

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

ROGER WEESE,
PETITIONER

v.

HARRY GREEN CHEVROLET, INC.,
RESPONDENT.

SUPREME COURT NO.: _____

ICA No: 22-ICA-247

JCN: 2021013416

DOI: 01/04/2021

PETITION FOR APPEAL
From a Decision and Mandate of the
INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
Issued on
April 10, 2023 and May 11, 2023

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FROM THE INTERMEDIATE COURT
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PETITION FOR APPEAL

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA:

I.

NATURE OF THE CASE AND KIND OF PROCEEDING

Your claimant and Petitioner, Roger Weese, respectfully represents that he is aggrieved by the decision and Mandate of the Intermediate Court of Appeals of West Virginia issued on April 10, 2023 and May 11, 2023 respectively, which affirmed the order of the West Virginia Workers' Compensation Board of Review dated October 27, 2022, which affirmed two orders of

the Claims Administrator dated January 19, 2022, which closed his claim for temporary total disability benefits; and January 24, 2022, which denied authorization for a repeat MRI of his lumbar spine. Your claimant and Petitioner, Roger Weese, respectfully asserts that the decisions of the Intermediate Court of Appeals of West Virginia are clearly wrong in light of the reliable, probative and substantial evidence on the whole record.

II.

STATEMENT OF FACTS

Roger Weese suffered substantial damage to his right hand, lower back, and right lower extremity from an injury he sustained in the course of and resulting from his work as a mechanic/technician with Harry Green Chevrolet, Inc. (a car dealership in Clarksburg, WV) on January 4, 2021. On that date, Mr. Weese's right hand became entrapped between a moving car tire and a strut while he was checking a wheel bearing. (App. #17, Employees' and Physicians' Report of Injury) When his hand got caught, the turning wheel violently jerked his body, injuring his back, and broke the fifth (5th) metacarpal of his right hand. He went to the main office at Harry Green Chevrolet, Inc., reported his injury, and iced his hand, also noting the onset of burning pain going down his right leg. Mr. Weese attempted to continue working following his injury, but was forced by escalating symptoms to stop his work effort as of January 12, 2021. Mr. Weese's employer directed him to go to a chiropractor, and he followed that instruction, only to be informed by the chiropractor that there was nothing they were able to do to aid him, and he was told to seek medical attention at an emergency department at a hospital. He attempted to "tough it out" for a period of time after his injury, however, his symptoms continued to worsen. (App. #2, Roger Weese Deposition)

In order to address his symptoms of injury, Mr. Weese sought evaluation and treatment at the Emergency Department of WVU Medicine United Hospital Center in Bridgeport, WV on January 20, 2021. He reported back pain radiating into his right leg following his January 4, 2021 work injury. X-rays were taken and interpreted to show no acute abnormality, and Mr. Weese was diagnosed with low back pain and right-sided sciatica. (App. #21, WVU Medicine UHC ED)

Six days later, Mr. Weese came under the care of Dr. Russell Biundo with WVU Medicine UHC Department of Neurosurgery, on January, 26, 2021. He was evaluated by Dr. Biundo and Dr. Biundo's physician's assistant, Gary Barcinas, PA-C, who noted that Mr. Weese had reduced range of motion and grip strength in his right hand, limited by pain; a positive straight leg raise test on the right; and a flexed forward posture with antalgic gait. Dr. Biundo stated that Mr. Weese exhibited evidence of lumbar radiculopathy, lumbar strain, and possible lumbar herniated disc. (App. #20, Biundo/Barcinas Initial Evaluation) He ordered a right-hand x-ray and an MRI of Mr. Weese's lumbar spine. Diagnoses were Lumbar Radiculopathy, M54.16; Lumbar Herniated Disc, M51.26; Right Hand Pain, M79.641; and Metacarpal Bone Fracture, S62.309A. (App. #19, Barcinas Referral)

Mr. Weese returned to WVU Medicine United Health Center on January 29, 2021, and was seen by Ashley Yelinek, DO. She found that he experienced a constant, dull, achy feeling in his hand which was worsened by attempted movement such as picking up or carrying anything. He was positive for right hand swelling and tenderness. X-rays performed on January 26, 2021 were interpreted to show a distal 5th metacarpal fracture. (App. #18, Ashley Yelinek) An Employees' and Physicians' Report of Occupational Injury or Disease was completed at this appointment, diagnosing right hand 5th metacarpal fracture. It was listed as an occupational

injury, and stated that Mr. Weese would be off work for more than 4 weeks. (App. #17, Employees' and Physicians' Report of Occupational Injury) On February 1, 2021, Mr. Weese's claim was held compensable for a right hand and low back injury. He was granted TTD benefits for the period of January 12, 2021, through February 1, 2021. (App. #16, Claims Administrator's Compensability Ruling)

Gary Barcinas, PA-C, arranged for an MRI of Mr. Weese's lumbar spine, which was performed on February 5, 2021. This MRI revealed a right paracentral disc extrusion with annular tear that extended superiorly at L4-5 with only mild facet arthropathy and mild canal narrowing. (App. #14, Lumbar MRI, February 5, 2021) APRN Rachel Gregis wrote a letter on this date stating that Mr. Weese would remain off work pending his next follow up appointment due to his lower back condition. (App. #15, APRN Gregis Progress Note and Letter)

Dr. Christopher Martin performed an IME at the direction of the employer's insurance carrier on April 13, 2021. It was noted in Dr. Martin's report that Mr. Weese reported that his right hand was improving, but that he had sharp pains if he bumped his hand, and a "buzzing" sensation in the tip of his right thumb after the removal of his cast. Regarding his lower back, Mr. Weese stated that he had experienced continuous symptoms for approximately 1 month. He described his pain as burning and that it would radiate into his right leg between 10 and 20 times per day. He experienced pain with walking and standing for more than 10 minutes. He had recently noticed a knot on the left side and the development of pain in his upper back. Dr. Martin noted that Mr. Weese repeatedly expressed the anxiety that not working was causing him, and a strong motivation to return to work. Dr. Martin found that Mr. Weese was "in obvious discomfort" and stood with a forward flexed posture. He noted diffuse tenderness throughout the lower thoracic spine and throughout the entire lumbosacral spine and coccygeal region to

minimal palpation. Mr. Weese was unable to perform toe walks on the right, but could perform a heel walk. He could not squat and declined to perform range of motion measurements due to pain. (App. #13, Dr. Martin IME, April 13, 2021)

Based upon these findings, Dr. Martin concluded that Mr. Weese had not reached MMI, finding that his lower back condition was the true limiting factor with respect to his return to work. He stated, “it is worth noting that his very significant hand fracture was not diagnosed until 22 days after the date of injury, never treated symptomatically, and he reports that it is improving. This is not a man to exaggerate or overrepresent his symptoms.” He stated that the MRI findings were non-specific, age-related conditions and not related to his injury of January 4, 2021, but noted that the extrusion and annular tear at L4-5 level could be argued to be traumatic and the source of pain in the absence of any obvious neural impingement. He stated that he believed Mr. Weese sustained a strain-type injury to his lumbar region and that his problem is “predominantly muscular in nature rather than from any abnormality of the spinal column.” He stated that he did not believe the CT-guided nerve block would be beneficial to Mr. Weese, but that it would not be unreasonable to consider a trial of one injection. He stated, “If he did pursue one injection, I would regard any such nerve block as medically necessary to treat the injury under this claim on the grounds that the extrusion and annular tear at L4-5 level may be related to the injury.” He recommended 4-8 weeks of physical therapy if Mr. Weese declined the injection. (Id.)

Mr. Weese received treatment from Rachel Gregis, APRN, on August 4, 2021. She noted that he had been seen since June 16, 2021 for flairs of back pain approximately every 2 weeks for pain that would last between 2 and 3 days, and low back stiffness. She noted that an MRI of February 5, 2021 showed disc bulge, annular tear with right paracentral disc herniation at L4-5

with bilateral recess narrowing on the right greater than left, and mild spinal canal narrowing. She noted that Mr. Weese reported that physical therapy had exacerbated his symptoms. Mr. Weese reported that he had presented to the emergency department at Stonewall Jackson Memorial Hospital in Weston on July 26, 2021 for acute worsening of his lumbar spine, which now radiated to his bilateral lower extremities. This was treated with intramuscular injections and oral steroids. Ms. Gregis noted that this left side pain was new. Mr. Weese stated that his right lower extremity pain had improved, but that he experienced constant numbness and some weakness of his right lower extremity from his knee to his foot. He stated that pain was worsened by standing and walking. Sitting minimally alleviated his symptoms. Ms. Gregis diagnosed Strain of lumbar region, subsequent encounter; lumbar radiculopathy; and lumbar herniated disc. She recommended injections to address Mr. Weese's symptoms, and he was agreeable to this plan. (App. #12, APRN Gregis Progress Note)

Nurse Gregis treated Mr. Weese again on September 8, 2021. He continued to improve from his last visit and elected not to undergo the previously mentioned injections at the time of the scheduled appointment. She assessed Strain of lumbar region, subsequent encounter; lumbar radiculopathy; lumbar herniated disc; and annular tear of lumbar disc. Mr. Weese expressed interest in returning to work, but was concerned about deconditioning and re-injury. Nurse Gregis recommended conservative treatment such as work conditioning with physical therapy, and Mr. Weese was agreeable to this plan. She referred him for physical therapy with follow up in 6 weeks. (App. #11, APRN Gregis Progress Note)

Mr. Weese received physical therapy from Jeffrey Sandy at Healthworks Physical Therapy in Buckhannon. PT Sandy wrote that Mr. Weese was recommended to continue work conditioning to promote full RTW or undergo an FCE to further determine current

capacity/functional ability. It was recommended that he continue to attend physical therapy for 5 sessions per week for an additional 4 weeks. PT Sandy supplied a re-evaluation of this same date, October 29, 2021, stating that Mr. Weese reported that he had improved over the previous 6 weeks of physical therapy but still has his greatest limitation with the combination of lifting and turning/twisting to reach objects. PT Sandy wrote that Mr. Weese had made great improvement through therapy and reported decreased overall pain, reporting his pain to be 1/10. (App. 9-10, Jeffrey Sandy, Physical Therapist)

At the direction of the employer's insurance carrier, Dr. Joseph. Grady performed an IME on November 1, 2021. He found that Mr. Weese's right hand injury had resolved, but that he continued to experience lower back pain. His assessment was healed right hand fifth metacarpal fracture, and lumbar sprain superimposed upon preexisting multilevel lumbar spondylosis. He found Mr. Weese to have reached MMI regarding both compensable injuries, and in need of no additional treatment. (App. #8, Dr. Grady IME, November 1, 2021)

Mr. Weese returned to PA Barcinas on November 10, 2021 for follow up regarding his lumbar complaints. He reported that his pain was 0/10, and his physical examination was found to be unremarkable outside of his antalgic gait pattern. PA Barcinas assessed lumbar strain and lumbar herniated disc. He ordered a repeat MRI to assess Mr. Weese's status. (App. #7, PA Barcinas Progress Note) On November 17, 2021, PA Barcinas submitted a request for authorization for an MRI of Mr. Weese's lumbar spine and a follow up appointment with Dr. Biundo. (App. #6, Request for Authorization)

On November 30, 2021, the Claims Administrator issued a notice of TTD suspension. Dr. Biundo submitted a repeat request for authorization for an MRI prior to Mr. Weese's return to work dated December 3, 2021, noting the lumbar herniated disc as the basis for his request.

(App. #5, Russel Biundo Repeat Request) On January 19, 2022, the Claims Administrator issued an order closing Mr. Weese's claim for Temporary Total Disability benefits, stating that it had not received additional medical evidence showing that Mr. Weese remained disabled after the notice of suspension had been issued. (App. #4, Claims Administrator) By order dated January 24, 2022 the Claims Administrator denied the request for a repeat MRI of Mr. Weese's lumbar spine. Both orders were protested and entered litigation. (App. #3, Claims Administrator)

Mr. Weese testified at a deposition held on February 28, 2022. He stated that he was working as a technician for Harry Green Chevrolet, Inc. at the time of his injury of January 4, 2021. His right hand got caught between a spinning tire and a strut while he was checking a wheel bearing. He stated that he developed immediate pain in his right hand, followed by back pain going down into his right leg. He stated he attempted to continue working for multiple days, but came off work on January 12, 2021 when he could no longer bear the pain, and was told to go to the chiropractor, who referred him to the emergency department. He stated that he was seen by Dr. Biundo who recommended physical therapy. He stated that Dr. Joseph Grady performed an IME on November 1, 2021, where Dr. Grady had told Mr. Weese and Mr. Weese's wife that Mr. Weese would never be able to return to his previous employment again. Mr. Weese stated that the report he received from Dr. Grady following this conversation had stated that he had reached MMI and could return to work. He stated that his employer had told him that he needed to be released to return to work by Dr. Biundo. He returned to Dr. Biundo, who requested another MRI prior to releasing him to return to work. He stated that he has been unable to obtain this MRI due to his lack of insurance. He stated that he continues to experience limitations doing everyday things and that simple tasks cause his back to "go out". He noted that he has difficulty sleeping because he has a constant burning sensation in his back and can never get comfortable.

He stated that he had no symptoms or issues with his back prior to his January 4, 2021 work injury. On cross-examination, he testified that his right hand still occasionally caused him pain. Regarding his back, he related that he no longer had sciatic pain, but that his back constantly burned and that he had developed pain in the lower left area of his back. He stated that he was not taking any medications prior to his injury, and had never been in a motor vehicle accident. (App. #2, Roger Weese Deposition) At the conclusion of the time frames, both orders were submitted for decision, resulting in the October 27, 2022 order affirming the TTD closure and denial of lumbar MRI. (App. #1, Board of Review Order) The Intermediate Court of Appeals of West Virginia order dated April 10, 2023 affirmed those denials. Your claimant and Petitioner respectfully appeals these decisions to this Honorable Court.

III.

ASSIGNMENT OF ERROR RELIED UPON FOR REVERSAL

The Intermediate Court of Appeals of West Virginia was clearly wrong in its Decision of April 10, 2023, and its Mandate of May 11, 2023, affirming the West Virginia Workers' Compensation Board of Review's Order of October 27, 2022, which affirmed two Orders of the Claims Administrator dated January 19, 2022, which closed his claim for temporary total disability benefits; and January 24, 2022, which denied authorization for a repeat MRI of his lumbar spine, in light of the reliable, probative and substantial evidence on the whole record.

IV.

POINTS OF LAW AND CITATIONS TO AUTHORITY

- 1) The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It 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.

West Virginia Code § 23-5-12a(b) (2022)

- 2) If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

West Virginia Code §23-4-1g(a).

- 3) Where, [. . .] only probable or conjectural reasons or causes are assigned by physicians in an effort to explain the disabilities on grounds other than the injury, the presumptions should be resolved in favor of the employee rather than against him.

Pripich v. State Comp. Comm'r., 112 W.Va. 540, 166 S.E. 4 (W.Va., 1932)

- 4) 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 afterward. There still must be sufficient medical evidence to show a causal relationship between the compensable injury and the disability, or the nature of the accident, combined with the other facts of the case, raises a natural inference of causation.

Moore v. ICG Tygart Valley, LLC (W. Va. 2022)

- 5) A claimant is entitled to temporary total disability benefits until either the claimant is released to return to work or it conclusively appears that the claimant's inability to return to

work is the result of a permanent disability or of medical problems that are unrelated to the compensable injury.

UMWA v. Lewis, 172 W. Va. 560, 309 S.E.2d 58 (1983)

V.

ARGUMENT

Roger Weese was injured in the course of and resulting from his employment as a mechanic/technician for Harry Green Chevrolet, Inc. on January 4, 2021, when his right hand got caught between a spinning tire and a strut, as he was checking a wheel bearing. This event jerked his whole body, injuring his hand and lower back. He attempted to self-treat his hand with ice from the main office, and he noted the onset of intense back pain. Mr. Weese attempted to work through his pain for an additional 8 days, finally acknowledging to himself that he could no longer “tough it out” at work on January 12, 2021, at which time his employer urged him to seek chiropractic care. Mr. Weese was seen at the Chiropractic Clinic of Dr. Michael Mason, who evaluated him and determined that they could not help him. He was then referred on to an emergency department. Mr. Weese drove himself to the Emergency Department of WVU Medicine United Hospital Center on January 20, 2021, reporting back pain since his work injury on January 4, 2021. He did not mention that his hand had been injured, as his back pain was causing significantly worse symptoms. Mr. Weese was diagnosed with low back pain and sciatica on his right side. It was not until January 26, 2021, at WVU Medicine UHC, that Mr. Weese presented for his right-hand pain, at which time Dr. Biundo and PA-C Barcinas determined Mr. Weese had a fractured fifth (5th) metacarpal/right hand. He was diagnosed with Lumbar Radiculopathy; Lumbar Strain; Possible Lumbar Herniated Disc; and Suspected Right Fifth Metacarpal Fracture.

The Claims Administrator's January 19, 2022 closure of Mr. Weese's claim for Temporary Total Disability benefits was clearly wrong, because he had not been released to return to work by his treating physician and was still in active treatment.

Mr. Weese entered treatment with Dr. Biundo's office for his lumbar spine and PA-C Gary Barcinas Ordered an MRI of Mr. Weese's lumbar spine which was performed on February 5, 2021. This MRI revealed a right paracentral disc extrusion with annular tear that extended superiorly at L4-5. All other findings were noted to be mild. This finding, combined with Mr. Weese's symptoms, resulted in the conclusion that Mr. Weese's lumbar disc herniation was the result of his occupational injury. APRN Gregis with Dr. Biundo's office wrote a letter on this date stating that Mr. Weese would remain off work due to his lower back condition pending his next follow up appointment. Physical Therapy was recommended.

Dr. Christopher Martin performed an IME on April 13, 2021 at the direction of Mr. Weese's employer's insurance carrier, finding that Mr. Weese had not reached MMI. Dr. Martin found that Mr. Weese was "in obvious discomfort" and stood with a forward flexed posture. He noted diffuse tenderness throughout the lower thoracic spine and throughout the entire lumbosacral spine and coccygeal region to minimal palpation. Mr. Weese could not squat and declined to perform range of motion measurements due to pain. Based upon these findings, Dr. Martin concluded that Mr. Weese had not reached MMI, and opined that his lower back condition was the true limiting factor with respect to his return to work. He stated, "it is worth noting that his very significant hand fracture was not diagnosed until 22 days after the date of injury, never treated symptomatically, and he reports that is improving. This is not a man to exaggerate or overrepresent his symptoms." Dr. Martin noted that the extrusion and annular tear at L4-5 level could be argued to be traumatic and the source of Mr. Weese's pain in the absence of any obvious neural impingement. He stated that it would not be unreasonable to consider a

trial of one nerve block injection. He went on to note that “If he did pursue one injection, I would regard any such nerve block as medically necessary to treat the injury under this claim on the grounds that the extrusion and annular tear at L4-5 level may be related to the injury.” Here, Dr. Martin’s report clearly indicates his acknowledgement that Mr. Weese’s disc extrusion with annular tear was caused by his occupational injury of January 4, 2021, and his support regarding treatment directed toward its resolution, stating that it is medically reasonable and necessary.

Mr. Weese continued to receive regular treatment through appointments with Dr. Biundo’s office. He saw Nurse Gregis on August 4, 2021, who noted his complaints of flair ups which would result in back stiffness. She further noted that he complained of increased symptoms, now extending into his bilateral lower extremities. His right lower extremity pain had improved, but he now experienced constant numbness and some weakness of his right lower extremity from his knee to his foot. His pain was worsened by standing and walking. Sitting minimally improved his symptoms. Nurse Gregis treated Mr. Weese again on September 8, 2021. He continued to improve from his last visit and expressed interest in returning to work, but was concerned about re-injury. Nurse Gregis referred him for physical therapy with follow up in 6 weeks.

Mr. Weese received a course of physical therapy through Jeffrey Sandy, P. T. at Healthworks Physical Therapy in Buckhannon. At the conclusion of his physical therapy, PT Sandy supplied a re-evaluation dated October 29, 2021, stating that Mr. Weese reported improvement over the previous 6 weeks of physical therapy but still has his greatest limitation with the combination of lifting and turning/twisting to reach objects. PT Sandy wrote that Mr. Weese had made great improvement through therapy and reported decreased overall pain.

Dr. Joseph Grady was retained by the employer's insurance carrier to perform an IME on November 1, 2021. He found that Mr. Weese's right hand injury had resolved, but that he continued to experience lower back pain. Examination of his back found tenderness to palpation of the lumbar paraspinal muscles bilaterally. Straight leg raising test could not be attempted with Mr. Weese's left leg due to pain. Dr. Grady noted lumbar range of motion deficits. His assessment was healed right hand fifth metacarpal fracture, and lumbar sprain superimposed upon preexisting multilevel lumbar spondylosis. He found Mr. Weese to have reached MMI regarding both compensable injuries, and in need of no additional treatment. This is clearly wrong, as Mr. Weese has no history of back pain or any form of treatment prior to his January 4, 2021 work injury, and was working full duty, without symptoms or limitations prior to said injury. His treating physician had not certified him as reaching MMI at this point, and went on to request further testing.

Dr. Grady has wrongly opined that Mr. Weese's symptoms and limitations are the result of a "lumbar strain superimposed upon preexisting multilevel lumbar spondylosis" despite the clear medical evidence demonstrating that Mr. Weese's lumbar spine contained only mild degenerative changes with the glaring exception of a disc extrusion with annular tear at L4-5, discovered solely as a result of treatment for his lumbar symptoms that began at the time of his injury. Because this herniation was discovered through treatment of Mr. Weese's work injury, Dr. Grady's suggestion that Mr. Weese's condition was the result of a sprain "superimposed" upon preexisting conditions, requiring no additional treatment, should not carry significant weight. "Where, [. . .] only probable or conjectural reasons or causes are assigned by physicians in an effort to explain the disabilities on grounds other than the injury, the presumptions should be resolved in favor of the employee rather than against him." Pripich v. State Comp. Comm'r.,

112 W.Va. 540, 166 S.E. 4 (W.Va., 1932). Here, the facts support that Mr. Weese sustained this herniation at the time of his work injury, because he was working full duty, without symptoms or limitations, prior to January 4, 2021. Despite this, Dr. Grady has generated some alternative narrative to explain Mr. Weese's lumbar symptoms. Dr. Grady's opinion that Mr. Weese required no additional treatment is in direct contradiction to recommendations from his treating physician, Dr. Biundo, who continued to hold Mr. Weese off work until a repeat Lumbar MRI could be obtained to evaluate his lumbar spine for purposes of assessing whether he could safely return to work. Further, it is contradicted by the April 13, 2021 IME report of Dr. Martin, which opined that injections were "medically necessary to treat the injury under this claim on the grounds that the extrusion and annular tear at L4-5 level may be related to the injury".

Mr. Weese returned to PA Barcinas on November 10, 2021 for follow up regarding his lumbar complaints. He reported minimal pain, and yet his antalgic gait pattern persisted. PA Barcinas assessed lumbar strain and lumbar herniated disc. In preparation for Mr. Weese's return to work, PA Barcinas ordered a repeat lumbar MRI with follow up appointment to Dr. Biundo to assess whether Mr. Weese's lumbar herniation was stable. This request was submitted on November 17, 2021. Despite Mr. Weese having not been released to return to work, his temporary total disability benefits were wrongly suspended on November 30, 2021, based upon the speculations within Dr. Grady's IME report of November 1, 2021.

Dr. Biundo submitted a repeat request for authorization for an MRI dated December 3, 2021 to assess Mr. Weese's spine, stating lumbar herniated disc as its basis. This is clearly a medically reasonable request, as Dr. Biundo would need to visualize the status of Mr. Weese's herniation prior to authorizing him to return to his physically demanding occupational duties as a mechanic/technician. On January 19, 2022, the Claims Administrator issued an Order wrongly

closing Mr. Weese's claim for Temporary Total Disability benefits stating that it had not received additional medical evidence showing that Mr. Weese remained disabled. "A claimant is entitled to temporary total disability benefits until either the claimant is released to return to work or it conclusively appears that the claimant's inability to return to work is the result of a permanent disability or of medical problems that are unrelated to the compensable injury." UMWA v. Lewis, 172 W. Va. 560, 309 S.E.2d 58 (1983). Here, Mr. Weese had remained under the active care of Dr. Biundo's office throughout, and had been consistently found unable to return to work due to his lumbar herniation resulting from his occupational injury on January 4, 2021.

Dr. Biundo required further evaluation to determine whether it was medically appropriate to release Mr. Weese to return to work. His only method of accurately assessing Mr. Weese's lumbar herniation, and its current status (to-wit: his ability to return to work), was through a repeat MRI. As both requests for authorization had been unsuccessful, and Mr. Weese's employer had told him they required a full-duty release from his treating doctor before he would be allowed to return to work, and Mr. Weese did not have insurance to pay for an MRI, he had not been released to return to work by his treating physician. Therefore, Mr. Weese's temporary total disability benefits, to which he is entitled, having not been released to return to work due to his disc herniation resulting from his occupational injury, were wrongly closed on January 19, 2022. This Honorable Court is requested to rectify this error, and reopen Mr. Weese's claim for temporary total disability benefits.

The Claims Administrator's January 24, 2022 denial of Dr. Biundo's request for authorization to obtain a repeat MRI was clearly wrong, because this is a medically reasonable and necessary treatment protocol in this claim.

Two requests for authorization to perform a repeat MRI to determine the appropriateness of Mr. Weese's return to work were submitted. The first was submitted by PA-C Barcinas dated November 17, 2021. The record does not indicate that this request was acknowledged in any way. The second request was submitted by Dr. Biudno, dated December 3, 2021, stating Mr. Weese's lumbar disc herniation as its basis. Dr. Biundo's request was wrongly denied by order of the Claims Administrator dated January 24, 2022. This Order cited Dr. Grady's opinion of MMI, and no further need for treatment as its basis. This is clearly wrong, as Dr. Biundo and PA-C Barcinas both clearly documented the symptoms Mr. Weese experienced from his lumbar disc extrusion with annular tear, sustained on January 4, 2021.

An initial MRI was performed on February 5, 2021, in response to Mr. Weese's significant lumbar symptoms originating at the time of his work injury, which revealed a disc extrusion with annular tear at L4-5. Any and all mention of degenerative findings in this MRI were noted to be mild. Mr. Weese has no history of back pain or any form of treatment, and there is no evidence of any lumbar herniation preexisting Mr. Weese's January 4, 2021 work injury. Therefore, Dr. Grady's offered opinion that Mr. Weese's symptoms are merely a "strain" that is "superimposed" upon preexisting conditions lacks medical support. There is no evidence that makes his opinion "more likely", and therefore the presumption must be resolved in Mr. Weese's favor.

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 afterward. There still must be sufficient medical evidence to show a causal relationship between the compensable injury and the disability, or the nature of the accident, combined with the other facts of the case, raises a natural inference of causation.

Moore v. ICG Tygart Valley, LLC (W. Va. 2022) Here, Mr. Weese was working full duty, without symptoms or restrictions, at the time of his injury and developed debilitating symptoms which continually manifested thereafter. The evidence of record demonstrated that he had a herniated lumbar disc, and there is no evidence that this herniation preexisted his compensable injury. Additionally, as noted in the reasoned dissent by Judge Scarr from the ICA decision, the compensable condition of “low back” cannot be said to exclude an annular tear/herniated disc. “If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.” West Virginia Code §23-4-1g(a). In this matter, Dr. Biundo requested medically reasonable and necessary imaging to assess Mr. Weese’s lumbar herniation prior to a determination concerning releasing him to return to work. This evaluation is both reasonable and medically necessary to establish that his lumbar condition was stable and that he was capable of returning to full duty work. This request was wrongly rejected by the Claims Administrator on January 24, 2022. This order should be reversed, and the request for repeat lumbar MRI authorized.

The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It 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.

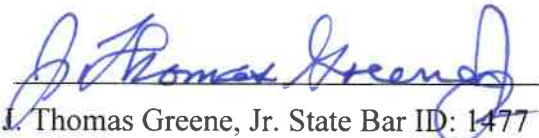
West Virginia Code § 23-5-12a(b) (2022). The evidence of record clearly preponderates in favor of awarding Mr. Weese Temporary Total Disability benefits during the period he was held off work by his treating physician; and in favor of authorizing reasonable and medically necessary imaging techniques to provide informed and knowledgeable medical information regarding Mr. Weese's return to work. Your Petitioner, Roger Weese, respectfully requests that this Honorable Court reverse the orders of the West Virginia Workers' Compensation Board of Review and the Intermediate Court of Appeals, and order the reopening of Mr. Weese's claim for temporary total disability benefits, and the authorization to perform a repeat Lumbar MRI.

VI.

PRAYER

WHEREFORE, your claimant and Petitioner, Roger Weese, respectfully prays that this Honorable Court will reverse the Decision of the Intermediate Court of Appeals of West Virginia and the West Virginia Workers' Compensation Board of Review and issue an order directing that Roger Weese's claim be reopened for temporary total disability benefits and retroactively authorize a repeat MRI of his lumbar spine, as is clearly supported by competent medical evidence of record.

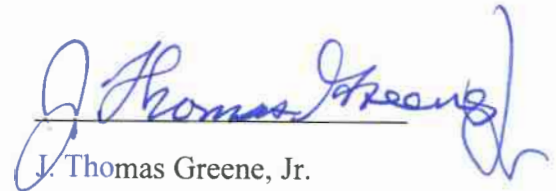
Respectfully submitted
Roger Weese
By Counsel



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CERTIFICATE OF SERVICE

I, J. Thomas Greene, Jr., counsel for the Petitioner, Roger Weese, do hereby certify that on this the 8th day of June, 2023, a copy of the foregoing Petition for Appeal and an Appendix of Relevant Documents was served upon Jeffrey M. Carder, Esq., Counsel for the Employer and Respondent, Harry Green Chevrolet, Inc. by service via File&ServeXpress.


J. Thomas Greene, Jr.