

APPENDIX B – RULES OF APPELLATE PROCEDURE
WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Filed in:	<input type="checkbox"/> Intermediate Court of Appeals <input checked="" type="checkbox"/> Supreme Court of Appeals	SCA EFiled: Apr 24 2023 03:12PM EDT Transaction ID 69879788
Complete Case Title: <u>Donald Gwinn v. JP Morgan Chase</u>		
Petitioner: <u>Donald Gwinn</u>	Respondent: <u>JP Morgan Chase</u>	
Counsel: <u>Reginald D. Henry</u>	Counsel: <u>Jeffrey Brannon</u>	
Claim No.: <u>188056511</u>	Board of Review No.: <u>2058360</u>	
Date of Injury/Last Exposure: <u>7/16/2015</u>	Date Claim Filed: <u>7/22/2015</u>	
Date and Ruling of the Office of Judges: <u>06/01/2022 - Affirmed denial of surgery, physical therapy; affirmed denial of T</u>		
Date and Ruling of the Board of Review: <u>10/26/2022 - Affirmed the OOJ ruling</u>		
Date and Ruling of the Intermediate Court of Appeals: <u>02/02/2023 - Affirmed BOR ruling</u>		
Issue and Relief requested on Appeal: <u>Reverse ICA decision to allow the fusion surgery/physical therapy/re-open TTD</u>		

CLAIMANT INFORMATION

Claimant's Name: <u>Donald Gwinn</u>	
Nature of Injury: <u>Fall injury to his left ankle, left knee, left hip, left arm, left ribs, and head</u>	
Age: <u>51</u>	Is the Claimant still working? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No. If yes, where: <u>Chase Bank</u>
Occupation: <u>Branch Manager</u>	No. of Years: <u>11.00</u>
Was the claim found to be compensable? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No. If yes, order date: <u>7/28/2015</u>	

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): _____	Old Fund or New Fund (please circle one)
Date of Last Employment: _____	
Total amount of prior PPD awards: _____	(add dates of orders on separate page)
Finding of the PTD Review Board: _____	

List all compensable conditions under this claim number: _____
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?
☐ Yes ☒ No (If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below?
☐ Yes ☒ No (If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Intermediate Court Judges or the Supreme Court Justices should be disqualified from this case? ☐ Yes ☒ No

If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

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April 24, 2023

Edythe Nash Gaiser, Clerk of Court
West Virginia Supreme Court of Appeals
State Capitol Building
Building 1, Room EW-317
Charleston, WV 25305

RE: Donald Gwinn v. JP Morgan Chase
SC Appeal No.: 23-172
ICA No. 22-ICA-250
BOR No. 2058360
JCN: 2016001947
Claim No.: 188056511-001

Dear Clerk of Court Gaiser:

Enclosed please find the original of the "Brief on Behalf of JP Morgan Chase" in the above claim. Thank you for your consideration of this matter.

Very truly yours,



Jane Ann Pancake
T. Jonathon Cook
Jeffrey B. Brannon

JAP/tlb

Enclosure

cc: JP Morgan Chase, *via e-mail*
Laura Grant, Broadspire, *via e-mail*
Reginald Henry, Esq.

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

DONALD GWINN,

Appellant,

v.

JP MORGAN CHASE,

Appellee.

Supreme Court No.	23-172
ICA No.	22-ICA-250
BOR No.	2058360
JCN:	2016001947

BRIEF ON BEHALF OF APPELLEE
JP MORGAN CHASE

Jane Ann Pancake
WV Bar ID # 10743
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II. STATEMENT OF THE CASE

This claim is before this Court pursuant to the claimant’s appeal from the February 2, 2023, decision of the West Virginia Intermediate Court of Appeals which properly affirmed the October 26, 2022, Order of the Board of Review, which affirmed the Office of Judges June 1, 2022, decision which affirmed the November 3, 2020, and two January 28, 2021, orders of the Claims Administrator. The November 3, 2020, order denied the request for authorization for an anterior lumbar spinal fusion at L5-S1. The January 28, 2021, orders denied authorization for physical therapy and denied the claimant’s request to reopen the claim for temporary total disability benefits.

The decision of the Office of Judges dated June 1, 2022, the Board of Review Order dated October 11, 2022, and the decision of the Intermediate Court of Appeals dated February 2, 2023, contain detailed Findings of Fact and Conclusions of Law based on the evidence available for review at the time of the decisions. The employer hereby adopts and incorporates by

reference the findings adopted by the Office of Judges, the Board of Review, and the Intermediate Court of Appeals 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 sustained an injury during the course of and resulting from his employment on July 16, 2015, when he fell down some stairs. By order dated July 28, 2015, the Claims Administrator accepted the claim as compensable for a left ankle sprain, left knee sprain, left hip sprain, left wrist sprain, unspecified head injury, and lumbar sprain/strain. (Petitioner's Exhibit 2) By Order dated August 10, 2015, the Claims administrator accepted the claim for a lumbar sprain/strain and sciatica. (Exhibit A) By Order dated November 13, 2015, the Claims Administrator accepted the claim for L-5 radiculopathy. (Petitioner's Exhibit 3) **Thus, the compensable diagnoses related to the lumbar spine are lumbar sprain/strain, sciatica, and L-5 radiculopathy.**

Dr. Patel treated the claimant on December 7, 2020, for complaints of leg and back pain. Dr. Patel diagnosed the claimant with spondylolisthesis L5-S1; lumbar sprain; neural foraminal narrowing bilateral L5-S1; spondylolysis bilateral L5; left L5 radiculopathy; neural foraminal narrowing bilateral L5-S1; and lumbar disc protrusion L5-S1. (Petitioner's Exhibit 12) The "Recommendation and Plan" was recorded as follows:

I explained to Mr. Gwinn at this stage that he has lost 20+ pounds and is making progress with his weight loss to get ready for the surgery. He feels a little bit of improvement also after losing the weight. I do feel that with losing weight he will get a lot of improvement, **though he may still need surgical intervention for the listhesis.** The goal right now is to pursue weight loss regimen aggressively while he is waiting for authorization for surgery. I will keep him off work for another 3-4 more weeks. If anything worsens between now and then he will call and come see us sooner.

Dr. Patel prepared a letter regarding the issues in this claim at the request of the claimant's attorney. (Petitioner's Exhibit 16) The June 28, 2021, letter states as follows:

This is in regards to your questions regarding Mr. Donald J. Gwinn. As you know, he is a very pleasant 51-year-old who has been having some trouble in his lower back and into his left leg and hip area which started on 07/16/2015 when he fell over three steps at work and twisted when he landed. Since then he has had pretty significant discomfort in his lower back and into his left leg. He used to work as a branch manager, and he was working as a banker when I first evaluated Mr. Gwinn on 07/13/2016. He was trying to work and do his normal job, though he continued to have severe discomfort.

When I first evaluated Mr. Gwinn, he had been having back pain and leg pain going on for close to a year. He had tried multiple analgesic medications without much long term relief. He presented with MRI which showed bilateral L5 pars defects as well as spondylolisthesis L5-S1 with instability. He had EMG result from 11/24/2015 performed by Dr. Vaught which revealed an active radiculopathy of S1 on the left side consistent with his leg pain symptoms.

Initially we recommended Mr. Gwinn undergo conservative treatments involving physical therapy. We also encouraged him to focus on an aggressive weight loss regimen which we believed would be imperative for his long term success. It was explained to Mr. Gwinn that most likely the spondylolysis as well as spondylolisthesis may have been pre-existing, though I believe the fall caused the spondylolysis and spondylolisthesis to become symptomatic. At the time of his presentation he had evidence on EMG showing active radiculopathy of S1 on the left side to indicate his active symptoms and injury. Mr. Gwinn stated that prior to his injury he did not have leg symptoms, which he was having at the time of presentation. Once again, the EMG confirmed these leg symptoms.

Over the subsequent years Mr. Gwinn underwent multiple conservative treatments involving physical therapy options as well as injection options. He had facet injections which did make him more functional and allowed him to function at a higher level. He worked with Dr. Thymius with pain management options. In addition to that, he has been going through an aggressive weight loss regimen. At this stage I believe it would be reasonable for Mr. Gwinn to have epidural and facet injections done while he is going

through a weight loss regimen. Physical therapy has also been recommended for Mr. Gwinn at this time to allow him to function at a higher level and try maintain his functional status. Again, his injury was back in July 2015 and since then of course he is becoming deconditioned over a period of time. I believe weight loss is imperative for him to undergo surgery safely.

I also recommended Mr. Gwinn undergo a lumbar fusion surgery at L5-S1 level. I believe the need for surgery would be related to his injury. I have communicated this earlier in the form of a letter. To reiterate my opinions from 2017, I believe the spondylolisthesis and spondylolysis are symptomatic in Mr. Gwinn's case because of his injury. Once again, his EMG test did show an active radiculopathy which seems to support the theory that the L5- S1 nerve was aggravated because of the injury. We are treating the radiculopathy that occurred because of the injury. Once again, to clarify I believe the spondylolisthesis as well as spondylolysis were pre-existing and did not occur because of the injury. The injury caused Mr. Gwinn to suffer from a radiculopathy which is evidenced on his EMG study. Furthermore, this radiculopathy resulted because of the spondylolisthesis and spondylolysis becoming symptomatic because of Mr. Gwinn's injury.

Dr. Chaun Fang Jin evaluated the claimant on September 22, 2021. (Petitioner's Exhibit

17) Dr. Jin noted the claimant's current complaints as "the patient states he has lower back pain.

He states he has nerve pain into the legs, more frequent and severe in the left leg compared to the right leg". The history of present illness states:

Mr. Gwinn is a 51-year-old white male who was referred to the occupational medicine clinic for a medical evaluation related to his work injury on July 16, 2015. The patient was in the clinic by himself. He stated he drove about 3 hours for this appointment. As per the patient, at the time of injury, he was employed by the JP Morgan Chase Bank as a branch manager. He states he has worked for the bank for about 10-1/2 years. He reported an injury on July 16, 2015, when he tripped over a doorstep. He stated he fell off several steps. He landed on the left side of his body. He did not lose consciousness, though he had hip pain, leg pain, left arm/wrist pain and lower back pain. He stated the pain was severe, he could not get up himself. He stated an ambulance was called and he was taken to the Emergency Department at Raleigh General Hospital. He stated he had x-rays of the left hip and the left wrist. X-rays did

not show any fracture and he was discharged to home. He stated he was taken off work.

The patient stated he followed up with his primary care physician. He believed he had physical therapy. He had therapy for about 4-6 weeks. The patient stated physical therapy did not help much but helped some. He stated that traction helped most. He explained that his symptoms got somewhat better, though his back pain never completely went away.

He stated that his hip, arm and wrist injuries resolved. It took a longer time for his left wrist to get better. However, he stated his lower back symptoms never completely resolved.

The patient stated he was referred to Dr. Patel in late 2015. Dr. Patel did not recommend surgical treatment at the time and suggested physical therapy and weight reduction. The patient stated he probably had another course of physical therapy, though he does not remember clearly.

The patient stated he was referred to the pain clinic and has had multiple injections. He stated he got the first injection either in late 2015 or early 2016. He stated the first injection did not help much. He stated he probably had partial pain reduction, though the benefit of injection lasted about a few days.

The patient stated then he had the second injection about 2-3 months after the first injection. Again, he believed injection did reduce pain partially, and the benefit of the injection lasted a few weeks. He stated gradually the pain and symptoms returned to the level before the injection.

The patient stated he had his third injection about 1 year later. Again, the injection did reduce pain partially, and this time he stated the injection lasted for about 5-6 weeks. Again, the pain gradually recurred to the same level before the injection.

The patient stated he had a fourth injection in 2019. He stated the injection helped only a little and lasted for a short while. He stated there was no long-term benefit or long-term relief from the injections.

The patient stated he might have had a fifth injection, though he does not remember whether it was done in later 2019 or in early 2020. He stated his doctor recommended additional injection,

though the request of injection got denied by the Workers' Compensation.

The patient continues seeing Dr. Patel periodically for his lower back pain. He states he sees Dr. Patel every 3 or 4 months. He believes his last visit was around August 2021. Dr. Patel requests physical therapy, injections, and also surgery. He believed the request of treatment got denied by the Workers' Compensation.

The patient stated he had an EMG study, which showed nerve damage in his legs.

The patient stated in terms of his treatment, he purchased an inversion table, and he believes the inversion table has helped his pain significantly compared to other treatment modalities. He also has a home traction unit and the device does help sometimes. He also uses a back brace to support his back. He states the inversion table probably helps most compared to other devices. He does use the inversion table almost daily.

The patient states he does some exercise at home. He does some stretching exercises. He states he does not do it every day, though he does stretch frequently. He estimates doing exercise about 5 times a week. He states the stretching exercises do help, though again it does not last long. The patient denies any other treatment.

He was taken off work after the injury. He was off work for about 3 months. Then, he was released back to work in November 2015 without restrictions. The patient states he has been working his pre-injury employment. However, he was taken off work for about 2-3 months in 2021 because of worsening back pain and leg pain.

The patient states he continues having lower back pain constantly. He has good days and bad days. He states his back pain is soreness in the lower back. He states the back pain is toward to the left side and radiates to the left leg most of the time. Sometimes he feels burning and stabbing pain to the right side. If he turns the body wrong way, he gets muscle spasm in the lower back. He states the pain is deep seated. He states the burning pain shoots down to the legs, along the lateral side to the calf and all the way down to his foot and the great toe. He also reports having numbness, tingling in the leg/foot/toes that comes and goes. **The patient felt his symptoms got worse about 2 years ago.** He did not recall having any new injury or any triggers. **He stated he noted right leg symptoms about 2 months ago that is new.** He used to have left leg symptoms only. His right leg symptoms come and go. The

patient denies incontinence with bowel or bladder. He reports he started to have left leg give out on him about 2 years ago when he started to have symptoms worsening. He reports he fell a few times, though he does not fall all the time. He states that he has had 6 falls this year and his last fall was in June 2021. He states he does not recall or figure out any triggers to cause his fall. He states when it happens while he walks, he just goes down on his left knee. He states he generally catches himself and gets up right away with no injury. He states his weakness/fall episode seems improving after he started to use inversion table. He uses a cane to balance himself sometimes, though not all the time. He states he uses cane when he has severe pain and limps. He states he does not use it frequently, about once in a few months. He takes pain medication as needed to manage pain. He states that he was prescribed baclofen and a muscle relaxant. Occasionally he might use hydrocodone. He states hot tub helps sometimes as well.

The patient is living with the family. He states he lives with his wife and 2 children, who are 18 and 12 years old. He is able to do self-care. He is able to drive. He drove himself to this appointment. He states he does most of his housework and yard work responsibilities. However, he states he cannot do any heavy physical work, and he cannot do weed eating.

The patient denied any previous back pain or back problems or back injury before. The patient reported he had a car accident in 1988 with cervical spine fracture. He believes he was in the hospital for a few days with no surgery. He recovered, though he stated once in a while he has arthritic pain in the neck.

On physical examination, Dr. Jin recorded the following:

Mr. Gwinn is a pleasant white male, who was in no acute physical distress. His height was 6 feet and his weight was 341.9 pounds. His blood pressure was 144/85, pulse was 78, temperature was 97.5 degrees Fahrenheit, respirations were 16, and oxygen saturation was 95% on room air. He was alert and cooperative with the evaluation.

The patient was able to stand up without assistance. He walked with a normal gait, though he appeared to have a mildly forward leaning posture while walking. He was able to walk on his toes and heels. He was able to squat slowly, though squat fully. He was able to stand up without difficulty. He was able to bend forward, when we removed the back brace, to touch the lower legs. He was able to

undress and get dressed without assistance, and get on and get off the examination table without help. He had a normal Romberg test.

Straight leg raising in the sitting position was 90 degrees bilaterally without any pain or symptoms. Straight leg raising in the supine position in the right leg was 55 degrees without pain or issues. Straight leg raising of the left leg in supine position was 30 degrees with reported pain in the lower back. There was no increased pain, numbness, or tingling during the maneuver.

Back examination revealed mild palpable tenderness in the lower portion of the lumbar spine. He also reported bilateral SI joint tenderness, more significant in the right compared to the left. There was some paraspinal muscle tenderness bilaterally, though more prominent on the right side. There was some muscle spasm in the right paraspinal area. Lumbar curvature was mildly hypolordotic.

The muscle measurement for the right thigh was 60.2 cm and the left thigh was 59.5 cm at 10 cm above the patella. Right calf was 49.5 cm and left calf was 49.5 cm at 12 cm below the tibial tubercle. There was no significant limb length discrepancy.

Lower extremity examination revealed bilateral ankle and lower leg edema. Distal pulses were palpated. There was also some pigmentation change bilaterally, suggesting stasis in the lower extremity. There was no cyanosis. There was no open wound in the lower extremity.

Active range of motion of the lumbar spine was examined with inclinometers. Each motion was examined multiple times, and measurements were documented on the worksheet.

The patient had lumbar flexion of 50 degrees, with maximum sacral flexion of 50 degrees. Lumbar extension was 10 degrees, with maximal sacral extension of 0 degrees. Right lateral flexion was 24 degrees and the left lateral flexion was 20 degrees. The patient passed the validity test.

Neurologic examination, there was no skin atrophy or muscle atrophy appreciated. The patient had normal muscle tone and muscle strength. However, patient reported reduced pin prick in the left great toe suggestive of L5 radiculopathy, and reduced vibratory sensation in the left big toe, consistent with left radiculopathy. Deep tendon reflexes were absent in both knees and ankles symmetrically. There was no clonus, and Babinski was downgoing.

Dr. Jin diagnosed the claimant with 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 preexisting degenerative lumbar spine disease with pre-existing spondylolisthesis at left L5 over S1; left L5 radiculopathy, most likely from pre-existing degenerative lumbar spine disease and pre-existing spondylolisthesis L5 over S1. Regarding the proposed fusion, Dr. Jin opined the following:

The compensable condition for this claim is lumbar sprain/strain which is most likely the true injury of the claim, however, sciatica and radiculopathy were included into the claim. From a medical perspective, underlying pathology for radiculopathy and radiculitis/sciatica are pre-existing conditions, degenerative changes of the lumbar spine, and preexisting pars defect with left L5-S1 spondylolisthesis. It should be pointed out that the x-rays showed those changes a few days after his reported injury, evidently, the pathologies on the x-rays are pre-existing conditions. The fall injury has not caused pars defect with spondylolisthesis. Even though certain fractures of the spine can cause pars defect, it is not the case in this claim because his x-rays and MRI after the injury did not show any acute fracture. Evidently, his x-ray finding and MRI findings after his fall injury strongly indicate that his lumbar pathologies were preexistent and were not causally related to the injury of the claim. However, the injury itself can be a trigger to manifest the symptoms of radiculopathy. For that reason, the radiculopathy/sciatica were accepted as compensable components in the claim.

Because the injury incident is, at its maximum, a symptom trigger to sciatica and radiculopathy, not an etiological cause, the fall injury would not like to cause pathological change. A mechanical fall will not cause or accelerate the degenerative process. A one-time trauma with sprain/strain type soft tissue injury does not aggravate or alter the underlying pathologies. **His chronic and worsening symptoms are the direct result of the disease progression of preexisting conditions. Degenerative lumbar spine disease is a well-known progressive and ongoing pathology. Worsening and chronic symptoms are common. In addition, spondylolisthesis can be progressive. His multiple MRIs have demonstrated worsening spondylolisthesis and degenerative changes in the lumbar spine, which evidently is unrelated to his fall injury in this claim.**

Having said that, it is not too hard to understand that the treatments that Dr. Patel is requesting, including, injections, therapy and surgery, are for the pre-existing degenerative lumbar spine disease and spondylolisthesis that are not caused or causally related to his reported injury of the claim. **The reason or rationale requiring for surgery is due to worsening symptoms due to progress of the pre-existing degenerative disease.** Evidently, degenerative lumbar spine disease, and pars defect related spondylolisthesis are not the result of the injury of this claim. It is logical and medically reasonable to treat the radicular symptoms or radiculopathy because his fall injury might have made some contribution to symptom manifestation as a trigger, instead of a cause. However, it is not logical and not medically reasonable to treat continuing progression of preexisting pathology. A one-time fall does not cause degeneration, and it certainly should not have caused progression of pre-existing degeneration. A man can have acute back pain after a fall, though only an individual can have chronic pain when he or she has pre-existing chronic pathology, such as degenerative spine disease. Otherwise, acute back pain after a fall is expected to heal within a few weeks naturally.

Therefore, Dr. Jin did not believe the surgery was reasonable and necessary medical treatment for the compensable conditions in the claim. Likewise, she determined the claimant did not need physical therapy as the result of the injury.

By decision dated June 1, 2022, the Office of Judges affirmed the November 3, 2020, and January 28, 2020, orders of the Claims Administrator. (Petitioner's Exhibit 18) The Office of Judges concluded:

It is found that the requested surgery is required due to preexisting degenerative conditions and the spondylolisthesis. These conditions are not compensable in the claim. While the injury is compensable for radiculopathy which may have been triggered by the injury, it appears that the surgery is more related to the non-compensable conditions than the compensable radiculopathy. The claimant argued that the Administrative Law Judge Decision dated January 3, 2019, agreed with Dr. Patel when it reversed the claim administrator's denial of a referral to Dr. Thymius and lumbar injections. He also argued that the conservative treatments had been tried but failed and he continued to have severe limitations from the injury. He said that surgery was the next step to relieve the symptoms and regain function. Additionally, he argued that

when the Office of Judges authorized conservative treatments in the January 3, 2019, Decision, the plan had been to progress to surgery if needed.

It is found that the Administrative Law Judge Decision dated January 3, 2019, considered a request for injections that were requested to treat radiculopathy, a compensable condition. In contrast with the prior issue, the current protest concerns a request for surgery that will treat a non-compensable, pre-existing condition. The Administrative Law Judge Decision dated January 3, 2019, did not find that a future surgery would be compensable. Therefore, it is found that the Order of November 3, 2021, properly denied the request for the fusion surgery at L5-S1, because it is not medically required to treat a compensable condition. It is also found that the physical therapy was requested to prepare the claimant for the surgery and as a follow-up to the surgery. Thus, if the surgery is not compensable, the physical therapy is not compensable. The Order dated January 28, 2021, which denied a request for physical therapy, is also affirmed.

The Office of Judges went on to find the following regarding the denial of the request to reopen the claim for temporary total disability benefits:

The dates requested in the reopening application do not seem to match the dates that the claimant was off work due to the injury from what can be gleaned from Dr. Patel's reports. For instance, a report of Dr. Patel dated September 18, 2019, indicated that the claimant was still trying to work at his normal job. Before that, a note from March 6, 2019, contained Dr. Patel's recommendation that the claimant use an ergonomic chair at work since sitting at work aggravated his pain.

However, a report dated November 9, 2020, indicated that Dr. Patel took the claimant off work for a month beginning on that date. In the claimant's closing argument, he clarified that he sought temporary total disability benefits from November 9, 2020, until January 29, 2021, and for as long as medical evidence indicated that he remained temporarily totally disabled. A close review of Dr. Patel's report from November 9, 2020, shows that the claimant was experiencing worsening pain as he was awaiting authorization for the surgery. It is found that the claimant's worsening pain was best explained by Dr. Jin who indicated that his pre-existing, degenerative conditions were progressive. Since it was those conditions for which surgery was needed, it seems most likely that he was taken off work more for a flare-up of the pre-existing

conditions than for the compensable conditions. Therefore, the Order of January 28, 2021, is affirmed.

The Board of Review affirmed the Office of Judges in its October 26, 2022, Order.
(Petitioner's Exhibit 19)

The Intermediate Court of Appeals affirmed the June 1, 2022, decision of the Office of Judges and the October 26, 2022, Order of the Board of Review. In doing so, the Board of Intermediate Court of Appeals found as follows:

Upon review, we find no error in the Board's finding that Mr. Gwinn was not entitled to the requested medical treatment or additional TTD benefits. Here, both Dr. Patel and Dr. Jin agreed that Mr. Gwinn had preexisting conditions that predated the compensable injury. While Dr. Patel believed that Mr. Gwinn's symptoms were attributable to compensable conditions in the claim, Dr. Jin opined that the symptoms were ultimately attributable to preexisting conditions and their natural progression, which were not aggravated by a one-time fall. As such, Dr. Jin opined that any treatment requested by Dr. Patel was aimed at treating noncompensable conditions, and the OOJ and the Board agreed with her assessment. Credibility determinations are exclusively reserved for the trier of fact. *See Martin v. Randolph Cnty Bd. of Educ.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995) ("We cannot overlook the role that credibility places in factual determinations, a matter reserved exclusively for the trier of fact. We must defer to the ALJ's credibility determinations and inferences from the evidence . . ."). Given that the OOJ's and the Board's conclusions are adequately supported by the evidence of record, we decline to disturb either tribunal's reliance upon the report of Dr. Jin over that of Dr. Patel.

Accordingly, we find that the Board did not err in affirming the denial of additional medical treatment as the requested treatment was not medically necessary or reasonably related to the compensable injury. We likewise find no error in the Board's order affirming the denial of Mr. Gwinn's additional TTD benefits as the record demonstrates that Mr. Gwinn was taken off of work in anticipation of the requested surgery, which was found to be neither medically necessary nor reasonably related to the compensable conditions. Therefore, Mr. Gwinn is entitled to no relief.

III. SUMMARY OF ARGUMENT

This claim is before this Court pursuant to the claimant's appeal from the February 2, 2023, decision of the West Virginia Intermediate Court of Appeals which properly affirmed the October 26, 2022, Order of the Board of Review, which affirmed the Office of Judges June 1, 2022, decision which affirmed the November 3, 2020, and two January 28, 2021, orders of the Claims Administrator. The November 3, 2020, order denied the request for authorization for an anterior lumbar spinal fusion at L5-S1. The January 28, 2021, orders denied authorization for physical therapy and denied the claimant's request to reopen the claim for temporary total disability benefits.

On appeal, the claimant is asking this Court to replace the factual findings and conclusions of law of the Office of Judges, Board of Review, and the Intermediate Court of Appeals with his own. This is not a valid basis on which the reversal of a decision of the Intermediate Court of Appeals may be based. The Intermediate Court of Appeals correctly determined that the Board of Review did not err in affirming the denial of the request for the authorization of the lumbar fusion; the denial of the request for the authorization for physical therapy; and the denial of the reopening of the claim for temporary total disability benefits. Accordingly, the employer requests that this Court AFFIRM the decision of the Intermediate Court of Appeals dated February 2, 2023.

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

The issue before this Court is whether the decision of the Intermediate Court of Appeals was correct and not clearly wrong in affirming the denial or the addition of compensable conditions in this claim. The employer submits that the decision of the Intermediate Court of Appeals is correct and supported by the substantial evidence of record and thus, should be affirmed by this Court. West Virginia Code § 23-5-15(b) provides states that this Court's review of a final Order by the Intermediate Court of Appeals (previously Board of Review) shall consider the record before the Intermediate Court of Appeals and this Court should give deference to the Intermediate Court of Appeals 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.

This Court addressed its standard of review and held at Syllabus Point 1 of Moran v. Rosciti Constr. Co., LLC, 240 W. Va. 692, 815 S.E.2d 503 a 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.

With due consideration to this standard of review, this Court must affirm the decision of the Intermediate Court of Appeals as the decision 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.

The claimant argues that the preponderance of the evidence shows that the proposed fusion surgery is treatment that is medically necessary and reasonably related to the compensable injury. He also argues that the preponderance of the evidence supports the payment of temporary total disability benefits. The claimant argues the decision of the Intermediate Court of Appeals is clearly erroneous and is extremely prejudicial. That is simply not correct.

It is well established that the claimant bears the burden of establishing his claim. "In order to establish compensability an employee who suffers a disability in the course of his employment must show by competent evidence that there was a causal connection between such disability and his employment." Deverick v. State Workmen's Compensation Director, 150 W. Va, 145, 144 S.E.2d 498 (1965) (Syl.pt 3). Further, "Where proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim." Clark v. State Workmen's Compensation Comm'r, 155 W. Va. 726, 187 S.E.2d 213 (1972) (Syl.pt 4). 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, 108W. Va. 391, 397, 151 S.E. 313, 315 (1930)).

Here, the claimant must show that the Intermediate Court of Appeals, Board of Review and the Office of Judge's erred in affirming the denial of authorization for surgery, physical therapy, and a request to reopen the claim for temporary total disability benefits. The claimant asserts that the Intermediate Court of Appeals erred in finding that the surgery and physical therapy are not medically necessary and reasonably related to the injury. The claimant also asserts that the claimant has not had proper medical treatment for his radiculopathy and sciatica, and the symptoms from these conditions kept him off work from November 9, 2020, to January 29, 2021, and therefore, he should be paid temporary total disability benefits for that period of time.

The claimant is asking this Court to do is re-weigh the facts because the Office of Judges and Board of Review adopted the opinion of Dr. Jin instead of that of Dr. Patel. In essence the claimant argues that the Office of Judges, Board of Review, and Intermediate Court of Appeals erred in failing to adopt the opinion of Dr. Patel because he is the treating physician. The claimant goes further to state that basically Dr. Patel can be the only correct opinion as he is the treating physician. Looking at Dr. Patel's medical records, from November and December of 2020, it is clear that Dr. Patel is recommending surgery for the spondylolisthesis. In fact, in his July 29, 2020, medical record, Dr. Patel listed the diagnoses as spondylolisthesis L5-S1; lumbar sprain, neural foraminal narrowing bilateral L5-S1; spondylolysis bilateral L5; left L5 radiculopathy, and neural foraminal stenosis bilateral L5-S1. Dr. Patel went on to note:

he does have listhesis with neural foraminal narrowing, and I explained that surgery is an option to help him out. We talked

about him addressing L5-S1 for now and at this point we are just waiting to get things authorized

The listhesis is not a compensable condition in the claim. The neural foraminal narrowing is not a compensable condition in the claim. The surgery was recommended to treat these conditions. Moreover, the claimant told Dr. Jin that the pain he experienced increased inexplicably about two years prior to her evaluation of him. That points to further degeneration being involved. Therefore, the denial of the authorization for the surgery was properly affirmed.

The issue here is not one that requires an analysis under Moore, as the claimant would have this Court believe. See Moore v. ICG Tygart Valley, LLC, 879 S.E.2d 779 (W.Va. 2022). The issue in Moore is not the same, or even similar to the issue in this claim. The issue at bar is whether the recommended surgery was requested to treat a compensable condition in this claim. Again, the compensable diagnoses are lumbar sprain/strain, sciatica, and L-5 radiculopathy. The surgery was requested to treat the claimant's pre-existing degenerative condition of spondylolisthesis. This is not a compensable condition in the claim. It has never been a compensable condition in the claim. Therefore, the recommended surgery was not requested to treat a compensable condition in the claim. The question in Moore involved the denial of a request to add a compensable condition to the claim, not the denial of authorization for medical treatment for a condition that was not compensable. Therefore, the claimant's argument that the Office of Judges, Board of Review, and Intermediate Court of Appeals ignored the recent precedent established in Moore is erroneous.

The claimant argues that because lumbar epidural steroid injections for the compensable condition of radiculopathy were ordered to be approved, that it "logically follows that the lumbar fusion surgery was requested as a last resort to treat the symptoms caused by the injury".

However, the lumbar fusion surgery was not recommended to treat the compensable diagnosis of radiculopathy. The lumbar fusion surgery was recommended to treat the noncompensable condition of spondylolisthesis. Therefore, the Intermediate Court of Appeals determined the Board of Review properly affirmed the denial of authorization for the surgery. Because the physical therapy request was related to the surgery, the Intermediate Court of Appeals determined the Board of Review properly affirmed the denial of that as well.

Finally, the Board of Review did not err in affirming the denial of the request to reopen the claim for temporary total disability benefits. The application for reopening Dr. Patel repeatedly wrote “see notes”. Therefore, we do not know the diagnoses for which Dr. Patel related the claimant’s need to be off of work for, nor do we know what condition has progressed to the point that Dr. Patel believed the claimant needed to be off work. The notes attached to the reopening application show the claimant was diagnosed with spondylolisthesis L5-S1, lumbar sprain, neural foraminal narrowing bilateral L5-S1, spondylolysis bilateral L5, left L5 radiculopathy, and lumbar disc protrusion L5-S1. Of these, only the sprain and radiculopathy are compensable diagnoses. As stated above, Dr. Patel went on to note:

he does have listhesis with neural foraminal narrowing, and I explained that surgery is an option to help him out. We talked about him addressing L5-S1 for now and at this point we are just waiting to get things authorized.

The diagnoses including the L5-S1 are spondylolisthesis, bilateral neural foraminal narrowing, and lumbar disc protrusion. None of these conditions is compensable. Therefore, the request to reopen the claim for temporary total disability was properly denied.

The Intermediate Court of Appeals specifically found:

Given that the OOH's and the Board's conclusions are adequately supported by the evidence of record, we decline to disturb either tribunal's reliance upon the report of Dr. Jin over that of Dr. Patel

Therefore, the Intermediate Court of Appeals properly affirmed the decision of the Office of Judges and the Order of the Board of Review. The claimant is now asking that you question the credibility determination made by the Office of Judges and Board of Review because the Intermediate Court of Appeals properly declined to do so. This Court should decline to do so as well.

VI. CONCLUSION

The Intermediate Court of Appeals did not err in affirming the denial of the authorization for the fusion surgery, the denial of the authorization for physical therapy, or the denial of the request to reopen the claim for temporary total disability benefits. The claimant has not shown that the decision is in clear violation of constitutional or statutory provision; is clearly the result of erroneous conclusions of law; and/or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, based on the arguments as set forth above, the employer requests that this Court AFFIRM the February 2, 2023, decision of the Intermediate Court of Appeals.



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CERTIFICATE OF SERVICE

I, Jane Ann Pancake, attorney for the Appellee, JP Morgan Chase, hereby certify that a true and exact copy of the foregoing "Brief on Behalf of JP Morgan Chase" was served upon the Appellant by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 24th day of April, 2023, addressed as follows:.

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