoms and make the claimant more functional. **[Id.]** He noted that pain limits the claimant's ability to work. Dr. Patel, who has been treating the claimant for years now, stated unequivocally that he believes the requested treatment, surgery and physical therapy, to be medically necessary and reasonably related to the compensable injury. **[Id.]**

The CA must provide medically related and reasonably required medical treatment, health care or healthcare goods and services pursuant to West Virginia Code § 23-4-3 and 85 CSR 20. Dr. Patel has been treating the Claimant over the course of the injury, for multiple years, and is in the best position to determine what treatment is appropriate and reasonable for the injury, as well as

the pathology of the symptoms. Yet, the OOJ improperly found, that Dr. Jin, who evaluated the Claimant a single time at the request of the Employer, was better equipped to determine what treatment was reasonable for the injury. Dr. Jin stated that all of the treatments so far requested by Dr. Patel had been for pre-existing degenerative lumbar spine disease and was not causally related to the injury, but went on to state that it was reasonable to treat the radicular symptoms. Yet, the OOJ previously authorized such treatments in its decision dated January 3, 2019, when it reversed a denial for referral to Dr. Thymius and the lumbar injections that were recommended at that time, which is in direct conflict with Dr. Jin's opinion. **[See Exhibits 9, 17]** It is clear from the record that Dr. Patel's treatment plan all along has included injections and other conservative measures until surgery was needed for the symptoms. The injections were deemed to be reasonable to treat the symptoms, so it logically follows that the lumbar fusion surgery was requested as a last resort to treat the symptoms caused by the injury.

The ALJ's reasoning that now the treatment being requested is not to treat the compensable conditions, but rather is to treat pre-existing conditions **[Exhibit 18, p. 12]** is flawed and not supported by the preponderance of the evidence of record, which provides: 1) Claimant's symptoms did not begin until the injury occurred; 2.) that the treatments, including the approved injections, have been to treat the symptoms caused by the compensable injury; and 3.) that the next step to treat the injury has always been the lumbar fusion. The Moore elements have

been met, and have not been rebutted. Because a preponderance of the evidence provides that the surgery should be authorized, it naturally follows that physical therapy following the surgery should also be approved.

The record further reflects that the Claimant's treating physician took him off work on November 9, 2020, through January 29, 2021, due to his severe and worsening pain. **[See Exhibit 14]** The ALJ noted that because his pain was worsening, it was more likely than not he was taken off work because of pre-existing conditions. **[Exhibit 18, p. 13]** However, as described above and throughout the record, the Claimant was asymptomatic prior to the injury, and began to experience pain only after the injury at hand. His course of treatment for such symptoms included injections until surgery was necessary. It is logical, then, that the symptoms of pain stemming from the compensable sciatica and radiculopathy was the reason for Claimant being taken off work while awaiting the surgery. The Claimant was taken off work due to the symptoms stemming directly from the compensable conditions, therefore, TTD benefits should have been awarded for the time the Claimant was off work due to the compensable injury pursuant to W.Va. Code § 23-4-1c(3)(b) which requires TTD to be paid to a Claimant if the disability from a compensable injury will last longer than three days.

Accordingly, the BOR decision dated October 26, 2022, is clearly wrong, and should have be reversed pursuant to West Virginia Code § 23-5-12a(b). It follows that the ICA decision dated February 2, 2023, is clearly wrong, and

should be reversed.

## PRAYER

**WHEREFORE,** based upon the foregoing, the Claimant respectfully moves this Honorable Court to **REVERSE** the ICA's decision of February 2, 2023, and enter a final decision which authorizes the surgery, physical therapy, and reinstates TTD benefits from November 9, 2020, through January 29, 2021.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I, Reginald D. Henry, counsel for the Claimant herein, do hereby certify that I served the foregoing Petitioner's Brief and Appendix by forwarding a true copy thereof by File & Serve Xpress efiling, to the following:

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March 24, 2023

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